IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

LARRY PORCHIA,

Appellant,

vs.

CITY OF LAS VEGAS, STEPHEN MASSA, NICHOLAS PAVELKA, WILLIAM HEADLEE, MARINA CLARK, JASON W. DRIGGERS, AND LVFR RISK MANAGEMENT,

Appellees.

CASE NO. 78954

DC CASE NO. A-17-758321-C

APPELLEES CITY OF LAS VEGAS, STEPHEN MASSA, AND NICHOLAS PAVELKA'S ANSWERING BRIEF

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Appellees CITY OF LAS VEGAS, STEPHEN MASSA, and NICHOLAS PAVELKA through their attorneys of record, BRADFORD R. JERBIC, City Attorney, by JEFFRY M. DOROCAK, Deputy City Attorney, file their Answering Brief, as follows:

I.

ISSUES PRESENTED FOR REVIEW

1. Did the District Court properly conclude that the public duty doctrine—codified in NRS 41.0336—applied to Appellees; and, thus, Appellees owed no special duty to Appellant Larry Porchia, including an individualized duty to provide emergency transport?

2. Did the District Court properly conclude that Appellees' alleged actions could not give rise to liability for civil damages pursuant to NRS 41.500(5)?

II.

STATEMENT OF FACTS

The City of Las Vegas Department of Fire and Rescue (hereinafter, "Las Vegas Fire and Rescue") provided an emergency response and medical assessment to Appellant Porchia on April 26, 2015. (Record on Appeal ("ROA") at 22.) Las Vegas Fire and Rescue's emergency response is a public duty owed to all Las Vegas residents, rather than a particular duty of care owed individually to the

Appellant. In other words, whether a person is wealthy or indigent, medically insured or uninsured, the emergency response or lack of emergency response by Las Vegas Fire and Rescue does not create an individual duty of care from which a claim of negligence can arise against Las Vegas Fire and Rescue, its firefighters, or its emergency medical technicians. This longstanding legal concept is the public duty doctrine, which is codified in NRS 41.0336.

The facts, here, make plain that (1) Appellee Stephen Massa, a Las Vegas Firefighter-Paramedic, and Appellee Nicholas Pavelka, a Las Vegas Firefighter-Advanced Emergency Medical Technician, (collectively, "Appellee Firefighters"), ably performed their public duty on April 26, 2015; (2) Appellee Firefighters did not owe Appellant Porchia any individualized duty of care, including a duty to provide emergency transport as alleged by the Appellant; and (3) Appellee Firefighters did not breach any duty of care that can otherwise be discerned from Appellant's trial-court pleadings. (ROA at 22, 574-576.)

Indeed, the events surrounding Appellee Firefighters' emergency response are straightforward. On Sunday, April 26, 2015, a friend of Appellant Porchia called in an emergency request to the Las Vegas Fire and Rescue Dispatch Center at 3:41 a.m. (ROA at 22.) Appellee Firefighters were dispatched at 3:44 a.m., they were en route to the scene at 3:45 a.m., and they were on scene at 3:52 a.m. (*Id.*)

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Almost simultaneously with Appellee Firefighters' dispatch and response, the Las Vegas Fire and Rescue Dispatch Center also dispatched an American Medical Response ("AMR") ambulance to the scene. (ROA at 184.) AMR is a third-party emergency medical and ambulance service that is contracted with the City of Las Vegas to provide emergency transportation if needed. (ROA at 445.)

With Appellee Firefighters and AMR both on the scene at 3:52 a.m., Appellee Firefighters took the lead in assessing Appellant Porchia. (ROA at 574-576, 22, and 184.) Appellant Porchia complained of hot flashes and stomach pain. (ROA at 575.) As a result, Appellee Firefighters began their medical assessment of Appellant Porchia by immediately placing him on a stretcher, taking his vitals, and asking him questions regarding his symptoms. (ROA at 572-579.) During this assessment, Appellant Porchia informed Appellee Firefighters that he was "seeking to be transported to a hospital" and "had no insurance." (ROA at 575.)

After Appellee Firefighters completed their medical assessment, they informed Appellant Porchia that his abdominal pains were stomach gas, and he did not require emergency transport to a hospital. (*Id.*) With no transport required, Appellee Firefighters relayed this conclusion to AMR and excused AMR from the scene. (ROA at 184.)

Following Appellee Firefighters and AMR's departure, Appellant Porchia allegedly remained in pain for another eight hours at the same location. (ROA at

572-579.) After those eight hours—around 11:00 a.m.—another friend of Appellant Porchia called in a second emergency request to the Las Vegas Fire and Rescue Dispatch Center. (*Id.*) Like the emergency response eight hours earlier, both Las Vegas Fire and Rescue and AMR responded. (ROA at 25-27, 176-179.) During this response, however, Appellant Porchia was transported to the hospital and underwent surgery for a bowel obstruction. (*Id.*)

Based upon the aforementioned facts, Appellant Porchia explicitly claimed in his Amended Complaint—and argued before the District Court—negligence by Appellee Firefighters for failure to transport him to the hospital. (ROA 574-577.) Specifically, Appellant Porchia argued that the breach of the alleged duty to transport during the 3 a.m. emergency response was the legal and actual cause of his subsequent bowel-obstruction surgery. (*Id.*)

Even if Appellant Porchia's factual allegations are all accepted as true—which they were by the District Court during argument on the City's Motion to Dismiss—the Appellant's negligence claim was properly dismissed by the lower court for two reasons. First, Appellee Firefighters' emergency response is a duty owed to the public at large, rather than a duty of care owed particularly to individuals. Second, Appellee Firefighters did not owe Appellant Porchia a special duty to transport, they did not affirmatively and directly cause his bowel-

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obstruction surgery, and they did not breach any other distinguishable duty of care found in the Appellant's Amended Complaint.

III.

ARGUMENT

A. PRELIMINARY STATEMENT

The fundamental issue before the Court is whether the District Court correctly dismissed Appellant Porchia's negligence claim for failing to allege any legal duty owed particularly to the Appellant by Appellee Firefighters and Las Vegas Fire and Rescue. Appellant Porchia argued before the lower court that Appellees breached an alleged duty to transport him to the hospital. (ROA 574-577.) In the instant appeal, Appellant Porchia now argues that Appellees affirmatively and directly caused his bowel-obstruction surgery by breaching an alleged and convoluted duty; this duty purportedly required Appellee Firefighters to allow the simultaneously arriving first responders from AMR to examine and transport the Appellant immediately after Appellee Firefighters completed their assessment and determined that no transport was necessary. (Appellant Br. at 16-22.)

However Appellant Porchia wishes to frame the alleged duty owed to him by Appellee Firefighters, the underlying facts remain unchanged: Appellee Firefighters owed the Appellant no special duty to transport and did not

affirmatively and directly cause his alleged harm. Therefore, based on the Appellant's alleged facts, the District Court properly dismissed his negligence action because the public duty doctrine shields Appellee Firefighters from suit, and Appellant Porchia failed to allege any special duty breached or affirmative action taken by Appellee Firefighters that actually and proximately caused his bowel-obstruction surgery.

B. THE STANDARD OF REVIEW

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

For Appellant Porchia to prevail on his negligence theory, he "must generally show that: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the breach was the legal cause of the plaintiff's injury; and (4) the plaintiff suffered damages." *Scialabba v. Brandise Construction Co.*, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996). The District

Court dismissed Appellant Porchia's cause of action on the basis that he did not allege facts to establish that Appellee Firefighters owed him an individualized duty of care that pierced the public duty doctrine. "[I]n a negligence action, the question of whether a 'duty' to act exists is a question of law . . . ." *Lee v. GNLV Corp.*, 117 Nev. 291, 295, 22 P.3d 209, 212 (2001). Based on the record before this Court and drawing all factual inferences in favor of the Appellant, the District Court's conclusion on this question of law and corresponding dismissal should be upheld.

C. THE PUBLIC DUTY DOCTRINE APPLIES TO THIS MATTER BECAUSE APPELLEE FIREFIGHTERS' EMERGENCY MEDICAL RESPONSE IS A DUTY OWED TO THE PUBLIC AT LARGE, NOT INDIVIDUALLY TO APPELLANT PORCHIA

The public duty doctrine is a century old common law doctrine that shields public safety agencies with immunity from suit. It provides that a government's duty to govern runs to all citizens—as opposed to a particular individual—and is to protect the safety and well-being of the public at large. Breach of that public duty does not result in tort liability. The purpose of this doctrine is self-evident: to ensure that governments are not saddled with prohibitive liability as they conduct the people's business; and to prevent a party, much like the Appellant here, from suing the government when it exercises functions essentially governmental in character.

Appellant Porchia does not dispute the public duty doctrine in his appeal, but raises three arguments in a last-ditch attempt to either pierce the doctrine or create an unfounded factual dispute to warrant remand:

- First, that his clear allegation to the lower court that Appellee Firefighters owed him a special duty to transport was, in fact, a pro per's drafting mistake (Appellant Br. at 17);
- Second, that his actual allegation—though never previously pleaded nor argued before the District Court—is that Appellee Firefighters affirmatively and directly caused his bowel-obstruction surgery by breaching an alleged duty to allow AMR to examine and transport the Appellant immediately after Appellee Firefighters completed their assessment and determined that no transport was necessary (Appellant Br. at 17-21); and,
- Third, that even if the public duty doctrine shields Appellee Firefighters' actions, their medical assessment of Appellant Porchia—though not alleged as such—was grossly negligent. (Appellant Br. at 9-16.)

A review of applicable Nevada Supreme Court case law as well as Nevada legislative history reveals that no enforceable duty exists against Appellee Firefighters. Because the public duty doctrine negates the duty element required to prove the Appellant's negligence claim, there can be no cause of action for a

bowel-obstruction surgery purportedly resulting from an alleged breach of a public duty. Absent a legal duty owed separately and individually to Appellant Porchia, the District Court properly dismissed his Amended Complaint.

1. A brief history of the common-law public duty doctrine in Nevada jurisprudence uncovers that it applies to government functions generally, not just typical police or fire protection services.

The Nevada Supreme Court has plainly declared, "[W]hen a **governmental duty** runs to the public, no private cause of action is created by a breach of such duty." *Scott v. Department of Commerce*, 104 Nev. 580, 585, 763 P.2d 341, 344 (1988) (emphasis added). It first adopted the public duty doctrine, otherwise referred to as the government-function doctrine, in 1979 in an otherwise sad case. A young son was "repeatedly stabbed" while attending a showing of "Beatles" movies in the parking lot of the Clark County Public Library, and he sued Metro for its failure "to provide proper security **and medical care**." *Bruttomesso v. Las Vegas Metropolitan Police Department*, 95 Nev. 151, 152, 591 P.2d 254, 255 (1979) (emphasis added).[1] The parents sued also, claiming financial loss due to their son's dire injuries. *Id.* The Supreme Court upheld the lower court's ruling striking all claims, holding: "[I]t is generally true that **government** is not liable for

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[1] Shocking, although not dispositive, a representative of the Clark County Library District—presumably acknowledging that security services were needed for its public event—requested *before* the film festival that Metro provide security; Metro declined, citing its inadequate resources. *Bruttomesso*, 95 Nev. at 153, 591 P.2d at 255.

failing to prevent the unlawful acts of others. The **duty of government**, in this instance the Police Department, **runs to all citizens** and is to protect the safety and well-being of the public at large." *Id.* at 153, 591 P.2d at 255 (emphasis added). In adjudicating the plaintiff's claims for inadequate medical care and security as insufficient, the Court emphasized the duty of government generally, not just police roles. *Id.*

Just two years later, in *Frye v. Clark County*, the Nevada Supreme Court similarly upheld the lower court's adjudication of a complaint in favor of Las Vegas Fire and Rescue. 97 Nev. 632, 633-34, 637 P.2d 1215, 1216 (1981). There, the plaintiff homeowner called 911 to report that his house erupted in flames, but the fire department's arrival was delayed by its own mishap (going to the wrong address), leading to the plaintiff's home destruction. *Id.* In support of it applying the public duty doctrine to insulate the fire department and its firefighters from liability, the Supreme Court principally relied on two out-of-state court opinions "[w]here the same result was reached predicated **upon the governmental function rule**," not a fire protection rule, or a law enforcement protection rule. *Id.* (emphasis added) (citing *Bagwell v. City of Gainesville*, 106 Ga. App. 367, 126 S.E.2d 906, 907 (1962) ("It is clear that a municipality in operating a fire department is performing a governmental function, and it is elementary that there

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is no liability for damages to private individuals resulting from the improper performance or non-performance of a government function.").

Merely because the doctrine often applies in cases involving police or fire protection does not mean it extends only to those traditional safety roles. Since 1979, Nevada has extended this doctrine to cover other public safety agencies and other functions essentially governmental in character—including criminal prosecutors, state banking regulators and investment agencies, and municipal building and licensing departments.[2], [3] Whenever a government undertakes a

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[2] *See, e.g., Whalen v. Clark County*, 96 Nev. 559, 560, 613 P.2d 407, 407-08 (1980) (applying the public duty doctrine to uphold the lower court's striking of a negligence suit against a district attorney for failing to successfully prosecute a violent criminal, ruling that "[a] failure to prosecute, under any circumstances, does not give rise to a private cause of action," for a duty to prosecute, which is a "duty owed to the public," cannot be transformed "into a basis for a private action for damages"); *see, e.g.*, *Scott*, 104 Nev. at 585, 763 P.2d at 344 (applying the public duty doctrine to uphold the lower court's striking of a lawsuit against the State of Nevada for financial losses due to the State's negligence regulation of Imperial Mortgage Corporation, ruling that the public duty doctrine "applies to the regulation of financial institutions" because "bank regulators do not owe individual persons or institutions a duty under their power to examine and supervise banks."); *see, e.g., Charlie Brown Construction, Inc. v. City of Boulder City*, 106 Nev. 497, 505-06, 797 P.2d 946, 951 (1990) (although the public duty doctrine applied, initially, to protect the City of Boulder's Building Department from negligently releasing funds deposited by a subdivider and in not requiring the subdivider to post a payment bond, the Court ultimately found that the plaintiff adequately pierced the doctrine by establishing the existence of a "special duty"—e.g., the City passed a municipal ordinance, imposing on itself, an affirmative duty "to require performance and payment bonds from subdividers.").

[3] *See* 2 MODERN TORT LAW: LIABILITY AND LITIGATION § 16:24 Municipal Governmental Immunity—Public Duty Doctrine (2d ed.) ("The doctrine is often applied in cases involving police and fire protection, and other public safety

duty to protect the safety and well-being of the public at large, no private liability may attach for injuries resulting from an alleged breach of that public duty.

If the public duty doctrine protects law enforcement officers, firefighters, criminal prosecutors, banking institutions and regulators, it most assuredly intended to shield Appellee Firefighters, here, rendering an emergency medical response and assessment—a quintessential government function. If a citizen is experiencing a fire or medical emergency, the same government resources are expended, the same government employees are dispatched, and the same government apparatuses are deployed. It would defy both common sense and case law if the public duty doctrine protected certain 911 calls, but excluded others.

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agencies and activities such as building code enforcement, or municipal code inspections, or providing sufficient security against criminal assaults committed upon persons conducting business in a court facility, and 911 operators."); *see also* 24 A.L.R. 5th 200—Municipal Liability for Negligent Performance of Building Inspector's Duties (setting forth a list of traditional government roles that are often granted protection under the public duty doctrine—e.g., building and code regulators, sewage control regulators, gas piping regulators, and electrical line regulators. "[Courts have] recognized that the duties of municipal building inspectors and similar officials, including inspection, plan review, issuance of permits and certificates, building code enforcement, remedial action as to unsafe buildings, and providing information concerning such matters, **are generally owed to the public at large rather than to its individual members, and do not give rise to municipal tort liability for their negligent performance**, absent a special duty of care toward a particular person or class imposed by law or arising from a special relationship between the municipality and the person or persons injured. [Emphasis added.]").

Indeed, the public duty doctrine freely enables governments to serve better the public and its interest without fear of excessive liability. The Nevada Supreme Court in *Scott* best outlined this overarching-principle when it applied the public duty doctrine to cloak state bank regulators and public financial institutions:

> When the governmental entity is performing a self-imposed protective function as it was in the case at hand, the individual citizen has no right to demand recourse against it . . . . Any ruling to the contrary would tend to constitute the [government] an insurer of the quality of services its many agents perform and serve only to stifle government's attempts to provide needed services to the public which could not otherwise be effectively supplied.
>
> We perceive that the public interest is better served by a government which can aggressively seek to identify and meet the current needs of the citizenry, uninhibited by the threat of financial loss should its good faith efforts provide less than optimal—or even desirable—results.

104 Nev. at 585-86, 763 P.2d at 344 (internal quotations and citations omitted).

2. When the Nevada Legislature promulgated NRS 41.0336 to protect fire departments and law enforcement agencies, it did not abrogate the common-law public duty doctrine.

a. The Nevada Legislature enacted NRS 41.0336 to curb, in part, costly litigation due to lawsuits, much like this one, that sought to hold fire departments liable for exercising their public duty.

Between 1979 and 1990, the Nevada Supreme Court published all but one of its seven cases that addressed directly the common-law public duty doctrine. During that transitional period, however, there were many cases against fire departments in district courts throughout the State—upwards of thirty-two in Washoe County alone—where lower court judges either misapplied or outright

ignored the public duty doctrine. *See Hr'g Before Assem. Comm. on Jud.*, 63rd Sess. 60 (Feb. 8, 1985) (testimony from Chairman Stone, Assemblyman Sader, and State Forester Smith); *see Hr'g Before Assem. Comm. on Jud.*, 64th Sess. 8 (Feb. 13, 1987) (A.G. staff member testifying that "the inconsistencies in the court decisions was part of the reason they felt the law should be codified.").[4] These inconsistent rulings were having a sinister impact on fire departments statewide, with Deputy Attorney General Scott Bodeau issuing this warning to the Legislature:

> The problem now experienced by public officials in this State is that they are being sued in civil actions with increasing frequency and despite the existence of case law, some district court judges are extremely reluctant to dismiss these cases in the preliminary law and motion stage of litigation.
>
> Often the result is that the Judge will leave the decision up to a jury which improperly requires the defendant agency to go to trial on a case that should have been dismissed by the Judge. Not only is this extremely expensive and time consuming, but distressing to the people [working for the departments].
>
> A civil jury is most likely to identify with the plaintiff that has suffered a loss, and is thus somewhat predisposed to awarding damages to the plaintiff. The public agencies then must pursue a costly and time consuming appeal to the Nevada Supreme Court

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[4] Although the Nevada Legislature enacted NRS 41.0336 during the 64th Legislative Session in 1987, the assembly bill introducing that statutory language was originally brought forth during the 63rd Legislative Session in 1985. At that time, it was "indefinitely postponed" because there were two Nevada Supreme Court cases pending, which—depending on their outcome—the Legislature sought to address. *See Hr'g Before Assem. Comm. on Jud.*, 63rd Sess. 127 (Mar. 1, 1985) (Chairman Stone's testimony). With those cases now resolved, the Legislature re-introduced the bill during the next regularly scheduled Legislative session. *See Hr'g Before Assem. Comm. on Jud.*, 64th Sess. 8 (Feb. 13, 1987) (Assemblyman Kearns's testimony). Thus, these records may be read harmoniously.

> seeking reversal of the verdict based on the lower court's failure to follow the case law.

See id. at 52 (Feb. 7, 1985) (Memo from Deputy A.G. Bodeau to Assem. Jud. Comm.).

This litigation bonanza coupled with legal uncertainty began stifling, rather quickly, local fire departments who had trouble to recruit personnel to render public services.[5] Litigation was so robust, and it made fire departments so "vulnerable to liability suits," that the Legislature even proposed a unique tax scheme in order to fund its defense of these suits. *See Hr'g Before Assem. Comm. on Jud.*, 63rd Sess. 109-14 (Memo from Senior Research Analyst Mouritsen to Chief Deputy Research Director Welden, Dec. 10, 1984). To address specifically this harm facing fire departments statewide, the Legislature enacted NRS 41.0336 for the following judicial principles: to reassure lower court judges "that the legislative branch is in agreement with and supports the position taken by the

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[5] *See Hr'g Before Assem. Comm. on Jud.*, 63rd Sess. 46 (Feb. 7, 1985) (Chief Holmes, Jack's Valley Fire Department, testified that his firefighters were studying "a federally recognized firefighting manual . . . to protect themselves in a lawsuit as proof of their competency," and this was a "very great detriment to recruiting" members to his department); *see id.* at 59 (Feb. 8, 1985) (Assemblyman R. Sader testified that he was aware of departments' difficulties in recruiting personnel "when they were aware they were subject to law suits for the execution of their duties."); *see see Hr'g Before Assem. Comm. on Jud.*, 64th Sess. 8 (Feb. 13, 1987) (Assemblyman Kearns testifying "that many people were reluctant to be a part of a fire department or a law enforcement agency, when there was the worry about being individually sued.").

Supreme Court"; and to "make it more difficult for a judge to ignore the existing law and thus [to] promote justice and judicial economy." *Id.* That statute, in its entirety, sets forth the following:

> A fire department or law enforcement agency is not liable for the negligent acts or omissions of its firefighters or officers **or any other persons called to assist it**, nor are the individual officers, employees or volunteers thereof, unless:
>
> 1. The firefighter, officer **or other person made** a specific promise or representation to a natural person who relied upon the promise or representation to the person's detriment; or
>
> 2. The conduct of the firefighter, officer **or other person** affirmatively caused the harm.
>
> The provisions of this section **are not intended to abrogate the principle of common law** that the duty of governmental entities to provide services is a duty owed to the public, not to individual persons.

NRS 41.0336 (emphasis added). Much like the Supreme Court's rationale in *Scott*, the overarching policy rationale guiding the Nevada Legislature's decision continues to ring with a resounding truth today:

> It is generally conceded that the operation of government would be severely handicapped if officials whose very function and duty require the making of decisions involving judgment and discretion were to be held answerable in civil actions for mistakes or poor judgment while performing their duties in good faith. This concern is even more obvious with regard to firefighters and police officials who often have to make split-second decisions under emergency or life threatening conditions.

. . . .

> The **public policy** behind affording these public officers this limited immunity **is to prompt performance of their duties without concern for second-guessing by plaintiffs civil actions.**
>
> . . . .
>
> In a nutshell, the law is that absent special circumstances, you may not sue a police or fire officer in a negligence action . . . [and] unless the special circumstances exist, **the judge should dismiss the case upon petition by the defendant.**

See Hr'g Before Assem. Comm. on Jud., 63rd Sess. 52 (Feb. 7, 1985) (Memo from Deputy A.G. Bodeau to Assem. Jud. Comm.) (emphasis added).

b. When it enacted NRS 41.0336 and codified the public duty doctrine, the Nevada Legislature intended to protect firefighters who also render emergency medical services, not just fire suppression services.

The legislative history makes clear that the Nevada Legislature intended to protect firefighters rendering an emergency medical response and services with the codification of the public duty doctrine in NRS 41.0336. Specifically, during the 63rd Legislative Session in 1985, the Assembly noted:

> [W]e are concerned that codifying the "public duty doctrine" as to two groups of public employees, firemen and police, the remainder of public employees will be excluded. **Plaintiff's attorneys will argue that the legislature clearly abrogated the public duty doctrine in this state <u>except</u> for fire and police.**

Hr'g Before Assem. Comm. on Jud., 63rd Sess. 52 (Feb. 7, 1985) (emphasis added). To assuage concerns about overzealous plaintiff's lawyers and to clarify its intent to preserve the public duty doctrine in its entirety, the Legislature

amended the proposed statute to include the following language: "[this statute is] not intended to abrogate the principle of common law that the duty of governmental entities to provide services is a duty owed to the public, not to individual persons." NRS 41.0336.

So as to dispel any remaining doubt that the protections under NRS 41.0336 were not limited to just fire suppression services, Mr. Holmes of Jack's Valley Fire Department "asked if this bill would cover . . . **medical emergency responses**," to which Chairman Stone answered, "**those situations would be covered.**" *See Hr'g Before Assem. Comm. on Jud.*, 63rd Sess. 45 (emphasis added). Pleased, Mr. Holmes advocated for the statute's passage, elaborating further on his firefighters' concerns of being sued in the course of their "help[ing] in an emergency," and explained that his firefighters and paramedics undertake significant procedures "to protect themselves from lawsuit-happy people":

> Paramedics are also afraid of being sued. [Holmes] cited an example of an accident where he spent ten minutes administering minor first aid, and spent twenty minutes with the paramedics filling out papers certifying that the people had refused medical treatment so that the paramedic would not be sued later . . . .

Id. at 45. (J. Holmes testimony).

Doubling down, Deputy A.G. Scott Bodeau advised that the statute "be made in Chapter 41 of NRS to shelter fireman **and other emergency service personnel** from some types of liability suits." *Id.* at 64 (Memo from Senior

Research Analyst P. Mouritsen to Assemblyman J. Dini, Jr.) (emphasis added). Tripling down even further, when asked if the statute should be "expanded to include ambulance services," Assemblyman Dini, Jr. responded, "the fire department and ambulance attendants [are] synonymous." *See Hr'g Before Assem. Comm. on Jud.*, 64th Sess. 7 (Feb. 13, 1987) (Assemblyman J. Dini, Jr. testimony).

In sum, the 1985 and 1987 legislative history concerning the public duty doctrine and its codification in NRS 41.0336 makes plain that the doctrine and its corresponding statute protect firefighters, who are also paramedics or emergency medical technicians, while they are rendering emergency responses and medical services. Thus, here, the public duty doctrine shields Appellee Firefighters from liability for their emergency response to and medical assessment of Appellant Porchia.

D. THERE ARE TWO NARROW EXCEPTIONS TO THE PUBLIC DUTY DOCTRINE, AND NEITHER APPLIES TO APPELLANT PORCHIA'S ALLEGED FACTS

The Nevada Supreme Court in *Frye* recognized two narrow exceptions to the public duty doctrine: the "special duty" and "affirmatively causes harm" exceptions. 97 Nev. at 634, 637 P.2d at 1216; *see also Coty v. Washoe County*, 108 Nev. 757, 760, 839 P.2d 97, 99 (1992). Before the District Court, Appellant Porchia ostensibly argued the first narrow exception by alleging that Appellees breached a special duty to transport him to the hospital. (ROA 574-577.) In the

present appeal, Appellant Porchia abandons one narrow exception for the other and argues, improperly[6] for the first time, that Appellees affirmatively caused his harm (i.e., a bowel-obstruction surgery) by dismissing the simultaneously arriving AMR first responders immediately after Appellee Firefighters completed their assessment and determined that no transport was necessary for the Appellant. (Appellant Br. at 16-22.)

1. Appellee Firefighters did not owe Appellant Porchia a special duty to transport him to the hospital.

Under Nevada law, to establish the existence of a "special duty" between the governmental agency and a particular person sufficient to pierce the public duty doctrine, a plaintiff must establish the breach or violation of a *specific* (rather than a *general*) legal duty. *Charlie Brown Construction*, 106 Nev. at 505-06, 797 P.2d at 951, *reversed on other grounds* by *Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000). In other words, to establish a "special reliance" on a municipality's acts or omissions, that person must point to a specific promise, rule, ...

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[6] *See La Jolla Development Group LLC v. Bank of America, N.A.*, 439 P.3d 956 (Nev. 2019) ("The general rule is that '[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.' *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). This rule applies even to issues that are subject to a de novo standard of review." *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010)).

statute, or ordinance that would otherwise impose an affirmative duty on the municipality to act for his or her benefit.

For example, in *Charlie Brown Construction*, the Supreme Court found that Boulder City "created a special relationship between the City, its agencies, and subcontractors doing offsite [construction] work" when Boulder City enacted an ordinance imposing on itself a "duty to require performance and payment bonds from subdividers before the City issues final approval to commence subdivision projects." *Id.* at 505, 506, 797 P.2d at 951. The Court reasoned, "The duty created by the ordinance imposes liability for its breach," which in turn, created a "special duty" between the city and plaintiff. *Id.*

In his Amended Complaint, Appellant Porchia repeatedly claimed—without any legal support—that Appellees' refusal of his "request for transportation is a negligence breach of duty," and the refusal to transport "is a violation in the performance . . . of [their duties]." (ROA at 574-575.) Despite these conclusory statements of law, the Appellant failed—and now unsurprisingly abandons any attempt (ROA at 16-17)—to identify a legal basis for his contention that Appellees owed him a special duty to provide hospital transport merely because they responded to his emergency call and arrived on-scene.

Most significantly, Appellant Porchia's argument that Appellee Firefighters owed him a special duty to transport was understood, considered, and properly

rejected by the lower court. Specifically, the District Court noted, "Mr. Porchia argued if a [plaintiff] believes they should be transported, then [defendants] had a duty to transport . . . ." (ROA at 663.) Nevertheless, because Appellant Porchia failed to show any statute, ordinance, promise, or other governing legal principle that affirmatively imposed a special, individualized duty on Appellee Firefighters and Las Vegas Fire and Rescue to transport the Appellant, the District Court concluded that no special duty to transport existed. (ROA at 630-631, 663-664.) Instead, the Court correctly concluded that Appellee Firefighters' emergency response, including any subsequent emergency transport or not, was a duty owed generally to the public, which triggered the public duty doctrine and shielded Appellees from suit. (*Id.*)

2. Appellee Firefighters did not affirmatively and directly cause Appellant Porchia's bowel-obstruction surgery.

Under Nevada law, to establish the existence of the extraordinarily narrow "affirmatively causes harm" exception to the public duty doctrine, a plaintiff must show substantial culpability on the part of the public officer and a direct causal nexus between the alleged act or omission and alleged harm. *See Coty*, 108 Nev. at 761, 839 P.2d at 99. In other words, to demonstrate that Appellee Firefighters affirmatively caused his alleged harm (the bowel-obstruction surgery), Appellant Porchia must allege (which he did not)—and later be able to prove by a

preponderance of the evidence (which he cannot)—that Appellees actively and directly caused his surgery by excusing AMR from the scene.

NRS 41.0336 does not define "affirmatively caused the harm" for purposes of piercing the public duty doctrine. The Nevada Supreme Court, however, in *Coty*, 108 Nev. at 760, 839 P.2d at 99, noted that "affirmatively caused" has been defined as an act creating a dangerous situation which leads directly to the injurious result (*see Hennes v. Patterson*, 443 N.W.2d 198, 203 (Minn. Ct. App. 1989)); and, in a negligent situation, "legal cause" is determined when "the actors' negligent conduct actively and continuously operate[s] to bring about harm to another" (*see* RESTATEMENT (SECOND) OF TORTS § 439 (1964)). Thus, this Court concluded that "affirmatively caused the harm," as used in NRS 41.0336(2) (the section relied upon by the Appellant in the present appeal) means that a public officer must **actively** create a situation which leads **directly** to the damaging result. *Coty*, 108 Nev. at 760, 839 P.2d at 99.

Even if the Court entertains Appellant Porchia's argument on the narrow "affirmatively causes harm" exception—despite his failing to raise it with the lower court—there is simply no set of facts, either alleged by the Appellant in his Amended Complaint or improperly raised for the first time before this Court, establishing that Appellee Firefighters affirmatively, actively, continuously, and directly acted to bring about the bowel-obstruction surgery. Indeed, Appellant

Porchia's farfetched argument on appeal is that Appellee Firefighters caused his harm by breaching a purported duty requiring Appellees to allow the simultaneously arriving medics from AMR to examine and transport the Appellant immediately after Appellee Firefighters completed their assessment and determined that no transport was necessary. (Appellant Br. at 16-22.)

Notwithstanding the reality that no such duty exists, Appellant Porchia's argument defies common sense and the facts. First, no statute or established legal duty requires Las Vegas Fire and Rescue to respond to an emergency call with its own ambulance *and* its contracted ambulance service (AMR)—much less that it must respond with AMR and must also allow a *redundant* medical assessment. To do so would demand the expenditure of limited governmental resources and defy the underpinnings of the public duty doctrine—that the government's duty to govern and provide services (or failure thereof) is a duty owed to the public at large.

Second, Appellant Porchia's argument that Appellee Firefighters' dismissal of AMR affirmatively, actively, continuously, and directly caused his bowel-obstruction surgery is belied by the following undisputed facts: (1) the active and direct cause of the surgery was his stomach situation, which existed prior to Appellee Firefighters' arrival; (2) the Appellant could have called Las Vegas Fire and Rescue Dispatch any time after Appellee Firefighters departed, rather than

waiting eight hours; (3) the Appellant could have proceeded to a medical facility after Appellee Firefighters departed, rather than waiting eight hours; and (4) Appellee Firefighters, in fact, responded to the emergency call, performed a medical assessment, determined no transport was necessary, and fulfilled their public service and duty.

Third, after assessing Appellant Porchia and determining that no emergency transport was needed, Appellee Firefighters could not foresee that the Appellant would later require bowel-obstruction surgery. Even if such a surgery were foreseeable—which it is not—this Court has never concluded that foreseeability, alone, fulfilled the measure of an affirmative and direct cause. For example, in *Coty*, the facts suggested it was foreseeable that the teenage driver would drive drunk, and the defendant deputy sheriff had direct knowledge of that dangerous possibility. 108 Nev. at 758-761. Nevertheless, this Court rightfully focused on whether the deputy sheriff was the active and direct cause of the harm alleged. *Id.*

Other jurisdictions concur with this approach and have concluded that there must be purposeful and substantial evidence to demonstrate conduct that affirmatively causes harm. *See, e.g., Collins v. Chicago Transit Authority*, 677 N.E.2d 449 (App. Ct. Ill., 1997) (holding no special duty for firefighters except when the acts or omissions were "affirmative or willful in nature"); *Berger v. City of University City*, 676 S.W.2d 39, 41 (Mo. App. E.D. 1984) (same); *Kroger v.*

City of Mount Vernon, 104 A.D.2d 855 (Sup. Ct. N.Y., 1984) (holding conduct within the ambit of mere negligence is obviously deficient). In other words, the more tenuous the connection between the government's action and the alleged injury, the easier it is for the government to argue successfully that the harm was not affirmatively caused or actively created by the public officers.

Here, even if Appellee Firefighters could foresee that, after dismissing AMR from performing a redundant medical assessment, Appellant Porchia would ultimately require a bowel-obstruction surgery, there are simply no factual allegations in the Appellant's Amended Complaint to support the extremely tenuous argument that Appellees willfully or purposely engaged in an effort to actively and directly cause the Appellant's bowel-obstruction surgery.

Finally, while the discussion above demonstrates that Appellee Firefighters did not affirmatively and directly cause the Appellant's surgery, Appellant Porchia uses two unpersuasive federal cases in an attempt to convince this Court that Appellee Firefighters should be subjected to evidentiary discovery. (Appellant Br. at 19-21.) This effort should go unrewarded by the Court because the federal equivalent to the "affirmatively causes harm" narrow exception of the public duty doctrine also reveals that, as a matter of law, Appellees did not affirmatively cause the Appellant's injury.

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For guidance, the federal analog to the "affirmatively causes harm" exception is the state-created-danger exception. The state-created-danger exception creates the potential for federal tort liability against a state actor only where there is "*affirmative conduct* on the part of the [city] in placing the plaintiff in danger" that she would not have otherwise faced. *Cf. Munger v. City of Glasgow Police Department*, 227 F.3d 1082, 1986 (9th Cir. 2000) *with Coty*, 108 Nev. at 760, 839 P.2d at 99. To determine whether the state-created-danger exception applies to impose liability, the federal district courts are encouraged to consider the following three factors: "(1) **whether any affirmative actions of the official placed the individual in danger he otherwise would not have faced;** (2) whether the danger was known or obvious; and (3) whether the officer acted with deliberate indifference to that danger." *Henry A. v. Willden*, 678 F.3d 991, 1002 (9th Cir. 2012) (emphasis added). A plaintiff must adequately allege all three factors for the exception to apply; fatally defective to the Appellant's claim, even if he sought to leverage this exception, is his inability to overcome this first factor.

Appellant Porchia's claim against Appellee Firefighters arises from alleged acts of omission—e.g., *refusal to transport*, *refusal to act*, and *refusal to permit a redundant medical assessment*. These allegations merely describe acts of failure. Inaction on part of a local government does not amount to affirmative conduct under the state-created-danger theory. *Munger*, 227 F.3d at 1087. "Affirmative

conduct" requires conduct that is both affirmative (i.e., coercive) and alters the *status quo* in a negative way; if the conduct does not alter the *status quo*, the state official neither created nor exposed the victim to a danger she would not have otherwise faced. *Id.* at 1086.

Instructive here is *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989). There, a police officer pulled a car to the side of the road at 2:30 a.m. where, after placing the drunk driver under arrest and impounding his car, the officer forcibly ejected the female passenger and left her stranded alone in a high-crime area where she was subsequently raped. *Id.* at 586. Indeed, there was an affirmative act—coercion by the officer in ejecting the female passenger—that placed her in a dangerous position that rendered her unable to protect herself from harm. In other words, the state actor altered the *status quo*—i.e., the female passenger who was (presumably) heading home—in a negative way. On these facts, the court found the officer affirmatively acted using its *sovereign power* and thereby created a danger that the female passenger would not have otherwise faced. *Id.* at 590.

In this case, there are no allegations of affirmative conduct on part of Appellee Firefighters that negatively altered Appellant Porchia's status quo. Indeed, as noted *supra*, the Appellant remained in the same location for an additional eight hours after Appellees responded to the emergency, performed their medical assessment, and determined that no emergency transport was necessary.

Simply put, Appellant Porchia's status quo was not altered in a negative way by Appellees—he remained in the same place, with the same stomach pains, and the same ability to call again for any type of assistance. Therefore, whether applying available Nevada case law on the public duty doctrine's second narrow exception or federal case law on the federal equivalent, Appellant Porchia cannot support his argument that Appellee Firefighters affirmatively, actively, continuously, and directly caused his bowel-obstruction surgery.

E. APPELLEE FIREFIGHTERS ARE NOT LIABLE FOR ANY DAMAGES BECAUSE THEIR ACTIONS WERE NOT GROSSLY NEGLIGENT

As the District Court correctly concluded, the public duty doctrine immunized Appellees from suit for any alleged claims related to their emergency response and medical assessment of Appellant Porchia. (ROA at 663-664.) That conclusion, if upheld based on the arguments *supra*, likewise should end the matter here.

Nevertheless, just as Appellee Firefighters noted before the lower court (ROA at 663), even if the Court liberally construed the Appellant's Amended Complaint to discern some individualized duty owed to the Appellant that was allegedly breached during Appellees' rendering of emergency care, such a claim would fail unless Appellees were **grossly negligent**. *See* NRS 41.500(5). Indeed, the lower court informed the Appellant that Appellee Firefighters were shielded by

immunities found in NRS 41.0336 and 41.500; and, thereby, correctly dismissed Appellant Porchia's Amended Complaint. (ROA at 664.)

The Appellant now attempts to resuscitate his negligence claim by arguing a factual dispute exists surrounding whether Appellee Firefighters' actions were grossly negligent. (ROA at 9-16.) This argument is unfounded and fails as a matter of law for three decisive reasons. First, Appellant Porchia's fundamental claim—that he required bowel-obstruction surgery because Appellees would not transport him and dismissed AMR from performing a redundant medical assessment—is, as described thoroughly above, defeated by the public duty doctrine, rendering an examination of NRS 41.500(5) moot. Second, if a factual dispute concerning Appellee Firefighters' rendering of care existed, Appellant Porchia's alleged facts—even if accepted as true—do not reasonably rise to gross negligence; Appellee Firefighters medically assessed the Appellant by placing him on a stretcher, taking his vitals, and asking him questions regarding his symptoms. (ROA at 572-579.) Third—and most significantly—Appellant never alleged in his Amended Complaint that Appellee Firefighters were grossly negligent; his claim, throughout his pleading, was a claim for negligence. (ROA 574-577.) In sum, the District Court properly concluded that, even if any of Appellees' actions were not shielded by the public duty doctrine, such actions could not give rise to liability for

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civil damages absent adequately supported allegations that the actions were grossly negligent (of which there were none).

IV.

CONCLUSION

As set forth above, the District Court's dismissal of Appellant Porchia's Amended Complaint should be upheld by this Court. Appellee Firefighters' emergency response and medical assessment of the Appellant were shielded from suit by NRS 41.0336—the public duty doctrine. Appellant Porchia did not pierce this doctrine because he failed to allege that Appellees breached any special duty or took any affirmative action that actively and directly caused the alleged harm (i.e., the bowel-obstruction surgery). Finally, any other discernible breach of duty during Appellees' rendering of care, particularized to the Appellant, was shielded from liability by NRS 41.500(5).

DATED this 31st day of March 2020.

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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 Word 2007 in Times New Roman 14 point font size.

2. 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 or more and contains 7,463 words.

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

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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 31st day of March 2020.

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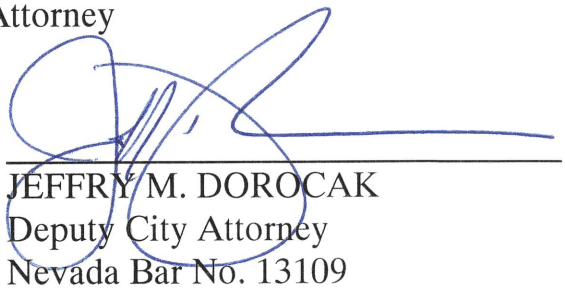
By: 

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I hereby certify that on March 31, 2020, I served a true and correct copy of the foregoing APPELLEES CITY OF LAS VEGAS, STEPHEN MASSA, AND NICHOLAS PAVELKA'S ANSWERING BRIEF through the electronic filing system of the Nevada Supreme Court, (or, if necessary, by United States Mail at Las Vegas, Nevada, postage fully prepaid) upon the following:

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