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 LVER RISK MANAGEMENT,

Respondents.

Supreme Court No.: 78954
Dist. Court No.: A-17-758321-C

APPELLANT'S REPLY BRIEF

Submitted by:

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities that must be disclosed under NRAP 26.1(a). These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

The law firm Olson Cannon Gormley & Stoberski

Stephanie M. Zinna, Esq.

Appellant is not using a pseudonym.

DATED this 1st day of June, 2020.

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I. Summary of Argument

Respondents substantively and comprehensively briefed the common law and legislative history behind the public duty doctrine, codified in NRS § 41.0336. Appellant does not take issue with the statute, attack its constitutionality, or otherwise argue the statute does not apply. Appellant's argument is the exception to NRS § 41.0336 applies to the instant case: emergency responders are not liable for civil damages flowing from their conduct unless their conduct affirmatively caused the harm.

It must be emphasized that at no point in their answering brief, outside a brief reference in the factual allegations of the claim, did Respondents discuss or respond to Appellant Porchia's clear and repeated allegation that he was denied emergency transport for a life-threatening condition simply because he was homeless and lacked insurance. That allegation forms the basis of why Appellant Porchia's claims fall within the statutory exceptions to both NRS § 41.0336 and NRS § 41.500. It shows the conduct of the responders was an

intentional, affirmative act to deny Appellant Porchia medical treatment on the basis of his status as an indigent homeless person, and such conduct put Appellant Porchia in harm's way and rises to the level of gross negligence.

Respondents then rely upon Appellant Porchia's pro per status and inartful pleading as a defense, despite the multiple pleadings laying forth the claim in basic detail. Appellant Porchia's multiple complaints are clear: emergency services were called upon Appellant Porchia's behalf. Upon informing the responders that he was homeless and uninsured, they immediately and affirmatively ceased services, ignoring Appellant Porchia's clear request to go to the hospital and dismissing his complaints of excruciating pain as "gas pains." Appellant Porchia then suffered an additional eight hours until emergency services were called again, and this time, responders transported him to the hospital. Appellant Porchia underwent emergency surgery to save his life, a surgery that may not have been necessary but for his delay in treatment. This conduct was laid out clearly in Appellant Porchia's multiple complaints.

II. NRS § 41.0336 Contains Specific Exceptions Included by the Legislature Upon Codification, and the Conduct by Respondents Rises to the Level of "Affirmatively Causing Harm"

Appellant agrees that NRS § 41.0336 applies to the instant action; however, Appellant's focus on appeal is the exceptions to civil immunity provided by the statute. Respondents focus in on the legislative and common law history of the statute, which is not at issue.

The issue here is the lower court was required to take all factual allegations as true and in the light most favorable to Appellant in evaluating a motion to dismiss, and the lower court erred in dismissing the case and not permitting any discovery as to Appellant Porchia's claims. *Stubbs v. Strickland*, 129 Nev. 146, 150, 297 P.3d 326, 328-29 (2013), *citing Buzz Stew LLC* at 227-28, 672.

NRS § 41.0336 provides civil immunity to first responders except in cases where the responders affirmatively cause the harm. Appellant clearly and repeatedly set forth facts that support a finding that Respondents affirmatively caused him harm.

In *Coty v. Washoe County*, this Court interpreted that phrase to mean that "a public officer must actively create a situation which leads directly to the damaging result." 108 Nev. 757, 761, 839 P.2d 97, 99

(1992). Here, the responders were medically assessing Appellant upon his request to be transported to the hospital due to excruciating stomach and abdominal pain. Upon being informed that Appellant Porchia was homeless and without medical insurance, responders abruptly stopped evaluating him, affirmatively cancelled the ambulance request, did not permit further examination by trained emergency technicians, and dismissed Appellant Porchia's complaints as gas pains. Responders left Appellant Porchia to suffer for eight further hours, and Appellant Porchia alleges in his complaints that his physician informed him the delay in treatment necessitated surgery as opposed to less invasive treatment.

The cases cited by Respondents are supportive of Appellant's argument. Respondents cited to *Munger v. City of Glasgow Police Dept.* to discuss the special duty exception. 227 F.3d 1082 (9th Cir. 2000). That case is instructive as to the affirmative harm exception. In *Munger*, police officers ejected an intoxicated man from a bar, into below freezing temperatures in insufficient clothing. *Id.* at 1084. The court held that "a duty to protect arises where a police officer takes affirmative steps that increase the risk of danger to an individual." *Id.*

at 1089. The court further stated that "[a]lthough the general rule is that the state is not liable for its omissions…[r]elevant here is the 'danger creation' exception…[which] exists where there is 'affirmative conduct on the part of the state in placing the plaintiff in danger." *Id*. at 1086.

The court then examined whether the officers in *Munger* affirmatively placed the man in danger, stating,

> In examining whether an officer affirmatively places an individual in danger, we do not look solely to the agency of the individual, nor do we rest our opinion on what options may or may not have been available to the individual. Instead, we examine **whether the officers left the person in a situation that was more dangerous than the one in which they found him**.

Id. at 1086 (emphasis added).

In overturning the lower court's dismissal, the court in *Munger* relied upon a case similar to the facts at hand. In *Penilla v. Huntington*, officers responded to a 911 call, examined the plaintiff, and determined him to be in need of medical care. 115 F.3d 707, 710 (9th Cir. 1997). Instead of providing or arranging for that care, they affirmatively cancelled the request for paramedics, moved the plaintiff into his home, locked the door and left. *Id*. at 708. The man later died. *Id*. The court determined officers placed the plaintiff in a more dangerous position

than the one in which they found him, and denied them immunity. *Id*. at 710-11.

The other case cited by Respondents again supports Appellant's position. In *Henry A. v. Willden*, the court examined claims from children in foster care. 678 F.3d 991 (9th Cir. 2012). One child's claims stemmed from a denial of medical care. *Id*. at 1001. The court noted a long history of denying immunity when a claimant's serious medical needs are denied upon a finding "deliberate indifference." *Id*. citing *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 845 (9th Cir. 2010); see also *Norfleet v. Ark Dep't of Human Servs.*, 989 F.2d 289 (8th Cir. 1993) (foster child denied medical care), *Wakefield v. Thompson*, 177 F.3d 1160 (9th Cir. 1999) (prisoner denied medical care).

At the crux of this case is whether Respondents affirmatively caused harm. Put another way, the question is: did Respondents leave Appellant in a situation that was more dangerous than the one in which they found him? *Munger* at 1086. The answer to that inquiry is resoundingly yes: Respondents left Appellant in a more dangerous situation than the one in which they found him, due to their own

deliberate indifference upon learning he was homeless, indigent, and without insurance.

Again, Respondents did not address or deny the claim that Appellant was denied medical care based upon his status as a homeless, uninsured indigent man. Taking this fact as true, Respondents took affirmative steps to harm a man suffering from a life-threatening medical condition. They affirmatively ceased their evaluation, affirmatively cancelled the ambulance request, and affirmatively denied Appellant emergency transport.

Respondents summarily argue that there is no harm because they did not cause the need for surgery. This is precisely one of the allegations made by Appellant, which must be taken as true at the motion to dismiss stage. Indeed, Appellant was directly harmed by Respondents' actions. The harm here is twofold: (1) the delay in treatment caused the need for surgery in lieu of less invasive treatments, and (2) the delay in treatment caused Appellant extreme pain and suffering for eight hours.

To combat these allegations, Respondents simply state they did not cause the need for surgery. This argument was unsupported by anything outside of the bare statement. Appellant specifically pled he was

informed by his doctors and nurses that but for the delay, surgery would not have been necessary. Respondents then argue Appellant could have mitigated the harm affirmatively caused by the responders by (1) calling 911 again, or (2) he could have gone to the hospital himself. Thus, Respondents argue that despite affirmatively denying care to Appellant based upon his socio-economic status, Appellant should have simply called again to request services that should have already been provided. Respondents do not address why this action should be necessary, nor the risks inherent with this action, such as possible arrest or citations. Respondents also posit that a homeless, indigent man in excruciating pain should have just taken himself to the hospital. Appellant required emergency services and transport. He was denied emergency care and transport on the basis that he was indigent and uninsured. The proposed remedy should not be for him to call a taxi.

Respondents then argue that they are not equipped to determine whether Appellant needed emergency surgery. This is absolutely true, and supports Appellant's position that they affirmatively caused him harm. Namely, despite being admittedly ill-equipped to assess his medical status, Respondents instead ceased treatment, affirmatively

cancelled the ambulance, and dismissed Appellant with "gas pains." Respondents, given they recognize they would not be able to diagnose a life-threatening bowel obstruction in the field, should have honored Appellant's request for transport to a hospital. Instead, they heard he was homeless and lacked insurance, and so they dumped him. This was an affirmative action that caused Appellant to suffer for hours, and may have necessitated the surgery as opposed to other means of clearing an intestinal blockage.

III. The Actions of Respondents Rise to the Level of Gross Negligence as Set Forth in NRS § 41.500(5)

Respondents cursorily address this statute and the argued exception. First, they argue that the public duty doctrine precludes the Court from even reaching this argument. Next, they argue that because responders assessed Appellant and took his vital signs, their actions cannot rise to the level of gross negligence. Finally, they argue that gross negligence was not adequately pled by the pro per Appellant in the lower court.

First, as briefed above, the public duty doctrine does apply to Respondents; however, their affirmative actions in denying Appellant medical care based upon his lack of insurance and homelessness caused

him direct harm. Therefore, they are not shielded from liability under that statute.

Next, Respondents argues that because responders assessed Appellant and took his vitals, their actions did not rise to the level of gross negligence. They again do not address the primary issue that Appellant alleges he was affirmatively denied necessary emergency care based upon his statements that he was homeless and lacked insurance. His complaint centers around the fact that the reasons he was denied medical care were not ordinary negligence, they were intentional, affirmative actions of discriminatory behavior that put Appellant at serious risk and caused him pain, suffering, and what may have been unnecessary surgery.

Finally, Respondents summarily state that Appellant did not allege gross negligence. Again, Appellant was in proper person drafting pleadings. He went through a number of pleadings with the lower court, which properly gave him opportunities to amend. Appellant pled gross negligence in his Amended Complaint filed March 30, 2018 (ROA, Volume 2, Part II at 345-347). Respondents knew what Appellant was attempting to plead, and any attempt to argue Appellant's complaint

did not put Respondents on notice of the claims and bases therefor are incongruous.

CONCLUSION

The primary issue for this appeal is that the district court did not take all factual allegations set forth by Appellant as true and evaluate them in the context of the statutory exceptions under NRS § 41.500 and NRS § 41.0336. Appellant was willfully denied care on the basis that he was homeless and did not have health insurance. The delay in treatment may have necessitated surgery, and at a minimum, caused Appellant unnecessary pain and suffering.

The facts here are sufficient to defeat a dismissal pursuant to NRCP 12(b)(5). As such, reversal is warranted.

DATED this 1st day of June, 2020.

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NRAP 28.2 CERTIFICATION

1. I hereby certify that this Reply Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because:

   [x] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Century Schoolbook 14 pt. font.

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)

   [x] it does not exceed 15 pages.

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 of the transcript or appendix

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

DATED this 1st day of June, 2020.

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CERTIFICATE OF SERVICE

This is to certify that on June 1, 2020, a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** was served on the following by United States Mail, first class, and by the Supreme Court Electronic Filing System:

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