

IN THE SUPREME COURT OF THE STATE OF NEVADA

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* * *

LARRY PORCHIA,

Appellant,

vs.

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

Respondents.

CASE NO. 78954

DC CASE No. A-17-758321-C

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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Respondents CITY OF LAS VEGAS, STEPHEN MASSA, and NICHOLAS PAVELKA through their attorneys of record, BRYAN K. SCOTT, City Attorney, by JEFFRY M. DOROCAK, Deputy City Attorney, file their Answer to Petition for Review, as follows:

I.

ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals properly analyze Nevada's public duty doctrine (NRS 41.0336), including the application of the doctrine's affirmative harm exception, in its Order of Affirmance of the District Court's dismissal of Appellant's Complaint alleging negligence against Respondents?

II.

STATEMENT OF FACTS

City of Las Vegas Department of Fire and Rescue employees Stephen Massa, a firefighter-paramedic, and Nicholas Pavelka, a firefighter-advanced emergency medical technician, (hereinafter, "Respondents") provided an emergency response and medical assessment to Appellant Porchia on August 26, 2015. (Record on Appeal ("ROA") at 22.) Respondents' 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 Respondents 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 events surrounding Respondents' emergency response are straightforward. On Sunday, August 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.) Respondents 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.*)

Almost simultaneously with Respondents' 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 Respondents and AMR both on the scene at 3:52 a.m., Respondents 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, Respondents 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 Respondents that he was “seeking to be transported to a hospital” and “had no insurance.” (ROA at 575.)

After Respondents 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, Respondents relayed this conclusion to AMR and excused AMR from the scene. (ROA at 184.)

Following Respondents’ 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 claimed negligence by Respondents 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 and the Court of Appeals—the Appellant’s negligence claim was dismissed by the lower court and properly affirmed by the Court of Appeals based on a correct application of Nevada’s public duty doctrine and its two narrow exceptions.

III.

ARGUMENT

A. PRELIMINARY STATEMENT

The fundamental issue on review is whether the Court of Appeals correctly affirmed the lower court’s dismissal of Appellant Porchia’s negligence claim based on the public duty doctrine and the Appellant’s failure to invoke either narrow exception to that doctrine. An examination of the Court of Appeals’ Order of Affirmance (hereinafter, the “Order”) plainly shows that the appellate court thoroughly applied Nevada’s public duty doctrine and exceptions, precisely followed available Nevada Supreme Court precedent, and reached an accurate conclusion that in no way conflicts with prior decisions.

Respondents argued—and the Court of Appeals agreed—that the emergency response and medical assessment provided to Appellant Porchia was a public duty. (Order at 3-4.) Consequently, the Appellant could only pierce the public duty doctrine by invoking one of two narrow exceptions to the doctrine. Respondents

argued that Appellant Porchia's allegations did not adequately raise either exception—the special duty exception or the affirmative harm exception—and, again, the Court of Appeals agreed. (Order at 5-11.) In so doing, the Court of Appeals applied all available, applicable Nevada case law concerning both narrow exceptions to Appellant Porchia's arguments and alleged facts. (*Id.*) In the end, the Court of Appeals' Order amounts to a thorough, well-reasoned, and correct opinion that provides important clarity for the application of the public duty doctrine and the doctrine's affirmative harm exception to allegations of misdiagnosis or delayed treatment by emergency medical responders throughout Nevada.

B. THE COURT OF APPEALS CORRECTLY ANALYZED THE PUBLIC DUTY DOCTRINE AND ITS TWO NARROW EXCEPTIONS BEFORE AFFIRMING THE DISMISSAL OF APPELLANT PORCHIA'S NEGLIGENCE CLAIM

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.

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. *See Bruttomesso v. Las Vegas Metropolitan Police Department*, 95 Nev. 151, 591 P.2d 254 (1979). As a result, the Court of Appeals properly concluded that the public duty doctrine applied to this case. (Order of Affirmance at 3-4.)

However, as the Court of Appeals noted (Order at 4), the Nevada Supreme Court in *Frye* and *Coty* recognized two narrow exceptions to the public duty doctrine: the special duty and affirmative harm exceptions. *Frye v. Clark County*, 97 Nev. 632, 634, 637 P.2d 1215, 1216 (1981); *Coty v. Washoe County*, 108 Nev. 757, 760, 839 P.2d 97, 99 (1992). Respondents argued that neither exception applied to this case, and the Court of Appeals agreed. (Order of Affirmance at 5-11.)

1. Respondents 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 Company v. City of Boulder*

City, 106 Nev. 497, 505-06, 797 P.2d 946, 951 (1990), *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, statute, or ordinance that would otherwise impose an affirmative duty on the municipality to act for his or her benefit.

In his Amended Complaint, Appellant Porchia repeatedly claimed—without any legal support—that Respondents’ 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 his conclusory statements of law, the Appellant failed to identify a legal basis for his contention that Respondents owed him a special duty to provide hospital transport merely because they responded to his emergency call and arrived on-scene. In the end, the Court of Appeals applied the applicable law concerning the special duty exception and correctly concluded that it did not apply to the Appellant’s arguments and alleged facts. (Order at 5-7.)

2. Respondents did not affirmatively and directly cause Appellant Porchia’s harm.

Under Nevada law, to establish the existence of the extraordinarily narrow affirmative 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 Respondents 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 not transporting him to the hospital after completing their medical assessment.

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) 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.

The Court of Appeals accurately noted the Nevada precedent, described *supra*, in its Order. (Order at 7-8.) Then the Court of Appeals succinctly and

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correctly described how the relevant case law applied to Appellant Porchia's claims:

[T]o invoke the affirmative harm exception to the public duty doctrine, Porchia must allege facts that when taken as true demonstrate that the LVFR EMTs "created a situation which [led] directly to" his alleged harm, and must further allege facts that support that the actions of the LVFR EMTs "actively and continuously" operated to bring about his harm. Consequently, we must consider whether Porchia's allegations that the actions of the LVFR EMTs, including their alleged misdiagnosis of Porchia's medical condition and their subsequent decision to call off AMR and decline Porchia transport to the hospital, were sufficient to invoke the affirmative harm exception to the public duty doctrine.

(Order at 8 (internal citations omitted).) Thereafter, with this summation of law regarding the second exception to the public duty doctrine articulated, the Court of Appeals properly applied it to Appellant's arguments and alleged facts. (*Id.* at 8-11.)

Although Nevada lacked any cases directly discussing the application of the affirmative harm exception to an alleged misdiagnosis or failure to transport an individual to the hospital leading to an adverse outcome, the Court of Appeals relied on persuasive authority from the District of Columbia Court of Appeals. (*Id.* at 8-9 citing *Woods v. District of Columbia*, 63 A.3d 551 (D.C. 2013).) Because the fact pattern in *Woods* mirrored the facts in the instant matter (i.e., medical assessment, no transport, subsequent claims of worsened condition caused by

delay, public-duty-doctrine defense), the Court of Appeals was persuaded by the District of Columbia Court of Appeals' conclusion that a "negligent judgment call" or "discretionary determination" made during an emergency medical assessment does not "rise to the level of active and direct harm necessary to invoke the affirmative harm exception." (Order at 9-10.)

Indeed, the Court of Appeals further explained:

In this case, the LVFR EMTs placed Porchia on a stretcher, took his vitals, and questioned him about his condition to determine if he required emergency transportation to a hospital. Only after assessing Porchia's condition and determining that emergency care was unnecessary did LVFR leave the scene. The LVFR EMTs did not affirmatively injure Porchia or worsen his medical condition when providing emergency care, nor did they take any affirmative action that prevented Porchia from either calling emergency services again (which he later did) or seeking other care options.

(Order at 10 (internal citations omitted).)

Based on that analysis and application of the law, the Court of Appeals concluded that Respondents' "conduct here does not constitute continuous affirmative harm as contemplated by the second exception to the public duty doctrine" and "that the City is shielded from liability under the provisions of NRS 41.0336." Thus, the Court of Appeals issued its Order of Affirmance of the District Court's dismissal of the Appellant's negligence action.

....

IV.

CONCLUSION

As set forth above, the District Court's dismissal of Appellant Porchia's Amended Complaint was rightfully upheld by the Court of Appeals. As properly analyzed by the Court of Appeals, Respondents' emergency response and medical assessment of the Appellant were shielded from suit by NRS 41.0336—the public duty doctrine, and Appellant Porchia did not pierce the doctrine with either exception. The Court of Appeals' Order of Affirmance is thorough, well-reasoned, and correct; while the Order provides important clarity on the affirmative harm exception of the public duty doctrine for emergency medical responders throughout Nevada, the Nevada Supreme Court need not exercise its discretion and grant review because of the accuracy of the Court of Appeals' Order.

DATED this 9th day of February 2021.

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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 2,321 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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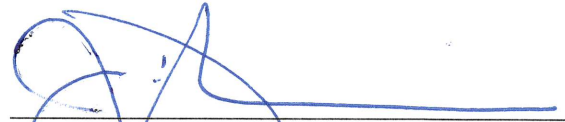
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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 9th day of February, 2021.

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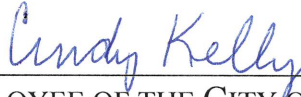
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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2021, I served a true and correct copy of the foregoing RESPONDENTS' ANSWER TO PETITION FOR REVIEW 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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