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 SUPPLEMENTAL OPENING 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

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Appellant is not using a pseudonym.

DATED this 14th day of May, 2021.

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STATEMENT OF JURISDICTION

This appeal is from the Order of Affirmance from the Court of Appeals of the State of Nevada affirming the lower court's granting of Defendant's Motion to Dismiss on April 30, 2019 from the courtroom of District Court Judge Gloria Sturman, Department 26. (ROA, Volume 3, Part II, at 657-658).

The Order Granting the Motion to Dismiss was filed on May 15, 2019. (ROA, Volume 3, Part II, at 628-631). The Notice of Entry of the Order Granting the Motion to Dismiss was filed May 16, 2019. (ROA, Volume 3, Part II, at 494-495). Appellant's Notice of Appeal was timely filed on June 3, 2019. (ROA, Volume 3, Part II, at 633-641).

The matter was fully briefed and argued to the Court of Appeals of the State of Nevada on October 27, 2020. An Order of Affirmance was filed December 16, 2020. Appellant filed a Petition for Review on January 4, 2021, and a response was directed and filed on February 9, 2021. The Court filed an Order Directing Supplemental Briefing on March 19, 2021.

Jurisdiction is therefore proper under NRAP 3(a), NRAP 3A(b)(1), NRAP 4(a), and NRS § 233B.150.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether deliberately misdiagnosing appellant satisfies NRS § 41.0336(2)'s "affirmatively caused the harm" exception?

STATEMENT OF THE CASE

Pertinent to the Court's Order Directing Supplemental Briefing, Appellant Larry Porchia filed suit alleging he was affirmatively denied emergency transport to the hospital after he sought emergency services for severe stomach pain. Appellant alleged that he was being assessed by first responders, and then informed them he was homeless and lacked insurance. After this was stated, the first responders immediately ceased their assessment, affirmatively cancelled the ambulance transport en route, informed Appellant he had gas pain, and left. Appellant's condition deteriorated, and when he was later transported by different EMTs to the hospital, he required emergency surgery for a bowel obstruction.

A motion to dismiss was granted at the lower court on the basis that Respondents were entitled to immunity under the NRS § 41.0336 (the "public duty doctrine") and found Appellant had failed to meet any of the exception requirements, including the "affirmative harm"

exception focused on in this briefing. The Court of Appeals issued an Order of Affirmance regarding the public duty doctrine immunity and explicitly found that any harm caused by Respondents' actions was the result of a "judgment call" and was not "active and continuous" harm that rose to the level of the exception for affirmative harm in NRS § 41.0336. (Order of Affirmance at p. 11).

SUMMARY OF THE ARGUMENT

The lower court and the Court of Appeals held that the first responders' actions did not meet any exceptions to the public duty doctrine as set forth in NRS § 41.0336. At issue in this brief is the Court of Appeals' finding that the Respondents' actions specifically did not meet the "affirmative harm" exception because their actions did not affirmatively injure Appellant, worsen his medical condition, prevent him from calling emergency services again, or prevent him from seeking other care. (Order of Affirmance at p. 10). They relied upon other jurisdictions to come to this conclusion, and considered the Respondents' decision to cease rendering care a "judgment call." (Order of Affirmance at p. 11).

It is Appellant's position that the facts alleged in the Complaint are not supporting a claim based upon negligent care in the sense that the Respondents simply negligently misdiagnosed Appellant. Rather, Appellant claims that he was affirmatively denied care based upon his socio-economic status. Appellant is not arguing malpractice or a simple misdiagnosis. Appellant is arguing discrimination and affirmative harm resulting from deliberate misdiagnosis and refusal of care.

STATEMENT OF FACTS

Appellant refers to and incorporates by reference all briefing regarding the factual background of the case. Appellant wishes to set forth a brief statement of the pertinent facts in accordance with the question posed by the Order Directing Supplemental Briefing herein for the Court's ease and convenience.

On or about August 26, 2015, a friend of Appellant Porchia called emergency services to the location of 525 E. St. Louis Avenue, Unit #418. (ROA, Volume 3, Part II, at 572-579). Appellant Porchia complained of severe stomach pain, vomiting, and hot flashes. (ROA, Volume 3, Part II, at 572-579).

Emergency services from Las Vegas Fire and Rescue ("LVFR") were dispatched to Appellant Porchia's location. (ROA, Volume 1, Part I, at 22-23). American Medical Response ("AMR") was also dispatched. (ROA, Volume 1, Part II, at 184-186).

LVFR firefighters immediately began assessing Appellant Porchia by placing him on a stretcher, taking his vitals and asking him questions regarding his condition. (ROA, Volume 3, Part II, at 572-579). Appellant Porchia affirmatively requested transport to a hospital. (ROA, Volume 3, Part II, at 572-579). Appellant Porchia further relayed he had no insurance was currently homeless. (ROA, Volume 3, Part II, at 572-579). Upon learning this information, LVFR firefighters immediately ceased assessment of Appellant Porchia, removed him from the stretcher, and stated he had gas pain. (ROA, Volume 3, Part II, at 572-579). LVFR firefighters affirmatively cancelled the call to AMR for the ambulance, and affirmatively refused to transport Appellant Porchia to the hospital. (ROA, Volume 1, Part II, at 184-186); (ROA, Volume 1, Part I, at 22-23).

Appellant Porchia suffered in excruciating pain for another eight hours. (ROA, Volume 3, Part II, at 572-579). Someone on his behalf

again called for emergency services. (ROA, Volume 3, Part II, at 572-579). LVFR was again dispatched to the scene, but this time with different responders. (ROA, Volume 1, Part I, at 25-27). AMR was again dispatched to the scene. (ROA, Volume 1, Part II, at 176-179).

This time, Appellant Porchia was immediately transported to the hospital. (ROA, Volume 1, Part II, at 176-179). Appellant Porchia underwent emergency surgery for a bowel obstruction. (ROA Volume 1, Part I, at 20).

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews an order granting a motion to dismiss pursuant to NRCP 12(b)(5) de novo. *Dezzani v. Kern & Associates, Ltd.*, 134 Nev. 61, 64, 412 P.3d 56, 59 (2018), *citing Buzz Stew LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). "An order granting an NRCP 12(b)(5) motion to dismiss 'is subject to a rigorous standard of review on appeal.'" *Stubbs v. Strickland*, 129 Nev. 146, 150, 297 P.3d 326, 328-29 (2013), *citing Buzz Stew LLC* at 227-28, 672.

"This Court presumes all factual allegations in the complaint are true and draws all inferences in favor of the plaintiff." *Id.* Dismissal is

only appropriate when "it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.*

"Issues of statutory construction are reviewed de novo." *Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 146, 179 P.3d 542, 548 (2008). "The leading rule of statutory construction is to ascertain the intent of the legislature in enacting the statute." *McKay v. Bd. of Supervisors of Carson City*, 102 Nev. 644, 650, 730 P.2d 438 (1986). "To determine legislative intent, we first consider and give effect to the statute's plain meaning because that is the best indicator of the Legislature's intent." *Dezzani*, 134 Nev. at 64, 412 P.3d at 59, *citing Pub. Emps.' Benefits Program*, 124 Nev. at 147, 179 P.3d at 548.

II. DELIBERATE MISDIAGNOSIS SATISFIES THE "AFFIRMATIVE HARM" EXCEPTION CODIFIED IN NRS § 41.0336(2)

NRS § 41.0336 provides:

> 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**.

(emphasis added).

A. Policy Behind the Public Duty Doctrine

The general policy and sentiment behind the public duty doctrine is clear: it is intended to establish that a government's duty runs to all citizens to protect the safety and well-being of the public at large, rather than a specific individual. *See Bruttomesso v. Las Vegas Metropolitan Police Department*, 95 Nev. 151, 591 P.2d 254 (1979); *see also Scott v. Dept. of Commerce*, 104 Nev. 580, 763 P.2d 341 (1988).

In Nevada, the public duty doctrine was codified in 1987. In *Coty v. Washoe County*, 108 Nev. 757, 839 P.2d 97 (1992), this Court was called upon to analyze the exception created by NRS § 41.0336 as to what constitutes "affirmative harm." That Court held that "affirmative harm" is caused by "a public officer actively creat[ing] a situation which leads directly to the damaging result." *Id.* at 761, 99. There is no Nevada caselaw on point found by Appellant interpreting this definition in the context of emergency care.

B. The Court of Appeals Erred in Relying Upon Cases from Washington, D.C. in Their Analysis

At issue for the Petition for Review is the Court of Appeals' reliance upon a case in Washington, D.C., *Woods v. District of Columbia*, 63 A.3d 551 (D.C. 2013), to conclude that the Respondents actions in this case did not rise to the level of "affirmative harm" because the officers did not affirmatively injure him or prevent him from seeking care. This case was inapplicable to the facts at hand because the first responders in *Woods* involved the negligence of EMTs incorrectly medically assessing a woman based upon her symptoms. She was thoroughly examined – both inside the residence and in the ambulance. *Woods* at 552. After evaluating her symptoms and possible causes, the EMT responders then stated there was no need for transport based upon their medical assessment. *Id.* That case involved simple negligence – the EMTs missed the signs of stroke and were merely negligent in failing to transport her. The "affirmative harm" exception was not designed for ordinary negligence.

Another case relied upon by the Court of Appeal was *Potts v. Bd. of Cty. Comm'rs*, 176 P.3d 988, 995-96 (Kan. Ct. App. 2008). In *Potts*, the patient was refusing to be transported to the hospital, and the EMTs followed her wishes. *Id.* at 994-95. The family sued, and the Court

analyzed the public duty doctrine in the context of a special duty. *Id.* The Court found that no duty was owed since the patient was never in their care or custody. *Id.* The Court specifically rejected the argument that by responding to the 911 call, the EMTs performed an affirmative act. *Id.* at 995. This case is inapplicable, as Appellant was not declining transport, but rather affirmatively requesting transport to the hospital and was denied that service upon the basis of his socio-economic status.

By relying upon these cases, the analysis of the Court of Appeal was misplaced. The Court of Appeals erred when it evaluated the public duty doctrine in the context of passive harm (i.e. ordinary negligence from a misdiagnosis) as opposed to the active harm Appellant alleged (i.e. intentional misdiagnosis based upon discrimination). Many of the cases involving first responders found by Appellant do largely involve general negligence or malpractice allegations, and those types of cases typically fail to rise to the level of an affirmative harm exception, if that exception is even argued or analyzed.

This case is distinct under the facts. Appellant is not alleging mere negligence; rather, Appellant has alleged facts, which taking as true, establish that Respondents deliberately ceased care being provided,

deliberately cancelled assistance en route, and deliberately left Appellant to suffer and necessitated eventual surgery because of the delay in care. These actions were undertaken on the sole basis of Appellant's socio-economic status. Appellant was not arguing he was the victim of passive negligence; he is arguing is the victim of affirmative harm by way of the Respondents affirmative actions in actively refusing care and causing his delay in treatment.

C. Respondents Affirmatively Harmed Appellant By Actively Refusing Care Based Upon His Socio-Economic Status

Courts in other jurisdictions have rejected attempts to apply the public duty doctrine in cases where there is either gross negligence or there are affirmative actions by the party claiming protection.

The most persuasive case based upon the facts at hand was examined in Appellant's reply brief: *Penilla v. Huntington*, 115 F.3d 707 (9th Cir. 1997).

In *Penilla*, the decedent became seriously ill and neighbors called for emergency services. *Id.* at 708. Police officers responded, examined the decedent, and found him in need of medical care. *Id.* Instead of assisting the decedent, the officers affirmatively cancelled the request for

medical care, moved the decedent into his home, and left. *Id.* He was found dead the next day as a result of respiratory failure. *Id.* While the Court in *Penilla* evaluated the case in the context of a 42 U.S.C. § 1983 action and a 14th amendment violation, the reasoning is applicable in the context of affirmative harm.

Specifically, the Court noted that "[a]ppellees do not allege that these officers attempted, but failed, to rescue Penilla, or even that they should have, but did not, attempt to rescue him. Their allegation is that the officers placed Penilla in danger in deliberate indifference to his medical needs." *Id.* at 709. The Court found that the officers allegedly took

> [A]ffirmative actions that significantly increased the risk facing Penilla: they cancelled the 911 call to the paramedics; they dragged Penilla from his porch where he was in public view...they then locked the door and left him there alone. And they allegedly did so *after* they had examined him and found him to be in serious medical need.

Id. at 710 (emphasis in original).

Appellant's treatment was similar. A friend of Appellant summoned emergency services. Respondents arrived, and Appellant requested to go to the hospital for care. Appellant stated he was homeless and without insurance. Respondents then took affirmative actions:

- They abruptly and immediately ceased all evaluation;
- They cancelled the ambulance transport en route;
- They deliberately misdiagnosed Appellant with gas pains; and
- Left a homeless, indigent man on the street in excruciating pain.

Other jurisdictions have evaluated whether affirmative or intentional harm by the state actor prohibits protections afforded by the public duty doctrine.

In *Beaudrie v. Henderson*, 465 Mich. 124, 631 N.W.2d 308 (2001), a police dispatcher purposely hid the whereabouts of a criminal actor from police due to her friendship with his mother. The Court considered the public duty doctrine's extension to government employees outside of police officers and ultimately did not expand the application on other grounds, but carefully examined the purpose and intent of the doctrine in finding the dispatcher was not protected. The Court cited approvingly to *Beasley v. Humbert*, 453 Mich. 308, 552 N.W.2d 1 (1996) and Justice Boyle's opinion that the doctrine should be limited to cases involving nonfeasance, or "passive inaction or the failure to actively protect others from harm." *Beaudrie* at 131, 312, citing *Beasley* at 328, 8.

In *Cooper v. Rodriguez*, 443 Md. 680, 118 A.3d 829 (2015), an inmate murdered another inmate on a transport bus that was staffed by five correctional officers. The plaintiffs alleged gross negligence against the correctional officer in charge of the bus because he failed to have the appropriate amount of officers, failed to check restraints, improperly placed restraints, and seated protective custody inmates next to general population inmates. *Id.* at 690-691, 835-836. Maryland recognizes a gross negligence exception to the public duty doctrine, and the Court held the allegations by plaintiffs rose to the level to defeat summary judgment. *Id.* at 733, 860.

In *Smith v. Jackson County Bd. of Educ.*, 168 N.C. App. 452, 608 S.E.2d 399 (2005), a schoolteacher manipulated and attempted to videotape a sexual relationship between an 18-year-old student and a 14 year-old student. The Court evaluated whether the cause of action rests upon the direct misconduct of the defendant and rose to the level of "calculated conduct on the part of defendants directed at the plaintiffs..." *Id.* at 461, 407. The Court recognized where "the conduct complained of rises to the level of an intentional tort...the public duty doctrine ceases to apply." Id. at 459, 406, *citing Clark v. Red Bird Cab Co.*, 114 N.C.App.

400, 406, 442 S.E.2d 75, 78-9, (1994) (a plaintiff must allege conduct that rises to the level of an intentional tort). Here, Appellant is claiming affirmative, intentional conduct was the legal cause of his injuries, and Courts have routinely found that cases of affirmative harmful actions, as opposed to passive negligence, are not protected by the public duty doctrine.

D. The Argument That Appellant Was Not Barred From Seeking Additional Care Is A Red Herring

Appellant wishes to readdress the argument set for the by Respondents and the Court of Appeals that Appellant was not barred from seeking additional care. The only case cited by the Court of Appeals for this proposition was *Johnson v. District of Columbia*, 580 A.2d 140 (D.C. 1990). This case does not address a claimant being able to seek other care options, but rather appears to be for the support that Respondents did not affirmatively injure Appellant.

In *Johnson*, the decedent requested someone call for emergency assistance, which was performed by her roommate. *Id.* at 141. The dispatcher stated an ambulance was on the way. *Id.* Soon after, the decedent collapsed of a heart attack. *Id.* The roommate again called for emergency services after the ambulance did not show up for 10-15

minutes. *Id.* He made a third call after the ambulance did not show up for 20-30 minutes. *Id.* Firefighters arrived on scene but did not render any emergency care outside of CPR, and emergency technicians did not arrive for some time. *Id.* Doctors stated the decedent could have been saved if she arrived sooner. *Id.*

The Court denied an exception to the public duty doctrine, stating that a "victim may arguably 'rely' on an emergency crew not to worsen her condition, no such reliance can fairly be based on the inaction or futile action of the firefighters in this case." *Id.* at 142-43.

The Court in *Johnson* protected the ineptitude or lack of care rendered by the firefighters, finding that in the absence of affirmative steps to worsen her condition, no liability could be found. *Id.* at 143. This case actually supports the notion that the Respondents caused affirmative harm under the facts present. The Court in *Johnson* relied upon the firefighters response to the decedent – they rendered the only available emergency care via CPR while they waited for an ambulance. The firefighters in *Johnson* took no affirmative action to either deny the decedent care or harm her, therefore, there was no exception to the public duty doctrine.

This case is the opposite, as Respondents were not simply passive responders. They took affirmative steps to deny Appellant care as stated herein. Further, Respondents have argued they could not determine whether Appellant needed emergency surgery. (Respondent's Answering Brief at 25). This admission is important: instead of waiting for EMTs to arrive and medically assess Appellant and honor his request for transport to the hospital, Respondents instead took affirmative steps to deny Appellant emergency care, despite being ill-equipped to evaluate the emergent nature of the situation.

Appellant wishes to further emphasize the argument that he could have sought other care not only lacks any authority whatsoever, but also denies the reality of Appellant's situation and evades the issue at hand. He was a homeless man in excruciating pain. Had he called for emergency services again, he may have had the same responders. He may have faced arrest for an alleged misuse of emergency services. As an indigent homeless man, expecting him to call a taxi to a hospital is not a reasonable solution after being purposely rejected by emergency responders. To expect an indigent homeless man in excruciating pain, who is vomiting, having hot flashes, and in general distress, to have the

wherewithal to seek further care after being denied care and face the potential barriers in doing so, is a cruel position. The solution was to honor Appellant's request to be transported to the hospital, not affirmatively deny him care based upon his socio-economic standing and then expect him to continue efforts to seek it out for himself while suffering from a painful bowel obstruction. It certainly should not pave a way to avoid liability for responders to affirmatively deny people care on discriminatory bases, since anyone could just "call[] emergency services again...or seek[] other care options." (Order of Affirmance at p. 10).

III. CONCLUSION

The Court of Appeals relied upon caselaw that did not address the issue presented upon appeal. The facts of the case as plead by the Complaint allege Respondents took affirmative steps that caused affirmative harm, thus the public duty doctrine does not shield them from liability. Appellant repeatedly alleged that he was affirmatively denied care on the bases that he was homeless and did not have health insurance. He stated that his doctors informed him that but for the delay in medical treatment, he may not have required surgery. The delay in

treatment, at a minimum, caused Appellant to suffer in excruciating pain for eight additional hours.

The facts here support both a finding a gross negligence and affirmative harm on their face, and that is sufficient to defeat a dismissal pursuant to NRCP 12(b)(5). As such, reversal is warranted.

DATED this 14th day of May, 2021.

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NRAP 28.2 CERTIFICATION

1. I hereby certify that this Supplemental Opening 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 30 pages and/or

   [x] contains 4,340 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 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 14th day of May, 2021.

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CERTIFICATE OF SERVICE

This is to certify that on January 4, 2021, a true and correct copy of the foregoing **APPELLANT'S SUPPLEMENTAL OPENING BRIEF** was served on the following by United States Mail, first class, and by the Supreme Court Electronic Filing System:

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