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-17-763321-C

APPELLANT'S SUPPLEMENTAL 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 12th day of August, 2021.

OLSON CANNON GORMLEY & STOBERSKI

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SUMMARY OF ARGUMENT

Respondents did not address the question posed by the Court. The issue ordered by the Court was "whether **deliberately misdiagnosing** appellant satisfies NRS 41.0336(2)'s 'affirmatively caused the harm' exception." (Order Directing Supplemental Briefing) (emphasis added). Respondents argue an entirely different issue: whether an "allegation of misdiagnosis by first responders does not fall within the affirmative harm exception of the public duty doctrine." (Respondents' Supplemental Answering Brief at 1). To be clear, Appellant has never argued that this case concerned negligent misdiagnosis, and that is not the question presented for review.

Appellant's argument both before the Court of Appeals and in the supplemental briefing is an entirely different issue. Appellant alleged that he was deliberately misdiagnosed and deliberately denied care based upon his socio-economic status after he informed first responders he was homeless and without medical insurance. Appellant is claiming that Respondents then took affirmative action to cease their evaluation,

deliberately misdiagnose him, deliberately deny him transport, and affirmatively cancel the ambulance.

At no point in their briefing did Respondents address the issue of deliberate misdiagnosis and affirmative actions to deny care, nor did they address whether such affirmative actions rise to the level of affirmative harm to be an exception to the public duty doctrine. Instead, Respondents improperly dispute factual allegations and argue that the actions taken by LVFR were simply negligent misdiagnosis or discretionary judgment calls. These are not the issues in Appellant's Petition for Review.

The issue for review 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 10). This Court issued a direction for supplemental briefing on a very specific issue related to that decision, and it is Appellant's position that the facts alleged in the Complaint support a

finding of affirmative harm resulting from deliberate misdiagnosis and refusal of care based upon Appellant's socio-economic status.

BRIEF STATEMENT OF FACTS

Respondents accuse the Appellant of "embellish[ing] facts to make his situation worse." (Respondents' Supplemental Answering Brief at 2). If Respondents are worried that the facts seem troubling in this case, it is because the facts are indeed troublesome.

In support of this argument, Respondents argue that Appellant never claimed he was vomiting. This is incorrect, but Appellant does apologize for a mis-citation to the record. The allegation of vomiting was made to the lower court at least twice. (ROA Volume 1, Part I, at 12, ROA, Volume 1, Part II, at 122).

Respondents further dispute Appellant's claim that he was homeless, since he was fortunate enough to be at a friend's apartment during his medical emergency. This is referenced throughout the brief as Appellant's "residence." Respondents' characterization of Appellant's living status is disingenuous and improper. All allegations are accepted as true for purposes of a motion to dismiss. Appellant has clearly and repeatedly alleged he was homeless. Respondents' purposeful

mischaracterization is an improper attempt to negate Appellant's argument that he was deliberately denied care on the basis of his socio-economic status. The proper forum to challenge Appellant's living status is at trial.

ARGUMENT

I. Appellant's Allegations of Affirmative Actions Must Be Taken as True for Purposes of Appeal

Respondents dispute the facts as set forth by Appellant and claim they are inaccurate, which is improper. What Respondents believe occurred at the scene of the emergency is irrelevant for purposes of this appeal. The standard of review on a motion to dismiss is a rigorous *de novo* standard. *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, 224, 227-28, 181 P.3d 670, 672 (2008). The Court must take all alleged facts as true. *Stubbs v. Strickland*, 129 Nev. 146, 150, 297 P.3d 326, 328-29 (2013), *citing Buzz Stew LLC* at 227-28, 672.

Appellant alleged the facts as follows: LVFR firefighters assessed Appellant 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 affirmatively requested transport to a hospital. (ROA,

Volume 3, Part II, at 572-579). Appellant 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, 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 to the hospital. (ROA, Volume 1, Part II, at 184-186); (ROA, Volume 1, Part I, at 22-23).

Respondents then improperly attack the allegations by arguing they simply "excused" the ambulance after an evaluation. (Respondents' Supplemental Answering Brief at 3-4). This attempt to dispute an alleged fact is improper. The record shows that LVFR cancelled the ambulance. (ROA, Volume 1, Part II at 184). The allegation set forth by Appellant is LVFR cancelled the ambulance after learning he was homeless and lacked insurance. (ROA, Volume 3, Part II, at 572-579). Appellant's allegations must be taken as true for purposes of a motion to dismiss. *Id.*

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Respondents then state that LVFR are qualified EMTs that can assess patients for medical emergencies. (Respondents' Supplemental Answering Brief at p.4). This is in direct contradiction to their prior argument that they were unable to determine whether Appellant needed emergency care. (Respondents' Answering Brief at 25). Appellant has never argued that EMTs would be able to diagnose a bowel obstruction in the field. Appellant argues he was in excruciating pain, experiencing vomiting, fainting, and hot flashes, affirmatively requesting transport to the hospital. Appellant alleges that despite his physical condition and request for emergency services, that LVFR denied further evaluation, care and transport solely on the basis that he was homeless and lacked insurance, and instead deliberately misdiagnosed him with gas pain.

At no point do Respondents argue why these facts do not rise to the level of affirmative harm. Instead, Respondent dispute the alleged facts and argue that Appellant was not really homeless, which is improper and disingenuous.

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II. The Court of Appeals' Reliance on Nonbinding Authority was Misplaced

Respondents argue that the cases cited by the Court of Appeals are applicable to the facts at hand, but this argument is misplaced. As stated by Appellant, this case does not involve an act of negligence. Appellant is not arguing that he was negligently misdiagnosed. Therefore, the Court of Appeals' reliance upon *Woods v. District of Columbia*, 63 A.3d 551 (D.C. 2013) was misplaced, as that case was a negligent misdiagnosis of a stroke and did not involve any affirmative action to deny care on the basis of socio-economic standing as alleged in this matter.

Next, Respondents misrepresent the facts in *Potts v. Bd. Of Cty. Comm'rs*, 176 P.3d 988 (Kan. Ct. App. 2008). In that case, Respondents omit the fact that the EMTs refused transport because the patient herself was refusing care. *Id.* at 994-95. It is irrelevant that her family requested transport, as the patient herself refused care. Here, Appellant affirmatively requested transport for himself and was denied that service upon the basis of his socio-economic status.

Respondents turn to the argument that Appellant was not prevented from seeking other care. Instead of analyzing the affirmative

actions of LVFR, Respondents jump to the conclusion that there were other remedies potentially available to Appellant. This argument is inapplicable as to whether Respondents caused affirmative harm in their deliberate misdiagnosis and denial of medical care. Appellant again notes the problems inherent in this argument. The proposition that an indigent person of color should just repeatedly call 911 for assistance or catch a cab after being denied emergency medical care is implausible.

Respondents criticize Appellant's reliance upon *Penilla v. Huntington*, 115 F.3d 707 (9th Cir. 1997) on the basis that it involved police officers rather than firefighters. Respondents further allege that *Penilla* does not apply because of their theory Appellant was not homeless.

Appellant's reliance on *Penilla* is based upon that court's analysis of the affirmative actions taken by emergency responders. The cases cited by the Court of Appeals centered around negligent medical care and negligent misdiagnosis. *Penilla* evaluated a different situation where the emergency responders took affirmative actions to harm the claimant.

The Court in *Penilla* 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).

Here, as in *Penilla*, Respondents took affirmative actions that harmed Appellant. Upon learning he was homeless and without insurance, they ceased evaluation, cancelled ambulance transport, deliberately misdiagnosed him, and left a homeless man without emergency medical care. Appellant further alleged that the delay in treatment contributed to the need for emergency surgery. Appellant is not claiming Respondents caused the bowel obstruction itself, but rather their affirmative actions to deny care and deliberately misdiagnose him left him in excruciating pain and caused a delay in treatment that led to the need for emergency surgery.

At no point do Respondents provide any legal authority or argument that these actions were not affirmative harm. Instead, Respondents simply dispute the facts alleged by Appellant, which is improper. They further continue to focus on the argument that the

public duty doctrine applies in the context of passive harm (i.e. ordinary negligence from a misdiagnosis), and neglect to address the argument as to the active harm Appellant alleged (i.e. intentional misdiagnosis).

III. As Alleged, Respondents' Actions Were Deliberate and Rise to the Level of Affirmative Harm

Respondents' discrimination analysis is inapplicable to this case. Appellant has repeatedly alleged and argued that he believes he was denied care based upon his socio-economic standing. Specifically, Appellant alleged that he was affirmatively denied care after he informed responders he was homeless and lacked insurance. Appellant argues that this purposeful denial of care and deliberate misdiagnosis constitutes affirmative harm and is thus an exception to immunity.

The briefing requested by the Court was to analyze whether this allegation of deliberate misdiagnosis rises to the level of affirmative harm. Respondents did not address this request. At no point do Respondents discuss the allegation that they deliberately misdiagnosed Appellant. Indeed, the word "deliberate" is used only once – in a section heading. That section discusses a right to emergency transport and the misplaced argument that they did not affirmatively cause a bowel obstruction. There is no mention, argument, or legal authority

addressing the allegation of deliberate misdiagnosis as a basis for finding affirmative harm. Therefore, Respondents concede that argument and reversal is warranted.

CONCLUSION

The order directing supplemental briefing requested the parties address a specific question: whether deliberately misdiagnosing Appellant constitutes affirmative harm under NRS § 41.0336(2). Respondents failed to address that question, instead impermissibly disputing the facts alleged by Appellant.

The affirmative harm alleged by Appellant is clear: Appellant alleged that he was affirmatively denied care when he told responders that he was homeless and did not have health insurance. Appellant alleged he was deliberately misdiagnosed with gas pain. Appellant alleged Respondents affirmatively cancelled the ambulance despite his requests for transport. Appellant alleged that his doctors informed him that but for the delay in medical treatment, he may not have required surgery. Taking these allegations as true, as required by the standard of review for a motion to dismiss, Appellant has alleged facts sufficient to

illustrate affirmative harm and defeat a dismissal pursuant to NRCP 12(b)(5). As such, reversal is warranted.

DATED this 12th day of August, 2021.

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NRAP 28.2 CERTIFICATION

1. I hereby certify that this Supplemental 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 30 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 12th day of August, 2021.

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CERTIFICATE OF SERVICE

This is to certify that on August 12th, 2021, a true and correct copy of the foregoing **APPELLANT'S SUPPLEMENTAL 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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