IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LARRY PORCHIA,
Appellant,
vs.
CITY OF LAS VEGAS; STEPHEN MASSA; AND NICHOLAS PAVELKA,
Respondents.

No. 78954-COA

FILED

DEC 16 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

Larry Porchia appeals from a district court order dismissing his complaint in a tort action. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.[1]

On the morning of August 26, 2015, Porchia asked a friend to contact emergency services on his behalf as he was experiencing severe stomach pains and "hot flashes."[2] Las Vegas Fire and Rescue (LVFR) and American Medical Response (AMR) were dispatched to respond to the call. LVFR arrived first at the scene. Two LVFR emergency medical technicians (EMTs), Steven Massa and Nicholas Pavelka (collectively LVFR EMTs), placed Porchia on a stretcher, took his vitals, asked questions regarding his medical history and current symptoms, and completed a medical assessment. During the assessment, Porchia informed the LVFR EMTs that he "had no insurance and was homeless." Thereafter, the LVFR EMTs

[1]It has come to the court's attention that Marina Clark, William Headlee, Jason W. Driggars, and LVFR (erroneously named LVER) Risk Management are not proper parties to this appeal. Accordingly, we direct the clerk of this court to amend the caption on this court's docket sheet to correspond to the caption on this order.

[2]We do not recount the facts except as necessary to our disposition.

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determined that it was likely Porchia was experiencing discomfort due to stomach gas, informed him that he did not require medical transport to the hospital, and advised AMR that its ambulance did not need to respond to the call. The LVFR EMTs then left the scene without transporting Porchia to the hospital.

Approximately eight hours later, Porchia, still experiencing stomach pain, asked another friend to call emergency services on his behalf. On this occasion, AMR responded to the call and transported Porchia to the hospital, where he underwent emergency surgery to repair a bowel obstruction.

Porchia initiated his lawsuit below pro se, alleging negligence against the City of Las Vegas, Massa, and Pavelka (hereinafter collectively, the City), along with several other defendants who are not parties to this appeal. Specifically, Porchia alleged that the LVFR EMTs breached their duty by failing to transport him to the hospital, causing him to suffer significant and prolonged pain and to undergo bowel obstruction surgery. Porchia additionally alleged that the surgery would have been avoided had he been transported following his first 9-1-1 call.[3] The City filed a motion to dismiss under NRCP 12(b)(5) for failure to state a claim for which relief could be granted. The district court granted the City's motion and dismissed Porchia's case, finding that the public duty doctrine, NRS 41.0336, and the good samaritan statute, NRS 41.500(5), barred Porchia's claims as a matter of law. This appeal followed.

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[3]We note that there is no documented medical evidence in the record to support Porchia's assertion that surgery would have been avoided if he had been transported to the hospital following his first 9-1-1 call. Nevertheless, we take his factual assertions as true and draw all inferences in his favor.

On appeal, Porchia argues that (1) the district court erred in finding that neither of the two exceptions to NRS 41.0336, the public duty doctrine, applied; and (2) the district court erred in its application of NRS 41.500(5), the good samaritan statute. The City, on the other hand, argues that the district court did not err as either of the statutes provides the City with immunity from liability.

We review a dismissal for failure to state a claim under NRCP 12(b)(5) de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). In conducting this analysis, this court will "regard all factual allegations in [Porchia's] complaint as true and draw all inferences in [his] favor." *Stockmeier v. Nev. Dep't of Corr. Psychological Review Panel*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008). Porchia's complaint is properly dismissed "only if it appears beyond a doubt that [Porchia] could prove no set of facts, which, if true, would entitle [him] to relief." *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

The public duty doctrine

Porchia argues that the district court erred in determining the public duty doctrine immunized the City from liability, and therefore, his case should not have been dismissed. The City, on the other hand, argues that the public duty doctrine bars liability in this case as neither of its exceptions apply.

The public duty doctrine, as codified in NRS 41.0336, provides that "[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 [individually liable for their own negligent acts or omissions]." Under this doctrine, public officers, such as firefighters, do not owe duties

to individuals, but are instead entrusted with guarding the general health and well-being of the public as a whole. As such, there is no private liability for a breach of that duty. *See Bruttomesso v. Las Vegas Metro. Police Dep't*, 95 Nev. 151, 153, 591 P.2d 254, 255 (1979) ("The duty of government . . . runs to all citizens and is to protect the safety and well-being of the public at large.").

The rationale behind the public duty doctrine permits public entities to carry out their duty to the public without fear of financial loss or reprisal. *See generally Scott v. Dep't of Commerce*, 104 Nev. 580, 585-86, 763 P.2d 341, 344 (1988) ("[T]he 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." (internal quotation omitted)). Thus, the public duty doctrine shields public entities, like fire departments or public ambulance services, from liability on the basis that such entities should not be inhibited by their good faith efforts to serve the public, even when the outcome of their emergency treatment is less than desirable.

However, the immunity provided by the public duty doctrine is not absolute, as Nevada recognizes two exceptions to the doctrine: "(1) where a public agent, acting within the scope of official conduct, assumes a *special duty* by creating specific reliance on the part of certain individuals; or (2) where a public officer's conduct *'affirmatively causes' harm* to an individual." *Coty v. Washoe Cty.*, 108 Nev. 757, 760, 839 P.2d 97, 99 (1992) (emphasis in original) (quoting *Frye v. Clark Cty.*, 97 Nev. 632, 634, 637 P.2d 1215, 1216 (1981)); *see also* NRS 41.0336(1)-(2).

Duty to Transport/Special Duty Exception

We first address whether the City had a duty to transport Porchia to the hospital. Both on appeal and below, Porchia appears to argue that the City owed him a duty to transport him to the hospital, simply because he summoned emergency services. We disagree.

While our Legislature has recognized the importance of emergency medical services to the health and general welfare of the public,[4] NRS 41.0336 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. We note that neither the Legislature nor the City of Las Vegas have enacted regulations that would create a duty to transport every individual who calls 9-1-1. Indeed, the City's decision as to what level of ambulance service to provide is largely discretionary, and thus there is no general duty requiring public officials and emergency responders to transport individuals to the hospital simply because that individual called 9-1-1.[5]

Nonetheless, the City may still be liable for its failure to transport Porchia to the hospital if Porchia can allege facts sufficient to show that the special duty exception to the public duty doctrine applied. Nevada recognizes two ways in which a special duty may be established:

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[4]*See generally* NRS 450B.015 (recognizing that "prompt and efficient emergency medical care and transportation is necessary for the health and safety of the people of Nevada").

[5]Other jurisdictions have concluded the same. *See* 63 C.J.S. Municipal Corporations § 913 (collecting cases and noting that "[a] city's decision as to what level of ambulance service it will provide is discretionary, and thus, it is immune from liability for failing to provide a higher level of service").

(1) if a statute or ordinance sets forth "mandatory acts clearly for the protection" of an individual "rather than the public as a whole," *Coty*, 108 Nev. at 761 n.6, 839 P.2d at 99 n.6 (internal quotation omitted); or (2) if a public official, "acting within the scope of official conduct, assumes a *special duty* by creating specific reliance on the part of certain individuals." *Id.* at 760, 839 P.2d at 99.

Here, however, Porchia has provided no statute, rule, or regulation that sets forth a mandatory act to protect him as an individual, and our review of Nevada law has also found no statute or ordinance that would apply to impose such a duty on the LVFR EMTs. Porchia has also failed to allege any conduct by the LVFR EMTs on which Porchia relied that would establish a special duty to transport him to the hospital. *See Hines v. District of Columbia,* 580 A.2d 133, 136 (D.C. 1990) (stating that "the mere fact that an individual has emerged from the general public and become[s] an object of the special attention of public employees does not create a relationship which imposes a special legal duty"); *Wanzer v. District of Columbia*, 580 A.2d 127, 132 (D.C. 1990) (stating that "a one-time call to 9-1-1 for help does not establish a special relationship," and holding that "[i]t is not enough [when attempting to overcome the public duty doctrine] to allege ineptitude, even shameful and inexcusable ineptitude, by a municipal agency in failing to respond adequately to a call for help"). Thus, while Porchia contacted emergency services, his call was no different from the other calls received by the City, and we conclude that the City did not

owe Porchia either a general or special duty to transport him to the hospital.[6]

As Porchia failed to allege sufficient facts to support that the LVFR EMTs assumed a special duty to transport Porchia to the hospital, and offers no statute or other legal authority to support that the City owed him a special duty to transport under the facts and circumstances presented here, we decline to abrogate the City's immunity pursuant to the public duty doctrine for the failure to transport Porchia under the special duty exception.

The Affirmative Harm Exception

We now turn to the affirmative harm exception. Porchia argues that the LVFR EMTs' failure to transport him to the hospital caused an additional eight hours of significant pain and discomfort, as well as an invasive medical procedure (the bowel obstruction surgery), because the delay in treatment worsened his medical condition. Indeed, Porchia contends that he could have avoided surgery with earlier medical intervention. To the contrary, the City argues that it was not the cause of the bowel obstruction. However, this is not Porchia's argument. Instead, Porchia's argument is that earlier intervention would have avoided the necessity of surgery—not that it would have prevented the obstruction altogether.

Under the affirmative harm exception to the public duty doctrine, this court must consider whether the actions of the LVFR EMTs

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[6]This would be the case regardless of whether or not Porchia had health insurance. Although Porchia's allegation that the LVFR EMTs denied him transport due to his indigent status is troubling, even if true, this alone does not impose a separate duty to transport him to a hospital.

"actively create[d] a situation which [led] directly to the damaging result." *Coty*, 108 Nev. at 760-61, 839 P.2d at 99. And, in negligence actions, "legal cause is determined when the actor's negligent conduct *actively and continuously* operates to bring about harm to another." *Id.* at 760, 839 P.2d at 99 (emphasis in original) (internal quotations omitted).

Accordingly, to 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. *Id.* at 761, 839 P.2d at 99. 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.

Nevada has one case discussing the application of the affirmative harm exception, *Coty v. Washoe County*, 108 Nev. 757, 839 P.2d 97. However, *Coty* is not directly analogous to the present case, as it does not address whether an alleged misdiagnosis or failure to transport an individual to the hospital leading to an adverse outcome rises to the level of affirmative harm.[7] Accordingly, we turn to other jurisdictions for persuasive authority on this issue.

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[7]In *Coty*, a police officer pulled over a teenaged driver for driving under the influence of alcohol. 108 Nev. at 758-59, 839 P.2d at 97-98. However, instead of arresting the driver, the officer instructed the driver to remain stopped, and made plans to have the driver escorted home. *Id.* After

We find the reasoning of the District of Columbia Court of Appeals in *Woods v. District of Columbia* to be informative. 63 A.3d 551 (D.C. 2013).[8] In *Woods*, District of Columbia EMTs incorrectly assessed the appellant and determined that her symptoms, which included slurred speech, loss of balance, and vomiting, were a side effect of the appellant recently quitting smoking. *Id.* at 552. The EMTs refused to transport her to the hospital following this assessment. *Id.* The next morning, the appellant was transported to the hospital by a different medical team, where it was determined that she had suffered a stroke. *Id.*

In the subsequent negligence action, the appellant alleged that the EMTs aggravated her medical condition, and asserted the EMTs negligently assessed her medical condition and caused harm by failing to transport her to the hospital in the first instance. *Id.* On appeal, the District of Columbia Court of Appeals held that detrimental reliance on "a

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the officer left, the driver ignored the officer's orders and began driving, eventually drifting into oncoming traffic, and colliding with another vehicle, killing the two teenagers inside. *Id.*

On appeal, the supreme court held that although the police officer's departure was "a violation of Washoe County law," the police officer "did not instruct [the driver] to continue driving." *Id.* at 761, 839 P.2d at 99. Rather, the police officer "actively and directly ordered [the driver] off the road." *Id.* Because the police officer took these precautionary measures, the supreme court held that the police officer was not the "active and direct cause of the harm to the appellants." *Id.* at 762, 839 P.2d at 100.

[8]*See also Potts v. Bd. of Cty. Comm'rs*, 176 P.3d 988, 995-96 (Kan. Ct. App. 2008) (concluding that the only affirmative act taken by the government employees—responding to an ambulance call—was clearly within their duties and that because the EMTs did not injure the patient with their care or prevent the patient from obtaining further medical assistance, liability under the public duty doctrine did not exist.).

negligent judgment call, discretionary determination, or incorrect statement of fact by a [public] employee providing on-the-scene emergency services does not constitute the kind of actual and direct worsening of the plaintiff's condition that will permit imposition of negligence liability despite the public-duty doctrine." *Id.* at 557 (internal quotations omitted).

We approve of this reasoning here and conclude that the LVFR EMTs' actions in completing a medical assessment and declining to take Porchia to the hospital do not rise to the level of active and direct harm necessary to invoke the affirmative harm exception. *See Coty,* 108 Nev. at 760-61, 839 P.2d at 99; *Scott,* 104 Nev. at 585-86, 763 P.2d at 344.

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. *See Johnson v. District of Columbia,* 580 A.2d 140, 142 (D.C. 1990) ("[A]ppellant must show that some act of the firefighters in administering emergency medical assistance to [the heart attack victim] actually made [the victim's] condition worse than it would have been had the firefighters failed to show up at all or done nothing after their arrival.").

We therefore agree with the City that the LVFR EMTs made a "judgment call" and exercised their discretion in determining whether to

transport Porchia.[9] Thus, even if the LVFR EMTs' judgment call was incorrect or negligent, we conclude that their conduct here does not constitute continuous affirmative harm as contemplated by the second exception to the public duty doctrine, and therefore conclude that the City is shielded from liability under the provisions of NRS 41.0336. Accordingly, Porchia can show no set of facts that would entitle him to relief, and we therefore conclude that the district court did not err when dismissing Porchia's complaint under NRCP 12(b)(5).

The good samaritan statute

Finally, because we conclude that the public duty doctrine applies in this case, which provides the City with immunity, we need not reach the issue of whether the City is also provided with immunity under NRS 41.500, the good samaritan statute. *See, e.g., Lassiter v. Cohn*, 607 S.E.2d 688, 691 (N.C. Ct. App. 2005) (concluding that "[b]ecause we herein hold that plaintiff's claims are completely barred by the public duty doctrine, we need not consider the constitutional issues raised by plaintiff's complaints," nor additional grounds presented by the defendant); *cf. Chase v. City of Memphis*, 971 S.W.2d 380, 385 (Tenn. 1998) (concluding that "[i]f immunity is found under the [Government Tort Liability Act], a court need not inquire as to whether the public duty doctrine also provides immunity").

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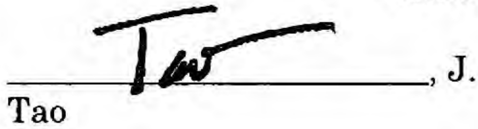
[9]While the district court based its decision on NRS 41.0336 and NRS 41.500(5), it should be noted that under Nevada law, the decision of whether to transport a person to the hospital is largely discretionary. Therefore, we note that NRS 41.032(2), which provides immunity for discretionary acts, may well have decided this issue in the absence of NRS 41.0336.

Therefore, we

ORDER the judgment of the district court AFFIRMED.

______________________, C.J.
Gibbons



______________________, J.
Tao

______________________, J.
Bulla

cc: Hon. Gloria Sturman, District Judge
Olson, Cannon, Gormley, & Stoberski
Las Vegas City Attorney
Eighth District Court Clerk