

Case No. 74912

In the Supreme Court of Nevada

CRISTINA PAULOS,
Appellant,

vs.

FCH1, LLC; LAS VEGAS
METROPOLITAN POLICE
DEPARTMENT; JEANNIE
HOUSTON; and AARON BACA,
Respondents.

Electronically Filed
Oct 24 2018 12:14 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable ROB BARE, District Judge
District Court Case No. A716850

**APPELLANT'S APPENDIX
VOLUME 4 PART 2
PAGES 982-1000**

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After a fair reading of Judge Mahan’s Order, this Court finds that his decision was based upon qualified immunity. It is true that Judge Mahan found that delay was not unreasonable under the head note, whether the suspect actively resisted arrest or attempted to evade arrest by flight. However, this was in the context of whether a violation of a constitutional right had occurred and whether qualified immunity applies. This Court finds that issue preclusion does not apply and dismissal is improper. Therefore, Defendants’ Motion to Dismiss regarding the negligence claim is DENIED.

See Ex. A.

In short, this court found that Judge Mahan never found that Ofc. Baca acted reasonably and only addressed the issue of qualified immunity. This is “clearly erroneous.”

III. LEGAL STANDARD

Eighth Judicial District Court Rule 2.24(a) allows a party to seek reconsideration of a ruling of the court. “In a concise and non-argumentative manner, such a petition should direct attention to some controlling matter which the court has overlooked and misapprehended.” See Matter of Ross, 99 Nev. 657 (1983). “A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous.” See Masonry & Tile Contractors Ass’n of S. Nevada v. Jolley, Urga & Wirth, Ltd., 113 Nev. 737, 741 (1997) (citing Little Earth of United Tribes v. Dept. of Housing, 807 F.2d 1433, 1441 (8th Cir. 1986)). A prior decision may be erroneous on the basis that “[a]lthough the facts and law [are] unchanged,” the Court is “more familiar with the case by the time the second motion [is] heard.” See Harvey’s Wagon Wheel, Inc. v. MacSween, 96 Nev. 215, 217-18 (1980). EDCR 2.24 provides that the Court has complete discretion to consider a motion to reconsider or for rehearing. See EDCR 2.24(a).

IV. LEGAL ARGUMENT

A. RELEVANT LAW

In order to establish issue preclusion, a litigant must establish: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been a party or a privity with a party with the prior litigation; and (4) the issue was actually and necessarily litigated. Five Star Corp. v. Ruby, 124 Nev. 1048, 1055

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1 (2008) (holding modified by Weddell v. Sharp, 131 Nev. Adv. Op. 28, 350 P.3d 80 (2015)).
2 Here, the Court’s Order only took issue with the first prong of the test – whether the issue
3 decided in the federal litigation was identical to the issue in the current action.

4 **B. LEGAL ANALYSIS**

5 **1. The Issue is Identical**

6 The issue in the current litigation is identical to the issue decided by Judge Mahan.
7 Numerous other courts have addressed this exact issue. And, every court that has addressed the
8 issued had found that issue preclusion applies. See Hernandez v. City of Pomona, 46 Cal. Fourth
9 501, 207 P.3d 506 (2009); F.E.V. v. City of Anaheim, 2013 WL 3184670 (Cal. Ct. App. June 6,
10 2013); Vanvorous v. Burmeister, 262 Mich. App. 467, 687 N.W. 2d 132 (2004

11 In Hernandez, the California Supreme Court addressed this very issue in an officer
12 involved shooting case. The decedent’s family filed a § 1983 complaint in federal court alleging
13 excessive force and state law wrongful death and negligence claims. The federal court
14 bifurcated the state and federal law claims. A jury found that the decedent’s Fourth Amendment
15 rights were not violated and the federal court declined to exercise supplemental jurisdiction on
16 the remaining state law claims. The decedent’s family, just like Paulos, re-filed the state law
17 claims in California state court. The state court dismissed the complaint concluding the plaintiffs
18 were collaterally stopped from pursuing them. The California Court of Appeal reversed and the
19 California Supreme Court granted review and reversed the appellate court.

20 According to the California Supreme Court, “an issue was actually litigated in a prior
21 proceeding if it was properly raised, submitted for determination, and determined in that
22 proceeding.” Id., 46 Cal. 4th at 511-512. With respect to the reasonableness of the officers’
23 actions, the Hernandez Court found that “in plaintiffs’ federal action, the issue of whether the
24 officers exercised reasonable care in using deadly force was raised, submitted decision, and
25 actually decided against plaintiffs in resolving their section 1983 claim.” Id. at 512. Since the
26 “totality of the circumstances” test used to analyze the reasonableness of the officers’ acts under
27 the Fourth Amendment was the same test under California negligence law, the issue was
28 identical and the court found issue preclusion applied.

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1 In F.E.V., the California Court of Appeals held that “under principals of collateral
 2 estoppel, a judgment in a federal lawsuit on federal civil rights claims based on police conduct
 3 bars state law claims brought in state court based on the same conduct.” Id., 2013 WL 3184670,
 4 at *1. In F.E.V., a suspect was shot and killed in an incident with two Anaheim police officers.
 5 The decedent’s family filed a complaint in federal court against the City of Anaheim and two
 6 officers. The federal complaint asserted civil rights claims under § 1983 and five state law
 7 claims. The federal district court granted summary judgment in favor of the defendants on the
 8 civil rights claims and concluded that the police officers did not act unreasonably. Id. at *1. The
 9 federal court, similar to the federal court in this case, declined to exercise supplemental
 10 jurisdiction over the state law claims and dismissed them without prejudice. The decedent’s
 11 family then filed a complaint in California state court reasserting the five state law claims
 12 dismissed without prejudice by the federal court. The defendants moved to dismiss the state
 13 court complaint on the grounds of collateral estoppel. The trial court granted the motion without
 14 leave to amend and dismissed the state court complaint. The California Court of Appeals found
 15 that the reasonableness issue was “fully litigated in the [federal] district court” because the issue
 16 was necessary to the determination of the federal law claims. Id. at *5. The court of appeals
 17 found that the district court had adjudicated all the issues when it determined that the officers did
 18 not use excessive or unreasonable force on the plaintiff. Id.

19 In Vanvorous, the plaintiff’s decedent was shot and killed by police officers after a car
 20 chase and collision involving the decedent’s and an officer’s vehicle. Plaintiff then brought suit
 21 against the officers, claiming that the officers violated the decedent’s Fourth Amendment right to
 22 be free from excessive force. The federal court ultimately granted the defendant’s motion for
 23 summary judgment regarding the federal constitutional claim, finding that the officers’ actions
 24 were objectively reasonable and that even if the defendants acted unreasonably, qualified
 25 immunity still protected the officers from suit. [This is the exact ruling Judge Mahan made in
 26 Paulos’ case.] The federal court dismissed plaintiff’s state law claims for assault and battery,
 27 gross negligence, and intentional infliction of emotional distress without prejudice. [Again, this
 28 is identical to what Judge Mahan did in Paulos’ case.] The plaintiff then pursued her state law

1 claims in state court. The defendants moved for summary judgment on the state law claims
 2 arguing that the federal district court's determination that the defendants' use of force was
 3 reasonable prevented re-litigation of the issue. The trial court agreed, granting summary
 4 judgment in defendants' favor. The plaintiff then appealed to the Michigan Court of Appeals.

5 The precise issue raised before the Michigan Court of Appeals was whether the doctrine
 6 of collateral estoppel precluded the plaintiff's state law claim because her Fourth Amendment
 7 excessive force claim had been adjudicated in federal court. Similar to Paulos, the Vanvorous
 8 plaintiffs "misinterpret[ed] the rules surrounding collateral estoppel and mistakingly argue[d]
 9 that because her claims are different - - rather than her issues - - collateral estoppel should not
 10 apply." Id. at 141 (emphasis added). In rejecting the plaintiff's argument, the court noted that
 11 the issue in the federal court as to whether the defendant officers' actions were "objectively
 12 reasonable under the circumstances" was identical to Michigan state law regarding negligence.
 13 Id. As a result, the Michigan Court of Appeals found that plaintiffs were collaterally stopped
 14 from pursuing their state law claims because they received a full and fair opportunity to litigate
 15 the reasonableness issue in the §1983 action. Id. at 142-43. In sum, the court found that
 16 plaintiffs' state law claims were untenable because it "would have required plaintiff to re-litigate
 17 the reasonableness of defendants' actions, a matter previously litigated in federal court." Id. at
 18 143. See also Williams v. City of Grosse Pointe Park, 2008 WL 274872 (Mich. App. January
 19 31, 2008) (same); Dunn v. Matatall, 2010 WL 1979795 (Mich. App. May 18, 2010) (same).

20 In sum, the issue of reasonableness with respect to Paulos' federal law § 1983 claim is
 21 identical to her state law negligence claim. See Belch v. Las Vegas Metro. Police Dep't., 2012
 22 WL 4610803, *11 (D. Nev. 2012)("An officer's breach of duty in a negligence claim is analyzed
 23 under the reasonableness standard of the Fourth Amendment" (citations omitted)).

24 **2. Analysis of Judge Mahan's Order**

25 According to this Court, Judge Mahan did not rule on the reasonableness of Ofc. Baca's
 26 actions and only found that qualified immunity applied. Specifically, this Court's Order reads:
 27
 28

1 5. Second, the LVMPD defendants move to dismiss the negligence claim
 2 under the doctrine of issue of preclusion. Issue preclusion requires: (1) the issue
 3 decided in the prior litigation must be identical to the issue presented in the
 4 current actions; (2) the initial ruling must have been on the merits and have
 5 become final; (3) the party against whom the judgment is asserted must have been
 6 a party or privy with a party to the prior litigation; and (4) the issue was actually
 and necessarily litigated. Five Star Corp. v. Ruby, 124 Nev. 1048, 1055 (2008)
 (holding modified by Weddell v. Sharp, 131 Nev. Adv. Op. 28, 350 (P.3d 80
 (2015)). Paulos argues that issue preclusion does not apply in this case because
 the issue decided in a prior litigation was not identical to the issue presented in the
 current action.

7 6. ***This Court finds that Judge Mahan, in the federal case, did not issue a***
 8 ***ruling or a finding that Ofc. Baca acted reasonably. This Court finds that***
 9 ***Judge Mahan only found that Ofc. Baca was entitled to qualified immunity and***
 10 ***only granted summary judgment on this issue. See Paulos v. FCH1, LLC, No.***
 11 ***2:13-cv-1546-JCM-PAL 2015 WL 1119972, at *12 (D. Nev. Mar. 12, 2015).***

12 7. Because this Court finds that Judge Mahan's order and decision was based
 13 only upon qualified immunity and not reasonableness finding, it finds that issue
 14 preclusion does not apply and dismissal is improper. Therefore, the LVMPD
 15 defendants' motion to dismiss the negligence claim based upon issue preclusion is
 16 DENIED.

17 See Exhibit B, Court Order at p. 5 (emphasis added). Therefore, if Judge Mahan found that Ofc.
 18 Baca acted reasonably, issue preclusion would apply.

19 Contrary to this Court's Order, Judge Mahan's order is very clear that he found Ofc. Baca
 20 acted reasonably. Prior to addressing the issue of qualified immunity, Judge Mahan analyzed
 21 whether Ofc. Baca violated Paulos' constitutional rights – i.e., acted unreasonably. See Paulos,
 22 at *5-6, §III(A)(2). Judge Mahan correctly noted that it was his job to make an objective inquiry
 as to “whether the officers’ actions are ‘objectively reasonable’ in light of the facts and
 circumstances confronting them.” Id. at *7 (citing Graham v. Connor, 490 U.S. 386, 397
 (1989)). In making his decision, Judge Mahan analyzed each of the Graham factors. Judge
 Mahan made the following findings:

- 23 • “Here, the incidents’ objective factors made it ***reasonable*** for officer Baca to
 24 believe that Paulos was reaching for his firearm and that she was therefore a
 25 serious threat to him and all involved. Paulos’ own security expert asserts that in
 26 the security footage, she ‘is seen to reach towards the right waist area of the
 27 officer . . .’ [citations omitted]. Even without considering the firearm itself, it is
 28 undeniable that Paulos lunged at Ofc. Baca after he calmly approached her mere
 seconds earlier. This erratic, irrational, and aggressive behavior indicated that
 Paulos was dangerous. ***Therefore, both [Graham] factors 1 and 2 weigh in favor***
of the LVMPD defendants.” Paulos, at *8 (emphasis added).

- 1 • “. . . the court has already found that there was at most a two minute and 40
2 second delay between additional officers’ arrival and Paulos being lifted off the
3 ground. Such a delay is **not unreasonable** considering that the officers arrived to
4 a scene involving a multi-vehicle accident, multiple bystanders, and individuals
5 restrained on the ground, and a winded officer. It is thus **reasonable** to take a few
6 minutes to assess the scene before moving a suspect that poses an unknown level
7 of danger. This conclusion is further supported by the fact that Paulos admits she
8 never verbalized her discomfort to any officer at any time. [citation omitted]
9 Therefore, this factor weighs in favor of the LVMPD defendants. Paulos, at *9
10 (emphasis added).

11 After finding that all of the Graham factors weighed in favor of the LVMPD defendants,
12 Judge Mahan issued the following paragraph confirming the reasonableness of Ofc. Baca’s
13 actions. Paulos, at *9 §III(2)(b)(IV).:

14 While it is unfortunate that Paulos incurred such burns as a result of her arrest in
15 this incident, the court finds that officer Baca’s use of minimal force in restraining
16 her was appropriate considering the objective threat she posed in her undeniable
17 attempt to resist arrest. In light of this assessment and the lack of any genuine
18 disputed material fact, the court finds that **officer Baca did not use excessive
19 force in arresting Paulos**. The conclusion applies to all officers who arrived on
20 scene after Paulos was restrained on the ground.

21 Paulos, *9 (emphasis added). Because Judge Mahan specifically found Ofc. Baca did not use
22 excessive force, he also found that Ofc. Baca used reasonable force. See Hernandez, F.E.V., and
23 Vanvorous. That is because excessive force is unreasonable force. See Mladzinski v. Lewis,
24 648 F.3d 24, 33 (1st Cir. 2011) (“excessive force is by definition unreasonable force.”).

25 It is critical to note that all of the above statements occurred before Judge Mahan even
26 addressed the issue of qualified immunity. After finding that Ofc. Baca acted reasonably, Judge
27 Mahan turned his attention to the issue of qualified immunity. In doing so, he specifically
28 qualified his analysis by stating “[e]ven if officer Baca used excessive force against Paulos in
violation of a constitutional right, LVMPD defendants would still be entitled to qualified
immunity if they could show that the rights Paulos claims is not ‘clearly established’.” Paulos at
*10 (citations omitted). The phrase “even if” clearly demonstrates that Judge Mahan was stating
an alternative basis for his decision.

Finally, in Section III of Judge Mahan’s Order, he addressed LVMPD’s 42 U.S.C. §1983
liability. Qualified immunity only applies to individuals and not municipalities. See Harlow v.
Fitzgerald, 457 U.S. 800, 818 (1982); Hynson v. City of Chester, 827 F.2d 932, 934 (3rd Cir.

1 1987) (qualified immunity only applies to individuals and not municipalities). Thus, a
2 municipality could still be liable for an officer who violated the Constitution but received
3 qualified immunity.

4 Here, Judge Mahan, in addressing LVMPD’s liability, specifically states “the court has
5 already determined that LVMPD officers did not violate Paulos’ Fourth Amendment rights.”
6 Paulos, 2015 WL 1119972 *12 (emphasis added). Thus, Judge Mahan specifically states there
7 was no Fourth Amendment violation – i.e., the officers acted reasonably.

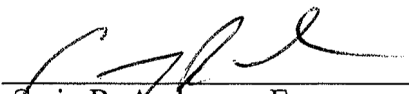
8 In short, it is clear that Judge Mahan’s order made two specific findings: (1) that Ofc.
9 Baca used reasonable force and (2) in the alternative, “even if” the force was excessive, he would
10 still be entitled to qualified immunity. Judge Mahan specifically used the words “reasonable”
11 and “not unreasonable” to describe Ofc. Baca’s actions on three separate occasions to reach his
12 conclusion that Ofc. Baca “did not use excessive force.” Further, he specifically stated no Fourth
13 Amendment violation ever occurred. Therefore, this Court’s Order stating that Judge Mahan
14 “did not issue a ruling or a finding that Ofc. Baca reasonably” and that Judge Mahan only
15 granted summary judgment based upon qualified immunity is “clearly erroneous.”

16 **V. CONCLUSION**

17 Based upon the foregoing, the LVMPD defendants respectfully request that this court
18 reconsider its order denying the LVMPD Defendants’ Motion to Dismiss, or in the Alternative,
19 Summary Judgment on Paulos’ negligence claim. As set forth above, Judge Mahan clearly
20 found that Ofc. Baca acted reasonably. Because this finding is binding upon this court, Paulos’
21 negligence claim must be dismissed pursuant to the doctrine of issue preclusion.

22 Dated this 13 day of November, 2015.

24 MARQUIS AURBACH COFFING

25 By: 
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27 Nevada Bar No. 6882
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **DEFENDANTS LVMPD AND OFC. BACA'S MOTION FOR RECONSIDERATION ON MOTION TO DISMISS** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 13th day of November, 2015. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹

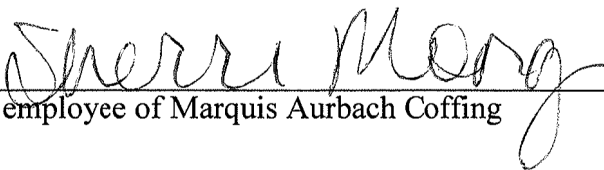
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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

n/a


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¹ Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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Exhibit A

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A-15-716850-C

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Other Negligence

COURT MINUTES

September 14, 2015

A-15-716850-C Cristina Paulos, Plaintiff(s)
vs.
FCH1 LLC, Defendant(s)

September 14, 2015 2:19 PM Minute Order Re: Defendant Las Vegas Metropolitan Police Department and Officer Aaron Baca's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment

HEARD BY: Bare, Rob

COURTROOM: RJC Courtroom 03C

COURT CLERK: Tia Everett

PARTIES PRESENT: No parties present

JOURNAL ENTRIES

- This matter came before the Court on August 11, 2015 for hearing on Defendant Las Vegas Metropolitan Police Department (hereinafter LVMPD) and Defendant Aaron Baca s (hereinafter Officer Baca) Motion to Dismiss, or in the alternative, Motion for Summary Judgment. Plaintiff Cristina Paulos (hereinafter Paulos) appeared by and through her attorney, Cal Potter, Esq. Defendants appeared by and through their attorney, Craig Anderson, Esq. Counsel presented their case and Court took matter under advisement. After carefully considering the papers submitted and hearing arguments, Court issued its Decision this 14th day of September, 2015. COURT ORDERED, Defendants Motion to Dismiss GRANTED in part.

LVMPD moved to dismiss the negligent hiring, training, and supervision claim under NRS 41.032. As there is no Nevada Supreme Court case law on this issue, this Court looks to the federal courts for guidance. Under Nevada law, the discretionary function exception barred negligent hiring and supervision claims. Beckwith v. Pool, No. 2:13-CV-125 JCM NJK, 2013 WL 3049070, at *6 (D. Nev. June 17, 2013) (dismissing plaintiff s cause of action for negligent hiring, retention, training and supervision in a motion to dismiss posture because the decision of which police officers to hire, and how to train and supervise them, are an integral party of governmental policy-making or planning).

PRINT DATE: 09/14/2015

Page 1 of 3

Minutes Date: September 14, 2015

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A-15-716850-C

Nevada looks to federal case law to determine the scope of discretionary immunity and federal case law consistently holds training and supervision are acts entitled to such immunity. *Neal-Lomax v. Las Vegas Metro. Police Dep't*, 574 F. Supp. 2d 1170, 1192 (D. Nev. 2008) *aff'd*, 371 F. App'x 752 (9th Cir. 2010). In this case, the alleged failure by LVMPD to adequately train its officers falls within the scope of discretionary immunity. This Court finds that LVMPD is entitled to discretionary immunity. Therefore, Defendants Motion to Dismiss the negligent hiring, training, and supervision claim against LVMPD is GRANTED.

Defendants moved to dismiss the negligence claim under issue preclusion. Issue preclusion requires: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008) holding modified by *Weddell v. Sharp*, 131 Nev. Adv. Op. 28, 350 P.3d 80 (2015). Here, Paulos argues that issue preclusion does not apply in this case because the issue decided in the prior litigation was not identical to the issue presented in the current action. In Judge Mahan's Order, he states, Based on the foregoing reasons, the court finds that officer Baca did not violate a clearly established right and thus qualified immunity applies to him and all LVMPD defendants for Paulos' excessive force claim. The court will therefore grant LVMPD defendants' motion for summary judgment on this claim. *Paulos v. FCH1, LLC*, No. 2:13-CV-1546 JCM PAL, 2015 WL 1119972, at *12 (D. Nev. Mar. 12, 2015). After a fair reading of Judge Mahan's Order, this Court finds that his decision was based upon qualified immunity. It is true that Judge Mahan found that delay was not unreasonable under the headnote, whether the suspect actively resisted arrest or attempted to evade arrest by flight. However, this was in the context of whether a violation of a constitutional right had occurred and whether qualified immunity applies. This Court finds that issue preclusion does not apply and dismissal is improper. Therefore, Defendants Motion to Dismiss regarding the negligence claim is DENIED.

Counsel for Defendants is directed to submit a proposed Order consistent with the foregoing which sets forth the underpinnings of the same in accordance herewith and with counsel's briefing and argument and submit to opposing counsel for review and signification of approval/disapproval.

CLERK'S NOTE: The above minute order has been distributed via email to:

Cal Potter Esq. (pottercal@aol.com)

Craig Anderson Esq. (efox@maclaw.com)

Lew Brandon Esq. (l.brandon@moranlawfirm.com)

Exhibit B

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Original

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8 canderson@maclaw.com
9 Attorneys for Defendants LVMPD and
10 Baca

Electronically Filed
11/05/2015 03:21:29 PM


CLERK OF THE COURT

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 CRISTINA PAULOS,

14 Plaintiff,

Case No.: A-15-716850-C
15 Dept. No.: XXXII

16 vs.

Date: 8/11/15
17 Time: 9:00 a.m.

18 FCHI, LLC, a Nevada limited liability company;
19 LAS VEGAS METROPOLITAN POLICE
20 DEPARTMENT, a government entity; JEANNIE
21 HOUSTON, an individual; AARON BACA, an
22 individual and DOES 1 through 10,

23 Defendants.

24 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

25 Defendants Las Vegas Metropolitan Police Department ("LVMPD") and Ofc. Aaron
26 Baca's (hereinafter "LVMPD defendants") Motion to Dismiss, or in the Alternative, Motion for
27 Summary Judgment, having come on for hearing before this honorable on August 11, 2015, with
28 Craig R. Anderson, Esq., of Marquis Aurbach Coffing, appearing on behalf of the LVMPD
defendants; Justin W. Smerber, Esq., of Moran Brandon Bendavid Moran, appearing on behalf of
defendants FCHI, LLC and Jeannie Houston; and Cal Potter, III, Esq. and C.J. Potter, IV, Esq.,
of Potter Law Offices, appearing on behalf of the plaintiff, with the Court having considered the
pleadings and papers on file herein, and the argument of counsel made a the hearing, the Court
HEREBY FINDS AS FOLLOWS:

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FINDINGS OF FACT

1. On August 14, 2012, plaintiff Cristina Paulos (“Paulos”) filed a complaint in Nevada’s Eighth Judicial District Court alleging that LVMPD acted negligently on August 7, 2011. See Case No. A-12-666754-C.

2. Paulos amended this complaint on two occasions.

3. Paulos’ Second Amended Complaint filed on August 5, 2013, included federal 42 U.S.C. §1983 claims against LVMPD and three individual officers.

4. Due to the federal claims, on August 27, 2013, the LVMPD defendants removed Paulos’ case to the United States District Court for the District of Nevada. See 2:13-cv-01546-JCM-PAL.

5. After discovery closed in the federal litigation, the LVMPD defendants filed a motion for summary judgment on all claims against them. Paulos opposed the motion and the LVMPD defendants filed a reply.

6. On March 12, 2015, federal district court Judge James C. Mahan entered his summary judgment order. See Paulos v. FCH1, LLC, 2:13-cv-1546-JCM-PAL, 2015 WL 1119972 (D. Nev. Mar. 12, 2015). The federal court order only addressed Paulos’ federal 42 U.S.C. §1983 law claims against the LVMPD defendants. Id.

7. The federal district court found that summary judgment was appropriate on all federal 42 U.S.C. §1983 claims against the LVMPD defendants. Id.

8. After dismissing the federal law claims against the LVMPD defendants, the federal court “decline[d] to exercise supplemental jurisdiction over the state law claims against the LVMPD defendants (negligence) and Palms (negligence and false imprisonment) and dismisses them without prejudice.” Id. at p. 18.

9. After dismissing the state law claims without prejudice, Paulos filed her current lawsuit. With respect to the LVMPD defendants, the complaint alleges negligence. Paulos’ negligence claim against the LVMPD defendants reads as follows:

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26. Defendant LVMPD owed Plaintiff a duty to use ordinary care and/or skill in performing police practices so as not to cause Plaintiff to suffer emotional and physical injuries.

27. Defendant LVMPD also owed plaintiff a duty to use ordinary care and/or skill in the hiring, training, supervision and retention of their employees so as not to cause, or allow their employees to cause Plaintiff to suffer emotional and physical injuries.

28. That LVMPD Officers had a duty to use reasonable care in restraining Plaintiff to avoid causing injuries, to wit, see burns to her body.

29. The LVMPD Officers breached that duty by acting in a negligent manner and/or with reckless disregard for the rights and safety of Plaintiff. The LVMPD Officers failed to use reasonable care in restraining Plaintiff by keeping her lying down on the concrete for a prolonged period of time while the concrete was excessively hot in over 100 degree weather.

Compl. at ¶¶26-29.

10. On May 19, 2015, the LVMPD defendants filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment.

11. According to the LVMPD defendants' motion: (1) the doctrine of issue preclusion barred Paulos' entire negligence claim against the LVMPD defendants because the federal district court had specifically found that Ofc. Baca acted reasonably; and (2) that Paulos' negligent, hiring, training and supervision claim was untenable as a matter of law pursuant to NRS 41.032.

12. Paulos opposed the LVMPD defendants' motion and filed a counter-motion for sanctions.

13. The LVMPD defendants replied to Paulos' opposition and filed an opposition to Paulos' countermotion. Paulos replied to the LVMPD defendants' opposition to the countermotion.

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CONCLUSIONS OF LAW

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1. NRCF 12(b) calls for summary judgment when things outside the pleadings are presented to and not excluded by the court. Here, the LVMPD defendants submitted evidence and federal court orders. The court therefore, treats the LVMPD defendants' motion to dismiss, or in the alternative, motion for summary judgment, as a motion for summary judgment.

2. Summary judgment is appropriate when no genuine issue of material fact remains for trial and the moving party is entitled to judgment as a matter of law. Moody v. Manny's Auto Repair, 110 Nev. 320, 323 (1994).

3. First, the LVMPD defendants moved to dismiss Paulos' negligent hiring, training and supervision claim under NRS 41.032. Nevada has generally waived its sovereign immunity. See NRS 41.032(1). Its waiver, however, contains exceptions. One exception is that no action may be brought against an officer or employee of Nevada "[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused." See NRS 41.032(2).

4. Because there is no Nevada Supreme Court case law on this issue, the Court looks to federal courts for guidance. Under Nevada law, the discretionary function exception barred negligent hiring and supervision claims. See Beckwith v. Pool, No. 2:13-cv-125-JCM-NJK, 2013 WL 3049070, at *6 (D. Nev. June 17, 2013) (dismissing plaintiff's cause of action for negligent hiring, retention, training, supervision in a motion to dismiss posture because the decision of which police officers to hire, and how to train and supervise them are an integral part of governmental policy-making or planning). See also Neal-Lomax v. Las Vegas Metro. Police Dep't., 574 F.Supp. 2d 1170, 1192 (D. Nev. 2008) aff'd 371 F.App'x 752 (9th Cir. 2010). The Court finds that the alleged failure by LVMPD to adequately train its officers falls within the scope of discretionary immunity, and LVMPD is entitled to discretionary immunity. Therefore, the LVMPD defendants' motion to dismiss the negligent hiring, training, and supervision claim against LVMPD is GRANTED.

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1 5. Second, the LVMPD defendants move to dismiss the negligence claim under the
 2 doctrine of issue of preclusion. Issue preclusion requires: (1) the issue decided in the prior
 3 litigation must be identical to the issue presented in the current actions; (2) the initial ruling must
 4 have been on the merits and have become final; (3) the party against whom the judgment is
 5 asserted must have been a party or privy with a party to the prior litigation; and (4) the issue was
 6 actually and necessarily litigated. Five Star Corp. v. Ruby, 124 Nev. 1048, 1055 (2008) (holding
 7 modified by Weddell v. Sharp, 131 Nev. Adv. Op. 28, 350 (P.3d 80 (2015))). Paulos argues that
 8 issue preclusion does not apply in this case because the issue decided in a prior litigation was not
 9 identical to the issue presented in the current action.

10 6. This Court finds that Judge Mahan, in the federal case, did not issue a ruling or a
 11 finding that Ofc. Baca acted reasonably. This Court finds that Judge Mahan only found that Ofc.
 12 Baca was entitled to qualified immunity and only granted summary judgment on this issue. See
 13 Paulos v. FCH1, LLC, No. 2:13-cv-1546-JCM-PAL 2015 WL 1119972, at *12 (D. Nev. Mar.
 14 12, 2015).

15 7. Because this Court finds that Judge Mahan’s order and decision was based only
 16 upon qualified immunity and not reasonableness finding, it finds that issue preclusion does not
 17 apply and dismissal is improper. Therefore, the LVMPD defendants’ motion to dismiss the
 18 negligence claim based upon issue preclusion is DENIED.

19 8. The Court finds that Paulos’ counter-motion for sanctions is DENIED.

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1 ACCORDINGLY, IT IS ORDERED, ADJUDGED AND DECREED that:
2 The LVMPD Defendants' Motion to Dismiss, or in the Alternative, Motion for Summary
3 Judgment is GRANTED in part and DENIED in part and Paulos' countermotion for sanctions is
4 DENIED.

5 Dated this 15 day of October, 2015.

Dated this 6 day of October, 2015.

6 MARQUIS AURBACH COFFING

POTTER LAW OFFICES

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Attorney for LVMPD Defendants

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C.J. Potter, IV, Esq.
Nevada Bar No. 13255
1125 Shadow Lane
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Attorney for Plaintiff

11 Dated this 6 day of October, 2015.

Dated this 5 day of October, 2015.

12 BLUT LAW GROUP, APC

MORAN BRANDON BENDAVID MORAN

13 By: Elliot S. Blut For:
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Houston

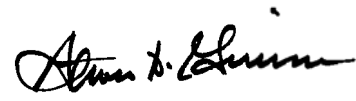
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21 IT IS SO ORDERED this 3 day of Nov October, 2015.

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23 Rob Bare
24 District Court Judge
25 ROB BARE
26 JUDGE, DISTRICT COURT, DEPARTMENT 32
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CLERK OF THE COURT

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11 *Attorneys for Plaintiff,*
12 *CRISTINA PAULOS*

13 **DISTRICT COURT**
14 **CLARK COUNTY, NEVADA**

15 CRISTINA PAULOS, an individual;
16 Plaintiff
17 v.
18 FCH1, LLC, a Nevada limited liability
company; LAS VEGAS METROPOLITAN
19 POLICE DEPARTMENT, a government
entity; JEANNIE HOUSTON, an individual;
20 AARON BACA, an individual; and DOES 1
through 10;
21 Defendants.

CASE NO.: A-15-716850-C
DEPT. NO.: XXXII

Hearing Date: 01/21/2016
Time of Hearing: 9:00 a.m.

22 _____
23 **PLAINTIFF'S OPPOSITION TO DEFENDANT LVMPD'S**

24 **MOTION TO RECONSIDER**

25 COMES NOW the Plaintiffs, named above, by and through their counsel of record,
26 Elliott S. Blut, Esq., Cal J. Potter, III, Esq., C. J. Potter, IV, Esq. and hereby respond and
27 oppose Defendant LVMPD'S Motion to Reconsider.

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