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.

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APPEAL

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

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant Cristina Paulos is an individual.

Elliot S. Blut of Blut Law Group and Cal J. Potter III and C.J. Potter IV of Potter Law Offices represented Paulos in the district court.

Daniel F. Polsenberg and Abraham G. Smith of Lewis Roca Rothgerber Christie, LLP represent Paulos *pro bono* before this Court.

Dated this 24th day of October, 2018.

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JURISDICTION

Cristina Paulos appeals from a final judgment dismissing her claims. NRAP 3A(b)(1). Defendants Las Vegas Metropolitan Police Department and Aaron Baca (together, Metro) served notice of entry of the dismissal on December 14, 2017, and Paulos timely appealed on January 12, 2018. (7 App. 1687; 7 App. 1683.)

ROUTING STATEMENT

This Court should retain the appeal to clarify that "reasonable care" under Nevada common law is not the same issue as the "reasonableness" of a seizure under the Fourth Amendment to the U.S. Constitution. This, the second of Paulos's issues presented, is a question of statewide importance, NRAP 17(a)(12), and is likely to recur in other cases in which plaintiffs bring both federal claims under 42 U.S.C. § 1983 and negligence claims under state law.[1] This issue was raised at

[1] Paulos acknowledges, however, that the appeal may be independently resolved on her first issue, on which there is overwhelming consensus and binding precedent: that an alternative ground for a federal district court's decision, which is not affirmed on appeal, is not "finally decided" for issue preclusion. If this case is assigned to the Court of Appeals, that court could resolve the appeal on the first issue without reaching the second. *See Dolorfino v. Univ. Med. Ctr. of S. Nev.*, 134 Nev., Adv. Op. 79, at 4 n.1, ___ P.3d ___, ___ n.1 (Oct. 4, 2018) (reversing order of dis-

4 App. 837–38, initially decided at 4 App. 977:10–18, ¶¶ 6–7, and decided on reconsideration at 7 App. 1680:3–7, ¶ 3.

PRINCIPAL ISSUES PRESENTED

1. When a district court's decision rests on alternative grounds, and an appellate court affirms on just one ground, is the district court's decision preclusive for the alternative ground not relied upon?

2. For issue preclusion, is the "reasonableness" of a seizure under the Fourth Amendment of the U.S. Constitution the same issue as the exercise of "reasonable care" for a negligence claim under state common law?

3. Does Nevada's discretionary-act immunity in NRS 41.032(2) categorically bar a claim for negligent training or supervision?

STATEMENT OF THE CASE

This is an appeal from an order of dismissal by the Honorable Rob Bare, District Judge of the Eighth Judicial District Court, Clark County.

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missal on appellant's first argument and declining to address other arguments).

Cristina Paulos bears the literal scars of a tremendous injustice. While suffering a psychosis on the Palms' property, Cristina Paulos was pinned to the blistering summer asphalt by a Metro officer and a Palms security guard and left there for more than five minutes. She was handcuffed for four of those minutes; backup officers were on scene for more than two-and-a-half minutes. No one moved Paulos off of the burning pavement. Paulos's delirium occludes much of her memory of the incident, but the pain remains searingly clear:

> I also remember being pushed in the hot pavement, really hard and my face burning. I remember the sensation on my face. And I remember being pushed hard. I remember not being able to get up. I remember being burnt . . . on the sidewalk because I wasn't allowed to stand up. I remember wanting to stand up and not being able to stand up. I asked to stand up, and I remember people telling me, no, you can't stand up . . . .

(4 App. 901, at 76:7–18.) As a result, Paulos suffered second- and third-degree burns that cause excruciating pain and have permanently disfigured her.

Federal District Judge Mahan rejected her federal constitutional claims. Paulos argued that she was seized with excessive force under the Fourth Amendment, but Judge Mahan granted the officers qualified

immunity, a decision that the Ninth Circuit affirmed because no Supreme Court or circuit precedent clearly established the unconstitutionality of the officers' actions. Judge Mahan also considered Paulos's seizure "reasonable" under the Fourth Amendment, but the Ninth Circuit did not affirm on those grounds.

Now the state district court has dismissed Paulos's claims under state law on the notion that this unreviewed alternative ground creates issue preclusion that bars a negligence claim against Metro or the Palms.

Paulos appeals.

STATEMENT OF FACTS

A. The Burns: Paulos is Pinned to Scorching Asphalt for More than Five Minutes

In midsummer 2011, Paulos suffered a psychotic episode that made her lose control of her car. (4 App. 791, *Paulos v. FCH1, LLC* (*Paulos I*), 2:13-CV-1546 JCM PAL, 2015 WL 1119972, at *9 (D. Nev. Mar. 12, 2015); 4 App. 908, 915, at 101:19–25, 131:22–132:5; 7 App. 1676:3–4, ¶ 1; *see also* 7 App. 1560–61, at 40:7–42:10 (no drugs or alcohol); 7 App. 1600, ¶ 11(e).) After hitting two cars near an exit from the Palms, she

got out of her car, briefly left, and then returned to what she thought was her car. (4 App. 915, at 131:22–132:5; 7 App. 1676:3–4, ¶ 1.) In her delirium, she did not realize that she was actually getting into one of the cars that she had hit. (4 App. 897:6–15.) The owner told an arriving police officer, Aaron Baca, that Paulos was trying to steal the car. (4 App. 797:16–18, *Paulos I*, 2015 WL 1119972, at *5.)

Officer Baca confronted Paulos and, he claims, Paulos lunged at him. (4 App. 793:1–3, *Paulos I*, 2015 WL 1119972, at *2.) Officer Baca pushed Paulos, eventually forcing her to the scorching asphalt pavement. (3 App. 701, at 15:16:57–15:17:02; 7 App. 1600–01, ¶ 11(f); 4 App. 793:6–9, *Paulos I*, 2015 WL 1119972, at *2.) Palms security arrived just seconds after Paulos went down, and she was handcuffed a minute later. (3 App. 701, at 15:17:28–15:18:38; 7 App. 1600–01, ¶ 11(f); 4 App. 793:15–17, *Paulos I*, 2015 WL 1119972, at *2.) Paulos nonetheless remained pinned to the asphalt for another four minutes, at least two-and-a-half of which was after backup from Metro arrived—a total of five-and-a-half minutes—before being moved to the nearby grassy area. (3 App. 701, at 15:19:50, 15:22:30; 4 App. 793:18–794:3, *Paulos I*, 2015 WL 1119972, at *2.)

Paulos was never charged with any crime. Paramedics transported her to UMC to treat her psychosis and her burns. (3 App. 714, at 40:7–10; 7 App. 1569, at 16:17–23; 4 App. 794:12–17, *Paulos I*, 2015 WL 1119972, at *3.) After several days, it became apparent that Paulos had suffered second- and third-degree burns across her body—from her face down to her legs—requiring multiple skin-removal and skin-graft surgeries. (7 App. 1572, at 27:1–23.)

B. The Lawsuit in State Court

Paulos sued Las Vegas Metropolitan Police Department and the responding officers, Baca, Jake Von Goldberg, and Jeffrey Swan; and the Palms (FCH1, LLC) and its security guard, Jeannie Houston, in state court. (4 App. 757; 7 App. 1677, ¶ 1.) Paulos brought negligence and false-imprisonment claims under state law, as well as claims under 42 U.S.C. § 1983 against Metro and the officers for Fourth Amendment violations. (4 App. 774.)

C. Removal and Dismissal of the Federal Claim

The defendants removed the case to federal court, and the officers asked for qualified immunity. (4 App. 787; 7 App. 1677–78, ¶ 3, 6; 4 App. 797:16–18, *Paulos I*, 2015 WL 1119972, at *5.) There are two ave-

nues to immunity: (1) the conduct alleged does not violate the Constitution; or (2) the constitutional right was not clearly established at the time of its violation. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

District Judge Mahan dismissed the officers, taking both paths to qualified immunity. The court ruled that the officers had not committed an "unreasonable seizure" under the Fourth Amendment because the force used to restrain Paulos was not constitutionally excessive in light of Paulos' struggle. (4 App. 803:22–27, *Paulos I*, 2015 WL 1119972, at *9 .) Alternatively, the court held that "[e]ven if officer Baca had used excessive force," that constitutional violation was not "clearly established" because no case holds that "restraining a suspect on asphalt hot enough to cause severe burns violates the Fourth Amendment." (4 App. 804:15–16, 807:9–12, *Paulos I*, 2015 WL 1119972, at *10, 12.) The court distinguished cases where the victim complained about burning because Paulos had merely "screamed in pain" and had yelled incoherently before and after being held on the asphalt. (4 App. 806:14–17, *Paulos I*, 2015 WL 1119972, at *11.)

The court accordingly dismissed Metro and rejected supplemental jurisdiction over Paulos's state-law claims. (4 App. 807–08, *Paulos I*, 2015 WL 1119972, at *12.)

D. The Ninth Circuit's Narrow Decision

The Ninth Circuit affirmed, but only on the ground that the constitutional right was not clearly established:

> No decision from the Supreme Court or this Circuit clearly establishes that keeping a suspect on hot asphalt for approximately two minutes and forty seconds after backup officers arrive on the scene constitutes excessive force when the suspect does not inform the officers that the pavement is hurting her.

(6 App. 1381, *Paulos v. FCH1, LLC* (*Paulos II*), 685 Fed. App'x 581, 582 (9th Cir. 2017).) The Ninth Circuit declined to address whether the officers used constitutionally excessive force. (6 App. 1380, *Paulos II*, 685 Fed. App'x at 582 ("We exercise our discretion to proceed immediately to whether any constitutional right at issue her was clearly established.").) Similarly, the Ninth Circuit affirmed Metro's dismissal not because the officers had executed a reasonable seizure but because Paulos "did not provide sufficient evidence of a pattern of similar, allegedly unconstitutional conduct," such that Metro's "mere failure to discipline its officers does not amount to ratification of their allegedly unconstitutional ac-

tions." (6 App. 1381, *Paulos II*, 685 Fed. App'x at 582 (internal citations and quotation marks omitted).)

E. Dismissal in State Court for Issue Preclusion

Pending the Ninth Circuit appeal, Paulos refiled her suit in state district court, raising claims of negligence and negligent training and supervision against Metro and claims of negligence and false imprisonment against the Palms. (3 App. 606.)

The district court dismissed Paulos's claim against Metro for negligent training and supervision but initially opted not to dismiss Paulos's negligence claim. (4 App. 976:24–28, 977:10–18, ¶¶ 4, 6–7.)

After the Ninth Circuit's decision, however, the district court reconsidered. (7 App. 1680:23–1681:3, ¶¶ 1–2.) Now, the court held, issue preclusion barred recovery under a common-law negligence theory because "Judge Mahan found that Officer Baca's actions were reasonable." (7 App. 1680:3–7, ¶ 3.) According to the district court, the issue before Judge Mahan was identical to Paulos's negligence claim and his finding had become final. (7 App. 1680:6–9, ¶¶ 3–4.) The court dismissed the Metro defendants and the Palms defendants, who had joined in Metro's motion. (7 App. 1681:1–3, ¶ 2.)

Paulos appealed. (7 App. 1683.) In the meantime, the dismissal leaves Paulos vulnerable to medical providers' efforts to collect Paulos's crushing medical debt. (3 App. 620, ¶ 24.)

SUMMARY OF THE ARGUMENT

If the judgment in one lawsuit stands on an issue that you litigated and lost, you don't get to relitigate the same issue in a second suit. But if the issues in the two cases are different, or an appellate court affirms the first judgment for a different reason, no bar applies. The district court ignored these principles in dismissing Ms. Paulos's complaint.

This Court should reverse for either of two straightforward reasons: (1) Judge Mahan's finding of "reasonableness" did not become final when the Ninth Circuit affirmed on an alternative ground; and (2) the reasonableness of a seizure under the Fourth Amendment is not the same issue as the exercise of reasonable care for negligence.

The district court likewise erred in dismissing Paulos's other claims. As the Palms' dismissal was contingent on Metro's, a reversal would reinstate Paulos's claims against both Metro and the Palms. Even if Metro is out on issue preclusion, though, the federal court de-

cided no issue relating to the *Palms*, so the district court erred in holding that the Palms could not be independently liable for its own torts. And the dismissal of Paulos's claim for Metro's negligent training and supervision. Although the application of discretionary-act immunity depends on the circumstances of each case, the district court considered such claims categorically barred by a misreading of this Court's decision in *Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007).

ARGUMENT

Standard of Review: The application of issue preclusion is a question of law that this Court reviews *de novo*. *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014). When a district court grants summary judgment based on issue preclusion, this Court exercises plenary review, taking the facts in the light most favorable to the appellant. *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 479–80, 215 P.3d 709, 717 (2009).

I.

ISSUE PRECLUSION DOES NOT BAR PAULOS'S CLAIM

A. Issue Preclusion Requires Finality and Identity

1. Federal Law Applies

When a federal court decides an issue of federal law, federal law governs the preclusive effect of that decision. *Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 21, 293 P.3d 869, 873 (2013) (citing *Bower*, 125 Nev. at 482, 215 P.3d at 718). As the federal district court and the Ninth Circuit decided only Paulos's § 1983 claims, federal preclusion law governs.

2. The Prior Judgment Must Actually Decide the Same Issue

Issue preclusion exists to keep parties from relitigating issues that prior litigation conclusively resolved. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008).

The identity of the issues in the two proceedings and the finality of its resolution in the prior proceeding are essential features of this doctrine. It applies only if "(1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior

proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits." *Oyeniran v. Holder*, 672 F.3d 800, 806 (9th Cir. 2012).

B. Alternative or Unreviewed Grounds are Not Issue Preclusive

Here, Judge Mahan's decision as to the reasonableness of Paulos's seizure was not a conclusive adjudication—either initially or on appeal.

1. Alternative Grounds are Not Preclusive on Either Ground

"If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. i (1982). The reason is that a contrary rule would actually *multiply* litigation—contrary to the purpose of preclusion doctrines—because it would force a party to appeal an erroneous ground of decision even in the face of likely affirmance on the alternative ground. *Id.* The Ninth Circuit has adopted this approach. *See In re Ellis*, 674 F.2d 1238, 1250 (9th Cir. 1982) (alternative findings are not "an essential basis" of the trial court's decision).

Here, Judge Mahan's qualified-immunity determination rested on alternative grounds: (1) the seizure was reasonable; *or* (2) even if unreasonable, Paulos's constitutional right was not clearly established. Thus, even initially Judge Mahan's decision was not preclusive on the issue of reasonableness.

2. A Ground Not Affirmed is Not Preclusive

After appeal, the absence of preclusion is even clearer: "It is a well-established principle of federal law that if an appellate court considers only one of a lower court's alternative bases for its holding, affirming the judgment without reaching the alternative bases, only the basis that is actually considered can have any preclusive effect in subsequent litigation." *City of Colton v. Am. Promotional Events, Inc.-W.*, 614 F.3d 998, 1004 n.4 (9th Cir. 2010) (quoting *Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians*, 94 F.3d 747, 754 (2d Cir. 1996) and citing RESTATEMENT, *supra*, § 27 cmt. o); *accord* 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4421 (3d ed. updated 2017) ("The federal decisions agree with the Restatement view that once an appellate court has affirmed on one ground and passed over another, preclusion does not attach to the ground omitted

from its decision."); *Odom v. Kaizer*, 884 F. Supp. 2d 923, 934–35 (D.N.D. 2012) (applying the rule in a qualified-immunity case).

Here, the Ninth Circuit passed on the question of reasonableness, affirming solely on the basis that Paulos's constitutional right was not clearly established. (6 App. 1380–81, *Paulos II*, 685 Fed. App'x at 582.) So there is no final adjudication of the reasonableness issue. The district court erred in giving it preclusive effect. This Court should reverse.

C. A "Reasonable Seizure" is Not the Same as "Reasonable Care"

The standard for excessive force for seizures under the Fourth Amendment is not the same as Nevada's common-law duty of care. A defendant's "reasonable seizure" can still fall short of discharging that duty, rendering the defendant negligent under state law. The lack of identity between the two issues is an independent basis for reversing the judgment.

1. States Can Define Negligence More Broadly

Federal law tosses back to Nevada the question of whether "reasonable care" for a negligence claim is the same as a "reasonable sei-

zure" under the Fourth Amendment. *See Mulligan v. Nichols*, 835 F.3d 983, 991–92 (9th Cir. 2016) (applying California law).

2. Negligence Covers More than "Excessive Force" in the Fourth Amendment

"The Fourth Amendment's 'reasonableness' standard is not the same as the standard of 'reasonable care' under tort law." *Hayes v. County of San Diego*, 305 P.3d 252, 262–63 (Cal. 2013) (quoting *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002)).[2] That is because negligence "encompass[es] a broader spectrum of conduct than excessive force claims under the Fourth Amendment." *Mulligan*, 835 F.3d at 991. Excessive force is an unreasonable "intrusion on the individual's Fourth Amendment interests." *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017). Negligence is the "failure to exercise that degree of care in a given situation which a reasonable man under similar circumstances would exercise." *Driscoll v. Erreguible*, 87 Nev. 97, 101, 482 P.2d 291, 294 (1971).

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[2] *Billington* was abrogated on other grounds by *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017) (imposing a *stricter* standard for excessive-force claims under federal law).

Action can be unreasonable under state law because it is merely careless, even if it is not an unreasonable Fourth Amendment seizure because it is not intentional. In *Brower v. County of Inyo*, for example, the U.S. Supreme Court gave the example of a parked police car that "slips its brake and pins a passerby against a wall." 489 U.S. 593, 596 (1989). Because the Fourth Amendment does not address accidental or "unintended consequences of government action," "it is likely that a tort has occurred, but not a violation of the Fourth Amendment." *Id.* Thus, just because an officer avoids committing a *federal constitutional* tort in an arrest does not mean that the officer has discharged the duty of reasonable care under *state* law.[3]

It is precisely because simple negligence is a broader standard that proving a negligence claim does not prove a Fourth Amendment violation. *Pauly v. White*, 874 F.3d 1197, 1219–20 (10th Cir. 2017); *Maughon v. Bibb County*, 160 F.3d 658, 660 (11th Cir. 1998); *Yates v. City of Cleveland*, 941 F.2d 444, 447 (6th Cir. 1991); *Estate of Bleck v. City of Alamosa*, 105 F. Supp. 3d 1222, 1227 (D. Colo. 2015)

[3] Nevada, too, recognizes that claims under § 1983 are different from "an ordinary tort cause of action." *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 367, 212 P.3d 1068, 1081 (2009).

("mere negligence is insufficient to make out a viable constitutional claim") (citing *Sevier v. City of Lawrence*, 60 F.3d 695, 699 n.7 (10th Cir. 1995)).[4]

3. The Order Rests on Bad or Irrelevant Law

The district court cites no authority that considers ordinary, reasonable care the same as a "reasonable seizure" under the Fourth Amendment. Metro, however, cited three categories of cases: cases relying on overruled California law, cases involving claims of intentional torts rather than negligence, and cases involving Michigan's immunity statute, which does not allow claims of simple negligence against law enforcement. None of those cases are persuasive.

a. OVERRULED CALIFORNIA LAW

Metro cited *F.E.V. v. City of Anaheim*, No. G046937, 2013 WL 3184670 (Cal. Ct. App. June 26, 2013) in its briefs (4 App. 927:16) and oral argument (4 App. 957:13–18) for the proposition that the reasonableness issue is the same for federal constitutional claims and state-law negligence claims. The California Supreme Court decided *Hayes* on Au-

[4] In *Estate of Bleck*, as in this case, the federal district court did not exercise jurisdiction over the plaintiff's state-law claims. *See Estate of Bleck ex rel. Churchill v. City of Alamosa*, 540 Fed. App'x 866, 868 (10th Cir. 2013).

gust 19, 2013, two months after *F.E.V.*, to refute that very proposition. *See Hayes*, 305 P.3d at 262–63 (clarifying *Hernandez v. City of Pomona*, 207 P.3d 506 (Cal. 2009) to reject the interpretation that the Court of Appeal adopted in *F.E.V.*). *F.E.V.* is bad law.

Metro also cited a series of federal-court decisions, each of which traces its pedigree back to *Munoz v. City of Union City*, 16 Cal. Rptr. 3d 521 (Cal. Ct. App. 2004), the decision that *Hayes* expressly overruled on this point. *See Hayes*, 305 P.3d at 639 n.1.

- *Belch v. Las Vegas Metro. Police Dep't*, No. 2:10-CV-00201-GMN-VCF, 2012 WL 4610803, at *11 (D. Nev. Sept. 30, 2012), cited at 3 App. 647:9–21, quotes *Knapps v. City of Oakland*, 647 F. Supp. 2d 1129, 1164–65 (N.D. Cal. 2009), which in turn cites *David v. City of Fremont*, No. C 05-46 CW, 2006 WL 2168329, at *21 (N.D. Cal. July 31, 2006), which relies on *Munoz*, 16 Cal. Rptr. 3d at 539–43).
- And *Nelson v. City of Davis*, 709 F. Supp. 2d 978 (E.D. Cal. 2010) again cites *David v. City of Fremont*, No. C 05-46 CW, 2006 WL 2168329, at *21 (N.D. Cal. July 31, 2006).

None of these decisions contains any analysis beyond fealty, ultimately, to *Munoz*. *Hayes* correctly vanquished the incorrect premise at the root of each of these decisions.

b. TORTS OTHER THAN NEGLIGENCE

Metro also cited *Yada v. Simpson*, but that case involved the intentional tort of battery, not negligence. 112 Nev. 254, 256, 913 P.2d 1261, 1262 (1996); *see also Ramirez v. City of Reno*, 925 F. Supp. 681, 691 (D. Nev. 1996) (claim of assault and battery). The distinction is important because even inadvertent harm can constitute negligence, but a police officer's liability for battery requires the *intentional* application of unnecessary force. *Yada*, 112 Nev. at 256, 913 P.2d at 1262.

c. MICHIGAN LAW, WHICH REQUIRES RECKLESSNESS

Metro also cites Michigan cases using federal excessive-force decisions as the basis for precluding tort claims under state law. (4 App. 931:17–932:18 (citing *Vanvorous v. Burmeister*, 687 N.W.2d 132 (Mich. Ct. App. 2004); *Williams v. City of Grosse Pointe Park*, No. 269211, 2008 WL 274872 (Mich. Ct. App. Jan. 31, 2008); *Dunn v. Matatall*, No. 291264, 2010 WL 1979795 (Mich. Ct. App. May 18, 2010).)

Michigan's statutory waiver of sovereign immunity, however, is markedly different from Nevada's (and California's): it retains immunity for conduct that "does not amount to *gross* negligence." MICH. COMP. LAWS § 691.1407(2)(c) (emphasis added). Under Michigan law, gross negligence is nothing like negligence: gross negligence is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MICH. COMP. LAWS § 691.1407(8)(a). It is

> almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge.

Tarlea v. Crabtree, 687 N.W.2d 333, 339–40 (Mich. Ct. App. 2004), *quoted in Jackson v. Lubelan*, No. 338275, 2018 WL 3309610, at *2 (Mich. Ct. App. July 5, 2018). This is consistent with the federal decisions holding that "unreasonableness" under the Fourth Amendment requires recklessness, not "mere negligence." *Pauly*, 874 F.3d at 1219–20; *accord Maughon*, 160 F.3d at 660.

In contrast, Nevada "consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations" except as expressly limited

by statute. NRS 41.031(1). No statute limits the government's liability to claims of "gross negligence." *See also Martinez v. Maruszczak*, 123 Nev. 433, 444, 168 P.3d 720, 727 (2007) (recognizing a claim of simple negligence).

4. The Negligence Claim is a Different Issue for Issue Preclusion

Here, the issue in front of Judge Mahan is not the same issue in Paulos's negligence claim. Even if Judge Mahan was reluctant to say that the delay in moving Paulos off of the asphalt was "unreasonable" under the Fourth Amendment—based on such factors as the backup officers' arrival to a "scene involving a multi-vehicle accident, multiple bystanders, an individual restrained on the ground, and a winded officer" (4 App. 802:22–24, *Paulos I*, 2015 WL 1119972, at *9—a jury could find that at least one of these officers failed to act as a reasonably prudent person would. Indeed, the jury's verdict could rest on a finding that Metro inadvertently left Paulos in peril, rather than that it intentionally applied excessive force. (*See* 4 App. 793:19–21, *Paulos I*, 2015 WL 1119972, at *2.) In any case, there is evidence that Officer Baca acted unconscionably—and at least unreasonably—in holding Ms. Pau-

los to the asphalt long after she was under control. (5 App. 1198, at 83:12–13; 4 App. 894, at 48:12–14; 7 App. 1601, ¶ 12(d).) And the other officers were negligent in not intervening in response to Paulos's cries of pain. (*See* 4 App. 902, at 79:9.)

Because the two issues are different, the state district judge erred in applying issue preclusion.

II.

PAULOS HAS VIABLE CLAIMS AGAINST THE PALMS

A. The Palms' Dismissal was Tied to Metro's, So Both Must be Vacated

The district court dismissed the Palms based solely on its joinder to Metro's motion on issue preclusion. (7 App. 1681:1–3, ¶ 2.) In reversing the erroneous preclusion analysis, this Court will necessarily take away any basis for the Palms' dismissal.

B. Issue Preclusion for Metro Does Not Affect the Claims against Palms

Paulos had no federal claim against the Palms defendants, who are not state actors capable of committing constitutional torts, and no court has passed on the reasonableness of their actions. Regardless of

any government immunity, the Palms defendants are not immune for injuries they cause to patrons on their property. *See Grosjean*, 125 Nev. at 360, 212 P.3d at 1076 (rejecting qualified immunity for casino employees).

C. The Palms Breached Independent Duties to Paulos

Paulos also had independent duties to individuals on its property. *Lee v. GNLV Corp.*, 117 Nev. 291, 295, 22 P.3d 209, 212 (2001) ("where a special relationship exists between the parties, such as with an innkeeper-guest, teacher-student or employer-employee, an affirmative duty to aid others in peril is imposed by law") (citing *Sims v. Gen. Tel. & Elecs.*, 107 Nev. 516, 526, 815 P.2d 151, 157–58 (1991) and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 376 (5th ed. 1984)).

1. The Palms Owes Duties to Patrons in Peril

"Generally a premises owner or operator owes entrants a duty to exercise reasonable care . . . ." *FCH1, LLC v. Rodriguez*, 130 Nev. 425, 428, 335 P.3d 183, 186 (2014) (citing *Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 775, 291 P.3d 150, 152 (2012)). That includes a duty to

render aid and at least not to worsen the individual's condition. *Lee*, 117 Nev. at 295, 22 P.3d at 212 ("a party who is in control of the premises is required to take reasonable affirmative steps to aid the party in peril" (internal quotation marks omitted) (quoting *Sims*, 98 Nev. at 526, 815 P.2d at 158 and citing KEETON ET AL., § 56, at 376).

2. Metro's Arrival Does Not Relieve the Palms of its Duties of Care

Palms does not shed these duties as soon as Metro arrives, especially when Metro asks Palms security for help. The Palms retains its obligation, so far as possible, to ensure that third parties do not negligently endanger its patrons. Because police officers can cause inadvertent injury as much as anyone, the Palms' continuing duties helps protect patrons when Metro drops the ball.

3. Negligence can be Inferred where the Palms Acted Jointly with Metro

Because Paulos was suffering a psychotic episode, she has no clear memory of the events. Under the circumstances, however, a jury can assess the Palms' negligence. The jury does not have to take Officer Baca's or Houston's word.

a. PEOPLE IN RESTRAINTS ARE NOT USUALLY BURNED

As third-degree asphalt burns do not ordinarily occur in the absence of negligence, an incapacitated plaintiff like Paulos—who because of her psychosis remembers little of the incident—can assert a claim of negligence even without direct proof of the breach. In *Heastie v. Roberts*, the Illinois Supreme Court allowed the plaintiff to invoke the doctrine of *res ipsa loquitur* in a similar situation. 877 N.E.2d 1064 (Ill. 2007). There, the plaintiff arrived at a hospital "extremely drunk, unable to stand, uncooperative, disoriented, and incapable of making rational decisions for himself. He was also yelling and combative." *Id.* at 1069–70. Because he did not need immediate medical attention, though, hospital staff restrained the plaintiff on a wheeled cart and closed him in a private room to keep others from hearing his screaming. *Id.* at 1070. A fire broke out and, because the plaintiff was unable to move, he was badly burned. *Id.* at 1071. Although the plaintiff remembered "nothing about the experience," the fact that he was restrained under the hospital's control was enough to take his negligence claim to a jury. *Id.* at 1077, 1081 n.5. The hospital "owned and maintained the premises on which plaintiff was injured" and was "responsible for creating the conditions under which defendant was restrained and confined." *Id.* at 1081.

Critically, the plaintiff in *Heastie* did not have to point to a particular defendant as the most likely culprit or eliminate all possible causes of his injuries other than the defendants' negligence. *Id.* at 1077. That follows from the principle that where multiple defendants are acting together, it is not necessary for the incapacitated plaintiff to pinpoint the responsible defendants—an often impossible task. *See Jackson v. H. H. Robertson Co., Inc.*, 574 P.2d 822, 825–26 (Ariz. 1978).

b. A JURY CAN FIND THE PALMS NEGLIGENT

Here, too, a jury could reasonably infer that the Palms was negligent, notwithstanding Paulos's diminished capacity to remember the incident. The Palms owned and maintained the premises on which Paulos was injured. And Houston, the security guard, admits that she "helped keep [Paulos] down until more Metro showed up at the accident." (5 App. 1217, at 50:15–25 (quoting Ex. 3, written statement for Palms).) Officer Baca says that he did not instruct Houston to do that. (5 App. 1200, at 92:13–14.) She also admits that she left without ensuring that Officer Baca, who was "winded" (3 App. 726, at 85:6–9; 4 App. 805:22–24, *Paulos I*, 2015 WL 1119972, at *9), would be able to quickly move Paulos off of the scorching asphalt. (5 App. 1198, at 83:18–23.)

Although Paulos cannot testify firsthand about the accuracy of Officer Baca's and Houston's accounts—and gaps in the surveillance video make them impossible to corroborate (4 App. 793:19–26, *Paulos I*, 2015 WL 1119972, at *2)—a jury can evaluate their credibility and could reasonably conclude that the Palms played an essential role in Paulos's injury.

III.

IMPROPER TRAINING AND SUPERVISION ARE NOT *PER SE* IMMUNE ACTS

A. Only Policy Decisions are Entitled to Immunity

Exempt from Nevada's general waiver of sovereign immunity are claims

> [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 of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.

NRS 41.032(2). In *Martinez v. Maruszczak*, this Court clarified that to take advantage of this exception for discretionary acts, not only must the act involve "an element of individual judgment or choice," but it must "be based on considerations of social, economic, or political policy."

123 Nev. at 446, 168 P.3d at 728–29 (adopting the U.S. Supreme Court's test in *Berkovitz v. United States*, 486 U.S. 531 (1988) and *Gaubert v. United States*, 499 U.S. 315 (1991)).

B. Not All Training and Supervision Involve Core Policy Choices

Nevada's federal district courts are split on whether discretionary-act immunity categorically bars claims for negligent supervision and training. In *Neal-Lomax v. Las Vegas Metropolitan Police Department*, the district court applied such a bar. 574 F. Supp. 2d 1170, 1192 (D. Nev. 2008). But in *Wheeler v. City of Henderson*, the court held that in contrast with hiring decisions, "negligent training, supervision, and retention claims are not barred by discretionary immunity." No. 2:15-CV-1772-JCM-CWH, 2017 WL 2692405, at *4–5 (D. Nev. June 22, 2017); *accord Herrera v. Las Vegas Metro. Police Dep't*, 298 F. Supp. 2d 1043, 1055 (D. Nev. 2004); *Perrin v. Gentner*, 177 F. Supp. 2d 1115, 1126 (D. Nev. 2001).

The better approach is to look at the individual claim and see whether the training or supervision at issue would necessarily "jeopardize the quality of the governmental process" because it is "an integral

part of governmental policy-making or planning." *Martinez*, 123 Nev. at 446, 168 P.3d at 729.

C. Training Officers to Minimize Asphalt Burns is Not Policy

Here, the allegation is not that Metro needs to rebalance some delicate political calculus or enact some controversial social policy. Paulos's claims is straightforward: Metro ought to have trained and supervised Officer Baca to remove detained persons from scorching asphalt as soon as it is safe to do so—i.e., as soon as backup arrives.

This is the kind of allegation that could be brought against a private provider of security services. *Cf. id.* at 444, 168 P.3d at 727 (Nevada's waiver of sovereign immunity is "to compensate victims of government negligence in circumstances like those in which victims of private negligence would be compensated"). In fact, that's very much what Paulos is arguing made the Palms negligent. In this regard, Metro is acting like a private citizen and needs to take the kinds of precautions that ordinary, prudent employers would take. Because an ordinary, prudent employer would supervise and train its employees to avoid these kinds of asphalt injuries, it is reasonable to expect Metro to do so, too. In fact,

Metro asserts that it *does* have such a policy and training; Paulos simply argues that the training was ineffective, leading Officer Baca to ignore the policy. (4 App. 754–55, ¶¶ 13–14.) It is not the kind of core governmental function to which discretionary-act immunity applies.

CONCLUSION

For Nevadans suffering from mental illness, interactions with police and private security can be perilous. *See* Rachel Christiansen & Casey Morell, *Nevada's Struggles with Mental Health Care Continue*, NEVADA PUBLIC RADIO (May 29, 2018), https://knpr.org/knpr/2018-05/nevadas-struggles-mental-health-care-continue (describing 911 caller's death after his plea for help was treated as "a full barricade situation" requiring SWAT). Too often, carelessness or inadequate training leads officers to mistake vulnerability for violence, needlessly exposing these members of our community to extreme and prolonged applications of force and consequent injury. The paucity of protection under the federal Constitution, however, is no reason to foreclose these victims their rights under state law. This Court should reverse the judgment.

Dated this 24th day of October, 2018.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

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3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 24th day of October, 2018.

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