

IN THE SUPREME COURT OF THE STATE OF NEVADA

CRISTINA PAULOS,
Appellant,

v.

FCH1, LLC, A NEVADA LIMITED
LIABILITY COMPANY; LAS
VEGAS METROPOLITAN POLICE
DEPARTMENT, A GOVERNMENT
ENTITY; JEANNIE HOUSTON; AN
INDIVIDUAL; AND AARON BACA,
AN INDIVIDUAL,
Respondents.

Electronically Filed
Nov 21 2018 08:39 a.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

RESPONDENTS' ANSWERING BRIEF

LEW BRANDON, JR., ESQ.

Nevada Bar No.: 5880

JUSTIN W. SMERBER, ESQ.

Nevada Bar No.: 10761

MORAN BRANDON BENDAVID MORAN

630 S. Fourth Street

Las Vegas, Nevada 89101

(702) 384-8424

(702) 384-6568 - *facsimile*

l.brandon@moranlawfirm.com

Attorneys for Respondents FCH1, LLC and JEANNIE HOUSTON

IN THE SUPREME COURT OF THE STATE OF NEVADA

CRISTINA PAULOS,
Appellant,

v.

FCH1, LLC, A NEVADA
LIMITED LIABILITY COMPANY;
LAS VEGAS METROPOLITAN
POLICE DEPARTMENT, A
GOVERNMENT ENTITY;
JEANNIE HOUSTON; AN
INDIVIDUAL; AND AARON
BACA, AN INDIVIDUAL,
Respondents.

Supreme Court Case
No.: 74912

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities 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.

1. Respondent Jeannie Houston is an individual.
2. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock:

FCH1, LLC has been acquired by FP Holdings, LP, whose current parent corporation is Red Rock Resorts, Inc., which is a publicly-held company (NASDAQ:RRR).

3. Names of all firms who attorneys have appeared for the parties or amicus in this case (including proceedings in the district court, federal court, or before an administrative agency) or expected to appear in this court:

MORAN BRANDON BENDAVID MORAN

4. If litigant is using a pseudonym, the litigant's true name: None.

DATED this 14th day of November, 2018.

 /s/ Lew Brandon, Jr., Esq.

LEW BRANDON, JR., ESQ.

Nevada Bar No. 5880

JUSTIN W. SMERBER, ESQ.

Nevada Bar No. 10761

MORAN BRANDON BENDAVID MORAN

630 S. Fourth Street

Las Vegas, Nevada 89101

Attorneys for Respondents,

CH1, LLC and JEANNIE HOUSTON

TABLE OF CONTENTS

	Page
NRAP 26.1 DISCLOSURE STATEMENT	i-ii
TABLE OF CONTENTS.....	iii-iv
TABLE OF AUTHORITIES.....	v-vi
I. JURISDICTIONAL STATEMENT.....	1
II. ROUTING STATEMENT.....	1
III. STATEMENT OF THE ISSUES.....	2-3
IV. STATEMENT OF THE CASE.....	3-5
V. STATEMENT OF THE FACTS.....	5-13
A. Immediately Prior to the Incident.....	5-7
B. The Subject Incident.....	7-9
C. FCH1 and Houston's Limited Involvement In The Subject Incident At The Request Of LVMPD Officer Baca.....	9-13
VI. SUMMARY OF THE ARGUMENT.....	13-15
VII. ARGUMENT.....	15-30
STANDARD OF REVIEW.....	15-16
Summary Judgment Was Proper With Respect To Appellant's False Imprisonment Claim Against FCH1 And Houston.....	16-19

Summary Judgment Was Proper With Respect To Appellant’s Negligent Claim Against FCH1 And Houston.....	19-25
Appellant’s Argument That FCH1 Breached Independent Duties Is Without Merit.....	25-26
FCH1 And Houston Acted Reasonably At The Request Of LVMPD Officer Baca To Protect FCH1 Patrons And The Las Vegas Community From Appellant.....	26-28
The District Court Properly Dismissed Appellant’s Claims Against All Respondents Since The Federal District Already Determined That LVMPD And Officer Baca Acted Reasonably Under The Circumstances.....	28-30
VIII. CONCLUSION.....	30

TABLE OF AUTHORITIES

Cases	Page
<i>Clement v. City of Glendale</i> , 518 F.3d 1090 (9th Cir. 2008).....	18
<i>Collins v. Union Fed. S&L Ass'n</i> , 99 Nev. 284, 662 P.2d 610 (1983).....	16
<i>Doud v. Las Vegas Hilton Corp.</i> , 864 P.2d 796, 109 Nev. 1096 (1993).....	19
<i>Goodman v. Las Vegas Metro. Police Dep't</i> , 2012 U.S. Dist. LEXIS 67364 (D. Nev. May 11, 2012).....	18
<i>Grosjean v. Imperial Palace</i> , 125 Nev. 360, 212 P.3d 1068 (2009).....	17-18
<i>Graham v. Connor</i> , 400 U.S. 386 (1989).....	29
<i>Gunlock v. New Frontier Hotel</i> , 78 Nev. 182, 370 P.2d 682 (1962).....	19
<i>Heastie v. Roberts</i> , 877 N.E.2d 1064 (Ill. 2007)	20
<i>Lee v. GNLV Corp.</i> , 117 Nev. 291, 22 P.3 209 (2001).....	25-27
<i>Marschall v. City of Carson</i> , 86 Nev. 107, 464 P.2d 494 (1970).....	17
<i>Turner v. Mandalay Sports Entm't, LLC</i> , 124 Nev. 213, 180 P.3d 1172 (2008).....	16
<i>Wood v. Safeway, Inc.</i> , 121 Nev. 724, 121 P.3d 1026(2005).....	15, 16
 Rules	
<i>The Constitution United States, Fourth Amendment</i>	12, 29

NRAP3(A)(b)(1).....	1
---------------------	---

Statutes

NRS §171.132.....	18, 24
-------------------	--------

I. JURISDICTIONAL STATEMENT

The basis for the Supreme Court of Nevada's jurisdiction is NRAP 3(A)(b)(1), regarding a final judgment entered in this matter. On December 14, 2017, Eighth Judicial District Court Judge Rob Bare entered an Order Granting Las Vegas Metropolitan Police Department (hereinafter "LVMPD") and Aaron Baca (hereinafter "Baca")'s Motion for Summary Judgment with respect to Appellant's remaining negligence claim, and FCH1, LLC (hereinafter "FCH1") and Jeannie Houston (hereinafter "Houston")'s Joinder, thereby dismissing FCH1 and Houston. 7 App. 001673-001682. On January 12, 2018, Cristina Paulos (hereinafter "Appellant") filed a Notice of Appeal whereby appealing all judgments and orders in this case; the Findings of Facts and Conclusions of Law electronically served on December 14, 2017; and all ruling and interlocutory orders made appealable by any of the foregoing. 7 App. 001683-001685.

II. ROUTING STATEMENT

FCH1 and Houston agree with Appellant's position that this case should be retained by the Supreme Court of Nevada.

III. STATEMENT OF THE ISSUES

1. Whether the district court properly dismissed Appellant's negligence and false imprisonment causes of action against FCH1 and Houston when no genuine issue as to any material fact remains, and Appellant's claims are entirely based upon the gossamer threads of whimsy, speculation and conjecture that summary judgment is designed to preclude?

2. Whether the district court's Order dismissing Appellant's negligence and false imprisonment causes of action against FCH1 and Houston is proper in light of the fact that Appellant can present no evidence that FCH1 and Houston acted unreasonably?

3. Whether the district court properly dismissed Appellant's claims against FCH1 and Houston after dismissing Appellant's claims against LVMPD and Baca on the grounds that the United States Court of Appeals for The Ninth Circuit already determined that Officer Baca acted reasonably under the circumstances, and Appellant can present no evidence against FCH1 and Houston?

3. Whether the district court properly dismissed Appellant's claims against LVMPD and Baca on the grounds that Appellant's claims are precluded since the United States Court of Appeals For The Ninth

Circuit determined that LVMPD and Baca did not violate Appellant's rights when there are no decisions from the Supreme Court or 9th Circuit clearly establishing that keeping a suspect on hot asphalt constitutes excessive force when the suspect does not inform the officers that the pavement is hurting her?

IV. STATEMENT OF THE CASE

This case is based upon Appellant's appeal of Eighth Judicial District Court Judge Rob Bare's December 14, 2017 Order Granting LVMPD and Baca's Motion for Summary Judgment with respect to Appellant's negligence claim, and FCH1 and Houston's Joinder, thereby dismissing FCH1 and Houston.

On August 12, 2012, Appellant filed a Complaint in the Nevada Eighth Judicial District Court. 1 App. 1-9. On August 1, 2013, Appellant filed a Second Amended Complaint to add 42 U.S.C. §1983 claims. On August 28, 2013 LVMPD removed the case to the Nevada Federal Court, No. 2:13-cv-1456-JCM(PAL). 1 App. 60-101.

On March 12, 2015, Federal District Court Judge James C. Mahan issued an Order Granting Summary Judgment and dismissing all Federal claims against LVMPD and Baca. 4 App. 000791-000808. Specifically, Judge Mahan found that "officer Baca did not use excessive

force in arresting Paulos. This conclusion also applies to all officers who arrived on scene after Paulos was restrained on the ground.” 4 App. 000803:25-18. Judge Mahan further opined that even if Officer Baca used excessive force, Officer Baca was entitled to qualified immunity because “there is no clearly established right against being restrained on hot asphalt for a brief period of time.” 4 App. 000806:4-5.

It should be noted that after receiving the Federal Court Order, Appellant appealed the granting of summary judgment to the Ninth Circuit Court of Appeals and re-filed the State claims. 7 App. 001678. On April 29, 2015, in the Eighth Judicial District Court, Appellant filed a First Amended Complaint against FCH1, LVMPD, Houston, and Baca. 3 App. 000616-000623. Appellant’s claims against FCH1 and Houston are based upon negligence and false imprisonment. *Id.* On May 14, 2015, FCH1 and Houston filed their Answer and denied the allegations of Appellant’s First Amended Complaint. 3 App. 000625.

On March 28, 2017, the Ninth Circuit Court of Appeals upheld Judge Mahan’s order dismissing the federal law claims against the LVMPD Defendants. 7 App. 001679:8-9. On January 6, 2016, LVMPD and Baca filed their Motion for Summary Judgment. 5 App. 001105-1250; 6 App. 001251. On January 6, 2016 FCH1 and Houston filed their

Joinder to LVMPD and Baca's Motion for Summary Judgment. 5 App. 001042-001104. LVMPD and Baca's Motion for Summary Judgment and FCH1 and Houston's Joinder came before the Eighth Judicial District Court, Honorable Rob Bare on October 19, 2017. 7 App. 001659-001670.

The district court properly found that Judge Mahan's federal district court ruling that Officer Baca acted reasonably under the circumstances was on the merits and became final. 7 App. 001680:8-9. The district court also properly found that issue preclusion applies and the issue of reasonableness "was actually and necessarily litigated in the federal court case." *Id.* at 001680:12-16. The district court granted LVMPD and Baca's Motion to Dismiss, or in the Alternative Motion for Summary Judgment, and "hereby finds that FCH1, LLC's Joinder to the LVMPD Defendants' Motion is granted." *Id.* at 001680:17-22.

On January 12, 2018, Appellant's Notice of Appeal followed. 7 App. 001683-001696.

V. STATEMENT OF FACTS

A. *Immediately Prior to the Incident*

This case involves an alleged incident that occurred on August 7, 2011, stemming from Appellant's unreasonable and criminal behavior.

Immediately prior to the subject incident, Appellant caused two separate car accidents. 3 App. 000637:11. FCH1 surveillance video captured Appellant's westbound vehicle jump a median on Flamingo and entered the intersection at Flamingo and Wynn Road against a red light causing a head-on collision. Id. at 000637:18-20. Appellant next turned left into the Palms exit lane and struck a second vehicle head on, owned by Brian Larson. Id. at 20-22. Appellant is further observed fleeing the scene toward the Palms' entrance, and returning to the scene where she attempted to steal Brian Larson's vehicle. Id. at 000637:22-25; 000638:1.

As Appellant exited Brian Larson's vehicle she encountered Baca. Id. at 000638:1-2. In fact, as Baca approached, Brian Larson informed Baca that Appellant was trying to steal his car. Id. at 000638:11-13. As LVMPD and Baca indicated, at the time Baca first encountered Appellant, he was not provided any information that Appellant was "mentally ill, acting strangely, or behaving erratically." Id. at 000638:15-16.

Baca had no reason to believe Appellant was mentally ill. Id. at 17. At the time Baca first encountered Appellant, Baca's knowledge was limited to:

- (1) A multiple vehicle accident had occurred;
- (2) Witnesses identified Appellant as the cause; and
- (3) A citizen reported that Appellant tried to steal his vehicle. *Id.* at 000638:12-14.

B. *The Subject Incident*

Baca contacted Appellant to find out what was going on and if she was “okay.” *Id.* at 000638:18-19. Appellant initially walked away from Baca, and Baca ordered Appellant to stop. *Id.* at 000638:18-20. In response, Appellant turned and started screaming at Baca, and **“without warning, Paulos lunged at Ofc. Baca and ‘reached for [his] firearm.’”** (*Emphasis added*). *Id.* at 000638:20-22. LVMPD and Baca noted that less than six seconds passed from the time Baca first made contact with Appellant to the time that Appellant lunged at Baca and committed a battery upon a police officer. *Id.* at 000638:23-25.

Appellant began to physically resist and yell incoherently at Baca. *Id.* at 000639:5-6. Despite Appellant’s physical and violent resistance, Baca did not use a taser, pepper spray, or police baton against Appellant, and instead attempted to use the least amount of force necessary with an empty hand technique. *Id.* at 000639:9-12. Appellant was taken to the ground thirteen (13) seconds after she first made contact

with Baca, and continued to violently resist and refused to be handcuffed.

Id. at 000639:12-15.

LVMPD and Baca clearly described FCH1 and Houston's limited involvement in the incident:

Due to the resistance, Ofc. Baca summoned Palms security officer Houston for assistance. **He summoned her for his safety and Paulos' safety.** Houston responded and also went hands on with Paulos. Paulos aggressively resisted Ofc. Baca and Houston. Finally at 3:18:35 p.m. Paulos was handcuffed. (*Emphasis added*). Id. at 000639:15-19

After Appellant was taken to the ground, Appellant continued screaming in the same manner prior to being taken to the ground. Id. at 000639:24-25. Appellant never complained of any injury to Baca, and Baca never observed any physical injuries to Appellant's body. Id. at 000639:25; 000640:1-2. Baca recalled that Appellant was taken to the shaded grassy area once backup arrived. Id. at 000640:2-3. The record indicates that LVMPD backup officers arrived at 3:19:50 p.m. Id. at 000640:19.

The record indicates that Appellant was brought to her feet at the very latest 3:22:30 pm, likely earlier. Id. 000640:23-24. LVMPD Sergeant Jason Harney arrived thereafter and indicated that Appellant had no visible injuries to her face or legs and never reported discomfort.

Id. at 000640:27-28;000641. In fact, Sgt. Harney was under the opinion that Appellant needed medical attention to evaluate her mental behavior and not physical injuries. Id. at 000641:1-2. At no time did Appellant tell anyone that she was being burned or sustained any injuries. Id. at 000640:16-17.

C. *FCH1 and Houston's Limited Involvement In The Subject Incident At The Request Of LVMPD Officer Baca*

As addressed above and more thoroughly below, FCH1 and Houston only became involved in the incident since due to Appellant's resistance, "Baca summoned Palms security officer Houston for assistance." Id. at 000639:15-16. Following the incident, Security Officer Houston wrote a voluntary statement, which described her involvement as follows:

At approximately 3:20 pm on Aug 7, 2011 I security officer Jeannie Houston was called to the front main doors for an accident. When I arrived Metro had just arrived on scene. I parked the truck to block exit going out when I witness a female trying to leave the accident. Officer Baca told her to stop when she tried to hit him, she then tried to reach for his gun. Officer Baca took her down to the ground and asked for assistance from me. I helped keep her down till more Metro showed up at the accident. 5 App. 001044:1-7.

Regarding his actions, LVMPD Officer Baca testified:

- Q. ...I've stopped the video at 15:17:02, can you describe what's going on at this point?
- A. **I took Ms. Paulos to the ground** in an attempt to handcuff her.
- Q. So at approximately 15:17:02 Ms. Paulos is taken to the ground. Once she's taken to the ground is she being compliant with you?
- A. No. (*Emphasis*). Id. at 001045:9-15.

LVMPD Officer Baca's testimony confirmed FCH1 and Houston's limited involvement at LVMPD Officer's Baca's discretion:

- Q. Would you agree with me that the Palms security officer became involved in this matter at your request?
- A. Yes.
- Q. I assume the point of what's going on here was that you were trying to detain the plaintiff at that point, correct?
- A. Yes.
- Q. **Was that being done at your discretion or at the Palms' discretion?**
- A. **At mine.**
- Q. **Would you agree that Plaintiff was being detained under your control and not the Palms' control?**
- A. Yes.
- Q. **Do you agree that the Palms did not participate in this matter until you requested them to do so?**
- A. Yes.
- Q. **Did you request that they aid in detaining the plaintiff because that was necessary?**
- A. Yes. (*Emphasis added*). Id. at 001046:7-21.

The record is clear that Appellant herself corroborated Baca's testimony that Baca took Appellant to the ground. Id. at 001046:25-26. Specifically, Appellant testified:

Q. Who pushed you on the floor?

A. I'm not sure. Somebody in a uniform.

...

Q. Was the person a male or female

A. Male. (*Emphasis added*). *Id.* at 001047:1-5.

Appellant further testified regarding Houston and FCH1's limited involvement:

Q. Okay. So let's go back to the incident that you had at the Palms. Can you tell me any interaction that you had, physical or verbal, with anyone from the Palms?

A. I only would talk to a woman. That's all I remember. And she worked for the Palms. *Id.* at 1047:8-11.

The record is further clear that Appellant's own Expert Witness, Steven T. Baker, confirmed that Appellant's detention was performed by LVMPD. *Id.* at 001047:25-27. Steven T. Baker testified:

Q. So would you agree with me that the plaintiff was arrested by Metro in this matter; is that fair?

A. Well, detained, arrested, depending, because there was no actual charge from the initial part. But they're taking that person into custody, if you will, might be a better way to clarify that.

Q. Okay.

A. It was done by Metro, yes. (*Emphasis added*). *Id.* at 001048:4-8.

Of further significance Appellant's own expert also agreed that there was nothing wrong with Plaintiff being taken to the ground, or Plaintiff being detained on the ground until back up LVMPD officers arrived. *Id.* at 001048:9-12. Steven T. Baker's finding is significant

because the record is clear that Houston only assists until the back-up LVMPD Officers arrive. Id. at 001048:12-13. The record indicates that surveillance shows Houston withdraws from the situation after LVMPD Officers arrive. Id. at 001048:13-14.

On March 12, 2015, Federal District Court Judge James C. Mahan issued an Order Granting Summary Judgment and dismissing all Federal claims against LVMPD and Baca. 4 App. 000791-000808. Judge Mahan found Appellant's Fourth Amendment rights were not violated since "officer Baca did not use excessive force in arresting Paulos. This conclusion also applies to all officers who arrived on scene after Paulos was restrained on the ground." 4 App. 000803:25-18. Judge Mahan further opined that even if Officer Baca used excessive force, Officer Baca was entitled to qualified immunity because the alleged constitutional violation was not clearly established since "there is no clearly established right against being restrained on hot asphalt for a brief period of time." 4 App. 000806:4-5.

Appellant appealed to the United States Court of Appeals for The Ninth Circuit, who issued its decision on March 28, 2017, affirming Judge Mahan's ruling. 6 App. 001379-001382. The United States Court of Appeals for The Ninth Circuit found that there is not a clear violation

of established rights since there are no decisions from the Supreme Court or Ninth Circuit which:

Clearly establish 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. 001380-001381.

Prior to the United States Court of Appeals for The Ninth Circuit's decision, on April 29, 2015, in the Eighth Judicial District Court, Appellant filed a First Amended Complaint against FCH1, LVMPD, Houston, and Baca. 3 App. 000616-000623. Appellant's claims against FCH1 and Houston are based upon negligence and false imprisonment. *Id.* The district court properly found that Judge Mahan's federal district court ruling that Officer Baca acted reasonably under the circumstances was on the merits and became final. 7 App. 001680:8-9. As a result, the district court granted LVMPD and Baca's Motion for Summary Judgment, and FCH1 and Houston's Joinder. 7 App. 001681. Appellant now appeals. 7 App. 001683.

VI. SUMMARY OF THE ARGUMENT

Appellant's contentions are critically flawed for several reasons. Judge Mahan clearly addressed reasonableness in Appellant's federal action. 4 App. 000791. Judge Mahan noted that "the reasonableness of a

particular use of force must be judged from the perspective reasonable officer in the scene, rather than with the 20/20 vision of hindsight.” *Id.* at 000800:7-9. Judge Mahan previously determined that “Baca’s use of minimal force in restraining her was appropriate” and “Baca did not use excessive force in arresting Paulos.” 4 App. 000803:23-26

Despite any play on words by Appellant, Appellant’s First Amended Complaint (the dismissal of which Appellant’s appeal is based), is based upon allegations that **“DEFENDANTS USED EXCESSIVE FORCE IN CONSCIOUS DISREGARD FOR PLAINTIFF’S HEALTH AND WELL BEING.”** (*Emphasis added*). 3 App. 000619:3-4. With Judge Mahan previously determining that Baca acted reasonably under the circumstances, the district court properly applied issue preclusion and found that “the issue of reasonableness was actually and necessarily litigated in the federal court case.” 7 App. 001680:12-13.

With LVMPD and Baca being previously found to have acted reasonably, the district court did not err in dismissing Appellant’s claims. Furthermore, with the record being clear that FCH1 and Houston only becoming involved at Baca’s request for assistance, with Baca being

found to have acted reasonably, the record is clear that the district court was proper in dismissing Appellant's claims against FCH1 and Houston.

With total disregard to the record at hand, Appellant erroneously contends that even if issue preclusion bars Appellant's claims against Baca and LVMPD, Appellant may proceed against FCH1 and Houston. The record is clear that the district court did not err by granting summary judgment in favor of FCH1 and Houston, since Appellant does not have viable claims against FCH1 and Houston. The arguments raised in Appellant's Brief specifically towards FCH1 and Houston are wholly unsupported by caselaw and the record at hand.

VII. ARGUMENT

STANDARD OF REVIEW: The Supreme Court of Nevada reviews the granting of summary judgment *de novo*, without deference to the findings of the lower court. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). As part of this *de novo* review, this court considers the evidence "in a light most favorable to the nonmoving party." *Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 777, 291 P.3d 150, 153 (2012).

However, in *Wood* this Court further held:

...That party bears the burden to "do more than

simply show that there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in the moving party's favor. *Id.* at 732.

Summary judgment is appropriate when the parties' pleadings and other evidence on file, viewed in a light most favorable to the nonmoving party, demonstrate that no genuine issue as to any material fact remains and that the moving party is entitled to judgment as a matter of law. *Turner v. Mandalay Sports Entm't, LLC*, 124 Nev. 213, 216, 180 P.3d 1172, 1174, (2008). Although the party opposing a motion for summary judgment is entitled to all favorable inferences from the pleadings and documentary evidence, the opposing party "is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture." *Collins v. Union Fed. S&L Ass'n*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983).

A. Summary Judgment Was Proper With Respect To Appellant's False Imprisonment Claim Against FCH1 And Houston

Appellant's Brief is largely focused upon issue preclusion with respect to LVMPD and Baca and the federal rulings. Appellant's argument that *Paulos Has Viable Claims Against The Palms* is unsubstantiated by any law in Nevada. Appellant's Brief, pp. 23-28. Despite Appellant's contentions, summary judgment was still proper

with respect to Appellant's negligence and false imprisonment claims against FCH1 and Houston.

"To establish false imprisonment of which false arrest is an integral part, it is . . . necessary to prove that the person be restrained of his liberty under the probable imminence of force **without any legal cause or justification.**" (*Emphasis added*). *Marschall v. City of Carson*, 86 Nev. 107, 110, 464 P.2d 494 (1970). An actor is subject to liability to another for false imprisonment "if (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and (b) his act directly or indirectly results in such a confinement of the other, and (c) the other is conscious of the confinement or is harmed by it. *Hernandez v. Reno*, 97 Nev. 429, 433, 634 P.2d 668, 671 (1981).

Appellant contends that with respect to false imprisonment, pursuant to *Grosjean v. Imperial Palace*, 125 Nev. 360, 212 P.3d 1068, 1076 (2009) the Court rejected qualified immunity for casino employees. Appellant misapplied *Grosejean*. The record is clear, FCH1 and Houston's justification is based upon a request for assistance from a law enforcement officer, LVMPD Officer Baca. Baca testified:

- Q. Do you agree that the Palms did not participate in this matter until you requested them to do so?**
A. Yes.

Q. Did you request that they aid in detaining the plaintiff because that was necessary?

A. Yes. (*Emphasis added*). *Id.* at 001046:18-21.

Nevada law permits a police officer making an arrest to summon assistance as the officer feels necessary. *See NRS 171.132*. Specifically, the statute provides:

Any person making an arrest may orally summon as many persons as the person making the arrest deems necessary to aid him or her therein.

In *Grosjean v. Imperial Palace, Inc.*, the Nevada Supreme Court adopted the good-faith defense, which applies to private parties who become liable solely because of their compliance with government agents' request or in attempting to comply with the law. *Grosjean v. Imperial Palace, Inc.*, 212 P.3d 1068 (Nev. 2009). This Honorable Court has enforced the good faith defense and so has the 9th Circuit Court of Appeals. *See Goodman v. Las Vegas Metro. Police Dep't*, 2012 U.S. Dist. LEXIS 67364 (D. Nev. May 11, 2012); *Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9th Cir. 2008). *Grosjean* is clear that the good faith defense would provide "protections similar to qualified immunity." *Grosejean*, 125 Nev. at 361. Accordingly, the good-faith defense clearly resolves any liability against FCH1 and Houston as they were only acting to aid the LVMPD Officer. Appellant wholly ignored the good

faith defense, which is similar to qualified immunity. Despite Appellant's contentions, the record is wholly void of any evidence which would permit recovery against FCH1 and Houston for false imprisonment.

B. Summary Judgment Was Proper With Respect To Appellant's Negligent Claim Against FCH1 And Houston

In order for Palms and Houston to be held liable under a theory of negligence, Plaintiff has the burden of demonstrating that the (1) defendant owed a duty of care with respect to the plaintiff; (2) defendant breached this duty; (3) the breach was both the actual and proximate cause of the plaintiff's injuries; and (4) that the plaintiff did in fact suffer damages. *Doud v. Las Vegas Hilton Corp.*, 864 P.2d 796, 109 Nev. 1096 (1993). Longstanding Nevada case law makes clear that, **"THE MERE FACT THAT THERE WAS AN ACCIDENT OR OTHER EVENT AND SOMEONE WAS INJURED IS NOT ITSELF SUFFICIENT TO PREDICT LIABILITY."** (*Emphasis added.*) *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 184-84, 370 P.2d 682 (1962). Negligence is never presumed but must be established by substantial evidence. *Id.*

Appellant's contention that negligence can be "inferred" where Palms acted jointly with Metro is completely unsubstantiated by the record at hand. In desperation, Appellant cites the Illinois Supreme Court case *Heastie v. Roberts*, 877 N.E.2d 1064 (Ill. 2007), and contends that "the Illinois Supreme Court allowed the plaintiff to invoke the doctrine of *res ipsa loquitur* in a similar situation." Appellant's Brief, pg. 26. Appellant's application of "*res ipsa loquitur*" is without merit. First, Illinois Supreme Court cases are clearly not controlling in Nevada, and are unnecessary in this matter. Secondly, Appellant's First Amended Complaint alleged negligence and false imprisonment against FCH1 and Houston. 3 App. 000616-000623. Appellant never pled *res ipsa loquitur*. As a result, Appellant's newly raised *res ipsa loquitur* is without merit.

The record is clear that FCH1 and Houston only became involved at the request of assisting LVMPD Baca. Moreover, video surveillance further confirmed that FCH1 and Houston's involvement in the subject incident is very limited and Houston only has physical contact with Appellant from 15:17:37 until 15:19:58. 7 App. 001606:19-

20; 001607:1. The record is also clear that Houston had no further contact with Appellant after 15:19:58. 7 App 001607:8.

Appellant's brief is clear that Appellant has no witnesses to the subject incident. Furthermore, despite Appellant's claims of FCH1 and Houston using excessive force, Appellant's testimony indicates that she viewed Houston as her only ally and was the only person Appellant would talk to since Appellant was afraid of all the men. Specifically, Appellant testified:

Q. Okay. So let's go back to the incident that you had at the Palms. Can you tell me any interaction that you had, physical or verbal, with anyone from the Palms?

A. **I only would talk to a woman. That's all I remember. And she worked for the Palms.**

Q. So you spoke to a woman from the Palms. Was it during your incident or after?

A. After.

Q. So after your incident you spoke to a woman, and do you know her name?

A. No.

Q. What did you and this woman speak to you after your incident occurred? [sic]

A. **I don't remember. But I remember I wouldn't talk to anybody. Any of the men. I wanted to talk to a woman. I felt threatened. So I felt like, that the only person I could talk to was a woman.** (*Emphasis added*). 5 App. 001081.

Incredibly, Steve Baker offered crucial testimony substantiating summary judgment in favor of FCH1 and Houston. Specifically, Steve

T. Baker's testimony makes clear that LVMPD detained Plaintiff, not FCH1 or Houston:

Q. And as far as you already told me, it was Metro who arrested or detained the plaintiff, correct?

A. Correct. (*Emphasis added*). 7 App. 001626; pp. 40-41, ll. 23-25; 1-1.

Steve Baker's testimony also made clear that LVMPD was justified in arresting Appellant, therefore disputing any claims of false imprisonment.

Mr. Baker testified:

Q. You agree that Metro had the right to take Ms. Paulos into custody?

A. Correct. (*Emphasis added*). 7 App. 001628, p. 50, ll. 14-16.

Steve Baker also indicates that Houston did nothing wrong with respect to FCH1 and Houston did nothing wrong in assisting LVMPD Officer Baca. Specifically:

Q. Do you think the Palms was doing anything inappropriate in following officer Baca's request for assistance?

A. Following the request, no. (*Emphasis added*). 7 App. 001626, p. 40, ll. 4-7.

To reiterate, the record is clear that Houston had no further contact with Appellant after the time 15:19:58. 7 App 001607:8. Incredibly, Appellant's own expert Steve Baker has no criticisms of

Appellant's detention prior to the second group of officers arriving, prior to the 15:19:58 when Houston's involvement ends. Steve Baker testified:

**Q. Do you have any criticisms of Officer Baca?
You understand he's the primary officer?**

A. Correct.

**Q. Do you have any criticism of his
conduct prior to the second group of officers
arriving beyond him touching her head?**

A. No. (*Emphasis added*). 7 App. 001628, p. 52, ll. 3-10.

Despite Appellant's contentions raised in Appellant's First Amended Complaint, the record is void of any evidence that FCH1 and Houston used excessive force. In fact, Appellant's own disclosed Security Expert, Steve T. Baker disagrees with Appellant in this regard. Contrary to Appellant's contentions that FCH1 and Houston used excessive force, Steve T. Baker testified:

**Q. IS IT YOUR OPINION THAT THE PALMS
SECURITY OFFICERS USED EXCESSIVE
FORCE TOWARDS THE PLAINTIFF IN
THIS MATTER?**

**A. EXCESSIVE AS IN TOO MUCH FORCE, NO.
(*Emphasis added*). 7 App. 001625, pg. 27:12-16.**

Accordingly, Plaintiff's own security expert disagrees with Appellant that FCH1, LLC or HOUSTON used excessive force. FCH1 and Houston's lack of negligence is substantiated in the record by Appellant's expert, Steve T. Baker's own testimony.

In addition to Appellant's own expert establishing that FCH1 and Houston cannot be found liable for negligence and false imprisonment, Appellant's claims against FCH1 and Houston are disputed by security expert Alan Zajic. In his March 24, 2013 report, Alan Zajic opined:

LVMPD was in full control of the Plaintiff, the custody decisions, and the requested involvement by Palms Security to assist in restraining the Plaintiff. LVMPD Officer Baca had the statutory authority to request assistance from Security Officer Houston as defined by NRS §171.132.¹ 5 App. 001098.

Alan Zajic also opined:

Security Officer Houston responded in a professional and appropriate manner and was subsequently requested by a sworn police officer to assist him in controlling the combative Plaintiff. Security Officer Houston assisted LVMPD Officer Baca until he was able to place Plaintiff in restraints and until additional LVMPD Officers arrived on scene. Palms Security Officers also assisted in traffic control during the incident until sufficient police arrived. Once sufficient police arrived, Houston extracted herself from assisting Baca.

The actions of Palms security personnel were more than reasonable, appropriate and professional under the circumstances and were well within or exceeded the common practices and Standard of Care similar security environments and conditions. 5 App. 001099.

¹ NRS §171.132 Person making arrest may summon assistance. Any person making an arrest may orally summon as many persons as he deems necessary to aid him therein. (Added to NRS by 1967, 1402)

As a result, based upon the foregoing, summary judgment is appropriate with respect to Appellant's negligence claims against FCH1 and Houston.

C. Appellant's Argument That FCH1 Breached Independent Duties Is Without Merit

Appellant contends that FCH1 breached "independent duties" to Appellant who was in peril. Appellant's Brief, pp. 24-28. Appellant's contentions are unsubstantiated and do not warrant overturning summary judgment in favor of FCH1 and Houston.

Appellant misapplies *Lee v. GNLV Corp*, which is completely distinguishable from the instant matter. With respect to the party in control of the premises being required to take "reasonable affirmative steps" to aid the party in peril, dealt with whether Carson Street Café took reasonable affirmative steps to aid patron, Strums, who had choked to death. *Lee v. GNLV Corp.*, 117 Nev. 291, 293-294, 22 P.3 209 (2001).

In *Lee* this Court also noted:

A proprietor of a public place has a duty only to take reasonable action to give or secure first aid **after he knows that a patron is ill or injured**; he is not required to take any action beyond that which is reasonable under the circumstances. The action taken by the proprietor under the circumstances herein [summoning a medical rescue team within five minutes of discovering the patron was choking] was reasonable. (*Emphasis added*). *Id.* at 298.

In the present case, the record is clear that Houston and FCH1 did not know Appellant was ill or injured. In fact, the record is also clear that based upon Appellant's conduct, Houston acted reasonably in assisting LVMPD Baca because Appellant placed FCH1 patrons and the public in peril.

D. FCH1 And Houston Acted Reasonably At The Request Of LVMPD Officer Baca To Protect FCH1 Patrons And The Las Vegas Community From Appellant

Appellant testified that she believed **"THE DEVIL WAS AFTER ME"** at the time of the incident. (*Emphasis added*). 3 App. 000640:7. Immediately prior to the incident, Appellant had caused two motor vehicle accidents. In fact, when LVMPD Officer Baca first encountered Appellant, Appellant was attempting to steal Brian Larson's vehicle. The record is also clear that Appellant turned and started screaming at Baca, and **"without warning, Paulos lunged at Ofc. Baca and 'reached for [his] firearm.'"** (*Emphasis added*). *Id.* at 000638:20-22. The record is also clear that Baca summoned Houston **"for his safety and Paulos' safety."** (*Emphasis added*). *Id.* at 000639:15-19. Baca testified that **"I took Ms. Paulos to the ground** in an attempt to handcuff her." 5 App. at 001045:9-15. In *Lee*, this Court determined that "it is

possible to say, in many cases, that the conduct of the individual clearly has or has not conformed to what the community requires, and that no reasonable jury could reach a contrary conclusion.” *Lee* 117 Nev. at 296-297. FCH1 and Houston exercised reasonable care in preventing Appellant from placing FCH1 patrons and the Las Vegas community in peril. Based upon the record at hand no reasonable jury could reach a contrary conclusion.

The record is also clear that FCH1, Houston, LVMPD, and Baca did not know that Appellant was injured. Appellant never complained of any injury to Baca, and Baca never observed any physical injuries to Appellant’s body. 3 App. 000639:25; 000640:1-2. It is clearly not the law in Nevada to hold FCH1 and Houston to an even more heightened standard to take reasonable affirmative steps to aid a patron when it is unknown that the patron is injured or in peril.

Appellant claims this matter is about protecting “Nevadans suffering from mental illness” since inadequate training of officers needlessly exposes “these members of our community to extreme and prolonged applications of force and consequent injury.” Appellant’s Brief, pg. 32. Despite Appellant’s contentions suggesting that mental

illness is the justification for Appellant's actions it must be noted that at the time of the incident, Appellant was never diagnosed with any mental disorders and was not under any doctor's care or taking any medication. 3 App. 000691, pg. 135.

Appellant testified that "I was diagnosed with bipolar in March—March 2012 time, around March 2012 time." *Id.* at 000683, pg. 101:24-25. Appellant testified that in 2012 she had a "manic episode" in which "I attacked my parents." *Id.* at 000697, pg. 160:15-25; 000698, pg. 161:1-3. Appellant testified that she attacked her mother with a potted plant in which Appellant's mother required hospitalization. *Id.* at 000698, pg. 161:21-23. Based upon the record, in addition to all Respondents having no knowledge of Appellant sustaining any physical injuries, Respondents would have no knowledge of Appellant's mental illness which was diagnosed in March 2012.

E. The District Court Properly Dismissed Appellant's Claims Against All Respondents Since The Federal District Court Already Determined That LVMPD And Officer Baca Acted Reasonably Under The Circumstances

On March 12, 2015, Federal District Court Judge James C. Mahan issued an Order Granting Summary Judgment and dismissed all

Federal claims against LVMPD and Baca. 4 App. 000791-000808. Specifically, Judge Mahan found that “officer Baca did not use excessive force in arresting Paulos. This conclusion also applies to all officers who arrived on scene after Paulos was restrained on the ground.” 4 App. 000803:25-18.

Appellant alleged that “Defendants used excessive force in conscious disregard for Plaintiff’s health and well being.” 3 App. 000619:3-5. Judge Mahan’s Order properly indicated that pursuant to *Graham v. Connor*, 400 U.S. 386 (1989), “determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interest at stake.” In applying the *Graham* factors, the federal district court found:

The Court finds that officer Baca’s use of minimal force in restraining her was appropriate considering the objective threat she posed and her undeniable attempt to resist arrest... this court finds that officer Baca did not use excessive force in arresting Paulos. This conclusion also applies to all officers who arrived on scene after Paulos was restrained on the ground. 4 App. 000803:22-27.

Based upon Judge Mahan's Order, the district court properly found that "the issue of reasonableness was actually and necessarily litigated in the federal court case" therefore issue preclusion applies. 7 App. 001694:3-16.

VIII. CONCLUSION

FCH1, LLC and JEANNIE HOUSTON respectfully request that this Honorable Court Affirm the district court's order granting summary judgment in favor of FCH1, LLC, JEANNIE HOUSTON, LAS VEGAS METROPOLITAN POLICE DEPARTMENT, and AARON BACA.

DATED this 14th day of November, 2018.

**MORAN BRANDON BENDAVID
MORAN**



/s/ Lew Brandon, Jr., Esq.

LEW BRANDON, JR., ESQ.

Nevada Bar No. 5880

JUSTIN W. SMERBER, ESQ.

Nevada Bar No. 10761

630 S. Fourth Street

Las Vegas, Nevada 89101

Attorneys for Respondents,

FCH1, LLC and JEANNIE HOUSTON

VERIFICATION

I, Lew Brandon, Jr., Esq., declare as follows:

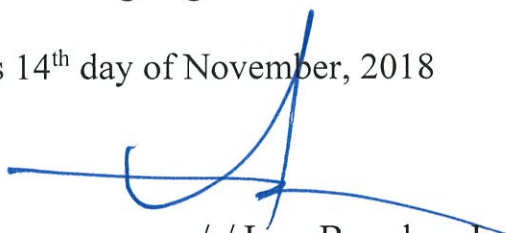
1. I am one of the attorneys for FCH1, LLC and JEANNIE HOUSTON.

2. I verify that I have read and compared the foregoing RESPONDENTS' ANSWERING BRIEF and that the same is true to my own knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

3. I, as legal counsel, am verifying RESPONDENTS' ANSWERING BRIEF because the questions presented are legal issues, which are matters for legal counsel.

4. I declare under the penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED this 14th day of November, 2018



/s/ Lew Brandon, Jr., Esq.
LEW BRANDON, JR., ESQ.
Nevada Bar No. 5880

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read Respondents' Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the Nevada Rules of Appellate Procedure.

I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) as this brief was prepared in a proportionally spaced typeface using Times New Roman 14 pt font. I also certify that this brief complies with the page or type volume

///

///

///

///

limitations of NRAP 32(a)(7) as it does not exceed thirty (30) pages.

DATED this 14th day of November, 2018.

**MORAN BRANDON BENDAVID
MORAN**

/s/ Lew Brandon, Jr., Esq. _____

LEW BRANDON, JR., ESQ.

Nevada Bar No. 5880

JUSTIN W. SMERBER, ESQ.

Nevada Bar No. 10761

630 S. Fourth Street

Las Vegas, Nevada 89101

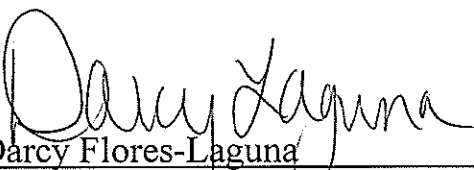
Attorneys for Respondents,

FCH1, LLC and JEANNIE HOUSTON

CERTIFICATE OF SERVICE

I certify that on November 20, 2018 I submitted the foregoing
RESPONDENTS' ANSWERING BRIEF for filing *via* the Court's eFlex
electronic filing system. Electronic notification will be sent to the
following:

MARQUIS AURBACH COFFING CRAIG R. ANDERSON 10001 Park Run Drive Las Vegas, Nevada 89145 <i>Attorneys for Las Vegas Metropolitan Police Department and Aaron Baca</i>	LEWIS ROCA ROTHGERBER CHRISTIE LLP DANIEL F. POLSENBERG ABRAHAM G. SMITH 3993 Howard Hughes Parkway, Suite 600 Las Vegas, Nevada 89169 <i>Pro Bono Attorneys for Appellant</i>
SNELL & WILMER, LLP KELLY DOVE 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, Nevada 89169 <i>Co-chairs of Pro Bono Committee Appellate Section of State Bar of Nevada</i>	UNLV WILLIAM S. BOYD SCHOOL OF LAW Professor Anne Traum 4505 S. Maryland Parkway, Box 451003 Las Vegas, Nevada 89154


/s/ Darcy Flores-Laguna
An Employee of Moran Brandon Bendavid Moran