IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTINA PAULOS, Appellant, vs. FCH1, LLC; LAS VEGAS METROPOLITAN POLICE DEPARTMENT; JEANNIE HOUSTON; and AARON BACA, Respondents.	Case No.: 74912 Appeal from the Eighth Judicial District Court, The Honorable Rob Bare Presiding.

RESPONDENTS' ANSWERING 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.

1. Las Vegas Metropolitan Police Department is a governmental entity that is not owned by any publicly traded corporation.

2. Aaron Baca is an individual.

3. Respondents were represented in the District Court by Craig R. Anderson of the law firm Marquis Aurbach Coffing. Mr. Anderson and Marquis Aurbach Coffing Associate, Kathleen A. Wilde, are counsel of record for Respondents in the appellate proceedings before this Court.

Dated this 10th day of January, 2019.

MARQUIS AURBACH COFFING

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I. JURISDICTIONAL STATEMENT

Cristina Paulos ("Paulos") seeks appellate review of the November 17, 2017, Findings of Fact and Conclusions in which the District Court reconsidered in part a previous decision and granted summary judgment in favor of the Las Vegas Metropolitan Police Department ("LVMPD") and Officer Aaron Baca ("Officer Baca" and, collectively with LVMPD, the "LVMPD Defendants"). Because Paulos filed a timely Notice of Appeal regarding this order, it is undisputed that this Court has jurisdiction to review the grant of summary judgment pursuant to NRAP 3A(b)(1).

II. ROUTING STATEMENT

The LVMPD Defendants defer to the Court's judgment as to routing, though the Supreme Court of Nevada's review appears unnecessary because this case does not involve issues of first impression, matters of statewide importance, or any of the presumptive categories listed in NRAP 17(a).

III. ISSUES ON APPEAL

A. CAN PAULOS QUESTION THE EFFECT OF THE NINTH CIRCUIT'S DECISION OR ARGUE THAT ALTERNATIVE GROUNDS ARE NOT PRECLUSIVE WHERE NEITHER POINT WAS URGED IN THE DISTRICT COURT?

B. WHETHER THE DISTRICT COURT CORRECTLY CONCLUDED THAT ISSUE PRECLUSION APPLIED WHERE PAULOS' 42 U.S.C. §1983 CLAIM AND STATE NEGLIGENCE CLAIM WERE BASED ON IDENTICAL FACTS AND AN OBJECTIVE REASONABLENESS STANDARD APPLIES?

C. DID THE DISTRICT COURT ERR BY RULING THAT LVMPD'S HIRING, TRAINING, AND SUPERVISORY DECISIONS ARE DISCRETIONARY ACTS ENTITLED TO IMMUNITY UNDER NRS 41.032(2)?

D. SHOULD THIS COURT AFFIRM ON ALTERNATIVE GROUNDS BECAUSE PAULOS INDISPUTABLY CANNOT PROVE CAUSATION?

IV. STATEMENT OF THE CASE

On August 7, 2011, Paulos caused two separate car accidents in front of the Palms Casino Resort. Though purportedly unaware of her actions due to a manic episode, Paulos then attempted to steal an occupied vehicle before encountering Officer Baca. Within six seconds of Officer Baca asking Paulos if she was okay, Paulos started screaming and lunged for Officer Baca's firearm. Seven seconds later, Officer Baca took Paulos to the ground while he attempted to secure her arms.

On the ground, Paulos struggled with Officer Baca and an assisting Palms' security guard, Jeannie Houston ("Houston"), for a minute and a half before Officer Baca restrained Paulos' arms. Shortly after LVMPD back-up arrived to

assist Officer Baca, the officers assisted Paulos to her feet and moved her to a cooler location.

Although not initially visible to the untrained eye, Paulos sustained burns from the contact with the ground. As a result, Paulos asserted a 42 U.S.C. §1983 claim and state law negligence claim against the LVMPD and Officer Baca, alleging that it was unreasonable to keep her "on the concrete for a prolonged period of time . . . in over 100 degree weather."

The Federal District Court granted summary judgment in favor of the LVMPD Defendants because Officer Baca's "use of minimal force in restraining [Paulos] was appropriate considering the objective threat she posed and her undeniable attempt to resist arrest" and the "LVMPD defendants did not violate any right established by case law." The Federal District Court declined, however, to exercise supplemental jurisdiction over Paulos' closely related state law negligence claim.

After Paulos re-asserted her negligence claim in the Eighth Judicial District Court, the LVMPD Defendants successfully moved for summary judgment on the bases of issue preclusion and discretionary-function immunity. In the instant brief, the LVMPD Defendants urge this Court to affirm the District Court's rulings because Paulos' claims fail as a matter of law multifold.

V. FACTUAL BACKGROUND

A. THE PARTIES.

In August 2011, Paulos was a 32-year-old Las Vegas resident. 5 Appellant's Appendix ("AA") 1136. Although Paulos *now* knows that she has bipolar disorder, she had not been diagnosed with any mental disorders or other health issues at the time of the underlying incident. 2 AA 632; 5 AA 1167-68.

LVMPD is a municipality in Clark County, Nevada. Officer Baca is an LVMPD police officer. 5 AA 1180. It is undisputed that Officer Baca was acting in the course and scope of his employment as a police officer at all times relevant to this case. 1 AA 44, 112.

B. THE AUGUST 7, 2011 INCIDENT.

August 7, 2011 was certainly a bad day for Paulos. On the morning of August 7, 2011, Paulos broke up with her then-boyfriend, packed a suitcase, and left their shared apartment. 5 AA 1142-43, 1147. Paulos then met her sister at the Palms Hotel Casino though the two quickly got into an argument. 5 AA 1143-44. After "storming off," Paulos aimlessly drove around for a short time before deciding to return to the Palms to revisit the situation with her sister. *Id.*

1. Paulos causes two separate car accidents and enters another driver's vehicle.

As Paulos approached the Palms' entrance on Flamingo Road, she caused not one, but two separate car accidents. Although Paulos did not recall anything unusual about her mental condition, her memory of the accidents and subsequent events is very limited. 5 AA 1144, 1169. During her deposition, Paulos testified that the last things she recalled were getting in a car accident and a "really hard" impact. 5 AA 1169. After the initial accident, her memory of the event essentially ends. *Id.* In fact, Paulos still believes that she was only involved in one accident even though the video proves otherwise. *Id.*

Palms' video surveillance captured much of what Paulos cannot recall.[1] At 3:13:30 p.m., Paulos' westbound vehicle jumped a median on Flamingo, entered the intersection of Flamingo and Wynn Road against a red light and caused a head-on collision. 4 AA 792 (citing video at 15:13:30-32).

Following the first collision, Paulos turned left into the Palms' exit lane and struck head-on a vehicle owned by Brian Larson "Larson"). *Id.*; 7 AA 1657. After

[1] The surveillance videos were attached as Exhibit 6 to the Motion for Summary Judgment in Federal Court, 1 AA 237-38, Exhibit B to the LVMPD Defendants' Motion to Dismiss or, Alternatively, Motion for Summary Judgment, 3 AA 700-01, and Exhibit D to the Motion for Summary Judgment, 5 AA 1220-21.

causing the second accident, Paulos exited her vehicle, threw her suitcase on the ground, and began to pace. Paulos then fled the scene on foot and headed towards the Palms' entrance. 4 AA 792; 7 AA 1657. After a short time, Paulos returned to the scene of the accidents and entered Larson's vehicle. 4 AA 792; 7 AA 1657. Larson instructed her to get out of the vehicle, but Paulos continued "trying to drive away." 7 AA 1658. Larson then thwarted Paulos' attempt to steal his vehicle by taking the keys out of the ignition and Paulos then exited the vehicle. *Id.*

2. Officer Baca encounters the scene and takes Paulos into custody.

Around 3:15 p.m. on August 7, 2011, Officer Baca was completing his regular shift when he happened upon the vehicle accidents that Paulos caused. 4 AA 792; 5 AA 1180. Although Officer Baca had no prior knowledge of the accidents or how they had occurred, he naturally stopped to offer assistance. 5 AA 1180, 1190. After Officer Baca exited his patrol vehicle, witnesses directed him to Paulos and indicated that she had caused both accidents.

Because Officer Baca had little information regarding the scene, his primary concern was simply to see if Paulos had been injured in the car accidents. 5 AA 1199. As Officer Baca approached, Larson informed him that Paulos was "trying

to steal my car." 5 AA 1180, 1193. Thus, when Officer Baca came into contact with Paulos, he only knew that: (1) a multiple vehicle accident had occurred; (2) witnesses identified Paulos as the cause of the accidents; and (3) a citizen reported that Paulos had tried to steal his vehicle.

Officer Baca calmly approached Paulos to see if she was "okay" and to "find out what was going on." 5 AA 1181, 1199. After Paulos walked away without responding, Officer Baca ordered her to stop. 4 AA 793 (discussing video at 15:16:48-54); 5 AA 1181. Paulos then turned toward Officer Baca, started screaming, and, without warning, lunged at Officer Baca while reaching for his firearm. 4 AA 793; 5 AA 1181, 1189, 1199. Officer Baca was able to create distance by pushing Paulos away. 4 AA 793 (citing video at 15:16:57); 5 AA 1181.

A mere six seconds passed from the time Officer Baca asked Paulos if she was okay until Paulos lunged for his firearm. 4 AA 792-93 (citing video time stamps); 5 AA 1181. Given the fast succession of events, Officer Baca still had no idea whether Paulos was mentally ill, intoxicated, or a hardened criminal. 5 AA 1189. Officer Baca also did not know what role, if any, Paulos actually played in the accidents. *Id.* He did discern, however, that Paulos posed an immediate threat

and that there was probable cause to arrest for committing battery upon a peace officer.[2]

Officer Baca attempted to handcuff Paulos from a standing position, but Paulos resisted. 4 AA 793 (citing video footage); 5 AA 1181, 1200. In response to Officer Baca's orders to "stop resisting," Paulos yelled incoherently and struggled. 5 AA 1181. Accordingly, Officer Baca decided to take Paulos to the ground for improved safety. 4 AA 793; 5 AA 1199-1200; *see also* 5 AA 1238-41 (expert report opining that Officer Baca "had no choice but to respond to the resistance for his own protection, the protection of all persons in the area; and, in order to accomplish the restraint/arrest of Ms. Paulos"). In doing so, Officer Baca used an empty hand technique and avoided all greater uses of force. 4 AA 793, 799; 5 AA 1194, 1200.

Paulos was taken to the ground at 3:17:02 p.m., *i.e.*, thirteen seconds after first contact with Officer Baca. 4 AA 793 (citing video footage). Once on the ground, Paulos continued to violently thrash about and refused to surrender her arms/wrists for handcuffing. 4 AA 793; 5 AA 1181-82. Because Paulos' continued resistance posed a significant safety concern, Officer Baca summoned a

[2] *See* NRS 200.481 (providing that battery upon a peace officer is a category C felony).

nearby Palms' security officer, Jeannie Houston, for assistance. 4 AA 793; 5 AA 1182; 5 AA 1213. Houston responded and went hands on with Paulos around 3:17:38. 4 AA 793 (citing video at 3:17:38); 5 AA 1214. Paulos then aggressively resisted Officer Baca and Houston for another minute before she was handcuffed. *Id.*

During the exhausting, two-minute struggle, Officer Baca was the only officer on the scene. 4 AA 793, 802; 5 AA 1200. As soon as Paulos was handcuffed, Officer Baca updated dispatch, called for medical assistance, and visually surveyed for other suspects. 5 AA 1200. On the ground, Paulos continued to scream in the same manner as before the skirmish. *Id*.

3. <u>Other officers arrive to assist.</u>

Other LVMPD officers arrived on the scene at 3:19:50 and began assisting Officer Baca. 4 AA 793 (citing video). At 3:22:30, surveillance footage from the Palms showed LVMPD officers talking to a standing Paulos. *Id.* Although it is unclear when, exactly, Paulos was raised to her feet, the inference from the available video is that she remained on the ground for, at the very most, two minutes and forty seconds after back-up arrived. 4 AA 794; *see also* 5 AA 1218 (stating officers got Paulos off the ground in "maybe a minute . . . [i]t was fast").

Paulos was seated on a grassy area while LVMPD investigated both traffic accidents and Paulos' condition. 4 AA 794; 5 AA 1219. After interviewing Paulos, Officer Baca's supervisor, Sergeant Jason Harney, noted that Paulos had no visible injuries and had not reported any injuries or discomfort. 5 AA 1246. Similarly, others on the scene did not see any signs of physical injury, including burns, nor hear Paulos complain of pain. *See, e.g.*, 5 AA 1200, 1219, 1246; 6 AA 1257; 6 AA 1265-66. Although Paulos continued to rant and scream, their overall impression was that Paulos was intoxicated or mentally ill. 5 AA 1246 6 AA 1267. In fact, LVMPD traffic officer Jeffrey Swan issued Paulos a citation for driving while impaired, and Sergeant Harney opined that Paulos needed medical attention to evaluate her bizarre behavior. 5 AA 1246, 6 AA 1267; 6 AA 1276.

Thus, while potential mental health issues were a concern, not a single witness testified to seeing any burns or physical injuries to Paulos during the entire time she was at the Palms. Importantly, even Paulos admits that she never told anyone she was injured, burned, or in pain. 4 AA 802 ("Paulos admits she never verbalized her discomfort to any officer at any time"); 5 AA 1153-54.

C. PAULOS' BURN INJURIES.

Paulos was promptly transported to UMC Hospital. 4 AA 794. Although she likely sustained burns within ten seconds to one minute after connecting with

the ground, the burns were not visible to an untrained eye. 4 AA 794; *see also* 6 AA 1318-19, 1321, 1333. Instead, as Paulos' doctors explained, her burns developed over several days before becoming obvious. 4 AA 794; 6 AA 1318-19, 1335.

During discovery, Paulos produced graphic photographs depicting her burns. *See* 6 AA 1278-79. Even though Paulos lacked the memory to properly authenticate the photos, it is undisputed that Paulos received medical treatment for the burns in August 2011. 4 AA 794.

VI. PROCEDURAL HISTORY

A. PAULOS' INITIAL COMPLAINTS IN THE EIGHTH JUDICIAL DISTRICT COURT.

On August 14, 2012, Paulos filed a complaint in the Eighth Judicial District Court in which she asserted a single claim of negligence against the LVMPD based upon its "fail[ure] to use reasonable care in restraining Plaintiff by keeping her lying down on the concrete for a prolonged period of time . . . in over 100 degree weather." 1 AA 6. After Paulos amended the complaint in September 2012, the parties conducted discovery in the ordinary course.

In or around August 2013, the parties stipulated to allow Paulos to file a Second Amended Complaint in which she named three LVMPD Officers,

including Officer Baca, as individual defendants. *See generally* 1 AA 43-54 or Respondents' Appendix ("RA") at 1-12.[3] In addition, Paulos' Second Amended Complaint included a 42 U.S.C. §1983 claim based upon the use of force, which included "keeping Plaintiff on the concrete for an extended period of time while the weather exceeded 100 degrees," 1 AA 50, and a *Monell*[4] claim against the LVMPD based upon its failure to "properly hire, train, instruct, monitor, supervise, evaluate, investigate, and discipline its officers." 1 AA 51-52.

B. LITIGATION IN THE FEDERAL DISTRICT COURT FOR THE DISTRICT OF NEVADA.

After Paulos asserted the two new claims, the LVMPD Defendants promptly removed the case to the Federal District Court. 1 AA 69-71. There, the parties actively litigated the case and completed discovery.

On October 30, 2014, the LVMPD Defendants filed a Motion for Summary Judgment (ECF No. 33). *See generally* 1 AA 102 to 2 AA 354. In their motion, the LVMPD Defendants explained that Paulos' state negligence claim and Fourth Amendment claim were identical because both claims centered on whether Officer

[3] The print quality of the Second Amended Complaint is poor in Paulos' Appendix. For the sake of everyone's eyes, the LVMPD Respondents have provided a better copy in their Appendix.

[4] *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 98 S. Ct. 2018 (1978).

Baca acted objectively reasonable in keeping Paulos on the ground for, at most, 2 minutes and 40 seconds after Officer Baca's backup arrived. 1 AA 123, 130. After detailing the evidence and undisputed facts, the LVMPD Defendants then advanced four separate arguments which supported their request for summary judgment: (1) the undisputed evidenced proved that Office Baca acted reasonably; (2) Officer Baca is protected by qualified immunity because no clearly established law in August 2011 indicated that it was unreasonable for an officer to leave a suspect on hot pavement for a few minutes after a violent struggle; (3) the *Monell* claims failed as a matter of law because Paulos could not establish an underlying constitutional violation; and (4) all of Paulos' claims failed because she did not sustain her injuries during the 2 minutes and 40 seconds at issue. 1 AA 114-31.

The LVMPD Defendants' motion for summary judgment was thoroughly briefed. *See* 2 AA 3355 to 3 AA 602. Notably, in opposing the motion, Paulos and/or her experts acknowledged several crucial facts:

- Paulos was not aware of her bipolar disorder in August 2011. 2 AA 357, 362.
- Paulos' bizarre actions, including her alleged "excited delirium" were consistent with a manic episode. 2 AA 356.
- In the summer months, asphalt causes second and third degree burns within 35 seconds. And, Paulos likely sustained her burns within the first 10 to 30 seconds of being taken to the ground. 2 AA 359.

- Officer Baca used minimal force and acted reasonably by taking Paulos to the ground after she resisted. 6 AA 1344 (report from Steven Baker); 1361-62 (testimony of Mr. Baker).

- Under the circumstances, it was reasonable to keep Paulos on the ground for 3 minutes and 50 seconds until Officer Baca's backup arrived. *E.g.*, 6 AA 1344-1361-62; *see also* 2 AA 361 (emphasizing that Paulos was "secured" when officers wrongfully kept her in "direct contact" with the ground).

The Federal District Court declined to hold a hearing regarding the LVMPD Defendants' motion. Instead, on March 12, 2015, the Honorable Judge James Mahan issued a written order (ECF No. 46) which granted summary judgment in favor of the LVMPD Defendants. *See generally* 4 AA 791-808.

In assessing the LVMPD Defendants' motion, Judge Mahan began by noting Paulos' concession as to several important facts and the testimony from her treating physicians which indicated that her burns developed and worsened over time and, as such, would not have been obvious on August 7, 2011. 4 AA 793-94. Judge Mahan then analyzed whether Officer Baca violated Paulos' constitutional rights by subjecting her to an objectively unreasonable, excessively forceful seizure. 4 AA 797-98 (citing *Graham v. Conner*, 490 U.S. 386, 109 S. Ct. 1865 (1989)). In ruling that Officer Baca acted reasonably in this case, Judge Mahan opined:

Paulos did commit a serious crime when she attacked officer Baca and therefore posed a serious threat to him and bystanders.

* * *

Here, the incidents' objective factors made it reasonable for officer Baca to believe that Paulos was reaching for his firearm and that she was therefore a serious threat to him and all involved. Paulos' own security expert asserts that in the security footage, she "is seen to reach towards the right waist area of the officer . . . ." (Doc. # 33-17 p.4). Even without considering the firearm itself, it is 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.

* * *

There is no doubt that Paulos resisted arrest for at least some portion of her time on the ground.

* * *

[T]he court has already found that there was at most a two minute and 40 second delay between additional officers' arrival and Paulos being lifted off the ground. Such a delay is not unreasonable considering that the officers arrived to a scene involving a multi-vehicle accident, multiple bystanders, and individuals restrained on the ground, and a winded officer. It is thus reasonable to take a few minutes to assess the scene before moving a suspect that poses an unknown level of danger. This conclusion is further supported by the fact that Paulos admits she never verbalized her discomfort to any officer at any time.

* * *

[A]ny mental illness that Paulos may have been suffering from could not have been apparent to officer Baca at the onset of the arrest.

4 AA 801-03.

In addition, Judge Mahan determined that the LVMPD Defendants were entitled to summary judgment because "there is no clearly established right against being restrained on hot asphalt for a brief period of time." 4 AA 806. And, because Paulos failed to establish liability which could be imputed to the LVMPD, the Court concluded that all of Paulos' federal claims failed as a matter of law. 4 AA 807. Judge Mahan declined, however, to exercise supplemental jurisdiction over Paulos' remaining state law claims because there was no federal hook. 4 AA 807-08.

C. THE NINTH CIRCUIT AFFIRMS JUDGE MAHAN'S ORDER GRANTING SUMMARY JUDGMENT.

Paulos appealed Judge Mahan's order to the Court of Appeals for the Ninth Circuit, 4 AA 809-29, and the appeal was fully briefed and argued. On March 28, 2017, the Panel (Circuit Judge Fernandez, Circuit Judge Watford, and District Court Judge Staton) issued an unpublished memorandum disposition in which they affirmed the order granting summary judgment. 6 AA 1378-87. As is typical of memorandum dispositions, the Panel's decision was less than three pages and included a terse analysis. 6 AA 1380-82. Indeed, in affirming Judge Mahan, the Panel simply ruled that "[n]o 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 AA 1381. And, with respect to Paulos' *Monell* claim, the Panel concluded that the LVMPD's "mere failure to discipline its officers 'does not amount to ratification of their allegedly unconstitutional actions.'" 6 AA 1381-82 (quoting *Sheehan v. City & Cty. of San Francisco*, 743 F.3d 1211, 1231 (9th Cir. 2014)).

D. RETURN TO THE EIGHTH JUDICIAL DISTRICT COURT.

In April 2015, while her appeal to the Ninth Circuit was pending, Paulos filed a new complaint in the Eighth Judicial District Court, *see generally* 3 AA 606-15, in which she asserted negligence-based claims against the LVMPD and Officer Baca which centered on their "fail[ure] 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." 3 AA 611.

1. The LVMPD Defendants' May 2015 Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment.

On May 19, 2015, the LVMPD Defendants filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, in which they argued that issue preclusion applied because Judge Mahan's objective determination regarding

reasonableness should apply to a civil claim for negligence. 3 AA 634 to 4 AA 829; *see specifically* 3 AA 644-49. In addition, the Defendants argued that Paulos' claims for negligent hiring, training, supervision and retention claim failed because LVMPD is entitled to discretionary immunity under NRS 41.032 and this Court's opinion in *Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007). 3 AA 649-50.

After briefing and a hearing, the District Court took the motion under advisement to further consider why Judge Mahan actually granted summary judgment. 4 AA 964. On November 5, 2015, the District Court issued a written order in which it dismissed Paulos' negligent hiring, training, and supervision claim(s) against the LVMPD on the basis of discretionary function immunity. 4 AA 973-78. The Court declined, however, to apply claim preclusion to Paulos' general negligence claim because "Judge Mahan, in the federal case, did not issue a ruling or a finding that Ofc. Baca acted reasonably" and "Judge Mahan only found that Ofc. Baca was entitled to qualified immunity." 4 AA 977.

2. The LVMPD Defendants' November 2015 Motion for Reconsideration.

Because the District Court's decision misconstrued Judge Mahan's ruling, the LVMPD Defendants filed a timely motion for reconsideration. 4 AA 979-99.

The motion was fully briefed by the end of December 2015 and scheduled for a hearing in March 2016. *See generally* RA 13-47, 5 AA 1035-41.

3. The LVMPD Defendants' January 2016 Motion for Summary Judgment.

On January 6, 2016, the LVMPD Defendants filed a Motion for Summary Judgment based upon Paulos' failure to generate evidence that Officer Baca acted unreasonably and Paulos' failure to prove that her injuries were caused during the later 2 minutes and 40 seconds that she was on the ground (as opposed to the initial 3 minutes and 50 seconds that all parties found reasonable). *See generally* 5 AA 1105 to 6 AA 1364.[5]

4. The February 2016 stipulation and order for stay.

Before Paulos responded to the motion for summary judgment, the parties agreed to stay the case pending a decision from the Ninth Circuit Court of Appeals. The District Court entered an order consistent with the parties' stipulation on February 9, 2016.

[5] This motion and the exhibits thereto are the most instructive pleadings for purposes of the instant appeal.

5. The lift of the stay and continued motion practice.

As noted above, the Ninth Circuit issued its memorandum disposition on March 28, 2017. *See* 6 AA 1379-80. The District Court then lifted the stay in June 2017, and set a revised briefing schedule. *See* RA 51 and RA 52-56.

On June 28, 2017, the LVMPD Defendants filed a brief supplement to their motion for summary judgment in which they recapped their previous points and argued that the Ninth Circuit's decision supported, but generally had little impact on, issue preclusion. 6 AA 1365-87.

Paulos opposed the motion and supplement on July 25, 2017. 6 AA 1388. In doing so, Paulos argued that "the issue previously litigated in Federal Court concerning Baca's use of force concerned Qualified Immunity rather than reasonableness. Likewise, the Ninth Circuit's Order also concerned Qualified Immunity." 6 AA 1389. Citing a study from the Maricopa Medical Center, Paulos also suggested that the Defendants' conduct was obviously negligent because pavement in the summer months is hot enough to cause second-degree burns within 35 seconds. 6 AA 1393.

In their July 25, 2017, reply the LVMPD Defendants pointed out, amongst other things, that Paulos could not establish causation because her own medical experts testified that her burns occurred in the first 10 to 30 seconds, *i.e.*, the time

period when her own experts agreed that the contact with the ground was reasonable. 7 AA 1629-58, *see especially* 7 AA 1645-46.

6. Judge Bare's decision regarding the motions for reconsideration and summary judgment.

The District Court held a hearing regarding the pending motions on October 19, 2017. *See* 7 AA 1659-70. After entertaining arguments from counsel, the District Court found that its previous order was mistaken because it failed to give due consideration for Judge Mahan's specific findings and ruling that Officer Baca's conduct was reasonable. 7 AA 1668. In addition, the District Court explained that issue preclusion applied because the real issue presented in this case was the same as the action in federal court because both claims hinged on the reasonableness of Officer Baca's use of force to seize Paulos. 7 AA 1669.

Written Findings of Fact and Conclusions of Law followed on November 17, 2017. 7 AA 1673-82. Consistent with the verbal ruling, the written order again stated that the November 5, 2015, order denying the LVMPD Defendants' motion was "clearly erroneous." 7 AA 1680. In addition, the District Court ruled that the *Five Star*[6] factors were satisfied because: (1) the issue litigated in the federal court case, namely the reasonableness of Officer Baca's use of force,

[6] *Five Star v. Ruby*, 124 Nev. 1048 (2008).

"is identical to Plaintiff's negligence claim against the LVMPD Defendants," (2) "Judge Mahan's ruling that Office Baca acted reasonably under the circumstances was on the merits and has become final," (3) "the current parties are identical to the parties involved in the federal lawsuit," and (4) the issue of reasonableness was actually and necessarily litigated in the federal court case." 7 AA 1680 .

E. PAULOS' APPEAL.

Paulos filed a notice of appeal on January 12, 2018, in which she sought review of the November 17, 2017, Findings of Fact and Conclusions of Law, as well as "[a]ll ruling [sic] and interlocutory orders made appealable by any of the foregoing." 7 AA 1683-96. It thus appears that Paulos is appealing: (1) the portion of the November 5, 2015 order, in which the District Court dismissed her negligent hiring, training, and supervision claims on the basis of discretionary function immunity; (2) reconsideration of the remaining portion of the November 5, 2015, order which erroneously held that Judge Mahan did not issue a ruling or finding that Officer Baca acted reasonably; and (3) the grant of summary judgment in favor of the Respondents.

VII. SUMMARY OF THE ARGUMENT

Summary judgment is a "salutary device" that contributes to the just, efficient resolution of legal disputes. *See Dredge Corp. v. Husite Co.*, 78 Nev. 69, 89 n.2, 369 P.2d 676, 687 n.2 (1962) (describing summary judgment as a "salutary device" and reasoning that "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the [ ] Rules as a whole").

Although summary judgment is not proper where there are genuine issues of material fact, summary judgment is appropriate where one or more elements of the plaintiff's prima facie case is clearly lacking as a matter of law. *See, e.g.*, *Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 461, 168 P.3d 1055, 1063 (2007). In this case, the District Court correctly determined that Paulos' state claim for negligence was barred by issue preclusion because the Federal District Court considered the exact same facts and concluded that Officer Baca did not act unreasonably by keeping Paulos "on the concrete for a prolonged period of time while the concrete was excessively hot in over 100 degree weather." Further, because Paulos' bare

negligent hiring, training, and supervision claim implicated judgments susceptible to a policy analysis, the District Court properly concluded that the LVMPD was entitled to discretionary-function immunity under NRS 41.032(2).

Accordingly, and as explained in more detail below, this Court should affirm the District Court's orders because issue preclusion and discretionary immunity defeat Paulos' claims as a matter of law. Alternatively, even if this Court disagrees with portions of the District Court's analysis, it should nevertheless affirm because any error was harmless in light of the undisputed evidence that Paulos sustained burns in 10 to 30 seconds, when all parties agree that the initial 3 minutes and 50 seconds of contact with the ground was reasonable.

VIII. STANDARDS OF REVIEW

This Court reviews an order granting summary judgment order de novo. *See, e.g.*, *Butler*, 123 Nev. at 457, 168 P.3d at 1061.

It is well-established that summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. NRCP 56(c); *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). A factual dispute is genuine when the evidence is such that a rational trier of fact could

return a verdict for the nonmoving party." *Id.* at 731, 121 P.3d at 1031 (citing *Matsushita Electric Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986)).

The burden for demonstrating an absence of genuine issues of material fact lies with the moving party, though "[t]he manner in which each party may satisfy its burden of production depends on which party will bear the burden of persuasion on the challenged claim." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). Where, as here, the moving party is a defendant that will not bear the burden of persuasion at trial, "the party moving for summary judgment may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) 'pointing out . . . that there is an absence of evidence to support the nonmoving party's case.'" *Id.* at 602-03, 172 P.3d at 134 (quoting *Celotex Corp.*, 477 U.S. at 325, 106 S. Ct. 2548 at 2554). In such cases, "the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." *Id.* at 603, 172 P.3d at 134 (citing *Wood*, 121 Nev. at 732, 121 P.3d at 1031); *see also Stockmeier v. State, Bd. of Parole Comm'rs*, 127 Nev. 243, 248, 255 P.3d 209, 212 (2011) ("Conjecture and speculation do not create an issue of fact.").

To the extent that the instant case implicates other legal issues, including statutory construction, interpretation of case law, and/or issue preclusion, this Court's review is also de novo. *See, e.g., LVMPD v. Blackjack Bonding*, 131 Nev., Adv. Op. 10, 343 P.3d 608, 612 (2015) ("[W]e review the district court's interpretation of caselaw and statutory language de novo."); *Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 984, 103 P.3d 8, 16 (2004) (noting that "[t]he availability of issue preclusion is a mixed question of law and fact," but holding that de novo review applies because "legal issues predominate.").

IX. LEGAL ARGUMENT

A. PAULOS CANNOT ARGUE THAT ALTERNATIVE OR UNREVIEWED GROUNDS ARE NON-PRECLUSIVE BECAUSE SHE DID NOT RAISE EITHER POINT IN THE DISTRICT COURT.

Paulos argues that "alternative or unreviewed grounds are not issue preclusive." Appellant's Opening Brief ("AOB") at 13. Although the LVMPD Defendants address both issues on the merits below, *see* Subsection B, *infra*, it is unlikely that this Court should even consider Paulos' first sub-argument because it was not raised in the District Court.

It is well-established that a point not urged in the district court "is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v.*

Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); *see also, e.g.*, *State Bd. of Equalization v. Barta*, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008) ("[T]his court generally will not consider arguments that a party raises for the first time on appeal."). As this Court explained in *Schuck v. Signature Flight Support of Nevada, Inc.*, this rule is not a formalistic trap for unwary litigators. 126 Nev. 434, 437, 245 P.3d 542, 544 (2010). Instead, "'the requirement that parties may raise on appeal only issues which have been presented to the district court maintains the efficiency, fairness, and integrity of the judicial system for all parties.'" *Id.* (quoting *Boyers v. Texaco Refining and Marketing, Inc.*, 848 F.2d 809, 812 (7th Cir. 1988)).

Admittedly, the series of motions in the District Court was a bit convoluted. But, even if one gives Paulos the benefit of the doubt, none of her responsive pleadings argued that alternative bases for Judge Mahan's decision were non-preclusive or that issue preclusion only applied to the reasoning explicitly upheld in the Ninth Circuit's Memorandum Disposition. *See generally* 4 AA 830-45; 4 AA 1000 to 5 AA 1034; 6 AA 1388-1408; *see also* RA 13-47.[7] Instead, Paulos'

[7] The Table of Contents to Paulos' Appendix indicates that her opposition carries over to Volume 5. It appears, however, that most of her opposition is omitted since Volume 5 begins with page 1030.

"Opposition to Defendant LVMPD's Motion to Dismiss and Motion for Summary Judgment and Counter-Motion for Sanctions" contrasted the elements of a §1983 claim with the elements of a Nevada claim for negligence and argued that negligence was not "necessarily litigated" because Judge Mahan declined to exercise supplemental jurisdiction. 4 AA 837-38. In opposing the motion for reconsideration, Paulos unsurprisingly argued that the District Court's November 2015 order was not clearly erroneous. RA 14, 20. In doing so, Paulos reiterated her previous arguments that reasonableness for purposes of §1983 is a different standard and that negligence was not "necessarily litigated" in the federal case. RA 18-19. Paulos filed her opposition to the 2016 motion for summary judgment in July 2017, *after* the Ninth Circuit issued its decision and the District Court lifted the stay. 6 AA 1388. In the opposition, Paulos discussed the dangers of hot asphalt and faulted the LVMPD for its alleged failure to train officers regarding the same. 6 AA 1393. In addition, Paulos argued that issue preclusion did not apply because "the issue previously litigated in Federal Court concerning Baca's use of force concerned Qualified Immunity rather than reasonableness" and, "[l]ikewise, the Ninth Circuit's Order also concerned Qualified Immunity." 6 AA 1396.

Thus, to summarize, the arguments that Paulos now raises in Subsection I(B) of her Legal Argument are notably absent from all three of the oppositions that she

filed in the District Court. As such, this Court need not – and should not – consider theories that Paulos raised for the first time in her opening brief. *See, e.g.*, *Dermody v. City of Reno*, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997) ("Parties 'may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below.'") (quoting *Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989)).

B. THE DISTRICT COURT CORRECTLY CONCLUDED THAT ISSUE PRECLUSION APPLIED BECAUSE PAULOS' §1983 CLAIM AND STATE NEGLIGENCE CLAIM WERE BASED ON IDENTICAL FACTS

Issue preclusion "is based upon the sound public policy of limiting litigation by preventing a party who had one full and fair opportunity to litigate an issue from again drawing it into controversy." *Thompson v. City of N. Las Vegas*, 108 Nev. 435, 439-40, 833 P.2d 1132, 1134-35 (1992); *see also* AOB 12 (citing *Taylor v. Sturgell*, 553 U.S. 880, 128 S. Ct. 2161 (2008), and noting that "[i]ssue preclusion exists to keep parties from relitigating issues that prior litigation conclusively resolved.").

Consistent with this objective, issue preclusion is a proper basis for summary judgment. *See, e.g.*, *Kahn v. Morse & Mowbray*, 121 Nev. 464, 474, 117 P.3d 227, 234 (2005); *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 479-

80, 215 P.3d 709, 717 (2009). In fact, "issue preclusion may be appropriate, even when the causes of action asserted in the second proceeding are substantially different from those addressed in the initial proceeding, as long as the court in the prior action addressed and decided the same underlying factual issues." *Kahn*, 121 Nev. at 474-75; 117 P.3d at 235; *see also New Hampshire v. Maine*, 532 U.S. 742, 748-49, 121 S. Ct. 1808, 1814 (2001) (Opining that issue preclusion applies "whether or not the issue arises on the same or a different claim.").

In reviewing the preclusive effect of a federal decision, including an order granting summary judgment, this Court applies federal law. *See Clark v. Columbia/HCA Info. Servs.*, 117 Nev. 468, 481, 25 P.3d 215, 224 (2001); *Bower*, 125 Nev. at 484, 215 P.3d at 720. Under federal law, issue preclusion applies only to parties whose due process rights have been satisfied through a "full and fair opportunity to litigate the issue." *Oyeniran v. Holder*, 672 F.3d 800, 806 (9th Cir. 2012), *as amended* May 3, 2012; *see also Taylor*, 553 U.S. at 905 128 S. Ct. at 2179-80. In addition, a previous federal decision has a preclusive effect when: (1) the issue a party seeks to preclude is "identical to the one alleged in the prior litigation;" (2) the issue was "actually litigated in the prior litigation'" and (3) resolution of the issue was "a critical and necessary part of the earlier

judgment." *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992); *Taylor*, 553 U.S. at 892-93, 128 S. Ct. at 2171.

In this case, there is no question that Paulos' due process rights have been satisfied because the parties in the federal case were identical to the parties in the instant case, *compare* 4 AA 791 *with* 3 AA 616, and, as such, Paulos received her "own day in court." *Richards v. Jefferson Cty., Ala.*, 517 U.S. 793, 798, 116 S. Ct. 1761, 1766 (1996) (discussing "our 'deep-rooted historic tradition that everyone should have his [or her] own day in court") (quoting 18C *Federal Practice and Procedure* §4449, p. 417 (1981)). It also appears undisputed that the "actually litigated" factor is satisfied because Paulos does not deny that the parties completed discovery and fully litigated her claims in the federal court. *See generally* AOB.

And, while Paulos contends that the other two elements of issue preclusion are not satisfied, this Court should reject her arguments and affirm the District Court's order(s) because: (1) Paulos' federal and state cases involve identical issues; and (2) Judge Mahan's determination that Officer Baca acted reasonably, without the use of excessive force, was a critical part of his decision.

1. Paulos' federal §1983 claim involved the exact same issue as her state law claim for negligence – namely, the objective reasonableness of Officer Baca's actions.

All of Paulos' complaints hinge on the allegation that the LVMPD Defendants unreasonably kept her "on the concrete for a prolonged period of time . . . in over 100 degree weather." *See* 1 AA 27; 1 AA 48; 3 AA 611. In fact, while Paulos asserted wholly separate causes of action for the alleged violation of her constitutional rights and negligence under Nevada state law, both claims included the exact same allegations, written in the exact same language. *Id*.

It is no surprise that Paulos' complaints included identical language because both of her claims necessarily centered on the same issue – the objective reasonableness of Office Baca's use of force. *See, e.g., Belch v. Las Vegas Metro. Police Dep't.*, 2012 WL 4610803, *11 (D. Nev. 2012) ("An officer's breach of duty in a negligence claim is analyzed under the reasonableness standard of the Fourth Amendment." (citations omitted)); *Luchtel v. Hagemann*, 623 F.3d 975, 984 (9th Cir. 2010) (rejecting a plaintiff's §1983 excessive force claim and explaining "[b]ecause the officers had reasonable cause to detain and reasonably detained Luchtel, they cannot be liable for negligence."); *see also Graham*, 490 U.S. at 397, 109 S. Ct. at 1872 (In assessing a Fourth Amendment excessive force claim, "the question is whether the officers' actions are 'objectively reasonable' in light of the

facts and circumstances confronting them."); *Driscoll v. Erreguible*, 87 Nev. 97, 101, 482 P.2d 291, 294 (1971) (to sustain a claim for negligence, a plaintiff must prove that the defendant failed to "exercise the degree of care in a given situation which a reasonable [person] under similar circumstances would exercise.").

This is not to say that a §1983 *claim* for excessive force is the same as a negligence *claim* under Nevada state law. Indeed, while Paulos argues that simple negligence is its own cause of action, with its own elements, *see* AOB 16-18, her obvious argument is beside the point because Judge Bare granted summary judgment on the basis of *issue* preclusion. *See, e.g.*, *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 257, 321 P.3d 912, 915 (2014) (addressing the differences between claim preclusion and issue preclusion); 18 *Fed. Prac. & Proc. Juris.* §4401 (3d ed., updated Sept. 2018). It is thus irrelevant how Paulos labeled her claims so long as the underlying *issues* in both cases were the same. *See, e.g.*, *New Hampshire v. Maine*, 532 U.S. at 748-49, 121 S. Ct. at 1814.

Paulos' complaints are compelling evidence that the issues were the same. After all, Paulos alleged in *both* matters that Officer Baca acted unreasonably by keeping her on the concrete longer than necessary on a summer day. Further, because reasonableness is an objective standard that depends on the circumstances, the issue in both cases was necessarily the same. After all, the alleged danger of

hot asphalt applied equally to Paulos' §1983 and negligence claims. By the same token, Paulos' mania and attempt to take Officer Baca's firearm, the prolonged struggle to secure Paulos' arms, and the number of officers on the scene were also crucial to both cases. It thus would not make sense to have potentially differing outcomes when the issue of objective reasonableness in both cases turned on the same analysis. *See, e.g., Hernandez v. City of Pomona*, 46 Cal. 4th 501, 513, 207 P.3d 506, 515 (2009) (affirming demurrer on the basis of issue preclusion where the issue of "whether the officers acted with reasonable care" was precisely the same in Appellants' federal civil rights case and state negligence case); *Knapps v. City of Oakland*, 647 F.Supp.2d 1129, 1164 (N.D. Cal. 2009) (ruling that individual officers were liable for negligence where the court previously found their actions unreasonable under the Fourth Amendment). As such, the District Court reached a correct, sensible conclusion by holding that "the issue litigated in the federal court case is identical to Plaintiff's negligence claim against the LVMPD Defendants in this case." 7 AA 1680.

Finally, it is worth noting that the authorities upon which Paulos relies have no bearing on the issue preclusion analysis in this case. For example, while Paulos cites to *Grosjean v. Imperial Palace, Inc.*, as proof that reasonableness under the Fourth Amendment is narrower than reasonableness for purposes of negligence,

AOB 17 and n.3, this Court's decision said no such thing. Instead, in noting that there was "'no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action,'" the *Grosjean* Court simply reached the sensible conclusion that punitive damages are available in some §1983 cases. *See* 125 Nev. 349, 367, 212 P.3d 1068, 1081 (2009) (quoting in *Smith v. Wade*, 461 U.S. 30, 48-49, 103 S. Ct. 1625, 1635 (1983)). Similarly, Paulos' reliance on *Brower v. County of Inyo*, is misplaced because the Supreme Court's discussion of an accident involving a police vehicle was intended to illustrate the reasons why a Fourth Amendment violation "requires an intentional acquisition of physical control." 489 U.S. 593, 596, 109 S. Ct. 1378, 1381 (1989). The decision did not, however, address preclusion in cases where the same underlying circumstances allegedly support a Fourth Amendment claim and a state negligence claim. *See generally Brower*, 489 U.S. 593, 109 S. Ct. 1378.

Thus, to summarize, there is no logical or legal reason why this Court should overturn Judge Bare's determination that the issue of reasonableness in this case is the same as the issue that Judge Mahan resolved in the federal case.

2. Paulos' approach to alternative arguments would waste judicial resources and defeat the purpose of issue preclusion.

"By 'preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate,' [issue preclusion and claim preclusion] protect against 'the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions.'" *Taylor*, 553 U.S. at 892, 128 S. Ct. at 2171 (quoting *Montana v. United States*, 440 U.S. 147, 153-154, 99 S. Ct. 970, 974 (1979)) (second alteration added; other alterations in original); *see also Bower*, 125 Nev. at 481, 215 P.3d at 718 ("This doctrine ends litigation and lends stability to judgments, thus inspiring confidence in the judicial system.") (citing *Willerton v. Bassham*, 111 Nev. 10, 19, 889 P.2d 823, 828 (1995)). Although these laudable goals are well-established, Paulos nevertheless argues that any ruling not explicitly affirmed in an appellate court order is not preclusive. *See* AOB 14.

As Wright and Miller explain in their excellent treatise, there are two common reasons why issue preclusion may not apply to an alternative ground upon which another court based its decision: (1) "the tribunal that decided the first case may not have taken sufficient care in determining an issue that did not affect the result," or (2) "appellate review may not be available to ensure the quality of the

initial decision." 18 *Fed. Prac. & Proc. Juris.* §4421 (3d ed., updated Sept. 2018). Here, there is no reason to believe either concern is warranted. For one, it is unrealistic and insulting to believe that learned jurists like Judge Mahan do not put significant thought into every aspect of their decisions. Indeed, the relevant decision in this case is evidence, of itself, that Judge Mahan put a thought into the relevant legal standards, the interplay between the undisputed facts, and each of his rulings. As for the second factor, there is no question that Paulos had a full and fair opportunity to challenge every aspect of Judge Mahan's decision in her appeal to the Ninth Circuit. Thus, the most common concerns with alternative bases are not applicable in this case.

It is also troubling to limit issue preclusion to the rulings explicitly addressed in an unpublished memorandum disposition. After all, the Ninth Circuit is well-known for using short succinct decisions in order to cope with its massive caseload. *See* United States Courts for the Ninth Circuit, *2017 Annual Report, available at*: https://www.ca9.uscourts.gov/judicial_council/publications/AnnualReport2017.pdf (noting that the Circuit produced 6,956 unpolished opinions and 500 published opinions in fiscal year 2017). Such decisions are not intended to be comprehensive even though the circuit judges certainly give full, appropriate consideration to every appeal. Yet, if litigants were able to take a

second (or third) bite at issues simply because the overwhelmed appellate courts cannot address every single issue raised on appeal, then litigants could simply re-assert the same issues in the guise of "different claims."

Although Paulos suggests that this inefficient approach is necessary regardless of the negative consequences, the precedent upon which she relies does not compel such a result. For example, while Paulos quotes a footnote in *City of Colton v. Am. Promotional Events, Inc.-W.*, the Ninth Circuit's decision did not make any lofty holdings regarding issues preclusion. *See generally* 614 F.3d 998 (9th Cir. 2010). Instead, the Ninth Circuit's dicta merely suggested that the Appellant's concerns regarding preclusion were overstated because it "could argue" that the Court's actual ruling "vitiates any preclusive effect." *Id.* at 1004 n.4. Similarly, while the *In re Ellis* court did note that issue preclusion may apply to issues that were "an essential basis for the earlier decision," the context of the Ninth Circuit's comment is hypothetical and not intended to resolve any issue actually before the court. *See* 674 F.2d 1238, 1250 (9th Cir. 1982). Meanwhile, the Ninth Circuit has explicitly held that issue preclusion applies to each of the independent, alternative grounds upon which a prior decision was based. *See*, *e.g.*, *In re Westgate–California Corp.*, 642 F.2d 1174, 1176–1177 (9th Cir. 1981).

Thus, this Court should not limit issue preclusion to the narrow basis upon which the Ninth Circuit panel affirmed because doing so would needlessly waste resources. There is no question that Paulos had a full opportunity to conduct discovery and litigate her claims. In fact, the litigation in the Federal District Court was so comprehensive that Paulos did not even attempt to conduct discovery in this case.

Further, such a narrow approach to "necessity" is inconsistent with the sound principle "that later courts should honor the first actual decision of a matter that has been actually litigated." 18 *Fed. Prac. & Proc. Juris.* §4416 (3d ed., updated Sept. 2018) (Also noting that "[m]any applications of this principle are as simple and persuasive as this nontechnical statement may suggest."). After all, most judges do not have the time or energy to needlessly address extraneous issues. So, where, as here, the previous court included a detailed analysis of the issue in question, it follows that the issue was necessary to the previous court's decision. As such, this Court should affirm Judge Bare's deference to Judge Mahan's order because the issue of objective reasonableness was necessary to the previous decision.

C. LVMPD WAS ENTITLED TO DISCRETIONARY IMMUNITY FOR ITS HIRING, TRAINING, AND SUPERVISORY DECISIONS.

Nevada has generally waived its sovereign immunity. *See* NRS 41.032(1). Its waiver, however, contains an exception for claims asserted against the State's agencies or political subdivisions which are "[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 . . . whether or not the discretion involved is abused." *See* NRS 41.032(2). Stated more succinctly, Nevada statutory law provides State agencies and employees with immunity from claims based upon the performance or exercise of discretionary functions and duties.

NRS 41.032(2) is "practically identical" to 28 U.S.C. §2680(a), the discretionary function exception to the Federal Tort Claims Act. *Scott v. Dep't of Commerce*, 104 Nev. 580, 583, 763 P.2d 341, 343 (1988). Accordingly, Nevada courts may look to federal law for guidance on what type of conduct discretionary function immunity protects. *Id.*; *see also Neal-Lomax v. Las Vegas Metro. Police Dep't*, 574 F. Supp. 2d 1170, 1192 (D. Nev. 2008) (observing that Nevada "looks to federal decisional law on the Federal Tort Claims Act for guidance on what type of conduct discretionary immunity protects"). In fact, in *Martinez v. Maruszczak*,

this Court even adopted the federal *Berkovitz-Gaubert* test for discretionary-function immunity. 123 Nev. 433, 446-47, 168 P.3d 720, 729 (2007) (citing *Berkovitz v. United States*, 486 U.S. 531, 108 S. Ct. 1954 (1998), and *United States v. Gaubert*, 499 U.S. 315, 111 S. Ct. 1267 (1991)).

Under the *Berkovitz-Gaubert* test, discretionary-function immunity applies when: (1) the acts alleged to be negligent are discretionary in that they involve an "element of judgment or choice," and (2) the act is "based on considerations of social, economic, or political policy." *Id.* at 447, 168 P.3d at 729.

In this case, the District Court correctly determined that LVMPD was entitled to discretionary immunity as to Paulos' "claim" for negligent hiring, training, retention, and supervision.[8] Although Paulos argues that the decision relied upon an incorrect legal standard, her argument lacks merit because: (1) the District Court's decisions relied upon a proper analysis; and (2) employment and training decisions are discretionary functions entitled to immunity under the *Berkovitz-Gaubert* test.

[8] Paulos did not assert full claims for negligent hiring, retention, training, and/or supervision. Instead, her second cause of action states that LVMPD owed a duty of care or skill "in the hiring, training, supervision and retention of their employees" and that the LVMPD *Officers* breached their duty of care. 1 AA 48. The second amended complaint does not even allege that the LVMPD breached its duty of care, let alone explain *how* it did so. 1 AA 43-48.

1. The District Court used a proper discretionary immunity analysis.

In her opening brief, Paulos states that "improper training and supervision are not per se immune acts." AOB 28. Although this statement is not particularly controversial, *see Martinez*, 123 Nev. at 447, 168 P.3d at 720; *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813, 104 S. Ct. 2755, 2764 (1984), its relevance to the instant case is unclear.

The District Court first addressed discretionary immunity during the August 2015 hearing. In doing so, the District Court cited the relevant statute and the *Berkvitz Gaubert* test before explaining that there are two criteria: "one, that the acts are – the alleged negligent acts must be discretionary, in that they involve some sort of judgment or choice; and then, whether that judgment is the kind of function the exception was designed to shield." 4 AA 953. Because this explanation is nearly a verbatim quote of this Court's decision in *Martinez*, *see* 123 Nev. at 445, 168 P.3d at 728, there is no question that the District Court understood the correct legal standard.

More importantly, the District Court *applied* the relevant standard in its order by considering whether the threadbare allegations in the Complaint were activities within the scope of discretionary immunity. *See* RA 48-49; 4 AA 976.

In doing so, the District Court considered comparable federal cases, as is acceptable under this Court's precedent. *Id*.; *see*, *e.g.*, *Martinez*, 123 Nev. at 444, 168 P.3d at 727; *Terry v. Sapphire Gentlemen's Club*, 130 Nev. 879, 887, 336 P.3d 951, 957 (2014) (noting that judicial efficiency supports consideration of comparable federal authorities). Yet, contrary to Paulos' suggestion of error, the District Court's decision was ultimately based on an application of NRS 41.032(2) to the facts of this case. Thus, to the extent Paulos argues the District Court erred by using a "per se" standard, her argument is mistaken.

2. The conduct in question qualifies for discretionary immunity.

As previously noted, Paulos' Complaint does not specify *how* the LVMPD breached its duty to use ordinary care in the hiring, training, supervision, and retention of their employees. Instead, the clearest explanation of her claim comes from her appellate brief to this Court: "Metro ought of have trained and supervised Officer Baca to remove detained persons from scorching asphalt as soon as it is safe to do so." AOB 30. Assuming that the Complaint actually conveyed this theory – which is a big assumption – Paulos still fails to prove that the District Court erred in applying discretionary-function immunity.

The first prong of the *Berkovitz-Gaubert* test assesses whether the allegedly negligent conduct involved an "element of judgment or choice" or an operational function. *Martinez* at 443 (citing *Ortega v. Reyna*, 114 Nev. 55, 62, 953 P.2d 18, 23 (1998)). Here, the actions in question – hiring Officer Baca, retaining Officer Baca as an employee, and allegedly failing to provide training regarding hot pavements all involved an element of choice because the LVMPD was not merely performing operational duties over which it has no choice. As such, the first element is easily met.

The second prong is satisfied when the act in question is susceptible to a policy analysis. *Martinez*, 123 Nev. at 445, 168 P.3d at 728. This is not to say that the State agency actually had to make a conscious decision or address a matter of great importance. *Id.* at 447, 168 P.3d at 729. Instead, because the purpose of discretionary-function immunity is to prevent judicial second-guessing of legislative and administrative decisions, *see, e.g.*, *Varig Airlines*, 467 U.S. at 814, 104 S. Ct. at 2765, the second prong is satisfied if the nature of action or decision could be subjected to a policy analysis.

In this case, Paulos contends that failure to train officers to minimize asphalt burns is not a policy decision because law enforcement *should* take reasonable precautions. AOB 30. This distorted analysis is incorrect in three respects. First,

as Sergeant Harney testified, the LVMPD trains its officers "to get suspects off the ground once it is reasonably safe to do so" and to consider the scorching heat that is common in Las Vegas summers. 4 AA 754-55. The record thus does not support any argument that LVMPD essentially chose a reckless policy.

Second, the merits of a policy decision (or lack thereof) are not a bar to discretionary immunity unless the Defendant's negligence was "unrelated to any plausible policy objectives." *Id*. (quoting *Coulhurst v. United States*, 214 F.3d 106, 111 (2d Cir. 2000)). For example, a government employee falling asleep at the wheel and causing an accident would not get discretionary-function immunity. *Martinez*, 123 Nev. at 446, 168 P.3d at 728-29 (citing *Gaubert*, 499 U.S. at 325 n.7, 111 S. Ct. at 1275 n.7)). But, by contrast, injuries caused by policymaking or planning decisions are entitled to immunity even if actual harm results. *Id.* at 446, 168 P.3d at 729. So, even if LVMPD purportedly could have done better in training its officers, the merits of its decision-making are not relevant because its program "could be subjected to policy analysis."

Third, it is widely accepted that "decisions relating to the hiring, training, and supervision of employees usually invoke policy judgments of the type Congress intended the discretionary function exception to shield." *Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000) (citing cases); *Neal-Lomax*, 574

F. Supp. 2d at 1182; *Ramirez v. Clark Cnty*, 2011 WL 3022406 (D. Nev. 2011) ("[D]efendants are immune from suit pursuant to NRS 41.032 for their supervision and training); *Beckwith v. Pool*, 2013 WL 3049070, *6 (D. Nev. 2013) (discretionary-function immunity bars claims for negligent hiring, training, and supervision); *Koiro v. Las Vegas Metro. Police Dep't*, 2013 WL 236898, *2 (D. Nev. 2013) (holding LVMPD immune from negligent hiring, training and supervision claim). This is not to say that such decisions are entitled to discretionary immunity in *all* cases. But, because Paulos' poorly-pled allegations in this case vaguely suggest that the LVMPD was negligent in unspecified hiring, training, and retention decisions, these persuasive authorities are instructive because they explain the reasons why employment decisions generally are susceptible to a policy analysis which warrants discretionary immunity.[9] And, because Paulos fails to explain why the individual claims in this case were not subject to discretionary-immunity, she cannot meet her burden of proving that the District Court erred.

[9] Judge Mahan's decision in *Wheeler v. City of Henderson*, No. 215CV1772JCMCWH, 2017 WL 2692405, at *5 (D. Nev. June 22, 2017), is an outlier decision which differs from comparable decisions. Although Paulos suggests that Wheeler is better reasoned, *see* AOB 20, this Court should note that *Wheeler* relied upon two other *federal* court decisions as evidence of Nevada *state* law. *Wheeler* thus has limited persuasive value.

Thus, to summarize, the District Court correctly determined that discretionary immunity applied to the limited allegations in this case, because LVMPD exercised its judgment and made policy decisions relating to officer training and employment.

D. THIS COURT MAY AFFIRM THE DISTRICT COURT FOR ANY REASON SUPPORTED IN THE RECORD, INCLUDING PAULOS' INABILITY TO PROVE CAUSATION.

"[T]his [C]ourt will affirm the order of the district court if it reached the correct result, albeit for different reasons." *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987); *see also, e.g., Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981); *Bower*, 125 Nev. at 479, 215 P.3d at 716. So, even if this Court disagrees with the District Court's application of issue preclusion and/or discretionary function immunity, this Court may still affirm the District Court's orders on other bases supported by the record, including lack of causation.

It is well-established that a plaintiff must satisfy the elements of actual and proximate causation to establish a prima facie case of negligence. *See, e.g., Clark Cnty. Sch. Dist. v. Payo*, 133 Nev. Adv. Op. 79, 403 P.3d 1270, 1279 (2017); *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 824, 221 P.3d 1276, 1280 (2009). Although causation is a question of fact which is typically resolved by a jury, this

Court has repeatedly upheld summary judgment where causation was not supported in the record. *See, e.g., Bower*, 125 Nev. at 491, 215 P.3d at 724 ("Here, there is no genuine issue of material fact regarding causation, and Harrah's is entitled to judgment as a matter of law."); *Van Cleave v. Kietz–Mill Mini Mart*, 97 Nev. 414, 633 P.2d 1220 (1981) (affirming summary judgment on the issue of causation); *Thomas v. Bokelman*, 86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970) (affirming summary judgment because "[n]egligence, is not actionable unless . . . it proximately causes the harm for which complaint was made."). Such is the case here.

Paulos' expert had no concerns with the initial take-down, which took place at 3:17:02 p.m., 6 AA 1356, 1358, and there is no suggestion in her complaint that the take-down was unreasonable. Further, Paulos' expert testified that the use of force "certainly could have done much worse," 6 AA 1356; Officer Baca's actions were justified for at least 55 seconds after the takedown, 2 AA 335; and it was reasonable to keep Paulos on the ground until backup arrived at 3:19:50 p.m. because Office Baca was completely exhausted, and there was no safe way to lift her from the ground. 6 AA 1362. Thus, Paulos' expert opined that it was reasonable to keep Paulos on the ground for almost three minutes and, throughout all the briefing in this case, Paulos has effectively conceded as much. *See, e.g.*,

2 AA 375 ("Defendant Baca unreasonably deployed excessive force upon Ms. Paulos by pinning her against hot asphalt even after she was under his control."); 4 AA 793 ("[H]er opposition . . . never disputes these specific, key assertions"); AOB 30 (suggesting that Officer Baca should have moved Paulos "as soon as it [wa]s safe to do so – i.e., as soon as backup arrive[d].").

In turn, Paulos' and her expert physicians agree that Paulos likely incurred her burns within ten seconds to one minute of being on the ground. 6 AA 1318, 1338; *see also* 2 AA 359. Similarly, the Maricopa Medical Center study upon which Paulos relies states that second degree burns occur within 45 seconds when a surface is 53 degrees Celsius (127.4 °F) or 15 seconds when a surface is 56 degrees Celsius (132.8 °F). 2 AA 359, 3 AA 552; *see also* 6 AA 1318 (testimony of Dr. Matt N. Young that the ground "could have been anywhere between 130 to 160 degrees on this date").

Comparing the liability expert's testimony to the medial experts' testimony and the Maricopa Medical Center study thus reveals that Paulos' injuries occurred during the takedown or the initial time period when Officer Baca reasonably and necessarily struggled to secure Paulos' arms. So, because the burns occurred during the time deemed reasonable (as opposed to the more controversial time

period after back-up arrived), Paulos cannot, as a matter of law, establish that her injuries were caused by the LVMPD Defendants' unreasonable, negligent actions.

As such, this Court should affirm the District Court's orders because the LVMPD Defendants proved that a necessary element of Paulos' prima facie case was lacking, and there is no reason to proceed to trial on the "mere hope" that Paulos will be able to discredit her own experts. *See, e.g., Howard Hughes Med. Inst. v. Gavin*, 96 Nev. 905, 909, 621 P.2d 489, 491 (1980) ("Neither mere conjecture nor hope of proving the allegations of a pleading is sufficient to create a factual issue.").

X. CONCLUSION

The LVMPD Defendants were entitled to judgment as a matter of law on the bases of issue preclusion and discretionary function immunity. Although Paulos attempts to undermine the District Court's decision through an interesting *new* analysis, this Court should not even consider any arguments that were not first raised in the District Court. In addition, this Court should reject Paulos' arguments on the merits because the District Court correctly applied the relevant law to the undisputed facts of this case.

Yet, even if this Court disagrees with portions of Judge Bare's orders, it should nevertheless affirm on an alternative basis because Paulos cannot establish

the necessary element of causation. Thus, while there are many ways in which this Court can approach the instant appeal, the end result should be the same – affirmation of the District Court's grant of summary judgment in favor of the LVMPD Defendants.

Dated this 10th day of January, 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 10th day of January, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENTS' ANSWERING BRIEF AND RESPONDENTS' APPENDIX** were filed electronically with the Nevada Supreme Court on the 10th day of January, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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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:

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