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, Respondent.	Case No.: 74912 Appeal from the Eighth Judicial District Court, The Honorable Rob Bare Presiding

RESPONDENTS' APPENDIX TO ANSWERING BRIEF
(Volume 1, Bates Nos. 1-56)

Marquis Aurbach Coffing
Craig R. Anderson, Esq.
Nevada Bar No. 6882
Kathleen A. Wilde, Esq.
Nevada Bar No. 12522
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
canderson@maclaw.com
kwilde@maclaw.com
Attorneys for Las Vegas Metropolitan Police Department and Aaron Baca

INDEX TO RESPONDENTS' APPENDIX

ACOM
Elliot S. Blut, Esq.
Nevada Bar No. 6570
BLUT LAW GROUP, APC
300 South Fourth Street, Suite 701
Las Vegas, NV 89101
Telephone (702) 384-1050
Facsimile (702) 384-8565

Attorneys for Plaintiff,
CRISTINA PAULOS

DISTRICT COURT

CLARK COUNTY, NEVADA

CRISTINA PAULOS, an individual; Plaintiff v. FCH1, LLC, a Nevada limited liability company; LAS VEGAS METROPOLITAN POLICE DEPARTMENT, a government entity; DOES 1 through 10; Defendants.	CASE NO.: A-12-666754-C DEPT. NO.: XXVI SECOND AMENDED COMPLAINT FOR: (1) NEGLIGENCE (2) NEGLIGENCE (3) FALSE IMPRISONMENT (4) VIOLATION OF CONSTITUTIONAL RIGHTS (5) VIOLATION OF CONSTITUTIONAL RIGHTS

COMES NOW Plaintiff CRISTINA PAULOS, an individual, who hereby complains and alleges as follows:

THE PARTIES

1. Plaintiff CRISTINA PAULOS, ("Plaintiff"), an individual, is, and at all times herein mentioned was, an individual residing in the State of Nevada.

2. Plaintiff is informed and believes and based thereon alleges that Defendant FCH1, LLC, (hereinafter "FCH1") is, and at all times herein mentioned, a limited liability company formed and existing under the laws of Nevada, with its principal place of business in Clark

County, Nevada and is the controlling entity of the Palms Casino Resort (hereinafter, "Palms"), located at 4321 W. Flamingo Road, Las Vegas, Nevada, 89103.

3. Plaintiff is informed and believes and based thereon alleges that Defendant LAS VEGAS METROPOLITAN POLICE DEPARTMENT (hereinafter "LVMPD"), is, and at all times herein mentioned, a government entity formed and operated pursuant to the Nevada Revised Statutes, located and operating in Clark County, Nevada, and at all times relevant herein, employed Defendant Police Officer BACA, Defendant Police Officer VON GOLDBERG, and Defendant Police Officer SWAN.

4. Plaintiff is informed and believes and, based thereon alleges that Defendant JEANNIE HOUSTON ("HOUSTON") is and was at all times relevant to this Complaint, a citizen of the United States of America, and a resident of the State of Nevada. She is sued in both her capacity as a security guard formerly employed by FCH1 as well as in her individual capacity. Defendant HOUSTON is named as defendant DOE 1.

5. Plaintiff is informed and believes and, based thereon alleges that Defendant Police Officer BACA ("BACA") is and was at all times relevant to this Complaint, a citizen of the United States of America, and a resident of the State of Nevada. He is sued in both his capacity as a police officer with the LVMPD as well as in his individual capacity. Defendant BACA is named as defendant DOE 6.

6. Plaintiff is informed and believes and, based thereon alleges that Defendant Police Officer VON GOLDBERG ("VON GOLDBERG") is and was at all times relevant to this Complaint, a citizen of the United States of America, and a resident of the State of Nevada. He is sued in both his capacity as a police officer with the LVMPD as well as in his individual capacity. Defendant VON GOLDBERG is named as defendant DOE 7.

7. Plaintiff is informed and believes and, based thereon alleges that Defendant Police Officer SWAN ("SWAN") is and was at all times relevant to this Complaint, a citizen of the United States of America, and a resident of the State of Nevada. He is sued in both his capacity as a police officer with the LVMPD as well as in his individual capacity. Defendant SWAN is named as defendant DOE 8.

8. Plaintiff is informed and believes and based thereon alleges that DOE Defendants 2 through 5, and at all times herein mentioned, are employees of Defendant FCH1. The true names and capacities, whether corporate, associate, individual or otherwise, of defendants DOES 2 through 5, inclusive, are unknown to Plaintiff, who therefore sues said defendants by such fictitious names. Each of the defendants designated herein as a DOE is deliberately, intentionally, negligently or otherwise legally responsible in some manner for the events and happenings herein referred to and caused injuries and damages proximately thereby to Plaintiff, as herein alleged. Plaintiff will amend this Complaint to allege their true names and capacities when ascertained.

9. Plaintiff is informed and believes and based thereon alleges that DOE Defendants 9 through 10, and at all times herein mentioned, are employees of Defendant LVMPD. The true names and capacities, whether corporate, associate, individual or otherwise, of defendants DOES 9 through 10, inclusive, are unknown to Plaintiff, who therefore sues said defendants by such fictitious names. Each of the defendants designated herein as a DOE is deliberately, intentionally, negligently or otherwise legally responsible in some manner for the events and happenings herein referred to and caused injuries and damages proximately thereby to PLAINTIFF, as herein alleged. Plaintiff will amend this Complaint to allege their true names and capacities when ascertained.

10. Plaintiff is informed and believes and based thereon allege that Defendants, and each of them, including those alleged herein fictitiously, are the agents, co-venturers, joint venturers, co-conspirators, employees or representatives of the other Defendants, and in acting in the manner alleged herein did so with the knowledge, ratification and consent of the other Defendants, and acted in concert with them. Plaintiff is further informed and believes that each of the Defendants named herein engaged in wrongful conduct that is a cause of Plaintiff's damages.

JURISDICTION

11. The events and circumstances which are the subject of this lawsuit occurred within the County of Clark, State of Nevada.

COMMON ALLEGATIONS

12. On August 7, 2011, Plaintiff was involved in an automobile accident at the entrance to the Palms Casino Resort parking lot at Flamingo and Palms Winners Way.

13. Following the accident, Plaintiff was restrained by the Palms security officers, including HOUSTON ("Security Personnel") and LVMPD officers including BACA, VON GOLDBERG, and SWAN (the "LVMPD Officers") (hereinafter, the Palms security officer and LVMPD officers will be referred to collectively as "Defendants"), and detained on the property and placed on the asphalt for an extended period of time.

14. During this time, Defendants kept Plaintiff down on the ground for an extended period of time. As a result of high temperatures that afternoon, the concrete was excessively hot causing severe burns to Plaintiff's body.

15. In committing the aforementioned acts, Defendants used excessive force in conscious disregard for Plaintiff's health and well being.

16. Based upon information and belief, HOUSTON was an employee of Defendant FCH1 and in committing the acts alleged herein, acted within the course and scope of her employment. Based upon further information and belief, members of FCH1's Security Personnel have previously demonstrated a propensity for violence in that they have been involved in other prior incidents where excessive force was used against guests and invitees of the Premises. Defendant was aware of these other prior incidents and notwithstanding these other prior incidents and these individuals' propensity for violence, these individuals were allowed to remain employed by Defendant in their capacity as security personnel. As a result, Defendant FCH1 ratified HOUSTON's conduct.

17. Based on information and belief, the LVMPD Officers were acting in the course and scope of their employment

18. As a proximate and direct cause of Defendants' actions and the actions of the Doe Defendants, Plaintiff sustained severe injuries.

FIRST CAUSE OF ACTION

(Negligence - against FCH1, LLC, HOUSTON, and DOE Defendants 2 through 5)

19. Plaintiff repeats, realleges and incorporates herein by reference the allegations of Paragraphs 1 through 18, inclusive, as though set forth at length.

20. Based upon information and belief, the Security Personnel, including HOUSTON were employees of Defendant FCH1 and in committing the acts alleged herein, acted within the course and scope of their employment.

21. Defendant FCH1 owed Plaintiff a duty to use ordinary care and/or skill in operating and maintaining the Premises in a safe condition and in the management of Defendant's property and persons so as not to cause Plaintiff to suffer emotional and physical injuries.

22. Defendant FCH1 also owed Plaintiff a duty to use ordinary care and/or skill in the hiring, training, supervision and retention of their employees so as not to cause, or allow their employees to cause Plaintiff to suffer emotional and physical injuries.

23. In committing the acts alleged hereinabove, and negligently permitting its employees and agents, including but not limited to the Security Personnel, to commit these acts, Defendants breached their duties owed to Plaintiff.

24. As a direct and proximate result of the Security Personnel's negligent actions, Plaintiff has been injured in mind and body and sustained severe burn injuries, all to Plaintiffs' damage in an amount to be determined according to proof.

25. At all relevant times, Defendant FCH1 and its Security Personnel, including HOUSTON, knew or should have known that negligence, or reckless disregard in operating and maintaining the Premises, and in managing Defendant FCH1's property was dangerous and could lead to serious physical injuries.

26. As a further proximate result of the aforementioned acts, Plaintiff was required to and did employ physicians to examine, treat, and care for her, and incurred additional medical expenses for surgery to her left leg, rehabilitation, prescription drugs and other incidental medical expenses and sundries reasonably required in the treatment and relief of the injuries herein

alleged in an amount to be determined according to proof but in excess of $10,000.00. Plaintiff is informed and believes and thereon alleges that she will incur additional medical expenses, the exact amount of which is yet unknown.

SECOND CAUSE OF ACTION

(Negligence - against LVMPD, BACA, SWAN, VON GOLDBERG and DOE Defendants 9 through 10)

27. Plaintiff repeats, realleges and incorporates herein by reference the allegations of Paragraphs 1 through 26, inclusive, as though set forth at length.

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

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

30. The LVMPD Officers had a duty to use reasonable care in restraining Plaintiff and to avoid causing injuries, to wit, severe burns to her body.

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

32. Defendant LVMPD and the LVMPD Officers knew or should have known that reckless disregard for the rights and safety of Plaintiff could lead to serious and life threatening injuries. NRS 41.035 provides immunity for acts or omissions by a police officer that occur while acting within the scope of his public duties or employment only. The LVMPD Officers' behavior was negligent, or, in the alternative, so grossly reckless, that such immunity does not apply.

33. As a direct and proximate result of the LVMPD Officers' actions, Plaintiff suffered severe bodily injury. Plaintiff has been injured in mind and body, and sustained severe burn injuries, all to Plaintiffs' damage in an amount to be determined according to proof.

34. As a further proximate result of the aforementioned acts, Plaintiff was required to

and did employ physicians to examine, treat, and care for her, and incurred additional medical expenses for surgery to her left leg, rehabilitation, prescription drugs and other incidental medical expenses and sundries reasonably required in the treatment and relief of the injuries herein alleged in an amount to be determined according to proof but in excess of Ten Thousand Dollars ($10,000.00). Plaintiff is informed and believes and thereon alleges that she will incur additional medical expenses, the exact amount of which is yet unknown.

THIRD CAUSE OF ACTION

(False Imprisonment- against FCH1, LLC, HOUSTON, and DOE Defendants 2 through 5)

35. Plaintiff repeats, realleges and incorporates herein by reference the allegations of Paragraphs 1 through 34, inclusive, as though set forth at length.

36. The Security Personnel unlawfully detained Plaintiff by confining and detaining Plaintiff without sufficient legal authority. The Security Personnel kept Plaintiff on the concrete for an extended period of time while it was excessively hot in over 100 degree weather.

37. Such confinement and detainment of Plaintiff by the Security Personnel was without sufficient cause therefor.

38. As a further proximate result of the aforementioned acts, Plaintiff was required to and did employ physicians to examine, treat, and care for her, and incurred additional medical expenses for surgery to her left leg, rehabilitation, prescription drugs and other incidental medical expenses and sundries reasonably required in the treatment and relief of the injuries herein alleged in an amount to be determined according to proof but in excess of Ten Thousand Dollars ($10,000.00). Plaintiff is informed and believes and thereon alleges that she will incur additional medical expenses, the exact amount of which is yet unknown.

39. The conduct of Defendants as described herein was malicious, oppressive, and fraudulent, and done without justification or privilege, thus entitling Plaintiff to an award of punitive and exemplary damages in an amount appropriate to punish said Defendant and to make an example to the community.

THIRD CAUSE OF ACTION

(Violation of Constitutional Rights- against LVMPD, BACA, VON GOLDBERG, SWAN, and DOE Defendants 9 through 10)

40. Plaintiff repeats, realleges and incorporates herein by reference the allegations of Paragraphs 1 through 39, inclusive, as though set forth at length.

41. The actions of DEFENDANTS LVMPD, BACA, VON GOLDBERG, SWAN, and Doe Defendants 9 through 10 constitute unreasonable seizure and deprivation of liberty by means of physical force without due process of law in violation of the Fourth Amendment to the United States Constitution. The LVMPD Officers restrained the liberty of Plaintiff by means of physical force by keeping Plaintiff on the concrete for an extended period of time while the weather exceeded 100 degrees.

42. Such confinement and detainment of Plaintiff by the LVMPD Officers constituted a use of excessive force without sufficient cause therefor.

43. The intentional use of excessive force in restraining the liberty of Plaintiff by the LVMPD Officers and authorized by the LVMPD violated the following right of Plaintiff as guaranteed by the Fourth Amendment to the United States Constitution:

> Freedom from the deprivation of life or liberty without due process of law and from unreasonable force in violation of the Fourteenth Amendment.

44. As a direct and proximate result of the acts and omissions of the LVMPD Officers, Plaintiff was deprived of her physical liberty, endured physical and mental injury, pain and suffering, and severe emotional distress and other related costs, medical, and lost wages, including but not limited to attorney fees in excess of $10,000.00.

45. Plaintiff is entitled to compensatory and exemplary damages resulting from the violation of the aforementioned right under 42 U.S.C. § 1983 all in excess of $10,000.00.

46. The unlawful detention and arrest of Plaintiff by the LVMPD Officers was done with actual malice toward Plaintiff and with wilful and wanton indifference to and deliberate disregard for the constitutional rights of Plaintiff. Plaintiff is thus entitled to exemplary damages against the individual defendants in their individual capacities all in excess of $10,000.00.

47. Plaintiff has been forced to pursue this action in search of justice and to enforce the provisions of 42 U.S.C. § 1983 and is therefore entitled to be awarded reasonable attorney's fees pursuant to 41 U.S.C. § 1988.

48. As a further proximate result of the aforementioned acts, Plaintiff was required to and did employ physicians to examine, treat, and care for her, and incurred additional medical expenses for surgery to her left leg, rehabilitation, prescription drugs and other incidental medical expenses and sundries reasonably required in the treatment and relief of the injuries herein alleged in an amount to be determined according to proof but in excess of $10,000.00. Plaintiff is informed and believes and thereon alleges that she will incur additional medical expenses, the exact amount of which is yet unknown.

FOURTH CAUSE OF ACTION

(Monell Claim)

(Violation of Constitutional Rights- against LVMPD)

49. Plaintiff repeats, realleges and incorporates herein by reference the allegations of Paragraphs 1 through 48, inclusive, as though set forth at length.

50. LVMPD failed to adequately train, direct, supervise or control the LVMPD Officers as to prevent the violation of Plaintiff's constitutional rights.

51. At all times pertinent hereto, the LVMPD Officers were acting within the course and scope of the employment and the inadequate training, supervision, direction and/or control they received as to how to detain individuals in excessively hot weather was the proximate cause behind the conduct causing Plaintiff to suffer the constitutional violation. Defendant LVMPD is therefore liable for the violation of Plaintiff's constitutional rights by the LVMPD Officers.

52. Plaintiff is thus entitled to compensatory damages resulting from the violation of the aforementioned constitutional rights under 42 U.S.C. § 1983 in excess of $10,000.00.

53. Plaintiff has been forced to pursue this action in search of justice and to enforce the provisions of 42 U.S.C. § 1983 and is therefore entitled to be awarded reasonable attorney's fees pursuant to 41 U.S.C. § 1988.

54. Defendant LVMPD failed to properly hire, train, instruct, monitor, supervise, evaluate, investigate, and discipline the LVMPD Officers, with deliberate indifference to Plaintiff's constitutional rights, which were thereby violated as described above all to her damage in an amount in excess of $10,000.00

55. The unconstitutional actions and/or omissions of the LVMPD Officers, as described above, were approved, tolerated and/or ratified by policy making officers for the LVMPD. Plaintiff is informed and believes, and thereupon alleges, the details of this incident have been revealed to the authorized policy makers of the LVMPD, and that such policy makers have direct knowledge of the fact that detaining individuals face down outside on a hot concrete floor is extremely dangerous, causes severe injuries and is not justified, but rather represented an unconstitutional display of deprivation and excessive force. Notwithstanding this knowledge, the authorized policy makers within the LVMPD have approved of the LVMPD Officers' actions, and have made a deliberate choice to endorse the LVMPD Officers' detention and restraining of Plaintiff. By so doing, the authorized policy makers within the LVMPD have shown affirmative agreement with the individual defendant officers' actions, and have ratified the unconstitutional acts of the individual defendant officers.

56. The aforementioned customs, policies, practices, and procedures, the failures to properly and adequately train, hire, instruct, monitor, supervise, evaluate, investigate, and discipline, as well as the unconstitutional orders, approvals, ratification and toleration of wrongful conduct of the LVMPD were the moving force and/or a proximate cause of the deprivations of Plaintiff's clearly-established and well-settled constitutional rights in violation of 42 U.S.C. § 1983, as more fully set forth above.

57. Defendants subjected Plaintiff to their wrongful conduct, depriving Plaintiff of rights described herein, knowingly, maliciously, and with conscious and reckless disregard for whether the rights and safety of Plaintiff were trampled on.

58. As a direct result of the acts and omissions of the LVMPD and the LVMPD Officers, and each of them, Plaintiff was caused to suffer physical and mental injury, pain and suffering, and severe emotional distress and other related costs, and lost wages, including but not

limited to attorney fees in excess of $10,000.00.

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

AS TO EACH AND EVERY CAUSE OF ACTION

1. For general damages in an amount in excess of $10,000.00;
2. For past and future medical and treatment expenses according to proof at the time of trial;
3. For past and future wage loss according to proof at the time of trial;
4. For reasonable attorneys' fees, costs and interest thereon as permitted by law;
5. For exemplary and punitive damages in an amount deemed adequate to punish and make example of Defendants, to be determined at time of trial; and
6. For such other and further relief as the Court may deem just and proper.

DATED this 1st day of August, 2013

BLUT LAW GROUP, APC

By: _____

Elliot S. Blut, Esq.
NEVADA BAR No. 6570
300 South Fourth Street, Suite 701
Las Vegas, Nevada 89101
Attorneys for Plaintiff
CRISTINA PAULOS

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of BLUT LAW GROUP, APC and that on the 1st day of August, 2013, I caused a correct copy of the **SECOND AMENDED COMPLAINT FOR: (1) NEGLIENCE, (2) NEGLIGENCE, (3) FALSE IMPRISONMENT, (4) VIOLATION OF CONSTITUTIONAL RIGHTS, (5) VIOLATION OF CONSTITUTIONAL RIGHTS** to be served as follows:

[X] by placing same to be deposited in the United States mail in a sealed envelope, postage prepaid:

Craig R. Anderson, Esq.
MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorney for Defendant, LVMPD

Lew Brandon, Jr., Esq.
Justin Smerberg, Esq.
Moran Law Firm
630 South Fourth Street
Las Vegas, NV 89101
Attorney for Defendant, F.P. Holdings, L.P.

[ ] pursuant to EDCR 7.26, to be sent via facsimile; and/or

[ ] to be hand-delivered; to the attorneys listed below at the address and/or facsimile number indicated below:

An employee of Blut Law Group, APC

Electronically Filed
12/21/2015 05:07:43 PM

CLERK OF THE COURT

ELLIOT S. BLUT, ESQ.
Nevada Bar No. 6570
BLUT LAW GROUP, APC
300 South Fourth Street, Suite 701
Las Vegas, NV 89101
Telephone (702) 384-1050
Facsimile (702) 384-8565
email: eblut@blutlaw.com

CAL J. POTTER, III, ESQ.
Nevada Bar No. 1988
C. J. POTTER, IV, ESQ.
Nevada Bar No. 13225
POTTER LAW OFFICES
1125 Shadow Lane
Las Vegas, NV 89102
Telephone (702) 385-1954
Facsimile (702) 385-9081
email: info@potterlawoffices.com

Attorneys for Plaintiff,
CRISTINA PAULOS

DISTRICT COURT

CLARK COUNTY, NEVADA

CRISTINA PAULOS, an individual; Plaintiff v. FCH1, LLC, a Nevada limited liability company; LAS VEGAS METROPOLITAN POLICE DEPARTMENT, a government entity; JEANNIE HOUSTON, an individual; AARON BACA, an individual; and DOES 1 through 10; Defendants.	CASE NO.: A-15-716850-C DEPT. NO.: XXXII **Hearing Date: 01/21/2016** **Time of Hearing: 9:00 a.m.**

PLAINTIFF'S OPPOSITION TO DEFENDANT LVMPD'S MOTION TO RECONSIDER

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

. . .

This Opposition is made and based upon all of the files and pleadings herein, the Points and Authorities set forth hereunder, and any oral argument that this Court may entertain at the hearing of the Motion.

DATED this 21st day of December, 2015

POTTER LAW OFFICES
BLUT LAW GROUP

By /s/ Cal J. Potter, III, Esq.
CAL J. POTTER, III, ESQ.
Nevada Bar No. 1988
C. J. POTTER, IV, ESQ.
Nevada Bar No. 13225
1125 Shadow Lane
Las Vegas, Nevada 89102

ELLIOT S. BLUT, ESQ.
Nevada Bar No. 6570
300 South Fourth Street, Suite 701
Las Vegas, NV 89101
Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

LVMPD's Motion merely rehashes the same arguments that this Court has previously rejected in its Findings of Fact and Conclusions of Law of November 5, 2015. (Exhibit 1). LVMPD's Motion is a "second bite at the apple" that fails to offer any new evidence, whatsoever; and merely states the conclusion the that Court's prior order was clearly erroneous, apparently because LVMPD disagrees with the Order.

II.

FACTS

A. PROCEDURAL POSTURE

Plaintiff originally filed this case in Nevada's Eighth Judicial District Court on August 12, 2012. The LVMPD Defendants removed this case to U.S. District Court on August 27, 2013. Eventually, LVMPD filed a Motion for Summary Judgment. On March 12, 2012, the U.S. District Court granted summary judgment in favor of LVMPD as to Plaintiff's claims for

violations of her civil rights. As noted above, the U.S. District Court did not analyze Plaintiff's staet tort claims and declined to exercise supplemental jurisdiction over those claims.

On May 19, 2015, LVMPD filed a Motion to Dismiss or, in the alternative, Motion for Summary Judgment raising identical arguments as those addressed in LVMPD's present Motion for Reconsideration. This Court properly denied LVMPD's Motion. (See, Exhibit 1).

III.

ARGUMENT

A. STANDARD OF REVIEW

E.D.C.R. 2.24(a)-(c) provides:

> (a) No motions once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties.
>
> (b) A party seeking reconsideration of a ruling of the court, . . . must file a motion for such relief within 10 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order. A motion for rehearing or reconsideration must be served, noticed, filed and heard as is any other motion .....
>
> (c) If a motion for rehearing is granted, the court may make a final disposition of the cause without reargument or may reset it for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

"A district court may reconsider a previously decided issue **if substantially different evidence is subsequently introduced or the decision is clearly erroneous**." Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd., 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (emphasis added). In the subject Motion, LVMPD did not provide the Court with substantially different evidence in support of their request to Rather, It appears that LVMPD simply want to make the same unavailing arguments previously raised in their Motion to Dismiss.

. . .

. . .

. . .

B. PLAINTIFF'S STATE TORT CLAIMS ARE NOT BARRED BY THE DOCTRINE OF ISSUE PRECLUSION

Plaintiff's negligence claim was not litigated in the U.S. District Court. On the contrary, the U.S. District Court granted summary judgment in favor of LVMPD on Plaintiff's civil rights claims pursuant to 42 USC § 1983 and declined to exercise supplemental jurisdiction over Plaintiff's state tort claims. Specifically, the Federal Court stated: "**Considering the court's ruling on the instant motions, the only remaining claims in this suit are Paulos' state law claims against LVMPD defendants (negligence) and Palms (negligence and false imprisonment). The court therefore declines to exercise supplemental jurisdiction over theses state law causes of action. *Wade v. Reg'l Credit Ass'n*, 87 F.3d 1098. 1107 (9th Cir. 1996)(holding that 'where a district court dismisses a federal claim, leaving only state claims for resolution, it should decline jurisdiction over the state claims and dismiss them without prejudice').**

Based on the foregoing, Paulos' remaining claims will be dismissed without prejudice." (Exhibit 2 - Mahan's Order, pp.17-18)(emphasis added).

In light of the fact that the U.S. District Court unequivocally declined to decide the merits of Plaintiff's state tort claims, LVMPD's instant motion must be denied.

As the Court, and Counsel, are well aware in order to sustain an action under section 1983, a plaintiff must demonstate (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the plaintiff of a federal constitutional or statutory right." Wood v. Ostrander, 879 F.2d 583, 587 (9th Cir. 1989).

Whereas, in order to prevail on a negligence theory a plaintiff must demonstrate that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, (3) the breach was the legal cause of the plaintiff's injuries, and (4) the plaintiff suffered damages. Dauber v. Sr. Bridges of Sparks Fam. Hosp., 282 p.3d 727, 732 (2012).

Therefore, it is apparent that LVMPD's assertion that "[t]he legal standard for Paulos' current negligence claim and her § 1983 claim is the same" lacks candor because the elements of each cause-of-action are separate and distinct. For example, the tort of negligence does not

require state action or deprivation of a constitutional right. Likewise, a § 1983 action does not require that a plaintiff demonstrate the elements of duty, breach, causation, or damage. Consequently, this Court should deny LVMPD's Motion because the Court's prior ruling is correct and LVMPD has failed to offer any new evidence to justify disturbing the prior order.

Nevada does not employ the terminology of *res judicata* to encompass the separate and distinct concepts of claim preclusion and issue preclusion. Five Star Capital Corporation v. Ruby, 194 P.3d 709 (2008). Rather, the Nevada Supreme Court addresses the concepts separately. Id.

LVMPD's brief merely raises arguments concerning issue preclusion. (*LVMPD Motion,* pp. 12-15). Accordingly, Plaintiff will limit her opposition to LVMPD's issue preclusion arguments because generally a court will not address arguments which a party failed to provide any argument or citation to authority on the issue. LVMPD v. Coregis Insurance Co., 256 P.3d 958, 961 n.2 (2011).

Issue preclusion refers to the effect of a judgment in foreclosing re-litigation of a matter that has been litigated and decided. Migra v. Warren Cirt School Dist. Bd. Of Ed., 465 U.S. 75, 77 fn. 1 (1984)(*citing* Restatement (Second) of Judgments § 27). The factors necessary for application of issue preclusion: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated. Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 1055 (Nev. 2008).

In this case, LVMPD cannot satisfy at least three of the four facts necessary for issue preclusion. Although, Plaintiff and LVMPD were parties to the proceedings in federal court, none of the other factors are satisfied.

. . .

. . .

. . .

. . .

1. Identical Issues

Evaluating whether a defendant was negligent versus evaluating whether a individual violated a citizen's civil rights are not identical issues because each analysis requires discrete questions of law and factual determinations. Specifically, in order "[t]o sustain an action under section 1983, a plaintiff must show (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the plaintiff of a federal constitutional or statutory right." Wood v. Ostrander, 879 F.2d 583, 587 (9th Cir. 1989).

Whereas in order to prevail on a negligence theory, under Nevada law, a plaintiff must demonstrate that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, (3) the breach was the legal cause of the plaintiff's injuries, and (4) the plaintiff suffered damages. Dauber v. Sr. Bridges of Sparks Fam. Hosp., 282 P.3d 727, 732 (2012).

As noted above, the issues presented by a § 1983 action for violation of federal civil rights differ considerably for a state tort under a negligence theory obviously differ because a plaintiff is not required to demonstrate the elements of duty, breach, causation, or damage when proving a § 1983 claim; just as a Plaintiff alleging negligence is not required to demonstrate a violation of a constitutional right, committed by an official acting under the color of law. Consequently, a § 1983 action does not present "identical issues" to a state tort claim for negligence. Therefore, an individual struck by a vehicle being pursued by a police car, while not able to sue police for a violation of civil rights, can sue for the police's negligence. City of Pinellas Park v. Brown, 604 So. 2d 1222 (Fla. 1992). Additionally, numerous other courts have upheld the viability of a negligence action against the police department in the absence of a civil rights violation. For example, although officers were immune from suit, plaintiff who was injured following a police pursuit, could sue the city for its negligent vehicular pursuit police. Colvin v. City of Gardena, 11 Cal. App. 4th 1270 (2d Dist. 1992). Likewise, a plaintiff who was an innocent could sue police for negligent high-speed police pursuit of a suspected bank robber. Biscoe v. Arlington County, 738 F.3d 1352 (1984). Furthermore, a New York appellate court upheld finding of negligence following a jury verdict when plaintiff was struck by a speeding car being negligently pursued by a police

officer. Myers v. Harrison, 438 F.2d 293 (2d. Cir. 1971); Similarly, police liable under state torts for injuries resulting from a negligent pursuit. Thain v. City of New York, 30 N.Y.2d 524 (1972).

The mere fact that LVMPD conflates "reasonableness under the totality of the circumstances", for purposes of § 1983, with negligence does not make the discrete theories of liability "identical issues."

2. Final ruling on the merits

LVMPD's assertion that the U.S. District Court made a "final ruling upon the merits," with regard to Plaintiff's negligence claim cannot withstand the scrutiny of reason.

Simply put, the U.S. District Court expressly declined to make any ruling, whatsoever, on the merits of Plaintiff's negligence claim. On the contrary, the Court stated: "**The court therefore declines to exercise supplemental jurisdiction over theses state law causes of action.**" (Exhibit 2 - Mahan's Order, pp.17-18)(emphasis added).

3. Issues actually and necessarily litigated

Similarly, Plaintiff's negligence claim was not litigated in the U.S. District Court. On the contrary, the U.S. District Court granted summary judgment in favor of LVMPD on Plaintiff's civil rights claims pursuant to 42 USC § 1983 and declined to exercise supplemental jurisdiction over Plaintiff's state tort claims. (Exhibit 2, pp. 17-18). In doing so the Court chose not to perform any analysis, whatsoever, concerning Plaintiff's negligence claims. Consequently, it is disingenuous to argue that Plaintiff's negligence claims were actually and necessarily litigated.

. . .

. . .

. . .

. . .

IV.

CONCLUSION

LVMPD has failed to demonstrate the existence of any new evidence. Further, LVMPD's Motion does not demonstrate that the Court's Order was clearly erroneous, but rather than LVMPD merely disagrees with the prior order. Consequently, this Court should Deny LVMPD's motion, without reargument, because the Court has previously made the proper findings of fact and conclusions of law.

DATED this 21st day of December, 2015

POTTER LAW OFFICES
BLUT LAW GROUP

By /s/ Cal J. Potter, III, Esq.
CAL J. POTTER, III, ESQ.
Nevada Bar No. 1988
C. J. POTTER, IV, ESQ.
Nevada Bar No. 13225
1125 Shadow Lane
Las Vegas, Nevada 89102

ELLIOT S. BLUT, ESQ.
Nevada Bar No. 6570
300 South Fourth Street, Suite 701
Las Vegas, NV 89101
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9 on the 21st day of December, 2015, I did serve at Las Vegas, Nevada a true and correct copy of **PLAINTIFF'S OPPOSITION TO DEFENDANT LVMPD'S MOTION TO RECONSIDER** on all parties to this action by:

☐ Facsimile

☐ U.S. Mail

☐ Hand Delivery

X Electronic Filing/Service

Addressed as follows:

Justin W. Smerber, Esq.
MORAN LAW FIRM, LLC
630 S. Fourth Street
Las Vegas, NV 89101
Ph: (702)384-8424
Fax: (702) 384-6568

Craig R. Anderson, Esq.
MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, NV 89145
Ph: (702) 382-0711
Fax: (702) 382-5816

/s/ Jenna Enrico
An Employee of POTTER LAW OFFICES

Exhibit 1

Exhibit 1

Original

Marquis Aurbach Coffing
Craig R. Anderson, Esq.
Nevada Bar No. 6882
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
canderson@maclaw.com
Attorneys for Defendants LVMPD and Baca

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

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

CRISTINA PAULOS, Plaintiff, vs. FCH1, LLC, a Nevada limited liability company; LAS VEGAS METROPOLITAN POLICE DEPARTMENT, a government entity; JEANNIE HOUSTON, an individual; AARON BACA, an individual and DOES 1 through 10, Defendants.	Case No.: A-15-716850-C Dept. No.: XXXII Date: 8/11/15 Time: 9:00 a.m.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants Las Vegas Metropolitan Police Department ("LVMPD") and Ofc. Aaron Baca's (hereinafter "LVMPD defendants") Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, having come on for hearing before this honorable on August 11, 2015, with Craig R. Anderson, Esq., of Marquis Aurbach Coffing, appearing on behalf of the LVMPD defendants; Justin W. Smerber, Esq., of Moran Brandon Bendavid Moran, appearing on behalf of defendants FCH1, LLC and Jeannie Houston; and Cal Potter, III, Esq. and C.J. Potter, IV, Esq., of Potter Law Offices, appearing on behalf of the plaintiff, with the Court having considered the pleadings and papers on file herein, and the argument of counsel made a the hearing, the Court HEREBY FINDS AS FOLLOWS:

///

///

///

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

FINDINGS OF FACT

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

2. Paulos amended this complaint on two occasions.

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

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

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

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

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

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

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

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

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

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

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

Compl. at ¶¶26-29.

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

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

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

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

///

///

///

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

8. The Court finds that Paulos' countermotion for sanctions is DENIED.

///

///

///

///

///

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

ACCORDINGLY, IT IS ORDERED, ADJUDGED AND DECREED that:

The LVMPD Defendants' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment is GRANTED in part and DENIED in part and Paulos' countermotion for sanctions is DENIED.

Dated this 15 day of October, 2015.

MARQUIS AURBACH COFFING

By: _____
Craig R. Anderson, Esq.
Nevada Bar No. 6882
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorney for LVMPD Defendants

Dated this 6 day of October, 2015.

POTTER LAW OFFICES

By: _____
C.J. Potter, IV, Esq.
Nevada Bar No. 13255
1125 Shadow Lane
Las Vegas, Nevada 89102
Attorney for Plaintiff

Dated this 6 day of October, 2015.

BLUT LAW GROUP, APC

By: _____ FOR:
Elliot S. Blut, Esq.
Nevada Bar No. 6570
300 South Fourth Street, Ste. 701
Las Vegas, Nevada 89101
Attorney for Plaintiff

Dated this 5 day of October, 2015.

MORAN BRANDON BENDAVID MORAN

By: _____
Justin W. Smerber, Esq.
Nevada Bar No. 10761
630 S. Fourth Street
Las Vegas, Nevada 89101
Attorney for Defendants FCH1, LLC and Houston

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

_____
District Court Judge
ROB BARE
JUDGE, DISTRICT COURT, DEPARTMENT 32

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

Exhibit 2

Exhibit 2

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

CRISTINA PAULOS, Plaintiff(s), v. FCH1, LLC, et al., Defendant(s).	Case No. 2:13-CV-1546 JCM (PAL) ORDER

Presently before the court is a motion for summary judgment submitted by the Las Vegas Metropolitan Police Department (hereinafter "LVMPD"), as well as officers Aaron Baca, Jake Von Goldberg, and Jeffery Swan (collectively hereinafter "LVMPD defendants"). (Doc. # 33). Plaintiff Cristina Paulos filed a response, (doc. # 39), and LVMPD defendants filed a reply, (doc. # 43).

Also before the court is a motion for summary judgment submitted by defendant FCH1, LLC (hereinafter "Palms"). (Doc. # 35). Paulos filed a response, (doc. # 40), and Palms filed a reply, (doc. # 44).

Also before the court is a partial motion for summary judgment regarding punitive damages submitted by Palms. (Doc. # 34). Paulos filed a response, (doc. # 40), and Palms filed a reply, (doc. # 42).

I. Background

This case arises out of an incident where a police officer detained a suspect who attacked him by forcing her to the ground. The suspect received second and third degree burns as the result of being restrained on the hot asphalt for several minutes. Officer Baca, who brought Paulos to the ground and handcuffed her, is the officer primarily involved in the incident. Paulos asserts multiple

claims against LVMPD, officer Baca, and officers Swan and Von Golberg, who arrived later on scene. Paulos also brings claims against FCH1, LLC, the owner and operator of the Palms casino and resort hotel, for the participation of one of its security guards, Jeannie Houston, in the arrest.[1]

The incident took place on August 7, 2011. In her deposition, Paulos attests to not remembering many of the underlying events, including how she ended up restrained on the ground. (Doc. # 39-1 pp. 144–45). However, two different Palms security cameras captured much of the incident on video.[2] A comparison of this footage, Paulos' own deposition testimony, and LVMPD defendants' presented evidence reveals that there is no genuine dispute of material fact in this case.

The incident began at about 3:13 P.M., when Paulos' vehicle jumped a median and entered the intersection in front of an exit from Palms, colliding with another vehicle. Paulos continued driving the short distance into the exit and collided head-on with a separate vehicle. Shortly thereafter, Paulos is clearly seen rapidly leaving the scene of the accident. (Video A at 15:14:32). She then returned to the scene, and the footage shows her sitting in the passenger seat of the second vehicle she struck. The apparent owner of the vehicle reached across Paulos in order to remove the keys from the ignition. (Video B at 15:16:32).

By this time, officer Baca, who was in the area during the course of his normal shift, arrived on scene in order to evaluate the situation. As Paulos exited the vehicle she struck, its owner told officer Baca that she was attempting to steal the vehicle. Officer Baca therefore approached Paulos in order to speak with her. It is clear from the footage that the officer had not drawn any type of weapon or even handcuffs from his utility belt and approached Paulos in a calm manner. (Video B at 15:16:48).

---

[1] Paulos also brought suit against Houston. While attorneys for LVMPD defendants also originally listed themselves as attorneys for Houston (see, e.g., doc. # 5), the parties later stipulated that this was in error. (Doc. # 14). Since then, Houston has failed to file an answer to Paulos' complaint, and the clerk of the court entered an order of default against her. (Doc. # 22). Therefore, none of these motions for summary judgment apply to Houston, and the court will only refer to her for the purpose of discussing the case's facts.

[2] Each video camera captures different key portions of the incident, and the court will therefore refer to their content separately. The black-and-white video will be referred to as "Video A," while the color video will be referred to as "Video B." (See doc. # 33 p. 5 n. 2). Time cites will be given in the twenty-four hour format that both videos use (e.g., 3:00 P.M. is 15:00:00).

In response, Paulos turned her back to officer Baca and walked a short distance away from him. After the officer ordered her to stop, Paulos turned and then lunged at officer Baca towards his waist with both hands extended. (Video B at 15:16:54). He claims that she was reaching for his gun and that he felt her hand make contact with it. Whether Paulos was specifically reaching for the weapon and whether she actually made contact is not clear from the video.

In order to thwart the attack, officer Baca immediately pushed Paulos a short distance away. Although stumbling backwards, Paulos remained standing. Officer Baca quickly closed the distance between them and attempted to restrain Paulos from behind. Struggling to do so, he forced her to the ground. (Video B at 13:17:02). Paulos was thus lying on the asphalt pavement that constitutes the exit lane coming out of Palms.

For the next two minutes, officer Baca continued his attempts to handcuff Paulos. (Video B at 15:17:04–18:35). He claims that Paulos resisted arrest throughout this time period. At the onset, however, trees and surrounding bystanders obstruct the camera's view. Nonetheless, officer Baca is seen calling over Palms security officer Jeannie Houston to assist him in restraining Paulos, which she proceeded to do. (Video B at 15:17:28). By this point, the camera shows Paulos struggling against officer Baca and Houston until they finally succeed in handcuffing her. (Video B at 15:17:38–18:35).

Less than two minutes later, additional LVMPD officers arrived on scene. (Video B at 15:19:50). The color footage ends at this points and the black-and-white security camera's view is obscured. It is therefore not clear exactly how long Paulos remained on the ground after back-up arrived. However, LVMPD defendants assert that the timeframe can be two minutes and forty seconds at most, because back-up arrived at 15:19:50 and Paulos is seen standing at 15:22:30. (Video A). LVMPD defendants further assert that Paulos is seen seconds later walking with officers away from the pavement towards a nearby grassy area.

It is not clear to the court that the figure in this footage segment is definitively Paulos. However, her opposition to LVMPD defendants' motion to dismiss, which disputes several of the "undisputed facts" in defendants' motion, never disputes these specific, key assertions. (Doc. # 39,

pp. 6–7). The court will therefore accept that the figure is Paulos and that she remained on the ground for at most two minutes and forty seconds after additional officers arrived on scene. This means that Paulos spent a little more than five minutes on the ground in total.

After Paulos was situated in the grassy area, several other officers spoke with her, including officer Swan and Sergeant Jason Harney, officer Baca's immediate supervisor. At no point did Paulos complain to any of the officers of burns or any other type or injury. (Doc. # 33-2 pp. 79–83). Nor did any of the officers note seeing any injury in their reports. Officer Swan did note, however, that Paulos' behavior was erratic at this point. She would be crying, then suddenly happy, then suddenly screaming. (Doc. # 33-5 p. 22). Paulos both screamed to herself and cursed at the officers. It was this behavior and the fact that she had just been in a car accident that led to her being submitted for medical treatment. (see doc. # 33-9 p. 2; doc. # 33-3 p. 91).

After paramedics arrived on scene, they transported Paulos to University Medical Center, where she was treated from August 7–9. Paulos' own medical expert, Dr. Matthew Young, testified at his deposition that this treatment was primarily related to the psychosis she exhibited during the incident. (Doc. # 33-15 p. 17–20). Despite how visually severe Paulos' burns later appeared,[3] the application of a burn cream was the only burn-related treatment she received during this initial hospital stay. (Id; doc. # 33-10).

This is not surprising. As explained by both Dr. Young and Dr. Andrew Silver, the burn specialist who eventually treated Paulos, a burn may not seem serious at first but can reveal itself to be more severe over the course of several days. (Doc. # 33-15 pp. 18–19; doc. # 39-4 pp. 14–16). This process is called "burn conversion." (Doc. # 39-4 pp. 14–15).

When University Medical Center discharged Paulos on August 9, her discharge sheet referenced only blisters that had developed on her body. (Doc. # 39-4 pp. 21–22). It was not until August 11 that Paulos began receiving treatment at Lyons Burn Care Unit. There, she received skin graft surgeries. (Id. at p. 27).

Paulos filed a complaint on August 14, 2012, and a second amended complaint on August 5, 2013. (Doc. # 2 Exh. A,C). Defendants then removed the instant action to federal court.

[3] It is unclear when photos of Paulos' burns were taken.

Paulos' complaint asserts five causes of action: (1) a negligence claim against Palms, Houston, and other unnamed defendants; (2) a negligence claim against LVMPD defendants; (3) a false imprisonment claim against Palms, Houston, and other unnamed defendants; (4) a claim of excessive force in violation of the Fourth Amendment under 42 U.S.C. § 1983 against LVMPD defendants; (5) a failure to train, direct, or supervise (Monell municipal liability) claim against LVMPD. (Doc. # 2 Exh. C).

LVMPD defendants move for summary judgment for claims two, four, and five. (Doc. # 33). Palms moves for summary judgment for claims one and three. (Doc. # 35). It also moves for partial summary judgment on Paulos' request for punitive damages. (Doc. # 34).

II. Legal Standard

The Federal Rules of Civil Procedure provide for summary judgment when 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 movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." Celotex Corp. v. Catrett, 477 U.S. 317, 323–24 (1986).

In determining summary judgment, a court applies a burden-shifting analysis. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc., 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

. . .

. . .

In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that

party will bear the burden of proof at trial. See Celotex Corp., 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 159–60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass*'n*, 809 F.2d 626, 631 (9th Cir. 1987).

In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. See Celotex Corp., 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth, but to determine whether there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. See id. at 249–50.

. . .

. . .

III. Discussion

Defendants seek summary judgment on each of the five claims in Paulos' second amended complaint. Because the fourth claim (Fourth Amendment excessive force) and the fifth claim (a

Monell municipal liability claim) are the only federal questions in this case, the court will address them first.[4]

A. Fourth Amendment excessive force (claim four)

Paulos' fourth claim seeks to hold LVMPD; officers Baca, Von Goldberg, and Swan; and other unnamed LVMPD employees, liable for violations of her Fourth Amendment rights. Paulos brings this claim under 42 U.S.C. § 1983, asserting that officer Baca exercised excessive force during his arrest of her on August 7, 2011, and that the other officers failed to prevent this constitutional violation.

As an initial matter, it is well established that "a local government body [such as a police department] cannot be held liable under § 1983 'solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory.'" Jackson v. Barnes, 749 F.3d 755, 762 (9th Cir. 2014) cert. denied, 135 S. Ct. 980 (2015) (quoting Monell v. N.Y.C. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978)). The court will therefore address the liability of the Las Vegas Metropolitan Police Department only in regards to Paulos' Monell claim.

In response to Paulos' claim of excessive force, officer Baca argues that his actions were reasonable as a matter of law and that in the alternative, he cannot be held liable on this claim under the doctrine of qualified immunity. Because a qualified immunity analysis addresses whether a defendant violated a constitutional right, it will be combined with the excessive force analysis.

1. Legal standard- qualified immunity for excessive force

Where a plaintiff has stated a valid cause of action under 42 U.S.C. § 1983, government officials sued in their individual capacities may raise the affirmative defense of qualified immunity. See Spoklie v. Montana, 411 F.3d 1051, 1060 (9th Cir. 2005); see also Goodman v. Las *Vegas Metro. Police Dep't*, 963 F. Supp. 2d 1036, 1058 (D. Nev. 2013). Qualified immunity "balances two important interests–the need to hold public officials accountable when they exercise

[4] Paulos' second amended complaint contains a typographical error, labeling both the false imprisonment claim and the separate excessive force claim as "third cause of action." The court will therefore refer to the excessive force claim as the "forth claim" and the Monell claim as the "fifth claim."

power irresponsibly, and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223, 231 (2009). It protects government officials performing discretionary functions from liability for civil damages as long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law." Pearson, 555 U.S. at 244.

Deciding whether an officer is entitled to qualified immunity is a two-step analysis. First, the court assesses whether the plaintiff has alleged or shown a violation of a constitutional right. Second, the court decides whether the right at issue was clearly established at the time of the defendant's alleged misconduct. Pearson, 555 U.S. at 232. Meeting either prong will establish qualified immunity. See Davis v. City of Las Vegas, 478 F.3d 1048, 1056 (9th Cir. 2007). The Supreme Court has instructed that district judges may use their discretion in deciding which prong to address first based on the circumstances of the case at hand. See Pearson, 555 U.S. at 236.

2. Violation of a constitutional right

Turning to the first step, whether officer Baca violated a constitutional right through excessive force, the court "examine[s] the use of force to effect an arrest in light of the Fourth Amendment's prohibition on unreasonable seizures." Deorle v. Rutherford, 272 F.3d 1272, 1279 (9th Cir. 2001) (citing Graham v. Connor, 490 U.S. 386 (1989)). "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." Graham, 490 U.S. at 396 (internal quotation marks omitted).

a. The nature and quality of intrusion

This side of the balancing test "assess[es] the quantum of force used to arrest [a plaintiff] by considering the type and amount of force inflicted." Deorle, 272 F.3d at 1279 (internal quotation marks omitted). At the onset, it is important to note that the force that officer Baca used against Paulos is different than most excessive force cases in regards to both type and amount.

In arresting Paulos by bringing her to the ground and handcuffing her, officer Baca did not use any seizure devices that the Ninth Circuit has classified as at least an "intermediate" use of force, such as pepper spray, a baton, or a taser. See, e.g., Young v. Cnty. of L.A., 655 F.3d 1156, 1161 (9th Cir. 2011) (holding that "[b]oth pepper spray and baton blows are forms of force capable of inflicting significant pain and causing serious injury . . . [and] [a]s such, both are regarded as 'intermediate force . . . .'"); Bryan v. MacPherson, 630 F.3d 805, 826 (9th Cir. 2010) (concluding that the use of tasers "constitute an intermediate, significant level of force . . . .").

Even without the use of such devices, the way in which officer Baca manually restrained Paulos is vastly different from incidents the Ninth Circuit has found excessive. See, e.g., Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052, 1056 (9th Cir. 2003) (finding that officers applying their weight to a suspect's neck and torso while he lay handcuffed on the ground was "severe and . . . capable of causing death or serious injury."); Davis, 478 F.3d at 1055 (deeming an officer's conduct "extremely severe," when he slammed a handcuffed suspect head-first into a wall, pressed his knee into his back, and punched him in the face). In contrast to these types and amounts of force, the court finds that officer Baca used minimal force in arresting Paulos.

Additionally, Paulos' own security expert, Steven Baker, explicitly stated that he had no criticism of how officer Baca brought Paulos to the ground and handcuffed her. (Doc. # 33-18 pp. 50–52). Baker also opined that he had little to no criticism of officer Baca keeping Paulos on the ground until the point that additional officers arrived on scene. (Id.). Baker readily agrees that the type of physical exertion that officer Baca underwent in restraining Paulos would have "absolutely" tired him. (Id.). The plaintiff's own evidence supports the officer's assertion that he was too winded from the struggle with Paulos to move her off the ground. (Doc. # 33-3 p. 85).

In turn, the only use of force actually in dispute in this incident is LVMPD defendants' decision to allow Paulos to continue lying on the hot asphalt for the approximately two minutes and forty seconds between additional officers arriving on scene and them lifting her to her feet. The court must therefore weigh this decision and the second and third degree burns Paulos incurred during her entire time on the asphalt against the government interests at stake.

b. The countervailing governmental interests at stake

In Graham, the Supreme Court created three factors for measuring the government's interest in conducting a particular arrest: (1) the severity of the suspect's crime, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect actively resisted arrest or attempted to evade arrest by flight. 490 U.S. at 396. Beyond these specific factors, courts also look at the totality of the circumstances. Mattos v. Agarano, 661 F.3d 433, 441 (9th Cir. 2011).

In weighing these factors against the nature and quality of instruction, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer in the scene, rather than with the 20/20 vision of hindsight." Graham, 490 U.S. at 396. The court must allow "for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." Mattos, 661 F.3d at 442 (quoting Graham, 490 U.S. at 396–97).

This inquiry is objective. Graham, 490 U.S. at 397 ("[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them . . ."). A reasonable use of force encompasses a range of conduct, and the availability of a less-intrusive alternative will not render conduct unreasonable. Wilkinson v. Torres, 610 F.3d at 551 (citing Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994)).

. . .

. . .

i. Factors 1 & 2: the severity of the crime and the immediate threat of safety of the officers or others

The court will combine these two factors, because the only crime at issue is Paulos' assault against officer Baca. The latter factor, whether Paulos posed an immediate threat to the safety of officer Baca or others, is the most important Graham inquiry. See, e.g., Smith v. City of Hemet, 394 F.3d 689, 702 (9th Cir. 2005). An officer's good intentions will not make an objectively unreasonable use of force constitutional. Graham, 490 U.S. at 397. When the court considers whether an immediate threat existed, a "simple statement by an officer that he fears for his safety

or the safety of others is not enough; there must be objective factors to justify such a concern." Mattos, 661 F.3d at 441–42 (quoting Deorle, 272 F.3d at 1281).

As an initial matter, LVMPD defendants assert that Paulos' conduct prior to her contact with officer Baca (i.e., causing the accident, fleeing the scene, and possibly attempting to steal a vehicle) should be included in weighing the severity of her actions. While hindsight might suggest that some of these actions were criminal, officer Baca himself admits that he approached Paulos to only determine what had happened and that he did not believe at the time that she had committed any crime. (Doc. # 33-3 pp. 62, 88). Since these initial events did not enter in officer Baca's decision to arrest Paulos and use force in doing so, the court will not weigh them in this consideration.

Nonetheless, Paulos did commit a serious crime when she attacked officer Baca and therefore posed a serious threat to him and bystanders. While not denying the attack itself, Paulos disputes the officer's contention that she was reaching for his firearm. She asserts that the video evidence is not clear to this end and that the question should therefore be left for a jury. This argument is not convincing.

This case is not a criminal prosecution of Paulos, where a determination that she attempted to use a deadly weapon would create an aggravating condition in a crime. See NRS § 200.471(2) (increasing the sentence for assaulting an officer with "the use of a deadly weapon or the present ability to use a deadly weapon"). Instead, an excessive force claim is premised on the reasonability of an officer's conduct and whether objective factors supported his safety concerns.

Here, the incident's 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 toward 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 officer Baca after he had calmly approached her mere seconds earlier. This erratic, irrational, and aggressive behavior indicated that Paulos was dangerous. Therefore, both factors 1 and 2 weigh in favor of LVMPD defendants.

ii. Factor 3: whether the suspect actively resisted arrest or attempted

to evade arrest by flight

Turning to the third Graham factor, there is no doubt that Paulos resisted arrest for at least some portion of her time on the ground. The segments of the security footage not obscured clearly show her struggling against both officer Baca and the Palms security guard. (Video B at 15:17:38). Furthermore, both Paulos' security expert and her police practices expert acknowledge that the footage shows her struggling. (Doc. # 33-17 p. 4; doc. # 39-7 p. 7).

Despite this evidence and the fact that Paulos claims limited memory of the incident, she denies ever struggling with officer Baca. (Doc. # 39-1 p. 48). Nonetheless, the court is not required to accept a version of events in contradiction to available evidence. Scott v. Harris, 550 U.S. 372, 380 (2007) (holding that when a non-moving party's version of the facts "is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt [it] for purposes of ruling on a motion for summary judgment."). The court therefore concludes that Paulos resisted arrest.

While analysis of this factor would normally end at this point, the court must consider how it applies to the fact that LVMPD defendants allowed Paulos to lie on the ground even once additional officers arrived. Her security expert asserts that the availability of more officers and their "caged" police vehicles necessitated immediately moving Paulos into one of these vehicles. (Doc. # 33-18 p. 51). The court agrees that the presence of additional officers would naturally begin to mitigate the severity of a suspect's resistance once she is restrained on the ground.

Nonetheless, the court has already found that there was at most a two minute and forty second delay between the 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, an individual 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. (Doc. # 33-2 pp. 79–83). Therefore, this factor weighs in the favor of LVMPD defendants.

iii. Other factor: mental illness

Finally, the court addresses Paulos' contention that the disturbed mental state she displayed throughout the incident should be a mitigating factor in assessing the governmental interest at stake. In this regard, the Ninth Circuit has rejected a "per se rule establishing two different classifications of suspects: mentally disabled persons and serious criminals." Deorle, 272 F.3d at 1283. It has instead "emphasized that where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under Graham, the reasonableness of the force employed." Id. (emphasis added).

The rationale for this policy is that "[t]he problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is . . . resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal . . . ." Id. at 1282–83 (finding that firing upon an emotionally disturbed suspect with a less-than-lethal round was unreasonable when the officer observed his state for over half an hour. Id. at 1283.

While it is clear in hindsight that Paulos was suffering from some form of psychosis during the incident, officer Baca never had a chance to make this observation. Unlike the officer in Deorle, he did not have time to observe her state of mind; she attacked him mere seconds after he approached her. In turn, any mental illness that Paulos may have been suffering from could not have been apparent to officer Baca at the onset of the arrest. The issue therefore does not enter into the analysis.

iv. Totality of the circumstances

While it is unfortunate that Paulos incurred such severe burns as a result of her arrest in this incident, 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. In light of this assessment and the lack of any genuine dispute of material fact, the 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.

3. Clearly established right

Even if officer Baca had used excessive force against Paulos in violation of a constitutional right, LVMPD defendants would still be entitled to qualified immunity if they can show that the right that Paulos claims is not "clearly established." Mattos, 661 F.3d at 440 (citing Pearson, 555 U.S. at 223). In this analysis, courts determine "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Deorle, 272 F.3d at 1278–79.

The Ninth Circuit has developed a three-step inquiry for determining whether a right is clearly established. See Boyd v. Benton Cnty., 374 F.3d 773, 781 (9th Cir. 2004). First, courts must examine whether "the right is clearly established by decisional authority of the Supreme Court or [the Ninth] Circuit. Id. Next, "[i]n the absence of binding precedent, [the Ninth Circuit] look[s] to whatever decisional law is available . . . including decisions of state courts, other circuits, and district courts." Id. (internal quotation marks omitted). Finally, even when there is no relevant case law available, courts analyze whether "an officer's conduct 'is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional . . . .'" Id. (quoting Deorle, 272 F.3d at 1286) (emphasis added).

Here, there are no binding decisions analyzing whether restraining a suspect on asphalt hot enough to cause severe burns violates the Fourth Amendment. There is, however, a district court case within the Ninth Circuit, as well as two circuit court cases outside this circuit, with circumstances comparable to the instant case. The court will therefore analyze whether taken together, these cases carve out a clearly established right. The court will then proceed to address whether officer Baca's conduct was patently violative of the constitutional right.

a. Non-binding case law

In Price v. County of San Diego, the district court found that leaving a suspect restrained on hot asphalt for several minutes did not constitute excessive force. 990 F. Supp. 1230, 1241 (S.D. Cal. 1998). There, officers sprayed the suspect with pepper spray and wrestled him to the ground after he violently resisted arrest. Id. at 1234. The officers then placed the suspect in a four-point restraint (a "hogtie") and allowed him to lie shirtless for several minutes on asphalt approximately 133.9 degrees in temperature. Id. at 1235. The suspect stopped breathing and died on the scene. Because the district court specifically concluded that leaving him on the hot asphalt

did not constitute excessive force, this case does not help to clearly establish a right against being placed on hot asphalt.

Similarly, in Rubio v. Lopez, the Eleventh Circuit found that restraining a suspect on hot asphalt did not violate a clearly established right. 445 F. App'x 170, 173 (11th Cir. 2011). There, an officer removed the suspect from his police vehicle after the suspect began kicking at the windows and then "hobble-tied" him, forcing his chest and face onto the hot pavement. Id. at 172. "While on the pavement, [the suspect] screamed that his skin was burning." Id. at 172–73. The "incident lasted about a minute" and resulted in second degree burns. Id. at 174. The court "conclude[d] that not every reasonable officer in [the officer's] position would have known that restraining [a suspect] on the hot pavement violates the Fourth Amendment." Id. at 174. Therefore, this case also does not help establish a right against being placed on hot asphalt.

Finally, in Howard v. Kansas City Police Department, the Eighth Circuit found that officers used excessive force and violated a clearly established right when they forced an individual to remain seated on hot asphalt, even after he was complaining about the resulting pain. 570 F.3d 984, 988. However, the court defined this right narrowly, finding that case law had "clearly established that the Fourth Amendment was violated if an officer unreasonably ignored the complaints of a seized person that the force applied by the officer was causing more than minor injury." Id. at 991 (citing "a series of cases involving failure to respond to complaints of overly-tight handcuffs") (emphasis added).

There, officers discovered that the plaintiff was an injured victim rather than a suspect after they forced him to the ground. Id. at 989. Despite this fact, the officers ignored the plaintiff's complaints that the asphalt was burning him and his request to move to a grassy area. Id. at 989–90. The plaintiff began "moving his shoulders back and forth in an attempt to lift his back and arms off the asphalt," but the officers held him down against the asphalt. Id. at 987. It took officers four to six minutes after the plaintiff began complaining to finally place a blanket under him. Id. at 990. As a result, he suffered second degree burns. Id.

In turn, the officers in Howard violated the plaintiff's clearly established right by ignoring his consistent and explicit complaints for four to six minutes and by forcibly preventing him from moving without any justification. Id.

In comparing these cases, this court finds that there is no clearly established right against being restrained on hot asphalt for a brief period of time. Even in Price and Rubio, the courts did not find violations of the Fourth Amendment, despite the fact that officers there used more extreme methods of restraining the suspect on the ground than in the instant case (i.e., hog-tying or hobble-tying). Additionally, the Eighth Circuit in Howard limited the right it was identifying to the right against having one's complaints of pain ignored by arresting officers.

Even if the right identified in Howard is a clearly established right, a question this court does not reach today, it would not be applicable to the instant case. Paulos admits that she does not remember explicitly telling any of the officers on scene that she was being burned by the asphalt or was generally in pain. (Doc. # 33-2 pp. 79–83).[5] Similarly, all the officers claim that Paulos never expressed any discomfort to them. While Paulos does assert she screamed in pain for some portion of the time she was on the ground, (doc. # 33-2 p. 79), she also screamed incoherently at officer Baca before attacking him, (doc. # 33-3 pp. 15–16),[6] and later yelled to herself while seated in the grassy area (doc. # 33-5 p. 22). Therefore, it is clear that Paulos did not communicate her pain to the officers in any discernible manner.

Accordingly, the court finds that LVMPD defendants did not violate any right established by case law.

b. Whether officer Baca's conduct was patently violative of the Constitution

---

[5] This portion of Paulos' deposition refers to a twenty-minute period she spent on the ground. This time range, however, is based on an estimate she heard from a nurse after the incident. (Doc. # 33-2 p. 50). Asked about her personal recollection, Paulos responded: "I don't know how long I was on the ground." (Id.). Therefore, this speculation does not conflict with the court's earlier determination based on the security footage that Paulos spent a total of five minutes on the ground.

[6] Paulos does not deny screaming prior to attacking officer Baca, but rather claims that she does not remember doing so. She stated: "I don't know what occurred before I was placed on the ground." (Doc. # 33-2 p. 80).

The Ninth Circuit has recognized that some conduct is "'so patently violative of [a] constitutional right' that reasonable officers should have known that their actions were unconstitutional without guidance from the courts." Boyd, 374 F.3d at 783 (quoting Deorle, 272 F.3d at 1286). This court finds that officer Baca's conduct does not fit this description. It is undisputed that he reasonably brought Paulos to the ground after she attacked him and then struggled to handcuff her. It would be very difficult to conclude that briefly allowing her to remain on the ground was a patent violation of the Constitution, when Paulos neither complained of injuries nor exhibited them immediately after the incident.

Based on the foregoing reasons, the court finds that officer Baca did not violate a clearly established right and thus qualified immunity applies to him and all LVMPD defendants for Paulos' excessive force claim. The court will therefore grant LVMPD defendants' motion for summary judgment on this claim.

III. Monell claim against LVMPD (claim five)

Under Monell, municipal liability must be based upon the enforcement of a municipal policy or custom, not upon the mere employment of a constitutional tortfeasor. 436 U.S. at 691. Therefore, in order for liability to attach, four conditions must be satisfied: "(1) that [the plaintiff] possessed a constitutional right of which he was deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate indifference to the plaintiff's constitutional right; and (4) that the policy is the moving force behind the constitutional violation." Van Ort v. Estate of Stanewich, 92 F.3d 831, 835 (9th Cir. 1996) (internal quotation marks omitted).

Here, the court has already determined that LVMPD officers did not violate Paulos' Fourth Amendment rights. Accordingly, there is no liability to impute to their municipal employer (i.e., Las Vegas Metropolitan Police Department). The court therefore grants LVMPD defendants' motion for summary judgment on Paulos' Monell claim.

IV. State law claims against LVMPD defendants and Palms

Considering the court's ruling on the instant motions, the only remaining claims in this suit are Paulos' state law claims against LVMPD defendants (negligence) and Palms (negligence and false imprisonment). The court therefore declines to exercise supplemental jurisdiction over these

state law causes of action. *Wade v. Reg'l Credit Ass'n*, 87 F.3d 1098, 1101 (9th Cir. 1996) (holding that "where a district court dismisses a federal claim, leaving only state claims for resolution, it should decline jurisdiction over the state claims and dismiss them without prejudice").

Based on the foregoing, Paulos' remaining state law claims will be dismissed without prejudice.

V. Conclusion

Based on the above analysis, the court will grant LVMPD defendants' motion for summary judgment, (doc. # 33), as to Cristina Paulos' fourth claim (excessive force) and fifth claim (Monell municipal liability). The court will therefore decline to exercise supplemental jurisdiction over the state law claims against LVMPD defendants (negligence) and Palms (negligence and false imprisonment) and dismiss them without prejudice.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that LVMPD defendants' motion for summary judgment, (doc # 33), be, and the same hereby is, GRANTED in part, as to plaintiff's federal claims.

IT IS FURTHER ORDERED that plaintiff's remaining state law claims against LVMPD defendants and Palms, be, and the same hereby are, DISMISSED without prejudice.

IT IS FURTHER ORDERED that Palms' motions for summary judgment, (docs. # 34, 35), be, and the same hereby are, DENIED as moot.

IT IS FURTHER ORDERED that plaintiff file her motion for default judgment against defendant Jeannie Houston within ten days of the date of this order, when the court intends to close the case.

DATED March 12, 2015.

James C. Mahan

UNITED STATES DISTRICT JUDGE

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Other Negligence	**COURT MINUTES**	**September 14, 2015**

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

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

HEARD BY: Bare, Rob **COURTROOM:** RJC Courtroom 03C

COURT CLERK: Tia Everett

PARTIES PRESENT: No parties present

JOURNAL ENTRIES

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

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

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

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

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

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

Cal Potter Esq. (pottercal@aol.com)

Craig Anderson Esq. (efox@maclaw.com)

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

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Other Negligence	**COURT MINUTES**	**June 13, 2017**

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

June 13, 2017 **10:15 AM** **Minute Order**

HEARD BY: Bare, Rob **COURTROOM:** Chambers

COURT CLERK: Elizabeth Vargas

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- The stay was lifted in this case on May 24, 2017 pursuant to an unopposed Motion. At the request of counsel, the Court set this matter on calendar for June 13, 2017 at 9:30 a.m. in order to set a briefing schedule for the Motion for Summary Judgment which was filed on January 6, 2016. On June 13, 2017, no parties appeared at the hearing.

The briefing schedule for the Motion for Summary Judgment is set as follows:

Defendants LVMPD and Baca may file a Supplement if necessary, due by June 28, 2017 at 5:00 p.m.
Any Opposition is due by July 12, 2017 at 5:00 p.m.
Any Reply is due by July 19, 2017 at 5:00 p.m.

The hearing on the Motion for Summary Judgment is set to be heard on August 1, 2017 at 9:30 a.m.

CLERK'S NOTE: A copy of this minute order was placed in the attorney folder(s) of: Justin Smerber, Esq. (Moran Brandon Bendavid Moran); Eliott Blut, Esq. (Blut Law Group); Cal J. Potter III (Potter Law Offices); Craig Anderson, Esq. (Marquis Aurbach Coffing) //ev 6/15/17

ORIGINAL

Electronically Filed
6/26/2017 2:15 PM
Steven D. Grierson
CLERK OF THE COURT

ORDG
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 Defendants,
FCH1, LLC and JEANNIE HOUSTON

DISTRICT COURT
CLARK COUNTY, NEVADA

CRISTINA PAULOS, an individual,

Plaintiff,

v.

FCH1, LLC, a Nevada limited liability company; LAS VEGAS METROPOLITAN POLICE DEPARTMENT, a government entity; JAKE VON GOLDBERG, an individual; JEFFREY B. SWAN, an individual; JEANNIE HOUSTON, an individual; AARON BACA, an individual; and DOES 1 through 10,

Defendants.

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

ORDER GRANTING DEFENDANTS, FCH1, LLC AND JEANNIE HOUSTON'S MOTION TO LIFT STAY

Defendants, FCH1, LLC, and JEANNIE HOUSTON's Motion to Lift Stay, set for hearing on May 18, 2017, to come before this Honorable Court in Chambers, Non-Opposition being filed by, the Court having reviewed the Motion, the papers on file therein, for good cause being found in the premises, hereby, by finds the following:

JUN 0 8 2017

MB BM
MORAN BRANDON BENDAVID MORAN
ATTORNEYS AT LAW
630 SOUTH 4TH STREET
LAS VEGAS, NEVADA 89101
PHONE (702) 384-8424
FAX (702) 348-6568

Case Number: A-15-716850-C

IT IS HERBY ORDERED that pursuant to EDCR 2.20, Defendants' Motion to Lift Stay is hereby GRANTED.

IT IS FURTHER ORDERED that the Court will issue a Trial Scheduling Order in the ordinary course.

DATED this 7th day of June, 2017.

MORAN BRANDON BENDAVID MORAN

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 Defendants,
FCH1, LLC and JEANNIE HOUSTON

BLUT LAW GROUP, APC

Elliot Blut
by Jenne of Blut No 1640

ELLIOT BLUT, ESQ.
Nevada Bar No. 6570
300 South Fourth Street, Suite 701
Las Vegas, Nevada 89101
Attorney for Plaintiff,
CRISTINA PAULOS

POTTER LAW OFFICES

See Attached

CAL JOHNSON POTTER, ESQ.
Nevada Bar No. 1988
1125 Shadow Lane
Las Vegas, Nevada 89102
Co-Counsel for Plaintiff,
CRISTINA PAULOS

MARQUIS AURBACH COFFING

See Attached

CRAIG R. ANDERSON, ESQ.
Nevada Bar No. 6882
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorney for Defendant,
LVMPD

///

///

///

///

///

MORAN BRANDON BENDAVID MORAN
ATTORNEYS AT LAW
630 SOUTH 4TH STREET
LAS VEGAS, NEVADA 89101
PHONE: (702) 384-8424
FAX: (702) 348-6568

IT IS HERBY ORDERED that pursuant to EDCR 2.20, Defendants' Motion to Lift Stay is hereby GRANTED.

IT IS FURTHER ORDERED that the Court will issue a Trial Scheduling Order in the ordinary course.

DATED this 7th day of June, 2017.

MORAN BRANDON BENDAVID MORAN

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 Defendants,
FCH1, LLC and JEANNIE HOUSTON

BLUT LAW GROUP, APC

ELLIOT BLUT, ESQ.
Nevada Bar No. 6570
300 South Fourth Street, Suite 701
Las Vegas, Nevada 89101
Attorney for Plaintiff,
CRISTINA PAULOS

POTTER LAW OFFICES

CAL JOHNSON POTTER, ESQ.
Nevada Bar No. 1988
1125 Shadow Lane
Las Vegas, Nevada 89102
Co-Counsel for Plaintiff,
CRISTINA PAULOS

MARQUIS AURBACH COFFING

CRAIG R. ANDERSON, ESQ.
Nevada Bar No. 6882
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorney for Defendant,
LVMPD

///

///

///

///

///

///

MORAN BRANDON BENDAVID MORAN
ATTORNEYS AT LAW
630 SOUTH 4TH STREET
LAS VEGAS, NEVADA 89101
PHONE:(702) 384-8424
FAX: (702) 348-6568

IT IS HERBY ORDERED that pursuant to EDCR 2.20, Defendants' Motion to Lift Stay is hereby GRANTED.

IT IS FURTHER ORDERED that the Court will issue a Trial Scheduling Order in the ordinary course.

DATED this 7th day of ~~May~~ June, 2017.

MORAN BRANDON BENDAVID MORAN

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 Defendants,
FCH1, LLC and JEANNIE HOUSTON

BLUT LAW GROUP, APC

ELLIOT BLUT, ESQ.
Nevada Bar No. 6570
300 South Fourth Street, Suite 701
Las Vegas, Nevada 89101
Attorney for Plaintiff,
CRISTINA PAULOS

POTTER LAW OFFICES

CAL JOHNSON POTTER, ESQ.
Nevada Bar No. 1988
1125 Shadow Lane
Las Vegas, Nevada 89102
Co-Counsel for Plaintiff,
CRISTINA PAULOS

MARQUIS AURBACH COFFING

CRAIG R. ANDERSON, ESQ.
Nevada Bar No. 6882
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorney for Defendant,
LVMPD

///

///

///

///

///

///

MBBM
MORAN BRANDON BENDAVID MORAN
ATTORNEYS AT LAW
630 SOUTH 4TH STREET
LAS VEGAS, NEVADA 89101
PHONE:(702) 384-8424
FAX: (702) 384-6568

IT IS HERBY ORDERED that pursuant to EDCR 2.20, Defendants' Motion to Lift Stay is hereby GRANTED.

IT IS FURTHER ORDERED that the Court will issue a Trial Scheduling Order in the ordinary course.

DATED this 13 day of ~~May~~ June, 2017.

HONORABLE DISTRICT COURT JUDGE,
DEPT. XXXII

ROB BARE
JUDGE, DISTRICT COURT, DEPARTMENT 32

Submitted By:
MORAN BRANDON BENDAVID MORAN

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 Defendants,
FCH1, LLC and JEANNIE HOUSTON