Case No. 74912

In the Supreme Court of Nevada

CRISTINA PAULOS,

Appellant,

vs.

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

Respondents.

APPEAL

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

Treatises

Other Authorities

INTRODUCTION

Metro and the Palms cite nothing to answer Paulos's main point: the dismissal of Paulos's federal claims does not bar her claims under state law. The Ninth Circuit avoided stating that Metro officers executed a "reasonable seizure" under the Fourth Amendment of the U.S. Constitution when they and Palms security pinned Paulos to the scorching asphalt on a midsummer Las Vegas afternoon and left her there for more than five minutes. Regardless, that constitutional standard is a different issue from the reasonable-person standard for negligence.

Instead, the Palms and Metro throw up meritless alternative grounds for affirmance. The Palms misstates how and when negligence can be inferred, and it argues for an affirmative defense that wasn't pleaded and doesn't apply. Metro admits that the district court was wrong to categorically exclude claims for negligent training and supervision, yet Metro asks for immunity by confusing its negligent *enforcement* of department policy with the policy itself. Metro also argues that five-and-a-half minutes of agony and lifelong pain and scarring are not compensable because some of Paulos's permanent injuries occurred when Metro was supposedly justified in inflicting them, an argument

that misstates the medicine, the allegations, and the law on pain and suffering.

This Court should reverse.

I.

THE ORDER FROM THE NINTH CIRCUIT ELIMINATES ISSUE PRECLUSION

Issue preclusion is a tool for managing repeat litigation. Issues that were resolved in one suit cannot be revived in another.

But federal law[1] is clear: an issue that is initially resolved in the district court but not upheld in an appeal remains an open question in a second lawsuit. By not addressing "reasonable force" (6 App. 1380, *Paulos v. FCH1, LLC* (*Paulos II*), 685 F. App'x 581, 582 (9th Cir. 2017)), the Ninth Circuit stripped that aspect of Judge Mahan's decision of any issue-preclusive effect. "Reasonableness" is an open question for the jury in Paulos's state-court suit.

[1] Metro concedes that federal law controls. (Metro RAB 30 (citing *Clark v. Columbia/HCA Info. Servs.*, 117 Nev. 468, 481, 25 P.3d 215, 224 (2001)).)

A. The Consensus Rule: a Ground that Is Not Affirmed Is Not Preclusive

No one rebuts the major argument of the opening brief (AOB 12–23):

> If a court of first instance . . . bases its judgment on alternative grounds, and the reviewing court affirms the judgment on only one of the two grounds, refusing to consider the other, the second ground is no longer conclusively established.

Martin v. Henley, 452 F.2d 295, 300 (9th Cir. 1971).[2]

Neither Metro nor the Palms cites a single case to the contrary.

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[2] *SFM Holdings, Ltd. v. Banc of Am. Sec., LLC*, 764 F.3d 1327, 1338 (**11th** Cir. 2014); *Yingbin-Nature (Guangdong) Wood Indus. Co. v. Int'l Trade Comm'n*, 535 F.3d 1322, 1334 n.4 (**Fed.** Cir. 2008) ("When a Court of Appeals decides a case without reaching a particular issue, the resolution of that issue by the trial court does not give rise to collateral estoppel."); *Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc.*, 519 F.3d 421, 428 (**8th** Cir. 2008); *In re Kane*, 254 F.3d 325, 329 n.2 (**1st** Cir. 2001); *Salovaara v. Eckert*, 222 F.3d 19, 33–34 n.10 (**2d** Cir. 2000); *Ash Creek Min. Co. v. Lujan*, 969 F.2d 868, 872–73 (**10th** Cir. 1992); *Reuber v. Food Chem. News, Inc.*, 899 F.2d 271, 286–87 (**4th** Cir. 1990) (citing *Int'l Refugee Org. v. Republic S.S. Corp.*, 189 F.2d 858, 862 (4th Cir. 1951)), *vacated on reh'g on other grounds*, 925 F.2d 703 (4th Cir. 1991); *Gray v. Lacke*, 885 F.2d 399, 407 (**7th** Cir. 1989); *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1168 (**5th** Cir. 1981).

B. The Ninth Circuit Did Not Affirm the Finding of Reasonableness

1. The Court Expressly Limited its Decision to Immunity

Metro and the Palms ignore that the Ninth Circuit did not affirm Judge Mahan's decision that Metro's officers acted constitutionally. The Ninth Circuit instead "proceed[ed] immediately" to the question of qualified immunity: whether the officers were immune from suit because "any constitutional right at issue here was [not] clearly established." (6 App. 1380, *Paulos II*, 685 F. App'x at 582.) The court found that Paulos's right was not clearly established, so the Metro officers were immune even if they violated it. (6 App. 1381, *Paulos II*, 685 F. App'x at 582.) That is the sole finding necessary to the judgment.

2. Getting Qualified Immunity Does Not Make You Reasonable

Qualified immunity is not a badge of reasonableness. In *Mendez v. County of Los Angeles*, the Ninth Circuit granted qualified immunity to officers who entered a residence without first knocking and announcing themselves, "because it was not clearly established at the time that,

under the circumstances, the failure to knock and announce was a federal constitutional violation." 897 F.3d 1067, 1083 (9th Cir. 2018), *cert. denied*, ___ U.S. ___ (Mar. 4, 2019). Like Metro, the officers argued that the decision on qualified immunity amounted to a holding "that they behaved reasonably in failing to knock and announce" and so precluded the plaintiffs' claims under state tort law. *Id.* The Ninth Circuit emphatically disagreed, noting that "[u]nder the evolving precedent of qualified immunity, officers can receive qualified immunity under 42 U.S.C. § 1983 for acts that are *negligent under state common law*." *Id.* (emphasis added) (citing *Robinson v. Solano County*, 278 F.3d 1007, 1016 (9th Cir. 2002) (en banc)). To say that the qualified-immunity holding precludes a negligence claim "would effectively eviscerate state common law." *Id.* "[T]he doctrine of qualified immunity does not shield defendants from state law claims." *Id.* (quoting *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1171 (9th Cir. 2013)).

Here, too, the Ninth Circuit's order stops Paulos from relitigating just one issue—whether federal law "clearly establishes" the unconstitutionality of Metro's actions—an issue that Paulos's state-law claims do not touch. That decision under the "narrow and unique context" of

qualified immunity for § 1983 claims, *see id.*, does not establish that any Metro officer acted reasonably.

3. The Ninth Circuit Would Disagree with the District Court's Analysis

This is not just a technical omission. Indeed, the Ninth Circuit likely would *not* have agreed with Judge Mahan's analysis on excessive force. In *Vos v. City of Newport Beach*, officers shot a mentally disturbed man who "cut someone with scissors, asked officers to shoot him, simulated having a firearm, and ultimately charged at officers with something in his upraised hand." 892 F.3d 1024, 1035–36 (9th Cir. 2018). The Ninth Circuit considered the shooting unreasonable, in part because backup had arrived at the scene, *id.* at 1033, because the victim had not created a life-threatening danger prior to police intervention, *id.*, and because a jury could find that the officers should have recognized the victim's mental instability, *id.* at 1033–34. It didn't matter that, in retrospect, the victim's behavior could be considered criminal. *Id.* at 1031.

Here, Metro used unreasonable force in pinning Paulos to the pavement for more than five minutes. There is no evidence that Paulos

committed a violent crime before Metro arrived. (2 App. 485:11–12.) Lying with exposed skin on asphalt in the middle of a Las Vegas summer is a known, life-threatening danger. (5 App. 1246–17, ¶¶ 13–14; *see also* 2 App. 474:18–24; 2 App. 475:21–476:2.)[3] And Paulos exhibited clear signs of excited delirium and mental instability (6 App. 1266, at 18:3–9), symptoms that were not be aided by being handcuffed and pressed into the scorching asphalt for more than five minutes.

In *Vos*, as in this case, the unreasonableness of the officers' conduct did not prevent their dismissal on qualified immunity, only because existing precedent had not "placed the conclusion that officers acted unreasonably in these circumstances 'beyond debate.'" *Id.* at 1035–36 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015)).

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[3] *See* Cynthia Hubert, *Police Held Him Down on the Hot Pavement. He Ended Up in a Burn Unit, Fighting for his Life*, SACRAMENTO BEE (updated July 24, 2017), *available at* https://www.sacbee.com/news/local/crime/article162589428.html (describing near-fatal injuries from police restraining mentally ill individual on hot pavement). *See generally* Michel H.E. Hermans, M.D., *An Introduction to Burn Care*, 32 ADVANCES IN SKIN & WOUND CARE: THE JOURNAL FOR PREVENTION & HEALING 9, 10 (Jan. 2019), *available at* https://www.nursingcenter.com/cearticle?an=00129334-201901000-00003&Journal_ID=54015&Issue_ID=4871323#P28.

C. The Rule's Policy Is Advanced, Not Undermined, in Paulos's Case

Metro recognizes the rule that defeats preclusion but suggests, wrongly, that the policies underlying the rule aren't at play here, so this Court can ignore the rule in this particular application. (Metro RAB 36–37.) Metro argues that it is "troubling to limit issue preclusion to the rulings explicitly addressed in an unpublished memorandum disposition." (Metro RAB 37.) But what is troubling is the attempt to *expand* a deliberately narrow decision into a sweeping one. Metro forgets that Paulos could not force the Ninth Circuit to reach both grounds: courts may grant qualified immunity just by showing that a constitutional right was not clearly established without deciding that the right was violated. *See Perason v. Callahan*, 555 U.S. 223, 236–42 (2009) (cited at 6 App. 1380, *Paulos II*, 685 F. App'x at 582).

The concern that one erroneous ground of decision (such as Judge Mahan's "reasonableness" analysis) will go uncorrected in a summary affirmance of the other alternative ground is the reason for the rule. Metro's argument to apply issue preclusion to the unreviewed ground has no support.

D. Paulos Emphasized What Was Left Unaffirmed to Preserve the Issue

The Palms does not dispute that the preclusion issue is properly presented. It simply misrepresents that the Ninth Circuit "determined that [Metro] Officer Baca acted reasonably under the circumstances." (Palms RAB 2.)

Metro wrongly contends that Paulos waived the issue. (Metro RAB 28.) After the Ninth Circuit's decision, Paulos argued that issue preclusion could not apply because of the limited scope of affirmance: while "the Ninth Circuit affirmed the grant of Qualified Immunity, it did not find that Defendants acted reasonably." (6 App. 1396:26–27.)[4] This is precisely Paulos's argument on appeal.

E. Alternative Grounds at the District-Court Level Are a Moot Question

Federal courts split on whether to adopt the modern rule[5] that an unappealed decision resting on alternative grounds is not preclusive as

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[4] *See also Mendez*, 897 F.3d at 1083 (using "qualified immunity" in this way).

[5] RESTATEMENT (SECOND) OF JUDGMENTS, § 27 cmt. i (1982); *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008 (7th Cir. 1997) (en banc) (calling the Restatement's approach a "general principle[] of issue preclusion").

to either ground. *Phil-Insul Corp. v. Airlite Plastics Co.*, 854 F.3d 1344, 1357 n.2 (Fed. Cir. 2017).[6] Once a party appeals, however, that debate vanishes: what the appellate court does controls.[7]

Here, because Paulos appealed and obtained a judgment that did not affirm Judge Mahan's finding on reasonableness, what Judge Mahan's decision would have precluded without an appeal is an academic question that this Court need not resolve.

II.

THE STANDARDS OF CARE FOR THE FOURTH AMENDMENT AND NEGLIGENCE DIFFER

The issue of "reasonable care" for simple negligence is different from the issue of "objective reasonableness" for a violation of the Fourth Amendment.

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[6] Paulos raised this issue at 7 App. 1664:17–22.

[7] *See Stanton v. Schultz*, 222 P.3d 303, 308 (Colo. 2010):

> The present case, however, does not require us to enter this debate. Comment i addresses situations in which the trial court's alternative judgments were not appealed. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. i, illus. 15 (1982).[] When the judgment has been appealed, comment *o* provides the more appropriate analysis.

(Footnote omitted.) (*See* AOB 14.)

A. Tort Law and the Fourth Amendment Diverge on What Is "Reasonable"

1. No One Attempts to Distinguish the Cases from the Opening Brief

The cases that Paulos cited in the opening brief (at 16–18), and that neither Metro nor the Palms tries to distinguish, make clear that "[t]he Fourth Amendment's 'reasonableness' standard is not the same as the standard of 'reasonable care' under tort law." *Hayes v. County of San Diego*, 305 P.3d 252, 262–63 (Cal. 2013) (quoting *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002)). Tort law holds public officers to a higher standard than does the U.S. Constitution. *Vos*, 892 F.3d at 1037–38 (citing *Villegas v. City of Anaheim*, 823 F.3d 1252, 1257 n.6 (9th Cir. 2016) and *Hayes*, 305 P.3d at 263).

2. The Difference in the Standards of Care Defeats Issue Preclusion

They are not merely different *claims*, as Metro contends. (*See* Metro RAB 33.) The *issue* of the governing standard is different. A common term such as "reasonableness" does not obscure the "different interpretive case law" that distinguishes federal constitutional law from

state analogues. *Jensen ex rel. Jensen v. Cunningham*, 250 P.3d 465, 477–78 (Utah 2011).

This is especially true for excessive-force claims. The U.S. Constitution regulates only reckless or deliberate acts[8] leading to the use of intentional force,[9] so "unreasonable" in that context means something more like "unjustifiable"—as in whether it's justifiable to shoot a person approaching with a drawn weapon.[10] The Constitution does not regulate acts or omissions that are unreasonable in the sense of "careless." *Pauly*, 874 F.3d at 1219–20.

Brower v. County of Inyo, 489 U.S. 593 (1989) highlights the difference. Metro argues that *Brower* did not "address preclusion in cases where the same underlying circumstances allegedly support a Fourth Amendment claim and a state negligence claim." (Metro RAB 35.) But *Brower*'s example of a carelessly parked police car that "slips its brake and pins a passerby against a wall" was drawn for exactly that purpose: The Fourth Amendment, unlike negligence, requires intentional conduct. 489 U.S. at 596. So if the victim brought Fourth Amendment and

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[8] *Pauly v. White*, 874 F.3d 1197, 1219–20 (10th Cir. 2017).

[9] *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989)

[10] *Hayes*, 305 P.3d at 261.

state tort claims, the Fourth Amendment claims would be dismissed and the state law claims would go forward. *Id.*

Similarly, in *Hayes v. County of San Diego*, 305 P.3d 252 (Cal. 2013), the reasonableness of *intentional* police action did not bar a negligence claim based on prior, *careless* conduct. There, police responded to a call about a suicidal man by entering the home, ordering the man to show his hands, and—when he approached the officers with a knife—shooting him. *Id.* at 254. Under the Fourth Amendment, the shooting itself was a reasonable use of force. *Id.* at 256. But state tort law provided a remedy for "negligently provoking [that] dangerous situation." *Id.* at 256.

State courts across the country confirm that a finding of objective reasonableness in a federal civil-rights claim does not create issue preclusion in a subsequent state tort action. *Jensen ex rel. Jensen v. Cunningham*, 250 P.3d 465, 477–78 (Utah 2011); *Walker v. City of Huntsville*, 62 So. 3d 474, 493 (Ala. 2010); *Thacker v. City of Hyattsville*, 762 A.2d 172, 182–83 (Md. Ct. Spec. App. 2000); *Scott v. Henrich*, 938 P.2d 1363, 1366–68 (Mont. 1997); *cf. also Reynolds v. Krebs*, 916 N.Y.S.2d 699, 701 (N.Y. App. Div. 2011) (dismissal of federal due process claim

did not resolve the issue in a negligence claim, "whether a defendant breached a duty of reasonable care").

3. Two Issues Can Spring from One Set of Facts and Have Different Outcomes

The similar facts underlying Paulos's federal civil-rights claim and state tort claims do not mean that they present the same legal issues. In conflating the Fourth Amendment's "objective reasonableness" standard with Nevada's "reasonable care" standard for negligence, Metro ignores how Paulos's pleadings raise different issues. First, she asked for relief under federal law on the basis that her detention "constituted a use of excessive force without sufficient cause therefor." (1 App. 50:9–13, ¶¶ 41–42.) Second, she asked for relief under state law for Metro's negligence: in leaving her exposed for more than five minutes to the life-threatening peril that it had created, the officers "failed to use reasonable care." (3 App. 621:6–8, ¶ 29.)

As contrasted with Judge Mahan's analysis of "objective reasonableness" under the Fourth Amendment, neither the Ninth Circuit nor Judge Mahan adjudicated whether leaving Paulos handcuffed on scorching pavement fell below a standard of ordinary, reasonable care.

B. Judge Mahan Ceded Jurisdiction Rather than Decide Negligence

It is no surprise that Judge Mahan did not wade into Paulos's state-law claims. If the elimination of federal liability were conclusive on the question of negligence, he would have dismissed Paulos's tort claims on the merits. Instead, he left them for resolution in state court. *See Scott*, 938 P.2d at 1368.

C. Metro Continues to Rely on Overruled or Inapt Cases

1. Hayes *Abrogated All the Cases Cited for California Law*

Without addressing Paulos's authorities (*see* AOB 16–18), Metro relies again on cases that Paulos identified as having been overruled. Metro cites *Hernandez v. City of Pamona*, 207 P.3d 506 (Cal. 2009) as holding that the standard of "reasonable care" is identical under federal and state law (Metro RAB 34), but *Hayes* calls that a "misread[ing]." *Hayes*, 305 P.3d at 263. Two other pre-*Hayes* decisions—*Belch v. Las Vegas Metro. Police Dep't*, No. 2:10-CV-00201-GMN-VCF, 2012 WL 4610803 (D. Nev. Sept. 30, 2012) (cited at Metro RAB 32) and *Knapps v.*

City of Oakland, 647 F. Supp. 2d 1129 (N.D. Cal. 2009) (cited at Metro RAB 34)—trace back to *Munoz v. City of Union City*, 16 Cal. Rptr. 3d 521 (Cal. Ct. App. 2004), which *Hayes* overruled on the point that Metro now presses. *See Hayes*, 305 P.3d at 639 n.1. (*See* AOB 19.)

2. Washington Law, which Requires Gross Negligence and Bad Faith, Is Inapt

Metro also cites *Luchtel v. Hagemann*, 623 F.3d 975 (9th Cir. 2010) (cited at Metro RAB 32), but it is inapt because it is not comparing the Fourth Amendment to an ordinary negligence standard like Nevada's.[11] *Luchtel* analyzed Washington's limited waiver of immunity: "Officers cannot be liable for detaining a person for a mental-health evaluation under Washington law if the officers acted with *good faith* and without *gross negligence*." *Luchtel v. Hagemann*, 623 F.3d 975, 984 (9th Cir. 2010) (emphasis added) (citing WASH. REV. CODE § 71.05.120) (quoted sentence omitted at Metro RAB 32).

The difference is critical. Even negligent acts can be done in good faith. *Guild v. First Nat. Bank of Nev.*, 92 Nev. 478, 483, 553 P.2d 955,

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[11] *See* AOB 20–22 (discussing Metro's reliance on cases applying Michigan law, which, like Washington but unlike Nevada, immunizes acts of ordinary negligence).

958 (1976) (citing NRS 162.020(2)). In Washington, good faith is equivalent to qualified immunity—a belief that conduct is "lawful, in light of clearly established law." *Estate of Lee ex rel. Lee v. City of Spokane*, 2 P.3d 979, 991 (Wash. Ct. App. 2000) (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). And gross negligence is "substantially and appreciably greater than ordinary negligence." *Estate of Davis v. State, Dept. of Corr.*, 113 P.3d 487, 491 (Wash. Ct. App. 2005). "[I]ncomplete and unreasonable" conduct "does not rise to the level of gross negligence." *Id.*

In Nevada, by contrast, simple negligence is enough. NRS 41.031(1). Incomplete and unreasonable conduct, such as keeping Paulos on the burning pavement for more than five minutes, subjects an officer to liability.

3. Metro's Distortion of Authority Makes Clear: It Has No Support

These contortions are telling. Metro cannot produce a single decision holding that a claim for ordinary negligence is foreclosed by a finding of reasonableness under the Fourth Amendment.

This Court should join its sister courts in holding that the dismissal of a Fourth Amendment excessive-force claim is not issue preclusive on the question of ordinary negligence under state law.

D. Under the Correct Standard, Metro Did Not Use Ordinary Care

Even if no Metro officer applied "excessive force" within the meaning of the Fourth Amendment, Officer Baca and his colleagues breached their duty of ordinary care.

"[T]o leave a secured person in a position of direct contact with a surface so hot as to cause . . . extreme burn injuries" is unconscionable. (3 App. 570, ¶ 12(c), (d).) Not only was Paulos handcuffed with her hands behind her back, making it impossible for her to get up or shield herself from the asphalt, but Officer Baca restrained her head in a way that made movement even more dangerous. (7 App. 1625, at 27:22–28:1; 7 App. 1627, at 41:12-21.) After Officer Baca handcuffed Paulos, he left her on the ground supposedly because he felt "[t]ired, winded," yet no officer said, "Look, let us take it from here." (7 App. 1539:6–12.) Because Metro's policy was "not to place individuals [with excited delirium] down for a prolonged period on a prone position," as soon as Paulos was

handcuffed, or certainly once backup arrived, no one should have continued to push her into the burning pavement. (2 App. 478:6–21, 2 App. 479:6–7.)

III.

THE PALMS, ON ITS OWN AND WITH METRO, COMMITTED TORTS AGAINST PAULOS

The Palms owed Paulos a duty of aid and protection against physical harm, both because of its special relationship to its patrons and because Palms security contributed to Paulos's peril by intervening. *Mangeris v. Gordon*, 94 Nev. 400, 402–03, 580 P.2d 481, 483 (1978) (adopting RESTATEMENT (SECOND) OF TORTS § 314A (1965)); RESTATEMENT (SECOND) OF TORTS § 322 (1965).

The jury can infer negligence from the circumstances of Paulos's injury and specific evidence that the Palms mishandled the situation.

A. Paulos's Burns Give Rise to an Inference of the Palms' Negligence

1. The General Rule Palms Cites Has an Exception: Res Ipsa *Cases*

The Palms trumpets the general rule that an accident is not its own proof of negligence (Palms RAB 19 (citing *Gunlock v. Frontier Hotel*, 78 Nev. 182, 185, 370 P.2d 682, 684 (1962))), ignoring that

> *[r]es ipsa loquitur is an exception* to the general negligence rule, and it permits a party to infer negligence, as opposed to affirmatively proving it, when certain elements are met.

Carver v. El-Sabawi, 121 Nev. 11, 15–16, 107 P.3d 1283, 1285–86 (2005) (emphasis added) (quoting *Woosley v. State Farm Ins. Co.*, 117 Nev. 182, 188, 18 P.3d 317, 321 (2001)). The doctrine acknowledges that some injuries "ordinarily do[] not occur in the absence of someone's negligence." *Woosley v. State Farm Ins. Co.*, 117 Nev. 182, 193, 18 P.3d 317, 323 (2001). Those circumstances "raise a presumption, or at least permit an inference, of negligence." *Dolorfino v. Univ. Med. Ctr. of S. Nev.*, 134 Nev., Adv. Op. 79, 427 P.3d 1039, 1040 (2018) (quoting *Las Vegas Hosp. Ass'n v. Gaffney,* 64 Nev. 225, 233, 180 P.2d 594, 598 (1947)).

The Palms' absolute position that "[n]egligence is never presumed" has been overruled. *See Carver*, 121 Nev. at 15–16, 107 P.3d at 1285–86. Indeed, to so instruct the jury in a *res ipsa* case is error. *Id.*

2. Res Ipsa *Is a Rule of Evidence, Not a Pleading Requirement*

Equally baseless is the Palms' objection that Paulos needed to plead *res ipsa loquitur* as a cause of action. (Palms RAB 20.) *Res ipsa loquitur* customarily arises at trial because it is "a rule of evidence, not a substantive rule of law," meaning it "is not a rule of pleading, but rather an inference aiding in the proof." *Las Vegas Hosp. Ass'n*, 64 Nev. at 234, 180 P.2d at 598–99.[12] The Palms cites no contrary authority. (Palms RAB 20.)[13]

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[12] *Accord Tennant v. Tabor*, 932 N.Y.S.2d 648, 649 (N.Y. App. Div. 2011); *Kerns v. Sealy*, 496 F. Supp. 2d 1306, 1315 n.13 (S.D. Ala. 2007) (quoting *Ala. Great S. Ry. Co. v. Johnson*, 71 So. 620, 621–22 (Ala. Ct. App. 1916)); *Hofer v. Gap, Inc.*, 516 F. Supp. 2d 161, 172 n.12 (D. Mass. 2007); *Gifford v. City of Meriden*, 864 A.2d 902, 904 (Conn. Super. Ct. 2004); *Rector v. Oliver*, 809 N.E.2d 887, 895 (Ind. Ct. App. 2004); *Martinez v. CO2 Servs., Inc.*, 12 Fed. App'x 689, 692 (10th Cir. 2001) (quoting *Mireles v. Broderick*, 872 P.2d 863, 866 (N.M. 1994)); *Haddock v. Arnspiger*, 793 S.W.2d 948, 950 (Tex. 1990).

[13] By dismissing solely on issue preclusion, which did not depend on the evidentiary record, the district court kept Paulos from finishing discovery or amending her claims. *Cf.* NRCP 56(f). If *res ipsa loquitur* has to be

3. Burns Sustained while in Someone's Care Are the Classic Case of Res Ipsa

An instruction on *res ipsa loquitur* would be appropriate here. The Palms does not dispute the similarity of this case to *Heastie v. Roberts*, 877 N.E.2d 1064 (Ill. 2007) (discussed at AOB 26–27), which this Court may consider persuasive. Besides, this case resembles one of the earliest examples from Nevada: In *Las Vegas Hospital Ass'n v. Gaffney*, this Court specifically held that the doctrine applies when an incapacitated plaintiff suffers burns. 64 Nev. at 235–37, 180 P.2d at 599–600 (citing *Meyer v. McNutt Hosp.*, 159 P. 436 (Cal. 1916)). There, the plaintiff awoke from anesthesia following childbirth to find a "serious burn or injury on her leg" causing a permanent scar. *Id.* at 225, 227–30, 180 P.2d at 595–97. The plaintiff did not mention *res ipsa loquitur* in the complaint, and the hospital argued for dismissal because she did not plead or prove specific acts of negligence. *Id.* at 232–33, 180 P.2d at 598. This Court disagreed. *Id.* at 234, 235–37, 180 P.2d at 598. Even though the plaintiff lacked "proof of any acts of negligence," and even though the hospital *did* present specific evidence that its staff could not have

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pleaded, Paulos should be allowed to amend her complaint on remand.

caused her injuries, the jury was free to infer negligence. *Id.* at 237–38, 180 P.2d at 600.

Here, too, Paulos suffered severe burns while mentally and physically incapacitated. The surveillance footage has significant gaps and does not convey the conversations among Palms employees or between Palms security and Metro. Officer Baca did not complete a "use of force" report to corroborate the Palms' account, and he does not have "any field notes or anything concerning this incident." (7 App. 1541:5–17.) Like the hospitals in *Las Vegas Hospital Ass'n* and *Heastie*, defendants are free to put on evidence that they could not have done anything to assist Paulos. But the jury is free to disbelieve them.

B. Paulos Presented Specific Evidence of the Palms' Negligence

Even without a *res ipsa* instruction, specific evidence demonstrates the Palms' negligence.

1. The Palms' Duty Was to Protect Paulos from Harm and Come to Her Aid

The Palms wrongly suggests that its duty to protect Paulos was never triggered because the Palms did not actually know about any

physical injury. (Palms RAB 25, 27–28.) Apart from the fact question of what the Palms actually knew, this misstates the duty: the Palms has to *protect* its patrons against risks of injury—that is, *before* the actual injury; and it has to give aid to patrons once it "has reason to know that they are ill or injured." *Lee v. GNLV Corp.*, 117 Nev. 291, 295–96, 22 P.3d 209, 212 (2001) (duty triggered when "employees are reasonably on notice that a customer is in distress" (quoting *Drew v. LeJay's Sportmen's Cafe, Inc.*, 806 P.2d 301, 306 (Wyo. 1991))).

2. Houston Made Things Worse by Touching Paulos's Head and Moving Her Arms

The Palms' actions were unreasonable even before backup arrived. The Palms points to the admission that "it was Metro who arrested or detained the plaintiff" (Palms RAB 22, citing 7 App. 1626, at 40:23-41:1) and misrepresents that Paulos's security expert, Steve Baker, "has no criticisms" of how Paulos was detained until Houston left. (Palms RAB 22-23 (citing 7 App. 1628, at 52:3-10).) But even the cited testimony shows both that the question was only about "criticism of *Officer Baca*," not the Palms, and that Baker *did* criticize "him touching her head," which is also one of the criticisms of Houston:

> [G]oing to the head again, which happens to be the issue here, wouldn't be appropriate. Holding them down on the pavement wouldn't be appropriate. Continuing to let them lay on the pavement wouldn't be appropriate.

(7 App. 1627, at 41:12-21.) The Palms makes much ado over Baker's out-of-context "admission" that House did not use "excessive force" (Palms RAB 23), disregarding that Baker carefully distinguished the *danger* or *impropriety* of a restraint technique versus the *amount* of force used in the sense of pressure. (7 App. 1625, at 27:13–16.) Baker was emphatic that no matter the quantity of force, holding someone by the head is contrary to "anything that's taught" and "just dangerous." (7 App. 1625, at 27:22–28:1.) Holding Paulos's head made it more dangerous to move, thus making it more likely that Paulos would stay pinned to the asphalt.[14] Baker confirmed that he could see Houston "holding the plaintiff by her head" in the video (7 App. 1625, at 28:2–7) and decries that as an improper restraint technique. (7 App. 1625, at 28:8-10.)

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[14] The Palms ought to have known about and trained its security guards to deal with the danger of hot asphalt. (3 App. 548, William Z. Harrington et al, *Pavement Temperature and Burns: Streets of Fire*, 26 ANNALS EMERG. MED. 563 (1995); 2 App. 478:6–21, 2 App. 479:6–7.) Houston testified, however, that security guards receive no training on "dealing with hot surfaces." (5 App. 1209, at 20:2–6; 5 App. 1218, at 55:2–6.)

Regardless, as we discussed, excessive force is not the same as negligence. Officer Baca disclaims asking Houston to keep Paulos pinned to the ground, and Metro did not prevent Houston from lifting Paulos off of the pavement. (7 App. 1546:13–14.)

In addition, Officer Baca testifies that Houston was "[a]ttempting to help me get Ms. Paulos' arms out from underneath her." (3 App. 443:10–11.) The jury could infer that Paulos was trying to use her arms to shield her body from direct contact with the asphalt and that Houston and Officer Baca deliberately or negligently made Paulos's injuries worse by forcing her more directly into the asphalt.

3. The Palms Abandoned Paulos without Seeing What Help Metro Needed

The problem after Houston left was not that Palms security physically held Paulos to the asphalt; it's that "they just left her laying there." (7 App. 1627, at 42:19–24.) Houston and her supervisors were negligent for not paying attention to what was going on after Houston left.

After backup arrived, Houston considered herself free to go, but the jury could conclude that in doing so she was abandoning Paulos to

an officer who was physically exhausted and a group of new officers who did not understand the situation or the urgent need to get Paulos off of the pavement. The arrival of backup "doesn't necessarily mean that it ceases [the Palms'] involvement. It ceases their direct physical contact with the plaintiff that I'm aware of at that point." (6 App. 1355, at 23:14–17.) "That is the issue here, because if they were in Metro's control they wouldn't need assistance." (6 App. 1355, at 22:21–23.) Everyone present—Officer Baca, Houston, and the arriving backup—had a duty to move Paulos off of the asphalt. Officer Baca didn't. And Houston negligently abandoned Paulos without bothering to see whether that duty was discharged.

4. The Palms Should Have Trained to Watch for Signs of Mental Instability

The Palms also confuses symptoms of mental instability with a diagnosis of mental illness. (Palms RAB 28.)

> Psychosis is a condition in which a person has lost touch with reality or believes that things which are not true are actually true. Psychosis is not a mental illness diagnosis, but it is a symptom of a number of mental health disorders. In some cases, psychosis may be a symptom of illness, substance use, exposure to toxins, or allergic reactions. Regardless of the cause, patients with psychosis can have difficulty interacting

> with their environment, which can render them virtually incapable of functioning in a normal or healthy manner.

Learn about Psychosis Treatment, BELMONT BEHAVIORAL HOSPITAL, https://www.belmontbehavioral.com/disorders/psychosis/ (last visited Mar. 10, 2019).

Officers in a security role ought to recognize excited delirium, psychosis, or other mental instability. (*See* 6 App. 1266, at 18:3–9, 19:11–16.) Getting a diagnosis takes longer because psychosis features in multiple psychiatric disorders—not just bipolar, but the schizophrenia spectrum disorders and major depressive disorder—as well as neurologic conditions. David B. Arciniegas, M.D., *Psychosis*, 21 CONTINUUM 715, 720 (2015).

According to Houston, though, the Palms offered no training on dealing with emotionally-disturbed people. (5 App. 1212, at 33:12–14; *see also* 5 App. 1213, at 37:16–18.) Palms and Metro had reason to know that Paulos was suffering a psychosis that required their aid—not to be left handcuffed on the scorching asphalt.

C. No Affirmative Defense of "Good Faith" Applies to Paulos's Claims

The Palms asserts that Paulos cannot assert a claim of false imprisonment because complied in "good faith" with Metro's directions. But that defense does not warrant dismissal: the Palms did not raise it, it does not apply to false-imprisonment claims under state law, and it leaves a factual dispute for the jury.

1. The Defense Was Not Pleaded Affirmatively in the Palms' Answer

An affirmative defense that is not pleaded in the answer is forfeited. NRCP 8(c); *Clark Cty. Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 395 & n.25, 168 P.3d 87, 96 & n.25 (2007).

"Good faith" compliance with the directions of law enforcement is an affirmative defense. *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 361, 212 P.3d 1068, 1076 (2009). Yet the Palms pleaded no such defense. (3 App. 627–30.) It mentioned good faith for the first time in its reply brief on summary judgment—too late, but even then without a request to amend the answer. (7 App. 610.) The Palms has forfeited the defense.

2. The Good-Faith Defense Is Not for State-Law Claims, Just § 1983

In any case, the defense of good faith applies only to claims under § 1983, not to claims under state law.

First, the Palms does not even argue that good faith bars Paulos's negligence claim, so it doesn't matter if the Palms correctly applied it to false imprisonment. Whatever the legal theory, Paulos is entitled to her recovery.

Second, good faith is not a defense to false imprisonment. The decision on which the Palms relies was *vacated in relevant part* on reconsideration. *Goodman v. Las Vegas Metro. Police Dep't (Goodman I)*, 2:11-CV-1447-RCJ, 2012 WL 1681761, at *7 (D. Nev. May 14, 2012), *order vacated in part*, *Goodman II*, 2:11-CV-1447-MMD, 2013 WL 819867 (D. Nev. Mar. 5, 2013). *Goodman*, like this case, involved a claim for false imprisonment against a casino. Because the intent for false imprisonment is the intent to commit the act of confinement, not a malicious purpose, the actor's motives are immaterial. *Goodman II*, 2013 WL 819867, at *1 (citing RESTATEMENT (SECOND) OF TORTS § 44 cmt. a (1965)), *aff'd in relevant part*, 613 F. App'x 610, 611 (9th Cir. 2015). So

Nevada law does not create a good-faith defense for false imprisonment. *Id.* Indeed, the court rejected the casino's argument that *Grosjean* allows such a defense in this context. *Id.*

The reason for this is straightforward. Private actors acting in concert with state officials can be liable for "state action," but they do not enjoy the qualified immunity that state officers do. The good-faith defense helps mitigate the unequal treatment. But if private actors are sued under state tort law, then they aren't being treated unequally from state officers, who are generally held to a standard of reasonable care. For a purely state-law claim, only state-law defenses apply.

3. The Application of the Defense Is for the Jury to Decide

In any event, the Palms has not shown that they win on that defense as a matter of law. Officer Baca's testified that he did not instruct Houston to pin Paulos down (7 App. 1546:13–14), and Houston left once backup arrived without getting permission from Officer Baca or the arriving officers—without seeing that Paulos was moved to safety. (*See* Palms RAB 12; 7 App. 1536:1–3 (no one asked Officer Baca to take Paulos to the grass).) Unlike the specific orders followed in *Grosjean*, Hou-

ston was responding to a broad summons (7 App. 1533:19–22), and it is far from clear that her *particular* actions followed the express requests of law enforcement.

IV.

METRO CAN BE SUED FOR ITS NEGLIGENT TRAINING AND SUPERVISION[15]

Metro confesses error in the district court's categorical prohibition of claims against Metro for negligent training and supervision.

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[15] Paulos adequately alleged these claims. (*Contra* Metro RAB 41 n.8.) Metro's duty "in the hiring, training, supervision and retention of their employees" was not to "*allow their employees to cause* Plaintiff to suffer emotional and physical injuries." (3 App. 620:28–621:2, ¶ 27 (emphasis added).) Metro "knew or should have known that reckless disregard for the rights and safety of Plaintiff could lead to serious and life threatening injuries" (3 App. 621:9–11, ¶ 30), and as a result of the officers' negligent and reckless actions, "Plaintiff suffered severe bodily injury." (3 App. 621:5–15, ¶¶ 28–31.) That states a breach of the duties of training and supervision.

In addition, while Metro asserts that "Paulos had a full opportunity to conduct discovery" (Metro RAB 39), the Court applied its *per se* rule to dismiss the negligent training and supervision claim three months before the discovery cutoff. (7 App. 1679:1–3; 4 App. 971; 4 App. 969.) On remand, Paulos should be given additional discovery.

A. In Disclaiming *Per Se* Immunity, Metro Confesses Error

Metro concedes that "improper training and supervision are not per se immune acts." (Metro RAB 42, 46.) That's not even "particularly controversial," Metro says. (Metro RAB 42.)

The district court, though, applied just such a blanket rule, holding *as a matter of law* that "the discretionary function exception bar[s] negligent hiring and supervision claims." (4 App. 976:17–24, ¶ 4 (citing *Beckwith*, *Neal-Lomax*).)

In retreating from the rule that the district court applied, Metro has confessed error.

B. Deciding Not to Enforce a Policy Is Not a Policy

Metro confuses the adoption of department policy with training and supervision to enforce that policy. Social, economic, or political policy choices are generally immune. *Martinez v. Maruszczak*, 123 Nev. 433, 446, 168 P.3d 720, 728–29 (2007). But the "[n]egligent failure to perform a policy decision—such as a failure to provide information and training to employees . . .—would not involve the same policy

judgments as the actual creation of those policies and procedures." *In re Tenn. Valley Auth. Ash Spill Litig.*, 787 F. Supp. 2d 703, 718 (E.D. Tenn. 2011) (citing *In re Ohio River Disaster Litig.*, 862 F.2d 1237, 1246 (6th Cir. 1988) and *Reminga v. United States*, 631 F.2d 449, 452 (6th Cir. 1980)).

C. The Problem Is Not The Policy; It Is the Negligent Training

Here, Metro's own policy recognizes the special dangers of dealing with people who are experiencing excited delirium or other mental instability: officers are "not to place individuals [with excited delirium] down for a prolonged period on a prone position" "[s]o they can breathe a little bit better." (2 App. 478:6–21, 2 App. 479:6–7.) And Metro recognizes the peril of having detainees on hot asphalt in the summer: "it is important to get suspects off the ground once it is reasonably safe to do so." (5 App. 1246–17, ¶¶ 13–14; *see also* 2 App. 474:18–24; 2 App. 475:21–476:2.)

What's not clear is whether Officer Baca or the arriving backup officers were adequately trained to take these policies seriously. (*See* 2

App. 476:20–25 (Baca doesn't recall whether training dealt with putting people on asphalt in the summer).)

1. If the Officers Followed their Training, They Were Negligently Trained

Here, Baca insists that he did exactly what he was trained to do, both in taking Paulos down to the asphalt to handcuff her—

> Q. So if you're trying to handcuff someone in a standing position and they're not being compliant what are you trained to do?
> A. To use arm locks or to take them to the ground . . . it's easier in some aspects to handcuff somebody when they're on the ground.

(3 App. 512:21–513:2) and in leaving her there for more than five minutes—

> Q. According to your training when do you take someone off the ground?
> A. When the scene's safe.
> Q. Do you believe you followed that training in this instance?
> A. Yes.

(Baca Depo., 3 App. 515:5–10.) A jury could find that Baca's negligent conduct did not follow department policy, meaning that the *training* of officers in implementing those policies was inadequate.

Likewise, Officer Baca testified that his supervisors ratified his conduct or at least were uninterested in a use-of-force report that would have helped them assess what happened and why:

> Q. Do you recall whether you filed [a use-of-force report] in this case?
> A. I did not.
> Q. And why is that?
> A. I was instructed not to do it.
> Q. Who instructed you not to file a use of force report?
> A. My supervisor.

(2 App. 462:4–19.) The lack of interest in whether Officer Baca was following department policy constitutes negligent supervision.

2. Metro Disputes the Facts; That Does Not Entitle It to Dismissal

Metro argues that it *does* train its officers "'to get suspects off the ground once it is reasonably safe to do so' and to consider the scorching heat that is common in Las Vegas summers." (Metro RAB 45 (citing 4 App. 754–55).)

But whether the training was adequate is a fact question. The jury is not required to believe, just because Metro had a *policy* to remove detainees from the asphalt as soon as possible, that its training of was *adequate* so as to instill the urgency of removing Paulos. The two-and-a-

half minute delay indicates that, notwithstanding the *policy*, officers did not actually understand the life-threatening nature of the emergency that they had created.

V.

METRO CAUSED PAULOS BOTH TEMPORARY PAIN AND LASTING INJURIES

Metro makes the abhorrent argument that because Metro justifiably caused Paulos severe burns within the first three minutes, pinning her to the asphalt unjustifiably for another two-and-a-half minutes caused no injury. (Metro RAB 49–50.) This is false as a matter of law and science.

A. Paulos Suffered More Severe Burns Because She Was on the Ground So Long

Metro misunderstands how burns progress over time.

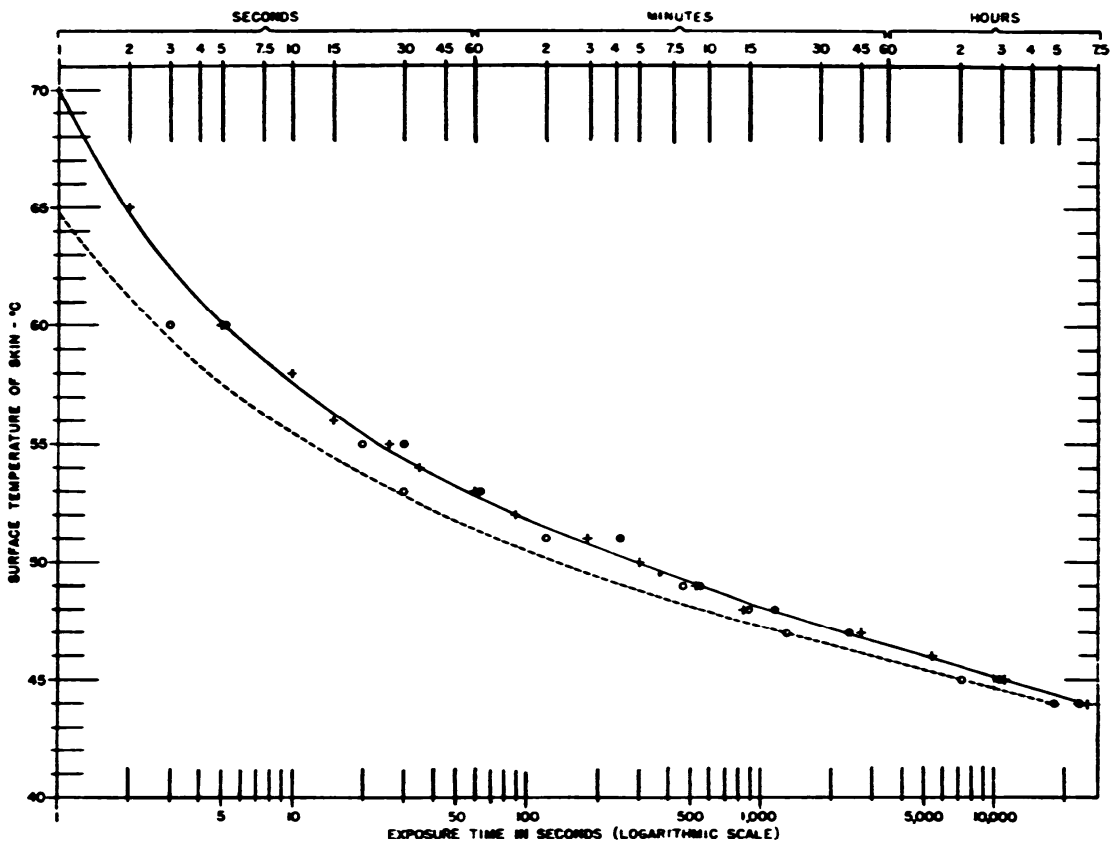
1. Burns Are Progressive Injuries: Longer Contact Means More Severe Burns

A contact burn is a progressive injury: the longer you touch the burning surface or chemical, "the worse the injury will be, and the deeper the burn will be." *Kennerly v. State*, 40 S.W.3d 718, 720 (Tex.

App. 2001). Medical science has recognized this temporal relationship for more than seven decades. *See* A.R. Moritz, M.D., & F.C. Henriques, Ph.D, *Studies of Thermal Injury: II. The Relative Importance of Time and Surface Area in the Causation of Cutaneous Burns*, 23 AM. J. PATHOL. 695 (1947), *cited in* Hermans, *supra*, at 13 n.63 *and* Harrington (3 App. 551). The harm caused by a burn is not fixed at the moment the burn destroys the epidermis:

> The more any given exposure exceeded in either duration or intensity the threshold at which the epidermis was destroyed, the greater the depth to which the dermis was affected.

Mortiz & Henriques, *supra*, at 706–07. A third-degree burn just means one that causes "a significant degree of irreversible injury to the dermis," *id.*, but the level and depth of the destruction varies. The injury may be irreversible at a certain point, but that is not the end of the injury. *See id.* at 718. After destruction of the dermis, the burn begins to affect the tissue beneath the skin. Hermans, *supra*, at 12.



Text-Figure 4. Time-surface temperature thresholds at which cutaneous burning occurs. The broken line indicates the threshold at which irreversible epidermal injury of porcine skin is first sustained. The solid line indicates the threshold at which epidermal necrosis of porcine skin occurs. Critical exposures of porcine skin are represented by crosses. Each cross denotes the shortest exposure time at the temperature indicated which resulted in trans-epidermal necrosis. The results of critical experimental exposures of human skin are indicated by circles. The open circles represent the longest exposure at the temperature indicated that failed to destroy the epidermis, and the solid circles represent the shortest exposure at the temperature indicated that resulted in trans-epidermal necrosis.

Moritz & Henriques, *supra*, at 711.

2. Paulos's Burns Got Worse Even Once They Became Irreversible

Metro's own expert notes "that the complaint alleges and Ms. Paulos testified that she was left on the ground for a *long period of time* causing *significant* burns to her leg and other burns on her buttocks

and face." (4 App. 751, ¶ 67 (emphasis added).) Just because some third-degree burns can appear after thirty seconds does not make Paulos's injuries beyond that point trivial. (6 App. 1338, at 39:24–40:12 (describing how direct contact with 140-degree pavement would cause "a burn" within 30 seconds, but not suggesting that severity would not vary); 6 App. 1318, at 16:1–20 (opining that Paulos could suffer third-degree burns in three minutes, but not describing variation among third-degree burns).) Her burns continued to more deeply and more severely destroy her skin and underlying tissue the longer she lay on the asphalt.

B. Metro's Negligence Began During Handcuffing, Not When Backup Came

Paulos has made it clear that even if Metro and the Palms were faultless before the arrival of backup, Paulos has viable tort claims. But they were negligent even before then. Her experts criticize their improper restraint techniques and their failure to stand Paulos up as soon as she was handcuffed—during the period that Metro claims Paulos suffered her permanent injuries. (7 App. 1625, at 27:22–28:10.)

C. Temporary Pain and Suffering Are as Real as Permanent Scars

Metro wrongly focuses on Paulos's permanent injuries from her burns, as though that were the only damage. She is also entitled to general damages for her pain and suffering:

> An award for pain and suffering compensates the injured person for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself. Separate damages are given for mental anguish where the evidence shows, for example, that the injured person suffered shock, fright, emotional upset, and/or humiliation as the result of the defendant's negligence.

Banks ex rel. Banks v. Sunrise Hosp., 120 Nev. 822, 836, 102 P.3d 52, 61–62 (2004) (quoting *Boan v. Blackwell*, 541 S.E.2d 242, 244 (S.C. 2001)).

Here, Paulos suffered terror and excruciating pain, not just until backup arrived, but for the entire five-and-a-half minutes or more that she was "being burnt . . . on the sidewalk because [she] wasn't allowed to stand up," five-and-a-half minutes where she felt her face and skin burning. (4 App. 901–02, at 76:7–77:2.) At least for the two minutes and forty seconds after backup arrived, Metro caused this pain and suffering.

CONCLUSION

Our neighbors with mental illness continue to suffer. *See Vegas Police, Coroner Investigating Death of Handcuffed Man*, U.S. NEWS & WORLD REP. (Mar. 8, 2019), https://www.usnews.com/news/best-states/nevada/articles/2019-03-08/vegas-police-coroner-investigating-death-of-handcuffed-man. Paulos's case illustrates the danger of using the steep barriers of federal civil-rights law to trample Nevada tort law and deny those who have suffered mistreatment their day in court. This Court should reverse.

Dated this 13th day of March, 2019.

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CERTIFICATE OF COMPLIANCE

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

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 6988 words.

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

Dated this 13th day of March, 2019.

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