Supreme Court Case No. 65143

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUDY PALMIERI,

Appellant,

vs.

CLARK COUNTY, a political subdivision of the STATE OF NEVADA; DAWN STOCKMAN, CE096, individually,

Respondents.

Appeal from the Eighth Judicial District Court for the District of Nevada
Order Granting Motions for Summary Judgment

Case No. A-11-640631-C

APPELLANT'S OPENING BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred when it declined to view the evidence in this case in the light most favorable to the non-moving party.
2. Whether the District Court erred in granting the Defendants/Respondents Qualified Immunity.
3. Whether the District Court erred in granting the Defendants/Respondents Discretionary Immunity.

II.

STATEMENT OF JURISDICTION

The Nevada Supreme Court has appellate jurisdiction pursuant to NRAP 3A(b)(1).

This appeal is timely pursuant to NRAP 4(a):

Date of entry of written order appealed from: Feb. 5, 2014

Date notice of appeal filed: Feb. 27, 2014

This appeal is from a final order granting summary judgment in favor of the Defendants/Respondents.

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III.

STATEMENT OF THE CASE AND STANDARD OF REVIEW

This is an appeal from a District Court Order granting Respondent's Motion for Summary Judgment. This case arises out of the execution of a fraudulent search warrant and subsequent malicious prosecution which was a vindictive effort against Plaintiff/Appellant Judy Palmieri ("Mrs. Palmieri"), a proprietor of pet stores in Clark County and the City of Las Vegas at the Meadows Mall. The search warrant was based upon a false affidavit, filed by Respondent Dawn Stockman, which contained material misrepresentations concerning the identity and information provided to the City of Las Vegas, which was subsequently referred to Clark County Animal Control because Mrs. Palmieri's house was in the County.

On May 19, 2010, Clark County Animal Control served a search warrant upon Mrs. Palmieri's residence at 4302 Callahan Avenue Las Vegas, Nevada. There were no exigent circumstances in existence at the time the warrant was sought or executed. Most significantly, the warrant was obtained without validating the identity of the person reporting the alleged violations at Plaintiff's residence. Additionally, the search warrant was executed on the day that a new Animal Control ordinance went into effect.

Respondents based their warrant on a purported complaint made by Kaitlyn Nichols, who in reality had never even been to Plaintiff's home. Respondents knew, or reasonably should have known, that the statement by the alleged witness was untrue. Similarly, Respondents knew, or reasonably should have known, at the time that the warrant was sought that the statements were untrue. Defendants had the intent of going to Plaintiff's residence in order to commence criminal proceedings based upon prior failed attempts to find violations.

The warrant was facially invalid and contained inaccurate information which was not only untrue but, most importantly, was unverified and unreliable. When Mrs. Palmieri offered to verify the inaccurate information the Officers refused and proceeded against Mrs. Palmieri's will to take her property without sufficient probable cause or basis in violation of Mrs. Palmieri's Constitutional rights. The information was later verified by Plaintiff demonstrating the witness had never been to Plaintiff's home further supporting retaliation against Plaintiff in violating her civil rights.

Mrs Palmieri filed suit for violations of her civil rights, malicious prosecution, and several other torts. This Court has jurisdiction over civil rights violation and state tort claims.

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The standard of review to apply for review of summary judgment orders is de novo. Tore, Ltd. v. Church, 105 Nev. 183, 185, 772 P.2 1281, 1282 (1989).

IV.

STATEMENT OF THE FACTS

Both Clark County and the City of Las Vegas have long standing grudges against Mrs. Palmieri. Each entity has subjected Mrs. Palmieri to a pattern of continued harassment and excessive scrutiny. On April 29, 2007, Clark County Animal Control Officer, Danielle Harney, filed a declaration in support of a warrant and summons for alleged violations which were attributed against Mrs. Palmieri, individually, but should have only been brought against her husband's corporation. Harney's 2007 declaration was based upon alleged lack of care and treatment of the animals under the care of the corporation at a Clark County location.

Ultimately, Clark County Animal Control caused two criminal charges to be filed against Mrs. Palmieri, prior to the prosecution which is the basis of this litigation. The first criminal charges were brought on March 28, 2008 before the Honorable J. Bonaventure. When Mrs. Palmieri refused to plead guilty in that case, Clark County Animal Control sought out the Mrs. Palmieri with the specific purpose of finding criminal activity, without a warrant, and brought second

charges against her for twenty one alleged violations. The second prosecution was initially brought before the Honorable W. Jansen on July 21, 2008. Subsequently, the two matters were consolidated before the Honorable J. Bonaventure. The March 28, 2008 and July 21, 2008 charges against Plaintiff were ultimately dismissed on May 20, 2009. This failed prosecution became the basis for the search of Mrs. Palmieri's home.

A. ANIMAL CONTROL'S FAILURE TO INVESTIGATE A FICTITIOUS COMPLAINT

Clark County argued the search warrant was based upon a purported complaint made by Kaitlyn Nichols ("Ms. Nichols"). (*APP 000017-000138*). Yet, Kaitlyn Nichols had never even been to Plaintiff's home and Ms. Nichols has testified by way of a declaration that she never made a Complaint against Mrs. Palmieri to Animal Control. (Declaration of Kaitlyn Nichols).

During her deposition in this matter, Defendant Dawn Stockman conceded that Clark Country Animal Control has a policy of failing to adequately investigate complaints and by failing to personally confirm the identity of persons making complaints. Stockman testified as follows:

> Q. Did you make any efforts to identify the individual that you had talked to as being Kaitlyn Nichols?
>
> A. No.

> Q. And why is that?
>
> A. That's not our normal procedure. We get thousands of calls. We don't go out and investigate if the person reporting is that person.
>
> Q. Okay. So your actions were pursuant to policy and practice?
>
> A. Correct
>
> Q. Of your department?
>
> A. Correct.
>
> (*APP 000164, p. 16, ln. 13-25*).

Although Stockman swore to a judge that her affidavit was truthful, during her deposition, Stockman also conceded that her affidavit included several fallacies, inaccuracies, and misrepresentations. Stockman conceded that if the individual filing the complaint was not Kaitlyn Nichols then her report "would all be fictitious" (*APP 000168, p. 32, ln. 5-6*). Likewise, Stockman conceded that she made no effort to determine whether Ms. Nichols was a former employee of Mrs. Palmieri. (*Id., p. 32, ln. 7 through p. 33, ln. 18*). Additionally, Stockman made no effort to investigate Kaitlyn Nichols' background. (*APP 000168, p. 33, ln. 25 through 000169, p. 34, ln, 2*).

Stockman made no effort whatsoever to corroborate the purported report. Stockman did not seek preliminary information, such as a description of the

residence. (*APP 000169, p. 34, ln. 13-15*). Incredibly, Stockman did not even ask the date of the alleged infractions which were the basis of the purported complaint. (*Id. p. 36, ln. 1 through p. 37, ln. 13*) Stockman likewise did not ever attempt to ascertain the number of animals alleged to be at Mrs. Palmieri's house. (*APP 000170, p. 38, ln. 1-6*).

Stockman also conceded that the prior contacts which she detailed in her affidavit concerned incidents which were not recent, but on the contrary, which had occurred approximately two and half to four and years prior. (*APP 000172, p. 46, ln. 6-11; Id. p. 49, ln. 18-21*). Lastly, Stockman never contacted Officer Jason Elff , whose prior report Stockman claimed necessitated obtaining a search warrant (*Id. p. 49, ln. 12-17*).

B. SERVICE OF WARRANT BASED ON FRAUDULENT AFFIDAVIT

On May 19, 2010, Animal Control officers Dawn Stockman and Tory Olson served a search warrant at Mrs. Palmieri's residence. (*APP 000229, ln. 13-16*). Stockman and Olson were accompanied by a Las Vegas Metropolitan Police Department officer. Metro is not a part of this lawsuit. Mrs. Palmieri's residence is in a neighborhood which is zoned "rural estates residential." Mrs. Palmieri's neighbors have horses, goats, chickens, and pigs. (*APP 000259, ln. 24 through APP 000260, ln. 6*).

At the time of the execution of the warrant, Mrs. Palmieri was in the shower when she heard her alarm chime. (*APP 000229, ln. 20-24*). Mrs. Palmieri quickly dressed and headed down stairs. When she encountered the individuals executing the search warrant, Mrs. Palmieri was in pajamas and was not wearing underwear nor shoes. (*APP 000233, ln. 20-22*).

Thereafter, Mrs. Palmieri told the agents that there were inaccuracies in the affidavit. (*Id. ln. 12-13*). While executing the warrant, Dawn Stockman told Mrs. Palmieri that "Animal Control has never been able to get anything on you until now" (*APP 000273 ln. 18-22*). Mrs. Palmieri understood Stockman's statement to mean that the very day that a new ordinance went into effect animal control served a warrant on Mrs. Palmieri's residence to conduct an exploratory search to try and find anything. (*Id. ln. 18-22*).

Following the execution of the search warrant, Stockman took Mrs. Palmieri's two elderly dogs without justification and caused one of them to be burned when the elderly dog was forced to ride in an excessively hot area of the Animal Control truck. (*APP 000182*).

C. MALICIOUS PROSECUTION AND DISMISSAL OF CRIMINAL CHARGES

Following the execution of the search warrant, Clark County and Dawn Stockman brought five new charges against Mrs. Palmieri before the Honorable

M. Andress-Tobiasson. The charges were ultimately dismissed on October 4, 2010 pursuant to a Motion to Suppress.

V.

ARGUMENT

A. THE DISTRICT COURT FAILED TO VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO MRS. PALMIERI AND ERRED IN GRANTING SUMMARY JUDGMENT

Cases based on violations of constitutional rights are often inappropriate for summary judgment. Wright, Miller and Kane, *Federal Practice and Procedure Civil*, 3d § 2732.2, at 152 (1998). This is because police misconduct cases almost always turn on a jury's credibility determinations. Drummond v. City of Anaheim, 343 F.3d 1052, 1056 (9th Cir. 2003). "Further, the very nature of the claims involved often presents factual issues that require summary judgment to be denied." Id. "Credibility determinations, the weighing of evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in her favor." See, Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986).

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1. Clark County is Liable Because its Animal Control Department Has a Policy or Custom of Violating the Constitutional Rights of the County's Inhabitants and Because the Animal Control Department Ratified the Actions of the Defendant Officers

In Monell v. Dept. of Social Services of the City of N.Y., 436 U.S. 658, 98 S.Ct. 2018, 56 (1977), the Supreme Court held that municipalities are persons subject to liability under §1983 where, "action pursuant to a official municipal policy of some nature cause[s] a constitutional tort." Id. at 691.

A plaintiff can establish municipal liability under 42 U.S.C. §1983 in one of three ways. Gillette v. Delmore, 979 F.2d 1342, 1346 (9th Cir. 1992). "First, the plaintiff may prove that a city employee committed the alleged constitutional violation pursuant to a formal government policy or a longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity." Id. "Second, the plaintiff may establish that the individual who committed the constitutional tort was an official with 'final policy-making authority' and that the challenge action itself thus constituted an act of official governmental policy." Id. (citing Pembaur v. City of Cincinnati, 475 U.S. 469, 480-81 (1986)). "Third, the plaintiff may prove that an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and

the basis for it. Id. at 1346-47 (citing City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988). Here, Plaintiff asserts municipal liability based upon two of the above theories: (1) the existence of municipal policies that caused a constitutional harm, and (2) the City's ratification of the Officers' unconstitutional conduct.

a. Policy or Custom

A local government entity may be held liable pursuant to 42 U.S.C. §1983 where the alleged constitutional tort was inflicted in the execution of the entity's (1) policy or (2) custom. Monell v. Dept. of Social Services, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2035-36 (1978). In order to avoid summary judgment, Plaintiff need only show that there is a question of fact regarding whether there is a city custom or policy that caused the constitutional deprivation. See, Chew v. Gates, 27 F.3d 1432, 1444 (9th Cir. 1994)(city may be liable when its policy is the moving force behind the constitutional violation). For purposes of proving a Monell claim, a custom or practice can be supported by evidence of repeated constitutional violations which went uninvestigated and for which the errant municipal officers went unpunished. Hunter v. County of Sacramento, 652 F.3d 1225, 1236 (9th Cir. 2011). Additionally, a policy or custom of constitutional violations may be proved by subsequent acts. See, Larez v. City of Los Angeles, 946 F.2d 630 (9th Cir. 1991)(Court relied upon evidence of subsequent acts in

holding police chief liable in his individual and official capacities) and Henry v. The County of Shasta, 132 F.3d 512 (9th Cir. 1997)(Holding, in part, that post-event evidence is not only admissible for proving existence of municipal defendant's policy or custom to violate federal rights in §1983 actions, but is also highly probative to that inquiry).

In the case at hand, a reasonable jury could determine that Clark County had a policy or custom of violating citizen's constitutional rights based upon the County's policy of failing to adequately investigate complaints as testified to by Dawn Stockman in her deposition and verify the identity and reliability of complainants. As noted above, Dawn Stockman conceded that Clark Country Animal Control has a policy of not ascertaining the identity of individuals whom file complaints. Additionally, Stockman testified to all of her failings during her investigation, including the failure to obtain a date of the alleged infraction, the failure to get a description of the residence, the failure to ask the alleged number of animals at the residence, and the failure to investigate the background of the individual making the complaint. As a result, a reasonable juror could determine that the County is liable for Mrs. Palmieri's civil rights violations as a result of the County's policy and practice of tolerating inadequate investigations and failing to adequately investigate complaints and complainants. Therefore, there exits a

genuine issue of material fact as to whether the County's policies and practices caused the violation of Mrs. Palmieri's civil rights. Yet, the district court erred in failing to view those facts in the light most favorable to Mrs. Palmieri. Incredibly, the district court concluded that "County policy clearly states that warrants are carefully reviewed." The district court did not elaborate upon its ambiguous and conclusory statement, however the conclusion that warrants are "carefully reviewed" is contradicted by the testimony of Respondent Stockman and thus belied by the record.

b. Ratification

"Ordinarily, ratification is a question for the jury." Christie v. Iopa, 176 F.3d 1231, 1238-39 (9th Cir. 1999). A single decision by a municipal official that ratifies unconstitutional conduct may be sufficient to trigger §1983 liability if that official has "final policymaking authority." Pembaur, 475 U.S. at 481/83; Gillette, 979 F.2d at 1347.[1]

The Ninth Circuit distinguishes between affirmative or deliberate conduct by a policymaker, which constitutes ratification, and mere acquiescence, which is insufficient to establish municipal liability by ratification. See, Gillette. In Fuller

[1] It should be noted that the Plaintiff need not establish an existing unconstitutional municipal policy to proceed against the City on the theory of ratification. See, Christie v. Iopa, 176 F.3d 1231, 1238 (9th Cir. 1999)("A municipality also can be liable for an isolated constitutional violation if the final policymaker 'ratified' a subordinate's actions.")

v. City of Oakland, 47 F.3d 1522, 1534 (9th Cir. 1995), the court found §1983 municipal liability where a police chief ratified an unconstitutional investigation by expressly "approv[ing] both of the propriety of the investigation and the reports conclusions." See, Christie, 176 F.3d at 1240 (finding municipal liability via ratification where prosecutor "affirmatively approved" of alleged constitutional violations).

In the case at hand there can be no doubt that the County ratified Stockman's unconstitutional conduct because the County, in its Motion for Summary Judgment, argues that Stockman did nothing wrong and followed Animal Control's policies. Additionally, the County ratified Stockman's conduct by failing to discipline her or take any corrective measures. As a result summary judgement is precluded because a reasonable jury could determine that the County ratified Stockman's constitutional violations.

B. DEFENDANT STOCKMAN IS NOT ENTITLED TO QUALIFIED IMMUNITY

Government officials have no "discretion" to violate the Constitutional rights of citizens. See, Owen v. City of Independence, Mo., 445 U.S. 622, 100 S.Ct.1398 (1980). A Defendant is only entitled to qualified immunity if the Defendant did not violate "clearly established rights" at the time of the conduct in question. Harlow v. Fitzgerald, 457 U.S. 800, 817-818, 102 S.Ct. 2727 (1982).

See, Mattos v. Agarano, 661 F.3d 433 (9th Cir. 2011)(holding that the law must be well settled).

The test for qualified immunity is objective. The Defendant's actual purpose or state of mind is not material. Whether rights were "clearly established" at the relevant time is determined in most instances by looking at controlling published court decisions as of that time. See, United States v. Lanier, 520 U.S. 259, 269-71 (1997). Here, it is well settled law that an officer may not obtain a search warrant without probable cause.

Moreover, in similar contexts Franks v. Delaware, 438 U.S. 154 (1978), instructs that where a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by an affiant in a search warrant affidavit, the affidavit's false material is to be stricken and the affidavit's remaining content is examined to determine the sufficiency of probable cause. Franks v. Delaware, 438 U.S. 154 (1978).

C. DEFENDANT STOCKMAN IS NOT ENTITLED TO DISCRETIONARY IMMUNITY

Nevada Revised Statute 41.032 sets forth exceptions to Nevada's general waiver of sovereign immunity. Pursuant to NRS 41.032(2), no action may be brought against a state officer or employee or any state agency or political

subdivision that is "[b]ased upon exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused."

Discretionary immunity is often misunderstood by both Courts and counsel. Therefore an understanding of the analytic basis of the complex and confusing doctrine of discretionary immunity is necessary. As the United States Supreme Court explained when it modified the discretionary immunity test, "[t]he purpose of the exception is to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort" United States v. Gaubert, 499 U.S. 315, 323 (1991)(Nevada adopted the federal "Gaubert test"in Martinez v. Maruszczak, 123 Nev. 433, 168 P.3d 720, 729 (2007) and Butler ex rel. Biller v. Bayer, 123 Nev. 450, 168 P.3d 1055 (2007). Therefore, the discretionary immunity test is rooted in the judiciary's view of its proper role in government.

To determine whether immunity for a discretionary act applies, Nevada utilizes a two-part test. First, an act is entitled to discretionary immunity if the decision involved an element of individual judgment or choice. Martinez v. Maruszczak, 168 P.3d 720, 729 (2007)(wherein Nevada adopted the federal

"Gaubert test"). Second, the judgment must be "of the kind that the discretionary function exception was designed to shield," which includes actions "based on considerations of social, economic, or political policy." Id. at 728-29 (quotations omitted). Acts which violate the Constitution are not discretionary. Goodman v. Las Vegas Metropolitan Police Dept., 963 F. Supp. 2d 1036, 1061 (D. Nev. 2013). Similarly, where an officer's action are attributable to bad faith, immunity does not apply whether an act is discretionary or not. Davis v. City of Las Vegas, 478 F.3d 1048, 1059 (9th Cir. 2007). Moreover, state tort claims favor a waiver of immunity. Hagblom v. State Director of Motor Vehicles, 93 Nev. 599, 571 P.2d 1172 (1977).

The Nevada Supreme Court opinion concerning discretionary immunity in a civil rights context is Butler ex rel. Biller v. Bayer, 123 Nev. 450, 168 P.3d 1055, 1067 (Nev. 2007). Butler involved an inmate that was attacked and beaten by other inmates resulting in severe physical and mental disabilities and impairments. The court looked at whether the government and their employees were entitled to immunity under NRS 41.032. In addressing what matters are discretionary, the court found that the Defendants in Butler who made the decision to parole the Plaintiff found the "overarching prison policies for inmate release are policy decisions that require analysis of multiple social, economic, efficiency, and

planning concerns," which were entitled to discretionary immunity. Butler at 1067.

In Butler the court also found in contrast, that the Defendant's conduct in placing a severely disabled parolee in the care of an individual whose home needed and lacked sufficient accommodations required the exercise of judgment or choice, but this decision was not based on the consideration of any social, economic, or political policy. Id. Accordingly, the Defendants in Butler made the decision to leave the disabled inmate at his girlfriend's residence "despite the obvious lack of preparation" which action was not entitled to discretionary act immunity. Id. The same analysis is applicable in this case because none of Stockman's decisions were the type of decisions the discretionary function exception was designed to shield because the decision to obtain a warrant, and aver to the accuracy of its facts, without any corroboration of those facts is not an integral part of governmental policy-making or planning, as analyzed below.

This Court has held that NRS 41.032 does not provide discretionary immunity from liability in all cases. Williams v. City of North Las Vegas, 91 Nev. 622, 541 P.2d 652 (1975). The purpose of Nevada's waiver of sovereign immunity is to "compensate victims of government negligence in circumstances like those in which victims of private negligence would be compensated." Martinez v. Maruszczak, 168 P.3d 720, 727 (Nev. 2007). Further, officers have no "discretion"

to violate the Constitutional rights of citizens. See, Owen v. City of Independence, Mo., 445 U.S. 622, 100 S.Ct.1398 (1980).

In a well reasoned Order by one of Nevada's longest-tenured United States District Court Judge, Phillip M. Pro, determined that defendants' decisions regarding police practices are not the kind of decisions the discretionary function exception was designed to shield. Huff v. N. Las Vegas Police Dep't, 2013 U.S. Dist. LEXIS 179683 (D. Nev. Dec. 23, 2013). Judge Pro's Order in Huff has been subsequently relied upon by Nevada District Court Judges Larry Hicks and James Mahan in denying defendants discretionary immunity in civil rights actions. See, Kelly v. Las Vegas Metropolitan Police Department, 2014 U.S. Dist. LEXIS 102495 (D. Nev. July 25, 2014); and, Vasquez-Brenes v. Las Vegas Metropolitan Police Department, 2014 U.S. Dist. LEXIS 127405 (D. Nev. Sept. 10, 2014), respectively.

This Court recently issued an unpublished Order concerning discretionary immunity. Gonzalez v. LVMPD, No. 61120, 2013 Nev. Unpub. LEXIS 1815; 2013 WL 7158415 (Nev. Nov. 21, 2013). In Gonzalez, this Court's conclusion was based upon a United States District Court Order Sandoval v. Las Vegas Metro. Police Dep't, 854 F. Supp. 2d 860, 871 (D. Nev. 2012) by Judge Clive Jones. Gonzalez v. LVMPD, No 61120 at FN 1(stating "We conclude that this

case is not subject to the same policy concerns as in Martinez because injured parties may bring federal suit for violations of 42 U.S.C. §1983 against officers, including false arrest, malicious prosecution, failure to intervene, discrimination, excessive force, etc. See generally Sandoval v. Las Vegas Metro. Police Dep't, 854 F. Supp. 2d 860, 871 (D. Nev. 2012)) However, the Sandoval District Court Order, upon which this Court relied in Gonzalez, was subsequently overturned by the Ninth Circuit. See, Sandoval v. Las Vegas Metropolitan Police Department, 756 F.3d 1154, 1169 (9th Cir. 2014)(holding, in part, "The district court erred in granting summary judgment to the officers on the grounds of statutory immunity"). Therefore, the foundation upon which this Court relied in issuing its unpublished Gonzalez Opinion is no longer good law. Consequently, Gonzalez should not be persuasive in the instant action because Gonzalez is not a published opinion, Gonzalez was premised upon a failed assumption that state tort claims are duplicative of Federal civil rights claims, Sandoval is no longer good law and the Ninth Circuit instructed, at the time it reversed Sandoval, that when viewing facts in the light most favorable to the Plaintiffs factual questions exist concerning Plaintiff's state law claims.

In this case, Defendants' conduct does satisfy the second prong of the test because Stockman's decision regarding to obtain a search warrant without

determining the veracity of the complaint upon which the warrant was based is not the type of decision the discretionary function exception was designed to shield because evaluating whether an law enforcement officer violated a citizen's constitutional rights does not involve judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy. The officers' obligations in this regard are grounded in the Fourth Amendment, not policy decisions from the legislative or executive branches. Additionally, the decision to obtain a search warrant is not an integral part of governmental policy-making or planning. Imposing liability on officers who commit torts will not jeopardize the quality of the governmental process. Further, declining to apply the exception does not usurp the legislative or executive branch's power or responsibility. Defendants' conduct therefore does not fall within NRS 41.032 and Defendants are not entitled to discretionary immunity.

Lastly, when the evidence is viewed in the light most favorable to the plaintiff, Stockman is also not entitled to discretionary immunity because her actions were taken in "bad faith" given the lack of probable cause to enter Plaintiff's home, and Stockman's statement while executing the warrant, that "Animal Control has never been able to get anything on you until now" (*APP 000273, ln. 18-22*). Mrs. Palmieri understood Stockman's statement to mean that

the very day that a new ordinance went into effect animal control served a warrant on Mrs. Palmieri's residence to conduct an exploratory search to try and find anything. (*Id.*).

1. Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress

The elements of an intentional infliction of emotional distress ("IIED") claim are "(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress and (3) actual or proximate causation." Star v. Rabello, 97 Nev. 124, 625 P.2d 90, 91-92 (Nev. 1981).

Here, the Defendant intentionally and negligently inflicted emotional distress upon Mrs. Palmieri by searching her residence based upon a warrant which was obtained without probable cause. During the search Mrs. Palmieri was forced to wait in her pajamas without underwear or shoes. Then the County seized Mrs. Palmieri's two elderly dogs and burned the skin of one of the dogs. The County had a duty to investigate complaints made to Animal Control and not execute warrants which were obtained without probable cause. Instead, the County engaged in a series of actions to vex, harass and annoy Mrs. Palmieri in an extended pattern of conduct. As a result, a reasonable jury could find that the

County's conduct was outrageous and engaged in reckless disregard for causing Mrs. Palmieri's emotional distress. There exists a genuine issue of material fact as to whether Stockman's statement while executing the warrant, that "Animal Control has never been able to get anything on you until now" demonstrates the County acted with malice, or reckless disregard for, Mrs. Palmieri's emotional well-being. (*Id.*). Therefore, the district court failed to view the evidence in the light most favorable to Mrs. Palmieri when the court erroneously concluded that there is "no evidence of malice."

2. Conspiracy

To state a claim for conspiracy, Plaintiffs must demonstrate a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, and that damage has resulted from said act or acts. See, Hilton Hotels Corp. v. Butch Lewis Prods., Inc., 109 Nev. 1043, 862 P.2d 1207, 1210 (Nev. 1993).

It is unlikely that direct evidence of a conspiracy exists. Thus the question of whether an agreement exists should not be taken from the jury so long as there is a possibility that the jury can infer from the circumstances [that the alleged conspirators] reached an understanding to achieve the conspiracy's objectives. An express agreement among all the conspirators in not a necessary element of a civil

conspiracy. Hampton v. Hanrahan, 600 F.2d 600, 620-624 (7th Cir. 1979). *cert. granted in part, judgment rev'd in part on other grounds*, 446 U.S. 754, 100 S. Ct. 1987 (1980); See also, Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598 (1970); Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988).

Here, Stockman and Animal Control officers conspired to deprive Mrs. Palmieri's Fourth and Fourteen Amendment rights and Mrs Palmieri suffered actual harm when Mrs Palmieri's residence was unlawfully searched and she had false criminal charges filed against her. Therefore, a reasonable juror could infer that the alleged conspirators reached an understanding to achieve the objective of depriving Mrs. Palmieri of her Fourth and Fourteen Amendment rights. Additionally, Stockman's statement that "Animal Control has never been able to get anything on you until now" shows that Animal Control engaged in a pattern of behavior and conspiracy to vex, harass, and annoy Mrs. Palmieri by subjecting her to excessive scrutiny in hope to "get something on her." (*Id.*). Consequently, the question of whether an agreement exists should not be taken from the jury.

3. Malicious Prosecution

The elements of a malicious prosecution cause of action are: (1) Defendant initiated, procured the institution of, or actively participated in the continuation of a criminal proceeding against plaintiff; (2) Defendant lacked probable cause to

commence that proceeding; (3) Defendant acted with malice; (4) The prior proceeding was terminated; and (5) Plaintiff sustained damages. LaMantia v. Redisi, 118 Nev. 27, 38 P.3d 877 (2002).

Want of probable cause is judged by an objective test. The Court is required to determine whether, on the facts known by the attorney, a reasonable attorney would have considered the prior action legally tenable. Jordan v. Bailey, 113 Nev. 1038, 944 P.2d 828 (1997).

Summary judgment was erroneously granted on Mrs. Palmieri's claim for Malicious Prosecution because there existed questions of fact concerning whether Stockman had probable cause to swear an affidavit for criminal activity when she conducted no investigation whatsoever. The bedrock principle of a malicious prosecution claim is that one who causes or triggers a charge to be filed may be sued for malicious prosecution. In Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L. Ed. 2d 561 (1976) the Court used the term of the "moving force" in the context of a malicious prosecution in a 42 U.S.C. 1983 action. That means that the fact that Stockman's affidavit was granted by a Judge does not insulate Stockman from liability. In Catrone v. 105 Casino Corp., 82 Nev. 166 414 P.2d 106 (1966), the

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Supreme Court approved the rule that a person who maliciously procures prosecution by a third person is as liable as if he had instituted the criminal proceeding himself.

Moreover, there exists a question of fact as to whether Stockman acted with malice. In Countrywide Home Loans, Inc. v. Thitchener, 192 P.3d 243, 252 (Nev. 2008) the court defined malice and oppression when they held, "'[m]alice, express or implied' means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others." "'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person." The court went on to state that both definitions utilize conscious disregard of a person's rights as a common mental element, which in turn is defined as "the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences." (Id). At the summary judgment stage the court is required to accept Plaintiff's contention that during the search Stockman said something to the effect that "we haven't been able to get anything on you until now." Accepting that statement as true and drawing reasonable inferences therefrom there can be no doubt that Stockman's statement corroborates Mrs. Palmieri's allegations that Animal Control had something against her and

engaged in a pattern of behavior to "get her." The County's Motion for Summary Judgement contains a material misrepresentation of page 6 beginning at line 20 when the County argues that the "Plaintiff admitted in her deposition that there was no malice by the officer against the Plaintiff." The Plaintiff never testified in that fashion and The County's argument is inaccurate at best. In actuality, Plaintiff said that she did not think that Stockman had something against her personally, but that Stockman was acting as an officer who was instructed to go ahead and serve the warrant and see what she could come up with. (*APP 000265*). Therefore, the district court failed to view the evidence in the light most favorable to Mrs. Palmieri when the court erroneously concluded that there is "no evidence of malice."

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VI.

CONCLUSION

The Appellant respectfully requests that this court reverse the district court's grant of summery judgment because the district court failed to view the evidence in the light most favorable to the Appellant as is required at the summary judgment stage. Additionally, the district court misapplied the doctrines of qualified and discretionary immunity.

DATED this 17th day of October, 2014.

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VII.

CERTIFICATE OF COMPLAINCE

Pursuant to NRAP 32(a)(8), I certify that the Appellant's Opening Brief is proportionally spaced, has a font typeface of 14 points of Times New Roman type-style, and contains 6,941 words, and is 38 pages long.

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

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 20th day of October, 2014.

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VIII.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to NRAP 25(1)(d) on the 17th and 20th of October, 2014, I did serve at Las Vegas, Nevada a true and correct copy of **APPELLANT'S OPENING BRIEF**, on all parties to this action by:

- ☐ Facsimile
- ☐ U.S. Mail
- ☐ Hand Delivery
- X Electronic Filing

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