IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL RUSSO AND JAMES GROSJEAN,
Appellants,
vs.
THE STATE OF NEVADA/NEVADA GAMING CONTROL BOARD; RODERICK O'NEAL; AND CHARLES POINTON,
Respondents.

No. 46019

FILED

JUL 30 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from district court judgment on a jury verdict in a bifurcated civil rights/tort action.[1] Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

FACTS

Appellants Michael Russo and James Grosjean filed a district court action after they were detained or arrested at two different Las Vegas casinos on separate occasions. Specifically, appellants were both arrested at Caesars Palace and later jailed on charges that they were cheating at poker. Ten months later, appellant James Grosjean alone was detained by two Gaming Control Board (GCB) agents and casino security personnel at Imperial Palace, based on an alert from a third GCB agent who was interested in a suspect matching Grosjean's description. Appellants then filed a complaint, naming, among others, the two casino corporations, respondent the State of Nevada Gaming Control Board (the State), and the two GCB agents who were involved in the Caesars Palace incident, respondents Roderick O'Neal and Charles Pointon. Appellants'

[1]The Honorable Ron D. Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.

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original complaint asserted tort claims against all of the defendants and Nevada law civil rights violations against the State and agent defendants. On August 23, 2002, the district court dismissed the claims against the State and the GCB agents, finding that they were entitled to discretionary-function immunity for any tort liability damages.

Appellants then moved for reconsideration arguing that dismissal on discretionary-function immunity grounds was inappropriate. Alternatively, they asked the court to certify the dismissal order as final, under NRCP 54(b), asserting that the dismissal entirely removed the State and the two GCB agents from the action, finally resolving appellants' claims against those parties. Within the same motion, appellants also asked for leave to amend their complaint, asserting that if the dismissal had been granted based on their failure to plead facts sufficient to defeat immunity, their proposed amended complaint would clarify their allegations. Appellants' proposed complaint also sought to add as defendants the two GCB agents involved in the Imperial Palace detention, Anthony Vincent and Phillip Pedote, against whom Grosjean wished to assert similar state law tort and civil rights claims, and a new claim for federal civil rights violations under 42 U.S.C. § 1983 against all four GCB agents. The proposed amended complaint alleged that agents Vincent and Pedote detained Grosjean without reasonable suspicion of criminal activity and that they continued to detain him in order to examine items removed from his pockets and obtain personal information about him, even though a third GCB agent informed them that Grosjean should be released.

The district court denied reconsideration and leave to amend the complaint, finding that amendment would be futile. The court granted the motion for finality certification under NRCP 54(b) as to the dismissed

claims against the State and agents O'Neal and Pointon however. Appellants then appealed.

On appeal, this court affirmed the dismissal order, concluding that the district court properly determined that discretionary-function immunity precluded appellants' state law claims against the State and agents O'Neal and Pointon. Russo v. State, Gaming Control Bd., Docket No. 40216 (Order of Affirmance, November 15, 2004, and Order Denying Rehearing, February 11, 2005). This court, however, declined to consider the order denying leave to amend, concluding that it lacked jurisdiction because such orders are not susceptible to NRCP 54(b) certification. Id.

Subsequently, the district court granted a motion to bifurcate the action for trial, separating the claims against the remaining Caesars Palace defendants from those against the Imperial Palace defendants. After the court entered the final judgment, this appeal followed.[2] Upon Imperial Palace's motion, the district court bifurcated the case as it related to Imperial Palace. After the trial was completed as to the Imperial Palace incident, the judgment on the jury verdict was certified as final under NRCP 54(b), and Grosjean appealed therefrom.

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[2]After the trial was completed as to the Imperial Palace incident, the judgment on the jury verdict was certified as final under NRCP 54(b), and Grosjean appealed separately therefrom.

DISCUSSION

On appeal, appellants challenge the order denying them leave to amend the complaint to (1) clarify their state law claims against the State and agents O'Neal and Pointon and add a § 1983 claim against them, based on the Caesars Palace incident; and (2) add as defendants the two GCB agents involved in the Imperial Palace incident, Vincent and Pedote, to assert a § 1983 and state law claims against them.

The Caesars Palace incident

Appellants argue that the district court should have reconsidered its August 23, 2002, order dismissing the State and agents O'Neal and Pointon from the action on immunity grounds and allowed them leave to amend the complaint to proceed with their state law tort and civil rights claims, and the proposed § 1983 claim, against those parties. As explained below, however, preclusion principles apply to foreclose such claims.

On appellants' motion, and over respondents' objection, the district court certified the August 23 order dismissing the state and its agents from the action as final under NRCP 54(b). As appellants previously acknowledged, the court was able to do so because all of the claims and issues involving those parties had been finally resolved, so that there was no reason to delay the appeal. See NRCP 54(b); Mallin v. Farmers Insurance Exchange, 106 Nev. 606, 610-11, 797 P.2d 978, 981 (1990); see generally Lee v. GNLV Corp., 116 Nev. 424, 426, 996 P.2d 416, 417 (2000). In that regard, when a judgment concludes a case between opposing parties, it disposes of not just the causes of action actually pleaded, but all available grounds of recovery arising from the same core facts. Five Star Capital Corp. v. Ruby, 124 Nev. ___, 194 P.3d 709 (2008). Appellants appealed, again treating the order as final, and this court

accepted jurisdiction and affirmed the dismissal order on its merits. See Russo v. State Gaming Control Bd., Docket No. 40216 (Order of Affirmance, November 15, 2004, and Order Denying Rehearing, February 11, 2005).

In their petition seeking rehearing, appellants acknowledged that the district court's finality certification applied to parties in the case, i.e., the State and agents O'Neal and Pointon, and that all orders concerning those parties merged into the order dismissing them, including the subsequent order denying leave to amend the complaint to reassert the state law claims and to add a § 1983 claim against them. After rehearing was denied and remittitur issued, the dismissal order in favor of the State and O'Neal and Pointon became final. 18A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction § 4432, at 58-59 (2d ed. 2002) (noting that "[w]hen properly entered, [Rule 54(b)] judgments are final for purposes of preclusion as well as appeal" and that the disposition "enjoys all the characteristics of the final judgment that would have been entered in less complex litigation"). That decision stands as the law of the case, and its finality precludes the district court from reconsidering the matter and appellants from bringing "a second action that presents the same claim through a better complaint." Id. § 4439, at 197; see Zalk-Josephs Co. v. Wells Cargo, Inc., 81 Nev. 163, 171, 400 P.2d 621, 625 (1965) (explaining that a dismissal with prejudice is a final judgment on the merits, preclusive of new causes of action based on same factual scenario); Keams v. Tempe Technical Institute, Inc., 16 F. Supp. 2d 1119, 1121 n.2 (D. Ariz. 1998) (explaining that when a trial court dismissed the plaintiffs' claims against certain defendants, certifying that dismissal as final under Rule 54(b), and the Court of Appeals affirmed that order, the plaintiffs could not, in an amended complaint, rename

those parties as defendants because the plaintiffs claims were already dismissed in a final judgment); 10 James Wm. Moore, Moore's Federal Practice ¶ 54.26[2] at 54-91 (3rd ed. 2009) ("A final judgment certified and entered under the authority of Rule 54(b) is a judgment for all purposes. Accordingly, the judgment is res judicata as to the claims adjudicated . . . ."); see also Renfro v. Forman, 99 Nev. 70, 657 P.2d 1151 (1983) (stating that the parties who treated a judgment against them as final and appealed from it were later estopped from asserting that the judgment was not final).

The Imperial Palace incident

With regard to the Imperial Palace incident, no previous order dismissing any defendants was certified under NRCP 54(b), so preclusion and law of the case concerns do not limit our review of the order denying leave to amend the complaint as it relates to that incident. Grosjean, in seeking leave to amend, sought to add as defendants GCB agents Anthony Vincent and Phillop Pedote in order to assert a federal law claim under § 1983 and state law tort and civil rights claims against them. The parties have briefed the issues, and, at our invitation, amicus curiae Nevada Trial Lawyers Association filed a brief on the immunity issues raised in this appeal.

Proposed federal civil rights claim under 42 U.S.C. § 1983

On appeal, Grosjean argues that the district court abused its discretion when it denied him leave to amend the complaint to add a § 1983 claim against agents Vincent and Pedote, based on purported Fourth Amendment violations. In particular, the proposed amended complaint asserted that the GCB agents deprived Grosjean of his Fourth Amendment right to be free from unreasonable searches and seizures when they detained and searched him without reasonable suspicion.

The district court's decision to deny a motion for leave to amend a complaint is reviewed for an abuse of discretion. University & Cmty. Coll. Sys. v. Sutton, 120 Nev. 972, 988, 103 P.3d 8, 19 (2004). When amendment would be futile, denying a motion for leave to amend is appropriate. See Foman v. Davis, 371 U.S. 178 (1962), cited in Adamson v. Bowker, 85 Nev. 115, 121, 450 P.2d 796, 800 (1969) (noting that "futility of amendment" is a reason to deny a motion to amend but also explaining that outright refusal to grant leave to amend without any justifying reason appearing for the denial is not an exercise of discretion but, instead, "merely abuse of that discretion"). In determining whether a proposed amendment would be futile, the same standard as that used to determine whether a claim would be subject to dismissal under NRCP 12(b)(6) applies: we look at all of the allegations in the light most favorable to the parties proposing to amend the complaint to determine whether the allegations, if true, would entitle them to relief. See Hampton Bays Connections, Inc. v. Duffy, 212 F.R.D. 119, 123 (E.D.N.Y. 2003); Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. ___, ___, 181 P.3d 670, 672 (2008).

To assert a viable federal law civil rights claim under 42 U.S.C. § 1983, and establish a basis for amending his complaint, Grosjean was required to allege facts demonstrating that Vincent and Pedote, acting under color of state law, deprived him of a "right, privilege, or immunity protected by the Constitution or laws of the United States." Butler v. Bayer, 123 Nev. 450, 458, 168 P.3d 1055, 1061 (2007) (citing Leer v. Murphy, 844 F.2d 628, 632-33 (9th Cir. 1988)). Further, the agents' entitlement to immunity cannot be apparent from the proposed complaint, however, when the alleged facts support that a constitutional violation

occurred, the § 1983 claim nevertheless might be defeated by an assertion of qualified immunity.

With respect to these issues, courts typically apply the two-part test set forth by the United States Supreme Court in Saucier v. Katz, 533 U.S. 194, 200-01 (2001); see also Butler, 123 Nev. at 458, 168 P.3d at 1061 (applying the Saucier test). Under Saucier, a court must decide whether the facts alleged make out a violation of a constitutional right and, if so, whether the constitutional right at issue was "clearly established" at the time of the defendant's alleged misconduct. Saucier, 533 U.S. at 210; Pearson v. Callahan, 555 U.S. ___, ___, 129 S.Ct. 808, 817-18 (2009) (holding that appellate courts should be permitted to exercise their sound discretion in deciding, in light of the circumstances of the particular case, which of the two qualified immunity prongs should be analyzed first, but recognizing that the Saucier protocol, while not mandatory, "is often beneficial"). If the alleged facts indicate the violation of a clearly established constitutional right, qualified immunity does not apply to shield the government agent from liability.

In accordance with Saucier, in evaluating whether Grosjean's proposed complaint set forth a viable § 1983 claim, we first must determine whether, when viewed in the light most favorable to Grosjean, the facts alleged in the proposed amended complaint show that it was unreasonable for the GCB agents to detain Grosjean initially based on Stolberg's alert and to continue to detain him after being told to release him, such that his Fourth Amendment right to be free from an unlawful seizure was abridged. To determine whether a search and seizure are constitutionally reasonable under the Fourth Amendment, we balance the intrusion on a person's Fourth Amendment interests against the governmental interests served by the law enforcement agents'

investigatory stop. See Graham v. Connor, 490 U.S. 386, 396 (1989). We therefore begin by considering the intrusion on Grosjean's right to be secure in his own person, free from restraints or interferences of others, unless justified by authority of law. U.S. Const. amend. IV; Terry v. Ohio, 392 U.S. 1, 9 (1968). Grosjean's proposed amended complaint alleges that the detention was initiated without reasonable suspicion and that even if there was a reason to detain him, the detention continued beyond when the original justification for the stop ended. Thus, the proposed complaint sets forth an actionable Fourth Amendment injury under § 1983, since, in order for an investigatory stop to be lawful, the agents must have "a reasonable suspicion supported by articulable facts" of criminal activity. United States v. Sokolow, 490 U.S. 1, 7 (1989); Ramirez v. City of Buena Park, 560 F.3d 1012, 1022-23 (9th Cir. 2009) (reversing and remanding a district court summary judgment in a § 1983 action after applying the Saucier test to determine that the law enforcement officer defendant was not entitled to qualified immunity from liability, since his search of the plaintiff was supported only by his "conclusory reference to 'officer safety,'" without any evidence that would provide a reasonable suspicion that the plaintiff had a weapon); see Terry, 392 U.S. 1.

Next, we consider the interests of the GCB, recognizing that the GCB has a legitimate interest in apprehending those suspected of violating gaming laws. Although the GCB's interests in doing so are weighty, according to the complaint there was no basis for suspecting Grosjean of violating any gaming laws. Thus, the search and seizure alleged cannot reasonably be said to have served any law enforcement benefit that might outweigh the harm caused to Grosjean's Fourth Amendment interests. Nothing in the proposed complaint indicates that the agents had reasonable suspicion that a gaming law was going to be or

had been violated. As for the continued detention, the search assertedly was completed while the GCB agents still were investigating whether Grosjean was the suspect for whom agent Stolberg was looking. Thus, it is not clear why the GCB agents would require additional time after they were instructed to release Grosjean to review the contents of Grosjean's pockets. Florida v. Royer, 460 U.S. 491, 500 (1983) ("It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.").

Any intrusion on Grosjean's right to be secure in his person without any corresponding public benefit tilts the balance of interests toward unconstitutionality, we next consider the second Saucier inquiry, under which we determine whether a reasonable officer would have known that the detention was unlawful. Because a reasonably competent law enforcement agent should know the law governing his conduct, Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982), we must determine whether the state of the law at the time of the incident gave the GCB agents sufficient warning that their alleged misconduct was unconstitutional. Hope v. Pelzer, 536 U.S. 730, 741 (2002). If reasonably competent law enforcement agents could disagree on this issue of whether the law was clear, immunity should be recognized. Malley v. Briggs, 475 U.S. 335, 341 (1986). Thus, law enforcement agents are liable for their conduct only when that conduct transgresses a bright legal line. Doe v. Broderick, 225 F.3d 440, 453 (4th Cir. 2000). As the U.S. Court of Appeals for the Ninth Circuit recently explained, "we do not require [law enforcement agents] to act as legal experts to avoid violating the Constitution." Brittain v. Hansen, 451 F.3d 982, 996 (9th Cir. 2006).

Our review of relevant authority leads us to the conclusion that, by allegedly detaining Grosjean without reasonable suspicion of criminal activity, agents Vincent and Pedote may have violated a clearly established rule: an agent's act of detaining a person violates the Fourth Amendment's mandate against unreasonable seizures if it furthers no governmental interest, such as apprehending a criminal suspect or protecting an officer or the public. Relevant authority available at the time of the incident established that law enforcement agents will not be shielded by immunity if they detain a person without reasonable suspicion of criminal activity. See United States v. Sokolow, 490 U.S. 1, 7 (1989); United States v. Cortez, 449 U.S. 411, 417-18 (1981) (explaining that reasonable suspicion is "a particularized and objective basis for suspecting the particular person stopped of criminal activity"); Terry v. Ohio, 392 U.S. 1, 27 (1968); cf. Florida v. J.L., 529 U.S. 266, 272 (2000) (noting, in the context of a stop made based on an anonymous tip, that reasonable suspicion "requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person"); see also, e.g., Asble v. Com., 653 S.E.2d 285, 288 (Va. Ct. App. 2007) (concluding that an officer who identified no suspected criminal activity lacked constitutional authority to detain and search a defendant's car). Likewise, qualified immunity does not apply to law enforcement agents who detain a suspect beyond what is necessary to confirm or dispel any such suspicions. See Illinois v. Caballes, 543 U.S. 405, 407 (2005); United States v. Sharpe, 470 U.S. 675, 686 (1985); Florida v. Royer, 460 U.S. 491, 500 (1983); U.S. v. Jones, 234 F.3d 234, 241 (5th Cir. 2000) (explaining that "[t]he basis for the stop was essentially completed when the dispatcher notified the officers about the defendants' clean records, three minutes before the officers sought consent to search the vehicle. . . . [T]he failure to release

the defendants violated the Fourth Amendment"); Brown v. State, 720 A.2d 1270, 1275-77 (Md. Ct. Spec. App. 1998) (detaining a suspect for an additional five minutes after a police officer concluded a patdown search was unreasonable under the Fourth Amendment because, once the purpose of the stop—to determine whether the suspect had drugs or weapons—was fulfilled, there was no justification to detain him further, as the suspect's actions did not raise suspicion of other crimes). Thus, the state of the law demonstrates that a law enforcement agent must have some justification to hold a suspect.[3]

Accordingly, applying the Saucier standards, and accepting Grosjean's allegations as true for purposes of this appeal only, we conclude that the GCB agents were not automatically entitled to qualified immunity from Grosjean's proposed § 1983 claim. Therefore, the district court abused its discretion by concluding that amending the complaint to add a § 1983 claim against GCB agents Vincent and Pedote would be futile.

State law tort and civil rights claims

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[3]The law establishing that a GCB agent may not detain a gaming patron unless to further the legitimate governmental interest of regulating the gaming industry also is apparent from state statutes and regulations. See, e.g., NRS 171.123 (limiting the scope of a agent's detention to no "longer than is reasonably necessary"); NRS 171.1231 (directing that, "[i]f, after inquiry into the circumstances which prompted the detention, no probable cause for arrest appears, [the detained] person shall be released"); NRS 289.360 (conferring the powers of a peace officer on GCB agents for the purposes of administering and enforcing gaming laws); NRS 463.140(4) (conferring power on GCB agents to investigate, for the purpose of prosecution, any suspected criminal violation of the gaming laws or suspected crimes against the property of a gaming licensee).

Grosjean asserts that the district abused its discretion by denying him leave to amend the complaint to assert state law tort and civil rights claims against agents Vincent and Pedote, based on its finding that discretionary-function immunity would preclude any such claims against those agents.

NRS 41.032(2) discretionary-function immunity

NRS 41.032(2) grants immunity to the State and its agents who exercise or perform or fail to exercise or perform discretionary functions or duties. We recently addressed the application of discretionary-function immunity in Martinez v. Maruszczak, 123 Nev. 433, 168 P.3d 720 (2007). In that case, after pointing out that NRS 41.032(2) mirrors the Federal Tort Claims Act's (FTCA's) discretionary-function immunity provision, we adopted the two-part federal test articulated in two United States Supreme Court cases, Berkovitz v. United States, 486 U.S. 531 (1988) and United States v. Gaubert, 499 U.S. 315 (1991), for determining when discretionary-function immunity applies to shield a government agent from civil liability. Martinez, 123 Nev. at 446, 168 P.3d at 729. Under the so-called Berkovitz-Gaubert test, a government agent is entitled to discretionary-function immunity if his or her alleged misconduct meets two criteria. Id. at 445, 168 P.3d at 728.

First, the court must inquire whether the challenged conduct is truly discretionary, in that it "involve[s] an 'element of judgment or choice.'" Id. (quoting Berkovitz, 486 U.S. at 536). If the challenged conduct meets this first criterion, the court must consider the second criterion: whether the "'judgment is of the kind that the discretionary-function exception was designed to shield,'" that is, one based on considerations of public policy. Martinez, 123 Nev. at 445, 168 P.3d at 728 (quoting Gaubert, 499 U.S. at 322-23). In determining whether a

government agent is entitled to discretionary-function immunity, the "focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." Id. at 325.

Proposed state law claims against agents Vincent and Pedote

The proposed amended complaint alleged that Grosjean, while undertaking no suspicious activity, was detained by Imperial Palace security officers after being instructed to do so by GCB agents Pedote and Vincent, and that although Pedote and Vincent subsequently were informed that Grosjean was not the suspect whom agent Stolberg was persuing, they nevertheless wanted to look at Grosjean's belongings and obtain personal information about him. According to the proposed complaint, Pedote, Vincent, and an Imperial Palace security officer then devised a plan, whereby Vincent and Pedote posed as Imperial Palace employees and entered the room in which Grosjean was being held to review the contents of his pockets, which had been removed and placed on a table. Analyzing those alleged decisions under the Berkovitz-Gaubert test's first criterion, it is clear that the agents, in determining whether Grosjean should be detained and later whether he should continue to be detained, exercised their judgment as to the best course of action. In particular, the agents, in working with Imperial Palace security, had to determine whether to detain Grosjean based on agent Stolberg's alert that he was interested in a suspect matching Grosjean's description or to allow him to leave the premises without further investigation. Later, after confirming that Grosjean was not a suspect, the agents had to determine whether to release him or continue detaining him so they could examine the items removed from his pockets. Thus, because the detention decision

involved the necessary element of judgment, it satisfies the Berkovitz-Gaubert test's first criterion.

Next, we must examine whether the decision fits within the test's second criterion, in that it was grounded in policy. While some courts have determined that various law enforcement decisions are entitled to discretionary-function immunity, See, e.g., Sabow v. U.S., 93 F.3d 1445, 1453-54 (9th Cir. 1996) (noting that law enforcement officials are required to "consider relevant political and social circumstances in making decisions about the nature and scope of a criminal investigation"); Kelly v. U.S., 924 F.2d 355, 362 (1st Cir. 1991) (concluding that, for claims brought under the Federal Tort Claims Act (FTCA), "decisions to investigate, or not, are at the core of law enforcement activity," and such judgment calls are "precisely the kind of policy-rooted decisionmaking" that discretionary-function immunity was intended to safeguard); Pooler v. United States, 787 F.2d 868, 871 (3d Cir. 1986) (concluding that when a complaint is addressed to the quality of an investigation as judged by its outcome, discretionary-function immunity applies because "Congress did not intend to provide for judicial review of the quality of investigative efforts"), those decisions do not compel us to conclude that discretionary-function immunity conclusively shields all law enforcement activities involving judgment or choice. Adhering to that proposition would eviscerate the second criterion of the Berkovitz-Gaubert analysis and constitute a step toward allowing the discretionary-function exception to swallow the general waiver of sovereign immunity, an approach not favored by this court's precedent. Compare ASAP Storage, Inc. v. City of Sparks, 123 Nev. 639, 657-58, 173 P.3d 734, 746 (2007) (Maupin, C.J., concurring) (pointing out that restrictions on the waiver of sovereign immunity under NRS Chapter 41 must be construed narrowly), with

United States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992) (pointing out that waivers of the government's sovereign immunity are not generally to be liberally construed and are instead construed strictly in favor of the government). Although virtually any government action can be traced back to a policy decision of some kind, an attenuated tie is not enough to show that conduct is policy-grounded. United States v. Gaubert, 499 U.S. 315, 325 n.7 (1991) (noting that not all discretionary acts performed by a government agent are within the discretionary-function exception because certain "acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish"); see Shansky v. U.S., 164 F.3d 688, 692-93 (1st Cir. 1999); Cope v. Scott, 45 F.3d 445, 448-49 (D.C. Cir. 1995).

Courts have held that when it is alleged that government agents violated constitutional rights or statutes, such immunity does not attach, since government "officials do not possess discretion to commit such violations." Pooler v. United States, 787 F.2d 868, 871 (3d Cir. 1986). In other words, when plaintiffs allege facts supporting that they were detained, arrested, or prosecuted illegally, without reasonable suspicion or probable cause, discretionary-function immunity does not apply because to conduct an illegal investigation or to affect an illegal arrest or prosecution does not represent a choice based on plausible policy considerations. See Coyne v. U.S., 270 F. Supp. 2d 104, 112 (D. Mass. 2003) (recognizing that "'the government may not immunize an otherwise tortious action simply by showing that the government took the action in order to implement some policy purpose,'" and noting that, instead, "'courts must carefully disaggregate the government's course of conduct in order to focus on the specific action at issue and determine whether that action was truly grounded in policy'") (quoting Peter H. Schuck and James J. Park, The

Discretionary Function Exception In the Second Circuit, 20 Quinnipiac L. Rev. 55, 73 (2000)), reversed on other grounds by Coyne v. Cronin, 386 F.3d 280 (1st Cir. 2004); Shansky, 164 F.3d at 693 (explaining that inquiry into whether a decision is policy-based is highly "case-specific, and not subject to resolution by the application of mathematically precise formulae"); see also, e.g., Morales v. U.S., 961 F. Supp. 633, 636 (S.D.N.Y 1997) (citing Caban v. United States, 671 F.2d 1230, 1233 (2d Cir. 1982), and concluding that the defendant drug enforcement agents were not entitled to discretionary-function immunity on the plaintiff's malicious prosecution and false arrest claims, when disputed issues remained as to whether agents had probable cause to arrest plaintiffs).

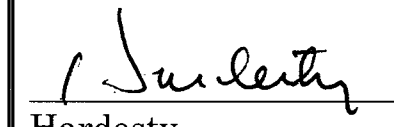
Here, since Grosjean's proposed state law claims were based on allegations that he was detained and searched without reasonable suspicion or probable cause, we have limited our inquiry to determining whether the GCB agents' actions were reasonable for Fourth Amendment purposes. In so doing, we keep in mind that the subjective intent of an agent is not relevant in evaluating whether the disputed government action is shielded by discretionary-function immunity, United States v. Gaubert, 499 U.S. 315, 325 (1991) ("The focus of the inquiry is not on the agent's subjective intent . . . but on the nature of the actions taken and on whether they are susceptible to policy analysis."); see also NRS 41.032(2) (providing that discretionary-function immunity applies "whether or not the discretion involved is abused"), and judicial review of an investigation's quality as judged by its outcome is foreclosed by the discretionary-function exception. Pooler, 787 F.2d at 871. Nevertheless, as explained above in the section analyzing the proposed § 1983 claim, since Grosjean alleged that the GCB agents detained him without reasonable suspicion of criminal activity, he has asserted a claim that the

GBC agents violated a clearly established rule against unreasonable seizures. Because acting in an unconstitutional manner is not consistent with legislative policies, discretionary-function immunity is not available, id. (explaining that government officials do not possess discretion to commit constitutional violations), and the district court improperly concluded that leave to amend the complaint to assert state law claims against agents Vincent and Pedote would be futile. In so concluding, however, we emphasize that nothing in this order precludes the district court from later dismissing or entering summary judgment on those claims on a more developed record for other reasons.

CONCLUSION

As to the decision denying leave to amend the complaint as to the respondents involved the Caesars Palace incident, we summarily affirm the district court's decision based on preclusion and law of the case principles. With regard to the decision related to the Imperial Palace incident, we reverse the district court's order denying leave to amend the complaint to add as defendants agents Vincent and Pedote, and we remand this matter to the district court with instructions to permit Grosjean to file the proposed claims against agents Vincent and Pedote.

It is so ORDERED.



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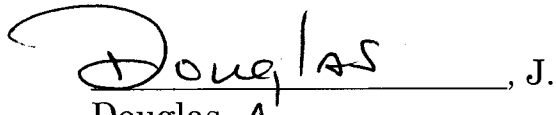

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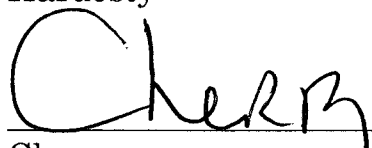

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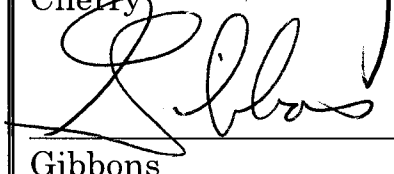

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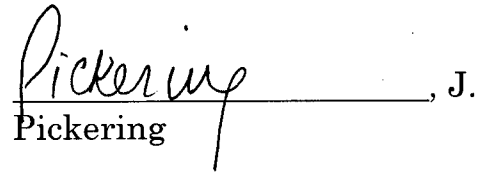

_____, J.
Pickering

cc: Eighth Judicial District Court Dept. 8, District Judge
Nersesian & Sankiewicz
Attorney General Catherine Cortez Masto/Gaming Division/
Las Vegas
Eighth District Court Clerk