


IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCISCO GONZALEZ, AN
INDIVIDUAL,
Appellant,
vs.
LAS VEGAS METROPOLITAN POLICE
DEPARTMENT, A POLITICAL
SUBDIVISION OF CLARK COUNTY,
NEVADA,
Respondent.

No. 61120

FILED

NOV 21 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court summary judgment granting immunity in a tort action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

In November 2007, the North Las Vegas Police Department (NLV) entered a warrant (the NLV warrant) for the arrest of one "Francisco Garcia-Gonzalez" (the wanted man) into the Nevada Criminal Justice Information System for drug trafficking-related charges. Appellant Francisco Gonzalez is a lifelong resident of Las Vegas who has the same name, birthdate, height, and eye color as the information listed for the wanted man in the NLV warrant. Between June 2008, and August 2010, respondent Las Vegas Metropolitan Police Department (LVMPD) detained or arrested Gonzalez at least 11 times based on the NLV warrant. Each incident involved a different LVMPD officer. Only NLV had the ability to modify or edit the NLV warrant. NLV ultimately modified the NLV warrant and since then, Gonzalez has not had any additional incidents with the LVMPD.

As a result of the stops and arrests, Gonzalez filed a complaint against LVMPD and NLV that alleged negligence, false imprisonment, and asserted a claim for injunctive relief. Gonzalez then voluntarily dismissed NLV from the lawsuit for unknown reasons. LVMPD filed a motion for summary judgment on Gonzalez's claims. The district court granted LVMPD summary judgment on three independent grounds: (1) discretionary immunity under NRS 41.032, (2) the existence of probable cause, and (3) the lack of an expert to establish the standard of care for LVMPD's alleged negligence. Gonzalez now appeals.

The district court properly granted LVMPD's motion for summary judgment based upon discretionary immunity under NRS 41.032

We review a district court's grant of summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate if the pleadings and other evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact remains in dispute and that the moving party is entitled to judgment as a matter of law. *Id.* To withstand summary judgment, the nonmoving party cannot rely solely on general allegations and conclusions set forth in the pleadings, but must instead present specific facts demonstrating the existence of a genuine factual issue supporting his claims. NRCP 56(e); *see also Wood*, 121 Nev. at 731, 121 P.3d at 1030-31. "The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." *Wood*, 121 Nev. at 731, 121 P.3d at 1031.

Gonzalez argues that LVMPD officers should not receive discretionary immunity protection under NRS 41.032 because (1) officers do not use personal judgment or discretion when they stop persons

pursuant to arrest warrants because they are only acting under orders, and (2) the officers are not policy makers and the decision to arrest is a routine, day-to-day, operational act entrusted to the LVMPD. Gonzalez relies on *Martinez v. Maruszczak*, 123 Nev. 433, 435-36, 168 P.3d 720, 722 (2007), where this court concluded that a state medical doctor's practice of medicine did not fall within the scope of immunity protections. We disagree.

NRS 41.031 contains Nevada's general waiver of sovereign immunity from civil suits arising from the wrongful acts of state employees. NRS 41.032 sets forth exceptions to Nevada's general waiver of sovereign immunity and provides that no action may be brought against a state officer or employee or any state agency or political subdivision that is:

Based upon the exercise or performance or the failure to exercise or perform *a discretionary function* or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.

NRS 41.032(2) (emphasis added). NRS 41.0336(2) also states that LVMPD is not responsible for "negligent acts" of its officers unless an officer affirmatively causes the harm. Our "application of sovereign immunity under NRS Chapter 41 presents mixed questions of law and fact." *Martinez*, 123 Nev. at 438, 168 P.3d at 724. We review de novo conclusions of law, including statutory construction. *Id.* We "will not disturb a [district] court's findings of fact if supported by substantial evidence." *Id.* at 438-39, 168 P.3d at 724.

In 2007, we adopted the United States Supreme Court's *Berkovitz-Gaubert* two-part test regarding discretionary immunity.

Martinez, 123 Nev. at 435-36, 445-47, 168 P.3d at 722, 728-29. Thus, a decision is entitled to discretionary immunity under NRS 41.032 if the decision “(1) involve[s] an element of individual judgment or choice and (2) [is] based on considerations of social, economic, or political policy.” *Id.* at 446-47, 168 P.3d at 729. In applying this test, we assess cases on their facts, keeping in mind Congress’ purpose “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.” *Id.* at 446, 168 P.3d at 729 (quoting *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)).

We conclude that LVMPD meets the first prong of the *Berkovitz-Gaubert* test because an officer must make his/her best educated guess within the course of their duties to determine whether someone was the right person sought in a warrant. Therefore, LVMPD’s actions in detaining and/or arresting Gonzalez pursuant to a facially valid warrant involved an element of individual judgment or choice regarding the scope of its treatment of Gonzalez. *Martinez*, 123 Nev. at 446-47, 168 P.3d at 729.

Immunity attaches under the second criterion “if the injury-producing conduct is an integral part of governmental policy-making or planning, if the imposition of liability might jeopardize the quality of the governmental process, or if the legislative or executive branch’s power or responsibility would be usurped.” *Martinez*, 123 Nev. at 446, 168 P.3d at 729.¹ NRS 41.032 protects even “frequent or routine decisions . . . if [they]

¹In *Martinez*, we concluded that a state physician was not entitled to immunity for his diagnostic and treatment decisions because they did not include policy considerations. 123 Nev. at 447, 168 P.3d at 729. To hold

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require analysis of government policy concerns.” *Id.* at 447, 168 P.3d at 729. The district court does not determine a police officer’s “subjective intent in exercising the discretion conferred by statute or regulation, but [rather focuses] on the nature of the actions taken and on whether they are susceptible to policy analysis.” *Id.* at 445, 168 P.3d at 728 (quoting *United States v. Gaubert*, 499 U.S. 315, 325 (1991)). Therefore, to satisfy the second criterion, we need not consider whether an LVMPD officer “made a conscious decision regarding policy considerations.”² *Id.* at 446, 168 P.3d at 728.

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otherwise would have left many clients and patients with no form of recourse against doctors who fail to act according to their profession’s reasonable standard of care. *Id.* at 448, 168 P.3d at 730. It would have also discriminated against indigent patients who make up a greater portion of those seeking treatment from state providers. *Id.* 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) (“To sustain an action under § 1983, a plaintiff must prove: (1) that a defendant acted under color of state law; and (2) the conduct deprived the plaintiff of a right secured by the Constitution or laws of the United States.”).

²Acts that involve negligence unrelated to policy objectives do not fall within discretionary immunity. *Martinez*, 123 Nev. at 446, 168 P.3d at 728. “For example, a government employee who falls asleep while driving her car on official duty is not protected by the exception because her negligent judgment in falling asleep cannot be said to be based on the purposes that the regulatory regime seeks to accomplish.” *Id.* at 446, 168 P.3d at 729 (internal quotations omitted). In contrast, we conclude that the decision whether to arrest or detain relates to policy objectives and falls within the purpose of Nevada’s regulatory scheme, which seeks to apprehend criminals.

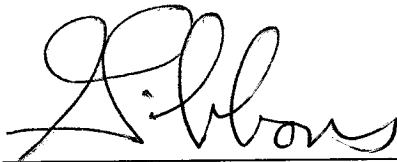
We conclude that LVMPD's decision to arrest or detain Gonzalez based on the NLV warrant was part of a policy consideration that required analysis of multiple social, economic, efficiency, and planning concerns including public safety. *See Martinez*, 123 Nev. at 446-47, 168 P.3d at 729; *see also Santiago v. Mass. Dep't of State Police*, No. 11-30248-KPN, 2013 WL 680685, at *9 (D. Mass. Feb. 22, 2013) (officers' decisions regarding investigation and when to seek warrants for arrests are based on considerations of public policy). LVMPD's stops were in furtherance of public policy goals, including the apprehension and arrest of wanted criminals pursuant to a facially valid warrant. *See United States v. Gaubert*, 499 U.S. 315, 334 (1991). We further note that Gonzalez does not challenge the facial validity of the NLV warrant.


We also observe that the imposition of liability against LVMPD in this case may jeopardize the quality of the governmental process. *Martinez*, 123 Nev. at 446, 168 P.3d at 729. For example, LVMPD could be faced with the difficult choice between releasing a potential criminal closely matching the description of a valid warrant, or running the risk of potential civil liability in those close cases. Officers must be able to make this decision confidently. Thus, although we are sympathetic to Gonzalez's plight, we conclude that the decision to detain or arrest a person closely matching a warrant's description is the type of decision that discretionary immunity should protect.³ Therefore, the district court properly granted LVMPD summary judgment because no


³We accept respondent's representation to this court that measures have been taken to avoid recurrence of the situation which gives rise to this appeal.

genuine issue of material fact remained regarding whether LVMPD was entitled to discretionary immunity under NRS 41.032.

Accordingly, we ORDER the judgment of the district court AFFIRMED.⁴


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Saitta

cc: Hon. Timothy C. Williams, District Judge
Craig A. Hoppe, Settlement Judge
Parker Scheer Lagomarsino
Marquis Aurbach Coffing
Eighth District Court Clerk

⁴Because we affirm the district court's order granting summary judgment based on discretionary immunity grounds under NRS 41.032, we decline to consider Gonzalez's remaining arguments.