APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED APRIL 25, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15657

MARINO SCAFIDI,

Plaintiff-Appellant,

v.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, A POLITICAL SUBDIVISION ON BEHALF OF STATE OF NEVADA; *et al.*,

Defendants-Appellees,

and

FCH1, LLC, DBA PALMS CASINO RESORT; *et al.*,

Defendants.

MEMORANDUM*

D.C.No. 2:14-cv-01933-RFB-VCF

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appendix A

Appeal from the United States District Court
for the District of Nevada
Richard F. Boulware, II, District Judge, Presiding

Submitted April 1, 2024**
Pasadena, California

April 25, 2024, Filed

Before: R. NELSON, VANDYKE, and SANCHEZ, Circuit Judges.

Appellant Marino Scafidi (Scafidi) brought claims against the Las Vegas Metropolitan Police Department (LVMPD), several of its officers, and an investigating nurse (collectively Appellees), alleging that he was arrested without probable cause and wrongfully prosecuted for sexual assault. The district court granted summary judgment for the Appellees. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. On September 1, 2012, Scafidi went on a date with Stephanie Carter at the Palms Hotel & Casino in Las Vegas, where Scafidi rented a room. The night went awry, ending with Carter locked in Scafidi's bathroom early the next morning, where she called 911. Carter reported that Scafidi was trying to harm her. Officers arrived, finding Carter locked and bleeding in Scafidi's hotel bathroom. Carter was taken to be interviewed and receive medical attention, while Scafidi was detained.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Carter told officers that Scafidi sexually assaulted her. A Sexual Assault Nurse Exam (SANE) stated that her "clinical impression" was "sexual assault." Based on this, and Carter's 911 call, Scafidi was arrested. Scafidi was charged for three counts of sexual assault. After several years, in 2017, Scafidi's charges were dropped.

2. Scafidi sued, asserting several claims. These included two claims against LVMPD: (1) a *Monell* claim, and (2) a negligence claim; two claims against just the investigating officers and nurse: (1) a § 1983 claim; and (2) a false imprisonment claim; two claims against the officers and the nurse: (1) a § 1983 conspiracy claim, and (2) a malicious prosecution claim; and an intentional infliction of emotional distress (IIED) claim against all Appellees.

On May 15, 2018, the district court granted Appellees summary judgment because there was probable cause to arrest Scafidi and any issue with probable cause was precluded from relitigation, among other things. *Scafidi v. Las Vegas Metro. Police Dep't*, No. 2:14-cv-01933-RCJ—GWF, 2018 U.S. Dist. LEXIS 78413, 2018 WL 2123372, at *3-4 (D. Nev. May 8, 2018). Scafidi appealed. We reversed, holding that "controlling Nevada state precedent expressly rejects the view that a probable cause determination at a preliminary hearing precludes later relitigation of that question." *Scafidi v. Las Vegas Metro. Police Dep't*, 966 F.3d 960, 963 (9th Cir. 2020). We also concluded that Scafidi's allegations that Defendants fabricated evidence or otherwise committed misconduct in bad faith created a triable issue of material fact as to probable cause. *Id.* at 963-64.

The case was remanded to the district court. On February 9, 2021, the district court granted summary judgment for the nurse that performed the SANE. *Scafidi v. Las Vegas Metro. Police Dep't*, No. 2:14-cv-01933-RCJ-GWF, 2021 U.S. Dist. LEXIS 24115, 2021 WL 472920, at *8 (D. Nev. Feb. 9, 2021). On March 31, 2023, the district court granted summary judgment for the remaining Appellees. *Scafidi v. Las Vegas Metro. Police Dep't*, No. 2:14-cv-01933-RFB-VCF, 2023 U.S. Dist. LEXIS 56298, 2023 WL 2744737, at *11 (D. Nev. Mar. 31, 2023). Scafidi now appeals the district court's grant of summary judgment.

3. We review a grant of summary judgment de novo. *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1029 (9th Cir. 2004). Summary judgment is appropriate when "there is no genuine dispute [of] material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We hold that the district court correctly granted summary judgment for all Appellees and affirm.

First, Scafidi's § 1983 claims fail because undisputed evidence shows that Appellees did not violate his constitutional rights. To prove a § 1983 claim based on the Fourth Amendment, "'[s]eizure' alone is not enough," it must also be unreasonable. *Brower v. County of Inyo*, 489 U.S. 593, 599, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989). Scafidi's "seizure" was not unreasonable, because his arrest was based on probable cause as a matter of law. At the time of the arrest, the responding officer had found Carter locked and bleeding in Scafidi's hotel bathroom,

and knew that Carter had called 911 and reported that Scafidi was trying to harm her. Based on these undisputed facts, a reasonable detective could conclude that a "fair probability" existed that a sexual assault occurred, which is sufficient to establish probable cause to arrest. *See United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007).

Scafidi's § 1983 claim based on deliberately fabricated evidence also fails as a matter of law because Scafidi has not presented evidence that an official "deliberately fabricated evidence." *Spencer v. Peters*, 857 F.3d 789, 798 (9th Cir. 2017). Scafidi alleges that Defendant Beza deliberately fabricated evidence in his search warrant application because the application stated that the SANE exam resulted in "positive findings," despite the fact that, in Scafidi's view, the SANE exam never "found or confirmed a sexual assault." But Scafidi's allegation does not raise a genuine factual dispute because the nurse's SANE exam indisputably says that her "clinical impression" was "sexual assault." Scafidi therefore has no direct evidence of fabrication. Scafidi also cannot establish his deliberate fabrication claim using circumstantial evidence because Scafidi presented no evidence that Defendants Pool and Beza should have believed Scafidi was innocent, given the results of the SANE exam and Carter's representations. *See Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc) (plaintiff can prove a fabrication claim using circumstantial evidence by showing that "[d]efendants continued their investigation . . . despite the fact that they knew or should have known that [the plaintiff] was innocent").

Because Scafidi has not raised triable issues as to whether Appellees violated his constitutional rights, his § 1983 conspiracy claim and his *Monell* claim necessarily fail. *See Woodrum v. Woodward County*, 866 F.2d 1121, 1126 (9th Cir. 1989); *see also City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986).

Finally, Scafidi's state law claims fail because, as explained above, Appellees had probable cause to arrest him for sexual assault as a matter of law. The existence of probable cause bars these claims because "an arrest made with probable cause is privileged and not actionable." *Nelson v. City of Las Vegas*, 99 Nev. 548, 665 P.2d 1141, 1144 (Nev. 1983). In addition, the existence of probable cause is a required element, or affirmative defense, to Scafidi's false arrest, malicious prosecution, and IIED claims. *See, e.g., Schulz v. Lamb*, 504 F.2d 1009, 1011 (9th Cir. 1974) (false arrest claim); *LaMantia v. Redisi*, 118 Nev. 27, 38 P.3d 877, 879 (Nev. 2002) (malicious prosecution claim); *Palmieri v. Clark County*, 131 Nev. 1028, 367 P.3d 442, 446 n.2 (Nev. Ct. App. 2015) (IIED claim). Along the same lines, Scafidi's negligence claim similarly fails because it is factually premised on a lack of probable cause.

Because Scafidi's claims fail as a matter of law, we affirm the district court's grant of summary judgment for Appellees.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, FILED MARCH 31, 2023

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. 2:14-cv-01933-RFB-VCF

MARINO SCAFIDI,

Plaintiff,

v.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, *et al.*,

Defendants.

Filed March 31, 2023

ORDER

RICHARD F. BOULWARE, II, District Judge

I. INTRODUCTION

Before the Court is Defendants Las Vegas Metropolitan Police Department ("LVMPD"), Sgt. S. Comiskey, Lt. D. McGrath, Det. K. Pool, Det. R Beza, Det. A. Christensen, and CSI K. Grammas's Motion for Summary Judgment (ECF No. 107) and Motion to Seal (ECF No. 108). The

Court finds this matter properly resolved without a hearing. *See* Local Rule 78-1.

For the foregoing reasons, Defendants' motions are granted.

II. PROCEDURAL BACKGROUND

On August 29, 2014, Plaintiff filed a Complaint against, as relevant here, LVMPD, five officers and detectives, and a crime scene investigator in state court. ECF No. 1. The Complaint specifically alleges (1) a violation of 42 U.S.C. § 1983 against Defendants McGrath, Comiskey, Pool, Beza, Christensen, and Grammas; (2) *Monell* Liability against Defendant LVMPD; (3) a Section 1983 conspiracy claim against Defendants McGrath, Comiskey, Pool, Beza, Christensen, and Grammas; (4) a negligence claim against Defendant LVMPD; (5) a false imprisonment claim against Defendants McGrath, Comiskey, Pool, Beza, Christensen, and Grammas; (6) a malicious prosecution claim against Defendants McGrath, Comiskey, Pool, Beza, Christensen, and Grammas; and (7) an intentional infliction of emotional distress claim against all Defendants. *Id.* On November 20, 2014, Defendants removed this action, and it was assigned to the Honorable Robert C. Jones. *Id.* On January 20, 2015, the district court granted the parties' stipulation to stay the proceedings, including discovery, as Plaintiff's underlying criminal matter was pending on appeal before the Nevada Supreme Court. ECF No. 30. On May 17, 2017, the district court continued the stay until December 31, 2017, even though it would still entertain any motions to dismiss. ECF No. 47.

Appendix B

On August 21, 2017, Defendants filed their first motion for summary judgment. ECF No. 48. On June 15, 2018, the district court granted Defendants summary judgment on the ground that Plaintiff was precluded from relitigating the state justice of the peace's determination that there was probable cause to believe that Plaintiff had committed a crime. ECF No. 58. The district court also concluded that Plaintiff's state tort claims against Defendant LVMPD were barred because Plaintiff failed to comply with Nevada's administrative presentment statute, and the individual officers were entitled to discretionary-act immunity for the those claims as well. *Id.* On July 3, 2018, Plaintiff appealed from the grant of summary judgment with the Court of Appeals for the Ninth Circuit. ECF No. 65.

On July 23, 2020, the Ninth Circuit affirmed the district court's grant of summary judgment as to Defendant LVMPD on Plaintiff's state tort claims but reversed and remanded on the remaining claims. *Scafidi v. Las Vegas Metro. Police Dep't*, 966 F.3d 960 (9th Cir. 2020). First, it concluded that the district court had erroneously decided that the probable cause determination made at the state justice of the peace hearing precluded Plaintiff from asserting in his federal suit that Defendants lacked probable cause to arrest and detain him. *Id.* at 963. Second, the Ninth Circuit concluded that Plaintiff's allegations that Defendants fabricated evidence or undertook other wrongful conduct in bad faith created a triable issue of material fact as to probable cause, pursuant to the Nevada Supreme Court's decision in *Jordan v. State ex rel. Dep't of Motor Vehicles & Pub. Safety*, 121 Nev. 44, 110 P.3d 30,

48-49 (Nev. 2005), *overruled on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (Nev. 2008), and its decision in *Awabdy v. City of Adelanto*, 368 F.3d 1062 (9th Cir. 2004). *Id.* at 963-64. Accordingly, the panel reversed the district court's order as to Plaintiff's Section 1983 claims. Lastly, as it relates to Plaintiff's state tort claims, the Ninth Circuit affirmed the district court's ruling that Plaintiff's claims against Defendant LVMPD were barred under Nevada Revised Statute § 41.036(2). *Id.* at 965. The panel, however, held that, given the factual disputes, discretionary act immunity under Nevada state law did not bar Plaintiff's state law claims against the individual Defendant officers. *Id.*[1]

On October 13, 2020, after the case was remanded, the district court granted the parties' scheduling order, including discovery plan. ECF No. 81. Discovery closed on April 13, 2022. *See* ECF No. 106. On May 9, 2022, Defendants filed the instant motion for summary judgment. ECF No. 107. Plaintiff responded on June 27, 2022, ECF Nos. 115, 117, and Defendants replied on July 21, 2022. ECF No. 120.

On June 23, 2022, this case was reassigned from the Honorable Robert C. Jones to the undersigned. ECF No.

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1. The Ninth Circuit separately declined to consider Plaintiff's argument that Nevada Revised Statute § 41.036(2) was invalid and unenforceable under the Nevada Supreme Court's decision in *Turner v. Staggs*, 89 Nev. 230, 510 P.2d 879 (Nev. 1973), because it was raised for the first time on appeal. *Scafidi*, 966 F.3d at 964.

113. On September 21, 2022, the Court vacated the jury trial set for October 25, 2022. ECF No. 121.

This Order follows.

III. FACTUAL BACKGROUND

a. Undisputed Facts

The Court finds the following facts to be undisputed based on the record.

On September 1, 2012, after months of communication through Match.com, an online dating platform, Plaintiff and S.C. decide to meet in person at the Palms Hotel and Casino in Las Vegas where Plaintiff has rented a room. That night, they eat dinner, dance, and drink at the Palms. After initially going to Plaintiff's hotel room to talk, they then spend time at Rain, a nightclub at the Palms. Thereafter, they return to Plaintiff's hotel room where they engage in sexual activity in the early morning hours of September 2.

At around 4:19 a.m., S.C. calls 911 from the hotel room's bathroom telephone, reporting that Plaintiff is trying to harm her. She indicates that she is locked in the bathroom. She claims that Plaintiff has a gun, and that he is going to kill her. The 911 operator spends the duration of the call attempting to locate S.C., as S.C. does not know what hotel room she is in. At around 4:22 a.m., the operator calls the hotel's security explaining that "we have somebody calling from one of your rooms, she's

locked in the bathroom and she's crying, she called on 911 if I give you the phone number can you tell me what room number it is?" ECF No. 107-6 at 9. The 911 operator then indicates to security that the situation "looks like it's an assault too." *Id.* at 11. Plaintiff is heard throughout the 911 call asking if S.C. is alright, telling her he needs to use the bathroom, and demanding that S.C. open the door. Twice, he threatens to "kick [her] ass" for not opening the door.[2] ECF No. 107-6 at 26. At no point during the twenty-seven-minute call, however, does S.C. say she was sexually assaulted.

When Palms's security and LVMPD officers arrive at Plaintiff's hotel room, around 5 a.m., they find S.C. locked in the bathroom and bleeding. The officers and hotel security then take Plaintiff to a hotel security room, while detectives investigate S.C.'s allegations against Plaintiff. At this time, Plaintiff invokes his Fifth Amendment rights.

In the meantime, S.C. is transferred to the University Medical Center ("UMC"). There, Defendant Pool, a sexual assault detective assigned to investigate what happened that morning, and Defendant Comiskey, his supervisor, conduct an initial interview with S.C. Meanwhile, Defendant Beza, also a sexual assault detective, is called by Defendant Pool to initiate an investigation at the hotel room. When Defendant Beza arrives at the Palms, he goes to the security area where Plaintiff is being detained. There, he waits for Defendant Pool to determine, based

2. Plaintiff is unaware that Carter is on the phone with a 911 operator during this time.

on Defendant Pool's interviews with S.C., whether there is probable cause for a search warrant.

Defendant Pool's interview with S.C. takes place around 6:27 a.m. Although S.C. tells Defendant Pool that her cell phone contained text messages sent between her and friends during her evening and morning with Plaintiff, she initially appears unable and reluctant to recount all of the specific details of here interaction with the Plaintiff. While she is not able to remember many details, when asked if she believes she was sexually assaulted she responds "100% I was." Nevertheless, Defendant Pool tells S.C. that the conduct S.C. can recall Plaintiff engaging in is not illegal. S.C. indicates multiple times that she does not want to continue the interview. In response, Defendant Pool states that he will be unable to prosecute the case against Plaintiff, including obtaining a search warrant for the hotel room, if she does not give him more information. Defendants then end the interview, and S.C. undergoes a sexual assault medical evaluation ("SANE").

Defendant Pool then interviews S.C. a second time around 8:42 a.m., and S.C. states that she affirmatively told Plaintiff that she did not want to engage in sexual activity with him. In doing so, she provides more details about their morning encounter in his hotel room, including that at some point she was "laughing and joking," that she told him "no" to having sex, that he put his fingers and penis in her vagina, that it was not consensual, that she pretended to be asleep, and that she pretended to be sick to go to the bathroom. It was then, after the second interview, that Defendant Pool contacts Defendant Beza to obtain a search warrant for Plaintiff's hotel room.

Defendant Pool then calls Defendant Beza and tells him that it was a "sexual assault" case, that S.C. underwent a SANE examination, and that its "findings" are "positive." Defendant Beza uses this and other information to set forth probable cause to obtain a search warrant for Plaintiff's hotel room. Although Defendant Beza finds S.C.'s phone and a cell phone video camera in the room during his initial search, he only obtains a second search warrant for the video camera. While Defendants secure S.C.'s cell phone, they do not review the text messaging history but instead return the phone to S.C. sometime after the second interview concludes.

After completing the interviews with S.C., Defendant Pool returns to the hotel. Once there, he arrests Plaintiff around 10 a.m. for the crime of sexually assaulting S.C. and transfers him to the Clark County Detention Center ("CCDC"). Defendant McGrath approves the Arrest Report that Defendant Pool has prepared regarding Plaintiff's arrest for sexual assault. While he is booked, Plaintiff mentions to Defendant Pool that someone possibly drugged him. Plaintiff is held at CCDC for three to four days before he is released on bail.

A criminal case is filed against Plaintiff on September 4, 2012. *See* ECF No. 107-3. Plaintiff's preliminary hearing is on January 17, 2013, and the state justice of the peace determines, based on testimony from S.C. and Defendant Pool, that there is sufficient evidence to believe Plaintiff committed the crime of sexual assault against S.C. ECF No. 107-3 at 24. On January 28, 2013, Plaintiff is criminally charged with sexually assaulting

S.C. under Nevada Revised Statutes §§ 200.364, 200.366. ECF No. 1; *State of Nevada v. Victor Marino*, Docket No. C-13-286991-1 (Nev. Dist. Ct. Jan 25, 2013). Plaintiff subsequently files separate motions to dismiss the charges based on the government's failure to preserve S.C.'s blood and urine samples, Plaintiff's blood samples, and S.C.'s text message exchanges with friends from that night. ECF No. 115-6. On June 13, 2014, the state district court grants Plaintiff's motions, dismissing the charges due to spoliation of evidence. *Id.* On January 15, 2015, the Nevada Supreme Court reverses and remands the state district court, ruling that only the text messages were foreseeably exculpatory. *State v. Scafidi*, 131 Nev. 1351, at *3 (Nev. 2015). Accordingly, on remand, the state district court is to consider whether to dismiss the charges or give a curative jury instruction. *Id.* The state district court finds that a curative jury instruction is sufficient, and it schedules the trial for October 30, 2017. ECF No. 48. On October 12, 2017, however, the state district court grants the State's motion to dismiss all charges. ECF No. 115-9.

b. Disputed Facts

The parties dispute the following facts. First, the parties dispute whether the SANE examination provided evidence to support any sexual assault allegations and whether the text messages in S.C.'s phone provided exculpatory evidence important to Defendants' investigation. Second, the parties dispute whether Defendants McGrath, Comiskey, Christensen, and Grammas played any role in Plaintiff's arrest. Lastly, the parties dispute: whether Plaintiff was repeatedly

denied the right to counsel despite his requests for legal assistance while he was held in the hotel security room; whether, during that time, LVMPD officers and detectives also threatened Plaintiff with being jailed, if he did not cooperate with the investigation; whether Defendants staged an incriminating crime-scene photograph to support the case against Plaintiff; and whether Defendants made racially derogatory remarks about Plaintiff after he was arrested.

IV. LEGAL STANDARD

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265(1986). When considering the propriety of summary judgment, courts view all facts and draws all inferences in the light most favorable to the nonmoving party. *Gonzalez v. City of Anaheim*, 747 F.3d 789, 793 (9th Cir. 2014). If the movant has carried its burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts.... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (alteration in original) (internal quotation marks omitted). It is improper for the Court to resolve genuine factual disputes or make credibility determinations at the

summary judgment stage. *Zetwick v. County of Yolo*, 850 F.3d 436, 441 (9th Cir. 2017) (citations omitted).

V. DISCUSSION

a. Federal Claims

"To state a claim under Section 1983, [a plaintiff] must plead two essential elements: 1) that the Defendants acted under color of state law; and 2) that the Defendants caused them to be deprived of a right secured by the Constitution or laws of the United States." *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997). Defendants, however, are entitled to qualified immunity from Section 1983 claims, if their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Gausvik v. Perez*, 345 F.3d 813, 816 (9th Cir. 2003) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). On a motion for summary judgment, the Court determines "whether a constitutional violation occurred and, if so, whether a reasonable officer would have acted in the same manner." *Id.*

i. First Cause of Action

Plaintiff's first cause of action alleges that he was "arrested [ ] without probable cause," and that he was confined "within the Clark County Detention Center." ECF No. 1 at 15. This is because Defendants "conspired and deliberately [chose] to not preserve exculpatory evidence," and as such, he "was falsely charged with felony

crimes." *Id.* at 17. He alleges the actions were in violation of his Fourth and Fourteenth Amendment rights. The Court construes that Plaintiff's alleged constitutional violations in his First Cause of Action as resting on two different claims under the Fourth and Fourteenth Amendments: a.) a deliberate fabrication of evidence claim under the Fourteenth Amendment, and b.) a false arrest claim under the Fourth Amendment. The Court separately analyzes each claim.

1. Deliberate Fabrication of Evidence Claim

Plaintiff claims that Defendants deliberately used coercive and abusive techniques during the sexual assault investigation against Plaintiff by (1) falsely characterizing the results of the SANE examination and the 911 call's contents in the search warrant application for Plaintiff's hotel room and by (2) failing to preserve and review the exculpatory evidence of text messaging history from S.C.'s cell phone.

"'[T]here is a clearly established constitutional due process right not to be subject to criminal charges on the basis of false evidence that was deliberately fabricated by the government.'" *Caldwell v. City & County of San Francisco*, 889 F.3d 1105, 1112 (9th Cir. 2018) (quoting *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001)). A plaintiff prevails on a deliberate fabrication of evidence claim if he establishes that "(1) the defendant official deliberately fabricated evidence and (2) the deliberate fabrication caused the plaintiff's deprivation of liberty." *Spencer v. Peters*, 857 F.3d 789, 798 (9th Cir. 2017).

Appendix B

a. Fabrication

Deliberate fabrication can be shown by either "direct evidence of fabrication" or "circumstantial evidence related to a defendant's motive." *Caldwell*, 889 F.3d at 1112. Circumstantial evidence includes showing that "(1) Defendants continued their investigation of [the plaintiff] despite the fact that they knew or should have known that he was innocent; or (2) Defendants used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information." *Spencer*, 857 F.3d at 793, 799. A plaintiff, however, does not have to prove that Defendants knew or should have known the plaintiff was innocent if the plaintiff provides direct evidence of fabrication. *See id.* at 799. Direct evidence of fabrication may be shown by the inclusion of statements that were "never made" in an officer's report, or "when an interviewer deliberately mischaracterizes witness statements in her investigative report." *Id.* at 793.

i. Fabrication of SANE Examination Results and 911 Call Contents

The Court finds that there are genuine issues of disputed fact as to deliberate fabrication of evidence by Defendant Pool.

Plaintiff asserts that Defendant Pool deliberately fabricated the results of S.C.'s SANE examination by mischaracterizing them in the search warrant affidavit

used to support a search of Plaintiff's hotel room. According to Plaintiff, the exam revealed no physical evidence to support any sexual assault allegation. Therefore, Defendant Beza's inclusion of the statement in the affidavit that the findings of the SANE exam performed were "positive" was a misleading statement. In opposition, Defendants contend that Defendant Pool's representation of "sexual assault" was a truthful statement based upon the information received from a medical professional. This is because the SANE Nurse, Jeri Dermanelian, told Defendant Pool that "there was positive findings for sex/sexual assault." Moreover, during his investigation, Defendant Pool relied on UMC medical records confirming a "sexual assault" finding.

The Court finds that there are genuine issues of disputed fact as to whether Defendant Pool deliberately fabricated evidence. First, Plaintiff has presented evidence that Pool was never told by the SANE nurse that the SANE examination found or confirmed that a sexual assault occurred. Second, Plaintiff has presented expert evidence which finds that the results were not consistent with sexual assault or even showed that sexual contact even occurred. Thus, based upon Plaintiff's asserted facts, Defendant Pool misrepresented to Defendant Beza that he had been told by a medical professional that a sexual assault had occurred, and he also misrepresented the facts when he said that the examination had found that a "sexual assault" had occurred.

These fabrications were augmented by further fabrications made by Defendant Beza himself in his

affidavit. First, he affirmatively and falsely indicated that Carter had said in the 911 call that she had been "sexually assaulted" when no such allegation was made by Carter during the call. The affidavit repeated the false conclusion that the SANE examination had provided "positive findings." Additionally, the affidavit deliberately omitted the fact that, when S.C. was questioned by Defendant Pool, she initially indicated in her *first interview*—two hours before the second interview—that she could not fully remember what had happened, and that she only offered statements providing specific details about the alleged sexual assault in a *second interview* after Pool told her that her first interview did not establish probable cause to arrest Plaintiff.

Accordingly, there is a triable issue as to whether Defendants deliberately fabricated the results of S.C.'s SANE examination and the contents of the 911 call in connection with the arrest of Plaintiff.

ii. Failure to Preserve Text Messages from S.C.'s Cell Phone

Next, however, the Court finds that Plaintiff's claim that Defendants' failure to collect and preserve S.C.'s text messages violates the "due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government" fails as a matter of law. *Devereaux*, 263 F.3d at 1075-76. Plaintiff contends that Defendants seized S.C.'s cell phone but made no effort to record or capture S.C.'s text message history from that evening and morning with Plaintiff.

Even if the erased text messages would have presented exculpatory evidence as to Plaintiff's alleged guilt on the charge of sexual assault, the Court finds that federal law has not yet recognized a civil claim under *Devereaux* for such a failure to preserve exculpatory evidence by itself. As the Ninth Circuit has recently confirmed, withholding exculpatory evidence "cannot in itself support a deliberate-fabrication-of-evidence claim." *O'Doan v. Sanford*, 991 F.3d 1027, 1045 (9th Cir. 2021) (quoting *Devereaux*, 263 F.3d at 1079). Deliberate fabrication, the Ninth Circuit has concluded, "must mean something more than a mere omission." *Id.*

Therefore, Plaintiff's Fourteenth Amendment failure to preserve exculpatory evidence claim under the *Devereaux* framework fails as a matter of law.

b. Causation

The Court now addresses whether Defendants' deliberate fabrication of evidence caused Plaintiff's deprivation of liberty. Indeed, Plaintiff contends that Defendants' deliberate fabrication caused him to be arrested without probable cause and falsely charged with felony crimes. The Court disagrees.

"To establish causation, [a plaintiff] must raise a triable issue that the fabricated evidence was the cause in fact and proximate cause of his injury." *Caldwell*, 889 F.3d at 1115. "[A] § 1983 plaintiff need not be convicted on the basis of the fabricated evidence to have suffered a deprivation of liberty—being criminally charged is

enough." *Id.* Proximate cause exists where "the injury is of a type that a reasonable person would see as a likely result of the conduct in question." *Spencer*, 857 F.3d at 798.

The Court finds that, even assuming the facts in Plaintiff's favor, the deliberate fabrication did not cause Plaintiff to suffer a constitutional deprivation. This is because, even without considering the deliberately fabricated evidence in the initial search warrant affidavit as discussed above, Defendants still had a proper basis for detaining Plaintiff in the hotel security room and then arresting and transferring him to CCDC. It is undisputed that S.C. called 911 reporting that Plaintiff had a gun and was attempting to harm her. Using a phone in the bathroom, S.C. told the 911 operator to "please help me," "he's gonna hurt me," "he's gonna kill me," and "I wanna kill myself before he kills me." ECF No. 107-6 at 20-35. Throughout the 27 minute 911 call, S.C. is locked in the bathroom, and Plaintiff can be heard knocking on the door, demanding to be let in and, at one point, threatening to "kick [her] ass." ECF No. 107-6 at 26. In the process of detaining Plaintiff, the officers also find S.C. locked in the bathroom and bleeding. Even if at this point the officers lacked probable cause, the officers had at least "reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'" *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989). Under the totality of the circumstances, the Court finds that the officers used the "least intrusive means reasonably available to verify or dispel the officer's suspicion. . . ." *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). The Court concludes that the officers acted reasonably in initially detaining Plaintiff.

Next, the Court finds that, absent the deliberately fabricated evidence discussed above, the length and scope of Plaintiff's detention in the hotel security room were still justified by Defendant Pool's two interviews with S.C. Of course, no per se duration exists as to when a *Terry* stop becomes an arrest. Rather, the "length and scope of detention must be justified by the circumstances authorizing its initiation." *Pierce v. Multnomah County*, 76 F.3d 1032, 1038 (9th Cir. 1996). "In assessing whether a detention is too long in duration to be justified as an investigative stop," courts "examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *United States v. Sharpe*, 470 U.S. 675, 686, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985).

The Court finds that Defendants diligently pursued a means of investigation intended to confirm or dispel their suspicions as quickly as possible. Defendants do not dispute, as Plaintiff contends, that Plaintiff was detained in the hotel security room for approximately four to five hours before Plaintiff was formally arrested. Approximately only one hour and a half pass between the time S.C. is found in the hotel bathroom and her first interview with Defendant Pool at UMC. What is plainly evident from the first interview is that she believes she communicated to Plaintiff that she did not want to engage in sexual activity with him, and that she experienced something traumatic. For instance, when Defendant Pool asks her about what happened in Plaintiff's hotel room, she states: "we were just like joking around and I was just like

not interested in hooking up with him or anything. And I told him that."; "He came out just like—he started making out with me and I was like, 'No.' And I—I don't know. I don't really remember."; "I just remember thinking if I pretended to pass out and like I was just going to go to sleep, it would stop."; "But I—I remember telling him, 'No,' so many times and laughing at him like, 'Are you kidding me? This isn't going to-happen.' And then it getting to the point where like it was going to happen whether I wanted it or not." Defendant Pool then asks "do you believe you were sexual assaulted or do you not know?" Her answer was "100% I was and 100% he would've killed me if he would've got into that bathroom." Throughout the interview, she has trouble recalling details about what happened that morning. This is understandable given the nature of the event, as evident by the 911 call and the state she was found by the police officers and hotel security. She is also sharing these traumatic details with Defendant Pool, a stranger she just met.

The Court rejects Plaintiff's assertion that Defendant Pool engaged in coercive behavior during this interview. Indeed, even after S.C. shared the above details, Defendant Pool states that he would be unable to charge Plaintiff without her sharing more details from that morning. Of course, S.C. has already strongly suggested that she experienced something traumatic that she did not agree to. Defendant Pool, having heard of the details she can remember, asks her if she believes she was sexually assaulted, and she responds "100%." While acknowledging that she does not want to continue the interview at that time, he asks S.C. if she wants to take a SANE

examination and answers her questions about continuing the investigatory efforts at a later time. Ultimately, S.C. asks Defendant Pool if she can take a break from being interviewed, which he agrees to. In sum, throughout the course of the first interview, Defendant Pool diligently seeks to determine whether S.C. has been sexually assaulted. It is reasonable that, during this time, Plaintiff remains detained.

After the SANE exam, Defendant Pool then interviews S.C. a second time, around 8:42 a.m. During this interview, S.C. states that she told Plaintiff that she did not want to engage in sexual activity with him. In doing so, she now provides more details, including that she told him "no" to having sex, that he put his fingers and penis in her vagina, that it was not consensual, that she pretended to be asleep, and that she pretended to be sick to go to the bathroom. At bottom, the Court finds that, given the traumatic nature of such an inquiry, it was reasonable for Defendant Pool to give S.C. time to recollect the details of that morning over the span of two interviews. Defendant Pool then contacts Defendant Beza to provide him not just the details of the SANE exam and 911 call but also details from what S.C. had shared during the two interviews.

By 9:12 a.m., Defendant Beza applies for an initial search warrant of Plaintiff's hotel room, based on information provided by Defendant Pool. Omitting the SANE exam and the statement regarding the 911 call, the search warrant affidavit included the following as a basis for probable cause: S.C. "told [Plaintiff] to stop and that they were not going to have sex"; Carter told Defendant

Pool that she "told [Plaintiff] to stop several times and then she allowed him to take her clothes off," and "that if he was going to do this to her, he must at least wear a condom"; and that Plaintiff "penetrated [Carter's] vagina with his penis, fingers and tongue." The Court finds that, given the proximity of these statements to the 911 call, her condition when she was found in the bathroom, and that she was the alleged crime victim in the investigation, Defendants had a reasonable basis to continue detaining Plaintiff in the hotel security room while they searched his hotel room for evidence corroborating S.C.'s allegations against him.

It is undisputed that, at around 10 a.m., after he completed his interviews with S.C., Defendant Pool returned to the Palms, arrested Plaintiff, and then transferred him to CCDC for sexually assaulting S.C. The Court finds that, even without the deliberately fabricated evidence discussed above, S.C.'s statements and evidence collected from the search of his hotel room, under the totality of the circumstances, provided Defendants with a reasonable basis to conclude that probable cause existed to arrest and charge Plaintiff with the crime of sexual assault. *See Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1444 (9th Cir. 1991) ("[C]rime victims are presumed reliable" if they can "furnish underlying facts sufficiently detailed to cause a reasonable person to believe a crime had been committed and the named suspect was the perpetrator."); *see also United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007) ("Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to

believe that an offense has been or is being committed by the person being arrested."). The Court concludes that Plaintiff has failed to establish that the deliberately fabricated evidence caused Plaintiff's deprivation of liberty.

Therefore, the Court finds that Plaintiff's deliberate fabrication of evidence claim fails.

2. False Arrest Claim

Plaintiff contends that Defendants lacked probable cause to arrest him and therefore subjected him to a false arrest. "A claim for unlawful arrest is cognizable under § 1983 as a violation of the Fourth Amendment, provided the arrest was without probable cause or other justification." *Velazquez v. City of Long Beach*, 793 F.3d 1010, 1018 (9th Cir. 2015). Under Nevada law, a "person is guilty of sexual assault if he or she: Subjects another person to sexual penetration, or forces another person to make a sexual penetration on himself or herself or another, or on a beast, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct." Nevada Revised Statute 200.366(1)(a).

For the reasons stated in the Court's causation analysis of Plaintiff's deliberate fabrication of evidence claim, the Court finds that Plaintiff's false arrest claim fails as a matter of law. *See Ewing v. City of Stockton*, 588 F.3d 1218, 1230 n.19 (9th Cir. 2009) (emphasis in

the original) ("[P]robable cause to believe that a person has committed *any* crime will preclude a false arrest claim. . . .").

Accordingly, the Court grants summary judgment in Defendants' favor against Plaintiff's First Cause of Action in its entirety.

ii. Second Cause of Action

Plaintiff asserts that his *Monell* claim is based on the following pattern or series of disputed facts. First, patrol officers were not properly trained that an individual may not be subject to de facto arrest by being placed in a secured room for hours without first establishing probable cause. Second, officers may not mischaracterize or omit evidence in an attempt to create probable cause. Third, officers may not threaten individuals who invoke their Fifth Amendment right to remain silent. Here, Plaintiff alleges that more than one of the Defendants continued to try to question Plaintiff and threatened to throw him in jail if he did not talk to them after he asserted his right to remain silent and to have an attorney present during questioning. This coercive conduct, as to the assertion of his rights, also allegedly included: a.) not being allowed to put on clothes, b.) denying him the ability to call an attorney, c.) denying him access to food or water for the four to five hours that he was detained in the hotel security room.

Defendants argue that this claim must be dismissed because there is no underlying constitutional violation.

Defendants also argue that Plaintiff has made no attempt to prove his *Monell* claim because he fails to identify a written policy, provide evidence of an unwritten custom, or identify a single other instance that supports his claim.

Under *Monell*, when a municipal policy of some nature is the "driving force" behind an unconstitutional action taken by municipal employees, the municipality will be liable. *Monell v. Dep't of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). A litigant can establish a *Monell* claim: "(1) by showing a longstanding practice or custom which constitutes the standard procedure of the local governmental entity; (2) by showing that the decision-making official was, as a matter of state law, a final policy-making authority whose edicts or acts may fairly be said to represent official policy in the area of decision; or (3) by showing that an official with final policymaking authority either delegated that authority to, or ratified the decision of, a subordinate." *Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005). Alternatively, a municipality's failure to train an employee who has caused a constitutional violation can be the basis for § 1983 liability if the failure to train amounts to deliberate indifference to the rights of persons with whom the employee comes into contact. *City of Canton Ohio v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989). Ultimately, *Monell* claims are "contingent on a violation of constitutional rights." *Lockett v. County of Los Angeles*, 977 F.3d 737, 741 (9th Cir. 2020).

The Court finds that Plaintiff's *Monell* claim fails as a matter of law because he has not established a policy

or practice outside of his own interaction with LVMPD. Further, as to the failure to train theory, "[w]hile deliberate indifference can be inferred from a single incident when the unconstitutional consequences of failing to train are patently obvious, an inadequate training policy itself cannot be inferred from a single incident." *Hyde v. City of Willcox*, 23 F.4th 863, 874-75 (9th Cir. 2022) (citation omitted). Plaintiff fails to present evidence outside of the evidence from his own single incident that would support any claim that Defendant LVMPD failed to train its officers. The Court notes that Plaintiff alleges that other alleged constitutional violations, separate from the First Cause of Action, also form the basis for his *Monell* claim. He, however, fails to provide evidence to support a finding that those alleged violations should be imputed to Defendant LVMPD based upon a policy or practice.

Thus, the Court grants summary judgment in Defendant LVMPD's favor against Plaintiff's Second Cause of Action.

iii. Third Cause of Action

Plaintiff asserts that Defendants conspired to conduct a biased and fundamentally unfair investigation against him in violation of his constitutional rights. Plaintiff alleges several acts of bad faith committed by the officers and their supervisors. Plaintiff also claims that approximately six different police officers were involved in this conspiracy. In response, Defendants argue that, because Plaintiff has failed to establish an independent constitutional violation, his conspiracy claim fails as a

matter of law. Additionally, Defendants argue that there is no civil conspiracy because Plaintiff has not pointed to evidence that Defendants had an express or implied agreement amongst themselves to deprive Plaintiff of any constitutional right.

"To establish liability for a conspiracy in a § 1983 case, a plaintiff must demonstrate the existence of an agreement or meeting of the minds to violate constitutional rights." *Crowe v. County of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010); *id.* at 440-41 ("A 'common objective' to merely prosecute [plaintiff] is insufficient; fair prosecution would not violate [his] constitutional rights."). Such an agreement "may be inferred from conduct and need not be proved by evidence of an express agreement"—a plaintiff need only point to some "facts probative of a conspiracy." *Ward v. EEOC*, 719 F.2d 311, 314 (9th Cir. 1983). An agreement "may be inferred on the basis of circumstantial evidence such as the actions of the defendants," meaning, "[f]or example, a showing that the alleged conspirators have committed acts that 'are unlikely to have been undertaken without an agreement'. . . ." *Mendocino Env't Ctr. v. Mendocino County*, 192 F.3d 1283, 1301 (9th Cir. 1999).

The Court, incorporating by reference both its deliberate fabrication of evidence causation analysis and its false arrest analysis, finds that Plaintiff's conspiracy claim fails as a matter of law because Plaintiff has failed to establish Defendants violated any of Plaintiff's constitutional rights. The Court also finds Plaintiff's conclusory reliance on prior state court decisions and alleged acts of "bad faith" by "officers and their

supervisors" alleged in his affidavit, although not alleged in his actual Complaint as a cause of action, for instance, fails to support his federal conspiracy claim. *See Indep. Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (stating that courts cannot "manufacture arguments" for litigants). Plaintiff must clearly set forth his claims so that the Court and Defendants can clearly understand the nature of his case. He cannot simply assert in conclusory fashion alleged violations without identifying them as separate claims. *See id.*

The Court accordingly grants summary judgment in Defendants' favor as to Plaintiff's Third Cause of Action.

b. State Claims

Now, the Court addresses Plaintiff's state law claims against Defendants. Plaintiff's Complaint contains state law claims for negligence, false imprisonment, malicious prosecution, and intentional infliction of emotional distress. Defendants contend that these claims fail as a matter of law. First, they argue that the claims are barred by Nevada Revised Statutes § 41.036(2) because Plaintiff failed to provide timely notice of the claims, and the Ninth Circuit erred in concluding that this statute only applied to Defendant LVMPD and not the individual Defendants. Second, all Plaintiff's state law claims require a lack of probable cause finding, and here probable cause to search Plaintiff's hotel room and to arrest him for sexual assault existed. Third, the individual Defendants are also entitled to discretionary-act immunity pursuant to Nevada Revised Statute § 41.032. This is because, among

other things, there was no bad faith as Defendant Pool's representation in reports and to Defendant Beza that the SANE exam had positive findings for "sexual assault" was supported by UMC medical records, and that at worst, it was a mistaken representation.

Under Nevada Revised Statutes § 41.036(2), "[e]ach person who has a claim against *any political subdivision* of the State arising out of a tort must file the claim within 2 years after the time the cause of action accrues with the governing body of that political subdivision." (emphasis added). The Ninth Circuit affirmed Judge Jones's grant of summary judgment in favor of Defendant LVMPD finding that Plaintiff's state-law claims against it "were barred under § 41.036(2)." *Scafidi*, 966 F.3d at 964. The panel concluded that "[t]he claim statute bars claims against political subdivision[s] of the State only. . . ." *Id.* The Court agrees with the Ninth Circuit. Accordingly, it does not reconsider Plaintiff's negligence and intentional infliction of emotional distress causes of action against Defendant LVMPD.[3] Second, the Court agrees with the Ninth Circuit that the statute "does not bar [Plaintiff]'s claims against the individual defendants. . . ." *Id.* at

3. The Ninth Circuit declined to consider Plaintiff's argument relying on *Turner v. Staggs*, 89 Nev. 230, 510 P.2d 879 (Nev. 1973) to argue that Nevada Revised Statute § 41.036 is unconstitutional, because it was raised for the first time on appeal. *Scafidi*, 966 F.3d at 964. The Court declines to consider this argument as well. *See United States v. Luong*, 627 F.3d 1306, 1309 (9th Cir. 2010) ("When a case has been decided by an appellate court and remanded, the court to which it is remanded must proceed in accordance with the mandate and such law of the case as was established by the appellate court.").

965. Thus, the Court finds that Nevada Revised Statute § 41.036(2) is not a bar to Plaintiffs state claims against the individual Defendants.

In any event, "an arrest made with probable cause is privileged and not actionable." *Nelson v. City of Las Vegas*, 99 Nev. 548, 665 P.2d 1141, 1144 (Nev. 1983). Nevada's appellate courts have addressed the type of state tort claims alleged in Plaintiffs Complaint, and they have determined that the claims fail where the challenged conduct is supported by probable cause. *See, e.g., Hernandez v. City of Reno*, 97 Nev. 429, 634 P.2d 668, 671 (Nev. 1981) (false imprisonment claim dismissed because the plaintiffs arrest was based on probable cause); *Bonamy v. Zenoff* 77 Nev. 250, 362 P.2d 445, 446-47 (Nev. 1961) (concluding lack of probable cause is an element of a malicious prosecution claim); *Palmieri v. Clark County*, 131 Nev. 1028, 367 P.3d 442, 446 n.2 (Nev. Ct. App. 2015) (intentional infliction of emotional distress claim dismissed because residential search the claim was based on was supported by probable cause). For the reasons discussed in the Court's deliberate fabrication of evidence causation analysis and its false arrest analysis above, the Court concludes that Plaintiffs remaining state claims fail as a matter of law. The Court does not address the parties' other arguments.

Accordingly, the Court grants summary judgment in Defendants' favor as to Plaintiffs Fourth, Fifth, Sixth, and Seventh Causes of Action.

VI. CONCLUSION

IT IS THEREFORE ORDERED that Defendants Las Vegas Metropolitan Police Department, Sgt. S. Comiskey, Lt. D. McGrath, Det. K. Pool, Det. R Beza, Det. A. Christensen, and CSI K. Grammas's Motion for Summary Judgment (ECF No. 107) is GRANTED. The Clerk of the Court shall enter judgment accordingly.

Good cause being found, **IT IS FURTHER ORDERED** that Defendant Las Vegas Metropolitan Police Department's Motion to Seal (ECF No. 108) is GRANTED.

The Clerk of the Court is instructed to close this case.

DATED: March 31, 2023

/s/ Richard F. Boulware, II
RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, FILED FEBRUARY 9, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. 2:14-cv-01933-RCJ-GWF

MARINO SCAFIDI,

Plaintiff,

v.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, *et al.*,

Defendants.

Filed February 9, 2021

ORDER

ROBERT C. JONES, District Judge

Plaintiff was charged with three counts of sexual assault under Nevada law. At the preliminary hearing, the state district court determined that there was probable cause to prosecute Plaintiff, but the court later dismissed the charges based upon spoliation of evidence. The government appealed, and the Nevada Supreme Court reversed and remanded, holding that the district court needed to consider whether a curative jury instruction

would suffice. The state district court held that such a jury instruction would. Nonetheless, the government later voluntarily dismissed the charges against Plaintiff.

Plaintiff brought suit against, as relevant here, the Las Vegas Metro Police Department ("LVMPD"), five officers, a crime scene investigator, and the nurse who performed a sexual assault exam on the alleged victim. He alleges that these parties conspired to frame him by fabricating inculpatory evidence and destroying exculpatory evidence. He claims that their actions violated his constitutional rights guaranteed by the Fourth and Fourteenth Amendments. He therefore brings claims pursuant to 42 U.S.C. § 1983 and various state law grounds.

The Court previously granted summary judgment for all Defendants on the basis of issue preclusion. The Nevada state court determined that there was probable cause to prosecute Plaintiff at the preliminary hearing; a finding that would be fatal to Plaintiff 's claims. The Ninth Circuit reversed and remanded because Nevada law now "rejects the view that a probable cause determination at a preliminary hearing precludes later relitigation of that question." (ECF No. 69 at 6.)

Presently, the nurse, Defendant Jeri Dermanelian, moves for summary judgment based upon the evidence adduced through the criminal case but without the benefit of discovery from this case. Plaintiff alleges the following claims against her: a conspiracy under 42 U.S.C. § 1983, malicious prosecution, and intentional infliction of emotional distress. Plaintiff counters that the current

record is sufficient to survive summary judgment and alternatively moves for further discovery to survive the motion. The Court finds that the evidence adduced through the criminal prosecution shows that Defendant Dermanelian failed to commit these torts and that Plaintiff has failed to identify specific facts that would alter this determination. The Court therefore grants summary judgment in favor of Defendant Dermanelian.

FACTUAL BACKGROUND

Plaintiff alleges the following pertinent facts in his amended complaint (ECF No. 31 Ex. 3): Plaintiff met with the alleged victim, Ms. Stephanie Carter in Clark County, Nevada on September 1, 2012 after communicating with her for several months online and through text messages. Over the course of that night and into the early morning hours of September 2, 2012, Plaintiff and Ms. Carter ate dinner, drank alcohol, and went to a nightclub. At approximately 3:00 a.m., Plaintiff and Ms. Carter went to Plaintiff 's hotel room, where they engaged in consensual intercourse, which they recorded on their cell phones. Over the course of these events, Ms. Carter had sent multiple text messages about Plaintiff to her friends, including while she was in Plaintiff 's room. Subsequent to the sexual relations, Ms. Carter walked to the bathroom, locked herself in, and called 911 falsely claiming that Plaintiff was attempting to kill her. Plaintiff was arrested by LVMPD and charged with sexual assault. Defendant Dermanelian is a sexual assault nurse examiner ("SANE") and performed a sexual assault examination on Ms. Carter. This "examination demonstrated that there were no signs

consistent with physical violence, rather there were only indications of sexual activity. Despite that fact [Defendant] Dermanelian set-in-motion a malicious prosecution of [Plaintiff]. [Defendant] Dermanelian also conspired with all other Defendants to violate [Plaintiff]'s civil rights."

Defendant Dermanelian admits to performing the examination of Ms. Carter and doing so on behalf of University Medical Center ("UMC")—a political subdivision of the State of Nevada—as a private contractor. (*See* ECF No. 72 Ex. A ¶¶ 6-7.) According to a medical record that bears the electronic signatures of Defendant Dermanelian and Physician Dale Carrison, DO, Ms. Carter chose to undergo the sexual assault examination after claiming that she was sexually assaulted. (ECF No. 79 Ex. 4 at 6, 8.)[1] Defendant Dermanelian and Dr. Carrison documented findings that were consistent with recent sexual activity including the following: labial soreness; external genital soreness; pain to the region of the posterior fourchette; cold and burning sensation with the application of toluidine blue dye; erythemic hymenal edging; red tinge to swabs taken from vaginal walls and cervical os; and redness at the perineal region bordering the posterior fourchette. (*Id.* at 8-9.)[2] In a

1. This exhibit contains a declaration, parts of two medical records, and parts of two police reports. To avoid confusion, the page numbers in citations to this exhibit refer to the page of the entire exhibit including the cover page.

2. Despite these noted findings indicating recent sexual activity, Plaintiff oddly claims, "It is undisputed that the SANE record signed by both Dr. Carrison and [Defendant] Dermanelian rendered no medical conclusions or impressions related to [Ms.]

medical chart that only bears Defendant Dermanelian's signature, "Sexual Assault" is written in the blanks next to "Diagnosis" and "CLINICAL IMPRESSION." (*Id.* at 3, 5.) Besides these notes, these documents do not indicate whether these findings evince whether sexual activity was consensual. Defendant Dermanelian swears by affidavit that she did not "opine whether a sexual assault or crime ha[d] occurred" to the police. (ECF No. 72 Ex. A ¶ 10.)

The LVMPD arrest report states, "[Ms.] Carter received a SANE exam which showed positive findings consistent with a sexual assault." (ECF No. 79 Ex. 4 at 10.)[3] The LVMPD search warrant affidavit states, "Results of the [SANE] exam showed positive findings of a sexual assault which can be obtained through the SANE Nurse." (*Id.* at 11.)

Carter sustaining objective findings consistent with sexual activity or sexual assault." (ECF No. 79 at 8.) Plaintiff may have made this assertion based upon the impression, which merely reads, "Sexual assault exam, sexually transmitted infection evaluation." (*Id.*) This impression, however, does not state that the nurse examiner failed to find evidence of recent sexual activity. Indeed, he appears to concede that these findings are indicative of recent sexual activity as he argues elsewhere that these findings were made in error. (*See, e.g.*, ECF No. Ex. 3 at 6-7 (arguing that the only redness that could be seen on Ms. Carter's vaginal wall and cervix was caused by the improper administration of the examination).)

3. It is not clear from the exhibit itself that this page is from the arrest report, but Plaintiff indicates that this page is in one of his affidavits. (ECF No. 72 Ex. 5 at 2.) Similarly, it is unclear from the exhibit, but Plaintiff asserts that the following page is from the search warrant affidavit. (*Id.*)

Appendix C

Defendant Keith Pool testified that Defendant Dermanelian merely indicated that the findings of the SANE examination adduced "positive findings" of "some sort of sexual contact" without indicating if "it was sexual assault or just sex" during his testimony in the state court proceedings. (ECF No. 85 Ex. A at 40.) Defendant Pool further noted that he typically does not review the medical reports generated from a SANE examination but merely consults with the nurse examiner, and in this case, he had not seen the reports when LVMPD brought the case to the DA's office. (ECF No. 85 Ex. B. at 84-85.) Defendant Pool relayed all of the evidence that he had collected about the alleged sexual assault, including Defendant Dermanelian's statement of "positive findings," to Defendant Detective Beza, who applied for and obtained the search warrant against Plaintiff. (ECF No. 85 Ex. A at 115-17.) Defendant Beza testified that he made the search warrant application without talking to Defendant Dermanelian and based his affirmations regarding the examination upon Defendant Pool's statements. (*Id.*) Defendant Pool's statements regarding the examination may have been misleading as he relayed to Defendant Beza that there were "positive findings" from the examination and "left out the aspect that it was positive findings for sex and not sexual assault." (*Id.* at 40.) He claims that he failed to include that detail since the examination is only used to determine whether recent sexual activity occurred and not whether such sexual activity was the result of an assault. (*Id.*)

Plaintiff has attached two self-authored affidavits to his response. (ECF No. 79 Exs. 3, 5.) The first affidavit is dated October 19, 2017, and in it, he states, in pertinent part:

At the [SANE] examination, [a] nurse wrote that Ms. Carter "sat in chair and rocked back and forth and kept muttering 'he was going to kill me.'" Regarding the SANE examination, the Nevada District Court previously found that Detective Beza falsely stated in his warrant affidavit that the findings of the SANE exam performed on [Ms. Carter] positive for sexual assault. Without further qualification, however, this statement was provably false and misleading. The court found that the actual findings of the exam were positive only for sexual intercourse; the findings did not indicate that the sex was not consensual. This was a false and misleading statement which should have been removed from the affidavit or, at a minumum [sic], clarified for the magistrate's determination of probable cause. Additionally, I have newly discovered upon review of the SANE exam and SANE pictures that there was not even evidence of sexual activity. There was a positive uptake of toluidine dye for the mere presence of mucous tissue because the SANE nurse wrongfully misapplied the dye only to the mucosal tissue, which revealed a purple uptake color; there was no positive uptake of dye regarding abraded tissue, which would have been a deep blue uptake color if positive when properly added to the dead skin cell layer. Furthermore, there was no abnormal redness to the vaginal wall and cervix. The only redness that can be visualized was caused as a result of

> examination error by the SANE nurse applying pressure to the delicate tissue during her examination, which created medical artifact, and the nurse should have not misrepresented this in the medical record. The nurse also omitted the fact that a white substance could be seen on the walls of her vagina, indicating that [Ms. Carter] actually suffered from a yeast infection.

(ECF No. 79 Ex. 3 at 6-7.) The second affidavit is dated October 9, 2020. (ECF No. 79 Ex. 5.) In this affidavit, he states:

> Defendant Dermanelian co-conspired with defendants from LVMPD, thereby acting in bad faith and/or was negligent; by failing to properly perform an objective SANE examination and fabricated corroborative physical evidence of a sexual assault with either a deliberate and/or reckless disregard for the truth. This false and misleading physical evidence was used by the LVMPD to violate my constitutional rights related to false arrest, false imprisonment, several illegal searches of my person and hotel room, and to initiate a malicious prosecution. I was wrongfully charged with sexual assault by the LVMPD based on the manufactured physical evidence, however, the Clark County District Attorney ultimately dismissed the baseless charges.

(ECF No. 79 Ex. 5 at 1.) He further attests that "based on [his] professional experience," Defendant Dermanelian improperly administered the SANE examination leading to a number of "false and misleading" conclusions. (*Id.* at 3-6.) He also claims:

> [Defendant] Dermanelian failed to notify police of material facts such as: the alleged victim had a blood alcohol level of.173, a history of substantial mental illness as noted in her exam and examination forms, and she was mixing her psychoactive antidepressant medication (Wellbutrin) with alcohol during the time she experienced a psychotic episode and memory impairment, which are both known side effects of mixing alcohol with her psychoactive medication. [Defendant] Dermanelian also omitted the fact that a white substance could be seen on the walls of her vagina during the speculum examination indicating that [Ms.] Carter suffered from a yeast infection, also known as vulvovaginal candidiasis.

(*Id.* at 6-7.)

LEGAL STANDARD

A court should grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A factual dispute is genuine when "the evidence is such that a reasonable jury

could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Only facts that affect the outcome are material. *Id.*

To determine when summary judgment is appropriate, courts use a burden-shifting analysis. On the one hand, if the party seeking summary judgment would bear the burden of proof at trial, then he can only satisfy his burden by presenting evidence that proves every element of his claim such that no reasonable juror could find otherwise assuming the evidence went uncontroverted. *Id.* at 252. On the other hand, when the party seeking summary judgment would not bear the burden of proof at trial, he satisfies his burden by demonstrating that the other party failed to establish an essential element of the claim or by presenting evidence that negates such an element. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (Brennan J., concurring). A court should deny summary judgement if either the moving party fails to meet his initial burden or, if after the moving party meets that burden, the other party establishes a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

ANALYSIS

Defendant Dermanelian moves for summary judgment claiming that the evidence adduced through the criminal proceedings definitively shows that she was not a state actor and never conspired to violate Plaintiff 's rights. She argues that rather the evidence proves that she performed the SANE exam as a private contractor, concluded that

there was a "positive finding" for sexual activity (which Plaintiff admits to), and relayed those results to the police.[4]

I. Section 1983 Conspiracy

Plaintiff first alleges that Defendant Dermanelian entered into a conspiracy with the police to violate Plaintiff's constitutional rights in violation of § 1983. In his complaint, Defendant points to his right to be free from unreasonable searches and seizures, right to be free from unlawful arrest, and his right to due process as guaranteed by the Fourth and Fourteenth Amendments. (ECF No. 31 Ex. 3 ¶ 53.) "To establish § 1983 liability, a plaintiff must show both (1) deprivation of a right secured by the Constitution and laws of the United States, and (2) that the deprivation was committed by a person acting under color of state law." *Chudacoff v. Univ. Med. Ctr. of S. Nev.*, 649 F.3d 1144, 1149 (9th Cir. 2011). A private party may be liable pursuant § 1983 by conspiring with a government actor to violate a party's rights. *Lacey v. Maricopa Cty.*, 693 F.3d 896, 935 (9th Cir. 2012). To show

4. Plaintiff also points to the colloquy between the Ninth Circuit and Plaintiff's counsel, in which all three judges on the panel indicated that Plaintiff's claims against Defendant Dermanelian were not plausible and even pressured Plaintiff to dismiss the claims against her. (Video Recording of Oral Argument at 29:59-32:12, *Marino Scafidi v. LVMPD*, No. 18-16229 (available at https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000016876).) Even though the Ninth Circuit did make these comments, they do not factor into the Court's analysis for this motion.

such a civil conspiracy, the plaintiff must show that the defendant reached an agreement to violate the plaintiff's constitutional rights and that conspiracy resulted in the actual denial of the plaintiff's constitutional rights. *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 783 (9th Cir. 2001).

Defendant Dermanelian argues in this motion that Plaintiff cannot show sufficient evidence that would establish a genuine issue of fact over whether Defendant Dermanelian reached an agreement with the police to violate Plaintiff's rights.[5] According to the operative complaint, Defendant Dermanelian only found signs of sexual activity but could not determine whether the activity was consensual. (ECF No. 31 Ex. 3 ¶ 36.) From this Plaintiff merely concludes, "[Defendant] Dermanelian set-in-motion a malicious prosecution of [Plaintiff]. [Defendant] Dermanelian also conspired with all other Defendants to violate [Plaintiff]'s civil rights." (*Id.*)

In his opposition to this motion, Plaintiff posits additional facts to support the conclusion that Defendant Dermanelian conspired with the police to infringe upon his rights. He first points to assertions that Defendant Dermanelian "conducted the SANE exam at the direction

5. Defendant Dermanelian also argues that there is no evidence that she was acting under the color of law. This is argument is entwined with her argument over whether there is a conspiracy. Such a conspiracy satisfies the "joint action test" to hold a private party liable for § 1983 violation. *Brunette v. Humane Soc'y of Ventura Cty.*, 294 F.3d 1205, 1211 (9th Cir. 2002). For this reason, the Court treats these arguments as one.

of [LVMPD] . . . [,] performed the examination to look for physical evidence of sexual assault on [Ms.] Carter . . . [, and] was not privately retained by [Ms.] Carter to conduct this examination." (ECF No. 79 at 22.) Even assuming the veracity all of these three assertions, they merely show that there was a contract for Defendant Dermanelian to perform a sexual assault examination of Ms. Carter and have no bearing on whether Defendant Dermanelian "share[d] the [alleged] common objective" of violating Plaintiff's rights. *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1541 (9th Cir. 1989) (en banc). As such these assertions fail to evince a conspiracy.

Plaintiff next alleges that Defendant Dermanelian "submit[ed] a knowingly false diagnosis of sexual assault to the LVMPD Detectives." (ECF No. 79 at 22.) For this argument, Plaintiff points to the following facts: Defendant Dermanelian indicated sexual assault was the diagnosis on her examination report, (ECF No. 79 Ex. 4 at 5), the LVMPD arrest report stated that "the exam showed positive findings of a sexual assault which can be obtained through the SANE nurse," (*Id.* at 10), and the LVMPD search warrant affidavit also states that "[Ms.] Carter received a SANE exam which showed positive findings consistent with a sexual assault," (*Id.* at 11).

This assertion however is otherwise belied by the record. Defendant Dermanelian swears by affidavit that she only communicated to LVMPD detectives that she found positive signs of sexual activity without being able to determine whether the activity was consensual from the examination. (ECF No. 72 Ex. A ¶ 10.) Defendant Pool

and Defendant Beza confirmed Defendant Dermanelian's statement in their testimony before the state court. Defendant Pool swore that Defendant Dermanelian only communicated "positive findings [for] some sort of sexual contact." (ECF No. 85 Ex. A at 39.) Defendant Beza swore that when he applied for the search warrant, he had not spoken to Defendant Dermanelian but relied upon Defendant Pool's representations about the examination. (*Id.* at 115-17.) Both detectives testified that they had not seen the records generated by Defendant Dermanelian that indicated that her diagnosis was sexual assault. (*Id.* at 40, 115-16.) Further, as Plaintiff admits in his complaint and in his affidavits, the state district court also concluded that the sexual assault examination results presented to the police merely showed signs of sexual activity and not sexual assault. (ECF No. 31 Ex. 3 ¶ 36; ECF No. 79 Ex. 3 at 6; ECF No. 79 Ex. 5 at 3.)

If Defendant Dermanelian fabricated evidence of sexual assault to help the government wrongfully prosecute Plaintiff, then this could be a conspiracy to infringe upon Plaintiff's constitutional rights. However, the Court finds that no reasonable juror the Defendant Dermanelian communicated the diagnosis of sexual assault to the police. This basis for Plaintiff's claim therefore fails to show that Defendant Dermanelian engaged in a conspiracy—even if this Court were to grant that such a diagnosis was wrongful.

In addition to claiming that Defendant Dermanelian fabricated findings of sexual assault, Plaintiff also now claims based on his review of the documents produced from

the SANE examination that it was incorrectly applied and should not have even elicited positive indications of sexual activity. (ECF No. 79 Ex. 3 at 6-7; ECF No. 79 Ex. 5 at 3-6.) Plaintiff is apparently attempting to claim that the Defendant Dermanelian also fabricated evidence of sexual activity. Despite this apparent argument, Plaintiff claims that Defendant Dermanelian did so out of "bad faith and/or was negligent." (ECF No. 79 at 8.) The Court initially notes that negligence would be insufficient to show that Defendant Dermanelian conspired with the LVMPD to deprive him of his rights.

He bases this assertion on his own review of the examination records. However, the medical record signed by Defendant Dermanelian and Dr. Carrison, notes several indications of recent sexual activity: labia soreness, external genitalia soreness, pain in the posterior fourchette with light palpation with swabs, the toluidine blue dye had a positive uptake and caused a cold and burning sensation, and the patient has hymenal edging that is noted to be erythemic at the 1 o'clock position. While Plaintiff contests this conclusion based upon his professional experience as a chiropractor, he has not shown that he is a qualified expert according to Fed. R. Evid. 702; indeed, he has not indicated that he has any experience in interpreting sexual assault examinations. Plaintiff's self-serving assertion that the exam failed to produce any evidence of recent sexual activity is insufficient for a reasonable juror to make that conclusion. This is especially true in light of the fact that he admits to having sexual relations with Ms. Carter just hours before Defendant Dermanelian conducted the examination. (*See*

ECF No. 31 Ex. 3 ¶ 20 (alleging that Plaintiff and Ms. Carter went to his hotel room at approximately 3:00 a.m. on September 2, 2012); ECF No. 79 Ex. 4 at 5 (noting that the sexual assault examination occurred at 9:00 a.m. on September 2, 2012).)

Lastly, Plaintiff appears to argue that Defendant Dermanelian engaged in a conspiracy because she failed to indicate to officers that Ms. Carter's blood alcohol level was 0.173; she had a history of mental illness; she was on Wellbutrin, which should not be combined with alcohol according to its label; and that she had a yeast infection.[6] The medical records generated by Defendant Dermanelian and Dr. Carrison note that Ms. Carter had a history of depression, anxiety with tremors, and anorexia. (ECF No. 79 Ex. 4 at 7.) They also note that she was currently taking Wellbutrin and that her blood alcohol level was 0.173. (*Id.* at 7, 9.) Plaintiff 's assertion that Ms. Carter was suffering from a yeast infection at the time appears to be only based upon his personal assessment of the pictures taken from the SANE examination, which as discussed above is not admissible expert testimony. (ECF No. 79 Ex. 5 at 7.) Plaintiff also fails to provide evidence that Defendant Dermanelian actually omitted the alcohol level, history of mental illness, and possible side effects of combining alcohol and Wellbutrin, when she reported the

6. In his second affidavit, Plaintiff asserts that Defendant Dermanelian omitted these facts. In the section of his brief where he argues that Defendant Dermanelian engaged in a conspiracy, he does not specifically mention this allegation, but he does state summary judgment is not warranted based, in part, upon Plaintiff 's affidavits. (ECF No. 79 at 23.)

results of the examination to Defendant Pool. He merely relies upon his affidavit but fails to indicate how he has personal knowledge of these facts. Fed. R. Evid. 602. And even if she did, no reasonable juror could conclude that the omissions were sufficient to have affected the government's decision to prosecute Plaintiff. The police reports already note that they were aware that Plaintiff had been drinking and that she was "having a hard time remembering events." For these reasons, this assertion also fails to prove that Defendant Dermanelian engaged in a conspiracy.

The Court agrees with Defendant Dermanelian that, in sum, Plaintiff lacks sufficient evidence such that a reasonable juror could conclude that Defendant Dermanelian conspired with the LVMPD to deprive Plaintiff of his rights. As such the Court finds that summary judgment is appropriate in favor of Defendant Dermanelian on this claim.

II. Malicious Prosecution

Plaintiff next alleges that Defendant Dermanelian's actions amount to malicious prosecution under Nevada law. For such a claim to prevail a plaintiff must show: "(1) want of probable cause to initiate the prior criminal proceeding; (2) malice; (3) termination of the prior criminal proceedings; and (4) damage." *LaMantia v. Redisi*, 38 P.3d 877, 879 (Nev. 2002) (quoting *Jordan v. Bailey*, 944 P.2d 828, 834 (Nev. 1997)). The plaintiff must also show active participation in the prosecution. *Id.*

Here, Plaintiff merely asserts that Defendant actively participated "by submitting a false diagnosis of sexual assault." (ECF No. 79 at 24.) However, assuming arguendo that such a claim is sufficient to prove this element, as discussed above, there is insufficient evidence such that a reasonable juror could conclude that Defendant Dermanelian ever submitted a diagnosis of sexual assault to the detectives. As such summary judgment is also appropriate in favor of Defendant Dermanelian on this claim.

III. Intentional Infliction of Emotion Distress

Plaintiff lastly alleges intentional infliction of emotion distress against Defendant Dermanelian. For this claim, Plaintiff must prove "(1) extreme and outrageous conduct on the part of [Defendant Dermanelian]; (2) intent to cause emotional distress or reckless disregard for causing emotional distress; (3) that Plaintiff actually suffered extreme or severe emotional distress; and (4) causation." *Miller v. Jones*, 970 P.2d 571, 577 (Nev. 1998). Plaintiff similarly bases this claim entirely on his contention that Defendant "Dermanelian submit[ed] a false diagnosis of sexual assault to" the police and the resulting arrest, searches, and prosecution. (ECF No. 79 at 25.) Again, the Court finds that Plaintiff has not submitted evidence sufficient such that a reasonable juror could conclude that Defendant Dermanelian provided detectives a false diagnosis of sexual assault. As such, the Court concludes that summary judgment is appropriate in favor of Defendant Dermanelian on this remaining claim.

Appendix C

IV. Fed. R. Civ. P. 54(d) Request

While summary judgment may be appropriate in favor of Defendant Dermanelian based on the current record, Plaintiff moves to allow for additional discovery under Fed. R. Civ. P. 54(d). For such a motion to succeed, the moving party must show that "(1) it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment." *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008). In an affidavit in support of this motion, Plaintiff 's counsel states that it is essential that he depose Defendant Dermanelian and other "vital parties" and hire experts regarding Defendant Dermanelian's examination of Ms. Carter. (ECF No. 79 Ex. B.)

The Court is aware that while this case is more than six years old, no formal discovery has been taken due to a stay and an appeal. Plaintiff, however, has failed to identify any specific facts in his Rule 56(d) affidavit that would allow him to survive summary judgment were he allowed to commence with discovery. Rather, he merely states in broad terms that he seeks discovery regarding the sexual assault examination. The failure to state specific facts in a Rule 54(d) request is sufficient grounds for denial. *Echlin v. Dynamic Collectors, Inc.*, 102 F. Supp. 3d 1179, 1183 (W.D. Wash. 2015) (citing *Fam. Home*, 525 F.3d at 827.) The Court therefore declines to grant this request, and grants summary judgment in favor of Defendant Dermanelian and dismisses her from this case.

Appendix C

CONCLUSION

IT IS HEREBY ORDERED that Defendant Dermanelian's Motion for Summary Judgment (ECF No. 72) is GRANTED.

IT IS FURTHER ORDERED that Defendant Dermanelian is DISMISSED from this case.

IT IS SO ORDERED.

Dated: February 9, 2021.

/s/
ROBERT C. JONES
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MAY 31, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15657

MARINO SCAFIDI,

Plaintiff-Appellant,

v.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, A POLITICAL SUBDIVISION ON BEHALF OF STATE OF NEVADA; *et al.*,

Defendants-Appellees,

and

FCH1, LLC, DBA PALMS CASINO RESORT; *et al.*,

Defendants.

Filed May 31, 2024

ORDER

D.C. No. 2:14-cv-01933-RFB-VCF
District of Nevada, Las Vegas

Appendix D

Before: R. NELSON, VANDYKE, and SANCHEZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and the petition for rehearing en banc. **Dkt. 38.** The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.