

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of August, two thousand seventeen,

Brenda Joyce Haynes,

Plaintiff - Appellant,

ORDER

Docket No: **16-2526**

v.

Mike Acquino, William Rezabek, Jason Whitenights,
Bohdan Papisz, John Sullivan, Unknown Officers,
Unknown Others,

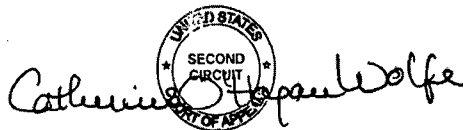
Defendants - Appellees.

Appellant Brenda Joyce Haynes filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

The block contains a handwritten signature in cursive script that reads "Catherine O'Hagan Wolfe". Overlaid on the signature is a circular official seal of the United States Court of Appeals for the Second Circuit. The seal features the words "UNITED STATES" at the top, "SECOND CIRCUIT" in the center, and "COURT OF APPEALS" at the bottom, separated by small stars.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 30th day of June, two thousand seventeen.

Present: GUIDO CALABRESI,
ROSEMARY S. POOLER,
Circuit Judges.
EDGARDO RAMOS,¹
District Judge.

BRENDA JOYCE HAYNES,

Plaintiff-Appellant,

v.

16-2526-cv

MIKE ACQUINO, WILLIAM REZABEK, JASON
WHITENIGHTS, BOHDAN PAPISZ, JOHN SULLIVAN,
UNKNOWN OFFICERS, UNKNOWN OTHERS,

*Defendants-Appellees.*²

Appearing for Appellant: Brenda Joyce Haynes, pro se, Buffalo, NY.

¹ Judge Edgardo Ramos, United States District Court for the Southern District of New York, sitting by designation.

² The Clerk of the Court is respectfully directed to amend the caption as above.

APPENDIX "A"

Appearing for Appellees: Robert E. Quinn, Assistant Corporation Counsel, City of Buffalo, Department of Law, *for* Timothy A. Ball, Corporation Counsel, Office of the Corporation Counsel, City of Buffalo, Buffalo, NY.

Appeal from the United States District Court for the Western District of New York (Foschio, *M.J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment and orders of said District Court be and they hereby are **VACATED** and **REMANDED**.

Plaintiff-Appellant Brenda Joyce Haynes, pro se, appeals from the June 28, 2016 judgment, and as relevant here, the June 14, 2016 and September 16, 2015 orders, of the United States District Court for the Western District of New York (Foschio, *M.J.*), affirming the jury's verdict in favor of defendants, granting qualified immunity to the police officer defendants, and granting defendants' motion to limit the permissible uses of a prior city court decision, respectively. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

This Court reviews evidentiary rulings for abuse of discretion. *United States v. Natal*, 849 F.3d 530, 534 (2d Cir. 2017). If a district court abuses its discretion by making an erroneous evidentiary ruling, that error is ordinarily subject to harmless error analysis. *United States v. Mercado*, 573 F.3d 138, 141 (2d Cir. 2009). "An erroneous ruling on the admissibility of evidence is harmless if the appellate court can conclude with fair assurance that the evidence did not substantially influence the jury." *Id.*

Under Federal Rule of Evidence 401, "[e]vidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence." Fed. R. Evid. 401. "[T]he definition of relevance under Fed. R. Evid. 401 is very broad." *United States v. Certified Envtl. Servs., Inc.*, 753 F.3d 72, 90 (2d Cir. 2014). "[U]nless an exception applies, all 'relevant evidence is admissible.'" *United States v. White*, 692 F.3d 235, 246 (2d Cir. 2012) (quoting Fed. R. Evid. 402) (brackets omitted) (emphasizing Rule 401's "very low standard").

Under Federal Rule of Evidence 403, a court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury." Fed. R. Evid. 403. "Application of this Rule requires a balancing analysis, and the trial judge has broad discretion to weigh the probative value of the evidence against the negative factors." *Li v. Canarozzi*, 142 F.3d 83, 88 (2d Cir. 1998). "However, the broad discretion afforded to the district court in conducting that balancing is not limitless." *United States v. Morgan*, 786 F.3d 227, 232 (2d Cir. 2015). "Where there was inadequate consideration of the probative value of the evidence, or a failure to adequately consider the risk of unfair prejudice and to balance this risk against probative value, we will reverse an evidentiary determination as an abuse of discretion." *Id.*

In a separate criminal prosecution against Haynes, a Buffalo City Court suppressed evidence based on its determination that Haynes was arrested without probable cause (the "City

Court's Decision"). Although the City Court's Decision was later reversed on appeal, the Buffalo City Court again dismissed the charges against Haynes.

After the Buffalo City Court dismissed the criminal prosecution against her, Haynes sued several City of Buffalo police officers (the "Officers"), the City of Buffalo, the Buffalo Police Department, several county departments, and others under 42 U.S.C. § 1983. Haynes alleged principally that she was falsely arrested and subjected to excessive force in violation of her Fourth Amendment rights. At a final pretrial conference, Haynes represented that she intended to offer the City Court's Decision into evidence. She contended that such ruling should have been given collateral estoppel effect with respect to her false arrest claim: specifically, the issue of whether the Officers arrested her without probable cause. Moreover, Haynes argued that even if the City Court's Decision was not preclusive, it was relevant and admissible on that same issue.

In its September 16, 2015 order, the district court rejected Haynes's contentions. First, the district court held that because "Fed. R. Evid. 401 states that only relevant evidence is admissible[,] and as the City Court's Decision has no collateral estoppel effect in this case, it is irrelevant and therefore inadmissible." Decision and Order at 3, *Haynes v. Acquino, et al.*, 10-cv-00355 (W.D.N.Y. Sept. 16, 2015), ECF No. 77. Second, the district court held that, "even if [the City Court's Decision were] relevant, the court finds the prejudicial effect to Defendants of admitting such judicial finding outweighs its potential probative value requiring preclusion under Fed. R. Evid. 403." *Id.* Ultimately, the district court excluded the use of the City Court's Decision to establish that Haynes's arrest lacked probable cause. At trial, consistent with that ruling, the district court admitted the City Court's Decision but redacted its probable cause ruling.

We hold that the district court erred by deeming the City Court's Decision irrelevant and in redacting the probable cause ruling. We hold further that, as a result of that legal error, the district court erred by conducting its Rule 403 balancing analysis without adequately considering the probative effect of the City Court's Decision.

As a preliminary matter, the district court was correct in concluding that the City Court's Decision was not owed any collateral estoppel effect in the instant case. *See Jenkins v. City of New York*, 478 F.3d 76, 85-86 (2d Cir. 2007). That conclusion, however, is not dispositive of the distinct question of whether the City Court's Decision was relevant.

"Under New York law, a false arrest claim requires a plaintiff to show that the defendant intentionally confined him without his consent and without justification." *Dancy v. McGinley*, 843 F.3d 93, 107 (2d Cir. 2016) (internal quotation marks omitted). Moreover, "the existence of probable cause for an arrest is an absolute defense to a false arrest claim." *Id.* (internal quotation marks and brackets omitted). Here, the City Court's Decision—concluding that Haynes was arrested without probable cause—was relevant under Rule 401 because it was probative on the key issue of whether the Officers falsely arrested her. Certainly, the City Court's Decision has a tendency to make it more probable that the Officers arrested Haynes without probable cause. *See United States v. Litvak*, 808 F.3d 160, 179-80 (2d Cir. 2015) ("To be relevant, evidence need not be sufficient by itself to prove a fact in issue, much less to prove it beyond a reasonable doubt.").

Therefore, the district court erred when it held that the City Court's Decision was irrelevant and excluded its use to establish that Haynes's arrest lacked probable cause.

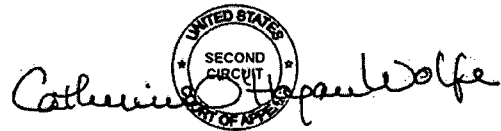
As a result of that legal error, in conducting its Rule 403 balancing analysis, the district court gave inadequate consideration of the probative value of the City Court's Decision. Under these circumstances, we reverse that evidentiary determination as an abuse of discretion. *See Morgan*, 786 F.3d at 232.

Moreover, the district court's erroneous exclusion of the City Court's Decision was not harmless. In its questionnaire, the jury found, contrary to the City Court's Decision, that there was probable cause for Haynes's arrest. *See* Questionnaire at 1-3, 10-cv-00355 (W.D.N.Y. June 6, 2016), ECF No. 99 ("Questionnaire"). Additionally, the jury in its special interrogatories made factual findings inconsistent with the City Court's Decision. Although the jury might well have reached these same conclusions had the district court admitted an unredacted version of the City Court's Decision, under these circumstances we cannot conclude with fair assurance that such exclusion did not substantially influence the jury in reaching its verdict in favor of the Defendants. *See Mercado*, 573 F.3d at 141. Therefore, both the September 16, 2015 order, which excluded the use of the City Court's Decision to establish that Haynes's arrest lacked probable cause, and the June 28, 2016 judgment, which affirmed the jury verdict against Haynes, are vacated.

Also, in reaching its determination that the Officers were entitled to qualified immunity, the district court relied at least in part on the jury's findings, as evidenced in the special interrogatories. Because the jury's findings were made without the unredacted City Court's Decision, we cannot conclude with fair assurance that the district court's evidentiary error did not also substantially influence the district court's qualified immunity determination. Therefore, the June 14, 2016 order, which granted the Officers qualified immunity, is vacated.

Accordingly, the June 28, 2016 judgment, the June 14, 2016 order, and the September 16, 2015 order of the district court hereby are VACATED and we REMAND to the district court for further proceedings consistent with this order. Finally, we recommend that the district court consider whether the appointment of pro bono counsel for Haynes is appropriate in this matter.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

The signature of Catherine O'Hagan Wolfe is written in cursive over a circular seal. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".

Judgment in a Civil Case

United States District Court
WESTERN DISTRICT OF NEW YORK

BRENDA JOYCE HAYNES

JUDGMENT IN A CIVIL CASE
CASE NUMBER: 10-CV-355-F

v.

MIKE ACQUINO, ET AL

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: that the Defendants' motion seeking the dismissal of all Plaintiff's claims on qualified immunity is GRANTED; alternatively, the jury's verdict finding all Defendants' not guilty on all of Plaintiff's claims is AFFIRMED.

Date: June 28, 2016

MARY C. LOEWENGUTH
CLERK OF COURT

By: s/K.McMillan
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BRENDA JOYCE HAYNES,

Plaintiff,

v.

MIKE ACQUINO, WILLIAM RESABEK,
JASON WHITENIGHT, BOHDAN PAPISZ, and
JOHN SULLIVAN,

Defendants.

**DECISION
and
ORDER**

10-CV-355F

(Consent)

APPEARANCES:

BRENDA JOYCE HAYNES, *Pro Se*
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Buffalo, New York 14215

TIMOTHY A. BALL
CORPORATION COUNSEL, CITY OF BUFFALO
Attorney for Defendants
ROBERT E. QUINN, of Counsel
65 Niagara Square
Buffalo, New York 14202

On June 10, 2016, following a four-day jury trial on Plaintiff Brenda Joyce Haynes's civil rights claims for false arrest, excessive force and malicious prosecution, the jury returned a verdict in favor of all Defendants, Mike Acquino, William Rezabek, Jason Whitenight, Bohdan Papisz, and John Sullivan. After the close of evidence, Defendants made an oral motion to dismiss as a matter of law because Defendants are entitled to qualified immunity on all three of Plaintiff's claims. Defendants' oral motion was consistent with the request in their final pretrial papers that the jury be charged on qualified immunity, (Dkt. 83 at 4), and Defendants' proposed jury instructions included an instruction on qualified immunity.¹ (Dkt. 83-2 at 31).

¹ Defendants never moved for summary judgment based on either qualified immunity or any other ground.

Recognizing there is a high likelihood of confusion when the jury is given instructions on a substantive claim, here, false arrest, excessive force, and malicious prosecution, and then instructed to consider qualified immunity, and that the prospect of finding in favor of the defendants on qualified immunity may present to the jury an attractive option where liability on the substantive claims is close, the undersigned reserved decision on the issue of qualified immunity and, instead, presented the jury with special interrogatories regarding several disputed material issues of fact which, upon resolution by the jury, would permit the undersigned to decide the qualified immunity issue as a matter of law. This approach is in accord with the Second Circuit's preference that where disputed issues of fact preclude qualified immunity being decided by the court as a matter of law, the jury should be charged on the substantive claim, but not on qualified immunity, and special interrogatories may be presented for resolution by the jury of disputed material issues of fact, on which the court may then rely in ruling on qualified immunity. See *Stephenson v. Doe*, 332 F.3d 68, 80-81 (2d Cir. 2003). Accordingly, notwithstanding the jury verdict in favor of Defendants, the undersigned now addresses Defendants' oral motion that they are qualifiedly immune from liability on all Plaintiff's claims against them, relying on the factual findings made by the jurors on the Special Interrogatories.

"The defense of qualified immunity 'shields law enforcement officers from § 1983 claims for money damages provided that their conduct does not violate clearly establishes constitutional rights of which a reasonable person would have been aware.'" *Figuerroa v. Mazza*, ___ F.3d ___, 2016 WL 3126772, at * 6 (2d Cir. June 3, 2016) (quoting *Zalaski v. City of Hartford*, 723 F.3d 382, 388 (2d Cir. 2013)). The qualified

immunity doctrine “aims to give officials room to act with confidence in gray areas by absolving from personal liability ‘all but the plainly incompetent or those who knowingly violate the law.’” *Id.* (quoting *Mullenix v. Luna*, __ U.S. __, 136 S.Ct. 305, 308 (2015)).

In the context of § 1983 actions predicated on false arrest, “an arresting officer is entitled to qualified immunity so long as ‘arguable probable cause’ was present when the arrest was made.” *Figueroa*, 2016 WL 3126772, at * 6 (quoting *Zalaski*, 723 F.3d at 390). “A police officer has arguable probable cause ‘if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met.’” *Id.* “The fact that an innocent explanation may be consistent with the facts alleged . . . does not negate probable cause.” *Panetta v. Crowley*, 460 F.3d 388, 395 (2d Cir. 2006) (quoting *United States v. Fama*, 758 F.2d 834, 838 (2d Cir. 1985)). Further, “an officer’s failure to investigate an arrestee’s protestations of innocence generally does not vitiate probable cause.” *Id.* at 395-96. Applying this standard establishes Defendants are entitled to qualified immunity on the false arrest claim because, the answers to the Special Interrogatories establish that a reasonable police officer could have determined that Plaintiff was engaging in some unlawful conduct.

In particular, in response to the relevant Special Interrogatories, Court Exh. B, the jury found that on February 3, 2009, Defendants Acquino and Rezabek saw Plaintiff walking in the street shouting obscenities, with members of the public in the area and close enough to observe Plaintiff and to hear the obscenities. Special Interrogatories 1, 2 and 3. Based on these observations, as found by the jury, Defendants Acquino and Rezabek reasonably could have determined Plaintiff was engaging in disorderly conduct

in violation of N.Y. Penal Law § 240.20(3), which is defined as intentionally causing and recklessly creating a public inconvenience, annoyance, and alarm by using obscene language. In response to other Special Interrogatories, the jury found that Defendants Acquino and Rezabek also observed Plaintiff in possession of narcotics, crack cocaine, and narcotics paraphernalia, a crack pipe. Special Interrogatories 4 and 5. These observations, also found by the jury, support a determination by Defendants Acquino and Rezabek that Plaintiff was in possession of narcotics and narcotics paraphernalia in violation of N.Y. Penal Law § 220.03, by knowingly and unlawfully possessing a controlled substance and a crack pipe. Significantly, under the collective or imputed knowledge doctrine, all five Defendants collectively “knew” when Plaintiff was arrested that Plaintiff had engaged in disorderly conduct and was in possession of controlled substances, and all five Defendants “would have had reasonable cause to believe, at least to the standard of qualified immunity,” that Plaintiff had committed the crimes of disorderly conduct and criminal possession of a controlled substance. *Giannullo v. City of New York*, 322 F.3d 139, 142 (2d Cir. 2003) (citing *Lee v. Sandberg*, 136 F.3d 94, 101 (2d Cir. 1997)). See also *Panetta*, 460 F.3d at 395 (“When making a probable cause determination, police officers are entitled to rely on the allegations of fellow police officers.”). Accordingly, Defendants are entitled to qualified immunity on the issue of probable cause to arrest Plaintiff for disorderly conduct and two counts of criminal possession of controlled substances in the seventh degree. Further, because the existence of probable cause is a complete defense to Plaintiff’s § 1983 false arrest and malicious prosecution claims, see *Manganiello v. City of New York*, 612 F.3d 149, 161-62 (2d Cir. 2010) (probable cause is complete defense to malicious prosecution claim in

violation of New York common law and § 1983); *Jaegly v. Couch*, 439 F.3d 149, 152 (2d Cir. 2006) (“Under New York law, the existence of probable cause is an absolute defense to a false arrest claim.”); (*Singer v. Fulton County Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995) (probable cause is complete defense to false arrest in violation of civil rights claim), Defendants’ motion to dismiss based on qualified immunity is GRANTED as to Plaintiff’s false arrest and malicious prosecution claims which are DISMISSED on this ground.

With respect to Plaintiff’s § 1983 excessive force claim, “[d]etermining whether the force used during an arrest is ‘reasonable’ requires balancing the ‘nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.’” *Lennon v. Miller*, 66 F.3d 416, 425 (2d Cir. 1995) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). “This standard evaluates the reasonableness of the force used by considering the totality of the circumstances faced by the officer on the scene.” *Id.* “[T]he question for purposes of qualified immunity is ‘whether a reasonable officer could have believed that the use of force alleged was objectively reasonable in light of the circumstances.’” *Id.* (quoting *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994)). In the instant case, the answers to the Special Interrogatories establish that Defendants are entitled to qualified immunity on Plaintiff’s excessive force claim because “no rational jury could have found that the force used was so excessive that no reasonable officer would have made the same choice.” *Id.* at 426.

Specifically, in response to the relevant Special Interrogatories, the jury found that Plaintiff resisted Defendant Acquino’s attempt to subdue her, Special Interrogatory

7, that Defendants Acquino and Rezabek did not unreasonably apply the handcuffs to Plaintiff so as to cause Plaintiff undue pain, Special Interrogatory 8, that it was reasonably necessary for Defendants Papisz and Sullivan to place Plaintiff on the pavement to apply the handcuffs, Special Interrogatory 9, and that no Defendant beat Plaintiff with his fists, a flashlight, or a baton with any gross indifference to possibly causing injury to any part of Plaintiff's body, including her arms, legs, and knees, Special Interrogatory 10. The jury's responses to these Special Interrogatories is consistent with Defendants' testimony that because Plaintiff was resisting arrest, Defendants had no choice but to apply some force to effectuate Plaintiff's arrest and preserve evidence of Plaintiff's crack cocaine possession, and that the amount of force applied was no more than the circumstances warranted. Under these circumstances, no rational jury could find that Defendants' admitted use of force was so excessive that no reasonable officer would have made the same choice. *Lennon*, 66 F.3d at 426. Defendants' motion for to dismiss based on qualified immunity therefore is GRANTED as to Plaintiff's excessive force claim which is DISMISSED as such.

Accordingly, Defendants are qualifiedly immune from liability on all of Plaintiff's claims. Alternatively, the jury verdict exonerating all Defendants from liability on all three of Plaintiff's claims stands. See *Song v. Ives Laboratories, Inc.*, 957 F.2d 1041, 1047 (2d Cir. 1992) (reversing district court's judgment notwithstanding the verdict overturning jury determination that plaintiff's termination by his former employer constituted unlawful employment discrimination and affirming district court's alternative holding ordering a new trial).²

² Defendants have failed to raise the defense that they are absolutely immune from liability on the malicious prosecution claim insofar as such claim is based solely on their trial testimony. See *Briscoe v.*

CONCLUSION

Based on the following, Defendants' motion seeking the dismissal of all Plaintiff's claims on qualified immunity is GRANTED; alternatively, the jury's verdict finding all Defendants' not guilty on all of Plaintiff's claims is AFFIRMED.

SO ORDERED.

/s/ Leslie G. Foschio

LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

DATED: June 14, 2016
Buffalo, New York

LaHue, 460 U.S. 325, 335-36 (1983) (extending to police officers testifying as witnesses at trials absolute immunity with respect to any claim based on witness testimony for which the possibility of prosecution for perjury was a sufficient deterrent to false testimony); *Rehberg v. Paulk*, ___ U.S. ___, 132 S.Ct. 1497, 1505-06 (2012) (extending *Briscoe* to witnesses who testify before a grand jury); and *Jovanovic v. City of New York*, 486 Fed.Appx. 149, 152-53 (2d Cir. 2012) (holding police detective entitled to absolute immunity for testimony given in § 1983 plaintiff's criminal trial). Rather, the first element of a malicious prosecution claim – the initiation of a criminal prosecution against the plaintiff – is established only by signing a criminal complaint or completing complaining and corroborating affidavits, *Mitchell v. Victoria Home*, 434 F.Supp.2d 219, 227 (S.D.N.Y. 2006) (citing *Llerando-Phipps v. City of New York*, 390 F.Supp.2d 372, 383 (S.D.N.Y. 2005) (“In malicious prosecution cases against police officers, plaintiffs have met this first element by showing that officers brought formal charges and had the person arraigned, or filled out complaining and corroborating affidavits, or swore to and signed a felony complaint.” (citing cases))), or by fabricating information likely to influence a jury's decision and forwarding such information to the prosecutors to induce the commencement of a criminal prosecution against the plaintiff. *Ricciuti v. N.Y.C. Transit Authority*, 124 F.3d 123, 130 (2d Cir. 1997) (determining jury could find police officer “played a role in initiating the prosecution by preparing the alleged false confession and forwarding it to prosecutors.”). Significantly, no evidence was presented at trial that Defendants Rezabek, Whitenight, or Papisz, who testified at Plaintiff's criminal trial, prepared declarations in support of the commencement of the criminal proceedings against Plaintiff. Nor was any evidence presented that such Defendants cajoled, encouraged, or importuned the District Attorney to pursue the charges. See *Bermudez v. City of New York*, 790 F.3d 368, 377 (2d Cir. 2015) (“While police officers do not generally ‘commence or continue criminal proceedings against defendants, a claim for malicious prosecution can still be maintained against a police officer if the officer is found to ‘play[] an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act.’” (quoting *Manganiello v. City of New York*, 612 F.3d 149, 163 (2d Cir. 2010))). Nevertheless, by failing to raise absolute immunity, either in their answer or in support of their oral motion to dismiss, Defendants have waived such defense. See *Beechwood Resorative Care Center v. Leeds*, 436 F.3d 147, 154 n. 3 (2d Cir. 2006) (considering absolute immunity defense raised in passing only in a footnote to have been waived (citing *United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993))). Accordingly, in the absence of any assertion by Defendants, Plaintiff's malicious prosecution claim is not dismissed on the ground of absolute immunity as against Defendants Rezabek, Whitenight, and Papisz based on their trial testimony against Plaintiff in Buffalo City Court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BRENDA JOYCE HAYNES,

Plaintiff,

v.

MIKE ACQUINO,
WILLIAM REZABEK,
JASON WHITENIGHT,
BOHDAN PAPISZ,
JOHN SULLIVAN,

Defendants.

**DECISION
and
ORDER**

10-CV-355F
(Consent)

APPEARANCES:

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TIMOTHY A. BALL
CORPORATION COUNSEL, CITY OF BUFFALO
Attorney for Defendants
ROBERT E. QUINN, of Counsel
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Buffalo, New York 14202

In this § 1983 action alleging claims of false arrest and excessive force in violation of Plaintiff's Fourth Amendment rights, at a final pretrial conference, conducted September 15, 2015, Plaintiff represented that she intended to offer into evidence a prior decision of a Buffalo City Court Judge suppressing evidence in a criminal prosecution against Plaintiff based on Plaintiff's warrantless arrest at issue in this case ("the City Court's Decision"), as a result of which the charges for which Defendants arrested Plaintiff were dismissed. Specifically, Plaintiff contends that such ruling, concluding that Plaintiff's arrest was without probable cause, should be given collateral estoppel effect on Plaintiff's false arrest claim thus requiring the court direct a verdict in

favor of Plaintiff on the issue of whether Defendants arrested Plaintiff without probable cause as an element of Plaintiff's case. Alternatively, Plaintiff states she should be permitted to offer the City Court's Decision into evidence as relevant to the probable cause issue as part of her case-in-chief. Defendants oppose this proffer as not relevant or that preclusion is required under Fed.R.Evid. 403 (probative value of evidence outweighed by prejudicial effect) ("Rule 403").

It is settled in this Circuit that where a New York court suppresses evidence based on its finding that the arresting officer lacked probable cause to arrest on accused which results in a dismissal of the underlying criminal charges, pursuant to New York law, the New York court's finding that the arrest was without probable cause is not entitled to preclusive effect in a subsequent civil rights action brought by the plaintiff under the collateral estoppel doctrine because the arresting officers, now defendants in the ensuing § 1983 action in federal court, did not have a full and fair opportunity to litigate the threshold probable cause issue in the prior criminal case. See *Jenkins v. City of New York*, 478 F.3d 76, 85-86 (2d Cir. 2007). This holding results from the fact the arresting officers were witnesses but not parties to the prosecution of the underlying criminal case and the police are not sufficiently in privity with the District Attorney who prosecuted the criminal case to provide a basis for application of collateral estoppel on the probable cause issue. *Id.* (citing *D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 564 N.E.2d 634, 637 (N.Y. 1990); *Brown v. City of New York*, 458 N.E.2d 1250, 1251 (N.Y. 1983)). Thus, in this case, where Defendant police officers are accused in a § 1983 action of violating the plaintiff's Fourth Amendment rights, Plaintiff may not rely upon the City Court Decision's determination in the underlying criminal

prosecution of Plaintiff that Defendants' arrest of Plaintiff was without probable cause based on the doctrine of collateral estoppel. See *Jenkins*, 478 F.3d at 85-86.

Plaintiff's proffer of the City Court's Decision for consideration by the jury as evidence on the probable cause issue fares no better. Fed.R.Evid. 401 states that only relevant evidence is admissible and as the City Court's Decision has no collateral estoppel effect in this case, it is irrelevant and therefore inadmissible. Additionally, the City Court's Decision represents a judicial determination as a matter of law and thus does not constitute evidence of the fact of probable cause or the lack thereof, one within the exclusive province of the jury in this lawsuit. To admit the decision into evidence would most certainly have a profound effect upon the jury favorable to Plaintiff, thus permitting Plaintiff to achieve through the 'back-door' what Plaintiff cannot do under the anti-collateral estoppel rule established in *Jenkins, supra*. Alternatively, even if relevant, the court finds the prejudicial effect to Defendants of admitting such judicial finding outweighs its potential probative value requiring preclusion under Fed.R.Evid. 403.

CONCLUSION

Based on the foregoing, Defendants' in limine motion to exclude the use or admission into evidence of the City Court's Decision to establish that Plaintiff's arrest lacked probable cause is GRANTED.

SO ORDERED.

/s/ Leslie G. Foschio

LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

Dated: September 16, 2015
Buffalo, New York

**Additional material
from this filing is
available in the
Clerk's Office.**