

No. 10-20743

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOSLYN M. JOHNSON,

Plaintiff-Appellant,

v.

CITY OF HOUSTON; HOUSTON POLICE DEPARTMENT,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

JOSLYN M. JOHNSON,

Plaintiff-Appellant,

v.

No. 10-20743

CITY OF HOUSTON; HOUSTON POLICE DEPARTMENT,

Defendants-Appellees.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1. Joslyn M. Johnson;
2. The City of Houston;
3. The Houston Police Department;
4. Harold Hurtt in his Capacity as Chief of Police of the Houston Police Department;
5. Ben Dominguez, II, Counsel for Plaintiff-Appellant in the district court;
6. Paul J. Orfanedes, Counsel for Plaintiff-Appellant in the appellate court;

7. Julie B. Axelrod, Counsel for Plaintiff-Appellant in the appellate court;
8. Judicial Watch, Inc., Counsel for Plaintiff-Appellant in the appellate court;
9. Jaqueline I. Leguizamon, City of Houston Legal Department, Counsel for Defendants-Appellees in the district court; and
10. Andrea Chan, City of Houston Legal Department, Counsel for Defendants-Appellees in the appellate court.

Dated: January 27, 2011

JUDICIAL WATCH, INC.

/s/ Julie B. Axelrod

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REQUEST FOR ORAL ARGUMENT

The Plaintiff-Appellant, Joslyn M. Johnson, respectfully requests oral argument. This appeal presents the issue of when the doctrine of *res judicata* precludes parties from litigation. Oral discussion of the facts and the applicable precedent would benefit the panel. See Fed. R. App. P. 34(a)(1).

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment in the district court in a civil case. Jurisdiction in the District Court was based on 42 U.S.C. § 1983, as Plaintiff-Appellant brought an action for violation of her First Amendment rights. The jurisdiction of this Court is invoked pursuant to 5 U.S.C. § 1291. This appeal is timely because the District Court entered its final judgment on September 30, 2010 and Plaintiff-Appellant filed a Notice of Appeal pursuant to Fed. R. App. 4(a)(1)(A) on November 1, 2010. USCA5 4.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Whether the doctrine of *res judicata* precludes a police officer from seeking to enjoin policies, practices, and procedures of a city and police department that limit the officer's ability to contact and communicate with federal immigration officials when that same officer, acting in her capacity as the executrix of the estate of a fellow officer killed in the line of duty, previously asserted unsuccessful claims for money damages against the city and police department, on behalf of the deceased officer's estate, alleging that prior versions of these same policies, practices, and procedures had contributed to the officer's death.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

On September 21, 2009, Plaintiff-Appellant Joslyn M. Johnson, a sergeant in the Houston Police Department, commenced this action against the City of Houston ("the City"), the Houston Police Department ("HPD"), and former Chief of Police Harold Hurtt ("Chief Hurtt"), in his official capacity, in the 151st Judicial District of Harris County, Texas. USCA5 233. The lawsuit challenges current policies, practices, and procedures of the HPD that restrict Sergeant Johnson's ability to contact and communicate with federal immigration officials regarding the citizenship or immigration status of persons she encounters in carrying out her

duties and responsibilities as a police officer. Sergeant Johnson alleges that the HPD's current policies, practices, and procedures violate her rights, including her right to free expression under the First Amendment and her right as a U.S. citizen to communicate with federal officials about possible violations of federal law. USCA5 114, 116, 234. Sergeant Johnson seeks mandamus, declaratory, and injunctive relief as a remedy for her claims ("the First Amendment Action"). USCA5 15, 99, 234. She does not seek damages. *Id.* On February 8, 2010, the City removed Sergeant Johnson's lawsuit to the U.S. District Court, Southern District of Texas. USCA5 99, 249.

On February 9, 2010, the City and the HPD filed a motion to dismiss, arguing, among other legal theories, that Sergeant Johnson's claims were barred by the doctrine of *res judicata*. Specifically, the City and the HPD argued that Sergeant Johnson's claims in this action were precluded by a 2008 action that had unsuccessfully sought money damages from the City for the homicide of Officer Rodney Johnson, a fellow HPD police officer and the husband of Sergeant Johnson. USCA5 105. Officer Johnson was killed in the line of duty by a previously deported alien who had had multiple contacts with the HPD after illegally reentering the United States. Because of HPD policies in effect at the time, however, the alien had not been reported to federal immigration officials and remained at large. USCA5 20. The action was brought against the City by Officer

Johnson's estate ("the Wrongful Death Action"). USCA5 100, 232, 249. Sergeant Johnson was the Executrix of Officer Johnson's estate.

In the Wrongful Death Action, the estate of Officer Johnson had asserted various claims, including a claim for negligence under the Texas Tort Claims Act, a claim for gross negligence, and a claim under 42 U.S.C. § 1983 alleging that the HPD's policy had deprived Officer Johnson of his life and liberty in violation of the due process provision of the 14th Amendment of the U.S. Constitution. USCA5 232-233. The City removed the Wrongful Death Action to federal court on December 30, 2008, then moved to dismiss. USCA5 232-33. On September 30, 2009, the district court granted the City's motion to dismiss both the estate's § 1983 claim and its state law claim for gross negligence. USCA5 233. The district court remanded the estate's negligence claim to state court. *Id.*

Exactly one year later, on September 30, 2010, the district court in the First Amendment Action granted the City's and the HPD's motion to dismiss on the grounds of *res judicata*. USCA5 247. Plaintiff filed a timely Notice of Appeal on November 1, 2010. USCA5 4.

B. Statement of the Facts

Prior to the September 21, 2006 shooting death of Officer Johnson by Juan Leonardo Quintero-Perez, an unlawfully present alien who had been deported following a conviction for indecency with a minor, but illegally reentered the

United States and thereafter had multiple interactions with the HPD, General Order 500-05 stated in pertinent part: “Officers shall not make inquiries as to the citizenship status of any person” USCA5 19-21. Following Officer Johnson’s death, the HPD changed its policies, practices, and procedures. USCA5 21. Specifically, the HPD issued Circular No. 06-1010-298, authorizing officers to check the “wanted” status of anyone who is legally detained and affirmatively requiring officers to check the “wanted” status of anyone who has been ticketed, arrested, and/or jailed. USCA5 21-22. The officer then runs the arrestee’s name through the National Crime Information Center (“NCIC”) database, which may reveal whether the person is the subject of any outstanding “wants” or warrants. USCA5 22. The officer may contact U.S. Immigration and Customs Enforcement (“ICE”) only if the officer receives a “hit” from this database, indicating that a person is the subject of an outstanding criminal warrant issued by ICE, an administrative warrant of removal, or a notice of detainer for a previously deported felon. *Id.*

Not all previously deported aliens are included in the NCIC database, however. *Id.* The only aliens included are those convicted and deported for “drug trafficking, firearms trafficking, or serious violent crimes.” USCA5 22-23. Aliens deported for any other reasons are not included in the database. USCA5 23. Consequently, it is not clear that Quintero-Perez, who was deported following his

conviction for indecency with a minor, would have been identified as a “previously deported felon” by the NCIC database even if the officers who arrested or detained Quintero-Perez before he killed Officer Rodney Johnson had checked his “wanted” status. *Id.*

ICE operates and maintains a broad range of databases regarding persons’ citizenship and immigration status, and it makes this information available to other law enforcement agencies whose policies, practices, and procedures allow them to access it. *Id.* In this regard, in 1994, the Law Enforcement Support Center (“LESC”) was established by what was then known as the U.S. Immigration and Naturalization Service to provide timely, accurate information to local, state, and federal law enforcement agencies on individuals arrested, suspected, or under investigation for criminal activity. *Id.* LESC operates 24 hours a day, 7 days a week assisting law enforcement agencies with information gathered from a wide range of databases and intelligence resources, including ICE immigration databases, the NCIC, the Interstate Identification Index, the Student and Exchange Visitor Information System, the U.S. Visitor and Immigrant Status Indicator Technology System, and the National Security Entry-Exit Registration System. According to an ICE Fact Sheet, “[t]he primary users of the LESL are state and local law enforcement officers in the field who need information about foreign nationals they encounter in the course of their daily duties.” USCA5 23-24.

By limiting an officer to checking the “wanted” status, via the NCIC database, of a person who is lawfully detained, ticketed, arrested, or jailed, the HPD substantially restricts the officer's ability to obtain information from ICE about that person’s immigration status, whether legal, illegal, or criminal. USCA5 24. Even when a person’s immigration status is or becomes known to an officer, such as if a person identifies himself or herself as an illegal alien or a previously deported alien, current HPD policies, practices, and procedures substantially restrict the officer's ability to report that information to ICE. *Id.* In this regard, HPD General Order 500-05 states, in pertinent part: “Officers will contact [ICE] regarding a person only if that person is arrested on a separate criminal charge (other than a class C misdemeanor) and the officer knows the prisoner is an illegal alien.” *Id.* Thus, an officer is prohibited from notifying ICE about persons who identify themselves as illegal or previously deported aliens but are not arrested. Similarly, an officer is prohibited from notifying ICE about known illegal aliens, including previously deported aliens, whom the officer encounters, unless the aliens are charged with a class B misdemeanor or a higher offense. *Id.*

At the time Sergeant Johnson was sworn in as an HPD Officer, she took the following oath:

I do solemnly swear that I will faithfully execute the duties of the office of Regular Officer of the City of Houston, Texas, and will to the best of my ability preserve, protect, and defend the Constitution

and laws of the United States and of this State and City. So help me God.

USCA5 19. In addition, as an officer in the HPD, Sergeant Johnson is charged by City Ordinance 34-21 with the duty of “detecting and preventing crimes, and arresting violators of the law.” *Id.* In order to fulfill these duties and responsibilities, Sergeant Johnson seeks to have the ability to contact LESC or other appropriate ICE offices to request or provide information about the immigration status of persons she lawfully encounters as an officer of the HPD.

USCA5 25. She is currently restricted from doing so by HPD policies, procedures, and practices. USCA5 21 and 25. These restrictions have injured Sergeant Johnson by harming her ability to fulfill her oath and otherwise carry out her duties and responsibilities as a law enforcement officer. USCA5 25. HPD’s policies, practices, and procedures also harm Sergeant Johnson by restricting her freedom of expression. *Id.*

SUMMARY OF THE ARGUMENT

The claims brought by the estate of Officer Johnson in the Wrongful Death Action do not arise from the same transaction as the claims brought by Sergeant Johnson in the First Amendment Action. The facts and legal theories at issue in the Wrongful Death Action revolve around the circumstances of Officer Johnson’s death on September 21, 2006 and whether the policies, practices, and procedures of the HPD in effect at the time contributed to Officer Johnson’s death by placing him

in unreasonable danger. By contrast, the facts and legal theories at issue in the First Amendment Action concern whether the restrictions imposed by the HPD in 2009 on Sergeant Johnson's contacts and communications with federal immigration officials are lawful and constitutional. The two claims are not related in time, space, origin, or motivation and would not have formed a convenient trial unit. Nor would trying them together have conformed to the parties' expectations or business understanding or usage, achieved any judicial economies, or avoided any inconsistent opinions. *Res judicata* does not apply.

ARGUMENT

A. Standard of Review

An appellate court reviews *de novo* a trial court's dismissal of a case without a hearing based on the doctrine of *res judicata*, or claim preclusion. The appellate court "reviews the *res judicata* effect of a prior judgment *de novo* because it is a question of law." *United States v. Davenport*, 484 F.3d 321, 326 (5th Cir. 2007). See also, *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 313 (5th Cir. 2004). *Res judicata* is an affirmative defense and the party seeking to assert it bears the burden of proof. *GLF Construction Corp. v. LAN/STV Inc.*, 414 F.3d 553, 555 (5th Cir. 2005).

B. Legal Standard Governing *Res Judicata*

The doctrine of *res judicata* prevents parties from relitigating issues that have already been decided. “Res judicata insures the finality of judgments and thereby conserves judicial resources and protects litigants from multiple lawsuits.” *Oreck Direct LLC v. Dyson Inc.*, 560 F.3d 398, 401 (5th Cir. 2009) (citations omitted). “To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Montana v. United States*, 440 U.S. 147, 153-154 (1979). But *res judicata* only operates as a bar to a claim when four factors are present: “(1) the parties in both the prior suit and the current suit must be identical; (2) a court of competent jurisdiction must have rendered the prior judgment; (3) the prior judgment must have been final and on the merits; and (4) the plaintiff must raise the same cause of action in both suits.” *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 313 (5th Cir. 2004).

The final factor, whether or not the plaintiff has raised the same cause of action in both suits, is generally the most complicated to determine and often is the only factor at issue. To determine whether the prior and current suits involve the same cause of action, courts apply the “transactional” test which “requires that the

two actions be based on the ‘same nucleus of operative facts.’” *Oreck*, 560 F.3d at 402; *In re: Robert Warren Paige*, 610 F.3d 865, 872 (5th Cir. 2010). The new claim must involve the same “transaction” or “series of transactions” that were involved in the prior claim. *Davis*, 383 F.3d at 313. What constitutes a ‘transaction’ or series of ‘transactions’ is determined pragmatically, by weighing various factors such as “whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a trial unit conforms to the parties’ expectations or business understanding or usage.” *Id.* A different cause of action “should differ in the theories of recovery, the operative facts, and the measure of recovery.” *United States v. Lockheed Martin Engineering and Science Services Co.*, 336 F.3d 346, 359 (5th Cir. 2003) (citations omitted).

The mere presence of “factual overlap” between the facts alleged in the first claim and the facts alleged in the second claim does not mean that the two claims form a convenient trial unit for purposes of claim preclusion. *Id.* For instance, if the subject matter of one suit revolves around a different question than the other, and the “centerpiece evidence” related to one claim will have nothing to do with the proof necessary for the other, such a difference weighs against preclusion. *Id.* A court can find a lack of convenience in trying two cases together, even when “factual underpinnings” of each suit are related. When a factual comparison shows

a plaintiff's claims primarily arise out of different facts, courts will decline to bar the new claim. *Id.* at 360.

C. Sergeant Johnson's First Amendment Action Is Not Barred by *Res Judicata*

The Wrongful Death Action brought by Sergeant Johnson in her capacity as the Executrix of the Estate of Officer Johnson alleged that the City was liable to Officer Johnson's estate for money damages because the HPD policies, practices, and procedures in effect at the time placed Officer Johnson in an unreasonable danger and proximately caused his death in 2006. That damage action does not preclude Officer Johnson's widow, Sergeant Johnson, from bringing a separate action against the City, in her personal capacity, seeking declaratory and injunctive relief because, in 2009, the HPD's subsequently revised policies, practices, and procedures violate her right to freedom of expression and are otherwise illegal. These two separate actions fail to meet the test for applying *res judicata*, because, not only are the "parties" not technically identical, but they do not fulfill the essential element of asserting the same causes of action. The "central question" around which the two lawsuits revolve is entirely and materially different. See, *e.g.*, *Lockheed Martin*, 336 F.3d at 359.

At issue in the Wrongful Death Action was whether the HPD's policies in effect at the time placed Officer Johnson in an unreasonably dangerous position and proximately caused his death in September 2006. At issue in the First

Amendment Action is whether the U.S. Constitution, federal law, and the Texas Constitution permit the HPD to limit Sergeant Johnson's contacts and communications with federal immigration officials in 2009. The question of the HPD's culpability for Officer Johnson's death in the Wrongful Death Action hinged on whether the HPD policies in effect at the time proximately caused Officer Johnson's death and whether the City could be held liable for damages to Officer Johnson's estate. In the First Amendment Action, by contrast, all of the facts relating to Officer Johnson's homicide are immaterial. While the unfortunate death of Officer Johnson in September 2006 may serve to illustrate one reason why the HPD's policies, practices, and procedures on immigration are ill-advised as a matter of public policy, his death has no bearing on the legal question of whether the HPD's subsequently revised policies, practices, and procedures governing contacts and communications with federal immigration officials in 2009 are an unconstitutional restriction on speech or otherwise violate federal law. When the City won a judgment that avoided liability for Officer Johnson's homicide, it did not also win a judgment that upheld restrictions on Sergeant Johnson's contacts and communications with federal immigration officials in the future.

The test for *res judicata* is applied by pragmatically weighing whether the facts involved in the Wrongful Death Action and the First Amendment Action are related in time, space, origin, or motivation, whether the two claims form a

convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations. See, e.g., *Lafreniere Park Foundation v. Broussard*, 221 F.3d 804, 810 (5th Cir. 2000), *Davis* 383 F.3d at 313. The two cases under discussion fail on all factors.

1. The Facts in Each Case Are Not Related in Time, Space, Origin, or Motivation

The two actions at issue originated at different times, under different factual circumstances, and have different motivations. The origin of the Wrongful Death Action was, quite obviously, the death of Officer Johnson on September 21, 2006. The motivation behind the lawsuit was to seek compensation for Officer Johnson's estate from the City. The origin of the First Amendment Action was the HPD's policies, practices, and procedures, instituted in their current form after Officer Johnson's death, that substantially restricted Sergeant Johnson's contacts and communications with federal immigration officials in 2009 and continue to do so.

Sergeant Johnson brought the First Amendment claim as a response to HPD's continuing restrictions on her rights to freedom of expression and to communicate with federal officials. Her motivation was to force the City and the HPD to stop restricting her rights to freedom of expression and to communicate with federal officials so that she could fulfill her duties as a police officer and obey the oath she took when she joined the police force. In this action, no determination will be made about whether the HPD's current policy, practices, and procedures

contributed to Officer Johnson's death in September 2006, as these current policies, practices, and procedures did not even exist until after his death. Only claims that are in existence at the time the original complaint is filed can be precluded. *Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir. 1992).

2. The Two Cases Do Not Form a Convenient Trial Unit

The cases do not form a "convenient trial unit" for several reasons. First, Sergeant Johnson has brought these actions in entirely different capacities. See e.g. *Lockheed Martin*, 336 F.3d at 359 (two cases brought in different capacities are not the same cause of action). Second, the facts and legal theories to be tried vary widely: the central questions in the first action concern the circumstances of Officer Johnson's death and legal theories regarding when a police department can be held liable for the death of one of its officers, whereas the central question in the second action concerns whether a police officer has a constitutional or statutory right to contact or communicate with federal officials about possible violations of federal law. Adjudicating such diverse claims together, which require different proofs and different arguments, does not form a convenient trial unit.

Not only are the facts and legal theories different, but the relief sought is different as well. See *Id.* ("the remedies sought and the measure of recovery ... are completely different."). The Wrongful Death Action sought money damages, but the First Amendment Action seeks injunctive and declaratory relief only.

Should the Wrongful Death Action have reached trial, determining a remedy for the Estate of Officer Johnson would have involved calculating the HPD's culpability and determining the amount of damages suffered by Officer Johnson's estate, based on his salary, age, and other personal characteristics, among other factors. The declaratory and injunctive relief sought by Sergeant Johnson in the First Amendment Action obviously is of an entirely different nature.

3. Trying the Cases Together Does Not Meet Any Expectations or Business Understanding or Usage of the Parties

Trying these cases together also does not conform to any expectations or business understanding or usage of the parties. Tellingly, the City failed to produce any evidence in this regard. In particular, it failed to produce any evidence demonstrating that plaintiffs who sue the City for wrongful death are expected to assert later-in-time constitutional claims on behalf of other parties. Nor should cities and police departments have any reasonable expectation that they are safe from suits by officers for violations of the officers' constitutional and statutory rights because they previously were involved in litigation concerning the death of one of their officers. There certainly is no "business understanding."

Finally, while the Court should be mindful of judicial economy and inconsistent opinions, such considerations do not preclude litigation of Sergeant Johnson's claims in this case. The claims brought by Sergeant Johnson in the First

Amendment Action were neither raised nor ruled on in the Wrongful Death Action. A ruling on the merits of the claims in the present action will not create any inconsistencies in judicial opinions. Nor is it proper to refuse to hear new cases for the first time simply for the purpose of judicial economy, which itself may not necessarily be promoted by dismissing this case. Even if the district court's dismissal of Sergeant Johnson's claims in the First Amendment Action stands, the causes of action she has asserted will not have been adjudicated fully and finally, since they apply equally to all officers of the HPD and therefore can be brought by any officer of the HPD. Thus, this case may very well be back before the courts, albeit with a different plaintiff.

CONCLUSION

For the foregoing reasons, the district court's dismissal of Sergeant Johnson's First Amendment Action on the basis of *res judicata* should be reversed, and this matter should be remanded to the district court for further proceedings.

Dated: January 27, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation,
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1. This brief complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B) because:
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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2011, a true and correct copy of the foregoing Brief for Appellant has been served electronically via this Court's ECF system on the following:

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