IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

JAMIE CLEM, INDIVIDUALLY AND ON BEHALF OF THE BENEFICIARIES OF SKYLER CLEM, DECEASED,
Plaintiff/Appellant,

v.

PINAL COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF ARIZONA; AND MARK LAMB, IN HIS OFFICIAL CAPACITY AS SHERIFF OF PINAL COUNTY, ARIZONA,
Defendants/Appellees.

No. 2 CA-CV 2020-0101
Filed May 10, 2021

Appeal from the Superior Court in Pinal County
No. S1100CV201600707
The Honorable Robert C. Olson, Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

COUNSEL

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OPINION

Judge Eckerstrom authored the opinion of the Court, in which Presiding Judge Espinosa and Vice Chief Judge Staring concurred.

E C K E R S T R O M, Judge:

¶1 Jamie Clem appeals from the trial court's entry of summary judgment in favor of Pinal County and Pinal County Sheriff Lamb.[1] Specifically, Clem argues the court erred in concluding that principles of res judicata and issue preclusion required it to grant summary judgment. For the reasons discussed below, we affirm the entry of summary judgment in part, we reverse in part, and we remand the case for further proceedings as explained below.

Factual and Procedural Background

¶2 On appeal from a trial court's grant of summary judgment, we "consider the evidence and all reasonable inferences in the light most favorable to the non-moving party." *Span v. Maricopa Cnty. Treasurer*, 246 Ariz. 222, ¶ 9 (App. 2019). In April 2015, Skyler Clem, while incarcerated in the Pinal County Jail, became non-responsive and was later pronounced dead after resuscitative efforts proved unsuccessful. It was subsequently determined he died from morphine intoxication. A year later, his mother, Jamie Clem, filed suit in Pinal County Superior Court against Pinal County, then-Pinal County Sheriff Paul Babeau solely in his official capacity, and various unnamed defendants, asserting state-law claims of negligence and gross negligence.

¶3 The following year, Clem filed a second lawsuit in Pinal County Superior Court, naming as defendants a number of detention officers she alleged had been working at the jail during the hours Skyler was in custody. That suit named the officers solely in their individual capacities and asserted solely federal-law causes of action under 42 U.S.C. § 1983. The complaint alleged substantially the same facts as the complaint in the first lawsuit.

[1] Pursuant to Rule 27(c)(2), Ariz. R. Civ. App. P., we order the substitution of current Pinal County Sheriff Mark Lamb for former Sheriff Babeau.

¶4 On July 25, 2017, Clem moved the trial court to consolidate the two cases. Before the court ruled on that motion, two of the officer defendants in the second case removed the case to federal court. The first case remained in state court.

¶5 After several months of litigation in the federal case, Clem amended her federal complaint, eventually naming only Officer Gomez, still solely in his individual capacity.[2] The district court granted Gomez's motion for summary judgment with prejudice, finding he was entitled to qualified immunity. Specifically, the district court found that although Gomez had intentionally chosen not to conduct a face-to-photo verification as required by the jail's policy, his conduct did not amount to deliberate indifference such that a constitutional violation had occurred.[3] It further concluded the record provided "no evidence" Gomez's "conduct caused Skyler's injuries." In drawing these conclusions, the district court relied on the parties' undisputed facts regarding the conditions of Skyler's incarceration and his death.

¶6 Shortly after the district court dismissed the federal case, the County and the Sheriff filed a motion for summary judgment in the first case, which had remained in state court. After a hearing, the superior court granted that motion, concluding the judgment against Clem in federal court required it to dismiss the case on grounds of res judicata and issue preclusion. Clem has appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

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[2]Clem's original complaint in the § 1983 action was dismissed with leave to amend in January 2018. The district court reasoned that Clem had failed to state a claim that would overcome the officers' qualified immunity. The claims against one other officer were dismissed for failure of service. Of the original officer defendants, the amended complaint named only Officer Gomez.

[3]The jail's operating procedures required officers to conduct a number of formal and informal inmate counts at various intervals throughout the day and night. The face-to-photo verification, required each day at 7 a.m., 3 p.m., and 11 p.m., consisted of a "visual observation of an individual's physical appearance to a photo verification record." Clem argues here, as she did to the district court regarding Officer Gomez, that "because of" the failure of the jail officers to check Skyler's "condition on an ongoing, regular basis," his "untreated (but treatable) condition worsened until he died."

Res Judicata

¶7 "We review *de novo* the claim preclusive effect of a prior judgment." *Howell v. Hodap*, 221 Ariz. 543, ¶ 17 (App. 2009). Because the prior judgment was issued by a federal court, federal law determines whether that ruling precludes a later state court decision on the ground of res judicata. *Id.*; *see also W. Sys., Inc. v. Ulloa*, 958 F.2d 864, 871 & n.11 (9th Cir. 1992). Specifically, in the absence of a controlling United States Supreme Court case, "we look to the controlling federal law in the circuit in which the federal judgment was entered." *Howell*, 221 Ariz. 543, ¶ 18.

¶8 Res judicata "bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (quoting *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997)). For res judicata to apply, the two actions must share "(1) an identity of claims, (2) a final judgment on the merits, *and* (3) identity or privity between parties." *Id.* (emphasis added) (quoting *W. Radio Servs. Co.*, 123 F.3d at 1192). Clem contends, among other arguments, that the County and the Sheriff lack privity with Officer Gomez in his individual capacity, the only remaining defendant before the district court dismissed the federal case.[4] We agree.

¶9 The parties have not identified a case from the Ninth Circuit that directly controls this issue, and we are not aware of one. However, other federal circuits have held that a government employee named solely in an individual capacity is not in privity with the government. *See, e.g.*, *Harmon v. Dallas Cnty.*, 927 F.3d 884, 891-92 (5th Cir. 2019) (no privity between governmental entity and government employee later sued in individual capacity); *Conner v. Reinhard*, 847 F.2d 384, 395 (7th Cir. 1988) ("courts do not generally consider official sued in personal capacity to be in privity with the government"); *Headley v. Bacon*, 828 F.2d 1272, 1274, 1278-79 (8th Cir. 1987) (no privity between city found liable in earlier action and city employees later named in their individual capacities).

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[4]The County and the Sheriff contend that Clem either conceded the district court's ruling constitutes a final judgment on the merits or waived the contrary argument by failing to make it to the superior court. Because we find no privity between the defendants in the federal case and the defendants in the remaining state case, we need not address the finality element of res judicata and, therefore, we do not address this argument.

¶10 We see no reason to depart from the conclusions reached by the above-cited federal courts. Pinal County and the Sheriff cite numerous cases finding privity between a principal and an agent. But those cases are distinguishable because they analyzed either private principal-agent relationships or relationships in which a government representative was not named in an individual capacity and thus the government shared the burden of potential liability. *See, e.g.*, *In re Schimmels*, 127 F.3d 875, 883 (9th Cir. 1997) (finding privity between government and *qui tam* relators in False Claims Act litigation due in part to "unity of interest between the relators and the government who will share *any and all* recovery"); *Spector v. El Ranco, Inc.*, 263 F.2d 143, 145 (9th Cir. 1959) (finding privity between hotel and hotel employee). In such cases, the legal interests of the principal and the agent were substantially similar, justifying a finding of privity. *See Schimmels*, 127 F.3d at 881-83 (privity exists when interests of nonparty and party closely aligned).

¶11 By contrast, a government official named in an individual capacity must satisfy any judgment against him or her personally; the government is not accountable for its official's personal liability. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("award of damages against an official in [a] personal capacity can be executed only against the official's personal assets"). Thus, fundamentally, a government official named in an individual capacity does not represent the interests of the government and should not be considered its legal privy.

¶12 Furthermore, when a plaintiff sues a governmental officer solely in an individual capacity, that officer may assert immunities and defenses not available to the government. *See Pearson v. Callahan*, 555 U.S. 223, 237 (2009) ("Qualified immunity is 'an immunity from suit rather than a mere defense to liability.'" (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985))); *Graham*, 473 U.S. at 165-67 (qualified immunity unavailable in official-capacity actions, which represent alternative method of pleading against governmental entity); *Harmon*, 927 F.3d at 891 (no privity between government and government employee sued in individual capacity because defenses differ). Here, Officer Gomez was entitled to assert qualified immunity for his actions, a defense not available to the governmental entities. *See Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982) (explaining "qualified immunity" for public officers as expedient means to balance various burdens of litigation with need for viable "avenue for vindication of constitutional guarantees").

¶13 The County and the Sheriff nonetheless assert that the claims against them should be barred by res judicata because they are based on a

theory of vicarious liability.[5] Both the Ninth Circuit and Arizona courts follow the Restatement (Second) of Judgments when analyzing whether a vicarious liability claim is barred by res judicata. *See M.J. ex rel. Beebe v. United States*, 721 F.3d 1079, 1083 n.4 (9th Cir. 2013) (incorporating Tenth Circuit's recitation of Restatement (Second) of Judgments § 51 in vicarious liability context); *Schimmels*, 127 F.3d at 882 (citing Restatement (Second) of Judgments § 37 in privity analysis); *Banner Univ. Med. Ctr. Tucson Campus, LLC v. Gordon*, 249 Ariz. 132, ¶ 13 (App. 2020) (citing Restatement for proposition that "claim preclusion does not apply to a vicarious claim when, as here, the judgment in the first claim was based on a defense personal to the defendant"). Under the Restatement, "[i]f two persons have a relationship such that one of them is vicariously responsible for the conduct of the other," judgment in the first action will preclude further litigation unless, among other things, "[t]he judgment in the first action was based on a defense that was personal to the defendant in the first action." Restatement (Second) of Judgments § 51(1)(b) (1982). The facts here present the precise scenario contemplated by that section of the Restatement: the judgment in the district court was based exclusively on qualified immunity—an immunity that was personal to Officer Gomez. Thus, the County and the Sheriff's res judicata argument fails with respect to its vicarious liability for its officer's actions.

Issue Preclusion[6]

¶14 The trial court also ruled, "[a]s a matter of judicial economy," that issue preclusion prevented a continuation of Clem's state negligence lawsuit. The court did not specify which particular aspects of the district court's ruling precluded the continuation of Clem's negligence claims

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[5]The County and the Sheriff also suggest that privity exists because they share "a substantial identity of interest" with Officer Gomez, the defendants "advanced similar, consistent defenses . . . particularly on the fact issue of causation," and Clem's theory of liability is premised on a vicarious relationship between employee and employer. To the extent they argue the district court's causation analysis requires us to find the parties are in privity, we disagree for the reasons outlined above. We address how causation influences issue preclusion below.

[6]We adopt the term "issue preclusion" in accordance with recent Supreme Court case law, but the term is interchangeable with "collateral estoppel," a term adopted by both parties' briefs. *See Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1594 (2020).

against the County and the Sheriff. We agree with the County and Sheriff that the district court's ruling regarding causation precludes Clem's negligence claims to the extent those findings apply to Officer Gomez's actions. But we disagree that the district court's findings warrant complete preclusion of Clem's respondeat superior negligence claims against the County and the Sheriff.

¶15 As a threshold matter, neither individual officers nor their government employers enjoy presumptive immunity against state-law negligence claims in Arizona. *Glazer v. State*, 237 Ariz. 160, ¶¶ 10-11 (2015). Although our legislature has specified some "circumstances in which governmental entities and public employees are immune from tort liability," *id.* ¶ 11, none of those circumstances exist here. *See* A.R.S. §§ 12-820.01 (providing conditions for absolute immunity), 12-820.02 (providing conditions for qualified immunity), 12-820.04 (immunity from punitive and exemplary damages), 12-820.05 ("[o]ther immunities"). And, "[i]n Arizona, an employer may be held vicariously liable under the doctrine of respondeat superior for the negligent acts of its employee acting within the course and scope of employment." *Engler v. Gulf Interstate Eng'g, Inc.*, 227 Ariz. 486, ¶ 17 (App. 2011), *aff'd*, 230 Ariz. 55 (2012). Thus, Officer Gomez's qualified immunity from Clem's constitutional claims does not translate to immunity from the state-law negligence claims for the County or the Sheriff.

¶16 As with claim preclusion, federal law controls the issue-preclusive effect of an earlier federal ruling. *Corbett v. ManorCare of Am., Inc.*, 213 Ariz. 618, ¶ 12 (App. 2006). Issue preclusion prevents "a party from relitigating an issue actually decided in a prior case and necessary to the judgment." *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1594 (2020). An issue may be precluded from relitigation "even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). Federal courts will decline to bar successive litigation through issue preclusion when the parties in the first action were not in privity with the parties in the subsequent action. *See, e.g.*, *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1050-51 (9th Cir. 2008).

¶17 However, in contrast to the treatment of privity under res judicata, federal courts considering issue preclusion generally do not require strict mutuality between parties. *See Nevada v. United States*, 463 U.S. 110, 143 (1983); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327-28 (1979) (recounting criticism of mutuality requirement "almost from its inception"); *Blonder-Tongue Lab'ys, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 327 (1971) (patent-related opinion recognizing abrogation of mutuality

requirement in issue-preclusion analysis); *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 880-82 (9th Cir. 2007) (recognizing "broad discretion" of trial courts to determine when to apply offensive non-mutual issue preclusion in other contexts); *see also Standage Ventures, Inc. v. State*, 114 Ariz. 480, 484 (1977) (recognizing right of "stranger to the first judgment" to deploy defensive issue preclusion).[7]

¶18 Instead, in the interest of judicial economy, *Parklane*, 439 U.S. at 326, courts will apply issue preclusion if "(1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits," *Oyeniran v. Holder*, 672 F.3d 800, 806 (9th Cir. 2012); *see also* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4416 (3d ed. 2020 update) (listing numerous factors influencing courts' application of issue preclusion).

Preclusion of Vicarious Liability for Officer Gomez's Allegedly Negligent Acts

¶19 Clem argues that "none of the conditions exist" for issue preclusion to apply to the state negligence action. We disagree with respect to the particular issue of whether Officer Gomez's actions caused Skyler's death.

¶20 In determining whether an issue is identical in two matters, we consider the following factors: (1) whether "a substantial overlap" exists "between the evidence or argument to be advanced" in each proceeding; (2) whether the new argument involves "the application of the same rule of law as that involved in the prior proceeding"; (3) whether "pretrial preparation and discovery" in the first matter can "reasonably be expected to have embraced" the issue presented in the second action; and (4) the closeness of claims across the two actions. *Howard v. City of Coos Bay*,

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[7]Although courts have historically distinguished between offensive and defensive issue preclusion, *see, e.g.*, *Collins*, 505 F.3d at 881-82, "the distinct trend if not the clear weight of recent authority is to the effect that there is no intrinsic difference between 'offensive' and 'defensive' issue preclusion, although a stronger showing that the prior opportunity to litigate was adequate may be required in the former situation than the latter," *Parklane*, 439 U.S. at 331 n.16 (quoting Restatement (Second) of Judgments § 88, Rep. Note, at 99 (Tentative Draft No. 2, 1975); *see also* Restatement (Second) of Judgments, § 29, Rep. Note (1982).

871 F.3d 1032, 1041 (9th Cir. 2017). All of these factors are clearly met with regard to the question of causation as applied to Officer Gomez.

¶21 Although deliberate indifference is a more stringent standard than negligence or gross negligence, *Borello v. Allison*, 446 F.3d 742, 747 (7th Cir. 2006), each theory requires a plaintiff to show a defendant caused the alleged injuries, regardless of his mental state. To succeed on her state-law negligence claim in Arizona, Clem must prove Officer Gomez had a duty to conform to a certain standard of care, he breached that standard, his conduct caused the resulting injury; and Skyler incurred actual damages. *See Gipson v. Kasey*, 214 Ariz. 141, ¶ 9 (2007). The issue before the district court was whether, under an "objective deliberate indifference standard," Gomez "made an intentional decision with respect to the conditions" under which Skyler was confined; those conditions put Skyler "at substantial risk of suffering serious harm"; Gomez failed to "take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of [Gomez]'s conduct obvious"; and "by not taking such measures," Gomez caused Skyler's injuries. *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018).

¶22 The district court concluded that "the causation requirement is not met where the facts do not show that conducting a face-to-photo verification would have prevented Skyler's death because the time of death is unknown." It further reasoned that, "[a]bsent any facts showing that Skyler was still alive when Defendant Officer Gomez's shift began, there is no evidence that Defendant Officer Gomez's conduct caused Skyler's injuries." There was thus "substantial overlap" between the evidence and the argument necessary to prove causation under each theory of liability.[8] *Howard*, 871 F.3d at 1041. Similarly, the reasoning that animated the district court's causation analysis under the deliberate indifference standard would

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[8]The County and the Sheriff argue that the district court's analysis of Officer Gomez's reasonableness is also preclusive. The district court found that because Skyler had not made jail officials aware of his drug use, the third *Gordon* element—that Gomez failed to take reasonable measures to abate Skyler's risk of harm—had not been met. *See Gordon*, 888 F.3d at 1125. However, it also reasoned there was "no evidence" that Gomez's "failure to do a face-to-photo verification was anything more than oversight or negligence, which does not amount to deliberate indifference." This reasoning would not preclude further analysis of Gomez's reasonableness on a negligence theory.

apply identically to the analysis of causation under a negligence theory. Thus the second factor, that both proceedings involve the application of the same rule of law, is satisfied. *See id.* As to overlapping pretrial preparation and discovery, *see id.*, the parties conducted discovery on the precise issue of whether Gomez caused Skyler's death. And finally, the claims are closely related because they arose out of the same factual scenario. *See id.* at 1044. As the County and the Sheriff note, the complaints in each action are nearly identical. We therefore agree that, as to the vicarious liability claim arising from Gomez's conduct, the County and the Sheriff have satisfied the first factor in issue preclusion: this dispositive legal issue is identical across the actions. *See Oyeniran*, 672 F.3d at 806.

¶23 The three remaining requirements for issue preclusion recited in ¶ 18, *supra*, are also met here. *See Oyeniran*, 672 F.3d at 806. There was a full and fair opportunity to litigate the issue, it was actually litigated, and the claims in the two proceedings were closely related. As discussed above, both parties conducted discovery on the deliberate indifference claim, which included the opinions of a forensic pathologist and an expert toxicologist, both of whom considered but could not narrowly identify Skyler's time of death. This evidence—or lack thereof—compelled the district court's conclusion that Clem could not show Officer Gomez's actions had caused Skyler's death.[9] This issue of causation is a dispositive,

[9]Clem asserts that the district court's "odd causation analysis" was flawed because it was premised on the incorrect conclusion that "no one knew when Skyler died over the period of his incarceration from April 24 to April 25, 2015." To the extent Clem argues the district court's ruling "was wrong" because evidence established that his death occurred "sometime around 7:00 a.m.," it is not our role to reconsider the evidence that was before the district court. *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 212 Ariz. 64, ¶ 58 (2006) (federal court judgments accorded full faith and credit by state courts). The proper avenue for relief on that argument would have been a direct appeal from the district court's ruling. Although we consider the evidence and all reasonable inferences in the light most favorable to the non-moving party, *Span*, 246 Ariz. 222, ¶ 9, the relevant evidence here is that which Clem presented to the district court, *cf. Arduini v. Hart*, 774 F.3d 622, 629-30 (9th Cir. 2014) (doctrine of issue preclusion would be undermined by allowing parties to relitigate issue by bringing forward new facts or arguments in second proceeding); *In re Sonus Networks, Inc.*, 499 F.3d 47, 62-63 (1st Cir. 2007) (party may not avoid issue preclusion simply because it failed to present available evidence to court in first proceeding). Clem's record citations do not support the opening brief's suggestion that Clem presented evidence to the district court that narrowed

and thus necessary, element under both qualified immunity and negligence analyses. *See Gordon*, 888 F.3d at 1125; *Gipson*, 214 Ariz. 141, ¶ 9; *see also Arduini v. Hart*, 774 F.3d 622, 629-30 (9th Cir. 2014) (applying Nevada law and concluding "a party who has litigated an ultimate fact may not bring forward different evidentiary facts in order to relitigate the finding" (quoting *In re Sonus Networks, Inc.*, 499 F.3d 47, 63 (1st Cir. 2007)); Restatement (Second) of Judgments § 27 cmt. c (1982) (outlining same principle).

¶24 Thus, the district court's causation determination regarding Officer Gomez's conduct is fatal to Clem's negligence claim against the County and the Sheriff to the extent that claim rests on his conduct. We thus affirm, in part, the trial court's grant of summary judgment on the ground of issue preclusion. This ruling extends only to the finding that Gomez's conduct did not cause Skyler's death.

Preclusion of Vicarious Liability Claims Premised on Other Officers

¶25 We do not agree with the County and the Sheriff, however, that the district court's finding as to Officer Gomez entirely disposes of Clem's state-law negligence action. The negligence complaint alleges that several employees other than Gomez worked at the jail on the night Skyler died. As noted, Clem named several of those officers in the § 1983 complaint. That complaint was dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P., for failure to state a claim, specifically on the ground of qualified immunity. The district court did not resolve whether the County or the Sheriff might be vicariously liable for any actions of the other employees. Furthermore, Clem's allegations regarding the actions of the other employees were not actually litigated, as they were dismissed on the pleadings pursuant to the Rule 12(b)(6) motion and were not re-alleged in Clem's amended complaint. Therefore, we conclude that Clem's vicarious liability negligence action against the County and the Sheriff is not wholly barred by issue preclusion. *See Janjua v. Neufeld*, 933 F.3d 1061, 1065 (9th Cir. 2019) ("[I]ssue preclusion does not apply to those issues that could have been raised, but were not.").

Skyler's time of death to a time period near or during Officer Gomez's shift. Although Clem later presented evidence to the state trial court that Skyler likely died during Gomez's shift, issue preclusion prevents the trial court from considering this new evidence.

Costs

¶26 Both parties request their costs on appeal. Both parties have presented colorable arguments on appeal. Because neither party is entirely successful on appeal, we decline to award costs as provided by A.R.S. § 12-341. *See McDaniel v. Banes*, 249 Ariz. 497, ¶ 24 (App. 2020). We further deny the County and the Sheriff's request for fees under A.R.S. § 12-349. *See id.*

Disposition

¶27 For the foregoing reasons, we affirm the entry of summary judgment in part, to the extent that Clem is precluded from relitigating the issue of whether Officer Gomez's conduct caused Skyler's death. We reverse the entry of summary judgment in part, specifically in its application of res judicata and its application of issue preclusion to the conduct of actors other than Gomez. We thus remand the case to the trial court for further proceedings consistent with this opinion.