



1 **Marquis Aurbach Coffing**
Craig R. Anderson, Esq.
2 Nevada Bar No. 6882
Jackie V. Nichols, Esq.
3 Nevada Bar No. 14246
10001 Park Run Drive
4 Las Vegas, Nevada 89145
Telephone: (702) 382-0711
5 Facsimile: (702) 382-5816
canderson@maclaw.com
6 jnichols@maclaw.com
Attorneys for Defendant Las Vegas
7 Metropolitan Police Department

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 LINDSEY LICARI, an individual,

11 Plaintiff,

Case No.: A-20-820980-C

Dept. No.: 32

12 vs.

13 NIKKI SIKALIS BOTT, an individual;
NATIONAL TITLE CO., a Nevada corporation;
14 LINDA NAW, an individual, ERA BROKERS; a
Nevada Corporation; VALLEY WEST
15 MORTGAGE, a Nevada Corporation, DREW
LEVY, an individual, BOBBY ANTEE, an
16 individual, ONE REALTY GROUP; a Nevada
Corporation; MELISSA PARKER; an individual;
17 MELANIE TREANOR, an individual;
GREATER LAS VEGAS ASSOCIATION OF
18 REALTORS; a Nevada Corporation; NEVADA
REAL ESTATE DIVISION BUSINESS AND
19 INDUSTRY; a Nevada Corporation; LINDA
STRATTON, an individual; INGRID
20 TRUJILLO, an individual; DARYL
MCCLOSKEY; an individual; VATCHE
21 SAJIDIAN; an individual; CLARK COUNTY
RECORDERS OFFICE, a Nevada Corporation;
22 NEVADA SECRETARY OF STATE OFFICE; a
Nevada Corporation; LAS VEGAS
23 METROPOLITAN POLICE DEPARTMENT; a
Nevada Corporation JENNINGS AND FULTON
24 LTD, a Nevada Corporation, SHUMWAY VAN
LTD; a Nevada Corporation; DOES I through X;
25 and ROE CORPORATIONS I through X,
inclusive,

26 Defendants.

**DEFENDANT LAS VEGAS
METROPOLITAN POLICE
DEPARTMENT'S MOTION TO DISMISS**

[HEARING REQUESTED]

MARQUIS AURBACH COFFING

10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

**DEFENDANT LAS VEGAS METROPOLITAN POLICE DEPARTMENT’S MOTION
TO DISMISS**

Defendant Las Vegas Metropolitan Police Department (hereinafter “LVMPD”), by and through their attorneys of record, the law firm of Marquis Aurbach Coffing, hereby submit their Motion to Dismiss. This Motion is made and based upon all papers, pleadings, and records on file herein, the attached Memorandum of Points and Authorities, and any oral argument allowed at a hearing on this matter.

Dated this 12th day of November, 2020.

MARQUIS AURBACH COFFING

By: /s/ Jackie V. Nichols
Craig R. Anderson, Esq.
Nevada Bar No. 6882
Jackie V. Nichols, Esq.
Nevada Bar No. 14246
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Defendant Las Vegas
Metropolitan Police Department

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

Plaintiff’s Complaint, which asserts 20 different causes of action, must be dismissed as to LVMPD. First, plaintiff has only devoted four paragraphs regarding LVMPD’s alleged conduct related to plaintiff filling out a police report. From the Complaint, it appears plaintiff is dissatisfied with LVMPD’s investigation. This, however, is insufficient to establish any claim for relief. Accordingly, LVMPD seeks to have Plaintiff’s Complaint in its entirety dismissed.

II. STATEMENT OF FACTS¹

Plaintiff filed her Complaint on September 23, 2020, alleging 20 claims for relief. *See* Complaint on file herein. The Complaint asserts that Plaintiff’s signature was forged on a Grant,

¹ These statements of facts are taken strictly from the Complaint for purposes of LVMPD’s Motion to Dismiss.

1 Bargain, Sale Deed (the Deed). *Id.* at ¶ 31. As to LVMPD, Plaintiff makes the following
2 assertions:

3 36. Ms. Licari filed 3 police reports with LVMPD in which they fraud division
4 took no action, allowing Ms. Licare to be victimized and accumulate astronomical
5 losses.

6 37. LVMPD change the police report filed by Ms. Licari in January of 2020 to go
7 to the incorrect precinct and used white out to cover the correct address for
8 National Title Company.

9 38. LVMPD Detective Wilson in fraud and forgery dept. called and accused Ms.
10 Licari of signing the Forged Quit claim, when they could clearly see Nikki Sikalis
11 Bott notarized her own document, clear and concise evidence of mortgage fraud
12 and no action was taken and no arrest have been made.

13 39. LVMPD SCAC refused to let Ms. Licari add to her police report on
14 September 21, 2020, and would not take the report of fraud for LVMPD altering
15 Ms. Licari’s police report.

16 *Id.* There are no other allegations within the Complaint that pertain to LVMPD. Although
17 nearly all the claims for relief are, generally, asserted against all defendants, the Second, Third,
18 Fourth, and Fifth claims specifically include and identify allegations against LVMPD. *Id.*

19 **III. LEGAL ARGUMENT**

20 **A. LEGAL STANDARD.**

21 A claim for relief set forth in any pleading may be dismissed as a matter of law under
22 NRCP 12(b)(5) for failure to state a claim upon which relief can be granted. *See* NRCP 12(b)(5).
23 While dismissal requires the Court to construe the pleadings liberally and draw fair inferences in
24 favor of the non-moving party, if it appears that the pleading party can prove no set of facts
25 which would entitle it to relief dismissal should be granted. *See Brown v. Kellar*, 97 Nev. 582,
26 636 P.2d 874 (1981); *see also Bergmann v. Boyce*, 109 Nev. 670, 856 P.2d 560 (1993).

27 In reviewing a motion to dismiss, the court shall determine whether or not the challenged
28 pleading sets forth sufficient allegations to make out the elements for a claim for relief. *See*
Edgar v. Wagner, 101 Nev. 226, 699 P.2d 110 (1985); *see also Stockmeier v. Nev. Dep’t of*
Corrections Psychological Review Panel, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008)
 (“Dismissal is proper where the allegations are insufficient to establish the elements of a claim
 for relief.”) (internal quotations omitted).

1 To survive a motion to dismiss under NRCP 12(b)(5), a complaint must allege facts
2 sufficient to establish all the necessary elements of each cause of action upon which recovery is
3 predicated and, as the Nevada Supreme Court explained, “if a pleader cannot allege definitely
4 and in good faith the existence of an essential element of his claim, it is difficult to see why this
5 basic deficiency should not be exposed at the point of minimum expenditure of time and money
6 by the parties and the court.” *Danning v. Lum’s Inc.*, 86 Nev. 868, 869, 478 P.2d 166, 167
7 (1970).

8 **B. THE GENERALLY REFERENCED CLAIMS AGAINST LVMPD FAIL**
9 **BECAUSE PLAINTIFF HAS NOT ALLEGED SUFFICIENT FACTS TO**
10 **SUPPORT A CLAIM.**

11 Plaintiff has generally referenced LVMPD as a defendant to the following claims: (1)
12 Breach of Fiduciary Duty; (2) Violation of NRS 240.075; (3) Negligence Per Se; (4) Negligent
13 Misrepresentation; (5) Unjust Enrichment; (6) Quiet Title; (7) Title Slander; (8) Business
14 Disparagement; (9) Forgery; (10) Emotional Distress; (11) NRS 645.252(1)(a); (12) NAC
15 645.605(6); (13) NRS 645.3205; (14) NRS 645.3205; (15) NRS 645.252(1)(e)(r); and (16) NRS
16 642.254(4). Plaintiff has failed to plead the necessary elements as to these claims against
17 LVMPD.

18 **1. Breach of Fiduciary Duty.**

19 In Nevada, a claim for breach of fiduciary duty has three elements: (1) existence of a
20 fiduciary duty; (2) breach of the duty; and (3) the breach proximately caused the damages. *Klein*
21 *v. Freedom Strategic Partners, LLC*, 595 F. Supp. 2d 1152, 1162 (D. Nev. 2009). Under the
22 Restatement (Second) of Torts, a “fiduciary relation exists between two persons when one of
23 them is under a duty to act for or to give advice for the benefit of another upon matters within the
24 scope of the relation.” Restatement (Second) of Torts § 874 cmt. a (1979). Thus, a breach of
25 fiduciary duty claim seeks damages for injuries that result from the tortious conduct of one who
26 owes a duty to another by virtue of the fiduciary relationship. *Id.* Here, Plaintiff has failed to
27 allege any facts that would demonstrate that a fiduciary relationship existed between her and
28 LVMPD. Thus, Plaintiff’s first claim for relief against LVMPD fails as a matter of law.

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2. NRS 240.075.

Plaintiff's sixth claim pertains to NRS 240.075. NRS 240.075 identifies acts that a notary public is prohibited from performing. Here there are no allegations that LVMPD acted in a notary public capacity. As such, Plaintiff's sixth claim for relief against LVMPD must be dismissed.

3. Negligence Per Se.

Plaintiff's seventh claim asserts Negligence Per Se against LVMPD, generally. To establish a claim for Negligence Per Se, the plaintiff must assert: (1) Defendant had duty to exercise due care with respect to plaintiff as is defined by a statute or administrative regulation; (2) Plaintiff was of the class of persons the statute or regulation was designed to protect; (3) Defendant breached the duty by violating the statute or regulation, which constitutes negligence as a matter of law; and (4) Causation and damages. Here, plaintiff has neglected to identify any particular statute or regulation that required LVMPD to exercise due care. Accordingly, this claim must be dismissed.

4. Negligent Misrepresentation.

Plaintiff asserts a negligent misrepresentation claim for her eighth cause of action. Nevada has adopted the Restatement (Second) of Torts § 552 definition of the tort of negligent misrepresentation:

(1) One who, in the course of his business, profession or employment, or in any other action in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Barmettler v. Reno Air, Inc., 114 Nev. 441, 449, 956 P.2d 1382, 1387 (1998). Here, the Complaint fails to allege any facts pertaining to LVMPD that support this cause of action. Therefore, this claim must be dismissed.

5. Unjust Enrichment.

Unjust enrichment exists when the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is "acceptance and retention by the defendant of

1 such benefit under circumstances such that it would be inequitable for him to retain the benefit
2 without payment of the value thereof.’ ” *Unionamerica Mtg. v. McDonald*, 97 Nev. 210, 212,
3 626 P.2d 1272, 1273 (1981) (quoting *Dass v. Epplen*, 162 Colo. 60, 424 P.2d 779, 780 (1967)).
4 “[B]enefit” in the unjust enrichment context can include “services beneficial to or at the request
5 of the other,” “denotes any form of advantage,” and is not confined to retention of money or
6 property. *See* Restatement of Restitution § 1 cmt. b (1937); *see also Topaz Mutual Co. v. Marsh*,
7 108 Nev. 845, 856, 839 P.2d 606, 613 (1992) (citing § 1, cmt. b and noting that postponing
8 foreclosure on a property benefits owner by providing additional time to negotiate a sale and
9 reducing overall debt). But while “[r]estitution may strip a wrongdoer of all profits gained in a
10 transaction with [a] claimant ... principles of unjust enrichment will not support the imposition of
11 a liability that leaves an innocent recipient worse off ... than if the transaction with the claimant
12 had never taken place.” Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. d
13 (2011); *cf. Heartland Health Systems v. Chamberlin*, 871 S.W.2d 8, 11 (Mo.Ct.App.1993)
14 (quantum meruit available for provision of emergency medical services). Here, the Complaint
15 fails to allege that LVMPD received a benefit. Accordingly, as a matter of law, Plaintiff’s unjust
16 enrichment claim cannot move forward.

17 **6. Quite Title.**

18 An action may be brought by any person against another who claims an estate or interest
19 in real property, adverse to him, for the purpose of determining such adverse claims. NRS
20 40.010. “A plea to quiet title does not require any particular elements, but each party must plead
21 and prove his or her own claim to the property in question and a plaintiff’s right to relief
22 therefore depends on superiority of title.” *Chapman v. Deutsche Bank Nat’l Trust Co.*, 302 P.3d
23 1103, 1106 (Nev. 2013). Here, LVMPD is not asserting any right to any property. Thus, this
24 claim is wholly improper as to LVMPD and must be dismissed.

25 **7. Title Slander.**

26 Plaintiff has failed to allege any facts that would support a slander of title claim against
27 LVMPD. A slander of title claim requires a defendant to make false and malicious
28 communications disparaging to one’s rights in land. *Exec. Mgt., Ltd. v. Ticor Title Ins. Co.*, 962

1 P.2d 465, 478 (Nev. 1998). Here, there are no facts alleged in the Complaint to support this
2 claim. Therefore, dismissal is appropriate.

3 **8. Business Disparagement.**

4 In Nevada, the elements for a claim of business disparagement are: (1) A false and
5 disparaging statement that interferes with the plaintiff’s business or are aimed at the business’s
6 goods or services; (2) The statement is not privileged; (3) The statement is made with malice;
7 and (4) Proof of special damages. *Clark County School District v. Virtual Educ. Software, Inc.*,
8 125 Nev. 374, 213 P.3d 496 (Nev. 2009). The Complaint does not allege any statement made by
9 LVMPD that interfered with or was aimed at plaintiff’s business. As such, dismissal of this
10 claim is appropriate.

11 **9. Forgery.**

12 Plaintiff asserts a claim for forgery. However, forgery is a crime and there is not right to
13 a private action. NRS 200.090; NRS 205.095. Thus, this claim must be dismissed. To the
14 extent the Court construes this claim as a Fraud claim, LVMPD’s analysis is address below.

15 **10. Emotional Distress.**

16 It is unclear whether Plaintiff asserts a claim for intentional or negligent emotional
17 distress. As such, both are analyzed below.

18 **a. Intentional Infliction of Emotional Distress.**

19 To prevail on a claim for intentional infliction of emotional distress (IIED) under Nevada
20 law, a plaintiff must show: “1) extreme and outrageous conduct with either the intention of, or
21 reckless disregard for, causing emotional distress, 2) the plaintiff’s having suffered severe or
22 extreme emotional distress, and 3) actual or proximate causation.” *Olivero v. Lowe*, 995 P.2d
23 1023, 1025 (Nev. 2000). Outrageous conduct is behavior that goes “outside all possible bounds
24 of decency and is regarded as utterly intolerable in a civilized community.” *Maduikie v. Agency*
25 *Rent-A-Car*, 953 P.2d 24, 26 (Nev. 1998) (quotation omitted).

26 Here, there are no allegations of extreme and outrageous conduct. LVMPD had probable
27 cause to arrest Plaintiff. Thus, LVMPD’s conduct does not go “outside all possible bounds of
28 decency.” Likewise, Plaintiff has not alleged LVMPD officers intended to cause Plaintiff

1 emotional distress. Finally, the Complaint fails to include any allegations that any conduct by
2 LVMPD resulted in Plaintiff suffering emotional distress. Because Plaintiff cannot meet the
3 elements of her IIED claim, it must be dismissed as a matter of law.

4 **b. Negligent Infliction of Emotional Distress.**

5 While Nevada law recognizes a cause of action for negligent infliction of emotional
6 distress, this tort originated as a claim for a “bystander” plaintiff to seek compensation for
7 emotional distress resulting in physical symptoms he or she suffered as a result of “apprehending
8 the death or serious injury of a loved one due to the negligence of the defendant.” *State v. Eaton*,
9 101 Nev. 705, 718, 710 P.2d 1370, 1379 (1985). Subsequently, the tort has been expanded to
10 apply to plaintiffs who suffer emotional distress as a result of negligent acts committed directly
11 against the plaintiff. *See, e.g. Shoen v. Amerco, Inc.*, 111 Nev. 735, 748, 896 P.2d 469, 477
12 (1995) (“Many times a tort claim may be based on evidence that presents a close case of whether
13 an intentional or a negligent act was committed. In these cases, the direct victim should be able
14 to assert a negligence claim that includes emotional distress as part of the damage suffered as
15 well as an intentional tort cause of action.”).

16 However, the Nevada Supreme Court has consistently and repeatedly held that such a
17 claim requires resulting physical symptoms caused by the negligent act. *Chowdhry v. NLVH*,
18 *Inc.*, 109 Nev. 478, 851 P.2d 459 (1993). Insomnia and general physical or emotional
19 discomfort are insufficient to satisfy this “physical impact” requirement. *Id.* at 483, 851 P.2d at
20 462. Rather, “in cases where emotional distress damages are not secondary to physical injuries,
21 but rather, precipitate physical symptoms, either a physical impact must have occurred or, in the
22 absence of physical impact, proof of ‘serious emotional distress’ causing physical injury or
23 illness must be presented.” *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 447–48, 956 P.2d 1382,
24 1387 (1998) (holding that “additional minimal therapy undergone by Barmettler did not satisfy
25 the physical injury ‘or impact’ requirement...”). Further, the standard of proof for emotional
26 distress caused by a non-invasive negligent act is more stringent than for emotional distress
27 damages arising from assault and battery. *Olivero v. Lowe*, 116 Nev. 395, 995 P.2d 1023 (2000)

1 (allowing NIED claim in conjunction with claim seeking damages for plaintiff that was punched
2 in the face and held at gunpoint).

3 Here, Plaintiff has not alleged any resulting physical symptoms at the hands of LVMPD.
4 Moreover, there are no allegations that LVMPD acted negligently. As such, dismissal of this
5 claim is warranted.

6 **11. Claims pertaining to NRS Chapter 645.**

7 Plaintiff's 14th, 15th, 16th, 17th, 18th, and 19th claims for relief pertain to NRS Chapter 645.
8 This Chapter pertains to Real Estate Brokers and Salespersons. Because this Chapter does not
9 pertain to any actions by LVMPD, these claims must be dismissed as to LVMPD.

10 **C. PLAINTIFF'S FRAUD/INTENTIONAL MISREPRESENTATION CLAIM
11 MUST BE DISMISSED.**

12 In Nevada, the elements for a claim of fraud or intentional misrepresentation are: (1)
13 Defendant makes a false representation or misrepresentation as to a past or existing fact; (2)
14 With knowledge or belief by defendant that representation is false or that defendant lacks
15 sufficient basis of information to make the representation; (3) Defendant intended to induce
16 plaintiff to act in reliance on the representation; (4) Justifiable reliance upon the representation
17 by the plaintiff; (5) Causation and damages to plaintiff as a result of relying on
18 misrepresentation. *Jordan v. State ex rel. Dep't of Motor Vehicles & Pub. Safety*, 121 Nev. 44,
19 75, 110 P.3d 30, 51 (2005). Importantly, NRCp 9(b) provides, in relevant part, that "the
20 circumstances constituting fraud ... shall be stated with particularity." "The circumstances that
21 must be detailed include averments to the time, the place, the identity of the parties involved, and
22 the nature of the fraud...." *Brown v. Kellar*, 97 Nev. 582, 583-84, 636 P.2d 874, 874 (1981).
23 Here, Plaintiff's complaint is insufficient to form a basis of fraud, intentional misrepresentation
24 against LVMPD. Thus, this claim must be dismissed.

25 **D. PLAINTIFF'S CONSTRUCTIVE FRAUD CLAIM MUST BE DISMISSED.**

26 For a constructive fraud claim, Plaintiff must allege: (1) The existence of a confidential
27 relationship or some legal or equitable duty or fiduciary duty; (2) Breach of that duty in a way
28 that the law declares fraudulent because of its tendency to deceive others or to violate a duty or

1 confidence; and (3) Causation and damages. *Perry v. Jordan*, 111 Nev. 943, 947, 900 P.2d 335,
2 337 – 338 (1995). Because this claim is fraud-based, it must be stated with particularity. NRC
3 9(b). This includes the time, the place, the identity of the parties involved, and the nature of the
4 fraud...” *Brown*, 97 Nev. at 583–84, 636 at 874. Once more, Plaintiff has not satisfied the
5 necessary elements of constructive fraud. There are no allegations that demonstrate LVMPD and
6 Plaintiff maintained a confidential or fiduciary relationship. On this basis alone, dismissal is
7 warranted.

8 **E. PLAINTIFF’S NEGLIGENCE CLAIM MUST BE DISMISSED.**

9 A claim for negligence in Nevada requires that the plaintiff satisfy four elements: (1) an
10 existing duty of care, (2) breach, (3) legal causation, and (4) damages. *Turner v. Mandalay*
11 *Sports Entm’t, LLC*, 124 Nev. 213, 217, 180 P.3d 1172, 1175 (2008). It has been held that
12 police officers do not have an affirmative duty to investigate crimes in a particular manner or to
13 protect one citizen from another. *See Gini v. Las Vegas Metropolitan Police Dep’t*, 40 F.3d 1041,
14 1045 (9th Cir. 1994), *McKenna v. St. Louis County Police Dep’t*, 2010 WL 56011, *4 (E.D. Mo.
15 Jan.4, 2010). Here, the Complaint neglects to allege any particular facts that support a claim for
16 negligence. Plaintiff has not identified a particular duty owed by LVMPD. And, even if she
17 had, there are no facts that support the element of causation. That is, the Complaint does not
18 contain facts that demonstrate any duty owed and breached by LVMPD caused Plaintiff’s
19 damages. As such, this claim must be dismissed.

20 **F. PLAINTIFF’S NEGLIGENT HIRING, RETENTION AND, SUPERVISION**
21 **CLAIM MUST BE DISMISSED.**

22 Plaintiff has failed to allege any facts that support a negligent hiring, retention, and
23 supervision claim against LVMPD. “The tort of negligent hiring imposes a general duty on the
24 employer to conduct a reasonable background check on a potential employee to ensure that the
25 employee is fit for the position.” *Burnett v. C.B.A. Security Service*, 107 Nev. 787, 789, 820
26 P.2d 750, 752 (1991). An employer breaches this duty when it hires an employee even though
27 the employer knew, or should have known, of that employee’s dangerous propensities. *Hall v.*
28 *SSF, Inc.*, 112 Nev. 1384, 1393, 930 P.2d 94, 99 (1996) (citing *Kelley v. Baker Protective*

1 *Services, Inc.*, 198 Ga.App. 378, 401 S.E.2d 585, 586 (1991)). As is the case in hiring an
2 employee, the employer has a duty to use reasonable care in the training, supervision, and
3 retention of his or her employees to make sure that the employees are fit for their positions. *Id.*
4 (quoting 27 Am.Jur.2d *Employment Relationship* §§ 475–76 (1996)). Because the Complaint
5 fails to allege any facts pertaining to LVMPD’s hiring, retention, and supervision, this claim
6 must be dismissed. Alternatively, LVMPD is entitled to immunity on this claim as argued
7 below.

8 **G. LVMPD IS IMMUNE FROM PLAINTIFF’S CLAIM.**

9 **1. NRS 41.032: Nevada’s state law discretionary immunity statute.**

10 Nevada has generally waived its sovereign immunity. *See* NRS 41.031(1) (“The State of
11 Nevada hereby waives its immunity from liability and action . . . except as otherwise provided in
12 [certain statutory sections, including NRS 41.032].”). One statutory exception to that waiver is
13 that no action may be brought against an officer or employee of Nevada “[b]ased upon the
14 exercise or performance or the failure to exercise or perform a discretionary-function or duty on
15 the part of the State or any of its . . . political subdivisions or of any officer . . . of any of these,
16 whether or not the discretion involved is abused.” *See* NRS 41.032(2). Nevada’s discretionary-
17 function statute mirrors the federal tort claims act. *See Martinez v. Maruszczak*, 123 Nev. 433,
18 168 P.3d 720 (2007). As a result, the Nevada Supreme Court looks to federal decisional law on
19 the Federal Tort Claims Act (“FTCA”) for guidance on what type of conduct discretionary
20 immunity protects. *Id.* at 123 Nev. at 444, 168 P.3d at 727. The purpose of both NRS 41.032
21 and the FTCA is to compensate victims of negligence by government actors the same way they
22 would be compensated if the actors were private. *Martinez*, 123 Nev. at 444, 168 P.3d at 727.

23 **2. NRS 41.032 and the Nevada Supreme Court’s Interpretation.**

24 In 2007, the Nevada Supreme Court adopted the federal *Berkovitz-Gaubert* test for
25 determining what type of conduct is protected under discretionary immunity. The court adopted
26 a two-part test, allowing discretionary-function immunity to apply when (1) the acts alleged to be
27 negligent involved an element of individual judgment or choice; and (2) the decision is based on
28 considerations of social, economic or political policy. *Martinez*, 123 Nev. at 446–47, 168 P.3d at

1 729. Notably, the Nevada Supreme Court explained in *Martinez* that “under Nevada law, some
2 acts that do not involve an element of judgment or choice may also be entitled to immunity.” *Id.*
3 at 445 n.35, 168 P.3d at 728 n.35.

4 Since *Martinez*, the Nevada Supreme Court has held the decision of whether to detain a
5 suspect—a police function plainly within the purview of the Fourth Amendment, *see, e.g., Terry*
6 *v. Ohio*, 392 U.S. 1 (1968); *Michigan v. Summers*, 452 U.S. 692 (1981); *Muehler v. Mena*, 544
7 U.S. 93 (2005)—is a discretionary function covered by NRS 41.032. *See Gonzalez v. Las Vegas*
8 *Metro. Police Dep’t.*, Docket No. 61120, 2013 WL 7158415, *3 (Order of affirmance, Nov. 21,
9 2013) (“decision to arrest or detain [suspect on a warrant] was part of a policy consideration”
10 that invoked NRS 41.032).² Further, the Nevada Supreme Court implied, before *Martinez*, that
11 other Fourth Amendment activities—essentially, seizures other than uses of force—are covered
12 by NRS 41.032. *See Maturi v. Las Vegas Metro Police Dep’t.*, 110 Nev. 307, 310, 871 P.2d 932,
13 934 (1994) (decision of how to handcuff discretionary); *see also Ortega v. Reyna*, 114 Nev. 55,
14 62, 953 P.2d 18, 23 (1998) (decision to stop and to arrest motorist discretionary). Police officers
15 are statutorily immune from suit based on acts or omissions relating to a “discretionary
16 function,” even if that discretion is abused, unless the officers act in bad faith. *See NRS*
17 *41.032(2); Jones v. Las Vegas Metro. Police Dep’t.*, 873 F.3d 1123, 1133 (9th Cir. 2017); *see*
18 *also Franchise Tax Bd. of State of California v. Hyatt*, 133 Nev., Adv. Op. 102, 407 P.3d 717,
19 729–33 (2017) (describing history of discretionary-function immunity in Nevada).

20 **3. LVMPD is Immune from Plaintiff’s Negligent Hiring, Retention, and**
21 **Supervision Claim.**

22 Importantly, “decisions relating to the hiring, training, and supervision of employees
23 usually invoke policy judgments of the type Congress intended the discretionary function
24 exception to shield.” *Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000). Thus, both
25 state and federal courts in Nevada and in the Ninth Circuit consistently reject negligent hiring

26 ² Defendants acknowledge that this case, as an unpublished disposition, “does not establish mandatory
27 precedent except in a subsequent stage of a case in which the unpublished disposition was entered, in a
28 related case, or in any case for purposes of issue or claim preclusion or to establish law of the case” in
accordance with NRAP 36(c)(2) and, as a result, only cite the case to provide this Court with a factual
point of reference on this issue.

1 claims lodged against the police. *See, e.g., Neal-Lomax v. Las Vegas Metro. Police Dep't.*, 574
2 F. Supp. 2d 1170, 1192 (D. Nev. 2008), *aff'd*, 371 F. App'x 752 (9th Cir. 2010) (“Because
3 Nevada looks to federal case law to determine the scope of discretionary immunity, and because
4 federal case law consistently holds training and supervision are acts entitled to such immunity,
5 LVMPD is entitled to discretionary immunity on this claim.”); *Ramirez v. Clark Cty.*, No. 2:09-
6 CV-98 JCM RJJ, 2011 WL 3022406, at *5 (D. Nev. July 22, 2011) (“[The] plaintiff is claiming
7 negligent hiring, training, and supervision. As these functions are usually considered
8 discretionary functions, and there is no reason to depart from such an interpretation in this case,
9 the plaintiff's sixth claim for relief is barred by NRS 41.032.”); *Beckwith v. Pool*, No. 2:13-CV-
10 125 JCM NJK, 2013 WL 3049070, at *6 (D. Nev. June 17, 2013) (“[The plaintiff] has alleged
11 that the [] defendants negligently hired, trained, and supervised certain police officers that
12 allegedly caused her to remain in jail for up to twelve hours. However, the discretionary function
13 exception bars these claims.”); *see also Koiro v. Las Vegas Metro. Police Dep't.*, 2:12-CV-
14 00725-MMD-GWF, 2013 WL 236898, *2 (D. Nev. Jan. 22, 2013); *Vasquez-Brenes v. Las Vegas*
15 *Metro. Police Dep't.*, 2:12-CV-1635 JCM-VCF, 2014 WL 447152, at *10 (D. Nev. Sept. 10,
16 2014).

17 Here, there is no reason to depart from the court's consistent interpretation that LVMPD
18 exercises judgment when hiring, supervising, and retaining its officers, and that such judgment is
19 informed by policy considerations. LVMPD cannot be compelled to hire particular job
20 candidates. Furthermore, the amount of hours LVMPD is required to train and supervise its
21 officers on driving is a matter of policy. Likewise, whether LVMPD requires a supervisor to ride
22 with an officer at all times is also an issue of policy. These examples are agency decisions based
23 on economic, social and political considerations, such as the number of employees LVMPD has
24 and the funding LVMPD is allotted per division.

25 Nevada's discretionary function exception protects agency decisions concerning the
26 scope and manner in which the agency conducts various acts. *See Shafer v. City of Boulder*, 896
27 F.Supp.2d 915, 938 (D. Nev. 2012) (citation omitted) (emphasis added). This Court should look
28 to the analysis recently provided by the Nevada Court of Appeals in *Glover-Arnot v. Cargile*,

1 134 Nev. Adv. Op. 49, 426 P.3d 45, 54 (Ct. App. Nev. 2018) (determining that an officer driving
2 with lights and sirens is not entitled to discretionary immunity; however, North Las Vegas was
3 immune from the negligent hiring, training, and supervision claim because appellant failed to
4 demonstrate how North Las Vegas' failure to adequately train did not involve shielded policy
5 judgment). In *Glover*, the Nevada Supreme Court addressed whether an officer's duty to drive
6 under NRS 484B.700 was discretionary in nature, warranting immunity to the officer under NRS
7 41.032. *Id.* The Court ultimately determined that NRS 484B.700 did not confer discretion upon
8 the officer in the scope and manner in which he drove. *Id.* To be sure, the Court reasoned that
9 NRS 484N.700(4) expressly imposed a duty to drive with due regard upon the officer. *Id.* This
10 duty to drive with due regard is mandatory and therefore the officer was not entitled to
11 discretionary immunity. *Id.* The scope and manner which LVMPD utilizes to hire, train,
12 supervise, and retain its officers is discretionary. There is no law or policy that dictates the
13 manner and scope in which LVMPD must train and supervise its officers. Accordingly, the
14 manner and scope in which LVMPD hires, trains, supervises, and retains its employees cannot be
15 mandatory as there is no bar required of LVMPD because such requirements are governed by
16 policy considerations. Accordingly, this claim must be dismissed.

17 **IV. CONCLUSION**

18 Based on the foregoing, LVMPD respectfully requests the Court grants their Motion to
19 Dismiss.

20 Dated this 12th day of November, 2020.

21 MARQUIS AURBACH COFFING

22
23 By: /s/ Jackie V. Nichols
24 Craig R. Anderson, Esq.
25 Nevada Bar No. 6882
26 Jackie V. Nichols, Esq.
27 Nevada Bar No. 14246
28 10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Defendant Las Vegas
Metropolitan Police Department

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **DEFENDANT LAS VEGAS METROPOLITAN POLICE DEPARTMENT’S MOTION TO DISMISS** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 12th day of November, 2020. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:³

Barry E. Clarkson, Esq.
Matthew D. Spring, Esq.
Clarkson & Associates, LLC
340 Falcon Ridge Parkway, Suite 700A
Mesquite, Nevada 89027

162 North 400 East, Suite A-204
P.O. Box 1630
St. George, Utah 84771
bclarkson@clarksonlegal.com
spatel@clarksonlegal.com
mspring@clarksonlegal.com
Attorneys for Defendant ERA Brokers

Sheri M. Thome, Esq.
Chad C. Butterfield, Esq.
Virginia T. Tomova, Esq.
Wilson, Elser, Moskowitz, Edelman
& Dicker LLP
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, Nevada 89119
efilelasvegas@wilsonelser.com
Sheri.Thome@wilsonelser.com
iani.maile@wilsonelser.com
Chad.Butterfield@wilsonelser.com
Virginia.Tomova@wilsonelser.com
Attorneys for Defendants Greater Las Vegas
Association of Realtors and Ingrid Trujillo

Joseph P. Garin, Esq.
Angela T. Nakamura Ochoa, Esq.
Lipson Neilson P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
jcerezo@lipsonneilson.com

Michael C. Van, Esq.
Garrett R. Chase, Esq.
Margaret A. Manning, Esq.
Shumway Van
8985 South Eastern Avenue, Suite 100
Las Vegas, Nevada 89123
paulal@shumwayvan.com
grayson@shumwayvan.com
garrett@shumwayvan.com
MManning@shumwayvan.com
marinas@shumwayvan.com
Attorneys for Defendants Linda Naw and
Bobby Antee

Anthony T. Garasi, Esq.
Ryan Efros, Esq.
Bremer Whyte Brown & O’Meara, LLP
1160 N. Town Center Drive, Suite 250
Las Vegas, Nevada 89144
agarasi@bremerwhyte.com
refros@bremerwhyte.com
azuniga@bremerwhyte.com
Attorneys for Defendants Realty One and
Melissa Parker

Catherine Jorgenson
catherine.jorgenson@clarkcountyda.com

Christine Wirt
christine.wirt@clarkcountyda.com

³ Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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23
24
25
26
27
28

KLeaver@lipsonneilson.com
aochoa@lipsonneilson.com
snutt@lipsonneilson.com

Attorneys for Defendants National Title Co.
and Nikki Sikalis Bott

Lindsey Licari
9564 Scorpion Track Court
Las Vegas, Nevada 89178
lindsey@aydensarmyofangels.org
Plaintiff, In Proper Person

Aaron D. Ford, Esq.
Attorney General
Peter K. Keegan, Esq.
Deputy Attorney General
State of Nevada
100 North Carson Street,
Carson City, Nevada 89701
dmccloskey@red.nv.gov
Attorneys for Defendants Nevada Real Estate
Division and Daryl McCloskey

Defendant Drew Levy
dlevy@valleywestmortgage.com

Linda Stratton
lstratton@doi.nv.gov

Vatche Saatadjian
Valley West Mortgage
8010 W. Sahara Avenue, Suite 140
Las Vegas, Nevada 89117
spagan@valleywestmortgage.com
Defendant, Pro Se

Defendant Jennings and Fulton
Michael Nunez
mnunez@murchisonlaw.com

Defendant Clark County Recorder
Debbie Conway
djc@clarkcountynv.gov

I further certify that I served a copy of this document by mailing a true and correct copy
thereof, postage prepaid, addressed to:

Melanie Treanor
46 Precipice Court
Henderson, Nevada 89002
Defendant, Pro Se

/s/ Krista Busch
An employee of Marquis Aurbach Coffing