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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

WILLIAM B. SCOTT, individually	)	2:10-cv-01900-ECR-PAL
and as Administrator of the	)	
ESTATE OF ERIK B. SCOTT; LINDA G.	)	
SCOTT; and KEVIN W. SCOTT	)	
	)	
	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	<u>Order</u>
	)	
LAS VEGAS METROPOLITAN POLICE	)	
DEPARTMENT; et al.	)	
	)	
Defendants.	)	
	)	
	)	

This case arises out of the shooting and death of Plaintiffs' decedent, Erik B. Scott, by members of the Las Vegas Metropolitan Police Department ("LVMPD") at a Costco store in Las Vegas.

Now pending are (i) Defendant Clark County's motion (#14) to dismiss; (ii) Defendants Costco and Lierley's motion (#15) to dismiss; and (iii) Defendant LVMPD's motion (#16) to dismiss. The motions are ripe, and we now rule on them.

**I. Factual Background**

Plaintiffs William B. Scott and Linda G. Scott are the mother and father, and heirs at law, of Erik B. Scott, deceased ("Scott"). (Compl. ¶ 1 (#1).) Plaintiff William B. Scott is the Administrator of the Estate of Erik B. Scott (the "Estate"). (Id. ¶ 3.) Plaintiff

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1 Kevin W. Scott is Scott's brother. Defendant LVMPD is the merged  
2 police department for, and an agency of, Defendant Clark County,  
3 Nevada ("Clark County"). (Id. ¶ 4.) Defendant Clark County is a  
4 political subdivision of the State of Nevada. (Id. ¶ 7.) Defendant  
5 Douglas C. Gillespie ("Gillespie") was and is the Sheriff of Clark  
6 County and the chief commanding officer of the LVMPD. (Id. ¶ 5.)  
7 Gillespie was and is the commanding officer of the individual  
8 defendant police officers and was responsible for their training,  
9 supervision and conduct. (Id.) Plaintiffs sue Gillespie  
10 individually and in his official capacity. (Id.) Defendants William  
11 Mosher, Joshua Stark and Thomas Mendiola were and are duly appointed  
12 police officers with the LVMPD (together, the "Police Officer  
13 Defendants"). (Id. ¶ 6.) Defendant Costco Wholesale Corporation  
14 ("Costco") is a corporation with a place of business in, and doing  
15 business in, Clark County, Nevada. (Id. ¶ 8.) Defendant Shai  
16 Lierley ("Lierley") was and is a resident of Clark County, Nevada,  
17 employed by Costco as a security guard. (Id. ¶ 9.)

18 Plaintiffs assert that, on information and belief, Scott was a  
19 customer in a store owned and operated by Defendant Costco in Clark  
20 County on July 10, 2010. (Id. ¶ 11.) They contend that Scott did  
21 not engage in any disorderly or other conduct that would indicate  
22 that he posed a threat to the safety of any person, but that  
23 Defendant Lierley falsely reported to Defendants Costco and LVMPD  
24 that Scott did pose a threat to the safety of other persons. (Id. ¶¶  
25 12-13, 15.) Plaintiffs allege that, on information and belief, one  
26 or more of Defendant Costco's employees, including, but not limited  
27 to, Defendant Lierley, ordered a store-wide evacuation. (Id. ¶ 14.)

1 Plaintiffs aver that one or more Costco employees, including, but  
2 not limited to, Defendant Lierly, assisted and participated in the  
3 LVMPD officers' apprehension and shooting of Scott. (Id. ¶ 16.)  
4 According to Plaintiffs, Police Officer Defendants confronted Scott  
5 with weapons drawn and, though Scott did not engage in any conduct  
6 to indicate that he posed a threat to the safety of the Police  
7 Officer Defendants or any other person, the Police Officer  
8 Defendants shot Scott multiple times. (Id. ¶¶ 18-19.) Plaintiffs  
9 further assert that none of the Police Officer Defendants took any  
10 action to prevent, stop, or otherwise intercede in the shooting of  
11 Scott. (Id. ¶ 20.) They claim that Scott consciously experienced  
12 pain and suffering from being shot and later died from his gunshot  
13 wounds. (Id. ¶ 21.)

14 Defendants' allegations of facts asserted in their opposition  
15 cannot be considered by the Court in weighing Defendants' motions  
16 (## 14, 15, 16) to dismiss.<sup>1</sup> Nevertheless, we note that for their  
17 part, Defendants claim that Scott was observed by Lierley, a Costco  
18 Loss Prevention Supervisor, to be acting in a manner that suggested  
19 Scott could be shoplifting. (Costco MTD at 2 (#15).) In keeping  
20 with Costco policy, Lierley contacted Assistant Warehouse Manager  
21 Vince Lopez ("Lopez") and LVMPD on its non-emergency phone number.  
22 Id. Lierley observed that Scott was carrying a firearm and told  
23 Lopez, who informed Scott that Costco policy prohibited the carrying  
24 of firearms. Id. at 3. Lierley informed the LVMPD dispatcher that

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26 <sup>1</sup>While we cannot consider Defendants' allegations of facts in  
27 making our ruling, we include them here merely in the interest of  
adding context.

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1 Scott was carrying a firearm. Id. Defendants assert that Scott  
2 "reacted violently, started to swear and acted in a threatening  
3 manner," did not move to leave the store, and did not indicate that  
4 he would comply with Costco's firearms policy. Id. Lierley conveyed  
5 this information to the LVMPD phone dispatcher. Id. Upon arrival at  
6 the scene, LVMPD ordered an evacuation of the Costco warehouse. Id.  
7 Scott was confronted by LVMPD police officers and, according to  
8 witnesses who testified at the inquest, did not comply with LVMPD  
9 directives and reached for his weapon. Id. LVMPD police officers  
10 fired seven shots that killed Scott. Id. During the inquest, it was  
11 discovered that Scott was carrying two firearms, for one of which he  
12 did not have a concealed weapons permit, and that Scott had  
13 narcotics in his system at the time of the incident. Id.

14 Plaintiffs assert eleven causes of action for: (i) unreasonable  
15 seizure and use of excessive and lethal force by Police Officer  
16 Defendants in violation of the Fourth and Fourteenth Amendments to  
17 the United States Constitution and participation in such  
18 unreasonable seizure by Defendant Costco; (ii) violation of Scott's  
19 Constitutional rights to freedom from unreasonable seizure and the  
20 use of excessive force under color of law pursuant to 42 U.S.C. §§  
21 1983 and 1988 through the creation of a custom or practice of  
22 inadequate training of police officers against Defendants LVMPD,  
23 Gillespie and Clark County; (iii) assault by Police Officer  
24 Defendants, LVMPD and Clark County; (iv) battery by Police Officer  
25 Defendants, LVMPD and Clark County; (v) negligent creation of a  
26 dangerous condition that proximately caused the wrongful seizure and  
27 death of Scott by Defendants Costco and its employees, including,

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1 but not limited to, Defendant Lierley; (vi) defamation of Scott by  
2 Defendant Costco and its employees, including, but not limited to,  
3 Defendant Lierley; (vii) intentional infliction of emotional  
4 distress on Scott by Police Officer Defendants, LVMPD and Clark  
5 County; (viii) negligence in wrongfully seizing and killing Scott by  
6 Police Officer Defendants, LVMPD and Clark County; (ix) negligent  
7 hiring, training and/or supervision of police officers by LVMPD,  
8 Gillespie and Clark County as a proximate cause of the wrongful  
9 seizure and death of Scott; (x) negligent hiring, training and/or  
10 supervision of employees by Costco as a proximate cause of the  
11 wrongful seizure and death of Scott; and (xi) wrongful death of  
12 Scott by Defendants.

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## **II. Procedural Background**

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Plaintiffs filed their complaint (#1) on October 28, 2010. Summons was issued as to Defendants on October 29, 2010. Defendants Gillespie, LVMPD, and Police Officer Defendants were served with process on November 1, 2010. (## 5, 7, 8, 9, 10) Defendants Costco and Lierley were served with process on November 2, 2010. (## 4, 6) Defendant Clark County was served with process on November 3, 2010. (#11) Defendant Clark County filed a motion (#14) to dismiss on November 19, 2010. Defendants Costco and Lierley filed their motion (#15) to dismiss on November 22, 2010. Defendants LVMPD, Gillespie and Police Officer Defendants also filed their motion (#16) to dismiss on November 22, 2010. On December 21, 2010, Plaintiffs filed their response (#19) to Defendant Clark County's motion (#14) to dismiss. On December 27, 2010, Clark County filed its reply

1 (#20) to Plaintiffs' response (#19). On January 6, 2011, Plaintiffs  
2 filed a notice (#21) of voluntary dismissal without prejudice as to  
3 Defendants Costco and Lierley. Also on January 6, 2011, Plaintiffs  
4 filed a motion (#22) for hearing on Defendant Clark County's motion  
5 to dismiss (#14) and Defendant LVMPD's motion (#16) to dismiss. On  
6 January 14, 2011, Plaintiffs filed a response (#23) to Defendant  
7 LVMPD's motion (#16) to dismiss. On January 25, 2011, Defendants  
8 LVMPD, Gillespie and the Police Officer Defendants filed a reply  
9 (#24) to Plaintiffs' response (#23). This Court held a hearing on  
10 Defendants' motions (## 14, 15, 16) to dismiss on June 1, 2011.

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12 **III. Motion to Dismiss Standard**

13 Courts engage in a two-step analysis in ruling on a motion to  
14 dismiss. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009); Bell Atlantic  
15 Corp. v. Twombly, 550 U.S. 544 (2007). First, courts accept only  
16 non-conclusory allegations as true. Iqbal, 129 S. Ct. at 1949.  
17 "Threadbare recitals of the elements of a cause of action, supported  
18 by mere conclusory statements, do not suffice." Id. (citing Twombly,  
19 550 U.S. at 555). Federal Rule of Civil Procedure 8 "demands more  
20 than an unadorned, the-defendant-unlawfully-harmed-me accusation."  
21 Id. Federal Rule of Civil Procedure 8 "does not unlock the doors of  
22 discovery for a plaintiff armed with nothing more than conclusions."  
23 Id. at 1950. The Court must draw all reasonable inferences in favor  
24 of the plaintiff. See Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d  
25 943, 949 (9th Cir. 2009).

26 After accepting as true all non-conclusory allegations and  
27 drawing all reasonable inferences in favor of the plaintiff, the

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1 Court must then determine whether the complaint "states a plausible  
2 claim for relief." Iqbal, 129 S. Ct. at 1949. (citing Twombly, 550  
3 U.S. at 555). "A claim has facial plausibility when the plaintiff  
4 pleads factual content that allows the court to draw the reasonable  
5 inference that the defendant is liable for the misconduct alleged."  
6 Id. at 1949 (citing Twombly, 550 U.S. at 556). This plausibility  
7 standard "is not akin to a 'probability requirement,' but it asks  
8 for more than a sheer possibility that a defendant has acted  
9 unlawfully." Id. A complaint that "pleads facts that are 'merely  
10 consistent with' a defendant's liability... 'stops short of the line  
11 between possibility and plausibility of 'entitlement to relief.'" Id.  
12 (citing Twombly, 550 U.S. at 557).

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14 **III. Motion for Judgment on the Pleadings Standard**

15 Federal Rule of Civil Procedure 12(c) permits a party to move  
16 for judgment "after the pleadings are closed but within such time as  
17 not to delay the trial." "A judgment under the pleadings is  
18 properly granted when, taking all allegations in the pleadings as  
19 true, the moving party is entitled to judgment as a matter of law."  
20 Shilling v. Crawford, 2006 U.S. Dist. LEXIS 40845 (D. Nev. June 13,  
21 2006)(internal citations and quotations omitted); see also Holbrook  
22 v. Nevada ex rel. Dep't of Corr., 2007 U.S. Dist. LEXIS 60367 (D.  
23 Nev. Aug. 15, 2007). A motion for judgment on the pleadings  
24 pursuant to Federal Rule of Civil Procedure 12(c) "only has utility  
25 when all material allegations of fact are admitted or not  
26 controverted in the pleadings and only questions of law remain to be  
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1 decided by the district court." 5C WRIGHT & MILLER, FEDERAL PRACTICE AND  
2 PROCEDURE § 1367 (3d. Ed. 2004).

3 Because the motion for judgment on the pleadings was made by  
4 Defendants Costco and Lierley, who have been dismissed from this  
5 case by a notice (#21) of voluntary dismissal without prejudice  
6 pursuant to Federal Rule of Civil Procedure 41(a), we do not further  
7 consider the applicability of Rule 12(c).

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9 **IV. Defendant Clark County's Motion (#14) to Dismiss**

10 Defendant Clark County moves the Court for dismissal of  
11 Plaintiffs' complaint (#1) for failure to state a claim upon which  
12 relief can be granted against Clark County. (Clark MTD at 1 (#14).)  
13 In its motion (#14) to dismiss (the "Clark MTD"), Defendant Clark  
14 County asserts that it is not a proper party to this action because  
15 it is not legally liable for the conduct of LVMPD or its employees.  
16 Specifically, Defendant Clark County contends that under Nevada  
17 Revised Statute § 280.010, LVMPD is a legal entity independent of  
18 Clark County, and Clark County is not the employer, supervisor, or  
19 disciplinary authority for LVMPD employee officers.

20 Plaintiffs' complaint (#1) attempts to impute liability to  
21 Clark County for the actions of LVMPD and its employees (Compl. ¶¶  
22 23, 33, 34, 40, 45, 58, 63, 66.)

23 Pursuant to Nevada Revised Statutes § 280.010, the City of Las  
24 Vegas and Clark County merged their law enforcement agencies into  
25 the LVMPD. (Clark MTD at 2 (#14).) This merger was authorized by  
26 City and County Ordinances and reauthorized in 1981 in accordance  
27 with the 1981 legislative revisions to Nevada Revised Statutes

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1 Chapter 280.<sup>2</sup> Nevada Revised Statutes § 280.280(4) provides that  
2 LVMPD is subject to suit for, and is responsible for the defense of  
3 any claim, and for any judgment arising out of any acts or omissions  
4 of the Sheriff or any employee or agent of LVMPD. Nevada Revised  
5 Statutes § 280.307 provides that the Sheriff is responsible for  
6 adopting policies, procedures, rules and regulations for the LVMPD.  
7 On this basis, Defendant Clark County contends that it maintains no  
8 responsibility for the actions of LVMPD and its employees pursuant  
9 to Nevada Revised Statutes Chapter 280.

10 Plaintiffs contend that their claim against Defendant Clark  
11 County is not based on a theory of respondeat superior, but that  
12 Clark County's policies and practices, separate from LVMPD, have  
13 conveyed to LVMPD officers that Clark County's policy is to condone  
14 unlawful conduct and that Clark County will assist officers in  
15 avoiding accountability for their actions. (P.'s Resp. to Clark MTD  
16 at 2 (#19).) Plaintiffs assert that LVMPD fulfills Clark County's  
17 non-delegable responsibilities imposed by the Nevada Constitution in  
18 functioning as Clark County's law enforcement agency. (Id.)

19 Additionally, Plaintiffs argue that the fact that LVMPD is an  
20 entity subject to suit does not insulate the County from  
21 accountability with respect to oversight of law enforcement  
22 activities. (Id.) Plaintiffs asserted at the June 1, 2011 hearing  
23 that pursuant to Nevada Revised Statutes §§ 280.130, 289.387 and  
24 259.050, of which we take judicial notice, Clark County is  
25 sufficiently involved in setting the policies for LVMPD to be held

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27 <sup>2</sup> Clark County Ordinance Chapter 2.60; City of Las Vegas Code of  
Ordinances Chapter 2.24.

1 liable for the training and supervision policies set by LVMPD.  
2 Plaintiffs note that pursuant to Nevada Revised Statutes § 280.130,  
3 Clark County sends two representatives to the Metropolitan Police  
4 Committee on Fiscal Affairs. They further note that Clark County  
5 participates in the LVMPD review board which reviews complaints  
6 pursuant to Nevada Revised Statutes § 289.387. Finally, Plaintiffs  
7 point out that the coroner's review board established by Nevada  
8 Revised Statutes § 259.050 contemplates a joint investigation  
9 between the Clark County coroner, the district attorney, and the  
10 sheriff, if the sheriff is not ex officio the coroner.

11 The United States Supreme Court has held that a county will be  
12 subject to liability under 42 U.S.C. § 1983 if "its policies,  
13 whether set by the government's lawmakers or by those whose edicts  
14 or acts that may fairly be said to represent official policy caused  
15 the particular constitutional violation at issue." McMillian v.  
16 Monrow, 520 U.S. 781 (1997)(internal citation omitted).

17 This Court has held, and the Ninth Circuit Court of Appeals has  
18 affirmed, that Clark County is not a proper party to a wrongful  
19 death action under 42 U.S.C. § 1983 because Clark County's "only  
20 control over the LVMPD is budgetary supervision through the police  
21 commission." Palm v. Las Vegas Metro. Police Dep't, 1998 U.S. App.  
22 LEXIS 7939 at \*3 (9th Cir. 1998)(citing NEV. REV. STAT. § 280.190-  
23 270). See also Denson v. Clark County, 2010 U.S. Dist. LEXIS 89677  
24 (D. Nev. Aug. 4, 2010). We find that the ties between Clark County  
25 and LVMPD noted by Plaintiffs as set forth in Nevada Revised  
26 Statutes §§ 280.130, 289.387 and 259.050 are insufficient to  
27 overcome a finding that LVMPD and Clark County are separate

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1 entities, and the policies of Clark County cannot be said to be the  
2 moving force behind the actions of LVMPD. Id. (citing NEV. REV. STAT.  
3 § 280.280). As such, Clark County cannot be held liable for the  
4 actions or policies of LVMPD. Id. Defendant Clark County will,  
5 therefore, be dismissed from the case.

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7 **V. Defendants Costco and Lierley's Motion (#15) to Dismiss**

8 Defendants Costco and Lierley moved to dismiss Plaintiffs'  
9 First, Fifth, Sixth, Tenth and Eleventh causes of action pursuant to  
10 Federal Rule of Civil Procedure 12(b)(6). (Costco MTD at 1-2 (#15).)

11 On January 6, 2011, Plaintiffs filed a notice (#21) of  
12 voluntary dismissal without prejudice as to Defendants Costco and  
13 Lierley pursuant to Federal Rule of Civil Procedure 41(a). The  
14 motion (#15) to dismiss filed by Defendants Costco and Lierley will,  
15 therefore, be denied as moot.

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17 **VI. Defendants LVMPD, Gillespie and Police Officer Defendants'**  
18 **Motion (#16) to Dismiss**

19 In their motion (#16) to dismiss pursuant to Federal Rule of  
20 Civil Procedure 12(b)(6) (the "LVMPD MTD"), Defendants LVMPD,  
21 Gillespie and the Police Officer Defendants (together, the "LVMPD  
22 Defendants") move the Court to dismiss: (i) all claims brought by  
23 Kevin W. Scott; (ii) all claims brought under Nevada's survival  
24 statute that are properly asserted under Nevada's wrongful death  
25 statute; (iii) all claims against Defendant Gillespie; (iv)  
26 Plaintiffs' federal "Monell" claim against Defendant LVMPD; and (v)  
27 Plaintiffs' state law negligent hiring, training and supervision  
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1 claim, if the Court declines to dismiss the survival claims. The  
2 LVMPD Defendants concede that Plaintiffs' federal excessive force  
3 claim in their first cause of action and state wrongful death claim  
4 in their eleventh cause of action would survive a motion to dismiss  
5 with respect to the parties with legal standing. (LVMPD MTD at 3  
6 (#16).)

7 A. Claims Brought by Kevin W. Scott

8 As alleged in the complaint (#1), Kevin W. Scott ("Plaintiff  
9 Kevin") is the brother and heir of Scott. (Compl. ¶ 3 (#1).) The  
10 LVMPD Defendants request dismissal of all of Plaintiff Kevin's  
11 claims for lack of standing because Plaintiff Kevin is neither  
12 Scott's legal heir nor the Estate's administrator. (LVMPD MTD at 5  
13 (#16).) At the hearing on June 1, 2011, Plaintiffs voluntarily  
14 dismissed Plaintiff Kevin from the case. We therefore do not  
15 further consider the validity of the claims brought by Plaintiff  
16 Kevin.

17 B. Plaintiffs' Assault and Battery Claims Brought Under  
18 Nevada's Survival Statute Are Properly Asserted Under Nevada's  
19 Wrongful Death Statute. Plaintiffs' state law tort claims for  
20 emotional distress, negligence, and negligent hiring, training and  
21 supervision are properly asserted under Nevada's survival statute by  
22 Plaintiff William B. Scott as the Administrator Scott's estate.

23 Plaintiffs assert the following survival claims against the  
24 LVMPD Defendants under state law: (i) assault, in the third cause of  
25 action; (ii) battery, in the fourth cause of action; (iii)  
26 intentional infliction of emotional distress, in the seventh cause  
27 of action; (iv) negligence, in the eighth cause of action; and (v)

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1 negligent hiring, training and supervision, in the ninth cause of  
2 action. In addition, Plaintiffs assert a wrongful death claim  
3 against the LVMPD Defendants in their eleventh cause of action.

4 Nevada's wrongful death statute provides an independent cause  
5 of action for the heirs and personal representatives of a decedent  
6 whose death is caused by the wrongful act or neglect of another. NEV.  
7 REV. STAT. § 41.085. Under this statute, both the decedent's heirs  
8 and representatives may maintain a cause of action. A decedent's  
9 heirs may seek damages for the wrong done to them through the  
10 decedent's death, in the form of grief or sorrow, loss of probable  
11 support, companionship, society, comfort and consortium, as well as  
12 damages for the pain, suffering or disfigurement of the decedent.  
13 NEV. REV. STAT. § 41.085(5). The administrator may seek any special  
14 damages, such as medical expenses, which the decedent incurred or  
15 sustained before his death; funeral expenses; and any penalties that  
16 the decedent would have recovered if he had lived; but not damages  
17 for pain, suffering, or disfigurement of the decedent. NEV. REV. STAT.  
18 § 41.085(5).

19 Claims under Nevada's survival of action statute are separate  
20 and different from wrongful death claims. Nevada Revised Statutes §  
21 41.100 provides that no cause of action is lost by reason of the  
22 death of any person, and such causes of action may be maintained by  
23 the decedent's executor or administrator. Thus, any claims brought  
24 under Nevada Revised Statutes § 41.100 must be brought by Plaintiff  
25 William B. Scott as Administrator of Scott's estate, and may not be  
26 brought by Plaintiff Linda G. Scott as one of Scott's heirs at law.  
27 The statute specifically provides that this section does not apply

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1 to the cause of action of a decedent brought by the decedent's  
2 personal representatives for the decedent's wrongful death. NEV. REV.  
3 STAT. § 41.100(3). Nevada's survival of action statute provides that  
4 a cause of action in favor of an injured party for personal injury  
5 will abate when such personal injury results in death. Borrego v.  
6 Stauffer Chemical Co., 315 F. Supp. 980, 982 (D. Nev. 1970).

7 LVMPD Defendants claim that Plaintiffs' claims under Nevada's  
8 survival statute are properly asserted under Nevada's wrongful death  
9 statute, citing Alsenz v. Clark County Sch. Dist., 864 P.2d 285, 285  
10 (Nev. 1993). (LVMPD MTD at 9-11 (#16).) LVMPD Defendants' reliance  
11 on Alsenz is misplaced. Alsenz held that a wrongful death claim may  
12 not be brought under Nevada's survival statute, not that claims  
13 under the survival statute must be consolidated under the wrongful  
14 death statute. Alsenz, 864 P.2d at 288. While an administrator or  
15 heir may not recover for the same injury under both statutes,  
16 separate claims may be brought under both Nevada's wrongful death  
17 and survival statutes.

18 Here, under Borrego, Plaintiffs' claims for assault and battery  
19 would merge with their wrongful death claim because the assault and  
20 battery caused Scott's death. Plaintiffs' claims for intentional  
21 infliction of emotional distress, negligence, and negligent hiring,  
22 training and supervision, however, would survive as separate claims.  
23 There would be no risk of double recovery on the part of the Estate  
24 and heirs with respect to these claims. Therefore, Plaintiffs'  
25 state law tort claims for emotional distress, negligence, and  
26 negligent hiring, training and supervision are properly asserted

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1 under Nevada's survival statute by Plaintiff William B. Scott as the  
2 Administrator Scott's estate.

3 C. Claims Against Defendant Gillespie.

4 The complaint (#1) indicates that Plaintiffs are suing  
5 Defendant Gillespie in his official and individual capacities. The  
6 LVMPD Defendants claim (i) that a suit against Gillespie in his  
7 official capacity is really a suit against LVMPD and is, therefore,  
8 duplicative; and (ii) that Plaintiffs' complaint is void of facts  
9 suggesting individual liability on behalf of Gillespie.

10 i. Plaintiffs' Claims Against Gillespie in His Official  
11 Capacity.

12 Plaintiffs assert claims against Gillespie based on his conduct  
13 in matters underlying the claims for Monell supervisory liability,  
14 negligent supervision and discipline, and wrongful death. (P.'s  
15 Resp. to LVMPD MTD at 7 (#23).) LVMPD Defendants assert that  
16 Plaintiffs' claims against Gillespie in his official capacity are,  
17 in fact, claims against LVMPD and should therefore be dismissed as  
18 duplicative. (LVMPD MTD at 11-12 (#16).) We agree.

19 Defendants correctly state that "a suit against a governmental  
20 official in his official capacity is equivalent to a suit against  
21 the governmental entity itself." Larez v. Los Angeles, 946 F.2d 630,  
22 645 (9th Cir. 1991). The real party in such suits is the entity and  
23 it is the entity that will be responsible for any damages. Ward v.  
24 City of Sparks, 2011 U.S. Dist. LEXIS 13215 at \*12 (D. Nev. Jan. 12,  
25 2011). Indeed, the United States Supreme Court has held that  
26 "[t]here is no longer a need to bring official-capacity actions  
27 against local government officials, for under Monell...local

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1 government units can be sued directly for damages and injunctive or  
2 declaratory relief." Kentucky v. Graham, 473 U.S. 159, 167 n. 14  
3 (1985). Where both the public entity and a municipal officer are  
4 named in a lawsuit, a court may dismiss the individual named in his  
5 official capacity as a redundant defendant. Center for Bio-Ethical  
6 Reform, Inc. v. Los Angeles County Sheriff's Department, 533 F.3d  
7 780, 799 (9th Cir. 1986). See also George v. Sonoma County Sheriff's  
8 Dep't, 2010 U.S. Dist. LEXIS 111193 at \*67-68 (N.D. Cal. Oct. 19,  
9 2010); Pombrio v. Villaraigosa, 2010 U.S. Dist. LEXIS 110504 at \*13-  
10 14 (C.D. Cal. Oct. 15, 2010).

11 Plaintiffs' claims against Gillespie in his official capacity  
12 are duplicative of their claims against LVMPD because a suit against  
13 a governmental officer in his official capacity is equivalent to a  
14 suit against the governmental entity itself. We therefore find that  
15 Plaintiffs' claims with respect to Gillespie's liability in his  
16 official capacity will not survive LVMPD Defendants' motion (#16) to  
17 dismiss.

18 ii. Plaintiffs' Claims Against Gillespie in His Individual  
19 Capacity Under 42 U.S.C. § 1983.

20 A supervisor may be sued in his individual capacity under 42  
21 U.S.C. § 1983 "for his 'own culpable action or inaction in the  
22 training, supervision, or control of his subordinates'" Id.(quoting  
23 Clay v. Conlee, 815 F.2d 1164, 1170 (8th Cir. 1987)); for his  
24 "'acquiesce[nce] in the constitutional deprivations of which [the]  
25 complaint is made'" Larez, 946 F.2d at 646 (quoting Meade v. Grubbs,  
26 841 F.2d 1512, 1528 (10th Cir. 1988)(citation omitted)); or for  
27 conduct that shows a "'reckless or callous indifference to the  
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1 rights of others.'" Larez, 946 F.2d at 646 (quoting Bordanaro v.  
2 McLeod, 871 F.2d 1151, 1163 (1st Cir. 1989)). Supervisory liability  
3 is individual liability, based on the supervisor's personal  
4 responsibility for the constitutional violation, and does not  
5 require any proof of official policy or custom as the "moving  
6 force." City of Oklahoma v. Tuttle, 471 U.S. 808 (1985).

7 In Larez, the Ninth Circuit Court of Appeals held with respect  
8 to an action under 42 U.S.C. § 1983 that while a sheriff is rarely  
9 directly and personally involved in an incident in the same way as  
10 are the individual officers "who are on the scene inflicting  
11 constitutional injury . . . this does not prevent a supervisor from  
12 being held liable in his individual capacity." Larez, 946 F.2d at  
13 645.

14 Here, Plaintiffs allege that Gillespie was personally aware of  
15 numerous prior incidents in which LVMPD officers engaged in  
16 unreasonable seizures and the use of excessive force, and with such  
17 awareness, failed to properly supervise and discipline officers.  
18 (Compl. ¶ 33 (#1).) Viewing the allegations in Plaintiffs'  
19 complaint (#1) in the light most favorable to Plaintiffs at the  
20 motion to dismiss stage, we find that Plaintiffs' claims with  
21 respect to Gillespie's individual liability will survive the LVMPD  
22 Defendants' motion (#16) to dismiss.

23 D. Plaintiffs' federal "Monell" claim against Defendant LVMPD.

24 Plaintiffs allege a "Monell" claim against LVMPD, a  
25 municipality, in their second cause of action, claiming that LVMPD's  
26 failure to adequately train, supervise or discipline officers  
27 constituted a de facto policy causing a custom and practice of LVMPD

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1 officers engaging in unreasonable seizures and the excessive use of  
2 force.

3 In Monell v. Dept. of Social Services, the United States  
4 Supreme Court authorized suits against municipalities under 42  
5 U.S.C. § 1983 in limited circumstances. 436 U.S. 658, 690-91 (1978).  
6 Specifically, the Monell Court held that when a municipal policy is  
7 the cause of the unconstitutional actions taken by municipal  
8 employees, the municipality will itself be liable. Such municipal  
9 liability exists only (i) where the unconstitutional action  
10 "implements or executes a policy statement, ordinance, regulation or  
11 decision officially adopted and promulgated" by municipal officers,  
12 or (ii) where the constitutional deprivation is inflicted pursuant  
13 to governmental "custom," even though such a "custom" has not  
14 received formal approval. Monell, 436 U.S. at 690-691. In this  
15 context, "custom" is defined as "persistent and widespread  
16 discriminatory practices by state officials." Id. at 691(citing  
17 Adickes v. S.H. Dress & Co., 398 U.S. 144, 167-68 (1970)).

18 In summary, to establish municipal liability under 42 U.S.C. §  
19 1983, Plaintiffs must show (i) a violation of Plaintiffs'  
20 constitutional rights; (ii) that Defendant's actions were taken  
21 under color of law; (iii) that Defendant's actions were taken  
22 pursuant to a plan, policy or custom of the entity; and (iv) that  
23 the policy or custom was the actual cause or moving force behind the  
24 alleged deprivation. See City of Canton v. Harris, 489 U.S. 378  
25 (1989); West v. Atkins, 487 U.S. 42 (1988); Kentucky v. Graham, 473  
26 U.S. 159, 165 (1985); Davis v. City of Ellenberg, 869 F.2d 1230 (9th  
27 Cir. 1989).

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1 Previously, the Ninth Circuit Court of Appeals ruled that a  
2 claim for municipal liability under 42 U.S.C. § 1983 is sufficient  
3 to withstand a motion to dismiss even if the claim is based on  
4 "nothing more than a bare allegation that the individual officers'  
5 conduct conformed to official policy, custom or practice. Karim-  
6 Panachi v. Los Angeles Dept., 839 F.2d 621, 624 (9th Cir.  
7 1988)(internal quotation marks and citation omitted). However,  
8 several United States District Courts within the Ninth Circuit,  
9 including this Court, have noted that since the Karim-Panachi  
10 decision, Twombly and Iqbal have indicated that conclusory  
11 allegations that merely recite the elements of a claim are  
12 insufficient to survive a motion under Federal Rule of Civil  
13 procedure 12(b)(6). Ward v. Nevada, 2010 U.S. Dist. LEXIS 44149 at  
14 \*16-17 (D. Nev. Feb. 26, 2010) See also Warner v. County of San  
15 Diego, 2011 U.S. Dist. LEXIS 14312 at \*10-11 (S.D. Cal. Feb. 14,  
16 2011); Morgan v. Los Angeles County Jail, 2010 U.S. Dist. LEXIS  
17 24116 at \*4 (C.D. Cal. Mar. 10, 2010); Shivers v. Phoenix Police  
18 Dept., 2010 U.S. Dist. LEXIS 24116 at \*3 (D. Ariz. Mar. 4, 2010).

19 LVMPD Defendants allege that Plaintiffs' Monell claim against  
20 LVMPD "stops short of the line between possibility and plausibility"  
21 with respect to municipal liability under 42 U.S.C. § 1983 and must,  
22 therefore, be dismissed. (LVMPD MTD at 16 (#16).) We disagree.  
23 Plaintiffs' claim that LVMPD's failure to adequately train,  
24 supervise or discipline officers constituted a de facto policy  
25 causing a custom and practice of LVMPD officers engaging in  
26 unreasonable seizures and the excessive use of force is sufficient  
27 to survive a motion to dismiss because Plaintiffs allege facts

1 indicating that LVMPD was aware of previous incidents involving  
2 LVMPD officers constituting the excessive use of force that should  
3 have alerted LVMPD to the need for further training of its officers.  
4 (P.'s Resp. to LVMPD MTD at 8 (#23).) These facts are relevant to  
5 determining whether LVMPD's conduct was persistent and widespread  
6 enough to constitute a "custom" for purposes of 42 U.S.C. § 1983.

7 We therefore find that Plaintiffs have sufficiently alleged a  
8 Monell claim against Defendant LVMPD.

9 E. Plaintiffs' state law negligent hiring, training and  
10 supervision claim.

11 In their ninth cause of action, Plaintiffs allege that  
12 Defendant LVMPD was "negligent in [its] hiring, training and/or  
13 supervision of its police officers" under Nevada state law. (Compl.  
14 ¶ 66 (#1).)

15 Nevada Revised Statutes § 41.032 sets forth exceptions to  
16 Nevada's general waiver of sovereign immunity. Specifically, Nevada  
17 Revised Statutes § 41.032(2) provides that no action may be brought  
18 against a state officer or employee or any state agency or political  
19 subdivision that is "[b]ased upon the exercise or performance or the  
20 failure to exercise or perform a discretionary function or duty on  
21 the part of the state or any of its agencies or political  
22 subdivisions or of any officer, employee, or immune contractor of  
23 any of these, whether or not the discretion involved is abused."

24 Nevada uses a two-pronged test to determine whether immunity  
25 for a discretionary act applies. First, an act is entitled to  
26 discretionary immunity if the decision involved an element of  
27 individual judgment or choice. Martinez v. Maruszczak, 168 P.3d 720,

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1 729 (Nev. 2007). Second, the judgment must be "of the kind that the  
2 discretionary function exception was designed to shield," including  
3 actions "based on considerations of social, economic or political  
4 policy." Id. at 727-29 (internal quotations omitted). Therefore,  
5 "if the injury-producing conduct is an integral part of governmental  
6 policy-making or planning, if the imposition of liability might  
7 jeopardize the quality of the governmental process, or if the  
8 legislative or executive branches' power or responsibility will be  
9 usurped, immunity will likely attach under the second criteria." Id.  
10 at 729.

11 Nevada courts look to federal case law under the Federal Tort  
12 Claims Act for guidance with respect to discretionary immunity. Id.  
13 at 727-28. Defendants correctly indicate that with respect to the  
14 Federal Tort Claims Act, the Ninth Circuit Court of Appeals has held  
15 that "decisions relating to the hiring, training, and supervision of  
16 employees usually involve policy judgments of the type Congress  
17 intended the discretionary function exception to shield." Vickers v.  
18 United States, 228 F.3d 944, 950 (9th Cir. 2000). See also Gager v.  
19 United States, 149 F.3d 918, 921 (9th Cir. 1998). While such  
20 decisions may usually involve policy judgments intended to be  
21 subject to discretionary immunity, we find that a failure by the  
22 LVMPD to adequately train its officers with respect to unlawful  
23 seizures and the use of excessive force does not involve a policy  
24 judgment deserving of discretionary immunity.

25 Applying the two-pronged test, we first consider whether the  
26 alleged failure to adequately train LVMPD officers involved an  
27 element of individual judgment or choice. Martinez, 168 P.3d at 729.

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1 While a ruling on a motion pursuant to Federal Rule of Civil  
2 Procedure 12(b)(6) is based only on the sufficiency of the  
3 plaintiff's allegations, we note that neither Plaintiffs nor  
4 Defendants have argued that LVMPD has a policy regarding training  
5 officers with respect to unlawful seizures and the use of excessive  
6 force. In the absence of any statute, regulation or policy  
7 requiring such training, a decision not to train LVMPD officers  
8 plainly involves judgment or choice. Gager, 149 F.3d at 920.  
9 Further, even if such a policy does exist, a decision to deviate  
10 from the policy would likewise involve judgment or choice on behalf  
11 of the LVMPD. As such, we find that the alleged failure to  
12 adequately train LVMPD officers satisfies the first prong of the  
13 discretionary immunity test.

14 We then consider whether the alleged failure to train was "in  
15 furtherance of public policy goals" (United States v. Gaubert, 499  
16 U.S. 315, 334 (1991)) and "based on considerations of social,  
17 economic or political policy." Martinez, 168 P.3d at 727-29. The  
18 prevention of constitutional rights violations by police officers is  
19 surely a public policy goal, and this Court cannot conceive of any  
20 social, economic or political policy that would be furthered by a  
21 failure to prevent such violations. Further, the injury-producing  
22 conduct here cannot be found to be an integral part of governmental  
23 policy-making or planning. Martinez, 168 P.3d at 729. The  
24 imposition of liability here would not jeopardize the quality of the  
25 governmental process, but rather, should improve the quality of said  
26 process. Id. Finally, the legislative or executive branches' power

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1 or responsibility would not be usurped by a finding of liability  
2 here. Id.

3 As such, while courts may often grant discretionary immunity to  
4 a state agency or political subdivision with respect to its hiring,  
5 training and supervising decisions, we find that in this instance,  
6 LVMPD's alleged failure to adequately train its officers is not  
7 based on a policy judgment of the type discretionary immunity is  
8 intended to protect. Plaintiffs' ninth cause of action will,  
9 therefore, not be dismissed.

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**VII. Conclusion**

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Plaintiffs allege eleven causes of action against Defendants Clark County, Costco, Lierley, LVMPD and Police Officer Defendants in relation to the shooting of Erik B. Scott at a Costco store in Las Vegas, Nevada on July 10, 2010. Defendants Costco and Lierley were voluntarily dismissed from the case pursuant to Federal Rule of Civil Procedure 41(a) by Plaintiffs (#21) on January 6, 2011. Defendants have submitted three motions (## 14, 15, 16) to dismiss. Plaintiffs filed a Notice of Voluntary Dismissal (#21) without prejudice as to Defendants Costco and Lierley pursuant to Federal Rule of Civil Procedure 41(a) on January 6, 2011.

In its motion (#14) to dismiss, Defendant Clark County asserts that it is not a proper party to this action because it is not legally liable for the conduct of LVMPD or its employees. We agree.

In their motion (#16) to dismiss, LVMPD Defendants move the Court pursuant to dismiss: (i) all claims brought by Kevin W. Scott; (ii) all claims brought under Nevada's survival statute that are

1 properly asserted under Nevada's wrongful death statute; (iii) all  
2 claims against Defendant Gillespie; (iv) Plaintiffs' federal  
3 "Monell" claim against Defendant LVMPD; and (v) Plaintiffs' state  
4 law negligent hiring, training and supervision claim, if the Court  
5 declines to dismiss the survival claims. We have found that Kevin  
6 W. Scott does not have standing to bring either federal or state law  
7 claims in this case. Plaintiffs' claims were correctly brought  
8 under Nevada's survival statute and need not have been consolidated  
9 under Nevada's wrongful death statute. Plaintiffs' claims were  
10 properly brought against Defendant Gillespie in his individual  
11 capacity. Their claims against Defendant Gillespie in his official  
12 capacity, however, are duplicative of their claims against LVMPD and  
13 should therefore be dismissed. Finally, Plaintiffs' Monell claim  
14 against LVMPD and their state law negligent hiring, training and  
15 supervision claim against LVMPD and Gillespie were properly  
16 asserted.

17 **IT IS, THEREFORE, HEREBY ORDERED** that Defendant Clark County's  
18 motion (#14) to dismiss is **GRANTED** and that Defendant Clark County  
19 is dismissed from this case.

20 **IT IS FURTHER ORDERED** that Defendants' Costco and Lierley's  
21 motion (#15) to dismiss is **DENIED** as moot. Said Defendants have  
22 been dismissed entirely from the action by Plaintiffs (#21) pursuant  
23 to Federal Rule of Civil Procedure 41(a)(1).

24 **IT IS FURTHER ORDERED** that LVMPD Defendants' motion (#16) to  
25 dismiss is **GRANTED** as to all claims brought by Kevin W. Scott.

26 **IT IS FURTHER ORDERED** that LVMPD Defendants' motion (#16) to  
27 dismiss is **GRANTED** as to Plaintiffs' state law claims for assault

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1 and battery because these claims merge with Plaintiffs' wrongful  
2 death claim.

3 **IT IS FURTHER ORDERED** that LVMPD Defendants' motion (#16) to  
4 dismiss is **GRANTED** as to all claims against Defendant Gillespie in  
5 his official capacity.

6 **IT IS FURTHER ORDERED** that except as stated above, LVMPD  
7 Defendants' motion (#16) to dismiss is **DENIED**.

8  
9 DATED: June 8, 2011.

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11 UNITED STATES DISTRICT JUDGE

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