

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 CHRISTOPHER GARDNER, individually and)
4 as heir and as Special Administrator for THE)
5 ESTATE OF ELLEN FINNIE GALLUCCI,)

Case No.: 2:16-cv-01384-GMN-CWH

6 Plaintiff,)

ORDER

7 vs.)

8 CITY OF LAS VEGAS, a Corporate city of)
9 the State of Nevada; the LAS VEGAS)
10 METROPOLITAN POLICE DEPARTMENT,)
11 Political Subdivision of the State of Nevada;)
12 SHERIFF JOSEPH LOMBARDO; and DOE)
13 OFFICERS I through X, and DOES XI)
14 through XX, and ROE BUSINESS ENTITIES)
15 XXI through XXX, inclusive,)

16 Defendants.)

17 Pending before the Court is the Motion to Dismiss, (ECF No. 12), filed by Defendants
18 Sheriff Joseph Lombardo ("Sheriff Lombardo") and the Las Vegas Metropolitan Police
19 Department ("LVMPD"). Plaintiff Christopher Gardner ("Plaintiff") filed a Response (ECF
20 No. 19), and Defendants filed a Reply, (ECF No. 21).¹

21 I. BACKGROUND

22 This case arises from alleged constitutional violations when LVMPD officers initiated a
23 vehicular stop of Kenneth Rankin ("Rankin"), a 32-year old male, to serve a warrant upon him.

24 ¹ Also pending before the Court is Plaintiff's Motion to Amend/Correct the Complaint, (ECF No. 32), seeking to
25 add additional LVMPD officers as defendants. Defendants have not responded to the Motion, and the time to do
so has passed. For good cause appearing, the Court GRANTS Plaintiff's Motion. Although the instant Motion
to Dismiss pertains to the Amended Complaint, it merely seeks dismissal of certain claims against Sheriff
Lombardo and the LVMPD that are unchanged in the proposed second amended complaint. Therefore, the Court
considers the Motion by referring to the claims as asserted in the Amended Complaint.

1 (Am. Compl. ¶¶ 21–24, ECF No. 7). Rankin was driving eastbound on West Cheyenne Avenue
2 when LVMPD officers initiated the stop. (Id.). Rankin remained in his vehicle while officers
3 exited their vehicle but then fled the scene, driving eastbound on West Cheyenne Avenue. (Id.
4 ¶¶ 27–31). Concurrently, Ellen Gallucci (“Gallucci”) was riding in a vehicle headed
5 northbound on North Jones Boulevard through the intersection of North Jones Boulevard and
6 West Cheyenne Avenue as the traffic signal was green. (Id. ¶¶ 29–30). Rankin sped through
7 the intersection and struck the vehicle in which Gallucci was riding. (Id. ¶¶ 29–31). Gallucci
8 suffered severe blunt trauma that eventually caused her death. (Id. ¶ 33).

9 Plaintiff, heir to Gallucci and Special Administrator of her estate, alleges that LVMPD
10 officers knew of Rankin’s criminal history and risked the safety of the public when stopping
11 Rankin and attempting to serve a warrant in a populated area. (Id. ¶¶ 26, 38, 39). The Amended
12 Complaint lists, in relevant part, Doe Officers I – X (“Defendant Officers”), the LVMPD, and
13 Sheriff Lombardo (collectively “Defendants”) as defendants. (Id. ¶¶ 9, 12, 15). Plaintiff alleges
14 seven causes of action: (1) 42 U.S.C.A. § 1983 violations against Defendant LVMPD, Sheriff
15 Lombardo, and Defendant Officers; (2) 42 U.S.C.A. § 1983 violations against all Defendants;
16 (3) Monell liability against LVMPD; (4) negligence and/or reckless disregard against all
17 Defendants; (5) a survivor’s action against all Defendants; (6) wrongful death against all
18 Defendants; and (7) negligent supervision against LVMPD and Sheriff Lombardo. (Id. ¶¶ 33–
19 47, 48–55, 56–67, 68–78, 79–88, 89–98, 99–104).

20 **II. LEGAL STANDARD**

21 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon
22 which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
23 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on
24 which it rests, and although a court must take all factual allegations as true, legal conclusions
25 couched as factual allegations are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule

1 12(b)(6) requires “more than labels and conclusions, and a formulaic recitation of the elements
2 of a cause of action will not do.” Id. “To survive a motion to dismiss, a complaint must contain
3 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
4 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A
5 claim has facial plausibility when the plaintiff pleads factual content that allows the court to
6 draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. This
7 standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” Id.

8 If the court grants a motion to dismiss for failure to state a claim, leave to amend should
9 be granted unless it is clear that the deficiencies of the complaint cannot be cured by
10 amendment. *DeSoto v. Yellow Freight Sys. Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant to
11 Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in the
12 absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the
13 movant, repeated failure to cure deficiencies by amendments previously allowed, undue
14 prejudice to the opposing party by virtue of allowance of the amendment, futility of the
15 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

16 **III. DISCUSSION**

17 In the instant Motion, Lombardo and LVMPD move to dismiss: (1) all claims against
18 Sheriff Lombardo; (2) Plaintiff’s seventh cause of action for negligent training and supervision
19 against LVMPD; and (3) Plaintiff’s fourth cause of action for negligence and/or reckless
20 disregard against both Sheriff Lombardo and LVMPD. (Mot. to Dismiss (“MTD”) 12:2–5, ECF
21 No. 12). The Court addresses each request in turn.

22 **A. Claims Against Sheriff Lombardo**

23 Plaintiff alleges § 1983 claims against Sheriff Lombardo in both his official and
24 individual capacity along with Nevada state law claims. The Court begins by addressing the
25 § 1983 claims followed by the Nevada state law claims.

1 **1. 42 U.S.C. § 1983 Claims**

2 Plaintiff’s first and second cause of action allege violations of 42 U.S.C. § 1983 against
3 Sheriff Lombardo in both his official capacity and individual capacity. Because Plaintiff failed
4 to respond to the Motion to Dismiss regarding Plaintiff’s § 1983 claims against Sheriff
5 Lombardo, Plaintiff has in effect conceded their dismissal. See L.R. 7-2(d) (“The failure of an
6 opposing party to file points and authorities in response to any motion . . . constitutes a consent
7 to the granting of the motion.”). Even still, the Court will outline the deficiencies regarding
8 these claims first as asserted against Sheriff Lombardo in his official capacity and next in his
9 individual capacity.

10 Plaintiff asserts § 1983 claims against Sheriff Lombardo in his official capacity. (Am.
11 Compl. ¶ 12, ECF No. 7). However, because a suit against a government officer in his official
12 capacity is “equivalent to a suit against the government entity itself,” the claims are properly
13 analyzed as Monell claims. *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991).
14 Pursuant to Monell, municipalities can be sued directly under § 1983 for violations of
15 constitutional rights. See *Monell v. New York City Dep’t of Soc. Servs.*, 436 U.S. 658, 690
16 (1978). Because an official capacity suit against a municipal officer is equivalent to a suit
17 against the government entity, the court may dismiss the officer as a redundant defendant where
18 both the officer and the entity are named. See *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles*
19 *Cty. Sheriff Dep’t*, 533 F.3d 780, 799 (9th Cir. 2008) (“When both a municipal officer and a
20 local government entity are named, and the officer is named only in an official capacity, the
21 court may dismiss the officer as a redundant defendant.”). Accordingly, the claims against
22 Sheriff Lombardo in his official capacity are dismissed with prejudice as redundant of those
23 against LVMPD.

24 Plaintiff also asserts the § 1983 claims against Sheriff Lombardo in his individual
25 capacity. (Am. Compl. ¶¶ 12, 34–47, 48–55). “Personal-capacity suits . . . seek to impose

1 individual liability upon a government officer for actions taken under color of state law. Thus,
2 . . . ‘to establish personal liability in a § 1983 action, it is enough to show that the official,
3 acting under color of state law, caused the deprivation of a federal right.’” *Hafer v. Melo*, 502
4 U.S. 21, 25 (1991) (quoting *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)). However, at
5 bottom, “each [g]overnment official, his or her title notwithstanding, is only liable for his or her
6 own misconduct.” *Iqbal*, 556 U.S. at 677.

7 To adequately plead a local government official’s personal liability, a plaintiff must
8 plead facts from which a court could reasonably infer (1) that the official was personally
9 involved in the alleged constitutional deprivation, or (2) the existence of a sufficient causal
10 connection between the supervisor’s wrongful conduct and the constitutional violation. *Hansen*
11 *v. Black*, 885 F.2d 642, 645–46 (9th Cir. 1989). Thus, personal, supervisory liability “exists
12 even without overt personal participation in the offensive act if supervisory officials implement
13 a policy so deficient that the policy itself is a repudiation of constitutional rights and is the
14 moving force of the constitutional violation.” *Id.*

15 Here, Plaintiff does not assert that Sheriff Lombardo was personally involved in, or even
16 present during, the alleged incident that resulted in Plaintiff’s injuries. Rather, Plaintiff asserts
17 that he suffered the alleged constitutional violations as a result of a policy that all Defendants,
18 including Sheriff Lombardo, either implemented or ratified. (Am. Compl. ¶¶ 57, 60). However,
19 Plaintiff’s Amended Complaint lacks any factual allegations specifically linking these policies
20 or actions to Sheriff Lombardo. Similarly, the Amended Complaint lacks any allegations of
21 discrete actions taken by Sheriff Lombardo that caused the alleged injuries. Accordingly,
22 because Plaintiff has failed to provide anything beyond insufficient conclusory allegations, or
23 respond to LVMPD’s Motion to Dismiss, the Court must dismiss the § 1983 claims against
24 Sheriff Lombardo in his personal capacity without prejudice. See *Iqbal*, 556 U.S. at 678 (citing
25 *Twombly*, 550 U.S. at 555).

2. State Claims against Sheriff Lombardo

Plaintiff's fourth, fifth, sixth, and seventh causes of action are for the state torts of negligence and/or reckless disregard, survivor's action, wrongful death, and negligent supervision, respectively. (Am. Compl. ¶¶ 68–78, 79–88, 89–98, 99–104). Each claim as alleged against Sheriff Lombardo fails.

First, Defendants allege that Sheriff Lombardo is entitled to immunity regarding Plaintiff's state law claims. (MTD 9:3–10:10). Nevada law immunizes certain officers and employees of political subdivisions for the acts or omissions of other persons. See NRS § 41.0335(1)(a)–(b). In particular, “[n]o actions may be brought against (a) a sheriff or county assessor which is based solely upon any act or omission of a deputy; (b) a chief of a police department which is based solely upon any act or omission of an officer of the department.” *Id.* Plaintiff's claims for negligence and/or reckless disregard, survivor's action, and wrongful death seek to hold Sheriff Lombardo liable for Defendant Officers' alleged acts instead of his own, and are therefore barred by Nevada law. Because Plaintiff could amend the complaint to hold Sheriff Lombardo liable for his own acts or omissions, the claims are dismissed without prejudice.

Next, Plaintiff's seventh claim seeks to hold Sheriff Lombardo liable under a theory of negligent supervision. However, Sheriff Lombardo enjoys immunity from such a claim under Nevada's discretionary immunity statute. See NRS § 41.032(2); *Beckwith v. Pool*, No. 2:13-cv-125-JCM-NJK, 2013 WL 3049070 at *6–7 (D. Nev. Jun. 17, 2013). Pursuant to § 41.032(2), no action may be brought against a state officer or employee or any state agency or political subdivision that is “[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the state or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.” NRS § 41.032(2). Nevada looks to federal

1 law addressing the Federal Tort Claims Act for guidance on what type of conduct discretionary
2 immunity protects. *Martinez v. Maruszczak*, 168 P.3d 720, 727–28 (Nev. 2007) (en banc).
3 Federal courts have held that “decisions relating to the hiring, training, and supervision of
4 employees usually involve policy judgments of the type Congress intended the discretionary
5 function exception to shield.” *Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000)
6 (citing cases). However, acts taken in bad faith are not protected by discretionary immunity
7 under Nevada law. See *Falline v. GNLV Corp.*, 823 P.2d 888, 891 (Nev. 1991); see also *Davis*
8 *v. City of Las Vegas*, 478 F.3d 1048, 1059–60 (9th Cir. 2007).

9 Plaintiff points to *Scott v. Las Vegas Metro. Police Dep’t*, No. 2:10-cv-01900-ECR,
10 2011 WL 2295178 (D. Nev. June 8, 2011), to argue that discretionary immunity does not apply
11 to negligent hiring, training, and supervision claims. However, *Scott* is inapposite. The court
12 pointed out in *Scott* that courts “often grant discretionary immunity to a state agency or political
13 subdivision with respect to its hiring, training and supervising decisions” but found that in “this
14 instance” Plaintiff’s claims relating to allegations of unlawful seizures and the use of excessive
15 force were not subject to discretionary immunity. *Scott*, 2011 WL 2295178, at *11. Indeed, the
16 great weight of authority in this district holds that discretionary immunity applies to decisions
17 relating to the hiring, training, and supervision of employees. See, e.g., *Bryan v. Las Vegas*
18 *Metro. Police Dep’t*, 349 F. App’x 132, 134 (9th Cir. 2009) (“Because Nevada looks to federal
19 case law to determine the scope of discretionary immunity, and because federal case law
20 consistently holds that training and supervision are acts entitled to such immunity, METRO
21 police is entitled to discretionary immunity on this claim [for negligent training and/or
22 supervision].”).

23 Because Plaintiff does not allege Sheriff Lombardo acted in bad faith, discretionary-
24 function immunity applies to Plaintiff’s negligence claims against him. Accordingly, the
25 negligent supervision claim against Sheriff Lombardo is dismissed without prejudice.

1 **B. Negligent Training and Supervision against LVMPD**

2 Defendants assert that LVMPD is entitled to the same discretionary immunity as Sheriff
3 Lombardo regarding the state law claim of negligent training and supervision. (MTD 10:12–
4 11:6). Because the analysis for discretionary immunity is the same for the municipality as it is
5 for its’ officers, discretionary immunity is appropriate for LVMPD for reasons discussed supra.
6 See Cloes v. City of Mesquite, 582 F. App’x 721, 726 (9th Cir. 2014) (stating that “[u]nder
7 section 41.032(2), discretionary immunity precludes an action against an immune contractor or
8 an officer or employee of the State or any of its agencies or political subdivisions.”).
9 Accordingly, the state law claim for negligent training and supervision is dismissed against
10 LVMPD without prejudice.

11 **C. Negligence and/or Reckless Disregard**

12 Defendants move to dismiss the fourth cause of action, negligence and/or reckless
13 disregard, as duplicative of the fifth cause of action, survivor’s action, and the sixth cause of
14 action, wrongful death. Defendants contend that because “both the survivor’s action and the
15 wrongful death claim arise out of the alleged ‘negligence, carelessness, recklessness, lack of
16 due care and prudence by [Defendants],” it should be dismissed as “it will be litigated through
17 the fifth and sixth causes of action.” (MTD 11:9–11:22).

18 A survival action is not a claim recognized by Nevada Law. In fact, “survival actions”
19 is a term used in NRS § 41.100 that permits a plaintiff to pursue any valid cause of action on
20 behalf of the decedent. See Conover v. Vons Stores, Inc., No. 2:11-cv-01806-GMN, 2012 WL
21 4482591, at *5 (D. Nev. Sept. 25, 2012). Thus, a survivor’s action does not exist as a claim in
22 and of itself, but a method under which a plaintiff may bring claims on behalf of a decedent. *Id.*

23 Further, the Court agrees that Plaintiff’s claim for negligence and/or reckless disregard is
24 duplicative of his wrongful death claim. (Am. Compl. ¶¶ 89–98). “Under Nevada’s wrongful
25 death statute, a wrongful death claim must be based on some negligence or other wrongful act

1 that causes the death of the decedent.” Id. at *4. Here, Plaintiff alleges that “[d]ue to the
2 negligence, carelessness, recklessness, lack of due care and prudence by Defendant Officers
3 and the Las Vegas Metropolitan Police Department, Ms. Gallucci eventually died as a result of
4 [her] injuries.” (Am. Compl. ¶ 90). Plaintiff further alleges that “Defendants’ negligence and
5 reckless disregard for other is the sole and proximate cause of the personal injuries, medical
6 expenses and death of Ms. Gallucci.” (Id. ¶ 93). These allegations merely restate the similar
7 allegations in Plaintiff’s negligence and/or reckless disregard claim. (See id. ¶¶ 71–72).

8 Accordingly, Plaintiff’s claim for negligence and or/ reckless disregard is dismissed with
9 prejudice. In addition, because a survivor’s action is not a claim in and of itself, it is also
10 dismissed with prejudice. See Omar v. Sea-Land Serv., Inc., 813 F.2d 986, 991 (9th Cir. 1987)
11 (“A trial court may dismiss a claim sua sponte under Fed.R.Civ.P. 12(b)(6) . . . where the
12 claimant cannot possibly win relief.”).

13 **IV. CONCLUSION**

14 **IT IS HEREBY ORDERED** that the Motion to Dismiss, (ECF No. 12), is **GRANTED**.
15 The following causes of action are **DISMISSED with prejudice**: the § 1983 claim against
16 Sheriff Lombardo in his official capacity; negligence and/or reckless disregard against all
17 Defendants; and survivor’s action against all Defendants. The following causes of action are
18 **DISMISSED without prejudice**: the § 1983 claim against Sheriff Lombardo in his individual
19 capacity; all state law claims against Sheriff Lombardo; and the negligent training and
20 supervision claims against LVMPD. If Plaintiff elects to file a second amended complaint,
21 Plaintiff shall have twenty-one days from the filing date of this Order to do so. Failure to file a
22 second amended complaint by this date shall result in the dismissal of Plaintiff’s claims
23 dismissed herein with prejudice.

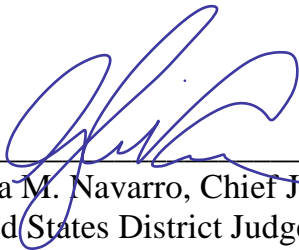
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1 **IT IS FURTHER ORDERED** that Plaintiff’s Motion to Amend/Correct the Complaint,
2 (ECF No. 32), is **GRANTED**.

3 **DATED** this 20 day of July, 2017.

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Gloria M. Navarro, Chief Judge
United States District Judge