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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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YOSEF L. MUSTAFANOS, et al.,

Plaintiffs,

v.

THE STATE OF NEVADA, et al.,

Defendants.

Case No. 3:16-cv-00254-MMD-WGC

ORDER

This is a civil rights action brought by a disabled Army veteran (Plaintiff Shirley Jean Clifton) and her guardian (Plaintiff Yosef L. Mustafanos). Before the Court are two motions for summary judgment to which Plaintiff has not responded: Defendant Laura Depaoli's motion for summary judgment ("Depaoli's Motion") (ECF No. 120) and Defendants Lyon County and Gregory Kantz's motion for summary judgment ("County Defendants' Motion") (ECF No. 123).

Also before the Court is Plaintiffs' motion for leave to file an amended complaint (ECF No. 131) and motion to add parties (ECF No. 132) ("Plaintiff's Motions").<sup>1</sup>

For the following reasons, the Court grants Depaoli's Motion and the County Defendants' Motion and denies Plaintiffs' Motions.<sup>2</sup>

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<sup>1</sup>Plaintiff's Motions do not qualify as responses to Depaoli's Motion or the County Defendants' Motion and cannot serve as devices to avoid summary judgment. See, e.g., *Harris v. Best Buy Stores, L.P.*, No. 15-CV-00657-HSG, 2015 WL 8527332, at \*4 (N.D. Cal. Dec. 11, 2015) (quoting *Ennis v. Sigurdson*, 185 F.3d 866 (9th Cir. 1999)) ("The Ninth Circuit has stated a 'motion for leave to amend is not a vehicle to circumvent summary judgment.'").

<sup>2</sup>The Court finds Plaintiffs' Motions deficient for a number of reasons, making it unnecessary to consider any responses thereto.

1 **I. BACKGROUND**

2 The Court incorporates herein the facts as described in the Court’s previous order.  
3 (ECF No. 95.) The dispute in this case revolves around the marriage and separation of  
4 Mustafanos and non-moving Defendant Deborah June Strode as well as the guardianship  
5 of Mustafanos’s sister, Plaintiff Clifton, though the Complaint is lengthy, repetitive, and  
6 confusing. (See *id.* at 1, 3; ECF No. 1.)

7 **II. DEPAOLI’S MOTION (ECF NO. 120)**

8 Depaoli moves for summary judgment on all of Plaintiffs’ claims. The Court will  
9 consider the claims against Depaoli in three groups: claims arising under 42 U.S.C. §§  
10 1983 and 1985 (Counts 1, 7, 8, and 9), claims arising under state law (Counts 3-6 and 17-  
11 18), and claims that do not appear to be directed at Depaoli (Counts 2, 10-16, and 20-22).

12 **A. Claims Arising Under 42 U.S.C. §§ 1983 and 1985**

13 Counts 1, 7, 8, and 9 arise under 42 U.S.C. §§ 1983 and 1985 (see ECF No. 1 at  
14 36, 46-48) and cannot succeed against Depaoli because she is not a state actor. See  
15 *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003) (“A § 1983 plaintiff must  
16 demonstrate . . . that the defendant acted under color of state law.”); *Sykes v. Cal. Dep’t*  
17 *of Motor Vehicles*, 497 F.2d 197, 200 (9th Cir. 1974) (“Under Section 1985, a plaintiff is  
18 required to allege . . . that the defendants acted under color of state law and authority.”).  
19 Accordingly, the Court will grant summary judgment in favor of Depaoli on Counts 1, 7, 8,  
20 and 9.

21 **B. State Law Claims**

22 Count 3 is a claim for trespass. (ECF No. 1 at 40-42.) “Under Nevada law, ‘[t]o  
23 sustain a trespass action, a property right must be shown to have been invaded.’” *Silver*  
24 *State Broad., LLC v. Beasley FM Acquisition Corp.*, No. 2:11-CV-01789-MMD, 2012 WL  
25 4049481, at \*6 (D. Nev. Sept. 12, 2012) (quoting *Lied v. Clark County*, 579 P.2d 171,  
26 173-74 (Nev. 1978)). Depaoli argues that she did not invade a property right because her  
27 only visits to the property were at the invitation of Defendant Strode, an owner of the

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1 property. (ECF No. 120 at 11.) Plaintiffs present no evidence to the contrary. Accordingly,  
2 the Court will grant summary judgment in favor of Depaoli on Count 3.

3 Count 4 is a claim for conversion. (ECF No. 1 at 42-43.) “Conversion is ‘a distinct  
4 act of dominion wrongfully exerted over another’s personal property in denial of, or  
5 inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such  
6 title or rights.’” *Evans v. Dean Witter Reynolds, Inc.*, 5 P.3d 1043, 1048 (2000). “Further,  
7 conversion is an act of general intent, which does not require wrongful intent and is not  
8 excused by care, good faith, or lack of knowledge.” *Id.* (citation omitted). “Whether a  
9 conversion has occurred is generally a question of fact for the jury.” *Id.* (citation omitted).  
10 Depaoli argues that the property she helped to move did not belong to Plaintiffs. (See ECF  
11 No. 120 at 12.) Plaintiffs have offered no evidence to the contrary. Accordingly, the Court  
12 will grant summary judgment in favor of Depaoli on Count 4.

13 Count 5 is a claim for conspiracy. (ECF No. 1 at 43-45.) “An actionable civil  
14 conspiracy consists of a combination of two or more persons who, by some concerted  
15 action, intend to accomplish an unlawful objective for the purpose of harming another, and  
16 damage results from the act or acts.” *Moonin v. Nev. ex rel. Dep’t of Pub. Safety Highway  
17 Patrol*, 960 F. Supp. 2d 1130, 1142-43 (D. Nev. 2013) (quoting *Consol. Generator–  
18 Nevada, Inc. v. Cummins Engine Co., Inc.*, 971 P.2d 1251, 1256 (Nev. 1998)). Depaoli  
19 argues that there is no evidence “that there was anything nefarious or ill-intentioned with  
20 regard to the plan to assist Strode in obtaining her personal property.” (ECF No. 120 at  
21 13.) Plaintiff has offered no evidence in this regard. Accordingly, the Court will grant  
22 summary judgment in favor of Depaoli on Count 5.

23 Count 6 is a claim for intentional infliction of emotional distress (“IIED”). (ECF No.  
24 1 at 45-46.) “To state a claim for [IIED] the plaintiff must establish: ‘(1) extreme and  
25 outrageous conduct with either the intention of, or reckless disregard for, causing  
26 emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress,  
27 and (3) actual or proximate causation.’” *Welder v. Univ. of S. Nev.*, 833 F. Supp. 2d 1240,  
28 1245 (D. Nev. 2011) (quoting *Dillard Dep’t Stores, Inc. v. Beckwith*, 989 P.2d 882, 886

1 (Nev. 1999)). Depaoli argues that Plaintiffs have produced no evidence to show that  
2 Depaoli acted with intent to cause harm, that her conduct was extreme or outrageous, or  
3 that Plaintiffs have suffered extreme emotional distress. (ECF No. 120 at 14.) Plaintiffs  
4 have offered no evidence in this regard. Accordingly, the Court will grant summary  
5 judgment in favor of Depaoli on Count 6.

6 Counts 17 and 18 are defamation claims. (See ECF No. 1 at 53-55.) “An action for  
7 defamation requires the plaintiff to prove four elements: ‘(1) a false and defamatory  
8 statement; (2) an unprivileged publication to a third person; (3) fault, amounting to at least  
9 negligence; and (4) actual or presumed damages.’” *Clark Cty. Sch. Dist. v. Virtual Educ.*  
10 *Software, Inc.*, 213 P.3d 496, 503 (Nev. 2009) (quoting *Pope v. Motel 6*, 114 P.3d 277,  
11 282 (Nev. 2005)). Depaoli argues that she did not make a false and defamatory statement.  
12 (ECF No. 120 at 16.) Plaintiffs have offered no evidence to the contrary. Accordingly, the  
13 Court will grant summary judgment in favor of Depaoli on Counts 17 and 18.

#### 14 **C. Inapplicable Claims**

15 The remaining claims do not seem to be directed toward Depaoli: Counts 2, 10-16,  
16 and 20-22. Nevertheless, Depaoli seeks summary judgment, citing to the lack of any  
17 allegations against her with respect to these claims. Plaintiffs have not offered any  
18 argument to the contrary. Accordingly, the Court will grant summary judgment in favor of  
19 Depaoli on these claims as well.

### 20 **III. THE COUNTY DEFENDANTS’ MOTION (ECF NO. 123)**

21 The County Defendants move for summary judgment on all of Plaintiffs’ claims. The  
22 Court will consider each claim independently, except for Counts 10-18, 20, and 22, which  
23 the Court will consider in two groups: state law tort claims to which discretionary immunity  
24 applies (Counts 11-12 and 14-18) and claims that do not seem to be directed towards the  
25 County Defendants (Counts 10, 13, 20, and 22).

#### 26 **A. Count 1**

27 In Count 1, Plaintiffs seem to seek liability directly against Lyon County based on  
28 the alleged existence of an unlawful custom or policy that led to a violation of their Fourth

1 Amendment rights as well as Lyon County's alleged failure to adequately train its officers  
2 on Fourth Amendment procedures. (See ECF No. 1 at 36-38.)

3 "A government entity may not be held liable under 42 U.S.C. § 1983, unless a  
4 policy, practice, or custom of the entity can be shown to be a moving force behind a  
5 violation of constitutional rights." *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir.  
6 2011) (citing *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658, 694  
7 (1978)). To establish Monell liability, a plaintiff must prove "(1) that [the plaintiff] possessed  
8 a constitutional right of which [s]he was deprived; (2) that the municipality had a policy; (3)  
9 that this policy amounts to deliberate indifference to the plaintiff's constitutional right; and,  
10 (4) that the policy is the moving force behind the constitutional violation." *Id.* (alteration in  
11 original) (quoting *Plumeau v. Sch. Dist. No. 40 Cty. of Yamhill*, 130 F.3d 432, 438 (9th  
12 Cir.1997)). Failure to train may amount to a policy of "deliberate indifference," if the need  
13 to train was obvious and the failure to do so made a violation of constitutional rights likely.  
14 *City of Canton v. Harris*, 489 U.S. 378, 390 (1989).

15 Under either theory, Plaintiffs must establish a deprivation of constitutional rights.  
16 The County Defendants argue that Plaintiffs have no evidence to show that Kantz violated  
17 their Fourth Amendment rights because Kantz neither searched Plaintiffs' residence nor  
18 seized anything during his short time at the property in question. (ECF No. 123 at 11.) In  
19 addition, the property at issue—taken by other individuals—did not belong to Plaintiffs.  
20 (*Id.*) Plaintiffs have failed to produce evidence to the contrary. Accordingly, the Court will  
21 grant summary judgment in favor of the County Defendants on Count 1.

## 22 **B. Count 2**

23 In Count 2, Plaintiffs allege that Kantz violated certain provisions of the Nevada  
24 Constitution: Article 1, Section 8 (substantive due process) and Article 1, Section 18  
25 (prohibition on unlawful search and seizure). (ECF No. 1 at 38-40.) Defendants argue that  
26 Plaintiffs cannot succeed on this claim because they have produced no evidence that  
27 Kantz conducted a search or seized any items. (ECF No. 123 at 13.) Plaintiffs have not

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1 produced any such evidence. Accordingly, the Court will grant summary judgment in favor  
2 of the County Defendants on Count 2.

3 **C. Count 3**

4 Count 3 is a claim for trespass. (ECF No. 1 at 40-42.) The County Defendants argue  
5 that Kantz was on the property lawfully at the request of Defendant Strode, one of the  
6 owners of the property. (ECF No. 123 at 20.) Plaintiffs have produced no evidence to the  
7 contrary. Accordingly, the Court will grant summary judgment in favor of the County  
8 Defendants on Count 3.

9 **D. Count 4**

10 Count 4 is a claim for conversion. (ECF No. 1 at 42-43.) The County Defendants  
11 argue that there is no evidence to show that Kantz was responsible for actually removing  
12 anything from the property. (ECF No. 123 at 21.) Plaintiffs have produced no evidence to  
13 the contrary. Accordingly, the Court will grant summary judgment in favor of the County  
14 Defendants on Count 4.

15 **E. Count 5**

16 Count 5 is a claim for conspiracy. (ECF No. 1 at 43-45.) For the applicable legal  
17 standard, see supra Section II(B). The County Defendants argue that Plaintiffs have failed  
18 to offer any facts to suggest that there was some form of agreement between Kantz and  
19 any other individual to accomplish an unlawful objective. (ECF No. 123 at 23.) Moreover,  
20 the County Defendants argue, Plaintiffs have not identified what the unlawful objective  
21 was. (Id.) Plaintiffs fail to provide any evidence in support of their claim. Accordingly, the  
22 Court will grant summary judgment in favor of Plaintiffs on Count 5.

23 **F. Count 6**

24 Count 6 is a claim for IIED. (ECF No. 1 at 45-46.) For the applicable legal standard,  
25 see supra Section II(B). The County Defendants argue that there is no evidence that Kantz  
26 participated in the acts allegedly giving rise to the claim (entering Plaintiff Clifton's  
27 bedroom, stripping a blanket off her bed, and trashing her bedroom). (ECF No. 123 at 22.)

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1 Plaintiffs have produced no evidence in this regard. Accordingly, the Court will grant  
2 summary judgment in favor of the County Defendants on Count 6.

3 **G. Count 7**

4 Liberally construed, Count 7 alleges that the County Defendants were part of a  
5 conspiracy to deprive Plaintiffs of their civil rights under 42 U.S.C. § 1985. (See ECF No.  
6 1 at 46-47.) In support of this claim, Plaintiffs make no allegations regarding Lyon County  
7 and only one allegation regarding Kantz: “Deputy Gregory Kantz behaved in the manner  
8 that he did because he did not want an American of African descent to be married to a  
9 Caucasian woman and he attempted to assist her at [sic] breaking the law to benefit her.”  
10 (Id. at 46.) The County Defendants argue that they are entitled to summary judgment on  
11 this claim because “Plaintiffs have offered no facts or evidence which would suggest that  
12 the actions of the Defendants were in any way motivated by, or constituted, intentional  
13 discrimination on account of the Plaintiffs['] race.” (ECF No. 123 at 16.)

14 “Under Section 1985, a plaintiff is required to allege: (1) That the purpose of the  
15 conspiracy was to deprive the plaintiff of equal protection, equal privileges and immunities,  
16 or to obstruct the course of justice in the state; (2) that the defendants intended to  
17 discriminate against the plaintiff; (3) that the defendants acted under color of state law and  
18 authority; (4) that the acts done in furtherance of the conspiracy resulted in an injury to the  
19 plaintiff’s person or property or prevented him from exercising a right or privilege of a  
20 United States citizen.” Sykes, 497 F.2d at 200. The Court agrees with the County  
21 Defendants. Plaintiffs have not adduced any evidence to support the second element (or  
22 any other element) of a claim under § 1985. Accordingly, the Court will grant summary  
23 judgment in favor of the County Defendants on Count 7.

24 **H. Count 8**

25 Liberally construed, Plaintiffs allege a violation of their equal protection rights under  
26 42 U.S.C. § 1983 in Count 8. (See ECF No. 1 at 47-48.) The County Defendants argue  
27 that this claim cannot succeed because it is supported only by conclusory allegations and  
28 because Plaintiffs have not offered any evidence to show that Kantz was motivated by a

1 discriminatory purpose or was even aware of Plaintiff Mustafanos's race before conducting  
2 the initial civil standby at issue. (ECF No. 123 at 15.)

3 "To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection  
4 Clause of the Fourteenth Amendment a plaintiff must show that the defendants acted with  
5 an intent or purpose to discriminate against the plaintiff based upon membership in a  
6 protected class." *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).

7 The Court agrees with the County Defendants that Plaintiffs have not adduced any  
8 evidence to show that the County Defendants acted with the purpose to discriminate  
9 against Plaintiffs on the basis of their race. Accordingly, the Court will grant summary  
10 judgment in favor of the County Defendants on Count 8.

11 **I. Count 9**

12 Count 9 is a substantive due process claim brought under 42 U.S.C. § 1983. (See  
13 ECF No. 1 at 48-49.) The County Defendants argue that they are entitled to summary  
14 judgment on Count 9 because it is subsumed by Plaintiffs' claims regarding violation of  
15 his Fourth Amendment rights. (See ECF No. 123 at 16.) The Court agrees with Defendants  
16 and will grant summary judgment in their favor on Count 9. See *Albright v. Oliver*, 510 U.S.  
17 266, 273 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)) ("Where a  
18 particular Amendment 'provides an explicit textual source of constitutional protection'  
19 against a particular sort of government behavior, 'that Amendment, not the more  
20 generalized notion of substantive due process, must be the guide for analyzing' such a  
21 claim.").

22 **J. Count 21**

23 Count 21 alleges a claim under 18 U.S.C. § 1519 based on the County Defendants'  
24 alleged tampering with Kantz's body camera. (ECF No. 1 at 58.) The County Defendants  
25 argue that 18 U.S.C. § 1519 does not confer a private right of action. (ECF No. 123 at 7.)  
26 The Court agrees with the County Defendants and will grant summary judgment in their  
27 favor on Count 21. See *Peavey v. Holder*, 657 F. Supp. 2d 180, 190 (D.D.C. 2009), *aff'd*,

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1 No. 09-5389, 2010 WL 3155823 (D.C. Cir. Aug. 9, 2010) (“[T]o date, no circuit or Supreme  
2 Court opinion has held that § 1519 creates a private right of action.”).

3 **K. State Law Tort Claims**

4 Regarding the state law tort claims (Counts 11-12 and 14-18),<sup>3</sup> the County  
5 Defendants argue that Kantz is entitled to discretionary immunity under NRS § 41.032(2).  
6 (ECF No. 123 at 24.) “Under [NRS] § 41.032(2), no action may be brought against an  
7 officer or employee of Nevada ‘[b]ased upon the exercise or performance or the failure to  
8 exercise or perform a discretionary function or duty on the part of the State or any of its  
9 agencies or political subdivisions or of any officer, employee, or immune contractor of any  
10 of these, whether or not the discretion involved is abused.’” *Jensen v. Las Vegas Metro.*  
11 *Police Dep’t*, No. 2:17-CV-01219-JAD-VCF, 2018 WL 4088012, at \*3 (D. Nev. Aug. 27,  
12 2018) (alterations in original) (quoting NRS § 41.032(2)). To qualify for discretionary  
13 immunity, a state official’s actions must “(1) involve an element of individual judgment or  
14 choice and (2) be based on considerations of social, economic, or political policy.” *Id.*  
15 (citing *Martinez v. Maruszczak*, 168 P.3d 720, 729 (Nev. 2007)).

16 Police officers are generally immune from suit when the act in question required  
17 personal deliberation, decision, and judgment. *Sandoval v. Las Vegas Metro. Police Dep’t*,  
18 756 F.3d 1154, 1168 (9th Cir. 2014) (quoting *Davis v. City of Las Vegas*, 478 F.3d 1048,  
19 1059 (9th Cir. 2007)). Police officers are not immune in connection with actions taken in  
20 bad faith. *Id.* (citing *Davis*, 478 F.3d at 1059).

21 The County Defendants argue that Kantz is entitled to discretionary immunity  
22 because he made decisions during a fluid and highly contentious domestic situation that  
23 required personal deliberation, decision, and judgment. (ECF No. 123 at 25.) The County  
24 Defendants further argue that there is no evidence in this case that Kantz acted in bad  
25 faith or with a willful disregard of Plaintiffs’ rights. (*Id.*) Plaintiffs have offered no evidence  
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27 <sup>3</sup>These claims are for breach of contract (Count 11), intentional interference with  
28 advantageous business relationship (Count 12), legal malpractice/negligence (Count 14),  
assault and battery (Count 15), filing a false police report (Count 16), and defamation  
(Counts 17-18). (ECF No. 1 at 49-55.)

1 to support their claim. Accordingly, the Court will grant summary judgment in favor of the  
2 County Defendants on Plaintiffs' state law tort claims (Counts 11-12 and 14-18).

3 **L. Inapplicable Claims**

4 The remaining claims do not seem to be directed toward the County Defendants:  
5 Counts 10, 13, 20, and 22.<sup>4</sup> To the extent they are, the Court will grant summary judgment  
6 in favor of the County Defendants on these claims as well.

7 **IV. PLAINTIFFS' MOTIONS (ECF NOS. 131, 132)**

8 The Court construes Plaintiffs' motions for leave to amend the Complaint and to  
9 add parties as one motion for leave to file an amended complaint. However, Plaintiff failed  
10 to comply with LR 15-1 regarding amended pleadings, which requires the moving party to  
11 "attach the proposed amended pleading to a motion seeking leave of the court to file an  
12 amended pleading." Moreover, the scheduling order in this case expressly established the  
13 deadline of November 15, 2017, for amending the pleadings and adding parties. (ECF No.  
14 109 at 8.) Plaintiffs have not demonstrated good cause for their delay in seeking  
15 amendment after the deadline. Finally, Plaintiffs assert that they "have discovered some  
16 minor factual errors in the original complaint and have discovered some additional factual  
17 matters, intimately connected to the facts in the case" but do not identify what these facts  
18 are. (See ECF No. 132 at 2-3.) Thus, the Court cannot determine whether the interests of  
19 justice weigh in favor of permitting amendment despite Plaintiffs' significant procedural  
20 errors. See Fed. R. Civ. P. 15(a).

21 Accordingly, the Court will deny Plaintiffs' Motions.

22 **V. CONCLUSION**

23 The Court notes that the parties made several arguments and cited to several cases  
24 not discussed above. The Court has reviewed these arguments and cases and determines

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28 <sup>4</sup>These are claims for false arrest and false imprisonment (Count 10), violation of  
the Fair Bail Act of 1984 (Count 13), judicial misconduct (Count 56), and deprivation of  
religious rights while incarcerated (Count 22). (ECF No. 1 at 49, 51, 55, 58.)

1 that they do not warrant discussion as they do not affect the outcome of the motions before  
2 the Court.

3 It is therefore ordered that Defendant Laura Depaoli's motion for summary  
4 judgment (ECF No. 120) is granted.

5 It is further ordered that Defendants Lyon County and Gregory Kantz's motion for  
6 summary judgment (ECF No. 123) is granted.

7 It is further ordered that Plaintiffs' motion to amend (ECF No. 131) and motion to  
8 add parties (ECF No. 132) are denied.

9 DATED THIS 27<sup>th</sup> day of September 2018.



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MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE

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