IN THE SUPREME COURT OF THE STATE OF NEVADA

JUDY PALMIERI,

Appellant,

vs.

CLARK COUNTY, a political subdivision of the STATE OF NEVADA; DAWN STOCKMAN, CE096, individually,

Respondents.

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Case No.: 65143

Appeal
From the Eighth Judicial District Court, Clark County
The Honorable Gloria Sturman, District Judge
District Court Case No. A-11-640631-C

RESPONDENTS' ANSWERING BRIEF

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2. Even if such a duty exists under the Constitution, was the duty "clearly established" at the time of the warrant in this case, and if not, why would qualified immunity not apply?

3. Without a clearly established constitutional duty to verify the identity of an informant, and without any evidence whatsoever of an intent to wrongfully harm Appellant, how would Appellant's tort claims survive?

II.

COUNTERSTATEMENT OF THE CASE

This is a civil rights action against Clark County ("the County") and one of its employees, Dawn Stockman ("Stockman") (collectively, "Respondents"). In sum, Plaintiff/Appellant, Judy Palmieri ("Appellant") asserts that Stockman obtained a warrant to search her home without probable cause. As the theory goes, the informant who called in the tip that led to the warrant was an imposter with a grudge

against Appellant, and Appellant contends that Respondents had an obligation to discover this alleged charade, and if they had, they would not have sought the warrant.

Appellant asserts another equally-attenuated theory. She claims that individuals within both Clark County and the City of Las Vegas, none of whom are named parties, also have a grudge against Appellant and therefore were more than happy to instruct Stockman to use the informant's tip to harass Appellant.

There are two fundamental problems with Appellant's theories. First, the law did not require Respondents to inquire into the identity of the informant because the identity of the informant was not material to establishing probable cause. Second, Appellant discovered no evidence whatsoever of a conspiracy or a grudge. In fact, Appellant admitted that Stockman, who is the lone individual named in this lawsuit, has no malice towards Appellant.

After discovery, the district court entered summary judgment against Appellant. The district court's order should be affirmed.

III.

COUNTERSTATEMENT OF RELEVANT FACTS

A. Relevant Details Surrounding the Application for the Warrant

Stockman is a licensed veterinary technician who is employed by Clark County Animal Control. 1 App. 162. She is trained in, and charged with, enforcing

local ordinances governing the welfare of animals. 1 App. 163. As part of her responsibilities, Stockman fields incoming complaints. Stockman regularly investigates complaints and, when necessary, obtains search warrants founded upon probable cause. 1 App. 163-64.

The facts of this case are best relayed by simply quoting Stockman's application for the search warrant at issue:

> On May 10, 2010 Richard Molinari Animal Control Supervisor for the City of Las Vegas contacted Clark County Animal Control. He was forwarding a complaint from Kaitlyn Nichols on a property located in the County. The property was 4302 Callahan Ave Las Vegas NV, 89120 belonging to Judy Palmieri.
>
> On May 10, 2010 I spoke with Ms. Kaitlyn Nichols by phone regarding her complaint. She then told me that she use [sic] to work for Mrs. Palmieri at Meadow Pets. She was asked to help Mrs. Palmieri move some boxes at her place of residence. She arrived at 4302 Callahan Ave Las Vegas NV, 89120. Once Ms. Nichols was inside the residence she saw several animals in the house. Ms. Nichols also told me there was several animals kept in the garage in kennels. The animals on the property looked very thin and several appeared to have mats and fecal madder [sic] all over them. Ms. Nichols said a lot of the animals appeared to be unhealthy. Ms. Nichols also stated Mrs. Palmieri also houses animals that are sick or too young for the pet shop in her house.
>
> After speaking with Ms. Nichols, I did a search on Judy Palmieri's address and name in our records. I found only one time Clark County Animal Control had been to Mrs. Palmieri's house at 4302 Callahan. There were multiple times Clark County Animal Control had been out to her Pet Shop Bark Avenue. The calls were always related to

> health and welfare and sanitation.
>
> Listed are two examples of those calls,[1]
>
> On September 15, 2007 we had a call for 4175 S. Grand Canyon, which was Bark Avenue Pets. Mrs. Palmieri was the owner of that pet store as well. The call was a complaint was [sic] for sanitation and health and welfare of the animals. Officer D. Harney responded. When she arrived she found multiple violations for sanitation, over crowding and failure to provide medical records.
>
> On January 13, 2006 Clark County Animal Control was called out to 4302 Callahan Ave Las Vegas NV, 89120, regarding dead animals in the garage. Officer Jason Elff responded. The Resident Judy Palmieri stated to him she owns Meadows Pets at Meadows mall [sic] and advised there were no dead animals on property, she was unwilling to allow us to check garage without warrant. Mrs. Palmieri advised Officer Elff to leave the property until such time [as] had a warrant. Officer Elff was able to smell foul odor from end of driveway, unable to state with any certainty it was a dead animal.

1 App. 47-48.

Other information could have been placed in the application. For instance, Stockman received a written statement from Kaitlyn Nichols via fax. 1 App. 164. Stockman then took another call from Nichols to confirm the tip. *Id*. (The fax cover sheet was saved, but the fax itself was lost.) Also, Stockman had worked for

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[1] Had Stockman had access to other records, she may have discovered that Appellant had been issued citations by the City of Las Vegas and the City of Henderson on other occasions. Appellant had even been indicted by a grand jury in 2000 on 18 counts of "selling [pets] on false pretenses." 2 App. 249-51.

Appellant years prior (and left on good terms). 1 App. 162. Therefore, she had personal knowledge that Appellant did indeed own a pet store.

In addition, using the Assessor's website, Stockman verified that the address given by the informant matched the name. 1 App. 167. As such, the informant provided information that could be, and was, corroborated in terms of the name of the accused, her address, and her occupation. Again, these corroborated facts were consistent with at least two prior complaints.

Following standard procedures, Stockman submitted the warrant application to two of her supervisors, then to the District Attorney's office. 1 App. 163-64; 1 App. 48. A deputy district attorney approved it, and District Judge Timothy Williams signed it. *Id*.

B. <u>Relevant Details Surrounding the Execution of the Warrant</u>

As relayed in Stockman's report and in her deposition testimony, Stockman, another officer from Animal Control, and a police officer met at Appellant's home to execute the warrant. 1 App. 54-55; 1 App. 174. They knocked on the front door, but there was no answer. 1 App. 175. They then knocked on the garage door, at which point they heard dogs barking, further corroborating the tip. 1 App. 54. They entered the home from the backyard. *Id*. Inside, they encountered Appellant and searched the home and garage. 1 App. 176. They found 24 adult dogs and five puppies. 1 App. 56. None had proof of rabies vaccination. *Id*. Although the 20+

dogs in the garage were not in ill health, two dogs in the home appeared sickly and were taken to a veterinarian because Appellant could not produce medical records. *Id*.; 1 App. 177.

Stockman cited Appellant for not having a Dog Fancier's Permit or a Special Use Permit allowing her to have such a large number of dogs at her residence. 1 App. 56. She was also cited for not having a permit to breed and sell puppies. *Id*. Finally, she was cited for failing to provide proof of rabies vaccinations. *Id*.

The search itself took just over one hour. 1 App. 176-78; 2 App. 245. Appellant was not handcuffed. *Id*. In fact, she stayed on her property during the search and interacted with the officers. *Id*. By all accounts, the search itself was reasonably amicable. *Id*.

After the search, Appellant spent $2,500 to ensure that all the dogs were vaccinated for rabies and were spayed or neutered. 2 App. 253. Other than $5,000 in attorneys' fees and $500 for a new gate to alleviate subjective fears of additional searches, Appellant could not identify any other direct monetary damage. 2 App. 252-57.

Appellant claims that, while executing the warrant, Stockman told her that "the county has never been able to get anything on you. . . ." 2 App. 276-77. Appellant insists this is evidence of malice and conspiracy. However, under cross examination, Appellant admitted that the call from the informant "wasn't

concocted." 2 App. 277. "They got a call from someone, yes, I know that." *Id*. As for Stockman specifically, Appellant admitted that there is no ill-will:

> Q: I just need your honest statement on this. Do you think that's what Dawn Stockman is doing, she's in on this conspiracy against you?
>
> A: No. I think Dawn came in as an officer instructed to go ahead and serve this warrant and see what she could come up with.
>
> Q: You don't think she has anything against you personally?
>
> A: No.

2 App. 265.

Appellant also insists that the informant was not really Kaitlyn Nichols. However, Stockman testified that she believed, and still believes, it was. 1 App. 167-68 ("I believe I was speaking with Kaitlyn Nichols;" "I believed that I was speaking with Kaitlyn, so I believe it [the information provided in the application for the warrant] to be correct"); 1 App. 173 ("I still believe I was talking to Kaitlyn Nichols.")

Appellant elicited no information from Stockman that indicated any conspiracy or grudge. There is likewise no testimony that Stockman would have acted differently had she suspected it was not really Kaitlyn Nichols. Appellant never asked Stockman what she would have done had the informant been anonymous, or if there were suspicions about the identity.

Appellant also took the depositions of other Animal Control officers, but could not uncover any evidence whatsoever that Clark County was or is "out to get" Appellant. 2 App. 280 (Tori Olson); 2 App. 300 (Danielle Harney).[2]

C. Relevant Details Surrounding the Lawsuit, Which Turns on a "Duty to Verify an Informant's Identity"

Appellant contends that the warrant was issued without probable cause. Again, the fundamental premise of this contention is that the informant was not the "real" Kaitlyn Nichols. As the theory goes, the informant was someone with a grudge against Appellant.[3] When the call came in, this gave Clark County Animal Control "just what it needed" – a reason to "finally get" Appellant. Op. Br. at pp. 3-4; 2 App. 271-77.

After deposing Appellant, Respondents moved for summary judgment. 1 App. 17. Appellant opposed the motion with an affidavit from the "real" Kaitlyn

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[2] Appellant had sued Harney over a different incident in 2007. 1 App. 193-96. U.S. District Judge Roger Hunt granted a motion to dismiss in 2011. *Id*.

[3] Appellant's theory also focuses on several unsupported "facts," many of which are repeated, without citation, in her Opening Brief. For instance, Appellant insists that "Clark County Animal Control sought out the [sic] Mrs. Palmieri with the specific purpose of finding criminal activity. . . ." Op. Br. at p. 3. Appellant also states that prior criminal prosecutions "became the basis for the search of Mrs. Palmieri's home." *Id*. at p. 4. There is no proof of any such "facts," and the Opening Brief contains no citations to the record supporting such "facts." NRAP. 28(7).

The most embellished unsupported statement may be that the "charges [against Appellant] were ultimately dismissed . . . pursuant to a Motion to Suppress." Op. Br. at p. 8. Appellant filed a motion to suppress, but the motion was never heard let alone granted.

Nichols stating she was not the caller. 1 App. 158. Based on the affidavit, the district court denied the motion until a deposition of the "real" Kaitlyn Nichols could occur. 2 App. 343. However, Nichols was supposedly in the Navy on the east coast, and a subpoena could never be served on her. 2 App. 345.

After the close of discovery, Respondents re-noticed their motion for summary judgment. 2 App. 349. The district court conducted a hearing, then later issued a well-reasoned decision rejecting Appellant's theories and granting summary judgment. 2 App. 375. In sum, the district court found that Stockman and the County (a) had probable cause to obtain the warrant and (b) are immune from this suit.

IV.

SUMMARY OF THE ARGUMENT

The law is well-established: law enforcement officers may obtain search warrants if the totality of the circumstances give rise to probable cause. Informants are common, even *anonymous* informants, yet probable cause often still exists.

Here, the informant was not anonymous, but rather may have lied about her actual name. However, because the proper analysis required the district court to step into Stockman's shoes *at the time of the warrant*, and since Stockman had more than adequate information to corroborate the accusations received during the call before obtaining the warrant, there is no constitutional violation in this case.

To hold otherwise, this Court will have to find a new rule of constitutional law – that officers have a blanket duty to verify the identities of informants. In fact, all causes of action turn on one fundamental premise: Stockman and the County must have violated a right, whether constitutional or common law, when they sought and obtained a search warrant *without verifying the actual identity of the informant*. Because there is no such duty, all claims necessarily fail.

V.

ARGUMENT

A. Under the Applicable Standard of Review, Appellant Bore a Heavy Burden to Come Forward with Substantial Evidence that Her Constitutional Rights Were Violated

1. Summary Judgment Standard

This Court reviews the grant of summary judgment *de novo*. *Wood v. Safeway, Inc.,* 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "Summary judgment is appropriate and 'shall be rendered forthwith' when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" *Id.*, *quoting* NRCP 56(c); *Tucker v. Action Equip. and Scaffold Co*., 113 Nev. 1349, 1353, 951 P.2d 1027, 1029 (1997).

To effectuate the purpose of summary judgment ("the just, speedy, and inexpensive determination of every action"), the proper inquiry is on the two key

terms: (1) material and (2) genuine. "The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the non-moving party." *Wood* at 731, 121 P.3d at 1031.

"While the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to "do more than simply show that there is some metaphysical doubt" as to the operative facts. . . ." 121 Nev. at 732, 121 P.3d at 1031.[4] The nonmoving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." *Id*.[5]

2. General Framework for a Qualified Immunity Analysis

Federal law provides a cause of action for violations of the federal Constitution. 42 U.S.C. § 1983. However, "[u]nder the qualified immunity doctrine, 'government officials performing discretionary functions ... are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

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[4] *Quoting Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Posadas v. City of Reno*, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993).

[5] *Quoting Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983).

Ortega v. Reyna, 114 Nev. 55, 59, 953 P.2d 18, 21 (1998), *abrogated on other grounds by Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007), *quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

The Court's *de novo* review of a grant of summary judgment based on qualified immunity involves two distinct steps. Government officials are not entitled to qualified immunity if (1) the facts "[t]aken in the light most favorable to the party asserting the injury ... show [that] the [defendants'] conduct violated a constitutional right" and (2) the right was clearly established at the time of the alleged violation. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

The Court may address these two prongs in either order. *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). Whether the defendants violated a constitutional right and whether the right was clearly established at the time of the violation are questions of law. *Serrano v. Francis*, 345 F.3d 1071, 1080 (9th Cir. 2003).

B. The District Court Properly Dismissed Appellant's Constitutional Claims

1. Taking the Evidence in the Light Most Favorable to Appellant, Respondents Did Not Violate Any Constitutional Right

a. Based on the Totality of the Circumstances, there was Probable Cause

"To successfully assert a civil rights claim under 42 U.S.C. § 1983, [Appellant] must show that [Defendant] acted under color of state law to deprive

h[er] of a right, privilege, or immunity protected by the Constitution or laws of the United States." *Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 458, 168 P.3d 1055, 1061 (2007).

Here, Appellant alleges a violation of her Fourth Amendment right to be free from unreasonable searches and seizures. A search is constitutional if supported by probable cause. Thus, if there was probable cause, there can be no § 1983 claim. *Id*., *citing Saucier, supra*.

"It is firmly established . . . that the finding of probable cause may be based on slight, even marginal, evidence." *State v. Boueri*, 99 Nev. 790, 795, 672 P.2d 33, 36 (1983). "'Probable cause'" requires that law enforcement officials have trustworthy facts and circumstances which would cause a person of reasonable caution to believe that it is more likely than not that the specific items to be searched for are seizable and will be found in the place to be searched." *Keesee v. State*, 110 Nev. 997, 1002, 879 P.2d 63, 66 (1994).[6] "When the issuance of a search warrant is based upon information obtained from a confidential informant, the proper standard for determining probable cause for the issuance of the warrant is whether, under the *totality of the circumstances*, there is probable cause to believe that contraband or evidence is located in a particular place." *Id*. at 1002, 879 P.2d at 67, *citing Illinois*

[6] The district court relied heavily on *Keesee*, and the case is highly instructive.

v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). "The reviewing court is not to conduct a de novo probable cause determination but instead is merely to decide whether the evidence viewed as a whole provided a substantial basis for the magistrate's finding of probable cause." *Id*.

In *Keesee*, a warrant was issued to search a residence for illegal drugs. The warrant was based, in part, on information received from an informant. After a motion to suppress was denied, the defendant pleaded guilty and appealed, asserting that the officers had a duty to conduct an investigation to determine whether the informant was reliable and trustworthy. This Court held otherwise, concluding that no such investigation was required because the information the informant gave was very specific and was corroborated by other information known to the officers. *Id*. at 1003, 879 P.2d at 67.

Under well-established law, probable cause does not require certainty nor even a preponderance of the evidence. Rather, all that is required is that a there is a *fair probability* that evidence of a crime or contraband will be found. *Dougherty v. Covina*, 654 F.3d 892, 897-98 (9th Cir. 2011), *citing Illinois v. Gates, supra*.

Here, probable cause existed based on the totality of the circumstances. "Kaitlyn Nichols" gave Stockman very specific information, including Appellant's name, Appellant's address, and Appellant's occupation. The informant provided an objectively plausible story – that a pet store owner was housing many dogs in her

garage. The credibility of that story was bolstered by specific facts. For instance, the informant stated that she was employed by Appellant and had personally visited the home to assist her employer move boxes. The informant described details about the condition of the dogs (overcrowding, matted fur). This was not a random tip with ambiguous or implausible allegations.

Stockman verified that, indeed, the address given by "Nichols" was owned by Appellant, that Appellant owned a pet store, and that Appellant had been investigated in the past for other similar abuses. The specific information indicated that crimes were being committed, and the information was reliable because the basic facts about the location and identity of the alleged wrongdoer were corroborated. Moreover, before the officers actually executed the warrant, they heard dogs barking in the garage.

Compare a scenario where "Kaitlyn Nichols" phoned in a complaint giving the wrong address, or an incorrect name of the violator, or the violator was not a known pet shop owner, or there was no noise coming from the garage. Possibly then Appellant could complain about a lack of probable cause, but under the circumstances here, there was no reason to suspect that the informant was giving a false identity, or that she had a grudge, or most importantly, that the information about the dogs in the garage was false.

. . .

In sum, there were "trustworthy facts and circumstances" that would have led Stockman, her supervisors, a deputy district attorney, and a judge to conclude that there was a "fair probability" that dogs were in danger and/or that County Codes were being violated. Based on the totality of the circumstances, and given the deference to Judge Williams' contemporaneous review, probable cause existed.

b. Stockman was Under No Constitutional Duty to Verify the Informant's Identity

As the district court found, Appellant has cited no case for the proposition that Stockman was under any constitutional duty to doubt the identity of the informant or to investigate the informant's "real" identity. Stockman was merely under an obligation to use the totality of the circumstances to determine whether probable cause existed.

The judgment here is consistent with well-established federal law. Where a party alleges that a warrant was obtained upon inaccurate information affecting probable cause, the warrant is still constitutional unless any "erroneous statements or omissions" in the search warrant affidavit "were made knowingly and intentionally, or with reckless disregard for the truth." *United States v. Elliott*, 322 F.3d 710, 714 (9th Cir.2003) (citations omitted). Moreover, even if there is such a finding, the warrant is only unconstitutional if "the affidavit's false material [is] set to one side, [and] the affidavit's remaining content is insufficient to establish probable cause." *Id*.

Elliott relies on many cases, including *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Appellant has continually raised *Franks* in this case. "*Franks* established a criminal defendant's right to an evidentiary hearing when he made a substantial showing of deliberate falsehood or reckless disregard for the truth in a search warrant affidavit and demonstrated that but for the dishonesty, the affidavit would not support a finding of probable cause." *Hervey v. Estes*, 65 F.3d 784, 788 (9th Cir. 1995), *as amended on denial of reh'g* (Dec. 5, 1995), *citing Franks*, 438 U.S. at 171-72, 98 S.Ct. at 2684–85.

Franks occurred in a *criminal* context. In a *civil* context, "a plaintiff can only survive summary judgment on a defense claim of qualified immunity if the plaintiff can *both* establish a substantial showing of a deliberate falsehood or reckless disregard and establish that, without the dishonestly included or omitted information, the magistrate would not have issued the warrant." *Hervey* at 789 (emphasis in original). "Put another way, the plaintiff must establish that the remaining information in the affidavit is insufficient to establish probable cause." *Id*. "The showing necessary to get to a jury in a section 1983 action is the same as the showing necessary to get an evidentiary hearing under *Franks*." *Id*., *citing Snell v. Tunnell*, 920 F.2d 673, 698 (10th Cir.1990), *cert. denied*, 499 U.S. 976, 111 S.Ct. 1622, 113 L.Ed.2d 719 (1991).

. . .

This Court has utilized these overarching principles in *Kelly v. State*, 84 Nev. 332, 440 P.2d 889 (1968). There, a criminal defendant argued that a warrant was insufficient because it was based on an affidavit that did not specifically set forth the source of the affiant's information, nor did it set forth the reliability of the source. This Court rejected these arguments:

> [T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleading have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

Id. at 338, 440 P.2d at 893, *quoting United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965).

Here, after conducting discovery, Appellant could not undercover any evidence that Stockman knowingly or recklessly made untruthful statements in her warrant application. There is no evidence that Stockman suspected it was an imposter, let alone that any of the imposter's *material* statements were untrue. Rather, upon reasonable inquiry, Stockman confirmed much of the information relayed by the informant; e.g., that Appellant owned a pet shop, lived at the stated

address, and had many dogs in the garage. Stockman also corroborated the allegations by finding similar charges against Appellant in the past.

Stated another way, it is *immaterial* that the informant allegedly lied about her identity. *Wood v. Safeway, supra*. The identity had little or nothing to do with the establishment of probable cause. Removing the name "Kaitlyn Nichols" from the search warrant application, probable cause still would have been established upon the remaining, specific assertions. If even *anonymous* tips can establish probable cause, then certainly a tip from an imposter can as well, especially where the officer has no facts undermining the veracity of the information received from the informant. *Illinois v. Gates, supra*.

A rule to the contrary would be inconsistent with this Court's holdings in *Kelly*. It would also be inconsistent with Appellant's own case, *Franks*, because there is no evidence (let alone *substantial* evidence) that Stockman intentionally or recklessly misstated the name of the informant, and there is no showing (let alone a *substantial* showing) that Judge Williams would not have signed the warrant had the application expressed skepticism over the name of the informant.

A rule requiring officers to obtain a driver's license or social security card is simply unrealistic and impractical. It would discourage searches by requiring reviewing courts to take a much more "grudging and negative" look at applications. Not only does Appellant ask this Court to adopt a drastic new approach to the law

of search and seizure, but as the facts in this case demonstrate, such an approach would have left dogs in danger and Appellant in violation of the law. In sum, there was no duty to verify Kaitlyn Nichols' identity before applying for the warrant.

2. Even if Respondents Violated a Constitutional Right, the Right Was Not Clearly Established at the Time of the Alleged Violation

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). "Qualified immunity under federal law is not merely a defense to liability; it is 'an entitlement not to stand trial or face the other burdens of litigation.'" *Id*., *quoting Saucier v. Katz*, *supra*, and *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). "Accordingly, a defense of qualified immunity should be resolved at the earliest possible stage in litigation, as a finding of qualified immunity is an appropriate basis for granting summary judgment." *Id*.

"The pertinent inquiry in determining whether an officer is entitled to qualified immunity for a Fourth Amendment violation is whether a reasonable officer *could have believed* his conduct lawful under the *clearly established principles* of law governing that conduct." *Ortega v. Reyna, supra,* 114 Nev. at 59, 953 P.2d at 21, *citing Alexander v. County of Los Angeles*, 64 F.3d 1315, 1319 (9th Cir.1995) (emphasis added). "An allegation of malice is not sufficient to defeat immunity if the officer acted in an objectively reasonable manner." *Id*., *citing*

Hansen v. Black, 885 F.2d 642, 644 (9th Cir.1989). The *Ortega* Court went on to further explain the application of the doctrine of qualified immunity:

> In determining whether the law is clearly established, "[t]he operation of this standard ... depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038–3039, 97 L.Ed.2d 523 (1987). The right which the official is alleged to have violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640, 107 S.Ct. at 3039. The issue is "the objective (albeit fact-specific) question whether a reasonable officer could have believed [appellant's] warrantless [arrest] to be lawful, in light of clearly established law and the information the ... officer[] possessed." *Id.* at 641, 107 S.Ct. at 3040. Stated another way, we look not at whether there was an arrest without probable cause, but rather whether the trooper reasonably could have believed that his conduct was lawful in light of clearly established law and the totality of the circumstances. *Alexander*, 64 F.3d at 1319.

Ortega at 59-60, 953 P.2d at 21.

Here, there is no rule of law, let alone a "clearly established" one, that required Stockman to verify the identity of the informant. As demonstrated above, even information from anonymous informants can give rise to probable cause. Stockman had no reason to believe that she was not speaking with the "real" Kaitlyn Nichols. Stockman corroborated much of the information she received from the informant. The story itself was detailed and credible on an objective basis.

. . .

Courts are even more likely to find qualified immunity where the applicant sought the advice of a lawyer, and the lawyer finds probable cause. *Ewing v. City of Stockton*, 588 F.3d 1218 (9th Cir. 2009). Here, a deputy district attorney reviewed the application and approved it before sending it to a district court judge. Even before that, Stockman had supervisors review and approve the application.

In sum, Appellant's claims of constitutional violations are barred by qualified immunity, and on that additional basis, the district court's order must be affirmed.

C. The District Court Properly Dismissed Appellant's *Monell* Claim

There is no *respondent superior* liability under 42 U.S.C. § 1983, but an action against a municipality will lie if there is an official policy, practice or custom that was the "moving force" behind a violation of someone's constitutional rights. *Monell v. City of New York*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). To establish a *Monell* claim, Appellant must prove that (1) she possessed a constitutional right that was violated, (2) that Clark County had an official policy, (3) that the policy amounts to a deliberate indifference of the Appellant's constitutional rights, and (4) that the policy was the moving force behind the violation. *Plumeau v. Yamhill Sch. Dist*., 130 F.3d 432, 438 (9th Cir. 1997).

A plaintiff may base his or her claim of municipal liability on three theories: commission, omission, or ratification. *See Clouthier v. Cnty. of Contra Costa*, 591 F.3d 1232, 1249–50 (9th Cir.2010). A plaintiff seeking to establish liability for a

municipality's omissions must show that the municipality's "deliberate indifference led to its omission and that the omission caused [a municipal] employee to commit the constitutional violation." *Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1186 (9th Cir. 2002). "To prove deliberate indifference, the plaintiff must show that the municipality was on actual or constructive notice that its omission would likely result in a constitutional violation." *Id.*

Here, the most fundamental element of Appellant's *Monell* claim is missing – there is no constitutional violation because there was probable cause. Even if the Court concludes otherwise, Appellant's *Monell* claim is clearly of the "omission" type because she asserts that the County should have had a policy that would have required Stockman to verify the identity of the informant. However, any constitutional violation the Court would find would be new, unique, and not reasonably anticipated based on the law surrounding anonymous informants. As such, Appellant did not and cannot show that the County had actual or constructive notice that the lack of such a policy would lead to a constitutional violation.

Appellant argues that this is a "ratification" case, not an "omission" case. Mere "acquiescence" is wholly insufficient in ratification cases, however. *Gillette v. Delmore*, 979 F.2d 1342, 1348 (9th Cir. 1992). The law required Appellant to show that the County made a "deliberate choice from among various alternatives to follow a particular course of action." *Id., citing Pembaur v. City of Cincinnati*, 475

U.S. 469, 483, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986). Likewise, the law requires "that a policymaker approve a subordinate's decision *and the basis for it* before the policymaker will be deemed to have ratified the subordinate's discretionary decision" (and thus converting it into a "policy"). *Id*. (emphasis in original), *citing City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988). Moreover, ratification is after-the-fact "affirmative" or "express" "approvals" of the underlying wrongful conduct of the municipal employee. *Fuller v. City of Oakland, Cal.*, 47 F.3d 1522 (9th Cir. 1995); *Christie v. Iopa*, 176 F.3d 1231 (9th Cir. 1999).

Here, there is no evidence that any supervisor at Clark County affirmatively or expressly approved Stockman's decision to proceed with the application without verifying the identity of the informant. There is likewise no proof that the County approved the *basis* for Stockman's decision. As such, Appellant failed in her burden to come forward with evidence of ratification, and the district court properly dismissed the *Monell* claim.

D. The District Court Properly Dismissed Appellant's Tort Claims

1. Every Common Law Claim Required that Probable Cause be Lacking

Each of Appellant's state law claims required that the County acted either negligently or intentionally to harm Appellant. *See Butler ex rel. Biller v. Bayer,* 123 Nev. 450, 461, 168 P.3d 1055, 1063 (2007) (for negligence, requiring a breach

of a duty of care and affirming summary judgment where no duty exists as a matter of law); *LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877, 879 (2002) (for malicious prosecution, requiring a lack of probable cause and malice); *Jordan v. State ex rel. Dep't of Motor Vehicles & Pub. Safety*, 121 Nev. 44, 74–75, 110 P.3d 30, 51 (2005), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n. 6, 181 P.3d 670, 672 n. 6 (2008) (for conspiracy, requiring an "agreement. . . to unlawfully harm" and "an act of fraud in furtherance thereof"); *Star v. Rabello*, 97 Nev. 124, 125, 625 P.2d 90, 92 (1981) (for intentional infliction of emotional distress, requiring "extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress").

In order to oppose summary judgment, Appellant had the burden to come forward with evidence of such intentional or negligent conduct. *Wood, supra*. However, as for intentional conduct, Appellant freely admitted that Stockman had no intent to harm Appellant. There is otherwise no evidence in the record suggesting Stockman had the intent to harm, let alone malice. As for negligent conduct, there is no duty to verify the name of an informant as a matter of law.

In sum, because probable cause existed in this case, Appellant has no viable common law cause of action against either Stockman or the County (through the acts of Stockman). Put most plainly, Respondents simply did not do anything wrong.

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2. The District Court Properly Found that Discretionary Immunity Barred All Tort Claims

a. Statement of Law Before and After Martinez v. Maruszczak

Even if the Court identifies a question of fact as to some actionable harm, discretionary immunity would still bar the tort claims. As the *Ortega* Court explained, qualified immunity bars federal constitutional claims, while state discretionary immunity under NRS 41.032(2) bars all state claims. *Ortega, supra*, 114 Nev. at 62, 953 P.2d at 23. In *Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007), the Court thoroughly reviewed its prior jurisprudence on the discretionary function exception to the waiver of sovereign immunity. The Court found that "Nevada's statutory language mirrors the Federal Tort Claims Act," and proceeded to look at federal court decisions for guidance. The Court then adopted the United States Supreme Court's two-part test to determine whether an act is discretionary in nature. *Id*. at 435. The test is known as the *Berkovitz-Gaubert* test.[7]

Under the first criterion, "the acts alleged to be negligent must be discretionary, in that they involve an 'element of judgment or choice.'" *Martinez*, 123 Nev. at 445, 168 P.3d at 728. "If the challenged conduct meets this first criterion . . . the court must consider the second criterion: 'whether [the] judgment is of the

[7] *See Berkovitz v. United States*, 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988); *United States v. Gaubert*, 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991).

kind that the discretionary-function exception was designed to shield.'" *Id., quoting* *Berkovitz* and *Gaubert*. The court further held:

> [C]ertain acts, although discretionary, do not fall within the discretionary-function exception's ambit because they involve 'negligence unrelated to any plausible policy objectives.' For example, a government employee who falls asleep while driving her car on official duty is not protected by the exception because her negligent judgment in falling asleep 'cannot be said to be based on the purposes that the regulatory regime seeks to accomplish.' *Id.* at 728-729 (citation omitted).

In applying the *Berkovitz-Gaubert* test, courts must consider the legislature's intent in enacting the discretionary function exception; i.e., "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Martinez* at 446, 168 P.3d at 729.[8] The Court went on to state:

> Thus, if the injury-producing conduct is an integral part of governmental policy-making or planning, if the imposition of liability might jeopardize the quality of the governmental process, or if the legislative or executive branch's power or responsibility would be usurped, immunity will likely attach under the second criterion. *Id.*[9]

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[8] *Citing United States v. Varig Airlines*, 467 U.S. 797, 814, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984).

[9] *Citing Horta v. Sullivan*, 4 F.3d 2, 19 (1st Cir. 1993).

The Court applied this test in a constitutional context in *Ransdell v. Clark County*, 124 Nev. 847, 192 P.2d 756 (2008). There, the Court agreed that the County's decision to abate a nuisance was discretionary in nature and grounded in social, economic, and political policy.

Prior to *Martinez*, this Court interpreted NRS 41.032(2) broadly to bar state tort claims against law enforcement officers. *See Ortega*, 114 Nev. at 62, 953 P.2d at 23 (police officer entitled to immunity where he used his judgment in stopping the plaintiff, arresting her, and taking her to jail); *Maturi v. Las Vegas Metro. Police Dept*., 110 Nev. 307, 309-10, 871 P.2d 932, 934 (1994) (arresting officers' decision to handcuff plaintiff behind his back rather than in front was discretionary).

The Court has found one narrow exception. If an officer's actions are "attributable to bad faith, immunity does not apply whether an act is discretionary or not." *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888 (1991); *see also Jordan v. State Dep't of Motor Vehicles*, 121 Nev. 44, 49 n. 66, 110 P.3d 30 (2005). Such "bad faith" is akin to an "abuse" of the officer's considerable discretion. In other words, if an act "completely transcends the circumference of authority granted the individual or entity," NRS 41.032(2) would not apply. *Falline* at 1009, 823 P.2d at 892, n. 3. To meet this standard, the plaintiff must generally demonstrate "personal animus" towards the plaintiff. *Id*.

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This Court does not appear to have specifically re-employed these tests post-*Martinez*, but did reference *Falline* in *City of Boulder City v. Boulder Excavating, Inc.*, 124 Nev. 749, 759, 191 P.3d 1175, 1182 (2008) (holding that city entitled to discretionary immunity for decision to terminate contractor). The federal courts have specifically cited *Ortega* and *Maturi* post-*Martinez*. *See, e.g., Carey v. Nevada Gaming Control Bd*., 279 F.3d 873, 878 (9th Cir.2002); *Davis v. City of Las Vegas*, 478 F.3d 1048, 1059-60 (9th Cir. 2007).

This Court did employ *Martinez* in a case involving a warrant in an **unpublished** decision. *See Gonzalez v. Las Vegas Metro. Police Dep't*, No. 61120, 2013 WL 7158415, at *1 (Nov. 21, 2013). There, the Court held that immunity applied to bar state claims arising from an allegation that the warrant was obtained without probable cause. The decision does not reference the standard under *Ortega*/*Maturi*. Instead, the Court cited *Santiago v. Mass. Dep't of State Police*, 2013 WL 680685, at *9 (D. Mass. 2013), for the proposition that "officers' decisions regarding investigations and when to seek warrants for arrests are based on considerations of public policy." 2013 WL 7158415, at *3.

Appellant attempts to distinguish *Gonzalez* by citing to *Sandoval v. Las Vegas Metro. Police Dep't*, 756 F.3d 1154 (9th Cir. 2014). However, *Sandoval* was about a warrantless search where police pointed guns at and handcuffed three innocent boys in their home and then killed their dog, facts egregious enough to qualify as

"bad faith" under *Falline*. *Sandoval* in no way supports a proposition that the *Ortega/Maturi/Falline* tests have been abandoned. Nor does it stand for a proposition that it is bad faith not to verify the identity of an informant.

b. Under Either Ortega/Maturi/Falline or Martinez v. Maruszczak, Respondents are Immune

Here, Appellant herself admitted that Stockman did not have any personal animus. Rather, the only assertion Appellant made about animus is that she is convinced that Stockman acted upon orders, from others, to "get" Appellant. These allegations are "pure whimsy, speculation, and conjecture." They do not have evidentiary support in the record whatsoever, and even if they did, Appellant would be suing the wrong defendant. Thus, under *Ortega/Maturi/Falline*, there is no evidence of "bad faith" sufficient enough to overcome discretionary immunity under NRS 41.032(2), and the deference traditionally given to law enforcement officers should bar the tort claims.

Moreover, using the *Berkovitz-Gaubert* test itself adopted in *Martinez*, NRS 41.032(2) applies in this case. First, Stockman's acts themselves were discretionary in nature. After receiving the tip, she decided to apply for a search warrant. She decided what information to corroborate and what information to place in the warrant. Thus, her actions involved "an element of judgment or choice," satisfying the first criterion.

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Second, whether to verify the names is a decision grounded in social, economic, and political policy. Stockman works in a fast-paced environment. Her decisions depend on the credibility of those who call her, and the facts they relay. Her role is to protect animals pursuant to the Clark County Code and the policies of this State, and to do so in an effective yet efficient manner. Verifying identity would take time and effort, and it could impede investigations without any real demonstration that it would actually protect the civil rights of the accused. As such, this is not an area in which courts should second-guess the decisions of those municipal employees. The public charges them with investigating violations of the law, and we count on them balancing various factors to get their jobs done.

Appellant relies on *Butler ex rel. Biller v. Bayer*, *supra*, to argue that that this Court should not find discretionary immunity. *Butler* is post-*Martinez* and concludes that the decision of prison officials to drop off a prisoner with disabilities to his former girlfriend who lived in a small trailer is not entitled to discretionary immunity. The Court held that a negligence claim could proceed because the officials had a general duty to exercise reasonable care and they knew the former girlfriend was not prepared to accept the prisoner. He needed substantial care. So a jury could find a duty breached, and immunity would not save the officials. *Butler*, 123 Nev. 450, 464-67, 168 P.3d 1055, 1065-67.

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However, *Butler* is not analogous because (a) unlike the general duty of care to inmates, there is no general duty to verify the identity of informants, and (b) unlike the notice the officials had of impending harm due to the former girlfriend's lack of preparedness, there is no foreseeability here because Stockman had no notice that the informant may not have been the "real" Kaitlyn Nichols.

In sum, even if the Court determines that genuine issues of material fact exist as to the tort claims, discretionary immunity would still bar them. As such, the district court was correct in dismissing the tort claims on this additional basis.

E. The Most Analogous Case Cited By Either Party Below is Very Compelling and its Reasoning Should be Adopted by this Court

The Second Circuit has addressed a situation fairly similar to that presented here. *See Fabrikant v. French*, 691 F.3d 193 (2nd Cir. 2012). There, the Humane Society, acting on behalf of the city and state, obtained a warrant to search a home after receiving tips about abused animals. No one answered when they knocked, so they used a ladder to enter from the upper floor. They found the owner of the pets inside. They handcuffed her and held her in a police car. They confiscated numerous dogs, and while the plaintiff was awaiting trial, had the pets neutered. Months later, a jury acquitted the plaintiff and she sued under § 1983 and for malicious prosecution.

As in our case, the owner claimed that the informants lied when they talked to the officers and claimed that the officers knew or should have known. As in our

case, there were previous inspections by animal control officers.

The court upheld the district court's grant of summary judgment, holding that both (a) probable cause existed for the original warrant and (b) qualified immunity protected the officers. The court reasoned that immunity applied regardless of whether the officers' error (if there was one) was a mistake of law or a mistake of fact. 691 F.3d at 212.

Consistent with *Franks*, *Kelly*, and *Keesee*, *supra*, the court went on to state that a plaintiff claiming that a warrant is invalid has to make a substantial showing that the officer *intentionally or recklessly* made a false statement. 691 F.3d at 214. It is not enough to show *later* that an informant lied. What matters is what a reasonable officer would have believed *at the time*. The court held:

> We agree with the district court that Fabrikant's claims of malicious prosecution, unreasonable search and seizure, and First Amendment retaliation fail because defendants had probable cause to believe Fabrikant committed animal cruelty. Crucially, Fabrikant does not contest that multiple witnesses reported to the SPCA that Fabrikant was abusing of her animals; she merely argues that the witnesses were lying. . . .

Id. at 215-16.

Here, although the number of tips received by animal control officers was much smaller than in *Fabrikant* (while the deprivation suffered by Appellant was likewise much smaller), there is very little fundamental difference in the theories asserted. Stockman relied on an informant. The informant may have been lying

about her identity, but there is no evidence that Stockman actually suspected that or should have suspected that. Moreover, it is entirely irrelevant who actually called, because the name of the informant had nothing to do with the establishment of probable cause. Probable cause arose from the informant's statements that dogs appeared to be in danger, Stockman's efforts to corroborate basic information, and Appellant's prior history of complaints. As in *Fabrikant*, the tip here was credible given the totality of the circumstances. As such, probable cause existed and Stockman is entitled to immunity from constitutional claims and torts.

VI.

CONCLUSION

In order to have survived summary judgment, it was Appellant's burden to come forward with evidence that Stockman knew or should have known that Kaitlyn Nichols was not the informant and that such information would undermine probable cause. Appellant could not meet that burden, and so on appeal, she essentially asks this Court to create a new blanket rule that does not exist in any jurisdiction. Appellant would have this Court require law enforcement officers to *always* verify the identity of an informant, even if the identity is not material, and even though verification is highly impractical. No such rule is required constitutionally or under the law of torts. As such, Respondents have not legally harmed Appellant, and even if some actionable harm could possibly be found, Respondents would immune. The

district court recognized this, and its order should be affirmed in total.

DATED this 19th day of November, 2014.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in size 14 font in Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 8,406 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous, interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada

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Rules of Appellate Procedure.

DATED this 19th day of November, 2014.

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I HEREBY CERTIFY that on the 19th day of November, 2014, I submitted the foregoing ANSWERING BRIEF for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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