

1 2315
2 PAUL A. LIPPARELLI
3 Assistant District Attorney
4 Bar No. 3993
5 P.O. Box 11130
6 Reno, NV 89520
7 (775) 337-5700

8 ATTORNEY FOR WASHOE COUNTY

9 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
10 **IN AND FOR THE COUNTY OF WASHOE**

11 TERRY W. TIERNAY,

12 Plaintiff,

Case No. CV13-01460

13 v.

Dept. No. 3

14 RICHARD GAMMICK; BONNIE WEBER;
15 KITTY JUNG; and DAVID HUMKE,

16 Defendants.. /

17 **MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5)**
18 **(Failure to State a Claim upon which Relief can be Granted)**

19 **MOTION TO QUASH CITATION**

20 Comes now, Assistant District Attorney Paul Lipparelli, on behalf of Washoe County
21 District Attorney, Richard A. Gammick and/or Washoe County Commissioners David Humke,
22 Bonnie Weber and Kitty Jung (“County Defendants”), and moves this court to dismiss the
23 complaint filed on July 3, 2013 and to quash the service of the citation issued by the court on
24 July 15, 2013. These Motions are based on the following Statement of Points and Authorities
25 and upon all the papers, pleadings and records on file with the court in this matter.

26 **STATEMENT OF POINTS AND AUTHORITIES**

Introduction.

The plaintiff seeks an order from the court for the removal from elected office of the Washoe County District Attorney and 3 Washoe County Commissioners (“County Defendants”).

1 The County Defendants move for an order dismissing the complaint and to quash the service of
2 the citation that was issued in reliance upon the deficient complaint. The complaint fails to
3 allege any facts that constitute neglect of duty, malpractice or malfeasance as required by NRS
4 283.440. The essence of the complaint is that AB 545 of the 2011 Nevada Legislature which
5 changed population thresholds in hundreds of Nevada statutes was bad for the citizens of
6 Washoe County and the County Defendants should be removed from office for supporting it or
7 failing to oppose it. Not a single sentence of the complaint recites the law that imposes a duty on
8 the district attorney or a county commissioner to support or oppose a bill being considered by the
9 legislature. From the face of the complaint it is clear the actions or inactions of the County
10 Defendants relating to the AB 545 are completely within their discretion. Put simply, none of
11 the County Defendants has any duty of office that requires support or opposition for the
12 enactments of the Nevada Legislature. The complaint is frivolous and apparently designed to
13 harass or embarrass the duly-elected officials against whom it is made. As further described
14 below, the County Defendants ask the court to impose sanctions against the plaintiff to
15 discourage him and others from attempting to invoke the enormous power of NRS 283.440 in
16 such a plainly groundless and improper fashion.

17 **The Statute Authorizing Court-ordered Removal from Office.**

18 The Nevada Constitution commands “Provision shall be made by law for the removal
19 from Office of any Civil Officer other than those in this Article previously specified, for
20 Malfeasance, or Nonfeasance in the Performance of his duties.” Nevada Constitution, Article 7,
21 Section 4. NRS 283.440 satisfies that mandate and provides: “Any person who is now holding
22 or who shall hereafter hold any office in this State and who refuses or neglects to perform any
23 official act in the manner and form prescribed by law, or who is guilty of any malpractice or
24 malfeasance in office, may be removed therefrom as hereinafter prescribed in this section, except
25 that this section does not apply to [judges, certain state officers and legislators].” A complainant
26 must file a verified complaint alleging the certain office-holder: (a) Has been guilty of charging

1 and collecting any illegal fees for services rendered or to be rendered in the officer's office; (b)
2 Has refused or neglected to perform the official duties pertaining to the officer's office as
3 prescribed by law; or (c) Has been guilty of any malpractice or malfeasance in office. The
4 proceedings are conducted in a summary manner and after a hearing if the court finds the charges
5 are sustained, the court enters a decree "the party complained of shall be deprived of the party's
6 office." NRS 283.440(2). Only the second two allegations are made by the complaint in this
7 case: the defendants have "refused or neglected to perform the official duties pertaining to the
8 officer's office as prescribed by law" and the defendants have "been guilty of any malpractice or
9 malfeasance in office." See, Complaint, p. 1, lines 20-23.

10 **Removal from Office is Appropriate Only in Extreme and Extraordinary Occasions.**

11 Removal is a civil proceeding, but the effect is very severe. The Nevada Supreme Court
12 has written that "statutory removal proceedings are highly penal in their effect and quasi criminal
13 in their nature." Jones v. Eighth Judicial District Court, 67 Nev. 404, 417, 219 P.2d 1055, 1061-
14 62 (1950) (Writ of prohibition halts district court's proceeding with 3 out of 4 counts in removal
15 complaint against district attorney.) When an elected official's failure to perform a statutory
16 duty is "proven by substantial evidence," the Nevada Supreme Court can sustain a lower court's
17 judgment ordering removal from office. Schumacher v. State ex rel. Furlong, 78 Nev. 167, 175,
18 370 P.2d 209, 213 (Nev. 1962) (emphasis added). The court also sanctioned this description of
19 removal: "It is an extreme and extraordinary measure, intended only for extreme and
20 extraordinary occasions." Id., at 418, 1062 citing Ex parte Jones and Gregory, 41 Nev. 523, 173
21 P. 885, 888 (McCarran C.J. concurring). In those extraordinary circumstances after a Nevada
22 court finds refusal or neglect "to perform any official act in the manner and form prescribed by
23 law", or "malpractice or malfeasance in office", an office-holder may be removed. NRS 283.440
24 (emphasis added.) The instant complaint does not present the extreme and extraordinary
25 occasion when removal is warranted.

26 //

1 **Supporting, Opposing or Remaining Neutral on State Legislation is not a Duty of Office**
2 **that Provides a Basis for Removal from Office.**

3 To constitute neglect of duty (omission to act), the acts which it is alleged were omitted
4 must be required duties of the public officer. Buckingham v. Fifth Judicial Dist. Court in and for
5 Mineral County, 102 P.2d 632, 635 (Nev. 1940) (Removal action against county clerk/treasurer
6 fails to charge neglect of duty or malfeasance because alleged wrongful handling of checks and
7 cash did not fall within duties of the office.) What official act is prescribed by law which the
8 County Defendants have refused or neglected to perform? Here is what the complaint alleges are
9 the duties of the County Defendants:

- 10 • "...to know and understand all relevant subjects addressed in AB545."
11 Complaint, p. 2, line 27 to p.3 line 1.
- 12 • "...to act in the public interest to solicit and coordinate input from all concerned
13 parties, to include; [sic] citizens during public hearings, other local government
14 entities, businesses and other interest groups." Complaint, p. 3, lines 1-3.
- 15 • "...to provide the legislature input on each of the approximately 240 sections
16 (NRS) affecting Washoe County." Complaint, p.3, lines 3-4.
- 17 • "...to provide realistic FISCAL IMPACT for the numerous relevant sections of
18 AB545." Complaint, p. 3, lines 5-6 (emphasis original.)
- 19 • "...to review and understand the 1981 case law cited in the Digest Section of
20 AB545 which requires that population based [sic] laws meet the following three
21 criteria..." Complaint, p. 3, lines 6-7.
- 22 • "...to recognize and support the constitution provisions and requirements for
23 General Laws, Uniform Local Governments and Single Subject bills, all three
24 provisions were violated with the enactment of AB545." Complaint, p. 3, lines
25 10-14.

26 None of the alleged duties contains a citation to legal authority. They appear to be nothing more
than the plaintiff's personal political philosophy or his hopes. What constitutional, statutory or
other legal duty do the County Defendants have to "know and understand all relevant subjects
addressed in AB545", to "provide realistic fiscal impact for the numerous relevant sections of

1 AB545” or to “provide the legislature input on each of the approximately 240 sections [of AB
2 545](NRS) affecting Washoe County”? There are no such duties. The complaint’s other made-
3 up duties are to solicit and coordinate all input from all concerned parties concerning AB 545; to
4 review and understand case law which requires that population-based laws meet certain criteria;
5 and to recognize and support the constitution provisions and requirements which were allegedly
6 violated with the enactment of AB545. Those sound like possible duties or the political
7 obligations of Nevada legislators and their legislative counsel, but are certainly not the duties of
8 county commissioners or the county district attorney. If they were, it would be a simple matter
9 to cite the legal authority that imposes those duties. Assume for the moment the complainant can
10 establish through substantial evidence the factual assertions of the complaint, as a matter of law
11 those assertions do not provide a basis for removal because the complaint does not establish that
12 the County Defendants have any legal duty to act or not act with regard to AB 545—or any other
13 piece of legislation.

14 In 1962 the Nevada Supreme Court upheld the removal from office of the Ormsby
15 County Assessor finding that he had failed to perform the clear statutory duties such as
16 determining the full cash value of property in the county, refusing or neglecting to list and assess
17 all property in the county, refusing or neglecting to assess property in the county that is subject to
18 taxation, and refusing or neglecting to demand from each property owner a statement of property
19 owned. Schumacher v. State ex rel. Furlong, 78 Nev. at 167, 370 P.2d at 209. The court found
20 that the assessor’s contentions that he merely acts as other assessors do, that he lacked the proper
21 tools to perform those duties or that he lacked knowledge about some of his statutory duties did
22 not constitute legal justification for omissions of his statutory duties which he effectively
23 admitted. The glaring distinction between Schumacher and this case is that here there are no
24 allegations of the failure to perform statutory duties. Instead, there are only the vague and
25 theoretical duties made up by the plaintiff. The removal statute requires it be shown an office-
26 holder refused or neglected to perform any official act in the manner and form prescribed by law.

1 NRS 283.440. The complaint fails to set forth any official act that is prescribed by law that was
2 not performed by the County Defendants with regard to AB 545. The neglect of duty allegations
3 fail as a matter of law and must be dismissed.

4 Ten pages of the complaint (pp. 10-14) are devoted to examples of rights and privileges
5 that the people of Washoe County “forfeited” as a result of the passage of AB 545. The plaintiff
6 points out the following apparently negative effects: the loss of room tax revenue for the school
7 district, maintaining the number of seats on the county commission staying at five instead of
8 raising it to seven¹, changing the bases for cities to annex territories and the authority of property
9 owners to object, fuel tax indexing, the allowance for bill draft requests for counties, fluoridation
10 of water, funding and naming rights for firearms shooting ranges, and the barrelage limits for
11 brew pub licensees. Then the complaint alleges: “Hundreds of millions of dollars, rights and
12 privileges directly affecting Washoe County citizens have been and will continue to be denied
13 for decades unless the court takes action to remove from office those guilty of betraying the
14 public trust.” Complaint, p. 14, lines 4-6. How will the removal from office of the district
15 attorney and three county commissioners provide the plaintiff the relief he really wants—the
16 repeal or invalidation of AB 545? In his complaint the plaintiff refers to County of Clark v. City
17 of Las Vegas, 628 P.2d 1120 (Nev. 1981) and includes excerpts of Clean Water Coalition v. The
18 M Resort, (Nev. 2011). Stripping away all the subterfuge relating to removing county officials
19 from office, the plaintiff’s real complaint is that statutes that apply differently depending on the
20 population of the county where they are applied are unconstitutional. Removal from office of
21 county officials is not a remedy for a purportedly unconstitutional law passed by the legislature.

22 In addition to the groundless notion that the County Defendants had duties to oppose AB
23 545, the plaintiff apparently believes they committed wrongs by monitoring the bill or supporting
24 it. In the context of Removal from Office Statute (NRS 283.440) this could be only malfeasance
25

26 ¹ The true purpose of the removal complaint may be the plaintiff’s frustration as an unsuccessful candidate for the
office of county commissioner. Exhibit 7 to the complaint consists of excerpts of county commission meeting
minutes and copies of correspondence from Terry Tiernay to state and local officials explaining that he is a

1 because “omissions to act are not acts of malfeasance in office, but constitute nonfeasance.”
2 Buckingham v. Fifth Judicial Dist. Court in and for Mineral County, 60 Nev. 129, ___ 102 P.2d
3 632, 635 (Nev. 1940). Malfeasance is “a wrongful or unlawful act; esp. wrongdoing or
4 misconduct by a public official; misfeasance in public office. Cf. misfeasance; nonfeasance.”
5 Black's Law Dictionary (9th ed. 2009). For the purposes of the removal statute “malpractice”
6 means no more and is not different from the word “malfeasance”. Buckingham, 60 Nev. at ___
7 102 P.2d at 635. The court recognized a distinct difference between the two concepts and wrote:
8 “Conduct invoking one charge will not be sufficient to justify the other.” Buckingham, 60 Nev.
9 at ___, 102 P.2d at 635 *citing*, State ex rel. Hessler v. District Court, 64 Mont. 296, 209 P. 1052;
10 State v. Beazley, 77 Mont. 430, 250 P. 1114; State v. McRoberts, 207 Ind. 293, 192 N.E. 428;
11 State ex rel. Hardie v. Coleman, 115 Fla. 119, 155 So. 129, 92 A.L.R. 989; Holliday v. Fields,
12 210 Ky. 179, 275 S.W. 642.

13 Importantly, an act of alleged malfeasance must have a “direct relation to and be
14 connected with the performance of official duties; that the conduct charged must be something
15 that the defendant did in his official capacity.” Jones, 67 Nev. at 408, 219 P.2d at 1057. The
16 closest the complaint comes to articulating a basis for malfeasance are the allegations that
17 District Attorney Gammick testified at the legislature in favor of preserving the at-will status of
18 deputy district attorneys and that the board of county commissioners and the district attorney
19 "are guilty of assuming the powers of the WCSD [Washoe County School District] by providing
20 input for all Washoe County entities and not notifying the WCSD of their right to protest the
21 population basis [sic] increase in relevant sections of AB545.” Complaint, p. 4, lines 17-19.
22 Those allegations cannot be malfeasance by definition because the allegations are not
23 accompanied by a citation to the legal duty the County Defendants violated through their alleged
24 actions. What duty did Mr. Gammick violate by advocating that his deputies should serve at-
25 will? Strangely, the complainant alleges that it was Mr. Gammick’s “duty to press the legislature

26 candidate for the office of county commissioner and stating his opinion that the size of the county commission should be increased from 5 to 7 members.

1 to bring all ‘at will’ public attorneys statewide in to the ideal conditions practiced in Washoe
2 County.’” Complaint, p. 12, lines 1-2. Again, there is no legal authority cited for this funny
3 notion. And what is the citation to the legal duty that compels the county commissioners to
4 notify “the WCSD of their [sic] right to protest the population basis [sic] increase in relevant
5 sections of AB545”? Again, the answer is none. The complaint fails to establish the direct
6 relation to or connection to the misconduct charged and the performance of official duties. The
7 complaint is fatally flawed as a matter of law and must be dismissed.

8 **Supporting or Opposing Legislation are Discretionary Acts not Duties of Office.**

9 Allegations of neglect of duty or malfeasance that are based in an elected official’s use of
10 discretion cannot be sustained. Discretion implies knowledge and prudence and that discernment
11 which enables a person to judge critically what is correct and proper. It is judgment directed by
12 circumspection. Cole v. Webster, 103 Wash.2d 280, 284-285, 692 P.2d 799, 802 - 803
13 (Wash.,1984). (Members of a school board cannot be recalled for their decision to close schools
14 which was a discretionary act that required judgment guided by knowledge, prudence and
15 circumspection and was necessary to the fulfillment of the paramount duty to provide for public
16 education.) A “discretionary” act requires personal deliberation, decision, and judgment. Herrera
17 v. Las Vegas Metropolitan Police Dept., 2004, 298 F.Supp.2d 1043, and Parker v. Mineral
18 County, 1986, 729 P.2d 491, 102 Nev. 593 (Interpreting Nevada’s discretionary act immunity
19 statute). With regard to AB 545—the heart of the plaintiff’s grievance—any decision of any of
20 the County Defendants to support, oppose, seek amendments to or do nothing about that
21 legislation is the archetype of a discretionary act. Logic and the law therefore compel the
22 conclusion that the actions or inactions taken by the County Defendants with regard to AB 545
23 cannot form the basis of complaint for removal from office which must be based on neglect of
24 duty or malfeasance.

25 //

26 //

1 The district attorney exercises discretion every day in determining which cases to
2 prosecute. “It is well known that innumerable matters are brought to the attention of the district
3 attorneys of the several counties of the state throughout the year, and that the district attorneys, in
4 the exercise of their discretion and for reasons which they deem sound, determine in many cases
5 that neither a prosecution nor an investigation is warranted. Under this count we see nothing
6 other than such a situation, and do not find that it constitutes a ground for removal for neglect of
7 duty or nonfeasance in office.” Jones, 67 Nev. at 411-412, 219 P.2d at 1059. When a mayor
8 used his discretion to disband the city’s police reserve forces under an ordinance that gave the
9 mayor the power to appoint police reserve forces, the recall petition which followed could not
10 stand because the use of the mayor’s discretion does not amount to misfeasance, malfeasance, or
11 violation of the oath of office. In re Zufelt, 112 Wash.2d 906, 913, 774 P.2d 1223, 1227 - 1228
12 (Wash.,1989).

13 The cases are legion which hold that public officers have immunity from suit for the
14 exercise of their discretion in office. Tort actions against public officers are permitted in Nevada
15 because the state has waived sovereign immunity for state and local officers. NRS 41.031.
16 However, the state reserved immunity for government officials in performing discretionary acts.
17 NRS 41.032(2) provides no action may be brought against a local government officer: “Based
18 upon the exercise or performance or the failure to exercise or perform a discretionary function or
19 duty on the part of the State or any of its agencies or political subdivisions or of any officer,
20 employee or immune contractor of any of these, whether or not the discretion involved is
21 abused.” Nevada cases that have interpreted the meaning of that statute have found the
22 following to be discretionary acts of public officials:

- 23 • Actions of county officials in abating nuisance in residential district involved an
24 element of judgment or choice, as required for discretionary-function immunity.
 Ransdell v. Clark County, 2008, 192 P.3d 756, 124 Nev. 847.
- 25 • City engineer decision to substitute subcontractor on city's public works project
26 was engaging in an act of individual judgment based on policy considerations and

1 entitled to discretionary-function immunity. City of Boulder City v. Boulder
2 Excavating, Inc., 2008, 191 P.3d 1175, 124 Nev. 749

- 3 • City officials decision whether to grant special use permit involved balancing
4 various factors and fell within statutory discretionary function. Travelers Hotel,
5 Ltd. v. City of Reno, 1987, 741 P.2d 1353, 103 Nev. 343.
- 6 • Acts of county social services employees whether to investigate claims of former
7 husband of sexual abuse of children by wife were inherently discretionary and
8 county and employees statutorily immune from claims that investigation was
9 conducted in negligent fashion. Foster v. Washoe County, 1998, 964 P.2d 788,
10 114 Nev. 936

11 Nevada legislators enjoy complete immunity under NRS 41.071 “from being held liable
12 and from being questioned or sanctioned in administrative or judicial proceedings for speech,
13 debate, deliberation and other actions performed within the sphere of legitimate legislative
14 activity.” The plaintiff is thus barred from taking action against the legislators who passed AB
15 545 which may explain why he has attacked county officials for “these abuses of power by the
16 legislature and governor.” See, Complaint, p.2, lines 2-3. Trying to get around legislative
17 immunity enjoyed by legislators by seeking to remove from office local government officials
18 from a county affected by the passage of a new law is a perversion of the removal from office
19 statute and should not be permitted by this court.

20 The court cannot supersede the will of Washoe County voters and order the removal from
21 office of the County Defendants unless the requirements of NRS 283.440 are met. In this case
22 they are not. This plaintiff is essentially seeking to have the County Defendants removed for the
23 way in which they exercised their discretion and the plaintiff’s contentions are apropos of a
24 recall petition. Unlike removal for neglect of duty or malfeasance which much be grounded in
25 an officer’s statutory duty, the merits of the claims in a recall petition are determined by the
26 voters in the recall election.²

²Under NRS 306.020 a recall petition does not need to establish malfeasance or neglect of duty and must simply set forth the reason why the recall is demanded. Batchelor v. Eighth Judicial Dist. Court, In and For Clark County, Dept. No. 4, 81 Nev. 629, 408 P.2d 239 (Nev.1965). (Recall petition determined valid which alleged the mayor had

1 **The Plaintiff/Complainant seeks Political Reform through a Removal Action and Sanctions**
2 **are Warranted for the Abuse of Process.**

3 The Jones court cautioned that the removal action “is fraught with seriousness and a
4 demand for extreme caution both from the standpoint of him who prefers the charge and him
5 who listens and pronounces judgment.” Jones, 67 Nev. at 418, 219 P.2d at 1062. “On both it
6 places a high degree of responsibility which is always attendant when the reputation and good
7 name of men are in the balance.” Id. The Nevada Supreme Court also noted that a removal
8 judgment could “result in irreparable damage to [the office-holder], in humiliation suffered, the
9 loss of the respect and confidence of constituents, to say nothing of loss of salary and surrender
10 of the office to another.” Buckingham, 102 P.2d at 634 (Nev. 1940). The plaintiff here did not
11 use extreme caution because he obviously failed to investigate the law surrounding removal and
12 fails to understand one of its simple truths: to be removed from office by a court, an elected
13 official must have failed or refused to perform a duty.

14 The plaintiff has impugned the reputation and good names of the elected officials he has
15 indicted when the true purpose of his action is political reform. He writes: “The goal of this
16 filing is a first step in overturning all sections of AB545.” Complaint, p.2, line 12. The plaintiff
17 reasons that once removed from office, the replacements for the County Defendants “will
18 provide a new Washoe County government the opportunity and means to call the legislature and
19 governor to task on AB545.” Complaint, p.2, lines 13- 15. From his own words, we know the
20 plaintiff’s motive in the filing of the removal complaint is political reform or the furtherance of a
21 legislative agenda. He clearly fails to understand the solemnity of what he has asked the court to
22 order—something Justice McCarran called “one of the most sacred duties, that of removing an
23 individual from the enjoyment of public position of trust and honor.” Jones, 67 Nev. at 419, 219
24 P.2d at 1062.

25
26
lost the respect and confidence of the great majority of the citizens for manner in which he sought to discharge city manager.)

1 Haling elected officials into court with little or no notice to submit to a hearing after
2 which a judge could undo the will of the electorate in as little as 20 days on the basis of a legally-
3 flawed, politically-motivated purpose is an abuse of process. Thus far, the plaintiff has
4 represented himself and seemingly all the people of the county in this matter. As such he has
5 succeeded in avoiding paying a licensed member of the bar who would be answerable for the
6 pleadings he filed. At the same time, he has cost the people of the county the time and attention
7 of their district attorney and his staff and the time and attention of a quorum of the board of
8 county commissioners. The court should not tacitly approve of the plaintiff's conduct by merely
9 dismissing his fatally-flawed complaint. He should be called to task by being required to
10 reimburse the county for all the time and resources he has wasted with his incompetent and
11 malicious misuse of legal process.³

12 **Conclusion**

13 The complaint fails to allege any facts that constitute neglect of duty, malpractice or
14 malfeasance as required by NRS 283.440. Not a single sentence of the complaint recites the law
15 that imposes a duty of office on the district attorney or a county commissioner to support or
16 oppose AB 545 of the 2011 Nevada Legislature. The actions or inactions of the County
17 Defendants relating to the AB 545 are completely within the discretion of the County
18

19 ³ NRCP 11 provides that even an unrepresented party is certifying that to the best of the person's
20 knowledge, information, and belief, formed after an inquiry reasonable under the circumstances that a pleading or
21 paper filed:

21 (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary
22 delay or needless increase in the cost of litigation;

22 (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a
23 nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of
24 new law;

24 (3) the allegations and other factual contentions have evidentiary support or, if specifically so
25 identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or
26 discovery; and

26 (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified,
are reasonably based on a lack of information or belief.

