

Case No.

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jul 19 2016 04:37 p.m.

Tracie K. Lindeman

Clerk of Supreme Court

PETER and CHRISTIAN GARDNER, on behalf of minor child, LEO AND SUPREME COURT
Plaintiffs-Petitioners,

v.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR
THE COUNTY OF CLARK; and THE HONORABLE JERRY A. WIESE II, DISTRICT
JUDGE

and

HENDERSON WATER PARK, LLC DBA COWABUNGA BAY WATER PARK, WEST
COAST WATER PARKS, LLC, AND DOUBLE OTT WATER HOLDINGS, LLC
Defendants-Real Parties in Interest,

Extraordinary Writ from the Eighth Judicial District Court of the State of Nevada, in and for
County of Clark

PETITION FOR WRIT OF MANDAMUS

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RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

PETER and CHRISTIAN GARDNER, on behalf of minor child, LELAND GARDNER.

Plaintiffs-Petitioners have not been represented by any other attorneys in addition to CAMPBELL & WILLIAMS.

ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding because it is a matter raising as a principal issue questions of first impression involving common law as well as questions of statewide importance. NRAP 17(a)(13)-(14).

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POINTS AND AUTHORITIES

I. INTRODUCTION AND RELIEF SOUGHT¹

This case arises from the severe non-fatal drowning of six-year old Leland Gardner (“Leland”) on May 27, 2015 in the wave pool at the Cowabunga Bay water park in Henderson, Nevada. Cowabunga Bay is owned and operated by Defendant Henderson Water Park, LLC (“HWP”). HWP’s membership is comprised of two limited liability companies (“LLCs”), West Coast Water Parks, LLC and Double Ott Water Holdings, LLC. HWP and, in turn, Cowabunga Bay is managed by seven (7) individuals who personally serve on HWP’s Management Committee.² Pursuant to HWP’s Operating Agreement, the Management Committee exercised complete control over every aspect of Cowabunga Bay’s operations, including the illegal conduct that resulted in Leland’s devastating injuries.

¹ Because this extraordinary writ proceeding arises out of the denial of a motion for leave to amend based on futility, Plaintiffs-Petitioners Peter and Christian Gardner (the “Gardners”) will not address factual matters outside of the four corners of proposed Amended Complaint. To the extent Henderson Water Park, LLC, West Coast Water Parks, LLC, and Double Ott Water Holdings, LLC (collectively referred to herein as the Cowabunga Bay entities”) seek to introduce extraneous, misleading and unsupported factual allegations, the Gardners reserve the right to refute any such allegations in their Reply brief.

² The seven individuals who personally serve on HWP’s Management Committee are Orluff Opheikens, Slade Opheikens, Chet Opheikens, Shane Huish, Scott Huish, Craig Huish, and Tom Welch (collectively referred to herein as the “Individual Defendants”).

Pursuant to Chapter 444 of the Nevada Revised Statutes, the Southern Nevada Health District (“SNHD”) required Cowabunga Bay to post seventeen (17) lifeguards at the Wave Pool at all times. Although Cowabunga Bay submitted a lifeguard plan to SNHD representing that it would comply with the law in this regard, it habitually operated the Wave Pool with only 5-7 lifeguards. In fact, on the date of the incident, Cowabunga Bay illegally operated its Wave Pool with just *three (3) lifeguards* on duty. Cowabunga Bay’s intentional violations of the law in this regard are undisputed and confirmed by the sworn deposition testimony of Cowabunga Bay’s General Manager, Shane Huish.

On May 5, 2016, the Gardners filed the Motion for Leave to File Amended Complaint (the “Motion”), which is the basis for this extraordinary writ proceeding. The Gardners’ request for leave to amend was two-fold. First, the Gardners sought to amend the Complaint to assert *direct* claims for negligence against the Individual Defendants who personally served on the Management Committee of HWP. To be clear, the Gardners did not seek to hold the Individual Defendants liable for the debts and obligations of HWP or obtain recovery simply by virtue of the fact that the Individual Defendants were managers of HWP. Rather, in their proposed Amended Complaint, the Gardners alleged that the Individual Defendants actively managed the operations of the Cowabunga Bay Defendants and, in that capacity, authorized, directed, ratified and participated in the grossly negligent and illegal conduct that forms

1 the basis of the Complaint. As a result, the Gardners asserted that the Individual
2 Defendants committed tortious acts for which they are personally liable.

3 Second, the Gardners requested leave to amend to plead allegations related to
4 the alter ego doctrine against HWP and its member-LLCs. In other words, the
5 Gardners alleged that HWP and its member-LLCs disregarded the corporate entity
6 such that the Gardners should be permitted to pierce the corporate veil to obtain
7 recovery from the Individual Defendants. Again, the alter ego doctrine constitutes a
8 separate and distinct route to liability against the Individual Defendants that is not
9 related to the Gardners' direct claims for negligence against the Individual
10 Defendants.
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12 On June 30, 2016, the Honorable Jerry A. Wiese II denied the Gardners'
13 Motion in its entirety. As to the Gardners' direct claims for negligence against the
14 Individual Defendants, the District Court ruled that the Individual Defendants were
15 wholly immune from liability because NRS 86.371 provides "no member or manager
16 of any limited-liability company formed under the laws of this State is individually
17 liable for the debts and liabilities of the company." In doing so, the District Court
18 ignored abundant case law and other persuasive legal authority holding that a member
19 or manager of an LLC can be held personally liable for its own tortious conduct that
20 was committed on behalf of a LLC.
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22 The District Court likewise ruled that the alter ego doctrine does not apply to
23 LLCs. Again, the District Court ignored highly persuasive case law from federal
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1 courts interpreting Nevada's statutory scheme for LLCs. More importantly, the
2 District Court disregarded the legislative history of Chapters 78 and 86 of the Nevada
3 Revised Statutes, which confirms the applicability of the alter ego doctrine to LLCs.
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5 Instead, the District Court relied on a Nevada Lawyer article authored by a local
6 attorney that was published in November 2014. With all due respect to the attorney
7 in question, his theory on why the alter ego doctrine does not apply to LLCs is
8 contradicted and outweighed by the underlying legislative history of the relevant
9 statutes as well as highly persuasive federal case law.
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11 In short, the District Court clearly abused its discretion by denying the
12 Gardners' Motion in contravention of prevailing legal authority. Because the District
13 Court's erroneous ruling has vitiated the Gardners' ability to present a viable claim
14 at trial, the Gardners have no adequate remedy on appeal, which warrants the issuance
15 of an extraordinary writ of mandamus.
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17 **II. STATEMENT OF THE ISSUES**

18 1. Whether the District Court abused its discretion by denying the
19 Gardners' Motion on grounds that NRS 86.371 constituted a complete bar to liability
20 against the Individual Defendants where the Gardners alleged that the Individual
21 Defendants personally committed the tort of negligence by authorizing, directing,
22 ratifying and participating in the illegal conduct that forms the basis of the Amended
23 Complaint.
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2. Whether the District Court abused its discretion by denying the Gardners' Motion on grounds that the alter ego doctrine does not apply to LLCs even though the legislative history underlying Chapters 78 and 86 of the Nevada Revised Statutes clearly indicates that the Nevada Legislature did not intend to exempt LLCs from alter ego liability.

III. STATEMENT OF THE FACTS

1. On May 5, 2016, the Gardners filed the Motion. GARD16-110. In the proposed Amended Complaint, the Gardners sought to plead direct claims for negligence against the Individual Defendants. *Id.* The Gardners did **not** seek to impose liability against the Individual Defendants simply by virtue of the fact that they were managers or members of the Cowabunga Bay entities. *Id.*

2. More specifically, the Gardners made the following allegations against the Individual Defendants concerning their tortious conduct that resulted in Leland's horrific injuries:

- The Individual Defendants personally served on Henderson Water Park, LLC's ("HWP") Management Committee in their individual capacity. *See* GARD98-99 at ¶¶ 7-13.
- Every aspect of Cowabunga Bay's operations was operated and controlled by the Management Committee pursuant to HWP's Operating Agreement. For example, Section 6.1 of HCP's Operating Agreement states that "all management rights, powers and authority over the business, affairs and operations of the Company shall be solely and exclusively vested in the Management Committee" and "the Management Committee shall have the full right, power and authority to do all things deemed necessary or desirable by it, in its reasonable discretion, to conduct the business, affairs and operations of [Cowabunga Bay]." Among numerous other specific powers identified in the Operating Agreement, HWP's Management

Committee has direct and absolute control over “the selection and dismissal of employees” and is responsible for “tak[ing] all actions which may be necessary or appropriate to accomplish the purpose of the [Cowabunga Bay].” *See* GARD101 at ¶¶ 21-22.

- All actions taken by Cowabunga Bay set forth [in the Complaint] were authorized, directed or participated in by the Individual Defendants in their individual capacity as members of the Management Committee. Additionally, as set forth below, the Individual Defendants knew or should have known that these actions could injure Cowabunga Bay patrons like Leland but negligently failed to take or order appropriate action to avoid that harm despite the fact that an ordinarily prudent person, knowing what the Individual Defendants knew at the time, would not have acted similarly under the circumstances. *See* GARD101-02 at ¶ 23.
- The Individual Defendants, as the members of HWP’s Management Committee, had direct knowledge of these hazardous conditions that threatened physical injury to their patrons like Leland, yet failed to take any action to avoid this harm and, in fact, took action which exacerbated the risk to patrons like Leland. *See* GARD105 at ¶ 35.
- The Individual Defendants owed multiple duties to Plaintiffs, including but not limited to: (1) the duty to keep Leland safe; (2) the duty to use reasonable care to protect Leland from known dangers such as drowning; (3) the duty to adequately staff lifeguards throughout Cowabunga Bay; (4) the duty to properly train employees, lifeguards and managers/supervisors to protect customers from dangers such as drowning; (5) the duty to provide ongoing training to employees, lifeguards and managers/supervisors to protect customers from dangers such as drowning; (6) the duty to maintain clean and clear water within Cowabunga Bay; (7) the duty to use reasonable care in the hiring, supervision, training and retention of its employees; and (8) the duty to act in a matter that does not violate State of Nevada, City of Las Vegas and Clark County statutes, laws and ordinances. *See* GARD107-08 at ¶ 48.
- The Individual Defendants breached their duties to Plaintiffs when they directed and/or approved of Cowabunga Bay’s unlawful scheme to understaff lifeguards at its Wave Pool and otherwise failed to take reasonable steps to protect Leland from drowning. *See* GARD108 at ¶ 49.

- In addition, the Individual Defendants' violations of the law were criminal in nature and constituted negligence *per se* as Leland's injuries are of the type which the statutes, laws, ordinances, and regulations of the United States, State of Nevada—including but limited to NRS 444.080—Clark County, and/or the Cities of Henderson and Las Vegas were intended to prevent. *See* GARD108 at ¶ 50.

3. In the proposed Amended Complaint, the Gardners also made allegations against the Cowabunga Bay entities related to the alter ego doctrine.

GARD99. To that end, the Gardners alleged the following:

- Upon information and belief, at all times material to this Complaint the Individual Defendants influenced and governed Defendants HWP, West Coast Water Parks, LLC, and Double Ott Water Holdings, LLC and were united in interest and ownership with said entities so as to be deemed inseparable from them. In this regard, the Individual Defendants (1) undercapitalized these limited liability companies; (2) diverted limited liability company funds; (3) treated limited liability company assets as their own; and (4) caused the entities to ignore certain required formalities. The Individual Defendants and Defendants HWP, West Coast Water Parks, LLC, and Double Ott Water Holdings, LLC, therefore, are one and the same and Plaintiffs should be permitted to pierce the corporate structure veil of Defendants HWP, West Coast Water Parks, LLC, and Double Ott Water Holdings, LLC to reach assets belonging to the Individual Defendants in order to prevent the sanction and/or promotion of an injustice.

4. The Cowabunga Bay entities filed their Opposition on May 23, 2016, and the Gardners submitted their Reply on June 9, 2016. GARD111-43.

5. The District Court conducted a hearing on the Gardners' Motion on June 16, 2016 and took the matter under submission. GARD156-68.

6. On June 30, 2016, the District Court entered the Order Denying Plaintiffs' Motion for Leave to Amend Complaint (the "Order") on grounds that the proposed amendment would be futile. GARD144-47.

1 7. As to the Gardners’ direct claims for negligence against the Individual
2 Defendants, the District Court exclusively relied on NRS 86.371 and held that “the
3 Nevada Revised Statutes protect members of an LLC, not only from debts incurred
4 by an LLC, but also from liabilities incurred by the LLC.” *Id.* The District Court did
5 not make any specific findings or conclusions related to whether a member or a
6 manager of an LLC can be held liable for his or her own tortious conduct. *Id.*

8 8. As to the Gardners’ allegations related to the alter ego doctrine, the
9 District Court cited a Nevada Lawyer article dated November 2014 for the
10 proposition that “although the Nevada corporation statutes include an alter ego
11 exception to the corporate protections, the LLC statutes do not contain a similar
12 exception, creating a negative inference that the Nevada legislature did not intend for
13 it to apply to LLCs.” *Id.*

14 9. The Cowabunga Bay entities filed the Notice of Entry of Order Denying
15 Plaintiffs’ Motion for Leave to Amend Complaint on July 5, 2016, and this
16 extraordinary writ proceeding followed. GARD148-55.

17 IV. ARGUMENT

18 A. Legal Standard.

19 “Under NRCP 15(a), leave to amend, even if timely sought, need not be granted
20 if the proposed amendment would be ‘futile.’” *Nutton v. Sunset Station, Inc.*, 131
21 Nev.Adv.Op. 34, 357 P.3d 966, 973 (Nev.Ct.App. 2015). “A proposed amendment
22 may be deemed futile if the plaintiff seeks to amend the complaint to plead an
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impermissible claim, such as one that would not survive a motion to dismiss under NRCP 12(b)(5) or a last second amendment alleging meritless claims in an attempt to save a case from summary judgment.” *Id.* “The liberality embodied in NRCP 15(a) requires courts to err on the side of caution and permit amendments that appear arguable or even borderline, because denial of a proposed pleading amendment amounts to denial of the opportunity to explore any potential merit that it might have had.” *Id.* at 975. “A motion for leave to amend is addressed to the sound discretion of the trial court and its action in denying the motion should not be held to be error unless that discretion has been abused.” *Stephens v. S. Nevada Music Co.*, 89 Nev. 104, 105, 507 P.2d 138, 139 (1973).

Here, the Cowabunga Bay entities argued that the Gardners’ claims against the Individual Defendants were barred as a matter of law, which required that the District Court apply the legal standards governing motions to dismiss under NRCP 12(b)(5). Under NRCP 12(b)(5), dismissal is appropriate “only if it appears beyond a doubt that [the plaintiffs] could not prove a set of facts which, if true, would entitle [the plaintiffs] to relief.” *Torres v. Nevada Direct Ins. Co.*, 131 Nev.Adv.Op. 54, 353 P.3d 1203, 1210 (2015) (citing *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008)). When assessing a motion to dismiss for failure to state a claim upon which relief may be granted, a court must construe the pleadings liberally and draw every reasonable inference in favor of the non-moving party. *Lubin v. Kunin*, 117 Nev. 107, 110 n. 1, 17 P.3d 422, 425 (2001). All factual

1 allegations of the complaint must be accepted as true. *Vacation Village v. Hitachi*
2 *Am.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994) (citing *Capital Mortgage Holding*
3 *v. Hahn*, 101 Nev. 314, 315, 705 P.2d 126, 126 (1985)). In that regard, NRCP 8(a)
4 provides that a pleading need only contain “a short and plain statement of the claim
5 showing that the pleader is entitled to relief.” *Chavez v. Robberson Steel Co.*, 94
6 Nev. 597, 599, 584 P.2d 159, 160 (1978).³
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9 **B. The District Court’s Erroneous Denial Of The Gardners’ Motion**
10 **Warrants Extraordinary Writ Relief.**

11 “A writ of mandamus is available to compel the performance of an act that the
12 law requires as a duty resulting from an office, trust or station.” NRS 34.160.
13 “Mandamus relief may also be proper to control an arbitrary or capricious exercise
14 of discretion.” *Halcrow, Inc. v. Eighth Judicial Dist. Court*, 129 Nev.Adv.Op. 42,
15 302 P.3d 1148, 1151 (2013). “Writ relief will not be available when an adequate and
16 speedy legal remedy exists.” *Id.* “Whether a future appeal is sufficiently adequate
17 and speedy necessarily turns on the underlying proceedings’ status, the types of issues
18 raised in the writ petition, and whether a future appeal will permit this court to
19 meaningfully review the issues presented.” *Id.* Here, this Court should invoke its
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26 ³ In the underlying proceeding, the Cowabunga Bay entities did not assert that
27 the Gardners’ specific factual allegations against the Individual Defendants were
28 insufficient to state a viable claim for negligence under NRCP 8(a) nor did the District
Court render any such finding.

jurisdiction to consider the instant Writ Petition and grant the extraordinary relief requested for two separate reasons.

Initially, although the Nevada Supreme Court has never considered the issue of whether writ relief is appropriate to address the denial of a motion for leave to amend to assert new claims against new defendants, other courts including the California Supreme Court have held that “mandamus will lie when it appears the trial court has deprived a party of an opportunity to plead his cause of action or defense, and when extraordinary relief may prevent a needless and expensive trial and reversal.” *Taylor v. Superior Court of Los Angeles Cnty.*, 598 P.2d 854, 855 (Cal. 1979); *Holtz v. Superior Court of the City and Cnty. of San Francisco*, 475 P.2d 441, 443 n. 4 (Cal. 1970) (“Where it appears that the trial court has made a ruling which deprives a party of the opportunity to plead his cause of action or defense, relief by mandamus may be appropriate to prevent a needless and expensive trial and reversal); *In re City of Dallas*, 445 S.W.3d 456, 462-63 (Tex.Ct.App. 2014) (stating “[a]n improper order prohibiting a party from amending a pleading may be set aside by mandamus when as a result of denial of leave to amend a party’s ability to present a viable claim or defense at trial is vitiated or severely compromised[,]” but concluding that mandamus was not appropriate because, unlike the instant action, “discovery was complete [and] the trial court [had] conducted a significant portion of the trial.”).

In this case, the Gardners lack an adequate and speedy legal remedy to address the District Court’s erroneous denial of leave to amend. Indeed, in the absence of

1 extraordinary writ relief, the Gardners would be forced proceed to trial against the
2 Cowabunga Bay entities and then appeal the District Court's denial of leave to amend
3 irrespective of the result. Assuming this Court reversed the District Court's ruling
4 on appeal, the Gardners would then be required to start the case over again in the
5 District Court, conduct discovery on the direct claims against the Individual
6 Defendants as well as the application of the alter ego doctrine to the Cowabunga Bay
7 entities, and then proceed to a new trial on those issues. Suffice it to say, mandamus
8 relief is warranted to avoid "a needless and expensive trial and reversal" especially
9 where, as here, the parties are still conducting discovery and an expedient resolution
10 will not disturb the District Court's trial setting.

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14 The second reason why the Court should invoke its jurisdiction to consider the
15 instant Writ Petition is that "consideration of extraordinary writ relief is often
16 justified where an important issue of law needs clarification and public policy is
17 served by this court's invocation of its original jurisdiction." *MountainView Hosp.*
18 *v. Eighth Judicial Dist. Court*, 128 Nev.Adv.Op. 17, 273 P.3d 861, 864 (2012); *see*
19 *also Smith v. Eighth Judicial Dist. Court*, 123 Nev. 468, 474-75, 168 P.3d 731, 736
20 (2013) (indicating that the Nevada Supreme Court will consider a writ petition when
21 an important issue of law needs clarification and considerations of sound judicial
22 economy and administration militate in favor of granting the petition).

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26 The Gardners' request for extraordinary writ relief implicates two important
27 and unresolved issues of law that impact the public policy of this State. Simply put,
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Nevada is generally referred as the “Delaware of the West” for its pro-business environment and was one of the first states to adopt a statutory scheme creating the limited liability company. Nevertheless, unlike the majority of other states in the country, Nevada does not have any case law addressing the issue of personal liability for members and/or managers of an LLC arising out of their own tortious conduct. Similarly, Nevada’s courts have never ruled on whether the alter ego doctrine applies to LLCs. The absence of law in this area has led to uncertainty from courts and resulted in erroneous decisions like the Order. Accordingly, the Gardners submit that the Court should consider the instant Writ Petition to establish the limits of protection from liability for individual members and managers of LLCs and confirm that the alter ego doctrine applies to LLCs in the State of Nevada.

C. The Gardners Are Entitled To Pursue Direct Claims Against The Individual Defendants Arising Out of Their Negligent Management And Operation Of Cowabunga Bay That Resulted In Leland’s Injuries.

In the lower court, the Cowabunga Bay entities relied exclusively on two Nevada statutes to support their argument that the Individual Defendants are wholly immune from liability for their own tortious conduct. GARD115-117. NRS 86.371 provides that “[u]nless otherwise provided in the articles of organization or an agreement signed by the member or manager to be charged, no member or manager of any limited-liability company formed under the laws of this State is individually liable for the debts and liabilities of the company.” NRS 86.381 further provides that “[a] member of a limited-liability company is not a proper party to proceedings by or against the

1 company, except where the object is to enforce the member's right against or liability
2 to the company."

3 What the Cowabunga Bay entities failed to recognize, however, is that the
4 Gardners are not seeking to hold the Individual Defendants liable "for the debts and
5 liabilities of the company," *see* NRS 86.371, nor is this action simply "against the
6 company." *See* NRS 86.381. To the contrary, the Gardners requested leave to amend
7 the complaint to hold the Individual Defendants personally liable for their own tortious
8 conduct. In other words, the Gardners would be entitled to bring these claims for
9 negligence against the Individual Defendants even if the Cowabunga Bay entities were
10 not named defendants in the underlying action. Respectfully, the District Court failed
11 to apprehend this distinction when it ruled that the Gardners' direct claims against the
12 Individual Defendants were barred because "the Nevada Revised Statutes protect
13 members of an LLC, not only from debts incurred by an LLC, but also from liabilities
14 incurred by the LLC." GARD145.
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19 At the outset, it is ironic that the Cowabunga Bay Defendants couched their legal
20 analysis of this issue with a comparison to the law governing corporations in Nevada,
21 *i.e.*, that "a corporation is a legal entity that exists separate and distinct from its
22 shareholders, officers, and directors." GARD116-17. Indeed, despite the fact that NRS
23 78.747, like NRS 86.371, states that "no stockholder, director or officer of a corporation
24 is individually liable for a debt or liability of the corporation....[.]" this Court has
25 expressly held that "[a]n officer of a corporation may be individually liable for any tort
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1 which he commits...” *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1098, 901
2 P.2d 684, 689 (1995); *see also Rosenthal v. Poster*, 2008 WL 4527859, *3 (D.Nev.
3 Sept. 30, 2008) (“Generally, a tortious act committed by a corporate officer, regardless
4 of the fact he was acting on behalf of the corporation, is considered a personal
5 wrongdoing, holding the officer himself personally liable.”). Accordingly, contrary to
6 the Cowabunga Bay entities’ reliance on the law governing corporations, this Court’s
7 binding precedent clearly establishes that officers—the “managers” of a corporation—
8 are individually liable for their own tortious acts committed on behalf of the
9 corporation. The same principle should apply to LLCs.⁴

10 The Nevada Supreme Court has not addressed direct liability against individuals
11 relating to tortious conduct committed in their capacity as members or managers of an
12 LLC in any published opinion. The overwhelming majority of federal and state courts
13 that have considered the issue hold that, like corporate officers and directors, individuals
14 may be held personally liable for torts committed in their capacity as members or
15 managers of an LLC.
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24 ⁴ Although statutory interpretation is not necessary to resolve this issue, the
25 Gardners must point out that the Legislature drew a direct comparison between the
26 language of NRS 78.747 and the section of the LLC bill that would eventually become
27 NRS 86.371. GARD141 (“Mr. Fowler pointed out that [] section [310 of the limited
28 liability company bill] stated ‘they were not liable under a judgment, decree, or order
of the court, for any debts, obligations or liabilities of the company,’ which was exactly
present corporate law.”) (emphasis in original).

For example, the United States District Court for the District of Nevada refuted the argument advanced by the Cowabunga Bay entities in *In re Commercial Mortg. Co.*, 802 F.Supp.2d 1147, 1164-65 (D.Nev. 2011). There, the plaintiff brought a tort claim for conversion against the defendant LLC and two individual defendants that served as the LLC's managing members. *Id.* The United States District Court cited the analogous corporate principles referenced above and held that the managing members were personally liable for the tortious conduct of the LLC as follows:

As managing members of Compass, Piskin and Blatt are personally liable for engaging in the conversion that plaintiffs proved was committed by Compass. See Pocahontas First Corp. v. Venture Planning Group, Inc., 572 F.Supp. 503, 508 (D.Nev. 1983) ("There is no doubt that an individual who commits a tort while acting in the capacity of a corporate officer may be held personally liable."); *Marino v. Cross Country Bank*, No. C.A.02-65-GMS, 2003 WL 503257, at *7 (D.Del. Feb. 14, 2003) ("Corporate officers are liable for tortious conduct even if they were acting officially for the corporation in committing the tort. A corporate officer can be held personally liable for the torts he commits and cannot shield himself behind the corporation when he is a participant.").

Id. at 1165 (emphasis added).

Numerous other courts have reached the same conclusion that members and managers are personally liable for their own tortious conduct committed on behalf of an LLC. *See, e.g., D'Elia v. Rice Dev., Inc.*, 147 P.3d 515, 524-25 (Utah Ct. App. 2006) ("We are persuaded by those authorities that hold that both limited liability members and corporate officers should be treated in a similar manner when they engage in tortious conduct. We therefore conclude that *Harrison's* imposition of personal liability on corporate officers who participate in a corporation's tortious acts [] also applies to

limited liability members or managers.”); *Rothstein v. Equity Ventures, LLC*, 299 A.2d 472, 474 (N.Y.App.Div. 2002) (“We agree that members of limited liability companies, such as corporate officers, may be held personally liable if they participate in the commission of a tort in furtherance of company business.”); *Weber v. United States Sterling Sec., Inc.*, 924 A.2d 816, 825 (Conn. 2007) (“Accordingly, we conclude that although § 18-303(a) of the Delaware Code Annotated shields the defendants from personal liability based solely on their affiliation with Retail Relief, it does not shield them from personal liability for their own tortious conduct.”) (interpreting Delaware law); *Dzurilla v. All American Homes, LLC*, 2010 WL 559923, *3 (E.D.Ky. Jan. 4, 2010) (“[A] shareholder of a corporation or a member of an LLC can be held liable for its individual conduct, without regard to the limited liability status of the corporation or company. While mere status as a manager of an LLC will not subject a person to liability, the statute does not preclude liability for the manager’s own tortious conduct.”).⁵

⁵ See also *Hoang v. Arbess*, 80 P.3d 863, 867 (Colo.Ct.App. 2003) (“While an officer of a corporation cannot be held personally liable for a corporation’s tort solely by reason of his or her official capacity, an officer may be held liable for his or her individual acts of negligence even though committed on behalf of the corporation, which is also held liable. The parties do not dispute that this principle applies equally to a manager of a limited liability company.”); *Equipoise PM LLC v. Int’l Truck and Engine Corp.*, 2007 WL 2228621, *10 (N.D.Ill. July 31, 2007) (“As its plain language suggests, this provision will shield Price and Morton from liability if the only basis defendants have for the claims against them is their membership in Equipoise. If, however, defendants prove that Price or Morton assumed liability, or committed, authorized or ratified tortious acts while acting for Equipoise, then this provision provides them no protection.”); *Mbahaba v. Morgan*, 44 A.3d 472, 476 (N.H. 2012)

Legal commentators and treatises addressing this issue likewise confirm that a member or manager of a Nevada LLC can be held personally liable for their own tortious conduct. *See, e.g.,* Ltd. Liability Co. § 14:38 (2015) (citing NRS 86.371 and NRS 86.381 and stating “[t]here are several important exceptions to the rule that members are not liable for the LLC’s debts and obligations. First, members are liable for their own tortious conduct, even when they act on the LLC’s behalf.”) (emphasis added); 3A Fletcher Cyc. Corp. § 1135 (“It is the general rule that an individual is personally liable for all torts the individual committed []. This rule applies equally to torts committed by those acting in their official capacities as officers or agents of a corporation. It is immaterial that the corporation may also be liable. []. **These rules have been applied to principals of a limited liability company.**”) (emphasis added).

In addition to the analogous Nevada law on tort liability for corporate officers and the overwhelming weight of highly persuasive legal authority on this issue, the Gardners ask this Court to consider the practical effects of the District Court’s Order that members and managers of an LLC are completely immune from liability for their

(“When [] a member or manager commits or participates in the commission of a tort, whether or not he acts on behalf of his LLC, he is liable to third persons injured thereby.”); *Allen v. Dackman*, 991 A.2d 1216, 1228-29 (Md.Ct.App. 2010) (“These cases discuss tort liability for corporate officers and agents who personally committed, inspired, or participated in torts in the name of the corporation. We have not previously determined whether these same principles apply to members of LLCs. We agree, however, with other jurisdictions that have come to that conclusion.”); *Morris v. Cee Dee, LLC*, 877 A.2d 899, 908-09 (Conn.Ct.App. 2005) (“Furthermore, the law of this state permits the court to attach individual assets if a member of a limited liability company personally commits a tort.”).

own tortious conduct. A manager of an LLC could, for example, make fraudulent misrepresentations in order to contract with another business yet that same manager would be wholly immune from liability for his intentional misconduct. Similarly, a member of an LLC could operate a company vehicle while under the influence of alcohol to perform business on behalf of the LLC and severely injure an innocent third party, but that member would not face any liability for his wrongful conduct. Simply put, this Court cannot condone the District Court's ruling as it would permit members and managers of an LLC in Nevada to engage in intentional misconduct with impunity and hide behind the shield of the LLC, which, as is the case here, may be severely underinsured and undercapitalized. That cannot be the law. The Gardners, therefore, respectfully request that the Court reverse the District Court's erroneous ruling and issue a writ of mandamus compelling the District Court to grant the Gardners' Motion.

D. The District Court Erred By Ruling That The Alter Ego Doctrine Does Not Apply To LLCs In The State Of Nevada.

"Nevada has long recognized that although corporations are generally regarded as separate legal entities, the equitable remedy of 'piercing the corporate veil' may be available to a plaintiff in circumstances where it appears that the corporation is acting as the alter ego of a controlling individual." *LFC Mktg. Group, Inc. v. Loomis*, 116 Nev. 896, 902, 8 P.3d 84, 845 (2000).⁶ "Indeed, the 'essence' of the alter ego

⁶ The idea of "piercing the corporate veil" is an important distinction when contrasting the Gardners' direct tort claims for negligence against the Individual Defendants, on one hand, with their request to plead the alter ego doctrine against the

1 doctrine is to ‘do justice’ whenever it appears that the protections provided by the
2 corporate form are being abused.” *Id.* at 903, 8 P.3d at 845-46. For reasons detailed
3 below, the Legislature codified the alter ego doctrine for corporations in 2001. *See*
4 NRS 78.747(2).
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6 The Nevada Supreme Court has never expressly addressed whether the alter
7 ego doctrine applies to LLCs. *See Webb v. Shull*, 128 Nev.Adv.Op. 8, 270 P.3d 1266,
8 1272 n. 3 (2012) (“The parties assume that NRS 78.747, which is part of the statutory
9 chapter governing corporations, applies to the alter ego assertion against Shull and
10 Celebrate, an LLC. Accordingly, for purposes of this appeal, we likewise assume,
11 without deciding, that the statute applies and analyze their alter ego arguments under
12 that standard.”). Although it did not specifically decide whether Nevada law on
13 corporations applied to alter ego claims against an LLC, this Court cited two cases from
14 the United States District Court for the District of Nevada in which the federal court
15 recognized the application of the alter ego doctrine to LLCs in Nevada. *Id.*
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23 Cowabunga Bay entities on the other. In point of fact, courts holding members or
24 managers of an LLC liable for their own tortious conduct have made it abundantly clear
25 that such a ruling does not require “piercing the corporate veil” under the alter ego
26 doctrine. *See, e.g., D’Elia*, 147 P.3d at 524 (“Several courts and commentators make
27 it clear that holding an officer or director personally liable for corporate torts in which
28 they participate is distinct from the piercing the veil doctrine.”) (listing cases and
authorities); *Morris*, 877 A.2d at 908-09 (“Contrary to the individual defendant’s
assertion, the court did not pierce the corporate veil provided by the act when it
attached his personal assets. The Court ordered a prejudgment attachment of his
assets because it found that he, himself, had committed the tort of negligence.”).

1 In *In re Giampetro*, the Honorable Bruce A. Markell considered “whether
2 Nevada law would recognize ‘alter ego’ claims with respect to limited liability
3 companies.” 317 B.R. 841, 845 (Bankr.D.Nev. 2004). After analyzing the alter ego
4 doctrine as it applies to corporations, the court concluded that it was “highly likely that
5 Nevada courts would recognize the extension of the alter ego doctrine to members of
6 limited liability companies.” *Id.* at 846. The *Giampetro* court then found “Nevada
7 courts would apply the same common law standards for alter ego liability to members
8 of limited liability companies that they have placed on shareholders of corporations.”
9 *Id.* at 847-48 and n. 9 (listing cases standing for proposition that “the tests are the same
10 for piercing the veil in a corporate or limited liability context”).

11 In *Montgomery v. eTreppid Tech., LLC*, the Honorable Valerie P. Cooke
12 conducted an extensive analysis of the nature of LLCs and noted that “an LLC borrows
13 the characteristics of member protection from personal liability” from a corporation.
14 548 F.Supp.2d 1175, 1180 (D.Nev. 2008). The federal court then listed a number of
15 cases standing for the principle that federal and state courts have consistently applied
16 corporate law to LLCs for the purpose of piercing the veil under the alter ego doctrine.
17 *Id.* at 1180-81. Accordingly, the federal courts that have addressed the application of
18 the alter ego doctrine to LLCs in Nevada have uniformly ruled that the doctrine does,
19 in fact, apply.

20 The District Court, however, disregarded the foregoing authority from the
21 United States District Court for the District of Nevada that was cited by this Court in
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1 *Webb* and instead relied on a Nevada Lawyer article written by a local attorney in
2 November 2014 styled *Suing the Man Behind the Curtain: Can Nevada LLC*
3 *Members be Liable Under the Alter Ego Doctrine*. GARD145, 169-71. Rather than
4 relying on the reasoned opinions of well-respected federal jurists in the absence of
5 binding authority from this Court, the District Court was apparently persuaded by the
6 author’s citation to *Dep’t of Taxation v. DaimlerChrysler*, 121 Nev. 541, 119 P.3d
7 135 (2005) to support the conclusion that “although the Nevada corporation statutes
8 include an alter ego exception to the corporate protections, the LLC statutes do not
9 contain a similar exception, creating a negative inference that the Nevada legislature
10 did not intend for it to apply to LLCs.” GARD145, 169-71.⁷

11 This conclusion—which was based on a general canon of statutory
12 construction as opposed to any clear indication of the Legislature’s intent—is directly
13 contradicted by the underlying legislative history of Nevada’s corporation statutes
14 **and** LLC statutes. It is well settled that this Court will “only look beyond the plain
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21 ⁷ In *DaimlerChrysler*, the Nevada Supreme Court addressed an alleged
22 ambiguity in the Sales and Use Tax Act and stated the general rule of statutory
23 construction that “omissions of subject matters from statutory provisions are
24 presumed to have been intentional.” 121 Nev. at 548, 119 P.3d at 139. Notably, this
25 Court in *DaimlerChrysler* also examined the legislative history of the allegedly
26 ambiguous statute and, more specifically, discussions held before the Assembly
27 Committee on Taxation. *Id.* at 548-49, 119 P.3d at 139. Here, the Gardners submitted
28 the legislative history of Chapter 86 of the Nevada Revised Statutes to the District
Court wherein the Assembly Committee on Judiciary discussed whether the alter ego
doctrine would apply to LLCs in the absence of an express statutory provision.
GARD120-43. Nevertheless, the District Court ostensibly failed to consider the
applicable legislative history despite its citation to *DaimlerChrysler* in the Order.

language [of a statute] if it is ambiguous or silent on the issue in question.” *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009). Here, Nevada’s LLC statutes are silent on the application of the alter ego doctrine to LLCs, which requires an analysis of the Legislature’s intent. Indeed, “when a statute is ambiguous [or silent], the legislature’s intent is the controlling factor in statutory construction.” *Potter v. Potter*, 121 Nev. 613, 616, 119 P.3d 1246, 1248 (2005). Because “legislative intent is controlling, [the Court] look[s] to legislative history for guidance.” *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1302, 148 P.3d 790, 793 (2006); *see also* *Baliotis v. Clark Cnty.*, 102 Nev. 568, 570, 729 P.2d 1338, 1339-40 (1986) (“Limited resort to reports of legislative committee minutes is appropriate to clarify or interpret legislation that is of doubtful import or effect.”); *Chanos v. Nevada Tax Comm’n*, 124 Nev. 232, 241-43, 181 P.3d 675, 681-83 (2008) (considering legislative hearing minutes to determine the meaning of ambiguous term).

Before turning to the legislative history of Nevada’s LLC statutes—which was submitted to, and apparently disregarded by, the District Court in the underlying proceedings—the Gardners will rely on Judge Markell’s analysis of why the Legislature’s codification of the alter ego doctrine for corporations does not create a “negative inference” about the application of the same to LLCs:

If presented with the issue, this court believes it highly likely that Nevada courts would recognize the extension of the alter ego doctrine to members of limited liability companies. The varieties of fraud and injustice that the alter ego doctrine was designed to redress can be equally

1 exploited through limited liability companies. As recently stated by the
2 Nevada Supreme Court, the ‘essence’ of the alter ego doctrine is to ‘do
3 justice’ whenever it appears that the protections provided by the
4 corporate form are being abused. With respect to limited liability
5 companies, the ‘protections’ of limited liability provide the same sort of
6 possibilities for abuse.

7 *Against this strong policy of preventing abuse of limited liability, the*
8 *court discounts heavily any argument that Nevada’s codification of the*
9 *principles of alter ego liability for corporations in 2001 created a*
10 *negative inference that the Nevada legislature intended to abrogate*
11 *alter ego liability for limited liability companies.* Although some states
12 have explicitly provided for alter ego liability for limited liability
13 companies, the sparse legislative history of the 2001 Nevada legislation
14 indicates that legislators were interested in increasing corporate franchise
15 fees, and were prepared to codify corporate alter ego liability as a price
16 for that increase.

17 *Nowhere in the legislative minutes or other scraps of legislative history,*
18 *however, is there any indication of an intent to tighten or clarify alter*
19 *ego liability for corporations while eliminating it for limited liability*
20 *companies or any other limited liability entity (such as limited*
21 *partnerships, limited-liability partnerships or limited liability limited*
22 *partnerships).* Indeed, such a course would be counterproductive, in that
23 it would disfavor the creating of corporations, which would lessen overall
24 corporate franchise fee revenues. The conclusion is thus drawn that the
25 2001 legislation dealt only with corporations, and left untouched the law
26 with respect to limited liability companies.

27 *In re Giampetro*, 317 B.R. at 846-47 (internal citations to legislative history omitted)
28 (emphasis added).⁸

26 ⁸ The Legislature enacted the statutory scheme governing LLCs (NRS Chapter
27 86) in 1991. As such, the 2001 Legislature surely would have discussed the impact
28 of codifying alter ego liability for corporations on LLCs if it intended to lessen or
extinguish the doctrine’s application to LLCs.

As evidenced by Judge Markell's thorough analysis, the Legislature's codification of the alter ego doctrine for corporations was wholly unrelated to LLCs and, therefore, this Court should not draw a negative inference from the fact that the Legislature did not pass the same statutory provision for LLCs. This is especially true when the legislative history behind the LLC statutes is taken into account as it is abundantly clear that the Legislature did not intend to exempt LLCs from alter ego liability by not specifically providing for the same in Chapter 86 of the Nevada Revised Statutes.

Indeed, Assemblyman Gene T. Porter questioned whether the proposed language that eventually became NRS 86.371 would exclude LLCs from the alter ego doctrine. GARD 140-42. The drafter of the statutory scheme, John Fowler of the law firm Jones Vargas, explained that "even though the liability portion [of Chapter 86] was worded differently than that for corporations, he did not believe it provided any additional protection over what corporations now possessed under the law. *Equal protections for limited-liability companies and corporations had been the intent in drafting AB 655. He saw no reason the 'alter ego' doctrine could not be applied to the limited-liability companies and no reason why the corporate veil could not be pierced if the entity was ignored in the fashion done in corporations.*"

GARD141 (emphasis added). Assemblyman Robert M. Sader also addressed the issue of whether the alter ego doctrine would apply to LLCs as follows:

Mr. Sader intervened to opine that conceptually, the alter-ego doctrine or piercing the corporate veil philosophically found the corporation was not

1 a corporation, that it has instead been handled as the alter-ego of the
2 persons owning the corporation. Therefore it was not a corporation and
3 the owners were liable for the debts. *He felt it was entirely consistent*
4 *with Section 310. In a limited-liability company the members and*
5 *managers were not liable, the same as in a corporation where the*
6 *directors, shareholders and officers were not liable. But if there was*
7 *not a company because there was an alter-ego, and because the*
8 *corporate veil had been pierced, then the owners and managers were*
9 *personally liable. Mr. Fowler emphasized that was exactly the*
10 *statement of doctrine the courts used. If the corporation's formalities*
11 *and existence were persistently ignored, then it really was not a*
12 *corporation. He opined there was no reason the same principle would*
13 *not be applicable to a limited-liability company, and felt a court would*
14 *agree.*

15 *Mr. Sader stated his opposition to the motion, saying he did not feel*
16 *there was any change in current policy by creating the limited-liability*
17 *company and that alter-egos and piercing the corporate veil could still*
18 *be used as defenses.*

19 GARD142 (emphasis added).

20 The legislative history of Chapter 86, therefore, directly contradicts the
21 negative inference referenced by the Nevada Lawyer article and adopted by the
22 District Court. Indeed, the Legislature did not intend to limit the application of the
23 alter ego doctrine to LLCs when it enacted Chapter 86 of the Nevada Revised
24 Statutes. Moreover, as evidenced by Judge Markell's analysis of the legislative
25 history from the 2001 legislative session, the Legislature did not intend to extinguish
26 alter ego liability for LLCs by codifying the doctrine for corporations. In other
27 words, the rationale cited by the Nevada Lawyer article and relied on by the District
28 Court is simply wrong. As such, the District Court abused its discretion by denying

1 the Gardners' request for leave to plead allegations related to the alter ego doctrine,
2 which warrants extraordinary writ relief.

3 **V. CONCLUSION.**

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5 Accordingly, this Court should grant the Petition for Writ of Mandamus in its
6 entirety.

7 DATED this 19th day of July, 2016

8
9 CAMPBELL & WILLIAMS

10 BY: /s/ **Donald J. Campbell**
11 DONALD J. CAMPBELL, ESQ. (#1216)
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VERIFICATION

I, Donald J. Campbell, declare as follows:

1. I am one of the attorneys for Peter and Christian Gardner, on behalf of minor child, Leland Gardner.

2. I verify that I have read and compared the foregoing PETITION FOR WRIT OF MANDAMUS and that the same is true to my own knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

3. I, as legal counsel, am verifying the Petition because the questions presented are legal issues, which are matters for legal counsel.

4. I declare under the penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED this 19th day of July, 2016

/s/ **Donald J. Campbell**
Donald J. Campbell, Esq. (#1216)

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Petition, and to the best of my knowledge, information, and belief, it is not frivolous or 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), which requires every assertion in the brief regarding matters in the record to be supported by a 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 Nevada Rules of Appellate Procedure.

I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) as this brief was prepared in a proportionally spaced typeface using Times New Roman 14 pt font. I also certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) as it does not exceed thirty (30) pages.

Finally, I certify that the Appendix accompanying this brief complies with NRAP 21(4) and NRAP 30 in that the Appendix includes a copy of the District Court's order that is challenged, the pertinent parts of the record before the respondent judge, and the other original documents, which are essential to

.....

.....

understand the matter set forth in this Petition.

DATED this 19th day of July, 2016

CAMPBELL & WILLIAMS

BY: /s/ **Donald J. Campbell**

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Las Vegas, NV 89101

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 19th day of July 2016, I caused true and correct copies of the foregoing Petition for Writ of Mandamus to be delivered to the following counsel and parties:

VIA HAND DELIVERY:

Judge Jerry A. Wiese II
Eighth Judicial District Court of Clark County, Nevada
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

VIA ELECTRONIC AND U.S. MAIL:

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/s/ **Lucinda Martinez**
An employee of Campbell & Williams