Case No. 77261

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

v.

R & O CONSTRUCTION, INC.

Respondent.

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

APPELLANTS' OPENING BRIEF

Donald J. Campbell, Esq. (#1216)
J. Colby Williams, Esq. (#5549)
Philip R. Erwin, Esq. (#11563)
Samuel R. Mirkovich, Esq. (#11662)
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 382-5222

Counsel for Appellants

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, individually and on behalf of minor child, LELAND GARDNER.

The Gardners have not been represented by any other attorneys besides 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).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

APPELLANTS' OPENING BRIEF

Peter and Christian Gardner, individually and on behalf of minor child, Leland Gardner, hereby submit their Opening Brief. For ease of reference, Appellants will be collectively referred to as the "Gardners," and Respondent R&O Construction, Inc. will be referred to as "R&O."

I. JURISDICTION

This is an appeal from the district court's order granting R&O's motion to dismiss pursuant to NRCP 12(b)(5). JA 638-641. In that same order, the district court granted NRCP 54(b) certification and specifically determined, directed and certified that, there being no just reason for delay, final judgment should be entered in favor of R&O. *Id.* As such, the Court has appellate jurisdiction pursuant to Nev. Const., Art. 6, § 4 and NRS 2.090.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the district court erred by dismissing the Gardners' claim for reverse veil-piercing under the alter ego doctrine because they did not allege negligence or other tortious conduct against R&O and, in any event, they are first required to (i) proceed to trial against Orluff Opheikens (the alleged alter ego of R&O), (ii) obtain a judgment against him, and (iii) unsuccessfully attempt to collect on that judgment for an indeterminate amount of time before being able to pursue such a theory of recovery?

III. STATEMENT OF THE CASE

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 (the "Member-LLCs"). HWP is operated by the seven individuals who personally serve on HWP's Management Committee and exercise complete control over every aspect of Cowabunga Bay's operations, including the illegal conduct that resulted in Leland's devastating injuries.[1]

On July 28, 2015, the Gardners filed the Complaint in the underlying action and brought claims for negligence against HWP and the Member-LLCs. JA 1-8. On May 5, 2016, the Gardners sought leave to (i) assert direct claims for negligence against the Individual Defendants, and (ii) plead allegations under the alter ego doctrine against HWP, the Member-LLCs and the Individual Defendants. The district court denied the Gardners' request for leave to assert direct claims for negligence against the Individual Defendants on grounds that LLC members and

[1] The seven members of HWP's Management Committee are Orluff Opheikens ("Orluff"), Slade Opheikens, Chet Opheikens, Tom Welch, Shane Huish, Scott Huish and Craig Huish (collectively referred to as the "Individual Defendants"). Orluff, Slade Opheikens, Chet Opheikens, and Tom Welch will be collectively referred to as the "Opheikens Defendants," and Shane Huish, Scott Huish and Craig Huish will be collectively referred to as the "Huish Defendants."

managers are completely immune from liability under NRS Chapter 86. The district court further held that the Gardners were barred from bringing alter ego claims because the doctrine does not apply to LLCs.

As a result, the Gardners filed a Petition for Writ of Mandamus, which was granted by this Court on November 22, 2017. *See Gardner on Behalf of L.G. v. Eighth Judicial Dist. Court*, 405 P.3d 651 (Nev. 2017) ("*Gardner I*"). Specifically, this Court held that the Gardners could pursue negligence claims against the Individual Defendants based on their own tortious conduct. This Court likewise held that the alter ego doctrine applied to LLCs and reinstated the Gardners' claims against HWP, the Member-LLCs and the Individual Defendants. The Gardners filed their Second Amended Complaint on December 17, 2017 and named the Individual Defendants in this action. JA 18. The Gardners also re-named the Member-LLCs as alter ego defendants only. *Id*.[2]

Thereafter, the Gardners promptly commenced discovery related to their claims against the Individual Defendants. The Gardners obtained extensive documentation that was previously undisclosed by HWP, and conducted the depositions of Orluff,

[2] The district court also granted summary judgment on the Gardners' direct claims for negligence against the Member-LLCs based on the same flawed reasoning that LLC managers and members are wholly immune from suit. The Gardners appealed the district court's ruling. This Court held that NRS Chapter 86 does not shield LLC members and managers from liability for personal negligence, but nevertheless affirmed the district court's ruling because the Gardners did not specify how any individual act or omission by the Member-LLCs contributed to Leland's injuries. *See Gardner v. Henderson Water Park, LLC*, 399 P.3d 350 (Nev. 2017).

Slade Opheikens, Tom Welch and Scott Huish. *Id*. This discovery conclusively demonstrated that Orluff obtained an ownership stake and managerial control of Cowabunga Bay to protect his primary business, R&O, from devastating financial losses and severe reputational harm resulting from the lack of financing for the construction of Cowabunga Bay.[3] *Id*. In order to facilitate this plan, R&O loaned Orluff millions of dollars to capitalize the Cowabunga Bay project with the understanding that those funds would be used to pay R&O's significant unpaid construction costs and subcontractor fees. *Id*. R&O, along with Orluff, likewise signed as a borrower on a $12.2 million loan from Bank of Utah that was used to complete the construction of Cowabunga Bay and fund its operations, the profits from which would flow back to R&O in the form of loan repayments. *Id*.

At all relevant times, Orluff governed and influenced his alter ego, R&O, and acted with a unity of interest and ownership towards the common purpose of making R&O whole and extricating the company from the "nightmare" situation created by the failed construction of Cowabunga Bay. *Id*. Because this arrangement blurred the corporate fiction and allowed R&O to reap the benefits of a fully constructed and operational Cowabunga Bay while attempting to avoid the liability caused by the negligent (and illegal) mismanagement of Orluff and his fellow Management

[3] R&O was hired as the general contractor for the construction of Cowabunga Bay. JA 18. Within months of breaking ground, R&O was forced to halt construction of Cowabunga Bay due to millions of dollars in unpaid construction costs that left its subcontractors on the verge of bankruptcy. *Id*.

Committee members, the Gardners sought leave to amend their complaint to pursue a reverse piercing theory against Orluff Opheikens and R&O. JA 15-44.

Though the district court reluctantly granted the Gardners leave to file their Third Amended Complaint to pursue a reverse veil-piercing claim against Orluff and R&O, it simultaneously invited the filing of a motion to dismiss. JA 356-357. R&O and the Opheikens Defendants subsequently moved to dismiss the Gardners' reverse veil-piercing claim on a number of different grounds, including that it was barred in the absence of an uncollectible judgment on the Gardners' predicate claim of negligence against Orluff. JA 450-530. In the face of abundant legal authority supporting the viability of the Gardners' reverse veil-piercing claim and notwithstanding this Court's prior writ of mandamus permitting the Gardners to pursue traditional alter ego claims in the absence of a predicate judgment, the district court granted R&O's motion to dismiss. JA 638-641. After the district court granted NRCP 54(b) certification of its order, the Gardners filed the instant appeal.

IV. STATEMENT OF FACTS

1. On June 18, 2018, the Gardners filed their Motion for Leave to File Third Amended Complaint and named R&O as an alter ego defendant only. JA 15-44. As stated previously, the Gardners alleged that R&O is the alter ego of Orluff under a reverse veil-piercing theory such that R&O may be held liable for his individual negligence. *Id.*

2. On July 5, 2018, the Opheikens Defendants filed their Opposition to the Motion for Leave to File Third Amended Complaint based on futility grounds. JA 45-334. In opposing the Gardners' request for leave to amend, the Opheikens Defendants asserted that the Gardners improperly identified their reverse veil-piercing claim as a "cause of action" and that the claim was unavailable in the absence of an uncollectible judgment against Orluff. JA 45-63.

3. The Gardners filed their Reply in Support of Motion for Leave to File Third Amended Complaint on July 18, 2018. JA 335-346.

4. The district court conducted a hearing on the Gardners' request for leave to amend on July 25, 2018. The district court began the hearing with the astonishing remark to the Gardners' counsel that "[y]ou guys are emboldened by the Supreme Court saying you can sue anybody you want, so now you want to bring in more people, right?" JA 349. After hearing argument, the district court stated that "because of the fact that the Supreme Court reversed me on the amending of other parties, if I'm going to deny the motion or if I'm going to dismiss this party because of the fact that there's not a judgment debtor or creditor relationship, doesn't it make more sense to do that on a motion to dismiss standard[?]" JA 356. The district court then granted the Gardners' motion for leave to amend and informed the parties "I'll see you when [the Opheikens Defendants] file their motion to dismiss." JA 359.

5. The district court entered its order granting the Gardners leave to file the Third Amended Complaint along with the notice of entry thereof on July 30, 2018. JA

366-378. The Gardners filed their Third Amended Complaint that same day. JA 379-398.

6. The Opheikens Defendants (along with Double Ott Water Holdings, LLC) filed their Answer to the Third Amended Complaint on August 16, 2018. JA 408-418.

7. On August 31, 2018, R&O filed its Motion to Dismiss and advanced multiple arguments in support of dismissal. JA 450-506. First, R&O argued that reverse veil-piercing is not a viable pre-judgment claim for relief because an uncollectible judgment against Orluff is a necessary element. JA 452-453. Second, R&O contended the Gardners' reverse veil-piercing claim was inadequately pleaded because the Third Amended Complaint alleged Orluff owned stock in R&O through his family trust and, according to R&O, personal ownership of the target corporation is a requirement under NRS 78.747. JA 454-458.[4] Third, R&O asserted the Gardners' reverse veil-piercing claim was inadequately pleaded because they did not

[4] The Gardners based their allegation that Orluff owned eighty-five percent (85%) of R&O through his family trust on the deposition testimony of Slade Opheikens. JA 545. In support of its misleading argument that Orluff did not personally own shares in the corporation, R&O improperly submitted a partial copy of Orluff's family trust agreement on grounds the document was incorporated by reference in the Third Amended Complaint. JA 504-506. While the Gardners objected to the attachment of extraneous evidence, the Gardners submitted e-mail correspondence from R&O's Chief Financial Officer that was obtained after the filing of the Third Amended Complaint reflecting Orluff's personal ownership of shares in R&O during the relevant time period. JA 548-550, 559-560. In sum, the exact nature of Orluff's ownership of R&O is an open question although the law is clear that ownership of stock is not controlling on the issue of alter ego liability. JA 545-550.

use the word "manifest" in alleging that adherence to the corporate fiction would sanction a fraud or promote manifest injustice. JA 458-461. Fourth, R&O urged the district court to adopt the federal pleading standard, claiming that the Gardners' reverse veil-piercing was inadequately pleaded under *Iqbal-Twombly*. JA 461-464.

8. Despite the fact that they had already answered the Third Amended Complaint, the Opheikens Defendants filed their "Comprehensive Joinder" to R&O's Motion to Dismiss on September 11, 2018. JA 507-530. The Opheikens Defendants reiterated their prior arguments that the Gardners incorrectly labelled their reverse veil-piercing claim as a cause of action and that reverse veil-piercing is only available in post-judgment proceedings. JA 512-514, 521-525. The Opheikens Defendants further claimed that the Gardners could not pursue a reverse veil-piercing theory because it would adversely impact other shareholders and creditors of R&O.[5] JA 514-521. Finally, the Opheikens Defendants also asked the district court to adopt the *Iqbal-Twombly* standard and dismiss the Gardners' reverse veil-piercing claim. JA 525.

9. On September 20, 2018, the Gardners filed their Opposition to R&O's Motion to Dismiss and the Opheikens Defendants' Joinder thereto. JA 531-560.

[5] Like R&O, the Opheikens Defendants improperly submitted extraneous evidence from outside of the pleadings in the form of an affidavit from Slade Opheikens. JA 528-530.

10. On October 3, 2018, R&O and the Opheikens Defendants filed their respective Replies in Support of the Motion to Dismiss. JA 561-597.

11. On October 10, 2018, the district court conducted a hearing on R&O's Motion to Dismiss and the Opheikens Defendants' Joinder therein. At the outset, the district court indicated its mistaken belief that R&O's motion sought the dismissal of the Gardners' direct claims for negligence against the Individual Defendants. JA 602. After receiving clarification on the purpose of the motion and hearing argument from counsel, the district court found that the Gardners first needed to obtain a judgment against Orluff, and then establish that the judgment is uncollectible, before being able to pursue a reverse veil-piercing theory against R&O. JA 621-629. Otherwise, the court found, "it's only to try and get a deep pocket or another pocket [and] I don't think that the statute or the cases anticipate or say that's what we want to happen." JA 621. The district court stated that permitting the Gardners to proceed against R&O would "confuse[ ] the issue for a jury" under NRS 48.035 because "[t]here isn't any allegation that I see in this case that R&O did anything individually wrong [or] that there's any liability on their part for any actions done on anybody's part for R&O." JA 621-622.[6] Rather than phase or bifurcate the

[6] This finding tracks the district court's apparent misunderstanding of this Court's decision in *Gardner I*. During the hearing, the district court stated that "what I remember from the Supreme Court's decision in this case was that they allowed the alter ego claims based on the allegations that [ ] those individuals did something individually wrong and that there was some individual negligence on their part." JA 627. In other words, the district court believed that this Court's prior decision

trial to address potential jury confusion as suggested by the Gardners, the district court dismissed their reverse veil-piercing claim because "[dismissal] makes more sense than to [ ] clutter up a negligence case." JA 625. Based on those findings, the district court granted R&O's Motion to Dismiss. JA 629.

12. The district court entered its Order Granting R&O's Motion to Dismiss on October 23, 2018. JA 638-641. The district court's written order restated its findings from the hearing as follows: "[p]ursuant to *LFC Marketing Group, Inc. v. Loomis*, 116 Nev. 896, 8 P.3d 841 (2000), NRS 78.747, and because Plaintiffs' sole claim for relief against R&O does not allege negligence or any other wrongful conduct by R&O and will, therefore, confuse the jury, Plaintiffs are barred from asserting their claim for relief for reverse piercing of the corporate veil against R&O prior to an uncollectible judgment being entered in this case against Orluff Opheikens." *Id*. Accordingly, the district court found "that Plaintiffs have failed to state a claim against R&O upon which relief may be granted" and dismissed the Gardners' reverse veil-piercing claim. *Id*. Finally, "there being no just reason for delay, this Court determine[d], direct[ed] and certifie[d] that final judgment is entered in favor of R&O pursuant to NRCP 54(b)." *Id*.

---

provides that a plaintiff must allege negligence or other tortious misconduct to proceed on an alter ego theory of recovery against a defendant. *Id*. This is clearly incorrect as the alter ego and personal negligence theories at issue in *Gardner I* are distinct and independent concepts.

13. R&O filed the Notice of Entry of Order Granting R&O's Motion to Dismiss on October 24, 2018. JA 642-649.

14. On October 25, 2018, the Gardners filed their Notice of Appeal in the district court, and subsequently filed the same in this Court on October 30, 2018. *See* Notice of Appeal (on file).

V. SUMMARY OF THE ARGUMENT

The district court committed clear error when it dismissed the Gardners' reverse veil-piercing claim on grounds that such relief is only available in post-judgment collection proceedings. Nevada law does not require that a plaintiff first obtain an uncollectible judgment before pursuing a reverse veil-piercing claim. In that regard, courts from other jurisdictions have frequently permitted plaintiffs to bring reverse veil-piercing claims in the original complaint. The district court further erred by finding that the Gardners cannot seek to pierce the corporate veil of R&O in reverse absent of allegations of negligence or other tortious conduct by R&O. And, of course, the potential for jury confusion cannot serve as the basis to dismiss a legally viable claim for relief under NRCP 12(b)(5). The Court should, therefore, reverse the district court's order dismissing the Gardners' reverse veil-piercing claim against R&O.

VI. ARGUMENT[7]

A. Standard Of Review.

Dismissal is permissible under NRCP 12(b)(5) "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Torres v. Nev. Direct Ins. Co.*, 131 Nev. Adv. Op. 54, 353 P.3d 1203, 1210 (2015) (quoting *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008)). This Court "rigorously review[s] orders granting NRCP 12(b)(5) motions to dismiss, presuming all alleged facts in the complaint to be true and drawing all inferences in favor of the plaintiff." *Facklam v. HSBC Bank USA for Deutsche ALT-A Sec. Mortg. Loan Trust*, 401 P.3d 1068, 1070 (Nev. 2017). The Court reviews all legal conclusions de novo. *Id.*[8]

. . . . .

. . . . .

. . . . .

---

[7] As stated previously, R&O and the Opheikens Defendants raised numerous arguments in support of their request for dismissal. The district court, however, did not enter findings on those arguments—many of which were not advanced at the hearing—and dismissed the Gardners' reverse veil-piercing claim on the sole basis that such relief was not available prior to the entry of an uncollectible judgment. As such, the Gardners will not address those other arguments here, but reserve the right to do so in reply should R&O advance these arguments as alternative grounds for affirming the district court's order of dismissal.

[8] R&O and the Opheikens Defendants improperly attached evidence outside of the pleadings as exhibits to their respective filings, but the district court stated in its order that it did not consider such evidence in rendering its decision. JA 638-641.

B. The Gardners May Pursue A Claim For Reverse Veil-Piercing Against R&O Prior To The Entry Of An Uncollectible Judgment Against Orluff.

Nevada has long recognized that reverse veil-piercing under the alter ego doctrine is a viable legal theory. "While the classic alter ego situation involves a creditor reaching the personal assets of a controlling individual to satisfy a corporation's debt, the 'reverse' piercing situation involves a creditor reaching the assets of a corporation to satisfy the debt of a corporate insider based on a showing that the corporate entity is really the alter ego of the individual." *LFC Mktg. Grp., Inc. v. Loomis*, 116 Nev. 896, 903, 8 P.3d 841, 845-46 (2000). In *Loomis*, the Court explained that "reverse piercing is not inconsistent with traditional piercing in its goal of preventing abuse of the corporate form[;]" holding that "reverse piercing is appropriate in those limited instances where the particular facts and equities show the existence of an alter ego relationship and require that the corporate fiction be ignored so that justice may be promoted." *Id.* at 904, 9 P.3d at 846.

To plead a viable reverse piercing theory, the Gardners must simply allege facts sufficient to demonstrate the basic elements for finding alter ego under Nevada law. *Id.* More specifically, the Gardners must allege that (1) the corporation was influenced and governed by the person asserted to be the alter ego; (2) there was such unity of interest and ownership that one is inseparable from the other; and (3) the facts are such that adherence to the corporate fiction of a separate entity would, under the circumstances, sanction a fraud or promote manifest injustice. *Id.* at 904, 8 P.3d at

846-47; NRS 78.747 (codifying the three common law elements of alter ego established by longstanding Nevada jurisprudence).

In the court below, R&O and the Opheikens Defendants sought to manufacture a new standing element for reverse veil-piercing claims by arguing that the existence of an uncollectible judgment is a prerequisite under Nevada law. R&O took a cautious approach in arguing that reverse veil-piercing is only available in post-judgment proceedings and conceded that while "[n]o Nevada appellate court has ever permitted a reverse veil-piercing claim pre-judgment, no Nevada appellate court has ever had the opportunity to expressly reject such a claim either." JA 452-453. Unlike R&O, the Opheikens Defendants argued that the Nevada Supreme Court's opinion in *Loomis* created ***four*** new elements for reverse veil-piercing claims that are not present in traditional alter ego claims: (1) the plaintiff must be a judgment creditor, (2) the defendant must be a judgment debtor, (3) the judgment must be entered, and (4) the judgment must be uncollectible from the non-corporate defendant. JA 522.

This language is nowhere to be found in *Loomis* as this Court never suggested, let alone held, that a party seeking to reverse pierce is required to have an unsatisfied judgment before pursuing such relief. Moreover, while the facts of *Loomis* arose in the post-judgment setting (as alter ego claims frequently do), the Court did not limit its holding to the specific facts of that case. Rather, the *Loomis* court merely stated that a plaintiff must prove the basic elements of a traditional alter ego claim by a preponderance of the evidence. *Id.* at 904, 8 P.3d at 846-47 (a party pursuing a reverse

veil-piercing theory must demonstrate (i) influence and control, (ii) unity of ownership and interest, and (iii) that adherence to the corporate fiction would sanction a fraud or promote injustice).

It is undisputed by the parties that reverse veil-piercing is simply an offshoot of traditional veil-piercing under the alter ego doctrine. Indeed, the *Loomis* court adopted reverse veil-piercing as a viable claim for relief because the theory is "not inconsistent with traditional piercing in its goal of preventing abuse of the corporate form." *Id.* at 903, 9 P.3d at 846. The Opheikens Defendants found support for their position in the *Loomis* court's statement that "the 'reverse' piercing situation involves a ***creditor*** reaching assets of a corporation to satisfy the debt of a corporate insider based on a showing that the corporate entity is the alter ego of the individual." *Id.* (emphasis added). The Court, however, similarly described "the classic alter ego situation" as "a ***creditor*** reaching the personal assets of a controlling individual to satisfy a corporation's debt[.]" *Id.* (emphasis added).

The Court's use of the word "creditor" in *Loomis* when referring to traditional veil-piercing claims is particularly noteworthy because parties are regularly permitted to pursue such claims prior to the entry of judgment. To that end, this Court already issued a writ of mandamus compelling the district court to allow the Gardners to bring alter ego claims against Henderson Water Park LLC, its member-LLCs and the

Individual Defendants. *Gardner*, 405 P.3d at 655-57 and n. 1.[9] If the Gardners are permitted to pursue traditional veil-piercing claims against the LLCs and Individual Defendants in this action prior to the entry of judgment, then it necessarily follows that the Gardners should be permitted to bring a well-plead reverse veil-piercing claim against R&O and Orluff at the same time.

The weight of authority is in accord. "A movant may seek to pierce the veil as part of the initial complaint or after a judgment has been obtained and the movant discovers that the corporate shield may be vulnerable. This difference only affects the procedure of obtaining the relief and not the nature of the remedy." *In re Howland*, 516 B.R. 163, 169 n. 3 (Bankr. E.D. Ky. 2014), *aff'd*, 579 B.R. 411 (E.D. Ky. 2016), *aff'd*, 674 Fed. Appx. 482 (6th Cir. 2017). For that reason, courts routinely allow plaintiffs to pursue reverse veil-piercing claims in the original complaint rather than after the entry of judgment. *See, e.g.*, *Allstate Ins. Co. v. TMR Medicabill Inc.*, 2000 WL 34011895, at *16 (E.D.N.Y. July 13, 2000) (entering pre-judgment writ of attachment against non-party corporations based on reverse veil-piercing theory premised on RICO and fraud claims asserted in original complaint); *McCleskey v.*

[9] This fact alone refutes R&O's argument in the district court that "a claim for relief cannot be predicated on a theoretical fulfillment of conditions that could not be met, if at all, until after trial." JA 453. By R&O's flawed logic, Plaintiffs' traditional alter ego claim is also "predicated on a theoretical fulfillment of conditions that could not be met, if at all, until after trial"—*i.e.* the inability to collect on a potential judgment—yet the Court issued a writ of mandamus granting Plaintiffs the right to pursue such relief in this very action.

David Boat Works, Inc., 225 F.3d 654, at *3-4 (4th Cir. 2000) (reversing entry of summary judgment on reverse veil-piercing claim premised on tort and contract claims asserted in the original complaint); *Smith v. Carolina Med. Ctr.*, 274 F. Supp. 3d 300, 327-28 (E.D. Pa. 2017) (denying motion to dismiss reverse veil-piercing claim premised on tort claims asserted in the original complaint); *Wilson v. Davis*, 305 S.W.3d 57, 68-72 (Tex. Ct. App. 2009) (reversing grant of summary judgment on reverse veil-piercing claim premised on negligence claims asserted in the original complaint); *cf. M.J. v. Wisan*, 371 P.3d 21, 36 (Utah 2016) (adopting reverse veil-piercing as a viable theory in connection with tort claims brought in original complaint but concluding that such relief was not necessary under the factual circumstances).[10]

Here, it is contrary to Nevada law and simply illogical to claim that the Gardners lack standing to pursue a reverse veil-piercing claim until they proceed to trial against Orluff, obtain a judgment against him, and unsuccessfully attempt to collect on that judgment for some indeterminate amount of time. The Court should reverse the district

[10] During the hearing on the Gardners' Motion for Leave to File Third Amended Complaint, the Opheikens Defendants made a number of inaccurate representations to the district court in an attempt to distinguish the facts of these cases. JA 543-545. The Gardners addressed those representations at length in their Opposition to R&O's Motion to Dismiss and the Opheikens Defendants' Joinder thereto. *Id*. To the extent R&O adopts a similar approach in its Answering Brief, the Gardners will respond accordingly in reply. At present, however, the Gardners refer the Court to the underlying record for a more detailed analysis of the cases cited above. *Id*.

court's order of dismissal as it was patently erroneous to find that a party may only pierce the corporate veil in reverse in post-judgment collection proceedings.

C. There Is No Requirement That A Plaintiff Allege Tortious Conduct In Order To Pursue An Alter Ego Theory Of Recovery; Nor Is Jury Confusion An Appropriate Basis For Dismissal Under NRCP 12(b)(5).

Piercing the corporate veil under the alter ego doctrine—whether in the traditional sense or in reverse—is merely a mechanism by which a party may satisfy a debt by demonstrating a corporate entity is the alter ego of an individual. *See Loomis*, 116 Nev. at 903, 8 P.3d at 845-46. There was no requirement under common law that a party seeking to pierce the corporate veil allege negligence or other misconduct against the target of an alter ego claim. *Id.* at 904, 8 P.3d at 846-47. Similarly, NRS 78.747—which merely codified the common law elements of an alter ego claim—does not impose an obligation to allege the target of an alter ego claim engaged in negligence or other misconduct.

In short, the district court's erroneous reliance on the absence of allegations of tortious behavior on the part of R&O appears to be premised on its fundamental misunderstanding of this Court's decision in *Gardner I.* JA 627. This Court's decision in *Gardner I* did not require that an alter ego claim be paired with allegations of negligence or other wrongdoing against the alleged alter ego. *Id.* at 655-656. Rather, the Court merely held that the alter ego doctrine applies to LLCs. *Id.*

It should also go without saying that the district court erred by finding that dismissal was the appropriate solution to address potential jury confusion caused by

the presence of the Gardners' reverse veil-piercing claim. This is especially true where, as here, the Gardners have preexisting alter ego claims against HWP, the Member-LLCs and the Individual Defendants that will be addressed at trial. Dismissal is appropriate under NRCP 12(b)(5) "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Torres*, 353 P.3d at 1210. Moreover, NRS 48.035 may not be used as a basis to dismiss the Gardners' reverse veil-piercing claim against R&O. *Cf. Hana Fin., Inc. v. Hana Bank*, 735 F.3d 1158, 1162 n. 4 (9th Cir. 2013) ("A motion in limine is not the proper vehicle for seeking a dispositive ruling on a claim[.]").

To be clear, the Gardners submit that the facts and evidence supporting their reverse veil-piercing claim are inextricably intertwined with their tort claims against HWP and the Individual Defendants such that the issues must be tried together. Nevertheless, to the extent the district court believed the Gardners' reverse veil-piercing claim may cause jury confusion, the proper remedy would be to conduct the trial in separate phases or bifurcate. *See, e.g.*, *Parish of St. Bernard Through the St. Bernard Parish Gov't v. Lafarge N. Am. Inc.*, 2016 WL 4241889, at *5 (E.D. La. Aug. 11, 2016) (conducting trial in separate phases would "alleviate Defendant's concerns of jury confusion resulting from a combined trial"); *Crown Cork & Seal Co., Inc. Master Ret. Trust v. Credit Suisse First Boston Corp.*, 288 F.R.D. 335, 337 (S.D.N.Y. 2013) ("In the court's view, eliminating the likelihood of juror confusion is the foremost factor in support of bifurcating the trial."). Notably, the Gardners

proposed these options to the district court, which were rejected because dismissal made "more sense than to [ ] clutter up a negligence case." While dismissing the Gardners' reverse veil-piercing claim may have made the case simpler for the district court, its ruling was clearly contrary to law.

VII. CONCLUSION

Based on the foregoing, the Gardners respectfully request that the Court reverse the district court's erroneous dismissal of their reverse veil-piercing claim under the alter ego doctrine against R&O. As stated in their Motion to Expedite and Reassign Upon Remand filed concurrently herewith, the Gardners further request that the Court reassign this matter to a different district court judge following remand.

DATED this 4th day of December, 2018

CAMPBELL & WILLIAMS

By: /s/ ***J. Colby Williams***
DONALD J. CAMPBELL, ESQ. (#1216)
J. COLBY WILLIAMS, ESQ. (#5549)
PHILIP R. ERWIN, ESQ., (#11563)
SAMUEL R. MIRKOVICH, ESQ. (#11662)
700 South Seventh Street
Las Vegas, Nevada 89101

Counsel for Appellants

VERIFICATION

I, J. Colby Williams, declare as follows:

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

2. I verify that I have read and compared the foregoing APPELLANTS' OPENING BRIEF 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 Opening Brief 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 4th day of December, 2018

/s/ ***J. Colby Williams***
J. Colby Williams, Esq. (#5549)

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Opening Brief, 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 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 4th day of December, 2018

CAMPBELL & WILLIAMS

By: /s/ ***J. Colby Williams***
DONALD J. CAMPBELL, ESQ. (#1216)
J. COLBY WILLIAMS, ESQ. (#5549)
PHILIP R. ERWIN, ESQ., (#11563)
SAMUEL R. MIRKOVICH, ESQ. (#11662)
700 South Seventh Street
Las Vegas, Nevada 89101

Counsel for Appellants

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 4th day of December 2018, I caused true and correct copies of the foregoing Appellants' Opening Brief 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:

Paul F. Eisinger, Esq.
Douglas J. Duesman, Esq.
THORNDAL ARMSTRONG DELK
BALKENBUSH & EISINGER
1100 E. Bridger Ave.
Las Vegas, Nevada 89125

Rebecca L. Mastrangelo, Esq.
ROGERS, MASTRANGELO,
CARVALHO & MITCHELL
700 South Third Street
Las Vegas, Nevada 89101

Steven T. Jaffe, Esq.
Kevin S. Smith, Esq.
HALL JAFFE & CLAYTON LLP
7425 Peak Drive
Las Vegas, Nevada 89128

John E. Gormley, Esq.
OLSON, CANNON, GORMLEY,
ANGULO & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129

Brett Godfrey, Esq.
Jeffrey Vail, Esq.
Karen Porter, Esq.
GODFREY JOHNSON
9557 S. Kingston Court
Englewood, Colorado 80112

Marsha L. Stevenson, Esq.
STEVENSON & DICKINSON
2820 W. Charleston Drive
Suite 200
Las Vegas Nevada 89128

/s/ ***John Y. Chong***
An employee of Campbell & Williams