IN THE SUPREME COURT OF THE STATE OF NEVADA

PETER GARDNER AND CHRISTIAN GARDNER, INDIVIDUALLY AND ON BEHALF OF MINOR CHILD, LELAND GARDNER, Appellants, v. R & O CONSTRUCTION, INC., Respondent.	)	Case No.: 77261

APPELLANTS' MOTION TO REASSIGN ON REMAND AND EXPEDITE APPEAL

Appellants Peter and Christian Gardner, individually and on behalf of minor child, Leland Gardner, through their undersigned counsel, hereby submit the following Motion to Reassign on Remand and Expedite Appeal.

I. INTRODUCTION

For the second time, the Honorable Jerry Wiese II has erroneously barred the Gardners from pursuing a viable claim for relief against a new party without any supporting basis in fact or law. In July 2016, Judge Wiese ignored abundant legal authority and prohibited the Gardners from pursuing direct claims for negligence against the seven members of Henderson Water Park, LLC's Management Committee (the "Individual Defendants") based on their own tortious conduct. The district court likewise precluded the Gardners from bringing traditional alter ego

claims on grounds that the doctrine did not apply to LLCs. In order to make the latter finding, Judge Wiese disregarded abundant legal authority including federal cases interpreting Nevada law, and instead relied on the flawed analysis of a Nevada Lawyer article discovered during his own independent research. This Court reversed the district court's erroneous ruling on all counts in *Gardner on Behalf of L.G. v. Eighth Judicial Dist. Court*, 405 P.3d 651 (Nev. 2017) ("*Gardner I*").

But in the eyes of Judge Wiese, this Court's ruling only "emboldened" the Gardners to "sue anybody [they] want" in an attempt to "get a deep pocket or another pocket." JA 349, 621. Armed with that negative view of the Gardners' intent, Judge Wiese was quick to dismiss their claim for reverse veil-piercing against R&O Construction, Inc. ("R&O") on grounds that such relief is only available in post-judgment collection proceedings. Like his denial of the Gardners' motion for leave to amend in July 2016, Judge Wiese disregarded ample case law supporting the viability of the Gardners' claim. The district court likewise resorted to the issue of potential jury confusion as a basis for dismissal because allowing the Gardners' reverse veil-piercing claim to proceed would only "clutter up a negligence case." JA 625.

Here, the Gardners do not contend that Judge Wiese carries an outright bias or prejudice against them that requires disqualification under NRS 1.230. But it is abundantly clear that Judge Wiese firmly believes the Gardners' lawsuit should be limited to a simple negligence claim against Henderson Water Park, LLC ("HWP").

In other words, Judge Wiese has prejudged the scope of this case and taken steps to prevent the Gardners from seeking to impose liability on any other parties. Because Judge Wiese cannot be expected to disregard his previously expressed views and to preserve the appearance of justice in a case involving a catastrophically injured little boy, the Gardners respectfully request this Court to order reassignment on remand and expedite its consideration of their appeal.

II. FACTUAL BACKGROUND

The Gardners will not restate the factual background of their prior appeals to this Court or the procedural history of the instant appeal. Instead, the Gardners incorporate by reference the Statements of Facts from their Petition for Writ of Mandamus in *Gardner I*—a copy of which is attached hereto as Exhibit 1—and their Opening Brief filed concurrently herewith.

III. ARGUMENT

A. The Court Should Reassign This Matter On Remand To A Different District Court Judge.

The Gardners' decision to bring this Motion does not come lightly as they acknowledge that reassignment on remand is "reserved for rare and extraordinary circumstances." *Krechman v. Cnty. of Riverside*, 723 F.3d 1104, 1112 (9th Cir. 2013). This Court has only reassigned matters on rare occasions and there is no established legal standard for seeking such relief in Nevada. *See, e.g.*, *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 250, 871 P.3d 320, 327 (1994)

(reassigning matter "[i]n fairness to the district court judge and the litigants"); *FCH1, LLC v. Rodriguez*, 130 Nev. Adv. Op. 46, 335 P.3d 183, 190 (2014) (reassigning matter where the district court judge heard evidence that should have been excluded and expressed opinion on the ultimate merits of the case); *Perez v. State*, 396 P.3d 745, at *2 (Nev. 2017) (noting that the Court's prior order directed the district court clerk to reassign case to different district court judge).[1]

The Ninth Circuit Court of Appeals has determined that it may "reassign a case to a different district judge under [its] supervisory powers in 'unusual circumstances.'" *Krechman*, 723 F.3d at 1111 (9th Cir. 2013) (citing *United States v. Wolf Child*, 699 F.3d 1082, 1102 (9th Cir. 2012)). "This standard does not require a showing of actual bias on the part of the judge who first heard the case." *Id.* (citing *Mendez v. Cnty. of San Bernardino*, 540 F.3d 1109, 1133 (9th Cir. 2008)). In determining whether to reassign a case on remand because of "unusual circumstances," the Ninth Circuit considers the following three factors:

> (1) Whether the original judge would reasonably be expected on remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether

[1] *See also Zollo v. Terrible Herbst, Inc.*, 2015 WL 3766856, at *1 n. 2 (Nev. June 12, 2015) (reassigning matter where district court judge twice dismissed case without entering the required findings of fact); *Coulter v. State*, 2015 WL 5554588, at *3 n. 2 (Nev. Sept. 18, 2015) (reassigning matter where multiple irregularities involving district court and jurors occurred during trial). The Gardners merely cite these unpublished decisions by way of example and not as legal authority.

> reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Id. (citing *United States v. Jacobs*, 855 F.2d 652, 656 (9th Cir. 1988). The first two factors are equally important and a finding of either is sufficient to support reassignment on remand. *Id.* (citing *United States v. Sears, Roebuck & Co.*, 785 F.2d 777, 780 (9th Cir. 1986)).

The Gardners respectfully submit that this Court should apply the Ninth Circuit's standard for reassignment as each of the first two factors are present here. As to his ability to put aside his previously expressed views, Judge Wiese's distaste for the Gardners' actions following this Court's decision in *Gardner I* was apparent from his unprompted comment that they "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. Judge Wiese further evidenced his desire to bar the Gardners from pursuing alter ego theories at trial or otherwise expanding the scope of this case by dismissing their reverse veil-piercing claim because "it makes more sense than to [ ] clutter up a negligence case." JA 625.

In short, Judge Wiese believes the Gardners are adding parties and pursuing alter ego theories (including the reverse veil-piercing claim at issue in this appeal) to "get a deep pocket or another pocket." JA 621. He is absolutely correct. The Gardners have been forced to pursue alternative avenues of recovery because HWP's insurance coverage for this incident pales in comparison to the staggering

medical expenses Leland's family has incurred—and will continue to incur for decades—as a result of Defendants' grossly negligent and illegal conduct.

To be clear, Judge Wiese's observation regarding the Gardners' motives for pursuing a reverse veil-piercing claim is not the basis for reassignment on remand. Rather, reassignment is necessary because Judge Wiese espoused his view that the law does not permit a plaintiff to plead claims designed to "get a deep pocket or another pocket." JA 621 (stating the Gardners' reverse veil-piercing claim is "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.").[2] Judge Wiese's determination that the Gardners should not be allowed to recover from sources other than HWP is particularly troubling in this case because the imposition of alter ego liability is (at least in part) a question of law for the court.[3] Moreover, given that Judge Wiese disregarded prevailing legal authority from across the country to determine that LLC members and managers were wholly immune from suit, it

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[2] Judge Wiese's interpretation of the alter ego doctrine is confusing. After all, the purpose of the doctrine—provided the necessary facts and equities are present—is to permit a party to disregard the corporate fiction and recover on a debt from third party—*i.e.* "another pocket"—when adherence to the corporate form would sanction a fraud or promote manifest injustice.

[3] The parties dispute the role of the jury in deciding an alter ego claim. The Gardners submit that the jury must render factual findings before the district court decides whether to impose alter ego liability. JA 535-536. R&O has argued that alter ego liability is a pure question of law for the district court that is appropriate for resolution on a dispositive motion without discovery or hearing evidence. JA 453-454.

stands to reason that he believes (incorrectly) the Gardners' direct claims for negligence against the Individual Defendants are likewise intended "to get a deep pocket or another pocket." Accordingly, this Court should reassign this case on remand because Judge Wiese cannot reasonably be expected to put his unequivocal views regarding the propriety of the Gardners' claims out of his mind.[4]

Reassignment is also required to preserve the appearance of justice based on the lengths to which Judge Wiese has gone to prohibit the Gardners from expanding their case beyond a simple negligence claim against HWP. Again, Judge Wiese ignored unbroken law in order to find the Gardners' direct claims for negligence against the Individual Defendants were barred. In preventing the Gardners from bringing a traditional alter ego claim, Judge Wiese similarly ignored prevailing authority including federal cases interpreting Nevada law, and instead cited a Nevada Lawyer article gleaned from his own research.

As to the Gardners' reverse veil-piercing claim, Judge Wiese evidenced a clear misunderstanding of this Court's opinion in *Gardner I* and manufactured a new standing requirement for reverse veil-piercing in direct contravention of

[4] Notably, Defendants have not hesitated to play to Judge Wiese's preconceived notions in this regard. For example, among other vitriolic accusations including that the Gardners were seeking to perpetrate a fraud on the court, the Opheikens Defendants claimed that the Gardners' Third Amended Complaint was premised on "misstatements of fact" and "utterly false" representations made with the "bad faith, ulterior motive to try to force a settlement" and "shak[e] down more money." JA 45-63. They, along with R&O, further argued that the Gardners were somehow acting in bad faith by seeking to name R&O as a defendant with "deep-pockets." *Id.*; JA 452.

Nevada law. Judge Wiese even went so far as to cite jury confusion as a basis for dismissal under NRCP 12(b)(5). And when the Gardners suggested that he phase or bifurcate the trial to alleviate jury confusion, Judge Wiese replied that dismissal made more sense than to "clutter up a negligence case." JA 625. Accordingly, the Court should reassign this matter on remand to preserve the appearance of justice in a case that will determine the livelihood of a young boy who was severely injured as a result of Defendants' willful decision to elevate their own financial interests over the public's safety.[5]

B. The Court Should Expedite Its Consideration Of The Instant Appeal.

Again, there is no established standard in Nevada for expediting the consideration of an appeal. The Court, however, has granted such relief where appropriate. *See, e.g.*, *The Las Vegas Review Journal v. Eighth Judicial Dist. Ct.*, Case No. 75073 (2018) (directing answer to writ petition in 24 hours and issuing published decision granting the writ fifteen days after the Court docketed the matter); *Wynn v. Eighth Judicial Dist. Ct.*, Case No. 74184 (2017) (requiring completion of briefing within seven days of the petition being filed and holding argument three

[5] As to the final factor, reassignment will not result in any waste or duplication of effort. To date, the district court's role has been confined to the amendment of pleadings, deciding dispositive motions under NRCP 12(b)(5), and ruling on routine objections to decisions from the Discovery Commissioner. Provided the Gardners' appeal is expedited as requested in Section II.B *infra*, there will be no waste or duplication of effort if this matter is assigned to a different district court judge on remand.

months later); *Wynn v. Eighth Judicial Dist. Ct.*, Case No. 74063 (2017) (requiring completion of briefing within seven days of the petition being filed and deciding matter within 3 months); *State of Nevada v. Eighth Judicial Dist. Ct.*, Case No. 76485 (2018) (requiring completion of briefing within 31 days and expediting resolution to the extent permitted by the Court's docket).

The Gardners, of course, do not seek the immediate resolution of this appeal. Rather, the Gardners ask the Court to expedite its consideration of this appeal such that it will be decided before the parties complete discovery and submit dispositive motions; the deadlines for which are currently set for April 12, 2019 and May 13, 2019, respectively. As demonstrated above, Judge Wiese has repeatedly confirmed his predetermined view that the scope of this case should be limited to the Gardners' negligence claim against HWP and not include claims that extend liability to other parties. It is, therefore, imperative that the Court decide this appeal, including the Gardners' request for reassignment, before Judge Wiese finally decides the scope of this case at the dispositive motion phase.

Moreover, it is undeniable that Judge Wiese's erroneous rulings in this matter have effectively derailed the Gardners' discovery efforts in this case. His denial of the Gardners' motion for leave to amend in May 2016 halted discovery on their claims against the Individual Defendants, which only commenced earlier this year. And while the Gardners were able to gather substantial evidence in support of their reverse veil-piercing claim against R&O prior to filing the Third Amended

Complaint, there is no question that more discovery is required before trial. Because trial is set for September 2019 and the five-year rule will run in July 2020, the Court should expedite its consideration of this matter to allow the Gardners to complete discovery prior to trial.

As such, the Gardners respectfully request that the Court order the completion of briefing within 30 days. Expedited briefing will not impose any hardship on the parties given that this appeal involves a straightforward legal question that was extensively briefed in the court below. While the Gardners are cognizant of the Court's heavy workload, they further request that the Court expedite its consideration of this appeal such that it is decided during the Spring calendar.

III. CONCLUSION

Based on the foregoing, the Gardners respectfully request that the Court expedite its consideration of this appeal in the manner described above. The Gardners recognize that their request for reassignment on remand is contingent on the Court's reversal of the district court's order dismissing their reverse veil-piercing claim against R&O. As a result, the Gardners ask that the Court defer its ruling on that request until its ultimate decision on the instant appeal.

Dated: December 4, 2018 CAMPBELL & WILLIAMS

By **/s/ *Donald J. Campbell***
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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 Motion to Reassign on Remand and Expedite Appeal to be delivered to the following counsel and parties:

VIA HAND DELIVERY:

Judge Jerry A. Wiese II
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Regional Justice Center
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EXHIBIT 1

Case No.

IN THE SUPREME COURT OF THE STATE OF NEVADA

PETER and CHRISTIAN GARDNER, on behalf of minor child, LUCAS GARDNER,
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

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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 SOUGHT[1]

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.

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[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").

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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

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

Second, the Gardners requested leave to amend to plead allegations related to the alter ego doctrine against HWP and its member-LLCs. In other words, the Gardners alleged that HWP and its member-LLCs disregarded the corporate entity such that the Gardners should be permitted to pierce the corporate veil to obtain recovery from the Individual Defendants. Again, the alter ego doctrine constitutes a separate and distinct route to liability against the Individual Defendants that is not related to the Gardners' direct claims for negligence against the Individual Defendants.

On June 30, 2016, the Honorable Jerry A. Wiese II denied the Gardners' Motion in its entirety. As to the Gardners' direct claims for negligence against the Individual Defendants, the District Court ruled that the Individual Defendants were wholly immune from liability because NRS 86.371 provides "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." In doing so, the District Court ignored abundant case law and other persuasive legal authority holding that a member or manager of an LLC can be held personally liable for its own tortious conduct that was committed on behalf of a LLC.

The District Court likewise ruled that the alter ego doctrine does not apply to LLCs. Again, the District Court ignored highly persuasive case law from federal

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courts interpreting Nevada's statutory scheme for LLCs. More importantly, the District Court disregarded the legislative history of Chapters 78 and 86 of the Nevada Revised Statutes, which confirms the applicability of the alter ego doctrine to LLCs. Instead, the District Court relied on a Nevada Lawyer article authored by a local attorney that was published in November 2014. With all due respect to the attorney in question, his theory on why the alter ego doctrine does not apply to LLCs is contradicted and outweighed by the underlying legislative history of the relevant statutes as well as highly persuasive federal case law.

In short, the District Court clearly abused its discretion by denying the Gardners' Motion in contravention of prevailing legal authority. Because the District Court's erroneous ruling has vitiated the Gardners' ability to present a viable claim at trial, the Gardners have no adequate remedy on appeal, which warrants the issuance of an extraordinary writ of mandamus.

II. STATEMENT OF THE ISSUES

1. Whether the District Court abused its discretion by denying the Gardners' Motion on grounds that NRS 86.371 constituted a complete bar to liability against the Individual Defendants where the Gardners alleged that the Individual Defendants personally committed the tort of negligence by authorizing, directing, ratifying and participating in the illegal conduct that forms the basis of the Amended 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

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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.

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

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

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

IV. ARGUMENT

A. Legal Standard.

"Under NRCP 15(a), leave to amend, even if timely sought, need not be granted if the proposed amendment would be 'futile.'" *Nutton v. Sunset Station, Inc.*, 131 Nev.Adv.Op. 34, 357 P.3d 966, 973 (Nev.Ct.App. 2015). "A proposed amendment 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

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allegations of the complaint must be accepted as true. *Vacation Village v. Hitachi Am.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994) (citing *Capital Mortgage Holding v. Hahn*, 101 Nev. 314, 315, 705 P.2d 126, 126 (1985)). In that regard, NRCP 8(a) provides that a pleading need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Chavez v. Robberson Steel Co.*, 94 Nev. 597, 599, 584 P.2d 159, 160 (1978).[3]

B. The District Court's Erroneous Denial Of The Gardners' Motion Warrants Extraordinary Writ Relief.

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station." NRS 34.160. "Mandamus relief may also be proper to control an arbitrary or capricious exercise of discretion." *Halcrow, Inc. v. Eighth Judicial Dist. Court*, 129 Nev.Adv.Op. 42, 302 P.3d 1148, 1151 (2013). "Writ relief will not be available when an adequate and speedy legal remedy exists." *Id.* "Whether a future appeal is sufficiently adequate and speedy necessarily turns on the underlying proceedings' status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented." *Id.* Here, this Court should invoke its

[3] In the underlying proceeding, the Cowabunga Bay entities did not assert that the Gardners' specific factual allegations against the Individual Defendants were insufficient to state a viable claim for negligence under NRCP 8(a) nor did the District Court render any such finding.

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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

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

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

The Gardners' request for extraordinary writ relief implicates two important 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

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

What the Cowabunga Bay entities failed to recognize, however, is that the Gardners are not seeking to hold the Individual Defendants liable "for the debts and liabilities of the company," *see* NRS 86.371, nor is this action simply "against the company." *See* NRS 86.381. To the contrary, the Gardners requested leave to amend the complaint to hold the Individual Defendants personally liable for their own tortious conduct. In other words, the Gardners would be entitled to bring these claims for negligence against the Individual Defendants even if the Cowabunga Bay entities were not named defendants in the underlying action. Respectfully, the District Court failed to apprehend this distinction when it ruled that the Gardners' direct claims against the Individual Defendants were barred because "the Nevada Revised Statutes protect members of an LLC, not only from debts incurred by an LLC, but also from liabilities incurred by the LLC." GARD145.

At the outset, it is ironic that the Cowabunga Bay Defendants couched their legal analysis of this issue with a comparison to the law governing corporations in Nevada, *i.e.*, that "a corporation is a legal entity that exists separate and distinct from its shareholders, officers, and directors." GARD116-17. Indeed, despite the fact that NRS 78.747, like NRS 86.371, states that "no stockholder, director or officer of a corporation is individually liable for a debt or liability of the corporation….[,]" this Court has expressly held that "[a]n officer of a corporation may be individually liable for any tort

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which he commits…" *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1098, 901 P.2d 684, 689 (1995); *see also Rosenthal v. Poster*, 2008 WL 4527859, *3 (D.Nev. Sept. 30, 2008) ("Generally, a tortious act committed by a corporate officer, regardless of the fact he was acting on behalf of the corporation, is considered a personal wrongdoing, holding the officer himself personally liable."). Accordingly, contrary to the Cowabunga Bay entities' reliance on the law governing corporations, this Court's binding precedent clearly establishes that officers—the "managers" of a corporation—are individually liable for their own tortious acts committed on behalf of the corporation. The same principle should apply to LLCs.[4]

The Nevada Supreme Court has not addressed direct liability against individuals relating to tortious conduct committed in their capacity as members or managers of an LLC in any published opinion. The overwhelming majority of federal and state courts that have considered the issue hold that, like corporate officers and directors, individuals may be held personally liable for torts committed in their capacity as members or managers of an LLC.

[4] Although statutory interpretation is not necessary to resolve this issue, the Gardners must point out that the Legislature drew a direct comparison between the language of NRS 78.747 and the section of the LLC bill that would eventually become NRS 86.371. GARD141 ("Mr. Fowler pointed out that [ ] section [310 of the limited 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).

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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)

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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

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("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.").

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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

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doctrine is to 'do justice' whenever it appears that the protections provided by the corporate form are being abused." *Id.* at 903, 8 P.3d at 845-46. For reasons detailed below, the Legislature codified the alter ego doctrine for corporations in 2001. *See* NRS 78.747(2).

The Nevada Supreme Court has never expressly addressed whether the alter ego doctrine applies to LLCs. *See Webb v. Shull*, 128 Nev.Adv.Op. 8, 270 P.3d 1266, 1272 n. 3 (2012) ("The parties assume that NRS 78.747, which is part of the statutory chapter governing corporations, applies to the alter ego assertion against Shull and Celebrate, an LLC. Accordingly, for purposes of this appeal, we likewise assume, without deciding, that the statute applies and analyze their alter ego arguments under that standard."). Although it did not specifically decide whether Nevada law on corporations applied to alter ego claims against an LLC, this Court cited two cases from the United States District Court for the District of Nevada in which the federal court recognized the application of the alter ego doctrine to LLCs in Nevada. *Id.*

Cowabunga Bay entities on the other. In point of fact, courts holding members or managers of an LLC liable for their own tortious conduct have made it abundantly clear that such a ruling does not require "piercing the corporate veil" under the alter ego doctrine. *See, e.g.*, *D'Elia*, 147 P.3d at 524 ("Several courts and commentators make it clear that holding an officer or director personally liable for corporate torts in which 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.").

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

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

The District Court, however, disregarded the foregoing authority from the United States District Court for the District of Nevada that was cited by this Court in

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

This conclusion—which was based on a general canon of statutory construction as opposed to any clear indication of the Legislature's intent—is directly contradicted by the underlying legislative history of Nevada's corporation statutes ***and*** LLC statutes. It is well settled that this Court will "only look beyond the plain

[7] In *DaimlerChrysler*, the Nevada Supreme Court addressed an alleged ambiguity in the Sales and Use Tax Act and stated the general rule of statutory construction that "omissions of subject matters from statutory provisions are presumed to have been intentional." 121 Nev. at 548, 119 P.3d at 139. Notably, this Court in *DaimlerChrysler* also examined the legislative history of the allegedly ambiguous statute and, more specifically, discussions held before the Assembly Committee on Taxation. *Id.* at 548-49, 119 P.3d at 139. Here, the Gardners submitted 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.

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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

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> exploited through limited liability companies. As recently stated by the Nevada Supreme Court, the 'essence' of the alter ego doctrine is to 'do justice' whenever it appears that the protections provided by the corporate form are being abused. With respect to limited liability companies, the 'protections' of limited liability provide the same sort of possibilities for abuse.
>
> ***Against this strong policy of preventing abuse of limited liability, the court discounts heavily any argument that Nevada's codification of the principles of alter ego liability for corporations in 2001 created a negative inference that the Nevada legislature intended to abrogate alter ego liability for limited liability companies.*** Although some states have explicitly provided for alter ego liability for limited liability companies, the sparse legislative history of the 2001 Nevada legislation indicates that legislators were interested in increasing corporate franchise fees, and were prepared to codify corporate alter ego liability as a price for that increase.
>
> ***Nowhere in the legislative minutes or other scraps of legislative history, however, is there any indication of an intent to tighten or clarify alter ego liability for corporations while eliminating it for limited liability companies or any other limited liability entity (such as limited partnerships, limited-liability partnerships or limited liability limited partnerships).*** Indeed, such a course would be counterproductive, in that it would disfavor the creating of corporations, which would lessen overall corporate franchise fee revenues. The conclusion is thus drawn that the 2001 legislation dealt only with corporations, and left untouched the law with respect to limited liability companies.

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

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

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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

> a corporation, that it has instead been handled as the alter-ego of the persons owning the corporation. Therefore it was not a corporation and the owners were liable for the debts. ***He felt it was entirely consistent with Section 310. In a limited-liability company the members and managers were not liable, the same as in a corporation where the directors, shareholders and officers were not liable. But if there was not a company because there was an alter-ego, and because the corporate veil had been pierced, then the owners and managers were personally liable. Mr. Fowler emphasized that was exactly the statement of doctrine the courts used. If the corporation's formalities and existence were persistently ignored, then it really was not a corporation. He opined there was no reason the same principle would not be applicable to a limited-liability company, and felt a court would agree.***
>
> ***Mr. Sader stated his opposition to the motion, saying he did not feel there was any change in current policy by creating the limited-liability company and that alter-egos and piercing the corporate veil could still be used as defenses.***

GARD142 (emphasis added).

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

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

V. CONCLUSION.

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

DATED this 19th day of July, 2016

CAMPBELL & WILLIAMS

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

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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

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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
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