CASE NO. _____

IN THE SUPREME COURT OF THE STATE OF NEVADA

ORLUFF OPHEIKENS, SLADE OPHEIKENS, GABBI OPHEIKENS, and TOM WELCH,

Petitioners

v.

The EIGHTH JUDICIAL DISTRICT COURT OF the STATE OF NEVADA in and for the COUNTY OF CLARK, DEPARTMENT XXX, the Honorable Judge Jerry A. Wiese II,

Respondent

and

PETER GARDNER & CHRISTIAN GARDNER on behalf of minor child L.G.; HENDERSON WATER PARK, LLC doing business as the COWABUNGA BAY WATER PARK; SHANE HUISH; SCOTT HUISH; CRAIG HUISH; WILLIAM PATRICK RAY, JR.; and R&O CONSTRUCTION COMPANY, INC.

Real Parties in Interest

EMERGENCY PETITION FOR A WRIT OF MANDAMUS

****Emergency Motion Under NRAP 27(e)****

(Action Required by 30 August 2019)

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

District Court Case No. A-15-722259-C

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NRAP 27(E) CERTIFICATE

I, Karen J. Porter, Esq., am among the counsel for Petitioners and make the following certification under penalty of perjury:

I am an attorney licensed to practice law in and in good standing before all courts in the State of Nevada and am a member of the law firm of GODFREY | JOHNSON, P.C., 9557 S. Kingston Ct., Englewood, CO 80112 (the "Firm"), counsel of record for Tom Welch, Orluff Opheikens, Slade Opheikens and Chet Opheikens (collectively the "Petitioners").

A. NATURE OF THE EMERGENCY

Petitioners are individual defendants in the action below, District Court Case No. A-15-722259-C. The Plaintiffs below seek damages against the Petitioners in their individual capacities, including punitive damages.

By agreement of the parties, Petitioners withheld the personal financial information of Petitioners from discovery unless and until the District Court determined that the punitive damages claim against Petitioners could proceed to trial (Petitioners personal financial information was not relevant to the case absent a viable punitive damage claim).

The District Court heard the matter of personal liability (including punitive damages) on separate motions for summary judgment on 9 August 2019 and issued a Written order on 15 August 2019 denying Petitioners' motions and allowing Plaintiffs' claims (including their punitive damages claim) to go to trial. Petitioners therefore owe the Plaintiffs below discovery on punitive damages forthwith.

Hence, Petitioners require immediate relief to avoid being forced to either disclose the materials before this Court can review the Petition and suffer irreparable harm from such disclosure, or withhold the materials while the Court adjudicates this Petition under its regular order, and thereby violate the Nevada Rules of Civil Procedure because the agreed-upon extension of time to provide punitive damages discovery materials expired upon the District Court entering its order on 15 August 2019.

Therefore, Petitioners are compelled to seek emergency relief from this Court in order to obtain a clarification of its previous Writ of mandamus in this case: *Gardner on Behalf of L.G. v. Eighth Judicial Dist. Court in & for County of Clark*, 405 P.3d 651, 655 (Nev. 2017)

(unpublished decision) (hereinafter "Gardner II"),[1] and to obtain an interpretation of the amendments of a Nevada statute, NRS § 78.138, by this Court as a matter of first impression.

Petitioners sent an emergency motion to the District Court on 16 August and requested a stay of discovery into punitive damages until 30 August 2019 (or this Court's disposition of the Petition, whichever occurs first). Plaintiffs refused to consent to the stay upon conferral. Accordingly, the District Court issued an order shortening time to hear the motion on 19 August and set the emergency motion for hearing on 21 August. However, later on 19 August 2019 Plaintiffs changed their mind and agreed to the stay request. Petitioners accordingly notified the District Court of the non-opposition and moved to vacate the hearing. Petitioners presume that the District Court will grant the unopposed motion for stay.

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[1] While *Gardner II* is unpublished, it is mandatory precedent in *this* case. NRAP 36 ("An unpublished disposition . . . does not establish mandatory precedent except in a subsequent stage of a case in which the unpublished disposition was entered, in a related case, or in any case for purposes of issue or claim preclusion or to establish law of the case.") (emphasis added).

Petitioners did not request a longer or broader stay because the final discovery cutoff is 7 September 2019 (30-days prior to the 7 October 2019 trial date), and a limited stay until 30 August covering only the punitive damages-related personal financial information strikes a reasonable balance between protecting the rights of Petitioners (by allowing for a meaningful review of the issues raised in this Petition) with the interests of the Plaintiffs below and the District Court in bringing this case to trial as scheduled.

Therefore, Petitioners respectfully request that the Court consider this Petition prior to 30 August 2019 under its emergency review procedures.

B. CONTACT INFORMATION FOR THE PARTIES

The telephone number and address of Respondent and the telephone numbers and office addresses of the attorneys for the parties below are:

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C. NOTIFICATION TO THE CLERK OF THIS COURT

On 16 August 2019 Petitioners notified by electronic mail and/or telephone the Clerk of the Supreme Court, clerk for Respondent, and counsel for the real parties in interest below about the filing of the emergency motion to stay and this forthcoming Petition.

D. SERVICE OF THE PETITION

On 19 August 2019 prior to filing this Petition, I served all real parties in interest with a copy of this Petition through electronic filing

with the District Court. I also provided a copy of this Petition directly to the Respondent District Court as directed by its clerk. Per the instructions of the Clerk of the Court, no hardcopies will be provided unless separately requested.

E. TIMELINESS OF EMERGENCY PETITION

This Petition became ripe for this Court's review upon filing of the District Court's order on Thursday 15 August 2019. Petitioners properly alerted all interested parties and this Court to the forthcoming motion the following day—Friday 16 August 2019—and filed this Petition with the Court (and served all interested parties) the following business day Monday 19 August 2019. Therefore, this Petition was filed at the earliest possible time as required by NRAP 27(e)(1).

F. EXHAUSTION OF REMEDIES IN THE DISTRICT COURT

The relief sought in this Petition is not available from the District Court because the District Court's final rulings on questions of law are the subject of this Petition and thus requesting reconsideration by the District Court is not a viable option.

G. DATE BY WHICH ACTION IS NECESSARY

Presuming the District Court grants the motion for stay, adjudication of this Petition must occur prior to 30 August to permit Petitioners to comply with their discovery obligations prior to expiration of the stay should this Court deny the Petition or rule against Petitioners on the merits.

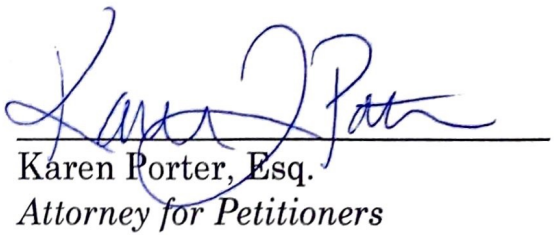
If the District Court denies the stay request, Petitioners will promptly request the same stay (to 30 August 2019) from this Court to allow the Court time to consider this Petition. Of course, this Court may also grant a stay *sua sponte* without waiting for the District Court to act, but Petitioners will show proper deference and respect to the District Court and its Order by requesting the stay from it first.

H. CONCLUSION

Four distinguished businessmen face the imminent disclosure of their sensitive personal financial information based on the District Court's 15 August 2019 decision to permit the personal liability and punitive damages claims against them to proceed to trial. However, as explained below, Petitioners are not subject to personal liability of any kind to Plaintiffs—much less personal liability for punitive damages—as

a matter of law. Therefore, the District Court plainly erred by ruling otherwise.

Absent emergency review of the District Court's decision by this Court through this Petition, the District Court's decision allowing the personal liability (including punitive damages) claims against Petitioners to proceed to trial controls, and Petitioners will be irreparably harmed by the disclosure of their personal financial information. Therefore, Petitioners respectfully request that this Court consider the Petition on an emergency basis.



Karen Porter, Esq.
Attorney for Petitioners

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as 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.

The Petitioners are four individuals: Orluff Opheikens, Slade Opheikens, Chet Opheikens, and Tom Welch.

Counsel appearing for Petitioners are:

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Brett M. Godfrey, Esq. (*pro hac vice*)
Jeffrey S. Vail, Esq. (*pro hac vice*)
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[2] Mr. McGill's application for *pro hac vice* is pending and he has not appeared in the case below, but he is expected to appear before this Court should it grant the petition and call for further argument.

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c) Declaring the standards for imposing personal liability on LLC Managers (and thereby also for corporate officers and directors) is an urgent matter of state-wide public importance. 29

d) The District Court's misinterpretation of the Court's order in Gardner II calls out for corrective action by the Court as a matter of fundamental fairness. 32

e) Judicial economy is best served by accepting the Petition because the District Court's error will derail this entire case and require a complete retrial should this Court rule for Petitioners on post-judgment appeal. 36

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1. The District Court improperly held that an LLC Manager may be personally liable for breaching a duty owed to a third-party that arose solely in his or her capacity as a Manager 39

a) An LLC Manager may not be held personally liable for a duty owed collectively by the LLC and its Managers to a third party, but only for duties owed by an individual Manager to a plaintiff personally. 40

b) Personal liability may only be imposed on an LLC Manager when supported by individualized evidence of the breach of qualifying duty owed to the third-party by that particular Manager. 45

2. The District Court improperly held that NRS § 78.138(3) does not protect LLC Managers against third-party tort claims. 49

a) The District Court's reading of NRS § 78.138 directly contradicts its plain wording. 51

b) NRS § 78.138 applies to Managers of limited liability companies. 54

c) NRS § 78.138 applies to third-party personal liability tort claims brought against an LLC Manager for an act or omission within the scope of the Manager's official duties. 56

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ROUTING STATEMENT

This Petition is not presumptively assigned to the Court of Appeals pursuant to NRAP 17(b) because it does not fit into any of the enumerated categories of cases presumptively assigned to the Court of Appeals.

Further, the Nevada Supreme Court has original jurisdiction over this matter pursuant to NRAP 17(a)(11) (matters raising as a principal issue a question of first impression involving Nevada law) and NRAP 17(a)(12) (matters raising as a principal issue a question of statewide public importance) as discussed below.

Accordingly, the Supreme Court has jurisdiction over this case.

ALTERNATIVE REQUEST FOR A STAY AND FOR EXPEDITED REVIEW

If this Court declines to consider this Petition under its emergency procedures, Petitioners respectfully request that the Court stay *all* proceedings below pending its adjudication of this Petition. Petitioners further request that the Court review the Petition on an expedited basis if practicable.

This case is scheduled to proceed to trial in a stack commencing on 7 October 2019. Absent either a stay or adjudication of the Petition prior to that date, Petitioners will be not only be forced to disclose highly sensitive personal financial information, but will be materially, unfairly, and irrevocably prejudiced by being forced to defend themselves based on an incorrect application of this Court's previous order in *Gardner II,* 405 P.3d at 655 and an incorrect interpretation of the recent amendments to NRS § 78.138. As discussed further below in the Petition proper, this prejudice cannot be cured by post-judgment relief and, even if it could, swift correction of the District Court's erroneous interpretation of NRS § 78.138 is an issue of statewide importance, the impact of which goes far beyond this case. Therefore, a stay of the proceedings below until this

Court adjudicates this Petition is justified if emergency relief is unavailable.

Additionally, Respondent District Court will suffer prejudice to its docket absent adjudication prior to the commencement of trial because, presuming this Court agrees with the merits of the Petition and grants relief post-judgment but does not grant a stay to delay trial, Respondent will be obliged to retry a very complex six-week trial *in toto*—a significant burden on Respondent's docket. Conversely, if the Court grants a stay but does not adjudicate this Petition in time for the trial to begin as scheduled, Respondent will suffer prejudice to its docket when it has to move a six-week trial just over a month before it was scheduled to start, and then try to fit that trial into its docket in early 2020 before the 'Five Year Rule' deadline runs in July 2020. Thus, Respondent specifically requested that any review be expedited if relief was sought from this Court to avoid interference with its docket. *See* Appendix, Hearing Transcript, p. 0261 ll. 17–21 ("Again, you guys are -- nobody's afraid to go to the Supreme Court with regard to my decisions. I have no problem when the Supreme Court tells me I'm wrong. That's how I learn. So take it up if you need to. We've got a trial coming up pretty soon, so do it fast.")

(emphasis added). The other parties in this case will be similarly prejudiced by a duplicate expenditure of time and treasure to retry this matter should this Court ultimately agree with Petitioners on the merits of the questions of law presented herein.

The Court can protect Petitioners from this unfair prejudice by entering a stay until the Court disposes of this Petition. The Court can avoid *all* of the problems set forth above by adjudicating the Petition sufficiently in advance of the commencement of trial to allow the trial to begin on time. Thus, if the Court determines that emergency relief is unjustified, Petitioners respectfully request that the Court enter a stay until it disposes of this Petition, and then adjudicate the Petition as far in advance of the trial date of 7 October 2019 as possible.

DISCLOSURE OF REAL PARTIES IN INTEREST

The following are parties in the action below and are accordingly real parties in interest to this Petition:

1. Peter Gardner and Christian Gardner ("Plaintiffs") on behalf of minor child L.G.;
2. Henderson Water Park, LLC doing business as the Cowabunga Bay Water Park (the "Water Park"), a Nevada limited liability company;
3. Orluff Opheikens, an individual;
4. Slade Opheikens, an individual;
5. Chet Opheikens, an individual;
6. Shane Huish, an individual;
7. Scott Huish, an individual;
8. Craig Huish, an individual;
9. Tom Welch, an individual;
10. William Patrick Ray, Jr., an individual;
11. R&O Construction Company, Inc. ("R&O"), a Utah corporation.

All of these parties are represented by counsel in the proceedings below, the identities of which are set forth in the Certificate of Service appended hereto. All real parties in interest have been served a copy of this Petition as required by this Court's rules.

To the best of the undersigned's knowledge, there are no other real parties in interest. If any such parties are identified during the pendency of the Petition, Petitioners will promptly notify the Court and the parties above and serve a copy of the Petition upon that new party.

TABLE OF AUTHORITIES

NEVADA CASES

Arguello v. Sunset Station, Inc., 127 Nev. 365, 252 P.3d 206 (2011) 51

Ashokan v. State, Dept. of Ins., 109 Nev. 662, 856 P.2d 244 (1993) 27, 30

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Bopp v. Lino, 110 Nev. 1246, 885 P.2d 559 (1994) 12

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Bus. Computer Rentals v. State Treasurer, 114 Nev. 63, 953 P.2d 13 (1998) 24, 26

Club Vista Fin. Servs. v. Dist. Ct., 128 Nev. 224, 276 P.3d 246 (2012) 10

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D.R. Horton, Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark, 123 Nev. 468, 168 P.3d 731 (2007) 12, 16, 24, 30

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Gardner v. Henderson Water Park, LLC, 399 P.3d 350 (Nev. 2017) ..... *passim*

Gill v. State ex rel. Booher, 75 Nev. 448, 345 P.2d 421 (1959) 33

Gragson v. Toco, 90 Nev. 131, 520 P.2d 616 (1974) 34

Helfstein v. Eighth Jud. Dist. Ct., 131 Nev. 909, 362 P.3d 91 (2015) 16

Henderson v. Henderson Auto, 77 Nev. 118, 359 P.2d 743 (1961) 34-35

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Int'l Game Tech., Inc. v. Second Judicial Dist. Court ex rel. County of Washoe, 124 Nev. 193, 179 P.3d 556 (2008) 12, 16, 28

Jeep Corp. v. Second Judicial Dist. Court of State of Nev. In & For Washoe County, 98 Nev. 440, 652 P.2d 1183 (1982) 26

Madera v. State Indus. Ins. Sys., 114 Nev. 253, 956 P.2d 117 (1998) 12

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MountainView Hosp., Inc. v. Eighth Judicial Dist. Court, 128 Nev. 180, 273 P.3d 861 (2012) 15, 16

Pan v. Eighth Judicial Dist. Court ex rel. County of Clark, 120 Nev. 222, 88 P.3d 840 (2004) 17

Pro-Max Corp. v. Feenstra, 117 Nev. 90, 16 P.3d 1074 (2001) 52

Redeker v. Eighth Judicial Dist. Court of State of Nev. ex rel. County of Clark, 122 Nev. 164, 127 P.3d 520 (2006) 23

Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981) 19, 33, 35

Semenza v. Caughlin Crafted Homes, 111 Nev. 1089, 901 P.2d 684 (1995) 62

Sheriff v. Provenza, 97 Nev. 346, 630 P.2d 265 (1981) 19

Smith v. Eighth Judicial Dist. Court In & For County of Clark, 113 Nev. 1343, 950 P.2d 280 (1997*)* 18, 72

Star Ins. Co. v. Neighbors, 122 Nev. 773, 138 P.3d 507 (2006) 12

State v. Eighth Judicial Dist. Court in & for County of Clark ex rel. Armstrong, 127 Nev. 927, 267 P.3d 777 (2011) 35

State ex rel. Dept. of Transp. v. Thompson, 99 Nev. 358, 662 P.2d 1338 (1983) 15, 38

State ex rel. List v. Douglas County, 90 Nev. 272, 524 P.2d 1271 (1974), *overruled on other grounds by Attorney Gen. v. Gypsum Res.,* 129 Nev. 23, 294 P.3d 404 (2013) 26

Steward v. McDonald, 330 Ark. 837, 958 S.W.2d 297 (1997) 35

Valdez v. Valdez v. Employers Ins. Co. of Nevada, 123 Nev. 170, 162 P.3d 148 (2007) 52

Washoe Med. Ctr. v. Second Judicial Dist. Court of State of Nev. *ex rel. County of Washoe*, 122 Nev. 1298, 148 P.3d 790, 792–793 (2006) 51-52

We People Nevada ex rel. Angle v. Miller, 124 Nev. 874, 192 P.3d 1166 (2008) 16

Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in & for County of Clark, 399 P.3d 334 (Nev. 2017) 16, 50, 55

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OTHER CASES

Cortez v. Nacco Material Handling Group, Inc., 356 Or. 254 (2014) ..... *passim*

Grobow v. Perot, 539 A.2d 180 (Del. 1988), *overruled on other*

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Petch v. Humble, 939 So.2d 499 (La. Ct. App. 2006) 40

WLR Foods, Inc. *v. Tyson Foods*, Inc., 857 F.Supp. 492 (W.D. Va. 1994) 55

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2003 Nevada Laws Ch. 485 (S.B. 436) 58

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2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 47:1 51

I. INTRODUCTION

Petitioners were four Managers of a limited liability company that owned and operated the Water Park where L.G. suffered serious injuries while a patron at the facility. Petitioners face *personal* joint and several liability based on nothing more than their being Managers because Plaintiffs have presented no evidence that any of them directly participated in the allegedly tortious conduct beyond engaging in their ordinary duties as Managers of an LLC such as voting on matters of importance to that LLC. They now face a claim for punitive damages at trial and, more immediately, an imminent obligation to disclose their sensitive personal financial information to Plaintiffs.

Petitioners properly moved the District Court below for summary judgment on their personal liability. The District Court found that Plaintiffs could be subjected to personal liability in their individual capacity based on nothing more than their participation in the routine business of the LLC that owns the Water Park.[2] However, the District

[2] Petitioners and the other Managers had delegated the day-to-day management of the Water Park to another Manager, Shane Huish (also a defendant in the case below) who purported to have extensive management experience at water parks.

Court also found that Petitioners were covered as if they were corporate officers/directors under NRS § 78.138 (which reads in pertinent part: "A director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer . . .") yet held that the statute did not protect them from individual liability to Plaintiffs based upon the District Court's reading of a prior ruling in this case by the Nevada Supreme Court. Thus, Petitioners face essentially unlimited personal liability despite case law (including prior decisions of this Court in this very case) and express statutory commandments to the contrary.

This cannot be a correct reading of the law.

I. ISSUES PRESENTED

1. May an LLC Manager may be held personally liable to a third party for breaching a duty owed to that third party solely in the Manager's official capacity as a Manager of the LLC?

2. May personal liability be imposed on an LLC Manager without evidence proving that particular Manager individually breached a duty owed to a third-party personally?

3. Does NRS § 78.138(3) as amended bar all personal liability claims against an LLC Manager in his official capacity as a Manager unless such claim meets the exception set forth in NRS § 78.138(7)?

II. RELIEF REQUESTED

Petitioners request that the Court clarify its decision in *Gardner II* and interpret, as a matter of first impression, NRS § 78.138 (as amended in 2017 and 2019) by declaring that:

1. An LLC Manager may not be held personally liable for a duty owed to a third party arising solely in the Manager's 'official' capacity as a Manager of the LLC, but only for a duty that would be owed *personally* by the Manager to that third party in the Manager's *individual* capacity even if the Manager were not acting in his or her official capacity.

2. Personal liability may not be imposed on an LLC Manager absent evidence demonstrating an act or omission of the Manager individually in breach of a duty owed personally to the third party.

3. NRS § 78.138(3) bars all personal liability claims against an LLC Manager in his or her official capacity as a Manager unless the claim meets the exception set forth in NRS § 78.138(7).

III. STATEMENT OF FACTS

There are no case-specific facts required for the Court to adjudicate the legal issues set forth above because the issues are pure questions of law; however, there are case-specific undisputed facts relevant as background information to put this case into context for the Court, or relevant to the *application* of the law at issue in this Petition to the case below. Petitioners cite directly to those documents and the associated undisputed facts below.

This case arises from an incident at the Cowabunga Bay Water Park (the "Water Park") facility owned and operated by Henderson Water Park, LLC on 27 May 2015 involving then six-year-old L.G. who suffered significant neurological injuries as a result of a lengthy episode of cardiac arrest that took over twenty minutes to resolve despite the valiant efforts of Water Park lifeguards and the Henderson Fire Department. Twenty minutes without a heartbeat deprived L.G.'s brain of oxygen and ultimately rendered him completely and totally disabled. Plaintiffs Peter and Christian Gardner brought the suit below on behalf of L.G. against a number of parties which, after three amendments, included the Water Park, its individual Managers in their personal capacity (including

Petitioners), the construction company that built the Water Park, and the Water Park LLC's members (themselves LLCs). The litigation has been ongoing for four years with multiple appeals to this Court.

Petitioners cannot and do not dispute the existence or significance of L.G.'s injuries; the sole dispute in this Petition is whether the Petitioners—some of the Managers of the Water Park LLC—can be *personally* liable to L.G. as a matter of law.

IV. STATEMENT OF THE CASE

Several years into the case, Plaintiffs moved to amend their Complaint to assert direct personal liability claims for negligence against the Water Park Managers, including Petitioners, in their individual capacities—and they sought to plead allegations supporting an alter ego theory of liability in order to pierce the corporate veil of the Water Park and the member-LLCs to reach the assets of the Managers. *Gardner II,* 405 P.3d at 653.

The District Court denied the Plaintiffs' motion, concluding that amendment would be futile because the Managers were improper defendants. Specifically, the District Court found that NRS § 86.371 protected the Managers from any liabilities incurred by the various LLCs and Nevada's LLC statutes contained no alter ego exception to the protection offered by NRS § 86.371. *Id.*

Plaintiffs petitioned this Court for a Writ of mandamus, which granted the Writ, reversed the District Court, and granted Plaintiffs leave to amend their complaint, *Gardner II,* 405 P.3d at 656. The Court found that NRS § 86.371 does not protect LLC Managers from personal liability, and that Nevada's corporate alter ego rules control LLCs and,

therefore, permit bringing alter ego claims against an LLC. Plaintiffs' accordingly amended their complaint, and subsequently settled their alter ego claims against the member-LLCs, leaving only their direct personal liability claims against the Managers at issue here.

Petitioners filed a Motion for Summary Judgment on 31 May 2019 arguing that Plaintiffs had failed to produce any evidence that a Petitioner breached an individual duty owed to Mr. Gardner personally, and that even had such evidence existed, Plaintiffs' personal liability claims against Petitioners were barred by operation of law pursuant to NRS § 78.138. See Appendix at 0021, Motion for Summary Judgment (Individual Liability). It is undisputed that Petitioners have no punitive damage liability if they have no personal liability. Nevertheless, Petitioners also moved separately for summary judgment on punitive damages. *See* Appendix at 0049, Motion for Summary Judgment (Punitive Damages).

The District Court denied the personal liability Motion on two grounds. First, the District Court held that this Court's order granting Plaintiffs' petition for a Writ of Mandamus in *Gardner II* commanded the District Court to permit Plaintiffs to impose personal liability on

Petitioners based solely on acts and omissions that arose exclusively in Petitioners' capacity as Managers of the LLC Water Park. The District Court stated that it would have granted the motion but for its belief that this Court commanded otherwise in *Gardner II*.[3] Second, while the District Court correctly held that Nevada's statutory Business Judgment Rule codified at NRS § 78.138 applies to limited liability companies and their Managers, it incorrectly held that the statute does *not* protect an LLC Manager from a third-party tort claim seeking to impose personal

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[3] *See* Appendix, Hearing Transcript, p. 0258 ll. 9–11 ("Here's the challenge is [sic] I think my original thoughts were consistent with yours, and I think that's why I ruled the way I have on prior motions."); p. 0259 ll. 3–6 ("I think that the Supreme Court is basically saying that there can be individual negligence of Managers and directors of corporate entities. And I'll be honest, that's contrary to what I thought."); p. 0259 ll. 7–9 ("But they've told me I was wrong. So I think I have to follow what the Supreme Court is telling me specifically on this case now."); p. 0260 ll. 17–20 ("I'm not saying that I necessarily disagree with your arguments. What I'm saying is I'm following what the Supreme Court's telling me in this case, and I think it's a little bit contrary to what you're arguing. . ."); p. 0269 ll. 10, 12–13, 15 ("No, you're . . . making total sense to me, and that's how I ruled previously . . . [the] Supreme Court told me I was wrong."); pp. 0269 ll. 24–25 to 0270 ll. 1–7 ("I totally get it. I just -- you're arguing what I -- I think that I previously ruled. And I think that that's -- that was my same thought process that I had at the time that it came in front of me previously . . . [but the] Supreme Court told me I was wrong.").

liability on an LLC Manager arising from acts and omissions within the scope of the Manager's duties as a Manager[4] despite the plain wording of the statute commanding otherwise.

Petitioners contend that both holdings are plainly erroneous and of sufficient magnitude to justify mandamus relief. Separately (and as discussed above in the NRAP 27(e) Certification), absent extraordinary relief Petitioners face irreparable harm in the form of the disclosure of their sensitive personal financial information to Plaintiffs as discovery material relevant to Plaintiffs" punitive damage claims.[5] Therefore,

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[4] *See* Appendix, Hearing Transcript, p. 0261 ll. 11–14 ("And the language in here [NRS § 78.138], to me, is not clear enough to say [imposing personal liability on LLC Managers] absolutely cannot happen, and because the Supreme Court has told me in this case that it can happen, I think I'm going to let it go forward.").

[5] "[W]e generally will not exercise our discretion to review discovery orders through petitions for extraordinary relief, unless the challenged discovery order . . . requires disclosure of privileged information." *Henderson Water Park, LLC v. Eighth Judicial Dist. Court in & for County of Clark,* 405 P.3d 104 (Nev. 2017) (quoting *Club Vista Fin. Servs. v. Dist. Ct.*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012)). However, while "we generally will not exercise our discretion to review discovery orders through petitions for extraordinary relief." That general rule does not apply when "the challenged discovery order is one that is likely to cause irreparable harm."

Here, the District Court's holding, if left unchecked, will result in the disclosure of Petitioners personal and highly sensitive financial

Petitioners respectfully submit this Petition and request that the Court accept the Petition under its emergency procedures, grant the Writ, and correct the District Court's erroneous legal conclusions.

information—an irreparable harm, that cannot be remedied after the fact.

V. STANDARD OF REVIEW

This Court reviews a district court's conclusions of law, including statutory interpretations, de novo. *Birth Mother v. Adoptive Parents*, 118 Nev. 972, 974, 59 P.3d 1233, 1235 (2002).[6] Although the Court generally reviews petitions for extraordinary relief under an abuse of discretion standard, a *de novo* standard of review applies to questions of law in a Writ petition, including questions of statutory interpretation. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court ex rel. County of Washoe*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008).

All of the issues in this Petition are pure questions of law, as discussed further below. Therefore, this Court reviews the Petition *de novo.*

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[6] *See also D.R. Horton, Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007) ("This court reviews de novo a district court's interpretation of a statute, even when the issue is raised in a petition for extraordinary Writ relief"); *Star Ins. Co. v. Neighbors*, 122 Nev. 773, 776, 138 P.3d 507, 509 (2006) ("questions of law, including questions of statutory interpretation . . . are reviewed independently"); *Madera v. State Indus. Ins. Sys.*, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998) ("[r]eview in this court from a district court's interpretation of a statute is de novo"); *Bopp v. Lino*, 110 Nev. 1246, 1249, 885 P.2d 559, 561 (1994) ("[t]he district court's conclusions of law, however, are reviewed de novo").

VI. DISCUSSION OF LAW

The extraordinary remedy of mandamus relief is justified in this case because the legal issues set forth herein are either/both matters of first impression of statewide importance and/or Plaintiffs will suffer significant irreparable harm absent extraordinary relief that cannot be cured by post-judgment review. Accordingly, this Court should accept the Petition and issue the Writ to correct an erroneous interpretation of both this Court's previous ruling in this matter (*Gardner II*) and the Nevada Business Judgment Rule (NRS § 78.138), not only to avoid prejudice to Petitioners in this case, but to ensure that both the Nevada courts and the State's citizens have clear guidance from the Court on the important issue of personal liability for corporate officers & directors and LLC Managers.

The limited liability company ("LLC") is a form of business entity created under state law. The principal benefits of the LLC are simplicity of creation, maintenance, and operation combined with limited liability. Owners of LLCs (called Members) may run the business themselves (a "Member-managed" LLC) or may engaged officers (called "Managers") to run the business for them (a "Manager-managed" LLC). Both Members

and Managers of LLCs benefit from limited liability similarly to shareholders and officers/directors of corporations.

Legal disputes over the liability of Members and Managers of LLCs are frequent, and the courts in every state are routinely faced with balancing the intent of the LLC form—limited liability—with the desire to provide remedies for injured third parties. To this end, many states have adopted some form of the Uniform Limited Liability Company Act, and many LLC issues are now resolved through application of a statute. However, Nevada and some other states often treat Members of LLCs like shareholders of corporations and Managers like officers and/or directors of corporations, and then apply the appropriate law from the state Corporations Code and the common law related thereto.

Nevada has codified robust protections for businesses and their management (including LLCs and their Managers) in order to attract businesses to this State—rendering Nevada one of the most business-friendly states in the country. However, the District Court's reasoning below *significantly* undercuts and, if fact, will eliminate several of those protections entirely if this Court does not accept the Petition and grant the Writ sought herein.

A. THIS COURT SHOULD GRANT THE PETITION

The Writ of Mandamus is an extraordinary remedy and should not be invoked lightly. *See, e.g., State ex rel. Dept. of Transp. v. Thompson,* 99 Nev. 358, 361, 662 P.2d 1338, 1340 (1983) (". . . petitions have generally been quite disruptive to the orderly processing of civil cases in the district courts, and have been a constant source of unnecessary expense for litigants"). Thus, this Court denies the vast majority of such petitions to come before it. S*ee id.* ("In the last two years, for example, this court summarily denied nearly 80% of all petitions for extraordinary Writs.").

However, mandamus relief is justified in this case because of the irreparable prejudice to Petitioners and the impact of the challenged decision on far more than just this case, and therefore Petitioners respectfully request that the Court grant the Petition.

1. Mandamus relief is available for the issues presented in this Petition.

"This court has original jurisdiction to issue Writs of mandamus . . .." *Gardner II,* 405 P.3d at 653–54 (quoting *MountainView Hosp., Inc. v. Eighth Judicial Dist. Court,* 128 Nev. 180, 184, 273 P.3d 861, 864 (2012)). "A Writ of mandamus is available to compel the performance of an act

that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Id.* (quoting *Int'l Game Tech,* 124 Nev. at 197, 179 P.3d at 558).

Extraordinary relief may be available "[w]here there is no 'plain, speedy and adequate remedy in the ordinary course of law.'" *Id.* (quoting NRS 34.170 as cited in *Helfstein v. Eighth Jud. Dist. Ct.,* 131 Nev. 909, 362 P.3d 91, 94 (2015)). "Writ relief is not available, however, when an adequate and speedy legal remedy exists." *D.R. Horton, Inc.,* 123 Nev. at 474, 168 P.3d at 736. Whether to consider a Writ petition is solely within this Court's discretion, and Petitioners bears the burden of demonstrating why extraordinary relief is warranted. *Id.* (citing *We People Nevada ex rel. Angle v. Miller*, 124 Nev. 874, 880, 192 P.3d 1166, 1170 (2008).

When reviewing district court orders challenged in a Writ petition, this Court typically only considers what was available to the District Court when rendering its decision. *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in & for County of Clark*, 399 P.3d 334, 340 n.3 (Nev. 2017). Nevertheless, the Court may also consider matters beyond what was available to the District Court because Writ petitions are addressed to

the Court's original jurisdiction, and thus its review is not limited to considerations applicable to appeals.

Here, mandamus relief is permissible because the issues presented are pure questions of law, the Petition puts a sufficient record before the Court to decide those questions, the decision and order of the District Court are final and ready for adjudication,[7] post-judgment remedies are insufficient, and the Court has the authority to grant relief to Petitioners. Therefore, the Court may accept this Petition and hear the Writ.

a) *Petitioners ask this Court only to review the District Court's legal conclusions on the important issues of law set forth herein—not to review the District Court's denial of summary judgment.*

A denial of summary judgment is inherently unappealable because a direct appeal after trial is presumed to afford adequate relief. *See Pan v. Eighth Judicial Dist. Court,* 120 Nev. 222, 224, 88 P.3d 840, 841 (2004) ("[T]he right to appeal is generally an adequate legal remedy that precludes Writ relief."). Denial of summary judgment is almost always an improper basis for an extraordinary Writ and is disfavored by this

[7] *See* Appendix, Order Denying Summary Judgment, pp. 0315–0322.

Court. *Smith v. Eighth Judicial Dist. Court In & For County of Clark,* 113 Nev. 1343, 1344–45, 950 P.2d 280, 281 (1997).

Accordingly, Petitioners do *not* ask this Court to review the District Court's denial of summary judgment, but instead ask the Court to review the District Court's conclusions of law on the limited issues set forth in this Petition, and determine whether the District Court complied with this Court's order in *Gardner II* & properly interpreted NRS § 78.138.

The impact of the District Court's decision in this case goes well beyond the summary judgment denial, and when combined with the statewide importance of the issues, justifies the extraordinary relief requested herein. *See Smith,* 113 Nev. at 1345, 950 P.2d at 281 (granting mandamus on a denial of a motion to dismiss and stating "we may exercise our discretion where, as here, an important issue of law requires clarification").[8]

Therefore, Petitioners respectfully request that this Court accept the Petition and issue a Writ declaring that the District Court's

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[8] Indeed, the District Court's reasoning is sufficiently "arbitrary or capricious or in contravention of clearly established law such that [the Court's] extraordinary and discretionary intervention is warranted." *Marshalls of Nevada, Inc. v. Eighth Judicial Dist. Court,* 385 P.3d 601 (Nev. 2016) (unpublished opinion) (citations omitted).

interpretations of *Gardner II* and NRS § 78.138 are in error, and remand to the District Court for resolution in compliance with this Court's conclusions.

b) *The issues presented in this Petition are pure questions of law with no relevant factual disputes.*

An appellate court is not an appropriate forum in which to resolve disputed questions of fact. *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (citing *Sheriff v. Provenza*, 97 Nev. 346, 630 P.2d 265 (1981); *Buchanan v. Buchanan*, 90 Nev. 209, 523 P.2d 1 (1974)).

However, this Petition asks the Court to do only two things: clarify its order in *Gardner II* and interpret NRS § 78.138 as amended in 2017 and 2019—something this Court has not done previously.[9] Both of these issues involve pure questions of law: clarifying a prior decision of this Court and interpreting a statute as a matter of first impression.

Therefore, the Court should grant this Petition and issue a Writ because the Petition involves only pure questions of law.

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[9] Both the 2017 and 2019 amendments are retroactive to cases filed after 1 October 2003. NRS § 78.138(7).

c) *The record before the Court is sufficient to decide the issues set forth herein.*

The Court only needs the facts particular to this case to determine whether the District Court's decision below contradicts the Court's answer to those questions and, if so, to fashion an appropriate mandamus order instructing the District Court to bring its decision in line with this Court's determinations of law.

Petitioners have attached hereto the entire record necessary to determine whether the District Court's decision contradicts this Court's reasoning on the issues set forth in this Petition (should the Court grant the Petition).[10]

Therefore, this Court has an adequate record before it to decide the issues set forth in this Petition and should grant the Petition and issue the Writ.

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[10] Although punitive damages are not directly challenged in this Petition (they are challenged only indirectly insofar as punitive damages would not be sustainable if Petitioners have no personal liability to Plaitniffs in the first place), Petitioners nevertheless attach all of the summary judgment briefing to ensure that the Court has a complete record before it.

d) ***The decision and order of the District Court are final and ripe for adjudication by this Court.***

This Court has stated that it will not consider an invocation of statutory liability protection by a party that is still eligible for pre-trial relief. *See Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in & for County of Clark*, 410 P.3d 983 (Nev. 2018) (unpublished disposition) (holding that a petition for a Writ of Mandamus was not ripe where the liability and protections therefrom of corporate directors had yet to be adjudicated on summary judgment and complete pre-trial relief was still available in the district court).

Here, the District Court found that Petitioners' liability remains an issue for the jury and denied their invocation of Nevada's Business Judgment Rule codified at NRS § 78.138. *See* Appendix at 0315–0322, Order Denying Summary Judgment. The District Court specifically stated that its ruling on NRS § 78.138 was final and binding for the remainder of the case.[11] Accordingly, the District Court has completed its

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[11] *See* Appendix, Hearing Transcript, p. 0262 ll. 7–11 ("As it relates to the Business Judgment Rule [under NRS § 78.138], I think that's a -- probably a final decision because I don't know that it's going to come up again if -- if I've said that the statute is not clear enough to preclude the claims."); pp. 0262 l. 25 to 0263 ll. 1–2 ("But I agree with you [the Petitioners] that I don't know that that issue's [NRS § 78.138]

pre-trial adjudication of the liability of Petitioners—and the protections therefrom—and these questions of law are now ripe for this Court's review.

e) *The Court may issue a declaratory judgment on these questions of law and thereby provide relief to Petitioners.*

This Court has the inherent authority to declare what the law is—and all Nevada courts are vested with broad authority by statute to enter declaratory judgments. *See* NRS § 30.040 ("Any . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder.").

Here, the District Court has already declared what it believes the law is[12] when adjudicating the instant Motion for Summary Judgment.

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going to come up again, so the Supreme Court will either take it or not.").

[12] Or, more correctly, what it believes that this Court would hold the law to be as the District Court stated that if left to its own devices it would side with Petitioners. *See* Appendix, Hearing Transcript, p. 0258 ll. 9–11 ("I think my original thoughts were consistent with yours, and I think that's why I ruled the way I have on prior motions").

Therefore, it is futile to ask the District Court for declaratory relief, and Petitioner must turn to this Court which has the inherent and statutory authority to say whether the District Court has erred.[13] Thus, this Court may afford Petitioners relief by stating what *Gardner II* and NRS § 78.138 mean in the context of this case and directing the District Court in a Writ to follow its declaration going forward. This Court should exercise its discretion and issue a Writ.

Ultimately, the decision to entertain an extraordinary Writ Petition lies within the Court's discretion, and it must "consider[] whether judicial economy and sound judicial administration militate for or against issuing the Writ," *Redeker v. Dist. Ct.*, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006), *limited on other grounds by Hidalgo v. Dist. Ct.,* 124 Nev. 330, 341, 184 P.3d 369, 377 (2008), including whether "'an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction,'" *Diaz v. Eighth Judicial Dist. Court*

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[13] Moreover, it is not necessary to seek declaratory relief from the district Court anyway. *See Falcke v. Douglas County*, 116 Nev. 583, 3 P.3d 661 (2000) (holding that seeking declaratory relief from the District Court is not a required prerequisite to petitioning for a Writ where the issues presented in the petition are of sufficient importance to justify extraordinary relief).

ex rel. County of Clark, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000) (quoting *Bus. Computer Rentals v. State Treasurer*, 114 Nev. 63, 67, 953 P.2d 13, 15 (1998)).

Here, both sets of ground for relief—*Gardner II* and NRS § 78.138—deal with important issues of law requiring clarification, and public policy is served by this Court's immediate review because the requirements to impose personal liability on an LLC Manager is an issue of statewide importance as yet unresolved by this Court.

2. The issues presented in this Petition justify extraordinary relief.

a) *A post-judgment appeal is not a sufficiently adequate and speedy remedy.*

"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." *D.R. Horton, Inc.,* 123 Nev. at 474–75, 168 P.3d at 736.

A post-judgment appeal is no remedy for Petitioners disclosure of their personal financial information—that cat cannot be put back in the bag. Only a decision prior to Petitioners being obliged to make the

disclosures can be an adequate remedy. Moreover, the District Court ordered certain parties in this case bifurcated with a second trial phase scheduled to occur in October 2020. Thus, final appeals in this matter cannot occur (absent certification) until after the second trial phase. Therefore, Petitioners may be obliged to wait an unreasonably extended period of time to begin to seek post-judgment remedies should Plaintiffs prevail at trial. This is particularly concerning given that the allegations against Petitioners—that they selfishly cut corners on safety and thereby crippled a six-year old boy for life—will cause untold damage to the reputations of Petitioners, their associated businesses, and to other individuals and entities doing business in the State of Nevada if allowed to fester without timely appellate review of an adverse outcome at trial. Accordingly, asking Petitioners to wait until after trial—particularly if "after trial" means after the second phase in October 2020—to receive review on the fundamental question of whether they can have any personal liability under Nevada law in the first place is unreasonable. Thus, this Court should issue a Writ and resolve these critical legal issues before trial.

b) *This Petition presents important issues of law regarding the personal liability of LLC Managers that require clarification—as demonstrated by the fact that this Court already accepted a Writ in this case on some of those same issues.*

Even if an adequate legal remedy exists, this Court will consider a Writ Petition if an important issue of law needs clarification. *Matter of Beatrice B. Davis Family Heritage Tr.,* 394 P.3d 1203, 1207 (Nev. 2017) (citing *Diaz*, 116 Nev. at 93, 993 P.2d at 54). "And, of course, it is established that the mere existence of other possible remedies does not necessarily preclude mandamus." *State ex rel. List v. Douglas County*, 90 Nev. 272, 277, 524 P.2d 1271, 1274 (1974), *overruled on other grounds by Attorney Gen. v. Gypsum Res.,* 129 Nev. 23, 294 P.3d 404 (2013). Although "mandamus is generally not appropriate in the face of effective alternative remedies, extraordinary relief may be granted where the circumstances reveal urgency or a strong necessity." *Bus. Computer Rentals*, 114 Nev. at 67, 953 P.2d at 15 (citing *Jeep Corp. v. Second Judicial Dist. Court of State of Nev. In & For Washoe County*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982)). Additionally, where an important issue of law needs clarification and public policy is served by this Court's invocation of its original jurisdiction, its consideration of a petition for

extraordinary relief may be justified. *Ashokan v. State, Dept. of Ins.,* 109 Nev. 662, 667, 856 P.2d 244, 247 (1993). This Court has and should accept petitions for Writs requiring it to interpret an important statute for the first time and provide guidance to private parties on their privileges and responsibilities even where adequate alternative remedies exist. *See id.*[14]

Establishing the legal standards for imposing personal liability on an LLC Manager in the State of Nevada for acts and omissions in his or her capacity as a Manager was previously adjudicated in this very case

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[14] The Court stated:

> Although loath to deviate from our general practice, we do so for the following reasons: First, this court has not yet had the opportunity to interpret NRS 49.265(1), the statute conferring a limited privilege upon medical review committee reports. The facts of the instant case provide a unique opportunity to define the precise parameters of the privilege. Second, in view of our interpretation of the privilege, we conclude that hospitals should be made aware as soon as possible of the privilege's limited scope so that they can take appropriate measures to safeguard their files against misappropriation by unauthorized persons.

This Petition implicates the same concerns. This case presents the first opportunity for this Court to define the scope of NRS § 78.138. It is also necessary to make LLC Managers (as well as corporate officers and directors) aware of the scope of their personal liability subsequent to the 2017 and 2019 amendments to NRS § 78.138. Thus, extraordinary review is appropriate.

as a matter of first impression. In *Gardner II,* the Court exercised its discretion to consider this issue, stating:

> In this matter, we exercise our discretion to consider this petition because it raises important and novel issues of law in need of clarification, "and considerations of sound judicial economy and administration militate in favor of granting the petition."

405 P.3d at 654 (quoting *Int'l Game Tech.,* 124 Nev. at 197–98, 179 P.3d at 559).

The District Court's holdings at issue here are driven entirely by its misinterpretation of this Court's order in *Gardner II* and its misreading of the plain language of NRS § 78.138 as amended in 2017 and 2019. Indeed, the District Court *explicitly* stated that it agreed with Petitioner's legal arguments and only held for Plaintiffs because the District Court believe that this Court had commanded otherwise in *Gardner II* (and that it believed that this Court would hold that NRS § 78.138 did not protect Petitioners). Appendix, Hearing Transcript, p. 0259 ll. 7–9 (But they've told me I was wrong. So I think I have to follow what the Supreme Court is telling me specifically on this case now.").

Yet, as discussed below, the District Court's holding was precisely the *opposite* of this Court's holding in *Gardner II* because the District

Court imposes personal liability on an LLC Manager based only on the act of managing the LLC and not on an individual act or omission breaching a personal duty owed to L.G. that then led to Plaintiffs' alleged damages. *See Gardner II,* 405 P.3d at 655 ("a Manager cannot be personally responsible in a negligence-based tort action against the LLC solely by virtue of being a Manager"). Thus, the District Court's interpretation of this Court's order in *Gardner II* alone justifies review because it *directly* contradicts this Court's clarification of that "important and novel issue[] of law."

c) *Declaring the standards for imposing personal liability on LLC Managers (and thereby also for corporate officers and directors) is an urgent matter of state-wide public importance.*

Another instance where issuing a Writ is appropriate even where an adequate remedy at law exists is when a Writ petition offers the Court "a unique opportunity to define the precise parameters of [a] privilege" conferred by a statute that this Court has never interpreted. *Diaz,* 116

Nev. at 93, 993 P.2d at 54 (quoting *Ashokan,* 109 Nev. at 667, 856 P.2d at 247 (1993)).[15]

The Legislature made significant alterations to Nevada's statutory Business Judgment Rule, codified at NRS § 78.138(3) in 2017, and again amended that section in 2019 (with a 1 October 2019 effective date, prior to the commencement of trial in this matter). *See* Appendix, 2019 Nevada Laws Ch. 19 (A.B. 207), pp. 0185–0187. This Court has not yet interpreted the amended statute (either the 2017 or upcoming 2019 versions) or opined upon the effect, if any, of the amendments upon this Court's precedents. Accordingly, determining whether the District Court

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[15] *See also D.R. Horton*, 123 Nev. at 475, 168 P.3d at 737:

> Although this court infrequently decides to exercise its discretion to consider issues presented in the context of a petition for extraordinary relief, we have elected to exercise our discretion in this instance to consider the issues raised. In doing so, we recognize that in large community-wide constructional defect cases, a fundamental disagreement exists regarding the interpretation of NRS 40.645. The interpretation of this statute is of great importance to both claimants and contractors. Our review of NRS 40.645's application in these constructional defect cases will aid the district courts in managing them.

This holding strongly suggests that the Court considers clarification of statutes with wide applicability and in which uncertainty can have a broad and deleterious economic impact a worthy cause for an extraordinary Writ.

properly read NRS § 78.138 and setting forth clear guidance on the privileges and protections afforded by the statute to officers and directors of Nevada's corporations and Managers of the State's limited liability companies is a public policy matter of statewide importance justifying the extraordinary remedy of mandamus. Otherwise officers, directors, and Managers will be left to guess whether an act or omission in their official capacity may trigger personal liability. Nevada cannot attract highly qualified officers, directors, and Managers to work for its businesses when there is substantial uncertainty regarding the personal exposure those executives assume when performing their official duties. Accordingly, it is critical to the stability of Nevada's economy for this Court to issue clear guidance about the impact of the 2017 and 2019 amendments to NRS § 78.138 on personal liability for officers, directors and Managers—particularly because the District Court's *significantly* undermines the statutory protections put in place by the Nevada Legislature. As such, the Court should grant the Petition and review the District Court's interpretation of NRS § 78.138.

d) *The District Court's misinterpretation of the Court's order in Gardner II calls out for corrective action by the Court as a matter of fundamental fairness.*

Petitioners respectfully submit that the District Court misinterpreted this Court's Order in *Gardner II* and as a result issued an order that *contradicts* this Court's holding in *Gardner II*. Moreover, the District Court misread the impact of the 2017 amendments to NRS § 78.138 and incorrectly held that the statutory protections of that section do not shield Petitioners from personal liability in this lawsuit notwithstanding the fact that this Court had confirmed the applicability of the Corporate Code to defendants in this matter in *Gardner II*. These errors, individually or collectively, completely change the landscape of this litigation. After four years of litigation, Petitioners must defend against a legal standard at ta trial (in less than two months) which imposes *significantly* broader personal liability upon them than this Court has previously recognized. Accordingly, extraordinary review is proper to protect the fundamental fairness of the judicial process.

(i) The District Court's failure to follow the plain commandment of this Court in *Gardner II* violates its duty to follow this Court's previous pronouncements in this case.

"A writ of mandamus will issue when the respondent has a clear, present legal duty to act." *Round Hill*, 97 Nev. at 603, 637 P.2d 536 (citing *Gill v. St. ex rel. Booher*, 75 Nev. 448, 345 P.2d 421 (1959)). The District Court has a clear and present duty to follow this Court's order in *Gardner II*.

This Court in *Gardner II* held that Managers of a limited liability company have no personal liability merely for acting in their capacity as Managers—but only have personal liability where an individual Manager owes a duty to the Plaintiff personally. 405 P.3d at 655. Yet the District Court stated that it believed this Court had come to the *opposite* conclusion. *See* Appendix, Hearing Transcript, p. 0284 ll. 7–14:

> It comes back to the same issue that I had from the beginning. I think it's hard to find individual liability on people for things that they do as part of the business entity. But under the case law that I'm looking at under *Gardner II* . . . what do I do? As a matter of law, I say that they didn't commit any kind of personal liability, then I get reversed on that.

Indeed, as noted above the District Court stated repeatedly that it would have ruled for Petitioners but for its belief that this Court directed

otherwise. *See, e.g.,* Appendix, Hearing Transcript, pp. 0284 ll. 24–25 to 0285 ll. 1–2 (". . . if the Supreme Court hadn't already told me that I was wrong in this case once, I think I'd probably rule differently. Sorry.").

This Court held in *Gardner II* that a Manager of an LLC cannot be personally liable merely for acting in his or her capacity as a Manager—a breach of a duty owed personally to the Plaintiffs is required. By coming to the opposite conclusion[16] and permitting the imposition of personal liability merely for acting as a Manager, the District Court failed in its duty to follow this Court's order in *Gardner II*.

(ii) The District Court's failure to follow the plain wording of NRS § 78.138 constitutes an arbitrary or capricious exercise of discretion.

Mandamus will not lie to control discretionary action, *Gragson v. Toco*, 90 Nev. 131, 520 P.2d 616 (1974), unless that discretion is manifestly abused or is exercised arbitrarily or capriciously, *Henderson*

[16] It appears that in its quite proper desire to fully comply with this Court's order in *Gardner II* allowing personal liability claims against LLC Managers when certain circumstance exist—something the District Court believed was impermissible under *any* circumstances and accordingly had dismissed Plaintiffs' personal liability claims—the District Court has swung too far the other direction and is permitting a personal liability claim here on broader grounds than that permitted by this Court in *Gardner II*.

v. Henderson Auto, 77 Nev. 118, 359 P.2d 743 (1961). See also *Round Hill*, 97 Nev. at 604, 637 P.2d at 536 (holding that mandamus is available to control a manifest abuse or an arbitrary or capricious exercise of discretion). "A manifest abuse of discretion is '[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.'" *State v. Eighth Judicial Dist. Court in & for County of Clark ex rel. Armstrong*, 127 Nev. 927, 931, 267 P.3d 777, 780 (2011) (quoting *Steward v. McDonald*, 330 Ark. 837, 958 S.W.2d 297, 300 (1997)).

The District Court stated that it found NRS § 78.138 ambiguous and ruled that it believed that this Court would not extend it to protect Petitioners as LLC Managers against the third-party tort claims brought by Plaintiffs. *See* Appendix, Hearing Transcript, p. 0261 ll. 7–8 ("I don't know that the Business Judgment Rule in 78.138 is clear enough that it says that that doesn't happen"); ll. 11–14 ("And the language in here, to me, is not clear enough to say it absolutely cannot happen, and because the Supreme Court has told me in this case that it can happen, I think I'm going to let it go forward."). The District Court accordingly held that NRS § 78.138, while applicable to LLCs, does not protect LLC Managers from personal liability claims brought by third parties.

The District Court's conclusion constitutes an arbitrary or capricious exercise of discretion because NRS § 78.138 is not ambiguous, and the plain wording of the statute facially protects Petitioners from Plaintiffs' personal liability claims.

e) *Judicial economy is best served by accepting the Petition because the District Court's error will derail this entire case and require a complete retrial should this Court rule for Petitioners on post-judgment appeal.*

The issues raised in this Petition dramatically affect the entirety of this action far beyond the mere denial of summary judgment—and pose a significant issue of public concern to boot. Thus, clarification of this Court's order in *Gardner II* and guidance on the amendments to NRS § 78.138 are necessary for this case to proceed in a fair and efficient fashion.[17]

The District Court stated that it had no idea how to apply its understanding of this Court's holding in *Gardner II* at trial. Appendix, Hearing Transcript, p. 0284 ll. 17–19 ("And, I mean, it's going to be an

[17] And, as discussed above, also to ensure that officers and directors of corporations and Managers of LLCs in the State of Nevada have proper notice of the standards for imposing personal liability upon them for acts and omissions that occur in their official capacities.

interesting jury instruction to determine individual liability on these people. I don't know how we're going to draft that." (emphasis added). Therefore, it is clear that the District Court would benefit from this Court's guidance on its holding in *Gardner II* as otherwise it will be attempting to try this case based on standards that the District Court itself admits that it is not currently capable of articulating.

Further, Petitioners contend that NRS § 78.138 serves as an absolute bar on Plaintiffs' claims of personal liability against them, as discussed further below. Thus, a ruling in Petitioners favor now will entirely resolve the claims against them and significantly simplify this litigation. Conversely, even if the defendants other than Petitioners are found to be liable in this matter, they will be entitled to a new trial because the original jury will have allocated fault to Petitioners, who will no longer be proper parties. This likely violates NRS § 41.141 because the jury will have allocated fault to a non-party. Thus, if Petitioners prevail on post-judgment appeal the case would have to be retried in its entirety with the remaining defendants so that the jury could properly allocate fault between the actual parties. Hence, the need to avoid the reasonable possibility of a complete retrial of this case if the issues contained herein

are left for post-judgment appeal strongly weighs in favor of accepting the Writ.

B. THIS COURT SHOULD ISSUE THE WRIT

A petitioner is *never* entitled to a Writ of mandamus; even when mandamus is available as a remedy, the Court is never compelled to issue the Writ because it is purely discretionary. *Thompson*, 99 Nev. at 361, 662 P.2d at 1340. Accordingly, Petitioners must demonstrate to this Court not only that mandamus relief is available and appropriate, but that it is sufficiently called for in this case that the Court should exercise its discretion.

Petitioners do so here. The District Court fundamentally misinterpreted and misapplied not only this Court's decision in *Gardner II* issued earlier in this very case, but entirely misread the 2017 amendments to NRS § 78.138 and thereby denied Petitioners the protections against personal liability put in place by the Legislature specifically to protect against *precisely* the claims Plaintiffs bring here.

1. The District Court improperly held that an LLC Manager may be personally liable for breaching a duty owed to a third-party that arose solely in his or her capacity as a Manager.

Plaintiffs' claims against Petitioners are based solely on their capacities as Managers of the Water Park LLC. The District Court previously held that LLC Managers can never be personally liable for torts to third parties. This Court reversed that conclusion in Gardner II and held that under some circumstances there can be personal liability; but also held that LLC Managers cannot—as a matter of law—be personally liable for duties which arise solely because they are a Manager. 405 P.3d at 655 ("[A] Manager cannot be personally responsible in a negligence-based tort action against the LLC solely by virtue of being a Manager . . . [t]hus, the act of managing an LLC in and of itself cannot result in personal culpability because this notion would be in conflict with the Manager's limited liability."). Thus, the Court held that an individual duty must be owed by a Manager to a third party personally before personal liability may be imposed. Id. (a Manager "remains responsible for his or her acts or omissions to the extent those acts or omissions would be actionable against the member . . . if that person were acting in an

individual capacity") (quoting Cortez v. Nacco Material Handling Group, Inc., 356 Or. 254, 268 (2014)) (emphasis added).

Here, none of the purported duties of Petitioners alleged by Plaintiffs are individually actionable—all arise solely in Petitioners' capacity as Managers of the Water Park LLC.

a) ***An LLC Manager may not be held personally liable for a duty owed collectively by the LLC and its Managers to a third party, but only for duties owed by an individual Manager to a plaintiff personally.***

This Court previously held in this case that a plaintiff must allege conduct by a Member (and this holding applies equally to Managers) of an LLC "separate and apart from the challenged conduct of the Water Park." *Gardner v. Henderson Water Park, LLC*, 399 P.3d 350, 351 (Nev. 2017) (hereafter "*Gardner I*"). The Court said:

> Indeed, the Gardners do not claim the member-LLCs breached a personal duty owed to L.G.; rather, the Gardners simply allege the member-LLCs breached certain duties that only arise based on the member-LLCs' roles as members. *See Petch v. Humble,* 939 So.2d 499, 504 (La. Ct. App. 2006) (interpreting similar limited liability statutes, and holding that personal liability for negligence will not stand when the plaintiff fails to allege that the member's acts "are either done outside one's capacity as a member . . . or which while done in one's capacity as a member . . . also violate some personal duty owed by the individual to the injured party"). Thus, the Gardners impermissibly seek to hold

> the member-LLCs liable for the alleged negligence of the Water Park solely by virtue of the member-LLCs being managing members of the Water Park.

Gardner I, 399 P.3d at 351. Thus, *Gardner I* stands for the proposition that individual liability will not lie against an LLC Member or Manager absent proof *either* that the act or omission is entirely outside of the Manager's capacity as a Manger, or which while done in the Manager's official capacity violates a personal duty owed by the individual Manager to the Plaintiff. *Id.*

However, *none* of the duties Plaintiffs claim Petitioners owed L.G. are outside of the Petitioners' official duties as Managers, and *all* of the duties arise solely in their capacity as Managers. The purported duties set forth in the Third Amended Complaint are:

> a. The duty to keep [L.G.] safe; b. The duty to use reasonable care to protect [L.G.] from known dangers such as drowning; c. The duty to adequately staff lifeguards throughout Cowabunga Bay; d. The duty to properly train and certify employees, lifeguards and Managers/supervisors to protect customers from dangers such as drowning; e. The duty to provide ongoing training to employees, lifeguards and Managers/supervisors to protect customers from dangers such as drowning; f. The duty to maintain clean and clear water within Cowabunga Bay; g. The duty to use reasonable care in the hiring, supervision, training and retention of its employees; and h. The duty to act in a matter that does not violate State of Nevada, City of

> Henderson and Clark County statutes, laws and ordinances.

Appendix, Third Amended Complaint, p. 0015. We address these purported duties below to demonstrate that each arises solely in the Petitioners official capacity as LLC Managers and, therefore, cannot create personal liability.

(i) <u>The duty to keep L.G. safe and the duty to use reasonable care to protect L.G. from known dangers such as drowning.</u>

The purported duties to keep L.G. safe and protect him from known dangers in the context of his safety while a patron at the Water Park is not an individual duty of any of the Petitioners. Indeed, an ordinary person could have stood by and watched L.G. drown without incurring any legal liability in the State of Nevada.[18] Thus, Petitioners purported duty to keep L.G. safe and protect him from dangers at the Water Park is based solely on their capacity as a Manager and is not an individual duty that can give rise to personal liability.

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[18] As *morally* reprehensible as such act would be, Nevada law imposes no general *legal* duty to rescue others.

(ii) The duty to adequately staff lifeguards throughout Cowabunga Bay; the duty to properly train and certify employees, lifeguards and Managers/supervisors to protect customers from dangers such as drowning; the duty to provide ongoing training to employees, lifeguards and Managers/supervisors to protect customers from dangers such as drowning; and the duty to use reasonable care in the hiring, supervision, training and retention of its employees.

The purported duties to adequately staff lifeguards and train lifeguards and other employees is clearly a duty that arises only in Petitioners' capacity as Managers of the Water Park LLC since they have individual duty to adequately staff lifeguards or train the employees. Thus, Petitioners' purported duty to staff adequate lifeguards at the Water Park is based solely on their capacity as Managers and is not an individual duty that can give rise to personal liability.

(iii) The duty to maintain clean and clear water within Cowabunga Bay.

The alleged duty to maintain clean and clear water in the Water Park's pools is based solely in Petitioners' capacity as Managers of the Water Park LLC. There is no individual responsibility under the laws in Nevada requiring a person acting in his/her individual capacity to meet clarity standards for a swimming pool.

(iv) The duty to act in a matter that does not violate State of Nevada, City of Henderson and Clark County statutes, laws and ordinances.

This stated duty is to the *State,* not to any individual. A breach of the general duty to follow the law is only actionable when a breach of that duty causes harm to a third party the law was designed to protect—in other words, the common law rule of negligence *per se*. Here, the purported violations of law Plaintiffs allege harmed L.G. are all related to the operations of the Water Park—none of these laws impose duties upon Petitioners in their individual capacities. *See* Appendix, Third Amended Complaint, pp. 0010–0012, ¶¶ 41–48 (this section is tellingly titled "Defendants Intentionally Violate Nevada Law by Understaffing Lifeguards at the Wave Pool"). Accordingly, Petitioners purported duty to comply with Nevada law arises, in the context of this case, is solely based on their capacity as Managers and is not an individual duty that can give rise to personal liability to a third party.

In short, none of these purported duties are even alleged to be individual duties owed personally to L.G. by Petitioners but are pled as official capacity claims. Plaintiffs have never argued that any of the duties are personal. Rather, Plaintiffs claim that merely engaging in the

duties of a Manager is sufficient to impose personal liability.[19] *See* Appendix, Hearing Transcript, pp. 0284 ll. 7–25 to 0285 l. 1. Thus, the District Court committed plain error by holding that Petitioners may be subjected to personal liability that is based solely on their capacities as Managers of the Water Park LLC—and this Court should clarify that *Gardner I* and *Gardner II* stand for the *opposite* proposition: that an LLC Manager only has personal liability in one of two circumstances: where the duty arises in the Manager's individual capacity; or the duty arises in the Manager's official capacity *but* breaches a duty that the Manager would have owed the Plaintiff as a private individual anyway.

b) *Personal liability may only be imposed on an LLC Manager when supported by individualized evidence of the breach of qualifying duty owed to the third-party by that particular Manager.*

In addition to erroneously permitting Plaintiffs' personal liability claims against Petitioners to proceed despite the lack of any individual duties owed personally to L.G., the District Court also permitted liability

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[19] *See, e.g.*, Appendix, Hearing Transcript, p. 0251 ll. 19–23 (". . . if they are participating in a decision as a group . . . but ultimately, the decision is made, we're voting as a Board . . . then, if I'm the plaintiff filing that suit, I'm naming each one of those individual directors personally.").

to be imposed based on evidence of an act or omission of the Managers collectively. If, as the District Court held, a Manager can not only be held personally liable merely for the routine business of managing the LLC (such as participating in management meetings and voting on business), but also without any proof that individual Manager actually did anything *individually* to breach that duty, then every official act (or failure to act) of an LLC Manager can create personal liability for every other Manager who participated in that decision in any way. *See* Appendix, Hearing Transcript, pp. 0280 l. 17 to 0285 l. 68 (denying summary judgment on the basis that the defendants participated in management decisions such as voting for delegations of management authority).

Imposing personal liability upon an LLC Manager requires evidence that Manager breached an individual duty owed to a Plaintiff personally. *Gardner I,* 399 P.3d at 351; *Gardner II,* 405 P.3d at 655. Accordingly, the evidence required to sustain a personal liability action must demonstrate that individual Manager owes a personal duty to the Plaintiff, and then demonstrate that individual Manager personally breached that duty. It is not enough for a Plaintiff to put forth evidence that the Managers collectively breached a duty owed communally by the

Managers to the Plaintiff—that merely raises vicarious liability for the LLC as *respondeat superior* for its Managers. Rather, a Plaintiff must put forth individualized evidence proving that a particular Manager personally breached an individual duty owed to the Plaintiff. Otherwise every breach by one manager can be imputed to every other manager in any way associated with the decision leading to the breach—that is what the District Court held—and that cannot be the law.

In short, an LLC Manager is not personally liable to a Plaintiff for the torts of a subordinate or another party to whom the Manager delegated management authority absent actual knowledge by the LLC Manager that the party to which the Manager delegated was incapable of properly discharging the delegated duties.[20] Otherwise, the limited

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[20] Indeed, the Supreme Court of Oregon held in *Cortez* (which this Court cited with favor in *Gardner II*) that "as a matter of common law, a member or Manager ordinarily will not be personally liable for a subordinate's negligence," but only for his or her individual negligence "to the same extent that they would be liable "if [they] were acting in an individual capacity." 337 P.3d at 118–19. This is consistent with NRS § 78.138(2) which permits officers and directors to rely on delegations, but not "if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted." Thus, only actual knowledge by a Manager of the

liability protections for corporate officers & directors and LLC managers is illusory. Personal liability requires proof that the individual Manager did something *personally* and *affirmatively* wrong beyond merely being a manager.

However, in this case, Plaintiffs failed to cite a single piece of material admissible evidence implicating any of the four Petitioners personally in a breach of duty. Thus, they cannot sustain their personal liability claims against Petitioners.

Accordingly, this Court should declare that personal liability claims against LLC Managers require individualized evidence showing that a Manager was personally negligent. The Court should hold that evidence

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incapability of a second Manager can create personal liability for the first Manager for the torts of the second Manager.

But here Plaintiffs have no evidence that Petitioners actually knew that fellow Manager Shane Huish was (according to Plaintiffs) incompetent. Therefore, Petitioners delegation of all management authority for the Water Park to Shane Huish cannot create personal liability for Petitioners even under the broader *Cortez* standard, much less under Nevada's more robust statutory protections for LLC Managers because there is no proof that Petitioners actually knew of Shane Huish's purported unsuitability for the position; therefore, there can be no personal liability for Petitioners based on Shane Huish's alleged negligence.

implicating LLC Managers as a group in negligence is insufficient to establish personal liability. This establishes a proper balance between upholding liability protections for Managers and ensuring that Managers are responsible for knowing or intentional bad acts even if undertaken as part of their official duties as Managers. As the District Court's decision below *significantly* upsets this balance, this Court's intervention on an extraordinary Writ is justified.

2. The District Court improperly held that NRS § 78.138(3) does not protect LLC Managers against third-party tort claims.

Nevada law—NRS § 78.138—flatly prohibits personal liability claims against corporate officers & directors (and, therefore, Managers of LLC's) except for a very narrow exception that is facially inapplicable here. Despite holding that NRS § 78.138 applies to Managers of LLCs, the District Court read the statute to not cover personal liability claims against LLC Managers by third parties, and provided no justification for its reading of the statute beyond stating that the Court believed that this Court would hold the statute does not protect Petitioners. *See* Appendix, Hearing Transcript, p. 0260 ll. 18–24.

> I don't know that the Business Judgment Rule in 78.138 is clear enough that it says that that doesn't happen.

> And the fact that the Supreme Court didn't comment on it in the *Gardner II* case or in the *Wynn*[21] case I think is

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[21] Plaintiffs argued, and the District Court agreed, that *Wynn Resorts*, 399 P.3d 334, stood against Petitioners' interpretation of NRS § 78.138 because this Court stated in a footnote to that case that the 2017 amendments did not affect its analysis of personal liability. 399 P.3d at 342 n.5. Thus, Plaintiffs argued, and the District Court agreed, that the 2017 amendments could not be the substantive change to the Business Judgment Rule posited by Petitioners, or this Court would not have declared them irrelevant to its personal liability analysis in *Wynn Resorts*.

However, this Court held in *Wynn Resorts* that the narrower pre-2017 version of NRS § 78.138 *protected* the defendant's directors. 399 P.3d at 344. Thus, it is unsurprising that this Court found that the 2017 amendments did not alter that outcome because the 2017 amendments *strengthened* the personal liability protections provided by NRS § 78.138. In other words, if this Court found the narrow pre-2017 version of the statute protected the *Wynn Resorts* defendants, then the broader 2017 amended version would provide at *least* as great of protection—obviating any need for this Court to analyze them as they could not have changed the outcome in favor of the defendants.

Yet the District Court held that this Court's passing over the 2017 amendments was *dispositive* evidence that the 2017 amendments did not change the statute. This is clear error. Setting aside the fact, discussed below, that the 2017 amendments facially and materially altered the statute, there is simply no basis in reading this Court's Footnote 5 in *Wynn Resorts* as an indication that this Court believes the 2017 amendments did not substantively change NRS § 78.138. Rather, Footnote 5 merely establishes that the amendments did not alter the outcome *in that case*—a case in which the defendants had already prevailed on the personal liability issue under the older and less generous statute. Accordingly, this Court should correct the District Court's misreading of *Wynn Resorts* that caused it to ignore the plain meaning of NRS § 78.138 as amended to the detriment of Petitioners.

> telling. And the language in here, to me, is not clear enough to say it absolutely cannot happen, and because the Supreme Court has told me in this case that it can happen, I think I'm going to let it go forward.

This is simply not the law. The plain wording of NRS § 78.138 clearly and unmistakably protects Petitioners from Plaintiffs' claims.

a) *The District Court's reading of NRS § 78.138 directly contradicts its plain wording.*

In Nevada, all questions of statutory construction must start with the language of the statute itself. *In re Nevada State Eng'r Ruling No. 5823*, 277 P.3d 449 (2012) (quoting 2A Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 47:1, at 274–75 (7th ed. 2007) ("The starting point in statutory construction is to read and examine the text of the act and draw inferences concerning the meaning from its composition and structure.") (footnote omitted. In other words, the Court must begin its inquiry with the statute's plain language. *Arguello v. Sunset Station, Inc.,* 127 Nev. 365, 370, 252 P.3d 206, 209 (2011). The Court may not look beyond the statute's language if it is clear and unambiguous on its face. See *Washoe Med. Ctr. v. Second Judicial Dist. Court of State of Nev. ex rel. County of Washoe*, 122 Nev. 1298, 1302,

148 P.3d 790, 792–793 (2006).[22] Stated another way, in circumstances where the statute's language is plain, there is no room for constructive gymnastics, and the Court is not permitted to search for meaning beyond the statute itself. *Pro-Max Corp. v. Feenstra, 117 Nev. 90, 95, 16 P.3d 1074, 1078 (2001), opinion reinstated on reh'g* (Jan. 31, 2001).

Here, the plain language of the statute is clear and unambiguous on its face: in "all cases, circumstances and matters" "[a] director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or office" unless a narrow statutory exception applies. NRS § 78.138. The District Court correctly found that LLC Managers are protected as if they were an officer or director of a corporation. But the District Court then held that the statute does not protect against third-party tort claims. The District Court's reading of the statute thus directly contradicts its plain wording: that it

[22] *See also Hobbs v. Nevada,* 127 Nev. 234, 237, 251 P.3d 177, 179 (2011); *Valdez v. Valdez v. Employers Ins. Co. of Nevada*, 123 Nev. 170, 162 P.3d 148 (2007).

applies to "all cases, circumstances and matters."[23] Accordingly, correction of the District Court's plain error interpreting a statutory of statewide importance is an appropriate use of this Court's discretion to grant extraordinary relief and this Court should issue the Writ.

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[23] There are no Nevada cases from this Court that contradict the plain wording of the statute. This Court did not consider NRS § 78.138 in either *Gardener I* or *Gardner II*. Both of those cases involved Nevada's Limited Liability Company Code (Chapter 86, NRS) and the provisions of that Code immunizing LLC Members and Managers from the debts of the LLC, which the Court held provided no protection against third-party tort claims. *See, e.g. Gardner I,* 399 P.3d at 351 (citing NRS §§ 86.371 and 86.381); *Gardner II,* 405 P.3d at 655 (citing NRS § 86.371). But NRS § 78.138(3) as amended in 2017 has nothing to do with the debts of the company—it provides blanket personal liability protection to officers and directors of corporations and Mangers of LLCs. In short, this Court has yet to interpret the statute as amended, much less apply such interpretation to this case.[23] Therefore, nothing in this Court's rulings in this case in any way foreclosed the District Court following the plain meaning of the statute. But the District Court erroneously believes that this Court barred the defense set forth in this statute and held against Petitioners accordingly.

Therefore, there is no basis for the District Court to disregard the plain and ordinary meaning of the statute's text controls and the District Court's disregarding of that plain and ordinary meaning because it *thought* this Court *might* rule to the contrary was error.

b) *NRS § 78.138 applies to Managers of limited liability companies.*

This Court in *Gardner II* extended the statutory liability provisions of the Nevada corporations code, NRS Chapter 78, to limited liability companies. 405 P.3d at 655 (applying the corporate alter ego statute, NRS § 78.747, to the Water Park LLC). Therefore, it would be entirely illogical, unreasonable, and unconstitutional as a matter of due process for this Court to impose liability upon an LLC and its Members and Managers under the Nevada corporations code but deny them the statutory *defenses* set forth in that same code.

The District Court agreed; and held that NRS § 78.138 applied to Petitioners. Appendix, Hearing Transcript, p. 0236 ll. 21–22, 24–25 ("I think the Supreme Court would say that . . . it [the Business Judgment Rule] applies based on the other rulings in this case previously."). Accordingly, this Court should affirm that a Manager of an LLC may call upon the statutory liability defenses available to corporate officers and directors, including the Nevada Business Judgment Rule codified at NRS § 78.138.

Moreover, NRS § 78.138 shields not only the individual officers and directors (Managers for an LLC), but also the board of directors (here, the

Management Committee of the LLC) collectively. *Wynn Resorts,* 399 P.3d at 342 ("The business judgment rule does not only protect individual directors from personal liability, rather, it expresses a sensible policy of judicial noninterference with business decisions and is designed to limit judicial involvement in business decision-making so long as a minimum level of care is exercised in arriving at the decision.") (internal quotation marks and citation omitted).[24]

Therefore, NRS § 78.138—codifying Nevada's Business Judgment Rule—applies to Petitioners as individual Managers and to Petitioners collectively as members of the Water Park's management committee.

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[24] This Court in *Wynn Resorts* also stated that the Nevada Legislature implicitly rejected substantive judicial second-guessing of officer and director conduct:

> Nevada's business judgment statute is a modified version of Section 8.30(e) of the Model Business Corporation Act. Compare NRS 78.138 with 2 Model Business Corporation Act Annotated § 8.30(e) (4th ed. 2011). By a plain reading of both texts, it is apparent that the Legislature adopted a great portion of the Model Act, with the exception of its "reasonableness" standard for judging whether a director's conduct should be protected. *Id.* "This signals legislative rejection of a substantive evaluation of director conduct." *WLR Foods, Inc. v. Tyson Foods, Inc.,* 857 F.Supp. 492, 494 (W.D. Va. 1994).

399 P.3d at 343.

c) *NRS § 78.138 applies to third-party personal liability tort claims brought against an LLC Manager for an act or omission within the scope of the Manager's official duties.*

The common law business judgment rule protects directors of corporations from suits by creditors and shareholders by applying a presumption of non-negligence to the decisions of corporate directors and permitting suit only when a creditor or shareholder puts forth sufficient evidence to overcome the presumption. *See, e.g., Grobow v. Perot,* 539 A.2d 180, 183 (Del. 1988), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). The courts of some states extended the Business Judgment Rule to protect officers as well as directors, but the Rule originated very much as a creature of the common law to protect boards and individual directors.

Some states decided that strong protections against personal liability suits against officers and directors were necessary to encourage qualified persons to serve as officers and directors and thereby increase economic prosperity. These states enshrined their view of the ideal Business Judgment Rule in statute so that the people of the state, through their elected representatives, would control when personal liability can be imposed against officers and directors, rather than leave

this to the courts. Nevada was one of these states, and the Nevada Legislature codified the state's Business Judgment Rule at NRS § 78.138 in 1991. The statute was subsequently amended in 1993, 1999, 2001, 2003, 2017, and most recently in May 2019. NRSA § 78.138 (West).

The purpose of each amendment was to strengthen Nevada's Business Judgment Rule into the strongest and most robust in the United States.[25] In 2017, following in the wake of cases weakening the Business Judgment Rule in Nevada and elsewhere, the Nevada legislature amended NRS § 78.138,[26] and modified NRS § 78.138 by

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[25] The Nevada Assembly Committee hearing on the 2019 amendments to NRS § 78.138 included testimony that "Assembly Bill 207 will distinguish Nevada from other competing states like Delaware, as it was mentioned, to make Nevada the most attractive place to do business." Appendix, p. 0183, Statement of Ken Evans, President, Urban Chamber of Commerce, Nevada Assembly Committee Minutes (Feb. 28, 2019).

[26] The 2017 amendments were also made with the express purpose of ensuring that the language of that statute will exclusively control Business Judgment Rule determinations in Nevada, without any reference to case law from other states or jurisdictions. *See* Appendix, p. 0175, Nevada Senate Journal, 79th Session, Day No. 102. Therein, the Legislative Counsel's Digest of the 2017 amendments to NRS § 78.138 stated that "the laws of other jurisdictions must not supplant or modify Nevada law." *Id.* That intent was codified at NRS § 78.012:

> The plain meaning of the laws enacted by the Legislature in this title, including, without limitation, the fiduciary duties and liability of the directors and officers of a

amending Subsection 3 and adding a new Subsection 8 so that the statute covers *all* personal liability claims against an officer or director in their official capacity.

The legislative history supports this reading of the statute.[27] The 2003 amendments (2003 Nevada Laws Ch. 485 (S.B. 436)) Subsection 3 stated only that:

> domestic corporation set forth in NRS 78.138 and 78.139, must not be supplanted or modified by laws or judicial decisions from any other jurisdiction.

Thus, this Court should not apply out-of-state case law such as *Cortez* (cited with approval in *Gardner II,* 405 P.3d at 655) to NRS § 78.138) to narrow the scope of NRS § 78.138 beyond its plain meaning because the Nevada Legislature clearly intended its uniquely broad take on the Business Judgment Rule to control in this State.

[27] Secondary sources also support Petitioners' interpretation of the effect of the 2017 amendments. *See* Jim Penrose, Esq. & Paul Young, Esq., *Nevada Senate Bill No. 203 (2017): An Important Development for Nevada Corporations and Their Counsel,* Nev. Law., January 2019, at 18, 21 (2019)

> Even before the adoption of SB 203, the former provisions of NRS 78.138(3) codified the business judgment rule, under which the officers and directors of a corporation are ordinarily "presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." SB 203 amended this provision, in part, by adding: "A director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer except under circumstances described in subsection 7." Chapter 559, Statutes of Nevada 2017, at

> Directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation.

Meanwhile, Subsection 7 stated in pertinent part

> [A] director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his capacity as a director or officer unless . . .

Thus, prior to the 2017 amendments Subsection 3 provided no absolute liability protection (merely a presumption of non-negligence)—while

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> p. 3998. NRS 78.138(7), in turn, has been amended to add - in addition to the requirement that the defendant be shown to have committed a breach of his or her fiduciary duties involving intentional misconduct, fraud or a knowing violation of law - a requirement that any finding of individual liability must be premised upon a determination by the trier of fact that the presumption set forth in NRS 78.138(3) has been rebutted.

(emphasis added). *See also* Newmeyer Dillion, "Nevada Doubles-Down as a Pro-Business Leader: Officer and Director Powers, and What Every Company Must Know About SB203" ("Simply stated, SB 203 creates nearly uncompromising obstacles to holding directors or officers of Nevada corporations personally liable for their actions taken on behalf of the corporation.") https://www.lexology.com/library/detail.aspx?g=83928cbd-5901-42f5-baf1-36f985d474bf. (Oct. 4, 2017)

Subsection 7 only provided liability protection against suits by the corporation, its stockholders, and its creditors.

The 2017 amendments (2017 Nevada Laws Ch. 559 (S.B. 203)) *substantially* modified Subsection 3 by adding the critical language:

> . . . A director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer except under circumstances described in subsection 7 . . .

Thus, the 2017 amendments substantively changed Subsection 3 from a mere *presumption* that officers and directors act properly in the performance of their official duties (i.e. a presumption of non-negligence) to a flat *prohibition* on personal liability for all acts and omissions within the scope of the officer or director's official duties. The modification of Subsection 3 changed Subsection 7 from a liability protection provision to the *exception* to the new liability protection provision established by Subsection 3. In short, prior to the 2017 amendments Subsection 3 provided no absolute personal liability protection while Subsection 7 provided a limited protection against personal liability suits by certain

parties: shareholders, creditors, and the corporation itself.[28] The 2017 amendments transformed Subsection 3 from a mere presumption of non-negligence to a complete *bar* on personal liability claims against an officer or director in his or her official capacity *except* for suits by a shareholder, creditor, or the corporation itself. Thus, the 2017 amendments transformed Subsection 7 went from a liability protection provision to the *exception* to the blanket personal liability protection established by Subsection 3.[29]

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[28] In other words, Subsection 3 was not an absolute to third party tort claims by anyone seeking personal liability against an officer or director for an act or omission within the scope of their official duties but instead merely provided a presumption of non-negligence that could be overcome by sufficient evidence, [28] while Subsection 7 served as a partial bar to personal liability suits by a shareholder, creditor, or the corporation itself.

[29] Following further case law developments in other states weakening their Business Judgment Rule, the Nevada legislature swiftly moved to strengthen its Rule once again in 2019, which will go into effect (with retroactive applicability to this case) on 1 October 2019. The amendment, 2019 Nev. Laws Ch. 19 (A.B. 207) is attached hereto in the Appendix, pp. 0184–0187.

The amendment only further strengthens the liability protections set forth in NRS § 78.138. *See* Appendix, p. 0180, Nevada Assembly Committee Minute of 28 February 2019:

> This [amendment] is a culmination of efforts after last session with the Business Law Section of the State Bar of Nevada about how we can continue our momentum to

This Court has yet to interpret NRS § 78.138 as modified by the 2017 amendments—but the Court's previous jurisprudence demonstrates that NRS § 78.138 is sufficiently important to be worthy of clarification on an extraordinary Writ.[30] Therefore, this Court should declare that NRS § 78.138(3) serves as a statutory bar to third party tort claims seeking *personal* liability against an officer, director, or LLC Manager for an act or omission occurring in his or her capacity as an officer, director, or LLC Manager. [31]

> make Nevada a leader and an attractive prospect for new business . . . [the amendments to NRS § 78.138] will solidify our consistent ranking as being one of the most business-friendly states in the country.

[30] The Court heard *Wynn Resorts* on a Writ of mandamus and clarified the scope of the pre-2017 NRS § 78.138 Thus, this Court's precedents establish that clarifying NRS § 78.138 is sufficiently important to be worthy of hearing on an extraordinary Writ.

This conclusion in turn further supports Petitioners' contention herein that the 2017 (and 2019) amendments to NRS § 78.138 (that substantively changed the statute as discussed herein) are also worthy of this Court's review on an extraordinary Writ because of the statute's statewide importance and the need to clarify the impact, if any, of those amendments upon the Court's prior jurisprudence—especially as the 2017 amendments facially and dramatically broaden the personal liability protections of the statute.

[31] Plaintiffs cited *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 901 P.2d 684 (1995) in their brief and during oral argument. *See* Appendix, Response Opposing Summary Judgment, pp. 0108, 0113;

Hearing Transcript, p. 0273 ll. 8–19. *Semenza* was an attorneys' fee case but also held that:

> An officer of a corporation may be individually liable for any tort which he commits, and, if the tort is committed within the scope of employment, the corporation may be vicariously or secondarily liable under the doctrine of respondeat superior.

The District Court relied heavily on *Semenza* in support of its decision. *See* Appendix, Hearing Transcript, p. 0278 ll. 20–21 ("I mean, looking at the . . . *Cortez* case and *Semenza* case, I think I'm stuck.); p. 0284 ll. 11–14 ("But under the case law that I'm looking at under *Gardner II*, under *Cortez*, under *Semenza*, what do I do? As a matter of law, I say that they didn't commit any kind of personal liability, then I get reversed on that.").

But *Semenza* was decided in 1995—and the first iteration of the Business Judgment Rule was not put in place until 1999. *See* 1999 Nevada Laws Ch. 357 (S.B. 61) (adding "Directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation" to the statute). More importantly, the critical personal liability protections of NRS § 78.138(3) were not put into place until 2017—over twenty years after this Court decided *Semenza*. NRS § 78.138 directly contradicts *Semenza* by flatly stating that directors and officers have no personal liability for torts committed within the scope of employment except when the narrow exception under NRS § 78.138(7) applies.

Accordingly, this Court should recognize the narrowing of *Semenza's* authorization of personal liability against corporate officers and directors by the 2017 amendments to NRS § 78.138. Post-2017, an officer or director (or Manager of an LLC) only has personal liability for a tort committed in his or her individual capacity, not in his or her official capacity as an officer, director, or LLC Manager. The District Court erred holding otherwise.

d) *NRS § 78.138(3) bars all personal liability claims brought against an LLC Manager in his capacity as a Manager except for those that fall within the limited exception of NRS § 78.138(7).*

The statute plainly states:

> . . . A director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer except under circumstances described in subsection 7.

NRS § 78.138(3). Thus, a claim that a Manger of an LLC breached a duty to a third party arising in his or her capacity as a Manager and seeking to impose *personal* liability cannot be sustained unless it meets the exception set forth in NRS § 78.138(7).

While this represents a significant change from the prior law (and appears to be unique among all state Business Judgment Rule statutes in the country), there is no other reasonable way to read the Legislature's substantive modifications of the statute in 2017.[32] No individual liability, NRS § 78.138(3), in "all cases, circumstances and matters," NRS § 78.138(8), without meeting the exception, NRS § 78.138(7) *means* no

[32] And, again, the legislative history strongly supports Petitioners' conclusion that the 2017 and 2019 amendments were intended to *significantly* strengthen the liability protections provided by NRS § 78.138.

individual liability in all cases and circumstances that do not meet the exception. Full stop. Plaintiffs' must meet the Subsection 7 exception or Subsection 3 *entirely* bars their claims.

e) *The exception at Subsection 7 does not apply to ordinary third-party negligence claims.*

(i) The exception set forth in Subsection 7 only applies where the plaintiff is the LLC itself, a member of the LLC, or a creditor of the LLC.

Subsection 7 sets forth a limited exception to Subsection 3's general protection from personal liability and states:

> . . . a director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless . . .

This exception is logical; when an officer or director acts negligently in his/her official capacity, the proper remedy by the injured party is to bring a vicarious liability claim against the corporation itself on grounds of *respondeat superior* to be made whole for the officer or director's negligence. Thus, a third party injured by a breach of a duty by an officer or director that arose in that officer or director's capacity as an officer or director is made whole from the assets of the corporation itself.

However, the three categories of plaintiff set forth in the exception *cannot* be made whole by suing the corporation and hance the Legislature

has carved out the exception at NRS § 78.138(7) permitting them to sue that officer or director personally. In short, a personal liability action against a Manager of an LLC for breach of a duty arising in the Manager's official capacity may only be commenced by the LLC itself, a Member of the LLC, or a creditor of an LLC. Where, as here, a plaintiff is not one of these three categories, the exception does not apply, and Subsection 3 plainly prohibits bringing a claim for personal liability.

(ii) A Plaintiff most overcome the presumption of proper conduct established in Subsection 3.

Subsection 3 states:

> . . . directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation . . ..

Subsection 7(a) then states that a plaintiff cannot take advantage of the exception unless:

> The trier of fact[33] determines that the presumption established by subsection 3 has been rebutted . . .

[33] As discussed further in Petitioners' Reply Brief, the Legislature removed the "trier of fact" language in the 2019 amendments of NRS § 78.138 (effective 1 October 2019, prior to trial of this matter) to make is clear that the judge—not the jury—must decide whether the presumption is overcome. Appendix, p. 0166–0168.

Thus, even a proper party (which Plaintiffs are not) must overcome the Business Judgment Rule presumption that LLC Managers act in good faith, on an informed basis, and with a view to the interests of the LLC before sustaining a personal liability action against an LLC Manager in his or her official capacity.

> (iii) A plaintiff must also prove that the act or omission giving rise to the purported personal liability constituted a breach of the Manager's fiduciary duties as a Manager *and* involved more than simple negligence.

Subsection 7(b) does not permit personal liability even by a proper plaintiff who has overcome the Subsection 3 presumption of proper conduct unless:

> It is proven that:
>
> > (1) The director's or officer's act or failure to act constituted a breach of his or her fiduciary duties as a director or officer; and
> >
> > (2) Such breach involved intentional misconduct, fraud or a knowing violation of law.

Thus, the only kind of personal liability action that can be sustained against an LLC Manager acting is his or her official capacity is a breach

of fiduciary duty to the LLC that includes intentional misconduct, fraud, or a knowing violation of law.[34]

(iv) In sum: no personal liability is the rule and the only exception is inapplicable to this case.

The plain wording of NRS § 78.138(3) is clear and unequivocal and personal liability against an LLC Manager based on an act or omission that occurred in the scope of that Manager's official capacity is expressly barred by statute.

f) *Therefore, NRS § 78.138 bars Plaintiffs' claims against Petitioners.*

(i) All of the claims against Petitioners arise solely by virtue of their being Managers of the Water Park LLC.

Plaintiffs' do not dispute that all of their claims against Petitioners arise from alleged acts or omissions that occurred in the Petitioners' official capacity as Managers of the Water Park. Indeed, all direct claims against the Petitioners explicitly state that the claims arise against each

[34] As discussed in Petitioners' MSJ Reply Brief, the legislative history of NRS § 78.138(7) confirms that simple negligence is not enough to establish personal liability. "Personal liability requires particular bad acts." Appendix, pp. 0168–0169 (quoting Statement of Lorne Malkiewich, Nevada Senate Committee Minutes (Apr. 10, 2017), p. 0210).

of them as "members of [the Water Park's] Management Committee" and Managers of the Water Park LLC. Appendix, Third Amended Complaint, p. 0015. Moreover, the purported duties are facially duties of the Managers in their capacity as Managers, not individual duties owed to L.G. personally.[35] Accordingly, all of the claims fall within the aegis of NRS § 78.138(3) because they are charges against the Petitioners for an act or failure to act in their 'official' capacities as Managers.

(ii) Plaintiffs facially fail to meet the exception set forth in NRS § 78.138(7).

Plaintiffs are not the Water Park LLC, a member of the LLC, or a creditor of the LLC. Therefore, they are not one of the three types of plaintiff that NRS § 78.138(7) permits to bring a personal liability action

[35] As discussed above, every duty Plaintiffs claim that Petitioners owed to L.G. arose solely in their capacity as Managers of the Water Park LLC. None of the alleged duties arose outside their capacity as members, nor are any of them personal duties owed individually by a 'person on the street.' Therefore, all claims against Petitioners are purely official capacity claims.

against an LLC Manager in his official capacity. Accordingly, the bar to personal liability set forth in NRS § 78.138(3) is fatal to Plaintiffs' suit.[36]

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[36] It is worthy of note that Plaintiffs may yet recover against the individual LLC Managers personally in a post-judgment action.

An LLC Manager could theoretically 'loot' the company (in breach of their fiduciary duties to the LLC's creditors) so that there are insufficient assets to cover the claims of a third party plaintiff, and then assert Subsection 3 to evade personal liability for that breach—leaving the third party plaintiff holding the proverbial bag and unable to be made whole from the (insufficient) assets of the LLC.

Clearly there are strong public policy reasons to avoid such an outcome. Fortunately, there are two remedies for such misconduct. First, a plaintiff can bring an alter ego claim against the Manager in their *personal* capacity, thus avoiding the Subsection 3 bar. Additionally, Subsection 7 prevents such an outcome because a third-party plaintiff with an excess judgment against an LLC becomes a creditor of the LLC and, therefore, falls within the Subsection 7 exception. To put it another way, the third-party plaintiff can bring a post-judgment action against the Managers as a *creditor* of the LLC. Together, these remedies ensure that unscrupulous Managers cannot breach duties owed to third part in their official capacities but deny a third-party plaintiff a recovery from the assets of the LLC and simultaneously avoid personal liability to that plaintiff by claiming the protections of Subsection 7. Thus, NRS § 78.138(3) does not leave third parties without a remedy for wrongdoing by a Manager of an LLC.

Applying this analysis here, Plaintiffs could (and did) bring alter ego claims against the members and Managers of the LLC—which have since settled. Moreover, if Plaintiffs prevail against the Water Park and become judgment creditors, they could then sue the individual

g) *The District Court failed to properly interpret or apply NRS § 78.138.*

The District Court correctly found that NRS § 78.138 applied to limited liability companies and LLC Managers; however, the District Court nevertheless held that the protections of NRS § 78.138 do not apply to third party tort claims against an LLC Manager in his or her official capacity. *See* Appendix, Hearing Transcript, p. 0262 ll. 4–11. Thus, the District Court did not even attempt to determine if Plaintiffs can meet the exception in Subsection 7.[37] However, by plain and unmistakable statutory commandment, NRS § 78.138 applies to "all cases,

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Managers personally (as a creditor of the Water Park LLC) if they could meet the other requirements of Subjection 7.

Thus, NRS § 78.138(3) is a clear bar to Plaintiffs claims *here*, but if Plaintiffs can—as they allege in the Third Amended Complaint—prove that Petitioners intentionally undercapitalized the Water Park LLC (in breach of their fiduciary duty to the Water Park's creditors), they could bring a post-judgment action against the Petitioners to assert personal liability. In other words, while Plaintiffs' *current* claims against Petitioners are barred by NRS § 78.138(3), the exception at NRS § 78.138(7) will afford them protection post-judgment if they have an uncollectable excess judgment caused by misconduct of the LLC Managers that qualifies for the Subsection 7 exception.

[37] Though it is plain that they cannot because Plaintiffs are not a Member of the LLC, a creditor of the LLC, or the LLC itself as required by Subsection 7.

circumstances and matters" unless provided otherwise in the articles of incorporation (the articles of organization for an LLC).[38] NRS § 78.138(8). Accordingly, the District Court committed plain error by holding that the flat bar on personal liability claims set forth in NRS § 78.138(3) does not apply to third party tort claims.

[38] There is no allegation in the record of this case that the articles of organization of the Water Park LLC "otherwise provide." Accordingly, NRS § 78.138 applies in its entirety.

VII. CONCLUSION

The District Court below quite properly sought to defer to this Court's order in *Gardner II*—but went too far*;* and attempted predict how this Court would interpret NRS § 78.128 when there is nothing to interpret due to the plain and unambiguous wording of the statute. Thus, the District Court allowed personal liability claims far beyond what this Court set forth in *Gardner II,* and in direct conflict with the controlling statute NRS § 78.138, to proceed to trial. Accordingly, this Court should grant the Petition and issue a Writ to assist the District Court with interpreting its prior order and the statute by declaring the proper interpretation of both its precedents in this case, and the 2017 and 2019 amendments to NRS § 78.138, and then remand the matter to the District Court for further proceedings consistent with this Court's declaration.[39]

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[39] Although Petitioners do not ask the Court to reverse the District Court's denial of summary judgment, if the Court accepts this Writ and finds for Petitioners, it may choose to exercise its inherent discretion to reverse denial if, as discussed above regarding NRS § 78.138, the Court finds that "no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action." *Smith,* 113 Nev. at 1345, 950 P.2d at 281. Nevertheless, that is not the relief sought in this Petition, and if the Court issues the Writ the decision of whether to reverse or simply remand with instructions is left to the sound discretion of this Court.

DECLARATION OF KAREN J. PORTER, ESQ.

STATE OF COLORADO)
) ss:
COUNTY OF ARAPAHOE)

KAREN J. PORTER, ESQ. declares and states as follows:

1. I am a Partner with the law firm of Godfrey | Johnson, P.C., and am duly licensed to practice law before all of the Courts in the State of Nevada. My Nevada bar number is 13099.

2. I am an attorney retained to represent Petitioners in this matter and have personal knowledge of the contents of this Petition.

3. The documents included in the attached Appendix to this Petition are true and accurate copies of those documents.

Karen J. Porter, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of August 2019, I served a true and correct copy of the foregoing document (and any attachments) entitled Emergency Petition for a Writ of Mandamus through the electronic filing system of the District Court, and dispatched either through hand deliver or by mailing a copy via United States Postal Service First Class Mail addressed as follows if electronic service was not possible for that party:

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