

CASE NO. \_\_\_\_\_

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**IN THE SUPREME COURT OF  
THE STATE OF NEVADA**

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Electronically Filed  
Aug 20 2019 08:51 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

ORLUFF OPHEIKENS, SLADE OPHEIKENS,  
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; ORLUFF OPHEIKENS; SLADE  
OPHEIKENS; CHET OPHEIKENS; SHANE HUIISH; SCOTT  
HUIISH; CRAIG HUIISH; TOM WELCH; WILLIAM PATRICK RAY,  
JR.; and R&O CONSTRUCTION COMPANY, INC.,

*Real Parties in Interest*

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**APPENDIX TO EMERGENCY PETITION  
FOR A WRIT OF MANDAMUS, VOLUME 2**

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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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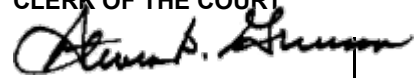
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RTRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

PETER GARDNER, et al.,	)	CASE NO. A-15-722259-C
	)	
Plaintiffs,	)	DEPT. NO. XXX
v.	)	
	)	
HENDERSON Water Park, LLC,	)	
et al.,	)	
Defendants.	)	
	)	

BEFORE THE HONORABLE JERRY A. WIESE, DISTRICT COURT JUDGE

FRIDAY, AUGUST 9, 2019

**RECORDER'S TRANSCRIPT OF HEARING:  
ALL PENDING MOTIONS**

APPEARANCES:

FOR THE PLAINTIFFS:	DONALD J. CAMPBELL, ESQ.
	JON C. WILLIAMS, ESQ.
	PHILIP R. ERWIN, ESQ.
	SAMUEL R. MIRKOVICH, ESQ.

FOR THE DEFENDANTS:	JOHN E. GORMLEY, ESQ.
	JEFFREY VAIL, ESQ.
	BRETT M. GODFREY, ESQ.
	REBECCA L. MASTRANGELO, ESQ.
	KEVIN S. SMITH, ESQ.
	BRANDEN D. KARTCHNER, ESQ.
	KAREN J. PORTER, ESQ.
	KIRK BANKS LENHARD, ESQ.

RECORDED BY: VANESSA MEDINA, COURT RECORDER  
TRANSCRIPTION BY: VERBATIM DIGITAL REPORTING, LLC

1                   LAS VEGAS, NEVADA, FRIDAY, AUGUST 9, 2019

2                   [Case called at 1:00 P.M.]

3                   THE COURT: All right. We're on the record in Case  
4 No. A-722259, Gardner versus Henderson Water Park. Do you  
5 guys want to state your appearances?

6                   MR. WILLIAMS: Good afternoon, Your Honor, Colby  
7 Williams on behalf of the plaintiffs.

8                   MR. ERWIN: Phil Erwin, Campbell and Williams on  
9 behalf of the plaintiffs.

10                  MR. CAMPBELL: Donald G. Campbell on behalf of the  
11 plaintiffs.

12                  MR. MIRKOVICH: Samuel Mirkovich on behalf of the  
13 plaintiffs.

14                  THE COURT: You guys switched seats today.

15                  MR. WILLIAMS: We did, Your Honor.

16                  MR. VAIL: Good afternoon, Your Honor. We probably  
17 did the same thing, a little musical chairs on this side.  
18 Jeff Vail, Godfrey Johnson, on behalf of the Opheikens, Welch,  
19 defendants and R&O Construction.

20                  MS. MASTRANGELO: Rebecca Mastrangelo, Scott Huish  
21 and Craig Huish.

22                  MR. SMITH: Kevin Smith for Shane Huish  
23 individually.

24                  MR. LENHARD: Kirk Lenhard on behalf of the Water  
25 Park.

1 MS. PORTER: Karen Porter on behalf of the  
2 Opheikens, Welch, defendants.

3 MR. GODFREY: Brett Godfrey, same.

4 THE COURT: You're usually up here in the front.

5 MR. GODFREY: Yes, sir, but today I just feel really  
6 tired so that's just --

7 THE COURT: All right.

8 MR. GORMLEY: John Gormley on behalf of the  
9 Opheikens and -- and Tom Welch.

10 MR. KARTCHNER: Branden Kartchner on behalf of Bliss  
11 Sequoia and Huggins Insurance.

12 THE COURT: Welcome. Do me a favor, when you guys  
13 -- as I asked you to do last time because we -- it's being  
14 recorded, just say who you are when you're going to say  
15 something.

16 Where do you guys want to start today?

17 MR. VAIL: Your Honor, unless you have a different  
18 plan in mind, I think we'd like to begin with the Motion for  
19 Summary Judgment on behalf of the Opheikens, Welch individuals  
20 as to duty and breach issue.

21 THE COURT: That's what I had first, too.

22 MR. VAIL: All right. And Your Honor, Jeff Vail for  
23 the Opheikens, Welch, individuals.

24 THE COURT: Okay. Go ahead.

25 MR. VAIL: And Your Honor, I've got a few slides up

1 here, and then we'll be discussing some finer points of what  
2 the statute actually says. I think it's reasonably  
3 straightforward, but rather than give you a he said/she said,  
4 I'm just going to put some of the language up there. Also a  
5 little bit of statutory -- or rather, legislative history that  
6 I think is relevant here to go -- go through this.

7 Now critically, this is a motion on behalf of four  
8 individual defendants, not the Water Park business; Tom Welch,  
9 Orluff Opheikens, Slade Opheikens, and Chet Opheikens.

10 And their argument, well, they're -- and you heard  
11 last week lots of statements about the Management Committee  
12 managers, these kinds of things. There is just noted  
13 individualized allegations as to these four individuals to  
14 show that they've actually engaged in a breach of any duty.

15 Now, we'll get into the specific standard for the  
16 duty and why the Business Judgment Rule applies, but that  
17 threshold issue, that individual action requirement, it's not  
18 sufficient on summary judgment when you do have affidavits  
19 saying we did not do any of these things.

20 To simply say, oh, well, the Management Committee  
21 [indiscernible] large did something. That is fault by  
22 association. That is collective allegation, is not sufficient  
23 to create a genuine issue of fact as to each of those four  
24 individuals when the only thing in the record as to that is  
25 actually the -- their own declaration and their own deposition

1 transcript, that they did not have knowledge, did not engage  
2 in any intentional willful conduct, certainly no allegations  
3 of fraud.

4           Now, what I'd like to do to start, Gardner II, the  
5 Supreme Court case. It focuses a bit on this individualized  
6 allegation concept. And this is where the plaintiffs must  
7 allege individual acts, not just this collective liability  
8 concept.

9           An LLC manager -- and Gardner II is a good example  
10 of where the Supreme Court of Nevada has taken the Nevada  
11 Corporation's Code and applied it to LLC managers to LLCs when  
12 determining their duties. And so I don't believe that is a  
13 significantly debated issue, but if it comes up and the  
14 plaintiffs just debate that issue, I'd be happy to bring up  
15 the reasons why.

16           But what I'd like to point out is that the language  
17 of the Supreme Court of Nevada itself, that those acts or  
18 omissions that would be actionable against, in this case, the  
19 manager, are -- they're only responsible for that, quote, "if  
20 that person were acting in an individual capacity."

21           Now, that's straight out of Gardner II from the  
22 Nevada Supreme Court. Now, this is paragraph 40 from the  
23 Complaint. Plaintiffs do use this individual capacity  
24 language. Paragraph 40 says, "All actions taken by Cowabunga  
25 Bay as set forth herein were authorized, directed, or



1 participated in by the individual defendants in their  
2 individual capacity."

3 But then it continues, "That capacity as members of  
4 the Management Committee." And this is the theme that you see  
5 throughout.

6 Every allegation plaintiffs make as to the Opheikens  
7 and Welch defendants, those four discrete individuals, they  
8 say it is in the capacity as a member of the Management  
9 Committee, whether it's their allegation that the individuals  
10 are individually personally responsible for negligent hiring  
11 of Shane Huish, for negligent allegation, for simple  
12 negligence, all of these are clearly within the course and  
13 scope of their role if they had any involvement whatsoever as  
14 a manager of the LLC.

15 Now, this is where the Business Judgment Rule comes  
16 up. And this is NRS 78.138. I think it's very important to  
17 lay some of the foundation here, and I'll get into this in  
18 more detail in a moment.

19 The Business Judgment Rule originally was a 2003  
20 statute, amended in 2017, and this is very important, and  
21 again amended actually in May of 2019 this year. Very  
22 significant. And we'll go into what the 2017 amendment is,  
23 but all the cases, with the sole exception of Gardner II of  
24 the Nevada Supreme Court, which does not actually address the  
25 Business Judgment Rule at all, every case plaintiffs' cite is

1 pre the 2017 amendment.

2 And we'll talk about how the 2017 amendment  
3 specifically injected the language, retroactive to October 1,  
4 2003, specifically injected that language into the statute  
5 that creates a higher bar/an actual bar for liability from LLC  
6 managers, corporate directors, and officers in their personal  
7 capacity.

8 Now, these are just a couple of clips. It's a long  
9 section in that statute. Subsection (3), though, is the key  
10 piece, and this is actually the part that was added in the  
11 2017 amendment, did not exist before.

12 It says, "A director or officer is not individually  
13 liable for damages as a result of an act or a failure to act  
14 in his or her capacity as a director or officer."

15 And it does have an exception. It says, "except as  
16 described in subsection (7). And we'll get into that in a  
17 moment and explain why that does not apply here.

18 But that is, reading from the top to bottom as you  
19 must with the statute, this is where this individual liability  
20 bar comes in. And it's very clear cut. And this is the --  
21 the intent, the amendment that is put forth and passed by the  
22 Nevada legislature, and this is the law of Nevada as of --  
23 subsection (3) as of October 1, 2017.

24 THE COURT: As you know, the plaintiffs argue that  
25 the Business Judgment Rule doesn't apply, that it only applies

1 to directors and officers in their capacity, or managers in  
2 derivative actions and things like that and their duty to the  
3 corporation itself.

4 MR. VAIL: Yes, Your Honor. And that was the  
5 original 2003. And that's kind of the -- the standard  
6 Business Judgment Rule, common law derived, quoted in the  
7 statute many states in the Union.

8 THE COURT: I looked at all the cases that I could  
9 find that cited to that statute, and it seemed like that's  
10 what it was used for is derivative actions.

11 MR. VAIL: And that was the 2003 intent, and every  
12 case that you looked at, every case in Nevada that exists, and  
13 every case that plaintiffs cite to is pre the 2017 amendment  
14 that injects this language right here at subsection (3), which  
15 I think is really the key piece.

16 The 2017 amendment also injects subsection (8).  
17 This is new as of 2017. This section, the entire 78.138,  
18 applies to all cases, circumstances, and matters full stop.  
19 That is the express text of the statute.

20 Now, pull forward to the next slide, and I'm going  
21 to explain, if I can, what I believe the plaintiffs are trying  
22 to argue here. They're saying that the exception in  
23 subsection (7) is limited to directors -- or rather,  
24 stockholders, officers, and creditors of the corporation.

25 That is true with respect to subsection (7), where

1 that language resides in the statute. It's not in subsection  
2 (3).

3 Subsection (3) says, "A director or officer," here  
4 manager of an LLC, "is not individually liable," and then it  
5 says below, "except as described in subsection (7)."

6 That subsection (3) is expansive, and if you go back  
7 slightly forward, subsection (8) tells us it applies in all  
8 cases, circumstances, and matters. And every case plaintiffs  
9 cite to is from before that text was added to the statute.

10 Now, in subsection (7), this is where they say,  
11 directors and officers, managers are not individually liable  
12 except as set forth in subsection (7). Subsection (7) does  
13 talk about derivative lawsuits specifically. And this is  
14 where they're saying not liable to the corporation or its  
15 stockholders or creditors.

16 That is not the case here. Subsection (7) does not  
17 and cannot apply because **L.G. [REDACTED]** is not a stockholder  
18 or creditor or the corporation itself. This is a third-party  
19 tort claim, and they argue third-party tort claims are not  
20 covered by the Business Judgment Rule, and that's simply  
21 incorrect.

22 The plain text of the statute, managers are not  
23 individually liable, except in those derivative circumstances  
24 that do not apply here. And subsection (8), it applies to all  
25 cases, circumstances, and matters.

1           And even if that subsection (7) did somehow apply,  
2 that's also where in a derivative lawsuit context, this breach  
3 requiring intentional misconduct, fraud, or a knowing  
4 violation of the law, that's just one more piece of evidence  
5 that would not -- that is not there and would be required.

6           Additionally, that's an issue that is a presumption  
7 in favor of the officer, director, or manager, and it's  
8 expressly a question for the Court to decide, not an issue for  
9 a jury. And that's also subject to the 2017 amendment where  
10 they took the finder of fact so that the Court would make that  
11 decision.

12           Now, I think it's important -- I pointed for -- that  
13 the 2017 amendment added that key language, directors,  
14 officers, managers of LLCs in the LLC context are not  
15 individually liable except for the derivative exception that  
16 doesn't apply here.

17           Now, it's also important to point out that the 2017  
18 and 2019 amendments state in each case file on or after  
19 October 1, 2003. Now, if there were any ambiguity, and I  
20 think this flat bar as to individual liability except under  
21 certain circumstances that don't apply, and the language in  
22 subsection (8) that says it applies to all cases and matters.

23           This piece of legislative history, I think, is  
24 really important because this tells us -- I'm not making this  
25 up out of whole cloth. Not only is this the clear, plain in

1 text reading of the statute, but from the Nevada Senate  
2 Committee Minutes, clarifies the business -- this is the 2017  
3 amendment -- clarifies the Business Judgment Rule that simple  
4 negligence is not enough. Personal liability requires  
5 particular bad acts.

6 This is flowing right into what we're discussing  
7 with the amendment that was made in 2017 that creates this new  
8 bar for personal liability with the minor exception,  
9 significant for business litigation, but the one exception of  
10 derivative lawsuits.

11 Now, as I mentioned before, plaintiffs cite only to  
12 pre-2017 amendment that went into effect October 1, 2017, only  
13 to pre-amendment case law on that point.

14 And this is a critical issue. What happened in  
15 Delaware is Delaware had the Business Judgment Rule, but  
16 courts in Delaware weakened the Business Judgment Rule. And  
17 that's one reason that led Nevada to choose to amend their  
18 Business Judgment Rule, to make the people of Nevada have  
19 spoken, that the Business Judgment Rule here should be the  
20 strongest protection in the nation.

21 And it's critical. Really, this was driven by  
22 U-Haul and their corporate headquarters here, wanting to  
23 ensure that if you have every single dealer, employee,  
24 bartender, every casino, every hotel in town potentially  
25 creating personal liability for the CEO, the Board of

1 Directors of those casinos, you're essentially saying a  
2 corporation or an LLC in this state just can't be bigger than  
3 five, ten people you can immediately supervise.

4 Now, I think it's really important additionally to  
5 say, I understand the plaintiffs are concerned about there not  
6 being enough insurance for the Water Park as an entity. They  
7 have a claim against the Water Park. That claim's going to  
8 trial per last Wednesday's hearing.

9 If they're concerned about not having enough  
10 capitalization or under insurance, the right thing to do  
11 there, bring an alter ego claim. Use that lack of  
12 capitalization, that lack of insurance as an equitable  
13 argument to say here's the corporate veil and go after  
14 individuals through the an alter ego theory.

15 Plaintiffs did that. Plaintiffs and the Opheikens,  
16 Welch defendants settled those claims. They've taken our  
17 money, and those claims have been dismissed. That is not an  
18 argument at this point that well, if you let the individuals  
19 out, there might not be a suitable source for recovery.

20 This is a case where you have individuals who  
21 primarily reside in Utah, who were part of the construction  
22 company that helped build this park, that only even had a seat  
23 on the Management Committee, and to the fact that they had to  
24 -- they had to invest a significant amount of money to save  
25

1 the project and prevent it from being this situation where  
2 their own subcontractors were not getting paid.

3 And now plaintiffs are suggesting, well, we want to  
4 hold them individually liable, but we want to say, no, this  
5 subsection (7) of the Business Judgment Rule says it only  
6 applies to derivative claims, and that's simply, per the plain  
7 text of the statute, not the case.

8 So here, as I mentioned, plaintiffs have a claim  
9 against the Water Park. That claim is going to trial. Acts  
10 of the Management Committee as a group, those are acts of the  
11 entity. That's not sufficient to create an individualized  
12 allegation.

13 But even if it were, the Business Judgment Rule says  
14 that individual managers of an LLC, in the LLC context, or  
15 directors and officers of a corporation, are not personally  
16 liable for things that are within the course and scope of  
17 their role as a manager. And that's exactly what every one of  
18 plaintiffs' allegation is here.

19 It's a negligent allegation, negligence hiring, a  
20 simple negligence theory. All of those are within the course  
21 and scope specifically within the ambit of the Business  
22 Judgment Rule, and they cannot be individual liability claims.  
23 The only exception there is that subsection (7) for derivative  
24 lawsuits and L.G. [REDACTED] nor his parents are creditors,  
25 managers, shareholders of the corporation itself or here of



1 the LLC.

2 So those remaining claims, the one sole remaining  
3 claim against my four individual clients is for simple  
4 negligence, and that does not cut it under the Business  
5 Judgment Rule.

6 THE COURT: But in the Brief it seemed like you were  
7 focusing more on the language of the intentional conduct and  
8 whether or not this was an intentional tort and arguing that  
9 it wasn't intentional, so that I thought that you were saying  
10 that subsection (7) did apply, except for the fact that they  
11 didn't have evidence of the intentional tort. It seems like a  
12 different argument today.

13 MR. VAIL: It is a partially different argument,  
14 Your Honor. The Reply certainly focuses and hones on this  
15 argument because it's important to recall this statute was  
16 most recently amended in May 2019. That gave us a whole host  
17 of new legislative history material, a new reason to go  
18 analyze the statute.

19 And as we look at that, and we see the plaintiffs'  
20 response saying, no, it's because you should read the statute  
21 backwards and know what the subsection (7) exception is, the  
22 criteria of who's protected by this Business Judgment Rule.  
23 Looking at it from that perspective, we'd see this, and  
24 clearly, this is the intent. And it's not just the intent. I  
25 think you never get to legislative intent because the plain

1 language of the statute, and just basic principles of  
2 statutory construction say that under the Business Judgment  
3 Rule -- I believe it's 209(a)(b) -- 207 is the most recent  
4 Nevada laws, 2019 AB207 is the May 2019 amendment.

5           And the Nevada legislature there is even saying,  
6 look, we are frustrated that what do we have to do to tell the  
7 courts we really mean it, enforce the text of the statute as  
8 written. Don't take Delaware case law, don't take Illinois  
9 case law, all the other cases from other states cited by  
10 plaintiffs. Look at the text as our legislature in this state  
11 has enacted it, and say, this is exactly what we meant. We  
12 said what we meant. If we didn't mean for it to intend to  
13 apply to third-party tort claims, we would not have put in in  
14 2017 subsection (8) that says this applies to all cases and  
15 matters.

16           And so I think that looking just simply statute  
17 itself, this is a clear cut case where this attempt to create  
18 an individual claim purely based on being a manager, that's  
19 expressly contravened by the text of the statute itself.

20           There is a method in the law, and that's alter ego  
21 claim. They've brought those claims. They've settled those  
22 claims. This is not the appropriate forum to bring these  
23 individual claims against Tom Welch, Orluff Opheikens, Slade  
24 Opheikens, and Chet Opheikens.

25           If you have any questions, I'd be happy to address

1     them.   Otherwise, I'd --

2             THE COURT:   I asked (indecipherable).

3             MR. VAIL:   -- yield to Mr. Williams.   Thank you,  
4     Judge.

5             MR. WILLIAMS:   Your Honor, do you want me to respond  
6     now or do you want to let the rest of the defendants argue  
7     whatever they're going to argue?   It doesn't matter to me.  
8     I'm happy to do it either way.

9             THE COURT:   If you guys want to add -- I mean, I  
10    know that there were joinders to a lot of these things.  
11    Anybody else want to add anything to what he said?

12            MS. MASTRANGELO:   I don't have anything to add  
13    specific to the Business Judgment Rule.   We've sort of joined  
14    in that argument, and our individual arguments are -- should  
15    be argued separately.

16            MR. SMITH:   Kevin Smith for Shane Huish  
17    individually.   Mr. Vail addressed some of the issues that  
18    we've got as well.   We have nothing further to add with  
19    respect to the motion dealing with the Business Judgment Rule.

20            THE COURT:   Okay.

21            MR. WILLIAMS:   Fair enough.   Good afternoon, Your  
22    Honor.   Colby Williams on behalf of the plaintiffs.

23            Your Honor, I recognize it's Friday afternoon.   I  
24    recognize you've heard from us for more than an hour last  
25    week, and you seemed pretty prepared and questions specific to

1 the motions heard last week and you appear to have questions  
2 with respect to these.

3           So let me start by asking, is there anything in  
4 particular you want me to address in response to that or do  
5 you want me just to go through and address the entire  
6 argument, which --

7           THE COURT: I read these things, so I kind of know  
8 what your Briefs say.

9           MR. WILLIAMS: Yeah. Well, good. That's helpful.

10          THE COURT: I'm happy to hear whatever else you want  
11 to tell me.

12          MR. WILLIAMS: Right. Well, I think it's important  
13 because Your Honor actually keyed on something that we had  
14 keyed on, which is the argument you saw in the Reply was  
15 different than what they had focused on in the original  
16 motion.

17          And I would submit to you, Your Honor, that the  
18 reason that that happened is because we pointed out that they  
19 were analyzing the Business Judgment Rule wrong. All they  
20 were focused on was subsection (7), and whether there was  
21 intentional conduct or not. They were skipping subsection  
22 (3), which is the presumption that officers and directors act  
23 in good faith.

24          So it's funny how it shifted, and now we're, you  
25 know, hearing the whole thing.

1 But let me just say this, Your Honor; this argument  
2 that they are presenting to you I can only sum it up with the  
3 words of Yogi Bear, this is deja vu all over again.

4 You will recall that it was these defendants who  
5 came in and they argued to you first that the LLC statutes  
6 provided them with complete immunity from any sort of a tort  
7 claim because they were managers or members of an LLC. And  
8 Your Honor denied our motion for leave to amend to add these  
9 individual defendants. We took it up on a Writ. The Supreme  
10 Court agreed with us, we were allowed to amend and add these  
11 fellows.

12 Next, when we sought to add R&O Construction as a  
13 defendant, based on a reverse veil piercing theory, we were  
14 permitted to amend over their objection, but then they  
15 promptly filed a Motion to Dismiss, and they've argued that  
16 Nevada statutes have changed Nevada Supreme Court precedent.

17 You can't allow this claim to go forward because  
18 it's prejudgment, Your Honor, was one of their arguments. And  
19 Your Honor granted that motion to dismiss. We took that up.  
20 The Nevada Supreme Court reversed that as well.

21 And so Your Honor --

22 THE COURT: You're telling me a lot that I'm wrong  
23 on this case.

24 MR. WILLIAMS: I'm telling Your Honor that they have  
25 -- they have -- most respectfully, they've led you astray.

1 And Your Honor, this is the most audacious example of it yet.  
2 It truly is. Their position, Your Honor -- and make no  
3 mistake what they're saying here. Okay? And I was happy to  
4 hear Mr. Vail repeat the term "full stop".

5 This is the position they're taking in their Brief:  
6 Nevada's Business Judgment Rule explicitly protects a  
7 corporate officer and their counterparts in LLCs, managers,  
8 from all personal liability in any case or cause of action  
9 full stop.

10 Now, Your Honor, that is the same argument they made  
11 with the LLC statutes, and now they're saying that that is the  
12 result that flows from the 2017 amendments to the Business  
13 Judgment Rule. And Your Honor it is just flat out wrong.

14 A quick sidebar about what the Business Judgment  
15 Rule is; right? The Business Judgment Rule is designed to  
16 protect officers and directors. And let me start by saying,  
17 there is no Business Judgment Rule for LLCs, Your Honor. Let  
18 me just state that on the record.

19 But I'm not -- that's not the focus of my argument.  
20 Let's assume it applies.

21 THE COURT: I think the Supreme Court would say  
22 that --

23 MR. WILLIAMS: I think --

24 THE COURT: -- it applies based on the other rulings  
25 in this case previously.

1           MR. WILLIAMS: I think that's a fair point, Your  
2 Honor, and I'm not going to debate it.

3           But it's designed to give officers and directors  
4 some breathing room, some flexibility, so that when they're  
5 exercising their fiduciary duties on behalf of corporations,  
6 they aren't constantly subjected to being second guessed by  
7 shareholders or creditors or eventually the courts.

8           Absent very narrow circumstances, can someone come  
9 in and say, you guys made a bad decision when running this  
10 business, okay, when you're a shareholder or creditor or the  
11 courts, Your Honor.

12           And they didn't talk about it, but when they made  
13 the 2017 amendment, 78 -- NRS 78.012 set forth the legislative  
14 intent while they were making these changes, and we're going  
15 to talk about that in a little more detail. But what they  
16 described as these deal with the, quote, "internal affairs",  
17 end quote, of corporations. Not external affairs when you  
18 have engaged in a tort and you have harmed a third party, Your  
19 Honor.

20           This talks about what's going on inside the  
21 corporation. Now, the 2017 amendments were basically  
22 reaffirmations and clarifications. You saw the legislative  
23 history. We're clarifying. We aren't rewriting Nevada law;  
24 we're clarifying Nevada law.

25           And what was going on, Judge, is that you have

1 plaintiffs' lawyers, creative as they are, were coming in and  
2 they were arguing under the old version of the Business  
3 Judgment Rule that hey, we only need to show intentional  
4 conduct under subsection (7) that they breached their  
5 fiduciary duty and engaged in intentional wrongdoing.

6 And they were skipping, just as they did in their  
7 original motion, they were skipping any analysis of subsection  
8 (3), which is the codification of the Business Judgment Rule  
9 that says, we are going to presume officers and directors act  
10 in good faith.

11 And what the legislative amendments did is say, time  
12 out, if you're going to pursue one of these claims, let's make  
13 it very clear you've got to first rebut that presumption in  
14 subsection (3), and then you've got to go to subsection (7)  
15 and prove the elements there, breach of fiduciary duty,  
16 intentional wrongdoing, et cetera.

17 That's what the amendments were designed to do,  
18 Judge. They were not designed to immunize officers and  
19 directors or managers and members of LLCs from all personal  
20 liability in the context of a third-party tort claim.

21 And Your Honor, this notion about all we have cited  
22 to you are pre-October 1, 2017 cases or all we've cited to you  
23 are out-of-state cases, it's almost comical, Judge, because  
24 Gardner II, okay, was decided in November of 2017. November  
25 22nd, to be specific, two months after these amendments went



1 into effect.

2 And the Nevada Supreme Court didn't say a single  
3 word about the Business Judgment Rule or these so-called  
4 sweeping changes that have now changed the entire landscape of  
5 liability for officers and directors or members and managers.

6 And you hear them say, well, you know, the Business  
7 Judgment Rule didn't come up, and the Nevada Supreme Court  
8 didn't have -- you know, there hasn't been enough time for a  
9 case to work its way through the system. That's wrong, Judge.  
10 Because in the Wynn case that we cited to you, Wynn Resorts is  
11 the seminal case on the Business Judgment Rule in Nevada,  
12 decided in July of 2017, right after the legislature had ended  
13 in June, issued an opinion, a lengthy opinion about the  
14 Business Judgment Rule, Judge.

15 And we know something about that case because we  
16 represented one of the defendants in that case for six-and-a-  
17 half-years. We were in front of Judge Gonzalez at 8:00  
18 o'clock Monday morning every day, every week for six-and-a-  
19 half-years right down the hallway dealing with nothing but the  
20 Business Judgment Rule.

21 And I can tell you, when you look at Footnote 5 of  
22 the Wynn Resorts opinion, Judge, what did they say? We  
23 recognize the legislature has just amended the Business  
24 Judgment Rule. But those amendments don't have any impact on  
25 our decision today.

1           So they were aware of those amendments back in July  
2 when they decided the Wynn case, and when they decided  
3 Gardner, after those amendments were in effect, they still  
4 came down with the ruling that they did saying, we've stated a  
5 cause of action against these individual members of this LLC.

6           So Your Honor, the notion that somehow these have  
7 wiped out personal liability for LLC members and managers is  
8 just not correct.

9           Next, Your Honor, if these amendments were going to  
10 have the sweeping scope that they say they do, you have to  
11 look at a fundamental principle of statutory construction.  
12 And that is, if a statute is going to be interpreted to  
13 abrogate the common law, then the Supreme Court or courts in  
14 Nevada, when interpreting that statute, they need to see an  
15 expression of that intent by the legislature. Okay?

16           The First National Bank case says, Judge, is a  
17 fundamental principle statutory construction that the Nevada  
18 courts will not interpret a statute to abrogate the common law  
19 without a clear legislative instruction to do so.

20           Now, we're lucky here because in 78.012 they did  
21 express what they wanted to convey as their reasons for doing  
22 this, Judge. There were four subsections. Not one of them  
23 says what we are doing here is wiping out personal liability  
24 for officers and directors full stop. That's not in there,  
25 Judge. You can look high and low, that is not expressed.

1           Now, what they rely on 78.012 for, Judge, is to tell  
2 you you aren't allowed to look at any pre-2017 Nevada case  
3 law, and you're not allowed to look at any out-of-state case  
4 law when ruling on this issue.

5           And they say that because subsection (3) of 78.012  
6 says, courts, you can't look at out-of-state case law that  
7 will supplant or modify the Business Judgment Rule.

8           Now, personally, I question the legislature's  
9 ability to tell a Court what it can and can't look at, but  
10 that's a debate for a different day. But no one here is  
11 asking you to supplant or modify Nevada law. What we're  
12 asking you to do is interpret it. And that's what the Nevada  
13 Supreme Court did in the Wynn case after acknowledging that  
14 these legislative amendments had been made and stating it  
15 doesn't change the decision that they were going to reach.

16           What did it do, Your Honor? It turned to the  
17 California Supreme Court and how it had analyzed its Business  
18 Judgment Rule. And not just any case in California, but the  
19 Lamden case that we have cited to you, which says that the  
20 Business Judgment Rule is not designed to apply in situations  
21 where a third party is suing an officer or a director for  
22 tortious conduct that he or she personally participated in.

23           Your Honor, you are perfectly free to consider that  
24 case, and all of the other cases we've cited to you. The  
25 reason they want you to think that you can't look at any of

1 that is because they have nothing to say in response. They  
2 haven't cited you a single case anywhere saying this is what  
3 the Business Judgment Rule is designed to do.

4 They can't do it, Judge, because that's not the  
5 purpose of it. And so they take this shortcut to say, well,  
6 you're just not allowed to look at it. Your Honor, that's not  
7 the case.

8 Now, you don't have to take my word for it because  
9 the legislative history, Your Honor, the legislative history  
10 that was added in the reply that we didn't have a chance to  
11 respond to and that they omitted from their reply says -- may I  
12 approach?

13 THE COURT: Yep. Thanks.

14 MR. WILLIAMS: Says this, Judge, and I'm looking at  
15 the upper right-hand corner that says page 54. It's kind of  
16 there's some dark highlights on your copy, Your Honor, just so  
17 we're all on the same page.

18 THE COURT: Got it.

19 MR. WILLIAMS: Okay. So you heard my colleague  
20 state that this amendment to the Business Judgment Rule was  
21 pushed by a representative of U-Haul, that's right. The  
22 person's name was Loren Malkowich (phonetic). You'll see them  
23 referenced there.

24 And this legislative history, Your Honor, is dated  
25 May 25th, 2017. Okay? So that's getting close to the end of

1 the session, right, because it ends in June. And it post  
2 dates the legislative history that they've included in their  
3 rely and that they show you here.

4 Now, I think this is worth reading. Assemblyman  
5 Elliot T. Anderson stated as follows, quote, "We talked in my  
6 office, and there was one question I wanted to get on the  
7 record just to make imminently clear that there is no intent  
8 here to stop courts from using persuasive authority to help  
9 explain the plain language in our laws; is that correct?"

10 Loren Malkowich. I don't know if I'm pronouncing  
11 that right, Your Honor, but this is what they said. Quote,  
12 "Thank you for that question. I would like to answer that  
13 question and just the other one. There is no question that  
14 people will continue to cite Delaware law. Again, if you look  
15 at Delaware and the annotations to the Nevada Revised  
16 Statutes, NRS Chapter 78, you will see that there just not a  
17 lot of Nevada case law. I think that the legislature  
18 establishing the Business Court is going to help greatly in  
19 the manner in which Nevada business laws are enforced. When  
20 someone comes to court, if you have a provision that has not  
21 been interpreted in Nevada or for which persuasive authority  
22 from Delaware or California, or any other state is helpful to  
23 the court, it should be cited."

24 That's what we did, Judge. That's what they're  
25 telling you you can't do and you can't consider. It's just

1 wrong. It's absolutely wrong.

2 And Judge, who else looked at these laws? I've got  
3 here, and I can hand it out if you want it, or you can accept  
4 my representation. You know what happens at the end of a  
5 legislative session. You have a bunch of people that will  
6 review what did the legislature do and summarize the  
7 significant events that took place during the legislature  
8 here.

9 And Judge, I've got packets that I can pass out.  
10 And I'm happy Mr. Lenhard is here, our esteemed colleague from  
11 Brownstein, Hyatt, who I have great respect for and haven't  
12 seen in a while.

13 THE COURT: Thanks.

14 MR. WILLIAMS: Because one of the people that  
15 commented on the changes to the Business Judgment Rule was the  
16 Brownstein Hyatt firm, and it's got a very well respected  
17 corporate practice who knows something about the Business  
18 Judgment Rule. And Judge, what did it say about these  
19 changes, these sweeping changes that happened, and now we've  
20 wiped out all personal liability? Not a word. Nothing.

21 The Legislative Council Bureau, who's responsible  
22 for doing the research for the legislature; no. The Nevada  
23 Lawyer, did they, when analyzing significant developments  
24 during the legislative session, say, hey, you aren't going to  
25 believe what has happened, now the Business Judgment Rule

1 insulates officers, directors; no. The UNLV School of Law,  
2 National Law Journal; same.

3 Your Honor, the Better Business Bureau -- or excuse  
4 me, the Las Vegas Chamber of Commerce, if anyone was going to  
5 be shouting from the mountaintops look what has happened,  
6 officers and directors are no longer liable for tort claims  
7 brought by third parties even if they personally participated,  
8 you'd think they'd say something about it. They didn't.

9 Judge, nobody, I mean, nobody has interpreted these  
10 2017 amendments the way that the defendants are asking you to  
11 interpret them, and there's a reason for that, Judge. It  
12 would absolutely violate public policy to enact a law that  
13 insulated officers and directors or members and managers of an  
14 LLC from all tortious conduct, even if they participated in  
15 it.

16 It would encourage people -- set aside whether  
17 there's a lack of adequate insurance or what have you, Your  
18 Honor, it doesn't answer the question to say you can sue the  
19 corporation. Judge, you would be inviting people to set up  
20 entities, be it corporations or LLCs, to allow someone to don  
21 themselves as a an officer or a director or a manager or a  
22 member and then get away literally with murder. Okay?

23 I mean, you could assault someone, you could batter  
24 someone, you could convert their funds, you could  
25 misappropriate their funds, you could do anything range of

1 things and say, you can't come after me personally. You can  
2 sue my corporation, sue my LLC. You can't come after me, I'm  
3 an officer. I'm a director.

4 Judge, that's not the law. It's not the law. So I  
5 don't know if the defendants thought this was going to be the  
6 third time is the charm for them to make this kind of a legal  
7 argument, but I would submit to you that it's three strikes  
8 and you're out, Judge.

9 So I'm happy to answer any questions about the  
10 Business Judgment Rule or any other aspects of their motions  
11 for summary judgment or any of your questions.

12 THE COURT: So here's the only concern that I have.  
13 We all learned in corporations and business entities in law  
14 school that part of the benefit of being -- having the  
15 corporate veil --

16 MR. WILLIAMS: Right.

17 THE COURT: -- or the LLC veil is to protect you  
18 from individual liability. So there's got to be a line  
19 somewhere --

20 MR. WILLIAMS: Right.

21 THE COURT: -- as far as an individual's conduct  
22 whether or not it's conduct of the corporation or business  
23 entities and whether or not it's conduct of the individual  
24 that is not protected by the business entity umbrella.

25 MR. WILLIAMS: Um-h'm.



1           THE COURT: Where is that line and how do we find  
2 that line?

3           MR. WILLIAMS: Sure. A couple of points there, Your  
4 Honor. I think the key is personal participation. And I  
5 think what the Court is focused on -- and we can give you an  
6 example from this case. Let's make it easy, right?

7           When we're talking about the members of the  
8 Management Committee implementing policies that resulted in  
9 cuts to labor and thus, cuts to lifeguard and sacrifice of  
10 safety, we brought that against all members of the Management  
11 Committee, except Craig Huish. And we're not bringing it  
12 against him because we don't have the evidence that he  
13 personally participated in those decisions. We have it for  
14 everybody else. We don't have it for him.

15           So the distinction, Your Honor, is if an officer or  
16 a director -- you're absolutely right, just because you sit on  
17 a Board of Directors or just because you are a manager doesn't  
18 mean you're automatically going to be liable. What we have to  
19 demonstrate, and I think we have demonstrated abundantly, is  
20 that these people have personally participated in tortious  
21 conduct that is a breach of duty.

22           And Your Honor, going back to the Semenza case, the  
23 Nevada Supreme Court case in Semenza, which was dealing in the  
24 corporate setting, if you'll give me just a second, I think  
25 it's important because the key -- and this gets muddy whether

1 intentionally or not in some of the briefing with respect to,  
2 you know, separate duties and they have to be acting, you know  
3 -- no.

4 I mean, if you're an officer or director and you act  
5 tortiously, you participate in tortious conduct, and that  
6 doesn't require actual participation, you don't have to commit  
7 the act, but if you're involved in it somehow, whether setting  
8 policy, you have knowledge of it, there's a variety of ways  
9 that this can occur, and we've cited the case to you, but it  
10 can give rise to two forms of liability. That conduct can  
11 result in personal liability, and it can result into the  
12 liability of the entity as well, if you're acting on behalf of  
13 the entity when you engage in that conduct.

14 And that's what Semenza had told us, Judge. And if  
15 you'd give me a second. Right. So corporate officers may be  
16 individually liable for any tort he commits. And if the tort  
17 is committed within the scope of employment shall the  
18 corporation may be vicariously or secondly liable. That's  
19 Semenza, 1995, Nevada Supreme Court.

20 So the line, Your Honor, absolutely, just because  
21 you're on a Board doesn't mean you're automatically subject to  
22 liability. But if you've participated in the conduct, okay,  
23 that's what the courts look at to determine whether someone  
24 can be held liable or not.

25 THE COURT: Okay. Let me play devil's advocate with

1 you for a minute because maybe I shouldn't be doing this,  
2 maybe I should -- maybe only the Supreme Court should do this,  
3 but I want to go -- I want to not use the facts of this case  
4 but let's use the facts of Granite Construction. I know that  
5 everybody cited to that in the punitive damage one.

6 My understanding from Granite Construction is you  
7 had a group of individuals or a board or a corporation that  
8 made a decision -- there were bulls that were crossing over  
9 the highway, right, and cars were running into them and people  
10 were getting hurt.

11 MR. WILLIAMS: Um-h'm.

12 THE COURT: And they made the decision that they  
13 weren't going to put up fences because it would cost too much  
14 money to put up fences, and they would just rather pay for the  
15 claims as they came in if people made claims.

16 MR. WILLIAMS: Right.

17 THE COURT: And the Court found that that was --  
18 that was enough reckless disregard to constitute punitive  
19 damages.

20 MR. WILLIAMS: Um-h'm.

21 THE COURT: So if we -- and we don't -- I don't know  
22 the facts, underlying facts, and that's why I'm using that  
23 case.

24 MR. WILLIAMS: I understand.

25 THE COURT: Let's assume that there's a corporate

1 board or a management board or somebody that gets together to  
2 make -- that made that decision.

3 MR. WILLIAMS: Yes.

4 THE COURT: And let's say you've got one individual  
5 on the Board that's very vocal and wants to not put up fences.  
6 You've got another individual on the Board that wants to put  
7 up the fences but gets out voted. You've got other people on  
8 the Board that don't make any comments about whether or not to  
9 put up fences, and they either vote one way or the other.

10 My dilemma is that are we going to hold them  
11 personally responsible if they voted in favor of that not to  
12 put up fences or are we going to hold them personally  
13 responsible only if they made statements in favor of not  
14 putting up fences?

15 Do they not get held personally responsible if they  
16 didn't vote for it? Do you understand the dilemma that I have  
17 and you're trying to figure this out?

18 MR. WILLIAMS: Right. I do. I do, Your Honor. And  
19 I would submit, so that -- just for -- and I know you  
20 understand. That scenario doesn't apply here, right, because  
21 everything that --

22 THE COURT: I get it.

23 MR. WILLIAMS: -- that this Management Committee  
24 did, the testimony is that they did in unison, you know, for  
25 example, delegating to Shane and it was unanimous. But in

1 your scenario, Your Honor --

2 THE COURT: It's a hypothetical that I don't -- I  
3 have no knowledge of what actually --

4 MR. WILLIAMS: Right.

5 THE COURT: -- happened in that case.

6 MR. WILLIAMS: I understand.

7 THE COURT: That's why I used that case.

8 MR. WILLIAMS: Right. And what I would submit to  
9 you, Your Honor, if they're participating in the decision, and  
10 it would obviously depend on board mechanics and majority vote  
11 and all that kind of stuff, which I don't, you know, have  
12 privy to, you know, under this hypothetical.

13 But, Your Honor, if they're participating and  
14 they're debating it and some may be for it and some may be  
15 against it, then I think the way that would be handled, if I  
16 was handling it for the plaintiff, and I'm going to read  
17 something to you in a second that I think is apropos here, but  
18 with respect to a Board of Directors, if they are  
19 participating in a decision as a group and they have different  
20 positions, but ultimately, the decision is made, we're voting  
21 as a Board that we're not going put up the barriers, then, if  
22 I'm the plaintiff filing that suit, I'm naming each one of  
23 those individual directors personally.

24 And there's a case that speaks to this, Judge, and  
25 we cited to it. It's the Flaherty case from Ohio. And it

1 talks about Boards. Because I think what you're asking is a  
2 very important question. And if the Court will allow me, I'll  
3 read it. This is quoted at page 55 of our Brief.

4 And it says, "We affirm the trial court's decision  
5 because a non-profit corporation's Board of Directors is not  
6 an entity." In other words, I can't go sue just the Board,  
7 right?

8 "It's not an entity separate from the corporation  
9 that is capable of being sued. It is made up of individuals  
10 who can be held liable for torts in their individual  
11 capacities only if they participated in the tortious conduct.  
12 Therefore, the trial court's decision granting judgment for  
13 the Board is correct. If Flaherty had wanted to recover from  
14 the members of Board, he should have sued the member of the  
15 Board in their individual capacities."

16 Now, getting to your point, Judge. "When someone  
17 thinks he has been wronged by a corporation and that the Board  
18 of Directors may be individually liable for that tortious  
19 conduct, there will be times when that person will not have a  
20 clear idea of exactly what each member knew or could have done  
21 about the tortious conduct. Accordingly, it would behoove  
22 that person to name each member of the Board of Directors  
23 individually in his capacity as a member of the Board until  
24 the course of the case shows which directors are not liable."

1           And Judge, that's the example I used with Craig on  
2 our first participation theory. Remember, we have three of  
3 them. But on our first participation theory, we're not  
4 including him in that because the discovery that we did shows  
5 that he wasn't involved in that decision, but that the other  
6 ones were.

7           And so that's how I would answer your question, Your  
8 Honor.

9           THE COURT: Okay. Thank you.

10          MR. WILLIAMS: Thank you.

11          THE COURT: You know, I just -- can I just tell you  
12 guys, it's kind of fun to do these weird issues, especially  
13 when I got lots of good lawyering on both sides. It's fun.  
14 Go ahead.

15          MR. VAIL: I enjoy it as well, Your Honor. And I  
16 would say, in this case, I think that there's a lot of  
17 rhetorical paths that you're -- paths that you're being  
18 suggested that you go down by Mr. Williams.

19          He said that we, the defendants, are leading you  
20 astray. But the plain text of the statute is what text of the  
21 statute is. There's no debate that the language that I cited  
22 to you was added in the 2017 legislative session, went into  
23 effect October 1st of 2017.

24          Mr. Williams tells you what the Business Judgment  
25 Rule is, in his opinion, but the statute actually tells you

1 what the Business Judgment Rule is under Nevada law. And I  
2 think that's critical.

3 He has not been able to cite to a single case that  
4 says, no, after this 2017 amendment, they actually didn't mean  
5 what they said. They did not mean that individual directors  
6 and officers, or in the case of a LLC managers, are not  
7 personally liable if they're acting within the course and  
8 scope of their role as a manager.

9 He says that will be against public policy. But  
10 it's the place of the legislature of Nevada to make policy  
11 through what they write in the statute itself. If there were  
12 a constitutional challenge, that could be a different issue.  
13 That has not been raised.

14 The issue here is that the legislature -- this is  
15 even in the 2019 legislative history -- expressed frustration;  
16 what do we have to do to convince the courts to read the law  
17 as we actually enacted.

18 And I realize that in the two years that have passed  
19 roughly, there are no published opinions that say, yes, the  
20 Opheikens, Welch defendants' interpretation is correct, we  
21 don't need an interpretation.

22 With respect, Your Honor, the language of the  
23 statute is very clear cut. It says it applies in every case  
24 and circumstance. I realize Mr. Williams would like it to not  
25 apply in third-party tort claims, but that's not the language  
26 enacted by the legislature.



1           It says, individual managers in the LLC context are  
2 not personally liable. And I make as an exception, but I  
3 think we agree, it does not apply in this case. And I  
4 understand Mr. Williams' argument that originally the common  
5 law Business Judgment Rule was having to do with internal  
6 derivative action shareholders used that kind of thing, but I  
7 think the case he cites to from Ohio where they're saying, oh,  
8 just sue every member of the Board in their individual  
9 capacity, if you don't like something that the Board has done,  
10 highlights exactly the issue why the legislature of Nevada  
11 decided that to create a business environment that is  
12 conducive to business and the growing economy, that this is,  
13 in fact, a protection that they want to put in place.

14           And I think that that -- that goes back to my  
15 argument about the alter ego claim. Mr. Williams says, oh,  
16 you could just then use the corporate veil or an LLC as a  
17 shroud and literally commit murder. No, that is clearly, Your  
18 Honor, where the alter ego and abuse of the corporate forum  
19 comes into play and there would then clearly be an alter ego  
20 claim against any individual who formed an LLC just for the  
21 purpose of engaging in fraud, just for the purpose of abusing  
22 that forum, that forum, that either LLC or corporation to do  
23 something wrongful.

24           That is an alter ego claim. They had asserted that.  
25 Defendants Double Ott, through whom they asserted the alter  
26 ego claim against the individual, defendants in this case,

1 settled with plaintiffs. That claim has been dismissed.

2 Now they're trying to resurrect this as a new way to  
3 continue going after the individuals. I understand that  
4 Gardner II said, yes, if you have an individual claim you can  
5 state it in a Rule 12 context, but this today is not about  
6 Rule 12. Today is about admissible evidence.

7 And there's really no question that the claims that  
8 they've made against the Opheikens, Welch individual  
9 defendants, those claims are clearly for actions that they  
10 allege occurred within the course and scope of their role on  
11 this Board. It's exactly as you mentioned, it's essentially a  
12 Board of Directors.

13 The Management Committee in this case is a list of  
14 managers, not owners, who are effectively a Board of Directors  
15 of a corporation.

16 Nevada legislature has the authority and, in fact,  
17 did through very clear language in this case say, individuals  
18 are not personally liable when they're acting within that  
19 context. If you want to go the alter ego route and say  
20 they're abusing the corporate forum, do that, but that is off  
21 the table here. That case, that claim has been settled.

22 The issue here is they're saying these individuals,  
23 Orluff Opheikens, in the back row, who was in Utah, Tom Welch,  
24 who was in Utah, Chet Opheikens, who was not at the Water Park  
25 that day, Slade Opheikens, who was not in the state that day,  
26 but these people who they're saying made a decision to hire

1 someone, possibly, they argue a jury should get to decide  
2 whether that was negligent.

3           If that were sufficient to bring Board of Directors,  
4 every officer of a corporation, and any case in for any  
5 negligent hiring decision, that's any case where any employee  
6 of any corporation or LLC does something that could be  
7 attributable to the corporation or the LLC for liability, and  
8 they're saying, oh, you know what, that decision to hire them  
9 should have been more careful, all of the Board of Directors,  
10 every officer and C-level executive personally liable because  
11 they approved that.

12           That would -- as I said before, that would literally  
13 limit the size of corporations down to this what one person's  
14 span of control can actually supervise directly. Every single  
15 bartender at every casino on the Strip would be creating  
16 personal liability for every director of every casino, every  
17 CEO.

18           That is not -- contrary to what Mr. Williams says,  
19 that is not actually the intent in Nevada. The legislature  
20 has been very clear. They've set forth in the 2017 amendment  
21 exactly what the minor exceptions for derivative suits is, it  
22 doesn't apply here. Otherwise, acting in the course and scope  
23 of their role as a manager, they cannot be held personally  
24 liable. You've got that alter ego route, but that's off the  
25 table.

26           So I think that Mr. Williams, he's reached out of

1 state cases, talked about why Delaware cases can still be  
2 cited, and California cases can still be cited, but none of  
3 that actually changes the plain text of the statute as enacted  
4 and as is law in Nevada.

5 Your Honor, if you have any questions on this, I'd  
6 be more than happy to answer them. I think we've --

7 THE COURT: I don't.

8 MR. VAIL: Thank you, Judge.

9 THE COURT: Here's the challenge is I think my  
10 original thoughts were consistent with yours, and I think  
11 that's why I ruled the way I have on prior motions. And  
12 unfortunately, I don't know that the language of 78.138 is as  
13 clear as either of you wants me to think it is.

14 I just -- I don't think it's that clear. But based  
15 on what the Supreme Court has done in this case previously, in  
16 what you guys consider, I believe, Gardner II, which is the  
17 405 P.3d 651 case, they specifically said, "The Gardners'  
18 proposed Amended Complaint contained in multiple allegations  
19 of individual negligence by the managers concerning their  
20 direct knowledge and actions that threaten physical injury to  
21 patrons, including LG," who we know to be **LG**.

22 "Specifically, the proposed Amended Complaint  
23 alleges that the managers who had authority and control over  
24 the Water Park owed personal duties to their patrons that they  
25 intentionally and willfully breached."

26 Now, in your original motion, you focused on the

1 intentional and willful breach language as it related to  
2 subsection (7). Even if we just said that that language is  
3 negligence, I think that the Supreme Court is basically saying  
4 that there can be individual negligence of managers and  
5 directors of corporate entities. And I'll be honest, that's  
6 contrary to what I thought.

7 But they've told me I was wrong. So I think I have  
8 to follow what the Supreme Court is telling me specifically on  
9 this case now.

10 MR. VAIL: Your Honor, if I may, on that point. In  
11 Gardner -- this case we're calling Gardner II, that issue was  
12 on a Rule 12(b).

13 THE COURT: He agree.

14 MR. VAIL: Really, it was -- it was an issue where  
15 there were no actual facts as far as admissible evidence,  
16 there's no record in front of the Court. There was never an  
17 argument made as to the application of the Business Judgment  
18 Rule. I understand Mr. Williams' statement that well, they  
19 could have said, wait a minute, we're familiar with it, and  
20 we're going to just voluntarily, sua sponte decide that we're  
21 going to raise the argument for counsel that should have been  
22 raised, and we're going to use that as a -- under Rule 12,  
23 which I would actually question, use that as a basis to  
24 dismiss.

25 Now, under Rule 56, we have raised this specific  
26 argument, and I would argue -- I understand your concern as

1 far as the Supreme Court's statement, but when the language of  
2 NRS 78.138 says, when they're acting in their individual -- in  
3 their capacity as managers, managers of an LLC, that's in the  
4 LLC context, I'm paraphrasing, directors and officers of a  
5 corporation cannot be held individually liable.

6 I don't think it can be more clear cut than that,  
7 and that's where well post Gardner II, May 2019, this most  
8 recent legislative session -- and we've cited this in our  
9 reply brief talking about the legislators saying, what do we  
10 have to do to get the Court to actually listen? How do we say  
11 we mean it? That's their --

12 THE COURT: I wasn't asking for additional argument.  
13 I was actually giving you my ruling.

14 MR. VAIL: I apologize.

15 THE COURT: I understand the arguments.

16 MR. VAIL: Um-h'm.

17 THE COURT: I'm not saying that I necessarily  
18 disagree with your arguments. What I'm saying is I'm  
19 following what the Supreme Court's telling me in this case,  
20 and I think it's a little bit contrary to what you're arguing  
21 because I think that the Supreme Court is telling us that  
22 they're going to accept claims for individual liability  
23 against directors and officers of corporate entities if it's a  
24 breach of an individual duty.

25 Now, in this case, we have an allegation of the  
26 breach of an individual duty, which I don't know that you guys

1 focused on it in these briefings or if it was in one of the  
2 cases that I read, but they're talking about an individual  
3 duty being that same individual duty that we have to anybody  
4 else to act reasonably under the circumstances.

5           So if that is the individual duty that is alleged to  
6 be -- to have been breached in this case, I think it goes  
7 forward. I don't know that the Business Judgment Rule in  
8 78.138 is clear enough that it says that that doesn't happen.  
9 And the fact that the Supreme Court didn't comment on it in  
10 the Gardner II case or in the Wynn case I think is telling.

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

15           So as far as that Motion for Summary Judgment is  
16 concerned, I'm going to deny it for now.

17           Again, you guys are -- nobody's afraid to go to the  
18 Supreme Court with regard to my decisions. I have no problem  
19 when the Supreme Court tells me I'm wrong. That's how I  
20 learn. So take it up if you need to. We've got a trial  
21 coming up pretty soon, so do it fast.

22           MR. VAIL: Judge, then I guess on that point I would  
23 request not further argument, but would you order that --  
24 certify that as being a final ruling as to the application of  
25 the statute in that case?

26           I don't believe this is a fact issue where you're

1 saying there's a disputed issue of fact. This, I believe, is  
2 a legal question that would potentially be subject for  
3 interlocutory appeal.

4 THE COURT: Well, I think there's a genuine issue of  
5 material fact as to whether or not there's a duty or breach.  
6 I think what you're asking for is a Rule 54(b) certification  
7 on the ruling as it relates to the Business Judgment Rule. As  
8 it relates to the Business Judgment Rule, I think that's a --  
9 probably a final decision because I don't know that it's going  
10 to come up again if -- if I've said that the statute is not  
11 clear enough to preclude the claims.

12 MR. VAIL: Okay. Thank you, Judge.

13 MR. WILLIAMS: All I was going to say, Your Honor,  
14 my understanding of 54(b) is there has to be a resolution of a  
15 claim or a resolution of a --

16 THE COURT: This isn't a --

17 MR. WILLIAMS: -- a party. And this -- the Business  
18 Judgment isn't a claim, so I mean, if they want to take a  
19 Writ --

20 THE COURT: It's not.

21 MR. WILLIAMS: -- knock themselves out. But I don't  
22 think it's subject to 54(b) certification.

23 THE COURT: I don't think it's a 54(b) certification  
24 because it has to be a claim or a party. I think he's right.  
25 But I agree with you that I don't know that that issue's going



1 to come up again, so the Supreme Court will either take it or  
2 not.

3 What's the next one?

4 MS. MASTRANGELO: Rebecca Mastrangelo for Scott  
5 Huish. We'll take his Motion for Summary Judgment next.

6 THE COURT: Okay.

7 MS. MASTRANGELO: Okay. I'm not going to argue the  
8 Business Judgment Rule, Your Honor. We're going to start with  
9 the statute, how we all start out here at 86.371 and Gardner  
10 I.

11 Those pieces of law stand for the proposition that a  
12 member or manager of an LLC is not personally liable for the  
13 liabilities of the company, and that's the whole purpose  
14 behind LLCs, and that law is consistent across the country.

15 THE COURT: Yeah, but how does the analysis differ  
16 from what we just did?

17 MS. MASTRANGELO: Well, I think it differs a lot  
18 because now we're looking at the questions of fact and have  
19 they shown a duty or a breach by the individual members. And  
20 I want to come back to -- because Gardner II, Judge, all  
21 Gardner II did was said the plaintiffs adequately alleged  
22 personal duty, personal breach. That they adequately alleged  
23 it. They didn't say there is a duty, there was a breach.  
24 They just said they adequately alleged it; therefore, they can  
25 go forward with those claims.

1           Now we're full circle to the point where, where's  
2 the evidence in support of those claims? Your example that  
3 you -- your hypothetical that you raised earlier about the  
4 Granite Construction, and the bulls crossing the road and all  
5 that, I think the way that would be viewed by our Supreme  
6 Court is if the members got together and they made a vote and  
7 some of them voted yes, let's do the fence because that's  
8 safe, and others of them voted, no, we're not -- we don't want  
9 to do the fence, and majority rule was we're going to build  
10 the fence or we're not going to build the fence.

11           If there's liability from that, that's LLC  
12 liability, that's corporate liability. That was the decision  
13 of everybody, and who voted for or against doesn't matter.  
14 That was the Board's decision, and that's company liability.  
15 That's not what --

16           THE COURT: But that's a little bit contrary to the  
17 case law that says that a Board can't be sued for negligence.  
18 That it can only -- you can only sue the individuals.

19           So then you're looking at, okay, if there were  
20 certain individuals that were pushing that, then they would be  
21 the only ones responsible. It shouldn't be the whole Board,  
22 right?

23           MS. MASTRANGELO: But the Board not being sued is  
24 not relevant because the company's being sued. The company's  
25 being run by the Board. The company's being sued for its

1 Board's decision not to put that fence in.

2 Contrast that with what didn't occur here, but I'm  
3 going to use another hypothetical based on this case. Let's  
4 say, for example, Scott Huish went to the Management Committee  
5 and said, I know we're supposed to have 17 lifeguards, but I  
6 want to make some money this year, so why don't we put three,  
7 and then we'll make some money on not having to pay all this  
8 labor. And then it went to a vote, and the Board said -- six  
9 of them said, absolutely not, we're doing 17 because that's  
10 safe and that's the law, and Scott said -- he's the only vote  
11 outvoted.

12 So now it's six to one. They're going to use 17  
13 lifeguards. Then Scott goes to the management, the guys on  
14 the ground at the Water Park, and says we took a vote and we  
15 decided we're only going to do three. Scott's personally  
16 liable. That's his decision. That's not a decision of the  
17 Board.

18 So I think there's a big difference there. Personal  
19 liability is not when a Board gets together and decides. What  
20 the Board got together and decided is company liability.  
21 That's LLC liability. It's not individual liability  
22 regardless of how each individual voted. So I think there's a  
23 big difference on that. And again --

24 THE COURT: So tell me, then, based on the  
25 allegations that were made in the Amended Complaint that I

1 didn't allow that the Supreme Court said I needed to, the  
2 allegations that were contained in that Complaint were -- they  
3 were vague but as to individual liability. But I think I  
4 denied it initially based on futility, and the Supreme Court  
5 said no.

6 MS. MASTRANGELO: Right.

7 THE COURT: That's what you're telling me is that it  
8 would be futile.

9 MS. MASTRANGELO: Well, that was Rule 12 standards.  
10 Now we're at 56 standards. What evidence have they shown that  
11 these individuals did anything in their personal capacity  
12 outside of a Board decision? That's the huge distinction that  
13 I see.

14 When individual members of an LLC make a decision  
15 that's a personal decision outside of the capacity and the  
16 scope of what the Board decided, that subjects them to  
17 personal liability. When it's a Board decision, that's LLC  
18 liability, and that's why Henderson Water Park is going in a  
19 trial in this case.

20 And Judge, that's the law throughout the country.  
21 That's not just in Nevada, whether it's been crystal clear in  
22 Nevada or not. But cases relied upon in Gardner II, they say  
23 exactly that, and let me reference some of them specifically.

24 THE COURT: I think Cortez is the case that they  
25 relied on the most.

1 MS. MASTRANGELO: Yep, that was one of them. But,  
2 Judge, this goes back to -- I'm going to start at the  
3 beginning with Grayson, which I think was 1985 case.

4 This was Supreme Court of Nevada, and the Supreme  
5 Court upheld a summary judgment in Grayson saying that, you  
6 know, we have this statute that says, "Individuals are not  
7 individually liable for the tortious acts of other members of  
8 that professional corporation unless they personally  
9 participated in the tortious acts."

10 In that case, the individual signed an affidavit  
11 saying he wasn't personally -- a personal participant in any  
12 of those negligent acts. There was no evidence to the  
13 contrary. Summary judgment was issued. The Supreme Court  
14 upheld it.

15 That's what we have here. Those are the facts I'm  
16 prepared to argue today. The Hodge case we cited, that was a  
17 case from Louisiana. Same type of thing. They alleged  
18 personal conduct by the member or manager, and the Court says,  
19 you have to do something more than make an allegation, and you  
20 have to do something more than allege they breached their duty  
21 as a member or manager. It has to be a personal  
22 responsibility.

23 We can go down the line to those other cases. You  
24 mentioned Cortez. That certainly was one that our Supreme  
25 Court cited with favor. And it basically said the same thing,

1 and let me find it, the cite for it.

2 It says, "A member or a manager would not be  
3 personally liable for a subordinate's negligence." Again,  
4 this all comes down to personal conduct. What personal  
5 conduct did any of these individuals do that caused the harm  
6 to L.G. [REDACTED] on that day? There's nothing personal.

7 They acted as a group when they delegated the  
8 management responsibility to Shane Huish. If that was a  
9 negligent delegation, the Water Park's on the line for it.  
10 The individuals who may or may not have voted for him, we  
11 don't know who voted and who didn't vote for him, but those  
12 individuals aren't personally liable for that.

13 The Forsyth case that the plaintiffs cited in their  
14 Opposition, budgetary concerns were one of the issues that  
15 they raised that the Board was concerned with trying to cut  
16 costs and cut labor. And specifically as to Scott Huish, they  
17 said that he planned on cutting labor. There's no  
18 allegations, there's no evidence that he cut labor as far as  
19 the lifeguards in the wave pool, but that's their allegation.  
20 And even that is insufficient under the Forsyth case, which  
21 says, "mere budgetary mismanagement is not enough to support  
22 direct participant liability."

23 That's the key that we're missing here, Judge, with  
24 all of these individuals. Where is the direct personal  
25 participant liability? There isn't any. They acted as a

1 group. Their group decisions make the Water Park liable.  
2 When they act as a group, they don't make themselves  
3 personally liable.

4 The Board of Directors of -- I won't use Wynn  
5 Resorts, but any -- any casino here is not going to be liable  
6 because someone he hired made a bad decision. The company is  
7 liable, not the individuals.

8 And you're looking at me like I'm not making any  
9 sense to you, and I don't know --

10 THE COURT: No, you're --

11 MS. MASTRANGELO: -- how to make it any clearer.

12 THE COURT: -- making total sense to me, and that's  
13 how I ruled previously.

14 MS. MASTRANGELO: Right, but Judge, that was --

15 THE COURT: Supreme Court told me I was wrong.

16 MS. MASTRANGELO: But that was on a Rule 12. You  
17 said they can't amend their Complaint. Gardner II says, okay,  
18 they've amended their Complaint, the allegations are enough to  
19 withstand Rule 12, now we're at Rule 56.

20 Where's the evidence that these individuals acted  
21 personally, personal negligence? It's absent.

22 THE COURT: Okay. No, I'm not looking like you --

23 MS. MASTRANGELO: Okay.

24 THE COURT: -- I don't understand. I totally get  
25 it. I just -- you're arguing what I -- I think that I

1 previously ruled. And I think that that's -- that was my same  
2 thought process that I had at the time that it came in front  
3 of me previously, and I did not think that there was any way  
4 that they could establish individual liability on the part of  
5 the individual members of the LLC, and that's why I denied the  
6 motion to amend. I thought that it was futile. Supreme Court  
7 told me I was wrong.

8 MS. MASTRANGELO: But now you have to look at what  
9 evidence they brought forward in support of their pleadings.

10 THE COURT: Okay.

11 MS. MASTRANGELO: And let me just make one more  
12 notation on the record. The Petch case, which is out of  
13 Louisiana, which was cited with favor by Gardner I, makes it  
14 even more clear. In that case, there was a Louisiana statute,  
15 very similar to our LLC statute.

16 The plaintiffs argued corporate negligence and  
17 individual member negligence, same thing as we have here, and  
18 the Court ruled, Such interpretation ultimately removes the  
19 entire limitation on liability, which the entity is designed  
20 to afford and renders the statute practically meaningless. To  
21 have meaning within the statute, the phrase negligent acts of  
22 the individual has to mean acts that are done outside one's  
23 capacity as a member, manager, agent, et cetera, and/or must  
24 violate some personal duty owed to the individual injured  
25 party by the individual Board members outside their capacity



1 of a board member.

2           It has to be a personal duty to the plaintiff. It  
3 has to be outside the scope, and yes, they can allege all of  
4 that, but when we're here, Rule 56, they have to prove it.  
5 That's what 56 says.

6           And, Judge, to rule any other way is just completely  
7 to eviscerate the statute. We won't have limited liability  
8 companies give any member whoever takes a vote or sits in on a  
9 Board meeting is liable. We won't have LLCs. There'll be  
10 unlimited liability companies. There won't be any reason for  
11 that statute. It will be absolutely meaningless, and anybody  
12 can sue anybody if they're on a Corporate Board, and that is  
13 not what the legislature meant. That is not what Gardner I,  
14 2, or any of the cases we've cited in the papers meant.

15           Now it's put up or shut up. Where is the evidence  
16 that Scott Huish did anything that day? He didn't know how  
17 many lifeguards were planned to be there. He didn't know how  
18 many were there. He didn't know the one lifeguard wasn't  
19 certified.

20           These are the factual issues that they would have to  
21 prove in order to get personal liability. And beyond that --

22           THE COURT: Not really, because if I buy the rest of  
23 your argument, it wouldn't matter what he knew because even if  
24 he knew all that stuff, the actions would have been taken  
25 within the Management Committee, right?

1 MS. MASTRANGELO: There was no Management Committee  
2 decision on how many lifeguards were going to be there that  
3 day. That's Water Park liability. That's the corporate  
4 liability.

5 These guys didn't know, they didn't participate,  
6 they didn't direct, they didn't personally say, let's only put  
7 three lifeguards because we want to make more money. They  
8 weren't part of that process.

9 They hired a general manager who hired another  
10 company to help him, who hired another manager to assist him.  
11 Those were the guys on the ground. Those are the guys that  
12 made the decision, and their decisions make the Water Park  
13 liable.

14 The Management Committee didn't know these things  
15 were going on. They didn't choose these things. They didn't  
16 directly participate, and that's what the case law over and  
17 over says in all the states, direct participation. Where is  
18 the direct participation by these individual board members  
19 that said let's put three lifeguards, we don't care if it's  
20 safe.

21 THE COURT: Well, who made the decision, then?

22 MS. MASTRANGELO: The general manager on the ground,  
23 Shane Huish. And his testimony was very clear in response to  
24 Mr. Campbell's questions. I made that choice. It was my  
25 decision. The Board didn't know anything about it. I didn't

1 discuss it with them.

2 THE COURT: Okay. Mr. Williams?

3 MR. WILLIAMS: Yes, Your Honor. And I will promise  
4 I'll keep it short.

5 So I think you're right. I think we're hearing a  
6 lot of the same arguments that we've heard before. Let me  
7 just go through a couple points pretty quickly.

8 This continuing notion that we hear there has to be  
9 separate duties, separate conduct. Your Honor, this is  
10 Semenza, right? And this -- Semenza was relied on in the  
11 Gardners' cases. This is Nevada Supreme Court 1995. "An  
12 officer of a corporation may be individually liable for any  
13 tort which he commits, and if the tort is committed within the  
14 scope of employment, the corporation may be vicariously or  
15 secondarily liable under the doctrine of respondeat superior."  
16 Secondarily meaning, both of them are liable, Your Honor, for  
17 the same conduct. It doesn't have -- this notion of separate  
18 conduct is not anywhere to be found in the law.

19 The key is participation. You're hearing that the  
20 sky is going to fall if you don't grant these motions because  
21 anyone can be held liable. That is not what we are saying.  
22 We are saying that if an officer, director, member, manager  
23 participates in the tortious conduct, Your Honor, that's when  
24 we can bring a claim.

25 And we've told you we're pursuing three forms of

1 participation, Your Honor. And they come right from Cortez,  
2 that the Nevada Supreme Court relied on. That there was an  
3 implementation of policy that led to cost cutting,  
4 specifically, to labor and to lifeguards, number one, that  
5 they all participated in, except for Craig Huish.

6           Next, they all participated in the negligent  
7 delegation of the day-to-day management of the Park to Shane.  
8 And Your Honor, there is no ambiguity on that. I can pull  
9 Orluff's, Mr. Opheikens' testimony. I don't mean any  
10 disrespect, I'm just saying "Orluff" to distinguish between  
11 the other Opheikens, where he said everyone voted in favor of  
12 that delegation.

13           Are there any Minutes to reflect that? No. But  
14 that's just the way we operated. And we reached an agreement  
15 and it was a foregone conclusion that it was going to be  
16 Shane. He was asked, did anyone dissent from that? The  
17 answer was, no. Your Honor, that's the second form of  
18 participation.

19           The third form of participation that Cortez  
20 recognized and that we're alleging here is that they  
21 negligently exercised the oversight authority that they  
22 retained. Shane still had to report to them. They still got  
23 reports from him. They still actively participated in their  
24 own way in the operations of the Park.

25           So those are the three forms of participation we're

1 alleging. Your Honor, the case law is equally clear that  
2 whether someone participated or not in the tortious conduct is  
3 a fact question. Your Honor, we cited you the Hoang case from  
4 the District of Colorado that I know Mr. Vail's firm is  
5 familiar with, and Ventres case for that proposition.

6 And it states, whether a member or manager, quote,  
7 "Approved of, directed, actively participated in, or  
8 cooperated in the negligent conduct is a question of fact."  
9 What evidence do we have? Let's talk about Scott. Your  
10 Honor, I think actually with Scott Huish, it's not even like,  
11 you know, that he inspired the conduct or any of these other  
12 forms where he -- he committed the crime. He actively  
13 participated in it, Your Honor.

14 Exhibit 37 to our Motion for Summary Judgment, our  
15 Bank of Utah notes reflecting a conversation between the Bank  
16 of Utah and Scott where he's telling them labor was heavy at  
17 the start-up, but we're not cutting employees, we're not cross  
18 training. There will be less supervision, Your Honor.

19 There's a big management meeting held in October of  
20 2014, where you look at the agenda on page 19 of our Brief.  
21 Everything is focused on how are we going to cut costs? How  
22 are we going to pay for stuff? We're going to have a \$600,000  
23 shortfall.

24 What happens after that meeting? Well, in December,  
25 Your Honor, Scott and Shane are exchanging draft employee

1 schedules. These are Exhibits 41 and 42. Scott sends a  
2 schedule cutting lifeguards at the wave pool from 17, required  
3 by law, to 11.

4           So he is actively participating in cutting  
5 lifeguards at the wave pool in his first draft. What happens  
6 next? Shane sends one back. He cuts it from 11 to seven.  
7 Your Honor, that's Exhibit 42. What does Scott do? Scott  
8 incorporates the number of seven lifeguards at the wave pool,  
9 and puts that into their budget max pro forma, in which  
10 they're going to use to operate the Park going forward with  
11 seven lifeguards, Judge.

12           That is then corroborated when you look at the daily  
13 lifeguard schedules that we've included, where they make this  
14 decision, they say it's going to be seven. That's what they  
15 employ going forward, Your Honor. Scott Huish is the one  
16 making these decisions with Shane.

17           I mean, so to suggest we don't have evidence of him  
18 participating is crazy, Judge. And the day after the incident  
19 -- actually, Scott sends an agenda the day of our incident.  
20 There was going to be a meeting. Our incident occurred on May  
21 27, 2015. The next day there was going to be a meeting with  
22 the Bank of Utah where they were going to be on site and look  
23 at the property.

24           Scott sends an agenda the night before saying, one  
25 of the things we're going to be talking about are our new

1 labor savings. Okay? He's absolutely involved in this,  
2 Judge.

3 So it is a fact question. We've presented more than  
4 enough evidence where a jury could reasonably infer that he  
5 participated in this tortious conduct. And participation is  
6 the key, Judge. These people aren't going to be liable just  
7 because they sit on a Management Committee. They have to have  
8 personally participated, and we have more than enough evidence  
9 showing that he did.

10 So if you have any questions about Scott, I'm happy  
11 to answer them.

12 THE COURT: Ms. Mastrangelo?

13 MS. MASTRANGELO: Judge, the only thing I want to  
14 say to rebut that is, you know, there's been dozens of  
15 depositions, thousands of deposition hours, tens of thousands  
16 of pages of documents produced, and not a single person said  
17 that that spreadsheet or those couple of spreadsheets that  
18 were in the evidence binders was ever used.

19 It wasn't anything that was implemented. The  
20 testimony, the uncontradicted testimony was this was being  
21 used as a template for the people on the ground to use. And  
22 if this was ever used, we would have had more lifeguards set  
23 on that day.

24 What was used, which is also in evidence, and I just  
25 picked one of them out, Exhibit 57 in the plaintiffs'

1 appendix, these handwritten forms were what were used by the  
2 guys on the ground to create day-to-day lifeguard schedules.

3           What Scott and Shane may have passed e-mails about  
4 wasn't ever used. And this's uncontradicted. So to say that  
5 he directed that three lifeguards were going to be stationed  
6 on the day of the incident, that's just not contrary to the  
7 evidence.

8           You know, we still come back to the personal  
9 participation and so far we haven't seen any of it.

10           THE COURT: Well, it's a Rule 56 motion. Whether  
11 it's Rule 12 or Rule 56, I mean, the standard's high. I have  
12 to view everything in light most favorable to the non-moving  
13 party, right?

14           MS. MASTRANGELO: Correct.

15           THE COURT: And when the plaintiff comes up with  
16 specific items, or exhibits that are relied upon that show  
17 that Mr. Huish was involved, maybe not in the decision to do  
18 three, but reducing it from 17 to seven, that he was involved  
19 in talking about cost cutting, and I mean, looking at the --  
20 what's the -- the Cortez case and Semenza case, I think I'm  
21 stuck.

22           So I think there's at least a genuine issue of  
23 material fact. I have to deny it. Sorry.

24           MS. MASTRANGELO: Understood. I'd like to move on  
25 to Craig, who's in a different -- different category.



1 THE COURT: Okay.

2 MS. MASTRANGELO: Is it okay if I just stand here,  
3 Your Honor?

4 THE COURT: Sure.

5 MS. MASTRANGELO: This will be quick. He's in a  
6 different position than the others. He never had any  
7 ownership in the business, and he only served on the  
8 Management Committee for a short period of time.

9 And while the motion advocated and I think all the  
10 evidence is uncontradicted that Craig was not on the  
11 Management Committee at the time of the incident or in the  
12 months leading up thereto, I don't want to create a question  
13 of fact and buy myself another appeal here.

14 So let's just say -- let's just accept their  
15 argument, he was on the Management Committee. Where is his  
16 personal participation? The sum total of the evidence that  
17 the plaintiffs have offered you in opposition as to Craig is  
18 exactly who e-mails, one in 2014 and one in March of 2015, not  
19 that he sent, not that he replied to, but that he was copied  
20 on.

21 He, along with others, some Management Committee  
22 members and some non-members. So he was copied on these two  
23 e-mails, one of which started out, if you want -- something to  
24 the effect of, if you want to know what's going on new at  
25 Cowabunga Bay, we're going to, you know, have a meeting and

1 talk about it, you're welcome to come.

2 That's it. That's the sum total of the evidence  
3 against Craig. There is nothing with the budgets that he was  
4 involved in. There was nothing with the staffing that he was  
5 involved in. There's no testimony, no documents, no nothing.

6 There's two e-mails that he was copied on, and  
7 that's the sum total of it. So I think it's clear that they  
8 have not shown any direct personal participation by Craig  
9 Huish.

10 THE COURT: Okay.

11 MR. WILLIAMS: Thank you, Judge. So with that, if  
12 we're going to agree that he was a member of the Management  
13 Committee because that was subject to debate in his  
14 deposition, but it sounds like we're going to agree that that  
15 was the case and --

16 MS. MASTRANGELO: Just for today.

17 MR. WILLIAMS: For today. Then, Your Honor, the two  
18 participation theories involving Craig Huish as a member of  
19 the Management Committee center around his delegation,  
20 negligent delegation of the Park management to Shane, Your  
21 Honor.

22 THE COURT: Was he involved in that decision? Is  
23 there evidence that he was involved in that?

24 MR. WILLIAMS: They all voted -- yes. Let me pull  
25 -- just for the record, Judge, it probably would help to read

1 it to you. Just so there's no ambiguity. This is --

2 THE COURT: I appreciate that you guys know where to  
3 find this stuff because --

4 MR. WILLIAMS: I know. It's we gave you too much  
5 paper, Judge. It's --

6 THE COURT: I don't know that I could find it.

7 MR. WILLIAMS: I know. It's -- it's -- okay. I'm  
8 reading, for everyone's benefit, but this is Exhibit 1 to our  
9 appendix, and this is excerpts of testimony from Orluff  
10 Opheikens, Your Honor.

11 Let me just -- okay. For context, and this is at  
12 page 162 of Mr. Opheikens' deposition.

13 Question, "As I understand your earlier testimony,  
14 there was a decision made at some point to have one of the  
15 members of the Management Committee to conduct the day-to-day  
16 operations of the Cowabunga Bay park; correct?"

17 Answer, "Yes."

18 Question, "Who was that?"

19 "Shane Huish."

20 Question, "Okay. And when was -- when was Shane  
21 Huish appointed to manage the Park on a day-to-day basis as  
22 its general manager?"

23 Answer, "Pretty much from the time that the Park was  
24 -- that we were all going forward, Shane Huish was the person  
25 that had been selected to be in that position."

1           Question, "Who voted in favor of that decision?"  
2           Answer, "Everybody."  
3           Question, "Okay. So there were no descents on  
4 that?"  
5           Answer. "No."  
6           THE COURT: And Craig was part of the Management --  
7           MR. WILLIAMS: Yes.  
8           THE COURT: -- Committee at that time?  
9           MR. WILLIAMS: You just -- you just heard them agree  
10 to that for purposes of today. Yes, he was, Your Honor.  
11           And if you need me to, I can go through the evidence  
12 that we've put in with respect to why that was a negligent  
13 delegation.  
14           THE COURT: So you're arguing that of your three  
15 participation forms, that he's not involved in the cost  
16 cutting, but he's involved in number two and three, which was  
17 the negligent delegation and negligent exercise of the  
18 oversight?  
19           MR. WILLIAMS: Precisely.  
20           THE COURT: All right.  
21           MR. WILLIAMS: Do you need me to go through the  
22 evidence, Your Honor? I have it --  
23           THE COURT: No.  
24           MR. WILLIAMS: -- with respect to Craig here.  
25           THE COURT: No.

1 MR. WILLIAMS: I think you've read everything. I  
2 don't want to take up more time than is necessary.

3 MS. MASTRANGELO: Judge, that epitomizes why this  
4 theory is wrong, why denying these motions is wrong because he  
5 sat on the Board, someone said, hey, James is going to be the  
6 general manager, okay. Yeah, that sounds good. And now he's  
7 liable for anything Shane ever does.

8 MR. WILLIAMS: No.

9 MS. MASTRANGELO: That's wrong, Judge. That is  
10 absolutely wrong.

11 MR. WILLIAMS: Your Honor --

12 MS. MASTRANGELO: This is -- excuse me. This is the  
13 whole reason why you can't have members being personally  
14 liable for decisions of the Board. What did Craig do that was  
15 negligent that caused L.G. [REDACTED]'s drowning? He voted who  
16 should run the Park.

17 MR. WILLIAMS: No. Your Honor, and most  
18 respectfully because I didn't have a chance to -- I asked you  
19 if you wanted me to go through the evidence.

20 MS. MASTRANGELO: I'm sorry.

21 MR. WILLIAMS: It's not what he did. It's what he  
22 didn't do. It's what all of them didn't do. They didn't  
23 interview anybody else for the Park. They didn't do a  
24 background investigation on Shane, which would have turned up  
25 three arrests.

1           You know the evidence. Our contention isn't just  
2 because he sat and he voted for Shane. That's not what  
3 creates the liability. What creates the liability is his  
4 failure to fulfill his obligation as a member of that  
5 Management Committee to exercise any delegation he was going  
6 to make with due care. That's what we're alleging.

7           THE COURT: It comes back to the same issue that I  
8 had from the beginning. I think it's hard to find individual  
9 liability on people for things that they do as part of the  
10 business entity.

11           But under the case law that I'm looking at under  
12 Gardner II, under Cortez, under Semenza, what do I do? As a  
13 matter of law, I say that they didn't commit any kind of  
14 personal liability, then I get reversed on that.

15           I think it's easier to keep him in, and we try to  
16 tailor a jury instruction, and we see what the evidence comes  
17 out as. And, I mean, it's going to be an interesting jury  
18 instruction to determine individual liability on these people.  
19 I don't know how we're going to draft that.

20           But I think under the standard that I have to look  
21 at under Rule 56 and based on those cases, I can't grant it at  
22 this point. I think there's still an issue of fact as it  
23 relates to what he did or didn't do.

24           If we didn't have Cortez and Semenza, and if the  
25 Supreme Court hadn't already told me that I was wrong in this

1 case once, I think I'd probably rule differently. Sorry.

2 You have another Huish, don't you?

3 MR. SMITH: I do, Your Honor. Kevin Smith for Shane  
4 Huish, individually. I'm going to try to avoid repeating any  
5 -- a lot of the argument that's already been presented to the  
6 Court --

7 THE COURT: Shane Huish is the one that was managing  
8 the -- the property, right?

9 MR. SMITH: Well, Your Honor, that's the issue,  
10 though. He's there as an employee of the Park. So he's  
11 working on behalf of the LLC. You don't sue the employees of  
12 the business entity. You sue the business entity, which is  
13 what they've done.

14 So for him to be liable --

15 THE COURT: But if anybody had any personal  
16 liability, it was the guy that managed the Park.

17 MR. SMITH: And Your Honor, but there's the issue.  
18 The three bases they're going to argue about, participation.  
19 I've gone through, I didn't see that in the Complaint. I  
20 started with the Complaint.

21 What I saw were allegations of the alter ego  
22 liability and then personal negligence. At paragraph 16 of  
23 the Third Amended Complaint, they stated four bases being that  
24 they were members of the Management Committee.

25 Under capitalization, diversion of funds, treating

1 corporate assets as their own, causing the LLC to avoid  
2 required formalities. Those are all alter ego issues.

3 With respect to the negligence claims, not one of  
4 three that they've articulated here in court, but in the  
5 Complaint they listed at paragraph 66 eight different topics,  
6 all of which are verbatim, the same that they alleged against  
7 the corporate entity.

8 The target's the corporate entity. Now, as I read  
9 Gardner II, I wasn't involved in that deal. We weren't in the  
10 case at that point. That's why we got brought in the case was  
11 because of Gardner II.

12 But the way I understood Gardner II was that the  
13 Supreme Court was allowing them the opportunity to articulate  
14 individual torts. Ms. Mastrangelo made reference to the Petch  
15 case at Louisiana, which we also cited the Court, too. And  
16 the fact that you have to have a tort that is outside of  
17 capacity as a member. It held, some duty owed by the  
18 individual defendant to the plaintiff outside of his capacity  
19 as a member must have been breached.

20 I understood that that was what Gardner II was  
21 about. They're allowing the place to articulate a new  
22 separate and distinct tort, which requires separate and  
23 distinct duties of care that these individuals would owe to  
24 the plaintiff.

25 Now, I looked at this from the auspices of premise



1 of liability case. The problem is these individuals aren't  
2 the owners of the premises. It's the LLC that owns the  
3 premises. Therefore, all of the duties that are articulated  
4 at paragraph 66 in the Third Amended Complaint flow from the  
5 obligations a premises owner owes to persons on the property.

6 But the individuals, they shouldn't be liable for  
7 that just because they are members of the LLC, the LLC has got  
8 that duty. Certainly, individual employees aren't liable for  
9 the conduct of the LLC. That's why the company exists.

10 And I'll entertain questions the Court may have.

11 THE COURT: No.

12 MR. SMITH: Thank you, Your Honor.

13 THE COURT: I don't know that I even need argument  
14 on this one. I think the other Huish -- I don't know if  
15 they're brothers or what the relationship is.

16 MR. SMITH: They're brothers, Your Honor.

17 THE COURT: But I think they have a more tenuous  
18 liability than Shane does as the guy that's making the  
19 decisions on the ground and the manager of the Park at the  
20 time.

21 If I'm keeping them in it, there's no way I can let  
22 Shane Huish out, right? I know you want me to.

23 MR. SMITH: As an advocate for my client, Your  
24 Honor, I can't agree with that, but I understand where the  
25 Court's going.

1           THE COURT: Yeah, there's -- he's got more  
2 involvement than any of the other ones do, so I've got to  
3 keep him in. There's clearly a issue in fact as it relates  
4 to Shane because, I mean, I don't think there's any dispute  
5 that some of the other people are pointing the finger at  
6 Shane, as he's the one that made the decision to go down to  
7 three, right?

8           MR. SMITH: He didn't ever make a decision to go to  
9 three, Your Honor.

10          THE COURT: But there's people that are saying  
11 that.

12          MR. SMITH: I (indecipherable) anyone's actually's  
13 pointed finger directly to Shane say that, no, Your Honor. I  
14 don't agree with that statement.

15          THE COURT: All right. Maybe that's just the  
16 impression I got from some of the stuff --

17          MR. SMITH: I understood.

18          THE COURT: -- that I read, but whether there was a  
19 direct allegation or not, I mean, that's -- that's the  
20 impression that I'm getting from all of the evidence is that  
21 Shane's at least the one who is making decisions on the  
22 ground as far as how the Park's running, and we have three  
23 lifeguards on the day that the plaintiff goes under the  
24 water.

25                 So I think there's at least an allegation of his

1 personal responsibility there. So I'm going to deny that one  
2 as well. Sorry.

3 MR. SMITH: Thank you, Your Honor.

4 THE COURT: What else?

5 MR. VAIL: Judge, next, I believe we have some  
6 individual motions for summary judgment on the issue of  
7 punitive damages.

8 I'd like to initially address the motion for -- and  
9 this is Jeff Vail for the Opheikens, Welch defendants.

10 THE COURT: See, now, I already talked to you about  
11 the Granite case because I -- that's a case that I come back  
12 to when it comes to this motion. And -- because that deals  
13 with -- that dealt with a failure to implement safety  
14 precautions, and I think it's similar in -- at least in  
15 allegations to the present case.

16 MR. VAIL: In allegations, I would concede that,  
17 Your Honor, and this is however on a Rule 56 standard. And  
18 specifically, when it comes to the statute for punitive  
19 damages requiring clear and convincing evidence. I think  
20 that's the specific issue with --

21 THE COURT: Isn't that a determination for the  
22 jury, though, to decide if it's preponderance or whether it  
23 rises to the level of clear and convincing?

24 MR. VAIL: Your Honor, I think that's exactly where  
25 the gatekeeper function of the Court becomes so important is,

1 yes, the jury would have to make a clear and convincing  
2 determination.

3 But when we look at a determination of the evidence  
4 is clear and convincing, not just by a preponderance of the  
5 evidence. But that's where I think the gatekeeper function  
6 of the Court is so critical with respect to Orluff Opheikens,  
7 Chet Opheikens, Slade Opheikens and Tom Welch. They weren't  
8 Shane Huish there at the Water Park making these  
9 determinations, actually implementing policy.

10 The only argument -- and this goes back to Ms.  
11 Mastrangelo's point that I think was very well made. The  
12 only argument is this idea that, well, they voted to hire  
13 Shane Huish, and they could have done more to research what  
14 happened. They weren't, my clients, were not involved in  
15 this budget max spreadsheet that actually showed these  
16 reductions in lifeguards.

17 This really comes down to this, well, they should  
18 have done a better and more extensive background check. And  
19 I'm not going to reargue the issue as far as personal  
20 liability, but when it comes to saying, just by being on that  
21 board and voting yes, and not having done enough, this is a  
22 passive negligence allegation. And to prove -- to establish  
23 punitive damages, you have to have either oppression, fraud,  
24 or malice by clear and convincing evidence.

25 No allegation of fraud in this case. The

1 plaintiffs rely on oppression and malice, and both of those  
2 have a certain requirement for a state of mind. Some kind of  
3 a -- if not at least knowing, arguably willful act --

4 THE COURT: Well, the malice can be express or  
5 implied, and that's where it refers to the conscious  
6 disregard, which is also defined under Chapter 42. And  
7 that's, I think, what the Granite Construction case relied  
8 on, was the conscious disregard issue.

9 MR. VAIL: Your Honor, I would quote from Yoshimoto  
10 2018 District of Nevada case, which is itself quoting  
11 Countrywide Home Loans versus Thitchener, which is a Nevada  
12 Supreme Court 2008 case, and that's, I think, the language  
13 that Your Honor is pointing to.

14 But I think it has some critical "ands", not "ors"  
15 in that quote. "Both malice and oppression" -- this is a  
16 direct quote -- "require a conscious disregard for a person's  
17 rights and knowledge of the probable harmful consequences of  
18 a wrongful act and a willful and deliberate failure."

19 Now, that is a state of mind that they're -- this  
20 is, again, a no evidence motion, not an argument that a legal  
21 standard bars liability. With respect to my four individual  
22 clients, there is simply no evidence in the record, let alone  
23 something that a jury could possibly see as clear and  
24 convincing evidence that Orluff Opheikens, Slade Opheikens,  
25 Chet Opheikens, Tom Welch, any of those individuals, and it'd

1 have to be with respect to each of those four individuals,  
2 engaged in this willful and deliberate failure. And that's  
3 another "and" I missed, emphasizing before willful and  
4 deliberate failure.

5           Conscious disregard and knowledge of the probable  
6 harmful consequences. That evidence simply doesn't exist in  
7 this case. Now, plaintiffs argue this should be able to be  
8 inferred or there should be something that you can get from  
9 cross-examination that attacks some credibility at trial.  
10 And they cite to the Short case a 1963, Nevada case. Okay.

11           THE COURT: Yeah, I'm -- I'm going back to the  
12 Granite case, which is an old case, too, sorry.

13           MR. VAIL: And, Your Honor, that's an important  
14 argument here is back when the Granite case was decided it's  
15 pre Liberty Lobby -- Anderson v. Liberty Lobby, pre NCP Bayou  
16 2, which is the most recent Nevada case to incorporate  
17 Liberty Lobby saying you cannot use this concept of an attack  
18 on credibility at trial as grounds to establish a disputed  
19 issue of fact to survive summary judgment, let alone when  
20 there's a clear and convincing evidence standard.

21           Now, that -- it certainly cannot be met by this  
22 argument that they'll be cross-examination and an attack on  
23 credibility. There's not a single piece of evidence in this  
24 case that can end -- in fact, there's contrary sworn  
25 declarations admittedly self-serving, but certainly

1 admissible. Not a single piece of admissible evidence that  
2 says Orluff Opheikens knew he was putting people in danger.  
3 He willfully disregarded that.

4 That's state of mind requirement. This is not -- I  
5 understand the argument that you've got this passive  
6 negligence where it's just an issue of well, you should have  
7 done more investigation prior to hiring. That's not good  
8 enough for punitive damages.

9 And look at the public policy behind it. I mean,  
10 going back to this idea that members of a Board just because  
11 they didn't dissent from a vote should be held personally  
12 liable. Not only are they suggesting that, they're saying  
13 they should also be tied with punitive damages potentially  
14 three times consequential damages on that basis.

15 Your Honor, I'd like to expand this briefly, the  
16 last motion we have, and I would like to address it briefly  
17 as it flows directly into this, is the motion in limine,  
18 which I know it's early for that. This is to exclude Frank  
19 Campagna, their expert CPA.

20 And the reason is really, this is the one piece  
21 that they have in an expert report. Mr. Campagna says labor  
22 was willfully reduced by management early in the 2015 season.

23  
24 Now, I'm not sure how a CPA can look at the books  
25 and say that he understands state of mind. But regardless,

1 he's talking about labor. And you've heard things about  
2 meetings and labor shortages. Mr. Campagna admits -- and  
3 this is direct from his deposition, page 23 lines 11 to 16 --  
4 "During this period where you identify a labor reduction, you  
5 can't say whether lifeguard specific labor was reduced or  
6 actually up; correct?"

7 Mr. Campagna answer: "Specifically, no."

8 All he can talk about is labor. Now, they're  
9 making this --

10 THE COURT: You cited that specific thing in your  
11 -- in your Brief?

12 MR. VAIL: We did, Your Honor. And --

13 THE COURT: I read it.

14 MR. VAIL: -- my point here is just to bring up  
15 Mr. Campagna, not -- and I understand the Motions in Limine  
16 are a ways off, but that's the one thing they have to grab  
17 onto that says management, all these guys, willfully did  
18 something.

19 I would argue that's either not sufficient, and not  
20 clear and convincing or certainly it should be excluded for  
21 the purposes, at least today, of ruling whether or not there  
22 is sufficient evidence for -- to get past the Court's  
23 gatekeeper function and say not just are these Opheikens,  
24 Welch defendants who were -- with the exception of Shane  
25 Huish, who was -- who was there, really, all of the other



1 individual defendants just weren't involved directly in much  
2 of this, but especially Orluff Opheikens, Tom Welch, Slade  
3 Opheikens, Chet Opheikens.

4           They were not at the Water Park. They're being  
5 brought in and argued that they should be liable for what I  
6 would argue is Water Park liability, not individual  
7 liability. But setting aside the Nevada Supreme Court in  
8 Gardner II, this is an opportunity to say now it's going one  
9 step -- one bridge way too far to say, and not only should  
10 they be held individually liable, but they should be  
11 subjected to punitive damages based on hopefully a jury  
12 listening to a limiting instruction on sympathy, and  
13 accepting that this is clear and convincing evidence.

14           I think this is a very appropriate situation where  
15 these punitive damages, this issue, summary judgment is  
16 appropriate, should be granted.

17           I'd answer any questions Your Honor has on that  
18 point or yield to Mr. Williams.

19           THE COURT: I think that part of the plaintiff's  
20 claim is that the appointment or designation of Shane Huish  
21 as the manager of the Park and the oversight afterwards on  
22 the part of these people is their claim of why -- how they --  
23 how and why they personally participated in these decisions.

24           So let's use somebody else instead of Shane Huish.  
25 Let's say that somebody went out and on the side of the

1 street and got a homeless guy and brought him in and said,  
2 we're going to make you the manager of the Park. If your  
3 people are involved in that decision, and then don't  
4 adequately do the oversight afterwards, and somebody gets  
5 hurt or killed, they're going to make the arguments that  
6 under the malice, oppression, or fraud standard, that that is  
7 malice or oppression, that there's a conscious disregard for  
8 the safety of others.

9 And because of those actions or inactions, that  
10 they're -- you're subject to potential liability for punitive  
11 damages. I understand Shane Huish was not some homeless guy  
12 on the side of the street, but that's the same -- I mean,  
13 they're making a similar argument that Shane Huish was not  
14 qualified to be the person responsible for the Park.

15 So how does that -- how does it -- how doesn't that  
16 fit?

17 MR. VAIL: They're making the same argument that  
18 Shane Huish wasn't qualified even though he was formally an  
19 executive at Six Flags and formal managed a Water Park. I  
20 suppose --

21 THE COURT: Well, he was involved in some  
22 operations portion of the Park, not in charge of the whole  
23 Park, like he was here, right?

24 MR. VAIL: And I understand that, and I don't want  
25 to dive into that as a fact issue. This is --

1           THE COURT: You guys are surprised that that I  
2 actually read this stuff, aren't you?

3           MR. VAIL: There's a lot there, Your Honor, big  
4 binders. I'm impressed.

5           What I will say and despite I was thinking  
6 frivolous, this is kind of like being a place kicker or a  
7 defensive back. You've got to have a short memory. But I'd  
8 ask that here we not have too short of a memory because I  
9 think what is critical is that -- if you set aside the  
10 statutory issues that I've argued previously, that probably  
11 is a negligence cause of action.

12           But every -- if this were enough, well, a jury can  
13 determine whether or not that's good enough to be clear and  
14 convincing evidence of conscious disregard, willful and  
15 deliberate failure, all these things coming straight from  
16 Yoshimoto and Thitchener, in that's good enough, then no  
17 claims for punitive damages will ever get out before it gets  
18 to the jury.

19           That's not the situation that we should. The Court  
20 is supposed to be a gatekeeper looking for, you've got to  
21 have something that can be clear and convincing evidence of  
22 the state of mind, this intentional, willful and deliberate  
23 failure.

24           I think the argument about going to the homeless  
25 person be on the street is a good -- to be the manager of the

1 Water Park is intentionally kind of a perfect example.

2 THE COURT: It's more egregious, right?

3 MR. VAIL: It's much more egregious, and even that,  
4 not a single -- punitive damages as to the Water Park?  
5 Possibly. But where is the actual specific evidence that  
6 Orluff Opheikens acted with willful and deliberate failure  
7 and conscious disregard even if it had been a homeless person  
8 on the street? It wasn't. It was a former Water Park  
9 officer of some sort. We don't have to get into that fact  
10 dispute over exactly what.

11 But where is the specific evidence with respect to  
12 Tom Welch or Chet Opheikens that actually says they've got --  
13 there's more than just -- any jury could always potentially  
14 find well, there's got to be a bad intent, some kind of a  
15 state of mind there that is sufficient to let this question  
16 go to the jury.

17 The evidence is just not there. Simple negligence,  
18 passive, non-action, that's one thing. But saying there's  
19 clear and convincing evidence that these individuals engaged  
20 in a willful, knowing failure, the evidence is just not  
21 there.

22 And this being a no-evidence motion, I think that's  
23 an important distinction, Judge.

24 THE COURT: Okay. Were there other people that  
25 filed punitive damage motions?

1 MS. MASTRANGELO: Yeah. Judge, just real briefly,  
2 unless I'm missing something, this claim is about negligent  
3 delegation, negligent oversight. It's negligence all over  
4 the place and our law is very clear in Nevada that  
5 negligence, even recklessness, even unconscionable,  
6 irresponsibility, those aren't grounds for punitive damages.

7 And I agree, if you let any negligence case assert  
8 punitives, then it's in every case. It's in every -- every  
9 car accident case. They have to show some intent. That's  
10 all over the place in our case law. They dispute that they  
11 have to show intent, but Countrywide talks about a greater  
12 state of mind than negligence. MGM, a willful wrong.  
13 Damages as an intended consequence.

14 I mean, this case is about negligence. And a  
15 negligent delegation because nobody bothered to check Shane's  
16 record to find out he stole an umbrella from the BYU  
17 bookstore in -- you know, when he was 18. I mean, that's  
18 ridiculous.

19 This isn't a punitive damages case against the  
20 individuals. I don't know if it is against the Water Park or  
21 not. That's not my job to say. But, you know, the  
22 individual's conduct, their passive negligence, their failure  
23 to find out more things, that doesn't arise to punitive  
24 damages. It just doesn't. Thank you.

25 THE COURT: Anybody else on this side?

1 MR. SMITH: Your Honor, we made reference to our  
2 motion. We'll join with the argument already presented.

3 THE COURT: Okay.

4 MR. WILLIAMS: Thanks, Judge. Again, I'll try and  
5 wrap this up and get everyone out of here.

6 We've heard a lot about state of mind. Listen,  
7 we're not saying that you get punitive damages just based on  
8 negligence. Obviously, you don't, right? You have to comply  
9 with the statutory definitions. And what we've alleged is  
10 there's evidence of implied malice and there's evidence of  
11 oppression, and both of those have a definition within them  
12 of conscious disregard, which is similarly defined by the  
13 Court.

14 So we hear this, there's no direct evidence of  
15 this, that they haven't shown the state of mind. I'm going  
16 to start, Your Honor, with Countrywide at Footnote 55 because  
17 the defendants there were making similar arguments.

18 Countrywide characterizes this case as a  
19 convergence of undetected mistakes and therefore contends  
20 that there was insufficient evidence that it acted with,  
21 quote, "an actual knowledge equivalent to the intent to cause  
22 harm," end quote.

23 The intent -- this is now the Supreme Court  
24 continuing -- "The intent to cause harm, however, is the  
25 mental element of express malice and plays no role in

1 analyzing a defendant's conscious disregard for purposes of  
2 implied malice or impression. Moreover, to the extent that  
3 Countrywide asserts that NRS 42.001, Subsection (1)'s  
4 definition of conscious disregard requires direct proof of a  
5 defendant's actual knowledge, we disagree."

6           So Your Honor, the fact that we don't have someone  
7 admitting this was my intent to harm, that doesn't mean that  
8 we don't get past a Motion for Summary Judgment, Your Honor.  
9 We have presented -- let me just go to the definition of  
10 conscious disregard because it says, "knowledge of the  
11 probable harmful consequences of a wrongful act and a willful  
12 and deliberate failure to avoid to act those -- to avoid  
13 those consequences."

14           So we've heard Mr. Vail say, where's the evidence,  
15 where's the evidence? Your Honor, here some evidence. The  
16 defendants knew -- this is Orluff's deposition of page 186.

17           Defendants knew that lifeguards were the single  
18 most important safety feature at the Water Park.

19 Mr. Opheikens agreed with that.

20           The defendants also knew that there was a direct  
21 correlation between lifeguards and safety at the Park. This  
22 is in Exhibit 30, an e-mail from Slade dated July 15, 2014  
23 shortly after the Park opened when he was writing about a  
24 particular attraction and said, quote, "Don't want to pay for  
25 another lifeguard, but don't want an injury either."

1           The jury can infer that they recognized it was  
2 foreseeable that reducing lifeguards could lead to injuries.  
3 Their own economist, Your Honor, agreed that if they  
4 implemented a lifeguard plan that violated Nevada law, that  
5 would be inappropriate because, quote, "someone could drown."

6           The defendants knew in 2015, before [REDACTED] drowned,  
7 Your Honor, that the wave pool was the most dangerous  
8 attraction at that park. That's undisputed because all 12  
9 water rescues from the year before happened at the wave pool,  
10 Judge.

11           And we've already gone through the evidence of them  
12 making the decisions to cut labor, which necessarily was  
13 cutting lifeguards, and this action occurred.

14           So if the question is do we have enough evidence to  
15 get past a Motion for Summary Judgment even when viewed  
16 through the prism of a clear and convincing evidence  
17 standard, I think the answer is unquestionably, yes.

18           And Your Honor, you don't have to deal with this  
19 now. You can hear the evidence come in. I have every belief  
20 that they will -- when we rest our case, they will file  
21 motions claiming that they're entitled to a directed verdict  
22 or judgment as a matter of law or whatever the case may be  
23 saying we haven't proven, you know, in this case, malice or  
24 oppression, and so throw out punitives.

25           You'll get the chance to do that if we haven't met



1 our burden. But I submit that we'll be able to do it.

2 And Your Honor, finally, with respect to the notion  
3 that they've presented declaration saying we didn't do this,  
4 I think the Short case, and even we don't have to go as far  
5 back as the Short case, but even the Anderson versus Liberty  
6 Lobby case, the U.S. Supreme Court case that got incorporated  
7 into Wood v. Safeway, recognized that you don't deal with the  
8 credibility of affiants and get into a war of affidavits at  
9 the summary judgment stage, even under the stricter standard  
10 that Wood v. Safeway ushered in, based on Anderson.

11 So unless you have any questions for me, I think  
12 this motion should be denied as well.

13 THE COURT: No. Anymore?

14 MR. VAIL: Just very briefly. Your Honor. I would  
15 here propose the actual line, where that line in the sand is  
16 for punitive damages, and what is sufficient to get past the  
17 necessary gatekeeper role of this Court. And I would say  
18 that is, did you have actual -- is there any evidence that  
19 you had actual knowledge that there weren't as many  
20 lifeguards as required by law on that day or at any day prior  
21 to L.G. [REDACTED]'s tragic drowning.

22 Is there any evidence that Orluff Opheikens, Tom  
23 Welch, Chet Opheikens, Slade Opheikens knew that? There's  
24 evidence that some people did. There is not a shred that any  
25 of my four clients actually had that knowledge. I mean, that

1 would qualify -- potentially a jury could say, that might be  
2 enough for willful disregard, conscious disregard. There's  
3 nothing with respect to my four individual clients that says  
4 they actually knew that was the case.

5           It comes down to Mr. Williams' statements that,  
6 yeah, it's common sense that lifeguards are important to  
7 safety. That's a negligence threshold. To get up to the  
8 clear and convincing evidence for punitives you need more  
9 than that. That's it, Judge.

10           THE COURT: Anybody else? Now, based on that  
11 language from the Countrywide footnote that Mr. Williams  
12 referenced, it almost takes the wind out of the argument that  
13 you need some intentional act. I mean, I know that there are  
14 cases that require willful intentional conduct, but that  
15 footnote from Countrywide seems to indicate for an implied  
16 malice or oppression you don't, and that's our Supreme Court  
17 saying that.

18           I think if I -- the fact that I've allowed that --  
19 the claims to go against the individual defendants based on  
20 individual participation, I think that there's at least  
21 evidence sufficient to -- under a Rule 56 standard to let the  
22 punitive damage claim go forward.

23           I mean, Mr. Williams is right, if he doesn't prove  
24 that at the time of trial by clear and convincing evidence,  
25 you can make a Rule 50 motion. I just granted a couple Rule

1 50 motions in a trial that we did this week. So if the  
2 evidence isn't presented at the time of trial, then it  
3 doesn't go to the jury.

4 But I think we have to let it go at this point  
5 based on the implied malice and the oppression standard and  
6 the definition of conscious disregard. I mean, if a jury was  
7 to believe that the individual people had individual  
8 liability for their participation in this plan and that it  
9 was their decision to not provide enough lifeguards or to  
10 hire Shane Huish, and he wasn't qualified or that they didn't  
11 conduct their oversight responsibilities adequately, I can  
12 see that -- the potential that they could find that that  
13 would equate with conscious disregard. So I'm going to deny  
14 them at this point.

15 Can we take a break before we keep going? How many  
16 more do we have?

17 MR. WILLIAMS: That's it. That's all.

18 THE COURT: How many more do we have?

19 MR. VAIL: The only remaining issue was the motion  
20 in limine to exclude Frank Campagna, which we raised --

21 MR. GODFREY: We've reached a stipulation, Your  
22 Honor. That should be seen by the Court when we get to the  
23 motions in limine [inaudible].

24 MR. ERWIN: So we're going to defer that.

25 MR. WILLIAMS: So, we're done.

1 THE COURT: Oh, so we're done anyway?

2 MR. WILLIAMS: Yep.

3 MR. GODFREY: We are.

4 THE COURT: I thought there was more than that.

5 Maybe it's just because there are so many joinders and stuff.

6 Okay. So we're going to wait and take the one about Campagna

7 up later on?

8 MR. WILLIAMS: Right.

9 MR. ERWIN: Yeah, with the rest of motions in

10 limine and expert motions.

11 THE COURT: When are they? Are they set yet or no?

12 MR. VAIL: August 23rd is the filing deadline for

13 motions in limine, Your Honor, and we had just filed --

14 THE COURT: Okay.

15 MR. VAIL: -- Campagna at this time as it

16 interplayed with the punitive damages, the willful issue.

17 THE COURT: Okay. So you could argue it as part of

18 this? I get it.

19 MR. VAIL: Correct.

20 THE COURT: All right. So that's all we have for

21 today?

22 MR. WILLIAMS: That's it, Judge.

23 THE COURT: I think you guys won all of them, so

24 let's have the plaintiffs prepare the order. Just run it by

25 everybody to approve to format and content.

1 MR. WILLIAMS: We will, Your Honor.  
2 MR. ERWIN: Will do.  
3 THE COURT: And then submit it.  
4 MR. VAIL: Thank you, Your Honor.  
5 MR. WILLIAMS: Thank you, Your Honor.  
6 THE COURT: Thanks, guys. Have a good day.  
7 MR. WILLIAMS: Thank you for the time on a Friday  
8 afternoon. We appreciate it.  
9 (Pause in the proceedings)  
10 THE COURT: You know what, guys, hold on a second  
11 before we go off the record because there is a -- the  
12 calendar included a reference to the Supreme Court's most  
13 recent decision in here. I guess, this was the fourth thing  
14 that's actually presented to the Supreme Court, and they --  
15 this is the one where they held that a member of a LLC is not  
16 individually liable and then they -- oh, no, that's the first  
17 one, excuse me.  
18 MR. MIRKOVICH: Judge, if I might, I believe that's  
19 a status check regarding the appeal that centers around R&O's  
20 participation or addition to this case.  
21 THE COURT: Okay.  
22 MR. MIRKOVICH: Sam Mirkovich for the plaintiffs.  
23 R&O has since filed an Answer of Remittitur [inaudible]  
24 Supreme Court. There is very little discovery for R&O. I  
25 think we're all set moving forward as far as the status of

1 it's concerned.

2 THE COURT: So we don't need to do anything with  
3 it?

4 MR. VAIL: Well, Your Honor --

5 MR. GODFREY: As an aside, Your Honor, there's --  
6 there's two issues that have not been decided on my side of  
7 the courtroom. One is whether or not Ms. Lee's clients,  
8 Bliss, Huggins and Sequoia are going to seek a trial  
9 continuance.

10 You may recall that at the time --

11 THE COURT: But that's on the second part of the  
12 case, right?

13 MR. GODFREY: Well, it is, but what you have ruled  
14 previously -- because I was fighting the bifurcation of the  
15 brokerage firm, and because you left R&O out of the case, you  
16 held that bifurcation of the brokerage claim would be  
17 appropriate, but I pointed out to you that it is possible  
18 that the Supreme Court could send R&O back into the case.

19 You said, well, if that happens, I'll definitely  
20 reexamine bifurcation of the broker [inaudible] . Now, we  
21 haven't determined yet as a defense team whether or not --  
22 and that's really more Patricia's decision, but we haven't  
23 decided whether we're going to ask you to, what I call  
24 reincorporate brokers, and unbifurcate the brokers because  
25 now R&O's back in the case, and we have those operative

1 averments in paragraph 79 on the Second Amended Complaint.

2 So if we file that motion and you reincorporate  
3 them because R&O's back in the case, under paragraph 79, Ms.  
4 Lee has said many times she intends to seek a continuance of  
5 trial.

6 Now that R&O's back in the case and has not had  
7 time to do any substantial discovery, R&O may also file a  
8 motion to continue the trial. But I don't think those  
9 decisions have been made yet. I wanted to --

10 THE COURT: Can you guys tell me when we come in on  
11 the motions in limine or the next time you're here what you  
12 want to do that?

13 MR. GODFREY: Well, I think what --

14 MR. MIRKOVICH: There's a pending motion, we'll  
15 have to [inaudible]. But there's a pending motion about it,  
16 but I think I can short circuit a lot of it, Judge. You'll  
17 remember when that hearing took place about bifurcation,  
18 Mr. Godfrey had asked the question about whether the  
19 allegation of underinsurance is going to be centered to our  
20 claims at a trial against individual defendants, the Water  
21 Park and R&O.

22 I can represent now that it will not be a part of  
23 that case, which I think makes this entire thing  
24 (indecipherable). They can still file whatever motions, but  
25 I think it takes it off the table.

1 MR. GODFREY: Well, can I ask for a little more  
2 clarity on that statement because he may be right. I just  
3 want to make sure there's no doubt what he's saying. Because  
4 if for all intents and purposes, there will be no claim that  
5 a jury hears or that the Court hears that there's liability  
6 on the part of any of my clients, Opheikens, Welch, R&O based  
7 on tortious conduct related to underinsuring the Water Park.

8 MR. ERWIN: So, Your Honor, paragraph 79 related to  
9 our reverse veil piercing claim against R&O -- this is Phil  
10 Erwin for the plaintiffs, by the way, and it said, in  
11 addition to underinsuring the Park, here's all the things  
12 that constitute manifest disregard, which is the third prong  
13 of a reverse veil piercing.

14 Our argument on the third prong is what the Supreme  
15 Court said we had alleged, and if shown by evidence that  
16 those allegations are true would constitute manifest  
17 disregard. Underinsurance isn't part of that, so it's not  
18 going to be a part of our case in --

19 MR. GODFREY: Yeah, I'm only trying to --

20 MR. ERWIN: -- reverse veil piercing.

21 MR. GODFREY: Yeah, I'm only trying to go to the  
22 mechanics of the brokers, and whether they are reintegrated  
23 into the primary suit. So I'm not addressing those other  
24 averments in the Complaint, just the insurance related  
25 [inaudible].



1           THE COURT: It sounds like we're not bringing in  
2 anything relating to the insurance.

3           MR. ERWIN: The insurance, underinsurance only --  
4 it was an aside in a reverse veil piercing claim against R&O,  
5 it's not a main allegation of our case. I don't know where  
6 that idea came from. It's reverse veil piercing, and it's  
7 not going to be a part of our showing on a manifest disregard  
8 at trial, so I don't see any reason why the insurance brokers  
9 need to come back in.

10          THE COURT: So everything dealing with the  
11 insurance is part of a second -- second part of the trial?

12          MR. GODFREY: Well, the second part of the trial is  
13 us versus the brokers.

14          THE COURT: Right.

15          MR. GODFREY: The plaintiffs aren't even in that.

16          THE COURT: Right.

17          MR. ERWIN: Correct.

18          MR. GODFREY: So as long as the plaintiffs aren't  
19 coming into court with evidence of underinsurance, then it  
20 may be that the addition of R&O back into the case with that  
21 stipulation might create a scenario where R&O's reintegration  
22 does not change the factual predicate of an earlier ruling.

23          THE COURT: Maybe you need to get a written  
24 stipulation on it.

25          MR. ERWIN: We can work that out, Judge.

1 THE COURT: Got to make everybody feel better.  
2 MR. GODFREY: Yeah, I think that's -- and we'd file  
3 it with the Court.  
4 MR. ERWIN: That's fine.  
5 MR. GODFREY: But it may be that he's right. He  
6 said he's --  
7 THE COURT: Okay.  
8 MR. GODFREY: -- thought he was going to nix that  
9 issue and may have just done that.  
10 MR. MIRKOVICH: Okay.  
11 MR. ERWIN: Yep.  
12 THE COURT: Why don't you guys get a written  
13 stipulation so everybody's clear on exactly what they're  
14 agreeing to and what they're not so --  
15 MR. GODFREY: Okay.  
16 THE COURT: Is sounds like you're waiving your  
17 claim against R&O for the underinsurance since the plaintiff  
18 won't be involved in the second part of the case.  
19 MR. ERWIN: Yeah, it was never really a part of it.  
20 It was an aside, like a five words at the start of a full  
21 paragraph --  
22 THE COURT: I get it.  
23 MR. ERWIN: -- and it's not [inaudible].  
24 THE COURT: And I think long as he's comfortable  
25 with that, then, I think, we're --

1 MR. ERWIN: We'll work it out.  
2 THE COURT: -- we're fine going forward.  
3 MR. GODFREY: Just send me a draft.  
4 MR. ERWIN: Okay.  
5 MR. GODFREY: He's going to send me a draft, so --  
6 THE COURT: Okay.  
7 MR. ERWIN: Thank you, Judge.  
8 THE COURT: Thanks, guys.  
9 MR. MIRKOVICH: Thank you, Your Honor.  
10 THE COURT: Now we're off the record.  
11 (Court went off the record at 3:02 p.m. until 3:02  
12 p.m.)  
13 THE COURT: Dr. Campagna.  
14 MR. VAIL: Your Honor, Frank Campagna, [inaudible].  
15 THE COURT: Who filed that motion?  
16 MR. VAIL: The Opheikens, Welch defendants  
17 individually.  
18 THE COURT: Can you guys just renotice it --  
19 MR. VAIL: Yes.  
20 THE COURT: When the motions in limine get set?  
21 We're just going to take it off today because we don't have  
22 anywhere to continue it to because we don't have another date  
23 for those motions yet. So just renotice it that that's going  
24 to happen at the same time as the other motion.  
25 MR. VAIL: And it's fully briefed by the other

1 side, so we should be [inaudible].

2 THE COURT: Yeah. Yeah, you don't need to file  
3 more stuff on it, just -- just renote that it's going to be  
4 heard then.

5 MR. VAIL: Okay. Will do, Judge. Thank you.

6 THE COURT: All right? Thank you.

7 (Hearing adjourned at adjourned 3:03 p.m.)

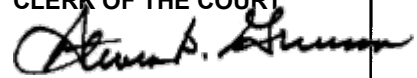
8 \* \* \* \* \*

ATTEST: I hereby certify that I have truly and correctly  
transcribed the audio/visual proceedings in the above-  
entitled case to the best of my ability.

*Julie Lord*

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**DISTRICT COURT  
CLARK COUNTY, NEVADA**

PETER GARDNER and CHRISTIAN GARDNER, )  
individually and on behalf of minor child, L.G. )

██████████, )

Plaintiffs, )

vs. )

HENDERSON WATER PARK, LLC dba )  
COWABUNGA BAY WATER PARK, a Nevada )  
limited liability company; WEST COAST WATER )  
PARKS, LLC, a Nevada limited liability company; )  
DOUBLE OTT WATER HOLDINGS, LLC, a Utah )  
limited liability company; ORLUFF OPHEIKENS, )  
an individual; SLADE OPHEIKENS, an individual; )  
CHET OPHEIKENS, an individual; SHANE )  
HUIH, an individual; SCOTT HUIH, an )  
individual; CRAIG HUIH, an individual; TOM )  
WELCH, an individual; R&O CONSTRUCTION )  
COMPANY, a Utah corporation; DOES I through )  
X, inclusive; ROE Corporations I through X, )  
inclusive; and ROE Limited Liability Company I )  
through X, inclusive, )

Defendants. )

AND ALL RELATED CLAIMS )

Case No.: A-15-722259-C  
Dept. No.: XXX

**ORDER**

The matters before the Court are Defendants Orluff Opkeikens, Slade Opheikens, Chet Opheikens and Tom Welch's (i) First Motion for Summary Judgment as to Issues of Duty and Breach on Negligence Claim; (ii) Second Motion for Summary Judgment on the Lack of Evidence that the Water Park's Breaches Delayed the Rescue of L.G. [REDACTED]; (iii) Third Motion for Summary Judgment Regarding the Lack of Evidence Supporting Plaintiffs' Theory of Medical Causation; (iv) Motion for Partial Summary Judgment as to Plaintiffs' Prayer for Punitive Damages. Also before the Court are the respective joinders to the abovementioned motions filed by Defendants Henderson Water Park, LLC, Scott Huish and Craig Huish. In addition, before the Court are Defendants Scott and Craig Huish's (i) respective Motions for Summary Judgment and (ii) joint Motion for Partial Summary Judgment as to Plaintiffs' Prayer for Punitive Damages. Finally, before the Court is Shane Huish's Motion for Summary Judgment. The Court, having reviewed the papers and pleadings on file in this matter and having heard the oral arguments of counsel on July 31, 2019 and August 8, 2019, good cause appearing and with no just reason for delay, hereby rules as follows:

**I. ORDER**

**IT IS HEREBY ORDERED AND ADJUDGED THAT:**

1. Defendants Orluff Opkeikens, Slade Opheikens, Chet Opheikens and Tom Welch's First Motion for Summary Judgment as to Issues of Duty and Breach on Negligence Claim is DENIED.

2. Defendants Orluff Opkeikens, Slade Opheikens, Chet Opheikens and Tom Welch's Second Motion for Summary Judgment on the Lack of Evidence that the Water Park's Breaches Delayed the Rescue of L.G. [REDACTED] is DENIED.

3. Defendants Orluff Opkeikens, Slade Opheikens, Chet Opheikens and Tom Welch's Third Motion for Summary Judgment Regarding the Lack of Evidence Supporting Plaintiffs' Theory of Medical Causation is DENIED.

4. Defendants Orluff Opkeikens, Slade Opheikens, Chet Opheikens and Tom Welch's  
Motion for Partial Summary Judgment as to Plaintiffs' Prayer for Punitive Damages is DENIED.

5. Defendant Scott Huish's Motion for Summary Judgment is DENIED.

6. Defendant Craig Huish's Motion for Summary Judgment is DENIED.

7. Defendants Scott and Craig Huish's Motion for Partial Summary Judgment as to  
Plaintiffs' Prayer for Punitive Damages is DENIED.

8. Defendant Shane Huish's Motion for Summary Judgment is DENIED.

DATED this \_\_\_\_ day of August, 2019.

*Signature on following page -*  
HON. JUDGE JERRY A. WIESE II

Respectfully submitted by:  
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*Attorneys for Defendant Shane Huish*

4. Defendants Orluff Opkeikens, Slade Opheikens, Chet Opheikens and Tom Welch's Motion for Partial Summary Judgment as to Plaintiffs' Prayer for Punitive Damages is DENIED.

5. Defendant Scott Huish's Motion for Summary Judgment is DENIED.

6. Defendant Craig Huish's Motion for Summary Judgment is DENIED.

7. Defendants Scott and Craig Huish's Motion for Partial Summary Judgment as to Plaintiffs' Prayer for Punitive Damages is DENIED.

8. Defendant Shane Huish's Motion for Summary Judgment is DENIED.

DATED this 15<sup>th</sup> day of August, 2019.

see next  
page

HON. JUDGE JERRY A. WIESE II


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*Attorneys for Defendant Shane Huish*



4. Defendants Orluff Opkeikens, Slade Opheikens, Chet Opheikens and Tom Welch's Motion for Partial Summary Judgment as to Plaintiffs' Prayer for Punitive Damages is DENIED.

5. Defendant Scott Huish's Motion for Summary Judgment is DENIED.

6. Defendant Craig Huish's Motion for Summary Judgment is DENIED.

7. Defendants Scott and Craig Huish's Motion for Partial Summary Judgment as to Plaintiffs' Prayer for Punitive Damages is DENIED.

8. Defendant Shane Huish's Motion for Summary Judgment is DENIED.

DATED this 15<sup>th</sup> day of August, 2019.

  
HON. JUDGE JERRY A. WIESE II

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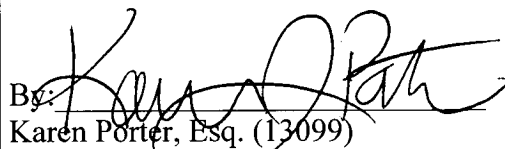
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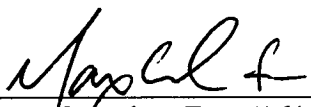
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Henderson Water Park, LLC

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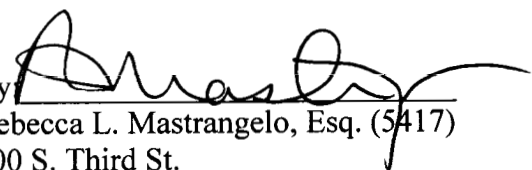
7 *Attorneys for Defendants Orluff*  
8 *Opheikens, Slade Opheikens and*  
9 *Tom Welch, and R&O Construction Inc.*

10 GODFREY JOHNSON

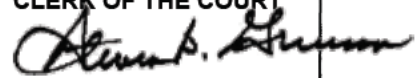
11 By: \_\_\_\_\_  
12 Karen Porter, Esq. (13099)  
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16 *Slade Opheikens, Tom Welch, and*  
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1 **MSTY**

2 Karen Porter

3 Nevada Bar No. 13099

4 Brett Godfrey (Admitted Pro Hac Vice)

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20 *Slade Opheikens, Chet Opheikens, Tom Welch*

21 *and R&O Construction Company, Inc.*

22 **DISTRICT COURT**  
23 **CLARK COUNTY, NEVADA**

24 **PETER GARDNER and CHRISTIAN GARDNER,**  
25 **individually, and on behalf of minor child**

26 **L.G. [REDACTED],**

27 **Plaintiffs,**

28 **vs.**

29 **HENDERSON WATER PARK, LLC dba**  
30 **COWABUNGA BAY WATER PARK, a Nevada**  
31 **limited liability company; R&O**  
32 **CONSTRUCTION COMPANY, INC., a Utah**  
33 **Corporation; ORLUFF OPHEIKENS, an**  
34 **individual; SLADE OPHEIKENS, an individual;**  
35 **CHET OPHEIKENS, an individual; SHANE**  
36 **HUIH, an individual; SCOTT HUIH, an**  
37 **individual; CRAIG HUIH, an individual; TOM**  
38 **WELCH, an individual; and DOES I through X,**  
39 **inclusive; ROE CORPORATIONS I through X,**  
40 **inclusive, and ROE LIMITED LIABILITY**  
41 **COMPANY I through X, inclusive,**

42 **Defendants.**

Case No. A-15-722259-C

Dept. No. XXX

**OPHEIKENS-WELCH**  
**DEFENDANTS' EMERGENCY**  
**MOTION FOR A LIMITED STAY**  
**OF DISCOVERY**

1  
2 HENDERSON WATER PARK, LLC dba  
3 COWABUNGA BAY WATER PARK, a Nevada  
limited liability company,

4 Third-Party Plaintiff,

5 vs.

6 WILLIAM PATRICK RAY, JR.; and DOES 1  
7 through X, inclusive,

8 Third-Party Defendants.  
9

10 ORLUFF OPHEIKENS, an individual; SLADE  
11 OPHEIKENS, an individual; CHET OPHEIKENS,  
an individual; and TOM WELCH, an individual,

12 Third-Party Plaintiff,

13 vs.

14 BLISS SEQUOIA INSURANCE & RISK  
15 ADVISORS, Inc., AND HUGGINS INSURANCE  
SERVICES, Inc.,

16 Third-Party Defendants  
17

18 HENDERSON WATER PARK, LLC dba  
19 COWABUNGA BAY WATER PARK, a  
Nevada limited liability company,

20 Third-Party Plaintiff,

21 vs.

22 BLISS SEQUOIA INSURANCE & RISK  
23 ADVISORS, Inc., AND HUGGINS  
INSURANCE SERVICES, Inc.,

24 Third-Party Defendants.  
25

26 Defendants ORLUFF OPHEIKENS; SLADE OPHEIKENS; CHET OPHEIKENS and  
27 TOM WELCH (hereinafter collectively known as the "Opheikens-Welch Defendants") by and  
28 through their undersigned counsel, and pursuant to EDCR 2.26 and 2.34, hereby file this  
EMERGENCY MOTION FOR A LIMITED STAY OF DISCOVERY and states as follows:

1           1.       As the Court is aware Plaintiffs are seeking punitive damages against the Opheikens-  
2       Welch Defendants as a result of the May 27, 2015 accident involving L.G. [REDACTED].

3           2.       In furtherance of their pursuit of punitive damage Plaintiffs propounded discovery  
4       requests to the Opheikens-Welch Defendants requesting discovery of highly sensitive and personal  
5       financial information from the Opheikens-Welch Defendants.

6           3.       By agreement of the parties, the Opheikens-Welch Defendants withheld the  
7       discovery on punitive damages of the Opheikens-Welch Defendants unless and until the Court  
8       determined that the punitive damages claim against the Opheikens-Welch Defendants could  
9       proceed to trial (discovery on punitive damages was not relevant to the case absent a viable punitive  
10      damages claim).

11          4.       The Court heard the matter on August 9, 2019 and issued a written order on August  
12      15, 2019 denying the Opheikens-Welch Defendants' motion for summary judgment and allowing  
13      Plaintiffs' claims for punitive damages to go to trial. Accordingly, the Opheikens-Welch  
14      Defendants now owe the Plaintiffs discovery on punitive damages forthwith.

15          5.       Given the nature of the sensitive personal financial information sought by the  
16      Plaintiffs, the Opheikens-Welch Defendants will suffer irreparable harm if it is disclosed and this  
17      harm cannot be undone once this sensitive personal information has been disclosed.

18          6.       The Opheikens-Welch Defendants respectfully disagree with this Court's reasoning  
19      regarding their personal liability, and pursuant to this Court's invitation at the August 9 hearing  
20      intend to request review from the Nevada Supreme Court.

21          7.       Accordingly, the Opheikens-Welch Defendants will file an Emergency Petition for  
22      a Writ of Mandamus with the Nevada Supreme Court on Monday August 19 (allowing the  
23      Opheikens-Welch Defendants adequate time to prepare the petition and voluminous appendix).

24          8.       As it is clearly unreasonable to expect the Supreme Court to even review said  
25      Petition—much less grant the relief requested therein—on a Friday afternoon, a stay of the  
26      underlying discovery issue is called for; otherwise the Opheikens-Welch Defendants are faced with  
27      a Sophie's Choice between obtaining review (but violating this Court's rules) or making the  
28      disclosures and suffering irreparable prejudice if the Supreme Court later holds for the Opheikens-

1 Welch Defendants.

2 9. Given the need to provide the Supreme Court with a reasonable period of time to  
3 review the Emergency Petition for a Writ of Mandamus, the Opheikens-Welch Defendants  
4 respectfully request that this Court stay all discovery related to punitive damages until August 30,  
5 2019—or until the Supreme Court disposes of the writ (whichever occurs first).

6 10. As the Court is aware, the ‘final’ discovery cutoff in this matter is September 7,  
7 2019 (30 days prior to the October 7, 2019 trial date). Thus, the requested stay will provide the  
8 Supreme Court with almost two weeks to determine if it will accept the writ, while also providing  
9 the parties with at least a week to resolve any issues related to the punitive damages discovery prior  
10 to that cutoff.

11 11. Pursuant to NRS § 42.005(4) “[e]vidence of the financial condition of the defendant  
12 is not admissible for the purpose of determining the amount of punitive damages to be assessed  
13 until the commencement of the subsequent proceeding to determine the amount of exemplary or  
14 punitive damages to be assessed.” Therefore, as a matter of law, the sensitive personal financial  
15 information sought by the Plaintiffs will not be admissible when the trial (which is scheduled to  
16 take 5 weeks) of this matter commences. As such, a two-week delay in discovery does not  
17 significantly prejudice Plaintiffs, any other party, or this Court’s docket.

18 Based on the foregoing, the Opheikens-Welch Defendants respectfully request that this  
19 Court grant their Emergency Request for a Limited Stay of discovery until August 30, 2019.

20  
21 Respectfully submitted this 16<sup>th</sup> day of August, 2019.  
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GODFREY | JOHNSON, P.C.

/s/ Karen Porter

Karen Porter, Esq.  
Nevada Bar No. 13099  
Brett Godfrey, Esq. (*Pro Hac Vice*)  
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Tom Welch and R&O Construction  
Company, Inc.*

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 19<sup>th</sup> day of August 2019, I served a true and correct copy of the foregoing document (and any attachments), in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List: and when necessary: by placing a copy in a sealed envelope, first-class postage fully prepaid thereon, and by depositing the envelope in the U.S. mail at Las Vegas, Nevada, addressed as follows:

Donald J. Campbell, Esq.  
Samuel R. Mirkovich, Esq.  
Philip R. Erwin, Esq.  
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*PETER GARDNER and CHRISTIAN  
GARDNER on behalf of minor child,  
L.G.*

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Daven P. Cameron, Esq.  
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FARBER SHRECK, LLP  
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Las Vegas, NV 89016  
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COWABUNGA BAY WATER PARK

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*BLISS SEQUOIA INSURANCE & RISK  
ADVISORS, INC.; and  
HUGGINS INSURANCE SERVICES, INC.*

By: /s/ Aleda Hall Murray  
An employee of GODFREY JOHNSON

1                   **AFFIDAVIT OF COUNSEL IN SUPPORT OF ORDER SHORTENING TIME**

2   State of Colorado       )  
                                      )ss:  
3   County of Douglas     )

4                   KAREN J. PORTER, ESQ., being duly sworn, deposes and states:

5  
6           1.       That I am an attorney licensed to practice law in all courts in the State of Nevada  
7   and am a member of the law firm of GODFREY | JOHNSON, P.C., 9557 S. Kingston Ct., Englewood,  
8   CO 80112 (the "Firm"), attorneys of record for Defendants Tom Welch, Orluff Opheikens, Slade  
9   Opheikens and Chet Opheikens (collectively, the "Opheikens-Welch Defendants") and Defendant  
10   R&O Construction Company, Inc. ("R&O").

11           2.       The parties agreed to withhold the disclosure of the Opheikens-Welch Defendants  
12   personal financial information in discovery unless and until the Court determined that the punitive  
13   damages claim against the Opheikens-Welch Defendants could proceed to trial.  
14

15           3.       Per the Court's written order dated August 15, 2019, the Court denied the  
16   Opheikens-Welch Defendants' motion for summary judgment thereby allowing Plaintiffs' claims  
17   for punitive damages to go to trial. Accordingly, the Opheikens-Welch Defendants now owe the  
18   Plaintiffs discovery on punitive damages forthwith.

19           4.       The Opheikens-Welch Defendants will file an Emergency Petition for a Writ of  
20   Mandamus with the Supreme Court of the State of Nevada regarding the reasoning of the Court's  
21   August 15, 2019 written order on or before August 19, 2019.  
22


23           5.       As the Supreme Court of the State of Nevada will have insufficient time to dispose  
24   of the writ before the Opheikens-Welch Defendants are required to provide Plaintiffs discovery  
25   on punitive damage, and not wishing to be in violation of this Court's discovery rules, the  
26   Opheikens-Welch Defendants bring the instant motion.

27           6.       The discovery cutoff for this matter is September 7, 2019, and Trial is set for this  
28   matter on October 7, 2019.

7. If the time period for this Motion is not shortened, any decision rendered by the Court regarding said Motion will be rendered after the time by which the Opheikens-Welch Defendants are required to provide Plaintiffs discovery on punitive damages, and will make the relief sought in the Opheikens-Welch Defendants Emergency Petition for a Writ of Mandamus moot and will also cause the Opheikens-Welch Defendants to suffer irreparable harm that cannot be undone once the sensitive personal financial information has been disclosed.

8. For the good cause set forth herein, the Opheikens-Welch Defendants have brought this foregoing Ex Parte Motion for Order Shortening Time.

FURTHER YOUR AFFIANT SAYETH NAUGHT,

T SAYETH NAUGHT.  
  
KAREN J. PORTER, ESQ.

SUBSCRIBED AND SWORN to before me

This 16<sup>th</sup> day of August, 2019.

Connie R. Higgs

NOTARY PUBLIC

CONNIE R HIGGS  
NOTARY PUBLIC  
STATE OF COLORADO  
NOTARY ID 19994012096  
MY COMMISSION EXPIRES JUNE 14, 2023

**AFFIDAVIT OF COUNSEL IN COMPLIANCE WITH EDCR 2.34**

State of Colorado     )  
                                  )ss:  
County of Douglas     )

KAREN J. PORTER, ESQ., being duly sworn, deposes and states:

1. That I am an attorney licensed to practice law in 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"), attorneys of record for Defendants Tom Welch, Orluff Opheikens, Slade Opheikens and Chet Opheikens (collectively, the "Opheikens-Welch Defendants") and Defendant R&O Construction Company, Inc. ("R&O").

2. The parties agreed to withhold the disclosure of the Opheikens-Welch Defendants personal financial information in discovery unless and until the Court determined that the punitive damages claim against the Opheikens-Welch Defendants could proceed to trial.

3. Per the Court's written order dated August 15, 2019, the Court denied the Opheikens-Welch Defendants' motion for summary judgment thereby allowing Plaintiffs' claims for punitive damages to go to trial. Accordingly, the Opheikens-Welch Defendants now owe the Plaintiffs discovery on punitive damages forthwith.

4. The Opheikens-Welch Defendants will file an Emergency Petition for a Writ of Mandamus with the Supreme Court of the State of Nevada regarding the Court's reasoning in its August 15, 2019 written order on or before August 19, 2019.

5. In light of the fact that the Supreme Court of the State of Nevada will have insufficient time to render a decision regarding said Petition before the Opheikens-Welch Defendants are required to provide Plaintiffs discovery on punitive damage, and not wishing to be in violation of this Court's discovery rules, the Opheikens-Welch Defendants bring the instant motion to extend the discovery deadline for the disclosure of discovery on punitive damages be stayed until August 30, 2019 – or until the Supreme Court of the State of Nevada renders a decision

1 on the contemporaneously filed Petition for Writ of Mandamus (whichever occurs first).

2 6. The discovery cutoff for this matter is September 7, 2019, and Trial is set for this  
3 matter on October 7, 2019.

4 7. As such, the Opheikens-Welch Defendants respectfully seek an extension of the  
5 discovery deadlines in the even this Court does not grant the Opheikens-Welch Defendants request  
6 for a stay of this Court's August 15, 2019 order.  
7

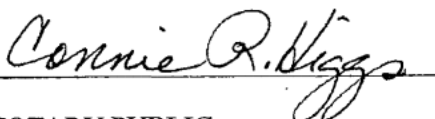
8 8. The undersigned conferred with counsel for Plaintiffs on August 16, 2019, via the  
9 telephone and was informed that Plaintiffs do not consent with the relief sought by the Opheikens-  
10 Welch Defendants in the instant motion.

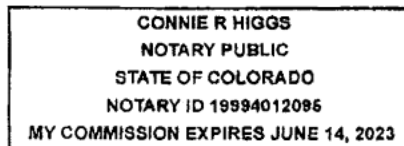
11 9. FURTHER YOUR AFFIANT SAYETH NAUGHT.  
12

13   
14 KAREN J. PORTER, ESQ.  
15

16 SUBSCRIBED AND SWORN to before me

17 This 16th day of August, 2019.

18  
19   
20 NOTARY PUBLIC  
21




**ORDER SHORTENING TIME**

TO: ALL PARTIES IN THIS MATTER; and

TO: COUNSEL OF RECORD FOR ALL PARTIES IN THIS MATTER:

GOOD CAUSE APPEARING, it is hereby ORDERED that the hearing of **OPHEIKENS-  
WELCH DEFENDANTS' OPHEIKENS-WELCH DEFENDANTS' EMERGENCY  
MOTION FOR A LIMITED STAY OF DISCOVERY** be set on the 21<sup>st</sup> day of  
August, 2019, at the hour of 9 AM

DATED this 19 day of August, 2019

  
\_\_\_\_\_  
Hon. Judge Jerry A. Wiese II