IN THE SUPREME COURT OF THE STATE OF NEVADA

ORLUFF OPHEIKENS, SLADE OPHEIKENS, CHET OPHEIKENS, and TOM WELCH, Petitioners, v. EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JERRY A. WIESE II, DISTRICT COURT JUDGE and PETER GARDNER AND CHRISTIAN GARDNER, ON BEHALF OF MINOR CHILD, L.G.; HENDERSON WATER PARK, LLC DBA COWABUNGA BAY WATER PARK; SHANE HUISH; SCOTT HUISH; CRAIG HUISH; WILLIAM PATRICK RAY, JR.; and R&O CONSTRUCTION COMPANY, INC. Real Parties in Interest	)	Case No.: 79426

THE GARDNERS' OPPOSITION TO PETITIONERS' ALTERNATIVE REQUEST FOR A STAY OF PROCEEDINGS AND FOR EXPEDITED REVIEW

Real Parties in Interest Peter and Christian Gardner, on behalf of minor child, L.G. (collectively the "Gardners"), through their undersigned counsel, hereby submit the following Opposition to Petitioners' Alternative Request for a Stay of Proceedings and for Expedited Review.

I. INTRODUCTION

On August 9, 2019, the district court denied multiple motions for summary judgment filed by Petitioners Orluff Opheikens, Slade Opheikens, Chet Opheikens and Tom Welch (collectively the "Individual Defendants") concerning their personal liability for the illegal and grossly negligent conduct that resulted in L.G.'s devastating injuries. In doing so, the district court followed this Court's prior holding that LLC managers—and, specifically, the Individual Defendants—can be held personally liable for tortious conduct in which they participate.[1] *See Gardner on Behalf of L.G. v. Eighth Judicial Dist. Court*, 405 P.3d 651 (Nev. 2017) (holding that NRS 86.371 and NRS 86.381 "are not intended to shield members or managers [of a LLC] from liability for personal negligence[,]" and stating the Individual Defendants could be held liable for negligence based on "their direct knowledge and actions that threatened physical injury to patrons, including L.G.").

[1] Although they neglected to include the Gardners' supporting appendix of exhibits, the overwhelming evidence of the Individual Defendants' negligence is addressed at length in the Gardners' Opposition to the Individual Defendants' Motions for Summary Judgment on the Issues of Duty and Breach. (1 App. 63-129.)

The district court correctly determined that the Individual Defendants can be personally liable even if they were acting in furtherance of the water park's business as managers of the LLC. *See, e.g.*, *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1098, 901 P.2d 684, 689 (1995) ("An officer of a corporation may be individually liable for any tort which he commits, and, if the tort is committed within the scope of employment, the corporation may be vicariously or secondarily liable under the doctrine of respondeat superior); *Hoang v. Arbess*, 80 P.3d 863, 867-68 (Colo. Ct. App. 2003) ("[A]n officer may be held personally liable for his or her individual acts of negligence even though committed on behalf of the corporation, which is also held liable" and, "[m]oreover, that a defendant is at all times acting on behalf of the corporation does not relieve the defendant of liability.") (applying corporate officer standard to a LLC manager); *see also Frances T. v. Village Green Owners Ass'n*, 723 P.2d 573, 581 (Cal. 1986) ("[D]irectors individually owe a duty of care, independent of the corporate entity's own duty, to refrain from acting in a manner that creates an unreasonable risk of personal injury to third parties. The reason for this rule is that otherwise, a director could inflict injuries upon others and then escape behind the shield of his or her representative character, even though the corporation might be insolvent or irresponsible.")

Finally, the district court properly declined to adopt the Individual Defendants' specious argument that the Nevada Legislature's 2017 amendments clarifying the business judgment rule transformed the legal landscape in this State

by granting blanket immunity to LLC managers from third-party tort claims. *See* NRS 78.138(1) (providing that that the business judgment rule applies to the exercise of the fiduciary duties owed by directors and officers to the corporation); *Wynn Resorts v. Eighth Judicial Dist. Court*, 399 P.3d 334, 342 (Nev. 2017) (the business judgment rule exists to prevent "a court from replacing a well-meaning decision by a corporate board with its own decision."); *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, 980 P.2d 940, 951 (Cal. 1999) (the "business judgment rule applies to parties (particularly shareholders and creditors) to whom the directors owe a fiduciary obligation, but does not abrogate the common law duty which every person owes to others—that is, the duty to refrain from conduct that imposes an unreasonable risk of injury to third parties.") (quoting *Frances T.*, 723 P.2d at 582-83) (cited with approval in *Wynn Resorts*, 399 P.3d at 342); *cf. Deboer v. Sr. Bridges of Sparks Fam. Hosp.*, 128 Nev. 406, 410, 282 P.3d 727, 731 (2012) ("Immunity from liability cannot be enjoyed simply due to one's legal status.").[2]

[2] The Individual Defendants expressly acknowledged that Nevada's common law business judgment rule as codified in 2003 only governed the fiduciary duties that a corporate director or officer owes to the corporation itself, not third parties such as L.G. (2 AA 224-225 at 7:24-8:15.) The Individual Defendants, however, assert that the Legislature abrogated the common law principles espoused in *Semenza* and *Gardner* by enacting the 2017 amendments. While the Individual Defendants' interpretation of the 2017 amendments to NRS 78.138 is flat wrong, it is well-settled that "this Court will not read a statute to abrogate the common law without clear legislative instruction to do so." *First Fin. Bank v. Lane*, 130 Nev. 972, 979, 339 P.3d 1289, 1293 (2014). Although the Legislature made express findings regarding its intent when enacting the 2017 amendments to NRS 78.138, *see* NRS 78.012, it never provided any "clear instruction" that it was abrogating the common law principle that

As a result of the district court's denial of summary judgment, the Gardners will finally have their day in court after more than four years of litigation including three different appeals to this Court. In a last-ditch effort to avoid liability or, at a minimum, delay the trial, the Individual Defendants filed an Emergency Petition for Writ of Mandamus on August 20, 2019. Based on a manufactured emergency, the Individual Defendants ask this Court to make a ruling based on a 100-page rambling writ petition in less than 10 days. Recognizing the unreasonable nature of their request, the Individual Defendants have furtively embedded an "alternative" motion to stay the *entire* district court proceedings within their writ petition and further ask the Court to enter any such stay on an expedited basis. *See* Pet. at xv. The instant Opposition is limited to addressing the Individual Defendants' request to stay the entire district court proceedings, which is improper for a multitude of reasons.

II. ARGUMENT

A. There Is No Emergency In This Case.

The basis for the Individual Defendants' so-called emergency is that they are required to produce discovery related to the issue of punitive damages now that the district court denied their motion for summary judgment on that issue. The

---

corporate directors and officers (or LLC managers) can be held personally liable in third party tort actions when they personally participate in tortious conduct. *See* NRS 78.012. This silence is telling.

Gardners, though, stipulated below to stay the requirement for the Individual Defendants to produce discovery related to punitive damages until August 30, 2019. Had the Individual Defendants asked to stay the production for a longer period of time, the Gardners would likely have agreed to any reasonable request as the parties are otherwise consumed with getting ready for the rapidly-approaching trial in this matter.

Again, the district court denied the Individual Defendants' multiple motions for summary judgment on August 9, 2019. Motions in *limine*—in excess of 40 by the defendants alone—are now due to be filed on August 23, 2019; oppositions to motions in *limine* are due on September 4; replies are due on September 10; and the pre-trial conference in this matter is set for September 14, 2019. The Court will hear the motions in *limine* on September 16, 2019, and trial is set to begin on a five-week stack on October 7, 2019. The punitive damages discovery, in other words, is the epitome of the tail wagging the dog.

That said, the Gardners do not object to the expeditious review of the Individual Defendants' writ petition especially where, as here, (i) the district court followed hornbook law in denying the motions for summary judgment, and (ii) this Court is fully capable of denying the writ petition without the necessity of an answer. If, however, the Court believes an answer would be of assistance, the Gardners merely request that the briefing schedule accommodate the parties' pretrial obligations in the district court.

B. The Individual Defendants' Request For A Complete Stay Is Procedurally And Substantively Deficient.

"NRAP 8(a) requires that an application for a stay pending appeal be made to the district court in the first instance." *See Nelson v. Heer*, 121 Nev. 832, 836, 122 P.3d 1252, 1254 (2005). "This requirement is grounded in the district court's vastly greater familiarity with the facts and circumstances of the particular case." *Id.* The failure to request a stay from the district court is grounds for denial absent circumstances that are not present here. *Id.* at 836-37, 122 P.3d 1254-55.

The Individual Defendants never presented their request to stay the entire proceedings to the district court as is ordinarily required under NRAP 8(a)(1). Nor have they explained why first moving in the district court would have been impracticable. *See* NRAP 8(a)(2)(A)(i). Indeed, the Individual Defendants can make no such showing because they were undisputedly able to move for more modest relief before the district court, namely a stay of their obligation to produce punitive damages discovery. When the Gardners' counsel saw the limited nature of the relief being sought—as opposed to the complete stay of proceedings sought here—they advised opposing counsel of their non-objection to the request, and the parties entered a stipulation to that effect. Now, after seeking to impose an entirely unworkable 10-day schedule on this Court and the Gardners to review, respond to and rule on their mammoth writ petition, the Individual Defendants feign reasonableness by suggesting that the Court can alternatively stay the entire district

court proceedings should it wish to take longer to address the writ petition. This tactic deprived both the district court and the Gardners from addressing this unreasonable request in the first instance below.

While the Individual Defendants have made known their true intention to shut down the trial court proceedings in their entirety on the eve of trial, they have nonetheless failed to address any of the factors set forth in NRAP 8(c). This, too, is reason enough to summarily deny the Individual Defendants' stay request. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). Even if the Court were to entertain this matter, a cursory review of the NRAP 8(c) factors demonstrates that the Individual Defendants are not entitled to the sweeping relief they seek.

In deciding whether there is good cause to issue a stay, the Court weighs the following factors: (i) whether the object of the writ petition will be defeated if the stay is denied; (ii) whether petitioner will suffer irreparable or serious injury if the stay is denied; (iii) whether the real party in interest will suffer irreparable harm or serious injury if the stay is granted; and (iv) whether petitioner is likely to prevail on the merits in the writ petition. *See* NRAP 8(c); *Hansen v. Eighth Judicial Dist. Ct.*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000). Each factor weighs in favor of denying a stay.

First, the object of the writ petition will not be defeated in the absence of a stay. "The right to immediately appeal or even to appeal in the future, after a final judgment is entered, will generally constitute an adequate and speedy legal remedy precluding writ relief." *D.R. Horton, Inc. v. Eighth Judicial Dist. Ct.*, 123 Nev. 468, 475, 168 P.3d 731, 736 (2007). The Individual Defendants contend that trial will be for naught if the Court accepts the writ petition and reverses the district court's denial of summary judgment. But the same could be said in every case where a defendant fails to obtain summary judgment prior to trial. That is not the law and, regardless, this case will proceed to trial against Henderson Water Park, LLC on October 7, 2019 irrespective of the outcome of the Opheikens-Defendants' writ petition.

Second, the Individual Defendants will not suffer irreparable harm without a stay. The disclosure of punitive damages discovery has been addressed by the district court through the partial stay that was stipulated to by the parties. And the mere fact that the Individual Defendants will be required to prepare for and participate in a trial does not constitute irreparable harm. *See Hansen*, 116 Nev. at 658, 6 P.3d at 986-87 (litigation expenses such as "lengthy and time-consuming discovery, trial preparation, and trial [ ] while potentially substantial, are neither irreparable nor serious.").

Third, the Gardners will undoubtedly suffer serious harm if a complete stay of proceedings is entered. Because of the delay caused by being repeatedly forced to seek appellate review to pursue straightforward causes of action against the

Individual Defendants and other parties, more than four years have elapsed since the Complaint was filed yet the Gardners still await their day in court. At the same time, L.G. continues to suffer from the severe neurological injuries caused by his drowning, which has resulted in Christian Gardner leaving her employment to provide 24-hour care to L.G. thus imposing a significant burden on the Gardner family. Any further delay in this case is both untenable and unjust.

Fourth, the Individual Defendants have no likelihood of success on the merits. As demonstrated above, the district court correctly applied the law governing personal liability for LLC managers as established by this Court in this case. *See supra* at Section I. Moreover, the district court properly rejected the Individual Defendants' hail-mary argument that Nevada's business judgment rule provides a complete bar to third-party tort liability for corporate officers/directors and LLC managers. *Id.* The Individual Defendants' desperate attempt to erect a statutory shield from the consequences of their illegal and grossly negligent conduct contravenes the law in Nevada and every other jurisdiction in the United States.

. . . . .

. . . . .

. . . . .

. . . . .

. . . . .

. . . . .

III. CONCLUSION

Based on the foregoing, the Gardners respectfully request that the Court deny the Individual Defendants' Alternative Request for a Stay and for Expedited Review in its entirety.

Dated: August 20, 2019

CAMPBELL & WILLIAMS

By /s/ ***J. Colby Williams***
DONALD J. CAMPBELL, ESQ. (1216)
J. COLBY WILLIAMS, ESQ. (5549)
PHILIP R. ERWIN, ESQ. (11563)
SAMUEL R. MIRKOVICH, ESQ. (11662)

Attorneys for Real Parties in Interest
Peter and Christian Gardner, on Behalf of
Minor Child, L.G.

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 20th day of August 2019, I caused true and correct copies of the foregoing Opposition to Alternative Request for a Stay and for Expedited Review to be delivered to the following counsel and parties:

VIA HAND DELIVERY:

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

VIA ELECTRONIC AND U.S. MAIL:

Kirk B. Lenhard, Esq.
Daven P. Cameron, Esq.
BROWNSTEIN HYATT
FARBER SHRECK, LLP
100 North City Parkway
Las Vegas, Nevada 89106

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

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

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

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

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

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