IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court No. _____
District Court Case No. A-18-772761-C



VENETIAN CASINO RESORT, LLC, a Nevada limited liability company;
LAS VEGAS SANDS, LLC, a Nevada limited liability company,
Petitioners,

v.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE KATHLEEN DELANEY in her capacity as District Judge,
Respondent,
JOYCE SEKERA, an individual,
Real Party in Interest

EMERGENCY PETITION UNDER NRAP 27(e)

PETITIONERS' EMERGENCY PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION UNDER NRAP RULES 21(a)(6) AND 27(e)

ACTION IS NEEDED IMMEDIATELY BEFORE PETITIONER IS REQUIRED TO PROCEED IN MATTER LACKING SUBJECT MATTER JURISDICTION

ALTERNATIVE EMERGENCY MOTION TO STAY UNDER NRAP RULES 8 AND 27(e) IS BEING FILED CONCURRENTLY WITH THIS PETITION

Michael A. Royal, Esq. (SBN 4370)
Gregory A. Miles, Esq. (SBN 4336)
ROYAL & MILES LLP
1522 W. Warm Springs Rd.
Henderson, Nevada 89014
Telephone: (702) 471-6777
Facsimile: (702) 531-6777
Email: mroyal@royalmileslaw.com
gmiles@royalmileslaw.com

## NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP, Rule 26.l(a) and must be disclose. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

VENETIAN CASINO RESORT, LLC, Nevada limited liability company licensed to do business in the State of Nevada, active since 1997, doing business as the Venetian Resort Hotel Casino.

LAS VEGAS SANDS, LLC, Nevada limited liability company licensed to do business in the State of Nevada since 2005.

VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC ("Petitioners") are represented in the District Court and in this Court by Michael A. Royal, Esq., and Gregory A. Miles, Esq., of the law firm of Royal & Miles LLP.

DATED this 22 day of January, 2020.

ROYAL & MILES LLP

By: _____

Michael A. Royal, Esq. (SBN 4370)
Gregory A. Miles, Esq. (SBN 4336)
1522 W. Warm Springs Rd.
Henderson, NV 89014
(702) 471-6777
Counsel for Petitioners

## ROUTING STATEMENT

This case involves a matter that falls in a category of cases for which the Supreme Court has retained assignment pursuant to NRAP, Rule 17(a). NRAP, Rule 17(a)(12) provides the Supreme Court shall hear and decide: "Matters raising as a principal issue a question of statewide public importance, or an issue upon which there is an inconsistency in the published decisions of the Court of Appeals or of the Supreme Court or a conflict between published decisions of the two courts." The instant writ petition challenges an order denying Petitioners request for summary judgment based upon subject matter jurisdiction and an employee's exclusive remedy within the Workers' Compensation system as provided under the Nevada Industrial Insurance Act ("NIIA"). This matter presents a question of statewide public importance regarding the scope and application of the immunity provided by the NIIA. This statement is made pursuant to NRAP, Rule 28(a)(5).

**AFFIDAVIT OF MICHAEL A. ROYAL, ESQ. IN SUPPORT OF PETITIONERS' EMERGENCY PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION AND *NRAP 27(E) CERTIFICATE***

STATE OF NEVADA )
) ss:
COUNTY OF CLARK )

1. I am an attorney licensed to practice in the State of Nevada and am an attorney at the law firm of Royal & Miles LLP, Attorneys for Petitioners VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC, in support of this PETITIONERS' EMERGENCY PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION UNDER NRAP RULES 21(a)(6) AND 27(e).

2. The telephone numbers and office addresses of the attorneys for the Real Party in Interest are listed as follows:

Keith E. Galliher, Jr., Esq.
THE GALLIHER LAW FIRM
1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89014
(702) 735-0049

Sean K. Claggett, Esq.
William T. Sykes, Esq.
Geordan G. Logan, Esq.
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, NV 89107
(702) 333-7777

3. Counsel for Real Party In Interest, Joyce Sekera (hereinafter "Sekera"), was served with this Petition via electronic service as identified on the proof of service in this document. Prior to filing this Petition and Motion my

office contacted, by telephone, the clerk of the Supreme Court, the Clerk of the Eight Judicial District Court of the State of Nevada, and Real Party in Interest's attorney to notify them that Petitioners were filing the instant Petitioners' Emergency Petition for Writ of Mandamus and/or Writ of Prohibition Under NRAP, Rules 21(A)(6) And 27(E).

4. Petitioners will be required to incur costly and needless litigation, and the underlying court will need to unnecessarily divert needed judicial resources, if this Honorable Court does not take action. Petitioners assert that they are entitled to summary judgment as a matter of law pursuant to the Nevada Industrial Insurance Act ("NIIA"), arising from a contract between Venetian Casino Resort, LLC, and Sekera's employer, Brand Vegas, LLC, with Sekera sustaining a work related injury in the course and scope of her employment on November 4, 2016. Petitioners contend that the issue of summary judgment based upon statutory immunity presented before the District Court is jurisdictional and potentially case ending. Accordingly, principles of both judicial economy and fairness favor this Honorable Court granting immediate relief. Petitioner is filing an Emergency Motion for Stay pursuant to Rules 8 and 27(e). If this Court grants that motion, then this Petition may be considered on a non-emergency basis.

5. The August 3, 2020 trial setting was recently vacated, with discovery continued to the present deadline of July 6, 2020. Sekera has alleged that she

sustained injuries in a slip and fall due to the presence of a foreign substance on a marble floor within the Venetian Resort Hotel Casino ("Venetian") on November 4, 2016.

6. Petitioners filed a motion for summary judgment on July 9, 2019, asserting that the District Court lacks jurisdiction to adjudicate this matter under the NIIA. The motion was heard on August 13, 2019, in which the District Court denied Petitioners' motion with prejudice. The Findings of Fact, Conclusions of Law and Order Denying Defendants' Motion for Summary Judgment Based on Statutory Immunity under the Nevada Industrial Insurance Act was filed on September 13, 2019.

7. Petitioners currently have a Petition for Writ of Mandamus and/or Writ of Prohibition pending before the Court of Appeals (Case No. 79689-COA). This petition arises from a September 17, 2019, discovery order issued by the District Court under which Petitioners have been compelled to disclose the private information of non-party patrons. This petition is fully briefed and awaiting further response from the Court of Appeal.

8. Petitioners have incurred hundreds of thousands of dollars in defense of this matter, to date, and expect to incur much more in legal expenses to defend this matter through trial. Petitioners contend that the issue of summary judgment based upon statutory immunity presented before the District Court is jurisdictional

and potentially case ending. Accordingly, principles of both judicial economy and fairness favor this Honorable Court hearing this petition as soon as possible. Alternatively, Petitioners are filing concurrently with this Petition a Motion to Stay the proceeding below. If the Court grants this motion then this Petition need not be heard on an emergency basis.

9. The relief sought in this Writ Petition is not available by the District Court. The District Court denied the motion for summary judgment with prejudice, thereby leaving Petitioners with no other avenue for relief other than to file this writ with the Nevada Supreme Court. It is imperative this matter be heard at the Court's earliest possible convenience.

10. I certify that I have read this petition and, to the best of my knowledge, information and belief, this Petition complies with the form requirements of Rule 21(d) and is not frivolous or interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

11. I further certify that this brief complies with all Nevada Rules of Appellate Procedure, including the requirements of Rule 28(e) every assertion in the brief regarding matters in the record be supported by a reference to the appendix where the matter relied upon is to be found. I understand I may be

subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

12. I have discussed the PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS with my Client, and have obtained authorization to file this Writ Petition.

Further affiant sayeth naught.

MICHAEL A. ROYAL, ESQ.

SUBSCRIBED AND SWORN to before me by Michael A. Royal, Esq., on this 22 day of January, 2020.

ASHLEY SCHMITT
NOTARY PUBLIC
STATE OF NEVADA
Appt. No. 08-5493-1
My Appt. Expires Nov. 1, 2023

NOTARY PUBLIC in and for said County and State

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**

**Rules**



**Nevada Constitution**



**Unpublished Decisions**

## PETITION

COMES NOW, Petitioners, VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC ("Petitioners"), by and through their counsel of record, ROYAL & MILES LLP, and hereby petition this Court for a Writ of Prohibition and/or Mandamus under NRAP Rule 21(a) ordering the Eighth Judicial District Court to vacate the September 13, 2019 Findings of Fact, Conclusions of Law and Order Denying Defendants' Motion for Summary Judgment Based on Statutory Immunity Under the Nevada Industrial Insurance Act, and to enter a new Order granting said relief.

Petitioners further request that this relief be granted pursuant to NRAP Rules 27(e) and 21(a)(6). Petitioners are continuing to spend tens of thousands of dollars monthly to defend this litigation for which they claim that the District Court has no jurisdiction to hear. Accordingly, this matter is ripe for immediate review by this Honorable Court and irreparable harm will result to Petitioners if this matter is not heard on an emergency basis. Alternatively, Petitioners are filing concurrently with this Petition, a motion to stay the underlying proceedings pursuant to NRAP Rules 8(a) and 27(e). If this Honorable Court grants that motion, then this matter may be heard on a non-emergency basis.

This Petition is based on the following Memorandum of Points and Authorities, the Appendix of record and such oral arguments as presented to this Honorable Court.

DATED this 22 day of January 2020.

ROYAL & MILES LLP

By: _____

Michael A. Royal, Esq. (SBN 4370)
Gregory A. Miles, Esq. (SBN 4336)
1522 W. Warm Springs Rd.
Henderson, NV 89014
(702) 471-6777
Counsel for Petitioners

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. STATEMENT OF CASE

This case arises from an alleged slip and fall at the Venetian which occurred on November 4, 2016, involving JOYCE SEKERA ("Sekera"). More specifically, Sekera alleges that she slipped and fell while walking through the Grand Lux rotunda area of the Venetian property in the course and scope of her employment with Brand Vegas, LLC ("Brand Vegas"), resulting in bodily injuries. Sekera filed a claim for workers compensation which was accepted and is ongoing.

Petitioners contend that Sekera is precluded from suing them for civil liability because they qualify for protection under the exclusive remedy provision of the Nevada Industrial Insurance Act ("NIIA") pursuant to their contractual relationship with Brand Vegas and their working relationship with Sekera for a common business purpose. Brand Vegas contracted with Venetian to promote and sell tickets for various shows and events occurring on Venetian property. (The contracts which form the basis of the business relationship between Venetian and Brand Vegas are collectively referenced hereafter as the "Venetian/Brand Vegas Agreement".)

The Venetian/Brand Vegas Agreement provides Brand Vegas with authorization to sell tickets to entertainment events held on Venetian property with a compensation arrangement on a percentage basis. Sekera was in turn paid commissions by Brand Vegas for each ticket she sold as a kiosk employee. The

selling of Venetian show tickets is work normally carried on through Venetian employees and is part-and-parcel of Venetian's trade and business of hosting entrainment and shows at its property. As detailed further herein, Venetian qualifies as a statutory employer under the NIIA and is afforded the exclusive remedy protection set forth in NRS § 616B.612(4).

Sekera's employment with Brand Vegas, which began on or about December 26, 2015, required her to come upon Venetian property daily to work at one of three kiosks located in the Grand Canal Shops. As a Grand Canal Shops employee, Sekera was required to undergo a background check by Venetian and was thereafter issued an identification badge which provided her with access to the employee entrance and back of the house areas of Venetian's property. Petitioner was required by Venetian to use the Venetian Team Member entrance and exit daily. Sekera, was also issued a parking pass by Venetian, providing her with access to employee parking areas on Venetian property, which she was also required by Venetian to use. Venetian dictated not only where Sekera could park her vehicle and enter/exit its property, but also roads to be used when arriving and departing Venetian property. Also, by virtue of the Venetian/Brand Vegas Agreement, Sekera was to follow a "Code of Conduct" established by Venetian. Finally, Venetian could have invoked discipline on Plaintiff for non-compliance of

its policies, including expulsion from the property – which would render her entirely unable to work as a Brand Vegas employee within the Grand Canal Shops.

Sekera's employment with Brand Vegas required her to represent Venetian's interests to all guests who come upon Venetian property, to sell tickets for Venetian events, required her to interact regularly with Venetian box office personnel in furtherance of her sales efforts (which could not have been accomplished without coordination with Venetian box office personnel) and, as noted, provided her with access to exclusive Venetian parking and other areas reserved for Venetian employees. Further, Petitioners have two departments which perform the very same services provided by Sekera as a kiosk ticket salesperson for Brand Vegas.

On the basis of facts supporting Venetian's position as a statutory employer of Sekera, Venetian filed a Motion for Summary Judgment in the District Court. At the August 13, 2019 hearing, the District Judge concluded that Petitioners did not establish a right to statutory immunity under the NIIA by any measure, which is set forth within the Findings of Fact, Conclusions of Law and Order Denying Defendants' Motion for Summary Judgment Based on Statutory Immunity under the Nevada Industrial Insurance Act, filed on September 13, 2019. Petitioners' motion was denied with prejudice and their motion for a stay pending filing of this writ was likewise denied.

Petitioners respectfully submit that the District Judge was mistaken in her application of Nevada law to the given facts. Petitioners will suffer irreparable harm if this issue is not taken by the Supreme Court for review. Moreover, this case presents broader questions regarding the scope of exclusive remedy protection and statutory employer status that necessitate the filing of this writ in order to clarify these important issues of law and right the injustice to Petitioners who assert that the District Court has no jurisdiction in this matter under the NIIA.

## II. RELIEF SOUGHT

Pursuant to Nev. Const. Art. 6, § 4, NRS § 34.320 or NRS § 34.160 and NRAP Rule 21, Petitioners request that this Court issue a Writ of Mandamus and/or Writ of Prohibition instructing Respondent, the Eighth Judicial District Court of the State of Nevada and the Honorable Judge Delaney to:

1. Vacate the District Court's Findings of Fact, Conclusions of Law and Order Denying Defendants' Motion for Summary Judgment Based on Statutory Immunity under the Nevada Industrial Insurance Act was filed on September 13, 2019;

2. Provide clarification on the issue of the NIIA and its application to these and like circumstances; and/or

3. Issue an order instructing the District Court to enter an Order Granting Defendants' Motion for Summary Judgment Based on Statutory Immunity under the Nevada Industrial Insurance Act.

Petitioners are requesting this relief on an emergency basis as irreparable harm will be caused to Petitioners by virtue of ongoing mounting legal expenditures in a matter where they contend the District Court has no jurisdiction. Concurrently with this writ petition, Petitioners are filing an emergency motion to stay the underlying litigation until this Honorable Court issues its ruling on this Petition. If this Honorable Court grants that motion, then this writ may be considered on a non-emergency basis.

## III. ISSUES PRESENTED

Whether the District Court erred, as a matter of law, in failing to find that Defendants were the statutory employer of Sekera and denying Petitioners' motion for summary judgment under the NIIA exclusive remedy protection.

## IV. STANDARD OF REVIEW

### A. STANDARDS FOR WRIT REVIEW AND RELIEF

The Nevada Supreme Court has original jurisdiction to issue writs of prohibition and mandamus. (Nev. Const. Art. 6, § 4.) Mandamus is available to compel performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of

discretion. (*Ivey v. Dist. Ct.*, 299 P.3d 354 (2013). See also NRS § 34.160.) "[W]here an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction, our consideration of a petition for extraordinary relief may be justified." (*Mineral County v. State, Dep't of Conserv.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001) (internal citations omitted).)

Writ relief is warranted where the Petitioners do not have a plain, speedy, and adequate remedy at law. (*Millen v. District Court*, 122 Nev. 1245, 1250-1251 (2006).) Special factors favoring writ relief include status of underlying pleadings, types of issues raised by the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented. (*D.R. Horton v. District Court*, 123 Nev. 468, 474-75 (2007).) An appellate court generally will address only legal issues presented in a writ petition. (See *Poulos v. Eighth Jud. Dist. Ct.*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982).) "[T]he standard" in the determination of whether to entertain a writ petition is '[t]he interests of judicial economy." (*Smith v. Eighth Jud. Dist. Ct.*, 113 Nev. 1343, 1355, 950 P.2d 280, 281 (1997).) When the parties raise only legal issues on appeal from a district court order, the Court reviews the matter de novo. (*St. James Village, Inc. v. Cunningham*, 125 Nev. 211, 216 (2009).)

The District Judge denied Petitioners' motion for summary judgment with prejudice. Accordingly, Petitioners "have no effective remedy" other than

petitioning this Honorable Court for review. (See, *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350, 891 P.2d 1180, 1183-84 (1995).) The Supreme Court of Nevada is the proper forum to assess whether Petitioners are entitled to the relief being sought. Therefore, Petitioners seek immediate review of this critical jurisdictional issue.

Petitioners moved for a stay of execution in district court, which was denied. Due to the circumstances, this Emergency Petition is being filed with this Court pursuant to NRAP Rules 21(a)(6) and 27(e) asking this Court to grant the relief requested in less than 14 days. Alternatively, Petitioners herein move for an immediate stay pursuant to NRAP 8(a) so that the underlying matter will be stayed pending this Honorable Court's review. Such emergency relief or stay is required as the parties continue to incur substantial costs and judicial resources are being diverted to a matter over which the NIIA provides the District Court has no jurisdiction. Petitioners have no other available avenue for relief. Petitioners further submit that this case provides the Court with an opportunity to further clarify issues surrounding this critical area of the law.

### B. THIS PETITION PRESENTS EXTRAORDINARY CIRCUMSTANCES CALLING FOR EXTRAORDINARY RELIEF

The subject litigation arises from a slip and fall incident allegedly occurring due to a foreign substance on the Venetian marble floor on November 4, 2016.

Petitioners argue that Sekera has no legal basis to file a lawsuit against them as statutory employers under the NIIA. Given the potential case ending nature of the jurisdictional question at issue, Petitioners contend they will suffer irreparable damages by having to go through a trial in a case where they have no legal liability as a statutory employer of Sekera.

Absent intervention by this Court, Petitioners, and others similarly situated will suffer irreparable harm. In issuing its Order denying summary judgment, with prejudice, the District Court effectively forced Petitioners to file this writ and request a stay.

Under the current scheduling order in this matter the close of discovery is set for July 6, 2020. The parties will need to disclose expert witnesses by April 8, 2020. Petitioners currently anticipate needing to retain seven to 10 experts to address the various damages and liability issues raised by Sekera. Numerous discovery disputes are also ongoing in the underlying matter causing the parties to incur needless expenses and diverting judicial resources on a matter over which the District Court has no jurisdiction.

This Petition for Writ contains an important issue of law that can potentially end the litigation. Moreover, deciding this issue on Writ will promote judicial economy, as it will avert the unnecessary expenditure of legal expenses and judicial resources. Accordingly, Petitioners respectfully request that this Court

grant the emergency petition vacating the District Court's September 13, 2019 Findings of Fact, Conclusions of Law and Order Denying Defendants' Motion for Summary Judgment Based on Statutory Immunity under the Nevada Industrial Insurance Act. Additionally, Petitioners request this Honorable Court to provide guidance on the scope of NIIA immunity and direct the District Court to enter an Order Granting Petitioners' Summary Judgment Motion.

## V. RELEVANT FACTS

This litigation arises from a November 4, 2016, slip and fall allegedly occurring from a foreign substance on the floor. The underlying case was filed by Sekera on April 12, 2018. Sekera has alleged that Petitioners allowed liquid on the Venetian floor causing her to slip and fall. (*See* Petitioners' Appendix, Vol. 1, Tab 1 at VCR 226, ln. 4-10; Petitioners' Appendix, Vol. 2, Tab 1 at VCR 250.) Sekera related to Venetian security personnel at the scene following the incident that, "she was walking through the area when she slipped in what she believed was water on the floor." (See Petitioners' Appendix, Vol. 2, Tab 1 at VCR 250.)

Venetian is in the business of hospitality, gaming and entertainment. (See, *id.*, Petitioners' Appendix, Vol. 3, Tab 4 at VCR 696 (ln. 26) – VCR 697 (ln. 27).)

As part of its business operations, Venetian enters into agreements with entertainment entities to present shows and events for guests. (See *id.* at Petitioners' Appendix, Vol. 2, Tab 1 at VCR 407 – VCR 492; Petitioners'

Appendix, Vol. 3, Tab 1 at VCR 493 – VCR 618.) Venetian has a box office staff and concierge staff that provides guest services which include the selling of tickets to Venetian shows and events. (See Petitioners' Appendix, Vol. 2, Tab 1 at VCR 407 – VCR 414; Petitioners' Appendix, Vol. 3, Tab 1 at VCR 620 – VCR 623.) These Venetian employees also sell tickets to guests for other shows and events off Venetian property throughout the Las Vegas area. (See Petitioners' Appendix, Vol. 2, Tab 1 at VCR 407 – VCR 409; Petitioners' Appendix, Vol. 3, Tab 1 at VCR 620 – VCR 623.) Such was the case in 2015 when Venetian established a business relationship with Brand Vegas, by entering into an agreement allowing Brand Vegas to sell tickets to Venetian events and shows, with an established commission schedule. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 045 – VCR 46 ¶ 2; VCR 051; VCR 208 – VCR 217; Petitioners' Appendix, Vol. 2, Tab 1at VCR 407 – VCR 409; Petitioners' Appendix, Vol. 3, Tab 1 at VCR 620 – VCR 622.)[1]

[1] The affidavits of Charry Kennedy (Petitioners' Appendix, Vol. 1, Tab 1 at VCR 208 – VCR 211) and Edward DiRocco (*id.* at VCR 213 – VCR 217) reference Exhibits A, B and C to the motion for summary judgment, identified herein within Petitioners' Appendix, Vol. 1, Tab 1 as VCR 032 – VCR 166 (MSJ Exhibit A), VCR 167 – VCR 203 (MSJ Exhibit B), and VCR 204 – VCR 206 (MSJ Exhibit C). The Code of Conduct referenced by Ms. Kennedy as Exhibit B to her affidavit is Exhibit C to the MSJ, identified in this Petition as VCR 204 – VCR 206 within Petitioners' Appendix, Vol. 1, Tab 1. Exhibits A-C of the DiRocco affidavit follow the MSJ Exhibits A-C, identified herein as set forth above.

Venetian entered into a series of agreements with Brand Vegas to facilitate the sale of tickets to Venetian shows and events occurring on Venetian property prior to December 2015. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 032 – VCR 166; VCR 208 – VCR 217; Petitioners' Appendix, Vol. 2, Tab 1 at VCR 407 – VCR 492; Petitioners' Appendix, Vol. 3, Tab at VCR 493 – VCR 600.) Each Ticket Broker Agreement was linked to an agreement between Venetian and the respective entertainment company. (See *id.*) It was Venetian's desire to enhance its ability to sell tickets to entertainment shows it hosts on property by engaging Brand Vegas. (See *e.g.,* Petitioners' Appendix, Vol. 1, Tab 1 at VCR 033 (preamble); VCR 045 (preamble); VCR 057 (preamble).)

Per the Venetian/Brand Vegas Agreement, Venetian was to provide Brand Vegas with seats for patrons to attend Venetian shows and events, and Brand Vegas was to sell seats through its efforts by providing guests with vouchers to obtain tickets directly from the Venetian box office. (See *e.g.,* Petitioners' Appendix, Vol. 1, Tab 1 at VCR 045 – VCR 053; see also, *generally*, *id.* at VCR 054 – VCR 166; VCR 208 – VCR 217.) Guests could purchase tickets to these shows and events from Brand Vegas kiosks, the Venetian box office and the Venetian concierge desk. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 208 – VCR 217; Petitioners' Appendix, Vol. 2, Tab 1 at VCR 264 (44:15-25); VCR 265

(45:1-13); VCR 268 (59:17-25; 60:1-13); VCR 410 – VCR 414; Petitioners' Appendix, Vol. 3, Tab 1 at VCR 620 – VCR 623.)

As part of the Venetian/Brand Vegas Agreement, Brand Vegas was deemed an independent contractor with sole responsibility for the acts of its employees and/or agents while in furtherance of its obligations under the agreement. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 037 ¶ 19.) Brand Vegas operated kiosk spaces in three areas of the Grand Canal Shops, located above the Venetian casino area and within the Venetian property. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 213 – VCR 217; Petitioners' Appendix, Vol. 2, Tab 1at VCR 348 (14:1-20); see also Petitioners' Appendix, Vol. 2, Tab 1 at VCR 305 – VCR 306 (dep. pp. 207-12).)

Sekera was employed by Brand Vegas to operate one of its three kiosks in the Grand Canal Shops within the Venetian property from on or about December 26, 2015 through November 4, 2016. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 216 – VCR 217; VCR 224 (ln. 6-10); VCR 231 (ln. 8).)

Sekera was assigned to work at a Brand Vegas kiosk located in the Grand Canal Shops, within the same structure as Venetian, one floor above the Venetian casino. (See *id.*; see also Petitioners' Appendix, Vol. 2, Tab 1 at VCR 348 (41:1-20).)

Sekera's employment duties with Brand Vegas included her efforts to further the interests of Brand Vegas and Venetian pursuant to the Venetian/Brand Vegas Broker Agreement. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 216 ¶ 20.)

Sekera specifically testified as follows regarding her obligation to represent Venetian while working as a Brand Vegas kiosk employee:

> Q. *... when you were working for Brand Vegas, if people come up to you and ask you questions related to Venetian events and so forth, that you would provide the information with a smile?*
>
> A. *Definitely. Oh, yes.*
>
> Q. *And when you were on Venetian property or Grand Canal Shoppes, you had -- wasn't there some kind of a code of conduct that you –*
>
> A. *Yes.*
>
> Q. *What was the code of conduct that – your understanding about it?*
>
> A. ***Just be pleasant, smile a lot, and make sure you give the right information for the Venetian.***
>
> Q. ***Okay. Because it's important to your employer to represent the Venetian appropriately?***
>
> A. ***That's correct.***
>
> (See Petitioners' Appendix, Vol. 2, Tab 1 at VCR 307 (213:2-17) (emphasis added).)

During her employment with Brand Vegas from December 26, 2015 through November 4, 2016, Sekera sold tickets to Venetian shows and events consistent

with her responsibility associated with the Venetian/Brand Vegas Agreement. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 216 ¶¶ 19-20 (referencing BV 012 – BV 47, identified herein as VCR 168 – VCR 203).)[2] While on Venetian property, Sekera was to follow the Code of Conduct expected by Venetian of contracted workers. (See *id.* at VCR 216 ¶¶ 20-23; see also *id.* at VCR 209 – VCR 210 ¶¶ 10-13.)

Sekera described the process of engaging guests interested in seeing Las Vegas shows in part as follows:

> Q. *Do you remember --* ***can you give us an idea of some of the shows you sold tickets to at the Venetian?***
>
> A. *Phantom of the Opera, when it was there. You'd almost have to name them and I'd say yes or no.*
>
> Q. *Human Nature?*
>
> A. *Oh, definitely Human Nature. Yes.*
>
> Q. *There's a puppet one, Puppet Up or something?*
>
> A. *Yeah.*
>
> Q. *I'm trying to think of others.* ***But whatever the events were at the Venetian, so somebody says, "We're kind of looking to see a show. Do you have any recommendations?" would people do that sometimes?***

[2] Edward DiRocco, owner and CEO of Brand Vegas, testified in deposition on May 14, 2019 that information his company provided on Sekera's sales for 2015-16 is not complete, due to a significant loss of electronic data following a transfer to a new system after 2016. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 351 (dep. 25:1-18); VCR 354 – VCR 355 (dep. 40-41).)

A. ***Oh, definitely. We'd recommend the Venetian, like the others also.***

Q. *Right.* ***And so you would say, "Well, Phantom of the Opera is very popular. That happens to be on property at the Venetian"; right?***

A. ***Right.***

*Q. So whatever it is, when you would -- let's say somebody says, "Okay. I'd like some tickets for Phantom of the Opera," what's the next thing that you do? What would you do? Could you sell them tickets?*

A. *Yes.*

Q. *Okay. So they say, "We want two tickets," what's the next thing that you do when you were employed as a kiosk worker for Brand Vegas?*

A. *Tell them the price.*

Q. *Okay. "So I'd like two tickets and I'd like to get them -- four seats."*

A. *Show them the seating chart.*

Q. *So you had a seating chart and they could pick their seats?*

A. *Yes. Well, providing they're still available, yes.*

Q. *Okay. How do you know if they're still available?*

A. *There's certain ones that are blocked off so you can't.*

Q. *I see.* ***Did you have communication with the Venetian box office so you knew?***

A. ***Yes. We can call them and ask them.***

Q. *If something was sold?*

A. *Yes. Or if they should go downstairs where they could sell and we couldn't. We had a section. We didn't have all the seats.*

Q. *I see. Okay. So you had a certain section of the theater allotted to Brand Vegas where you could sell tickets?*

A. *Correct.*

Q. ***And if people wanted to spend more money and wanted something nicer, they had to go to the box office?***

A. *Correct.* ***We would send them to them.***

Q. *Okay. So let's say they want to buy tickets for Phantom of the Opera and you take the money, I guess credit card or something you can do that?*

A. *Correct, or cash.*

Q. *Whatever you do, you take their money. What do you give them next? Do you have the actual tickets?*

A. *Yes.*

Q. *Okay.*

A. *But the actual voucher. They have to go down and change it downstairs sometimes. It depends on the show.*

Q. *Okay. So you would give them -- so you take the money --*

A. *They get a -- yes.*

Q. *You take the money and then you give them – let's say they buy two tickets. You give them a voucher; correct?*

A. *Correct.*

Q. *Then –*

A. *Some were tickets, but it depends on the show.*

*Q Okay. Let's stay with the voucher so I can follow that. You give them the voucher, then what do they have to do with the voucher? Can they go to the theater or how do they get the tickets?*

*A. Depending on the show whether they -- if it was, like, the Blue Man Group that was there, they'd have to go downstairs to their desk and change it for an actual ticket.*

Q. *Okay. And the ticket would be available based upon what they purchased from the kiosk; correct? In other words, if they say, "I want seats A and B in Row 21"–*

*A. Right.*

(See Petitioners' Appendix, Vol. 2, Tab 1 at VCR 269 (62:4-25; 63:1-25; 64:1-25); VCR 270 (65:1-19), emphasis added.)

In summary, Sekera would engage guests walking by her kiosk to inquire about their interest in seeing a Venetian show, would offer a service to provide information and sell vouchers which had to be redeemed at the Venetian box office by the purchasing guests, with communication and coordination between Brand Vegas and Venetian to ensure sold seats were available, reserved and ultimately sold. (See *id.*; see also *id.* at VCR 270 (66:1-15); VCR 208 – VCR 217.) Sekera would personally communicate with the Venetian box office for guests to obtain additional information about Venetian shows and events when circumstances so required. (See *id.* at VCR 269 (63:20-22).)

Sekera also sold tickets to non-Venetian events in the Las Vegas area. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 168 – VCR 203; VCR 213 – VCR 217.) Venetian employees likewise sold thousands of tickets to shows, events and attractions to guests in 2016 for both Venetian and non-Venetian events, shows and attractions in Las Vegas, just as Sekera was doing for Brand Vegas. (See Petitioners' Appendix, Vol. 2, Tab 1 at VCR 407 – VCR 409; Petitioners' Appendix, Vol. 3, Tab 1 at VCR 602 – VCR 623.)

Venetian required Sekera to wear badges for identification, as it did for all employees coming upon its property. (See Petitioners' Appendix, Vol. 2, Tab at VCR 271 – VCR 272 (71:11-14; ,74:5-19) ("[Venetian] wanted all employees that come into the building to have badges, so we had to have badges" which were intended to show "[t]hat we worked there, employee badges").)

Sekera's work with Brand Vegas required her to come upon Venetian property daily, using a certain specified route to the employee parking area, to park in areas designated for Venetian employees, fully adhere to and comply with Venetian's parking policies, enter through the Venetian doors designated for employees only, and to follow other policies surrounding employees of tenants and those working in the Grand Canal Shops. (See *id.* at VCR 272 (74:5-19); VCR 275 (88:11-14); VCR 280 (105:7-25; 106:1); see also Petitioners' Appendix, Vol. 1, Tab 1 at VCR 205 – VCR 206; VCR 219 – VCR 221.)

The Venetian Parking policy to which Sekera, as a Grand Canal Shops employee, was obligated to follow, reads in pertinent part:

> *The policy of the Company is to provide parking for its Team Members and tenants in designated areas. Therefore, all hourly Team Members,* ***all Grand Canal Shoppes (GCS)*** *and Shoppes at Palazzo* ***personnel*** *must park in the Team Member parking structure (also known as the Shared Garage) on Levels 5 through 16.*
>
> (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 219, emphasis added.)

The Venetian parking policy expressly prohibited employees of Venetian and Grand Canal Shops from using the Venetian Porte Cochere to enter/exit the property, requiring use only via Koval Lane in order to avoid excess traffic for Venetian guests. (*Id.*) The policy further required that Sekera and other Grand Canal Shops employees use **only** The Venetian Team Member Entrance to enter the property to work. (*Id.* at VCR 220.) The parking policy further provides:

> *It is a violation of this policy for GCS [Grand Canal Shops] personnel, Shoppes at Palazzo personnel or for any Venetian or Palazzo Team Member to access the Company [Venetian] premises other than through the approved Team Member Entrances.*
>
> (*Id.* ¶ 3.)

It is further noted to be a violation for Sekera and all other Grand Canal Shops employees to park anywhere other than the where designated by Venetian. (*Id.* ¶ 4.) Sekera was subject to adverse action by Venetian if she failed to follow these policies. (*Id.* at VCR 221 ¶ 11.) This could potentially have included

expulsion from the property which, because Sekera's workplace was located in a landlocked area within the Venetian, would render her unable to work as a Brand Vegas kiosk employee. (See *e.g.*, Petitioners' Appendix, Vol. 1, Tab 1 at VCR 219 – VCR 221.)[3]

Sekera was parked on the eighth floor of the parking garage on November 4, 2016, the date of the subject work related incident, which is the employee level. (See Petitioners' Appendix, Vol. 2, Tab 1 at VCR 251; VCR 280 (105:7-25; 106:1.)

Sekera took regular breaks from her Brand Vegas kiosk and went to the Venetian casino area to purchase food and beverage items and use the restroom. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 224 (ln. 23-26); Petitioners' Appendix, Vol. 2, Tab 1 at VCR 275 (86:19-25; 87:1-5; 88:10-14).)

The Grand Lux rotunda is an area of the Venetian property located between the Grand Lux Café and the Venetian casino area. (See Petitioners' Appendix, Vol. 2, Tab 1 at VCR 250.) Sekera testified that she routinely walked through the Grand Lux rotunda area on a twice a day basis when working as a kiosk employee and estimated that she walked through that area of the Venetian casino many hundreds of times between December 26, 2015 and November 4, 2016 without

[3] See NRS § 207.200 (Nevada trespass statute, providing Venetian with authority to prohibit a person from coming onto its property for violation of company policies).

incident. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 225 (ln 2-7); Petitioners' Appendix, Vol. 2, Tab 1 at VCR 275 (85:15-25; 86:1-25; 87:1-8; 88:11-14.)

On November 4, 2016, at around 12:30 pm, Sekera left her Brand Vegas kiosk in the Grand Canal Shops to use a restroom located on the Venetian casino floor, per her usual daily routine. (See *id.*; see also Petitioners' Appendix, Vol. 1, Tab 1 at VCR 224 (ln 23-26); Petitioners' Appendix, Vol. 2, Tab 1 at VCR 250 – VCR 251.) As Sekera was walking through the Grand Lux rotunda area, she fell just outside the Venetian restroom at approximately 12:37 pm. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 225 (ln 9-15); VCR 250 – VCR 251.)

Sekera was in the course and scope of her employment with Brand Vegas at the time of the subject incident, which employment required Sekera to come upon Venetian's property for each shift. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 242 (ln. 2-17); VCR 243 (ln. 10-19); Petitioners' Appendix, Vol. 2, Tab 1 at VCR 260 (28:1-12).)

In addition to the above, the following was established below:

1. Sekera followed the same process to sell tickets as Venetian employees who were likewise engaged in ticket brokering activities (see Petitioners' Appendix, Vol. 1, Tab 1 at VCR 213 – VCR 217; Petitioners' Appendix, Vol. 2, Tab 1; Petitioners' Appendix, Vol. 3, Tab 1 at VCR 407 – VCR 414; VCR 620 – VCR 623);

2. Sekera underwent a background check by Venetian investigations to obtain an identification badge (see Petitioners' Appendix, Vol. 2, Tab 1 at VCR 271 (70:11-19; 71:3-19); VCR 272 (74:2-19); VCR 280 (105:20-25; 106:1);

3. Sekera understood that her employment with Brand Vegas required her to positively represent the Venetian to guests on property (see *id.* at 307 (213:2-17); and

4. Sekera could not complete a sale to a Venetian show or event without assistance and coordination from Venetian box office personnel (see *id.* Petitioners' Appendix, Vol. 1, Tab 1 at VCR 209 ¶¶ 7-9; VCR 214 ¶¶ 10-11); VCR 215 ¶¶ 12-15).

Sekera's employer, Edward DiRocco, testified that Sekera's work as a Brand Vegas kiosk employee was in furtherance of the Venetian/Brand Vegas Agreement, among other like agreements. (See *id.* at VCR 355 (41:23-25; 42:1-25; 43:1-25; 44:2-5.)

Mr. DiRocco agreed that Brand Vegas is in the entertainment business to the extent that it promotes and sells tickets to shows for entities with whom it has contracted. (See *id.* at VCR 361 (68:22-25); VCR 362 (69:1-21; 70, ln. 11-19).)

Venetian is engaged in the same kind of ticket brokering sales work as that engaged in by Brand Vegas and Sekera in 2016. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 207 – VCR 217; Petitioners' Appendix, Vol. 2, Tab 1 at VCR 407 – VCR 414; Petitioners' Appendix, Vol. 3, Tab 1 at VCR 620 – VCR 623.)

Mr. DiRocco, Charry Kennedy, Venetian Director of Ticketing Services & Box Office, and Anna Hersel, Venetian Director of Concierge confirmed that services provided by Brand Vegas kiosk employees and those of Venetian box office and concierge employees are similar in the following ways:

a. They provide information to guests about Venetian shows and events;

b. They accept payment to secure seats at Venetian shows and events;

c. Input guest information related to the ticket purchase; and

d. Provide documentation confirming the ticket purchase so guests may gain entry into the Venetian event or show desired.

(See *id.*)

Brand Vegas kiosk employees did not perform any kind of specialized work not usually accomplished by Venetian box office employees. (See *id.*)

Prior to and throughout 2016, Venetian Concierge Desk employees not only sold tickets for Venetian events, shows and attractions to guests, but also used a ticket brokering software service provided by Entertainment Benefit Group (*EBG*), which allowed Venetian employees to sell tickets for events throughout the Las Vegas area. (See Petitioners' Appendix, Vol. 2, Tab 1 at VCR 407 – VCR 409; Petitioners' Appendix, Vol. 3, Tab 1 at VCR 620 – VCR 623.)

Sekera filed a claim for workers compensation which was accepted and she continues to receive benefits associated with that claim. (See Petitioners' Appendix, Vol. 3, Tab 1 at VCR 699 (ln. 17-20).)

## VI. RELEVANT PROCEDURAL HISTORY

Petitioners filed Defendants' Motion for Summary Judgment Pursuant to NRCP 56(c) Based on Statutory Immunity Under the Nevada Industrial Insurance Act on July 9, 2019. (Petitioners' Appendix, Vol. 3, Tab 4 at VCR 693 (ln 7-9).)

Sekera filed Plaintiff's Opposition to Defendant's Motion for Summary Judgment Pursuant to NRCP 56(c), based on Statutory Immunity Under the NIIA on July 19, 2019. (*Id.*)

Petitioners filed a Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment Pursuant to NRCP 56(c), Based On Statutory Immunity Under the Nevada Industrial Insurance Act on August 6, 2019. (Petitioners' Appendix, Vol. 3, Tab 2 at VCR 624 – VCR 642.)

The hearing on this motion was held on August 13, 2019. (Petitioners' Appendix, Vol. 3, Tab 4 at VCR 694 – VCR 701; Petitioners' Appendix, Vol. 3, Tab 5 at VCR 694 – VCR 732.)

At the hearing, Judge Delaney recognized that Sekera was injured in the course and scope of her employment as a kiosk employee with Brand Vegas on Venetian property. (Petitioners' Appendix, Vol. 3, Tab 5 at VCR 710 (9:18-21).)

Judge Delaney also determined that the material facts are not in dispute. (*Id.* at 722 (21:5-7.) Specifically, Judge Delaney stated the following:

> *So my denial of the Motion for Summary Judgment is not based on the genuine issues of material fact for trial on this issue.*
>
> *My denial is that I believe, as a matter of law, that the Venetian would not be entitled to the relief.* ***I am persuaded by the opposition that ultimately the immunity is not available to the Venetian under any of the scenarios the Venetian has put forward.***
>
> (*Id.* (21:8-15), emphasis added.)

Judge Delaney denied Petitioners' motion with prejudice. (*Id.* at 725 (24:10-19).) Petitioners moved for a stay pending a writ, which was denied. (*Id.* at VCR 726 (25:1-25); VCR 727 (26:1-8).) In its Conclusions of Law issued on September 13, 2019, the District Court confirmed that no genuine issues of material fact exist, concluded that Petitioners did not demonstrate any basis for statutory immunity under the NIIA, that the motion for summary judgment was denied with prejudice, and that Petitioners' request for a stay of proceedings to allow for filing of a writ was denied. (Petitioners' Appendix, Vol. 3, Tab 4 at VCR 699 - VCR 701.)

## VII. LEGAL ARGUMENT

### A. THIS WRIT IS PROPERLY BEFORE THIS COURT

"A writ of mandamus is available to compel the performance of an act that the law requires, or to control a manifest abuse of discretion." (*ANSE, Inc. v.*

*Eighth Judicial Dist. Court of Nev.*, 124 Nev. 862, 867, 192 P.3d 738, 742 (2008), citing NRS § 34.160; *Round Hill Gen. Imp. Dist. v. Newman*, 97Nev. 601, 637 P.2d 534 (1981).) This Court will review "orders denying motions for summary judgment" where "summary judgment is clearly required by a statute or rule, or an important issue of law requires clarification." (See *id.*, citing *Smith v. District Court*, 113 Nev. 1343, 950 P.2d 280 (1997).) A petition for mandamus "is addressed solely" to the discretion of this Honorable Court. (See *id.*, citing *Poulos v. District Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982).) Petitioners contend that the District Court lacks jurisdiction to adjudicate the pending matter under the NIIA, that the law therefore requires granting of summary judgment.

## B. UNDERLYING MOTION AND SUMMARY OF ARGUMENTS

As discussed in detail herein below, Petitioners contend that Sekera is precluded from suing them for third-party liability under the NIIA based on a variety of factors, all of which arise from the Venetian/Brand Vegas Agreement. This includes the actual contractual relationship between Venetian and Brand Vegas, the undisputed fact that Sekera was in the course and scope of her employment at the time of the subject incident, the kind of work engaged in by Sekera as a Brand Vegas employee working daily on Venetian property, the degree of control exerted by Venetian over Brand Vegas employees (including Sekera) (*i.e.* parking pass, Venetian issued identification badge following a background

investigation, allowing access to and use of employee areas of Venetian property, expected code of conduct, etc.), application of NRS § 616B.603(1), and the ongoing working relationship between Venetian, Brand Vegas and Sekera in the sales of Venetian show tickets. Petitioners believe, based on the hearing proceeding, that Judge Delaney became hyper focused on whether a joint venture existed between Venetian and Brand Vegas (finding to the contrary), and that she failed to fully examine the other issues falling in favor of statutory immunity.

Here, Petitioners contend that Sekera is an employee as determined by application of the "normal work" test as defined in *Meers v. Haughton Elevator*, 101 Nev. 283, 286, 701 P.2d 1006, 1007 (1985) and the "control" test as set forth in *Tucker v. Action Equip. & Scaffold Co.*, 113 Nev. 1349, 951 P.2d 1027 (1997), that application of NRS § 616B.603(1) supports a finding in favor of statutory immunity, the she was engaged in work pursuant to and in furtherance of the Venetian/Brand Vegas Agreement at the time the incident occurred (thereby invoking the parenthetical language of *Meers* – that her work for Brand Vegas was "obviously a subcontracted fraction of a main contract"), and that the Venetian/Brand Vegas Agreement meets the criteria of a joint venture as set forth in *Hook v. Giuricich*, 108 Nev. 29, 823 P.2d 294 (1992), and related Nevada case law.

## C. NEVADA INDUSTRIAL INSURANCE ACT AND EXCLUSIVE REMEDY

The Nevada Industrial Insurance Act set forth in Nevada Revised Statutes Chapters 616A to 616D defines Nevada's Workers' Compensation system providing for the rights and remedies of an employee injured in the course and scope of employment. (NRS §§ 616A.005 *et seq.*) The remedies set forth in the NIIA are an employee's exclusive remedy against any employer, or co-employee, for injuries arising in the course and scope of employment. (NRS §§ 616A.020, 616B.612(4); *Frith v. Harrah South Shore Corp.*, 92 Nev. 447, 453, 552 P.2d 337, 341 (1976).) **District courts are without jurisdiction** to entertain an employee's common law suit against parties subject to the exclusive remedy protection provided by the NIIA. (*Howard v. District Court*, 98 Nev. 87, 640 P.2d 1320 (1982); *Stolte, Inc. v. Eighth Judicial Dist. Court*, 89 Nev. 257, 258, 510 P.2d 870, 870 (1973).) The exclusive remedy protection afforded by the NIIA extends not only to an employee's direct employer and co-employees, but also to other parties generally referred to as "statutory employers." (NRS §§ 616A.020(3), 616A.020(4) & 616A.210; *Stolte*, 89 Nev. at 260, 510 P.2d at 872.) The NIIA is "uniquely different" from industrial insurance acts of other states in that sub-contractors and independent contractors are given "employee" status. (*Holand v. Westinghouse Electric Corporation*, 97 Nev. 268, 628 P.2d 1123, 1125 (1981);

see also *Leslie v. J.A. Tiberti Constru. Co.*, 99 Nev. 494, 497, 664 P.2d 963 (1983); *Whitley v. Jake's Crane & Rigging, Inc.*, 95 Nev. 819, 603 P.2d 689 (1979).)

In cases involving industrial injuries on a construction project this statutory employer presumption in favor of the prime contractor and developer/landowner is nearly absolute. (NRS § 616B.603(3)(a).) In other settings, this statutory employer presumption is rebuttable. (NRS § 616B.603(1); *Meers v. Haughton Elevator, a Div. of Reliance Elec. Co.*, 101 Nev. 283, 286, 701 P.2d 1006, 1008 (1985).)

To rebut the presumption that a principal contractor is a statutory employer NRS § 616B.603 provides that an employee must show:

> *1. A person is not an employer for the purposes of chapters 616A to 616D, inclusive, of NRS if:*
>
> *(a) The person enters into a contract with another person or business which is an independent enterprise; and*
>
> *(b) The person is not in the same trade, business, profession or occupation as the independent enterprise.*

The test set forth in Section 616B.603 is considered a statutory codification of the test originally enunciated by the Nevada Supreme Court in *Meers*, supra. (*Oliver v. Barrick Goldstrike Mines*, 111 Nev. 1338, 1348, 905 P.2d 168, 175 (1995).) The "*Meers* test" or "normal work" test as set forth in that decision provides:

> *[T]he test is not one of whether the subcontractor's activity is useful, necessary, or even absolutely indispensable to the statutory employer's business, since, after all, this could be said of practically any repair, construction or transportation service. The test (except in cases where the work is obviously a subcontracted fraction of a main contract) is* ***whether that indispensable activity is, in that business, normally carried on through employees rather than independent contractors.***
>
> (*Meers*, 101 Nev. at 286, 701 P.2d at 1007, emphasis added.)

In the instant action, Sekera's industrial injury arises in a non-construction context. However, Petitioners are a principal contractor that contracted with Sekera's employer, Brand Vegas, to perform work that is within the same trade and business, and that is normally carried on through Venetian employees. There is no factual dispute that Brand Vegas and Petitioners are both in the same trade and business of selling tickets to entertainment events hosted by Venetian and at other venues in the Las Vegas area, which Petitioners normally accomplish through Venetian employees. Accordingly, Petitioners are presumed to be Sekera's statutory employer under Nevada law, and Sekera as a matter of law cannot rebut that presumption. Therefore, the District Court's order denying Petitioners' Motion for Summary Judgment was clearly in error.

## D. PETITIONERS ARE THE PRINCIPAL CONTRACTOR IN THE VENETIAN/BRAND VEGAS AGREEMENT AND QUALIFY FOR EXCLUSIVE REMEDY PROTECTION PURSUANT THE "NORMAL WORK" TEST SET FORTH IN 606B.603 AND *MEERS*

In *Meers,* supra, the Nevada Supreme Court adopted the "normal work" test to evaluate whether a third party defendant would qualify as a statutory employer. There, the plaintiff, Ruth Meers, was employed by Central Telephone Company and sustained a work injury when the elevator wherein she was riding at her work premises malfunctioned. After filing for workers compensation, Meers filed a third-party lawsuit against Haughton Elevator Company, which had a contract with her employer to maintain the elevator at her work premises. Haughton asserted that it was immune from suit as a statutory employee. It was from these factual circumstances that the Nevada Supreme Court adopted the "normal work" test to evaluate matters related to subcontracted activities. The question under this test is whether the activity in question is one that is normally carried on through employees rather than independent contractors. (*Id.,* at 286, 701 P.2d at 1007; *Bassett Furniture Industries, Inc. v. McReynolds,* 224 S.E.2d 323 (Va. 1976))

In *Meers*, the court looked to whether Haughton Elevator, the independent enterprise, was performing a specialized kind of work unique to the plaintiff employer, Centel. The analysis from which the Court drew to reach its conclusion in *Meers* is found in the case of *Bassett Furniture Industries, Inc. v. McReynolds*, 216 Va. 897, 224 S.E.2d 323 (1976). There, a Virginia plaintiff was injured while

on property of Bassett Furniture Industries manufacturing plant installing a conveyor belt system. The Virginia court, as part of its analysis, quoted the following from VA Code § 65.1-29:

> *... when an owner "undertakes to perform or execute any work which is part of his trade, business or occupation and contracts with" a subcontractor "for the execution or performance by or under such subcontractor* ***of the whole or any part of the work", the owner becomes a statutory employer*** *and the subcontractors employees become statutory employees of the owner.*
>
> (See *id.* at 901, 224 S.E.2d at 325 (emphasis added).)

The Virginia court continued, noting the following regarding the "normal work" test: "Frequency and regularity of performance **are factors** to be considered in determining whether work is 'normally carried on through employees.'" (*Id.*, emphasis added.) Sekera argued below that the "normal work" test does not apply because Venetian's "primary business" did not involve selling tickets to shows and events. (Petitioners' Appendix, Vol. 3, Tab 2 at VCR 639 (ln. 7-10).) However, there is nothing in the analysis presented by the Virginia court in *McReynolds* - much less the Nevada Supreme Court - requiring that for Petitioners to prevail they must establish that selling tickets to shows and events it provides for guests within its premises or selling tickets to shows elsewhere in Las Vegas is its ***primary business***.

Petitioners demonstrated below that Venetian was "equipped to handle" everything Sekera and her Brand Vegas coworkers were doing "with [Venetian's] own [work] force." Thus, application of the normal work test leads to the conclusion that Petitioners were Sekera's statutory employers and thus entitled to statutory immunity.

Here, Brand Vegas employees were engaged in the exact same work as Venetian employees within the box office and concierge areas of Venetian's business operation. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 207 – VCR 217; Petitioners' Appendix, Vol. 2, Tab 1 at VCR 407 – VCR 414; Petitioners' Appendix, Vol. 3, Tab 1 at VCR 620 – VCR 623; see also Petitioners' Appendix, Vol. 3, Tab 4 at VCR 698 – VCR 699.)

Evidence presented to the District Court establishes the following:

1. Venetian and Brand Vegas are both in the business of marketing and selling tickets for Venetian and non-Venetian shows, events and attractions (see *id.*; see also, Petitioners' Appendix, Vol. 3, Tab 4 at VCR 696 ln. 26 – VCR 697 ln. 27);
2. Venetian and Brand Vegas both employ workers to engage with potential customers for the purpose of providing information about Venetian events and selling tickets (see *id.*; see also, Petitioners' Appendix, Vol. 3, Tab 4 at VCR 698 - VCR 699);

3. The process of selling tickets followed by Venetian employees and Brand Vegas kiosk employees are substantially similar (if not identical), consisting of welcoming guests, offering information about Venetian events and shows, responding to customer questions and requests, checking resources about ticket availability, confirming show ticket availability, providing confirmation of tickets, accepting payment for tickets, and providing vouchers/tickets (see *id.*; see also Petitioners' Appendix, Vol. 1, Tab 2 at VCR 269 (pg. 63, ln 4-25; pg. 64, ln 1-25); VCR 270 (pg. 65, ln 1-25; pg. 66, ln 1-15); VCR 272 (pg. 74, ln 24 – pg. 75, ln 4); Petitioners' Appendix, Vol. 1, Tab 1 at VCR 208 – 217; see also Petitioners' Appendix, Vol. 2, Tab 1 at VCR 407 – VCR 492; Petitioners' Appendix, Vol. 3, Tab 1 at VCR 492 – VCR 623);

4. Sekera, in her capacity as a Brand Vegas employee selling tickets for Venetian events, would routinely communicate with the Venetian box office to coordinate her sales efforts (*see id.*); and

5. Venetian and Brand Vegas are both in the entertainment and ticket sales/brokering business for the same events within the Las Vegas area (see Petitioners' Appendix, Vol. 2, Tab 1 at VCR 361 – 362 (pg. 68, ln. 22 – pg. 69, ln. 21); VCR 362 (pg. 70, ln. 11-19); see also

Petitioners' Appendix, Vol. 1, Tab 1 at VCR 208 – 217; Petitioners' Appendix, Vol. 2, Tab 1 at VCR 407 – VCR 492; Petitioners' Appendix, Vol. 3 at VCR 493 – VCR 623).

Another way of approaching this analysis is: **What part of Sekera's work activities with Brand Vegas were not normally carried on through Petitioners' employees rather than independent contractors?** The answer is simple – none.

As noted above, the Nevada Supreme Court has adopted the "normal work" test from *Meers* to determine whether two contracting parties are in the "same trade" as set forth in NRS § 616B.603(1). (*Oliver*, supra, 111 Nev. at 1348; 905 P.2d at 175.) The presumption is that a contracting entity is an employer unless the plaintiff can show that neither of the conditions set forth in NRS § 616B.603 apply. (*Hays Home Delivery, Inc. v. Employers Ins. Co. of Nevada*, 117 Nev. 678, 682, 31 P.3d 367, 370 (2001).) Specifically, a plaintiff must show that their direct employer is not an independent enterprise, and that the defendant is not in the same trade or business as the plaintiff's direct employer. (NRS § 616B.603(1).)

An "independent enterprise" means an entity that holds itself out as being engaged in a separate business, holds a business license, and holds property in furtherance of its business. (See NRS § 616B.603(2); *Hays*, supra, 117 Nev. at 682, 31 P.3d at 370.) There was no dispute in the lower court that Brand Vegas

was an independent enterprise with whom Petitioners contracted to sell show tickets. (See Petitioners' Appendix, Vol. 3, Tab 4 at VCR 697 (ln. 16-20).)

The second part of the test is whether Brand Vegas and Petitioners were in the same trade. This test is determined by applying the *Meers* "normal work" test. (See *Oliver*, supra, 111 Nev. at 1348; 905 P.2d at 175; *Hays*, supra, 117 Nev. at 682; 31 P.3d at 370.) As discussed above, Sekera's activities fall within the scope of the "normal work" test and therefore Brand Vegas and Petitioners are deemed to be in the same trade. Without question, Brand Vegas employees were engaged in the exact same work as Venetian employees within the box office and concierge areas of Venetian's business operation. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 207 – VCR 217; Petitioners' Appendix, Vol. 2, Tab 1 at VCR 407 – VCR 414; Petitioners' Appendix, Vol. 3, Tab 1 at VCR 620 – VCR 623; see also Petitioners' Appendix, Vol. 3, Tab 4 at VCR 698 – VCR 699.)

Venetian and Brand Vegas were engaged in a common entertainment business enterprise memorialized by an executed written contract for a joint purpose of selling tickets to guests for Venetian events. Indeed, they were direct competitors for selling tickets to guests not only for Venetian shows, but also for shows and events occurring off Venetian property. (*See id.*) They are clearly "in the same trade, business, profession or occupation" as contemplated by NRS § 616B.603(1). Sekera's work of selling tickets to Venetian events and

shows was identical to that of Venetian box office employees. (*Id.*) Sekera's work of selling tickets to non-Venetian events and shows was likewise identical to that of Venetian concierge employees. (*Id.*)

Referring again to the *McReynolds* case followed by the Nevada Supreme Court in *Meers*, that court noted that being in the "same trade" was broad enough to include circumstances "when an owner 'undertakes to perform or execute any work which is part of his trade, business or occupation and contracts with 'a subcontractor'[for the execution or performance by or under such subcontractor of the whole ***or any part*** of the work", the owner becomes a statutory employer and the subcontractors employees become statutory employees of the owner." (See *id.* at 216 Va. 897, 901, 224 S.E.2d at 325, *quoting* VA Code 65. § 1-29.) The Virginia court noted that "Frequency and regularity of performance are factors to be considered in determining whether work is "normally carried on through employees." (*Id.*)

In *Hays*, supra, the court held that an employee injured while engaged in work *"normally carried on through an employee rather than an independent contractor"* was a statutory employee for purposes of the NIIA. (*Hays*, 117 Nev. at 684, 31 P.3d at 371.) There, Hays Home Delivery, Inc., was "a national logistics management company incorporated in Delaware and qualified to do business in Nevada," providing "appliance, electronics and furniture delivery

services nationwide for retailers like Montgomery Wards, Sears and Circuit City." (*Id.*) Retailers would enter into contracts with Hays Home Delivery, Inc., to transport merchandise from retail stores and warehouses to customers. (*Id.*) Hays, in turn, would then subcontract out the delivery to local "owner-operators." (*Id.*) Everett Green was an "owner operator" under contract with Hays to deliver goods. The contract expressly provided that Green was an independent contractor and not an employee of Hays, and that Green was responsible to acquire all moving equipment, insurances, licenses, etc. (*Id.*) Green subsequently filed a claim against Hays for personal injuries occurring in the course and scope of his employment. (*Id.*) The court held that Green was a statutory employee of Hays (noting that NRS 616A.210(1) provides that independent contractors of the principal contractor are deemed to be employees for purposes of workers compensation), because they are in the "same trade, occupation or profession."[4] (*Id.* at 682-83, 31 P.3d at 370.) The court noted the following:

> *Both Green and Hays were in the "trade" of delivering merchandise from retailers to end-customers. Although Hays attempts to distinguish its business from Green's by characterizing Hays's business as administrating the deliveries, and Green's business as delivering the merchandise, this distinction is unpersuasive. Even though Green arguably delivered the merchandise, while*

[4] Chapter 616A.210(1), Nevada Revised Statutes, reads generally as follows: *"subcontractors, independent contractors and the employees of either shall be deemed to be employees of the principal contractor for the purposes of chapters 616A to 616D, inclusive, of NRS."*

> *Hays arguably only acted as an administrator and oversaw the deliveries,* ***both Green and Hays are in the same trade of delivering merchandise from retailers to end-customers****. Therefore, notwithstanding any minimal distinction between Green's and Hays's functions, both are in the same trade of delivering merchandise.*
>
> (*Id.* at 684, 31 P.3d at 371, emphasis added.)[5]

The *Hays* decision is on point with the present facts. Here, Venetian, Brand Vegas and Sekera were in the same trade of marketing and selling tickets to Venetian shows and events; therefore, they are all in the "same trade, business, profession or occupation" as contemplated under *Meers* and NRS § 616B.603(1). As noted above, Venetian employs staff in its box office and concierge departments who perform the same substantive duties as employees of Brand Vegas when it comes to the selling of tickets to Venetian events and shows. There is no unique skill involved in Sekera's job as a kiosk employee for Brand Vegas beyond basic customer service training provided to Venetian box office employees. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 207 – VCR 217; Petitioners' Appendix, Vol. 2, Tab 1 at VCR 407 – VCR 414; Petitioners' Appendix, Vol. 3, Tab 1 at VCR 620 – VCR 623; see also Petitioners' Appendix, Vol. 3, Tab 4 at VCR 698 – VCR 699.)

---

[5] See also, *D & D Tire, Inc., v. Ouellette*, 352 P.3d 32, 36-37 (Nev. 2015) (the "normal work" test analysis is based upon an overall review of the working relationships existing before and after an incident, as opposed to what was occurring at the exact time an incident occurs).

In *Quick v. Freeman Decorating Co.*, 55 Fed. Appx. 450, 2003 U.S. App. LEXIS 1525, the Ninth Circuit Court of Appeals addressed a similar factual circumstance in a case decided by the United States District Court for the District of Nevada, Case No. CV-99-01734-PMP.[6] There, the defendant Freeman Decorating contracted with Glasgow to be a service provider for a trade show. Renaissance engaged Freeman to provide accessible storage for its equipment until disassembly. The plaintiff was injured while working on a Renaissance ladder that collapsed. The plaintiff filed for and received workers compensation benefits, then filed against Freeman for third-party liability. The federal court recognized that Renaissance was a principal contractor in relation to Freeman because it contracted and paid for the services of Freeman, an independent contractor. The court applied NRS § 616B.603(1) to the facts and determined that Freeman and Renaissance "were both involved in the same activities of assembling and disassembling trade show exhibit booths." (See *id.* at 452-53, 2003 U.S. App. LEXIS at *6-7.) In fact, the court noted that Freeman and Renaissance **were competitors** "in providing labor to erect and tear down booths." (See *id.*) When evaluating the issue of "same trade" under the *Meers* test, the Ninth Circuit wrote: "we must ask whether the 'indispensable activity [of Freeman] is, in that business, normally carried on

[6] A true and correct copy of this decision is provided at Petitioners' Appendix, Vol. 2, Tab 1 at VCR 395 – VCR 399.

through employees rather than independent contractors." (See *id.* at 453, 2003 U.S. App LEXIS at *7, citations omitted.) The Ninth Circuit held as follows:

> *The District Court properly found that Renaissance and Freeman were both involved in the same activities of assembling and disassembling trade show exhibit booths. Both entities provided these services at the APAA show.* ***Renaissance competes with Freeman in providing labor to erect and tear down booths.*** *Given the fact that Quick, a Renaissance employee, was actually injured while disassembling the NASCAR exhibit booth, Renaissance clearly furnished these services through its employees and not independent contractors.*
>
> *Quick challenges the District Court's finding by pointing to Freeman's additional duties as the APAA show's official service provider and asserting that the erection and dismantling of each separate exhibit booth was essentially a unique activity.* ***No case under the NIIA suggests that a court must apply the "same trade" requirement so rigorously as to distinguish between different exhibit booths and to consider as dispositive the broader activities of Freeman.*** *In Hays Home Delivery, Inc. v. Employers Insurance Co. of Nevada, 31 P.3d 367 (Nev. 2001) (en banc) (per curiam), the Nevada Supreme Court refused to draw such a technical distinction between the administrative and supervisory tasks performed by a delivery company and an independent driver's physical deliveries. Id. at 371.*
>
> *Quick does present a more persuasive argument when he challenges the relevance of the assembly and disassembly activities under these circumstances. He argues that, because the only contractual relationship between Freeman and Renaissance concerned the transportation and storage of equipment after assembly, a court should only consider transportation and storage activities in the "same trade" analysis.*

> *We need not resolve the broader questions raised by this argument given the facts of this case. The action of transporting and storing equipment used to erect and take down exhibit booths is closely related to the actual assembly and disassembly of these booths. It would therefore be inappropriate to draw any clear distinction in these circumstances. Cf. id. (refusing to distinguish between administrative tasks and actual deliveries). Additionally, Freeman has still satisfied the "same trade" requirement even if any inquiry were limited to a consideration of transportation and storage activities.* ***Like Freeman, Renaissance was involved in the transportation and storage of the equipment****, with its runners normally removing the equipment from the show floor.*
>
> ***Because Renaissance and Freeman were in "the same trade, business, profession or occupation," Freeman is immune as a statutory co-employee of Quick.***
>
> (Id. at 453-54, 2003 U.S. App. LEXIS at *7-*11, emphasis added.)

In the *Quick* analysis, the Court determined that Freeman and Renaissance were not only in the same trade, but that they were actually competitors therein. The same is true with Venetian and Brand Vegas. Both entities are in the business of entertainment, selling tickets to guests for the purpose of making a profit. Brand Vegas did not contract exclusively with Venetian, but also contracted with various other properties and entities, offering guests options to purchase tickets for events not only within Venetian but elsewhere. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 168 – VCR 203; VCR 213 – VCR 217; see also Petitioners' Appendix, Vol. 2, Tab 1 at VCR 346 (17:7-15).) Thus, Brand Vegas was not only in the same

trade of the Venetian box office and Concierge employees, but it was also a direct competitor.

In *Potter v. Wedgewood Group*, Case No. 3:08-CV-00272-LRH-VPC, 2009 U.S. Dist. LEXIS 95367, the United States District Court for the District of Nevada, applying Nevada law, granted a motion for summary judgment on the issue of statutory immunity.[7] There, the plaintiff, a certified nursing assistance for VistaCare, brought an action for injuries following a slip and fall occurring at the Life Care Center of Reno. In ruling for the defense, the court relied largely upon *Hays Home Delivery*, supra, writing as follows:

> *In Hays Home Delivery v. Employers Insurance Company of Nevada, 117 Nev. 678, 31 P.3d 367 (Nev. 2001),* ***the Nevada Supreme Court took an expansive view of what constitutes the "same trade" under Nevada law****. There, Hays Home Delivery, a national logistics management company, provided appliance, electronics, and furniture delivery services nationwide for various retailers. Id. at 368.* ***Rather than having its own employees deliver the merchandise, Hays contracted with "owners-operators" to make the deliveries****. Id. Hays attempted to distinguish its business from the business of one such owner-operator by characterizing its business as merely administering deliveries and characterizing the owner-operator's business as making deliveries. The court rejected Hays' argument and held that* ***the owner-operator was in the same trade as Hays because "both were in the 'trade' of delivering merchandise from retailers to end-customers."*** *Id. at 371.*

---

[7] A true and correct copy of this decision is provided at Petitioners' Appendix, Vol. 2, Tab 1 at VCR 402 - VCR 405.

> *Here, even assuming, as Plaintiff contends, Life Care does not provide hospice care services to its patients,* ***Life Care and VistaCare nonetheless each engage in the same trade of providing care and treatment to patients.*** *In Hays, the employees of Hays Home Delivery did not complete one aspect of Hays' business, delivering merchandise, and instead, the company hired independent contractors to make the deliveries. Similarly, here, Life Care hires independent contractors to provide hospice care services. Under the broad approach used by the Court in Hays, these services fall within the "trade" of providing care and treatment to patients.*
>
> (Id. at *8-*9, emphasis added.)

Following the analysis presented by the Federal District Court, Venetian and Brand Vegas are in the same trade of selling tickets for entertainment events to guests coming onto the Venetian property. The fact that similar jobs may vary slightly is immaterial under the *Hays* analysis discussed above. Indeed, the facts in the present case are even more compelling than those presented in *Hays*, and application of the "normal work" test clearly leads to the conclusion, as a matter of law, that Venetian is protected from third party litigation as a statutory employer. Sekera was injured on the job, has thus far received all benefits to which she is entitled in her workers compensation claim. Under Nevada Law, she is not entitled to further benefits beyond those which may be allowed under the NIIA.

## E. ADDITIONAL FACTORS TO BE CONSIDERED UNDER THE "NORMAL WORK" TEST ALSO ESTABLISH THAT PETITIONERS ARE SEKERA'S STATUTORY EMPLOYER

In *Tucker v. Action Equip. & Scaffold Co.*, 113 Nev. 1349, 1357, 951 P.2d 1027, 1032 (1997), the Nevada Supreme Court held that the "control" test, which predated *Meers*, is no longer the primary standard for evaluating facts related to NIIA immunity; however, it remains "one factor to be considered in resolving 'normal work' issues under Meers." Applying these factors provides further support that Petitioners were Sekera's statutory employer at the time of her November 4, 2016 work related injury.

It is important to note that the Grand Canal Shops mall is a **landlocked property** located exclusively within the Venetian. (See Petitioners' Appendix, Vol. 3, Tab 4 at VCR 698 (ln. 9-10).) Accordingly, Sekera was entirely dependent upon Venetian to allow her entry onto its property in order to work as a Brand Vegas kiosk employee; Sekera, like other Grand Canal Shops tenant employees, was required to adhere to Venetian's policies and procedures regarding arrival to and departure from her Brand Vegas kiosk work station, and to conduct herself in accordance with established Venetian guidelines. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 205 – VCR 221.) Failure to follow Venetian policies related to the above could result in discipline, from fines to Venetian expelling Sekera from

entering upon its property, rendering her unable to work as a Brand Vegas kiosk employee. (See *i.e.*, Petitioners' Appendix, Vol. 1, Tab 1 at VCR 221 ¶¶ 11-12.)[8]

As a Brand Vegas employee, Sekera drove her vehicle onto Venetian property just like every other Venetian employee, with instructions use designated streets around the Venetian property (*i.e.* using Koval Lane with a prohibition from using guest entry and parking areas to avoid vehicular congestion for Venetian guests), and to park only in areas designated for Venetian employees, using a parking pass issued by Venetian. (See Petitioners' Appendix, Vol. 2, Tab 1 at VCR 272 (74:5-19); VCR 275 (88:11-14); VCR 280 (105:7-25; 106:1); see also Petitioners' Appendix, Vol. 1, Tab 1 at VCR 205 – VCR 206; VCR 219 – VCR 221.)

Like every other Venetian employee, Sekera was provided an identification badge by Venetian after submitted to a background check, allowing her to have access to areas within Venetian dedicated for employees only. (See Petitioners' Appendix, Vol. 2, Tab 1 at VCR 271 (70:11-19; 71:3-19); VCR 272 (74:2-19); VCR 280 (105:20-25; 106:1); ); see also Petitioners' Appendix, Vol. 1, Tab 1 at VCR 205 – VCR 206; VCR 219 – VCR 221.) Further, Sekera, as a Grand Canal Shops tenant employee, was required to use the Venetian employee entrance/exit located on the south side of the property to arrive and depart the interior areas of

[8] See also note 3. (This refers to the trespass statute previously referenced.)

Venetian property to access her place of employment for Brand Vegas. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 219 – VCR 221.)

Sekera routinely entered upon Venetian property and used its facilities in the ordinary course of her employment for Brand Vegas from December 26, 2015 through November 4, 2016. (Petitioners' Appendix, Vol. 2, Tab 1 at VCR 275 (88:11-14); see also Petitioners' Appendix, Vol. 1, Tab 1 at VCR 216 ¶ 12; Petitioners' Appendix, Vol. 3, Tab 4 at VCR 698 (ln. 4-7).)

Sekera, as a Grand Canal Shops tenant employee coming onto Venetian's property daily and having access to its employee areas, was required to follow the Las Vegas Sands Supplier Code of Conduct. (See Petitioners' Appendix, Vol. 2, Tab 1 at VCR 216 ¶ 20-23; VCR 307 (213:1-17); see also Petitioners' Appendix, Vol. 1, Tab1 at VCR 209 – VCR 210 ¶ 10-13; Petitioners' Appendix, Vol. 3, Tab 4 at VCR 698 (ln. 21-25).)

Sekera represented Venetian's interests to guests at her Brand Vegas kiosk. (See Petitioners' Appendix, Vol. 2, Tab 1 at VCR 307 (213:1-17).)

As set forth above, Sekera was given access to Venetian property beyond that provided to normal guests because of her vendor/employee status. In deposition, former Venetian Security Officer/EMT, Joseph Larson, who responded to the subject incident, testified as follows on why he escorted Sekera from the accident scene to the back of the house area reserved for employees only:

> Q. *... Is it unusual to take someone from, let's say, the public area back to the medical room? Just a normal guest?*
>
> A. ***I wouldn't take a guest back to the medical room.***
>
> Q. ***Why did you on this occasion?***
>
> A. *Because she was an outside vendor. She worked at the property, but wasn't exactly a team member with us. Those employees on our property do have access to our back-of-house areas, so it's not against anything for me to bring her back to a secure area like that....*
>
> (See Petitioners' Appendix, Vol. 3, Tab 3 at VCR 603 (64:19-25); VCR 604 (65:1-6), emphasis added.)

Thus, Sekera's vendor/employee status provided her with greater access to Venetian property not enjoyed by normal guests, which is why she underwent a background investigation for an ID badge.

By applying both the "normal work" test of *Meers* and the "control" test of *Tucker*, it is clear that Venetian is entitled to statutory immunity under the given circumstances and that the District Court erred in denying summary judgment.

### F. PETITIONERS ARE SEKERA'S STATUTORY EMPLOYER AS THE VENETIAN/BRAND VEGAS AGREEMENT WAS A SUBCONTRACTED FRACTION OF A MAIN CONTRACT

In addition to the normal employee work analysis discussed in detail above, the Nevada Supreme Court in *Meers* found parties to be in the same trade under the "normal work" test if the work injury at issue is connected to a "main contract." (*Meers*, supra, at 286, 701 P.2d at 1007, quoting *Bassett Furniture Industries, Inc.*

*v. McReynolds,* 224 S.E.2d 323 (Va. 1976).) More specifically, the *Meers* court noted that the first inquiry is whether the work injury occurred as part of a "subcontracted fraction of a main contract." (See *id.*) Where such a contract setting forth the working business relationship between the parties is established, and an on the job injury occurs in furtherance thereof, the contracting parties are all entitled to statutory immunity. (See *id, generally.*)

Venetian presented evidence below to resolve all questions in this regard, including the following:

1. Brand Vegas was operating kiosks in the landlocked Grand Canal Shops mall, located exclusively within the Venetian property, in part pursuant to the Venetian/Brand Vegas Agreement for the entire period of Plaintiff's employment from December 26, 2015 through November 4, 2016 (see Petitioners' Appendix, Vol. 3, Tab 3 at VCR 697 – VCR 698);

2. In the normal course of business, Venetian routinely entered into contracts with entertainment entities to provide shows and events for Venetian guests on its property (*id.* at VCR 699);

3. Under the Venetian/Brand Vegas Agreement, Brand Vegas was authorized by Venetian to sell tickets to Venetian guests for shows occurring on Venetian property for which Brand Vegas received compensation by a percentage of profits from Venetian (*id.*; see also Petitioners' Appendix, Vol. 1, Tab 1 at VCR

033 – VCR 166; VCR 213 – VCR 215; Petitioners' Appendix, Vol. 3, Tab 4 at VCR 697 (ln. 25-27));

4. The sale of any Venetian show tickets by Brand Vegas employees required and, in fact, was entirely dependent upon, communication and cooperation of Venetian box office staff (see *id.*; *see also* Petitioners' Appendix, Vol. 1, Tab 1 at VCR 208 – VCR 217);

5. Sekera was paid a commission for each Venetian ticket sale accomplished under the Venetian/Brand Vegas Agreement (Petitioners' Appendix, Vol. 3, Tab 4 at VCR 698 (ln. 26-27));

6. Sekera followed a code of conduct as required in the Venetian/Brand Vegas Agreement and (see Petitioners' Appendix, Vol. 2, Tab 1 at VCR 216 ¶ 20-23; VCR 307 (213:1-17); see also Petitioners' Appendix, Vol. 1, Tab1 at VCR 209 – VCR 210 ¶ 10-13; Petitioners' Appendix, Vol. 3, Tab 4 at VCR 698 (ln. 21-25));

7. Brand Vegas carried workers compensation insurance (Petitioners' Appendix, Vol. 3, Tab 4 at VCR 699 (ln. 17-21)); and

8. Sekera made a claim for workers compensation, which was accepted, and has continued to receive all benefits available to her under the NIIA (*id.*).

Sekera was on a break from her Brand Vegas kiosk when the subject incident occurred; however, her fall was a direct result of the environment in which she had worked for the preceding eleven (11) months, which included daily

coming upon Venetian property by vehicle, entering Venetian through its employee entrance, as required by Venetian, and daily taking breaks from her kiosk by taking an elevator to the Venetian casino level, walking across the Grand Lux rotunda floor (where she fell on November 4, 2016), and using the restroom, smoking a cigarette or to get lunch. (*Id.* at VCR 699 (ln. 8-10); see also Petitioners' Appendix, Vol. 1, Tab 1 at VCR 224 (ln. 23-26); VCR 225 (ln. 1-7); Petitioners' Appendix, Vol. 2, Tab 1 at VCR 250 – VCR 251.)

In *Mitchell v. Clark County Sch. Dist.*, 121 Nev. 179, 181, 111 P.3d 1104, 1105 (2005), this Court reviewed a case involving a school teacher who "inexplicably fell down a flight of stairs while at work" and considered whether the injured worker could "prove a causal connection between a workplace injury and the workplace environment." The Court, citing *Rio Suite Hotel & Casino v. Gorsky*, 113 Nev. 600, 939 P.2d 1043 (1997), noted that there must be "a causal connection" between the employee's work workplace conditions and environment and the injury to establish "the origin of the injury is related to some risk involved within the scope of employment." (*Id.* at 604, 939 P.2d at 1046, citations omitted.) Where work conditions are alleged to have caused a fall, such as Sekera has alleged here by daily walking onto the same Venetian marble flooring daily on

hundreds of preceding occasions, the Court found in *Gorsky* and *Mitchell* that they are compensable under workers compensation.[9]

In the matter of *Brooks-Handler v. Venetian Casino Resort, LLC, et al*, Supreme Court of Nevada, Case No. 42160, this Court entered an unpublished *Order Affirming in Part, Reversing in Part and Remanding* related to a factually similar issue. (See Petitioners' Appendix, Vol. 2, Tab 1 at VCR 374 – VCR 381.) There, Brooks-Handler was injured while working as an outside contracted security guard in a Venetian ballroom. Brooks-Handler was employed by Special Operations Associates, which had been retained to provide security services for the Ramada/Rina annual conference held on Venetian property. The Court determined that the established contractual relationships between the named defendants were

---

[9] It is noteworthy that Nevada follows the "Personal Comfort Doctrine" wherein it permits workers compensation when an employee is injured while engaged in a reasonable work related activity, such as using the restroom. (See *Costley v. Nevada Ind. Ins. Com.*, 53 Nev. 219, 296 P. 1011 (1931) (holding that a miner's injuries sustained while erecting a tent on the employer's premises the day before commencing work arose out of and in the course and scope of employment); *Dixon v. SIIS*, 111 Nev. 994, 899 P.2d 571 (1995) (affirming workers compensation benefits provided by employer for a worker injured on a lunch break while exercising on a bicycle). Sekera argued below that in order for statutory immunity to apply under the "normal work" test, her injury would have to occur in the actual act of selling tickets, which is not consistent with Nevada law. (See Petitioners' Appendix, Vol. 3, Tab 5 at VCR 717 (16:20-25); VCR 718 (17:1-5).) It should be further noted that Sekera could not avoid walking on Venetian marble flooring to get to and from her Brand Vegas work station daily, as it surrounds the landlocked property of the Grand Canal Shops. (See *i.e.*, Petitioners' Appendix, Vol. 3, Tab 4 at VCR 690 (ln. 9-10).) Indeed, the Venetian property was part of Sekera's daily work environment.

sufficient to invoke statutory immunity under the NIIA. (*Id.* at VCR 378 – VCR 379.) Specifically, the Court held as follows in pertinent part:

> *In order to provide an extension of the exclusive remedy provided by the NIIA to SOA, PRG, CTS Sands, and Telave, the necessary link between those parties and Ramada must be evidenced. That evidence would be the contractual agreement between Ramada and Sands, and any other relevant contract that establishes the relationship of the parties as subcontractors of Ramada.*
>
> *Brooks Handler's contentions that the actions of the parties created a joint venture and that joint employer immunity does not extend beyond the construction context are both without merit.* ***This court has held that when companies combine their efforts in partnerships for specific purposes, so long as one of the partners maintains workers' compensation insurance, all of the partners and co-employers are entitled to the exclusive remedy protection of the NIIA. This partnership need not be a "formal partnership" in order for immunity from liability to lie.***
>
> (*Id.* at VCR 379, emphasis added.)

While the *Brooks-Handler* case is non-published, it clearly sets forth the law to be applied under the given circumstances. Sekera was on Venetian property on November 4, 2016 in furtherance of the Venetian/Brand Vegas Agreement. As noted above, Sekera represented Venetian's interests while engaged in her employment with Brand Vegas at the Venetian area kiosks, relied upon Venetian box office personnel to complete all ticket sales, and received a percentage of profits for each sale, from which Sekera was paid a commission. Petitioners insist that Sekera's work as a ticket salesperson under the Venetian/Brand Vegas

Agreement on November 4, 2016 was "obviously a subcontracted fraction of a main contract" as contemplated by the Nevada Supreme Court as set forth in *Meers*.

Sekera was on Venetian property solely because of her work for Brand Vegas as a ticket salesperson, and was injured in her capacity as a ticket salesperson due to her work environment. Sekera made a claim for workers compensation, which was accepted. Accordingly, pursuant to the factual exception set forth by the Court in *Meers*, Petitioners are statutory employers and immune from liability under the NIIA based on the Venetian/Brand Vegas Agreement. Respectfully, the District Court erred as a matter of law by denying Petitioners' motion for summary judgment under the NIIA pursuant to the *Meers* parenthetical exception language.

### G. THE VENETIAN/BRAND VEGAS AGREEMENT CREATED A JOINT VENTURE MAKING PETITIONERS SEKERA'S EMPLOYER

Petitioners argued below that the Venetian/Brand Vegas Agreement has attributes of a joint venture which could likewise invoke statutory immunity under *Hook v. Giuricich*, 108 Nev. 296, 823 P.2d 294, 295 (1992), where this Court held:

> *". . . where the evidence of a joint venture is uncontroverted and one joint venture is immune from suit by virtue of being been enrolled in State Industrial Insurance System, the other joint venturers are also immune from suit."* Haertel v. Sonshine Carpet Co., *104 Nev. 331, 335, 757 P.2d 364, 366 (1988).*

A joint venture is "a contractual relationship in the nature of an informal partnership wherein two or more persons conduct some business enterprises, agreeing to share jointly, or in proportion to capital contributed, in profits and losses." *(Bruttomesso v. Las Vegas Met. Police*, 95 Nev. 151, 154, 591 P.2d 254, 256 (1979). "The parties' intent to create a joint venture is determined by the application of ordinary rules concerning the interpretation and construction of contracts as well as a consideration of the actions and conduct of all the parties." (*Radaker v. Scott*, 109 Nev. 653, 658, 855 P.2d 1037, 1040 (1993).) Further, as noted above in *Brooks-Handler*, citing to *Haertel v. Sonshine Carpet Co.*, 104 Nev. 331, 335, 757 P.2d 364, 367 1988), "when companies combine their efforts in partnerships for specific purposes, so long as one of the partners maintains workers' compensation insurance, all of the partners and co-employers are entitled to the exclusive remedy protection of the NIIA."

Here, Petitioners argued below that Venetian was in a profit sharing venture with Brand Vegas having a basket of responsibilities that complemented Venetian's basket of responsibilities. The sum of those baskets resulted in the selling of tickets to Venetian entertainment shows and events by Sekera as a Brand Vegas kiosk employee, consummated only through the cooperation of Venetian box office employees. While Sekera argued below that the Venetian/Brand Vegas Agreement expressly states that the arrangement between Venetian and Brand

Vegas is not a *joint venture*, the fact remains that the two entities entered into an agreement designed to share the profits associated with ticket sales. (See Petitioners' Appendix, Vol. 1, Tab 1 at VCR 033 – VCR 166.) If a sale was accomplished by Brand Vegas but could ultimately not be closed by Venetian by offering tickets to the event, the opportunity cost of the loss was shared by Venetian and Brand Vegas. (See *id.*)

Judge Delaney rejected this argument, referring to Brand Vegas as "just a vendor utilizing a rental space." (See Petitioners' Appendix, Vol. 3, Tab 5 at VCR 711 (10:13-25); VCR 712 (11:1-21).) Based on all the foregoing, Judge Delaney's summation of the working relationship between Venetian and Brand Vegas is incorrect. The analysis is not that simple. Judge Delaney's comment suggests that she may not have completely and fairly evaluated the other key factors and bases for Petitioners' statutory immunity as related herein above, such as the "normal work" test, Venetian's control over Sekera,[10] application of the *Meers* parenthetical

---

[10] Some of the key "control" factors which do not appear to have been fully considered by the district court below include the following previously discussed herein:

- The manner in which she was to drive her vehicle to Venetian property;
- the parking of her vehicle only in the employee lot;
- Sekera's entry upon and exit from Venetian property;
- the landlocked nature of the Grand Canal Shops which required Sekera to walk upon Venetian marble flooring several times daily;
- the fact that Sekera had walked through the Venetian marble flooring of the Grand Lux rotunda on many hundreds of occasions previously in the

exception here under the circumstances, and the sharing of profits and losses between Venetian and Brand Vegas under the Venetian/Brand Vegas Agreement, among others.

At the August 13, 2019 hearing on this matter, Judge Delaney stated the following in conclusion:

> *I think the question is: Does the immunity attach to the Venetian in the scenario that we have here? I don't think there's any basis upon which we can look at the relationship between these two entities, her employer and the Venetian, and take the immunity of her employer is entitled to extrapolate over the Venetian issues. I'm not persuaded this exists, and I am concerned that if we were to find that that existed in this scenario, that we would be opening up a door to a slippery slope for which we would never recover for any scenario where someone is -- is working for a company within another company's location and somehow that works.*
>
> *I get it that there were relationships between the Venetian and her employer. But, again, in terms of what the Industrial Insurance Act and what the -- what the various definitional statutes related to that tell us about who's immune and who could be sued. I think, Venetian is not immune and Venetian can be sued based on how*

---

course and scope of her employment as a Brand Vegas kiosk employee prior to the November 4, 2016 incident;

- the manner in which Sekera conducted her work on and within its property;
- the reliance Sekera had on Venetian box office employees in perfecting ticket sales under the Venetian/Brand Vegas Agreement;

the fact that Venetian had the ability to discipline Sekera for failure to comply with its policies and procedures, including trespassing her from the property, which would have rendered her entirely unable to work in the Grand Canal Shops as a Brand Vegas kiosk employee.

> *you interpret reading those statutes. So that's the longer winded way to articulate that. But* ***it's a very close call.***
>
> *But I think at the end of the day I would be making a mistake to again find that immunity applies. So I am going to deny that on that basis.*
>
> (Petitioners' Appendix, Vol. 3, Tab 5 at VCR 734 (23:6-25); VCR 735 (24:1-4), emphasis added.)

Petitioners respectfully disagree with Judge Delaney that the circumstances here present "a very close call." To the contrary, Petitioners submit that the facts and law are very clear – that the NIIA clearly provides them with immunity from third-party liability.

## VIII. CONCLUSION

In the interests of judicial economy and the administration of justice, reversal is required in order to avoid severe prejudice to Petitioners, as the District Court is without jurisdiction to hear this matter by virtue of the NIIA, as Petitioners are entitled to statutory immunity from third-party liability in this matter.

DATED this 22 day of January, 2020.

ROYAL & MILES LLP

By _____

Michael A. Royal, Esq. (SBN 4370)
Gregory A. Miles, Esq. (SBN 4336)
1522 W. Warm Springs Rd.
Henderson, NV 89014
(702) 471-6777
Counsel for Petitioners

## CERTIFICATE OF COMPLIANCE

STATE OF NEVADA )
) ss:
COUNTY OF CLARK )

I, Michael A. Royal, hereby affirm, testify and declare under penalty of perjury as follows:

1. I am an attorney licensed to practice in the State of Nevada, and am a member of the law firm of Royal & Miles LLP, attorneys for Petitioners VENETIAN CASINO RESORT, LLC, and LAS VEGAS SANDS, LLC.

2. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman 14 point font.

3. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains **13,290 words** in compliance with NRAP 32(a)(1)(A)(ii) (having a word count of less than 14,000 words).

4. Finally, I hereby certify that I have read this Writ, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any

improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Further affiant sayeth naught.

MICHAEL A. ROYAL, ESQ.

SUBSCRIBED AND SWORN to before me by Michael A. Royal, Esq., on this 22 day of January, 2020.

ASHLEY SCHMITT
NOTARY PUBLIC
STATE OF NEVADA
Appt. No. 08-6493-1
My Appt. Expires Nov. 1, 2023

NOTARY PUBLIC in and for said County and State

## CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of Royal & Miles LLP, attorney's for Petitioners, VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC, and that on the 22 day of January, 2020, I served true and correct copy of the foregoing PETITIONERS' EMERGENCY PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION UNDER NRAP RULES 21(a)(6) AND 27(e), by delivering the same via U.S. Mail addressed to the following:

Keith E. Galliher, Jr., Esq.
THE GALLIHER LAW FIRM
1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89014

Honorable Kathleen Delaney
Eighth Jud. District Court, Dept. 25
200 Lewis Avenue
Las Vegas, NV 89155
*Respondent*

Sean K. Claggett, Esq.
William T. Sykes, Esq.
Geordan G. Logan, Esq.
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, NV 89107

*Attorneys for Real Party in Interest*

Ashley Schmitt
An employee of Royal & Miles LLP