Case No. _____

In the Supreme Court of Nevada

FELICE J. FIORE and SPEEDVEGAS, LLC,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark; and THE HONORABLE NANCY L. ALLF, District Judge,

Respondents,

and

ESTATE OF GIL BEN-KELY by ANTONELLA BEN-KELY, the duly appointed representative of the Estate and as the widow and heir of Decedent GIL BEN-KELY; SHON BEN-KELY, son and heir of decedent GIL BEN-KELY; NATHALIE BEN-KELY-SCOTT, daughter and heir of the decedent GIL BEN-KELY; GWENDOLYN WARD, as Personal Representative of the ESTATE OF CRAIG SHERWOOD, deceased; GWENDOLYN WARD, individually, and as surviving spouse of CRAIG SHERWOOD, deceased; GWENDOLYN WARD, as Mother and Natural Guardian of ZANE SHERWOOD, surviving minor child of CRAIG SHERWOOD, deceased,

Real Parties in Interest.

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District Court Case Nos.
A-17-757614-C &
A-18-779648-C

PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION

With Supporting Points and Authorities

DANIEL F. POLSENBERG (SBN 2376)
ABRAHAM G. SMITH (SBN 13,250)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, Nevada 89169

BRENT D. ANDERSON (SBN 7977)
JAMES D. MURDOCK, II (*pro hac vice*)
TAYLOR ANDERSON, LLP
1670 Broadway, Suite 900
Denver, Colorado 80202

Attorneys for Petitioners

PETITION FOR WRIT OF MANDAMUS
OR, ALTERNATIVELY, PROHIBITION

1. This petition arises from the district court case *Estate of Gil Ben-Kely by Antonia Ben-Kely, et al. v. SpeedVegas, LLC, et al.*, District Court No. A-17-757614-C, before the respondent judge, the HONORABLE NANCY L. ALLF. (1 App. 1.)

2. In the underlying cases, the plaintiffs/real-parties-in-interest include ESTATE OF GIL BEN-KELY by ANTONELLA BEN-KELY, the duly appointed representative of the Estate and as the widow and heir of Decedent GIL BEN-KELY; SHON BEN-KELY, son and heir of decedent GIL BEN-KELY; NATHALIE BEN-KELY-SCOTT, daughter and heir of the decedent GIL BEN-KELY, GWENDOLYN WARD, as personal representative of the ESTATE OF CRAIG SHERWOOD, deceased; GWENDOLYN WARD, individually, and as surviving spouse of CRAIG SHERWOOD, deceased; GWENDOLYN WARD, as Mother and Natural Guardian of ZANE SHERWOOD, surviving minor child of CRAIG SHERWOOD, deceased, filed claims seeking damages for the deaths of Gil Ben-Kely and Craig Sherwood.

3. At the time of the incident, decedent Craig Sherwood, a customer of defendant/petitioner SpeedVegas, LLC ("SpeedVegas"), was driving a Lamborghini Aventador owned by defendant/petitioner Felice J. Fiore, Jr. and leased to SpeedVegas for use at the SpeedVegas facility. Decedent Gil Ben-Kely, an employee of defendant SpeedVegas, was positioned in the passenger seat next to him. The vehicle crashed while being operated on the track and, plaintiffs claim, a fire occurred as the result of a defect in the fuel tank of the vehicle, and the fire caused the deaths of the decedents. (1 App. 272–74.)

3. The district court erred in denying summary judgment as to the strict products liability causes of action asserted against Mr. Fiore and SpeedVegas, in which the court held that there are questions of fact as to whether they were merchant seller under Nevada strict products liability law.[1] (7 App. 1534, 1564.)

4. Additionally, the district court erred in denying summary judgment as to the strict products liability causes of action asserted

[1] As plaintiffs have represented that they intend to abandon all other claims asserted against Mr. Fiore, the strict products claims are the only causes of action that would be pending against Mr. Fiore at the time of trial.

against Mr. Fiore because, as a member of the SpeedVegas board of directors, he was protected under Chapter 86 and the Nevada Industrial Insurance Act's ("NIIA") exclusive remedy provision.

Now, therefore, petitioners ask this Court to exercise its discretionary jurisdiction to enter an order directing the district court to vacate its order denying Mr. Fiore's and SpeedVegas' motions for summary judgment.

Dated this 7th day of October, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*
DANIEL F. POLSENBERG (SBN 2376)
ABRAHAM G. SMITH (SBN 13,250)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, Nevada 89169

BRENT D. ANDERSON (SBN 7977)
JAMES D. MURDOCK, II (*pro hac vice*)
TAYLOR ANDERSON, LLP
1670 Broadway, Suite 900
Denver, Colorado 80202

Attorneys for Petitioners

VERIFICATION

STATE OF NEVADA)
COUNTY OF CLARK)

Under penalty of perjury, I declare that I am counsel for the petitioner in the foregoing petition and know the contents thereof; that the pleading is true of my own knowledge, except as to those matters stated on information and belief; and that as to such matters I believe them to be true. I, rather than petitioner, make this verification because the relevant facts are procedural and thus within my knowledge as petitioner's attorney. This verification is made pursuant to NRS 15.010 and NRAP 21(5).

Dated this 7th day of October, 2021.

/s/ Daniel F. Polsenberg
DANIEL F. POLSENBERG

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Petitioner SpeedVegas, LLC is a Delaware limited liability company. It has no parent company, and no publicly held corporation owns 10% or more of its stock.

Petitioner Felice J. Fiore, Jr. is an individual.

Petitioners have been represented by attorneys at Perry & Westbrook; Agajanian, McFall, Weiss, Tetreault & Crist LLP; Taylor Anderson LLP; and Lewis Roca Rothgerber Christie LLP.

Dated this 7th day of October, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*
DANIEL F. POLSENBERG (SBN 2376)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200
Attorneys for Petitioners

ROUTING STATEMENT

Under NRAP Rule 17(a)(11) and (12), the Supreme Court shall hear and decide "[m]atters raising as a principal issue a question of first impression involving the . . . common law" and "[m]atters raising as a principal issue a question of statewide public importance. . .."

The Supreme Court should retain this petition, as it raises issues of statewide public importance:

(1) Whether an individual owner and lessor of a vehicle is a merchant seller under Nevada strict products liability law—and whether that determination is a question of fact for the jury or must be determined as a matter of law. NRAP 17(a)(12).

(2) Whether an individual board member of a limited liability company is a proper defendant in this case under Chapter 86 of the NRS.

(3) Whether the Nevada Industrial Insurance Act's ("NIIA") exclusive remedy provision protects Mr. Fiore from the Ben-Kely plaintiffs' claims against him because Mr. Fiore was a worker in the same employ with Mr. Ben-Kely.

(4) Whether the determination that SpeedVegas is a "seller" under Nevada strict products liability law is a question of fact for the jury or must be determined as a matter of law.

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ISSUES PRESENTED

1. Whether Mr. Fiore, an individual owner and lessor of a vehicle, is a "seller" under Nevada strict products liability law—and whether that determination is a question of fact for the jury or must be determined as a matter of law.
2. Whether Mr. Fiore, an individual board member of a limited liability company, is a proper defendant in this case under Chapter 86 of the NRS.
3. Whether the Nevada Industrial Insurance Act's ("NIIA") exclusive remedy provision protects Mr. Fiore from the Ben-Kely plaintiffs' claims against him because Mr. Fiore was a co-employee of Mr. Ben-Kely.
4. Whether the determination that SpeedVegas is a "seller" under Nevada strict products liability law is a question of fact for the jury or must be determined as a matter of law.

I.

FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED

A. Defendant Fiore was Not a Seller and He was Immune from Any Liability in This Action

Felice J. Fiore, Jr. was a member (shareholder) of SpeedVegas LLC ("SpeedVegas") at the time of the Incident. (2 App. 306 at ¶ 6; 3 App. 534 at ¶ 6; 7 App. 1585 :26-27.) Mr. Fiore was a paid member of SpeedVegas's board of directors at the time of the incident. (2 App. 306 at ¶ 7; 3 App. 534 at ¶ 7.)

Mr. Fiore owned the subject Lamborghini Aventador and leased it to SpeedVegas in his capacity as a member of SpeedVegas's board. (2 App. 306 at ¶ 8; 3 App. 534 at ¶ 8.) When Mr. Fiore leased the Lamborghini, he was not a merchant engaged in the business of supplying automobiles, the goods of the kind involved in the case. (2 App. 306 at ¶ 9; 3 App. 534 at ¶ 9; 2 App. 338:20-25.) Mr. Fiore has never been a merchant engaged in the business of supplying automobiles. (2 App. 307 at ¶ 12; 3 App. 535 at ¶ 12; 2 App. 338:20–25.)

Gil Ben-Kely ("Ben-Kely") was employed by SpeedVegas as a driving instructor/coach. (*See* 2 App. 271:22-27; 283:12-13.)

On February 12, 2017, Craig Sherwood ("Sherwood"), a customer of SpeedVegas, was driving a Lamborghini Aventador at the SpeedVegas facility with Mr. Ben-Kely seated next to him. *See* 2 App. 271:17-26. The accident occurred during the driving session. Both occupants of the Lamborghini Aventador were killed. *See* 2 App. 273:14–16; 274:8–9.

B. Defendant SpeedVegas was Not a Seller

SpeedVegas operated a facility where members of the public could drive exotic high-performance automobiles on a closed road course ("driving experiences"). Customers paid by the lap to drive a vehicle in SpeedVegas' fleet, including the Mr. Fiore's Lamborghini, on SpeedVegas' track. (2 App. 3017 at ¶ 13; 3 App. 535 2 App. 3017 at ¶ 13.) The customers were accompanied by a coach sitting in the front passenger seat who would guide the customer through the driving experience at SpeedVegas.

SpeedVegas did not design, build or sell the subject Lamborghini. *See also* 7 App. 1568:23–25. SpeedVegas merely provided driving experiences for purchase (a service) on a track with a coach.

C. Defendant Fiore Moved for Summary Judgment on Plaintiffs' Strict Products Liability Claims

Earlier this year, in the district court litigation, defendant Fiore moved for summary judgment, asking the district court to rule that (1) Fiore was not a merchant seller so as to subject him to strict products liability for product defects; (2) Fiore, a member of the board of directors of SpeedVegas, was not a proper defendant because he was not liable for the debts, obligations or liabilities of SpeedVegas, LLC, under NRS Chapter 86; and (3) Fiore, as a co-employee of Ben-Kely, was protected by NIIA's exclusive remedy provision as to the Ben-Kely plaintiffs' claims against him. (2 App. 311, 3 App. 539.)

1. Fiore was Not a Merchant Seller

Fiore asserted that as a one-time or occasional seller of a good or product causing injury due to a defect, he is not a merchant seller and should not be subject to strict products liability. Mr. Fiore relied primarily on the Nevada Supreme Court case of *Elley v. Stephens*, 104 Nev. 413, 760 P.2d 768 (1988). (2 App. 317–21; 3 App. 546–50.) As set forth in *Elley*, Mr. Fiore is unquestionably the "occasional seller[ ], hardly qualifying as retailer[ ] or manufacturer[ ] . . . . Strict liability theory does not apply to such sellers." (2 App. 32; 3 App. 550.) 104 Nev.

at 418. *See also*, N.R.S. 104.2103; RESTATEMENT (SECOND) OF TORTS § 402A (1965), Special Liability of Seller of Product for Physical Harm to User or Consumer, comment (f); *Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000); *Allison v. Merck & Co., Inc.*, 878 P.2d 948, 952 n.1 (Nev. 1994).

2. Fiore is Not a Proper Defendant by Virtue of Being a Member SpeedVegas's Board of Directors

Fiore asserted that because he leased his Lamborghini to SpeedVegas in his capacity as a member of the SpeedVegas's board of directors and it was authorized by SpeedVegas to do so in this capacity, he is not liable for the debts, obligations, or liabilities of SpeedVegas. *See* 2 App. 306 at ¶ 8; 3 App. 534 ¶ 8; *see also* 6 Del.C. § 18-303(a); NRS 86.381. Mr. Fiore has never waived the protection from individual liability provided by NRS Chapter 86 for the debts or liabilities of SpeedVegas in any written instrument. *Id.*, ¶ 9. Plaintiffs have not alleged that Mr. Fiore was acting as the alter ego of SpeedVegas, and no facts have been produced to show such claim.

3. As to the Ben-Kely Plaintiffs' Claims, Fiore is Protected by the NIIA's Exclusive Remedy Provision

Fiore asserted that as a paid member of SpeedVegas's board of directors, he qualified as an employee under NRS 616A.105 of the NIIA, thus, he is immune from any claims against him by a co-employee under the NIIA. *Meers v. Haughton Elevator, a Div. of Reliance Elec. Co.*, 101 Nev. 283, 285, 701 P.2d 1006, 1007 (1985). Mr. Fiore primarily relied on *Noland v. Westinghouse Elec. Corp.*, 97 Nev. 268, 628 P.2d 1123 n.1 (1981) (internal citations omitted.) which is squarely on point on this issue.

> MR. MURDOCK: In light of Noland versus Westinghouse, I would ask that Your Honor consider that -- that ruling. That was a Nevada Supreme Court case where the Court essentially said that an employee could not bring a claim for products liability against the subcontractor due to the NIIA…
>
> MR. MURDOCK: It -- Your Honor, what it is, is that there was a -- it was a defendant in the case manufactured, sold, supplied, installed, and maintained the -- essentially, the instrumentality that caused the injury.
> And the Court found that the plaintiffs' claims were barred for products liability against the subcontractor employer because of the NIIA.
> So it does speak to specifically product liability claims are precluded under the NIIA…
>
> We state the actual finding of the Court. And the Nevada Supreme Court said:

> "[N]o case has been called to our attention, nor has any independent research discovered any case, where statutory immunity of coemployees has abrogated the dual capacity doctrine. One of the principal purposes of the NIIA and similar workman's compensation acts is to protect employees from the possible financial burden arising from injuries to coemployees as a result of their negligence. We perceive no valid reason to deny Westinghouse the -- as a statutory coemployee of the appellant, the immunity afforded to the NIIA merely because it may have been serving the general contractor different from that as an appellant."
>
> And again, this is a products liability claim against an elevator [manufacturer, distributor, and employer]. And the Court is saying coemployees can't sue each other because of the NIIA.
>
> Here, [] Fiore and Mr. Ben-Kely were coemployees. Mr. Fiore was on the board and Mr. Ben-Kely was the coach at the time of the crash. The NIIA is very clear on this. This claim is barred.

(7 App. 1513:25–1514:7, 1514:17– 25, 1516:1– 23.)

In line with the Nevada Supreme Court's decision in *Noland,* the Court should reject plaintiffs' dual capacity argument and apply NIIA as the exclusive remedy for the Ben-Kely plaintiffs' claims. *Noland*, 97 Nev. at 268-269; *see also Harris v. Rio Hotel & Casino, Inc.*, 117 Nev. 482, 490–491, 25 P.3d 206, 212 (2001).

D. Defendant SpeedVegas Moved for Summary Judgment on Plaintiffs' Strict Products Liability Claims

On May 14, 2021, defendant SpeedVegas filed a motion for summary judgment, asking the district court to rule that plaintiffs' product liability claims fail as a matter of law because SpeedVegas was not a seller. (4 App. 756.)

Product liability claims can only be had against a "seller." *See Allison v. Merck*, 110 Nev. 762 (1994) (affirming summary judgment in favor of a hospital because it is not a "seller" of defective vaccine administered to a patient); *see also Barnard v. Bugsy's*, 2013 Nev. Dist. LEXIS 1966) (finding a hotel was not liable under a strict product liability theory for injuries to a guest when a defective chair collapsed under the guest, injuring him.); *see also Catha v. Ahern Rentals*, 2013 Nev. Dist. LEXIS 389 (finding that a lessor of a motorized work cart was not subject to a product liability claim because a lessor is not a seller.).

SpeedVegas did not design, build or sell the goods of the kind involved in this case. (4 App. 756.) Instead, it sold the experience (a service) of driving an exotic car on a track with a coach to customers

like Mr. Sherwood. SpeedVegas is similar to the lessor of the motor cart in *Catha v. Ahern Rentals*, 2013 Nev. Dist. LEXIS 389, wherein the court found that strict product liability does not apply to commercial lessors because a lessor is not a "seller."

II.

ARGUMENT

A. Strict Liability Theory Does Not Apply to One-Time or Occasional Sellers

The doctrine of strict liability in tort for product defects does not apply to occasional sellers or lessors of goods. (2 App. 317–21; 3 App. 546–50.) *See Elley v. Stephens*, 104 Nev. 413, 760 P.2d 768 (1988), which adopts the RESTATEMENT (SECOND) OF TORTS' rule on products liability (§ 402A(1)).

1. The District Court Erred by Misapplying the Plain Language of Elley

Elley notes that under the RESTATEMENT (SECOND), strict products liability does not apply to the occasional seller of products who is not engaged in that activity as part of his business. (2 App. 318; 3 App. 546. As quoted in the Fiore MSJ: "Thus it does not apply to the housewife who, on one occasion, sells to her neighbor a jar of jam or a pound of

sugar. Nor does it apply to the owner of an automobile who, on one occasion, sells it to his neighbor, or even sells it to a dealer in used cars. . . . [H]e is not liable to a third person, or even to his buyer, in the absence of his negligence." (2 App. 319; 3 App. 547.)

2. "Stock" Jury Instruction 7.1 Does Not Create a Factual Issue Whether Occasional Sellers are Subject to Strict Liability

Fiore's citation to pattern jury instruction 7.1 on products liability further recognizes Nevada's adoption of the Restatement's exclusion of a seller who is not "a merchant engaged in the business of supplying goods of the kind involved in the case" from strict liability for a product defect. (3 App. 547:21– 548:7.) In surveying all 50 states and the District of Columbia, every jurisdiction that has examined the issue of what constitutes a "seller" for purposes of applying strict products liability either follows the RESTATEMENT (SECOND) or has adopted its own legislation that is virtually identical. (3 App. 548:8–22.) Sixteen cases demonstrate widespread application, across the country, of the rule that occasional sellers or lessors are not subject to the doctrine of strict products liability. *See id*.

Fiore's citation to the pattern instruction, however, is not a concession that Fiore's status as a "merchant" is "a question of fact for the jury." (4 App. 914:21– 23.) Just because a jury instruction exists on an issue does not mean that summary judgment is precluded on that issue in every case. No authority holds that the mere existence of a jury instruction for a cause of action prevents the cause of action from being decided on summary judgment. When the fact is conceded, unopposed, or there is no admissible evidence offered to contest it, the fact may be accepted by the Court as true and the Court may "grant summary judgment if the motion and supporting materials - including the facts considered undisputed - show that the movant is entitled to it." (6 App. 1395; 6 App. 1407.) NRCP 56, subdivision (e)(3).

3. Strict Liability Does Not Apply to One-Time or Occasional Product Sellers

Nevada law is clear that occasional sellers or lessors of a product are not subject to the doctrine of strict products liability. There is no legal authority found anywhere in the United States that supports the proposition that it is the nature of the transaction that determines whether the seller or lessor of a product is strictly liable in tort for product defects. The sole consideration for holding a person or entity

strictly liable for product defects is their status as one who is "engaged in the business of selling such a product." (6 App. 1394; 6 App. 1407.) RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965). No other factor is relevant to such a determination.

Whether Mr. Fiore was making money in the deal is not determinative. (6 App. 1407.) *See Elley*, 104 Nev. 413, 760 P.2d 768. In *Elley*, this Court stated:

> [A] strict liability theory is not applicable to an occasional seller of a product, who does not, in the regular course of his business, sell such a product. See, e.g., Restatement (Second) of Torts § 402A (1965); Prosser and Keaton on Torts 705 (5th ed. 1984) ("Only a seller who can be regarded as a merchant or one engaged in the business of supplying goods of the kind involved in the case is subject to strict liability, whether on warranty or in tort."); Bailey v. ITT Grinnell Corp., 536 F.Supp. 84, 87 (N.D.Ohio 1982) ("[S]trict tort liability is not an appropriate theory of liability for application to the occasional seller); Lemley v. J & B Tire Co., 426 F.Supp. 1376, 1377 (W.D.Penn.1977) ("The plaintiffs cannot prevail on their [strict liability cause of action] because the defendants ... are not sellers engaged in the business of selling such a product.").

104 Nev. at 418.

Plaintiffs do not dispute that Mr. Fiore was an occasional or one-time seller/lessor of an automobile and that he did not, "in the regular course of his business, sell such a product." RESTATEMENT

(SECOND) OF TORTS § 402A (1965). They offered no evidence to support a finding that Mr. Fiore was "a seller who can be regarded as a merchant or one engaged in the business of supplying goods of the kind involved in the case." Prosser and Keaton on Torts 705 (5th ed. 1984). Indeed, plaintiffs did not dispute Undisputed Material Fact No. 5: "Felice J. Fiore, Jr. was not, at the time he leased the subject Lamborghini Aventador to SpeedVegas, a merchant engaged in the business of supplying goods of the kind (automobiles) involved in the case."

Plaintiffs never presented any evidence that Mr. Fiore was a merchant engaged in the business of selling or leasing vehicles. They did not dispute the fact that Mr. Fiore has never entered into a lease agreement like this either before or since the incident. If there is no material fact in dispute to present to the jury, summary judgment is appropriate.

The rule is clear. For a person or entity who sells or rents/leases a product to be subject to strict products liability for defects, that person or entity must be engaged in the business of selling such products and cannot be a one-time or occasional seller. The type of sale, lease, or rental–whether it was a personal or commercial sale, or whether the

seller did it to unload something that was unwanted or to turn a profit– has never been the determinative factor in any jurisdiction in applying strict products liability for defects upon the seller.

In sum, Mr. Fiore was a one-time seller/lessor of the Aventador. As such, he is not subject to the doctrine of strict products liability. Both the Ben-Kely plaintiffs' and the Sherwood plaintiffs' oppositions have not identified any facts or authority that view Mr. Fiore's leasing of a single vehicle to SpeedVegas as automatically converting him into a merchant engaged in the business of selling or leasing vehicles subject to strict products liability. There are no facts in dispute for a jury to consider that go to this question. To hold otherwise would go against the public policy underlying the doctrine.

B. Fiore is Not a Proper Defendant Under NRS Chapter 86

In Delaware, the state in which SpeedVegas, LLC was organized, limited liability company members and managers are not personally obligated for company debt, obligation, or liabilities. *See* 6 Del.C. § 18-303(a).

Similarly, under Nevada law, pursuant to NRS 86.381, "[a] member of a limited-liability company is not a proper party to

proceedings by or against the company, except where the object is to enforce the member's right against or liability to the company." NRS 86.371 provides: "Unless otherwise provided in the articles of organization or an agreement signed by the member or manager to be charged, no member or manager of any limited-liability company formed under the laws of this State is individually liable for the debts or liabilities of the company." This means that barring an exception, a lawsuit against the individual members and managers of a limited liability company, such as Mr. Fiore, is improper.

1. The District Court Erred by Not Applying the Protection Afforded Under Chapter 86 of NRS

Mr. Fiore was an LLC member (shareholder) of SpeedVegas and leased the subject Lamborghini Aventador to SpeedVegas in his capacity as a member of SpeedVegas, which he was authorized to do. (2 App. 306 at ¶ 8; 3 App. 534 at ¶ 8.) He has never waived the protection from individual liability provided by NRS Chapter 86 in any written instrument. *See also Gardner v. Henderson Water Park, LLC*, 133 Nev. 391, 399 P.3d 350 (2017) (the Nevada Supreme Court finding that members of an LLC are not personally liable). Moreover, plaintiffs never alleged that Mr. Fiore was acting as an alter ego of SpeedVegas,

and no facts have been produced showing this. In fact, plaintiffs' opposition has not identified the presence of any exceptions to these well-established rules. *See generally*, 4 App. 910; 5 App. 1241. The absence of argument challenging these statutory protections is tantamount to a concession of their merit under EDCR 2.20(e).

In sum, plaintiffs seek to hold Mr. Fiore liable by virtue of his membership in SpeedVegas. The conduct of which he is accused applies equally to the LLC. And there is no evidence that Mr. Fiore assumed a personal duty to the plaintiffs outside of his membership in the LLC. Therefore, under NRS Chapter 86, Mr. Fiore is protected from individual liability as a member of SpeedVegas LLC, thus, he is not a proper party in these proceedings.

C. NIIA's Exclusive Remedy Provision Protects Employers or Co-Employees from Being Sued

1. The District Court Erred by Not Applying the NIIA's Exclusive Remedy Provision as to the Ben-Kely Plaintiffs' Claims against Defendant Fiore

It is well-settled law in Nevada that the NIIA's exclusive remedy provision supersedes any right the employee may have against its employer or co-employees. Specifically, this Court found that dual capacity doctrine does not apply in Nevada. *See Noland v. Westinghouse*

Elec. Corp., 97 Nev. 268, 628 P.2d 1123 n.1 (1981) (internal citations omitted.); *see also Harris v. Rio Hotel & Casino, Inc.*, 117 Nev. 482, 490-491, 25 P.3d 206, 212 (2001). As noted in *Harris*, the Nevada courts have repeatedly held that the dual capacity doctrine is not recognized in Nevada for co-employees. *Id*. The Nevada Supreme Court in *Noland* stated:

> No case has been called to our attention, nor has independent research discovered any case, where statutory immunity of coemployees has been abrogated by the "dual capacity doctrine". One of the principal purposes of the NIIA and similar workmen's compensation acts is to protect employees from the possible financial burden arising from injuries to coemployees as a result of their negligence. We perceive no valid reason to deny Westinghouse, as the statutory coemployee of appellant, the immunity afforded by NIIA, merely because it might have been serving the general contractor in a capacity different than that of appellant who was injured.

Nolan, supra, at 270; *see also* 7 App. 1513:36–1514:7, 1514:17–25; 7 App. 1516:1–23.

Here, Mr. Fiore was a paid member of SpeedVegas's board of directors at the time of the incident. In addition, the leasing of the subject Aventador was done while rendering an actual service for SpeedVegas for pay. Thus, Mr. Fiore qualifies as an employee under NRS 616A.105. Like *Noland*, since Mr. Fiore was Mr. Ben-Kely's co-

employee, the protections of the NIIA extend to him. In sum, the NIIA's exclusive remedy provision supersedes any right the Ben-Kely plaintiffs may have had against Mr. Fiore in his secondary capacity as the owner of the subject Lamborghini Aventador.

D. Strict Liability Theory Does Not Apply to Lessor of Goods

As discussed above, the doctrine of strict liability in tort for product defects may only be applied to a manufacturer, a distributor or a seller of the product, who can be regarded as a merchant engaged in the business of supplying goods of the kind involved in the case. (2 App. 317–21; 3 App. 546–50.) *See Elley v. Stephens*, 104 Nev. 413, 760 P.2d 768 (1988), which adopts the Restatement (Second) of Torts' rule on products liability (§ 402A(1)); *see Shoshone Coca-Cola Bottling Co. v. Dolinski*, 82 Nev. 439, 420 P.2d 855 (1966); *see also Allison v. Merck,* 110 Nev. 762 (1994) (affirming summary judgment in favor of a hospital because it is not a "seller" of defective vaccine administered to a patient); *see also Barnard v. Bugsy's*, 2013 Nev. Dist. LEXIS 1966; *see also Catha v. Ahern Rentals*, 2013 Nev. Dist. LEXIS 389.

Here, SpeedVegas does not fall into any of these categories where strict liability in tort may be applied because SpeedVegas was not a

seller or manufacturer or distributor of vehicles. Moreover, the Nevada courts refused to apply the strict product liability claims on commercial lessors, see *Catha v. Ahern Rentals*, 2013 Nev. Dist. LEXIS 389, or provider of services. *see Allison v. Merck*, 110 Nev. 762, 878 P.2d 948 (1994); *see also Barnard v. Bugsy's*, 2013 Nev. Dist. LEXIS 1966. SpeedVegas did not "sell" Mr. Sherwood the allegedly defective Lamborghini. Rather, it sold the experience (a service) of driving an exotic car on a track with a coach. As such, SpeedVegas cannot be liable under a strict products liability theory for defects as a matter of law.

III.

WRIT RELIEF IS WARRANTED TO CLARIFY IMPORTANT ISSUES OF LAW AND TO ENSURE AN ADEQUATE REMEDY FOR FIORE AND SPEEDVEGAS

A. There is not a Plain, Speedy and Adequate Remedy in the Ordinary Course of Law for Defendants Fiore and SpeedVegas

Writ relief is appropriate "where there is not a plain, speedy and adequate remedy in the ordinary course of law," NRS 34.170, or "when an important issue of law needs clarification," particularly one "that could potentially affect other litigants statewide." *Okada v. Eighth Jud.*

Dist. Ct. in & for Cty. of Clark, 134 Nev. 6, 9-10, 408 P.3d 566, 569-70 (2018) (quotations omitted).

Here, the district court's erroneous determination that the doctrine of strict liability applies to defendants Fiore and SpeedVegas entitles them to writ relief as "there is not a plain, speedy and adequate remedy" for defendants Fiore and SpeedVegas "in the ordinary course of law." NRS 34.170.

B. Writ Relief Will Help Ensure an Adequate Remedy for Defendants Fiore and SpeedVegas

If the district court mis-instructs the jury on the law and advises it that the doctrine of strict liability in tort for product defects applies to occasional sellers or lessors of goods such as defendants Fiore and SpeedVegas when it in fact does not, this could affect the jury's verdict and prejudice said defendants. Moreover, defendant Fiore is not liable for the debts, obligations or liabilities of SpeedVegas, LLC under Chapter 86 and NIIA. Hence, a new trial *after* an appeal will not constitute a speedy remedy. At a minimum, both plaintiffs' and said Defendants' ability to prepare for trial and assess potential settlement will be aided by this Court's clarification of these important legal issues.

Moreover, the requirement that defendant Fiore may bear the cost of posting a bond for appeal would be highly prejudicial to Mr. Fiore and warrants this Court's consideration of the issue in advance of the upcoming trial.

CONCLUSION

For the foregoing reasons, this Court should (a) determine as a matter of law that the doctrine of strict liability in tort for product defects does not apply to occasional sellers or lessors of goods and (b) instruct the district court to vacate its order denying defendants Fiore and SpeedVegas' motions for summary judgment and enter judgment in favor of defendants Fiore and SpeedVegas on this cause of action.

Dated this 7th day of October, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
DALE KOTCHKA-ALANES (SBN 13,168)
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief exceeds the type-volume limitations of NRAP 21(d) because, except as exempted by NRAP 32(a)(7)(C), it contains 4,424 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 7th day of October, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*
DANIEL F. POLSENBERG (SBN 2376)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Petitioner

BRENT D. ANDERSON (SBN 7977)
JAMES D. MURDOCK, II (*pro hac vice*)
TAYLOR ANDERSON, LLP
1670 Broadway, Suite 900
Denver, Colorado 80202

CERTIFICATE OF SERVICE

I certify that on October 7, 2021, I submitted the foregoing "Petition for Writ of Mandamus or, Alternatively, Prohibition" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

William R. Brenske
Jennifer R. Andreevski
Ryan D. Krametbauer
BRENSKE ANDREEVSKI & KRAMETBBAUER
3800 Howard Hughes Parkway
Suite 500
Las Vegas, Nevada 89169

Attorneys for Real Parties in Interest Estate of Gil Ben-Kely by Antonella Ben-Kely, the duly appointed representative of the Estate and as the widow and heir of Decedent Gil Ben-Kely; Shon Ben-Kely, son and heir of decedent Gil Ben-Kely; Nathalie Ben-Kely-Scott, daughter and heir of the decedent Gil Ben-Kely

Corey M. Eschweiler
ER INJURY ATTORNEYS
4795 South Durango
Las Vegas, Nevada 89147

Rahul Ravipudi
Paul A. Traina
Ian P. Samson
PANISH SHEA & BOYLE, LLP
8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148

Attorneys for Real Parties in Interest Gwendolyn Ward, as Personal Representative of the Estate of Craig Sherwood, deceased; Gwendolyn Ward, individually, and as surviving spouse of Craig Sherwood, deceased; Gwendolyn Ward, as Mother and Natural Guardian of Zane Sherwood, surviving minor child of Craig Sherwood, deceased

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

The Honorable Nancy L. Allf
DISTRICT COURT JUDGE – DEPT. 27
200 Lewis Avenue
Las Vegas, Nevada 89155

Respondent

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP