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2  
3 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

4 FELICE J. FIORE and SPEED VEGAS, LLC,

5 Petitioners,

6  
7 v.

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

11 Respondents,

12 and

13 ESTATE OF GIL BEN-KELY by ANTONELLA BEN-KELY  
14 as the duly appointed representative of the Estate and as the  
15 widow and heir of Decedent GIL BEN-KELY; SHON BEN-  
16 KELY, son and heir of decedent GIL BEN-KELY;  
17 NATHALIE BEN-KELY-SCOTT, daughter and heir of the  
18 decedent GIL BEN-KELY; GWENDOLYN WARD, as  
19 personal representative of the ESTATE OF CRAIG  
20 SHERWOOD, deceased; GWENDOLYN WARD,  
21 individually and as the surviving spouse of CRAIG  
22 SHERWOOD, deceased; GWENDOLYN WARD, as mother  
23 and natural guardian of ZANE SHERWOOD, surviving minor  
24 child of CRAIG SHERWOOD, deceased,

25 Real Parties in Interest.

26  
27 **Real Parties In Interest The Estate of Gil Ben-Kely, Antonella Ben-Kely, Shon**  
28 **Ben-Kely, and Nathalie Ben-Kely's Answer to Felice J. Fiore and Speed Vegas,**  
**LLC's Petition for Writ of Mandamus or, Alternatively, Prohibition**

WILLIAM R. BRENSKE (SBN 1806)  
JENNIFER R. ANDREEVSKI (SBN 9095)  
RYAN D. KRAMETBAUER (SBN 12800)  
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*Real Parties in Interest*

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A-18-779648-C

## 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.

Real Parties in Interest, Antonella Ben-Kely, Shon Ben-Kely, and Nathalie Ben-Kely, are individuals.

Real Party in Interest, the Estate of Gil Ben-Kely, is an estate established in the State of Nevada for the deceased individual, Gil Ben-Kely.

Real Parties in Interest have been represented by attorneys, William R. Brenske, Jennifer R. Andreevski, Ryan D. Krametbauer, and Scott M. Brenske, at Brenske Andreevski & Krametbauer and formerly by attorneys (including but not limited to), Janiece Marshall and Dominic P. Gentile at Gentile Cristalli Miller Armeni Savarese.

DATED this 13<sup>th</sup> day of December, 2021.



WILLIAM R. BRENSKE (SBN 1806)

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## ROUTING STATEMENT

This case is an appeal of the District Court's denial of Appellants' Motion for Summary Judgment and is presumptively assigned to the Nevada Court of Appeals pursuant to NRAP 17(b)(5). Contrary to Appellants' assertions, Respondents submit the appeal does not present matters of first impression and should be routed to the Nevada Court of Appeals.

DATED this 13<sup>th</sup> day of December, 2021.



WILLIAM R. BRENSKE (SBN 1806)

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## TABLE OF CONTENTS

NRAP 26.1 Disclosure	i
Routing Statement	ii
Table of Authorities	iv
Issues Presented	1
Facts Necessary to Understand the Issues Presented	1-5
A. The Incident	1-2
B. The Ben-Kelys Have Settled with Speed Vegas	2
C. Mr. Fiore is an Investor, Not an Employee of Speed Vegas	3-5
Legal Analysis	5-16
A. All Facts Must be Construed in Favor of the Ben-Kelys	5
B. Mr. Fiore is a “Seller” Under Nevada law	6-11
C. Chapter 86 Does Not Insulate Mr. Fiore from Liability For His Individual Tortious Acts	12-14
D. Mr. Fiore Was Not an Employee of Speed Vegas and is Not Protected by NIIA	14-16
Conclusion	16-17
Certificate of Compliance	I-II
Verification	III
Proof of Service	IV

## TABLE OF AUTHORITIES

### Cases

<u>Elley v. Stephens</u> , 104 Nev. 413 (1988)	10
<u>Gardner on Behalf of L.G. v. Eighth Judicial District Court in and for County of Clark</u> , 113 Nev. 730 (2017)	13
<u>Kahn v. Morse &amp; Mowbray</u> , 121 Nev. 464 (2005)	5
<u>Kemp v. Miller</u> , 154 Wis. 2d 538 (1990)	6-7
<u>LaMantia v. Redisi</u> , 118 Nev. 27 (2002)	5
<u>Schueler v. Ad Art, Inc.</u> , 136 Nev. 447 (2020)	6
<u>Wood v. Safeway, Inc.</u> , 121 Nev. 724 (2005)	5

### Court Rules

Nevada Rules of Appellate Procedure, Rule 17	ii
Nevada Rules of Appellate Procedure, Rule 26	i

### Statutes

NRS 616A.010 (1993)	16
NRS 616A.020 (2011)	14
NRS 616A.105 (2011)	14
NRS 616A.110 (2003)	14

### Other Authority

Restatement 2d of Torts, sec. 402A	7
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## **Issues Presented**

1. Is Mr. Fiore, who entered into a commercial lease with Speed Vegas and was compensated for each and every sales transaction in which his vehicle was used on the Speed Vegas racetrack, a “seller” under Nevada strict products liability law – and is this a question of fact or a matter of law?
2. Can a board member of a limited liability company, such as Mr. Fiore, escape liability for his own, separate and individual liabilities, simply because the harmful event occurs on company property?
3. Is a board member of a limited liability company, such as Mr. Fiore, an employee of the company and does the Nevada Industrial Insurance Act (NIIA) protect that board member when he supplies a dangerous product to the company for use by its employees and customers?

## **Facts Necessary to Understand the Issues Presented**

### **A. The Incident**

On February 12, 2017, 59-year-old Gil Ben-Kely was working as a driving coach for Speed Vegas. (Appellant’s Appendix 000271). Speed Vegas is a racetrack located on the south-end of Las Vegas Boulevard where customers can buy “driving experiences” that allow them to drive exotic supercars around Speed Vegas’s 1.5-mile long race track. On that date, Canadian tourist, 37-year-old Craig Sherwood, paid to drive a Lamborghini Aventador around the Speed Vegas track



1 with Gil Ben-Kely as his coach. Id. The Aventador was owned by Felice J. Fiore  
2 aka Phil Fiore and was leased to Speed Vegas under a commercial profit share lease  
3 agreement. (Appellant's Appendix 000273). As Mr. Sherwood was driving his  
4 final lap around the Speed Vegas track in the Lamborghini Aventador, he crashed  
5 into the tire barriers at Turn 2 of the track. (Appellant's Appendix 000273). The  
6 vehicle burst into flames upon impact creating an inferno that could be seen from  
7 the nearby I-15 freeway and beyond. Id. As a result of the collision and the ensuing  
8 fire, Craig Sherwood and Gil Ben-Kely died and were burned beyond recognition.  
9 (Appellant's Appendix 000274).

10  
11  
12  
13 **B.**  
14 **The Ben-Kelys Have Settled with Speed Vegas**

15 As a preliminary matter, it is necessary to inform this Court that the Ben-  
16 Kelys have settled their claims against Speed Vegas. As such, the only appellate  
17 issues that pertain to the Ben-Kely parties are the ones asserted by Mr. Fiore. By  
18 contrast, the Sherwood parties have not settled their claims against Speed Vegas  
19 and will likely address the Speed Vegas claims in their brief. Given the Speed  
20 Vegas claims are moot insofar as the Ben-Kelys are concerned, those issues will not  
21 be addressed in this response.  
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C.

**Mr. Fiore Was a Speed Vegas Investor, Not an Employee**

Upon reading Mr. Fiore's writ petition, one would come away with the impression that he worked side-by-side with Mr. Ben-Kely at Speed Vegas. This is not true.

Mr. Fiore lives in Connecticut. (Fiore deposition at 42:8, Appellant's Appendix, Volume 6, page 1298). He invested hundreds of thousands of dollars in Speed Vegas but earns his living as a registered investment advisor. (Fiore deposition at 37:5-10, Appellant's Appendix, Volume 6, page 1293). When explaining why he leased his Lamborghini Aventador to Speed Vegas in the months before the incident, Mr. Fiore testified that he had recently lost his job in finance and went from "literally" earning "decent income *to a place of zero.*" (Fiore deposition at 62:13-15, Appellant's Appendix, Volume 6, page 1318) (emphasis added). At the time he leased his Lamborghini to Speed Vegas, Mr. Fiore was not on the payroll of his investment company, nor was he on the payroll of Speed Vegas. Id. He was at "a place of zero" and was not earning any income.

Mr. Fiore has only been to the Speed Vegas track two or three times. (Fiore deposition at 74:12-16, Appellant's Appendix, Volume 6, page 1330). When he goes to Speed Vegas, he is treated like a customer. (Fiore deposition at 75:7-76:13, Appellant's Appendix, Volume 6, pages 1331-1332). He is required to sign a waiver, undergo the regular customer trainings, and drive with a coach. Id.



1 Mr. Fiore is self-employed and operates a firm called Procyon Partners.  
2 (Fiore deposition at 40:12-25, Appellant's Appendix, Volume 6, page 1296). He  
3 does investment management on both the institutional side and the private wealth  
4 side. (Fiore deposition at 40:16-21, Appellant's Appendix, Volume 6, page 1296).  
5 He is not a Speed Vegas coach. He does not manage Speed Vegas. He does not  
6 race cars or sell car experiences. He does not do anything that is part of the normal  
7 operation of Speed Vegas. In fact, it is unclear what "services" he alleges Speed  
8 Vegas pays him for, especially since he testified he was not making any money at  
9 the time he leased his Lamborghini to Speed Vegas.  
10

11  
12  
13 Mr. Fiore's connection with Speed Vegas comes from his love of exotic cars.  
14 He invested \$100,000 - \$200,000 in Speed Vegas's predecessor company – World  
15 Class Driving – and another \$125,000 - \$150,000 when Aaron Fessler (Speed  
16 Vegas's eventual CEO) decided to transform World Class Driving into Speed  
17 Vegas. (Fiore deposition at 57:7-58:1, Appellant's Appendix, Volume 6, pages  
18 1313-1314). The only "evidence" Appellant has produced to suggest Mr. Fiore was  
19 "paid" by Speed Vegas is in the vaguely-worded affidavit he attached to his Motion  
20 for Summary Judgment saying he "received compensation for [his] services as a  
21 member of Speed Vegas's Board of Directors." (Appellant's Appendix 000306).  
22 Mr. Fiore never produced a pay stub; he never produced any documentation that he  
23 was paid for any services; he never indicated which "services" he performed; and  
24 he testified that he leased his car to Speed Vegas because he was not making any  
25  
26  
27  
28

1 money. As such, while the parties agree Mr. Fiore entered a commercial lease with  
2 Speed Vegas whereby he realized a portion of the profits from Speed Vegas's  
3 customers using his car, Respondents dispute Mr. Fiore's assertion that he was  
4 "paid" for "his services" by Speed Vegas such that he could be considered a co-  
5 employee of Mr. Ben-Kely. Mr. Fiore's own testimony is evidence to the contrary.  
6 Simply put, the evidence simply does not comport with Mr. Fiore's vague and self-  
7 serving statement in his affidavit.  
8

### 9 Legal Analysis

#### 10 **A.**

#### 11 **All Facts Must be Construed in Favor of the Ben-Kelys**

12 Appellants' Writ Petition is based on the District Court's denial of their  
13 Motion for Summary Judgment. This Court reviews orders on summary judgment  
14 motions *de novo*. Kahn v. Morse & Mowbray, 121 Nev. 464, 473 (2005). When  
15 considering a Motion for Summary Judgment, all pleadings and proof must be  
16 construed in a light most favorable to the non-moving party. Wood v. Safeway, Inc.,  
17 121 Nev. 724, 732 (2005). "A genuine issue of material fact exists when 'a  
18 reasonable jury could return a verdict for the non-moving party.'" Kahn at 474,  
19 citing LaMantia v. Redisi, 118 Nev. 27, 29 (2002). In this case, the Ben-Kelys were  
20 the non-moving party and all evidence must be construed in a light most favorable to  
21 them.  
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**B.**  
**Mr. Fiore is a “Seller” under Nevada Law**

Mr. Fiore argues Nevada law does not impose liability on “occasional sellers” while misrepresenting to this Court that Plaintiffs “do not dispute that Mr. Fiore was an occasional or one-time seller/lessor of an automobile.” (Appellant’s Opening Brief at page 12). To the contrary, in their Opposition to Mr. Fiore’s motion in the District Court, the Ben-Kelys argued Mr. Fiore is a seller and the commercial lease executed between Mr. Fiore and Speed Vegas created a “question of fact as to whether Fiore effectively engaged in the business (together with Speed Vegas) of selling [or leasing] his Lamborghini for use by consumers on the Speed Vegas track.” (Appellant’s Appendix at 001246:7-15). The Ben-Kelys did not (and still do not) agree with Mr. Fiore’s contention that he was an occasional seller.

In Nevada, “a seller or manufacturer of the faulty product” may be held liable for a product liability claim. *See, Schueler v. Ad Art, Inc.*, 136 Nev. 447, 457, 472 P.3d 686, 694 (2020). In addition, Nevada follows the Restatement, section 402A, which provides: “One who sells any product in a defective condition unreasonably dangerous to the user ... is subject to liability for physical harm caused to the ultimate user ... if the seller is engaged in the business of selling such a product and it is expected to ... reach the user ... without substantial changes. *Id.* at f.n. 5.

Although there is no case specifically on point in Nevada, the Supreme Court of Wisconsin considered a similar issue in *Kemp v. Miller*. There, the plaintiffs

1 were driving a Budget Rent-a-Car when they heard a loud noise. The driver applied  
2 the brakes and the car fishtailed before hitting a bridge abutment and spinning  
3 around to face east in the westbound lane. After the occupants exited the vehicle,  
4 the rental car was struck by a semitruck. Kemp v. Miller, 154 Wis. 2d 538, 546  
5 (1990). As the car was being towed from the scene, the tow truck operator told the  
6 occupants the right front tie rod on the car was broken. Id. The occupants sued  
7 Budget Rent-a-Car for product liability. Budget filed a motion for summary  
8 judgment arguing it was not a manufacturer or seller of the car. The Supreme Court  
9 of Wisconsin analyzed the public policy behind the Restatement 2d of Torts, sec.  
10 402A, and product liability law, and determined the “policy considerations which  
11 justify the imposition of strict liability on sellers and manufacturers apply to those  
12 who are engaged in the business of leasing products to the consuming public.” Id. at  
13 554. This is because “persons in the business of leasing continually introduce  
14 potentially dangerous instrumentalities into the stream of commerce.” Id. at 555.  
15 The same rationale should be applied in this case.

16  
17 Here, it is undisputed that Mr. Fiore entered into a **commercial** lease with  
18 Speed Vegas. (*See*, Appellant’s Appendix 001252-001254). Pursuant to that lease,  
19 Mr. Fiore was compensated for each and every sales transaction in which his vehicle  
20 was used on the Speed Vegas racetrack. Unlike a housewife who occasionally sells  
21 a jar of jam to her neighbor, Mr. Fiore effectively entered into a partnership with  
22 Speed Vegas whereby he got paid every time his car was driven for a lap around the  
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1 Speed Vegas track. He was continually introducing a dangerous vehicle into the  
2 stream of commerce by offering his vehicle to Speed Vegas customers to lease to  
3 drive around the Speed Vegas track.  
4

5 Mr. Fiore leased the vehicle under a profit-sharing agreement and received  
6 funds every time his vehicle was used. In other words, through his co-Defendant  
7 Speed Vegas, Mr. Fiore leased his vehicle over-and-over again to Speed Vegas's  
8 customers. That is likely why Mr. Fiore elected to call the lease a "commercial  
9 lease" instead of any other type of lease.  
10

11 According to the subject commercial lease agreement, Speed Vegas agreed to  
12 pay Mr. Fiore:  
13

- 14 A. Fifty percent (50%) of the total sales earned by Lessee from  
15 the rental of the Vehicle at the Speed Vegas facility (the  
16 "Track") each month, after deducting the cost of tires,  
17 repairs, and maintenance expense incurred by the Lessee in  
18 operation of the Vehicle at the Track;
- 19 B. Plus an additional Three thousand dollars and no cents  
20 (\$3,000.00) per month. Notwithstanding the foregoing the  
21 minimum payment due to the Lessor shall be six thousand  
22 dollars and no cents (\$6,000.00) per month for each and  
23 every month the Vehicle is leased by the Lessee.
- 24 C. The Lessee shall be granted an option to purchase the  
25 Vehicle for the greater of fair market value or the  
26 outstanding balance due to Putnam Leasing at anytime  
27 between April 14, 2018 and lease termination.  
28

(Appellant's Appendix 001252). Entering an agreement for "fifty percent of the  
total sales" obviously contemplates an expectation of payment for every single

1 transaction and not one single transaction. If Mr. Fiore had wanted to enter into a  
2 single transaction and be an “occasional seller,” he would have just sold his  
3  
4 Lamborghini to Speed Vegas (as outlined in the Purchase option set forth in 3.C. of  
5 the lease agreement). Mr. Fiore did not sell his vehicle to Speed Vegas. Instead, he  
6 made it available to all paying Speed Vegas customers with the expectation of  
7  
8 profiting each time it was used.

9       It is also necessary to note that Mr. Fiore was guaranteed to “win” under the  
10 lease agreement because his monthly payment for the note on the vehicle was  
11 \$6,000.00 per month. (Appellant’s Appendix at 001323-001324). By leasing the  
12  
13 Lamborghini to Speed Vegas for \$3,000.00 per month plus half the profit, with a  
14 minimum payment of \$6,000.00 per month, Mr. Fiore was ensuring his note was  
15  
16 being paid while also having the potential to make money from repeatedly providing  
17 his vehicle to Speed Vegas customers. Had Mr. Fiore simply sold his Lamborghini  
18 to Speed Vegas, he would not have had the potential to earn money from multiple  
19  
20 transactions concerning his vehicle.

21       The Ben-Kelys submit Mr. Fiore was not an occasional seller of his product.  
22  
23 He repeatedly put his Lamborghini into the stream of commerce by offering it to  
24 multiple customers on the Speed Vegas track. Each time a Speed Vegas customer  
25 purchased a driving experience in his vehicle, Mr. Fiore got paid. The commercial  
26  
27 lease agreement ensured Mr. Fiore could pay his note while also giving him the  
28 opportunity to earn money. At a minimum, as the District Court correctly decided,



1 sufficient evidence exists to suggest Mr. Fiore was a seller such that it is a question  
2 of fact for the jury to decide. As such, the District Court correctly denied Mr.  
3 Fiore's Motion for Summary Judgment.  
4

5 Mr. Fiore cites Elley v. Stephens as alleged support for his argument that Mr.  
6 Fiore was an occasional seller. The facts in Elley have no comparison to the facts  
7 before this court. In Elley, the Defendants purchased a prefabricated home and sold  
8 it before they lived in it. Twelve years later, the house was sold again. A month  
9 after the new owner purchased the home, he fell through the railing on the deck and  
10 was injured. He named the original owner of the prefabricated home as a defendant  
11 in the lawsuit arguing the original owner put the home in the stream of commerce.  
12 Elley v. Stephens, 104 Nev. 413 (1988). The Supreme Court of Nevada found the  
13 original owners could not be held liable under theories of strict liability because they  
14 were not engaged in the business of selling homes. Id. at 418. Specifically, they  
15 entered into a single transaction to sell their home and did nothing more after that.  
16 This is far different from Mr. Fiore, who entered into a *commercial* lease whereby he  
17 put his vehicle on the track for multiple Speed Vegas customers and received  
18 compensation for every individual sale of a driving experience in his Lamborghini  
19 on the Speed Vegas track. Mr. Fiore did not "sell" his Lamborghini once, he sold  
20 the use of his Lamborghini to every single Speed Vegas customer who purchased a  
21 driving experience in his vehicle.  
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1 Appellant also argues the Ben-Kelys offered no evidence to support their  
2 allegation that Mr. Fiore was a merchant engaged in the business of selling goods.  
3 This is incorrect. As noted above, the Ben-Kelys submitted the Commercial Lease  
4 as evidence Mr. Fiore engaged in the business (with his partner, Speed Vegas) of  
5 providing his Lamborghini to Speed Vegas customers who wanted to purchase a  
6 driving experience in his vehicle. The Ben-Kelys also attached Mr. Fiore's sworn  
7 deposition testimony in which he testified about the terms of the commercial lease  
8 agreement. (Appellant's Appendix at 001320-001323). In his deposition, Mr. Fiore  
9 admitted he entered into the lease and expected to be compensated for each time his  
10 vehicle was used on the track. Id.

14 Overall, the Ben-Kelys never agreed Mr. Fiore was a one-time lessor of his  
15 Aventador. In fact, they argued to the contrary in front of the District Court.  
16 Ultimately, the District Court correctly ruled the jury must decide if Mr. Fiore was  
17 engaged in the business of leasing his vehicle to customers by virtue of his  
18 commercial lease partner with Speed Vegas. (Appellant's Appendix 001564). As  
19 such, Appellants' Writ Petition should be denied because the District Court should  
20 not be compelled to enter summary judgment in favor of Mr. Fiore and rob the jury  
21 of their fact-finding mission.

25 ///

26 ///

28 ///

C.  
**Chapter 86 Does Not Insulate Mr. Fiore from Liability for  
His Individual Tortious Acts**

Respondents do not dispute that Chapter 86 of the Nevada Revised Statutes protects members of a limited-liability board of directors from the liabilities *of the company*. The Ben-Kelys' claims against Mr. Fiore are not liabilities of the company (Speed Vegas) however, they are the *liabilities of Mr. Fiore* himself. Mr. Fiore does not get blanket protection for his individual tortious acts simply because he was a member of the Speed Vegas board of directors.

In Plaintiffs' Fifth Amended Complaint, the Ben-Kelys did not assert Mr. Fiore was an alter ego of Speed Vegas and therefore liable for its negligence. (*See*, Appellant's Appendix 000277-000282). The only allegations the Ben-Kelys asserted against Mr. Fiore were:

- 1) he failed to properly maintain the vehicle (Appellant's Appendix, Plaintiffs' Second Cause of Action, 000286-000287);
- 2) he put a defective product into the stream of commerce (Appellant's Appendix, Plaintiffs' Fourth Cause of Action, 000289-000290); and,
- 3) he was vicariously liable for the negligence of his employees (Appellant's Appendix, Plaintiffs' Seventh Cause of Action, 000294).

Significantly, in their Opposition to Mr. Fiore's Motion for Summary Judgment, the Ben-Kelys indicated they intended to abandon their negligence claims against Mr. Fiore. (Appellant's Appendix at 001245). Counsel for the Ben-Kelys followed up by abandoning their 2<sup>nd</sup>, 7<sup>th</sup>, and 13<sup>th</sup> Causes of Action against Mr. Fiore in open

1 court. (Appellant's Appendix at 001511). As a result, the only cause of action that  
2 remains against Mr. Fiore, insofar as the Ben-Kelys are concerned, is their claim for  
3 Product Liability.  
4

5 The Ben-Kelys are not claiming Mr. Fiore is liable under their product  
6 liability claim based on his membership on the Speed Vegas Board of Directors;  
7 they are claiming Mr. Fiore is liable under their products liability claim because Mr.  
8 Fiore, as an individual, put his defective Lamborghini into the stream of commerce.  
9 Mr. Fiore is not responsible because he was part of the Speed Vegas Board of  
10 Directors, he is liable as the owner of the vehicle. Although Mr. Fiore attempts to  
11 argue he leased his Lamborghini in his capacity as a board member, the lease  
12 agreement suggests otherwise. Specifically, the lease lists Phil Fiore as the Lessor –  
13 not Phil Fiore as a Board Member of Speed Vegas. (See, Appellant's Appendix  
14 001252).  
15  
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17

18 This Court has analyzed a similar situation in Gardner v. Eighth Judicial  
19 District Court. In that case, a boy nearly-drowned at Cowabunga Bay Water Park.  
20 His parents sought to amend their Complaint to include the Managers as individual  
21 defendants for their individual negligence. Gardner on Behalf of L.G. v. Eighth  
22 Judicial District Court in and for County of Clark, 113 Nev. 730, 734 (2017). This  
23 Court held “statutes limiting personal liability of members and managers of an LLC  
24 for debts and obligations of the LLC are not intended to shield members of managers  
25 from liability for personal negligence.” Id. As such, the Managers of Cowabunga  
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1 Bay were appropriate defendants in the lawsuit for their personal acts of negligence  
2 despite the fact they were on the management committee governing the water park.  
3  
4 Similarly, Mr. Fiore is a proper Defendant in the Ben-Kelys' lawsuit for his personal  
5 acts of putting a defective product into the stream of commerce.

6 **D.**

7 **Mr. Fiore Was Not an Employee of Speed Vegas and Is Not Protected by NIIA**

8  
9 The Nevada Industrial Insurance Act protects employers and co-employees  
10 from liability for injuries from accidents arising within a person's course and scope  
11 of employment. NRS 616A.020 (2011). In pertinent part, NRS 616A.105 defines  
12 "employee" as "members of boards of directors *while rendering actual services* for  
13 such corporations for pay." NRS 616A.105 (2011) (emphasis added). A person who  
14 "receives compensation or remuneration based on sales to customers rather than for  
15 the number of hours that the person works" is specifically *excluded* from the  
16 definition of "employee" under the NIIA. NRS 616A.110(9)(b) (2003).

17  
18 Appellants rely on a single sentence in Mr. Fiore's affidavit for the  
19 proposition that he was paid like an employee of Speed Vegas. That line reads: "I  
20 was also a member of Speed Vegas's Board of Directors at the time of the incident  
21 and I received compensation for my services as a member of Speed Vegas's Board  
22 of Directors." (*See*, 2 App. 306).

23  
24 Here, there is no evidence Mr. Fiore rendered actual *services* to Speed Vegas  
25 for pay. The only known money he received from Speed Vegas was pursuant to the  
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27  
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1 commercial lease he entered into with Speed Vegas for the use of his Lamborghini.  
2 As he testified in his deposition, Mr. Fiore is a registered investment advisor. (Fiore  
3 deposition at 37:5-10, Appellant's Appendix, Volume 6, page 1293). He also was  
4 making no money at the time he entered into the commercial lease with Speed  
5 Vegas. (Fiore deposition at 62:13-15, Appellant's Appendix, Volume 6, page  
6 1318). Mr. Fiore is not engaged in the business of providing driving experiences to  
7 customers – he is an investment advisor. Mr. Fiore is not engaged in the business  
8 of coaching customers in driving exotic vehicles around a track – he is an  
9 investment advisor. Mr. Fiore is not engaged in the business of managing Speed  
10 Vegas – he is an investment advisor.  
11

12 In order to take advantage of the protections of the Nevada Industrial  
13 Insurance Act, Mr. Fiore must be an employer or co-employee of Mr. Ben-Kely.  
14 He was not. Mr. Fiore was an investor.  
15

16 As noted earlier, all facts must be construed in favor of the Ben-Kelys since  
17 they were the non-moving party. Here, the **only** “evidence” Mr. Fiore produced to  
18 support his contention that he was a co-employee of Mr. Ben-Kely was his vague  
19 statement in his affidavit that he “received compensation for his services as a  
20 member of Speed Vegas’s board of directors.” What services? What  
21 compensation? There is no evidence of either.  
22

23 To the contrary, the Ben-Kelys produced Mr. Fiore’s deposition in which he  
24 testified he only came to Las Vegas on two or three occasions to drive the Speed  
25  
26  
27  
28



1 Vegas vehicles and was making no money at the time he leased his Lamborghini to  
2 Speed Vegas. (Fiore deposition at 62:13-15, Appellant's Appendix, Volume 6, page  
3 1318; Fiore deposition at 74:12-16, Appellant's Appendix, Volume 6, page 1330).  
4  
5 The Nevada Industrial Insurance Act is intended to "ensure the quick and efficient  
6 payment of compensation to employees who are injured or disabled at a reasonable  
7 cost to employers." NRS 616A.010 (1993). Nowhere does the Act indicate it is  
8 intended to protect investors simply because they attend occasional board meetings  
9 for the company.  
10

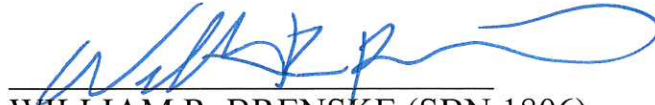
11  
12 At a minimum, the evidence presented creates a question of fact for the jury  
13 to decide as to whether Mr. Fiore can be considered an employer or co-employee of  
14 Mr. Ben-Kely. As such, the District Court's ruling denying Mr. Fiore's Motion for  
15 Summary Judgment was appropriate. The Ben-Kelys therefore request this Court  
16 deny Appellants' Petition for Writ of Mandamus, or in the Alternative, Writ of  
17 Prohibition.  
18  
19

### 20 Conclusion

21 The District Court correctly ruled that questions of fact exist as to whether  
22 Mr. Fiore was a merchant of an occasional seller and whether he could be  
23 considered Mr. Ben-Kely's co-employee or employer. It also correctly determined  
24 Mr. Fiore is not protected by Chapter 86 of the Nevada Revised Statutes for his  
25 (alleged) individual tortious conduct. As such, the Ben-Kelys respectfully request  
26  
27  
28

1 this Court to deny Appellants' Petition for Writ of Mandamus, or in the alternative,  
2 Writ of Prohibition.

3  
4 DATED this 13<sup>th</sup> day of December, 2021.

5  
6 

7 WILLIAM R. BRENSKE (SBN 1806)

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**CERTIFICATE OF COMPLIANCE**

1  
2 1. I hereby certify that this brief complies with the formatting  
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and  
4 the type style requirements of NRAP 32(a)(6) because:

5  
6 [ X] This brief has been prepared in a proportionally spaced typeface using  
7 Microsoft Word 2007 in Times New Roman, 14-point font; or  
8

9 [ ] This brief has been prepared in monospaced typeface using [*state*  
10 *name and version of word processing program*] in [*state font size and name of type*  
11 *style*].  
12

13 2. I further certify that this brief complies with the page- or type-volume  
14 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by  
15 NRAP 32(a)(7)(C), it is either:  
16

17 [ X] Proportionately spaced, has a typeface of 14 points or more and  
18 contains 4,020 words; or  
19

20 [ ] Monospaced, has 10.5 or fewer characters per inch, and contains  
21 \_\_\_\_\_ words or \_\_\_\_\_ lines of text; or  
22

23 [ ] Does not exceed 30 pages.

24 3. Finally, I hereby certify that I have read this appellate brief, and to the  
25 best of my knowledge, information, and belief, it is not frivolous or interposed for  
26 any improper purpose. I further certify that this brief complies with all applicable  
27 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires  
28

1 every assertion in the brief regarding matters in the record to be supported by a  
2 reference to the page and volume number, if any, of the transcript or appendix  
3 where the matter relied on is to be found. I understand that I may be subject to  
4 sanctions in the event that the accompanying brief is not in conformity with the  
5 requirements of the Nevada Rules of Appellate Procedure.  
6

7  
8 DATED this 13<sup>th</sup> day of December, 2021.

9  
10 

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**VERIFICATION**

STATE OF NEVADA,

COUNTY OF CLARK

Under penalty of perjury, I declare that I am counsel for the Real Parties in Interest (the Ben-Kelys) 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 the Real Parties in Interest, make this verification because the relevant facts are procedural and thus within my knowledge as the Real Parties in Interest's attorney. This verification is made pursuant to NRS 15.010 and NRAP 21(5).

Dated this 13<sup>th</sup> day of December, 2021.

  
WILLIAM R. BRENSKE



**CERTIFICATE OF SERVICE**

I certify that on the 13<sup>th</sup> day of December, 2021, I served a copy of the Real Parties In Interest The Estate of Gil Ben-Kely, Antonella Ben-Kely, Shon Ben-Kely, and Nathalie Ben-Kely's Answer to Felice J. Fiore and Speed Vegas, LLC's Petition for Writ of Mandamus or, Alternatively, Prohibition through the Court's electronic filing system consistent with N.E.F.C.R. 8.

DATED this 13<sup>th</sup> day of December, 2021.

Amunda Doughty  
An employee of Brenske Andreevski & Krametbauer