CASE NO. 83590

In the Supreme Court of Nevada

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Elizabeth A. Brown
Clerk of Supreme Court

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.

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

REAL PARTIES IN INTEREST GWENDOLYN WARD AND ZANE SHERWOOD'S ANSWER TO PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION

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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 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, are individuals.

Real parties in interest are represented by attorneys at Lerner & Rowe, ER Injury Attorneys, and Panish | Shea | Boyle | Ravipudi LLP.

Dated this 13th day of December 2021.

PANISH | SHEA | BOYLE | RAVIPUDI LLP

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ISSUES PRESENTED

1. Whether mandamus or prohibition review is appropriate for a denial of summary judgment premised on the district court's express determination there was a genuine issue of material fact.

2. Whether the determination whether Mr. Fiore is a "seller" for Nevada products liability claims should be determined by the jury or may be made as a matter of law despite the factual dispute.

3. Whether NRS 86 applies to shield members of limited liability companies from personal liability for claims made against them in their individual capacities (as opposed to for the debts or liabilities of the limited liability company).

4. Whether the determination whether SpeedVegas LLC is a "seller" for Nevada products liability claims should be determined by the jury or may be made as a matter of law despite the factual dispute.

I.

STATEMENT OF THE CASE

The instant case arises from the February 12, 2017, death of Craig Sherwood, a Canadian tourist visiting Las Vegas, Nevada for a real estate convention. Mr. Sherwood died after the 2015 Lamborghini Aventador he was driving impacted a tire barrier and wall at a racetrack operated by Petitioner SpeedVegas LLC. The Aventador burst into flames, causing a fire that killed Mr. Sherwood as he was trapped in the vehicle. Petitioner Felice "Phil" Fiore owned the Aventador, which he leased to SpeedVegas LLC under the terms of a "commercial lease agreement" drafted by the two parties.

Real parties in interest are Mr. Sherwood's widow, Gwendolyn Ward (in her individual capacity as well as her capacity as representative of Mr. Sherwood's estate), and Mr. Sherwood's son, Zane (referred to herein as the "Sherwood Plaintiffs"). Real parties in interest filed suit against, *inter alia*, SpeedVegas LLC and Mr. Fiore, alleging claims of negligence and product liability.

Relevant here, Petitioners moved for summary judgment as to the Sherwood Plaintiffs' claims for product liability. (Petitioners also

asserted a defense under the Nevada Industrial Insurance Act as to the claims brought by the heirs and Estate of Gil Ben-Kely, which the Sherwood Plaintiffs do not address.) Citing to Nevada Pattern Jury Instructions and arguing there was no substantial difference between sellers and lessors of goods, Petitioners argued they were entitled to summary judgment. The District Court agreed with Petitioners that the question of who is a "seller" was a question of fact, but determined that the factual disputes precluded summary judgment and left that issue for the jury to resolve. It therefore denied the motions for summary judgment. Petitioners then filed the instant petition for writ of mandamus or, alternatively, prohibition.

On November 15, 2021, this Court directed Real Parties in Interest to answer the petition, specifically requesting response to the petition as well as argument on the propriety of mandamus review.

As set forth below, the petition should be denied. Petitioners fail to carry their heavy burden to show mandamus or prohibitory review of a summary judgment denial is appropriate given this Court's longstanding use of its discretion to reserve that relief for extraordinary circumstances not present here. The petition's merits fare no better.

Petitioners successfully asserted the determination of who qualifies as a "seller" is a question of fact for the jury, and the District Court correctly determined the disputed issues of fact precluded summary judgment. And since the product liability claims are made against Mr. Fiore as the individual owner of the Aventador, and not by virtue of his membership in SpeedVegas LLC, NRS 86 has no application. As such, there is no cogent ground to grant the petition. It should be denied.

II.

FACTS PERTINENT TO THE ISSUES RAISED BY THE PETITION

A. The Sherwood Plaintiffs' Claims for Product Liability

The Sherwood Plaintiffs bring product liability claims against Mr. Fiore and SpeedVegas LLC. (7 App. 1589.) Those claims arise from the failure of the Aventador's right fuel tank in the crash, causing the release of gasoline and the fire that killed Mr. Sherwood. (*Id.*)

B. Felice Fiore's Ownership of the 2015 Lamborghini Aventador

Mr. Fiore owned the 2015 Lamborghini Aventador at the time of the Incident. (2 App. 306 ¶ 8.)

C. Mr. Fiore and SpeedVegas LLC Enter Into a "Commercial Lease Agreement"

In 2017, SpeedVegas LLC and Felice Fiore entered into a "commercial lease agreement" concerning a 2015 Lamborghini Aventador Mr. Fiore owned. (4 App. 919-921.) The "commercial lease agreement" provided that SpeedVegas would pay Mr. Fiore "[f]ifty percent (50%) of the total sales earned by [SpeedVegas] from the rental of the [Aventador] at the Speed Vegas facility." (4 App. 920.) That "commercial lease agreement" was in effect at the time of the crash that killed Mr. Sherwood. (4 App. 922.)

III.

ARGUMENT

A. Mandamus Review Is Inappropriate

It is always a petitioner's burden to demonstrate the propriety of mandamus review and relief. *Pan v. Eighth Judicial District Court*, 120 Nev. 222, 228-29, 88 P.3d 840, 844 (2004). Petitioners cannot meet that burden here. They challenge denial of summary judgment, an order that for years this Court has held is inappropriate for mandamus review absent exceptional circumstances. *See, e.g.*, *Smith v. Eighth*

Judicial District Court, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997) (reaffirming the "general rule" that this Court will "not exercise [its] discretion to consider writ petitions that challenge orders of the district court denying motions to dismiss or motions for summary judgment"). Petitioners do not even identify any of the extraordinary circumstances justifying mandamus or prohibitory review of a summary judgment denial in their petition. Since those extraordinary circumstances are absent here, the petition should be denied in line with this Court's general policy.

1. Petitioners' Sole Ground for the Appropriateness of Writ Relief Is the Purported Lack of a "Plain, Speedy, and Adequate Remedy" Absent Mandamus or Prohibition

Although Petitioners allude that their petition could "potentially affect other litigants statewide," *see* Pet. at 19, the grounds they identify as underlying the relief sought focus solely on Mr. Fiore and SpeedVegas LLC. Petitioners contend: that "there is not a plain, speedy and adequate remedy" for them "in the ordinary course of law"; that the District Court's jury instructions could "affect the jury's verdict and

prejudice" them; that Mr. Fiore (not SpeedVegas) would be adversely affected by two trials; and that Mr. Fiore (and, again, not SpeedVegas) would be financially burdened by posting a bond. (Pet. at 19-20.) These justifications are meritless, and none rises to the extraordinary level required to upset this Court's general practice to avoid mandamus or prohibitory review of summary judgment denials.

As the party with the heavy burden to demonstrate the propriety of writ relief, Petitioners must set forth the grounds for writ relief in their petition. They should be held to the grounds they state. Since none they identify rise to the extraordinary level necessary to justify mandamus or prohibitory review, it should be denied.

2. Petitioners Do Not Carry Their Heavy Burden to Overcomes This Court's Longstanding Practice of Refusing Writ Review of Summary Judgment Denials

For decades, this Court has emphasized mandamus is appropriate for review of a district court's denial of summary judgment in only narrow, limited circumstances. *See Smith*, 113 Nev. at 1344, 950 P.2d at 281; *State ex rel. Dept. of Transp. v. Thompson*, 99 Nev. 358, 361-62, 662 P.2d 1338, 1340 (1983); *Polous v. Eighth Judicial District Court*, 98

Nev. 453, 455, 652 P.2d 1177, 1178 (1982). Writ petitions are "disruptive" to proceedings in the district court and consume significant judicial resources for this Court, and there is little gained from review of mandamus petitions concerning summary judgment denials. *Thompson*, 99 Nev. at 362, 662 P.2d at 1340. Hence the Court's continued exercise of its discretion to decline mandamus review to summary judgment denials. *Smith*, 113 Nev. at 1344, 950 P.2d at 281.

The Court's present policy of declining mandamus review of summary judgment denials in all but the most extraordinary cases stemmed from its inundation with such writ petitions after it issued writ relief to reverse a summary judgment denial. Following the Court's decision in *Dzack v. Marshall*, 80 Nev. 345, 393 P.2d 610 (1964), this Court was flooded with mandamus petitions following summary judgment denials. These petitions—each of which undoubtedly claimed mandamus review was appropriate for the same, general reasons Petitioners offer here—cluttered the Court's docket with review of non-final orders. They also disrupted expeditious proceedings at the district court, forcing trial continuances and unnecessary delays (as the instant petition already has in this case).

In *Polous*, the Court took the opportunity to clarify the extraordinary circumstances under which mandamus review from a denial of summary judgment is appropriate. That was clear from the circumstances compelling mandamus review in *Dzack*, which the *Polous* court noted included "where plaintiff's judicial admissions made it clear that her claim was a sham." *Polous*, 98 Nev. at 455, 652 P.2d at 1178. Likewise, in *Smith*, this Court granted a mandamus petition to resolve a purely legal issue (with **no** disputes of fact) concerning whether a cross-claim was properly filed and served. 113 Nev. at 1347-48, 950 P.2d at 283. Circumstances like those justified mandamus review, either because the underlying case was obviously a "sham," or because this Court's determination of unadulterated legal issues (like how and when a cross-claim must be filed and served to be effective) carried widespread application to litigants statewide. Expanding review beyond those extraordinary facts runs the risk the Court would again find its docket overwhelmed with writ petitions.

Of course, just as this Court has the discretion to implement a general policy of declining mandamus review to summary judgment denials, it has the power to conduct such review where it deems

appropriate. Those appropriate circumstances, first outlined in *Polous* and reiterated in *Smith*, are few and far between: undisputed facts (or, as in *Dzack*, underlying judicial admissions), clear questions of law or procedure, and "serious," "substantial," and "statewide" issues of "public policy" and "precedential" questions.

None of those are present here. As explained further below, there ***is*** a "question of fact" remaining for trial, which means there ***is not*** a "clear question of law." *Polous*, 98 Nev. at 455, 652 P.2d at 1178. Unlike *Dzack*, where the court determined the plaintiff's claim was a "sham" based on her own admissions, the Sherwood Plaintiffs presented admissible evidence from which a jury could adequately find Mr. Fiore liable on a product liability theory. (As noted elsewhere, Petitioners themselves emphasized that, in Nevada, the jury must determine that fact.) The District Court exercised its discretion in determining that that question of fact precluded summary judgment.

Nor does the petition present "serious issues of substantial public policy" or "important precedential questions of statewide interest." *Polous*, 98 Nev. at 455, 652 P.2d at 1178. As Petitioners conceded before the District Court, it is already established Nevada law that

whether a party qualifies as a "seller" for product liability is a question of fact for the jury to decide. Letting that process play out is appropriate. Even if this Court believed a "substantial" issue could be resolved by its review in this matter, the facts here are still in dispute.

No matter how the jury decides the facts, the unique issues in this case limit its usefulness in determining any "substantial" or "statewide" issue this Court believes to be involved. Use of high-powered sports cars on a racetrack and "commercial lease agreements" where vehicle owners anticipate and profit from repeated commercial uses of their vehicle are neither "substantial" or "serious" public policy items to be addressed by this Court via mandamus review. For the same reasons, there is not an "important precedential question" this petition would answer.

3. Petitioners, Like Other Unsuccessful Summary Judgment Movants, Have a Plain, Speedy and Adequate Remedy Via an Appeal

Review should also be refused because Petitioners have a "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170. Like other unsuccessful summary judgment movants,

Petitioners still have the right to appeal any adverse verdict. As this Court's general policy to decline mandamus review of summary judgment denials evinces, that right of appeal is a more than adequate and speedy remedy for parties in Petitioners' shoes.

Purported "prejudice" at trial, the effect on trial preparation or settlement discussions, and the financial burden of posting a bond for an appeal are generic grounds any unsuccessful summary judgment movant could claim justifies mandamus relief—and Petitioner SpeedVegas LLC does not even contend it would be affected by a new trial or a bond posting (only Mr. Fiore does). (Pet. at 20.) Petitioners identify nothing differentiating their petition from any other unsuccessful summary judgment movant or justifies deviation from this Court's general refusal to extend mandamus relief to summary judgment denials.

B. There Are Genuine Issues of Material Fact as to the Product Liability Claims Against Mr. Fiore, Precluding Summary Judgment

Petitioner Fiore does not dispute that he was the Aventador's owner, deliberately placed in with SpeedVegas in a long-term lease

agreement designed to facilitate its repeated use by customers, or that there are genuine issues of material fact underlying the Sherwood Plaintiffs' product liability claim against him. The heart of Petitioners' arguments as to Mr. Fiore is that he is a purported "one-time seller" who was not "engaged in" the "business" of supplying Aventadors. (Pet. at 9-10.) The Sherwood Plaintiffs dispute that characterization, and, after considering the facts the Sherwood Plaintiffs presented, the District Court agreed it was a question of fact for the jury.

1. The District Court Correctly Determined that a Question of Fact as to Mr. Fiore's Status as a Seller Precluded Summary Judgment

Nothing in Petitioners' petition should disturb that result. Far from a "housewife who, on one occasion, sells to her neighbor a jar of jam or a pound of sugar [or] the owner of an automobile who, on one occasion, sells it to his neighbor, or even sells it to a dealer in used cars," *see* Pet. at 9-10 (quoting *Elley v. Stephens*, 104 Nev. 413, 760 P.2d 768 (1988)), Mr. Fiore entered into an arms-length "commercial lease agreement" wherein he negotiated 50% of each "rental" generated by use of his Aventador "at the Speed Vegas facility" for a term of "fifteen

months."[1] (4 App. 920.) Mr. Fiore was not selling his neighbor a jar of jam or even trading in the Aventador at the used car lot—he negotiated a "commercial" transaction wherein he would be paid half of whatever SpeedVegas charged for a "rental" of his car. That would amount to thousands of dollars per month.

These facts make this case far different from *Elley*. Although Petitioners criticize the District Court for purportedly "misapplying" *Elley*, Petitioners **never** explain why the "commercial lease agreement" and the facts contained within it support their argument that Mr. Fiore is within the exempted, neighbors-with-jam class *Elley* described. The heavy burden for mandamus relief is placed squarely on Petitioners, and that includes the burden of explaining the factual basis for the writ. *Pan*, 120 Nev. at 228-29, 88 P.3d at 844. Petitioners' failure to address the "commercial lease agreement" or any of its attendant facts not only fails to carry that burden; the omission highlights that, when it comes

[1] Those terms were words chosen by Petitioners to describe the Aventador transaction before the tragedy that claimed Mr. Sherwood's life. And the agreement itself makes clear Mr. Fiore "had a full and fair opportunity to negotiate and review the terms and provisions of the Agreement and to contribute to its substance and form" and was represented by counsel. (4 App. 922.)

to that agreement, Petitioners cannot deny it presents a genuine issue of material fact.

Despite this evidence in the record and failing to level a response, Petitioners inaccurately contend the Sherwood Plaintiffs "never presented any evidence that Mr. Fiore was a merchant engaged in the business of selling or leasing vehicles." (Pet. at 13.) That is false. To be clear, the Sherwood Plaintiffs contend Mr. Fiore is a merchant within the meaning of Nevada products liability law, and that, by voluntarily drafting and agreeing to a "commercial lease agreement" premised upon repeated uses of the Aventador by paying Nevada customers, he falls squarely within the class of persons to whom product liability laws should apply. Petitioners' other point—that Mr. Fiore had not entered into such a lease "before or after"—is a non-sequitur. That Mr. Fiore's foray into "commercial lease agreements" began and ended with the destruction of a $500,000 Aventador is not determinative. At best, it is an argument Petitioners may make to the jury about why their "commercial lease agreement" means something other than what it says. Whatever efficacy such an argument has is for the jury to decide.

2. Petitioners Are Judicially Estopped from Contending the Determination of "Seller" Is Not a Question of Fact

Although Petitioners contend an issue raised in their petition is "whether [the] determination [of whether Mr. Fiore is a seller] is a question of fact for the jury or must be determined as a matter of law," Pet. at 1, Petitioners conceded the question as one of fact before the district court by citing to model jury instructions. (3 App. 547-548.) Petitioners are judicially estopped from changing that position here. *Matter of Frei Irrevocable Trust Dated October 29, 1996*, 133 Nev. 50, 56, 390 P.3d 646, 652 (2017). Questions of judicial estoppel are assessed based upon the elements set forward in *Frei*. *Kaur v. Singh*, 136 Nev. Adv. Op. 77, 477 P.3d 358, 363 (2020).

Each of the *Frei* factors are met here. Mr. Fiore has "taken two positions." He took those positions in "judicial … proceedings." He was "successful in asserting the first position" (*i.e.*, that the question of "seller" is one of fact), as the district court reached the same conclusion. His present position (that the question of seller is a "matter of law") is "totally inconsistent" with his prior position. And as the petition confirms, the first position was not the result of "ignorance, fraud, or

mistake." *Frei*, 133 Nev. at 56, 390 P.3d at 652. Consequently, Mr. Fiore (and, for that matter, SpeedVegas) should not be permitted to change positions in his petition.

Even if they were not judicially estopped, Petitioners misunderstand the effect of their own citation to pattern jury instructions. The Sherwood Plaintiffs do not argue here (and did not argue to the District Court) that the mere existence of a jury instruction precludes summary judgment. Instead, the Sherwood Plaintiffs noted that **all parties agreed the question of who qualifies as a "seller" is one for the jury to make as a determination of fact**. Since there is a dispute of fact, writ relief is inappropriate under the longstanding policy of this Court. *See Polous*, 98 Nev. at 455, 652 P.2d at 1178.

C. NRS 86 Has No Application to Mr. Fiore for Claims Made Against Him in His Individual Capacity

Petitioner's reference to NRS 86 is misplaced. As Petitioner notes, NRS 86.381 provides that "[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." Pet. at 14-15 (quoting NRS 86.381). In other words, the

purpose of NRS 86 is to protect limited liability company members from personal liability for the company's alleged wrongdoing.

The Sherwood Plaintiffs' claims against Mr. Fiore are not derivative of their claims against SpeedVegas, but ***independent*** claims against Mr. Fiore for his role as the owner of the Aventador and signatory to the "commercial lease agreement" with SpeedVegas. Petitioners' insistence that the Sherwood Plaintiffs "seek to hold Mr. Fiore liable by virtue of his membership in SpeedVegas" (Pet. at 16) is flatly wrong. It also makes no sense—how could Mr. Fiore have been acting as SpeedVegas when he signed an agreement on his own behalf with the company? (4 App. 919-922.)

Mr. Fiore's self-serving statement that he was acting "in his capacity as a member of SpeedVegas LLC" when he entered into the "commercial lease agreement," *see* 2 App. 306 ¶ 8, does not change the analysis. As Mr. Fiore admits, he owned the Aventador at the time of Mr. Sherwood's death. (*Id.*) The Sherwood Plaintiffs bring the product liability claims based upon Mr. Fiore's ownership of the Aventador and his decision to "commercially lease" the car to SpeedVegas, all of which

relates to his individual capacity rather than his membership in SpeedVegas.

The Sherwood Plaintiffs did not "waive" their opposition to this contention. At oral argument on the motion, the Sherwood Plaintiffs' counsel clearly articulated the opposition:

> The argument [Mr. Fiore] is protected by laws intended to protect shareholders from the debts and liabilities of the corporation misses the mark in this respect because Mr. Fiore is being sued in his individual capacity.

(6 App. 1459.)

EDCR 2.20(e) does not provide a "tantamount concession" of any point, but ***allows*** the district court discretion to consider a concession. The district court did not do so here, agreeing with the Sherwood Plaintiffs that Petitioners misconstrued NRS 86's application to claims against Mr. Fiore in his individual capacity as opposed to those brought because he was as SpeedVegas LLC member. Nothing in the petition should disturb the District Court's conclusion.

D. There Are Genuine Issues of Material Fact as to the Product Liability Claims Against SpeedVegas, Precluding Summary Judgment

Petitioners contend mandamus relief is appropriate as to SpeedVegas because it is purportedly not a "seller" that can "be regarded as a merchant engaged in the business of supplying goods of the kind involved in the case." (Pet. at 18.) Genuine disputes of material fact dispel that conclusion as a matter of law. Although SpeedVegas contends it "did not 'sell' Mr. Sherwood the allegedly defective Lamborghini," but instead "sold the experience (a service) of driving an exotic car," *see* Pet. at 19, its "commercial lease agreement" with Mr. Fiore demonstrates otherwise. In that agreement—drafted entirely by Petitioners upon advice of counsel—Petitioners described SpeedVegas's business model as the provision of "rentals" of the Aventador and other vehicles. (4 App. 920.) Petitioners made no argument to the District Court that a lessor of products is not subject to product liability as a "seller"—in fact, Petitioners took the ***opposite position*** in Mr. Fiore's motion for summary judgment, contending there was "no substantive difference" between the two for the purpose of strict

products liability. Since there is a genuine issue of material fact whether SpeedVegas supplied goods of the kind involved in the case, and thus qualifies as a proper party under strict products liability, mandamus or prohibitory relief is inappropriate.

1. The Evidence Shows SpeedVegas "Rented" Vehicles to Customers Like Mr. Sherwood

After reviewing its terms and having the opportunity consult with counsel, SpeedVegas and Mr. Fiore agreed to the "commercial lease agreement" concerning the Aventador. (6 App. 919-922.) That agreement specifically describes SpeedVegas's business model as "rentals" of cars to customers, of which it agreed to share 50% of the proceeds with Mr. Fiore. (6 App. 920.) Describing the provision of vehicles as "rentals" is in line with the SpeedVegas business model, which marketed ***different cars*** to consumers and provided ***different pricing based upon the car selected***. (*See, e.g.*, 4 App. 980.) SpeedVegas did not have different pricing for instructors, or a different track customers could pay more to access—differentiations in price stemmed only from the type of car each customer selected to "rent" and drive around the track. And, as the "commercial lease agreement"

plainly shows, SpeedVegas (and, for that matter, Mr. Fiore): (1) made money from those "rentals"; and (2) intended to continue supplying the Aventador to customers to facilitate repeated "rentals" for at least fifteen months, and possibly even longer. (4 App. 920.)

These facts permit a jury to determine SpeedVegas should be "regarded as a merchant engaged in the business of supplying goods of the kind involved in the case." (*See* Pet. at 19.) Its ***self-described*** business model—in a document it prepared with the assistance of counsel—is making money from repeated "rentals" of exotic vehicles like the Aventador. That, and the other facts surrounding its business—like the marketing of specific vehicles, the vehicle-based pricing model, and similar evidence—is more than adequate to support a jury's conclusion that it qualifies as a seller.

Petitioners' authority does not change the analysis. *Barnard v. Bugsy's*, an unpublished district court disposition, concerned injuries suffered after a defective chair broke at the defendant's hotel. 2013 Nev. Dist. LEXIS 1966. There was **no evidence**, as there is here, that the hotel "rented" or otherwise supplied the chair in the same way SpeedVegas supplied the Aventador for "rentals." *Allison v. Merck*,

which concerned injuries allegedly arising from a defective vaccine, offered nothing more than a footnote agreeing the county health district was not a "seller" of the vaccine. Again, there was **no evidence**, let alone analysis, of whether the county even generated income from providing the vaccine. These cases do not approach the facts here, where SpeedVegas itself described its business as "rentals" and the evidence firmly supports its status as a "merchant engaged in the business of supplying goods of the kind involved in the case."

2. Petitioners Inconsistently Argued to the District Court that "There Is No Substantive Difference Between One Who Sells a Product and One Who Leases With Regard to Strict Product Liability"

Although Petitioners pointedly do not mention the "commercial lease agreement" in their petition—just as they did not attach it to their motions for summary judgment—they are unquestionably aware of its description of their business as the repeated "rental" of the Aventador. Hence Petitioners' fallback position: even though SpeedVegas is a "commercial lessor," product liability should not apply to it.

That is not what Petitioners told the District Court. In the motion for summary judgment as to Mr. Fiore, Petitioners averred that there was "no substantive difference between one who sells a product and one who leases with regard to strict products liability." (3 App. 548-549.) The District Court adopted this position, concluding there was no substantive difference, especially considering the Sherwood Plaintiffs' factual showing. Yet, despite taking that position before the District Court, Petitioners now contend "strict liability theory does not apply to [a] lessor of goods." (Pet. at 19.) Petitioners cite no precedential authority in support, but that is beside the point—as with their efforts to undo their concessions that the question of whether a party is a "seller" is a question of fact, Petitioners again attempt to undo their previous positions to justify writ relief. That is improper and cannot create a basis for mandamus review.

Instead, the evidence shows a factual dispute as to whether SpeedVegas is a "seller." As discussed above, Petitioners concede that question is one of fact for the jury to decide. The District Court was well within its discretion to determine factual questions existed that preclude summary judgment on this topic. Because of those disputed

issues of fact, and the impropriety of mandamus or prohibition review of the District Court's order, the petition should be denied.

IV.

CONCLUSION

For the foregoing reasons, the petition should be denied in its entirety.

Dated this 13th day of December, 2021.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4), (5) and (6) because it was prepared in a proportionately spaced typeface using Microsoft Word 365 in double-spaced 14-point 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 4,524 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 13th day of December, 2021.

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CERTIFICATE OF SERVICE

I certify that on December 13, 2021, I submitted the foregoing:

REAL PARTIES IN INTEREST GWENDOLYN WARD AND ZANE SHERWOOD'S ANSWER TO PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION for filing via the Court's eFlex electronic filing system.

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I further certify that I caused my office to mail a true and correct copy of this document, by postage prepaid, at Las Vegas, Nevada, addressed as follows:

THE HONORABLE NANCY L. ALLF
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