Case No. 83590

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.
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REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION

With Supporting Points and Authorities

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Treatises

ARGUMENT

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

No jurisdiction in the United States applies the strict products liability doctrine to one-time sellers or lessors such as Mr. Fiore. Nevada courts apply a bright-line rule:

> [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.

Elley v. Stephens, 104 Nev. 413, 418, 760 P.2d 768, 771 (1988) (citing RESTATEMENT (SECOND) OF TORTS § 402A (1965)).

Mr. Fiore is not in the business of leasing vehicles. Nor does he lease vehicles in the regular course of his business. He is "an investment advisor," as the Ben-Kely plaintiffs emphatically assert. (*See* B-K Br. at 14.) He has leased a vehicle just once: when he leased his personal vehicle, the Aventador, to SpeedVegas. (*See* 2 App. 313 (Undisputed Material Fact No. 5.[1])

[1] Plaintiffs opposed Mr. Fiore's motion for summary judgment without responding to Mr. Fiore's statement of undisputed material facts as required by NRCP 56(c). (*See* 4 App. 910-922; 5 App. 1241-1250.) But nowhere have plaintiffs identified any other instance when Mr. Fiore leased a vehicle.

Without precedent under Nevada law, the district court authorized the strict products liability claim against Mr. Fiore to proceed to a jury. This stands at odds with Nevada law and the policy rationales underlying the strict products liability doctrine—none of which apply to Mr. Fiore, who is in every material sense a retail consumer, not a manufacturer or distributer to whom the doctrine is intended to apply.

1. Elley *is Dispositive in Mr. Fiore's Favor*

Elley controls. Mr. Fiore cannot be subject to strict products liability because it is undisputed that he has leased a vehicle precisely once: when he leased the Aventador to SpeedVegas. Because a one-time vehicle lessor is by definition an "occasional" lessor, Mr. Fiore cannot be strictly liable for a defect in the Aventador. *Elley*, 104 Nev. at 418, 760 P.2d at 771.

2. A "Commercial" Lease Agreement Does Not Convert Mr. Fiore Into a Merchant-Seller

Plaintiffs insist, without citation to legal authority and contrary to *Elley*, that Mr. Fiore's "commercial lease agreement" with SpeedVegas converts him into a merchant-seller. (*See* Sherwood Br. 12-14; B-K Br.

6-11.) That is the crux of their argument, which they present in misleading ways.

For instance, in reliance on the lease terms stating that SpeedVegas is to pay Mr. Fiore both monthly and for each use of the Aventador, the Ben-Kely plaintiffs assert that "Mr. Fiore leas[ed] his vehicle over-and-over again to . . . customers." (B-K Br. at 8.) Based on these same lease terms (and nothing else), the Ben-Kely plaintiffs assert that "[h]e was continually introducing a dangerous vehicle into the stream of commerce by offering his vehicle to SpeedVegas customers to lease to drive around the SpeedVegas track." (*Id.*)

The Ben-Kely plaintiffs distort the record. Nothing in the record shows that Mr. Fiore ever interacted with SpeedVegas customers. Nor does any evidence show that SpeedVegas customers ever leased the Aventador.

The Ben-Kely plaintiffs' distortion of the record is revealing. They claim—relying solely on Mr. Fiore's lease agreement with SpeedVegas—that ***Mr. Fiore*** leased the Aventador to numerous customers. But the record belies their claim. It is undisputed that Mr. Fiore leased a vehicle just once: when he leased the Aventador to SpeedVegas. The

Ben-Kely plaintiffs mischaracterize Mr. Fiore as a repeat lessor because they recognize that, as a one-time lessor, Mr. Fiore is exempt from strict products liability under *Elley*. The district court was bound to apply this bright-line rule on summary judgment, but did not.

Elley removes any doubt that a solitary sale (or lease) transaction is insufficient to support a strict products liability claim. To inform its holding held that "a strict liability theory is not applicable to an occasional seller," the *Elley* Court excerpted comment (f) from the Restatement (Second) of Torts Section 402A:

> Comment (f) to § 402A notes:
>
> > The rule stated in this section [strict liability] . . . does not apply to the occasional seller . . . Thus it does not apply to the housewife who, ***on one occasion***, sells to her neighbor a jar of jam . . . 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 . . .

Id., 104 Nev. at 418 n.3, 760 P.2d at 771 n.3 (emphasis added).

Elley in this way categorically exempts one-time sellers (or lessors) from strict products liability. The nature of the transaction is immaterial in the analysis; jam can be sold to a neighbor, or a used vehicle can be sold to a dealer (an arms-length transaction). The nature

of each exempt sale is substantively different. What matters in each instance is that the sale is singular ("***on one occasion***").

Some cases may require a jury to determine whether the defendant is "an occasional seller" under *Elley*—but not here. Plaintiffs' strict products liability claim against Mr. Fiore fails as a matter of law because a *one-time* seller (or lessor) is necessarily an *occasional* seller (or lessor) under *Elley*.

3. Elley *Is Not Distinguishable*

Plaintiffs unpersuasively purport to distinguish *Elley*. They argue that, unlike the discrete sale of jam or a used car, Mr. Fiore was paid "thousands of dollars per month" for SpeedVegas's use of the Aventador. (Sherwood Br. at 13; *see* B-K Br. at 7-8 ("If Mr. Fiore had wanted to enter into a single transaction and be an 'occasional seller,' he would have just sold his Lamborghini to SpeedVegas . . . .").) Plaintiffs' argument captures a distinction between a lease and a discrete sale, but does not materially distinguish *Elley*.

In *Elley*, the Nevada Supreme Court does not contemplate occasional lease transaction because Nevada law does not recognize that strict products liability for lessors at all. The examples of exempt

transactions mentioned in *Elley* are sourced from the Restatement (Second) of Torts, Section 402A—which does not recognize that ***lessors*** may be subject to the strict products liability doctrine.[2]

As typical of a lease agreement, SpeedVegas made continuing payments to Mr. Fiore rather than a lump sum for the term of the lease. Without citation to legal authority, the Ben-Kely plaintiffs argue that this means "Mr. Fiore effectively entered into a partnership with SpeedVegas." (B-K Br. at 7.) No court, however, has held that a lessee's conduct determines whether the lessor qualifies as a merchant-seller. By the Ben-Kely plaintiffs' reasoning, any lessor may be strictly liable to a downstream plaintiff if his lessee reintroduces the leased product into the stream of commerce. That cannot be.

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[2] The Restatement (Third) of Torts recognizes that lessors may be subject to strict products liability, *see* Restatement (Third) of Torts: Prod. Liab. § 20 (1998), but Nevada has not adopted that rule. *See Maduike v. Agency Rent-A-Car*, 114 Nev. 1, 6 n.1, 953 P.2d 24, 27 n.1 (1998) ("[W]e decline to address the general applicability of strict liability to lessors of personalty."). Indeed, this Court has rejected the Third Restatement's approach to products liability. *See Ford Motor Co. v. Trejo*, 133 Nev. 520, 530–31, 402 P.3d 649, 657 (2017) ("This court is not persuaded that the Third Restatement's risk-utility analysis provides a superior framework for analyzing claims of design defect. . . . Therefore, claims of design defect in Nevada will continue to be governed by the consumer-expectation test [in Restatement (Second) of Torts § 402A].").

What matters under *Elley* is whether the seller sells "such a product" "in the regular course of his business." *Elley* concerned sellers and not lessors, but the logic applies with equal force to lessors: engaging in the business of leasing vehicles requires more than a single lease transaction.

4. No Jurisdiction Applies Strict Products Liability to One-Time Sellers (or Lessors)

No jurisdiction in the United States applies strict products liability to a one-time seller or lessor. Plaintiffs conspicuously fail to identify any decision from any jurisdiction supporting their position that Mr. Fiore—a one-time lessor—may become a merchant-seller upon entering into a "commercial lease agreement."

In sharp contrast, courts nationwide have consistently affirmed that strict products liability does not apply to a one-time seller or lessor. *See, e.g.*, *Lyzhoft v. Waconia Farm Supply*, No. A12-2237, 2013 WL 3368832, at *4 (Minn. Ct. App. July 8, 2013) (affirming dismissal of strict products liability claim against one-time lessor because a "one-time bailment by a non-distributor can[not] result in the imposition of strict liability."); *Smith v. Nick's Catering Serv.*, 549 F.2d 1194, 1196 (8th Cir. 1977) ("To the extent that the Missouri courts have indicated a

willingness to extend the strict liability doctrine to lessors, it seems likely that they would adopt the prevailing view that only a mass lessor similar to a manufacturer or a retailer could be held strictly liable."); *Bachner v. Pearson*, 479 P.2d 319, 328 (Alaska 1970) ("Just as strict liability has not been imposed in cases of single transaction, non-commercial sales, no such liability will result where the lease in question is an isolated occurrence outside the usual course of the lessor's business."); *Price v. Shell Oil Co.*, 466 P.2d 722, 728 (Cal. 1970); ("[F]or the doctrine of strict liability in tort to apply to a lessor of personalty, the lessor should be found to be in the business of leasing, in the same general sense as the seller of personalty is found to be in the business of manufacturing or retailing.").

5. Kemp v. Miller *Is Inapposite*

Plaintiffs cite just one judicial decision in support of their strict products liability claim against Mr. Fiore: *Kemp v. Miller*, 453 N.W.2d 872 (Wis. 1990). (*See* B-K Br. 6-7.) The Ben-Kely plaintiffs argue that the Wisconsin Supreme Court in *Kemp* "considered a similar issue." (*Id.*) Not so.

Kemp is inapposite because the defendant, Budget Rent-A-Car, was undisputedly in the business of leasing vehicles to consumers. *See generally id.* Indeed, Budget Rent-A-Car is the paradigm of a commercial lessor: its principal and primary business is renting vehicles to consumers. Mr. Fiore, in contrast, has leased a vehicle once: to SpeedVegas.

The Ben-Kely plaintiffs also misconstrue *Kemp* by arguing that the "policy considerations" cited by the Wisconsin Supreme Court to impose strict liability on Budget Rent-A-Car apply to Mr. Fiore. (*See* B-K Br. at 7.) Numerous policy considerations described in *Kemp* plainly do not apply to Mr. Fiore because he is not a commercial lessor.[3]

Without mentioning these inapplicable policy considerations, the Ben-Kely plaintiffs point to *Kemp*'s statement that "***persons in the business of leasing*** continually introduce potentially dangerous

[3] Notably, the Wisconsin Supreme Court reasoned that strict liability on a commercial lessor "places the risk of loss . . . on one who can implement procedures to avoid the distribution of defective products in the future"—explaining that "[t]he commercial lessor is familiar with the characteristics and prior history of the products he or she leases and is in a position to discover and correct defects in those products by means of routine inspection, servicing, and repair." *Kemp*, 154 Wis. 2d at 557.

instrumentalities into the stream of commerce." (Br. at 7 (emphasis added).) But this statement is irrelevant because it presumes that Mr. Fiore is in the business of leasing vehicles. Plainly, he is not.

6. Whether Mr. Fiore is a Merchant-Seller May Be Determined as a Matter of Law

The Sherwood plaintiffs argue that Mr. Fiore is estopped from arguing that he is not a merchant-seller because he "conceded" and "agreed" below that this is a factual determination reserved for the jury. (Br. at 15.) Not so.

Neither petitioner conceded or agreed that any element of the strict products liability doctrine is reserved for the jury. Mr. Fiore, in his motion for summary judgment, cited Nevada Jury Instruction 7.1 because the pattern instruction shows that strict liability applies only to a manufacturer, a distributor, or "a seller who can be regarded as a merchant engaged in the business of supply goods of the kind involved in the case." (3 App. 547:21-548:7.)

Plaintiffs fail to explain how Mr. Fiore's mere citation to a pattern jury instruction operates as a concession that the subject of the instruction is a factual question reserved for a jury. The Sherwood plaintiffs overtly distort the record by asserting—without explanation

or citation to the record—that "all parties agreed the question of who qualifies as a 'seller' is one for the jury to make as a determination of fact." (Br. at 16 (emphasis omitted); *but see* 3 App. 547:21-548:7.) Even if determining a party's status as a merchant-seller were a factual question, here there can be no genuine dispute: any reasonable juror would have to find that Mr. Fiore is but an occasional seller.

B. SpeedVegas and Fiore Are Not Subject to Strict Liability as Lessors

1. Nevada Does Not Apply Strict Products Liability to Lessors

In Nevada, the strict products liability doctrine applies only to manufacturers, distributors, and sellers. (*See* 3 App. 547-8.) Plaintiffs' strict products liability claims against Mr. Fiore and SpeedVegas fail because Nevada law does not authorize strict products liability claims against lessors.

Nevada Pattern Jury Instruction 7.1 is instructive. It provides that "[i]n order to establish a claim of strict liability for a defective product, the plaintiff must prove . . . The defendant was either: . . . a manufacturer of the product, a distributor of the product, or a seller

who can be regarded as a merchant engaged in the business of supply goods of the kind involved in the case." (*See* 4 App. 547-8.)

Pattern instruction 7.1 derives from *Elley*, in which the Nevada Supreme Court adopted the Restatement (Second) of Torts, Section 402A, concerning strict products liability. The Restatement (*Second*) of Torts does not recognize lessors as subject to strict products liability, either. That changes with the Restatement (*Third*) of Torts—but the Restatement (Third) of Torts has not been adopted in Nevada.

The Nevada Supreme Court has never authorized strict products liability for commercial lessors.[4] Plaintiffs' strict products liability claims against petitioners fail, therefore, as a matter of Nevada law.

2. Whether SpeedVegas "Rent[ed]" Vehicles to Customers Is Immaterial

The Sherwood plaintiffs unpersuasively argue that SpeedVegas must be subject to strict products liability because the Fiore-SpeedVegas lease agreement describes SpeedVegas as providing car "rentals" to customers. (*See* Br. at 20-22.) Even if SpeedVegas qualifies

[4] The Nevada Supreme Court has, however, "decline[d] to address the general applicability of strict liability to lessors of personalty." *Maduike v. Agency Rent-A-Car*, 114 Nev. 1, 6 n.1, 953 P.2d 24, 27 n.1 (1998).

as a commercial vehicle lessor, however, the Sherwood plaintiffs have not identified any Nevada legal authority authorizing strict products liability claims against commercial lessors.

Regardless, the standard that the Sherwood plaintiffs cite (". . . supplying goods of the kind involved in the case . . .") applies only to ***sellers***. *See Elley*, 104 Nev. at 418 (quoting 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 supply goods of the kind involved in the case is subject to strict liability . . ."); Nevada Jury Instruction (2019 ed.) No. 7.1 (same).

The Sherwood plaintiffs' strict products liability claim against SpeedVegas fails as a matter of law, therefore, because SpeedVegas does not ***sell*** vehicles in the regular course of its business and Nevada law does not authorize strict products liability claims against lessors.

3. SpeedVegas Is Not a "Seller"

Plaintiffs' strict products liability claim against SpeedVegas must also fail as a matter of law because the undisputed record shows that SpeedVegas is not in the business of selling or leasing vehicles. (*See* Pet. at 18-19.) SpeedVegas sells ***an experience***: that of driving an

exotic car on a race track, with a coach in the passenger seat. (*See* 4 App. 767.)

No published Nevada Supreme court decision articulates the standard for distinguishing products from services in hybrid transactions. But every U.S. jurisdiction to distinguish between products and services in the strict products liability context examines which one (product or service) lies at the heart of the transaction. *See Utah Loc. Gov't Tr. v. Wheeler Mach. Co.*, 199 P.3d 949, 952-55 (Utah 2008) (surveying case law distinguishing between products and services in products liability context).

"[W]here the provision of medical services also involves the doctor or hospital dispensing a medical device," California courts apply the "essence of the transaction test"—and reject products liability claims against medical providers. *See id.*, ¶ 24 (citing *San Diego Hosp. Ass'n v. Superior Court*, 35 Cal. Rptr. 2d 489 (Ct. App. 1994) and other authorities)). The strict products liability doctrine does not apply when—as with SpeedVegas and exotic cars it rents to customers— "the chain of distribution effectively ended with the defendant[,] who was more of a product user than a supplier." *Wheeler Mach. Co.*, ¶ 24.

Here, plaintiffs' strict products liability claim against SpeedVegas fails as a matter of law because the undisputed record shows that SpeedVegas is selling an experience—not selling or leasing cars. The Sherwood plaintiffs do not cite any provision within the agreement between SpeedVegas and customers, nor do they otherwise contradict Fiore's statement that customers purchased an *experience*; they did not get the bundle of property rights that would come from purchasing or leasing a *car*[5]:

> Customers of SpeedVegas paid by the lap to drive a vehicle in SpeedVegas' fleet, including the subject Lamborghini Aventador, on SpeedVegas' track. They were accompanied by a SpeedVegas employee serving as a "coach" and could not remove the vehicle from the premises.

(4 App. 752, ¶ 13.) While that experience might vary depending on the car selected, it nonetheless remains an experience or service—laps around a track with a coach—not the sale or lease of goods.

In this sense, SpeedVegas is even farther removed from a sale or lease transaction than is a medical provider, who in dispensing medicine or a medical device actually gives the plaintiff property rights

[5] If a customer desired to purchase or lease a vehicle, he or she would visit a dealership—not SpeedVegas.

in the dispensed product. In contrast, SpeedVegas customers receive none of the ownership or use rights inherently associated with car purchases or leases. SpeedVegas never conveys to customers the title to any car. Customers cannot even leave SpeedVegas's property with a SpeedVegas car. Customers are only briefly alone with the rented car. Customers relinquish the car when the experience ends after a certain number of laps or minutes. Most tellingly, customers never even have exclusive control of the car: each SpeedVegas car is modified with passenger-side brake pedals so that a SpeedVegas coach riding along with the customer can unilaterally control the car if necessary. (4 App. 930.)

But even if the temporary, restricted, supervised use of the car were considered a "rental" (though not a lease), the rental is incidental to a bundle of wrap-around services designed to create for customers a race-track driving experience. Those services are key to the experience: a closed race track environment and a SpeedVegas coach seated in the passenger seat, able to use modified passenger-side brake pedals to unilaterally slow the car from the passenger seat. Customers must sign up for these services as a condition of using the car. No reasonable jury

applying any established legal standard could find that SpeedVegas sold the Aventador to plaintiff Sherwood in the sense required to trigger strict products liability.

SpeedVegas is not a manufacturer, distributor, auto dealer, or commercial lessor, so it is not subject to strict products liability under established Nevada Supreme Court precedent. *See* Parts A.1, A.4. Indeed, the Sherwood plaintiffs have separately settled with Lamborghini—the Aventador's manufacturer.

Plaintiffs unpersuasively argue that SpeedVegas is in the business of supplying cars to customers merely because SpeedVegas, in its separate lease agreement ***with Mr. Fiore***, "describes [its] business model as 'rentals' of cars to customers." (Sherwood Br. at 20.) But the lease between SpeedVegas and Mr. Fiore (not a SpeedVegas customer) is scarcely relevant to understanding the nature of the transaction between SpeedVegas ***and its customers***.

Plaintiffs misconstrue the SpeedVegas-Fiore lease agreement, in any event. SpeedVegas does not describe its business model as renting cars—it simply states that Mr. Fiore's compensation is to be a function of the revenues SpeedVegas earns from renting the Aventador. (*See* 4

App. 920 at § 3.A.) Indeed, it is telling that in an agreement that carefully and consistently uses the term "lease" to describe the transfer of property rights in the Aventador from Mr. Fiore to SpeedVegas, the parties opted *not* to use that word to describe its use at the racing facility, instead using the colloquial term "rental." SpeedVegas is not a seller or lessor.

4. Neither Estoppel Nor Waiver Applies

The Sherwood plaintiffs improperly argue estoppel on the grounds that "[p]etitioners averred [below] that there was 'no substantive difference between one who sells a product and one who leases with regard to strict products liability.'" (Sherwood Br. at 23.)

First, the Sherwood plaintiffs strip Mr. Fiore's assertion of its essential context. Mr. Fiore's assertion that there is "no substantive difference between" a seller and a lessor was made in the context of arguing that if *Elley* holds that "an occasional seller" is not subject to strict liability, perforce an occasional lessor cannot be subject to strict products liability. (*See* 3 App. 545-49.) In other words, the similarity is specifically with respect to the word "occasional" (or "casual"): nothing in the difference between a lease and a sale justifies exempting

occasional sellers from strict products liability while denying that exemption to an occasional lessor. But that negative assertion about when strict liability *cannot* apply is far from an affirmative concession that commercial lessors *are* subject to strict liability.

Second, estoppel does not apply to Mr. Fiore because the district court rejected his argument. *See Matter of Frei Irrevocable Tr. Dated Oct. 29, 1996*, 133 Nev. 50, 56, 390 P.3d 646, 652 (2017) (estoppel requires that the party succeeded on the earlier asserted position). Nothing in the district court's order suggests that it adopted any of Fiore's arguments; to the contrary, the district court's denial of relief shows that Fiore did not succeed.

Finally, the Sherwood plaintiffs ignore that both Fiore and SpeedVegas repeatedly cited the test for products liability as applying only to a "seller, manufacturer, or distributor" in the business of supplying goods and showed that they were not sellers. (3 App. 539 ("Mr. Fiore was not engaged in the business of leasing *or selling* automobiles to others and is therefore not a merchant who is liable in strict liability for product defects." (emphasis added)); 3 App. 546 ("The doctrine of strict liability in tort for product defects has been long

recognized as applying to manufacturers, distributors and sellers of goods that place such goods into the stream of commerce."); 4 App. 766 ("SpeedVegas is not a seller, manufacturer, or distributor . . . and thus is not subject to a strict products liability claim.").)

C. NIIA's Exclusive Remedy Provision Bars the Ben-Kely Plaintiffs' Suit Against Mr. Fiore

The Ben-Kely plaintiffs' claims against Mr. Fiore are also barred by the Nevada Industrial Insurance Act ("NIIA") exclusive remedy provision.

Mr. Fiore, as a paid member of SpeedVegas's board of directors, qualifies for NIIA protection as a co-employee of Mr. Ben-Kely pursuant to NRS 616A.105. *See id.* ("'Employee' . . . include[s] . . . (2) Members of boards of directors of . . . private corporations while rendering actual service for such corporations for pay.").

The Ben-Kely plaintiffs disagree, arguing that Mr. Fiore does not meet the definition of employee under NRS 616A.105(2) because no evidence describes the services he rendered as a member of SpeedVegas's board of directors for pay. (*See* Br. at 14.) They object, in other words, that the evidence of Mr. Fiore's services to SpeedVegas is

thin.[6] They also argue that NRS 616.110(9)(b) excludes Mr. Fiore from NIIA protection because any compensation he received was based on sales to customers. (*See id.*)

None of the arguments the Ben-Kely plaintiffs now assert were raised below in briefing or oral argument.[7] (*See* 4 App. 910-918 (opposition to Fiore MSJ); 6 App. 1447-7 App. 1527 (hearing transcript).) Even though they now argue that the evidence of Mr. Fiore's employment with SpeedVegas is too thin to be relied on, the Ben-Kely plaintiffs never moved pursuant to NRCP 56(d) to take additional discovery regarding Mr. Fiore's role on SpeedVegas's board of directors.

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[6] Mr. Fiore submitted an affidavit attesting that he was compensated by SpeedVegas for his services on SpeedVegas's board of directors (*see* 2 App. 306, ¶ 7), and he testified regarding his role on SpeedVegas's board during his deposition.

[7] The Ben-Kely plaintiffs ignored Mr. Fiore's NIIA argument below: they did not respond to Mr. Fiore's statement of undisputed material fact that he was employed and paid by SpeedVegas as NRCP 56(c) requires, never responded to his NIIA argument in briefing, and responded to his NIIA argument only in passing at the hearing (*see* 7 App. 1511:25-1512:6).

Mr. Fiore cannot be liable to the Ben-Kely plaintiffs because it is undisputed that he was compensated for serving on SpeedVegas's board of directors. (*See* 2 App. 306.) This qualifies him for NIIA protection.

Mr. Fiore qualifies as an employee of SpeedVegas under NRS 616A.105 also based on his lease of the Aventador. Mr. Fiore testified that he and Aaron Fessler, SpeedVegas's CEO, developed the idea that Mr. Fiore would lease the Aventador during conversations Mr. Fiore had with Mr. Fessler in his capacity as a SpeedVegas board member. (6 App. 1318:5-1320:8.) Thus, in addition to serving on the board of directors for pay, Mr. Fiore's provision of the Aventador to SpeedVegas qualifies him as an employee subject to NIIA protections.

Mr. Fiore is not excluded from employee status by NRS 616.110(9)(b). (*See* B-K Br. at 14.) NRS 616.110(9)(b) excludes persons whose compensation is based on sales to customers. No evidence shows that Mr. Fiore's compensation as a board member is contingent on sales to customers: as discussed above, there were no sales. And even though SpeedVegas pays Mr. Fiore under the lease based on how many times the Aventador is used by SpeedVegas customers, SpeedVegas also pays

Mr. Fiore a monthly salary separate from the lease—i.e., that is not contingent on customers using the Aventador. (*See* 4 App. 920.)

The Ben-Kely plaintiffs' claim against Mr. Fiore is barred as a matter of law by the NIIA exclusive remedy provision. (*See* 2 App. 323-26.)

D. Mr. Fiore Is Not a Proper Defendant Under NRS Chapter 86

NRS Chapter 86 bars Plaintiffs' claims against Mr. Fiore because the conduct of which he is accused applies equally to SpeedVegas and Mr. Fiore owed no independent duty to Plaintiffs. (*See* Pet. at 14-16.) Plaintiffs purport to circumvent NRS Chapter 86 by arguing that Mr. Fiore is sued "in his individual capacity." (*See* Sherwood Br. at 16-18; B-K Br. at 12-14.) Their argument is unpersuasive for two reasons.

First, Plaintiffs' argument is circular and renders NRS Chapter 86's protections illusory. Their argument is that Mr. Fiore, a member of SpeedVegas's board of directors, is not protected by NRS Chapter 86 because they are seeking to hold liable in his personal capacity. But any plaintiff seeking to avoid an NRS Chapter 86 defense may assert this position. Plaintiffs' characterization of their claim is beside the point.

Second, plaintiffs have no viable claim against Mr. Fiore in his individual capacity because Mr. Fiore owed no personal duty to plaintiffs—and so plaintiffs' claims against him cannot be independent of their claims against SpeedVegas. (*See* Sherwood Br. at 17; B-K Br. at 13.) Plaintiffs' claims against Mr. Fiore are premised on the fact that "Mr. Fiore, as an individual, put his defective Lamborghini into the stream of commerce" when he leased the Aventador to SpeedVegas. (B-K Br. at 13.) But even if Mr. Fiore leased the Aventador to SpeedVegas in his individual capacity, plaintiffs identify no duty Mr. Fiore owed to them in connection with the lease. *See Gardner v. Henderson Water Park, LLC*, 133 Nev. 391, 394, 399 P.3d 350, 351 (2017) (affirming dismissal pursuant to NRS Chapter 86 where plaintiffs failed to allege defendants breached a personal duty owed to them).

Nevada products liability law does not create such a duty. Mr. Fiore is a lessor, not a seller, and Nevada does not apply strict products liability doctrine to lessors. (*See* Part B.1.) Even if it did, Mr. Fiore entered into just one lease, and *Elley* holds that strict products liability cannot be premised on a solitary transaction. (*See* Part A.1.) Besides, the party to whom Mr. Fiore leased his vehicle was also not a

manufacturer, seller, or distributor. (*See* Parts A.1, A.4.) Applying Nevada law to the undisputed record in this way negates the existence of any personal duty from Mr. Fiore to plaintiffs.

Any duty that Mr. Fiore could have owed to plaintiffs would have to flow from his role as a director of SpeedVegas. Because plaintiffs cannot show that Mr. Fiore owed an independent duty to them, their claims against Mr. Fiore are barred by NRS Chapter 86. *See Gardner*, 133 Nev. at 394, 399 P.3d at 351.

E. Mandamus Review Is Warranted

Mandamus review is appropriate and warranted. There are no undisputed material facts and the district court's order is contrary to a settled principle of Nevada law (that a one-time seller or lessor is not subject to strict liability for defects in the product). Mandamus review is warranted also because an important issue of law (whether lessors of personalty are subject to strict products liability) needs clarification. *Okada v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 134 Nev. 6, 9, 408 P.3d 566, 569 (2018).

1. No Material Facts Are Disputed

No material facts are genuinely disputed. Any factual disputes alleged by plaintiffs are illusory or immaterial.

For instance, the Sherwood plaintiffs repeatedly argue that a genuine factual dispute exists because petitioners conceded below that a jury must determine whether Mr. Fiore is a "seller." (Br. at 3, 9, 9-10, 15, 16, 23.) No other factual disputes are identified in their brief. The dispute based on petitioners' "concessions" is illusory for the reasons explained in Part A.6.

If the record is unclear,[8] petitioners should receive the benefit of the doubt because plaintiffs opposed petitioners' motions for summary judgment without responding to their statements of undisputed material facts. (*See* 2 App. 313-14; 4 App. 910-918; 5 App. 1241-1250; 6 App. 1438-1442.) Nor did plaintiffs request time to conduct additional discovery or other relief pursuant to NRCP 56(d).

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[8] For example, the Sherwood plaintiffs assert that "Petitioner Fiore does not dispute . . . that there are genuine issues of material fact underlying the Sherwood Plaintiffs' products liability claim against him." (Br. at 11-12.) Petitioners do not understand what this means. Fiore emphatically demonstrated the absence of any such issues; that is why he sought summary judgment. Any confusion should be charged to the Sherwood plaintiffs.

2. The District Court's Order is Contrary to Settled Principles of Nevada Law

The district court has authorized plaintiffs' strict products liability claims against Mr. Fiore and SpeedVegas to proceed to a jury—even though it is undisputed that neither petitioner is in the business of *selling* vehicles, and that Mr. Fiore has leased a vehicle only once. Even if a lessor may be subject to strict products liability in Nevada (which is unsettled), *Elley* bars such a claim if premised only on a single transaction. Requiring Mr. Fiore (and SpeedVegas) to defend himself at a jury trial against a claim that is barred by this Court's precedent is an extraordinary waste of judicial resources and extremely burdensome for Mr. Fiore.

3. An Important Issue of Law Needs Clarification

An important issue of Nevada law also needs clarification. *Okada v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 134 Nev. 6, 9, 408 P.3d 566, 569 (2018). No Nevada appellate court has held that lessors of personalty are subject to strict products liability. This Court ***has not*** adopted the Restatement (Third) of Torts, which recognizes lessors as subject to strict product liability.

Yet, the district court's order authorizes strict products liability claims against Mr. Fiore and SpeedVegas to proceed to a jury even though no evidence shows either Mr. Fiore or SpeedVegas has ever sold vehicles to consumers. While the Legislature could elect to extend products liability to lessors, it might not.[9] Nevada district courts should not anticipate such an expansion of Section 402A absent legislative direction.[10]

CONCLUSION

For these 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 Mr. Fiore and SpeedVegas's

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[9] For example, Colorado law defines "[s]eller" for purposes of the strict products liability doctrine as including individuals or entities "engaged in the business of selling **or leasing** any product for resale, use, or consumption." C.R.S. 13-21-401(3) (emphasis added). But C.R.S. 13-21-402(1) provides that "[n]o product liability action shall be commenced against any seller . . . unless said seller is also the manufacturer of said product or . . . of the part thereof giving rise to the product liability action."

[10] As discussed above, this Court has already (in the context of design defect) rejected the basic approach of the Third Restatement. *Ford Motor Co.*, 133 Nev. at 530–31, 402 P.3d at 657.

motions for summary judgment and enter judgment in favor of Mr. Fiore and SpeedVegas on this cause of action.

Dated this 25th day of February, 2022.

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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)–(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 complies with the type-volume limitations of NRAP 21(d) because, except as exempted by NRAP 32(a)(7)(C), it contains 5,636 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 25th day of February, 2022.

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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:

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