

CLERK OF THE COURT

1 **ORDER**  
2 **THORNDAL ARMSTRONG DELK**  
3 **BALKENBUSH & EISINGER**  
4 **PAUL F. EISINGER, ESQ.**  
5 **Nevada Bar No. 1617**  
6 **PHILIP GOODHART, ESQ.**  
7 **Nevada Bar No. 5332**  
8 **ALEXANDRA B. MCLEOD, ESQ.**  
9 **Nevada Bar No. 8185**  
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20 **Attorneys for Defendants,**  
21 **HENDERSON WATER PARK, LLC dba**  
22 **COWABUNGA BAY WATER PARK,**  
23 **WEST COAST WATER PARKS, LLC,**  
24 **DOUBLE OTT WATER HOLDINGS, LLC**

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

15 **PETER GARDNER and CHRISTIAN GARDNER,**  
16 **on behalf of minor child, LELAND GARDNER,**

17 **Plaintiffs,**

18 **vs.**

19 **HENDERSON WATER PARK, LLC dba**  
20 **COWABUNGA BAY WATER PARK, a Nevada**  
21 **limited liability company; WEST COAST WATER**  
22 **PARKS, LLC, a Nevada limited liability company;**  
23 **DOUBLE OTT WATER HOLDINGS, LLC, a Utah**  
24 **limited liability company; DOES I through X,**  
**inclusive; ROE CORPORATIONS I through X, and**  
**ROE Limited Liability Company I through X,**  
**inclusive,**

**Defendants.**

**CASE NO. A-15-722259-C**  
**DEPT. NO. XXX**

**ORDER DENYING PLAINTIFFS'**  
**MOTION FOR LEAVE TO**  
**AMEND COMPLAINT**

1 Date of Hearing: June 16, 2016 at 9:00 a.m.

2 For Plaintiffs: Donald J. Campbell, Esq. and  
3 Samuel R. Mirkovich, Esq. of  
CAMPBELL & WILLIAMS

4 For Defendants: Paul F. Eisinger, Esq. and  
5 Alexandra B. McLeod, Esq. of  
6 THORNDAL ARMSTRONG DELK  
BALKENBUSH & EISINGER

7 Plaintiffs' Motion for Leave to Amend Complaint, having come on for hearing before the  
8 above-entitled Court on the 16<sup>th</sup> day of June, 2016, at the hour of 9:00 a.m.; and this Honorable  
9 Court having considered all of the papers and pleadings on file herein, as well as the argument of  
10 counsel for the parties hereto; and good cause appearing therefor;

11 THE COURT HEREBY FINDS as follows:

12 L FINDINGS OF FACT

13 1. Plaintiff seeks to add various individuals, who make up the Defendant's  
14 Management Committee, as Defendants.

15 2. This Court finds that the Nevada Revised Statutes protect members of an LLC, not  
16 only from debts incurred by an LLC, but also from liabilities incurred by the LLC. NRS 86.371  
17 indicates that "...no member or manager of any limited-liability company formed under the laws  
18 of this State is *individually liable* for the debts or liabilities of the company." (emphasis added).

19 3. This Court finds further that although the Nevada corporation statutes include an  
20 alter ego exception to the corporate protections, the LLC statutes do not contain a similar  
21 exception, creating a negative inference that the Nevada legislature did not intend for it to apply to  
22 LLCs. (*Suing the Man Behind the Curtain: Can Nevada LLC Members be Liable Under the Alter*  
23 *Ego Doctrine?* by Ryan Lower, Esq., NEVADA LAWYER, November, 2014, pg. 16, citing to *Dep't.*  
24 *of Taxation v. DaimlerChrysler*, 121 Nev. 541, 548, 119 P.3d 135, 139 [2005]).

Therefore, THE COURT HEREBY CONCLUDES as follows:

II. CONCLUSIONS OF LAW

1. This Court concludes that the requested amendment and inclusion of the individuals who make up the Defendant's Management Committee would be futile, as such individuals are improper Defendants. *See Halcrow, Inc. v. Eighth Judicial Dist. Court of the State*, 302 P.3d 1148, 129 Nev. Adv. Rep. 42 (2013); *Allum v. Valley Bank of Nev.*, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993); *Soebbing v. Carpet Barn, Inc.*, 109 Nev. 78, 84, 847 P.2d 731, 736 (1993).

2. IT IS HEREBY ORDERED that the Motion for Leave to Amend is hereby DENIED without prejudice.

DATED this 28 day of June, 2016.

HON. JERRY A. WIESEM  
DISTRICT COURT JUDGE, DEPARTMENT 30

Respectfully submitted by:

THORNDAL ARMSTRONG  
DELK BALKENBUSH & EISINGER

PAUL F. EISINGER, ESQ.  
ALEXANDRA B. McLEOD, ESQ.  
1100 E. Bridger Avenue, P.O. Box 2070  
Las Vegas, Nevada 89125  
Attorneys for Defendants

Approved as to form and content by:

CAMPBELL & WILLIAMS

By  
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SAMUEL R. MIRKOVICH, ESQ.  
700 South Seventh Street  
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Attorneys for Plaintiffs

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# **EXHIBIT B**

1 CASE NO. A-15-722259-C

2

3

IN THE DISTRICT COURT OF LAS VEGAS

4

CLARK COUNTY, NEVADA

5

-oOo-

6

PETER GARDNER and CHRISTIAN  
GARDNER, on behalf of minor child,  
7 LELAND GARDNER,

8

Plaintiffs,

9

Department No. XXX

10

HENDERSON WATER PARK, LLC dba  
COWABUNGA BAY WATER PARK, a Nevada  
11 limited liability company; WEST  
COAST WATER PARKS, LLC, a Nevada  
12 limited liability company; DOUBLE  
OTT WATER HOLDINGS, LLC, a Utah  
13 limited liability company; DOES I  
through X, inclusive; ROE  
14 CORPORATIONS I through X; and ROE  
15 limited liability company I through  
X, inclusive,

16

Defendants.

17

18

REPORTER'S TRANSCRIPT  
OF

19

MOTION FOR LEAVE TO AMEND COMPLAINT

20

BEFORE THE HONORABLE JERRY A. WIESE,

21

THURSDAY, JUNE 16, 2016  
22 AT 9:46 A.M.

23

24

25

Reported by: Leah Armendariz, RFR, CCR No. 921

GARD156

A P P E A R A N C E S

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GARD157

GARD260

1 LAS VEGAS, CLARK COUNTY, NV, THURSDAY, JUNE 16, 2016  
2 9:46 A.M.,

3 P R O C E E D I N G S

4 THE COURT: Gardner versus Henderson Water  
5 Park.

6 MR. CAMPBELL: Good morning, Your Honor,  
7 Donald Jim Campbell on behalf of plaintiff.

8 MR. MIRKOVICH: Good morning. Samuel  
9 Mirkovich appearing on behalf of the plaintiff.

10 MR. McLEOD: Good morning, Your Honor,  
11 Alexandra McLeod from Thorndal Armstrong on behalf of  
12 defendants.

13 MR. EISINGER: Paul Eisinger, Bar  
14 Number 1617, of Thorndal Armstrong on behalf of  
15 defendants.

16 THE COURT: Good morning, guys.

17 All right. So two things. The first one I  
18 want to address with you is my calendar is showing on  
19 June 23rd Water Park's motion to quash subpoenas of  
20 nonparties.

21 Shouldn't that be in front of Commissioner  
22 Bulla?

23 MR. MIRKOVICH: It should, Your Honor. I  
24 didn't realize it would be set for your calendar.  
25 When she made me aware of that, that's when I

GARD158

GARD261

1 advised -- but in any case, Ms. McLeod and I have  
2 worked it out. That motion is going to be taken off  
3 calendar. There's no pending dispute.

4 THE COURT: All right. That's vacated. I  
5 can just vacate it now.

6 MR. McLEOD: Yes, Your Honor. Even -- we  
7 believe we resolved the issue. Even if we haven't, we  
8 believe it should be reset on the discovery calendar.

9 THE COURT: All right. I'm going to vacate  
10 it.

11 All right. So today we're here for  
12 plaintiff's motion for leave to file amended complaint.

13 I understand you want to bring in the  
14 individuals?

15 MR. CAMPBELL: Yes, Your Honor.

16 THE COURT: Who are the members of the LLC,  
17 but don't you have to prove alter ego before you get  
18 there?

19 MR. CAMPBELL: No, you don't, Your Honor.  
20 There's an abundance of case law on this very issue.  
21 You can sue individual members of a LLC, not for the  
22 liability for deaths, but you can sue them  
23 individually for their individual torts with respect  
24 to their operation of the LLC if they committed  
25 individual torts. That's what we are suing them for,

GARD159

1 the manner in which they operated. They're complete  
2 violations of the law with respect to the structures  
3 that were put on by the law by the counter.

4 And this isn't something new or novel, Your  
5 Honor. This is adopted by substantial case law that has  
6 existed for over, like almost 100 years with respect to  
7 corporations. If you'll see our citations to Fletcher  
8 on corporations it says exactly that, Your Honor, in our  
9 brief. These rules have been applied to principals of  
10 limited liability companies.

11 You'll also see the case that we cited that's  
12 here locally, Your Honor, the USA Mortgage Company by  
13 the United States Supreme Court across the street on  
14 that very issue. If you're talking about a corporate  
15 officer that commits a tort, you can sue them for that.

16 I was involved in a case directly on point in  
17 that regard with respect to Trump versus Wynn. Mr. Wynn  
18 sued Mr. Trump individually in the corporation that he  
19 was operating because he committed a personal tort or  
20 alleged the same.

21 There's no difference now that we have an LLC,  
22 Your Honor. And all of the case law -- all of the case  
23 law holds that standard. For example, if I can just  
24 read you just one part of USA Commercial Mortgage.

25 "As managing members of Compass,

GARD160

GARD263

1 Pinkton [phonetic] and Black are  
2 personally liable for engaging in the  
3 conversion that plaintiff's proved  
4 was committed by Compass."  
5 Citing Pocahontas First Corporation versus  
6 Venture Planning, also a Nevada case on that very issue.

7 "There is no doubt that an  
8 individual who commits a tort while  
9 acting in the capacity of a corporate  
10 officer may be personally liable."  
11 Citing Marina [phonetic]. Now this was  
12 dealing with an LLC. They went on to say:

13 "Officers are liable for their  
14 tortious conduct even if they were  
15 acting officially for the entity."

16 Your Honor, and that's exactly what you have  
17 here. Quite frankly, this isn't even a close case.  
18 There's literally no jurisdiction that we are aware of  
19 anywhere, anywhere, whether it's federal or state, who  
20 has adopted the position that's being advanced to you by  
21 the defense here.

22 The simple fact of the matter is if you engage  
23 in a tort, you engage in a tort, and you can be sued  
24 personally for engaging in that tort. This is not a  
25 situation — I want to make this absolutely clear to the

GARD161

1 Court. This is not a situation where we are seeking to  
2 hold them liable for a debt of the corporation insofar  
3 as an act of the corporation or the LLC with respect to  
4 a contract. Contracts are different. We're not  
5 claiming contracts here. We are claiming torts and not  
6 only torts but intentional torts.

7 And you'll see one of the cases that I think  
8 we also cited was one that was decided in that regard  
9 was then Judge Markell, now Professor Markell, one of  
10 the leading bankruptcy scholars in the country, saying  
11 exactly that same thing where they tried to advance that  
12 argument in front of him in bankruptcy court saying,  
13 Wait a second, we're not talking about a corporation,  
14 okay, being responsible for an individual debt.

15 We're talking about the individuals that run  
16 that corporation, not in a contract sense, but we're  
17 talking about them operating in a tortious sense, not a  
18 contract action, but a tort action. That makes all the  
19 difference in the world. We're not claiming any sort of  
20 a contract action whatsoever, Your Honor. None.

21 THE COURT: Okay.

22 MR. CAMPBELL: Thank you, Your Honor.

23 THE COURT: Thank you.

24 MR. MCLEOD: Plaintiff's are eager to point  
25 out all of the federal case law and case law from

GARD162



1 other states because there's no Nevada state case law  
2 on this point. The creation of business entities is  
3 strictly a state statutory provision, and that is why  
4 they differ from state to state.

5 States intentionally make decisions in those  
6 statutory constructions to lure businesses to their  
7 state, and as we know, Nevada and Delaware are both very  
8 popular states for businesses to do their formation in  
9 precisely because of the protections.

10 Plaintiff would have us do away with all of  
11 those because they want to sue the members of the  
12 managing committee. They said that they want to sue for  
13 individual torts, that these are for a person who  
14 engages in a tort then, they can be sued for a tort.

15 Their proposed amended complaint at  
16 Paragraph 48 links all of the duties of these  
17 individuals to their position as a management company,  
18 not that they have individual duties and that they  
19 individually committed torts.

20 They want to sue the management committee of  
21 an LLC. They want to do away with the statutory  
22 protections in Chapter 86 of our revised statutes that  
23 specifically are intended to protect the LLCs, and its  
24 members.

25 Specifically NRS 86.381 says:

GARD163

1 "A member of a limited liability  
2 company is not a proper party to  
3 proceedings by or against the  
4 company."

5 That's exactly what they want to get around.  
6 And Paragraph 14 of their proposed amended complaint,  
7 they basically recite the standard for piercing a  
8 corporate veil under Chapter 78 of the Nevada Revised  
9 Statutes, which pertains to corporations, not to limited  
10 liability companies.

11 We have confidence in our legislature, and if  
12 the legislature wanted those same exceptions to the  
13 protections to apply in Chapter 86, they would put them  
14 in there. They are notably absent.

15 And plaintiff's argument that they are suing  
16 individuals is disingenuous because what they want to do  
17 is sue the managing -- the management committee, the  
18 members of the LLC, and get around these protections.  
19 That is an essential flaw that submits their petition --  
20 excuse me, their amended complaint to a motion to  
21 dismiss the minute it's filed, and that's what makes  
22 that amendment futile and why we believe that motion for  
23 leave to amend should be denied here.

24 THE COURT: Okay. Last word.

25 MR. CAMPBELL: Last word, Your Honor. The

GARD164

1 case that I wanted to cite to the Court was an In Re:  
2 Giampetro decided by Judge Markell, and in that he  
3 specifically made a finding that there may not be a  
4 Nevada case that says that, but every other case in  
5 the country is that way so Nevada would decide it the  
6 same way.

7           And I also would advise the Court if you look  
8 at one of our footnotes -- and I can't think of it right  
9 now. Yes, Your Honor, if you look at our Footnote  
10 Number 3 in our reply, Your Honor, we cite the  
11 legislative history of this, which likewise is the same  
12 wise application of the corporate law to LLCs with  
13 respect to limits of liabilities and the differentiation  
14 of the standards with respect to contract and with  
15 respect to torts. This is a tort action. They keep on  
16 talking about contract cases. This is not a contract  
17 case. This is a tort action.

18           THE COURT: All right. I'm not comfortable  
19 with this one yet, so.

20           MR. CAMPBELL: Just one thing, Your Honor.

21           THE COURT: I'm going to do a little bit  
22 more research on my own, and then I'll --

23           MR. CAMPBELL: In that regard, they're  
24 suggesting that if it is somehow contract related, we  
25 are going to demonstrate through discovery in this

GARD165

1 matter -- we're going to demonstrate through discovery  
2 in this matter of their individual liability on all  
3 this.

4           It's one thing to come in and argue at a  
5 motion for summary judgment after you have a body of  
6 evidence upon which the Court can reply, but to suggest  
7 that in a case right up front you don't get to do it at  
8 all when we're entitled to every single inference, and  
9 the Court is saying in Rule 15, even in the most  
10 borderline of cases, you allow the amendment and  
11 they can move to dismiss or move for summary judgment at  
12 a later point in time. And that's what we're doing  
13 here.

14           We want you to remember this. We were  
15 grossly, grossly misled by the testimony of the  
16 individual that was running the company that said that  
17 he was running the company, that no one else was  
18 involved. We have determined absolutely that they were  
19 involved. All of these other individuals were guilty of  
20 the same tort.

21           Thank you, Your Honor.

22           THE COURT: Thank you.

23           All right. I'll get you a decision probably  
24 in the next couple weeks.

25           MR. CAMPBELL: Thank you very much, Your

GARD166

1 Honor.

2 MR. McLEOD: Thank you, Your Honor.

3 MR. EISINGER: Thank you, Judge.

4 (The proceedings were concluded at  
5 9:58 a.m.)  
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GARD167

REPORTER'S CERTIFICATE

STATE OF NEVADA )  
COUNTY OF CLARK ) ss

I, Leah Armendariz, CCR 921, RPR, CRR, do hereby certify that I took down in Stenotype all of the proceedings had in the before-entitled matter at the time and place indicated and that thereafter said shorthand notes were transcribed into typewriting by me and that the foregoing transcript constitutes a full, true, and accurate record of the proceedings had.

IN THE WITNESS WHEREOF, I have hereunto set my hand and affixed my signature in the County of Clark, State of Nevada, this 12th day of July, 2016.

Leah D. Armendariz, RPR, CRR, CCR 921

GARD168

GARD271



LAW OFFICES  
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DELK BALKENBUSH & EISINGER**  
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# EXHIBIT C

1 RSPN

2 THORNDAL ARMSTRONG DELK

3 BALKENBUSH & EISINGER

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18 HENDERSON WATER PARK, LLC dba

19 COWABUNGA BAY WATER PARK,

20 WEST COAST WATER PARKS, LLC and

21 DOUBLE OTT WATER HOLDINGS, LLC

22 DISTRICT COURT

23 CLARK COUNTY, NEVADA

24 PETER GARDNER and CHRISTIAN

25 GARDNER, on behalf of minor child, LELAND

26 GARDNER,

27 Plaintiffs,

28 vs.

29 HENDERSON WATER PARK, LLC dba

30 COWABUNGA BAY WATER PARK, a

31 Nevada limited liability company; WEST

32 COAST WATER PARKS, LLC, a Nevada

33 limited liability company; DOUBLE OTT

34 WATER HOLDINGS, LLC, a Utah limited

35 liability company; DOES I through X, inclusive;

36 ROE CORPORATIONS I through X, and ROE

37 Limited Liability Company I through X,

38 inclusive,

39 Defendants.

CASE NO. A-15-722259-C

DEPT NO. XXX

DEFENDANT, WEST COAST  
WATER PARKS, LLC'S ANSWERS  
TO PLAINTIFFS' FIRST SET OF  
INTERROGATORIES



1                   **DEFENDANT, WEST COAST WATER PARKS, LLC'S ANSWERS**  
2                   **TO PLAINTIFFS' FIRST SET OF INTERROGATORIES**

3           Defendant, WEST COAST WATER PARKS, LLC ("West Coast"), by and through its  
4   counsel of record, Paul F. Eisinger, Esq. and Philip Goodhart, Esq., of the law firm of  
5   THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER, does herein respond, in  
6   accordance with Rule 33 of the Nevada Rules of Civil Procedure, to Plaintiffs' Interrogatories.

7           This Defendant objects to the number of Interrogatories propounded by the Plaintiffs as  
8   they exceed forty (40) in total including subparts.

9   **INTERROGATORY NO. 1:**

10          Identify and describe in detail all claims, complaints, arbitration proceedings and/or  
11   lawsuits filed against Defendant during the five (5) year period prior to the Subject Incident.

12   **RESPONSE TO INTERROGATORY NO. 1:**

13          Objection. This Interrogatory is vague, ambiguous, overbroad and compound.  
14   This Defendant also objects to said Interrogatory on the grounds that it calls for several  
15   legal conclusions. Finally, this Interrogatory also seeks to invade Attorney-Client Privilege  
16   and/or Attorney Work-Product. Subject to and without waiving said objections, the  
17   response is as follows: Splash Management, LLC v. West Coast Water Parks, LLC,  
18   Henderson Water Park, LLC, et al - Case No.: A-13-689506-B.

19   **INTERROGATORY NO. 2:**

20          Identify and set forth in detail, including by name, address and telephone number, any  
21   individual that performed any type of investigation in any way related to the Subject Incident.

22   **RESPONSE TO INTERROGATORY NO. 2:**

23          None on behalf of West Coast.

24   **INTERROGATORY NO. 3:**

25          Identify and set forth in detail West Coast's policies and procedures in any way related to  
26   the operation of the Wave Pool, including but not limited to lifeguard staffing, from April 1, 2013  
27   through the present.

28   ...

1 **RESPONSE TO INTERROGATORY NO. 3:**

2 West Coast is simply an owner/investor in Henderson Water Park, LLC and has no  
3 involvement in the policies, procedures or daily operations of Cowabunga Bay Water  
4 Park.

5 **INTERROGATORY NO. 4:**

6 Identify and set forth in detail West Coast's policies and procedures in any way related to  
7 the training of its lifeguards from April 1, 2013 through the present.

8 **RESPONSE TO INTERROGATORY NO. 4:**

9 See West Coast's Response to Interrogatory No. 3 above.

10 **INTERROGATORY NO. 5:**

11 Identify West Coast employees or personnel, agents, representatives, consultants, vendors  
12 or contractors that were on duty and/or present at the Premises on May 27, 2015.

13 **RESPONSE TO INTERROGATORY NO. 5:**

14 Objection: Vague and ambiguous. Subject to and without waiving said objections,  
15 the response is as follows: None. See West Coast's Response to Interrogatory No. 3  
16 above. It is noted that Shane Huish, the general manager of the Cowabunga Bay Water  
17 Park was working on May 27, 2015.

18 **INTERROGATORY NO. 6:**

19 If you claim that any other person(s) or entity(ies) contributed to the Subject Incident,  
20 please state the name of each such person(s) or entity(ies) and the manner in which he/she/it  
21 contributed to the alleged occurrence.

22 **RESPONSE TO INTERROGATORY NO. 6:**

23 As noted above, West Coast is simply an owner/investor in Henderson Water Park,  
24 LLC and has no involvement in the policies, procedures or daily operations of Cowabunga  
25 Bay Water Park. West Coast would defer to Henderson Water Park, LLC dba  
26 Cowabunga Bay Water Park. Furthermore, formal discovery has just commenced. No  
27 depositions have been taken. Discovery is ongoing and therefore this Defendant reserves  
28 the right to supplement this response.



LAW OFFICES  
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# EXHIBIT D

1 RSPN  
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18 HENDERSON WATER PARK, LLC dba  
19 COWABUNGA BAY WATER PARK,  
20 WEST COAST WATER PARKS, LLC and  
21 DOUBLE OTT WATER HOLDINGS, LLC

22 DISTRICT COURT  
23 CLARK COUNTY, NEVADA

24 PETER GARDNER and CHRISTIAN  
25 GARDNER, on behalf of minor child, LELAND  
26 GARDNER,

27 Plaintiffs,

28 vs.

29 HENDERSON WATER PARK, LLC dba  
30 COWABUNGA BAY WATER PARK, a  
31 Nevada limited liability company; WEST  
32 COAST WATER PARKS, LLC, a Nevada  
33 limited liability company; DOUBLE OTT  
34 WATER HOLDINGS, LLC, a Utah limited  
35 liability company; DOES I through X, inclusive;  
36 ROE CORPORATIONS I through X, and ROE  
37 Limited Liability Company I through X,  
38 inclusive,

39 Defendants.

CASE NO. A-15-722259-C

DEPT NO. XXX

DEFENDANT, DOUBLE OTT  
WATER HOLDINGS, LLC'S  
ANSWERS TO PLAINTIFFS'  
FIRST SET OF  
INTERROGATORIES

1                   **DEFENDANT, DOUBLE OTT WATER HOLDINGS, LLC'S ANSWERS**  
2                   **TO PLAINTIFFS' FIRST SET OF INTERROGATORIES**

3                   Defendant, DOUBLE OTT WATER HOLDINGS, LLC, ("DOUBLE OTT") by and  
4                   through its counsel of record, Paul F. Eisinger, Esq. and Philip Goodhart, Esq., of the law firm  
5                   of THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER, does herein respond,  
6                   in accordance with Rule 33 of the Nevada Rules of Civil Procedure, to Plaintiffs'  
7                   Interrogatories.

8                   This Defendant objects to the number of Interrogatories propounded by the Plaintiffs as  
9                   they exceed forty (40) in total including subparts.

10                  **INTERROGATORY NO. 1:**

11                  Identify and describe in detail all claims, complaints, arbitration proceedings and/or  
12                  lawsuits filed against Defendant during the five (5) year period prior to the Subject Incident.

13                  **RESPONSE TO INTERROGATORY NO. 1:**

14                  **Objection.** This Interrogatory is vague, ambiguous, overbroad and compound.  
15                  This Defendant also objects to said Interrogatory on the grounds that it calls for several  
16                  legal conclusions. Finally, this Interrogatory also seeks to invade Attorney-Client Privilege  
17                  and/or Attorney Work-Product. Subject to and without waiving said objections, the  
18                  response is as follows: None.

19                  **INTERROGATORY NO. 2:**

20                  Identify and set forth in detail, including by name, address and telephone number, any  
21                  individual that performed any type of investigation in any way related to the Subject Incident.

22                  **RESPONSE TO INTERROGATORY NO. 2:**

23                  None on behalf of Double Ott.

24                  **INTERROGATORY NO. 3:**

25                  Identify and set forth in detail Double Ott's policies and procedures in any way related to  
26                  the operation of the Wave Pool, including but not limited to lifeguard staffing, from April 1, 2013  
27                  through the present.

1 **RESPONSE TO INTERROGATORY NO. 3:**

2 Double Ott is simply an owner/investor in Henderson Water Park, LLC and has no  
3 involvement in the policies, procedures or daily operations of Cowabunga Bay Water  
4 Park.

5 **INTERROGATORY NO. 4:**

6 Identify and set forth in detail Double Ott's policies and procedures in any way related to  
7 the training of its lifeguards from April 1, 2013 through the present.

8 **RESPONSE TO INTERROGATORY NO. 4:**

9 See Double Ott's Response to Interrogatory No. 3 above.

10 **INTERROGATORY NO. 5:**

11 Identify Double Ott employees or personnel, agents, representatives, consultants, vendors  
12 or contractors that were on duty and/or present at the Premises on May 27, 2015.

13 **RESPONSE TO INTERROGATORY NO. 5:**

14 None. See Double Ott's Response to Interrogatory No. 3 above.

15 **INTERROGATORY NO. 6:**

16 If you claim that any other person(s) or entity(ies) contributed to the Subject Incident,  
17 please state the name of each such person(s) or entity(ies) and the manner in which he/she/it  
18 contributed to the alleged occurrence.

19 **RESPONSE TO INTERROGATORY NO. 6:**

20 As noted above, Double Ott is simply an owner/investor in Henderson Water Park,  
21 LLC and has no involvement in the policies, procedures or daily operations of Cowabunga  
22 Bay Water Park. Double Ott would defer to Henderson Water Park, LLC dba  
23 Cowabunga Bay Water Park. Furthermore, formal discovery has just commenced. No  
24 depositions have been taken. Discovery is ongoing and therefore this Defendant reserves  
25 the right to supplement this response.

26 ...

27 ...

28 ...



LAW OFFICES  
**THORNDAL ARMSTRONG  
DELK BALKENBUSH & EISINGER**  
A PROFESSIONAL CORPORATION  
[www.thorndal.com](http://www.thorndal.com)

# EXHIBIT E

DISTRICT COURT  
CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN  
GARDNER, on behalf of minor  
child, LELAND GARDNER,

Plaintiffs,

vs.

CASE NO.  
A-15-722259-C

HENDERSON WATER PARK, LLC dba  
COWABUNGA BAY WATER PARK, a  
Nevada limited liability company;  
WEST COAST WATER PARKS, LLC, a  
Nevada limited liability company;  
DOUBLE OTT WATER HOLDINGS, LLC,  
a Utah limited liability company;  
DOES I through X, inclusive; ROE  
Corporations I through X, inclusive;  
and ROE Limited Liability Company  
I through X, inclusive,

Defendants.

VIDEOTAPED DEPOSITION OF SHANE HUISE  
Taken at the offices of Campbell & Williams  
on Tuesday, March 22, 2016  
at 9:33 a.m.  
at 700 South Seventh Street  
Las Vegas, Nevada

Reported by: Denise R. Kelly, CCR #252, RPR

CSR ASSOCIATES OF NEVADA  
LAS VEGAS, NEVADA (702) 382-5015



02:10:16 1 Q. Okay. And under WP1 through WP8, that  
2 means the number of lifeguards that would be assigned  
3 to the wave pool, correct?

02:10:25 4 A. Correct.

02:10:26 5 Q. All right. Again, so the absolute maximum  
6 under your plan, unilaterally adopted by you and put  
7 into effect, was that there would never be more than  
8 17, correct -- never more than 8; is that correct?

02:10:41 9 MR. EISINGER: Object to the form.

02:10:42 10 You can answer.

02:10:43 11 THE WITNESS: I believe that there would  
12 never be more than 7. On busy days, the 8th guard was  
13 at the life jackets, assisting passing out the life  
14 jackets.

02:10:51 15 BY MR. CAMPBELL:

02:10:52 16 Q. So the most that you would have there on  
17 any given day, irrespective of the amount of people,  
18 would be seven persons would be designated --

02:11:01 19 A. Correct.

02:11:02 20 Q. -- as lifeguards? Okay.

02:11:11 21 And once again, that was your unilateral  
22 decision, correct?

02:11:16 23 A. Yes.

02:11:16 24 Q. And you accept responsibility for that?

02:11:18 25 MR. EISINGER: Object to the form.

02:11:19 1                   You can answer.

02:11:20 2 BY MR. CAMPBELL:

02:11:21 3           Q.     Is that "yes"?

02:11:21 4           A.     Yes.

02:11:25 5           Q.     Okay. And what was the management

6 committee's position on that? Did they agree with you

7 in that regard?

02:11:33 8           A.     They weren't aware of it.

02:11:34 9           Q.     They weren't aware of it?

02:11:35 10          A.     No.

02:11:36 11          Q.     Okay. Why weren't they aware of it?

02:11:39 12          A.     Because they are not involved in that sort

13 of thing, the day-to-day stuff like that.

02:11:44 14          Q.     Why aren't they? Isn't that their job?

02:11:47 15          A.     Which management are you talking about?

02:11:50 16          Q.     The management committee, the owners that

17 sit on the management committee that you answer to and

18 you are responsible to.

02:11:56 19               MR. EISINGER: Object to the form.

02:11:57 20               Go ahead.

02:11:57 21               THE WITNESS: No, they are not involved in

22 the day-to-day operation. They don't know how many

23 people are doing cashiers or guarding or -- that's my

24 job.

02:12:04 25 ///

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02:12:04 1 BY MR. CAMPBELL:

02:12:04 2 Q. Well, why aren't they involved in that?  
3 In, for example, not necessarily cashiers, but life and  
4 death matters such as lifeguards, why have they  
5 exhibited no interest in being involved in that  
6 process?

02:12:17 7 A. Well --

02:12:17 8 MR. EISINGER: Object to the form.

02:12:19 9 THE WITNESS: They are just investors.  
10 They are not involved in doing those sort of things.

02:12:24 11 BY MR. CAMPBELL:

02:12:24 12 Q. You understand that they are members of the  
13 management committee, right?

02:12:28 14 A. Well, I think it's a management of the  
15 partnerships, not of the park.

02:12:32 16 Q. So they have nothing to do with the  
17 management of the park at all?

02:12:35 18 A. No.

02:12:35 19 Q. But that's not what your documents say, is  
20 it?

02:12:38 21 A. I'm, I'm not sure about that. But, no,  
22 they are not involved in the day-to-day operation. The  
23 management committee votes on things if we are going to  
24 sell the park or if we're going to divide the  
25 partnerships or...

A-15-722259-C • 09/13/2016

1 TRAN

2 DISTRICT COURT

3 CLARK COUNTY, NEVADA

4 PETER GARDNER and CHRISTIAN )  
 5 GARDNER, on behalf of minor )  
 6 child, LELAND GARDNER, )

7 Plaintiffs, )

8 vs. )

Case No.: A-15-722259-C

Dept. No.: XXX

9 HENDERSON WATER PARK, LLC dba )  
 10 COWABUNGA BAY WATER PARK, a )  
 11 Nevada limited liability )  
 12 company; WEST COAST WATER )  
 13 PARKS, LLC, a Nevada limited )  
 14 liability company; DOUBLE OTT )  
 15 WATER HOLDINGS, LLC, a Utah )  
 16 limited liability company; )  
 17 DOES I through X, inclusive; )  
 18 ROE Corporations I through X, )  
 19 inclusive; and ROE Limited )  
 20 Liability Company I through X, )  
 21 inclusive, )

22 Defendants. )

23 *REPORTER'S TRANSCRIPT OF MOTION FOR SUMMARY JUDGMENT AS*  
 24 *TO CLAIMS AGAINST WEST COAST AND DOUBLE OTT*  
 25 *BEFORE THE HONORABLE JUDGE JERRY WIESE*

DEPARTMENT XXX

TUESDAY, SEPTEMBER 13, 2016

9:15 A.M.

Reported by: Amber M. Riggio, NV CCR No. 914

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1 APPEARANCES

2 For the Plaintiffs:

3 BY: COLBY J. WILLIAMS, ESQ.

4 BY: SAMUEL R. MIRKOVICH, ESQ.

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7 Las Vegas, Nevada 89101

8 (702) 382-5222

9 jcw@campbellandwilliams.com

10 srm@campbellandwilliams.com

11  
12 For the Defendants:

13 BY: PAUL F. EISINGER, ESQ.

14 BY: ALEXANDRA B. MCLEOD, ESQ.

15 THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER

16 1100 East Bridger Avenue

17 Las Vegas, Nevada 89101

18 (702) 366-0622

19 peisinger@thorndal.com

20 amcleod@thorndal.com

21 \* \* \* \* \*

22  
23  
24  
25  
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GARD286

A-15-722259-C • 09/13/2016

1 LAS VEGAS, NEVADA; TUESDAY, SEPTEMBER 13, 2016

2 9:15 A.M.

3 \* \* \* \* \*

4 P R O C E E D I N G S

5 \* \* \* \* \*

6 THE COURT: Gardner versus Henderson Water  
7 Park.

8 We've been arguing this case a lot lately.

9 MR. WILLIAMS: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. WILLIAMS: Colby Williams, Bar No. 5549,  
12 on behalf of the plaintiffs.

13 MR. MIRKOVICH: Good morning, Your Honor.  
14 Samuel Mirkovich, Campbell & Williams, on behalf of the  
15 plaintiffs.

16 THE COURT: Good morning.

17 MS. MCLEOD: Good morning, Your Honor.  
18 Alexandra McLeod from Thorndal Armstrong on behalf of  
19 defendants, Bar No. 8185.

20 MR. EISINGER: Paul Eisinger on behalf of the  
21 defendants as well, Bar No. 1617.

22 THE COURT: Good morning.

23 So it's on for motion for summary judgment as  
24 to the claims against defendants West Coast and Double  
25 Ott. Right? The argument is that their -- I guess  
their owners are members of the LLC but -- I understand  
the arguments. I think I've already ruled on this once

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1 but. . .

2 **MS. McLEOD:** We agree, Your Honor, but --

3 **THE COURT:** I'm happy to hear whatever you  
4 want to tell me.

5 **MS. McLEOD:** The only difference between this  
6 and what we've previously discussed is we're talking  
7 about member LLCs instead of individual managing  
8 members, but we believe that, particularly since the  
9 Court took it under advisement the first time the issue  
10 was considered, that it's been decided and it's  
11 consistent with the prior ruling. We believe summary  
12 judgment is appropriate here.

13 **THE COURT:** Convince me otherwise.

14 **MR. WILLIAMS:** I'm going to do my best, Your  
15 Honor.

16 **THE COURT:** And just so we're all clear, I'm  
17 not saying that there can't be an alter ego claim at  
18 some point in time. I'm just saying at this point I  
19 haven't been shown that there's evidence of that, and I  
20 don't think that's what you're bringing is an alter ego  
21 claim.

22 **MR. WILLIAMS:** Right.

23 **THE COURT:** You're bringing it as a direct  
24 negligence claim against the members.

25 **MR. WILLIAMS:** That's exactly right, Your

1 Honor. They're distinct theories of liability. That's  
2 what we've presented to you with respect to the  
3 individual defendants. The only claim that we're  
4 asserting here against the member LLCs is the direct  
5 theory of liability, and that's premised on a body of  
6 case law that emanates from the corporate field. And  
7 if Your Honor -- I know you're familiar with it. We've  
8 been here before. But in light of the fact that I've  
9 got to convince you, Your Honor, I'd like to go through  
10 and sort of make my points for the record because it's  
11 an important issue to us.

12 So with that, the Court's familiar -- the  
13 basis of their argument is that two statutes, NRS  
14 86.371 which states that no members or managers of an  
15 LLC can be responsible for the debts or liabilities of  
16 an LLC, and then 86.381 which says that members can't  
17 be named in a proceeding against the LLC. And that's  
18 the basis for their argument, and they state in their  
19 motion it's purely a legal issue. We agree with that.  
20 And that's an important thing to raise because I think  
21 they changed course in the reply brief, and I'll get to  
22 that in a minute.

23 Your Honor's familiar with us having raised  
24 this issue before in the context of the seven  
25 individual defendants who are members of the management



A-15-722259-C • 09/13/2016

1 committee. We sought to add them as individual  
2 defendants. Your Honor declined motion for leave to  
3 amend. Respectfully, we think that decision was  
4 incorrect, and we have filed a writ on that. That is  
5 pending before the Nevada Supreme Court. We've yet to  
6 hear, but that's out there.

7 **THE COURT:** That actually doesn't hurt my  
8 feelings.

9 **MR. WILLIAMS:** Oh.

10 **THE COURT:** So, I mean, I'm fine --

11 **MR. WILLIAMS:** Sure.

12 **THE COURT:** -- with that. If they tell me --

13 **MR. WILLIAMS:** Yeah.

14 **THE COURT:** -- I need to include them, I'll  
15 include them.

16 **MR. WILLIAMS:** No, Your Honor, I don't think  
17 that it does. Because having been familiar with Your  
18 Honor in the past, I know your main concern is getting  
19 the issue right based on the facts and the law that are  
20 presented to you and that's --

21 **THE COURT:** I try.

22 **MR. WILLIAMS:** Respectfully, I'm trying to  
23 tell you why I think that denying their summary  
24 judgment motion now is the right decision.

25 And why do I say that? Because, Your Honor,

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1 I'll be the first tell you that the Nevada Supreme  
2 Court hasn't addressed this issue in the context of LLC  
3 members but it has addressed it in the context of  
4 corporate officers. And recall, Chapter 78, which  
5 governs corporations, has a very similar statute to the  
6 one they're invoking here in the context of LLCs.  
7 That's 78.747 and that says no stockholder, director,  
8 or officer of a corporation is individually liable for  
9 a debt or liability of the corporation; very similar to  
10 86.371. But in the *Semenza* case that we've given you,  
11 the Nevada Supreme Court stated that corporate officers  
12 can be individually liable for tortious conduct that  
13 they engage in personally regardless of that statute,  
14 and we're saying that principle applies equally in the  
15 context of LLCs.

16 And, Your Honor, the point is, is that when a  
17 corporate officer either directs, participates in,  
18 authorizes, or ratifies negligent or otherwise wrongful  
19 conduct, that officer can be sued individually  
20 regardless of the fact that they may be operating  
21 through the corporate forum. That's what the *Semenza*  
22 case says. Judge Dawson, United States District Court  
23 for the District of Nevada, has recognized that  
24 principle in applying Nevada law. And so have many  
25 other authorities. We've given those to you, and I

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1 know you've read them. They're in the cases that we've  
2 cited. So have a number of legal authorities,  
3 "Fletcher Cyclopedia Corporations." This -- we're not  
4 asking you to adopt something novel. This is something  
5 that's been established. One of the cases, the *Morgan*  
6 case we cite from New Hampshire, actually characterizes  
7 it as hornbook law.

8           So, Your Honor, when they cite in their reply  
9 brief -- I think it's on Page 4 -- they twice say LLCs  
10 are designed to provide a corporate style -- the actual  
11 quote is, "Limited liabilities are business entities  
12 created to provide a corporate-style liability shield."  
13 Totally agree. I totally agree with that. But, Your  
14 Honor, the point is, is that it's not absolute immunity  
15 for corporate officers, and that's what they're asking  
16 you to do in the context of LLC members.

17           The Nevada Supreme Court has said that's not  
18 the case when it comes to corporations. We're saying,  
19 Your Honor, apply that principle in the context of LLCs  
20 as many other courts have, and we've given you a number  
21 of cases on that. I mentioned a couple here just for  
22 the record. Judge Jones sitting in federal court  
23 applying Nevada law in the *USA Commercial Mortgage*  
24 case; said that two managing members of LLCs -- exactly  
25 what we're dealing with here -- were liable, personally

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1 liable, for the tort of conversion that was found to  
2 have been committed by their LLC.

3 So it's been recognized in Nevada. It's been  
4 recognized in a number of other states. I'll just  
5 mention, for the record, the Utah Court of Appeals in  
6 the *D'Elia* case that we gave you sort of succinctly  
7 summarizes it, and I'll just quote because I think this  
8 encapsulates what our position is.

9 "We are persuaded by those authorities that  
10 hold that both limited liability members and  
11 corporate officers should be treated in a  
12 similar manner when they engage in tortious  
13 conduct. We therefore conclude that  
14 *Harrison's* imposition of personal liability  
15 on corporate officers who participate in a  
16 corporation's tortious acts also applies to  
17 limited liability members or managers."

18 Your Honor, that's what we're asking you to  
19 adopt here. That case was decided in 2006. Double  
20 Ott, one of the LLCs we're talking about here, is a  
21 Utah LLC that was formed after that decision. So it's  
22 not a question of it being unfair notice or this is  
23 something new that we're asking the court to do.

24 So that's our argument. In reply, there's a  
25 couple of points that are made that I think are worth

1 addressing, and this is what I had talked about when I  
2 said they sort of shifted gears. They characterize it  
3 as a purely legal issue. We agreed with that. Does  
4 Chapter NRS 86 prevent us from naming these LLC members  
5 as individual defendants? In the reply, what you see  
6 them do is they start arguing the evidence; deposition  
7 testimony, there's no evidence to support that they're  
8 liable. Your Honor, that was never raised. If you  
9 want to get into a debate on the factual issues on  
10 whether there's a basis to name them, we can have that  
11 discussion later. But most respectfully, I think that  
12 was a new matter raised in reply, and if the Court's at  
13 all inclined to rely on that -- and I don't know that  
14 it is -- but if it was, we'd request the opportunity to  
15 brief it because discovery's still going on and I just  
16 don't think it's proper.

17 **THE COURT:** I think I looked at it as a legal  
18 issue, and I think that --

19 **MR. WILLIAMS:** Right.

20 **THE COURT:** -- my prior decision was based on  
21 the statutes.

22 **MR. WILLIAMS:** Right.

23 And so let's talk about that because that's  
24 the segue I wanted to move to next, law of the case.

25 You see in the brief they're talking about

A-15-722259-C • 09/13/2016

1 this is the law of the case; you've decided it. Your  
2 Honor has just told me to convince you. Your Honor,  
3 law of the case doesn't apply with respect to your  
4 decision on the denial of our leave to amend, most  
5 respectfully. Law of the case is a principle that is  
6 invoked when an appellate court makes a decision that  
7 then becomes binding on the lower court when it goes  
8 back for further proceedings or on a subsequent appeal.  
9 Trial courts don't create law of the case, and it's not  
10 just me telling you that. There's a case *Byford versus*  
11 *State of Nevada*, 116 Nev. 215, trial court decisions  
12 can be revisited at any time up until the entry of  
13 final judgment. That's also found in NRCP 54(b).

14 So with respect to your prior decision, I  
15 respect it, we followed it, we're challenging it to the  
16 extent that we can, but most respectfully that does not  
17 bind you here. It doesn't.

18 So, Your Honor, you also see in the reply  
19 brief that we're rewriting the statute or that we're  
20 rendering it meaningless. Most respectfully, we are  
21 not. We are not. This is a very well settled  
22 principle we're asking you to adopt. It doesn't need  
23 to be spelled out in the statutes. Again, if you want  
24 to look at the *D'Elia* case, the Utah case I've talked  
25 to you about, it says this because other defendants

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1 have raised it. "Wait a minute. The statute doesn't  
2 say that you can sue us, so that means you can't." No.

3 Again quoting, Your Honor, "Nonetheless,  
4 other states have determined that even absent an  
5 express statutory exception, a member or manager of a  
6 limited liability company can be held liable for  
7 tortious acts." We're asking you to simply apply that.

8 Now, does it render the statute meaningless?  
9 No. If an LLC enters into a contract, the individual  
10 member manager isn't liable for performing that  
11 contract. If the LLC breaches that contract, the LLC  
12 member manager isn't responsible for whatever damages  
13 are found to have occurred. If, for example, there's  
14 something in the everyday conducting of business,  
15 payroll taxes aren't paid or something like that, the  
16 individual member manager isn't liable. That's what  
17 the statute is geared toward. We aren't talking about  
18 doing away with that. We're talking about the  
19 individual actor engaging in tortious acts. They can  
20 be sued, Your Honor.

21 And, again, I'll just close with the public  
22 policy of it. Your Honor, if it is correct that their  
23 position prevails and that the member or manager of an  
24 LLC is absolutely immune from liability, absolutely  
25 immune, you're creating a license to engage in all

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1 sorts of wrongful conduct knowing you can't be held  
2 liable for it. That doesn't exist in corporate law, it  
3 doesn't exist in partnership law, and I'm confident,  
4 Your Honor, the legislature did not intend for that to  
5 apply in the context of limited liability companies.

6 I'm happy to answer any other questions that  
7 you may have.

8 **THE COURT:** It sounds like the argument is  
9 based on the case law and the interpretation of  
10 different judges as it relates to corporate immunity.  
11 You want me to find that the statute that says that a  
12 party -- or a member of an LLC can't be a party, you  
13 say that you don't want to rewrite the statute. But  
14 what you're really telling me is that I can't apply the  
15 statute strictly as it says because there are cases  
16 that say something different in the corporate realm.

17 Am I understanding that right?

18 **MR. WILLIAMS:** I think so, Your Honor. Let  
19 me see if I can clarify it. But, again, one of the  
20 things you say, Well, there's no Nevada case on this.  
21 I agree.

22 **THE COURT:** Right.

23 **MR. WILLIAMS:** I agree. But Your Honor is a  
24 long-time practitioner. How much time did you spend in  
25 federal court? A lot, I know, as we all have. And



A-15-722259-C • 09/13/2016

1 oftentimes -- we're in Nevada. Admittedly there's some  
2 gaps where the court is a busy court -- the Supreme  
3 Court I'm talking about -- and hasn't addressed  
4 everything. And so what does the federal court do?  
5 When there's a point of state law raised in federal  
6 court that hasn't been decided by the State's highest  
7 court, they have to predict. Okay? And they make that  
8 prediction based on the other authorities that are out  
9 there. So what I'm telling you is, Your Honor, it's  
10 sort of a building block. The building block that does  
11 exist in Nevada that is binding case law is that the  
12 Nevada Supreme Court has said despite the statute that  
13 gives corporate officers certain types of protection  
14 from liability, regardless of that statute, we are  
15 still articulating the principle that when an officer  
16 engages in -- you know, personally engages in tortious  
17 conduct, they can be sued. That's building block one.

18 Now, in Nevada we haven't gotten to the  
19 second part where they take that principle and apply it  
20 in the context of LLCs, but many other courts,  
21 including the U.S. District Court for the District of  
22 Nevada interpreting Nevada law has said that principle  
23 in corporate law is so well settled it makes perfect  
24 sense to apply it in the context of limit liability  
25 companies and their members. That's what I'm asking

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A-15-722259-C • 09/13/2016

1 you to do. And I understand the Nevada Supreme Court  
2 hasn't done it yet, but as a trial court you're faced  
3 all the time with having to make decisions where there  
4 may not be law from Nevada yet. You have to make a  
5 call on it and we'll see, you know, obviously whether  
6 it's my writ or if they have to -- if you rule in my  
7 favor and they have to take an appeal, we'll see who's  
8 right. But, Your Honor, that's what I'm asking you to  
9 do.

10 **THE COURT:** I understand. The problem is  
11 this. The Supreme Court has told myself and other  
12 judges in the past that when there's a statute that is  
13 clear and unambiguous -- and I think this is -- you  
14 have to enforce the statute, and it's not up to the  
15 courts to rewrite the law, it's up to the legislature.  
16 So we're -- I think in the past I have tried to fix  
17 things that I thought were screwed up in the laws, and  
18 the Supreme Court has said not to do that.

19 So I don't feel comfortable doing it in this  
20 case based on what some federal judges have done. So I  
21 think I'm going to grant their motion for today. Just  
22 add this to the writ if you want.

23 **MR. WILLIAMS:** Right. We will.

24 **THE COURT:** And, unfortunately, I think what  
25 the Supreme Court's going to tell you is that it's

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1 going to be up to the legislature if they need to  
2 change the law.

3 **MR. WILLIAMS:** Well, most respectfully, Your  
4 Honor, with -- just to finish the record, in the  
5 *Semenza* case they didn't do that. I mean, they just --  
6 it's -- that statute existed. They made the finding  
7 that they did. So most respectfully I would disagree  
8 with that.

9 **THE COURT:** I think the statute in the  
10 corporate realm is a little bit different than the LLC  
11 statute.

12 **MR. WILLIAMS:** Your Honor --

13 **MS. McLEOD:** Yes, Your Honor.

14 **MR. EISINGER:** Yes, Your Honor.

15 **MR. WILLIAMS:** -- we respectfully disagree  
16 with that, but I understand the Court's ruling and  
17 we'll take it up.

18 **THE COURT:** All right.

19 **MR. EISINGER:** We'll prepare the order and  
20 run it by counsel.

21 **THE COURT:** Okay. Thanks, guys. Have a good  
22 day.

23 **MS. McLEOD:** Thank you, Your Honor.

24 *(Whereupon, the proceedings concluded at 9:30*  
25 *a.m.)*

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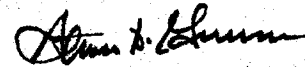
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ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT OF  
PROCEEDINGS.

*Amber Riggio*  
/S/ Amber Riggio, NV CCR No. 914

Amber M. Riggio, CCR No. 914  
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Pursuant to NRS 239.053, illegal to copy without payment.



CLERK OF THE COURT

1 **ORDR**  
THORNDAL ARMSTRONG DELK  
2 BALKENBUSH & EISINGER  
PAUL F. EISINGER, ESQ.  
3 Nevada Bar No. 1617  
ALEXANDRA B. McLEOD, ESQ.  
4 Nevada Bar No. 8185  
1100 East Bridger Avenue  
5 Las Vegas, NV 89101-5315  
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6 P.O. Box 2070  
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7 Tel: (702) 366-0622  
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8 E-Mail: peisinger@thorndal.com  
E-Mail: amcleod@thorndal.com  
9 Attorneys for Defendants,  
HENDERSON WATER PARK, LLC dba  
10 COWABUNGA BAY WATER PARK,  
WEST COAST WATER PARKS, LLC,  
11 DOUBLE OTT WATER HOLDINGS, LLC

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 PETER GARDNER and CHRISTIAN GARDNER,  
on behalf of minor child, LELAND GARDNER,

15 Plaintiffs,

16 vs.

17 HENDERSON WATER PARK, LLC dba  
COWABUNGA BAY WATER PARK, a Nevada  
18 limited liability company; WEST COAST WATER  
PARKS, LLC, a Nevada limited liability company;  
19 DOUBLE OTT WATER HOLDINGS, LLC, a Utah  
limited liability company; DOES I through X,  
20 inclusive; ROE CORPORATIONS I through X, and  
ROE Limited Liability Company I through X,  
21 inclusive,

22 Defendants.

CASE NO. A-15-722259-C  
DEPT. NO. XXX

**ORDER GRANTING MOTION  
FOR SUMMARY JUDGMENT AS  
TO DEFENDANTS WEST COAST  
AND DOUBLE OTT ONLY**

1 Date of Hearing: Sept. 13, 2016 at 9:00 a.m.

2 For Plaintiffs: J. Colby Williams, Esq. and  
3 Samuel R. Mirkovich, Esq. of  
CAMPBELL & WILLIAMS

4 For Defendants: Paul F. Eisinger, Esq. and  
5 Alexandra B. McLeod, Esq. of  
6 THORNDAL ARMSTRONG DELK  
BALKENBUSH & EISINGER

7 Defendants' Motion for Summary Judgment as to Claims Against West Coast and Double  
8 OTT, having come on for hearing before the above-entitled Court on the 13<sup>th</sup> day of September,  
9 2016, at the hour of 9:00 a.m.; and this Honorable Court having considered all of the papers and  
10 pleadings on file herein, as well as the argument of counsel for the parties hereto; and good cause  
11 appearing therefor;

12 THE COURT HEREBY FINDS as follows:

13 **I. FINDINGS OF FACT**

14 1. Defendant, Henderson Water Park, LLC does business as Cowabunga Bay Water  
15 Park, and oversees the water park's operations.

16 2. Defendants (Movants), West Coast Water Parks, LLC and Double OTT Water  
17 Holdings, LLC are each members of Henderson Water Park, LLC.

18 3. Plaintiffs and Defendants each concur there are no facts about the company  
19 structure in dispute and therefore, this legal issue is ripe for determination.

20 4. This Court finds that the Nevada Revised Statutes protect members of an LLC, not  
21 only from debts incurred by an LLC, but also from liabilities incurred by the LLC. NRS 86.371  
22 indicates that "...no member or manager of any limited-liability company formed under the laws  
23 of this State is *individually liable* for the debts or liabilities of the company." (emphasis added).

24 ...

5. Nevada Revised Statute 86.381 states "*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.*" (emphasis added)

Therefore, THE COURT HEREBY CONCLUDES as follows:

## II. CONCLUSIONS OF LAW

1. NRS 86.381 is clear on its face and unambiguously sets forth that "A member of a limited-liability company is not a proper party to proceedings ... against the company..."

2. Defendants, West Coast and Double OTT, as members of a limited-liability company, specifically Henderson Water Park, LLC, fall within the scope of NRS Chapter 86 and the absolute statutory protection of NRS 86.381, and are not proper parties to the proceedings against Henderson Water Park, LLC dba Cowabunga Bay Water Park.

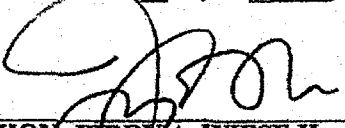
3. This Court has previously ruled in this case in favor of upholding the protections to members of LLCs. See this Court's July 5, 2016 Order Denying Plaintiffs' Motion for Leave to Amend Complaint, on file herein.

4. It is for the Nevada Legislature, if it so chooses, not the courts, to rewrite a clear and unambiguous statute dealing with limited-liability companies.

5. For these reasons, Summary Judgment is GRANTED in favor of Defendants, West Coast Water Parks, LLC and Double OTT Water Holdings, LLC.

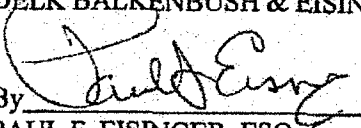
6. The caption will be amended to reflect the dismissal of Defendants, West Coast Water Parks, LLC and Double OTT Water Holdings, LLC from this action.

DATED this \_\_\_\_ day of \_\_\_\_, 2016.

  
HON. JERRY A. WIESE II  
DISTRICT COURT JUDGE, DEPARTMENT 30  
EB

Respectfully submitted by:

THORNDAL ARMSTRONG  
DELK BALKENBUSH & EISINGER

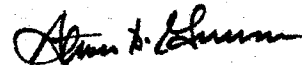
By   
PAUL F. EISINGER, ESQ.  
ALEXANDRA B. MCLEOD, ESQ.  
1100 E. Bridger Avenue, P.O. Box 2070  
Las Vegas, Nevada 89125  
*Attorneys for Defendants*

Approved as to form and content by:

CAMPBELL & WILLIAMS

By REFUSED TO SIGN  
J. COLBY WILLIAMS, ESQ.  
SAMUEL R. MIRKOVICH, ESQ.  
700 South Seventh Street  
Las Vegas, Nevada 89101  
*Attorneys for Plaintiffs*





CLERK OF THE COURT

1 **NEOJ**  
2 **THORNDAL ARMSTRONG DELK**  
3 **BALKENBUSH & EISINGER**  
4 **PAUL F. EISINGER, ESQ.**  
5 Nevada Bar No. 1617  
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16 E-Mail: amcleod@thorndal.com  
17 Attorneys for Defendants,  
18 **HENDERSON WATER PARK, LLC dba**  
19 **COWABUNGA BAY WATER PARK,**  
20 **WEST COAST WATER PARKS, LLC and**  
21 **DOUBLE OTT WATER HOLDINGS, LLC**

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 **PETER GARDNER and CHRISTIAN GARDNER,**  
15 **on behalf of minor child, LELAND GARDNER,**

16 **Plaintiffs,**

17 **vs.**

18 **HENDERSON WATER PARK, LLC dba**  
19 **COWABUNGA BAY WATER PARK, a Nevada**  
20 **limited liability company; DOES I through X,**  
21 **inclusive; ROE CORPORATIONS I through X, and**  
22 **ROE Limited Liability Company I through X,**  
23 **inclusive,**

24 **Defendants.**

CASE NO. A-15-722259-C  
DEPT. NO. XXX

**NOTICE OF ENTRY OF ORDER**  
**GRANTING MOTION FOR**  
**SUMMARY JUDGMENT AS TO**  
**DEFENDANTS WEST COAST AND**  
**DOUBLE OTT ONLY**

25 **PLEASE TAKE NOTICE** that on October 10, 2016, District Court Judge Jerry A. Wiese,  
26 **II, executed the Order Granting Motion for Summary Judgment as to Defendants West Coast**  
27 **and Double OTT Only. This Order was filed with the Clerk of the Court on October 10, 2016.**

28 ...

...

...

...

1 A true and correct copy of that filed Order is attached hereto as Exhibit "A".

2 DATED this 13th day of October, 2016.

3 THORNDAL, ARMSTRONG, DELK,  
4 BALKENBUSH & EISINGER

5 /s/ Paul F. Eisinger

6 

---

PAUL F. EISINGER, ESQ.

7 Nevada Bar No. 1617

8 ALEXANDRA B. M<sup>c</sup>LEOD, ESQ.

9 Nevada Bar No. 8185

10 1100 East Bridger Avenue, P.O. Box 2070

11 Las Vegas, NV 89125

12 Attorneys for Defendants,

13 HENDERSON WATER PARK, LLC

14 dba COWABUNGA BAY WATER PARK,

15 WEST COAST WATER PARKS, LLC and

16 DOUBLE OTT WATER HOLDINGS, LLC

- 1
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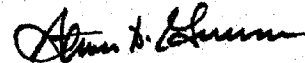
Donald J. Campbell, Esq.  
Samuel R. Mirkovich, Esq.  
**CAMPBELL & WILLIAMS**  
700 South Seventh Street  
Las Vegas, NV 89101  
Attorneys for Plaintiffs,  
**PETER and CHRISTIAN GARDNER**  
on behalf of minor child,  
**LELAND GARDNER**

An Employee of THORNDAL, ARMSTRONG, DELK,  
BALKENBUSH & EISINGER



LAW OFFICES  
**THORNDAL ARMSTRONG  
DELK BALKENBUSH & EISINGER**  
A PROFESSIONAL CORPORATION  
[www.thorndal.com](http://www.thorndal.com)

# EXHIBIT A



CLERK OF THE COURT

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BALKENBUSH & EISINGER

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Attorneys for Defendants,

HENDERSON WATER PARK, LLC dba

COWABUNGA BAY WATER PARK,

WEST COAST WATER PARKS, LLC,

DOUBLE OTT WATER HOLDINGS, LLC

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

PETER GARDNER and CHRISTIAN GARDNER,  
on behalf of minor child, LELAND GARDNER,

Plaintiffs,

vs.

HENDERSON WATER PARK, LLC dba  
COWABUNGA BAY WATER PARK, a Nevada  
limited liability company; WEST COAST WATER  
PARKS, LLC, a Nevada limited liability company;  
DOUBLE OTT WATER HOLDINGS, LLC, a Utah  
limited liability company; DOES I through X,  
inclusive; ROE CORPORATIONS I through X, and  
ROE Limited Liability Company I through X,  
inclusive,

Defendants.

CASE NO. A-15-72259-C  
DEPT. NO. XXX

**ORDER GRANTING MOTION  
FOR SUMMARY JUDGMENT AS  
TO DEFENDANTS WEST COAST  
AND DOUBLE OTT ONLY**

1 Date of Hearing:

Sept. 13, 2016 at 9:00 a.m.

2 For Plaintiffs:

J. Colby Williams, Esq. and  
Samuel R. Mirkovich, Esq. of  
3 CAMPBELL & WILLIAMS

4 For Defendants:

Paul F. Eisinger, Esq. and  
Alexandra B. McLeod, Esq. of  
5 THORNDAL ARMSTRONG DELK  
6 BALKENBUSH & EISINGER

7 Defendants' Motion for Summary Judgment as to Claims Against West Coast and Double  
8 OTT, having come on for hearing before the above-entitled Court on the 13<sup>th</sup> day of September,  
9 2016, at the hour of 9:00 a.m.; and this Honorable Court having considered all of the papers and  
10 pleadings on file herein, as well as the argument of counsel for the parties hereto; and good cause  
11 appearing therefor;

12 THE COURT HEREBY FINDS as follows:

13 I. FINDINGS OF FACT

14 1. Defendant, Henderson Water Park, LLC does business as Cowabunga Bay Water  
15 Park, and oversees the water park's operations.

16 2. Defendants (Movants), West Coast Water Parks, LLC and Double OTT Water  
17 Holdings, LLC are each members of Henderson Water Park, LLC.

18 3. Plaintiffs and Defendants each concur there are no facts about the company  
19 structure in dispute and therefore, this legal issue is ripe for determination.

20 4. This Court finds that the Nevada Revised Statutes protect members of an LLC, not  
21 only from debts incurred by an LLC, but also from liabilities incurred by the LLC. NRS 86.371  
22 indicates that "...no member or manager of any limited-liability company formed under the laws  
23 of this State is *individually liable* for the debts or liabilities of the company." (emphasis added).

24 ...

5. Nevada Revised Statute 86.381 states "*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.*" (emphasis added)

Therefore, THE COURT HEREBY CONCLUDES as follows:

## II. CONCLUSIONS OF LAW

1. NRS 86.381 is clear on its face and unambiguously sets forth that "A member of a limited-liability company is not a proper party to proceedings ... against the company..."

2. Defendants, West Coast and Double OTT, as members of a limited-liability company, specifically Henderson Water Park, LLC, fall within the scope of NRS Chapter 86 and the absolute statutory protection of NRS 86.381, and are not proper parties to the proceedings against Henderson Water Park, LLC dba Cowabunga Bay Water Park.

3. This Court has previously ruled in this case in favor of upholding the protections to members of LLCs. See this Court's July 5, 2016 Order Denying Plaintiffs' Motion for Leave to Amend Complaint, on file herein.

4. It is for the Nevada Legislature, if it so chooses, not the courts, to rewrite a clear and unambiguous statute dealing with limited-liability companies.

5. For these reasons, Summary Judgment is GRANTED in favor of Defendants, West Coast Water Parks, LLC and Double OTT Water Holdings, LLC.

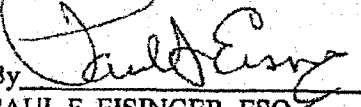
6. The caption will be amended to reflect the dismissal of Defendants, West Coast Water Parks, LLC and Double OTT Water Holdings, LLC from this action.

DATED this \_\_\_\_ day of \_\_\_\_, 2016.

  
HON. JERRY A. WIESE II  
DISTRICT COURT JUDGE, DEPARTMENT 30  
EB

Respectfully submitted by:

THORNDAL ARMSTRONG  
DELK BALKENBUSH & EISINGER

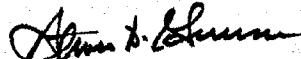
By   
PAUL F. EISINGER, ESQ.  
ALEXANDRA B. MCLEOD, ESQ.  
1100 E. Bridger Avenue, P.O. Box 2070  
Las Vegas, Nevada 89125  
*Attorneys for Defendants*

Approved as to form and content by:

CAMPBELL & WILLIAMS

By REFUSED TO SIGN  
J. COLBY WILLIAMS, ESQ.  
SAMUEL R. MIRKOVICH, ESQ.  
700 South Seventh Street  
Las Vegas, Nevada 89101  
*Attorneys for Plaintiffs*



  
CLERK OF THE COURT

1 **NEOJ**  
2 **CAMPBELL & WILLIAMS**  
3 **DONALD J. CAMPBELL, ESQ. (1216)**  
4 **E-mail: [djc@cwlawlv.com](mailto:djc@cwlawlv.com)**  
5 **SAMUEL R. MIRKOVICH, ESQ. (11662)**  
6 **E-mail: [srm@cwlawlv.com](mailto:srm@cwlawlv.com)**  
7 **700 South Seventh Street**  
8 **Las Vegas, NV 89101**  
9 **Tel: (702) 382-5222**  
10 **Fax: (702) 382-0540**

11 *Attorneys for Plaintiffs*

12 **DISTRICT COURT**  
13 **CLARK COUNTY, NEVADA**

14 **PETER GARDNER and CHRISTIAN GARDNER, )**  
15 **on behalf of minor child, LELAND GARDNER, )**  
16 **Plaintiffs, )**

17 **vs. )**

18 **HENDERSON WATER PARK, LLC dba )**  
19 **COWABUNGA BAY WATER PARK, a Nevada )**  
20 **limited liability company; WEST COAST WATER )**  
21 **PARKS, LLC, a Nevada limited liability company; )**  
22 **DOUBLE OTT WATER HOLDINGS, LLC, a Utah )**  
23 **limited liability company; DOES I through X, )**  
24 **inclusive; ROE Corporations I through X, inclusive; )**  
25 **and ROE Limited Liability Company I through X, )**  
26 **inclusive, )**

27 **Defendants. )**

28 **Case No.: A-15-722259-C**  
**Dept. No.: XXX**

**NOTICE OF ENTRY OF ORDER**

29 Please take notice that on the 1st day of November, 2016, an Order Granting Plaintiffs'  
30 Motion for NRCP 54(b) Certification of Order Granting Defendants' Motion for Summary  
31 Judgment as to Claims Against West Coast and Double Ott, was duly entered in the above entitled

32 ....

33 .....

34 .....

1 matter, a copy of which is attached as "Exhibit 1" and by this referenced made part hereof.

2 DATED this 2<sup>nd</sup> day of November, 2016.

3 CAMPBELL AND WILLIAMS

4  
5  
6 By: /s/ Sam Mirkovich  
7 Samuel R. Mirkovich, Esq. (11662)  
8 700 South 7th Street  
9 Las Vegas, NV 89101  
10 Telephone: (702) 382-5222  
11 Facsimile: 702-382-0540

12 *Attorney for Plaintiffs*

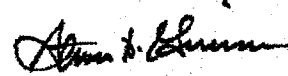
13 **CERTIFICATE OF SERVICE**

14 Pursuant to NRCP 5(b), I certify that I am an employee of Campbell & Williams, and that  
15 on this 2<sup>nd</sup> day of November, 2016, I caused the foregoing document entitled **NOTICE OF ENTRY**  
16 **ORDER** to be served upon those persons designated by the parties in the E-Service Master List for  
17 the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with  
18 the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada  
19 Electronic Filing and Conversion Rules.

20  
21 By: /s/ Lucinda Martinez  
22 An Employee of Campbell and Williams  
23  
24  
25  
26  
27  
28

**EXHIBIT 1**

**EXHIBIT 1**

  
CLERK OF THE COURT

ORDG  
CAMPBELL & WILLIAMS  
DONALD J. CAMPBELL, ESQ. (1216)  
[dj@cwlawlv.com](mailto:djc@cwlawlv.com)  
SAMUEL R. MIRKOVICH, ESQ. (11662)  
[sr@cwlawlv.com](mailto:sr@cwlawlv.com)  
700 South Seventh Street  
Las Vegas, NV 89101  
Tel: (702) 382-5222  
Fax: (702) 382-0540

*Attorneys for Plaintiffs*

DISTRICT COURT  
CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, )	Case No.: A-15-722259-C
on behalf of minor child, LELAND GARDNER, )	Dept. No.: XXX
Plaintiffs, )	
vs. )	<b>ORDER GRANTING PLAINTIFFS'</b>
	<b>MOTION FOR NRCP 54(b)</b>
	<b>CERTIFICATION OF ORDER</b>
HENDERSON WATER PARK, LLC dba )	<b>GRANTING DEFENDANTS'</b>
COWABUNGA BAY WATER PARK, a Nevada )	<b>MOTION FOR SUMMARY</b>
limited liability company; WEST COAST WATER )	<b>JUDGMENT AS TO CLAIMS</b>
PARKS, LLC, a Nevada limited liability company; )	<b>AGAINST WEST COAST AND</b>
DOUBLE OTT WATER HOLDINGS, LLC, a Utah )	<b>DOUBLE OTT</b>
limited liability company; DOES I through X, )	
inclusive; ROE Corporations I through X, inclusive; )	
and ROE Limited Liability Company I through X, )	
inclusive, )	
Defendants. )	

The matter before the Court is Plaintiffs' Motion for NRCP 54(b) Certification of Order Granting Motion for Summary Judgment as to Claims against Defendants West Coast and Double Ott and Order Shortening Time. The Court, having reviewed the papers and pleadings on file in this matter and having heard the oral argument of counsel on October 20, 2016, and good cause appearing and with no just reason for delay, hereby rules as follows:

I. FINDINGS

1. On October 10, 2016, the Court entered the Order Granting Defendants' Motion for Summary Judgment as to Claims against Defendants West Coast and Double Ott and Order Shortening Time.


2. Therein, the Court ruled that Defendants, West Coast and Double OTT, as members of a limited-liability company, specifically Henderson Water Park, LLC, fall within the scope of NRS Chapter 86 and the absolute statutory protection of NRS 86.381, and are not proper parties to the proceedings against Henderson Water Park, LLC dba Cowabunga Bay Water Park. As a result, the Court granted summary judgment in favor of Defendants, West Coast and Double OTT, and completely dismissed them from the case.

II. ORDER

IT IS HEREBY ORDERED AND ADJUDGED THAT:

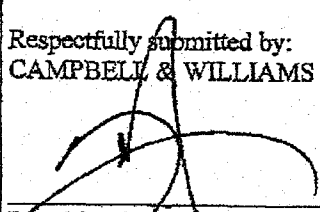
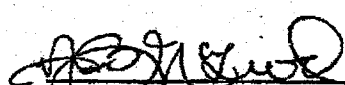
1. There being no just reason for delay, the Court hereby determines, directs and certifies that final judgment is entered in favor of Defendants Double Ott Water Holdings, LLC and West Coast Water Parks, LLC pursuant to NRCP 54(b).

DATED this 31 day of October, 2016.

  
HON. JUDGE JERRY A. WIESE II  
EB

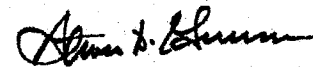
Respectfully submitted by:  
CAMPBELL & WILLIAMS

Approved as to form and content by:  
THORNDAL ARMSTRONG et al.

  
Donald J. Campbell, Esq. (1216)  
Samuel R. Mirkovich, Esq. (11662)  
700 South Seventh Street  
Las Vegas, Nevada 89101  
Paul P. Eisinger, Esq. (1617)  
Alexandra B. McLeod, Esq. (8185)  
1100 E. Bridger Ave.  
Las Vegas, Nevada 89101

Attorneys for Plaintiffs

Attorneys for Defendants



CLERK OF THE COURT

NOAS

CAMPBELL & WILLIAMS

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*Attorneys for Plaintiffs*

DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, )

on behalf of minor child, LELAND GARDNER, )

Plaintiffs, )

vs. )

HENDERSON WATER PARK, LLC dba )

COWABUNGA BAY WATER PARK, a Nevada )

limited liability company; DOES I through X, )

inclusive; ROE Corporations I through X, inclusive; )

and ROE Limited Liability Company I through X, )

inclusive, )

Defendants. )

Case No.: A-15-722259-C

Dept. No.: XXX

**NOTICE OF APPEAL**

CAMPBELL & WILLIAMS  
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Phone: 702.382.5222 • Fax: 702.382.0540  
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1 Please take notice that Plaintiffs Peter Gardner and Christian Gardner, on behalf of minor  
2 child, Leland Gardner hereby appeal to the Nevada Supreme Court from the "Order Granting  
3 Motion for Summary Judgment as to Defendants West Coast and Double Ott Only," notice of  
4 entry of which was filed and e-served on October 13, 2016 (attached hereto as Exhibit "1"). This  
5 appeal is procedurally proper pursuant to the Court's "Order Granting Plaintiffs' Motion for  
6 NRCP 54(b) Certification of Order Granting Defendants' Motion for Summary Judgment as to  
7 Claims Against West Coast and Double Ott," notice of entry of which was filed and e-served on  
8 November 2, 2016 (attached hereto as Exhibit "2").  
9

10 DATED this 2nd day of November, 2016.

CAMPBELL & WILLIAMS

By /s/ Donald J. Campbell

Donald J. Campbell, Esq. (1216)

Samuel R. Mirkovich, Esq. (11662)

700 South Seventh Street

Las Vegas, Nevada 89101

*Attorneys for Plaintiffs*

CERTIFICATE OF SERVICE

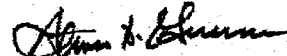
Pursuant to NRCP 5(b), I certify that I am an employee of Campbell & Williams, and that on this 2nd day of November, 2016 I caused the foregoing document entitled Notice of Appeal to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

/s/ Lucinda Martinez  
An Employee of Campbell & Williams



# **EXHIBIT 1**

# **EXHIBIT 1**

  
CLERK OF THE COURT

1 NEOJ  
2 THORNDAL ARMSTRONG DELK  
3 BALKENBUSH & EISINGER  
4 PAUL F. EISINGER, ESQ.  
5 Nevada Bar No. 1617  
6 ALEXANDRA B. MCLEOD, ESQ.  
7 Nevada Bar No. 8185  
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9 Las Vegas, NV 89101-5315  
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14 Fax: (702) 366-0327  
15 E-Mail: peisinger@thorndal.com  
16 E-Mail: amcleod@thorndal.com  
17 Attorneys for Defendants,  
18 HENDERSON WATER PARK, LLC dba  
19 COWABUNGA BAY WATER PARK,  
20 WEST COAST WATER PARKS, LLC and  
21 DOUBLE OTT WATER HOLDINGS, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

14 PETER GARDNER and CHRISTIAN GARDNER,  
15 on behalf of minor child, LELAND GARDNER,

CASE NO. A-15-722259-C  
DEPT. NO. XXX

16 Plaintiffs,

17 vs.

18 HENDERSON WATER PARK, LLC dba  
19 COWABUNGA BAY WATER PARK, a Nevada  
20 limited liability company; DOES I through X,  
21 inclusive; ROE CORPORATIONS I through X, and  
22 ROE Limited Liability Company I through X,  
23 inclusive,

24 Defendants.

**NOTICE OF ENTRY OF ORDER  
GRANTING MOTION FOR  
SUMMARY JUDGMENT AS TO  
DEFENDANTS WEST COAST AND  
DOUBLE OTT ONLY**

25 PLEASE TAKE NOTICE that on October 10, 2016, District Court Judge Jerry A. Wiese,  
26 II, executed the Order Granting Motion for Summary Judgment as to Defendants West Coast  
27 and Double OTT Only. This Order was filed with the Clerk of the Court on October 10, 2016.  
28

1 A true and correct copy of that filed Order is attached hereto as Exhibit "A".

2 DATED this 13th day of October, 2016.

3 THORNDAL, ARMSTRONG, DELK,  
4 BALKENBUSH & EISINGER

5 /s/ Paul F. Eisinger

6 

---

PAUL F. EISINGER, ESQ.

7 Nevada Bar No. 1617

8 ALEXANDRA B. McLEOD, ESQ.

9 Nevada Bar No. 8185

10 1100 East Bridger Avenue, P.O. Box 2070

11 Las Vegas, NV 89125

12 Attorneys for Defendants,

13 HENDERSON WATER PARK, LLC

14 dba COWABUNGA BAY WATER PARK,

15 WEST COAST WATER PARKS, LLC and

16 DOUBLE OTT WATER HOLDINGS, LLC  
17  
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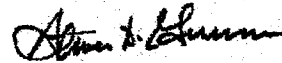
Donald J. Campbell, Esq.  
Samuel R. Mirkovich, Esq.  
**CAMPBELL & WILLIAMS**  
700 South Seventh Street  
Las Vegas, NV 89101  
Attorneys for Plaintiffs,  
**PETER and CHRISTIAN GARDNER**  
on behalf of minor child,  
**LELAND GARDNER**

An Employee of THORNDAL, ARMSTRONG, DELK,  
BALKENBUSH & EISINGER



LAW OFFICES  
**THORNDAL ARMSTRONG  
DELK BALKENBUSH & EISINGER**  
A PROFESSIONAL CORPORATION  
[www.thorndal.com](http://www.thorndal.com)

# EXHIBIT A



CLERK OF THE COURT

1 **ORDER**

2 **THORNDAL ARMSTRONG DELK**

3 **BALKENBUSH & EISINGER**

4 **PAUL F. EISINGER, ESQ.**

5 **Nevada Bar No. 1617**

6 **ALEXANDRA B. McLEOD, ESQ.**

7 **Nevada Bar No. 8185**

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11 **P.O. Box 2070**

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14 **Fax: (702) 366-0327**

15 **E-Mail: peisinger@thorndal.com**

16 **E-Mail: amcleod@thorndal.com**

17 **Attorneys for Defendants,**

18 **HENDERSON WATER PARK, LLC dba**

19 **COWABUNGA BAY WATER PARK,**

20 **WEST COAST WATER PARKS, LLC,**

21 **DOUBLE OTT WATER HOLDINGS, LLC**

22 **DISTRICT COURT**

23 **CLARK COUNTY, NEVADA**

24 **PETER GARDNER and CHRISTIAN GARDNER,**  
on behalf of minor child, LELAND GARDNER,

**Plaintiffs,**

**vs.**

**HENDERSON WATER PARK, LLC dba**  
**COWABUNGA BAY WATER PARK, a Nevada**  
**limited liability company; WEST COAST WATER**  
**PARKS, LLC, a Nevada limited liability company;**  
**DOUBLE OTT WATER HOLDINGS, LLC, a Utah**  
**limited liability company; DOES I through X,**  
**inclusive; ROE CORPORATIONS I through X, and**  
**ROE Limited Liability Company I through X,**  
**inclusive,**

**Defendants.**

**CASE NO. A-15-72259-C**  
**DEPT. NO. XXX**

**ORDER GRANTING MOTION**  
**FOR SUMMARY JUDGMENT AS**  
**TO DEFENDANTS WEST COAST**  
**AND DOUBLE OTT ONLY**

1 Date of Hearing:

Sept. 13, 2016 at 9:00 a.m.

2 For Plaintiffs:

I. Colby Williams, Esq. and  
Samuel R. Mirkovich, Esq. of  
3 CAMPBELL & WILLIAMS

4 For Defendants:

Paul F. Eisinger, Esq. and  
Alexandra B. McLeod, Esq. of  
5 THORNDAL ARMSTRONG DELK  
6 BALKENBUSH & EISINGER

7 Defendants' Motion for Summary Judgment as to Claims Against West Coast and Double  
8 OTT, having come on for hearing before the above-entitled Court on the 13<sup>th</sup> day of September,  
9 2016, at the hour of 9:00 a.m.; and this Honorable Court having considered all of the papers and  
10 pleadings on file herein, as well as the argument of counsel for the parties hereto; and good cause  
11 appearing therefor;

12 THE COURT HEREBY FINDS as follows:

13 I. FINDINGS OF FACT

14 1. Defendant, Henderson Water Park, LLC does business as Cowabunga Bay Water  
15 Park, and oversees the water park's operations.

16 2. Defendants (Movants), West Coast Water Parks, LLC and Double OTT Water  
17 Holdings, LLC are each members of Henderson Water Park, LLC.

18 3. Plaintiffs and Defendants each concur there are no facts about the company  
19 structure in dispute and therefore, this legal issue is ripe for determination.

20 4. This Court finds that the Nevada Revised Statutes protect members of an LLC, not  
21 only from debts incurred by an LLC, but also from liabilities incurred by the LLC. NRS 86.371  
22 indicates that "...no member or manager of any limited-liability company formed under the laws  
23 of this State is *individually liable* for the debts or liabilities of the company." (emphasis added).

24 ...

5. Nevada Revised Statute 86.381 states "*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.*" (emphasis added)

Therefore, THE COURT HEREBY CONCLUDES as follows:

## II. CONCLUSIONS OF LAW

1. NRS 86.381 is clear on its face and unambiguously sets forth that "A member of a limited-liability company is not a proper party to proceedings ... against the company..."

2. Defendants, West Coast and Double OTT, as members of a limited-liability company, specifically Henderson Water Park, LLC, fall within the scope of NRS Chapter 86 and the absolute statutory protection of NRS 86.381, and are not proper parties to the proceedings against Henderson Water Park, LLC dba Cowabunga Bay Water Park.

3. This Court has previously ruled in this case in favor of upholding the protections to members of LLCs. See this Court's July 5, 2016 Order Denying Plaintiffs' Motion for Leave to Amend Complaint, on file herein.

4. It is for the Nevada Legislature, if it so chooses, not the courts, to rewrite a clear and unambiguous statute dealing with limited-liability companies.

5. For these reasons, Summary Judgment is GRANTED in favor of Defendants, West Coast Water Parks, LLC and Double OTT Water Holdings, LLC.




6. The caption will be amended to reflect the dismissal of Defendants, West Coast Water Parks, LLC and Double OTT Water Holdings, LLC from this action.

DATED this \_\_\_\_ day of \_\_\_\_, 2016.

  
HON. JERRY A. WIESE II  
DISTRICT COURT JUDGE, DEPARTMENT 30  
EB

Respectfully submitted by:

THORNDAL ARMSTRONG  
DEK BALKENBUSH & EISINGER

By   
PAUL F. EISINGER, ESQ.  
ALEXANDRA B. MCLEOD, ESQ.  
1100 E. Bridger Avenue, P.O. Box 2070  
Las Vegas, Nevada 89125  
Attorneys for Defendants

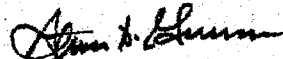
Approved as to form and content by:

CAMPBELL & WILLIAMS

By REFUSED TO SIGN  
J. COLBY WILLIAMS, ESQ.  
SAMUEL R. MIRKOVICH, ESQ.  
700 South Seventh Street  
Las Vegas, Nevada 89101  
Attorneys for Plaintiffs

# **EXHIBIT 2**

# **EXHIBIT 2**

  
CLERK OF THE COURT

CAMPBELL & WILLIAMS  
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700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101  
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www.campbellandwilliams.com

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3 DONALD J. CAMPBELL, ESQ. (1216)  
4 E-mail: [djc@cwlawlv.com](mailto:djc@cwlawlv.com)  
5 SAMUEL R. MIRKOVICH, ESQ. (11662)  
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8 Las Vegas, NV 89101  
9 Tel: (702) 382-5222  
10 Fax: (702) 382-0540

11 *Attorneys for Plaintiffs*

12 DISTRICT COURT  
13 CLARK COUNTY, NEVADA

14 PETER GARDNER and CHRISTIAN GARDNER, )  
15 on behalf of minor child, LELAND GARDNER, )

16 Plaintiffs,

17 vs.

18 HENDERSON WATER PARK, LLC dba )  
19 COWABUNGA BAY WATER PARK, a Nevada )  
20 limited liability company; WEST COAST WATER )  
21 PARKS, LLC, a Nevada limited liability company; )  
22 DOUBLE OTT WATER HOLDINGS, LLC, a Utah )  
23 limited liability company; DOES I through X, )  
24 inclusive; ROE Corporations I through X, inclusive; )  
25 and ROE Limited Liability Company I through X, )  
26 inclusive, )

27 Defendants.

Case No.: A-15-722259-C  
Dept. No.: XXX

NOTICE OF ENTRY OF ORDER

28 Please take notice that on the 1st day of November, 2016, an Order Granting Plaintiffs'  
29 Motion for NRCF 54(b) Certification of Order Granting Defendants' Motion for Summary  
30 Judgment as to Claims Against West Coast and Double Ott, was duly entered in the above entitled

1 matter, a copy of which is attached as "Exhibit 1" and by this referenced made part hereof.

2 DATED this 2<sup>nd</sup> day of November, 2016.

3 CAMPBELL AND WILLIAMS

4  
5  
6 By: /s/ Sam Mirkovich  
7 Samuel R. Mirkovich, Esq. (11662)  
8 700 South 7th Street  
9 Las Vegas, NV 89101  
10 Telephone: (702) 382-5222  
11 Facsimile: 702-382-0540

12 *Attorney for Plaintiffs*

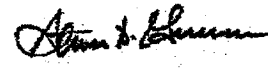
13 CERTIFICATE OF SERVICE

14 Pursuant to NRCP 5(b), I certify that I am an employee of Campbell & Williams, and that  
15 on this 2<sup>nd</sup> day of November, 2016, I caused the foregoing document entitled NOTICE OF ENTRY  
16 ORDER to be served upon those persons designated by the parties in the E-Service Master List for  
17 the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with  
18 the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada  
19 Electronic Filing and Conversion Rules.

20  
21 By: /s/ Lucinda Martinez  
22 An Employee of Campbell and Williams  
23  
24  
25  
26  
27  
28

**EXHIBIT 1**

**EXHIBIT 1**

  
CLERK OF THE COURT

ORDG  
1 CAMPBELL & WILLIAMS  
2 DONALD J. CAMPBELL, ESQ. (1216)  
3 [djc@cwlawlv.com](mailto:djc@cwlawlv.com)  
4 SAMUEL R. MIRKOVICH, ESQ. (11662)  
5 [srm@cwlawlv.com](mailto:srm@cwlawlv.com)  
6 700 South Seventh Street  
Las Vegas, NV 89101  
Tel: (702) 382-5222  
Fax: (702) 382-0540

Attorneys for Plaintiffs

DISTRICT COURT  
CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, )  
on behalf of minor child, LELAND GARDNER, )

Plaintiffs,

vs.

HENDERSON WATER PARK, LLC dba )  
COWABUNGA BAY WATER PARK, a Nevada )  
limited liability company; WEST COAST WATER )  
PARKS, LLC, a Nevada limited liability company; )  
DOUBLE OTT WATER HOLDINGS, LLC, a Utah )  
limited liability company; DOES I through X, )  
inclusive; ROE Corporations I through X, inclusive; )  
and ROE Limited Liability Company I through X, )  
inclusive,

Defendants.

Case No.: A-15-722259-C

Dept. No.: XXX

ORDER GRANTING PLAINTIFFS'

MOTION FOR NRCP 54(b)

CERTIFICATION OF ORDER

GRANTING DEFENDANTS'

MOTION FOR SUMMARY

JUDGMENT AS TO CLAIMS

AGAINST WEST COAST AND

DOUBLE OTT

The matter before the Court is Plaintiffs' Motion for NRCP 54(b) Certification of Order Granting Motion for Summary Judgment as to Claims against Defendants West Coast and Double Ott and Order Shortening Time. The Court, having reviewed the papers and pleadings on file in this matter and having heard the oral argument of counsel on October 20, 2016, and good cause appearing and with no just reason for delay, hereby rules as follows:

**I. FINDINGS**

1. On October 10, 2016, the Court entered the Order Granting Defendants' Motion for Summary Judgment as to Claims against Defendants West Coast and Double Ott and Order Shortening Time.

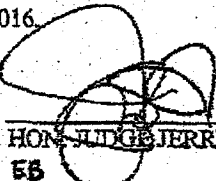
2. Therein, the Court ruled that Defendants, West Coast and Double OTT, as members of a limited-liability company, specifically Henderson Water Park, LLC, fall within the scope of NRS Chapter 86 and the absolute statutory protection of NRS 86.381, and are not proper parties to the proceedings against Henderson Water Park, LLC dba Cowabunga Bay Water Park. As a result, the Court granted summary judgment in favor of Defendants, West Coast and Double OTT, and completely dismissed them from the case.

**II. ORDER**

IT IS HEREBY ORDERED AND ADJUDGED THAT:

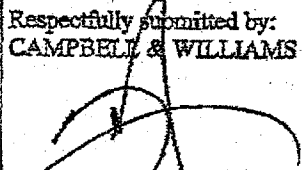
1. There being no just reason for delay, the Court hereby determines, directs and certifies that final judgment is entered in favor of Defendants Double Ott Water Holdings, LLC and West Coast Water Parks, LLC pursuant to NRCP 54(b).

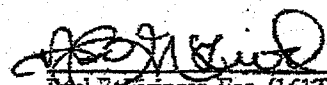
DATED this 31 day of October, 2016.

  
HON. JUDGE JERRY A. WIESE II  
55

Respectfully submitted by:  
CAMPBELL & WILLIAMS

Approved as to form and content by:  
THORNDAL ARMSTRONG et al.

  
Donald J. Campbell, Esq. (1216)  
Samuel R. Mirkovich, Esq. (11662)  
700 South Seventh Street  
Las Vegas, Nevada 89101

  
Paul P. Eisinger, Esq. (1617)  
Alexandra B. McLeod, Esq. (8185)  
1100 E. Bridger Ave.  
Las Vegas, Nevada 89101

Attorneys for Plaintiffs

Attorneys for Defendants

---

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

---

Electronically Filed  
Nov 07 2016 02:19 p.m.

Elizabeth A. Brown  
Clerk of Supreme Court

PETER and CHRISTIAN GARDNER, on behalf of minor child, LELAND  
GARDNER,  
Plaintiffs-Petitioners,

v.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN  
AND FOR THE COUNTY OF CLARK; and THE HONORABLE JERRY A.  
WIESE II, DISTRICT JUDGE

and

HENDERSON WATER PARK, LLC DBA COWABUNGA BAY WATER  
PARK, WEST COAST WATER PARKS, LLC, AND DOUBLE OTT WATER  
HOLDINGS, LLC  
Defendants-Real Parties in Interest,

---

Extraordinary Writ from the Eighth Judicial District Court of the State of Nevada,  
in and for County of Clark

---

**PETITIONERS' REPLY APPENDIX – VOLUME 1**

---

Donald J. Campbell, Esq.  
Philip R. Erwin, Esq.  
Samuel R. Mirkovich, Esq.  
CAMPBELL & WILLIAMS  
700 South Seventh Street  
Las Vegas, Nevada 89101  
Telephone: (702) 382-5222  
*Counsel for Plaintiffs-Petitioners*

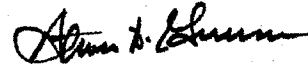


## INDEX

	Page
Motion for Summary Judgment as to Claims Against Defendants West Coast and Double Ott.....	GARD172
Nevada Legislative History, 2001 Leg., 71st Sess. ....	GARD337
Notice of Appeal.....	GARD319
Notice of Entry of Order Granting Motion for Summary Judgment as to Defendants West Coast and Double Ott Only .....	GARD306
Notice of Entry of Order Granting Plaintiffs' Motion for NRCP 54(b) Certification of Order Granting Motion for Summary Judgment as to Defendants West Coast and Double Ott .....	GARD314
Order Granting Motion for Summary Judgment as to Defendants West Coast and Double Ott Only .....	GARD302
Plaintiffs' Opposition to Motion for Summary Judgment as to Claims Against Defendants West Coast and Double Ott .....	GARD182
Reply in Support of Motion for Summary Judgment as to Claims Against Defendants West Coast and Double Ott.....	GARD244
Transcript of Hearing on Plaintiffs' Motion for Motion for Summary Judgment as to Claims Against Defendants West Coast and Double Ott dated September 13, 2016 .....	GARD285

1 MSJD  
2 THORNDAL ARMSTRONG DELK  
3 BALKENBUSH & EISINGER  
4 PAUL F. EISINGER, ESQ.  
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16 E-Mail: amcleod@thorndal.com  
17 Attorneys for Defendants,  
18 HENDERSON WATER PARK, LLC dba  
19 COWABUNGA BAY WATER PARK,  
20 WEST COAST WATER PARKS, LLC,  
21 DOUBLE OTT WATER HOLDINGS, LLC

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CLERK OF THE COURT

12 DISTRICT COURT  
13 CLARK COUNTY, NEVADA

14 PETER GARDNER and CHRISTIAN  
15 GARDNER, on behalf of minor child, LELAND  
16 GARDNER,

CASE NO. A-15-722259-C  
DEPT. NO. XXX

16 Plaintiffs,  
17 vs.

**MOTION FOR SUMMARY JUDGMENT**  
**AS TO CLAIMS AGAINST**  
**DEFENDANTS WEST COAST AND**  
**DOUBLE OTT**

18 HENDERSON WATER PARK, LLC dba  
19 COWABUNGA BAY WATER PARK, a  
20 Nevada limited liability company; WEST  
21 COAST WATER PARKS, LLC, a Nevada  
22 limited liability company; DOUBLE OTT  
23 WATER HOLDINGS, LLC, a Utah limited  
24 liability company; DOES I through X, inclusive;  
25 ROE CORPORATIONS I through X, and ROE  
26 Limited Liability Company I through X,  
27 inclusive,

Date of Hearing:

Time of Hearing:

23 Defendants.

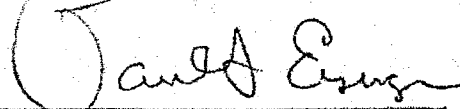
25 Defendants, HENDERSON WATER PARK, LLC dba COWABUNGA BAY WATER  
26 PARK, WEST COAST WATER PARKS, LLC (hereinafter "West Coast"), DOUBLE OTT  
27 WATER HOLDINGS, LLC (hereinafter "Double OTT"), (also collectively "Defendants" or the  
28 "Water Park Defendants"), by and through their counsel of record, THORNDAL,

1 ARMSTRONG, DELK, BALKENBUSH & EISINGER, do hercin submit their Motion for  
2 Summary Judgment as to Claims against Defendants West Coast and Double OTT in the above-  
3 entitled action pursuant to Nevada Rules of Civil Procedure 56, and Nevada Revised Statutes  
4 §§86.371 and 86.381.

5 This Motion is made and based upon all of the papers and pleadings on file herein, the  
6 Points and Authorities hereinafter to follow, and such oral argument and testimony as this  
7 Honorable Court may entertain at a hearing of the subject Motion, if so desired.

8 RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of August, 2016.

9 THORNDAL, ARMSTRONG, DELK,  
10 BALKENBUSH & EISINGER

11 

12 PAUL F. EISINGER, ESQ.  
13 Nevada Bar No. 1617  
14 ALEXANDRA B. MCLEOD, ESQ.  
15 Nevada Bar No. 8185  
16 1100 East Bridger Avenue, P.O. Box 2070  
17 Las Vegas, NV 89125  
18 Attorneys for Defendants,  
19 HENDERSON WATER PARK, LLC dba  
20 COWABUNGA BAY WATER PARK,  
21 WEST COAST WATER PARKS, LLC,  
22 DOUBLE OTT WATER HOLDINGS, LLC  
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1 proper defendants in light of the protections of NRS Chapter 86 is purely a legal issue, ripe for  
2 the Court's determination.

3 **II. BACKGROUND STATEMENT OF RELEVANT FACTS**

4 This lawsuit was brought on July 28, 2015 by Peter and Christian Gardner on behalf of  
5 their son, Leland Gardner. Leland was a six-year-old kindergarten student who was not wearing  
6 a life vest at the time of a near drowning in the wave pool at the Cowabunga Bay Water Park on  
7 May 27, 2015. The Complaint describes the incident as occurring during an after school  
8 playdate with a classmate hosted by the classmate's father, William Ray, but states a sole cause  
9 of action for negligence against the Water Park Defendants.

10 **III. WHEN NO ISSUE OF MATERIAL FACT EXIST, THE MOVING PARTY IS**  
11 **ENTITLED TO JUDGMENT AS A MATTER OF LAW**

12 Summary judgment is proper if the pleadings, depositions, answers to interrogatories,  
13 and admissions on file, together with the affidavits, if any, show that there is no genuine issue as  
14 to any material fact and that the moving party is entitled to a judgment as a matter of law.  
15 NRCP 56(c); *see also Dermody v. City of Reno*, 113 Nev. 207, 931 P.2d 1354 (1997); *Bish v.*  
16 *Guaranty Nat'l Ins. Co.*, 109 Nev. 133, 848 P.2d 1057 (1993); *Butler v. Bogdanovich*, 101 Nev.  
17 449, 451, 705 P.2d 662, 663 (1985); and *Wiltsie v. Baby Grand Corp.*, 105 Nev. 291, 774 P.2d  
18 432 (1989). Furthermore, since Nevada substantially has adopted the Federal Rules of Civil  
19 Procedure, federal case law interpreting the operation of those rules becomes persuasive. Here,  
20 the movant is the Defendant and, accordingly, the procedure set forth by NRCP 56 is as follows:

21 (a) For defending party. A party against whom a claim, counterclaim, or cross-  
22 claim is asserted or a declaratory judgment is sought may, at any time move with  
23 or without supporting affidavits for a summary judgment in his favor upon all or  
24 any part thereof.

25 As the Nevada Supreme Court reminded us in *Wood v. Safeway, Inc.*, 121 Nev. 724, 121  
26 P.3d 1026 (2005), Rule 56 should not be regarded as a "disfavored procedural shortcut." Most  
27 importantly, the Court dispelled the notion that even the "slightest doubt as to the operative  
28 facts" can preclude summary judgment by explicitly abrogating the slightest doubt standard  
from Nevada jurisprudence. *Id.* at 1031. "While the pleadings and other proof must be construed  
in a light most favorable to the nonmoving party, that party bears the burden to 'do more than

1 simply show that there is some metaphysical doubt' as to the operative facts in order to avoid  
2 summary judgment being entered in the moving party's favor." *Id.*

3 *Wood v. Safeway* is also instructive that "the substantive law controls which factual  
4 disputes are material and will preclude summary judgment; other factual disputes are irrelevant"  
5 *Id.* (quoting *Liberty Lobby*, 477 US at 248). Since the substantive law which controls here is  
6 NRS 86.371 and 86.381 and no facts about the company structure are in dispute, it is  
7 deferentially submitted that Defendants West Coast and Double OTT are entitled to judgment as  
8 a matter of law.

9 IV. BECAUSE LLCs EXPRESSLY PROTECT MEMBERS FROM LIABILITY FOR  
10 COMPANY OBLIGATIONS, WEST COAST AND DOUBLE OTT ARE  
11 IMPROPER DEFENDANTS

12 When Plaintiffs named West Coast and Double OTT in addition to Henderson Water  
13 Park, LLC, they failed to recognize longstanding Nevada law which insulates the member  
14 companies from direct liability. Specifically, NRS 86.381's absolute protection of members of  
15 an LLC is clear: "A member of a limited-liability company is not a proper party to  
16 proceedings by or against the company, except where the object is to enforce the member's  
17 right against or liability to the company." (emphasis added) Moreover, NRS 86.371 similarly  
18 sets forth that, "Unless otherwise provided in the articles of organization or an agreement signed  
19 by the member or manager to be charged, no member or manager of any LLC formed under the  
20 law of this State is individually liable for the debts or liabilities of the company." Under the  
21 absolute protections of NRS Chapter 86, there is simply no basis to break through the  
22 protections of Henderson Water Park, LLC to maintain an action against West Coast or  
23 Double OTT.

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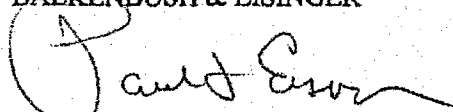
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1    **V.    CONCLUSION**

2            WHEREFORE, because it is for the Nevada Legislature, not its courts, to rewrite the  
3    LLC statute to allow piercing of the company veil, Defendants West Coast and Double OTT are  
4    protected from direct liability by NRS Chapter 86 as members of Henderson Water Park, LLC.  
5    For these reasons, summary judgment in favor of Defendants West Coast and Double OTT is  
6    warranted in the case at bar.

7            RESPECTFULLY SUBMITTED this 12<sup>TH</sup> day of August, 2016.

8                            THORNDAL, ARMSTRONG, DELK,  
9                            BALKENBUSH & EISINGER

10                           

11                           PAUL F. EISINGER, ESQ.  
12                           Nevada Bar No. 1617  
13                           ALEXANDRA B. McLEOD, ESQ.  
14                           Nevada Bar No. 8185  
15                           1100 East Bridger Avenue, P.O. Box 2070  
16                           Las Vegas, NV 89125  
17                           Attorneys for Defendants,  
18                           HENDERSON WATER PARK, LLC dba  
19                           COWABUNGA BAY WATER PARK,  
20                           WEST COAST WATER PARKS, LLC,  
21                           DOUBLE OTT WATER HOLDINGS, LLC  
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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b)(2)(D) and EDCR 7.26(a)(4) I hereby certify that on the 12<sup>th</sup>  
3 day of August 2016, I served a copy of the above and foregoing **MOTION FOR**  
4 **SUMMARY JUDGMENT AS TO CLAIMS AGAINST DEFENDANTS WEST COAST**  
5 **AND DOUBLE OTT** to the following parties via electronic service through the Eighth  
6 Judicial District Court's Odyssey E-File and Service System:

7 Donald J. Campbell, Esq.  
8 Samuel R. Mirkovich, Esq.  
9 CAMPBELL & WILLIAMS  
700 South Seventh Street  
Las Vegas, NV 89101  
10 Attorneys for Plaintiffs,  
PETER and CHRISTIAN GARDNER on  
11 behalf of minor child, LELAND GARDNER

12   
13 An Employee of THORNDAL, ARMSTRONG,  
14 DELK, BALKENBUSH & EISINGER  
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LAW OFFICES  
**THORNDAL ARMSTRONG  
DELK BALKENBUSH & EISINGER**  
A PROFESSIONAL CORPORATION  
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# **EXHIBIT A**

# HENDERSON WATER PARK, LLC

[Q New Search](#)  
(CorpSearch.aspx)

[Printer Friendly](#)

[\\$ Calculate List Fees](#)  
(FeeDetails.aspx?  
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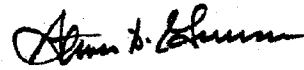
Business Entity Information			
Status:	Active	File Date:	8/8/2013
Type:	Domestic Limited-Liability Company	Entity Number:	E0387792013-8
Qualifying State:	NV	List of Officers Due:	8/31/2016
Managed By:	Managing Members	Expiration Date:	
NV Business ID:	NV20131474862	Business License Exp:	8/31/2016

Additional Information	
Central Index Key:	

Registered Agent Information			
Name:	GORDON LAW LLC	Address 1:	6655 S CIMARRON STE 200
Address 2:		City:	LAS VEGAS
State:	NV	Zip Code:	89113
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	NV
Mailing Zip Code:			
Agent Type:	Commercial Registered Agent - Limited-Liability Corporation		
Jurisdiction:	NEVADA	Status:	Active
View all business entities under this registered agent (RACorps.aspx?tsnsh=PahK2N2yF0YXUyuzCEM5A%253d%253d&RAName=GORDON+LAW+LLC)			

Financial Information	
No Par Share Count:	0
Capital Amount:	\$ 0
No stock records found for this company	

<input checked="" type="checkbox"/> Officers	<input type="checkbox"/> Include Inactive Officers		
Managing Member - DOUBLE OTT WATER HOLDINGS, LLC			
Address 1:	C/O ORLUFF OPHEIKENS 1025 E. 2100 N.	Address 2:	
City:	NORTH OGDEN	State:	UT
Zip Code:	84414	Country:	USA
Status:	Active	Email:	
Managing Member - WEST COAST WATER PARKS, LLC			
Address 1:	C/O SCOTT HUISH 7300 FUN CENTER WAY	Address 2:	
City:	TUKWILA	State:	WA
Zip Code:	98188	Country:	USA
Status:	Active	Email:	

  
CLERK OF THE COURT

**OPPS**

CAMPBELL & WILLIAMS

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*Attorneys for Plaintiffs*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

PETER GARDNER and CHRISTIAN GARDNER, )

on behalf of minor child, LELAND GARDNER, )

Plaintiffs, )

vs. )

HENDERSON WATER PARK, LLC dba )

COWABUNGA BAY WATER PARK, a Nevada )

limited liability company; WEST COAST WATER )

PARKS, LLC, a Nevada limited liability company; )

DOUBLE OTT WATER HOLDINGS, LLC, a Utah )

limited liability company; DOES I through X, )

inclusive; ROE Corporations I through X, inclusive; )

and ROE Limited Liability Company I through X, )

inclusive, )

Defendants. )

Case No.: A-15-722259-C

Dept. No.: XXX

**PLAINTIFFS' OPPOSITION TO**

**MOTION FOR SUMMARY**

**JUDGMENT AS TO CLAIMS**

**AGAINST DEFENDANTS WEST**

**COAST AND DOUBLE OTT**

Date of Hearing: September 13, 2016

Time of Hearing: 9:00 a.m.

Plaintiffs, by and through their undersigned counsel, hereby submit the following

Opposition to Motion for Summary Judgment as to Claims against Defendants West Coast and

Double Ott. This Opposition is made and based upon the papers and pleadings on file herein, the

exhibits attached hereto, and the Points and Authorities that follow.

## POINTS AND AUTHORITIES

### I. INTRODUCTION

On May 5, 2016, Plaintiffs filed their Motion for Leave to File Amended Complaint and, in part, sought to assert *direct* claims for negligence against the seven (7) individuals who personally served on the Management Committee of Defendant Henderson Water Park, LLC ("HWP").<sup>1</sup> To be clear, Plaintiffs did not seek to hold these individuals liable for the debts and obligations of HWP or obtain recovery simply by virtue of the fact that the individuals were managers of HWP. Rather, in their proposed Amended Complaint, Plaintiffs alleged that these individuals actively managed the operations of HWP and, in that capacity, authorized, directed, ratified and participated in the grossly negligent and illegal conduct that forms the basis of the Complaint. As a result, Plaintiffs asserted that the seven (7) individuals committed tortious acts for which they are personally liable.

On June 30, 2016, His Honor denied Plaintiffs' Motion for Leave to File Amended Complaint in its entirety. As to Plaintiffs' direct claims for negligence against the individual managers, the Court ruled that said individuals were wholly immune from liability because NRS 86.371 provides "no member or manager of any limited-liability company formed under the laws of this State is individually liable for the debts and liabilities of the company." See Order Denying Motion for Leave to File Amended Complaint (on file). In doing so, the Court disregarded abundant case law and other persuasive legal authority holding that a member or manager of an LLC can be held personally liable for his, her or its own tortious conduct that was committed on

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<sup>1</sup> Plaintiffs also requested leave to plead the alter ego doctrine against HWP and its member-LLCs, West Coast Water Parks, LLC ("West Coast") and Double Ott Water Holdings, LLC ("Double Ott"). Plaintiffs alleged that HWP and its member-LLCs disregarded the corporate entity such that Plaintiffs should be permitted to pierce the corporate veil to obtain recovery from seven (7) individuals who owned Cowabunga Bay water park. The alter ego doctrine constituted a separate and distinct route to liability against these individuals that was not related to Plaintiffs' direct claims for negligence.

1 behalf of a LLC. Because the Court abused its discretion by denying leave to bring direct claims  
2 for negligence against the individual managers, Plaintiffs filed their Petition for Writ of  
3 Mandamus, which is currently pending before the Nevada Supreme Court. *See* Exhibit "1,"  
4 Petition for Writ of Mandamus.

5 Here, Defendants ask this Court to double-down on its prior ruling and enter summary  
6 judgment in favor of West Coast and Double Ott on grounds that the entities are members of HWP  
7 and, therefore, immune from tort liability under NRS 86.371 and 86.381. In reality, however,  
8 Defendants have given this Court the opportunity to correct the clear error in its earlier ruling on  
9 Plaintiffs' Motion for Leave to Amend. In point of fact, the overwhelming weight of case law and  
10 other legal authority unequivocally demonstrates that a member or manager of an LLC can be held  
11 liable for his, her or its own tortious conduct. More importantly, the Nevada Supreme Court has  
12 explicitly stated that an officer or director of a corporation may be liable for his or her own tortious  
13 conduct despite the existence of NRS 78.747, which, like NRS 86.371, states "no stockholder,  
14 director or officer of a corporation is individually liable for a debt or liability of the corporation..."  
15 Respectfully, His Honor's prior order on Plaintiffs' Motion for Leave to Amend is at odds with the  
16 numerous legal authorities that have addressed this issue. Allowing that ruling to stand will, in turn,  
17 eviscerate Plaintiffs' ability to bring meritorious legal claims in this action.

18 As a final point before turning to their substantive legal arguments, Plaintiffs ask His Honor  
19 to consider the practical effects of the Court's prior ruling that members and managers of an LLC are  
20 completely immune from liability for their own tortious conduct. A manager of an LLC could, for  
21 example, make fraudulent misrepresentations in order to contract with another business yet that same  
22 manager would be wholly immune from liability for his intentional misconduct. Similarly, a  
23 member of an LLC could operate a company vehicle while under the influence of alcohol to perform  
24 business on behalf of the LLC and severely injure an innocent third party, but that member would not  
25 face any liability for his wrongful conduct. Simply put, this Court's ruling would permit members  
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28

1 and managers of an LLC in Nevada to engage in intentional misconduct with impunity and hide  
2 behind the shield of the LLC, which, as is the case here, may be severely underinsured and  
3 undercapitalized. That cannot be the law.

## 4 II. ARGUMENT<sup>2</sup>

5 As in their Opposition to the Motion for Leave to File Amended Complaint, Defendants  
6 failed to cite a single case to support their request for summary judgment and instead exclusively  
7 relied on two Nevada statutes to support their argument that West Coast and Double Ott are wholly  
8 immune from liability for their own tortious conduct. See Mot. at 4-6. NRS 86.371 provides that  
9 "[u]nless otherwise provided in the articles of organization or an agreement signed by the member or  
10 manager to be charged, no member or manager of any limited-liability company formed under the  
11 laws of this State is individually liable for the debts and liabilities of the company." NRS 86.381  
12 further provides that "[a] member of a limited-liability company is not a proper party to proceedings  
13 by or against the company, except where the object is to enforce the member's right against or  
14 liability to the company."  
15

16 Plaintiffs do not dispute the existence of these statutes, but Defendants again fail to recognize  
17 that Plaintiffs are not seeking to hold West Coast and Double Ott liable "for the debts and liabilities  
18 of the company," see NRS 86.371; nor is this action simply "against the company." See NRS  
19 86.381. To the contrary, Plaintiffs brought direct claims for negligence against West Coast and  
20 Double Ott arising out of their own tortious conduct. In other words, Plaintiffs would be entitled to  
21 bring these claims for negligence against West Coast and Double Ott even if the Cowabunga Bay  
22 entities were not named defendants in the underlying action. Respectfully, the Court did not account  
23 for this important distinction when it ruled that the Gardners' direct claims against the individuals  
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26  
27 <sup>2</sup> Plaintiffs agree that the question of whether West Coast and Double Ott are proper  
28 defendants is a purely legal issue that is ripe for the Court's determination. Similarly, Plaintiffs  
do not dispute that West Coast and Double Ott are members of HWP.

1 who personally served on HWP's Management Committee were barred because "the Nevada  
2 Revised Statutes protect members of an LLC, not only from debts incurred by an LLC, but also from  
3 liabilities incurred by the LLC." See Order Denying Motion for Leave to File Amended Complaint  
4 (on file).

5 It is ironic that Defendants repeatedly refer to NRS Chapter 78 in presenting their specious  
6 argument that "[t]he protections under Chapter 86 pertaining to LLC's [sic] are absolute." See Opp.  
7 at 4. Indeed, NRS 78.747, like NRS 86.371, states that "no stockholder, director or officer of a  
8 corporation is individually liable for a debt or liability of the corporation..."<sup>3</sup> The Nevada Supreme  
9 Court, however, has expressly recognized that "[a]n officer of a corporation may be individually  
10 liable for any tort which he commits..." *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1098,  
11 901 P.2d 684, 689 (1995); see also *Rosenthal v. Poster*, 2008 WL 4527859, \*3 (D.Nev. Sept. 30,  
12 2008) ("Generally, a tortious act committed by a corporate officer, regardless of the fact he was  
13 acting on behalf of the corporation, is considered a personal wrongdoing, holding the officer himself  
14 personally liable."). Accordingly, contrary to the Defendants' misguided citation to the law  
15 governing corporations, the Nevada Supreme Court's binding precedent clearly establishes that  
16 officers—the "managers" of a corporation—are individually liable for their own tortious acts  
17 committed on behalf of the corporation. The same principle must apply to LLCs, or else they would  
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25 <sup>3</sup> Although statutory interpretation is not necessary to resolve this issue, Plaintiffs must  
26 point out that the State Legislature drew a direct comparison between the language of NRS 78.747  
27 and the section of the LLC bill that eventually became NRS 86.371. See Exhibit "2," Excerpts of  
28 Legislative History ("Mr. Fowler pointed out that [ ] section [310 of the limited liability company  
bill] stated 'they were not liable under a judgment, decree, or order of the court, for any debts,  
obligations or liabilities of the company,' which was exactly present corporate law.") (emphasis in  
original).



1 become a vehicle by which ill-intended members could escape all manner of wrongdoing. Neither  
2 the law nor public policy supports such a harmful proposition.<sup>4</sup>

3 Plaintiffs acknowledge that the Nevada Supreme Court has not addressed direct liability  
4 against individuals or other business entities relating to tortious conduct committed in their capacity  
5 as members or managers of an LLC in any published opinion. Nevertheless, in *Batchelor v. Cortese*,  
6 2013 WL 3325208, \*1 (Nev. April 12, 2013), the Nevada Supreme Court rejected the argument that  
7 NRS 86.371 and NRS 86.381 constituted a complete bar to personal liability for a member of an  
8 LLC as follows:

9  
10 *Respondent asserts that he cannot be held personally liable for an obligation of the*  
11 *limited liability company law firm as outlined under NRS 86.371 and NRS 86.381.*  
12 *This argument fails, however, because it assumes that the liability is only that of the*  
13 *limited liability company. As outlined above, it is unclear whether respondent is*  
14 *personally liable on the contract. Thus, NRS 86.371 and NRS 86.381 do not apply.*

15 *Id.* (emphasis added).<sup>5</sup>

16 The overwhelming majority of federal and state courts that have considered the issue hold  
17 that, like corporate officers and directors, individuals or business entities may be held personally

18 <sup>4</sup> The Nevada Supreme Court's statement of law in *Semenza* is highly persuasive for two  
19 reasons. First, it is well settled that "[w]henver possible, [courts] will interpret a rule or statute  
20 in harmony with other rules and statutes." *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993-94, 860  
21 P.2d 720, 723 (1993) (using the same meaning of the term "trial" from NRCP 42(b) in  
22 interpreting NRCP 68 and NRS 17.115). Second, the Court expressly relied on a comparison of  
23 NRS Chapters 78 and 86 when it denied Plaintiffs' request to plead the alter ego doctrine. *See*  
24 *Order Denying Motion for Leave to File Amended Complaint* (on file). While Plaintiffs submit that  
25 the Court erred by ignoring the unequivocal legislative history of both NRS Chapter 78 and NRS  
Chapter 86 as it pertains to the alter ego doctrine, the Court should apply the same basic logic here.  
Indeed, it would be logically inconsistent to compare NRS Chapters 78 and 86 when denying  
Plaintiffs' request for leave to plead the alter ego doctrine while refusing to draw that same  
comparison in order to rule that NRS 86.371 shields West Coast, Double Ott and the seven  
individuals who personally serve on HWP's Management Committee from liability.

26 <sup>5</sup> Although Supreme Court Rule 123 states that an unpublished opinion is not binding legal  
27 precedent on this Court, the Nevada Supreme Court's opinion in *Batchelor* is highly persuasive  
28 on this issue. Plaintiffs, therefore, rely on *Batchelor* as persuasive (as opposed to binding)  
authority. *Cf. Villagrana v. Reconstrust Co., N.A.*, 2012 WL 1890236, \*7 (D.Nev. May 22, 2012)  
(unpublished opinions "may be considered for their persuasive authority.").

liable for torts committed in their capacity as members or managers of an LLC. For example, the United States District Court for the District of Nevada refuted the argument advanced by Defendants in *In re Commercial Mortg. Co.*, 802 F.Supp.2d 1147, 1164-65 (D.Nev. 2011). There, the plaintiff brought a tort claim for conversion against the defendant LLC and two individual defendants that served as the LLC's managing members. *Id.* The United States District Court cited the analogous corporate principles referenced above and held that the managing members were personally liable for the tortious conduct of the LLC as follows:

*As managing members of Compass, Piskin and Blatt are personally liable for engaging in the conversion that plaintiffs proved was committed by Compass. See Pocahontas First Corp. v. Venture Planning Group, Inc.*, 572 F.Supp. 503, 508 (D.Nev. 1983) ("There is no doubt that an individual who commits a tort while acting in the capacity of a corporate officer may be held personally liable."); *Marino v. Cross Country Bank*, No. C.A.02-65-GMS, 2003 WL 503257, at \*7 (D.Del. Feb. 14, 2003) ("Corporate officers are liable for tortious conduct even if they were acting officially for the corporation in committing the tort. A corporate officer can be held personally liable for the torts he commits and cannot shield himself behind the corporation when he is a participant.").

*Id.* at 1165 (emphasis added).

Numerous other courts have reached the same conclusion that members and managers are personally liable for their own tortious conduct committed on behalf of an LLC. *See, e.g., D'Elia v. Rice Dev., Inc.*, 147 P.3d 515, 524-25 (Utah Ct. App. 2006) ("We are persuaded by those authorities that hold that both limited liability members and corporate officers should be treated in a similar manner when they engage in tortious conduct. We therefore conclude that *Harrison's* imposition of personal liability on corporate officers who participate in a corporation's tortious acts [ ] also applies to limited liability members or managers."); *Rothstein v. Equity Ventures, LLC*, 299 A.2d 472, 474 (N.Y.App.Div. 2002) ("We agree that members of limited liability companies, such as corporate officers, may be held personally liable if they participate in the commission of a tort in furtherance of company business."); *Weber v. United States Sterling Sec., Inc.*, 924 A.2d 816, 825 (Conn. 2007) ("Accordingly, we conclude that although § 18-303(a) of the Delaware Code Annotated shields the

defendants from personal liability based solely on their affiliation with Retail Relief, it does not shield them from personal liability for their own tortious conduct”) (interpreting Delaware law); *Dzurilla v. All American Homes, LLC*, 2010 WL 559923, \*3 (E.D.Ky. Jan. 4, 2010) (“[A] shareholder of a corporation or a member of an LLC can be held liable for its individual conduct, without regard to the limited liability status of the corporation or company. While mere status as a manager of an LLC will not subject a person to liability, the statute does not preclude liability for the manager’s own tortious conduct”).<sup>6</sup>

Legal commentators and treatises addressing this issue likewise confirm that a member or manager of a Nevada LLC can be held personally liable for his, her or its own tortious conduct. *See, e.g., Ltd. Liability Co.* § 14:38 (2015) (citing NRS 86.371 and NRS 86.381 and stating “[t]here are several important exceptions to the rule that members are not liable for the LLC’s debts and obligations. First, members are liable for their own tortious conduct, even when they act on the LLC’s behalf.”) (emphasis added); 3A Fletcher Cyc. Corp. § 1135 (“It is the general rule that an individual is personally liable for all torts the individual committed [ ]. This rule applies equally to

<sup>6</sup> *See also Hoang v. Arbess*, 80 P.3d 863, 867 (Colo.Ct.App. 2003) (“While an officer of a corporation cannot be held personally liable for a corporation’s tort solely by reason of his or her official capacity, an officer may be held liable for his or her individual acts of negligence even though committed on behalf of the corporation, which is also held liable. The parties do not dispute that this principle applies equally to a manager of a limited liability company.”); *Equipoise PM LLC v. Int’l Truck and Engine Corp.*, 2007 WL 2228621, \*10 (N.D.Ill. July 31, 2007) (“As its plain language suggests, this provision will shield Price and Morton from liability if the only basis defendants have for the claims against them is their membership in Equipoise. If, however, defendants prove that Price or Morton assumed liability, or committed, authorized or ratified tortious acts while acting for Equipoise, then this provision provides them no protection.”); *Mbahaba v. Morgan*, 44 A.3d 472, 476 (N.H. 2012) (“When [ ] a member or manager commits or participates in the commission of a tort, whether or not he acts on behalf of his LLC, he is liable to third persons injured thereby.”); *Allen v. Dackman*, 991 A.2d 1216, 1228-29 (Md.Ct.App. 2010) (“These cases discuss tort liability for corporate officers and agents who personally committed, inspired, or participated in torts in the name of the corporation. We have not previously determined whether these same principles apply to members of LLCs. We agree, however, with other jurisdictions that have come to that conclusion.”); *Morris v. Cee Dee, LLC*, 877 A.2d 899, 908-09 (Conn.Ct.App. 2005) (“Furthermore, the law of this state permits the court to attach individual assets if a member of a limited liability company personally commits a tort.”).

torts committed by those acting in their official capacities as officers or agents of a corporation. It is immaterial that the corporation may also be liable. [ ]. *These rules have been applied to principals of a limited liability company.*" (emphasis added).

There is simply no legal authority to support Defendants' deficient argument that members and managers of LLCs are completely immune from tort liability.<sup>7</sup> To the contrary, the Nevada Supreme Court has expressly stated that corporate officers and directors can be held personally liable for their own tortious conduct despite the plain language of NRS 78.747, which mirrors NRS 86.371. Moreover, the overwhelming weight of highly persuasive case law and other legal authority addressing this exact issue directly contradicts Defendants' absurd position that members and managers of an LLC are completely immune from tort liability under any circumstances. Simply put, the Court erred when it denied Plaintiffs leave to amend to bring direct claims for negligence against the seven (7) individual members of HWP's management committee and, in doing so, vitiated Plaintiffs' ability to obtain complete recovery for Leland's devastating injuries that were caused by Defendants' blatantly illegal conduct. His Honor should decline Defendants' invitation to make that mistake again by granting their Motion for Summary Judgment based on the same flawed argument.

<sup>7</sup> Defendants demonstrate their ongoing failure to understand the nature of Plaintiffs' claims by repeatedly referring to the concept of "piercing" the corporate veil. To be clear, Plaintiffs are *not* seeking to "pierce" HWP by asserting direct claims for negligence against West Coast and Double Ott. To that end, courts holding members or managers of an LLC liable for their own tortious conduct have made it abundantly clear that such a ruling does not require "piercing the corporate veil" under the alter ego doctrine. See, e.g., *D'Elia*, 147 P.3d at 524 ("Several courts and commentators make it clear that holding an officer or director personally liable for corporate torts in which they participate is distinct from the piercing the veil doctrine.") (listing cases and authorities); *Morris*, 877 A.2d at 908-09 ("Contrary to the individual defendant's assertion, the court did not pierce the corporate veil provided by the act when it attached his personal assets. The Court ordered a prejudgment attachment of his assets because it found that he, himself, had committed the tort of negligence."). Defendants' inability—or unwillingness—to grasp this basic point of law is additional evidence of the serious flaws in their meritless position.

1 III. CONCLUSION

2 Based on the foregoing, Plaintiffs respectfully request that the Court deny the Motion for  
3 Summary Judgment against Defendants West Coast and Double Ott in its entirety.

4 DATED this 29th day of August, 2016.

5 CAMPBELL AND WILLIAMS

6  
7 By /s/ Donald J. Campbell

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Campbell & Williams, and that on this 29th day of August, 2016 I caused the foregoing document entitled **Plaintiffs' Opposition to Motion for Summary Judgment as to Claims against Defendants West Coast and Double Ott** to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

/s/ John Y. Chong  
An Employee of Campbell & Williams

# **EXHIBIT 1**

# **EXHIBIT 1**

Case No.

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

Electronically Filed  
Jul 19 2016 04:37 p.m.

Tracie K. Lindeman

Clerk of Supreme Court

PETER and CHRISTIAN GARDNER, on behalf of minor child, LORAN GARDNER,  
Plaintiffs-Petitioners,

v.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR  
THE COUNTY OF CLARK; and THE HONORABLE JERRY A. WIESE II, DISTRICT  
JUDGE

and

HENDERSON WATER PARK, LLC DBA COWABUNGA BAY WATER PARK, WEST  
COAST WATER PARKS, LLC, AND DOUBLE OTT WATER HOLDINGS, LLC  
Defendants-Real Parties in Interest,

---

Extraordinary Writ from the Eighth Judicial District Court of the State of Nevada, in and for  
County of Clark

---

**PETITION FOR WRIT OF MANDAMUS**

---

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**RULE 26.1 DISCLOSURE STATEMENT**

The undersigned counsel of record certifies that the following are persons and entities 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.

PETER and CHRISTIAN GARDNER, on behalf of minor child, LELAND GARDNER.

Plaintiffs-Petitioners have not been represented by any other attorneys in addition to CAMPBELL & WILLIAMS.

ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding because it is a matter raising as a principal issue questions of first impression involving common law as well as questions of statewide importance. NRAP 17(a)(13)-(14).

## TABLE OF CONTENTS

		Page
I.	INTRODUCTION AND RELIEF SOUGHT.....	1
II.	STATEMENT OF THE ISSUES .....	4
III.	STATEMENT OF THE FACTS .....	5
IV.	ARGUMENT.....	8
	A. Legal Standard .....	8
	B. The District Court's Erroneous Denial Of The Gardners' Motion Warrants Extraordinary Writ Relief .....	10
	C. The Gardners Are Entitled To Pursue Direct Claims Against The Individual Defendants Arising Out of Their Negligent Management And Operation Of Cowabunga Bay That Resulted In Leland's Injuries.....	13
	D. The District Court Erred By Ruling That The Alter Ego Doctrine Does Not Apply To LLCs In The State Of Nevada .....	19
V.	CONCLUSION .....	27

# TABLE OF AUTHORITIES

Page

## Cases

<i>Allen v. Dackman</i> , 991 A.2d 1216 (Md.Ct.App. 2010).....	18
<i>Allstate Ins. Co. v. Fackett</i> , 125 Nev. 132, 206 P.3d 572 (2009) .....	23
<i>Balotis v. Clark Cnty.</i> , 102 Nev. 568, 729 P.2d 1338 (1986).....	23
<i>Buzz Stew, LLC v. City of N. Las Vegas</i> , 124 Nev. 224, 181 P.3d 670 (2008).....	9
<i>Capital Mortgage Holding v. Hahn</i> , 101 Nev. 314, 705 P.2d 126 (1985) .....	10
<i>Chanos v. Nevada Tax Comm'n</i> , 124 Nev. 232, 181 P.3d 675 (2008).....	23
<i>Chavez v. Robberson Steel Co.</i> , 94 Nev. 597, 584 P.2d 159 (1978).....	10
<i>D'Elia v. Rice Dev., Inc.</i> , 147 P.3d 515 (Utah Ct. App. 2006) .....	16, 20
<i>Dep't of Taxation v. DaimlerChrysler</i> , 121 Nev. 541, 119 P.3d 135 (2005) .....	22
<i>Dzurilla v. All American Homes, LLC</i> , 2010 WL 559923 (E.D.Ky. Jan. 4, 2010).....	17
<i>Equipoise PM LLC v. Int'l Truck and Engine Corp.</i> , 2007 WL 2228621 (N.D.Ill. July 31, 2007).....	17
<i>Halcrow, Inc. v. Eighth Judicial Dist. Court</i> , 129 Nev.Adv.Op. 42, 302 P.3d 1148 (2013).....	10
<i>Hoang v. Arbess</i> , 80 P.3d 863 (Colo.Ct.App. 2003).....	17
<i>Holtz v. Superior Court of the City and Cnty. of San Francisco</i> , 475 P.2d 441 (Cal. 1970).....	11
<i>In re City of Dallas</i> , 445 S.W.3d 456 (Tex.Ct.App. 2014).....	11

1		
2	<i>In re Commercial Mortg. Co.</i> , 802 F.Supp.2d 1147 (D.Nev. 2011) .....	16
3		
4	<i>In re Giampetro</i> , 317 B.R. 841 (Bankr.D.Nev. 2004) .....	21, 23-24
5	<i>LFC Mktg. Group, Inc. v. Loomis</i> , 116 Nev. 896, 8 P.3d 84 (2000) .....	19-20
6	<i>Lubin v. Kunin</i> , 117 Nev. 107, 17 P.3d 422 (2001) .....	9
7		
8	<i>Marino v. Cross Country Bank</i> , 2003 WL 503257 (D.Del. Feb. 14, 2003) .....	16
9	<i>Mbahaba v. Morgan</i> , 44 A.3d 472 (N.H. 2012) .....	17-18
10	<i>Montgomery v. eTreppid Tech, LLC</i> , 548 F.Supp.2d 1175 (D.Nev. 2008) .....	21
11	<i>Morris v. Cee Dee, LLC</i> , 877 A.2d 899 (Conn.Ct.App. 2005) .....	18, 20
12		
13	<i>MountainView Hosp. v. Eighth Judicial Dist. Court</i> , 128 Nev.Adv.Op. 17, 273 P.3d 861 (2012) .....	12
14		
15	<i>Nutton v. Sunset Station, Inc.</i> , 131 Nev.Adv.Op. 34, 357 P.3d 966 (Nev.Ct.App. 2015) .....	8-9
16		
17	<i>Pocahontas First Corp. v. Venture Planning Group, Inc.</i> , 572 F.Supp. 503 (D.Nev. 1983) .....	16
18		
19	<i>Potter v. Potter</i> , 121 Nev. 613, 119 P.3d 1246 (2005) .....	23
20	<i>Rosenthal v. Poster</i> , 2008 WL 4527859 (D.Nev. Sept. 30, 2008) .....	15
21		
22	<i>Rothstein v. Equity Ventures, LLC</i> , 299 A.2d 472 (N.Y.App.Div. 2002) .....	17
23	<i>Semenza v. Caughlin Crafted Homes</i> , 111 Nev. 1089, 901 P.2d 684 (1995) .....	15
24	<i>Smith v. Eighth Judicial Dist. Court</i> , 123 Nev. 468, 168 P.3d 731 (2013) .....	12
25		
26	<i>Stephens v. S. Nevada Music Co.</i> , 89 Nev. 104, 507 P.2d 138 (1973) .....	9
27	<i>Taylor v. Superior Court of Los Angeles Cnty.</i> , 598 P.2d 854 (Cal. 1979) .....	11
28		

1	<i>Torres v. Nevada Direct Ins. Co.</i> , 131 Nev. Adv. Op. 54,	
2	353 P.3d 1203 (2015).....	9
3		
4	<i>Vacation Village v. Hitachi Am.</i> , 110 Nev. 481, 874 P.2d 744 (1994).....	10
5	<i>Washoe Med. Ctr. v. Second Judicial Dist. Court</i> , 122 Nev. 1298,	
6	148 P.3d 790 (2006).....	23
7	<i>Webb v. Shull</i> , 128 Nev. Adv. Op. 8, 270 P.3d 1266 (2012) .....	20
8	<i>Weber v. United States Sterling Sec., Inc.</i> , 924 A.2d 816 (Conn. 2007) .....	17
9		
10	<b>Rules</b>	
11	Nev. R. Civ. P. 8 .....	10
12	Nev. R. Civ. P. 12 .....	9
13		
14	Nev. R. Civ. P. 15 .....	8-9
15	<b>Statutes</b>	
16	NRS 34.160 .....	10
17		
18	NRS 78.747 .....	14-15, 20
19	NRS 86.371 .....	3-4, 8, 13-15, 18, 25
20	NRS 86.381 .....	13-14, 18
21		
22	NRS 444.080 .....	7
23	NRS Chapter 78 .....	4-5
24	NRS Chapter 86 .....	4-5, 24-26
25		
26	NRS Chapter 444 .....	2
27		
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24  
25  
26  
27  
28

**Legal Treatises**

Ltd. Liability Co. § 14:38 (2015) ..... 18

3A Fletcher Cyc. Corp. § 1135 ..... 18

**Legislative Materials**

Minutes of the Assembly Committee on Judiciary, 1991 Leg., 66th Sess.  
 (May 21, 1991) ..... 15, 25-26

**POINTS AND AUTHORITIES**

**L. INTRODUCTION AND RELIEF SOUGHT<sup>1</sup>**

This case arises from the severe non-fatal drowning of six-year old Leland Gardner ("Leland") on May 27, 2015 in the wave pool at the Cowabunga Bay water park in Henderson, Nevada. Cowabunga Bay is owned and operated by Defendant Henderson Water Park, LLC ("HWP"). HWP's membership is comprised of two limited liability companies ("LLCs"), West Coast Water Parks, LLC and Double Ott Water Holdings, LLC. HWP and, in turn, Cowabunga Bay is managed by seven (7) individuals who personally serve on HWP's Management Committee.<sup>2</sup> Pursuant to HWP's Operating Agreement, the Management Committee exercised complete control over every aspect of Cowabunga Bay's operations, including the illegal conduct that resulted in Leland's devastating injuries.

---

<sup>1</sup> Because this extraordinary writ proceeding arises out of the denial of a motion for leave to amend based on futility, Plaintiffs-Petitioners Peter and Christian Gardner (the "Gardners") will not address factual matters outside of the four corners of proposed Amended Complaint. To the extent Henderson Water Park, LLC, West Coast Water Parks, LLC, and Double Ott Water Holdings, LLC (collectively referred to herein as the Cowabunga Bay entities") seek to introduce extraneous, misleading and unsupported factual allegations, the Gardners reserve the right to refute any such allegations in their Reply brief.

<sup>2</sup> The seven individuals who personally serve on HWP's Management Committee are Orluff Opheikens, Slade Opheikens, Chet Opheikens, Shane Huish, Scott Huish, Craig Huish, and Tom Welch (collectively referred to herein as the "Individual Defendants").



1 Pursuant to Chapter 444 of the Nevada Revised Statutes, the Southern Nevada  
2 Health District ("SNHD") required Cowabunga Bay to post seventeen (17) lifeguards  
3 at the Wave Pool at all times. Although Cowabunga Bay submitted a lifeguard plan to  
4 SNHD representing that it would comply with the law in this regard, it habitually  
5 operated the Wave Pool with only 5-7 lifeguards. In fact, on the date of the incident,  
6 Cowabunga Bay illegally operated its Wave Pool with just *three (3) lifeguards* on duty.  
7 Cowabunga Bay's intentional violations of the law in this regard are undisputed and  
8 confirmed by the sworn deposition testimony of Cowabunga Bay's General Manager,  
9 Shane Huish.

10 On May 5, 2016, the Gardners filed the Motion for Leave to File Amended  
11 Complaint (the "Motion"), which is the basis for this extraordinary writ proceeding.  
12 The Gardners' request for leave to amend was two-fold. First, the Gardners sought  
13 to amend the Complaint to assert *direct* claims for negligence against the Individual  
14 Defendants who personally served on the Management Committee of HWP. To be  
15 clear, the Gardners did not seek to hold the Individual Defendants liable for the debts  
16 and obligations of HWP or obtain recovery simply by virtue of the fact that the  
17 Individual Defendants were managers of HWP. Rather, in their proposed Amended  
18 Complaint, the Gardners alleged that the Individual Defendants actively managed the  
19 operations of the Cowabunga Bay Defendants and, in that capacity, authorized,  
20 directed, ratified and participated in the grossly negligent and illegal conduct that forms  
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1 the basis of the Complaint. As a result, the Gardners asserted that the Individual  
2 Defendants committed tortious acts for which they are personally liable.

3 Second, the Gardners requested leave to amend to plead allegations related to  
4 the alter ego doctrine against HWP and its member-LLCs. In other words, the  
5 Gardners alleged that HWP and its member-LLCs disregarded the corporate entity  
6 such that the Gardners should be permitted to pierce the corporate veil to obtain  
7 recovery from the Individual Defendants. Again, the alter ego doctrine constitutes a  
8 separate and distinct route to liability against the Individual Defendants that is not  
9 related to the Gardners' direct claims for negligence against the Individual  
10 Defendants.  
11

12 On June 30, 2016, the Honorable Jerry A. Wiese II denied the Gardners'  
13 Motion in its entirety. As to the Gardners' direct claims for negligence against the  
14 Individual Defendants, the District Court ruled that the Individual Defendants were  
15 wholly immune from liability because NRS 86.371 provides "no member or manager  
16 of any limited-liability company formed under the laws of this State is individually  
17 liable for the debts and liabilities of the company." In doing so, the District Court  
18 ignored abundant case law and other persuasive legal authority holding that a member  
19 or manager of an LLC can be held personally liable for its own tortious conduct that  
20 was committed on behalf of a LLC.  
21

22 The District Court likewise ruled that the alter ego doctrine does not apply to  
23 LLCs. Again, the District Court ignored highly persuasive case law from federal  
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1 courts interpreting Nevada's statutory scheme for LLCs. More importantly, the  
2 District Court disregarded the legislative history of Chapters 78 and 86 of the Nevada  
3 Revised Statutes, which confirms the applicability of the alter ego doctrine to LLCs.  
4 Instead, the District Court relied on a Nevada Lawyer article authored by a local  
5 attorney that was published in November 2014. With all due respect to the attorney  
6 in question, his theory on why the alter ego doctrine does not apply to LLCs is  
7 contradicted and outweighed by the underlying legislative history of the relevant  
8 statutes as well as highly persuasive federal case law.

9  
10 In short, the District Court clearly abused its discretion by denying the  
11 Gardners' Motion in contravention of prevailing legal authority. Because the District  
12 Court's erroneous ruling has vitiated the Gardners' ability to present a viable claim  
13 at trial, the Gardners have no adequate remedy on appeal, which warrants the issuance  
14 of an extraordinary writ of mandamus.

## 15 16 17 18 **II. STATEMENT OF THE ISSUES**

19  
20 1. Whether the District Court abused its discretion by denying the  
21 Gardners' Motion on grounds that NRS 86.371 constituted a complete bar to liability  
22 against the Individual Defendants where the Gardners alleged that the Individual  
23 Defendants personally committed the tort of negligence by authorizing, directing,  
24 ratifying and participating in the illegal conduct that forms the basis of the Amended  
25 Complaint.  
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2. Whether the District Court abused its discretion by denying the Gardners' Motion on grounds that the alter ego doctrine does not apply to LLCs even though the legislative history underlying Chapters 78 and 86 of the Nevada Revised Statutes clearly indicates that the Nevada Legislature did not intend to exempt LLCs from alter ego liability.

### III. STATEMENT OF THE FACTS

1. On May 5, 2016, the Gardners filed the Motion. GARD16-110. In the proposed Amended Complaint, the Gardners sought to plead direct claims for negligence against the Individual Defendants. *Id.* The Gardners did *not* seek to impose liability against the Individual Defendants simply by virtue of the fact that they were managers or members of the Cowabunga Bay entities. *Id.*

2. More specifically, the Gardners made the following allegations against the Individual Defendants concerning their tortious conduct that resulted in Leland's horrific injuries:

- The Individual Defendants personally served on Henderson Water Park, LLC's ("HWP") Management Committee in their individual capacity. See GARD98-99 at ¶¶ 7-13.
- Every aspect of Cowabunga Bay's operations was operated and controlled by the Management Committee pursuant to HWP's Operating Agreement. For example, Section 6.1 of HCP's Operating Agreement states that "all management rights, powers and authority over the business, affairs and operations of the Company shall be solely and exclusively vested in the Management Committee" and "the Management Committee shall have the full right, power and authority to do all things deemed necessary or desirable by it, in its reasonable discretion, to conduct the business, affairs and operations of [Cowabunga Bay]." Among numerous other specific powers identified in the Operating Agreement, HWP's Management

1 Committee has direct and absolute control over "the selection and  
2 dismissal of employees" and is responsible for "tak[ing] all actions which  
3 may be necessary or appropriate to accomplish the purpose of the  
4 [Cowabunga Bay]." See GARD101 at ¶¶ 21-22.

- 5 • All actions taken by Cowabunga Bay set forth [in the Complaint] were  
6 authorized, directed or participated in by the Individual Defendants in their  
7 individual capacity as members of the Management Committee.  
8 Additionally, as set forth below, the Individual Defendants knew or should  
9 have known that these actions could injure Cowabunga Bay patrons like  
10 Leland but negligently failed to take or order appropriate action to avoid  
11 that harm despite the fact that an ordinarily prudent person, knowing what  
12 the Individual Defendants knew at the time, would not have acted  
13 similarly under the circumstances. See GARD101-02 at ¶ 23.
- 14 • The Individual Defendants, as the members of HWP's Management  
15 Committee, had direct knowledge of these hazardous conditions that  
16 threatened physical injury to their patrons like Leland, yet failed to take  
17 any action to avoid this harm and, in fact, took action which exacerbated  
18 the risk to patrons like Leland. See GARD105 at ¶ 35.
- 19 • The Individual Defendants owed multiple duties to Plaintiffs, including  
20 but not limited to: (1) the duty to keep Leland safe; (2) the duty to use  
21 reasonable care to protect Leland from known dangers such as drowning;  
22 (3) the duty to adequately staff lifeguards throughout Cowabunga Bay; (4)  
23 the duty to properly train employees, lifeguards and managers/supervisors  
24 to protect customers from dangers such as drowning; (5) the duty to  
25 provide ongoing training to employees, lifeguards and  
26 managers/supervisors to protect customers from dangers such as  
27 drowning; (6) the duty to maintain clean and clear water within  
28 Cowabunga Bay; (7) the duty to use reasonable care in the hiring,  
supervision, training and retention of its employees; and (8) the duty to act  
in a matter that does not violate State of Nevada, City of Las Vegas and  
Clark County statutes, laws and ordinances. See GARD107-08 at ¶ 48.
- The Individual Defendants breached their duties to Plaintiffs when they  
directed and/or approved of Cowabunga Bay's unlawful scheme to  
understaff lifeguards at its Wave Pool and otherwise failed to take  
reasonable steps to protect Leland from drowning. See GARD108 at ¶  
49.

- In addition, the Individual Defendants' violations of the law were criminal in nature and constituted negligence *per se* as Leland's injuries are of the type which the statutes, laws, ordinances, and regulations of the United States, State of Nevada—including but limited to NRS 444.080—Clark County, and/or the Cities of Henderson and Las Vegas were intended to prevent. See GARD108 at ¶ 50.

3. In the proposed Amended Complaint, the Gardners also made allegations against the Cowabunga Bay entities related to the alter ego doctrine. GARD99. To that end, the Gardners alleged the following:

- Upon information and belief, at all times material to this Complaint the Individual Defendants influenced and governed Defendants HWP, West Coast Water Parks, LLC, and Double Ott Water Holdings, LLC and were united in interest and ownership with said entities so as to be deemed inseparable from them. In this regard, the Individual Defendants (1) undercapitalized these limited liability companies; (2) diverted limited liability company funds; (3) treated limited liability company assets as their own; and (4) caused the entities to ignore certain required formalities. The Individual Defendants and Defendants HWP, West Coast Water Parks, LLC, and Double Ott Water Holdings, LLC, therefore, are one and the same and Plaintiffs should be permitted to pierce the corporate structure veil of Defendants HWP, West Coast Water Parks, LLC, and Double Ott Water Holdings, LLC to reach assets belonging to the Individual Defendants in order to prevent the sanction and/or promotion of an injustice.

4. The Cowabunga Bay entities filed their Opposition on May 23, 2016, and the Gardners submitted their Reply on June 9, 2016. GARD111-43.

5. The District Court conducted a hearing on the Gardners' Motion on June 16, 2016 and took the matter under submission. GARD156-68.

6. On June 30, 2016, the District Court entered the Order Denying Plaintiffs' Motion for Leave to Amend Complaint (the "Order") on grounds that the proposed amendment would be futile. GARD144-47.

1 7. As to the Gardners' direct claims for negligence against the Individual  
2 Defendants, the District Court exclusively relied on NRS 86.371 and held that "the  
3 Nevada Revised Statutes protect members of an LLC, not only from debts incurred  
4 by an LLC, but also from liabilities incurred by the LLC." *Id.* The District Court did  
5 not make any specific findings or conclusions related to whether a member or a  
6 manager of an LLC can be held liable for his or her own tortious conduct. *Id.*  
7

8  
9 8. As to the Gardners' allegations related to the alter ego doctrine, the  
10 District Court cited a Nevada Lawyer article dated November 2014 for the  
11 proposition that "although the Nevada corporation statutes include an alter ego  
12 exception to the corporate protections, the LLC statutes do not contain a similar  
13 exception, creating a negative inference that the Nevada legislature did not intend for  
14 it to apply to LLCs." *Id.*  
15

16  
17 9. The Cowabunga Bay entities filed the Notice of Entry of Order Denying  
18 Plaintiffs' Motion for Leave to Amend Complaint on July 5, 2016, and this  
19 extraordinary writ proceeding followed. GARD148-55.  
20

#### 21 IV. ARGUMENT

##### 22 A. Legal Standard.

23 "Under NRCP 15(a), leave to amend, even if timely sought, need not be granted  
24 if the proposed amendment would be 'futile.'" *Nutton v. Sunset Station, Inc.*, 131  
25 Nev.Adv.Op. 34, 357 P.3d 966, 973 (Nev.Ct.App. 2015). "A proposed amendment  
26 may be deemed futile if the plaintiff seeks to amend the complaint to plead an  
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1 impermissible claim, such as one that would not survive a motion to dismiss under  
2 NRCP 12(b)(5) or a last second amendment alleging meritless claims in an attempt to  
3 save a case from summary judgment.” *Id.* “The liberality embodied in NRCP 15(a)  
4 requires courts to err on the side of caution and permit amendments that appear arguable  
5 or even borderline, because denial of a proposed pleading amendment amounts to denial  
6 of the opportunity to explore any potential merit that it might have had.” *Id.* at 975. “A  
7 motion for leave to amend is addressed to the sound discretion of the trial court and its  
8 action in denying the motion should not be held to be error unless that discretion has  
9 been abused.” *Stephens v. S. Nevada Music Co.*, 89 Nev. 104, 105, 507 P.2d 138, 139  
10 (1973).  
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14 Here, the Cowabunga Bay entities argued that the Gardners’ claims against the  
15 Individual Defendants were barred as a matter of law, which required that the District  
16 Court apply the legal standards governing motions to dismiss under NRCP 12(b)(5).  
17 Under NRCP 12(b)(5), dismissal is appropriate “only if it appears beyond a doubt  
18 that [the plaintiffs] could not prove a set of facts which, if true, would entitle [the  
19 plaintiffs] to relief.” *Torres v. Nevada Direct Ins. Co.*, 131 Nev. Adv. Op. 54, 353  
20 P.3d 1203, 1210 (2015) (citing *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev.  
21 224, 227-28, 181 P.3d 670, 672 (2008)). When assessing a motion to dismiss for  
22 failure to state a claim upon which relief may be granted, a court must construe the  
23 pleadings liberally and draw every reasonable inference in favor of the non-moving  
24 party. *Lubin v. Kunin*, 117 Nev. 107, 110 n. 1, 17 P.3d 422, 425 (2001). All factual  
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1 allegations of the complaint must be accepted as true. *Vacation Village v. Hitachi*  
2 *Am.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994) (citing *Capital Mortgage Holding*  
3 *v. Hahn*, 101 Nev. 314, 315, 705 P.2d 126, 126 (1985)). In that regard, NRCP 8(a)  
4 provides that a pleading need only contain "a short and plain statement of the claim  
5 showing that the pleader is entitled to relief." *Chavez v. Robberson Steel Co.*, 94  
6 Nev. 597, 599, 584 P.2d 159, 160 (1978).<sup>3</sup>  
7

8  
9 **B. The District Court's Erroneous Denial Of The Gardners' Motion**  
10 **Warrants Extraordinary Writ Relief.**

11 "A writ of mandamus is available to compel the performance of an act that the  
12 law requires as a duty resulting from an office, trust or station." NRS 34.160.  
13 "Mandamus relief may also be proper to control an arbitrary or capricious exercise  
14 of discretion." *Halcrow, Inc. v. Eighth Judicial Dist. Court*, 129 Nev. Adv. Op. 42,  
15 302 P.3d 1148, 1151 (2013). "Writ relief will not be available when an adequate and  
16 speedy legal remedy exists." *Id.* "Whether a future appeal is sufficiently adequate  
17 and speedy necessarily turns on the underlying proceedings' status, the types of issues  
18 raised in the writ petition, and whether a future appeal will permit this court to  
19 meaningfully review the issues presented." *Id.* Here, this Court should invoke its  
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26 <sup>3</sup> In the underlying proceeding, the Cowabunga Bay entities did not assert that  
27 the Gardners' specific factual allegations against the Individual Defendants were  
28 insufficient to state a viable claim for negligence under NRCP 8(a) nor did the District  
Court render any such finding.

1 jurisdiction to consider the instant Writ Petition and grant the extraordinary relief  
2 requested for two separate reasons.

3 Initially, although the Nevada Supreme Court has never considered the issue  
4 of whether writ relief is appropriate to address the denial of a motion for leave to  
5 amend to assert new claims against new defendants, other courts including the  
6 California Supreme Court have held that “mandamus will lie when it appears the trial  
7 court has deprived a party of an opportunity to plead his cause of action or defense,  
8 and when extraordinary relief may prevent a needless and expensive trial and  
9 reversal.” *Taylor v. Superior Court of Los Angeles Cnty.*, 598 P.2d 854, 855 (Cal.  
10 1979); *Holtz v. Superior Court of the City and Cnty. of San Francisco*, 475 P.2d 441,  
11 443 n. 4 (Cal. 1970) (“Where it appears that the trial court has made a ruling which  
12 deprives a party of the opportunity to plead his cause of action or defense, relief by  
13 mandamus may be appropriate to prevent a needless and expensive trial and reversal);  
14 *In re City of Dallas*, 445 S.W.3d 456, 462-63 (Tex.Ct.App. 2014) (stating “[a]n  
15 improper order prohibiting a party from amending a pleading may be set aside by  
16 mandamus when as a result of denial of leave to amend a party’s ability to present a  
17 viable claim or defense at trial is vitiated or severely compromised[.]” but concluding  
18 that mandamus was not appropriate because, unlike the instant action, “discovery was  
19 complete [and] the trial court [had] conducted a significant portion of the trial.”).

20 In this case, the Gardners lack an adequate and speedy legal remedy to address  
21 the District Court’s erroneous denial of leave to amend. Indeed, in the absence of  
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1 extraordinary writ relief, the Gardners would be forced proceed to trial against the  
2 Cowabunga Bay entities and then appeal the District Court's denial of leave to amend  
3 irrespective of the result. Assuming this Court reversed the District Court's ruling  
4 on appeal, the Gardners would then be required to start the case over again in the  
5 District Court, conduct discovery on the direct claims against the Individual  
6 Defendants as well as the application of the alter ego doctrine to the Cowabunga Bay  
7 entities, and then proceed to a new trial on those issues. Suffice it to say, mandamus  
8 relief is warranted to avoid "a needless and expensive trial and reversal" especially  
9 where, as here, the parties are still conducting discovery and an expedient resolution  
10 will not disturb the District Court's trial setting.

11  
12 The second reason why the Court should invoke its jurisdiction to consider the  
13 instant Writ Petition is that "consideration of extraordinary writ relief is often  
14 justified where an important issue of law needs clarification and public policy is  
15 served by this court's invocation of its original jurisdiction." *MountainView Hosp.*  
16 *v. Eighth Judicial Dist. Court*, 128 Nev. Adv. Op. 17, 273 P.3d 861, 864 (2012); see  
17 also *Smith v. Eighth Judicial Dist. Court*, 123 Nev. 468, 474-75, 168 P.3d 731, 736  
18 (2013) (indicating that the Nevada Supreme Court will consider a writ petition when  
19 an important issue of law needs clarification and considerations of sound judicial  
20 economy and administration militate in favor of granting the petition).

21  
22 The Gardners' request for extraordinary writ relief implicates two important  
23 and unresolved issues of law that impact the public policy of this State. Simply put,  
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1 Nevada is generally referred as the "Delaware of the West" for its pro-business  
2 environment and was one of the first states to adopt a statutory scheme creating the  
3 limited liability company. Nevertheless, unlike the majority of other states in the  
4 country, Nevada does not have any case law addressing the issue of personal liability  
5 for members and/or managers of an LLC arising out of their own tortious conduct.  
6 Similarly, Nevada's courts have never ruled on whether the alter ego doctrine applies  
7 to LLCs. The absence of law in this area has led to uncertainty from courts and  
8 resulted in erroneous decisions like the Order. Accordingly, the Gardners submit that  
9 the Court should consider the instant Writ Petition to establish the limits of protection  
10 from liability for individual members and managers of LLCs and confirm that the  
11 alter ego doctrine applies to LLCs in the State of Nevada.  
12

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15 **C. The Gardners Are Entitled To Pursue Direct Claims Against The**  
16 **Individual Defendants Arising Out of Their Negligent Management**  
17 **And Operation Of Cowabunga Bay That Resulted In Leland's**  
18 **Injuries.**

19 In the lower court, the Cowabunga Bay entities relied exclusively on two Nevada  
20 statutes to support their argument that the Individual Defendants are wholly immune  
21 from liability for their own tortious conduct. GARD115-117. NRS 86.371 provides  
22 that "[u]nless otherwise provided in the articles of organization or an agreement signed  
23 by the member or manager to be charged, no member or manager of any limited-  
24 liability company formed under the laws of this State is individually liable for the debts  
25 and liabilities of the company." NRS 86.381 further provides that "[a] member of a  
26 limited-liability company is not a proper party to proceedings by or against the  
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1 company, except where the object is to enforce the member's right against or liability  
2 to the company."

3 What the Cowabunga Bay entities failed to recognize, however, is that the  
4 Gardners are not seeking to hold the Individual Defendants liable "for the debts and  
5 liabilities of the company," *see* NRS 86.371, nor is this action simply "against the  
6 company." *See* NRS 86.381. To the contrary, the Gardners requested leave to amend  
7 the complaint to hold the Individual Defendants personally liable for their own tortious  
8 conduct. In other words, the Gardners would be entitled to bring these claims for  
9 negligence against the Individual Defendants even if the Cowabunga Bay entities were  
10 not named defendants in the underlying action. Respectfully, the District Court failed  
11 to apprehend this distinction when it ruled that the Gardners' direct claims against the  
12 Individual Defendants were barred because "the Nevada Revised Statutes protect  
13 members of an LLC, not only from debts incurred by an LLC, but also from liabilities  
14 incurred by the LLC." GARD145.

15 At the outset, it is ironic that the Cowabunga Bay Defendants couched their legal  
16 analysis of this issue with a comparison to the law governing corporations in Nevada,  
17 *i.e.*, that "a corporation is a legal entity that exists separate and distinct from its  
18 shareholders, officers, and directors." GARD116-17. Indeed, despite the fact that NRS  
19 78.747, like NRS 86.371, states that "no stockholder, director or officer of a corporation  
20 is individually liable for a debt or liability of the corporation....[.]" this Court has  
21 expressly held that "[a]n officer of a corporation may be individually liable for any tort  
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1 which he commits..." *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1098, 901  
2 P.2d 684, 689 (1995); *see also Rosenthal v. Poster*, 2008 WL 4527859, \*3 (D.Nev.  
3 Sept. 30, 2008) ("Generally, a tortious act committed by a corporate officer, regardless  
4 of the fact he was acting on behalf of the corporation, is considered a personal  
5 wrongdoing, holding the officer himself personally liable."). Accordingly, contrary to  
6 the Cowabunga Bay entities' reliance on the law governing corporations, this Court's  
7 binding precedent clearly establishes that officers—the "managers" of a corporation—  
8 are individually liable for their own tortious acts committed on behalf of the  
9 corporation. The same principle should apply to LLCs.<sup>4</sup>

12  
13 The Nevada Supreme Court has not addressed direct liability against individuals  
14 relating to tortious conduct committed in their capacity as members or managers of an  
15 LLC in any published opinion. The overwhelming majority of federal and state courts  
16 that have considered the issue hold that, like corporate officers and directors, individuals  
17 may be held personally liable for torts committed in their capacity as members or  
18 managers of an LLC.  
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24 <sup>4</sup> Although statutory interpretation is not necessary to resolve this issue, the  
25 Gardners must point out that the Legislature drew a direct comparison between the  
26 language of NRS 78.747 and the section of the LLC bill that would eventually become  
27 NRS 86.371. GARD141 ("Mr. Fowler pointed out that [ ] section [310 of the limited  
28 liability company bill] stated 'they were not liable under a judgment, decree, or order  
of the court, for any debts, obligations or liabilities of the company,' which was exactly  
present corporate law.") (emphasis in original).

1 For example, the United States District Court for the District of Nevada refuted  
2 the argument advanced by the Cowabunga Bay entities in *In re Commercial Mortg.*  
3 *Co.*, 802 F.Supp.2d 1147, 1164-65 (D.Nev. 2011). There, the plaintiff brought a tort  
4 claim for conversion against the defendant LLC and two individual defendants that  
5 served as the LLC's managing members. *Id.* The United States District Court cited the  
6 analogous corporate principles referenced above and held that the managing members  
7 were personally liable for the tortious conduct of the LLC as follows:  
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10 *As managing members of Compass, Piskin and Blatt are personally*  
11 *liable for engaging in the conversion that plaintiffs proved was*  
12 *committed by Compass. See Pocahontas First Corp. v. Venture Planning*  
13 *Group, Inc.*, 572 F.Supp. 503, 508 (D.Nev. 1983) ("There is no doubt that  
14 an individual who commits a tort while acting in the capacity of a corporate  
15 officer may be held personally liable."); *Marino v. Cross Country Bank*,  
16 No. C.A.02-65-GMS, 2003 WL 503257, at \*7 (D.Del. Feb. 14, 2003)  
17 ("Corporate officers are liable for tortious conduct even if they were acting  
officially for the corporation in committing the tort. A corporate officer  
can be held personally liable for the torts he commits and cannot shield  
himself behind the corporation when he is a participant").

18 *Id.* at 1165 (emphasis added).

19 Numerous other courts have reached the same conclusion that members and  
20 managers are personally liable for their own tortious conduct committed on behalf of  
21 an LLC. *See, e.g., D'Elia v. Rice Dev., Inc.*, 147 P.3d 515, 524-25 (Utah Ct. App. 2006)  
22 ("We are persuaded by those authorities that hold that both limited liability members  
23 and corporate officers should be treated in a similar manner when they engage in  
24 tortious conduct. We therefore conclude that *Harrison's* imposition of personal liability  
25 on corporate officers who participate in a corporation's tortious acts [ ] also applies to  
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1 limited liability members or managers.”); *Rothstein v. Equity Ventures, LLC*, 299 A.2d  
2 472, 474 (N.Y.App.Div. 2002) (“We agree that members of limited liability companies,  
3 such as corporate officers, may be held personally liable if they participate in the  
4 commission of a tort in furtherance of company business.”); *Weber v. United States*  
5 *Sterling Sec., Inc.*, 924 A.2d 816, 825 (Conn. 2007) (“Accordingly, we conclude that  
6 although § 18-303(a) of the Delaware Code Annotated shields the defendants from  
7 personal liability based solely on their affiliation with Retail Relief, it does not shield  
8 them from personal liability for their own tortious conduct.”) (interpreting Delaware  
9 law); *Dzurilla v. All American Homes, LLC*, 2010 WL 559923, \*3 (E.D.Ky. Jan. 4,  
10 2010) (“[A] shareholder of a corporation or a member of an LLC can be held liable for  
11 its individual conduct, without regard to the limited liability status of the corporation or  
12 company. While mere status as a manager of an LLC will not subject a person to  
13 liability, the statute does not preclude liability for the manager’s own tortious  
14 conduct.”).<sup>5</sup>

21 <sup>5</sup> See also *Hoang v. Arbess*, 80 P.3d 863, 867 (Colo.Ct.App. 2003) (“While an  
22 officer of a corporation cannot be held personally liable for a corporation’s tort solely  
23 by reason of his or her official capacity, an officer may be held liable for his or her  
24 individual acts of negligence even though committed on behalf of the corporation,  
25 which is also held liable. The parties do not dispute that this principle applies equally  
26 to a manager of a limited liability company.”); *Equipoise PM LLC v. Int’l Truck and*  
27 *Engine Corp.*, 2007 WL 2228621, \*10 (N.D.Ill. July 31, 2007) (“As its plain language  
28 suggests, this provision will shield Price and Morton from liability if the only basis  
defendants have for the claims against them is their membership in Equipoise. If,  
however, defendants prove that Price or Morton assumed liability, or committed,  
authorized or ratified tortious acts while acting for Equipoise, then this provision  
provides them no protection.”); *Mbahaba v. Morgan*, 44 A.3d 472, 476 (N.H. 2012)



1 Legal commentators and treatises addressing this issue likewise confirm that a  
2 member or manager of a Nevada LLC can be held personally liable for their own  
3 tortious conduct. *See, e.g., Ltd. Liability Co.* § 14:38 (2015) (citing NRS 86.371 and  
4 NRS 86.381 and stating “[t]here are several important exceptions to the rule that  
5 members are not liable for the LLC’s debts and obligations. First, members are liable  
6 for their own tortious conduct, even when they act on the LLC’s behalf.”) (emphasis  
7 added); 3A Fletcher Cyc. Corp. § 1135 (“It is the general rule that an individual is  
8 personally liable for all torts the individual committed [ ]. This rule applies equally to  
9 torts committed by those acting in their official capacities as officers or agents of a  
10 corporation. It is immaterial that the corporation may also be liable. [ ]. *These rules*  
11 *have been applied to principals of a limited liability company.*”) (emphasis added).

12  
13 In addition to the analogous Nevada law on tort liability for corporate officers  
14 and the overwhelming weight of highly persuasive legal authority on this issue, the  
15 Gardners ask this Court to consider the practical effects of the District Court’s Order  
16 that members and managers of an LLC are completely immune from liability for their  
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22 (“When [ ] a member or manager commits or participates in the commission of a tort,  
23 whether or not he acts on behalf of his LLC, he is liable to third persons injured  
24 thereby.”); *Allen v. Dackman*, 991 A.2d 1216, 1228-29 (Md.Ct.App. 2010) (“These  
25 cases discuss tort liability for corporate officers and agents who personally  
26 committed, inspired, or participated in torts in the name of the corporation. We have  
27 not previously determined whether these same principles apply to members of LLCs.  
28 We agree, however, with other jurisdictions that have come to that conclusion.”);  
*Morris v. Cee Dee, LLC*, 877 A.2d 899, 908-09 (Conn.Ct.App. 2005) (“Furthermore,  
the law of this state permits the court to attach individual assets if a member of a  
limited liability company personally commits a tort.”).

own tortious conduct. A manager of an LLC could, for example, make fraudulent misrepresentations in order to contract with another business yet that same manager would be wholly immune from liability for his intentional misconduct. Similarly, a member of an LLC could operate a company vehicle while under the influence of alcohol to perform business on behalf of the LLC and severely injure an innocent third party, but that member would not face any liability for his wrongful conduct. Simply put, this Court cannot condone the District Court's ruling as it would permit members and managers of an LLC in Nevada to engage in intentional misconduct with impunity and hide behind the shield of the LLC, which, as is the case here, may be severely underinsured and undercapitalized. That cannot be the law. The Gardners, therefore, respectfully request that the Court reverse the District Court's erroneous ruling and issue a writ of mandamus compelling the District Court to grant the Gardners' Motion.

**D. The District Court Erred By Ruling That The Alter Ego Doctrine Does Not Apply To LLCs In The State Of Nevada.**

"Nevada has long recognized that although corporations are generally regarded as separate legal entities, the equitable remedy of 'piercing the corporate veil' may be available to a plaintiff in circumstances where it appears that the corporation is acting as the alter ego of a controlling individual." *LFC Mktg. Group, Inc. v. Loomis*, 116 Nev. 896, 902, 8 P.3d 84, 845 (2000).<sup>6</sup> "Indeed, the 'essence' of the alter ego

<sup>6</sup> The idea of "piercing the corporate veil" is an important distinction when contrasting the Gardners' direct tort claims for negligence against the Individual Defendants, on one hand, with their request to plead the alter ego doctrine against the

1 doctrine is to 'do justice' whenever it appears that the protections provided by the  
2 corporate form are being abused." *Id.* at 903, 8 P.3d at 845-46. For reasons detailed  
3 below, the Legislature codified the alter ego doctrine for corporations in 2001. *See*  
4 NRS 78.747(2).  
5

6 The Nevada Supreme Court has never expressly addressed whether the alter  
7 ego doctrine applies to LLCs. *See Webb v. Shull*, 128 Nev.Adv.Op. 8, 270 P.3d 1266,  
8 1272 n. 3 (2012) ("The parties assume that NRS 78.747, which is part of the statutory  
9 chapter governing corporations, applies to the alter ego assertion against Shull and  
10 Celebrate, an LLC. Accordingly, for purposes of this appeal, we likewise assume,  
11 without deciding, that the statute applies and analyze their alter ego arguments under  
12 that standard."). Although it did not specifically decide whether Nevada law on  
13 corporations applied to alter ego claims against an LLC, this Court cited two cases from  
14 the United States District Court for the District of Nevada in which the federal court  
15 recognized the application of the alter ego doctrine to LLCs in Nevada. *Id.*  
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22 Cowabunga Bay entities on the other. In point of fact, courts holding members or  
23 managers of an LLC liable for their own tortious conduct have made it abundantly clear  
24 that such a ruling does not require "piercing the corporate veil" under the alter ego  
25 doctrine. *See, e.g., D'Elia*, 147 P.3d at 524 ("Several courts and commentators make  
26 it clear that holding an officer or director personally liable for corporate torts in which  
27 they participate is distinct from the piercing the veil doctrine.") (listing cases and  
28 authorities); *Morris*, 877 A.2d at 908-09 ("Contrary to the individual defendant's  
assertion, the court did not pierce the corporate veil provided by the act when it  
attached his personal assets. The Court ordered a prejudgment attachment of his  
assets because it found that he, himself, had committed the tort of negligence.").

1 In *In re Giampetro*, the Honorable Bruce A. Markell considered "whether  
2 Nevada law would recognize 'alter ego' claims with respect to limited liability  
3 companies." 317 B.R. 841, 845 (Bankr.D.Nev. 2004). After analyzing the alter ego  
4 doctrine as it applies to corporations, the court concluded that it was "highly likely that  
5 Nevada courts would recognize the extension of the alter ego doctrine to members of  
6 limited liability companies." *Id.* at 846. The *Giampetro* court then found "Nevada  
7 courts would apply the same common law standards for alter ego liability to members  
8 of limited liability companies that they have placed on shareholders of corporations."  
9 *Id.* at 847-48 and n. 9 (listing cases standing for proposition that "the tests are the same  
10 for piercing the veil in a corporate or limited liability context").

14 In *Montgomery v. eTrepid Tech., LLC*, the Honorable Valerie P. Cooke  
15 conducted an extensive analysis of the nature of LLCs and noted that "an LLC borrows  
16 the characteristics of member protection from personal liability" from a corporation.  
17 548 F.Supp.2d 1175, 1180 (D.Nev. 2008). The federal court then listed a number of  
18 cases standing for the principle that federal and state courts have consistently applied  
19 corporate law to LLCs for the purpose of piercing the veil under the alter ego doctrine.  
20 *Id.* at 1180-81. Accordingly, the federal courts that have addressed the application of  
21 the alter ego doctrine to LLCs in Nevada have uniformly ruled that the doctrine does,  
22 in fact, apply.

26 The District Court, however, disregarded the foregoing authority from the  
27 United States District Court for the District of Nevada that was cited by this Court in  
28

1 Webb and instead relied on a Nevada Lawyer article written by a local attorney in  
2 November 2014 styled *Suing the Man Behind the Curtain: Can Nevada LLC*  
3 *Members be Liable Under the Alter Ego Doctrine*. GARD145, 169-71. Rather than  
4 relying on the reasoned opinions of well-respected federal jurists in the absence of  
5 binding authority from this Court, the District Court was apparently persuaded by the  
6 author's citation to *Dep't of Taxation v. DaimlerChrysler*, 121 Nev. 541, 119 P.3d  
7 135 (2005) to support the conclusion that "although the Nevada corporation statutes  
8 include an alter ego exception to the corporate protections, the LLC statutes do not  
9 contain a similar exception, creating a negative inference that the Nevada legislature  
10 did not intend for it to apply to LLCs." GARD145, 169-71.<sup>7</sup>

11 This conclusion—which was based on a general canon of statutory  
12 construction as opposed to any clear indication of the Legislature's intent—is directly  
13 contradicted by the underlying legislative history of Nevada's corporation statutes  
14 and LLC statutes. It is well settled that this Court will "only look beyond the plain  
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21 <sup>7</sup> In *DaimlerChrysler*, the Nevada Supreme Court addressed an alleged  
22 ambiguity in the Sales and Use Tax Act and stated the general rule of statutory  
23 construction that "omissions of subject matters from statutory provisions are  
24 presumed to have been intentional." 121 Nev. at 548, 119 P.3d at 139. Notably, this  
25 Court in *DaimlerChrysler* also examined the legislative history of the allegedly  
26 ambiguous statute and, more specifically, discussions held before the Assembly  
27 Committee on Taxation. *Id.* at 548-49, 119 P.3d at 139. Here, the Gardners submitted  
28 the legislative history of Chapter 86 of the Nevada Revised Statutes to the District  
Court wherein the Assembly Committee on Judiciary discussed whether the alter ego  
doctrine would apply to LLCs in the absence of an express statutory provision.  
GARD120-43. Nevertheless, the District Court ostensibly failed to consider the  
applicable legislative history despite its citation to *DaimlerChrysler* in the Order.

1 language [of a statute] if it is ambiguous or silent on the issue in question.” *Allstate*  
2 *Ins. Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009). Here, Nevada’s  
3 LLC statutes are silent on the application of the alter ego doctrine to LLCs, which  
4 requires an analysis of the Legislature’s intent. Indeed, “when a statute is ambiguous  
5 [or silent], the legislature’s intent is the controlling factor in statutory construction.”  
6 *Potter v. Potter*, 121 Nev. 613, 616, 119 P.3d 1246, 1248 (2005). Because  
7 “legislative intent is controlling, [the Court] look[s] to legislative history for  
8 guidance.” *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1302,  
9 148 P.3d 790, 793 (2006); see also *Baliotis v. Clark Cnty.*, 102 Nev. 568, 570, 729  
10 P.2d 1338, 1339-40 (1986) (“Limited resort to reports of legislative committee  
11 minutes is appropriate to clarify or interpret legislation that is of doubtful import or  
12 effect.”); *Chanos v. Nevada Tax Comm’n*, 124 Nev. 232, 241-43, 181 P.3d 675, 681-  
13 83 (2008) (considering legislative hearing minutes to determine the meaning of  
14 ambiguous term).

15  
16 Before turning to the legislative history of Nevada’s LLC statutes—which was  
17 submitted to, and apparently disregarded by, the District Court in the underlying  
18 proceedings—the Gardners will rely on Judge Markell’s analysis of why the  
19 Legislature’s codification of the alter ego doctrine for corporations does not create a  
20 “negative inference” about the application of the same to LLCs:

21  
22 If presented with the issue, this court believes it highly likely that Nevada  
23 courts would recognize the extension of the alter ego doctrine to  
24 members of limited liability companies. The varieties of fraud and  
25 injustice that the alter ego doctrine was designed to redress can be equally

1 exploited through limited liability companies. As recently stated by the  
2 Nevada Supreme Court, the 'essence' of the alter ego doctrine is to 'do  
3 justice' whenever it appears that the protections provided by the  
4 corporate form are being abused. With respect to limited liability  
5 companies, the 'protections' of limited liability provide the same sort of  
6 possibilities for abuse.

7 *Against this strong policy of preventing abuse of limited liability, the*  
8 *court discounts heavily any argument that Nevada's codification of the*  
9 *principles of alter ego liability for corporations in 2001 created a*  
10 *negative inference that the Nevada legislature intended to abrogate*  
11 *alter ego liability for limited liability companies. Although some states*  
12 *have explicitly provided for alter ego liability for limited liability*  
13 *companies, the sparse legislative history of the 2001 Nevada legislation*  
14 *indicates that legislators were interested in increasing corporate franchise*  
15 *fees, and were prepared to codify corporate alter ego liability as a price*  
16 *for that increase.*

17 *Nowhere in the legislative minutes or other scraps of legislative history,*  
18 *however, is there any indication of an intent to tighten or clarify alter*  
19 *ego liability for corporations while eliminating it for limited liability*  
20 *companies or any other limited liability entity (such as limited*  
21 *partnerships, limited-liability partnerships or limited liability limited*  
22 *partnerships). Indeed, such a course would be counterproductive, in that*  
23 *it would disfavor the creating of corporations, which would lessen overall*  
24 *corporate franchise fee revenues. The conclusion is thus drawn that the*  
25 *2001 legislation dealt only with corporations, and left untouched the law*  
26 *with respect to limited liability companies.*

27 *In re Giampetro*, 317 B.R. at 846-47 (internal citations to legislative history omitted)  
28 (emphasis added).<sup>8</sup>

29 <sup>8</sup> The Legislature enacted the statutory scheme governing LLCs (NRS Chapter  
30 86) in 1991. As such, the 2001 Legislature surely would have discussed the impact  
31 of codifying alter ego liability for corporations on LLCs if it intended to lessen or  
32 extinguish the doctrine's application to LLCs.

1 As evidenced by Judge Markell's thorough analysis, the Legislature's  
2 codification of the alter ego doctrine for corporations was wholly unrelated to LLCs  
3 and, therefore, this Court should not draw a negative inference from the fact that the  
4 Legislature did not pass the same statutory provision for LLCs. This is especially  
5 true when the legislative history behind the LLC statutes is taken into account as it  
6 is abundantly clear that the Legislature did not intend to exempt LLCs from alter ego  
7 liability by not specifically providing for the same in Chapter 86 of the Nevada  
8 Revised Statutes.  
9

10 Indeed, Assemblyman Gene T. Porter questioned whether the proposed  
11 language that eventually became NRS 86.371 would exclude LLCs from the alter ego  
12 doctrine. GARD 140-42. The drafter of the statutory scheme, John Fowler of the law  
13 firm Jones Vargas, explained that "even though the liability portion [of Chapter 86]  
14 was worded differently than that for corporations, he did not believe it provided any  
15 additional protection over what corporations now possessed under the law. *Equal*  
16 *protections for limited-liability companies and corporations had been the intent in*  
17 *drafting AB 655. He saw no reason the 'alter ego' doctrine could not be applied*  
18 *to the limited-liability companies and no reason why the corporate veil could not*  
19 *be pierced if the entity was ignored in the fashion done in corporations."*  
20

21 GARD141 (emphasis added). Assemblyman Robert M. Sader also addressed the  
22 issue of whether the alter ego doctrine would apply to LLCs as follows:  
23

24 Mr. Sader intervened to opine that conceptually, the alter-ego doctrine or  
25 piercing the corporate veil philosophically found the corporation was not  
26



1 a corporation, that it has instead been handled as the alter-ego of the  
2 persons owning the corporation. Therefore it was not a corporation and  
3 the owners were liable for the debts. *He felt it was entirely consistent*  
4 *with Section 310. In a limited-liability company the members and*  
5 *managers were not liable, the same as in a corporation where the*  
6 *directors, shareholders and officers were not liable. But if there was*  
7 *not a company because there was an alter-ego, and because the*  
8 *corporate veil had been pierced, then the owners and managers were*  
9 *personally liable. Mr. Fowler emphasized that was exactly the*  
10 *statement of doctrine the courts used. If the corporation's formalities*  
11 *and existence were persistently ignored, then it really was not a*  
12 *corporation. He opined there was no reason the same principle would*  
13 *not be applicable to a limited-liability company, and felt a court would*  
14 *agree.*

15 *Mr. Sader stated his opposition to the motion, saying he did not feel*  
16 *there was any change in current policy by creating the limited-liability*  
17 *company and that alter-egos and piercing the corporate veil could still*  
18 *be used as defenses.*

19 GARD142 (emphasis added).

20 The legislative history of Chapter 86, therefore, directly contradicts the  
21 negative inference referenced by the Nevada Lawyer article and adopted by the  
22 District Court. Indeed, the Legislature did not intend to limit the application of the  
23 alter ego doctrine to LLCs when it enacted Chapter 86 of the Nevada Revised  
24 Statutes. Moreover, as evidenced by Judge Markell's analysis of the legislative  
25 history from the 2001 legislative session, the Legislature did not intend to extinguish  
26 alter ego liability for LLCs by codifying the doctrine for corporations. In other  
27 words, the rationale cited by the Nevada Lawyer article and relied on by the District  
28 Court is simply wrong. As such, the District Court abused its discretion by denying

1 the Gardners' request for leave to plead allegations related to the alter ego doctrine,  
2 which warrants extraordinary writ relief.

3 **V. CONCLUSION.**

4  
5 Accordingly, this Court should grant the Petition for Writ of Mandamus in its  
6 entirety.

7 DATED this 19th day of July, 2016

8  
9 CAMPBELL & WILLIAMS

10 BY: /s/ Donald J. Campbell

11 DONALD J. CAMPBELL, ESQ. (#1216)

12 PHILIP R. ERWIN, ESQ., (#11563)

13 SAMUEL R. MIRKOVICH, ESQ. (#11662)

14 700 South Seventh Street

15 Las Vegas, NV 89101  
16  
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VERIFICATION

I, Donald J. Campbell, declare as follows:

1. I am one of the attorneys for Peter and Christian Gardner, on behalf of minor child, Leland Gardner.

2. I verify that I have read and compared the foregoing PETITION FOR WRIT OF MANDAMUS and that the same is true to my own knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

3. I, as legal counsel, am verifying the Petition because the questions presented are legal issues, which are matters for legal counsel.

4. I declare under the penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED this 19th day of July, 2016

/s/ Donald J. Campbell  
Donald J. Campbell, Esq. (#1216)

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the Nevada Rules of Appellate Procedure.

I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) as this brief was prepared in a proportionally spaced typeface using Times New Roman 14 pt font. I also certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) as it does not exceed thirty (30) pages.

Finally, I certify that the Appendix accompanying this brief complies with NRAP 21(4) and NRAP 30 in that the Appendix includes a copy of the District Court's order that is challenged, the pertinent parts of the record before the respondent judge, and the other original documents, which are essential to

.....

.....

1 understand the matter set forth in this Petition.

2 DATED this 19th day of July, 2016

3 CAMPBELL & WILLIAMS

4 BY: /s/ Donald J. Campbell

5 DONALD J. CAMPBELL, ESQ. (#1216)

6 PHILIP R. ERWIN, ESQ., (#11563)

7 SAMUEL R. MIRKOVICH, ESQ. (#11662)

8 700 South Seventh Street

9 Las Vegas, NV 89101

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 19th day of July 2016, I caused true and correct copies of the foregoing Petition for Writ of Mandamus to be delivered to the following counsel and parties:

VIA HAND DELIVERY:

Judge Jerry A. Wiese II  
Eighth Judicial District Court of Clark County, Nevada  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas, Nevada 89155

VIA ELECTRONIC AND U.S. MAIL:

Paul F. Eisinger, Esq.  
Alexandra B. McLoed, Esq.  
1100 E. Bridger Ave.  
Las Vegas, NV 89125

/s/ Lucinda Martinez  
An employee of Campbell & Williams

# **EXHIBIT 2**

# **EXHIBIT 2**

MINUTES OF THE  
ASSEMBLY COMMITTEE ON JUDICIARY

Sixty-sixth Session  
May 21, 1991

The Assembly Committee on Judiciary was called to order by Chairman Robert Sader at 8:12 a.m. on Tuesday, May 21, 1991, in Room 341 of the Legislative Building, Carson City, Nevada. Exhibit A is the Meeting Agenda, Exhibit B is the Attendance Roster.

MEMBERS PRESENT:

Mr. Robert M. Sader, Chairman  
Mr. Gene T. Porter, Vice Chairman  
Mr. Bernie Anderson  
Mr. John W. Bayley  
Mr. John C. Carpenter  
Mr. Joe Elliott  
Mr. Jim Gibbons  
Mr. William D. Gregory  
Mr. Warren B. Hardy  
Mr. Joseph Johnson  
Mr. John L. Norton  
Mr. William A. Petrak  
Mr. Scott Scherer  
Mr. Wendell P. Williams

STAFF MEMBERS PRESENT:

Frank Partlow, Research Analyst

OTHERS PRESENT:

John Hawley, Nevada Supreme Court  
Dr. Jacqueline Kirkland, Truckee Meadows Community College  
Carla R. Leveritt, Board for the Education and Counseling of  
Displaced Homemakers  
Helen Foley, Junior League of Las Vegas  
Bob Cavakis, Youth Services Division  
Bill Lewis, Chief Probation Officers  
Bob Calderone, Youth Services Division  
Lorne Malkiewich, Legislative Counsel Bureau  
John P. Fowler, Law Firm of Vargas & Bartlett

After the secretary called the roll, Mr. Sader asked for testimony on SJR 2.



Minutes of the Nevada State Legislature  
Assembly Committee on Judiciary  
Date: May 21, 1991  
Page: 11

might be beneficial on this legislation. He felt if they pursued adding the statement it would be done in the Senate. Mr. Sader mentioned bill drafters did not normally encourage adding legislative intent into the statutes. Mr. Scherer expressed there was some concern about the Indian gaming issue.

ASSEMBLYMAN SCHERER MADE A MOTION TO AMEND AND DO PASS AB 449.

ASSEMBLYMAN ANDERSON SECONDED THE MOTION.

THE MOTION TO AMEND AND DO PASS AB 449 CARRIED UNANIMOUSLY.

SENATE BILL 214 - Ratifies technical corrections made to NRS, Statutes of Nevada 1987 and Statutes of Nevada 1989.

ASSEMBLYMAN SCHERER MADE A MOTION TO DO PASS SB 214.

ASSEMBLYMAN JOHNSON SECONDED THE MOTION.

THE MOTION TO DO PASS SB 214 CARRIED UNANIMOUSLY.

ASSEMBLY BILL 655 - Revises laws governing corporations and similar organizations.

Mr. Gibbons summarized his concerns regarding AB 655 that it would make a significant policy change away from the traditional standards which corporate laws were currently addressed in Nevada. That standard addressed liability first to directors and away from the traditional business practice standard. AB 655 would allow a laundry list of considerations directors could take into view, excluding the traditional business judgment rule. Mr. Gibbons questioned why it was necessary to move away from the long-term standard used as precedence in many court decisions, as well as changing under Section 2, subsection 5, the burden of proof which under AB 655 appeared to favor directors, in a challenge by shareholders from a "preponderance of the evidence" to a more burdensome "clear and convincing" standard. Secondly, Mr. Gibbons stated in the section allowing shareholders to have a right of preemption on new issued shares, AB 655 moved away from the traditional "implied right" to one where that right was excluded except if it was specifically mentioned. That was the reverse of the current statutes. He expressed his concern the policy position for Nevada favored business and the corporation over the

Minutes of the Nevada State Legislature  
Assembly Committee on Judiciary  
Date: May 21, 1991  
Page: 12

shareholders and making shareholders now face a stiffer burden in challenging corporations.

Mr. John P. Fowler, of the law firm of Vargas and Bartlett in Reno and Las Vegas, testified the focus of AB 655 was a result of the takeover battles of the 1980s, which were waged in part in the markets and in part in the courts. When a takeover artist decided to perform a hostile takeover, he made a proposal and if not immediately accepted by the directors he often went directly to the shareholders and tendered an offer for their shares at a certain price. The directors then typically would fight it saying the price offered was far too low, which it usually was. The directors' strategies in either seeking to sell the company at a higher price, or in seeking not to sell the company at all, usually resulted in a lot more money per share for the shareholders if the company was sold. Alternatively, the company ended up in a somewhat different form after having to defend itself against the takeover artist, or the takeover artist would succeed, in which case it was guaranteed the company would be burdened with a tremendous amount of debt. The effects of the takeover battles of the 1980s had not necessarily been pro-shareholder value.

Mr. Fowler particularly mentioned that Section 2 of AB 655 allowed directors to consider other factors. The reason for that was the focus of the American securities markets seemed to be very short-term. Articles had been written stating the short-term thinking of American corporations had caused problems for American industries in numerous markets, whether automobiles, computers, or development of new technology. Focusing on tomorrow's stock price or quarterly results had not necessarily been good for the country. Section 2 allowed directors to consider other factors other than tomorrow's stock price or last quarter versus next quarter's earnings. It allowed the interests of other constituencies to be considered. Subsection 5 of that section provided for a "clear and convincing" evidence standard, which changed the normal evidence standard from "preponderance of the evidence." It raised the burden of proof to some degree when the duties and obligations of a director were being weighed in a court proceeding. Mr. Fowler stated subsections 3 and 4 were really a more critical part of AB 655 than was subsection 5. Subsections 3 and 4 dealt with the other constituency interests which directors could weigh. But subsection 5 provided some additional protection for directors in lawsuits that were often filed as a part of a takeover battle. If a takeover battle went away, the lawsuits did also. The importance

Minutes of the Nevada State Legislature  
Assembly Committee on Judiciary  
Date: May 21, 1991  
Page: 13

of a lawsuit in protecting shareholders was often subsidiary to the interests of the takeover artist who often filed them, or to the artist's affiliates. Mr. Fowler opined for that reason they had made it a part of the bill, and it was not simply that they wished to change the standard of proof, but it was part and parcel of a program to allow directors to consider other constituency interests and more long-range interests in making corporate decisions.

Mr. Fowler commented it amounted to a basic policy decision for the legislature and whether it felt a corporate board should be somewhat protected from lawsuits when it considered interests other than tomorrow's stock price or last quarter's earnings in making corporate decisions, and could the board look at more long-term interests and consider other constituencies to some extent. He said if the legislature wanted to make the burden of proof the same as it was for all other lawsuits, the guts of the bill would not be too adversely affected. Mr. Fowler reiterated the crucial part of Section 2 were subsections 3 and 4 concerning the board's ability to consider other constituencies.

As to preemptive rights, Mr. Fowler said AB 655 included that change because many other states had done the same thing under the Revised Model Business Corporation Act of 1984. It adopted an opt-in provision with respect to preemptive rights. He explained preemptive rights were a protective device for shareholders that permitted them to maintain their proportionate ownership interest, which was uniquely beneficial in small-held corporations such as family corporations, but was not useful in a publicly-held corporation. It was like cumulative voting in stockholder agreements, and it was useful in maintaining the percentage interest of each person in ownership.

Mr. Fowler said preemptive rights was something that should be carefully considered before being added to the corporate articles because it was uniquely suited to particular types of circumstances. He felt the Model Code had adopted the opt-in version which would, under AB 655, apply to all corporations formed after October 1, 1991, rather than the opt-out in which case it would be in the articles unless specifically stated to not be included. In addition to cumulative voting which allowed a voting scheme to maintain at least some representation on the board of directors for minority shareholders, preemptive rights would be included in that group of measures which could be taken to protect

Minutes of the Nevada State Legislature  
Assembly Committee on Judiciary  
Date: May 21, 1991  
Page: 14

shareholders in small holding situations. It was a change that a state going through a major overhaul of its corporate statutes tended to adopt in conformance with the Revised Model Act. Mr. Fowler stated that was not a major change because the statutory provision which was recommended (the Model Act approach) protected those rights if included in the articles. He felt "opt-in" was a better approach, but it was not crucial to the bill, even though he believed most jurisdictions were changing to the "opt-in" approach. The recommended amendments to AB 655 (Exhibit G) allowed existing corporations to continue their present scheme of having pre-emptive rights unless specifically excluded in the articles. All corporations formed after October 1, 1991, would be in a scheme whereby they would need to include pre-emptive rights in the articles in order to be governed thereby.

Mr. Johnson expressed his trouble with the policy statement in AB 655 and the necessity of the short-term view which was set by national monetary policy. He understood AB 655 sought to control the short-term view in a singularly protective way by management, acknowledging there had been obvious abuses, but he felt the method AB 655 used to protect against that was poor public policy which he disagreed with. He asked if the bill would be fundamentally damaged if some early sections were deleted.

Mr. Fowler responded AB 655 did many things and that was only one thrust for changes suggested by the corporate study which had been done. He felt shareholders under AB 655 were protected by the same devices they had enjoyed for a long time. As to the policy, there were good arguments to be made on both sides. However, shareholders had the power to vote out management, and it was power that had not been used enough in the past. Mr. Fowler believed in the future it would be used more, because large institutions that owned large blocks of stock in the largely held corporations were starting to understand they could no longer just sell the stock and get out of the company if they did not like management decisions. It was too difficult to sell easily and it affected the market tremendously. Many stockholders were starting to impact management decisions more and more. In that respect the system was self-correcting and the mechanisms were there for shareholders to control management if they chose to do so. In the narrow area of directors' duties and responsibilities, the subject of these legislative measures was the reaction to the use of lawsuits in takeover battles as another tactical device. When the takeover battle was over the lawsuits were dismissed. AB 655 provided some

Minutes of the Nevada State Legislature  
Assembly Committee on Judiciary  
Date: May 21, 1991  
Page: 15

protection to directors, and especially outside directors because they did not make much money from serving on the boards but usually did it for prestige, to further their own careers, or in retirement, and if they constantly had to risk their personal financial status in lawsuits then qualified people would not be found to fill the position of outside directors. Having good outside directors paying attention to what was going on in a corporation was critical. In order to sue a director, there had to be a substantial wrong committed where he had not used good business judgment in a material way. That was a protection Mr. Fowler thought a director ought to have and was a large part of the thrust behind those sections of AB 655. If Section 2 of AB 655 was deleted entirely, there were many other things the bill still accomplished, but Section 2 was an important section and he personally felt it should be passed.

Mr. Gibbons asked Mr. Fowler to explain what Section 2, subsection 3 on page 2, lines 4 and 5, did and what it prevented, and what other challenges could be raised that were not within the subsection. Mr. Fowler read, "This subsection does not create or authorize any causes of action against the corporation or its directors or officers." He said for instance if the board of directors decided to consider the workers in a factory which it thought it must close, typically as a result of a takeover, subsection 3 allowed the board of directors to consider the interests of the workers in that factory, along with all other considerations. The shareholders could not sue them simply because they considered the interest of the workers. Mr. Fowler said on the other hand, they had not wanted to create the situation where the workers by reason of that section could file an action against the directors because they considered only the interests of the shareholders in the decision to close the factory. The idea was to allow directors to consider other interests but not to provide the other interests another cause of action on which to sue the directors if the decision was to close the factory. The measure allowed a little greater latitude to directors, but did not provide stockholders another reason to sue.

ASSEMBLYMAN GIBBONS MADE A MOTION TO AMEND AND DO PASS AB 655 AS AMENDED, WITH THE FURTHER AMENDMENT TO DELETE SUBSECTION 5 OF SECTION 2.

ASSEMBLYMAN GREGORY SECONDED THE MOTION.

Minutes of the Nevada State Legislature  
Assembly Committee on Judiciary  
Date: May 21, 1991  
Page: 16

Mr. Petrak expressed concern about Section 2, line 22 on page 1, suggesting the wording be changed to "shall consider" instead of "may consider." Mr. Fowler stated one state had done that and it had been highly criticized in the academic press. That change would require directors to consider other constituency interests, rather than allowing them to do so. The whole idea of the bill was to give the directors the freedom to choose whether they wanted to consider those interests. Some would argue that no interests except the shareholders' should ever be considered, and if they were then the directors should be sued; corporate law in the past had always held that tradition. However, to compel the directors to consider other interests might be construed as considering them to the exclusion of the interests of the shareholders, the owners. Mr. Fowler strongly recommended the wording remain "may consider" to make sure the shareholders interests were properly protected and the directors gave proper consideration to the owners and did not focus exclusively on the interests of other constituencies.

ASSEMBLYMAN PORTER MADE A MOTION TO AMEND THE MAIN MOTION TO AB 655 BY DELETING SECTIONS 275 THROUGH 331 CONCERNING LIMITED-LIABILITY COMPANIES.

Mr. Porter explained Sections 276 through 331 provided all the advantages of a partnership as well as the total shield of doing business in the corporate form. In particular Section 310 on page 17, which summarized, "The members of a limited-liability company and the managers of a limited-liability company managed by a manager or managers are not liable under a judgment, decree or order of court, or in any other manner, for a debt, obligation or liability of the company." He said present corporate law prohibited the use of the corporate vehicle as a shield, and there was also the "alter ego doctrine" that said a person could be responsible for the debts and obligations of the corporation. Mr. Porter disagreed a statute could state that a court could not order a person or entity to be liable in any fashion for any debts, obligations or any liabilities of the company. He was sure people would use this to go out and make a lot of money and never have to pay its debts. Nevada would be only the fourth state in the country to consider the limited-liability company and consequently there was no body of case law yet developed. He was concerned with making Nevada a testing ground, especially with the knowledge of some businesses that had chosen to locate in Nevada in the past.

ASSEMBLYMAN JOHNSON SECONDED THE MOTION.

Minutes of the Nevada State Legislature  
Assembly Committee on Judiciary  
Date: May 21, 1991  
Page: 17

Mr. Fowler responded a limited-liability company would have the advantages of a partnership for tax purposes and some of the advantages of corporations for state law purposes, the most important of which was the limited liability of its owners and managers. Corporations provided limited liability for their stockholders, and most often shareholders were not liable for the debts of the company. Shareholders might lose their investment, but they could not be sued and their assets were not subject to any judgment against the company. Section 310 of AB 655 provided the same immunity to the limited-liability company. Mr. Fowler said even though the liability portion was worded differently than that for corporations, he did not believe it provided any additional protection over what corporations now possessed under the law. Equal protections for limited-liability companies and corporations had been the intent in drafting AB 655. He saw no reason the "alter ego doctrine" could not be applied to the limited-liability companies and no reason why the corporate veil could not be pierced if the entity was ignored in the fashion done in corporations. Even though piercing the corporate veil was difficult to prove, there was very good case law in that area in Nevada. Mr. Fowler opined those same standards would end up applying to limited-liability companies, but no one would know until some case law had developed. He asserted the limited liability protection in Section 310 was extremely important and was one reason for establishing the limited-liability company.

Mr. Porter pointed out the names had merely been changed: shareholders became members and directors became managers. Under Section 310 the immunity had been extended to everyone, directors, shareholders and everyone involved in the company, and further, everyone had immunity from the arm of the court. That was not the case in present corporate law. Mr. Fowler pointed out the section stated they were "not liable under a judgment, decree, or order of court, for any debts, obligations or liabilities of the company," which was exactly present corporate law. Mr. Porter asked Mr. Fowler if it was his testimony that a court of competent jurisdiction in Nevada could not under any circumstances order a director or shareholder to be liable for the debt of the corporation? Mr. Fowler responded, "No, because you have the alter-ego doctrine which is piercing the corporate veil." He declared the same statement, in effect, was contained in Chapter 78 of NRS with respect to shareholders, although different wording was used. The alter-ego doctrine could be used to circumvent the statutes under certain limited circumstances. Mr. Porter

Minutes of the Nevada State Legislature  
Assembly Committee on Judiciary  
Date: May 21, 1991  
Page: 18

summarized Mr. Fowler's testimony to mean the wording in Section 310 did not change the alter-ego doctrine despite the fact it specifically said a court could not order a member, shareholder, or director to do anything. Mr. Fowler stated he could not answer 100 percent either way because there was no case law.

Mr. Sader intervened to opine that conceptually, the alter-ego doctrine or piercing the corporate veil philosophically found the corporation was not a corporation, that it had instead been handled as the alter-ego of the persons owning the corporation. Therefore it was not a corporation and the owners were liable for the debts. He felt that was entirely consistent with Section 310. In a limited-liability company the members and managers were not liable, the same as in a corporation where the directors, shareholders and officers were not liable. But if there was not a company because there was an alter-ego, and because the corporate veil had been pierced, then the owners and managers were personally liable. Mr. Fowler emphasized that was exactly the statement of doctrine the courts used. If the corporation's formalities and existence were persistently ignored, then it really was not a corporation. He opined there was no reason the same principle would not be applicable to a limited-liability company, and felt a court would agree.

Mr. Sader stated his opposition to the motion, saying he did not feel there was any change in current policy by creating the limited-liability company and that alter-egos and piercing the corporate veil could still be used as defenses. The limited-liability company was a very helpful tool to combine the concepts of partnerships and corporations which allowed new types of business entities without changing relationships to third party creditors.

Mr. Johnson agreed with Mr. Porter the absence of case law in the area of limited-liability companies raised many questions. He understood the arguments for establishing the mechanism, but felt Nevada should wait and possibly address it in the future, and enacting it now was premature.

Mr. Scherer asked if it was believed the availability of limited-liability companies would bring additional companies to Nevada. Mr. Fowler answered he felt that would happen because it provided an additional vehicle which would allow those who wished to form a company to choose a Nevada venue because of the choice of a limited-



Minutes of the Nevada State Legislature  
Assembly Committee on Judiciary  
Date: May 21, 1991  
Page: 19

liability company or a corporation. Fees would be collected by the Secretary of State for limited-liability companies as they were for corporations.

Mr. Norton mentioned his entire career was spent in economic business development, and after reviewing AB 655 and limited-liability companies, felt it would help bring more diversified companies to Nevada.

THE MOTION TO AMEND THE MAIN MOTION TO AB 655 TO DELETE SECTIONS 275 THROUGH 331 PERTAINING TO LIMITED-LIABILITY COMPANIES FAILED FOR LACK OF A MAJORITY. VOTING YES WERE ASSEMBLYMEN GREGORY, JOHNSON AND PORTER. VOTING NO WERE ASSEMBLYMEN ANDERSON, BAYLEY, CARPENTER, ELLIOTT, GIBBONS, HARDY, NORTON, PETRAK, SCHERER, AND SADER. ASSEMBLYMAN WILLIAMS WAS ABSENT.

THE MOTION TO AMEND AND DO PASS AB 655 AS AMENDED, WITH THE FURTHER AMENDMENT TO DELETE SUBSECTION 5 OF SECTION 2 CARRIED BY A MAJORITY OF THOSE PRESENT. VOTING NO WAS ASSEMBLYMAN PORTER; ASSEMBLYMAN WILLIAMS WAS ABSENT.

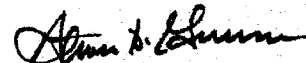
ASSEMBLY BILL 715 - Restricts expenditure of money appropriated to counties for special supervision programs.

Mr. Sader mentioned no one from the counties had been available to testify the previous day on AB 715, but since that time representatives of the Nevada Association of Counties, Clark County and Washoe County, had all said there was no opposition to the bill.

ASSEMBLYMAN ANDERSON MADE A MOTION TO DO PASS AB 715.

ASSEMBLYMAN PETRAK SECONDED THE MOTION.

THE MOTION TO DO PASS AB 715 CARRIED UNANIMOUSLY BY THOSE PRESENT.



CLERK OF THE COURT

1 **RPLY**

2 **THORNDAL ARMSTRONG DELK**

3 **BALKENBUSH & EISINGER**

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17 Attorneys for Defendants,

18 **HENDERSON WATER PARK, LLC dba**

19 **COWABUNGA BAY WATER PARK,**

20 **WEST COAST WATER PARKS, LLC,**

21 **DOUBLE OTT WATER HOLDINGS, LLC**

22 **DISTRICT COURT**

23 **CLARK COUNTY, NEVADA**

24 **PETER GARDNER and CHRISTIAN**  
25 **GARDNER, on behalf of minor child, LELAND**  
26 **GARDNER,**

27 **Plaintiffs,**

28 **vs.**

29 **HENDERSON WATER PARK, LLC dba**  
30 **COWABUNGA BAY WATER PARK, a**  
31 **Nevada limited liability company; WEST**  
32 **COAST WATER PARKS, LLC, a Nevada**  
33 **limited liability company; DOUBLE OTT**  
34 **WATER HOLDINGS, LLC, a Utah limited**  
35 **liability company; DOES I through X, inclusive;**  
36 **ROE CORPORATIONS I through X, and ROE**  
37 **Limited Liability Company I through X,**  
38 **inclusive,**

39 **Defendants.**

CASE NO. A-15-722259-C

DEPT. NO. XXX

**REPLY IN SUPPORT OF MOTION FOR**  
**SUMMARY JUDGMENT AS TO**  
**CLAIMS AGAINST DEFENDANTS**  
**WEST COAST AND DOUBLE OTT**

Date of Hearing: Sept. 13, 2016

Time of Hearing: 9:00 a.m.

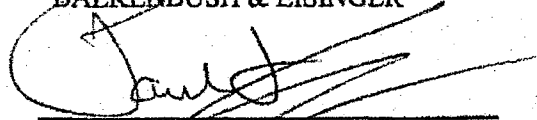
40 **Defendants, HENDERSON WATER PARK, LLC dba COWABUNGA BAY WATER**  
41 **PARK, WEST COAST WATER PARKS, LLC (hereinafter "West Coast"), DOUBLE OTT**  
42 **WATER HOLDINGS, LLC (hereinafter "Double OTT"), (also collectively "Defendants" or the**  
43 **"Water Park Defendants"), by and through their counsel of record, THORNDAL,**

1 ARMSTRONG, DELK, BALKENBUSH & EISINGER, do herein submit their Reply in  
2 Support of Motion for Summary Judgment as to Claims against Defendants West Coast and  
3 Double OTT in the above-entitled action pursuant to Nevada Rules of Civil Procedure 56, and  
4 Nevada Revised Statutes §§86.371 and 86.381.

5 This Reply is made and based upon all of the papers and pleadings on file herein, the  
6 Points and Authorities hereinafter to follow, and such oral argument as this Honorable Court  
7 may entertain at a hearing of the subject Motion, if so desired.

8 RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of September, 2016.

9 THORNDAL, ARMSTRONG, DELK,  
10 BALKENBUSH & EISINGER

11   
12 PAUL F. EISINGER, ESQ.  
13 Nevada Bar No. 1617  
14 ALEXANDRA B. McLEOD, ESQ.  
15 Nevada Bar No. 8185  
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17 Las Vegas, NV 89125  
18 Attorneys for Defendants,  
19 HENDERSON WATER PARK, LLC dba  
20 COWABUNGA BAY WATER PARK,  
21 WEST COAST WATER PARKS, LLC,  
22 DOUBLE OTT WATER HOLDINGS, LLC  
23  
24  
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POINTS & AUTHORITIES

I. NRS 86.381 PROTECTS MEMBERS OF LLC'S AND SUPPORTS SUMMARY JUDGMENT AS TO WEST COAST AND DOUBLE OTT

Pursuant to Plaintiffs' footnote 2, there are no disputed facts bearing on the question of whether West Coast and Double OTT are proper defendants in the case at bar. Nevertheless, Plaintiffs' insist that they are not making any attempt to pierce the statutory protections to members of LLCs, but to hold these LLCs liable for their own allegedly tortuous acts and "personal wrongdoings." Plaintiffs mistakenly set forth that they would be "entitled to bring these claims for negligence against West Coast and Double Ott even if the Cowabunga Bay entities were not named defendants in the underlying action." (Opposition at 4:21-23.)

Importantly, this very same issue has already been decided in this very same case. (See this Court's July 5, 2016 Order Denying Plaintiffs' Motion for Leave to Amend Complaint, attached hereto as EXHIBIT A; hearing transcript attached as EXHIBIT B). An issue becomes the law of the case only if presented, considered, and deliberately decided. *Sherman Gardens Co. v. Longley*, 87 Nev. 558, 565, 491 P.2d 48, 53 (1971).

"All the propositions assumed by the court to be within the case, and all questions *presented* and *considered*, and deliberately decided by the court, leading up to the final conclusion reached, are as effectually passed upon as the ultimate questions solved. The judgment is authority upon all points assumed to be within the issues which the record shows the court *deliberately considered* and *decided* in reaching it."

*State of Nevada v. Loveless*, 62 Nev. 312, 319, 150 P.2d 1015, 1018 (1944) (internal citations omitted) (emphasis supplied) (cited with approval in *Sherman Gardens Co. v. Longley*, 87 Nev. 558, 565, 491 P.2d 48, 53 (1971)). In deciding to prohibit Plaintiffs' from amending their complaint to add individual defendants, this Court already considered the questions of absolute protections of members of an LLC from liabilities incurred by the LLC, and the lack of any alter ego exception to the LLC statutes. In fact, Plaintiffs cite the exact same case law as they did when the issue was previously before the Court. (Compare Plaintiffs' Reply in Support of Motion for Leave to File Amended Complaint, filed June 9, 2016, at pp. 5-8 with Plaintiffs' Opposition to Motion for Summary Judgment as to Claims against Defendants West Coast and

1 Double OTT, filed August 29, 2016, at pp. 6-9.) Following the Court's June 16, 2016 hearing  
2 on this issue. His Honor took the matter under advisement and the record therefore reflects that  
3 the Court "deliberately considered and decided" these exact same issues.

4 Despite exhaustive briefing, extensive oral argument, and this Court's deliberation on  
5 these issues, Plaintiffs continue to ignore the plain and unambiguous meaning of NRS Chapter  
6 86. Our Nevada Supreme Court instructed in *Weddell v. H2O, Inc.*, 271 P.3d 743, 748 (Nev.  
7 2012) that "[l]imited-liability companies (LLCs) are business entities created 'to provide a  
8 corporate-styled liability shield with pass-through tax benefits of a partnership.'" (citing *White*  
9 *v. Longley*, 2010 MT 254, 358 Mont. 268, 244 P.3d 753, 760 (Mont. 2010); *Gottsacker v.*  
10 *Monnier*, 2005 WI 69, 281 Wis. 2d 361, 697 N.W.2d 436, 440 (Wis. 2005) (stating that "[f]rom  
11 the partnership form, the LLC borrows characteristics of informality of organization and  
12 operation, internal governance by contract, direct participation by members in the company, and  
13 no taxation at the entity level. *From the corporate form, the LLC borrows the characteristic of*  
14 *protection of members from investor-level liability.*" (internal citation omitted) (emphasis  
15 added)). The protection of LLC members from investor-level liability was codified at NRS  
16 86.381: "A member of a limited-liability company is not a proper party to proceedings by or  
17 against the company, except where the object is to enforce the member's right against or liability  
18 to the company."

19 Substituting the names of the parties in interest into that statute drives home the point:  
20 "A member [West Coast or Double OTT] of a limited-liability company [Henderson Water  
21 Park, LLC] is not a proper party to proceedings ~~by or~~ against the company [Henderson Water  
22 Park, LLC]..." Compare NRS 86.381. Plaintiffs cannot argue with a straight face that this  
23 lawsuit for Leland's non-fatal drowning at Cowabunga Bay is not a "proceeding against  
24 Henderson Water Park, LLC." Yet, what Plaintiffs are asking this Court to do is render the  
25 statute meaningless and usurp the role of legislator to re-write the statutes. As it stands, the  
26 member-LLCs are not proper parties under the plain meaning of the statute.

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1 **II. NRS 86.371 AND THE UNDISPUTED FACTS FURTHER SUPPORT**  
2 **SUMMARY JUDGMENT AGAINST PLAINTIFFS' DIRECT CLAIMS**

3 Plaintiffs' alternate argument – that they are entitled to bring these claims for negligence  
4 directly against West Coast and Double OTT even if Cowabunga Bay were not named – is  
5 misguided when viewed in light of NRS 86.371 and the factual record in the case at bar. NRS  
6 86.371 makes it clear that, “[N]o member or manager of any LLC formed under the law of this  
7 State is individually liable for the debts or liabilities of the company.” Again substituting the  
8 names of the parties in interest into this statute is instructive: “No member or manager [West  
9 Coast or Double OTT] of any LLC formed under the law of this State [Henderson Water Park,  
10 LLC] is individually liable for the debts or liabilities of the company [Henderson Water Park,  
11 LLC].” Under the absolute protections of NRS Chapter 86, there is simply no basis to break  
12 through the protections of Henderson Water Park, LLC to maintain a direct action against West  
13 Coast or Double OTT.

14 Should the Court have any inclination to consider Plaintiffs' direct claims as falling  
15 outside the scope of NRS Chapter 86, any such direct claims are solidly refuted by the  
16 undisputed factual record in this lawsuit. Plaintiffs' allegations of negligence in this matter are  
17 clearly stated in the Complaint as follows:

18 *Defendants breached their duties to Plaintiffs when they failed to provide*  
19 *adequate lifeguard coverage and otherwise failed to take reasonable steps to*  
*protect Leland from drowning.*

20 *See Complaint on file herein at p. 7, ll 7-8.* However both West Coast's and Double OTT's  
21 answers to interrogatories reveal their lack of involvement in the daily operations of the water  
22 park:

23 **INTERROGATORY NO. 3:**

24 Identify and set forth in detail West Coast's policies and procedures in any  
25 way related to the operation of the Wave Pool, including but not limited to lifeguard  
26 staffing, from April 1, 2013 through the present.

25 **RESPONSE TO INTERROGATORY NO. 3:**

26 West Coast is simply an owner/investor in Henderson Water Park,  
27 LLC and has no involvement in the policies, procedures or daily operations  
28 of Cowabunga Bay Water Park.

\*\*\*

**INTERROGATORY NO. 3:**

Identify and set forth in detail Double Ott's policies and procedures in any way related to the operation of the Wave Pool, including but not limited to lifeguard staffing, from April 1, 2013 through the present.

**RESPONSE TO INTERROGATORY NO. 3:**

Double OTT is simply an owner/investor in Henderson Water Park, LLC and has no involvement in the policies, procedures or daily operations of Cowabunga Bay Water Park.  
(See EXHIBITS C & D, attached.)

Likewise, the undisputed and unrefuted testimony of Cowabunga Bay General Manager Shane Huish conclusively establishes that no members of the LLC, neither West Coast nor Double OTT, took any role in the operations of the water park and that he, as an employee of Henderson Water Park, LLC, unilaterally made all such operational decisions:

BY MR. CAMPBELL:

Q. So the most that you would have there on any given day, irrespective of the amount of people, would be seven persons would be designated --

A. Correct.

Q. -- as lifeguards? Okay. And once again, that was your unilateral decision, correct?

A. Yes.

Q. And you accept responsibility for that?

MR. EISINGER: Object to the form. You can answer.

BY MR. CAMPBELL:

Q. Is that "yes"?

A. Yes.

Q. Okay. And what was the management committee's position on that? Did they agree with you in that regard?

A. They weren't aware of it.

Q. They weren't aware of it?

A. No.

Q. Okay. Why weren't they aware of it?

A. Because they are not involved in that sort of thing, the day-to-day stuff like that.

Q. Why aren't they? Isn't that their job?

A. Which management are you talking about?

Q. The management committee, the owners that sit on the management committee that you answer to and you are responsible to.

MR. EISINGER: Object to the form. Go ahead.

THE WITNESS: No, they are not involved in the day-to-day operation. They don't know how many people are doing cashiers or guarding or -- that's my job.

BY MR. CAMPBELL:

Q. Well, why aren't they involved in that? In, for example, not necessarily cashiers, but life and death matters such as lifeguards, why have they exhibited no interest in being involved in that process?

A. Well --

MR. EISINGER: Object to the form.

THE WITNESS: They are just investors. They are not involved in doing those sort of things.

///

BY MR. CAMPBELL:

Q. You understand that they are members of the management committee, right?

A. Well, I think it's a management of the partnerships, not of the park.

Q. So they have nothing to do with the management of the park at all?

A. No.

Q. But that's not what your documents say, is it?

A. I'm, I'm not sure about that. But, no, they are not involved in the day-to-day operation. The management committee votes on things if we are going to sell the park or if we're going to divide the partnerships or...

(Deposition of Shane Huish, taken March 22, 2016, attached as EXHIBIT E, at 156:15-158:25) (emphases added)

Plaintiffs concede that there is no Nevada case on point. (Opposition at 6:3.) Plaintiffs are eager to point out all of the federal case law and case law from other states because there's no Nevada state case law on this point. Yet, the creation of business entities is strictly a state function, and the nuisances and differences from state to state are meaningful and significant. States make intentional decisions in their statutory constructions to lure businesses to their state, and Nevada and Delaware are both very popular states for business formation precisely because of those protections. Plaintiffs would do away with all of those protections in order to allow them to maintain their suit against the members of a Nevada LLC. Plaintiffs repeat that they have brought direct claims against the member-LLCs but can offer no factual basis to support those claims, as required by NRCP 11, especially in light of the undisputed evidence above. Plaintiffs' interpretation of the Nevada statutes would do away with the statutory protections in Chapter 86 that were specifically intended to protect the LLCs, and its members.

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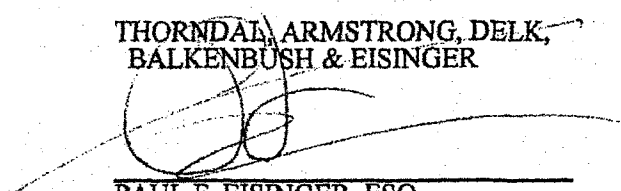


1 **III. CONCLUSION**

2 This Court has previously ruled in favor of upholding the protections to members of  
3 LLCs, making that the law of the case. Defendants respectfully request that the Court extend  
4 those protections by releasing West Coast and Double OTT via summary judgment, in  
5 accordance with NRS 86.381.

6 RESPECTFULLY SUBMITTED this 8<sup>TH</sup> day of September, 2016.

7 THORNDAL ARMSTRONG, DELK,  
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21 DOUBLE OTT WATER HOLDINGS, LLC  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b)(2)(D) and EDCR 7.26(a)(4) I hereby certify that on the 8th day of September, 2016, I served a copy of the above and foregoing **REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO CLAIMS AGAINST DEFENDANTS WEST COAST AND DOUBLE OTT** to the following parties via electronic service through the Eighth Judicial District Court's Odyssey E-File and Service System:

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# **EXHIBIT A**