

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

PETER GARDNER AND CHRISTIAN  
 GARDNER, ON BEHALF OF MINOR  
 CHILD, LELAND GARDNER,

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 COURT JUDGE

and

HENDERSON WATER PARK, LLC DBA  
 COWABUNGA BAY WATER PARK, A  
 NEVADA LIMITED LIABILITY  
 COMPANY; WEST COAST WATER  
 PARKS, LLC, A NEVADA LIMITED  
 LIABILITY COMPANY; and DOUBLE  
 OTT WATER HOLDINGS, LLC, A UTAH  
 LIMITED LIABILITY COMPANY,

Real Parties in Interest

PETER GARDNER AND CHRISTIAN  
 GARDNER, ON BEHALF OF MINOR  
 CHILD, LELAND GARDNER,

Appellants,

v.

HENDERSON WATER PARK, LLC dba  
 COWABUNGA BAY WATER PARK, A  
 NEVADA LIMITED LIABILITY  
 COMPANY; WEST COAST WATER

Case No.: 70823

Electronically Filed  
 Nov 09 2016 01:04 p.m.  
 Elizabeth A. Brown  
 Clerk of Supreme Court

Case No.: 71562

PARKS, LLC, A NEVADA LIMITED )  
LIABILITY COMPANY; AND DOUBLE )  
OTT WATER HOLDINGS, LLC, A UTAH )  
LIMITED LIABILITY COMPANY, )  
Respondents. )

**PETITIONERS’/APPELLANTS’ MOTION TO CONSOLIDATE APPEAL  
WITH PENDING ORIGINAL WRIT PROCEEDING  
AND TO REVISE BRIEFING**

Petitioners/Appellants Peter and Christian Gardner, on behalf of minor child,  
Leland Gardner, through their undersigned counsel, hereby submit the following  
Motion to Consolidate Appeal with Pending Original Writ Proceeding and to  
Revise Briefing.

**POINTS AND AUTHORITIES**

**I. INTRODUCTION**

This case arises from the severe non-fatal drowning of six-year old Leland  
Gardner on May 27, 2015 in the wave pool at the Cowabunga Bay water park in  
Henderson, Nevada. On July 19, 2016, the Gardners filed an original writ  
proceeding in the Supreme Court regarding the denial of their Motion for Leave to  
File Amended Complaint wherein the Gardners sought to assert direct claims for  
negligence against seven (7) individuals who served on the Management Committee  
of Henderson Water Park, LLC (“HWP”). *See Gardner v. Eighth Judicial Dist.*  
*Court*, Supreme Court Case No. 70823. More specifically, the district court denied  
the Gardners’ request for leave on grounds that LLC members and managers are

1 completely immune from liability under NRS 86.371 and NRS 86.381 despite the  
2 existence of abundant legal authority standing for the principle that a member or  
3 manager of a limited liability company can be held liable for tortious acts in which  
4 they personally participate, direct or otherwise ratify.<sup>1</sup>  
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6 On October 10, 2016, the district court granted Defendants' Motion for  
7 Summary Judgment as to Defendants West Coast Water Parks, LLC and Double Ott  
8 Water Holdings, LLC on grounds that the member-LLCs of HWP are similarly  
9 immune from any liability under NRS 86.371 and NRS 86.381. After the district  
10 court granted NRCP 54(b) certification, the Gardners commenced the instant appeal,  
11 which involves the exact same legal issue as their pending writ petition referenced  
12 above.  
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15 Because the Gardners' writ proceeding and appeal involve the identical legal  
16 issue (as well as the same facts and parties), the Gardners hereby seek consolidation  
17 of the two matters. Moreover, the briefing related to the Gardners' Petition for Writ  
18 of Mandamus is complete, which obviates the need for duplicative and time-  
19 consuming briefing regarding the common legal issue presented by the instant  
20 appeal. In the interests of speed, efficiency, and cost-effectiveness, therefore, the  
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26 <sup>1</sup> The Gardners likewise sought leave to plead allegations related to the alter  
27 ego doctrine against the member-LLCs and individual managers of HWP. The  
28 district court also denied that request on grounds that the alter ego doctrine does not  
apply to LLCs. The writ proceeding addresses this issue, which is the only  
substantive difference between it and this appeal.

Gardners request that the Court dispense with the necessity of any further briefing related to this appeal.

## II. ARGUMENT

### A. Consolidation Of The Appeal And Writ Proceeding Is Appropriate As Both Matters Involve The Identical Legal Issue.

This Court has repeatedly stated that consolidation is proper where pending appeals or writ petitions involve the same legal issue. *See, e.g., Bair v. Berry*, 86 Nev. 26, 28, 464 P.2d 469, 470 (1970) (“The appeal and writ were consolidated since the issue is common to each.”); *Shelton v. Lamb*, 85 Nev. 618, 619, 460 P.2d 156, 157 (1969) (“We have consolidated these appeals because they present the same issues.”); *Prieur v. D.C.I. Plasma Ctr. of Nevada, Inc.*, 102 Nev. 472, 473, 726 P.2d 1372, 1372 (1986) (“Because these appeals present identical issues and similar facts, we hereby consolidate them for disposition.”); *Taylor v. Taylor*, 105 Nev. 384, 385 n. 1, 775 P.2d 703, 703 n. 1 (1989) (“We have consolidated these cases for disposition on appeal because they involve identical issues of law.”).

Here, the Gardners’ writ proceeding and appeal involve the identical legal issue: whether NRS 86.371 and NRS 86.381 constitute a complete bar to liability against HWP’s member-LLCs and individual managers where the Gardners alleged that those member-LLCs and individual managers personally committed the tort of negligence by authorizing, directing, ratifying and participating in the illegal conduct that caused Leland Gardner’s injuries. In addition, the Gardners’ writ proceeding and appeal involve the same parties and underlying facts. As a result, there is no question

1 that consolidation is appropriate under these circumstances especially when the same  
2 panel of the Court should decide the common legal issue.

3 **B. The Court Should Dispense With Any Additional, Repetitive**  
4 **Briefing Related To The Appeal Because The Parties' Respective**  
5 **Legal Positions Are Fully Briefed In The Writ Proceeding.**

6 The parties completed the briefing related to the Gardners' Petition for Writ  
7 of Mandamus on November 7, 2016, and that proceeding is now ripe for resolution.  
8 *See* Docket, *Gardner v. Eighth Judicial Dist. Court*, Supreme Court Case No. 70823.  
9 In that briefing, the parties detailed their respective legal arguments as to whether  
10 Nevada's LLC statutes protect members and managers from personal liability  
11 arising out of their own tortious conduct. In addition, the Gardners submitted the  
12 relevant materials from the district court related to the motion for summary  
13 judgment including the underlying briefing, hearing transcript, and order. Because  
14 the parties already briefed the legal issue presented by the instant appeal in the writ  
15 proceeding, the Gardners respectfully submit that no further briefing is required  
16 unless the Court desires additional information on a question it finds unique to the  
17 order granting summary judgment. Such an order will promote the speedy and  
18 efficient resolution of the writ proceeding and appeal pursuant to NRAP 1(c).  
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1 **III. CONCLUSION**

2 Based on the foregoing, the Gardners respectfully request that the Court  
3 consolidate this appeal with the original writ proceeding (Supreme Court Case No.  
4 70823), and further order that the parties are not required to submit additional briefing  
5 unless the Court desires additional information on a question it finds unique to the  
6 order granting summary judgment.  
7

8 DATED this 9th day of November, 2016.  
9

10 CAMPBELL & WILLIAMS

11 By /s/ Donald J. Campbell

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## CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 9th day of November 2016, I caused true and correct copies of the foregoing Motion to Consolidate Appeal with Pending Original Writ Proceeding and to Revise Briefing to be delivered to the following counsel and parties:

VIA ELECTRONIC AND U.S. MAIL:

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