

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

2           PETER GARDNER and CHRISTIAN  
3           GARDNER, on behalf of minor child,  
4           LELAND GARDNER,

5                                   Appellants,

6           vs.

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

17                                   Respondents.

  Electronically Filed  
CASE NO. 71652                                   Nov 22 2016 09:02 a.m.  
Dist Ct. Case No. A722259  
  Elizabeth A. Brown  
  Clerk of Supreme Court

**OPPOSITION TO**  
**PETITIONERS'/**  
**APPELLANTS' MOTION**  
**TO CONSOLIDATE**  
**APPEAL WITH PENDING**  
**WRIT PROCEEDING & TO**  
**REVISE BRIEFING**

18           Respondents Henderson Water Park, LLC dba Cowabunga Bay Water Park,  
19           West Coast Water Parks, LLC, and Double OTT Water Holdings, LLC, through  
20           their counsel of record, the law firm of THORNDAL ARMSTRONG DELK  
                  BALKENBUSH & EISINGER, do herein submit the following Opposition to  
                  Petitioners'/Appellants' (hereinafter "Plaintiffs") Motion to Consolidate this  
                  Appeal (Case No. 71652) with the pending Writ Proceeding (Case No. 70823).

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1 **POINTS & AUTHORITIES**

2 **I. INTRODUCTION**

3 The underlying lawsuit was brought by Peter and Christian Gardner on  
4 behalf of their son, Leland Gardner. Leland was a six-year-old kindergarten  
5 student who was not wearing a life vest at the time he was rescued from the deep  
6 end of the wave pool at the Cowabunga Bay Water Park on May 27, 2015.  
7 Plaintiffs' July 28, 2015 Complaint named Henderson Water Park, LLC which  
8 does business as Cowabunga Bay, and oversees the park's operations. Plaintiffs  
9 also named two other limited liability companies that are each members of  
10 Henderson Water Park, LLC: West Coast Water Parks, LLC and Double OTT  
11 Water Holdings, LLC.<sup>1</sup>

12 On May 5, 2016, Plaintiffs filed a Motion for Leave to Amend Complaint  
13 seeking to add seven (7) individuals as Defendants who were/are members of the  
14 Management Committee for Henderson Water Park, LLC. Respondents opposed  
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16 <sup>1</sup> HENDERSON WATER PARK, LLC dba COWABUNGA BAY WATER  
17 PARK is a privately held limited-liability company, organized under the laws of  
18 Nevada. It is 39.5% owned by WEST COAST WATER PARKS, LLC, 51.5%  
19 owned by DOUBLE OTT WATER HOLDINGS, LLC, and the remaining 9%  
20 owned by individual member-investors.

WEST COAST WATER PARKS, LLC is a privately held limited-liability  
company, organized under the laws of Nevada. It has no parent corporation and  
there is no publically held corporation that owns 10% or more of its stock.

DOUBLE OTT WATER HOLDINGS, LLC is a privately held limited-  
liability company, organized under the laws of Utah. It is 100% owned by O & O  
INVESTMENT HOLDING, LP.

1 the Motion for Leave to Amend as it flies in the face of longstanding Nevada law  
2 and statutory protections for managers and members of limited-liability  
3 companies found at NRS 86.371 and 86.381. The trial court denied Plaintiffs'  
4 Motion for Leave to Amend.

5 Plaintiffs filed a Writ of Mandamus in the Supreme Court regarding the  
6 denial of their Motion for Leave to File Amended Complaint to assert direct  
7 claims of negligence against seven individuals of Henderson Water Park, LLC's  
8 ("HWP") Management Committee. The parties completed briefing related to the  
9 writ on November 7, 2016.

10 As noted above, Henderson Water Park, LLC's membership is comprised  
11 of two limited liability companies, specifically West Coast Water Parks, LLC and  
12 Double OTT Water Holdings, LLC. West Coast and Double OTT were dismissed  
13 pursuant to summary judgment granted in their favor on September 11, 2016 and  
14 entered on October 10, 2016. Thereafter, the District Court granted NRCP 54(b)  
15 certification of its Order and Plaintiffs commenced the instant appeal on  
16 November 2, 2016. On November 9, 2016, after briefing was completed in the  
17 writ proceeding (motion for leave to amend complaint), Plaintiffs filed the instant  
18 Motion to Consolidate the writ review with the newly filed appeal relating to the  
19 granting of summary judgment to Respondents.

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1 **II. ARGUMENT**

2 Consolidation is not appropriate in these circumstances because briefing has  
3 already been completed regarding the writ, rendering Plaintiffs' motion untimely.  
4 Additionally, consolidation is generally only appropriate where the issues of each  
5 proceeding are the same; in the instant case, the issues raised in the writ differ  
6 from those raised on this appeal. Specifically, the issue already briefed in the writ  
7 proceeding involved the denial of a Motion for Leave to Amended Complaint  
8 seeking to add seven individuals as defendants, and the alleged liability of same as  
9 *managers* (management committee for Henderson Water Park, LLC). The issue  
10 raised on the appeal in connection with the granting of summary judgment is  
11 whether two *members* (West Coast and Double OTT), who share no management  
12 role in the company (Henderson Water Park, LLC), can be liable for alleged  
13 negligence. Furthermore, the applicable standard of review is different for the  
14 writ as compared to the appeal. These considerations likewise render absurd  
15 Plaintiffs' request that briefing of the issues raised in their appeal be limited to the  
16 briefing of dissimilar issues already briefed in the writ proceeding. For these  
17 reasons, the instant motion should be denied and the parties should be given full  
18 opportunity to brief their arguments raised on appeal.

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1           **A.       THE MOTION TO CONSOLIDATE IS UNTIMELY**  
2           **BECAUSE THE WRIT OF MANDAMUS HAS ALREADY**  
3           **BEEN BRIEFED INDEPENDENTLY**

4           As noted above, the parties have already completed briefing in the writ  
5 proceeding. Plaintiffs now seek to consolidate the two related but not identical  
6 proceedings. The underlying goal of consolidation is to promote judicial  
7 economy. *See General Supply & Servs. v. Burke & Assocs.*, 2012 Nev. Unpub.  
8 LEXIS 626, \*3 (May 4, 2012). Judicial economy will not be achieved by  
9 consolidating these two proceedings when the parties will have to brief the issues  
10 raised in this appeal separately anyway. Plaintiffs ask this Court to assume that  
11 the issues in both proceedings are identical and that on that basis, no further  
12 briefing is necessary, but, as discussed *infra*, that is not the case. Because further  
13 briefing on the separate issues raised in the appeal is necessary, consolidation does  
14 not promote judicial economy, but will only confuse and unnecessarily complicate  
15 these proceedings. Plaintiffs do not offer any other justification for consolidating  
16 these proceedings either; they simply parrot the general rule that parties, facts and  
17 issues must be the same in each case in order to consolidate, and in so arguing,  
18 they incorrectly assume that the issues are the same. They do not present, and  
19 Respondents are unable to find, any instance where consolidation was granted  
20 after only one of multiple issues had already been briefed. Accordingly, there is  
no valid justification for consolidation and the motion should be denied.

1           **B.       THE ISSUES PRESENTED IN THE WRIT OF**  
2           **MANDAMUS ARE DIFFERENT FROM THOSE**  
3           **PRESENTED ON APPEAL**

4           As noted above, the writ proceeding concerns the denial of a Motion for  
5           Leave to Amend Complaint to add seven (7) individuals as Defendants and the  
6           issue of whether *managers* (management committee) of an LLC may be held  
7           liable for their management decisions made on behalf of the company. This issue  
8           is different from that raised in this appeal; *i.e.*, whether passive *members* (2 LLCs,  
9           West Coast and Double OTT) of a manager-managed LLC (akin to investing  
10          shareholders in a corporation) may be held liable. As already cited in the Answer  
11          to Petition for Writ of Mandamus, NRS 86.371 provides that “no member or  
12          manager of any limited-liability company formed [in Nevada] is individually  
13          liable for the debts or liabilities of the company.” Furthermore, NRS 86.381  
14          provides that “[a] member of a limited-liability company is not a proper party to  
15          proceedings by or against the company...”. Because the issues in the separate  
16          proceedings are not identical, consolidation is not appropriate and the motion  
17          should be denied.

18           **C.       THE WRIT OF MANDAMUS AND THE APPEAL SHOULD**  
19           **NOT BE CONSOLIDATED BECAUSE THEY BOTH**  
20           **PRESENT DIFFERENT STANDARDS OF REVIEW**

          A further indicator that the issue presented in the separate proceedings are  
different is that the standard of review applicable in the writ proceeding is

1 different from that applicable to the issues on appeal. The writ proceeding stems  
2 from the district court's denial of Plaintiffs' Motion for Leave to File Amended  
3 Complaint. The applicable standard of review is two-fold: Plaintiffs must first  
4 demonstrate they have "no plain, adequate, and speedy legal remedy," such that  
5 the extraordinary relief of mandamus is warranted. *See State ex rel. Masto v.*  
6 *Second Judicial Dist. Court of State*, 125 Nev. 37, 43-44, 199 P.3d 828, 832  
7 (2009). This Court has repeatedly held that an appeal is generally an adequate  
8 legal remedy precluding writ relief. *Pan v. Dist. Ct.*, 120 Nev. 222, 224, 88 P.3d  
9 840, 841 (2004) (citing seven cases). Once that high threshold is met, the Nevada  
10 Supreme Court applies a ***manifest abuse of discretion*** standard when considering  
11 a writ of mandamus. *See Hidalgo v. Eighth Judicial Dist. Court of Nev.*, 127 Nev.  
12 927, 931-32, 267 P.3d 777, 780 (2011). A manifest abuse of discretion requires  
13 "[a]n arbitrary or capricious exercise of discretion... founded on prejudice or  
14 preference rather than reason," a "clearly erroneous interpretation of the law or a  
15 clearly erroneous application of a law or rule," or discretion "exercised  
16 improvidently or thoughtlessly and without due consideration." *See State v. Eighth*  
17 *Judicial Dis. Court of Nev.*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011).  
18 Thus, the standard of review in the writ proceeding is exceedingly high and  
19 difficult to meet. Respondents have had the opportunity to brief the writ issues.

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1 Plaintiffs are also appealing the district court's granting of Respondents'  
2 Motion for Summary Judgment, which judgment is reviewed "*de novo*, without  
3 deference to the findings of the lower court." *Wood v. Safeway, Inc.*, 121 Nev.  
4 724, 729, 121 P.3d 1026, 1029 (2005). The court considers whether the  
5 "pleadings and other evidence on file demonstrate that no "genuine issue as to any  
6 material fact [remains] and that the moving party is entitled to judgment as a  
7 matter of law." *Id.* (citation omitted). The court also considers "the evidence, and  
8 any reasonable inferences drawn from it, ... in a light most favorable to the non-  
9 moving party." *Id.* Essentially, the reviewing court steps into the shoes of the  
10 district court to evaluate the pleadings and evidence as if the lower proceedings  
11 had not occurred. As of the drafting of this Opposition, neither party has had the  
12 opportunity to brief those issues that this Court must review *de novo*. It is  
13 superfluous to point out to this Court that the two standards of review are  
14 significantly different, but Plaintiffs would ignore this significant distinction  
15 altogether and pretend that such distinction is not relevant. In one case, this Court  
16 does not even consider the pleadings and evidence, but only the basis of the  
17 district court's decision, while in the later case, this Court considers all the  
18 pleadings and evidence as if it were the district court.

19 Thus, not only are the issues substantively different—as discussed above—  
20 but they are procedurally different and subject to very different standards of



1 review. These considerations militate against consolidation and the motion should  
2 be denied.

3       **D.       THE COURT SHOULD ALLOW THE LEGAL ISSUES**  
4       **RAISED ON APPEAL TO BE FULLY BRIEFED, AS THEY**  
5       **ARE SUBSTANTIVELY AND PROCEDURALLY**  
6       **DISTINCT FROM THOSE BRIEFED IN THE WRIT**  
7       **PROCEEDING**

8       Plaintiffs seek to preclude any additional argument concerning the issues  
9 they themselves have raised in an effort to handicap Respondents' ability to  
10 defend themselves. All parties have briefed the writ issues in the context of the  
11 applicable standard of review, and while Plaintiffs may be content with submitting  
12 the same brief in the appeal proceeding, Respondents recognize that the appeal  
13 presents distinct issues that are subject to a very different standard of review, and  
14 therefore requires briefing tailored to those issues. Plaintiffs' Motion to dispense  
15 with briefing would unfairly prejudice Respondents and should be denied.

16       If the Court is inclined to grant this motion and consolidate the writ and  
17 appeal, Respondents request that the parties nonetheless be given the opportunity  
18 to fully brief the issues presented in the appeal, as they differ from those already  
19 briefed in the writ proceeding, so that they might be fully presented to the Court.

20 **III. CONCLUSION**

WHEREFORE, based on the foregoing, the Court should DENY the  
Motion to Consolidate this appeal with the pending writ proceeding. In the

1 alternative, should this Court consolidate the writ and appeal, Respondents still  
2 request the opportunity to brief the issues presented in the appeal.

3 Dated this 21<sup>st</sup> day of November, 2016.

4 **THORNDAL, ARMSTRONG, DELK,**  
5 **BALKENBUSH & EISINGER**

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15 COWABUNGA BAY WATER PARK,

16 WEST COAST WATER PARKS, LLC, and

17 DOUBLE OTT WATER HOLDINGS, LLC  
18  
19  
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CERTIFICATE OF SERVICE

I hereby certify that on the 21<sup>st</sup> day of November, 2016, service of the foregoing **OPPOSITION TO PETITIONERS'/APPELLANTS' MOTION TO CONSOLIDATE APPEAL WITH PENDING WRIT PROCEEDING & TO REVISE BRIEFING** was made upon the following parties via the Nevada Supreme Court electronic notification system, pursuant to NRAP 25 and NEFCR 9, and served by email and facsimile to the Honorable Judge Wiese, II:

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