

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 29 2016 10:34 a.m.
 Elizabeth A. Brown
 Clerk of Supreme Court

Case No.: 71562

1 PARKS, LLC, A NEVADA LIMITED)
2 LIABILITY COMPANY; AND DOUBLE)
3 OTT WATER HOLDINGS, LLC, A UTAH)
4 LIMITED LIABILITY COMPANY,)

5 Respondents.)
6)

7 **PETITIONERS'/APPELLANTS' REPLY IN SUPPORT OF MOTION TO**
8 **CONSOLIDATE APPEAL WITH PENDING ORIGINAL WRIT**
9 **PROCEEDING AND TO REVISE BRIEFING**

10 **I. INTRODUCTION**

11 In their Opposition, the Cowabunga Bay entities exhibit a clear willingness to
12 adopt patently inconsistent positions in the interest of convenience. Indeed, many
13 of the Cowabunga Bay entities' arguments as to why consolidation and a revised
14 briefing schedule would be inappropriate are directly contradicted by their prior
15 representations to the district court. Moreover, the Cowabunga Bay entities' claim
16 that granting the relief requested by the Gardners would defeat judicial economy is
17 simply counterintuitive. The Gardners will address the Cowabunga Bay entities'
18 substantive arguments below.

19 **II. ARGUMENT**

20 **A. The Cowabunga Bay Entities' Own Statements Confirm That The**
21 **Issues Presented By The Writ Proceeding And Appeal Are**
22 **Identical.**

23 The Cowabunga Bay entities oppose the Gardners' request for consolidation
24 and a revised briefing schedule by asserting that "the issues raised in the writ differ
25 from those raised on this appeal." See Opp. at 4. More specifically, the
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1 Cowabunga Bay entities draw a distinction between the writ proceeding and appeal
2 by noting that the writ proceeding, on one hand, involves “managers [who make]
3 decisions on behalf of the company” while the appeal, on the other, involves
4 “passive members [] of a manager-managed LLC.” *Id.* at 6. Based on this alleged
5 distinction, the Cowabunga Bay entities describe the two proceedings as “related
6 but not identical” and attack the Gardners for “incorrectly assum[ing] the issues are
7 the same.” *Id.* at 5.
8

9
10 But the Cowabunga Bay entities adopted a completely different position in
11 the district court when they requested summary judgment on behalf of the LLC
12 members. Indeed, the Cowabunga Bay entities unequivocally stated that “this very
13 same issue has already been decided in this very same case,” and referenced the
14 district court’s ruling on the Gardners’ motion for leave to amend, which is the
15 subject of the writ proceeding. *See* Exhibit “1,” Defendants’ Reply in Support of
16 MSJ at 3. In fact, the Cowabunga Bay entities even went so far as to claim that the
17 district court had “previously ruled in favor of upholding the protections to
18 members of LLCs, making that law of the case.” *See* Exhibit “2,” Defendants’ MSJ
19 at 4. As such, the Court should disregard the Cowabunga Bay entities’ duplicitous
20 claim that the issues presented by the writ proceeding and appeal are not identical.¹
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27 ¹ The Cowabunga Bay entities’ argument also fails from a substantive
28 standpoint. Neither NRS 86.371 nor NRS 86.381 distinguishes between members
or managers. Moreover, the Cowabunga Bay entities did not mention this
purported distinction between members and managers in the underlying briefing

B. The Different Standard Of Review Between The Writ Proceeding And Appeal Is A Red Herring.

Next, the Cowabunga Bay entities claim that consolidation and a revised briefing schedule would be improper because the writ proceeding is evaluated under an abuse of discretion standard while the appeal is subject to *de novo* review. Setting aside that this Court is perfectly capable of applying the appropriate standard of review to the writ proceeding and appeal if the matters are consolidated, the Cowabunga Bay entities' position ignores the realities of the common issue presented by both matters. To that end, the Cowabunga Bay entities previously acknowledged that the question of whether LLC members and managers are "proper defendants in light of the protections of NRS Chapter 86 is *purely a legal issue...*" Ex. 2 at 5.

In other words, the resolution of the writ proceeding and appeal involves a discrete legal question that does not require an assessment of the facts or evidence in the underlying case. It is, therefore, irrelevant that the *de novo* standard of review applies to the appeal as the Court is solely tasked with deciding whether the district court erred by ruling that LLC members and managers are immune from

before the district court. Exs. 1-2. While the alleged difference between active individual managers and allegedly passive LLC members could conceivably relate to the ultimate liability of said individuals and/or entities, it is completely irrelevant to the threshold question of whether LLC members and managers can ever be held personally liable for their own tortious conduct.

1 personal liability for their own tortious conduct under NRS Chapter 86.² Simply
2 put, that “purely legal” question should be answered in the affirmative under any
3 standard of review.

4
5 **C. The Gardners’ Request For Consolidation And Revised Briefing Is**
6 **Not Untimely Nor Would It Lessen Judicial Economy.**

7 The Cowabunga Bay entities allege that consolidation would be inappropriate
8 because the parties already completed the briefing on the writ proceeding. The
9 Cowabunga Bay entities do not, however, provide any legal authority to support
10 their position that the Court must deny consolidation because one proceeding is
11 more advanced than the other. In addition, the Gardners previously addressed the
12 many reasons why consolidation and a revised briefing schedule would advance
13 judicial economy by obviating the need for duplicative briefing and ensuring the
14 same panel rules on the common legal issue. *See* Mot. at 3-5. If anything, these
15 considerations are even more applicable where, as here, the parties have fully
16 briefed the common legal question in both proceedings.
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27 ² Should this Court determine additional briefing is necessary on the
28 appropriate standard of review, the Gardners request that the Court limit the
briefing to that narrow issue and impose an expedited schedule.

1 **III. CONCLUSION**

2 Based on the foregoing, the Gardners respectfully request that the Court grant
3 the Motion to Consolidate Appeal with Pending Original Writ Proceeding and to
4 Revise Briefing in its entirety.
5

6 DATED this 28th day of November, 2016.

7 CAMPBELL & WILLIAMS

8
9 By /s/ Donald J. Campbell

10 DONALD J. CAMPBELL, ESQ. (1216)
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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 28th day of November 2016, I caused true and correct copies of the foregoing Reply in Support of 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:

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 1

EXHIBIT 1

CLERK OF THE COURT

1 **RPLY**

2 **THORNDAL ARMSTRONG DELK**

3 **BALKENBUSH & EISINGER**

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

5 Nevada Bar No. 1617

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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**

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

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

17 **Plaintiffs,**

18 **vs.**

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

29 **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.

30 Defendants, HENDERSON WATER PARK, LLC dba COWABUNGA BAY WATER
31 PARK, WEST COAST WATER PARKS, LLC (hereinafter "West Coast"), DOUBLE OTT
32 WATER HOLDINGS, LLC (hereinafter "Double OTT"), (also collectively "Defendants" or the
33 "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 17th day of September, 2016.

9 THORNDAL, ARMSTRONG, DELK,
10 BALKENBUSH & EISINGER

11 
12 PAUL F. EISINGER, ESQ.

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20 COWABUNGA BAY WATER PARK,

21 WEST COAST WATER PARKS, LLC,

22 DOUBLE OTT WATER HOLDINGS, LLC
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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
staffing, from April 1, 2013 through the present.

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

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

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

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

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

4 A. No.

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

5 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...

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

7 Plaintiffs concede that there is no Nevada case on point. (Opposition at 6:3.) Plaintiffs
8 are eager to point out all of the federal case law and case law from other states because there's
9 no Nevada state case law on this point. Yet, the creation of business entities is strictly a state
10 function, and the nuisances and differences from state to state are meaningful and significant.
11 States make intentional decisions in their statutory constructions to lure businesses to their state,
12 and Nevada and Delaware are both very popular states for business formation precisely because
13 of those protections. Plaintiffs would do away with all of those protections in order to allow
14 them to maintain their suit against the members of a Nevada LLC. Plaintiffs repeat that they
15 have brought direct claims against the member-LLCs but can offer no factual basis to support
16 those claims, as required by NRCP 11, especially in light of the undisputed evidence above.
17 Plaintiffs' interpretation of the Nevada statutes would do away with the statutory protections in
18 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 ^{9TH} 9 day of September, 2016.

7 THORNDAL, ARMSTRONG, DELK,
8 BALKENBUSH & EISINGER

9
10 
11 PAUL F. EISINGER, ESQ.
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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 31
3 day of September, 2016, I served a copy of the above and foregoing **REPLY IN SUPPORT**
4 **OF MOTION FOR SUMMARY JUDGMENT AS TO CLAIMS AGAINST**
5 **DEFENDANTS WEST COAST AND DOUBLE OTT** to the following parties via
6 electronic service through the Eighth Judicial District Court's Odyssey E-File and Service
7 System:

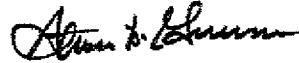
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13 Attorneys for Plaintiffs,
14 PETER and CHRISTIAN GARDNER on
15 behalf of minor child, LELAND GARDNER

16 
17 An Employee of THORNDAL, ARMSTRONG,
18 DELK, BALKENBUSH & EISINGER
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LAW OFFICES
**THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER**
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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 **PHILIP GOODHART, ESQ.**

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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 16th 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 I. 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 25th day of June, 2016.


HON. JERRY C. WIESEN
DISTRICT COURT JUDGE, DEPARTMENT 30

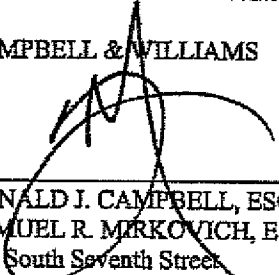
Respectfully submitted by:

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By
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Attorneys for Plaintiffs

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DELK BALKENBUSH & EISINGER**
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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
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,

11

12

13

14

15

16

Defendants.

17

18

REPORTER'S TRANSCRIPT
OF

19

MOTION FOR LEAVE TO AMEND COMPLAINT

20

21

BEFORE THE HONORABLE JERRY A. WIESE,

22

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

23

24

25

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

GARD156

A P P E A R A N C E S

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

3 PROCEEDINGS

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

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,

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,

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

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

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:

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

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

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

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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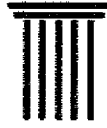
REPORTER'S CERTIFICATE

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



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EXHIBIT C

RSPN

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Attorneys for Defendants,

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COWABUNGA BAY WATER PARK,

WEST COAST WATER PARKS, LLC and

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-15-722259-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

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WEST COAST WATER PARKS, LLC and
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-15-722259-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.
28

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
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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 HUIISH
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

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 ///

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...

EXHIBIT 2

EXHIBIT 2

1 **MSJD**

2 **THORNDAL ARMSTRONG DELK**

3 **BALKENBUSH & EISINGER**

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

5 Nevada Bar No. 1617

6 **ALEXANDRA B. MCLEOD, ESQ.**

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15 E-Mail: peisinger@thorndal.com

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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**

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

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

17 Plaintiffs,

18 vs.

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

29 Defendants.

CASE NO. A-15-722259-C

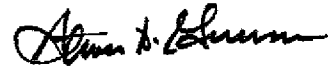
DEPT. NO. XXX

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

Date of Hearing:

Time of Hearing:

Electronically Filed
08/12/2016 03:28:47 PM



CLERK OF THE COURT

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 herein 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 13th 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.

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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
25
26
27
28



1 **NOTICE OF MOTION**

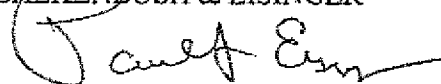
2 TO: ALL PARTIES HERETO; and

3 TO: COUNSEL OF RECORD FOR ALL PARTIES HERETO:

4 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will
5 bring the above and foregoing **MOTION FOR SUMMARY JUDGMENT AS TO CLAIMS**
6 **AGAINST DEFENDANTS WEST COAST AND DOUBLE OTT** on for hearing before the
7 above-entitled Court on the 13 day of SEPTEMBER, 2016, at the hour of
8 9:00~~A~~_{a.m./p.m.} said day, or as soon thereafter as counsel can be heard.

9 RESPECTFULLY SUBMITTED this 13th day of August, 2016.

10
11 THORNDAL, ARMSTRONG, DELK,
12 BALKENBUSH & EISINGER

13 

14 PAUL F. EISINGER, ESQ.

15 Nevada Bar No. 1617

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19 Las Vegas, NV 89125

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

1 POINTS & AUTHORITIES

2 I. INTRODUCTION AND SUMMARY OF ARGUMENT

3 Plaintiffs' July 28, 2015 Complaint named Henderson Water Park, LLC which does
4 business as Cowabunga Bay, and oversees the park's operations. Plaintiffs also named two other
5 limited liability companies that are each members of Henderson Water Park, LLC: West Coast
6 Water Parks, LLC and Double OTT Water Holdings, LLC. Defendants West Coast and Double
7 OTT seek summary adjudication that they are improper defendants in light of longstanding
8 Nevada law and statutory protections for managers and members of limited-liability companies
9 found at NRS 86.371 and 86.381.

10 In order for any of Plaintiffs to maintain this action against West Coast and Double
11 OTT, Plaintiffs MUST overcome the absolute protections of NRS Chapter 86, which they
12 cannot do. Unlike corporations, which may be pierced under very limited circumstances, there
13 are no statutory exceptions which allow one to "pierce" a limited-liability company. While the
14 protections under Chapter 78 (pertaining to corporations) are extremely strict—in fact, piercing
15 a corporation has only been allowed one time in Nevada in the past 20 years—the protections
16 under Chapter 86 pertaining to LLC's are absolute. NRS 86.381 unambiguously sets forth
17 that, "A member of a limited-liability company is not a proper party to proceedings... against
18 the company..." Furthermore, an analysis of the statutory construction shows that while
19 Chapter 78 provides specific statutory authority to "pierce" the corporate veil, there is no such
20 statutory authority within NRS Chapter 86.

21 This Court has previously ruled in favor of upholding the protections to members of
22 LLCs, making that the law of the case. (See this Court's July 5, 2016 Order Denying Plaintiffs'
23 Motion for Leave to Amend Complaint, not attached here pursuant to EDCR 2.27[e]).
24 Furthermore, all material facts weighing on the question of LLC-member liability are
25 undisputed: namely that Henderson Water Park, LLC is a NRS Chapter 86 limited liability
26 company, made up of a Washington LLC (West Coast Water Park, LLC) and a Utah LLC
27 (Double OTT Water Holdings, LLC). See EXHIBIT A, Business Entity Information Print-Out
28 from the Nevada Secretary of State. The question whether West Coast and Double OTT are

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
or without supporting affidavits for a summary judgment in his favor upon all or
any part thereof.

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

24 ///

25 ///

26 ///

27 ///

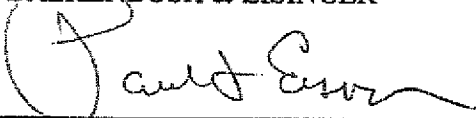
28 ///

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 12th day of August, 2016.

8 THORNDAL, ARMSTRONG, DELK,
9 BALKENBUSH & EISINGER


10 

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17 Attorneys for Defendants,
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19 COWABUNGA BAY WATER PARK,
20 WEST COAST WATER PARKS, LLC,
21 DOUBLE OTT WATER HOLDINGS, LLC
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28

CERTIFICATE OF SERVICE

Pursuant to NRCp 5(b)(2)(D) and EDCR 7.26(a)(4) I hereby certify that on the 12th day of August 2016, I served a copy of the above and foregoing **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:

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

EXHIBIT A

HENDERSON WATER PARK, LLC

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

[Printer Friendly](#)

[\\$ Calculate List Fees
\(FeeDetails.aspx?ctok=cBzOhaqHcnP0SF7uuWQ%253d%253d\)](#)

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?tsn=PaHK2N2yF0YXUYuzCBM5A%253d%253d&RAName=GORDON+LAW+LLC)			

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

<div><div></div>Officers</div>		<div><input type="checkbox"/> Include Inactive Officers</div>	
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:	