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

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| PETER GARDNER AND CHRISTIAN GARDNER, ON BEHALF OF MINOR CHILD, LELAND GARDNER,<br><br>Petitioners,<br><br>v.<br><br>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<br><br>and<br><br>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,<br><br>Real Parties in Interest | Case No.: 70823 |
| PETER GARDNER AND CHRISTIAN GARDNER, ON BEHALF OF MINOR CHILD, LELAND GARDNER,<br><br>Appellants,<br><br>v.<br><br>HENDERSON WATER PARK, LLC dba COWABUNGA BAY WATER PARK, A NEVADA LIMITED LIABILITY COMPANY; WEST COAST WATER | Case No.: 71562 |

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Docket 71652 Document 2016-35003

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

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completely immune from liability under NRS 86.371 and NRS 86.381 despite the existence of abundant legal authority standing for the principle that a member or manager of a limited liability company can be held liable for tortious acts in which they personally participate, direct or otherwise ratify.[1]

On October 10, 2016, the district court granted Defendants' Motion for Summary Judgment as to Defendants West Coast Water Parks, LLC and Double Ott Water Holdings, LLC on grounds that the member-LLCs of HWP are similarly immune from any liability under NRS 86.371 and NRS 86.381. After the district court granted NRCP 54(b) certification, the Gardners commenced the instant appeal, which involves the exact same legal issue as their pending writ petition referenced above.

Because the Gardners' writ proceeding and appeal involve the identical legal issue (as well as the same facts and parties), the Gardners hereby seek consolidation of the two matters. Moreover, the briefing related to the Gardners' Petition for Writ of Mandamus is complete, which obviates the need for duplicative and time-consuming briefing regarding the common legal issue presented by the instant appeal. In the interests of speed, efficiency, and cost-effectiveness, therefore, the

[1] The Gardners likewise sought leave to plead allegations related to the alter ego doctrine against the member-LLCs and individual managers of HWP. The 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

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

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

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

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## III. CONCLUSION

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

DATED this 9th day of November, 2016.

CAMPBELL & WILLIAMS

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:

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