

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

CASE NO. 71652

**VS.**

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Elizabeth A. Brown  
Clerk of Supreme Court

HENDERSON WATER PARK, LLC  
dba COWABUNGA BAY WATER  
PARK; WEST COAST WATER  
PARKS, LLC; DOUBLE OTT WATER  
HOLDINGS, LLC,  
Respondents.

Appeal from the Eighth Judicial District Court

## RESPONDENTS' ANSWERING BRIEF

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BALKENBUSH & EISINGER**

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DOUBLE OTT WATER HOLDINGS, LLC

1                                   **NRAP 26.1 DISCLOSURE STATEMENT**

2           The undersigned counsel of record certifies that the following are persons  
3 and entities described in NRAP 26.1(a), and must be disclosed. These  
4 representations are made in order that the Justices of this Court may evaluate  
5 possible disqualification or recusal:

6           HENDERSON WATER PARK, LLC dba COWABUNGA BAY WATER  
7 PARK is a privately held limited-liability company, organized under the laws of  
8 Nevada. It is 39.5% owned by WEST COAST WATER PARKS, LLC, 51.5%  
9 owned by DOUBLE OTT WATER HOLDINGS, LLC, and the remaining 9%  
10 owned by individual member-investors.

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

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

17           Respondents have not been represented by any other attorneys in addition to  
18 THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER.

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1 **POINTS & AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

3 The trial court granted summary judgment on September 13, 2016, in favor  
4 of Respondents, West Coast Water Park, LLC (hereinafter “West Coast”) and  
5 Double OTT Water Holdings, LLC (hereinafter “Double OTT”). **JOINT APPENDIX**  
6 **(JA)** 153. These two entities are member-investors in Henderson Water Park, LLC.  
7 The trial court found that West Coast and Double OTT are not proper Defendants in  
8 this action based upon longstanding Nevada law, including the statutory protections  
9 for members of limited-liability companies found in NRS 86.371 and 86.381.

10 **II. ISSUES PRESENTED**

11 1. Whether NRS 86.371 and 86.381 prohibit the claims the Gardners seek  
12 to assert against the Member-LLC’s of Henderson Water Park, LLC, given the  
13 statutes’ unambiguous language that members of a limited-liability company are not  
14 proper parties to proceedings against the company, and that members are not  
15 individually liable for the debts or liabilities of the company; and,

16 2. Whether or not the Nevada legislature intended the alter ego doctrine  
17 to apply to limited-liability companies when it omitted any such exception from  
18 Chapter 86 of the Nevada Revised Statutes, which governs limited-liability  
19 companies.

20 . . .

1     **III.   FACTS NECESSARY TO UNDERSTAND ISSUES PRESENTED**  
2     **BY THE APPEAL**

3     The underlying lawsuit was brought by Peter and Christian Gardner on behalf  
4 of their son, Leland Gardner. JA 2-9. 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. JA 6,  
7 ¶¶19-20. 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  
9 a sole cause of action for negligence against the Water Park Defendants. *Id.*, see  
10 also ¶¶24-30.

11     The Gardners' July 28, 2015 Complaint named Henderson Water Park, LLC  
12 which does business as Cowabunga Bay, and hires employees to operate the park.  
13 See generally, JA at 92-94. The Gardners also named two other limited-liability  
14 companies that are each members of Henderson Water Park, LLC: West Coast (a  
15 Washington LLC) and Double OTT (a Utah LLC).<sup>1</sup> See JA at 2. Appellants assert  
16 without citation to any evidence in the record that the members of the Henderson  
17 Water Park, LLC "exercise complete control over every aspect of Cowabunga

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18     <sup>1</sup> Appellants' May 5, 2016 Motion for Leave to Amend sought to add seven (7)  
19 individuals as Defendants who were/are members of the Management Committee  
20 for Henderson Water Park, LLC. Judge Wiese's denial of that Motion for Leave to  
Amend is the subject of the Gardners' Petition for Writ of Mandamus, Docket  
No.70823, and will be clustered with this proceeding pursuant to IOP 2(c)(2) and  
this Court's December 15, 2016 Order Denying Motion and Reinstating Briefing.

1 Bay's operations." **OPENING BRIEF (OB)** at 2:11-12. This fallacy was refuted with  
2 references to the factual record in the underlying briefing, **JA** at 92-94, despite  
3 being corollary to the determination of whether or not the Member-LLC's are  
4 proper defendants in this case. More importantly, the Gardners overlook an  
5 essential flaw in their argument to maintain claims against the Member-LLCs: In  
6 order for such claims to be viable against West Coast or Double OTT, Appellants  
7 must overcome the statutory protections of NRS Chapter 86, which they cannot do.

8 **IV. ARGUMENT**

9 The Gardners ask this Court to promulgate new law, which would impose  
10 personal liability on members (and, in the clustered matter, managers) of Nevada  
11 limited-liability companies. However, the statutory protections contained in Chapter  
12 86 of the Nevada Revised Statutes clearly prohibit such liability. Accordingly,  
13 summary judgment was proper as to West Coast and Double OTT, and the trial  
14 court's ruling should not be disturbed.

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1     A. WEST COAST AND DOUBLE OTT ARE NOT PROPER PARTIES TO  
2     PROCEEDINGS AGAINST HENDERSON WATER PARK, LLC,  
3     BECAUSE THEY ARE PROTECTED BY NRS 86.371 AND 86.381

4     Chapter 86 of the Nevada Revised Statutes governs limited-liability  
5     companies. Specifically, NRS 86.371 and 86.381 govern the limited liability of  
6     members and/or managers for the debts and liabilities of the company. Those  
7     statutes read as follows:

8             **NRS 86.371 Liability of member or manager for**  
9             **debts or liabilities of company.** Unless otherwise  
10            provided in the articles of organization or an agreement  
11            signed by the member or manager to be charged, no  
12            member or manager of any limited-liability company  
13            formed under the laws of this State is individually liable  
14            for the debts or liabilities of the company.

15            **NRS 86.381 Member of company is not proper**  
16            **party in proceeding by or against company;**  
17            **exception.** A member of a limited-liability company is  
18            not a proper party to proceedings by or against the  
19            company, except where the object is to enforce the  
20            member's right against or liability to the company.

21     These statutes make clear that a member of a limited-liability company is not a  
22     proper party to a lawsuit against the company, and cannot be held liable for the  
23     debts or liabilities of the company. The Gardners' personal injury action does not  
24     fall into the very specific and narrow exception set forth in NRS 86.381.  
25     Substituting the names of the parties in interest into these statutes is instructive:  
26     "Neither West Coast nor Double OTT (no member) is individually liable for the

1 debts or liabilities of Henderson Water Park, LLC;” and, “West Coast or Double  
2 OTT (a member) is not a proper party to proceedings by or against Henderson  
3 Water Park, LLC.” Under these unequivocal protections of NRS Chapter 86, there  
4 is simply no basis to break through the protections of Henderson Water Park, LLC  
5 to maintain a direct action against either West Coast or Double OTT.

6       The Gardners assert that the statutory protections provided to these members  
7 are null and void simply because they want to sue the Member-LLC’s for their own  
8 “individual actions.” Appellants contend that they are not attempting to sue West  
9 Coast and Double OTT for debts and liabilities of Henderson Water Park, LLC and  
10 that this suit is more than a straight-forward “action against the company.” **OB** at 8.  
11 The Gardners argue that they are attempting to sue West Coast and Double OTT for  
12 their own tortious conduct in negligently operating the water park. However, if the  
13 Court were to accept this theory, then anytime an accident occurred the injured  
14 party would have the ability to sue each and every member and/or manager of a  
15 limited-liability company, and allege that the accident was caused by the  
16 member/manager’s individual negligence in operating the LLC. The protections  
17 afforded to members and managers of limited-liability companies, as contemplated  
18 by the Nevada Legislature, would have no meaning whatsoever. Clearly, such a  
19 theory is misplaced, and the trial court’s ruling should be upheld.

1 B. BECAUSE ACTIONS UNDERTAKEN BY A LIMITED-LIABILITY  
2 COMPANY ARE DONE THROUGH A SEPARATE LEGAL ENTITY,  
3 MEMBERS AND MANAGERS OF LIMITED-LIABILITY COMPANIES  
4 CANNOT BE DIRECTLY LIABLE FOR NEGLIGENT OPERATION OF  
5 A COMPANY

6 While Appellants contend that they are attempting to sue the members of  
7 Henderson Water Park, LLC for their individual tortious operation of the water  
8 park, the Gardners fail to recognize that all actions taken by the Member-LLC's  
9 were performed through the legal entity of Henderson Water Park, LLC, which is  
10 separate and distinct from the members themselves. Pursuant to NRC 17(b), the  
11 capacity of an individual, including one acting in a representative capacity, to sue or  
12 be sued shall be determined by the law of this State. Longstanding Nevada law  
13 insulates individual limited-liability members from direct liability. A limited-  
14 liability company is an entity *distinct* from its managers and members, and the  
15 actions undertaken by a limited-liability company are done through the separate  
16 legal entity. NRS 86.201(3) (emphasis added).<sup>2</sup> The reasoning behind the foregoing  
17 logic is simple: a limited-liability company, like any organizational entity, must act  
18 through individuals or other entities with the authority to act on behalf of the  
19 company. Again, if these representatives have no protections from the company's  
20 operations, then Chapter 86 of the Nevada Revised Statutes is meaningless.

<sup>2</sup> See also *Cf. Canarelli v. Eighth Judicial Dist. Court of Nev.*, 127 Nev. Adv. Rep. 72, 265 P.3d 673, 677, (2011) (explaining that a corporation is a legal entity that exists separate and distinct from its shareholders, officers, and directors), citing BLACK'S LAW DICTIONARY 340 (6th ed. 1990) ("The corporation is distinct from the individuals who comprise it.").

1 This Court instructed in *Weddell v. H2O, Inc.*, 271 P.3d 743, 748 (Nev. 2012)  
2 regarding the hybrid nature of limited-liability companies, and specifically that  
3 limited-liability companies are business entities created “to provide a corporate-  
4 styled liability shield...” (citing *White v. Longley*, 2010 MT 254, 358 Mont. 268,  
5 244 P.3d 753, 760 (Mont. 2010)).<sup>3</sup> The protection of limited-liability members from  
6 investor-level liability was codified at NRS 86.381. Here, the Appellants seek to do  
7 away with the liability shield designed for limited-liability companies by merely  
8 saying that a member who acts in their representative capacity should be subject to  
9 individual liability because the Appellants want to sue them individually.

10 It would appear that Appellants intend to hold the members of Henderson  
11 Water Park, LLC personally liable for their alleged mismanagement of the park.  
12 This is nothing more than a thinly-veiled disguise to assert a claim for the allegedly  
13 negligent management of the limited-liability company by its members. However,  
14 third parties such as the Gardners have no standing to sue for duties owed by  
15 members to the company. Even, *arguendo*, if the Court were to accept the  
16 Appellants’ faulty premise, it still falls short of permitting a direct cause of action  
17 because it is only the company or its members who can sue for alleged

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18 <sup>3</sup> See also *Gottsacker v. Monnier*, 2005 WI 69, 281 Wis. 2d 361, 697 N.W.2d 436,  
19 440 (Wis. 2005) (stating that “[f]rom the partnership form, the LLC borrows  
20 characteristics of informality of organization and operation, internal governance by  
contract, direct participation by members in the company, and no taxation at the  
entity level. From the corporate form, the LLC borrows the characteristic of  
protection of members from investor-level liability.” [internal citation omitted]).

1 mismanagement. Merely holding a position as a member of an LLC cannot subject  
2 an individual to liability to a third party. *See* Rest. 3d of Agency §7.02 (“An agent is  
3 subject to tort liability to a third party harmed by the agent’s conduct only when the  
4 agent’s conduct breaches a duty that the agent owes to the third party.”) Again, if  
5 accepted, Appellants’ interpretation of the Nevada statutes would do away with the  
6 statutory protections in Chapter 86 that were specifically intended by the  
7 Legislature to protect the LLCs and their members.

8 It should be noted that Appellants are unable to direct the Court to any  
9 Nevada authority that would allow members of a limited-liability company to be  
10 held individually liable for negligence in the operation of a company that resulted in  
11 personal injury. The Gardners attempt to direct this Court to case law from other  
12 states and jurisdictions instead; however, the creation of business entities is strictly  
13 a state function, and the nuances and differences from state to state are meaningful  
14 and significant. States make intentional decisions in their statutory constructions to  
15 lure businesses to their state, and Nevada is a very popular state for business  
16 formation due largely to its statutory protections. Appellants would undermine  
17 those protections in order to allow them to maintain their suit against the members  
18 of a Nevada limited-liability company. The whole of the case law cited by  
19 Appellants is distinguishable as it relates to other jurisdictions and interprets  
20 dissimilar statutes. As such, federal and extra-jurisdictional case law carry little to

no weight with regard to interpreting the distinct and clear language of the Nevada LLC statutes. *See, e.g.*, NRCP 17(b).

C. THE CLEAR AND UNAMBIGUOUS STATUTES IN QUESTION HERE SUPPORT SUMMARY JUDGMENT AND PROVIDE NO BASIS TO PIERCE THE VEIL OF A NEVADA LIMITED-LIABILITY COMPANY

The Gardners’ insinuate that there is a basis to pierce the veil of a Nevada limited-liability company in order to reach the members and/or managers of the company. The analysis under Nevada law for piercing a corporate veil is statutory under NRS 78.747<sup>4</sup> and the standard for doing so extremely stringent. However, even greater protections are extended under NRS Chapter 86 to limited-liability companies such as Henderson Water Park, LLC because the alter ego doctrine has not been added to Chapter 86 of the Nevada Revised Statutes.

As the questions presented in the instant appeal concern the limitations on liability for Nevada business entities under the Nevada statutes (specifically NRS 86.371 and 86.381), “[i]t is the prerogative of the Legislature, not this court, to

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<sup>4</sup> NRS 78.747 provides that “no stockholder, director or officer of a *corporation* is individually liable for a debt or liability of the corporation, unless the stockholder, director or officer acts as the alter ego of the corporation.” (emphasis added). This provision does not refer to LLCs, their members or managers — and, by its terms, governs only *corporate* shareholders and officers. There has been no decision by this High Court that the alter ego doctrine applies with equal force to LLC members or managers. *See, e.g., Webb v. Shull*, 270 P.3d 1266, 1271 n.3 (Nev. 2012) (“The parties assume that NRS 78.747, which is part of the statutory chapter governing corporations, applies to the alter ego assertion against Shull and Celebrate, an LLC. Accordingly, for purposes of this appeal, we likewise assume, without deciding, that the statute applies and analyze their alter ego arguments under that standard.”) (emphasis added).

1 change or rewrite a statute.” *Holiday Ret. Corp. v. State DIR*, 128 Nev. Adv. Op.  
2 13, 274 P.3d 759, 761 (2012) (citing *Breen v. Caesars Palace*, 102 Nev. 79, 86-87,  
3 715 P.2d 1070, 1075 [1986]). The rules of statutory construction mandate if the  
4 statute text is clear and unambiguous on its face corollary evidence of the meaning  
5 of the statutes from other sources, such as legislative history or case law from other  
6 jurisdictions, shall not be considered. Accordingly, as Chapter 86 of the Nevada  
7 Revised Statutes provides no basis for “piercing” the limited-liability company veil,  
8 the Court should decline to do so in this action.

9 Moreover, the Court should not consider case law applicable to corporations  
10 as a basis for piercing the protective veil of limited-liability companies. While  
11 limited-liability companies are a hybrid of corporations and partnerships, the  
12 parallels to corporate structure stop at the alter ego doctrine. Although the Nevada  
13 corporation statutes include an alter ego exception to the corporate protections, the  
14 limited-liability company statutes do **not** contain a similar exception, creating a  
15 negative inference that the Nevada legislature did not intend for it to apply to LLCs.

16 (*Suing the Man Behind the Curtain: Can Nevada LLC Members be Liable Under*  
17 *the Alter Ego Doctrine?* by Ryan Lower, Esq., Nevada Lawyer, November, 2014,  
18 pg. 16, citing to *Dep’t. of Taxation v. DaimlerChrysler*, 121 Nev. 541, 548, 119  
19 P.3d 135, 139 [2005] [“omissions of subject matters from statutory provisions are  
20 presumed to have been intentional”]).

1 In that regard, the Appellants' reliance on the 1991 drafters notes (JA at 77-  
2 87) is misplaced. Although the alter ego doctrine in Nevada was originally based in  
3 common law, it was codified by our Nevada Legislature **only** as to Chapter 78  
4 corporations in 2001, ten years *after* the legislative history on which Appellants rely  
5 so heavily. *Compare* JA77-87 and NRS 86.371 added by 1991 Nev. Ch. 442, §310,  
6 p.1300 (1991 Nev. AB 655) *with* NRS 78.747(1), added by 2001 Nev. Stat. 601, §1,  
7 p. 3170 (2001 Nev. SB 577). Unlike Nevada's corporation statute (NRS Chapter  
8 78), however, the alter ego doctrine was not included in Nevada's LLC statute  
9 (NRS Chapter 86). The 2001 Legislature's omission of a similar alter ego exception  
10 to the LLC protections must be presumed to have been mindful and intentional.  
11 Therefore, under Nevada's statutory scheme, the limitations on liability for  
12 members and managers of LLCs are explicit and indisputable.

## 13 V. CONCLUSION

14 WHEREFORE, summary judgment as to West Coast and Double OTT is  
15 proper because the pertinent protections of NRS 86.371 and 86.381 for members of

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1 Nevada limited-liability companies apply without exception here. Any  
2 modifications or exceptions to those clear and unambiguous statutes are solely the  
3 purview of the Legislature. As such, the summary judgment should be affirmed.

4 Dated this 6<sup>th</sup> day of February, 2017.

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

7 /s/ 

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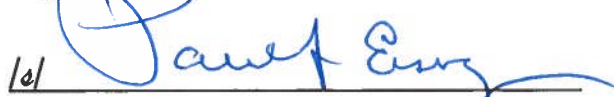
18 DOUBLE OTT WATER HOLDINGS, LLC  
19  
20

1 **CERTIFICATE OF COMPLIANCE**

2 I hereby certify that I have read this Answering Brief, and to the best of my  
3 knowledge, information, and belief, it is not frivolous or interposed for any  
4 improper purpose. I further certify that this brief complies with all applicable  
5 Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which  
6 requires every assertion in the brief regarding matters in the record to be supported  
7 by a reference to the page and volume number, if any, of the transcript or appendix  
8 where the matter relied on is to be found. I understand that I may be subject to  
9 sanctions in the event that the accompanying brief is not in conformity with the  
10 requirements of the Nevada Rules of Appellate Procedure.

11 I further certify that this brief complies with the formatting requirements of  
12 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle  
13 requirements of NRAP 32(a)(6) as this brief was prepared in a proportionally  
14 spaced typeface using Times New Roman 14 pt. font. I also certify that this brief  
15 complies with the page or type volume limitations of NRAP 32(a)(7) as it does not  
16 exceed thirty (30) pages. Dated this 6<sup>th</sup> day of February, 2017.

17 **THORNDAL, ARMSTRONG, DELK,**  
18 **BALKENBUSH & EISINGER**

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 6<sup>th</sup> day of February, 2017, service of the foregoing  
3 **RESPONDENTS' ANSWERING BRIEF** was made upon the following parties  
4 via the Nevada Supreme Court electronic notification system, pursuant to NEFCR 9  
5 and hand delivered:

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