

Case No. 71652

---

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

---

Electronically Filed  
Feb 09 2017 10:47 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

PETER and CHRISTIAN GARDNER, on behalf of minor child, LILLIAN  
GARDNER,

Appellants,

v.

HENDERSON WATER PARK, LLC dba COWABUNGA BAY WATER PARK,  
WEST COAST WATER PARKS, LLC, and DOUBLE OTT WATER  
HOLDINGS, LLC

Respondents.

---

Appeal from the Eighth Judicial District Court of the State of Nevada, in and for  
County of Clark

---

**APPELLANTS' REPLY BRIEF**

---

Donald J. Campbell, Esq. (#1216)  
Philip R. Erwin, Esq. (#11563)  
Samuel R. Mirkovich, Esq. (#11662)  
CAMPBELL & WILLIAMS  
700 South Seventh Street  
Las Vegas, Nevada 89101  
Telephone: (702) 382-5222

*Counsel for Appellants*

## **TABLE OF CONTENTS**

	Page
I. INTRODUCTION .....	1
II. ARGUMENT .....	2
A. The Plain Language Of NRS 86.371 And NRS 86.381 Does Not Establish Absolute Immunity For Members And Managers Of A Limited Liability Company .....	2
1. The generalized statements cited by the Cowabunga Bay entities are consistent with the Gardners' case law and the principle that LLC members and managers may be sued individually in certain circumstances.....	2
2. Pursuing direct claims for negligence against the Member-LLCs does not run afoul of either NRS 86.371 or NRS 86.381 .....	7
B. The Alter Ego Doctrine Is Distinct From Direct Liability For LLC Members And Managers And Not At Issue In This Appeal.....	8
III. CONCLUSION .....	9

## **TABLE OF AUTHORITIES**

	Page
<b>Cases</b>	
<i>Allen v. Dackman</i> , 991 A.2d 1216 (Md.Ct.App. 2010) .....	5
<i>D’Elia v. Rice Dev., Inc.</i> , 147 P.3d 515 (Utah Ct. App. 2006) .....	4, 9
<i>Equipoise PM LLC v. Int’l Truck and Engine Corp.</i> , 2007 WL 2228621 (N.D.Ill. July 31, 2007) .....	5
<i>In re Amerco Derivative Litig.</i> , 127 Nev. 196, 252 P.3d 681 (2011) .....	5
<i>In re Commercial Mortg. Co.</i> , 802 F.Supp.2d 1147 (D.Nev. 2011) .....	6
<i>John v. Douglas Cty. Sch. Dist.</i> , 125 Nev. 746, 219 P.3d 1276 (2009) .....	5
<i>Mbahaba v. Morgan</i> , 44 A.3d 472 (N.H. 2012) .....	5
<i>Morris v. Cee Dee, LLC</i> , 877 A.2d 899 (Conn.Ct.App. 2005) .....	5
<i>Pope v. Motel 6</i> , 121 Nev. 307, 114 P.3d 277 (2005) .....	5
<i>Rothstein v. Equity Ventures, LLC</i> , 299 A.2d 472 (N.Y.App.Div. 2002) .....	4
<i>Semenza v. Caughlin Crafted Homes</i> , 111 Nev. 1089, 901 P.2d 684 (1995) .....	3
<i>Weber v. United States Sterling Sec., Inc.</i> , 924 A.2d 816 (Conn. 2007) .....	5
<i>Weddell v. H20, Inc.</i> , 126 Nev.Adv.Op. 9, 271 P.3d 743 (2012) .....	2
<i>White v. Longley</i> , 244 P.3d 753 (Mt. 2010) .....	6
<b>Statutes</b>	
NRS 78.747 .....	3

NRS 86.371 .....	2-4, 7-8
NRS 86.381 .....	2, 4, 7-8
NRS Chapter 86 .....	7

## **Legal Treatises**

Limited Liability Companies: A State-by-State Guide to Law and Practice § 14:38 (2015) .....	7
---	---

## **Legislative Materials**

Minutes of the Assembly Committee on Judiciary, 1991 Leg., 66th Sess. (May 21, 1991) .....	3
---	---

## **POINTS AND AUTHORITIES**<sup>1</sup>

### **I. INTRODUCTION**<sup>2</sup>

The Cowabunga Bay entities essentially ask this Court to transform LLCs from a *limited*-liability business entity into an absolute, impenetrable shield from any liability for LLC members and managers. Indeed, under the Cowabunga Bay entities' warped interpretation of Nevada's statutory scheme for LLCs, members and managers of a LLC would be wholly immune from any personal liability for negligent, fraudulent or even criminal acts taken on behalf of the company. Put another way, the Cowabunga Bay entities urge this Court to depart from well-settled legal precedent governing LLCs in states around the country in order to make Nevada a safe haven for LLC members and managers seeking to avoid the consequences of their wrongful conduct. The Court should reject the Cowabunga

---

<sup>1</sup> For ease of reference, the Gardners will use the same terminology from their Opening Brief in the instant Reply.

<sup>2</sup> In their Opposition to the Gardners' Motion to Consolidate Appeal with Pending Writ Proceeding, the Cowabunga Bay entities argued that separate briefing was necessary because "the issues raised in the writ differ from those raised in this appeal." *Id.* at 4 (on file). Contrary to this convenient representation, however, the Cowabunga Bay entities' Answering Brief regurgitates the same flawed arguments from their Answer to the Gardners' writ petition. The Cowabunga Bay entities repeated many of their substantive arguments verbatim and even restated their arguments related to the application of the alter ego doctrine, which is an issue unique to the writ proceeding. Because the Cowabunga Bay entities did not submit any new arguments in their Answering Brief, the instant Reply will largely track the Gardners' Reply in Support of Petition for Writ of Mandamus.

Bay entities' invitation to adopt such a dangerous precedent as it would inevitably lead to grossly unjust results in this case and many others in the future.

With the exception of generic statements of law regarding LLCs and mere parroting of the Nevada statutes relied on by the district court, the Cowabunga Bay entities do not cite any applicable legal authority to support their strained interpretation of the law governing LLCs in Nevada. Instead, they argue the Court should flatly ignore the abundant federal and state case law supporting the Gardners' position that members and managers of LLCs can be held personally liable for their own tortious conduct. The Cowabunga Bay entities are forced to rely on these meager authorities because no court in the nation has been willing to hold that the formation of a LLC absolutely shields its members and managers from liability under any circumstances.

## **II. ARGUMENT**

### **A. The Plain Language Of NRS 86.371 And NRS 86.381 Does Not Establish Absolute Immunity For Members And Managers Of A Limited Liability Company.**

#### **1. The generalized statements cited by the Cowabunga Bay entities are consistent with the Gardners' case law and the principle that LLC members and managers may be sued individually in certain circumstances.**

As they did below, the Cowabunga Bay entities acknowledge that “limited liability companies are business entities created to provide a corporate styled liability shield[.]” *See* AB at 7 (citing *Weddell v. H2O, Inc.*, 128 Nev. Adv. Op. 9,

271 P.3d 743, 748 (2012)). The Gardners agree with this statement. That is exactly why they cited this Court’s decision in *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 901 P.2d 684 (1995). *See* OB at 9. In *Semenza*, the Court held that that “[a]n officer of a corporation may be individually liable for any tort which he commits . . . .” even though NRS 78.747, like NRS 86.371, states that “no stockholder, director or officer of a corporation is individually liable for a debt or liability of the corporation[.]” *Id.* at 1098, 901 P.2d at 689.

In other words, “the corporate styled liability shield” is not absolute despite the existence of a statute that immunizes corporate officers from individual liability for an entity’s debts or liabilities. This is true even though corporations, like LLCs, “must act through individuals or other entities with the authority to act on behalf of the company.” *See* AB at 6. Where a corporate officer personally participates in a tort, or directs or ratifies the same, he or she may be held personally liable. Because that same “corporate styled liability shield” applies to LLCs, logic dictates that members and managers of such an entity may likewise be sued when they personally commit a tort despite the existence of an analogous statute precluding individual liability for LLC debts or liabilities.<sup>3</sup> Tellingly, the Cowabunga Bay entities never addressed the *Semenza* opinion in their Answering Brief.

---

<sup>3</sup> Again, in drafting the statutes relied on by the Cowabunga Bay entities, the Legislature drew a direct comparison between the language of NRS 78.747 and the section of the LLC bill that would eventually become NRS 86.371. *See* OB at 9 n. 4; JA 85 (“Mr. Fowler pointed out that [ ] section [310 of the limited liability company

The Cowabunga Bay entities next attempt to grapple with the Gardners’ other authorities through the pithy assertion that “federal and extra-jurisdictional case law carry [sic] little to no weight with regard to interpreting the distinct and clear language of the Nevada LLC statutes.” *See* AB at 8-9. Such an over-simplified approach fails to acknowledge that state courts considering the personal liability of LLC members routinely do so in the context of statutes akin to NRS 86.371 and NRS 86.381.

The Utah Court of Appeals, for instance, considered the effect of Utah Code Ann. § 48-2c-601 (2002), which, like NRS 86.371, provides “no organizer, member, manager, or employee of a company is personally liable under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the company.” *D’Elia*, 147 P.3d at 524-25. Despite this statutory language, which is arguably broader than Nevada’s statute, the *D’Elia* court noted “other states have determined that even absent an express statutory exception, 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. *Id.* at 525 (citing *Rothstein v. Equity Ventures, LLC*, 299 A.2d 472, 474 (N.Y. App. Div. 2002) and *Salzano v. Goulet*, 2005 WL 1154225, \*6 (Conn. Super. Ct. April 18, 2005)).

---

bill] stated ‘they were not liable under a judgment, decree, or order of the court, for any debts, obligations or liabilities of the company,’ which was exactly present corporate law.”) (emphasis in original).



Many of the out-of-state cases cited by the Gardners involve the interpretation of statutes that, like Nevada's, provide a member or manager is not personally liable for the debts and obligations of the company. *See Weber v. United States Sterling Sec., Inc.*, 924 A.2d 816, 823-24 (Conn. 2007) (addressing Del. Code. Ann. tit. 6, § 18-303(a) (2005)); *Equipoise PM LLC v. Int'l Truck and Engine Corp.*, 2007 WL 2228621, \*10 (N.D.Ill. July 31, 2007) (same); *Mbahaba v. Morgan*, 44 A.3d 472, 476 (N.H. 2012) (addressing RSA 304-C:25 (2005)); *Allen v. Dackman*, 991 A.2d 1216, 1228 (Md.Ct.App. 2010) (addressing Md. Code (1975, 2007 Repl.Wol.), § 4A-301 of the Corporations and Associations Article); *Morris v. Cee Dee, LLC*, 877 A.2d 899, 908 (Conn. Ct. App. 2005) (addressing the Connecticut Limited Liability Company Act, General Statutes § 34-100 et seq.) (cited in OB at 10-12 and n. 5).

This Court often turns to opinions from other state courts that interpret statutes or legal principles analogous to those present in Nevada. *See, e.g., In re Amerco Derivative Litig.*, 127 Nev. 196, 218–19, 252 P.3d 681, 697–98 (2011) (“[t]o determine whether demand upon the board is excused, we apply standards articulated by the Delaware Supreme Court[.]”); *John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 756, 219 P.3d 1276, 1283 (2009) (“When determining whether Nevada's anti-SLAPP statute falls within this category, we consider California caselaw because California's anti-SLAPP statute is similar in purpose and language to Nevada's anti-SLAPP statute.”); *Pope v. Motel 6*, 121 Nev. 307, 315–17, 114

P.3d 277, 282–84 (2005) (surveying jurisdictions addressing whether statements made to law enforcement enjoy absolute or qualified privilege and concluding “we agree with those courts that have adopted a qualified privilege.”). Accordingly, the Cowabunga Bay entities cannot seriously claim that “the whole of the case law cited by [the Gardners] is distinguishable” simply because it is found outside Nevada. *See* AB at 8.

While many of those authorities are admittedly “federal and extra-jurisdictional,” *see* AB at 8, these attributes do not detract from their persuasiveness—particularly when the statutes being examined track Nevada’s statutory scheme and this Court has not squarely addressed the issue.<sup>4</sup> As such, the Gardners are not asking this Court to “promulgate new law[,]” *see* AB at 3, but rather to confirm that Nevada law is in accordance with every other state and federal court that has addressed the issue of direct liability for LLC members and managers.

---

<sup>4</sup> Ironically, the Cowabunga Bay entities cited *White v. Longley*, 244 P.3d 753 (Mt. 2010) as additional support for the general statement of law equating the “corporate-styled liability shield” to that of LLCs. *See* AB at 7. In so doing, they failed to appreciate that the Montana Supreme Court in *White* addressed the same issue presented here in the context of that state’s version of NRS 86.371 and found “[w]hile individual liability limitation is an aspect of the LLC form of business organization, there is wide-spread acknowledgement that individual members of an LLC may be subjected to personal liability” for tortious conduct. *Id.* at 760. And while this Court has yet to address the issue, a federal district court in Nevada has found the managing members of a Nevada LLC personally liable for the tort of conversion. *See In re Commercial Mortg. Co.*, 802 F.Supp.2d 1147, 1165 (D.Nev. 2011) (“As managing members of Compass, Piskin and Blatt are personally liable for engaging in the conversion that plaintiffs proved was committed by Compass.”)

**2. Pursuing direct claims for negligence against the Member-LLCs does not run afoul of either NRS 86.371 or NRS 86.381.**

Setting aside the overwhelming amount of case law supporting the Gardners' position, the Cowabunga Bay entities' interpretation of the plain language of NRS 86.371 and NRS. 86.381 is simply wrong. The Gardners acknowledge that the Member-LLCs are not personally liable "for the debts and liabilities of the company" just because they are members of HWP. *See* NRS 86.371. Similarly, the Gardners recognize that the Member-LLCs would not be proper parties to this litigation under NRS 86.381 if the Gardners were merely asserting claims "against the company," say, for instance, in a breach of contract action.

Here, however, the Gardners are not seeking to hold the Member-LLCs liable "for the debts and liabilities of the company," *see* NRS 86.371; nor is this action simply "against the company." *See* NRS 86.381. To the contrary, the Gardners are seeking to assert independent claims and impose direct liability against the Member-LLCs based on their own tortious conduct that resulted in the severe non-fatal drowning of Leland in the wave pool at Cowabunga Bay. This is clearly permissible under the legal authorities set forth above and would not "do away with the statutory protections in Chapter 86" as argued by the Cowabunga Bay entities. *See* AB at 8; *supra* at 2-5; *see also* Limited Liability Companies: A State-by-State Guide to Law and Practice § 14:38 (2016) ("[t]here are several important exceptions to the rule that members are not liable for the LLC's debts and obligations. First, members are liable

for their own tortious conduct, even when they act on the LLC's behalf.”) (interpreting NRS 86.371 and NRS 86.381).<sup>5</sup>

**B. The Alter Ego Doctrine Is Distinct From Direct Liability For LLC Members And Managers And Not At Issue In This Appeal.**

In their Answering Brief, the Cowabunga Bay entities restate their arguments from the clustered writ proceeding concerning the application of the alter ego doctrine to LLCs even though the underlying motion for summary judgment and district court's order did not address that issue. Because the alter ego doctrine is not at issue in this appeal, the Gardners will not respond to the Cowabunga Bay entities' arguments except to state that they are utterly baseless as demonstrated by the Gardners' briefing in the related writ proceeding. *See* Pet. at 19-27; Pet. Reply at 11-15.

That said, the Cowabunga Bay entities' confusion over the relevance of the alter ego doctrine to this appeal is indicative of their ongoing inability to comprehend the difference between direct liability for LLC members and managers and corporate veil piercing. Again, as the Gardners have previously argued, and as the case law makes clear, these are distinct legal theories. *See* Pet. at 19 n. 6; Pet.

---

<sup>5</sup> The Cowabunga Bay entities' argument that the Gardners are seeking to “assert a claim for the allegedly negligent mismanagement of the LLC by its members” is nonsensical. *See* AB at 13. The Gardners are claiming that the Member-LLCs, as the entities in control of Cowabunga Bay's operations along with the individual managers, owed a duty directly to Leland, which they breached by authorizing, directing, ratifying and participating in the illegal conduct that forms the basis of the Complaint. The Court should disregard the fallacious assertion that the Gardners somehow lack standing to sue the Member-LLCs for their negligent conduct.

Reply at 6 n. 4; *see also D'Elia v. Rice Dev., Inc.*, 147 P.3d 515, 524 (Utah Ct. App. 2006) (“Several courts and commentators make it clear that holding an officer or director personally liable for corporate torts in which they participate is distinct from the piercing the veil doctrine.”) (listing cases and authorities). That the Cowabunga Bay entities still fail to grasp, or at least acknowledge, the significance of this distinction speaks volumes.

### **III. CONCLUSION**

Based on the foregoing, the Gardners respectfully request that the Court reverse the district court’s erroneous grant of summary judgment in favor of the Member-LLCs and remand this matter for further proceedings on the Gardners’ causes of action against the Member-LLCs.

DATED this 9th day of February, 2017

CAMPBELL & WILLIAMS

By /s/ **Donald J. Campbell**  
DONALD J. CAMPBELL, ESQ. (#1216)  
PHILIP R. ERWIN, ESQ., (#11563)  
SAMUEL R. MIRKOVICH, ESQ. (#11662)  
700 South Seventh Street  
Las Vegas, NV 89101

*Attorneys for Appellants*

## VERIFICATION

I, Donald J. Campbell, declare as follows:

1. I am one of the attorneys for Peter and Christian Gardner, on behalf of minor child, Leland Gardner.
2. I verify that I have read and compared the foregoing APPELLANTS' REPLY BRIEF and that the same is true to my own knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.
3. I, as legal counsel, am verifying the Reply because the questions presented are legal issues, which are matters for legal counsel.
4. I declare under the penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED this 9th day of February, 2017

/s/ **Donald J. Campbell**  
Donald J. Campbell, Esq. (#1216)

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that I have read this Reply, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the Nevada Rules of Appellate Procedure.

I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) as this brief was prepared in a proportionally spaced typeface using Times New Roman 14 pt font. I also certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) as it does not exceed fifteen (15) pages.

Finally, I certify that the Appendix accompanying this brief complies with NRAP 21(4) and NRAP 30 in that the Appendix includes a copy of the District Court's order that is challenged, the pertinent parts of the record before the respondent judge, and the other original documents,

which are essential to understand the matter set forth in this Appeal.

DATED this 9th day of February, 2017

CAMPBELL & WILLIAMS

By /s/ **Donald J. Campbell**

DONALD J. CAMPBELL, ESQ. (#1216)

PHILIP R. ERWIN, ESQ., (#11563)

SAMUEL R. MIRKOVICH, ESQ. (#11662)

700 South Seventh Street

Las Vegas, NV 89101



## **CERTIFICATE OF SERVICE**

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 9th day of February 2017, I caused true and correct copies of the foregoing Appellants' Reply Brief 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