

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MCNAMEE,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; and THE HONORABLE
DOUGLAS E. SMITH, DISTRICT
JUDGE,

Respondent,

and

GIANN BIANCHI and DARA
DELPRIORE,

Real Parties in Interest.

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No.: _____

District Court
No. A-13-691887-C

PETITION FOR WRIT OF MANDAMUS

With Supporting Points and Authorities

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PETITION FOR WRIT OF MANDAMUS

Petitioner JAMES MCNAMEE ("MCNAMEE") seeks a writ of mandamus compelling the district court to grant Petitioner's Motion to Dismiss the Complaint of the Real Parties in Interest on the grounds that the Real Parties in Interest failed to file a Motion to Substitute the Deceased party, MCNAMEE, within 90 days of the Suggestion of Death pursuant to NRCP 25(a)(1). Although Petitioner did file a Motion to Substitute, the deceased party MCNAMEE within 90 days of the Suggestion of Death, (1) The District Court denied Petitioner's Motion and (2) the Motion merely sought to substitute a Special Administrator in place and stead of the deceased party, not a General Administrator.

Additionally, Petitioner contends that it was improper for the District Court to open a General Administration of the Estate of James McNamee as Mr. McNamee was not a Nevada resident at the time of his death and as such, Nevada courts would not have jurisdiction to generally administer his estate. Additionally, his estate contained less than \$300,000 in assets at

///

the time of death and would not therefore meet the threshold for a General Administration.

Dated this 10th day of September, 2018.

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VERIFICATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

Under penalties of perjury, the undersigned declares that he is counsel for the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes them to be true. This verification is made pursuant to NRS 15.010.

Dated this 10th day of September, 2018.

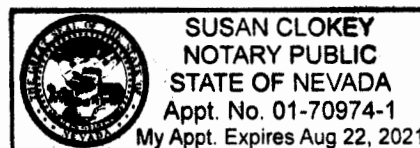


JEFFREY J. ORR, ESQ.

Subscribed and sworn to before me
this 10th day of September, 2018.



NOTARY PUBLIC



NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Petitioner has been represented in this litigation by Jeffrey J. Orr and James P.C. Silvestri of Pyatt Silvestri.

Dated this 10th day of September, 2018.

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ROUTING STATEMENT

This writ proceeding involves matters raising a principal issue of statewide public importance and therefore meets the requirements of NRAP 17(a)(11). However, it also involves an estate with a value of less than \$5,430,000 and therefore also meets the requirements of NRAP 17(b)(15).

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POINTS AND AUTHORITIES IN SUPPORT OF PETITION

ISSUES PRESENTED

1. Did the district court err when it denied Defendant McNamee's Motion to Dismiss pursuant to NRCP 25(a)(1)?

2. Did the district court err when it, *sua sponte*, ordered a General Administration of the Estate of James McNamee pursuant to NRS Chapter 139?

STATEMENT OF FACTS

A. The subject accident

This case involves a motor vehicle accident which occurred on July 17, 2013. On that day, a vehicle driven by Defendant James McNamee collided with a vehicle driven by Plaintiff Giann Bianchi. Plaintiff Dara Del Priore was a passenger in Plaintiff Bianchi's vehicle.

B. The subject lawsuit

On November 19, 2013 Plaintiffs Giann Bianchi and Dara Del Priore brought the instant lawsuit for personal injuries against Defendant James McNamee. The Complaint alleges Negligence and Negligence Per Se

against Defendant James McNamee and seeks damages for personal injuries.
1 App. 1-3.

PROCEDURAL HISTORY

Defendant James McNamee passed away on August 12, 2017. 1 App. 12. At the time, Mr. McNamee resided in Arizona and was an Arizona resident. 1 App. 12. Mr. McNamee was survived by his brother and left no assets in the State of Nevada or any other State. On September 20, 2017, Defendant filed a Suggestion of Death pursuant to NRCP 25. 1 App. 13. Defendant then petitioned the probate court in the Eighth Judicial District Court to open a Special Administration of the Estate of James McNamee. 1 App. 15-16. The probate court granted this petition. 1 App. 24-26. The Special Administrator's powers were limited to defending the instant action and distributing the proceeds of Mr. McNamee's automobile liability insurance policy with GEICO. 1 App. 25 lines, 15-18.

On December 14, 2017, Defendant filed a Motion to Substitute Susan Clokey, Special Administrator of the Estate of James McNamee in place and stead of Defendant James McNamee (deceased). 1 App. 32. On March 27,

2018, the court denied Defendant's Motion to Substitute the deceased Defendant. 1 App. 62-63. No other Motions to Substitute the deceased Defendant were filed within the 90 day time period pursuant to NRCPP 25(a)(1).

On March 30, 2018, Defendant McNamee filed a Motion to Dismiss pursuant to NRCPP 25(a)(1) as it had been over six months since the Suggestion of Death had been filed and no party had been substituted in place and stead of Defendant McNamee (deceased). 1 App. 125-131. The court denied that Motion. 1 App. 111-112.

On May 14, 2018, the court, *sua sponte*, ordered the creation of a General Administration and an additional Special Administration of the Estate of James McNamee. 1 App. 111-112. The court, *sua sponte*, also appointed Fred Waid as the General Administrator and the Special Administrator of the Estate of James McNamee. 1 App. 111-112. The court, *sua sponte*, also ordered the substitution of Fred Waid as the General Administrator and the Special Administrator of the Estate of James McNamee in place and stead of Defendant James McNamee. 1 App. 111-

112. At no time did any party file a Motion requesting that a general administrator be substituted in place and stead of the deceased Defendant. There were no assets of the Estate of James McNamee other than his automobile insurance policy with GEICO in the amount of \$30,000 per person and \$60,000 per accident.

WHY THE WRIT SHOULD ISSUE

This petition meets the criteria this Court has established for entertaining a writ petition. The court will consider writ petitions denying Motions to Dismiss when either (1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition. Int'l Game Tech Inc. v. Second Judicial Dist. Court, 124 Nev. 193, 197-198, 179 P.3d 556, 559. There are no factual disputes regarding the above facts. Defendant contends that the District Court was obligated to dismiss this matter pursuant to NRCP 25(a)(1) as this is a mandatory rule of civil procedure. Additionally, Defendant contends that

the District Court committed plain error when it opened a General Administration of an Arizona resident when the estate contained less than \$300,000 in assets.

STANDARD OF REVIEW

In deciding a writ of mandamus that seeks to compel entry of a dispositive motion as a matter of law, the Court is to consider legal questions de novo. State v. Eighth Judicial Dist. Ct., 131 Nev. Adv. Op. 41, 351 P.3d 736, 740 (2015). Also, statutory interpretation is a question of law that is reviewed de novo, even in the context of a writ petition. Libby v. Eighth Judicial Dist. Ct., 130 Nev. Adv. Op. 39, 325 P.3d 1276, 1279 (2014).

ARGUMENT ON THE MERITS

I.

IT IS PLAIN ERROR TO DENY DEFENDANT'S MOTION TO DISMISS

Nevada Rule of Civil Procedure 25(a)(1) mandates dismissal of the action unless a Motion to Substitute the deceased party is made within 90 days of the Suggestion of Death. NRCP 25 (a)(1) states:

"If a party dies and the claim is not thereby extinguished, the Court

may order substitution of the proper parties. The Motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons. **Unless the Motion for Substitution is made not later than ninety (90) days after the death is suggested upon the record** by service of a statement of the fact of the death as provided herein for the service of the Motion, **the action shall be dismissed as to the deceased party.**" NRCp 25(a)(1) (emphasis added)

This statute mandates dismissal of the action unless a Motion for Substitution is submitted to the District Court within ninety (90) days of the Suggestion of Death. The Suggestion of Death of Defendant James McNamee was filed on September 20, 2017. Plaintiffs never filed any Motion to Substitute the deceased Defendant.

On December 14, 2017, Defendant McNamee filed a Motion to Substitute Susan Clokey, Special Administrator of the Estate of James McNamee, in place and stead of the deceased Defendant. This Motion was filed within 90 days of the Suggestion of Death. However, Defendant's Motion only sought to substitute a Special Administrator in place and stead of the deceased Defendant, not a General Administrator. The Special Administrator's authority was limited to defending the instant litigation and

satisfying any eventual judgment up to the limits of the GEICO automobile insurance policy of \$30,000 per person and \$60,000 per accident. Also, the District Court denied that Motion.

Long after the 90 days expired, on May 14, 2018, the District Court, *sua sponte*, ordered the creation of a General Administration and an additional Special Administration of the Estate of James McNamee. The court, *sua sponte*, also appointed Fred Waid as the General Administrator and the Special Administrator of the Estate of James McNamee. The court, *sua sponte*, also ordered the substitution of Fred Waid as the General Administrator and the Special Administrator of the Estate of James McNamee in place and stead of Defendant James McNamee. The District Court made that order even though there was no Motion requesting such relief.

This Court has previously found that the 90 day deadline to substitute a deceased party is mandatory. In *Wharton v. City of Mesquite*, 113 Nev. 796, 942 P.2d 155 (1997) Plaintiff died during the pendency of the litigation. One hundred and twenty-five (125) days after the Suggestion of Death was filed,

Plaintiff's counsel filed a Motion to Substitute Wharton's surviving spouse as his personal representative. The Trial Court denied Defendant's Motion to Dismiss and granted Plaintiff's Motion to Substitute.

The Nevada Supreme Court reversed and held that it was error to deny Defendant's Motion to Dismiss because NRCP 25(a)(1) mandates dismissal unless the Motion to Substitute is filed within ninety (90) days of the Suggestion of Death. The Court held, "Although a trial on the merits is favored over a mechanical application of a ninety-day rule, this Court has strictly interpreted the language of NRCP 25 (a)(1)." *Wharton v. City of Mesquite*, 113 Nev. 796, 798, 942 P.2d 155 (1997) (citing *Barto v. Weishaar*, 101 Nev. 27, 692 P.2d 498 (1985)). "The rule is quite clear that unless the Motion for Substitution is made within ninety (90) days after the death is suggested upon the record, the action 'shall be dismissed as to the deceased party.' The district judge was required to dismiss the deceased party." *Id.* at 798. "In the instant case, Wharton's counsel failed to comply with NRCP 25(a)(1) by not moving the Court to substitute Wharton's surviving spouse as his personal representative within the 90-day period. Therefore, we conclude

that the District Court erred in granting Wharton's counsel's untimely Motion for Substitution of parties and denying the Defendant's Motions to Dismiss the action." *Id.* at 798.

The Suggestion of Death of James McNamee was filed on September 20, 2017. As such, any Motion to Substitute Defendant James McNamee as Defendant must have been filed on or before December 19, 2017. Because no other Motions to Substitute were filed during this time period, pursuant to NRCP 25(a)(1) and *Wharton v. City of Mesquite*, 113 Nev. 796, 798, 942 P.2d 155 (1997), the Court abused its discretion in substituting the Defendant. It is therefore requested that this Court order the District Court to dismiss this action.

II.

IT IS PLAIN ERROR TO OPEN A GENERAL ADMINISTRATION OF THE ESTATE OF JAMES MCNAMEE

The district court plainly erred in opening a General Administration and appointing Fred Waid as the General Administrator. Nevada law expressly limits the establishment of a general administration and the

appointment of a general administrator where: (1) the decedent was a resident of Nevada at the date of death or (2) the decedent was a non-resident, but owns property located within the State worth in excess of \$300,000. NRS 136.010(1)-(2) and 145.040. NRS 132.275 defines “probate” as “a legal proceeding in which the court has jurisdiction to administer, pay out and distribute the assets of a decedent to the persons entitled to them, including devisees, heirs, creditors and others.” NRS 132.275 (emphasis added).

Where an estate does not meet such criteria, Nevada law alternatively provides for the establishment of a special administration and the appointment of a special administrator to, among other things, defend claims asserted against a deceased defendant in district court. NRS 140.040(2)(a). Specifically, Nevada law authorizes the special administrator to satisfy a judgment where the exclusive source of such payment originates from a liability insurance policy covering the loss, rather than estate assets. NRS 140.040(3)(b). As recognized by this Court, the provisions of NRS 140.040 promote judicial economy and the efficient resolution of claims by

avoiding lengthy, costly and formal probate procedures when the sole asset is a liability insurance policy. Jacobsen v. Estate of Clayton, 121 Nev. 518, 522, 119 P.3d 132, 134 (2005).

Mr. McNamee died on August 12, 2017, in Mohave County, Arizona. At the time of his death, Mr. McNamee was an Arizona resident leaving no assets situated in Nevada or any other State. Thus, Plaintiff's only potential source of recovery in the litigation is Mr. McNamee's insurance coverage. Defendant, therefore, properly established a special administration in the probate court in and for the Eighth Judicial District for the purpose of substituting Mr. McNamee's estate as the party of interest in the litigation following his death.

In establishing a general administration and appointing a general administrator, the district court committed plain error on numerous grounds. First, Mr. McNamee's estate fails to meet the basic jurisdictional requirements necessary for a general administration. See NRS 136.010(1)-(2). At the time of his death, Mr. McNamee was not a Nevada resident, left no property in this State and did not own any assets beyond his automobile

insurance policy with GEICO in the amount of \$30,000 per person and \$60,000 per accident. Moreover, a general administration violates the public policy of promoting the efficient administration of estates by subjecting a no-asset estate to lengthy and costly procedures associated with formal probate proceedings. NRS 140.040.

Second, the district court – a court of general jurisdiction in the Eighth Judicial District Court – further erred in making orders concerning Mr. McNamee’s estate because it impermissibly invades the exclusive province of the probate court. Under the local rules, the Probate Commissioner enjoys exclusive jurisdiction over all matters pertaining to the administration of estates under Title 12 of the NRS. EDCR 4.03(a). Such jurisdiction necessarily includes the establishment of a general probate administration and the appointment of a general administrator. See generally NRS Chapters 139 and 143. The district court, therefore, exceeded its authority when initiating a general probate administration within the context of a personal injury lawsuit, particularly where the Defendant already substituted the Estate as

the party in interest after the probate court appointed a special administrator for such purposes.

Third, the district court plainly erred in establishing the general administration by erroneously adopting Plaintiff's unsupported claim that a theoretical, unripe and contingent claim for bad faith constitutes the ownership of property within the State of Nevada. It is well established that a cause of action for bad faith is premature until there is a determination of liability and the extent of damages owed on the first-party insurance contract. Pemberton v. Farmer's Ins. Exchange, 109 Nev. 789, 796-97, 858 P.2d 380, 383 (1993). See also Vest v. Travelers Ins. Co., 753 So.2d 1270, 1276 (Fla. 2000). Because Plaintiffs' claims for bad faith are contingent and speculative, they currently do not have a value. Therefore, Plaintiffs do not meet the \$300,000 threshold required to maintain a general administration of Mr. McNamee's Estate under NRS Chapter 145.

Fourth, the district court erred in its appointment of Fred Waid, a third party, as General Administrator of Decedent's estate in lieu and instead of Mr. McNamee's brother who has priority to so serve. NRS 139.040(1). Where

a decedent dies without a surviving spouse, children or parents, NRS 139.040 expressly provides that “administration of the intestate estate of a decedent **must be granted**” to the living sibling of the decedent prior to “[a]ny person or persons legally qualified,” the last in the order of priority under which Mr. Waid would qualify. *Id.* (emphasis added). As clearly reflected in the record, the district court unilaterally appointed Mr. Waid without giving preference to Mr. McNamee’s brother and otherwise providing him notice of such appointment.

Accordingly, a general probate administration is unavailable under the facts of this case. This Court should, therefore, determine that the district court committed plain error when it opened a General Administration and appointed Fred Waid as General Administrator.

CONCLUSION

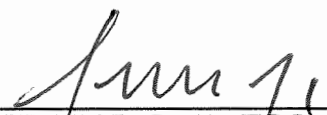
NRCP 25(a)(1) mandates dismissal of the action when the parties fail to file a Motion to Substitute the deceased party within 90 days of the Suggestion of Death. Although, Defendant filed a Motion to Substitute the Special Administrator of the Estate of James McNamee in place and stead of

James McNamee, that Motion was denied. Additionally, Defendant requested that the Special Administrator be substituted not a General Administrator. NRC 25(a)(1) uses the word "must", not may, and as such, it is not a discretionary rule. Therefore, this case must be dismissed as to Defendant.

Additionally, Nevada courts do not have the authority to open a general administration of Mr. McNamee's Estate. Mr. McNamee was an Arizona resident at the time of his death and as such, Nevada courts would not have jurisdiction to generally administer his estate. Also, his estate has less than \$300,000 in assets and cannot be generally administered under Nevada law.

Dated this 10th day of September, 2018.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, double-spaced Palatino font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 2,663 words.

3. I hereby certify that I have read this appellate brief, 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 requirements of the Nevada Rules of Appellate Procedure.

Dated this 10th day of September, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of September 2018, I caused to be delivered a copy of the foregoing **PETITION FOR WRIT OF MANDAMUS** by United States Postal Service, postage prepaid, at Las Vegas, Nevada, addressed as follows:

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