Case No. 76904

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MCNAMEE,
Petitioner,

v.

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 DEL PRIORE,
Real Parties in Interest,

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

ANSWER TO PETITION FOR WRIT OF MANDAMUS

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons or 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.

GIANN BIANCHI and DARA DEL PRIORE.

Real Parties in Interest have not been represented by any other attorneys besides GLEN LERNER INJURY ATTORNEYS, WEINBERG WHEELER HUDGINS GUNN & DIAL, and CAMPBELL & WILLIAMS.

DATED this 27th day of November, 2018

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I. INTRODUCTION

Defendant James McNamee ("McNamee") presents a grossly one-sided depiction of this case in his Petition for Writ of Mandamus (the "Petition"). McNamee, in particular, ignores numerous facts and circumstances that are crucial to this Court's inquiry. These omissions are exemplified by a woefully incomplete appendix that purposefully excludes any filings by Plaintiffs Giann Bianchi and Dara Del Priore (collectively referred to as the "Bianchi Parties") related to the issues raised by McNamee's Petition. There are, of course, two sides to every story, and the complete set of facts in this case clearly demonstrates that the district court did not err (i) by rejecting McNamee's baseless request for dismissal under NRCP 25(a)(1), or (ii) by appointing Fred Waid as the General Administrator of McNamee's Estate.

First, McNamee contends that the district court was required to dismiss the Bianchi Parties' Complaint because they did not file a motion to substitute within 90 days of the filing of McNamee's suggestion of death pursuant to NRCP 25(a)(1). McNamee's suggestion of death did not, however, trigger the 90-day deadline to file a motion to substitute because McNamee undisputedly failed to identify his successor or representative. Even if the 90-day deadline was triggered—and it was not—McNamee filed a motion to substitute within that time period in compliance with the plain language of NRCP 25(a)(1). And although the district court did not

reach the issue, the Bianchi Parties clearly demonstrated excusable neglect sufficient to enlarge the time to move for substitution under NRCP 6(b)(2). There is no basis for dismissal here.

Next, McNamee contends the district court committed error by appointing Fred Waid ("Mr. Waid") as the General Administrator of McNamee's Estate because the district court lacked jurisdiction or otherwise violated Nevada probate law. Both contentions are wrong. The district court's appointment of a General Administrator of McNamee's Estate was jurisdictionally proper as the Estate possessed one asset in addition to McNamee's insurance policy—an unaccrued cause of action for bad faith against GEICO. Moreover, the district court complied with the requirements of the Nevada Revised Statutes and/or Rules of Practice for the Eighth Judicial District Court when it appointed Mr. Waid as the General Administrator of McNamee's Estate.

II. COUNTERSTATEMENT OF THE ISSUES

1. Whether the district court properly denied McNamee's motion to dismiss under NRCP 25(a)(1) where (i) McNamee's suggestion of death failed to trigger the 90-day deadline to move for substitution, (ii) McNamee nonetheless made a motion to substitute within 90 days of the defective suggestion of death, and (iii) the Bianchi Parties demonstrated excusable neglect sufficient to enlarge the time to move for substitution?

2. Whether the district court properly appointed Fred Waid as the General Administrator of McNamee's Estate where the Estate possessed an unaccrued bad

faith claim against McNamee's insurer in addition to the insurance policy that is at issue in this litigation?

III. COUNTERSTATEMENT OF THE FACTS

1. On July 17, 2013, McNamee caused a rear-end automobile accident with an automobile occupied by Mr. Bianchi and Ms. Del Priore. P.App. Vol. I, 1-3. At the time of the accident, McNamee was covered by an automobile liability insurance policy issued by GEICO. R.App. Vol. I, 43. McNamee's GEICO policy had limits of $30,000 per person up to $60,000 per occurrence. *Id*.

2. On October 25, 2013, the Bianchi Parties served GEICO with a policy limits demand of $30,000 per person in exchange for a full release of any potential claims. *Id*. GEICO did not accept the Bianchi Parties' demand. *Id*.

3. On November 19, 2013, the Bianchi Parties filed their Complaint in this action alleging personal injuries arising out of the July 17, 2013 automobile accident. P.App. Vol. I, 1-3.

4. On April 3, 2014, GEICO served Ms. Del Priore with a settlement offer in the amount of $30,000, which she rejected as her medical bills already exceeded that amount. R.App. Vol. I, 44. Following GEICO's settlement offer, the Bianchi Parties' counsel advised GEICO to appoint separate counsel to advise McNamee of his potential bad faith claim against GEICO. *Id.* Less than three months later, McNamee retained new counsel from the law firm Pyatt Silvestri. *Id*.

5. On April 21, 2015, the Bianchi Parties served McNamee with settlement offers well in excess of the limits of the GEICO Policy based on Mr. Bianchi's and Ms. Del Priore's significant damages as of that date. *Id*. McNamee did not accept the Bianchi Parties' settlement offers. *Id*.

6. On July 13, 2015, McNamee offered to settle the Bianchi Parties' respective claims for amounts that exceeded the limits of the GEICO Policy, thereby conceding that GEICO exposed McNamee to excess liability as a result of its earlier bad faith refusal to compromise the Bianchi Parties' claims for the policy limits. *Id*. The Bianchi Parties did not accept McNamee's settlement offers. *Id*.

7. On September 20, 2017—three (3) judicial days before the trial in this matter was scheduled to begin—McNamee's counsel filed a Suggestion of Death on the Record (the "Suggestion of Death") stating that McNamee had passed away more than one month earlier on August 12, 2017. R.App. Vol. I, 1-2. Notably, the Suggestion of Death did ***not*** identify McNamee's successor or representative. *Id*.

8. That same day, and without providing notice to the Bianchi Parties' counsel, McNamee's counsel filed a Petition for Special Letters of Administration in the probate division of the Eighth Judicial District Court. R.App. Vol. I, 200-208. There, McNamee's counsel asked the probate court to appoint Susan Clokey, an administrative assistant at Pyatt Silvestri, as the Special Administrator of the Estate of James Allen McNamee on grounds the Estate had "no assets to satisfy any

judgment other than an automobile policy with GEICO [providing] automobile liability insurance coverage of $30,000 per person and $60,000 per accident." *Id.*

9. On November 16, 2017, the Honorable Vincent Ochoa granted the Petition for Special Letters of Administration and appointed Ms. Clokey as the Special Administrator of McNamee's Estate. R.App. Vol. I, 210-214. The probate court's order specifically stated that the "sole purpose of this Order is to allow *Bianchi et al. v. McNamee*, Case No. A-13-691887-C to proceed as to the insurance proceeds of the GEICO automobile insurance policy pursuant to Nevada Revised Statutes 140.040(2)(a) and 140.040(3)(b)." *Id.*

10. On December 14, 2017—approximately 85 days after the Suggestion of Death was filed—McNamee moved to substitute Ms. Clokey as the defendant in the underlying action in the place and stead of McNamee. R.App. Vol. I, 3-15.

11. On January 3, 2018, the Bianchi Parties filed their Petition for Issuance of General Letters of Administration and for Appointment of *Cumis* Counsel for the Estate of James McNamee in the probate court. R.App. Vol. I, 40-55. The Bianchi Parties asserted that McNamee had failed to advise the probate court of the full extent of the Estate's assets and, more specifically, that the Estate possessed a potential cause of action against GEICO for bad faith. *Id.* The Bianchi Parties further argued that McNamee failed to address the alleged conflict of interest between the Estate and GEICO arising out of the latter's bad faith conduct, which was compounded by the decision to appoint Pyatt Silvestri's administrative assistant,

Ms. Clokey, as the Special Administrator. *Id*. As a result, the Bianchi Parties requested that the probate court appoint *Cumis* counsel to advise the Estate of its rights. *Id*.[1]

12. Simultaneously on January 3, 2018, the Bianchi Parties filed their Opposition to McNamee's Motion to Substitute Ms. Clokey as Special Administrator on grounds that the Bianchi Parties had sought general letters of administration from the probate court. R.App. Vol. I, 16-39. Specifically, the Bianchi Parties alleged that Ms. Clokey had a conflict due to her employment at Pyatt Silvestri given that the firm's simultaneous representation of both McNamee and GEICO. *Id.*

13. On January 22, 2018, the district court issued a minute order denying McNamee's Motion to Substitute and directing the parties to each submit the names of three (3) individuals who could serve as the Administrator of McNamee's Estate. R.App. Vol. I, 73.

14. On February 9, 2018, the Bianchi Parties re-filed their Motion for Appointment of *Cumis* Counsel for the Estate of James Allen McNamee on order shortening time in the district court. R.App. Vol. I, 128-173. That same day, non-

[1] *See State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Op. 74, 357 P.3d 338 (2015) (adopting *Cumis* decision by California Supreme Court and requiring an insurance company to provide independent counsel if its interests conflict with those of the insured). The Bianchi Parties subsequently withdrew their request to the probate court for the appointment of *Cumis* counsel based on McNamee's admission that the district court had jurisdiction over the matter. R.App. Vol. I, 106.

party GEICO made a special appearance through separate counsel and opposed the Bianchi Parties' request for the appointment of *Cumis* counsel. R.App. Vol. I, 174-178.

15. The district court conducted a hearing on the Bianchi Parties' Motion for Appointment of *Cumis* Counsel for the Estate of James Allen McNamee on February 13, 2018. R.App. Vol. I, 179-191. At the outset, the district court requested the names of each party's proposed administrators for McNamee's Estate. R.App. Vol. I, 180-182. In response, the Bianchi Parties' counsel provided the district court with the names of two qualified attorneys, Fred Waid and Robert Morris. *Id*. McNamee's counsel, however, was not prepared to provide the district court with potential candidates and instead requested the opportunity to brief the issue. *Id*. Thereafter, the district court heard argument on the appointment of *Cumis* counsel and instructed the parties to submit proposed findings of fact and conclusions of law. R.App. Vol. I, 183-190.

16. On February 23, 2018, Ms. Clokey, as the Special Administrator, filed her Brief Concerning the Probate Court's Exclusive Jurisdiction over the Estate of James McNamee. R.App. Vol. I, 192-235. The Bianchi Parties filed their Response on March 12, 2018. R.App. Vol. I, 236-242.

17. On March 12, 2018, the district court entered its Order Denying Motion for Appointment of *Cumis* Counsel for the Estate of James Allen McNamee. R.App. Vol. I, 243-245. Specifically, the district court found that the Bianchi Parties lacked

standing to seek the appointment of *Cumis* counsel for McNamee's Estate and, regardless, sufficient bases for such relief did not exist at that time. *Id*.

18. On March 27, 2018, the district court entered its Order Denying Defendant James McNamee's Motion to Substitute Special Administrator in Place and Stead of Defendant James McNamee. R.App. Vol. I, 246-247. In that same order, the district court appointed Mr. Waid as the General Administrator of McNamee's Estate. *Id*.

19. On March 30, 2018, McNamee moved for dismissal under NRCP 25(a)(1) on grounds that the Bianchi Parties had failed to move for substitution within 90 days of the Suggestion of Death. R.App. Vol. II, 318-333. By separate motion, McNamee also moved to amend the March 27, 2018 Order appointing Mr. Waid as the General Administrator of McNamee's Estate based on the contention that neither party had petitioned the district court to open a general administration of the Estate. R.App. Vol. II, 248-317.

20. The Bianchi Parties filed their omnibus opposition to both motions on April 9, 2010. R.App. Vol. II, 334-345. As to the motion to dismiss, the Bianchi Parties argued that (i) the Suggestion of Death did not trigger the 90-day deadline, (ii) McNamee's motion to substitute filed 85 days after the Suggestion of Death satisfied the requirements of NRCP 25(a)(1), and (iii) excusable neglect existed to enlarge the time to move for substitution. R.App. Vol. II, 341-343 . With regard to the motion to amend, the Bianchi Parties agreed that the March 27, 2018 Order

should be amended albeit for reasons other than those asserted by McNamee. R.App. Vol. II, 343. Specifically, the Bianchi Parties submitted that the March 27, 2018 Order should be amended to state that the Motion to Substitute was (i) granted in part with Mr. Waid being appointed as the General Administrator of McNamee's Estate, and (ii) denied in part to the extent it sought to substitute Ms. Clokey as the Special Administrator of McNamee's Estate. *Id*.

21. The district court conducted a hearing on McNamee's dual motions on April 10, 2018. R.App. Vol. II, 346-373. The district court indicated that it was "bothered" by Pyatt Silvestri's decision to appoint its administrative assistant, Ms. Clokey, as the Special Administrator and "felt it would be better to have a third party come in." R.App. Vol. II, 360-361. Although the district court had directed the parties each to submit three (3) potential candidates, McNamee's counsel intentionally chose not to comply "because [counsel] did not want to waive the issue of whether it would be a special administrator or a general administrator." R.App. Vol. II, 361. At no point in time did McNamee's counsel identify McNamee's brother as a potential candidate to serve as the administrator. R.App. Vol. II, 346-373. Ultimately, the district court stated that it would appoint Mr. Waid as the Special and General Administrator of McNamee's Estate and invited motion practice on whether such an appointment was appropriate under Nevada law. R.App. Vol. II, 364-365. The district court made it abundantly clear that it wanted "the case to go forward and be decided on the facts and not a procedural issue" to which

McNamee's counsel had "no objection." *Id*. The district court then set the trial date in this matter for November 2018. R.App. Vol. II, 371.

22. The district court entered its Order Denying Defendant James McNamee's Motion to Dismiss and Granting in Party and Denying in Part Defendant James McNamee's Motion to Amend Order on May 14, 2018. R.App. Vol. II, 376-378. There, the district court appointed Mr. Waid as the Special and General Administrator of McNamee's Estate, and substituted Mr. Waid in the place and stead of McNamee. *Id.*

23. Following the April 10, 2018 hearing, McNamee did not file a motion or otherwise argue that the district court's appointment of Mr. Waid as the Special and General Administrator of McNamee's Estate was improper. Instead, McNamee waited more than five (5) months and filed the instant Petition on September 11, 2018.

IV. ARGUMENT

A. Legal Standard.

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station." NRS 34.160. "Mandamus relief may also be proper to control an arbitrary or capricious exercise of discretion." *Halcrow, Inc. v. Eighth Judicial Dist. Court*, 129 Nev.Adv.Op. 42, 302 P.3d 1148, 1151 (2013). "Writ relief will not be available when an adequate and speedy legal remedy exists." *Id.* "Whether a future appeal is sufficiently

adequate and speedy necessarily turns on the underlying proceedings' status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented." *Id.*

While the Bianchi Parties recognize that the Court directed them to answer the Petition based on McNamee's one-sided presentation of the underlying facts, it is worthwhile to note that "judicial economy and sound judicial administration militate against the utilization of mandamus petitions to review orders denying motions to dismiss and motions for summary judgment." *See Dep't. of Transp. v. Thompson*, 99 Nev. 358, 362, 662 P.2d 1338, 1340 (1983). Here, a cursory review of the complete record from the district court demonstrates that writ relief is not appropriate here.

B. The District Court Correctly Denied McNamee's Motion To Dismiss Under NRCP 25(a)(1).

1. Dismissal is not required because the Suggestion of Death did not trigger the 90-day deadline to move for substitution.

McNamee's Petition glosses over the question of whether the Suggestion of Death filed on September 20, 2017 triggered the 90-day deadline to move for substitution pursuant to NRCP 25(a)(1). This was by design as the Suggestion of Death was clearly defective under Nevada law because McNamee failed to identify his successor or representative. As a result, the 90-day deadline contained in NRCP 25(a)(1) did not commence and no grounds for dismissal exist.

NRCP 25(a)(1) provides as follows:

> 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 the 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 on the record by service of a statement of the fact of death as provided herein for the service of the Motion, the action shall be dismissed as to the deceased party***.

Id. (emphasis added).

In *Barto v. Weishaar*, the Nevada Supreme Court addressed "whether the suggestion of death must be made by, or identify, the successor or representative of the deceased" in order to trigger the 90-day limitation contained in NRCP 25(a)(1). 101 Nev. 27, 29, 692 P.2d 498, 499 (1985). This Court answered that question in the affirmative: "[b]ecause the suggestion of death in the present case was neither filed by nor identified a successor or representative of the deceased, we hold that the ninety-day limitation in NRCP 25(a)(1) was never triggered[.]" *Id.* As a result, this Court determined that the district court improperly dismissed the appellant's action. *Id.*

So, too, here. It is undisputed that the Suggestion of Death filed on September 20, 2017 did not identify McNamee's successor or representative. R.App. Vol. I, 1-2. As such, the Suggestion of Death "create[d] a 'tactical manuever' that would burden [the Bianchi Parties] with the duty of locating a representative for the deceased defendant's estate or have an otherwise meritorious action dismissed."

Moseley v. Eighth Judicial Dist. Court, 124 Nev. 654, 660, 188 P.3d 1136, 1141 (2008) (detailing when the 90-day deadline is triggered by a suggestion of death depending on whether the decedent is the plaintiff or defendant). Accordingly, the district court properly denied McNamee's Motion to Dismiss because the Suggestion of Death failed to identify his successor or representative and, therefore, did not trigger the 90-day deadline.

2. Assuming *arguendo* that the Suggestion of Death triggered the 90-day deadline, McNamee's Motion to Substitute satisfied the requirements of NRCP 25(a)(1).

It is undisputed that McNamee filed his Motion to Substitute Ms. Clokey as the Special Administrator of McNamee's Estate on December 14, 2017, and that it "was filed within 90 days of the Suggestion of Death." *See* Petition at 6. Nevertheless, McNamee seemingly contends that dismissal was required because the district court denied his Motion to Substitute on a "technicality," R.App. Vol. II, 362, and the Bianchi Parties did not file a separate motion to substitute within 90 days of the (defective) Suggestion of Death. McNamee's argument ignores the plain language of NRCP 25(a)(1) as well as the procedural history of this case.

At the outset, NRCP 25(a)(1) merely requires that any party "make"—*i.e.* "file"—a motion for substitution by no later than 90 days after death is suggested on the record. *See, e.g.*, *Moseley*, 124 Nev. at 660, 668, 188 P.3d at 1141, 1146 (referencing the "90-day period *to file* a motion for substitution" and "NRCP 25's 90-day limitation *to move for* substitution of the deceased party's successor.")

(emphases added); *Wharton, by and through Wharton v. City of Mesquite*, 113 Nev. 796, 797, 942 P.2d 155, 157 (1997) ("Wharton's counsel failed to comply with NRCP 25(a)(1) by not *moving* the court to substitute[.]") (emphasis added). In other words, NRCP 25(a)(1) does not require that a motion to substitute be granted within the 90-day period; nor does it obligate a plaintiff to file a competing motion to substitute to account for possible denial of the defendant's previously-filed motion.

To the extent the Suggestion of Death triggered the 90-day deadline under NRCP 25(a)(1)—and it did not—McNamee filed his Motion to Substitute 85 days after the Suggestion of Death on the record. McNamee's "making" of this Motion complied with the plain language of NRCP 25(a)(1). The tortured procedural history that followed is irrelevant to the question of whether the requirements of the Rule were initially satisfied. In any event, McNamee ignores the fact that his Motion to Substitute was ultimately granted in part such that Mr. Waid was appointed as the General Administrator of McNamee's Estate. R.App. Vol. II, 376-378. There has been no violation of NRCP 25(a)(1). The Bianchi Parties' meritorious claims should not be dismissed.

3. Even if the 90-day deadline expired—and it did not—the Bianchi Parties clearly demonstrated excusable neglect sufficient to enlarge the time to seek substitution.

The Nevada Supreme Court has held that "despite NRCP 25(a)(1)'s 90-day limitation period, under NRCP 6(b)(2), when a party establishes excusable neglect, the party may be granted an enlargement of time after the 90-day limitation has

expired." *Moseley*, 124 Nev. at 662, 188 P.3d at 1143. To demonstrate the existence of excusable neglect and obtain relief from NRCP 25(a)(1) under NRCP 6(b)(2), the Bianchi Parties must demonstrate that (i) they acted in good faith, (ii) they exercised due diligence, (iii) there is a reasonable basis for not complying within the specified time, and (iv) the nonmoving party will not suffer prejudice. *Id.* at 667-68, 188 P.3d at 1145-46. Although the district court did not reach this issue, the Bianchi Parties easily met these factors.

The Bianchi Parties acted in good faith, exercised due diligence, and had a reasonable basis not to file their own motion to substitute even if the 90-day deadline was triggered by McNamee's defective Suggestion of Death. First, McNamee filed a timely motion to substitute within 90 days of the Suggestion of Death. Second, there can be no doubt that legitimate disputes existed regarding (i) the proper forum to seek appointment of an administrator, (ii) whether a special or general administrator for McNamee's Estate was appropriate, and (iii) whether the Probate Court's appointment of Ms. Clokey as the Special Administrator created a conflict of interest that required court intervention. All parties vigorously contested these issues such that the district court did not enter its final order regarding the same until nearly three months later.

Accordingly, while McNamee may not agree with the Bianchi Parties' positions in the court below, he cannot genuinely assert that they acted in bad faith or otherwise sat on their hands while the 90-day deadline expired. Further,

McNamee will not suffer any prejudice if he is forced to defend the Bianchi Parties' claims on the merits, which is "favored over a mechanical application of [the] ninety-day rule," *Wharton,* 113 Nev. at 798, 942 P.2d at 157, as the parties have completed discovery and were twice set for trial before being delayed by procedural developments at the last minute. The district court has now substituted Mr. Waid as the General Administrator of McNamee's Estate, and this matter should proceed to a trial on the merits.

C. The District Court Did Not Err By Appointing Mr. Waid As The General Administrator Of McNamee's Estate.

McNamee raises four points of error with respect to the district court's appointment of Mr. Waid as the General Administrator of McNamee's Estate. First, McNamee asserts the district court lacked jurisdiction to open a general administration of the Estate. Second, McNamee contends the district court impermissibly invaded the exclusive province of the probate court by opening the general administration. Third, McNamee argues that the value of McNamee's Estate did not meet the alleged $300,000 threshold to create a general administration. Fourth, McNamee alleges that the district court erred by appointing Mr. Waid as the General Administrator rather than McNamee's never-before-identified brother. We address each argument below.

1. McNamee's unaccrued bad faith claim against GEICO is an asset sufficient to confer jurisdiction to open a general administration of the Estate.

The question of whether the district court had jurisdiction to open a general administration of McNamee's Estate turns on whether the Estate possessed assets in the State of Nevada other than the GEICO policy. *Cf. Jacobsen v. Estate of Clayton*, 121 Nev. 518, 522, 119 P.3d 132, 134 (2005) ("Here, decedent's Nevada estate contains only a liability insurance policy, and therefore, appellants properly proceeded against the Estate through the special administrator to recover damages for their injuries."). The Bianchi Parties contend that McNamee's Estate possessed an unaccrued cause of action for bad faith against GEICO, which constitutes an asset for the purposes of opening a general administration. R.App. Vol. I, 46-49. McNamee disputes that contention on grounds the bad faith claim is not yet ripe and, therefore, cannot constitute an asset sufficient to confer jurisdiction.

To begin, GEICO's impending liability for bad faith is readily apparent based on its conduct, the law and the posture of the underlying proceedings. GEICO repeatedly refused to settle the Bianchi Parties' claims for McNamee's policy limits despite GEICO's knowledge that their damages far exceeded the available coverage. Moreover, GEICO acknowledged McNamee's excess liability to the Bianchi Parties when it subsequently offered to settle their claims for amounts above the policy limits. And while McNamee may claim that the Bianchi Parties are treating the task of obtaining an excess judgment at trial as a foregone conclusion, McNamee ignores

that (i) the district court already entered an order precluding him from disputing his liability in the case at bar, and (ii) the Bianchi Parties' medical expenses alone dwarf McNamee's policy limits.

It is well settled that the "implied covenant [of good faith and fair dealing in an insurance contract] requires the insurer to settle the case within policy limits when there is a substantial likelihood of recovery in excess of those limits." *Kelly v. CSE Safeguard Ins., Co.*, 2011 WL 4526769, at *4 (D. Nev. Sept. 27, 2011) (citing *Murphy v. Allstate Ins. Co.*, 17 Cal.3d 937, 941 (1976)).[2] "The duty to settle is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble—on which only the insured might lose." *Id.* "When the insurer breaches its duty to settle, the insured has been allowed to recover [an] excess award over policy limits and other damages." *Id.*

In this scenario, "[t]he insured's remedy to protect himself from an excess judgment is to assign to the claimant his cause of action for bad faith refusal to settle in exchange for a covenant not to enforce the judgment against the insured's personal assets." *Safeco Ins. Co. of Am. v. Superior Court*, Cal.R.App.4th 782, 788 (Cal. Ct. R.App. 1999). "*Such an assignment may be made before trial*, but the assignment does not become operative, and the claimant's action against the insurer does not

[2] "Nevada courts often look to California law, particularly in the bad faith setting." *Clark Cnty. School Dist. v. Travelers Cas. & Sur. Co. of Am.*, 2015 WL 1578163, at *6 (D. Nev. April 8, 2015).

mature, until a judgment in excess of the policy limits has been entered against the insured." *Hamilton v. Maryland Cas. Co.*, 41 P.3d 128, 132 (2002) (emphasis added). Most importantly, because GEICO's bad faith conduct occurred prior to McNamee's death, the Estate retains the right to assign or pursue the potential action for bad faith against GEICO. *See Avila v. Century Nat'l Ins. Co.*, 473 Fed.Appx 554, 556 (9th Cir. 2012) ("If [an insurer] breached its implied covenant with [the insured] while he was alive, then, under Nevada law, the Estate would retain any such claims as if [the insured] were still alive.").

Accordingly, the law is clear that McNamee's Estate possesses an unaccrued cause of action for bad faith against GEICO that will become ripe once a judgment in excess of the policy limits is entered in the underlying litigation. In the court below, McNamee argued that this unaccrued claim for bad faith was not an asset of the Estate sufficient to confer jurisdiction over the creation of a general administration. McNamee did not cite any legal authority to support his position and the Bianchi Parties were unable to find any case law arising in this specific context. That said, the question of whether a potential cause of action for bad faith constitutes an asset frequently arises in bankruptcy proceedings when determining what property is subject to the debtor's estate.

In *Field v. Transcontinental Ins. Co.*, 219 B.R. 115, 119 (E.D. Va. 1998), for instance, the court considered whether a bad faith claim that accrued after filing the bankruptcy petition constituted property of the bankruptcy estate. The *Field* court

determined that "the bankrupt's estate includes not only claims that had accrued and were ripe at the time the petition was filed, but also those claims that accrued postpetition [ ] that [were] sufficiently rooted in the pre-bankruptcy past." *Id.* Because the automobile accident giving rise to the bad faith claim occurred four (4) months prior to the filing of the bankruptcy petition, the *Field* court held that the bad faith claim was property of the debtor's estate even though it did not accrue until after the bankruptcy estate was created. *Id.* As a result, the trustee could bring the bad faith action on behalf of the estate "regardless of whether either a declaratory judgment or bad faith cause of action existed" when the bankruptcy petition was filed. *Id.*

Other courts addressing this question in bankruptcy proceedings have reached the same result. *See, e.g.*, *In re Hetter*, 413 B.R. 733, 753-54 (Bankr. D. Mt. 2009) (potential bad faith claim was property of bankruptcy estate where the debtor "was covered by the CGL policy on the date he filed his Chapter 7 case, and on that date the state court action brought against him [ ] had been filed."); *In re Richards*, 249 B.R. 859, 861 (Bankr. E.D. Mich. 2000) (finding that debtor's asbestos injury claim was property of bankruptcy estate even though the claim did not accrue until after the debtor filed bankruptcy); *In re Tomaio*, 205 B.R. 10, 15 (Bankr. D. Mass. 1997)

("[A] debtor's property rights in a cause of action are not confined to rights necessary to form a matured claim.").[3]

The conclusion that McNamee's unaccrued bad faith claim against GEICO is an asset of the Estate is further supported by the exceedingly broad definition of "property" set forth in Nevada's probate statutes. Indeed, the Legislature defines "property" under Title 12 of the Nevada Revised Statutes as "anything that may be the subject of ownership, and includes both real and personal property and any interest therein." NRS 132.285. Because a potential cause of action for bad faith is capable of being assigned prior to accrual, *see, e.g.*, *Hamilton v. Maryland Cas. Co.*, *supra*, it falls squarely within the all-encompassing umbrella of "anything that may be the subject of ownership." Moreover, although Title 12 does not contain a specific definition for "personal property," NRS 10.045 defines that term to include "things in action"—*i.e.* causes of action.

In sum, McNamee's unaccrued cause of action against GEICO for bad faith is clearly an asset of the Estate even though it is not yet ripe. As such, McNamee's contention that the district court somehow lacked jurisdiction to open a general administration of his Estate is incorrect. To the contrary, the district court properly

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[3] Courts have applied a similar analysis in determining whether a potential cause of action is property subject to execution in post-judgment collection proceedings. For example, the United States District Court for the District of Alaska held that a judgment debtor's potential cause of action against its insurer for bad faith failure to settle was personal property subject to execution during collection proceedings. *See Bergen v. F/V St. Patrick*, 686 F.Supp. 786 (D. Alaska 1988).

appointed Mr. Waid as the General Administrator of McNamee's Estate to defend the Bianchi Parties' claims *and* oversee McNamee's right to assign and/or pursue a bad faith action against GEICO based on the insurer's bad faith refusal to settle prior to McNamee's death.

2. The probate court did not divest the district court of its authority to appoint Mr. Waid as general administrator of McNamee's Estate.

EDCR 4.03(a) provides that "the Probate Commissioner enjoys exclusive jurisdiction over all matters pertaining to the administration of estates under Title 12 of the NRS." *See* Petition at 12. Relying on this provision, McNamee asserts that the "district court, therefore, exceeded its authority when initiating a general probate administration within the context of a personal injury lawsuit." *Id.* This is decidedly incorrect.

At the outset, McNamee's reliance on EDCR 4.03(a) is misplaced as the district court's authority to address the representation of McNamee's Estate is governed by subdivision (c) of that same rule. Indeed, EDCR 4.03(c) provides that "[i]n ***any civil action*** in which the capacity or standing of a party to represent a decedent or an estate is in question, any district court judge ***may*** refer the matter to the probate commissioner for determination of standing or capacity." *Id.* (emphasis added).

First, this "personal injury lawsuit" is indisputably a "civil action" in which the representation of McNamee's Estate is in question. Second, hornbook law

dictates that "may" is permissive or discretionary, meaning the district court was in no way obligated to refer the administration of McNamee's Estate to the probate division. *See In re Nevada State Engineer Ruling No. 5823*, 128 Nev. 232, 239, 277 P.3d 449, 454 (2012) ("'Must' is mandatory, as distinguished from the permissive 'may'"); *Fourchier v. McNeil Constr. Co.*, 68 Nev. 109, 122, 227 P.2d 429, 435 (1951) ("There is no occasion for us to construe the discretionary 'may' as having the meaning of the mandatory 'must' or 'shall.'").

As such, the district court—as a court of general jurisdiction—had the authority to enter orders regarding McNamee's Estate and appoint Mr. Waid as the General Administrator. *Cf. Klabacka v. Nelson*, 394 P.3d 940, 945-46 (Nev. 2017) (finding that family court had subject matter jurisdiction over trust-related claims brought during divorce despite existence of statute conferring exclusive jurisdiction of trust-related affairs to probate court).[4]

3. There is no $300,000 requirement to maintain a general administration.

McNamee again seeks to construe the permissive "may" as a mandatory "must" by arguing that a general administration is only available to an estate with a gross value in excess of $300,000. In support of this erroneous proposition,

[4] The Bianchi Parties acknowledge that Mr. Waid cannot simultaneously serve as the Special and General Administrator of McNamee's Estate as the powers of a special administrator cease by operation of law upon the issuance of general letters of administration. NRS 140.070.

McNamee relies on NRS Chapter 145 concerning the summary administration of estates. Specifically, NRS 145.040 provides that "[i]f it is made to appear to the court that the gross value of the estate, after deducting encumbrances, does not exceed $300,000, the court ***may***, if deemed advisable after considering the nature, character and obligations of the estate, enter an order for a summary administration of the estate." *Id.* (emphasis added).

Put another way, if the district court determines that an estate is valued at less than $300,000, then it has the discretion to order a summary administration. But NRS 145.040 does not impose a mandatory jurisdictional limit of $300,000 before a district court can order the general administration of an estate. *See In re Nevada State Engineer Ruling No. 5823*, 128 Nev. at 239, 277 P.3d at 454; *Fourchier*, 68 Nev. at 122, 227 P.2d at 435. To the contrary, the district court has the discretion to establish a general administration regardless of whether the value of the estate's assets is less or more than $300,000. Moreover, given that McNamee acknowledged the Bianchi Parties are seeking a judgment in excess of $5.27 million, there should be no question that the value of the Estate's potential bad faith claim meets the artificial threshold of $300,000. R.App. Vol. I, 81.

4. The district court did not err by appointing Mr. Waid as the General Administrator of McNamee's Estate.

For the first time, McNamee claims that Mr. Waid was ineligible to serve as General Administrator because McNamee's brother—whose name is unknown to the Bianchi Parties—has priority under NRS 139.040(1). McNamee, however,

never identified his brother as a potential candidate for the position of General Administrator prior to the filing of the instant Petition. His belated effort to raise the issue for the first time at this stage should be disregarded. *Cf. Cooke v. American Sav. & Loan Ass'n*, 97 Nev. 294, 296, 630 P.2d 253, 254-55 (1981) (contentions raised for first time on appeal need not be considered). McNamee's counsel, in fact, expressly declined to provide the district court with the names of individuals who could serve as administrator on two separate occasions. He can hardly be heard to complain about this issue now. *See Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) ("a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit."). Additionally, McNamee has submitted no evidence to suggest that his brother is a resident of Nevada or otherwise qualified to serve as the General Administrator. Simply put, McNamee's belated attempt to identify an alternative candidate to Mr. Waid is pure gamesmanship and nothing more.

D. Should This Court Determine That A Special Administrator Is Appropriate, The Bianchi Parties Request An Order Directing The District Court To Confer The Powers Necessary To Administrate The Potential Bad Faith Claim Against GEICO.

To be clear, the Bianchi Parties submit that the district court's appointment of Mr. Waid as the General Administrator was entirely proper. If the Court disagrees, however, the Bianchi Parties seek an order directing the district court to revise its order of appointment to allow Mr. Waid, in the alternative capacity as Special Administrator, to exercise any available rights related to McNamee's unaccrued bad

faith claim against GEICO pursuant to NRS 140.140(2)(c) and/or NRS 143.335. In the absence of such an order, the potential bad faith claim retained by McNamee's Estate would effectively be nullified as the Special Administrator would lack the ability to exercise the Estate's rights in relation thereto.

E. The Court Should Impose Monetary Sanctions Against McNamee Pursuant To NRAP 30(g).

NRAP 30(g)(2) provides that "[i]f an appellant's appendix is so inadequate that justice cannot be done without requiring inclusion of documents in the respondent's index which should have been in the appellant's index, or without the court's examination of portions of the original record which should have been in the appellant's appendix, the court may impose monetary sanctions." Such relief is appropriate here based on McNamee's conscious decision to submit a patently deficient appendix.

At the outset, McNamee did not even attempt to confer with the Bianchi Parties' counsel regarding a joint appendix in violation of NRAP 30(a). *Id.* ("Counsel have a duty to confer and attempt to reach an agreement concerning a possible joint appendix."). Instead, McNamee unilaterally compiled an appendix that only contained filings on his behalf and the pertinent court orders. In that regard, McNamee did not include a single filing by the Bianchi Parties on any relevant issue. Suffice it to say, McNamee should have consulted with the Bianchi Parties' counsel regarding a joint appendix or, at a minimum, supplied the Court with a complete

record of the relevant filings. McNamee, however, chose to present this matter in the most slanted way possible for which monetary sanctions should issue.[5]

V. CONCLUSION.

Based on the foregoing, Mr. Bianchi and Ms. Del Priore respectfully request that the Court deny Mr. McNamee's Petition for Writ of Mandamus in its entirety.

DATED this 27th day of November, 2018

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[5] For the Court's convenience and ease of reference, the Bianchi Parties have compiled a complete appendix including both parties' filings along with the relevant court orders and hearing transcripts. As a result, the Court will be able to consider the full record from the district court proceedings and, in turn, disregard McNamee's cherry-picked submission.

VERIFICATION

I, J. Colby Williams, declare as follows:

1. I am one of the attorneys for Giann Bianchi and Dara Del Priore.

2. I verify that I have read and compared the foregoing ANSWER TO PETITION FOR WRIT OF MANDAMUS 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 Answer 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 27th day of November, 2018

/s/ ***J. Colby Williams***
J. Colby Williams, Esq. (#5549)

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Petition, 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 thirty (30) pages.

DATED this 27th day of November, 2017

BY: /s/ ***J. Colby Williams***
J. COLBY WILLIAMS, ESQ. (#5549)

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 27th day of November 2018, I caused true and correct copies of the foregoing Petition for Writ of Mandamus to be delivered to the following counsel and parties:

VIA HAND DELIVERY:

Judge Douglas E. Smith
Eighth Judicial District Court of Clark County, Nevada
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