IN THE SUPREME COURT OF THE STATE OF NEVADA

COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC., Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE NANCY L. ALLF, DISTRICT JUDGE, Respondents, and ROBERT CHUR; STEVE FOGG; MARK GARBER; CAROL HARTER; ROBERT HURLBUT; BARBARA LUMPKIN; JEFF MARSHALL; ERIC STICKELS; UNI-TER UNDER-WRITING MANAGEMENT CORP.; UNI-TER CLAIMS SERVICES CORP., and U.S. RE CORPORATION Real Parties in Interest.[1]	Supreme Court Case No.: 81857 District Court Case No.: A-14-711535-C **PETITION FOR *EN BANC* RECONSIDERATION**

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[1]The individual defendants are the real parties in interest who have had judgment entered in their favor, but the corporate defendants are also affected, and thus are listed in the caption as real parties.

NRCP 26.1 DISCLOSURE

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 COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC.

Petitioner is represented by Mark Hutchison, Esq., Michael K. Wall, Esq. and Brenoch Wirthlin, Esq. at Hutchison & Steffen.

DATED: January 20, 2021. **HUTCHISON & STEFFEN**

By */s/ Brenoch Wirthlin, Esq.*

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner, Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark LTC Risk Retention Group, Inc. ("Petitioner"), hereby files this Petition for En Banc Reconsideration ("Petition") of the December 23, 2020, Order by a three justice panel of this Court denying rehearing of Petitioner's Writ of Mandamus filed on September 29, 2020 ("Writ Petition").

This Court's denial of the Writ Petition raises important precedential, constitutional and public policy issues regarding: (1) the right of parties to amend pleadings in order to comply with changes in the underlying law which occur after a complaint has been filed but before the deadline for amending pleadings as provided in the trial court's scheduling order; and (2) application of this Court's recent amendments to NRCP 41(e) regarding additional time provided under Nevada's 5-year rule in which a case must be brought to trial.

On September 29, 2020, Petitioner filed its Petition for Writ of Mandamus seeking an order compelling the district court ("District Court") to allow plaintiff to file an amended complaint in direct response to this Court's prior opinion in this matter, *Chur v. Eighth Judicial Dist. Court*, 136 Nev. 68, 458 P.3d 336 (2020).

Chur substantively altered the law in Nevada, and most particularly in this case, it made the District Court's prior rulings incorrect as a matter of the changed

law. But the District Court and the parties relied on the law as stated in *Shoen v. SAC Holding Corp*., 122 Nev. 621, 640, 137 P.3d 1171, 1184 (2006).

The District Court denied Petitioner's motion to amend.[1] As noted in the Writ Petition, the District Court's failure to permit amendment despite its own reliance on *Shoen* will result in a trial against only the remaining defendants.[2] In fact, counsel for the Remaining Defendants has expressly acknowledged that due to the Directors being removed from the case, the Remaining Defendants intend to employ the "empty chair" defense at trial which would otherwise not be available to them.[3]

In its order denying the Writ Petition, entered November 13, 2020 ("Order Denying Petition"), this Court recognized that "the right to an appeal is generally an adequate remedy precluding writ relief."[4] However, the Order Denying Petition

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[1] PA003324 – PA003329.

[2] The remaining defendants include Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation, collectively referred to as the "Remaining Defendants."

[3] *See* PA003656 in which George Ogilvie, Esq., counsel for the Remaining Defendants, states the following:

> MR. OGILVIE: Your Honor, as I – there are tactical reasons that we would prefer to go to trial, and – and they are no secret, as Mr. Wirthlin indicated. There's the empty chair defense. And so for that reason, I'll be very transparent, we would prefer to go to trial.

[4] Citing *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844

overlooks the fact that exceptions to this general rule exist. One such exception this Court has specifically recognized is the situation in which a decision of a district court will likely impact resolution of a pending claim. In that situation, an appeal may not be an adequate remedy and writ relief should issue. As noted in the Writ Petition, the undisputed facts of this case present such a situation.

Further, on December 4, 2020, this Court issued its Order Amending Nevada Rule of Civil Procedure 41(e) ("41(e) Order"). As noted in the Writ Petition, the only issue on which the District Court relied to deny the Petitioner's motion to amend was timeliness and alleged prejudice because of the impending five year deadline. Due to the amendment of NRCP 41(e), the five year deadline has been extended for up to an entire year. Accordingly, Petitioner requests *en banc* reconsideration of its Writ Petition and that the same be granted.

II. PETITION FOR EN BANC RECONSIDERATION STANDARD

Under NRAP 40A(a), the Court may reconsider a decision of a panel of the Supreme Court "when (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue." NRAP 40A(a). *See also Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 201, 322 P.3d 429, 432 (2014) ("*En banc* reconsideration is disfavored, and this court will only order reconsideration when necessary to preserve precedential

uniformity or when the case implicates important precedential, public policy, or constitutional issues."); *Recontrust Co. v. Zhang*, 130 Nev. 1, 10, 317 P.3d 814, 819 (2014).

III. ANALYSIS

A. This Court's NRCP 14(e) Order warrants reconsideration as the relief sought in the Writ Petition involves a substantial precedential, constitutional or public policy issue.

As noted in the Writ Petition, the transcript of the hearing on Petitioner's motion for reconsideration requesting leave to amend bears out that the District Court denied leave to amend due to the "looming" five-year rule:

> Thank you all. This is a Motion for Reconsideration. And I realize that there's been a clarification by the Supreme Court of the *Shoen* case. And the reason I didn't grant the motion that was filed on July 2nd was simply because the complaint goes back to December 23 of 2014. And I just didn't think it was fair to the defendants to have to defend on a fourth amended complaint when it was two months[5] before the discovery deadline and we have a five-year rule looming.

PA003543 line 23 through PA003544 line 5, Transcript at 18-19. On December 4, 2020, this Court entered its Rule 41(e) Order amending NRCP 41(e)(5) to read now as follows (addition in underline):

> (5) **Extending Time; Computing Time.** The parties may stipulate in writing to extend the time in which to prosecute an action. If two time periods requiring mandatory dismissal apply, the longer

[5] The district court was mistaken. When the motion to amend was filed, more than five (5) months remained for discovery.

> time period controls. When a court is unable to conduct civil trials due to compelling and extraordinary circumstances beyond the control of the court and the parties, such as an epidemic, pandemic, natural disaster, or safety or security threat, and enters a district-wide administrative order staying such trials, neither the period of the stay nor an additional period of up to one year after the termination of the stay, if ordered by the court in the same or a subsequent administrative order, shall be counted in computing the time periods under this section.

See Rule 41(e) Order, ADKT 0560, entered December 4, 2020.

As noted above, the District Court's decision currently under review, was based upon Nevada's 5-Year Rule under NRCP 41(e) as it existed at the time that decision was issued. The law has changed in Nevada allowing an additional year for Petitioner to bring this case to trial.

As this Court is aware, Governor Sisolak declared a state of emergency in Nevada in response to the COVID-19 pandemic on March 12, 2020. The following day, on March 13, 2020, the Eighth Judicial District Court ("EJDC") issued Administrative Order 20-01 staying all civil cases for purposes of the five-year rule:

> "This order shall operate to stay trial in civil cases for purposes of NRCP 41(e)."[6]

Administrative Order 20-13 issued April 16, 2020, continued the stay of all civil cases for purposes of the five-year rule:

> "NRCP 41(e). This order shall continue to toll the time for bringing a case to trial for the purposes of NRCP 41(e) for the duration of this order and for a

[6] Petitioner requests this Court take judicial notice of the Administrative Orders issued by the EJDC and/or this Court pursuant to NRS § 47.130 et seq.

> period of 30 days after this order expires, is modified or is rescinded by a subsequent order."

On July 1, 2020, the trial court lifted the stay in the underlying action for 65 days before it was re-imposed on September 3, 2020. Administrative Order 20-17, issued June 1, 2020, reiterated the EJDC's intent to continue a stay of all civil cases with a very limited exception:

> "This order shall continue to stay trial in civil cases for purposes of tolling NRCP 41(e) except where a District Court Judge makes findings to lift the stay in a specific case to allow the case to be tried."

The underlying action is currently stayed pending resolution of the Writ Petition. Once the current stay is lifted, there will be not less than 219 days remaining to bring the underlying action to trial under the 5-year rule, plus an additional one year (365 days) pursuant to this Court's recent amendment to NRCP 41(e), for a total of 584 days remaining under the 5-year rule as amended.

Given the additional year allowed in this matter under amended NRCP 41(e), there can be no prejudice to the Director Defendants in allowing Plaintiff to amend its complaint, and justice requires that the District Court's decision be overturned to allow the case against the Director Defendants to be tried on the merits. Pursuant to this Court's Rule 41(e) Order, the District Court's concerns regarding the five-year rule are moot.

Further, this issue involves a substantial precedential, constitutional and public policy issue – should parties be permitted to amend when the underlying law

on which they justifiably relied is altered, particularly where the motion to amend is filed within the time frame set by the trial court? The clear answer is "yes". As noted in the Writ Petition, prior to *Chur*, every federal and state court in Nevada relied on *Shoen* for over 13 years. Courts, including the Ninth Circuit, addressed the fundamental unfairness of a trial court refusing to permit an amendment – particularly within the time set for an amendment – when such a change occurs, as it has here:

> **Plaintiffs contend that, if the Supreme Court's intervening decisions altered pleading standards in a meaningful way, and their complaint is found deficient under those standards, they should be granted leave to amend**. Courts are free to grant a party leave to amend whenever "justice so requires," Fed.R.Civ.P. 15(a)(2), and requests for leave should be granted with "extreme liberality." … " '**Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment**.' " *Gompper v. VISX, Inc*., 298 F.3d 893, 898 (9th Cir.2002) (quoting *Polich v. Burlington N., Inc*., 942 F.2d 1467, 1472 (9th Cir.1991)).
>
> We agree with Plaintiffs that they should be granted leave to amend. Prior to *Twombly*, a complaint would not be found deficient if it alleged a set of facts consistent with a claim entitling the plaintiff to relief. … Under the Court's latest pleadings cases, however, the facts alleged in a complaint must state a claim that is plausible on its face. As many have noted, this is a significant change, with broad-reaching implications. … **Having initiated the present lawsuit without the benefit of the Court's latest pronouncements on pleadings, Plaintiffs deserve a chance to supplement their complaint with factual content in the manner that *Twombly* and *Iqbal* require.**

Moss v. U.S. Secret Service, 572 F.3d 962 at 972 (internal citations omitted)

(emphasis added); *see also Darney v. Dragon Prod. Co., LLC*, 266 F.R.D. 23 (D. Me. 2010) ("Maine court's recent change in law relating to strict liability claims arising from blasting activity constituted good cause to allow homeowners leave to amend complaint to add such a claim against operator of a cement-manufacturing plant near their home, even though leave was not sought until well after the scheduling order deadlines for amendment of the pleadings and designation of experts, beyond the close of the discovery period, and months after rulings on summary judgment issues"); *Gregory v. Harris-Teeter Supermarkets, Inc*., 728 F. Supp. 1259 (W.D.N.C. 1990) (Civil rights plaintiff's motion to amend complaint and second motion to amend complaint would be granted where each motion was filed immediately after an apparent change in the law occurring after plaintiff had filed his complaint.).

To permit the trial court's decision in this case to stand, particularly given the recent amendments to NRCP 41(e), would set a very unfortunate and improper precedent. Further, the trial court's decision is in direct contradiction to public policy, including this Court's longstanding policy "that each case be decided on its merits whenever possible." *Banks v. Heater*, 95 Nev. 610, 612, 600 P.2d 245, 246 (1979); *Morris v. Morris*, 86 Nev. 45, 46, 464 P.2d 471, 472 (1970) ("The underlying policy most frequently mentioned is that of encouraging trial upon the merits.") *Howe v. Coldren*, 4 Nev. 171, (1868); *Hotel Last Frontier v. Frontier Properties*,

supra, *Blakeney v. Fremont Hotel*, 77 Nev. 191, 360 P.2d 1039 (1961); *Adams v. Lawson*, 84 Nev. 687, 448 P.2d 695 (1968). **We are reluctant to subvert that policy.**"); *Hotel Last Frontier Corp. v. Frontier Properties, Inc*., 79 Nev. 150, 155, 380 P.2d 293, 295 (1963) ("Finally we mention, as a proper guide to the exercise of discretion, the basic underlying policy to have each case decided upon its merits."); *Stubli v. Big D Int'l Trucks, Inc.*, 107 Nev. 309, 316, 810 P.2d 785, 789 (1991) (Recognizing that "public policy favors adjudication on the merits whenever possible"); *Bruno v. Schoch*, 94 Nev. 712, 713, 582 P.2d 796, 797 (1978) ("As we explained in *Minton v. Roliff*, 86 Nev. 478, 482, 471 P.2d 209, 211 (1970), the basic policy of this court is to favor a decision of each case upon the merits."); *Christy v. Carlisle*, 94 Nev. 651, 654, 584 P.2d 687, 689 (1978) ("It is our underlying policy to have each case decided upon its merits."); *Moon v. McDonald, Carano & Wilson, LLP*, 126 Nev. 510, 520, 245 P.3d 1138, 1144 (2010) (same); *In re Estate of Black*, 132 Nev. 73, 77, 367 P.3d 416, 419 (2016); *Dornbach v. Tenth Jud. Dist. Ct*., 130 Nev. 305, 311, 324 P.3d 369, 373 (2014). In the interests of public policy and precedent in this State, this basic, fundamental guiding policy should not be subverted, particularly given the harm to the policyholders and insured who will suffer as a result of the improper decision denying leave to amend.

The petition for reconsideration, and the relief requested in the Writ Petition, should be granted.

IV. CONCLUSION

For all these reasons, the Petitioner respectfully requests the Court grant the petition for *en banc* reconsideration in this case, issue a writ of mandamus compelling the District Court to allow Petitioner to amend its complaint based on *Chur*, and grant such other and further relief as the Court deems proper.

DATED: January 20, 2021. **HUTCHISON & STEFFEN**

By */s/ Brenoch Wirthlin*

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CERTIFICATE OF COMPLIANCE

I, Brenoch R. Wirthlin, Esq., declare as follows:

1. I am a partner with Hutchison & Steffen, counsel of record for Petitioner.

2. I certify that I have read the foregoing **PETITION FOR EN BANC RECONSIDERATION**.

3. I 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).

4. I further certify that this brief complies with the page- or type- volume limitations of NRAP 40(b)(3) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C) it is either proportionally spaced, has a type face of 14 points or more and contains no more than 4,667 words or does not exceed 10 (ten) pages.

5. Finally, I hereby certify that I have read this brief, and it is not frivolous of interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 40a(a) which requires any claim that the court overlooked a material fact be supported by a reference to the page of the transcript appendix or record where the matter may be found; any claim that the court has overlooked a material question of law or has overlooked or misapprehended or failed to consider controlling authority shall be

supported by a reference to the page of the brief where petitioner raised the issue. 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.

I declare under the penalty of perjury the statements herein are true and correct.

Executed on January 20, 2021 in Clark County, Nevada.

By: /s/ *Brenoch R. Wirthlin*_____
Brenoch R. Wirthlin, Esq.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, pursuant to NRAP Rule 25(d), I served the foregoing **PETITION FOR EN BANC RECONSIDERATION** on the following parties, via the manner of service indicated below, on January 20, 2021:

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