

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

NATIONAL CASUALTY COMPANY, a  
foreign corporation,

Petitioners,

v.

EIGHTH JUDICIAL DISTRICT COURT FOR  
THE STATE OF NEVADA IN AND FOR THE  
COUNTY OF CLARK; THE HONORABLE  
MARK RALPH DENTON, DISTRICT COURT  
JUDGE,

Respondents,

and

PHILIP BOUCHARD,

Real Party in Interest.

Supreme Court No. \_\_\_\_\_  
District Court No. 20-81305-C  
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**PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**

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## **NRAP 26.1 DISCLOSURE**

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.

- 1) Petitioner NATIONAL CASUALTY COMPANY (“NCC”) is an Ohio Corporation with its principal place of business in Ohio. None of NCC’s stock is publicly traded. It is 100% owned by Nationwide Mutual Insurance Company (“NMIC”). NMIC is a mutual insurance company and is not a publicly traded company.
- 2) NCC is represented by the undersigned counsel of record for the claims alleged against it in the Complaint(s) filed in this action by Philip Bouchard.

DATED this 14th day of September, 2021

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Priscilla L. O’Briant

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## TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE .....	ii
JURISDICTIONAL STATEMENT .....	vii
ROUTING STATEMENT .....	vii
PETITION FOR WRIT OF MANDAMUS.....	1
I.    ISSUES PRESENTED .....	1
II.   STATEMENT OF THE CASE .....	1
III.  STATEMENT OF FACTS NECESSARY TO UNDERSTAND ISSUES PRESENTED .....	3
a.    The Underlying Action .....	3
b.    The Declaratory Relief Action.....	6
c.    The Present Action.....	7
d.    Motion to Dismiss Dec Action is Denied .....	8
e.    Motion to Dismiss Present Action, or Alternatively, to Stay Claims Against NCC is Denied .....	9
IV.   SUMMARY OF ARGUMENT .....	10
V.    REASONS WHY THE WRIT SHOULD ISSUE.....	11
a.    Standards for Issuance of Writ.....	11
b.    Nevada Does not Allow Duplicative Actions to Proceed.....	12
c.    Under Nevada Law, Plaintiff will be Precluded from Re- litigating the Legal Issue, Determined at Trial in the Dec Action, at Trial in this Case .....	15
d.    NCC is Not a Necessary Party for the District Court to Determine the Claims Against Co-Defendant Coast National Insurance Company.....	17

VI.	WRIT RELIEF IS PROPER IN THIS CASE.....	18
VII.	CONCLUSION .....	19

## **TABLE OF AUTHORITIES**

### **Nevada Cases**

<i>Fitzharris v. Phillips</i> , 74 Nev. 371, 333 P.2d 721 (1958).....	10, 12, 15
<i>Five Star Capital Corp. v. Ruby</i> , 124 Nev. 1048, 194 P.3d 709 (2008).....	16
<i>Gabrielle v. Eighth Judicial Dist. Court</i> , 130 Nev. 1178 (2014) .....	13
<i>Galindo-Milan v. Hammer</i> , 438 P.3d 341 (Nev. 2019).....	10
<i>In re City Center Constr. &amp; Lien Master Litig. v. Eighth Judicial Dist. Court of Nev.</i> , No. 57186, 2011 Nev. Unpub. LEXIS 1433 (Oct. 19, 2011) .....	12
<i>Lee v. GNLV Corp.</i> , 116 Nev. 424, 996 P.2d 416 (2000).....	13
<i>Salaiscooper v. Eighth Judicial Dist. Ct.</i> , 117 Nev. 892, 34 P.3d 509 (2001).....	12
<i>Smith v. Eighth Judicial Dist. Court</i> , 113 Nev. 1343, 950 P.2d 280 (1997) ....	11, 12
<i>State of Nevada v. McCullough</i> , 3 Nev. 202 (1867).....	11
<i>Walcott v. Wells</i> , 21 Nev. 47, 24 P. 367 (1890).....	12

### **Federal Cases**

<i>Genentech, Inc. v. Eli Lilly &amp; Co.</i> , 998 F.2d 931 (Fed. Cir. 1993).....	14
<i>Inherent.com v. Martindale-Hubbell</i> , 420 F. Supp. 2d 1093 (N.D. Cal. 2006).....	13
<i>Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss., Inc.</i> , 787 F.3d 1237 (9th Cir. 2015) .....	13
<i>Pacesetter Sys., Inc. v. Medtronic, Inc.</i> , 8 F.2d 93 (9th Cir. 1982).....	14
<i>SAES Getters S.p.A. v. Aeronex, Inc.</i> , 219 F. Supp. 2d 1081(S.D. Cal. 2002) .....	13
<i>Wilton v. Seven Falls Co.</i> , 515 U.S. 277, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995) .....	14

### **Statutes**

NRS 34.150.....	vii
NRS 34.170.....	19

## Other Authorities

Nev. Const. Art. VI, § 4 .....	vii
--------------------------------	-----

## Rules

NRAP 17 .....	vii
NRAP 21 .....	vii, 21, 22, 23
NRAP 25 .....	25
NRAP 26.1 .....	ii
NRAP 28 .....	23
NRAP 32 .....	22, 23

## **JURISDICTIONAL STATEMENT**

This Court has jurisdiction to issue a writ of mandamus pursuant to NRS 34.150 and Nev. Const. Art. VI, § 4.

## **ROUTING STATEMENT**

Pursuant to NRAP 21(a)(1), although this case does not fall squarely within any of the categories presumptively assigned to the Nevada Supreme Court or the Nevada Court of Appeals pursuant to NRAP 17(b), Petitioner believes it most likely falls within cases assigned to the Nevada Court of Appeals as it relates to a denial of a motion to dismiss or alternatively, motion to stay.

DATED this 14th day of September, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Priscilla L. O'Briant

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## **PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**

### **I. ISSUES PRESENTED**

A. Whether duplicative litigation against a Defendant may proceed based on the presentation of a separate “cause of action” which would be resolved through the determination of the legal issues in the first filed action?

B. Whether determination of the legal issue in the pending federal Declaratory Relief Action will preclude relitigation of the issue in this case?

C. Whether duplicative litigation against a Defendant may proceed based on the purported necessity to determine the primacy of coverage between two Defendant insurers?

### **II. STATEMENT OF THE CASE**

This case involves claims by Philip Bouchard (“Bouchard”) brought pursuant to a judicial assignment of the rights of Efren Sotelo (“Efren”) against NCC, among others. The claims against NCC, which are the subject of this litigation all arise from NCC’s alleged failure to defend Efren in litigation brought by Philip Bouchard against Efren, among others, in Clark County District Court, case number A-16-740711-C (the “Underlying Action”). The subject matter of the instant litigation against NCC is duplicative of the Declaratory Relief action filed by NCC against Efren and Bouchard in the United States District Court for the District of Nevada, case number 2:17-cv-02456-KJD-DJA (the “Dec Action”)



which has been pending since 2017 and in which NCC seeks a declaration that it has no duty to defend or indemnify Efren in connection with the Underlying Action. Indisputably, Bouchard's Amended Complaint in this matter seeks declaratory relief arising from the very same claim, based on the very same facts, as the action pending in federal court. Despite being a party to the Dec Action, Bouchard filed the Present Action. Because the legal issue in the Present Action is duplicative of the legal issue pending in federal court and/or the resolution of the federal court action would resolve the claims in this matter, NCC moved to dismiss the claims against NCC in this action, or alternatively, moved that the claims against NCC be stayed pending resolution of the parallel action pending in federal court. The District Court denied this Motion. However under the first-to-file rule, long enforced by Nevada courts, the claims against NCC in this litigation should have been dismissed, or alternatively, should have been stayed pending resolution of the Dec Action. The Dec Action was properly filed in federal court, the federal court has jurisdiction, the parties have been litigating that action for over three years, trial in the Dec Action will commence on or about January 10, 2022, and the ends of justice would be best served by allowing the federal court case to resolve the factual and legal issues.

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### **III. STATEMENT OF FACTS NECESSARY TO UNDERSTAND ISSUES PRESENTED**

#### ***a. The Underlying Action***

This case arises from litigation by Philip Bouchard (“Bouchard”) against Now Services of Nevada LLC, dba Cool Air Now (“Now Services”), NCC’s insured, as well as Now Services’ Managing Member, Juan Sotelo (“Juan”), and his son Efren Sotelo (“Efren”) in Clark County, Nevada, case number A-16-740711-C. Petitioner’s Appendix (“PA.”), Vol. I, No. 6. The Underlying Action arose from a December 12, 2014 motor vehicle accident involving a vehicle owned by Now Services, insured by NCC, and driven by Efren (the “Accident”). PA, Vol. I, No. 6, 0159, ¶¶ 10-14.

The NCC Policy provided Commercial Auto Coverage with bodily injury liability limits of \$1,000,000. The NCC policy provides:

#### **5. Other Insurance**

- a. For any covered “auto” **you** own, this Coverage Form provides primary insurance.

PA, Vol. I, No. 1, 0033 “You” and “Your” refer to the Named Insured shown in the Declarations, Now Service of Nevada LLC dba Cool Air Now. PA, Vol. I, No. 1, 0005, 0025.

At the time of the accident, Juan Sotelo was the named insured under a personal policy of motor vehicle insurance issued by Coast National Insurance

Company (“Coast”) which insured four vehicles, a 2007 Cadillac STA, a 2009 Cadillac Escalade, a 2012 Chevrolet Camaro, and a 2003 GMC Yukon Denali. The Coast policy included bodily injury liability coverage with limits of \$25,000 per person. PA, Vol. I, No. 2, 0098-0100. The Coast policy provides:

#### **OTHER INSURANCE**

Any insurance **we** provide under Part A shall be excess over any other collectible insurance, self-insurance, protection and/or any other source of recovery, except for the insurance **we** provide for the ownership, maintenance and use of **your covered auto**.

PA, Vol. I, No. 2, 0117. “Your covered auto” is defined, in relevant part, as “any auto shown in the Declarations for the coverages applicable to that auto.” PA, Vol. I, No. 2, 0111.

Prior to the Accident, on December 10, 2014, Now Services fired Efren for embezzlement of company funds and relieved him of the company gas card and vehicle keys. PA, Vol. I, Nos. 3, 4 and 10. On December 12, 2014, Efren admittedly stole the Now Services truck and was driving the vehicle without permission when he was involved in the motor vehicle accident with Bouchard. PA, Vol. I, No. 10.

On July 27, 2016, Bouchard filed the Underlying Action against Efren, Juan and Now Services, seeking damages related to the accident. PA, Vol. I, No. 6. NCC provided a defense to Juan and Now Services. PA, Vol. I, No. 7. Efren did not tender his defense to NCC and NCC did not immediately provide a defense to

Efren as he admittedly stole the vehicle (and in fact was arrested, prosecuted and sentenced for the theft) and was therefore not an insured under the policy. PA, Vol. I, Nos. 5 and 10. Thereafter, a termination statement was produced in the Underlying Action which indicated that Efren's termination was effective December 20, 2014 rather than December 10, 2014. PA, Vol. I, No. 3. NCC thereafter agreed to defend Efren under a reservation of rights, including the right to file a declaratory relief action. PA, Vol. I, No. 8. Stephenson & Dickinson was retained to defend Efren. PA, Vol. I, No. 8, 0176. However, default had already been entered against Efren and in May, 2017, the court in the Underlying Action denied the motion to set aside the default. PA, Vol. I, No. 9. Plaintiff proceeded to litigate the Underlying Action as to the claims against Now Services and Juan for an additional two years before dismissing them. PA, Vol. I, No. 18.

Thereafter, in September, 2019, a prove up hearing was held as to Plaintiff's damages. NCC defended Efren at the prove up hearing trial. The Court awarded Bouchard damages against Efren in the amount of \$219,193.02. PA, Vol. II, No. 19. In March, 2020, the Court awarded fees and costs resulting in an amended default judgment of \$385,108.17.<sup>1</sup> PA, Vol. II, No. 20. Thereafter, the court in the

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<sup>1</sup> The award of costs and fees was the subject of an appeal to the Nevada Supreme Court. On June 11, 2021, the Nevada Supreme Court filed an Order of Affirmance.

Underlying Action judicially assigned to Bouchard any rights that Efren may have against any party arising from the Underlying Action. PA, Vol. II, No. 21. The present litigation followed.

***b. The Declaratory Relief Action***

In September, 2017, NCC filed an action for declaratory relief against Efren and Bouchard in the United States District Court for the District of Nevada, case number 2:17-cv-02456-KJD-DJA seeking a judicial determination that it had no duty to defend or indemnify Efren in connection with the Underlying Action. PA, Vol. I, No. 11. Bouchard filed an Answer. PA, Vol. I, No. 12. Efren did not appear and was defaulted. PA, Vol. I, No. 13. NCC moved for summary judgment on the issue that Efren was not an insured under the policy and NCC therefore had no duty to defend him in the Underlying Action. PA, Vol. I, No. 14. Bouchard opposed the motion arguing, in part, that there was a question of fact as to whether Efren was employed by Now Services on the date of the accident. PA, Vol. I, No. 15. The Court found that there was a genuine issue of fact whether Juan was an employee of Now Services on the date of the accident, and as such, might be found to be a permissive user of the Now Services vehicle. PA, Vol. I, No. 16, 0230. Because this issue would be resolved at the upcoming trial in the Underlying Action against Juan and Now Services (based on the negligent entrustment cause of action against Now Service and Juan), NCC moved to stay the Dec Action,

which motion the federal court granted. PA, Vol. I, No. 17. However, this factual issue was not litigated in the Underlying Action as Plaintiff dismissed all claims against Now Services and Juan. PA, Vol. I, No. 18. In April, 2020, after judgment was entered against Efren, the stay in the Dec Action was lifted. PA, Vol. II, No. 23.

Discovery in the Dec Action has closed. The parties filed the Joint Pretrial Order in the Dec Action on May 26, 2021 and requested a trial date of January 10, 2022. PA, Vol. II, No. 31. On September 2, 2021, the federal judge signed the Joint Pretrial Order setting the Dec Action for trial on January 10, 2022. PA, Vol. II, No. 31, 0354-0355. Trial is estimated to take up to three days. PA, Vol. II, No. 31, 0354.

***c. The Present Action***

In April, 2020, despite the fact that the Dec Action had been pending in federal court for over three years, Bouchard filed the instant action seeking declaratory relief – a judicial determination that Efren was entitled to benefits under the policy, including defense, independent counsel and indemnity relating to the Underlying Action - and asserting claims against NCC for breach of contract and bad faith arising from its alleged breach of the duty to defend Efren. PA, Vol. II, No. 22.

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The discovery cutoff in the Present Action is January 20, 2022. PA, Vol. II, No. 28, 0319. The jury trial is set on a four week stack to begin Tuesday, June 21, 2022. PA, Vol. II, No. 28, 0318.

***d. Motion to Dismiss Dec Action is Denied***

After filing the Present Action, Bouchard filed a motion to dismiss the Dec Action. Bouchard argued that the federal court should dismiss the Dec Action in favor of the Present Action. Bouchard argued that the Dec Action 1) “needlessly” asked the court to determine state law issues, 2) was an attempt to forum shop, and 3) was ***duplicative*** of the Present Action. PA, Vol. II, No. 24.

On September 23, 2020, the federal court entered an order denying Bouchard’s motion to dismiss the Dec Action. PA, Vol. II, No. 25. The federal court addressed each of Plaintiff’s arguments and determined that the factors weighed in favor of the federal court retaining jurisdiction and not dismissing the action. The federal court specifically found that the claims in the Present Action arose from the same set of facts as the Underlying Action and NCC’s alleged bad faith in not defending Efren. In analyzing the factors set forth in *Brillhart*, the federal court made the following determinations: 1) Bouchard’s actions in dismissing Now Services and Juan prevented the state’s court determination on liability and thus the coverage issues in the Dec Action were not contingent on any further state court proceedings; 2) Bouchard’s filing of the Present Action appeared

to be an effort to forum shop as he wished to proceed in state court after three years of litigation in federal court; and 3) that the Dec Action was not duplicative of the *Underlying Action* as the *Underlying Action* concluded without deciding the coverage issue. PA, Vol. II, No. 25, 0282-0283. Finally, the court noted that there was a “vast docket” in the Dec Action that had been ongoing since 2017 and a dismissal now (in favor of the Present Action) would “offend judicial economy and promote the waste of judicial resources”. PA, Vol. II, No. 25, 0284.

***e. Motion to Dismiss Present Action, or Alternatively, to Stay Claims Against NCC is Denied***

As the legal issue in this litigation is duplicative of the legal issue being litigated in the federal court Dec Action, NCC filed a Motion to Dismiss, or Alternatively, Motion to Stay Claims Against National Casualty Company. PA, Vol. II, No. 26. Bouchard opposed this motion based on two principle arguments: 1) that the Dec Action did not include bad faith and therefore would not resolve all claims against NCC and 2) that NCC was a necessary party to determine the “primacy” of the Coast and NCC policies. PA, Vol. II, No. 27. NCC filed a Reply in Support of its Motion to Dismiss arguing that the determination of the factual and legal issues in the Dec Action would have a preclusive effect in the Present Action and that NCC’s presence was not required for this Court to make any determination regarding the claims against the other defendants. PA, Vol. II, No. 29. The District Court denied NCC’s Motion. PA, Vol. II, No. 30.



#### IV. SUMMARY OF ARGUMENT

- A. It is contrary to fundamental judicial procedure to permit two actions to remain pending between the same parties upon the same cause. *Fitzharris v. Phillips*, 74 Nev. 371, 376, 333 P.2d 721, 724 (1958).
- B. Whether an action is duplicative turns on the essential issue in the actions not on whether the causes of action pleaded are different. See *Fitzharris*, Nev. 74 at 376, 333 P.2d at 723; see also *Galindo-Milan v. Hammer*, 438 P.3d 341 (Nev. 2019) (unpublished).
- C. When duplicate actions exist, the second action is properly dismissed and the court of the later-filed action should defer to the jurisdiction of the court of the first-filed action by either dismissing, staying, or transferring the later-filed suit. See *Fitzharris*, Nev. 371 at 376-77, 333 P.2d at 724 (1958; see also *Galindo-Milan*, 438 P.3d 341 (Nev. 2019) (unpublished).
- D. The determination of the legal issue at issue herein, whether NCC had a duty to defend and/or indemnify Efren and breached that duty, will be determined by the trier of fact at trial in January, 2021, and will preclude Plaintiff from relitigating the issue in this action.
- E. NCC is not a necessary party for the District Court to determine the claims against Coast National Insurance Company.

## V. REASONS WHY THE WRIT SHOULD ISSUE

### a. *Standards for Issuance of Writ*

The Nevada Constitution grants this Court the "power to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus." Nev. Const. Art. VI, § 4. The power to issue such writs is part of this Court's original jurisdiction; it is not merely auxiliary to its appellate jurisdiction. *State of Nevada v. McCullough*, 3 Nev. 202, 214-16 (1867).

Petitioners recognize that an appellate court will generally not exercise its discretion to consider writ petitions that challenge orders of a trial court denying motions to dismiss because very few writ petitions warrant extraordinary relief, and the appellate court expends an enormous amount of time and effort processing these petitions. *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997). However, there are exceptions where considerations of sound judicial economy and administration militate in favor of granting such petitions. *Id.* The appellate court will exercise its discretion with respect to certain petitions where no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the trial court is obligated to dismiss an action. *Id.* A writ of mandamus is also the proper vehicle to “control an arbitrary or capricious exercise of discretion” as well as a manifest abuse of discretion. *In re City Center Constr. & Lien Master Litig. v. Eighth Judicial Dist. Court of Nev.*,

No. 57186, 2011 Nev. Unpub. LEXIS 1433, at \*1 (Oct. 19, 2011). Similarly, writ relief is also available when needed to remedy a “*gross miscarriage of justice*.” *Salaiscooper v. Eighth Judicial Dist. Ct.*, 117 Nev. 892, 902, 34 P.3d 509 (2001) (emphasis added); see *Walcott v. Wells*, 21 Nev. 47, 51, 24 P. 367 (1890) (“The object of the writ is to restrain inferior courts from acting without authority of law in cases where wrong, damage and injustice are likely to follow from such action.”). The interest of judicial economy is the primary standard by which the appellate court exercises its discretion. *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997). Based on the above, this Court should exercise its discretion and consider this writ.

***b. Nevada Does not Allow Duplicative Actions to Proceed***

The Present Action against NCC is duplicative of the Dec Action as it involves the same essential issue and should be dismissed under the first-to-file rule. When duplicate actions exist, Nevada courts will follow the “first to file” rule to determine which action should proceed. See *Fitzharris*, Nev. 371 at 376-77, 333 P.2d at 724 (1958) (providing that when identical causes of action are pending, involving the same parties, a trial court may properly dismiss the second action), abrogated on other grounds by *Lee v. GNLV Corp.*, 116 Nev. 424, 996 P.2d 416 (2000); see also *Gabrielle v. Eighth Judicial Dist. Court*, 130 Nev. 1178 (2014) (unpublished) (finding that because the two actions were *substantially similar* and

sought the same relief, albeit through different legal means, the court exceeded its jurisdiction by entertaining the action without considering whether it was appropriate to proceed in accordance with the first-to-file rule) (emphasis added). The *Gabrielle* court noted the first-to-file rule provides that "where substantially identical actions are proceeding in different courts, the court of the later-filed action should defer to the jurisdiction of the court of the first-filed action by either dismissing, staying, or transferring the later-filed suit" (citing *SAES Getters S.p.A. v. Aeronex, Inc.*, 219 F. Supp. 2d 1081, 1089 (S.D. Cal. 2002)) and noted that the two actions *need not be identical, only substantially similar* for the first-to-file rule to apply (emphasis added) (citing *Inherent.com v. Martindale-Hubbell*, 420 F. Supp. 2d 1093, 1097 (N.D. Cal. 2006) ). *Gabrielle*, 130 Nev. 1178 (2014) .

Federal courts also apply the first-to-file rule, and in doing so consider three factors: (1) the chronology of the two suits; (2) the similarity of the parties; and (3) the similarity of the issues. See *Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1240 (9th Cir. 2015). "When applying the first-to-file rule, courts should be driven to maximize economy, consistency, and comity." *Kohn Law*, 787 F.3d at 1240. The policy rationales behind the first-to-file rule—economy, consistency, and comity—are "just as valid when applied to the situation where one suit precedes the other by a day as they are in a case where a year intervenes between the suits." *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 939 (Fed.

Cir. 1993), abrogated on other grounds by *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995). In *Pacesetter Sys., Inc. v. Medtronic, Inc.*, the 9th Circuit explained the rationale for the first-to-file rule by stating, "[n]ormally sound judicial administration would indicate that when two identical actions are filed in courts of concurrent jurisdiction, the court which first acquired jurisdiction should try the lawsuit and no purpose would be served by proceeding with a second action." *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 8 F.2d 93, 95 (9th Cir. 1982).

Here, the Dec Action will determine whether NCC had a duty to defend and/or indemnify Efren and breached that duty. Under Nevada law, NCC is entitled to dismissal of the Present Action as the Amended Complaint in this matter seeks declaratory relief relating to the very same claim, based on the very same facts, as the Dec Action. Despite the fact that Plaintiff's Amended Complaint in the Present Action asserts causes of action for breach of contract and bad faith in addition to the declaratory relief claim, the Present Action is *substantially similar* to the Dec Action as these claims all arise from the identical legal issue that will be determined in the Dec Action – whether NCC had a duty to defend and/or indemnify Efren and breached that duty.

Here, the Dec Action was filed first, has been litigated for over three years and will proceed to trial on or about January 10, 2022, before discovery in this case

is even completed. The federal court acquired jurisdiction of the Dec Action in 2017. The Present Action was filed in 2020. Thus, this Court should apply the first-to-file rule, dismiss the Present Action, and allow the fact and legal issues involved in the Present Action to be tried in the Dec Action.<sup>2</sup>

To allow the Present Action to proceed will result in unnecessary vexation and expense to the parties and wasted judicial resources. Indeed, Nevada has long recognized that it is contrary to fundamental judicial procedure to permit two actions to remain pending between the same parties upon the identical cause. *Fitzharris v. Phillips*, 74 Nev. 371, 376, 333 P.2d 721, 724 (1958) (noting that prior to adoption of the Nevada Rules of Civil Procedure such situation was a special ground of demurrer).

***c. Under Nevada Law, Plaintiff will be Precluded from Re-litigating the Legal Issue, Determined at Trial in the Dec Action, at Trial in this Case***

Under Nevada law, the determination of the issue of whether NCC had a duty to defend and/or indemnify Efren and breached that duty in the Dec Action

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<sup>2</sup> Defendants removed the Present Action to federal court and moved to consolidate the Present Action with the Dec Action. However, the federal court found that the presence of Defendant Stephenson & Dickinson destroyed diversity jurisdiction despite the arguments of Defendants that the law firm of Stephenson & Dickinson was fraudulently joined specifically to defeat diversity (based on the fact that the only cognizable claim Efren would have against Stephenson & Dickinson is a legal malpractice claim which is not assignable to Bouchard under Nevada law).

will preclude re-litigation of the issue in this action. See *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709 (2008). The following factors are necessary for application of issue preclusion: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated.

The issue that will be decided at trial in the Dec Action is identical to the issue in the Present Action - whether NCC had a duty to defend Efren and breached that duty. This issue has been actually and necessarily litigated in the Dec Action for over three years and will soon be determined on the merits through trial. Both NCC and Bouchard are parties to the Dec Action.

The determination of the legal issue in the Dec Action will apply to all claims in the Present Action against NCC, however styled. *Five Star Capital Corp.*, 124 Nev. at 1055, 194 P.3d at 714 (2008) (issue preclusion applies to prevent relitigation of a specific issue that was decided even if the second suit is based on different causes of action and different circumstances). As such, the judgment in the Dec Action will determine whether NCC had a duty to defend Efren and breached that duty and that issue will not be able to be re-litigated in the Present Action. Thus, the Present Action against NCC is futile and should have

been dismissed.

***d. NCC is Not a Necessary Party for the District Court to Determine the Claims Against Co-Defendant Coast National Insurance Company***

The damages against Efren have been finally determined with the Nevada Supreme Court's June 11, 2021 Order of Affirmance of the judgment in the Underlying Action. The NCC and Coast policies are clear, the NCC policy applies as primary coverage for the loss and the Coast policy applies as excess. Thus, if NCC owes a duty to indemnify Efren – a duty that will be determined at trial in the Dec Action - it will be required to pay the judgment to Bouchard as assignee of Efren. If NCC does not owe a duty to indemnify Efren, it will owe no indemnity to Efren.

Whether *Coast* has a duty to defend and/or indemnify Efren is not dependent on NCC's duties to Efren, nor will the determination of NCC's duties to Efren impact the determination of *whether* Coast has a duty to defend and/or indemnify Efren and whether it breached such duties. The only determination that will impact Coast's ultimate liability is whether NCC owes any coverage to Efren. The only relevancy that this determination has to the claims against Coast goes to the ultimate amount of indemnity damages – if NCC is found to owe indemnity to Efren Coast will not, as the indemnifiable damages are within the NCC policy limits. The determination of whether NCC owed indemnity will be made in the



Dec Action prior to trial in this matter. The claims against NCC have no bearing on the claims against Coast as Coast's duties to Efren are governed solely by the insurance policy issued by Coast, not by any action or inaction by NCC. Thus, NCC is not a necessary party to this action solely based on the claims against Coast.

## **VI. WRIT RELIEF IS PROPER IN THIS CASE**

Based on the first-to-file rule, the District Court was obligated to dismiss the action against NCC. The refusal of the District Court to dismiss the action is an abuse of discretion which will result in a "*gross miscarriage of justice*" – NCC will necessarily incur fees and costs re-litigating issues that have been ongoing in the Dec Action for over three years and which will be determined at trial in the Dec Action before discovery in this case will even be completed. Additionally, because the essential issue underpinning Plaintiff's claims will be determined at trial in the Dec Action, the doctrine of issue preclusion will prevent it from being re-litigated at trial in the Present Action.

Here, the only meaningful time to review the District Court's refusal to dismiss this action is *now*. Unless corrected, the District Court's refusal to dismiss this action will require NCC to participate in discovery that has already been completed in the Dec Action and is completely unnecessary as the issues in this matter will be determined by a jury in the Dec Action and will not be able to be re-

litigated in the Present Action. This is precisely the situation where mandamus relief is proper.

Additionally, for all of the above reasons, this Court should exercise its constitutional prerogative to entertain the instant writ petition based on sound considerations of judicial economy. If the Present Action proceeds it will require judicial resources, as well as significant expenditures from both parties, and the claims against NCC will not proceed to trial as the fact and legal issues will have been determined in the Dec Action. In other words, any judicial resources expended on the claims against NCC would be a complete waste.

## **VII. CONCLUSION**

The interest of judicial economy is the primary standard by which the appellate court exercises its discretion. Here, it is clearly in the interest of judicial economy to allow the Dec Action to proceed to trial and dismiss the Present Action. Accordingly, pursuant to NRS 34.170, Petitioners respectfully petition this Court for a Writ of Mandamus directing Respondent to dismiss the claims against Petitioner brought by Real Party in Interest Philip Bouchard or a Writ of Prohibition directing Respondent that this litigation may not continue.

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Alternatively, judicial economy requires that the claims against NCC be stayed pending the outcome of the Dec Action.

DATED this 14th day of September, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Priscilla L. O'Briant

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Nevada Bar No. 003062

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6385 S. Rainbow Boulevard, Suite 600

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*Attorneys for Petitioner*

**DECLARATION OF VERIFICATION IN SUPPORT OF PETITION FOR  
WRIT OF MANDAMUS**

I, Priscilla L. O'Briant, being first duly sworn, deposes and states:

1. I am an attorney of record for Petitioner and make this Affidavit pursuant to NRAP 21(a)(5).

2. The facts contained in the following Petition for Writ of Mandamus or Prohibition and Memorandum of Points and Authorities are based upon my own personal knowledge as counsel for Petitioners.

3. The contents of the foregoing Petition for Writ of Mandamus or Prohibition and the following Memorandum of Points and Authorities are true based upon my personal knowledge, except as to those matters stated on information and belief.

4. All documents contained in the Petitioner's Appendix, filed herewith, are true and correct copies of the pleadings and documents they are represented to be in the Petitioner's Appendix and as cited herein.

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5. This Petition complies with NRAP 21(d) and NRAP 32(c)(2).

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 14th day of September, 2021 at Las Vegas, Nevada.

/s/ Priscilla L. O'Briant, Esq.  
PRISCILLA L. O'BRIANT, ESQ.

## **CERTIFICATE OF COMPLIANCE**

1. I hereby certify that I have read this PETITION FOR WRIT OF MANDAMUS OR PROHIBITION, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. 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.

2. I also certify that this brief conforms to NRAP 32(c)(2). The brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style required by NRAP 32(a)(6), as the brief includes double spaced, Times New Roman typeface at 14 point. The brief also complies with NRAP 21(d) in that it contains 4,654 words, less than the maximum of 7,000 words (calculated using the Word Count feature within Microsoft Word).

3. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every section of the

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brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied is to be found.

DATED this 14th day of September, 2021.

**LEWIS BRISBOIS BISGAARD & SMITH LLP**

/s/ Priscilla L. O'Briant, Esq. \_\_\_\_\_

Robert W. Freeman, Esq.

Nevada Bar No. 3062

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*Attorneys for Petitioner*

## **CERTIFICATE OF SERVICE**

Pursuant to NRAP 25, I certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH; that, in accordance therewith, I caused a copy of the PETITION FOR WRIT OF MANDAMUS OR PROHIBITION to be delivered by United States Postal Service, First Class mail, in a sealed envelope, on the date and to the addressee(s) shown below:

The Honorable Mark R. Denton  
The Eighth Judicial District Court  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas, Nevada 89101  
Respondent

Jordan P. Schnitzer, Esq.  
THE SCHNITZER LAW FIRM  
9205 W. Russell Road, Ste. 240  
Las Vegas, NV 89148  
Attorneys for Plaintiff/Real Party in Interest

Dated this 14th day of September, 2021,

By: /s/ Anne Cordell  
An employee of  
Lewis Brisbois Bisgaard & Smith