

**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.: 83501

Electronically Filed  
District Court No. 13-2021-81315-PCm.  
Elizabeth A. Brown  
Clerk of Supreme Court

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**REPLY IN FURTHER SUPPORT OF PETITION FOR WRIT OF  
MANDAMUS OR PROHIBITION**

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

### **I. ARGUMENT**

Real Party in Interest, Philip Bouchard (“Bouchard”) asks the Court to allow this duplicative litigation to continue because National Casualty Company (“NCC”) has an adequate and speedy remedy at law, because there are factual disputes, and because there is no law that requires clarification. Bouchard further argues that the first to file rule does not apply because the Federal Court Declaratory Relief Action cannot provide complete resolution of his bad faith claim and has declined jurisdiction over this “claim”. NCC’s Response follows.

#### **A. Writ Relief is Appropriate**

##### **1. Considerations of Judicial Economy Favor Relief**

Nevada appellate courts will exercise their discretion to consider writ petitions where considerations of sound judicial economy and administration militate in favor of granting such petitions. *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997). The interest of judicial economy is the primary standard by which the appellate courts exercises their discretion. *Id.*

The Present Action against NCC is duplicative of the Dec Action as it involves the same essential issue - whether NCC had a duty to defend and/or indemnify Efren and breached that duty. 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). Thus writ relief is appropriate in light of the primary standard for writ relief – judicial economy.

## **2. The District Court Abused Its Discretion in Allowing Duplicative Litigation to Proceed**

Writ relief is also the appropriate 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). The District Court abused its discretion by allowing this duplicative action to proceed in light of the established rules of law – in this case, long-standing Nevada law disallowing duplicative litigation and applying the “first to file” rule wherein the District Court 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 *Gabrielle v. Eighth Judicial Dist. Court*, 130 Nev. 1178 (2014) (unpublished).

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### **3. NCC Has No Adequate and Speedy Legal Remedy**

As set forth in the Petition, NCC and Bouchard have been litigating the legal issues in the present action in the Dec Action for over three years. The Dec Action is set for trial in January, 2020. PA, Vol. II, No. 31, 0354-0355.<sup>1</sup> Thus, if this case continues, 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. Moreover, as set forth in the Petition, the determination of the issues in the Dec Action will *preclude* those issues from being relitigating in the Present Action. Thus, now is the only meaningful time to review the District Court's refusal to dismiss this action and prevent the unnecessary fees and costs with litigating issues that will be decided by the Federal Court.

### **4. Factual Disputes Do Not Foreclose Writ Relief**

NCC does not address Plaintiff's *Statement of Facts*, despite the fact that they are incomplete and misleading, as the disputed factual issues are not "critical in demonstrating the propriety" of the writ. *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981). What is critical in demonstrating the propriety of NCC's request for writ relief is the fact that the factual issues raised by Bouchard in his *Response* are identical to the factual issues

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<sup>1</sup> Trial in the Dec Action has been set for January 18, 2022.

raised by Bouchard in the Dec Action. In fact, Bouchard's *Statement of Facts* in the *Response* is nearly duplicative of *Bouchard's Issues of Fact* set forth in the Joint Pretrial Order in the Dec Action. See PA, Vol. II, No. 31, 0336-0342. Thus, the factual issues raised by Bouchard in the Present Action will be decided by the District Court in the Dec Action – this is in fact the very basis of NCC's *Petition*.

**B. The First to File Rule Should be Applied**

NCC has previously addressed the factors set forth in *Mesi v. Mesi*, 136 Nev. Adv. Op. 89, 478 P.3d 366 for determination of whether writ relief is appropriate, but now summarizes its argument in the framework set forth in *Mesi*.

**1. The First-to-File Rule Applies**

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. PA, Vol. I, No. 11. 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. PA, Vol. II, No. 22. NCC and Bouchard are both parties to the Dec Action. PA, Vol. I, No. 11. 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.

Additionally, the Declaratory Relief Complaint specifically requests the Federal Court to determine both whether NCC had a duty to defend Efren and whether NCC has a duty to indemnify Efren. PA, Vol. I, No. 11. Plaintiff's reliance on one statement in the Joint Pretrial Order to suggest otherwise is disingenuous at best. In fact, *Bouchard's Issues of Law* set forth in the *Joint Pretrial Order* specifically indicates that he will *also* be asking the Federal Court to determine whether the duty to defend existed (PA, Vol. II, No. 31, 0344 to 0346) as well as whether NCC must indemnify Efren. PA, Vol. II, No. 31, 0348.

The fact that Bouchard has asserted causes of action related to the implied covenant of good faith and fair dealing does not alter this analysis as the *legal issues* underlying both the contractual and tort claims are the same. Bouchard attempts to sidestep this truth by arguing that bad faith can exist in the absence of coverage, presumably implying that even if Bouchard loses the Dec Action he may still proceed with his bad faith claims against Nationwide in the Present Action. However, Bouchard ignores an essential determination that will be made in the Dec Action – whether Efren had permission to use the truck at the time of the accident and is thus an insured under the policy. See PA, Vol. II, No. 31, 0336,

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§IV.A; PA, Vol. II, No. 31, 0342-0343, §V.A. If Efren is not an insured under the policy, NCC owed no duties to Efren and cannot be liable to Efren for bad faith.

The relief available to Bouchard under either theory (breach of contract or breach of the implied covenant) is the same – the consequential damages Efren suffered as a result of the breach. See *Century Sur. Co. v. Andrew*, 134 Nev. 819, 432 P.3d 180 (2018). Thus, as the two actions are *substantially similar* and seek the same relief, albeit through different legal means, the first-to-file rule applies. *Gabrielle v. Eighth Judicial Dist. Court*, 130 Nev. 1178 (2014) (unpublished).

Finally, the fact that Bouchard has separate claims against additional parties, does not change the nature of his claims against NCC nor does it prevent him from litigating those claims.

## **2. There Is No Equitable Reason Not to Apply the First-to-File Rule**

There is no equitable reason not to apply the first-to-file rule. As set forth in the *Petition*, the only inequity would be in forcing NCC to continue to participate in discovery on issues that will be determined by the Federal Court in the Dec Action, and thus precluded from re-litigation in the present action. Additionally, dismissing this matter as to NCC will not prevent the District Court from ruling on the primacy between the Coast and NCC policies.

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### **3. Plaintiff Will be Precluded from Re-litigating the Issues**

#### **Determined in the Dec Action, and thus, Dismissal is Proper**

As set forth in the *Petition*, under Nevada law Plaintiff will be precluded from re-litigating the legal issues determined at trial in the Dec Action. As such, there is no need for the Present Action to remain on the District Court docket and dismissal is proper.

## **II. 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 13<sup>th</sup> day of December, 2021.

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## **CERTIFICATE OF COMPLIANCE**

1. I hereby certify this 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) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 1,620 words, less than the maximum of 7,000 words (calculated using the Word Count feature within Microsoft Word).

2. 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 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.

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## **CERTIFICATE OF SERVICE**

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 13<sup>th</sup> day of December, 2021 and Electronic Service made in accordance with the Master Service List as follows:

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I have also prepared this document to be served via United States Postal Service, First Class mail, in a sealed envelope, on the next available postal date of December 14<sup>th</sup>, 2021, to the addressee(s) shown below:

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