

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

2 **TESSIE ELMA ALMARIO,**
3 Petitioner,

4 vs.

5 **EIGHTH JUDICIAL DISTRICT**
6 **COURT, THE HONORABLE**
7 **DAWN THRONE, DISTRICT JUDGE,**
8 Respondents,

9 and

10 **SHERYL ATTERBERG, ON BEHALF**
11 **OF HER ADULT WARD RODNEY**
12 **WILKINSON**

Real Parties In Interest.

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13 **ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**

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1 **IV. COUNTERSTATEMENT OF THE CASE**

2 This case involves two parties who, at the time of their divorce, had been
3 separated and living in different states for six years.¹ One of whom was and is a
4 frail old man with dementia², while the other, a former strip club hostess, has been
5 living the high life after securing a multimillion-dollar windfall by way of an
6 unconscionable Decree of Divorce.³

7 After a Colorado Court declared Rodney incompetent⁴, he sought a properly
8 supported and timely Rule 60 Motion through his guardian in the Court below.⁵
9 The lower Court, upon hearing Rodney's Rule 60 Motion, set an evidentiary
10 hearing to determine (1) "Defendant's competency at the time of the signing of
11 the Decree of Divorce and" (2) "how much Plaintiff knew about Defendant's
12 competency."⁶

13 Since doing so, two experts have examined Rodney,⁷ both of whom have
14 rendered reports favorable to Rodney's, not Tessie's, claims.⁸

15 In a hail marry attempt to prevent a merits determination on the two
16 questions posed by the District Court, Tessie has ignored the Domesticated Order
17 of Guardianship which found:⁹

18 [Rodney] is an incapacitated person and [Rodney's] needs
19 cannot be met by less restrictive means, including the use
20
21
22

23 ¹ See Tessie's Appendix ("ROA") at Vol. 1 000001-000004; 000067-000073;000094-000098

24 ² ROA at 000001-000004; 000067-000073;000094-000098

25 ³ ROA at Vol. 1 000048-000064; See also ROA at Vol. 2 000255-000266

26 ⁴ ROA at Vol 1 000130-000135

27 ⁵ ROA at Vol 1 000065-000093; 000094-000098; Vol 2 000255-000300

28 ⁶ ROA at Vol 2 000350-000357

⁷ ROA at Vol 2 000369; Vol 3 000530; 000539

⁸ ROA at Vol 3 000530; 000539

⁹ See IN THE MATTER OF THE GUARDIANSHIP OF: RODNEY WILKINSON, PROTECTED PERSON(S) Case No. G-21-054224-A in the Eighth Judicial District Court

1 of appropriate and reasonably available technological
2 assistance.¹⁰

3 [Rodney] is not capable of completely caring for himself.
4 Due to his strokes and Traumatic brain Injuries he
5 “forgets” simple tasks such as how to use a microwave or
6 other household appliances. [Rodney] cannot always
7 remember to feed himself or to visit his medical doctors
8 and take prescriptions on time.¹¹

9 and that:

10 [Rodney] is unable to manage property and business
11 affairs because of an *inability to effectively receive or*
12 *evaluate information or to make or communicate decisions,*
13 even with the use of appropriate and reasonably available
14 technological assistance.¹²

15 In casting aside, the Colorado Court’s valid order domesticated in Nevada¹³,
16 Tessie rests her hat on an inapposite case out of the North Dakota Tribal Court
17 (“Tribal Court”).¹⁴ Unfortunately for Tessie, the Tribal Court case fails to meet
18 three of the four elements required to raise a claim of Issue Preclusion.¹⁵

19 The issue decided in the prior litigation must be identical to the issue
20 presented in the current action—*which it is not*.¹⁶ The issue in the Tribal Court was
21 a breach of contract.¹⁷ The issues here are: (a) Whether Rodney was competent
22

23
24 ¹⁰ ROA at Vol 2 000394-00401

25 ¹¹ ROA at Vol 2 000394-00401

26 ¹² ROA at Vol 2 000394-00401

27 ¹³ See IN THE MATTER OF THE GUARDIANSHIP OF: RODNEY WILKINSON, PROTECTED
28 PERSON(S) Case No. G-21-054224-A in the Eighth Judicial District Court

¹⁴ ROA at Vol 3 000451-000526

¹⁵ ROA at Vol 3 000536-000539

¹⁶ ROA at Vol 3 000536-000537

¹⁷ ROA at Vol 3 000536-000537

1 when he signed the Decree of Divorce; and (b) how much if anything Tessie knew
2 about Rodney's competency or lack thereof.¹⁸

3 Likewise, the party against whom the judgment is asserted must have been
4 a party or in privity with a party to the prior litigation. The parties involved in the
5 Tribal Court matter were Rodney Wilkinson as Plaintiff and Darrell Fortenot as
6 Defendant. Sheryl Atterberg and Steven Atterberg appeared on Rodney's behalf
7 but were not actually a party to the action themselves, only in their capacity as Co-
8 Guardians and Co-Conservators of Rodney—***Tessie was not a party.***¹⁹ Tessie is the
9 Plaintiff, and Rodney is the Defendant here.²⁰

10 The fourth element requires that the issue was actually and necessarily
11 litigated. Tessie incorrectly argues that the Tribal Court issued a final decision
12 finding Rodney was competent during the time the Decree was executed and
13 entered.²¹ Such a premise is false because:

- 14 (1) The Decree of Divorce itself, the execution and filing thereof, nor the
15 Eighth Judicial District Court Case No. D-19-596071-D were
16 discussed in or even fleetingly alluded to in the Tribal Court's
17 *Findings of Fact and Conclusions of Law and Order for Judgment*, entered
18 on or about December 29, 2020, in the District Court for the Fort
19 Berthold Indian Reservation Case No. CV-2020-0303. Therefore, the
20 issues at hand in the present matter could not have been "actually
21 and necessarily litigated" in the prior contract dispute if the issues
22 present here were not even mentioned in the prior contract dispute.²²
- 23 (2) The Tribal Court did not find or conclude that Rodney was
24 competent to enter into a binding contract agreement, also making it

26 ¹⁸ ROA at Vol 2 000353

27 ¹⁹ ROA at Vol 3 000537

28 ²⁰ ROA at Vol 3 000537

²¹ ROA at Vol 3 000537-000539

²² ROA at Vol 3 000537

1 clear that the Tribal Court *did not* associate Rodney's competency
2 with, and pleading associated with the present divorce suit, but
3 indicates that the Court did not have any evidence to support a
4 finding that Rodney was incompetent, *not* that Rodney was
5 competent. The present issue regarding Rodney's competency to
6 contract was not found to be competent by the Tribal Court but found
7 that no evidence was provided to the Court that would have
8 permitted them to make a finding of Rodney being incompetent.²³

9 In short, this case is not about Issue Preclusion, nor is it about comity. But
10 rather, this case is about a wife fearing she cannot prevail on the merits, is seeking
11 to appeal the denial of her Summary Judgment motion, so she is engaging in
12 dilatory tactics by improperly seeking what is, in essence, an appeal from the denial
13 of her Summary Judgment Motion.

14 **V. RESTATEMENT OF THE ISSUES PRESENTED**

- 15 **1.** Did the District Court err in denying Summary when material facts remain
16 in dispute, and Tessie failed to timely raise and meet the elements for Issue
17 Preclusion?
- 18 **2.** Did the District Court err by setting an evidentiary hearing to resolve timely
19 raised issues in a properly supported NRCP 60(b) Motion?

20 **VI. FACTUAL AND PROCEDURAL BACKGROUND**

21 **1. The Divorce Proceedings and Entry of Decree.**

22 The parties wed on March 22, 2009, in Burlington, Colorado.²⁴ In
23 February 2013, the parties separated, and Tessie moved to Las Vegas, Nevada,
24 where she remained.²⁵ On September 9, 2019, after being separated from Rodney
25 for over six years, Tessie filed for divorce.²⁶

26
27 ²³ ROA Vol 3 000538

28 ²⁴ ROA Vol 1 000001

²⁵ ROA Vol 1 000068; ROA 000236

²⁶ ROA Vol 1 000237

1 On January 17, 2020, before he filed his Answer in the divorce Case, Rodney,
2 who was suffering from dementia²⁷, was met by Tessie, who flew out to North
3 Dakota with a Decree she prepared in hand—at which time she had Rodney sign
4 the Decree.²⁸ Nine days later, Tessie filed Rodney's Answer, a document which her
5 attorney prepared.²⁹

6 On February 12, 2020, the Court filed the Stipulated Decree of Divorce. Under
7 the terms of the Decree, the Court divided the community assets as follows:

8 IT IS FURTHER ORDERED that the following community
9 property shall be set over and hereby awarded to Rodney
10 Wilkinson as his sole and separate property:³⁰

- 11 1. The Chevrolet Suburban VIN ending in 9469;
- 12 2. All personal property owned prior to the marriage;
- 13 3. Any and all current and future retirement accounts,
14 savings plans, IRA, pension plans or otherwise in his name
15 only not otherwise herein named;
- 16 4. Any and all wearing apparel, personal ornaments, and
17 jewelry belonging to him;
- 18 5. Any and all bank accounts in his name only not
19 otherwise herein named; and
- 20 6. Any personal items currently in his possession.

21 IT IS FURTHER ORDERED that the following community
22 property shall be set over and hereby awarded to the Tessie
23 Wilkinson as her sole and separate property:³¹

24
25
26 ²⁷ ROA Vol 1 000237

27 ²⁸ ROA Vol 1 000237

28 ²⁹ ROA Vol 1 000237

³⁰ ROA Vol 1 000033-000047; ROA Vol 2 000258-000260

³¹ ROA Vol 1 000033-000047; ROA Vol 2 000258-000260

1. US Bank account ending in the numbers 8904 with a current approximate value of \$373;
2. The real property located at 8382 Hollywood Hills Ave, Las Vegas, Nevada 89178;
3. The real property located at 5730 Road 10, Goodland, Kansas 67735;
4. The 2012 Chevrolet Corvette VIN ending in 0723;
5. The Service Truck VIN 2GCFK29K951206963;
6. The 1977 Kenworth Winch Truck VIN 155197SG2;
7. The following heavy equipment:
 - a. P & H 140 Ton crane, Model 9125-TC;
 - b. Manitowac 100 ton crane, Model 3900A, SN 39670;
 - c. Lima 90 ton crane, Model 990TC;
 - d. P & H 90 ton crane, Model 8115TC, SN 35419;
 - e. P & H 50 ton crane;
 - f. P & H 25 ton crane;
 - g. P & H 70 ton crane;
 - h. 2 bulldozers;
 - i. 1977 Kenworth VIN 055097SGL;
 - j. 1972 Peterbilt ID 41337P, FHP364802;
 - k. 1955 Mack VIN B70511209;
 1. 1955 Kenworth VIN 64338; m. 1959 Mack VIN B73S1370;
 - n. 1962 Mack winch truck;
 - o. 6000 Cherry Picker;
 - p. 100 ton press;
 - q. Lo Boy 35 ton Cozad Trailer CC80062;

- r. 1993 Western Star Boom Truck Serial No. 2WKIIDCCHIPK931154;
- s. 750 Holmes Wrecker Tow Truck;
- t. Autocar Winch Truck;
- u. Maritime Hydraulic Drilling Rig;
- v. Any and all tools located at 5730 Road 10, Goodland, Kansas 67735.

14. Any and all rights assigned to Rodney Wilkinson through the contract with Da Fontenot of Synergy Oil Field Services, LLC.

8. All personal property owned prior to the marriage;
9. Any and all current and future retirement accounts, savings plans, IRA, pension plans or otherwise in her name only;
10. Any and all wearing apparel, personal ornaments, and jewelry belonging to her;
11. Any and all bank accounts in her name only; and
12. Any personal items currently in her possession.

The *Decree of Divorce* divided the community debts as follows:³²

IT IS FURTHER ORDERED that the following community debts shall be set over and hereby awarded to Rodney Wilkinson as his sole and separate debts:

1. The loan on the real property located at 5730 Road 10, Goodland, Kansas 67735;
2. The loan through Dorman Renewable Fuels, LLC in the approximate amount of \$20,000;

³² ROA Vol 1 000033-000047; ROA Vol 2 000258-000260

3. Any and all tax debts in his name only;
4. Any and all student loan debts in his name only;
5. Any and all credit card debt in his name only;
6. Any and all credit instruments in his name only.

IT IS FURTHER ORDERED that the following community debts shall be set over and hereby awarded to Tessie Wilkinson as her sole and separate debts:³³

1. The Chase credit account ending in the numbers 9416 with an approximate current balance of \$3,860;
2. The US Bank credit account ending in the numbers 9270 with an approximate current balance of \$4,300;
3. Any and all student loan debts in her name only;
4. Any and all credit card debt in her name only;
5. Any and all credit instruments in her name only.

Finally, the *Decree of Divorce* awarded Tessie spousal support as follows:³⁴

IT IS FURTHER ORDERED that Tessie Wilkinson shall receive the sum of \$3,000 per month from Rodney Wilkinson for the duration of her life as and for Spousal Support. This amount shall be due on or before the 10th day of each month.

Any laymen upon review of the Decree would find it unconscionable. So much so that the Decree itself is arguably prima facie evidence of misconduct on Tessie's part. Had the Court held a prove-up hearing as it should have in the first instance given the terms in this Decree, this matter probably would not be before this Court.

///

³³ ROA Vol 1 000033-000047; ROA Vol 2 000258-000260

³⁴ ROA Vol 1 000033-000047; ROA Vol 2 000258-000260

1 **2. The Court Sets an Evidentiary Hearing.**

2 On January 25, 2021, Rodney sought relief under NRCP 60(b).³⁵ Tessie filed
3 her Opposition on February 2, 2021,³⁶ and Rodney filed replied on February 3,
4 2021.³⁷

5 At the February 4, 2021, hearing, the District Court ruled that for NRCP
6 60(b)(3) and 60(b)(6) purposes, a prima facie case had been made for an
7 evidentiary hearing to resolve: (a) Whether Rodney was competent when he signed
8 the Decree of Divorce, and (b) how much if anything Tessie knew about Rodney's
9 competency or lack thereof.³⁸

10 The Court has not yet weighed all the evidence, taken testimony, or
11 otherwise made a final determination as to whether it will set the Decree aside.

12 **3. The Court Denies Summary Judgment, and Tessie Seeks Review.**

13 On June 16, 2021, Tessie moved for Summary Judgment, in which she
14 asserted for the first time a claim of Issue Preclusion.³⁹ A claim Tessie basis on
15 Court proceedings she knew about before the entry of the Divorce Decree and filing
16 Rodney's Rule 60 motion.⁴⁰ As well as before her motion to dismiss in the Eighth
17 Judicial District Court Case No. A-20-825785-C.⁴¹

18 On June 20, 2021, Rodney filed his Opposition in which he identified
19 genuine issues of material fact that precluded the entry of Summary Judgment and
20 also pointed out that Tessie had failed to meet her burden in the papers for Claim
21
22

23
24 ³⁵ ROA Vol 1 000065-000098

25 ³⁶ ROA Vol 1 0000989-000125; 000126-000254

26 ³⁷ ROA Vol 2 000255-000300

27 ³⁸ ROA Vol 2 000353

28 ³⁹ ROA Vol 3 000451-000526

⁴⁰ ROA Vol 3 000455(Showing that Tessie testified during the proceedings before the Tribal Court)

⁴¹ Compare ROA Vol 3 000455(Showing that Tessie testified during the proceedings before the Tribal Court) with ROA Vol 1 000209-000230 (Failing to mention the Tribal Court proceedings)

1 Preclusion.⁴² Tessie responded on July 6, 2021.⁴³ At the hearing on July 7, 2021, the
2 District Court denied Tessie's Summary Judgment Motion.⁴⁴

3 When denying Summary Judgment, the Court stated:⁴⁵

4 "[I've read everything on the motion for summary judgment.
5 And I find as follows. I'm not sure that the competency was
6 fully litigated in the tribal court case because it was used as a
7 defense to the enforcement of the contracts.

8 Also, even [if] it was, it does not resolve the issues of the wife's
9 fiduciary duty to her husband in this case, the allegations of
10 fraud on him and or undue influence. Because of their marital
11 relationship, their relationship is very different than the
12 relationship between Mr. Wilkinson and the defendant in the
13 tribal court on their contracts. So, the Court is going to deny the
14 motion for summary judgement *at this time.*" (emphasis added)
15

16 The District Court's statement that it was deny Tessie's motion for
17 summary judgment at this time, is crucial, because it shows that the District Court
18 has not made a final determination on the issue and instead Tessie still has the
19 opportunity to persuade the District Court at the evidentiary hearing.

20 In other words, since Tessie failed to attach Transcripts of Testimony and
21 other evidence from the Tribal Court proceedings, which was held without notice
22 and without an opportunity to prepare, Tessie will have the opportunity at trial to
23 prove that the matter was in fact fully litigated and that said litigation has a
24 bearing on the instant proceedings. Rather put meat on the bones of her claim of
25 Issue Preclusion when moving for summary judgment in preparation for trial.

26
27 ⁴² ROA Vol 3 000451-000526

28 ⁴³ ROA Vol 3 000527-000558

⁴⁴ ROA Vol 4 000682-000789

⁴⁵ ROA Vol 4 000792-000793

1 Tessie instead sought this Court's intervention, one hundred and ten days day
2 later. Moreover, Tessie did not seek this Court's intervention until one hundred
3 and fifteen days had lapsed since she filed her Pretrial Brief.⁴⁶ And only a month
4 before Trial.

5 A reasonable person could conclude when reviewing Tessie's conduct in its
6 totality that her request for Writ relief was designed more to postpone trial than
7 anything else. Anyhow, laches applies here because Tessie's delay was not
8 reasonable and because her delay has prejudiced Rodney. After all, Rodney was
9 prepared for trial, had secured his trial witnesses, including expert witnesses, and
10 yet despite the costs associated with doing so, the trial was taken off calendar after
11 Tessie sought Writ Relief.

12 VII. SUMMARY OF ARGUMENT

13 This Court should dismiss Tessie's Petition because it is untimely sought
14 and raises issues that were waived below. To the extent Tessie's Petition is
15 cognizable at all, she has an adequate remedy at law. Moreover, the underlying
16 claims are meritless, and should be denied. Even if Tessie's claims did have merit
17 this Court should still deny her Petition because she is asking this Court to rule on
18 an issue that remains pending before the District Court.

19 VIII. ARGUMENT

20 1. Tessie's Estoppel Claim is Untimely and Thus Waived.

21 NRCp 8(c) states:

22 In responding to a pleading, a party must affirmatively state any avoidance
23 or affirmative defense, including:

24 (G) estoppel

25 Subsection (c) requires that all affirmative defenses be specifically asserted
26 in the pleading. If the affirmative defenses are not so pleaded, asserted by NRCp
27

28 ⁴⁶ ROA Vol 3 000589-000648

12(b) motion, or tried by consent, they are waived. *Second Baptist Church v. First Nat'l Bank*, 89 Nev. 217, 510 P.2d 630, No. 7043 (1973); *Williams v. Cottonwood Cove Dev. Co.*, 96 Nev. 857, 619 P.2d 1219, (1980).

Tessie has several opportunities over the course of several months, and in two separate court proceedings for that matter to raise a claim of Issue Preclusion.

Tessie failed to do so on December 28, 2020, when she moved to dismiss in the Eighth Judicial District Court Case No. A-20-825785-C a corresponding case in which Rodney seeks to obtain damages and set aside the Decree based on fraud.⁴⁷ Moreover, Tessie did not raise Issue Preclusion in her Opposition to Rodney's Rule 60 Motion.⁴⁸

No, Tessie only raised the issue after substantial discovery, including depositions had been conducted, and two expert reports had been obtained. By untimely raising such an issue, Tessie waived any such claim.

2. Tessie's Writ is Barred by the Doctrine of Laches.

This Court will apply laches to a writ petition where "(1) there was an inexcusable delay in seeking the petition; (2) an implied waiver arose from petitioners' knowing acquiescence in existing conditions; and (3) there were circumstances causing prejudice to respondent." *Buckholt v. Second Judicial Dist. Court*, 94 Nev. 631, 633, 584 P.2d 672, 673-74 (1978) (finding no basis to apply laches to writ petition), *overruled on other grounds by Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 88 P.3d 840 (2004).

Tessie waited 110 days between the denial of her motion for Summary Judgment and seeking relief with this Court. She further waited 326 days between the filing of a civil complaint in which Rodney alleged fraud and sought to set aside the decree before raising a claim of Issue Preclusion. It is worth noting that

⁴⁷ ROA Vol 1 000209-000230

⁴⁸ ROA Vol 1 000099-000125

1 she did not raise such a claim when she moved to dismiss that case.⁴⁹ Likewise,
2 Tessie waited 273 days after Rodney's Rule 60 motion was filed before raising a
3 claim of Issue Preclusion. All told between February 10, 2021 when the Court
4 issued its Trial Management Order and June 16, 2021 when Tessie filed for
5 Summary Judgment—Tessie and Rodney both conducted extensive discovery,
6 Tessie sought to compel the independent medical examination of Rodney,⁵⁰ Tessie
7 objected to the issuance of several subpoenas, and she Even Filed her Pretrial Brief
8 on July 2, 2021,⁵¹ one hundred and fifteen days before seeking this Court's
9 intervention. None of which raised the issue of Claim Preclusion.

10 By sitting on her hands, Tessie not only waived any right to assert said
11 defense under NRCP 8(c), but her conduct shows acquiescence to existing
12 conditions. By not raising this issue sooner, Tessie has prejudiced Rodney. Not
13 only has substantial discovery been done, depositions were taken, but Rodney has
14 retained an expert witness. Rodney even sat for an Independent Medical
15 Examination, which Tessie sought.⁵²

16 Laches is appropriate given Tessie's delay in raising her claim is inexcusable.
17 And because Rodney has been prejudiced by the delay. A reasonable person could
18 conclude that Tessie's decision to seek relief before this Court at the eleventh hour
19 after spending months proceeding as if she wanted a merits determination reeks of
20 impropriety—specifically gamesmanship to delay the trial, a tactic which has
21 proven successful.

22 **3. Writ Relief is not Appropriate.**

23 (a) Tessie has a plain, speedy, and adequate remedy at law.

24 An appellate court will exercise its original jurisdiction to issue an
25 extraordinary writ *only when the petitioner does not* have a plain, speedy, and
26

27 ⁴⁹ ROA Vol 1 000209-000230

28 ⁵⁰ ROA Vol 2 000369

⁵¹ ROA Vol 3 000559-000648

⁵² ROA Vol 2 000369

adequate remedy in the ordinary course of law. *Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012) (emphasis added).

An appeal from an eventual final judgment is usually an adequate remedy even though issuance of a writ might avoid wasting the time and expense of a trial. *See Cnty. of Washoe v. Reno*, 77 Nev. 152, 156, 360 P.2d 602, 603 (1961) (“[A] remedy does not fail to be speedy and adequate, because, by pursuing it through the ordinary course of law, more time probably would be consumed than in a mandamus proceeding.”)

Tessie’s claims can be raised on a direct appeal from an adverse judgment, assuming one occurs.

After all, this Court can and will address any claims related to Issue Preclusion on direct appeal. Not to mention, that by raising the issue on direct appeal this Court would then have the benefit of a full record, which would potentially include testimony regarding the Tribal Court proceedings, transcripts of the same, and other relevant evidence.

In short, Tessie’s wish to get a second bite at the apple on Summary Judgment is not a valid basis for Writ relief.

(b) Writ Relief is Not a Proper Vehicle to Seek Review from the Denial of Summary Judgment.

In *Thompson*, the Supreme Court held 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.” *State ex rel. Dep’t of Transp. v. Thompson*, 99 Nev. 358, 362, 662 P.2d 1338, 1340 (1983).

Tessie’s writ is nothing more than an attempt to prematurely appeal the denial of her Summary Judgment motion. On that basis alone, this Court should deny Writ relief under *Thompson*.

1 (c) **Material facts remain in dispute, and this Court should deny Tessie's writ**
2 **as she is seeking to have this Court resolve factual rather than legal**
3 **disputes.**

4 "[A]n appellate court is not an appropriate forum in which to resolve
5 disputed questions of fact." *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev.
6 601, 604, 637 P.2d 534, 536 (1981). When there are factual issues presented, this
7 Court will not exercise its discretion to entertain a mandamus petition even if
8 "important public interests are involved." *Id.*

9 "Summary Judgment is appropriate under NRCP 56 when the pleadings,
10 depositions, answers to interrogatories, admissions, and affidavits, if any, that are
11 properly before the court demonstrate that no genuine issue of material fact exists,
12 and the moving party is entitled to judgment as a matter of law." *Wood v. Safeway,*
13 *Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005).

14 The presence of any "genuine" dispute of "material" fact precludes the
15 Court from entering Summary Judgment. If Summary Judgment is so precluded,
16 the factual dispute "require[s] a jury or judge to resolve the parties' differing
17 versions of the truth at trial." *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289,
18 88 S. Ct. 1575, 1592, 20 L. Ed. 2d 569 (1968)

19 The District Court set an evidentiary hearing to resolve: (a) Whether Rodney
20 was competent when he signed the Decree of Divorce, and (b) how much if
21 anything Tessie knew about Rodney's competency or lack thereof.

22 Rodney contends that he was not competent when the Decree was executed,
23 and that Tessie knew it and used that knowledge to secure a financial windfall.
24 Tessie claims that Rodney was competent and that she had no reason to know or
25 suspect he was not competent.

1 Rodney's position is not only supported by the unconscionable Decree itself
2 but by two experts, one of whom Rodney retained, while the other was hired by
3 Tessie. Rodney's expert, Dr. Janda April 16, 2021, Report stated:⁵³

4 [Rodney] is a 66-year-old male, with: (1) major neurocognitive
5 disorder secondary to vascular dementia; (2) depression; (3)
6 history of stroke; (4) insomnia; (5) psychosis / agitation; (6)
7 traumatic brain injury (TBI); and mixed dementia
8 [t]he medical records indicate that [Rodney] had been
9 *susceptible to scams* and had reduced insight as he was overall
10 *having features of impulsivity, perseveration[1], disorganized*
11 *thought, disinhibition, and significant memory impairment.*

12 There is no dispute that dementia is a slow-progressing disease and does not
13 appear overnight. And that on or about May 4, 2020, less than three months after
14 the Court entered the Decree of Divorce, Rodney was formally diagnosed with
15 dementia.

16 Plus, the undisputed fact that on or about November 23, 2020, just eight
17 short months after the entry of the Decree, a Colorado Court determined by clear
18 and convincing evidence that Rodney could not care for himself or otherwise
19 manage his affairs.

20 By seeking Writ relief, Tessie is asking this Court to resolve the following
21 two questions which are set to be resolved by the District Court at an Evidentiary
22 Hearing:

23 (a) Whether Rodney was competent when he signed the Decree of Divorce,
24 and

25 (b) how much if anything Tessie knew about Rodney's competency or lack
26 thereof.⁵⁴

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28 ⁵³ ROA Vol 2 000374-000376

⁵⁴ ROA Vol 2 000353

1 Therefore, assuming arguendo, that Issue Preclusion could apply in this
2 case, the very questions set to be resolved at the evidentiary hearing would resolve
3 the any claims related to Issue Preclusion.

4 **(d) No statute or rule requires the grant of summary judgment.**

5 Although the rule in *Thompson* is still the law, the appellate courts may still,
6 in rare situations, review an order that denies a dispositive motion: (1) “where no
7 disputed factual issues exist and, pursuant to clear authority under a statute or
8 rule, the district court is obligated to dismiss an action”; or (2) where “an
9 important issue of law requires clarification.” *Smith v. Eighth Judicial Dist. Court*,
10 113 Nev. 1343, 1344–45, 1348, 950 P.2d 280, 281, 283 (1997); *accord Buckwalter v.*
11 *Eighth Jud. Dist. Ct.*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010); *Int’l Game Tech.,*
12 *Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197–98, 179 P.3d 556, 559 (2008);
13 *see Chur v. Eighth Judicial Dist. Court of Nev.*, 458 P.3d 336, 339 (Nev. 2020)
14 (reviewing order denying motion for judgment on the pleadings because the “writ
15 petition presents a purely legal question in need of clarification”);

16 Tessie can identify no rule or statute that would mandate the entry of
17 Summary Judgment, given that genuine issues of material fact remain in dispute.
18 Accordingly, this Court should not deviate from the rule announced in *Thompson*.

19 **4. Issue Preclusion Does Not Apply Here.**

20 The modern nomenclature of claim preclusion describes the doctrines once
21 known as “merger” and “bar” and “res judicata,” while Issue Preclusion
22 encompasses the doctrines of direct and collateral estoppel. *See Taylor v. Sturgell*,
23 553 U.S. 880 (2008); *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709
24 (2008).

25 For Issue Preclusion to apply: (1) the issue decided in the prior litigation
26 must be identical to the issue presented in the current action; (2) the initial ruling
27 must have been on the merits and have become final; (3) the party against whom
28 the judgment is asserted must have been a party or in privity with a party to the

1 prior litigation; and (4) the issue [must have been] actually and necessarily
2 litigated. *Tom v. Innovative Home Sys., L.L.C.*, 132 Nev. 161, 170, 368 P.3d 1219, 1225
3 (2016) (Nev. Ct. App. 2016) (alteration in the original) (quoting *Alcantara ex rel.*
4 *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 258, 321 P.3d 912, 916 (2014)).

5 As discussed, besides untimely raising a claim of Issue Preclusion, Tessie
6 cannot meet three of the elements required to raise such a claim. The issue decided
7 in the prior litigation is not identical or even similar to the issues here. Tessie was
8 not a party in the Tribal Court. And, finally, whether Rodney was competent when
9 the divorce Decree was executed and filed has never been litigated.

10 As previously noted, a trial on those two issues would allow for the Court
11 to fully flesh out a claim of Issue Preclusion. As such, this Court should decline
12 Writ Relief.

13 **5. Tessie's Jurisdictional Challenge is Meritless.**

14 NRCP 60(b) provides the Court with jurisdiction to set aside its only
15 Decrees. Jurisdiction to remedy fraud upon the Court is inherent, and the Court
16 can proceed even absent further action by a party. *Murphy v. Murphy*, 103 Nev. 185,
17 734 P.2d 738 (1987). Fraud upon the Court has been held to exist when the
18 unsuccessful party is kept away from the Court by such conduct as prevents a real
19 trial on the issues. *Price v. Dunn*, 106 Nev. 100, 104, 787 P.2d 785, 787 (1990).

20 The District Court explicitly found it had jurisdiction under NRCP 60(b),
21 and it granted Rodney's Motion under NRCP 60(b)(3) and 60(b)(6).⁵⁵ The Court
22 further found that Rodney's Motion was timely based on the guardians' ability to
23 act on Rodney's behalf as he was not competent in 2020.⁵⁶ Within 55 days of the
24 Colorado Court issuing *Amended Letters of Permanent Co-Conservatorship for an*
25 *Adult* Rodney's guardians retained the undersigned, who then filed a Rule 60(b)
26 motion.

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28 ⁵⁵ ROA Vol 2 000351

⁵⁶ ROA Vol 2 000352

1 When the District Court granted Rodney's Motion, it explicitly found that
2 "[a] prima facie case has been made" for "an evidentiary hearing."⁵⁷

3 If Rodney prevails on the merits of his claims at an evidentiary hearing,
4 specifically if he shows he was not competent when the Decree was executed, then
5 and only then will the Decree be set aside. Rodney seeks only the opportunity to
6 prove his case.

7 **(a) Tessie has not presented a valid ground warranting extraordinary relief.**

8 Generally, cases that warrant Writ relief are those: (a) raising a substantial
9 issue of general importance, *see Poulos v. Eighth Judicial Dist. Court*, 98 Nev. 453,
10 455, 652 P.2d 1177, 1178 (1982); (b) raising an issue of first impression *Humboldt*
11 *Gen. Hosp. v. Sixth Judicial Dist. Court of Nev.*, 132 Nev. 544, 547, 376 P.3d 167, 170
12 (2016); (c) raising only legal questions. *Poulos*, 98 Nev. at 455, 652, 652 P.2d
13 1177 1178; (d) seeking to clarify an important issue of law. *Smith*, 113 Nev. at 1345,
14 950, 950 P.2d 280 281; (e) raising issues of judicial economy. *Id.* ; and (f) showing
15 a party will suffer irreparable harm absent Writ relief. *See Okada v. Eighth Judicial*
16 *Dist. Court*, 131 Nev. 834, 839, 359 P.3d 1106, 1110 (2015) (citing *Club Vista Fin.*
17 *Servs. v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012)).

18 Tessie's Petition does not raise an issue of general importance, let alone an
19 issue of first impression. Her Petition does not seek to clarify an important
20 question of law. Nor does her Petition seek to resolve purely legal questions.

21 As far as Tessie claim's regarding judicial economy and irreparable harm go,
22 well, litigation expenses do not constitute irreparable harm. *Fritz Hansen A/S v.*
23 *Eighth Judicial Dist. Court*, 116 Nev. 650, 658, 6 P.3d 982, 986-87 (2000). And what
24 party would not claim that judicial economy would be served if this Court
25 terminated proceedings in a district court?

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⁵⁷ ROA Vol 2 000352

1 **IX. CONCLUSION**

2 Based on the foregoing, Rodney respectfully requests that this Court deny
3 Tessie's Petition in its entirety without oral argument.

4 Respectfully submitted this 13th day of January 2022.

5
6 *Respectfully submitted by:*

7 JAMES KWON, LLC

8
9 /s/ James W. Kwon, Esq.

10 JAMES W. KWON, ESQ.

11 Nevada Bar No. 8146

12 6280 Spring Mountain Rd., Suite 100

13 Las Vegas, Nevada 89146

14 *Attorney for Real Parties in Interest*

1 **X. CERTIFICATE OF COMPLIANCE**

2 1. I hereby certify that this *Answer to Petition for Writ of Mandamus or*
3 *Prohibition* ("Answer") complies with the formatting requirements of NRAP
4 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style
5 requirements of NRAP 32(a)(6) because this Answer has been prepared in a
6 proportionally spaced typeface using Microsoft Word in 14 point Valkyrie OT A
7 style.

8 2. I further certify that this Answer complies with NRAP 21(d) as it
9 contains 6,087 words well below the 7000 word limit.

10 3. I further certify that I have read this Answer, and to the best of my
11 knowledge, information, and belief, it is not frivolous or interposed for any
12 improper purpose. I further certify that this Answer complies with all applicable
13 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires
14 every assertion in the brief regarding matters in the record to be supported by a
15 reference to the page and volume number, if any, of the transcript or appendix
16 where the matter relied on is to be found. I understand that I may be subject to
17 sanctions in the event that the accompanying brief is not in conformity with the
18 requirements of the Nevada Rules of Appellate Procedure.

19 Dated this 13th day of January 2022.

20 *Respectfully submitted by:*
21 JAMES KWON, LLC

22 /s/ James W. Kwon, Esq.
23 JAMES W. KWON, ESQ.
24 Nevada Bar No. 8146
25 6280 Spring Mountain Rd., Suite 100
26 Las Vegas, Nevada 89146
27 Attorney for Real Parties in Interest
28

1 **XI. CERTIFICATE OF SERVICE**

2 Pursuant to NRAP 25(d), I hereby certify that the foregoing *Answer to*
3 *Petition for Writ of Mandamus or Prohibition* was served via United States Mail, in a
4 sealed envelope upon which first-class postage is prepaid, in Las Vegas, Nevada,
5 addressed to the following:

6 The Honorable Dawn Thorne
7 **FAMILY COURT HOUSE**
8 601 North Pecos Road,
9 Las Vegas, NV 89155
10 *Respondent District Court Judge*

11 Bradley Hofland, Esq.
12 **HOFLAND & TOMSHECK**
13 228 South 4th Street, 1st floor
14 Las Vegas, Nevada 89101
15 P: (702) 895-6760
16 *Attorney for Petitioner*

17 **Dated** this 13th day of January 2022

18 /s/ Elizabeth Honest
19 An employee of James Kwon, LLC
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