

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

\* \* \* \*

TESSIE ELMA ALMARIO,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT  
OF THE STATE OF NEVADA, CLARK  
COUNTY, AND THE HONORABLE  
DAWN R. THRONE,

Respondents,

And

SHERYL ATTERBERG, ON BEHALF  
OF HER ADULT WARD RODNEY  
WILKINSON,

Real Party in Interest,

Electronically Filed  
Oct 25 2021 08:22 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

CASE NO.:

District Court Case No.  
D-19-596071-D

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*Petition for Writ of Mandamus or Prohibition*

From the Eighth Judicial District Court, Family Division, Clark County  
Honorable Dawn R. Throne, District Court Judge

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ATTORNEYS FOR PETITIONER

## NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities are described in NRAP 26.1(a), and must be disclosed in order that the justices of this court may evaluate possible disqualification or recusal.

1. Parent corporations and publicly-held companies: None
2. Names of all law firms that have appeared for the party: Hofland & Tomscheck
3. If litigant is using a pseudonym, the litigant's true name: None

DATED this 22<sup>nd</sup> day of October, 2021.

/s/ Bradley J. Hofland

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## ROUTING STATEMENT

This matter is presumptively assigned to the Nevada Court of Appeals pursuant to NRAP 17(b). The underlying action is brought before Family Court, and thus, unless otherwise decided, the matter is assigned and to be decided by the Nevada Court of Appeals. NRAP 17(b)(10).

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## NATURE OF EMERGENCY

The request made by the Petitioner, Tessie Wilkinson (“Tessie”), to stay the underlying action so she could file this Writ, was denied by the lower court. As fully addressed herein, absent a stay, the lower court will force Tessie to undergo needless litigation at great expense—that is not only improper and unwarranted, but because of collateral estoppel, is disallowed as a matter of law. As detailed *infra*, courts have held that forcing such upon Tessie is unjust and should be prevented.

Notwithstanding, if injunctive relief, or at least a stay from this Court, is not obtained on or before **November 11, 2021**, that will be the result<sup>1</sup>.

## RELIEF SOUGHT

The competency of Rodney Wilkinson (“Rodney”), during the period in question, has been fully litigated and adjudicated by another District Court through an action commenced by Rodney and the real party in interest, Sheryl Atterberg (Rodney’s sister and guardian). Despite that adverse ruling, and the fact Rodney is collaterally estopped from doing so, Rodney is now seeking to relitigate his issue of competency in the lower court in order to set aside the parties Stipulated Decree of Divorce.

Thus, this Court is respectfully requested to:

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<sup>1</sup> A full day hearing is set for November 12, 2021, starting at 9:00 a.m.

- (a) Direct the lower court to stay the scheduled Evidentiary Hearing/Trial of the case at bar until the ruling on this Writ is rendered; and
- (b) Direct the lower court to enter the appropriate orders based upon the rulings and guidance contained in the Writ, specifically:
  - 1. Because of collateral estoppel, preventing the lower court from allowing Rodney to relitigate his claim of incompetency; and
  - 2. Because the lower court lacks jurisdiction pursuant to NRCP 60(b), preventing the lower court from allowing Rodney to litigate his claims of breach of fiduciary duty and undue influence.

Tessie respecting seeks a writ of prohibition preventing the lower court from allowing Rodney to relitigate his claim of incompetency, and litigate the claims of breach of fiduciary duty, and undue influence, and/or in the alternative, Tessie seeks a writ of mandamus directing the lower court to grant Tessie's motion for summary judgment and dismissing the underlying action with prejudice.

#### **ISSUES PRESENTED**

- 1. Whether SHERYL ATTERBERG, on behalf of her Ward, RODNEY WILKINSON, is collaterally estopped from relitigating the competency of RODNEY WILKINSON.

2. Whether the lower court lacks jurisdiction to address the claims of breach of fiduciary duty and undue influence as alleged by SHERYL ATTERBERG, on behalf of her Ward, RODNEY WILKINSON.

### STATEMENT OF FACTS

Rodney and Tessie were married on March 22, 2009 in Burlington, Colorado (I ROA 1). On September 9, 2019, Tessie filed a Complaint for Divorce in Clark County, Nevada under Case No. D-19-596071-D (*Id*). Rodney filed his Answer to the Complaint for Divorce on January 28, 2020 and admitted to all of the allegations set forth in the Complaint (I ROA 13). The Stipulated Decree of Divorce was entered on February 12, 2020 (I ROA 33). The Decree represents their agreement, and expressly found and confirmed by the Court as being equitable and fair (I ROA 43:20-21; 44:5-6). Notice of Entry of the Decree of Divorce was filed on February 13, 2020 (I ROA 48).

Almost a year later, on January 25, 2021, Rodney moved to set aside the decree of divorce *alleging*, among other things, that Tessie forced Rodney to agree to and sign the Stipulated Decree of Divorce (I ROA 69:5), that Rodney was diagnosed with the onset of Dementia less than three months *after* the Decree's entry (I ROA 71:6-7), and that Tessie knew Rodney was incapacitated and incompetent to enter into any contracts/agreements (I ROA 70:11-14). Tessie denied the allegations and contends that Rodney was competent at the time he

signed the Decree of Divorce, that there was an equitable distribution of the marital estate, and the decree is valid and the time to set it aside has long passed (I ROA 99-125).

What Rodney failed to disclose to the lower court was the fact that long *after* the entry of the decree of divorce (when Rodney's guardian (sister) claims he was *incompetent*), Rodney's guardian (sister) conclusively *relied upon* Rodney's competency when she obtained a power of attorney from Rodney on September 4, 2020 (approximately seven (7) months after the time she claimed Rodney was incompetent), to enable her to commence litigation on Rodney's behalf for the claim and delivery of certain real property (IV ROA 704:¶2)<sup>2</sup>. Notably, in that lawsuit Rodney claimed, in support of his causes of action, that Rodney was "incompetent to enter into the contracts" at issue<sup>3</sup> (IV ROA 711¶ 23).

Rodney also concealed from the Court the fact that prior to Tessie even filing for divorce, Rodney was conducting business and entering into contracts (IV ROA 705:¶6, 706: ¶¶7-9, 707: ¶11). One such contract was entered into between Rodney and the named defendant in that unrelated action, Darrel Fontenot, on August 21, 2019—*prior* to the time Rodney claims he was incompetent to file an Answer or sign a Stipulated Decree in the instant action (IV ROA 707: ¶11).

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<sup>2</sup> Clearly, an incompetent person lacks the capacity to execute a power of attorney, so the real party in interest relied upon Rodney's competency when seeking and obtaining the power of attorney. *See* NRS 162A *et. seq.*

<sup>3</sup> There were no power of attorney or guardianship appointment prior to this time.

Rodney entered into additional contracts with Mr. Fontenot in February of 2020<sup>4</sup>— a period of time *after* the time Rodney answered the complaint and stipulated to the decree (IV ROA 708:¶¶ 13-14, 709: ¶17). Thus, Rodney was contracting and conducting business both before and after the time period in question in the case at bar (*Id.*).

Rodney claimed he was incompetent to enter into the contracts with Mr. Fontenot, and thus sought to declare them void and compel the return of the personal property/equipment that was the subject of those contracts (IV ROA 711: ¶¶ 22-23). Rodney’s competency was fully litigated in the suit against Mr. Fontenot and confirmed by the District Court (IV ROA 712: ¶2). Undeterred, Rodney thereafter commenced litigation in the lower court referencing the same “traumatic brain injury in 1974”, the same claims of “incompetency”, and the same argument that Rodney was unable to enter into a binding contract (this time the Answer/Stipulated Decree) (I ROA 65-93).

Rodney’s competency has been fully litigated and confirmed by the District Court for the Fort Berthold Indian Reservation (IV ROA 701-16) and Rodney is precluded from relitigating the issue of his alleged incompetency at this time (see *infra*). The dispositive facts in this case confirm:

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<sup>4</sup> A February of 2020 contract (rescinding the prior contracts); a February 21, 2020 contract; and a February 24, 2020 contract. It is significant to note Sheryl Atterberg also represented in a different District Court that Rodney also entered into an “oral amendment” of “the February contact” (IV ROA 710: ¶ 20).

- **Prior to 2019** Rodney's competency was never at issue (IV ROA 701-16).
- **August 21, 2019**, Rodney was doing business with other businesses and/or individuals and entering into contracts—Rodney's competency never at issue (IV ROA 707: ¶11).
- **September 9, 2019**, Tessie filed for divorce from Rodney—Rodney's competency not at issue (I ROA 1-4).
- **January 28, 2020**, Rodney filed his Answer to Tessie's complaint for divorce—Rodney's competency was not at issue (I ROA 13-14).
- **February 12, 2020**, Stipulated Decree signed and entered—Rodney's competency was not at issue (I ROA 33-47). Notice of Entry was filed the next day (I ROA 48-64).
- **February 21 and 24, 2020<sup>5</sup>**, Rodney entered into additional contracts with other businesses/individuals—Rodney's competency was not at issue (IV ROA 708: ¶14, 709: ¶17).
- **September 4, 2020**, Sheryl Atterberg `relied upon Rodney's competency when seeking and obtaining a power of attorney ("POA")so she could commence litigation on behalf of Rodney—Rodney's competency was

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<sup>5</sup> Discovery has disclosed the existence of *additional* contracts Rodney entered into during this time, but Rodney has failed to provide any such documentation as requested in Discovery.

clearly not at issue when *she* sought the POA, yet Sheryl claimed Rodney was incompetent to enter into the above referenced contracts (preceding and following the subject period related to the Divorce, but unrelated and independent to the dissolution proceeding) (IV ROA 704-6: ¶¶ 2-5, 711: ¶23, 712: ¶2) in the motion she subsequently filed on Rodney's behalf (I ROA 65-93).

- **November 23, 2020**, Sheryl and her husband were appointed Rodney's guardian—Sheryl disclosed her intent to use Rodney's alleged incompetency as a basis to set aside the Stipulated Decree of Divorce (I ROA 71:17-18; 72:1).
- **December 17, 2020**, trial was conducted on Rodney's complaint for relief and the counterclaim for breach of written contract. Sheryl and her husband appeared, testified, and argued on behalf of, and in support of, Rodney's complaint (IV ROA 703).
- **December 29, 2020**, the District Court for the Fort Berthold Indian Reservation issued its comprehensive and detailed Findings of Fact and Conclusions of Law and Order for Judgment. Therein, the District Court expressly rejected Rodney's claims and reliance on his "incompetency" and found him to be competent during the entire period of time applicable to the contracts at issue (which, as noted above, precede and

follow the subject period pertaining to the parties' dissolution and Stipulated Decree) (IV ROA 701-16).

- **January 25, 2021**, despite the adverse and dispositive ruling of December 29, 2020, Sheryl nevertheless sought to relitigate the issue of Rodney's competency during the same time period and setting aside the Decree of Divorce as a result thereof, by filing a Motion to Set Aside the Decree of Divorce pursuant to NRCP 60(b) (IV ROA 65). Rodney's prior litigation was undisclosed, and thus unknown to Tessie, at that time. After argument, the lower court set the matter for a full day hearing to "determine [Rodney's competency at the time of signing the Decree of Divorce and how much [Tessie] knew about [Rodney's] competency" (II ROA 301, II ROA 353).
- **June 16, 2021**, following discovery of Sheryl's actions and the prior litigation of Rodney's competency during the period in question to the instant action, Tessie filed a motion for summary judgment based upon collateral estoppel (III ROA 451-526).
- **September 9, 2021**, the Order from the July 17, 2021 hearing on Tessie's motion for summary judgment was filed (IV ROA 807). The lower court ruled the issue of Rodney's competency was not fully litigated and denied the motion for summary judgment (IV ROA 809:6-12).

The lower court also denied Tessie's motion to stay the case in order to seek a Writ from this Court (IV ROA 809:16-17). The additional issues contained in the order<sup>6</sup> are inextricably related to Rodney's competency and ability to maintain the underlying action in the lower court (see *infra*).

- **This Writ follows.**

As noted above, Sheryl/Rodney were *unsuccessful* in the prior, and previously *undisclosed*, lawsuit where they sought to have the contracts Rodney entered into declared void ab initio because he was incompetent at the time he entered into them (IV ROA 701-16). The issue was litigated and the District Court found just the opposite; Rodney was competent at the time he entered into the subject contracts and they remained valid and enforceable (*Id.*).

Following the adverse ruling, almost one year *after* the notice of entry of the Decree, Sheryl/Rodney sought the same relief, using the same legal basis, before the lower court in Family Court (I ROA 65-93). The doctrine of collateral estoppel precludes the *relitigation* of Rodney's competency (*see* Section B, *infra*). Comparison of the two actions confirm the error in the lower court's dismissal of Tessie's motion for summary judgment.

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<sup>6</sup> As detailed *infra*, the issues of Plaintiff's fiduciary duty to Defendant, allegations of fraud, and alleged undue influence cannot be maintained with Rodney's competency being determined and his being estopped from relitigating that issue.

- Sheryl/Rodney initiated both actions (IV ROA 701, I ROA 65).
- Both actions sought to invalidate contracts/agreements based upon Rodney's alleged incompetency (*Id.*).
- Both actions pertained to Rodney's alleged "incompetency" between the months of August of 2019 through February of 2020 (IV ROA 701-16; I ROA 65-93).
- Sheryl/Rodney litigated the issue of competency before the District Court for the Fort Berthold Indian Reservation; the District Court found he was competent to enter into contracts/agreement during the time in question; and he is collaterally estopped from relitigating that issue in the instant action (IV ROA 701-16).

Continuing, Rodney filed his motion to set aside the decree pursuant to NRCP 60(b) (improperly) claiming fraud upon the court<sup>7</sup> and that Rodney lacked contractual capacity at the time the Decree was entered<sup>8</sup> (I ROA 65-93). Notably, Rodney did *not* mention undue influence or breach of fiduciary duty in either his underlying motion or reply (*Id.*). Rodney concealed the fact that his competency had already been litigated and confirmed by a district court less than a month

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<sup>7</sup> Fraud on the court is significantly distinct from fraud that may have been committed by a party. In this case, Rodney's claims of fraud on the court are patently baseless (*see Occhiuto v. Occhiuto*, 97 Nev. 143, 625 P.2d 568 (1981)), and the issue was not determined to be one to be tried before the lower court (II ROA 353:7-10).

<sup>8</sup> I ROA 65-92.

earlier (*Id.*). The lower court set the matter for an evidentiary hearing (II ROA 306).

With discovery, it was confirmed that Rodney was, in fact, competent at the time he signed his Answer and Decree (IV ROA 701-16). Tessie thereafter sought summary judgment based upon the fact Rodney was collaterally estopped from relitigating his claim of incompetency (III ROA 451-526).

At that hearing, Rodney challenged he was not collaterally estopped from relitigating his claim of incompetency, but again, did not allege breach of a fiduciary duty or undue influence by Tessie (III ROA 527-58). The lower court, in denying Tessie's motion for summary judgment, found it wasn't "sure that the competency was fully litigated (which it was) ... because it was used as a defense to the enforcement of contracts" (the claim of incompetency was raised by Rodney to invalidate the contracts so he could compel the return of the subject property). Thereafter, the lower court also identified "issues of the wife's fiduciary duty", the allegations of fraud on him and or undue influence" (alleged misconduct that was *not* raised by Rodney and which is disallowed)<sup>9</sup> (IV ROA 792:20-25, 793:1).

The evidence confirms the lower court erred claiming Rodney's "incompetency" was used as a defense; in reality, Rodney initiated the action against Mr. Fontenot and Rodney raised the issue of his "incompetency" (IV ROA

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<sup>9</sup> See NRCPC 60(c), section C, *infra*.

701-16). The issues of fiduciary duty and undue influence were *never* raised by Rodney, and while the lower court now characterizes the issue of fraud as “on [Rodney]” as opposed to “on the court”, such fraud and misconduct, if any, was required to have been brought within six months following the notice of entry of the Decree (I ROA 65-93, II ROA 255-300, III ROA 527-47). The lower court is dispossessed of jurisdiction.

### **POINTS AND AUTHORITIES/LEGAL ARGUMENT**

#### **A. The Issuance of a Writ is the Appropriate Remedy and Warranted.**

*This Court* has original jurisdiction to issue writs of mandamus under Article 6, section 4 of the Nevada Constitution<sup>10</sup>. The Court is also statutorily empowered to issue writs. *See* NRS Chapter 34.160 et. seq.

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion<sup>11</sup>. Mandamus is appropriate where a petition raises important legal issues that are likely to be the subject of litigation within the Nevada district court system<sup>12</sup>. A writ of prohibition is available when

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<sup>10</sup> *Employers Ins. Co. of Nevada v. State Bd. of Examiners*, 117 Nev. 249, 252, 21 P.3d 628, 630 (2001); *Cheung*, 121 Nev. at 868-69, 124 P.3d at 552 (2005).

<sup>11</sup> *Borger v. District Court*, 120 Nev. 1021, 1025, 102 P.3d 600, 603 (2004); NRS 34.160; *see also Lewis v. Smart*, 96 Nev. 846, 619 P.2d 1212 (1980);

<sup>12</sup> *Borger*, 120 Nev. at 1025-26.

proceedings are without or in excess of the jurisdiction of the tribunal and to ensure that a district court operates within its jurisdiction<sup>13</sup>.

A district court's failure to apply, or adhere to, controlling legal authority "is a classic example of a manifest abuse of discretion that may be controlled through a writ of mandamus."<sup>14</sup> A manifest abuse of discretion can consist of "a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule," for which mandamus relief is appropriate<sup>15</sup>.

Writ relief is available where (1) no factual dispute exists, and the district court is obligated to take certain action, or (2) an important issue of law needs clarification, and considerations of sound judicial economy and administration militate in favor of granting the petition<sup>16</sup>. *This Court* has previously held it will also exercise its discretion to entertain a writ petition where an important issue of law needs to be decided or clarified, and where circumstances indicate an urgency or strong necessity<sup>17</sup>.

As repeatedly ruled by this Court:

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<sup>13</sup> *State v. District Court (Anzalone)*, 118 Nev. 140, 146-47, 42 P.3d 233, 237 (2002); NRS 34.320; *Cheung*, 121 Nev. at 869; *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981).

<sup>14</sup> *Gonzalez v. Dist. Ct.*, 129 Nev. Adv. Rep. 22, 298 P.3d 448, 450 (2013).

<sup>15</sup> *Id.*

<sup>16</sup> *Beazer Homes Nevada, Inc. v. District Court*, 120 Nev. 575, 579, 97 P.3d 1132 (2004).

<sup>17</sup> *Cote H. v. District Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008).

a writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station or to control an arbitrary or capricious exercise of discretion<sup>18</sup>.

Courts have also long recognized that “[p]rohibition is generally the appropriate remedy to forestall unwarranted and useless litigation”<sup>19</sup> that would necessarily include the needless litigation that would inevitably result following the improper and unwarranted denial of a motion for summary judgment, such as the case at bar<sup>20</sup>. Indeed, “[f]orcing upon a [party] the expense and burdens of trial when the claim is clearly barred is unjust and should be prevented.”

As this Court knows, there is no right of appeal from the denial of the motion for summary judgment and refusal to utilize the writ will compel Tessie to undergo litigation that is clearly unwarranted and useless litigation at great expense and burden addressing issue(s) that have been previously litigated. Under the factual situation here, the real party at interest is collaterally estopped from re-litigating the issue of his competency with the hopes of obtaining a favorable ruling from a different District Court and prohibition/mandamus is an available remedy.

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<sup>18</sup> *Salaiscooper v. Eighth Judicial District Court*, 117 Nev. 892, 901, 34 P.3d 509 (2001). See also *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981).

<sup>19</sup> *State ex rel. O’Blennis v. Adolf*, 691 S.W.2d 498 (1985). *State ex rel. New Liberty Hospital District v. Pratt*, 687 S.W.2d 184 (Mo. banc 1985); *State ex rel. Hamilton v. Dalton*, 652 S.W.2d 237 (Mo.App.1983)

<sup>20</sup> *O’Blennis*, 691 S.W.2d at 500.

To deny Tessie a Writ and allow the summary disregard of the impact and finality of collateral estoppel would engender disrespect for courts and generally discredit the administration of justice. Maintaining the underlying action must be prohibited and the lower court should be directed to grant the motion for summary judgment.

Additionally, assuming arguendo, there is a plain, speedy and adequate remedy in the ordinary course of law, this court has held that:

Even when an arguable adequate remedy exists, this court may exercise its discretion to entertain a petition for mandamus under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition.

*State v. Second Judicial Dist. Court*, 118 Nev. 609, 55 P.3d 420 (2002).

Aside from all other reasons presented to this court, such a basis is certainly applicable to the case at bar. The District Court needs clarification and direction in order to properly recognize the application and impact of collateral estoppel and to properly dispose of the real party's maneuver to relitigate his competency identify and dispose of.

**B. The competency of Rodney Wilkinson has been fully litigated and he and his ward are collaterally estopped from relitigating that issue before the lower court in Nevada.**

Under the federal Full Faith and Credit Act, 28 U.S.C. § 1738, the acts of state tribunals are given the same "full faith and credit" as they have by law in the

states of their origin<sup>21</sup>. Accordingly, federal courts, as well as state courts, generally are bound to recognize the preclusion effects of state court judgments<sup>22</sup>. The foregoing result applies to the decisions of arbitrators as well because arbitration proceedings is a sufficient adjudicatory proceeding to support issue preclusion<sup>23</sup>.

As decided by this Court, issue preclusion, or collateral estoppel, is applied to conserve judicial resources, maintain consistency, and avoid harassment or oppression of the adverse party<sup>24</sup>. For this doctrine to apply, the following four elements must be met:

(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<sup>25</sup>.

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<sup>21</sup> Title 28 U.S.C. § 1738 provides that "[t]he records and judicial proceedings of any court of any . . . state . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken."

<sup>22</sup> See *Migra v. Warren City School District Bd. of Educ. et al.*, 465 U.S. 75, 81, 79 L. Ed. 2d 56, 104 S. Ct. 892 (1983).

<sup>23</sup> See, e.g., *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1321 (9th Cir. 1992); *Seborowski v. Pittsburgh Press Co.*, 188 F.3d 163, 169-71 (3d Cir. 1999); and *Dalow Industries, Inc. v. Jordache Enterprises, Inc.*, 631 F. Supp. 774, 778 (1985); *Van*

<sup>24</sup> *Berkson v. LePome*, 126 Nev. 492, 245 P.3d 560, 566 (2010).

<sup>25</sup> *Five Star Capital Corp. v. Ruby*, 124 Nev.1048, 1055, 194 P.3d at 709, 713 (2008) quoting *Univ. of Nev. v. Tarkanian*, 110 Nev. 581, 598, 879 P.2d 1180, 1191); See also *Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. 441, 245 P.3d 547 (2010).

Considering these requirements pursuant to the doctrine of issue preclusion, Rodney is precluded from relitigating the issue of his competency between the months of September of 2019 (when Tessie filed for Divorce) through the filing of Rodney's Answer, Rodney's signing of the Stipulated Decree of Divorce, and its entry in February of 2020, because he has already been found to have been competent during that entire period of time by another District Court in an action Sheryl/Rodney initiate to invalidate contracts Rodney had entered into. (IV ROA 701-16).

**(1) The issue decided in the prior litigation must be identical to the issue presented in the current action.**

In the North Dakota civil suit initiated by Sheryl/Rodney, they sought to have the contracts Rodney entered into declared void ab initio and the corresponding property returned based upon "Rodney's alleged incompetency" (IV ROA 703-704). In the instant action, Sheryl/Rodney are seeking to have the Agreements (Answer and Stipulated Decree) Rodney entered into declared void and set aside, and with such ruling, rescission of the property distribution of the marital estate, based upon "Rodney's alleged incompetency" (I ROA 65-93)). The critical issue in both proceedings is Rodney's competency.

**(2) The initial ruling must have been on the merits and have become final.**

The District Court for the Fort Berthold Indian Reservation made its Findings of Fact and Conclusions of Law and Order for Judgment on December 29, 2020. (IV ROA 701-16). At the trial on the complaint filed by Sheryl/Rodney, Sheryl and her husband (Rodney's guardians) testified and they were also permitted them "to supplement the complaint with their assertions that the Plaintiff was incompetent to enter into the contracts offered into evidence by the Defendant and thus they should be held to be void ab initio." (IV ROA 703-4). Thus, the District Court's ruling was on the merits. Further, Tessie has not identified any post-trial litigation or the filing of an appeal, and thus, the ruling is 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.**

Sheryl/Rodney initiated both actions—the one before the North Dakota District Court and the instant action before Family Court; the ruling of the District Court was averse to Rodney. Both the Defendant in the suit initiated by Rodney in the District Court in North Dakota and Tessie in the case at bar were parties to contracts/agreements entered into with Rodney between August of 2019 and February of 2020.

**(4) The issue was actually and necessarily litigated.**

This Court has expressly held that “[w]hen an issue is properly raised... and is submitted for determination...the issue is actually litigated.”<sup>26</sup> This Court further held “[w]hether the issue was necessarily litigated turns on whether ‘the common issue was...necessary to the judgment in the earlier suit.’”<sup>27</sup> Resolving the issue of Rodney’s alleged incompetency, or conversely establishing Rodney’s competency, was necessary, indeed, vital, for Rodney to prevail on his complaint before the District Court (which he did not), and was likewise vital for the Defendant in that action to prevail on his Counterclaim for breach of written contract and for foreclosure of liens (which he did).

It is clear that the issue of Rodney’s competency was actually and necessarily litigated. In Case Number CV-2020-0303, the District Court issued a thorough and comprehensive thirteen-page decision and corresponding findings concerning the evidenced presented by Sheryl/Rodney surrounding his *claimed* “incompetency” and found that Rodney was, in fact, competent during the time frame at issue in both cases (IV ROA 701-16).

Because the issue of Rodney’s competency both preceding and following his agreement and divorce with Plaintiff, was necessarily and properly raised in the

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<sup>26</sup> *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 321 P.3d 912 (2014) citing *Frei v. Goodsell*, 129 Nev. 403, 305 P.3d 70 (2013) quoting Restatement (Second) of Judgments §cmt. d.

<sup>27</sup> *Id.*, quoting *Tarkanian* 110 Nev. at 599, 879 P.2d at 1191.

prior district court case, issue preclusion applies to prevent Guardian from relitigating the issue of Rodney's competency at the time of the divorce<sup>28</sup>. See *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, (2014) (finding of nonliability in prior action bars relitigation of liability in separate action).

Courts have determined that litigants have the right to try their case, but public interest and case precedent firmly establish that they are limited to one such opportunity. Indeed, collateral estoppel is a doctrine that serves the vital functions of bringing litigation to an end, maintaining stability of court decisions, avoiding inconsistent results, and promoting judicial economy. Rodney is disallowed, as a matter of law, to have another opportunity to rehash his "competency" during the time of his agreement and divorce of Plaintiff, by switching adversaries.

As this Court knows, public reliance upon judicial pronouncements requires that which has been finally determined by competent tribunals be accepted as undeniable legal truth. Its legal efficacy is not to be undermined, and Rodney's endeavors to do so must not be allowed.

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<sup>28</sup> See *Alcantara, supra*, (finding of nonliability in prior action bars relitigation of liability in separate action).

**C. The lower court lacks jurisdiction to adjudicate Rodney's claims of breach of fiduciary duty and undue influence.**

“A decree of divorce cannot be modified or set aside except as provided by rule or statute.”<sup>29</sup> This Court has held that once a final judgment is entered, a district court lacks jurisdiction to reopen the case absent a proper and timely motion under the Nevada Rules of Civil Procedure (“NRCP”)<sup>30</sup>. “Absent specific authorization for continuing jurisdiction over property rights, NRCP 60(b) governs motions to modify property rights established by divorce decrees.”<sup>31</sup>

NRCP 60(b) provides:

**(b) Grounds for Relief From a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

NRCP 60(c) also mandates that motions for relief under reasons (1), (2), and (3) must be brought within six (6) months of the date of service of the written

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<sup>29</sup> *Lam v. Lam*, 86 Nev. 908, 478 P.2d 146 (1970).

<sup>30</sup> *See SFPP, L.P. v. Second Judicial Dist. Ct.*, 123 Nev. 608, 173 P.3d 715 (2007).

<sup>31</sup> *Kramer v. Kramer*, 96 Nev. 759, 616 P.2d 395 (1980).

notice of entry of the judgment or order. In this case, notice of entry was made on February 13, 2020 (I ROA 48). Accordingly, any claim of fraud, misrepresentation, or misconduct (i.e. breach of fiduciary duty and/or undue influence) must necessarily had to have been brought by way of motion on or before August 13, 2020. No such motion was ever filed within this allowable window.

In fact, Rodney didn't seek any relief until the Motion to Set Aside the Divorce Decree Pursuant to NRCP 60(b) that was filed on January 25, 2021—almost a year after the notice of entry of the Stipulated Decree (I ROA 65). Thus, Rodney's claims are precluded as a matter of Court Rule.

Collateral estoppel precludes Rodney from relitigating the issue of his "incompetency"; NRCP 60 prevents Rodney from seeking relief from the Decree based upon Tessie's alleged "misconduct". The District Court for the Fort Berthold Indian Reservation fully litigated and determined Rodney's claim of incompetency lacked merit, that Rodney was competent during the subject period in question, and therefore, had the capacity to answer the complaint for divorce any way he chose, had the capacity to stipulate to the dissolution of his marriage with Tessie any way he chose, and if he was to seek relief from the Decree, any such motion was required to be filed within six (6) months following the notice of entry of the decree—but he didn't.

Lastly, the lower court expressly found the provisions of the decree to be “fair and reasonable” (I ROA 43:20) and “equitable and just” (I ROA 44:6). The lower court is unable to ignore the prior rulings in this action, the lower court improperly raises issues that are contrary to the rulings of the lower court, and the lower court lacks jurisdiction to modify those terms.<sup>32</sup>

There is no factual or legal basis that would allow the lower court to proceed in this action. The lower court’s failure to disallow Rodney from relitigating his claim of “incompetency”, as required by collateral estoppel and applicable precedent<sup>33</sup>, is properly addressed by Writ. Pursuant to NRCP 60 and applicable precedent, the lower court is divested of jurisdiction from proceeding on the claims of breach of fiduciary duty and undue influence—claims that were, incidentally, *never* raised by Rodney, and thus, properly curbed by way of a Writ<sup>34</sup>.

## CONCLUSION

Sheryl/Rodney previously and *unsuccessfully* sought to invalidate contracts that Rodney had entered into and seeking the return of the subject property by claiming Rodney was incompetent at the time he entered into the subject contracts. Following an adverse ruling, Sheryl/Rodney sought the same relief in Family

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<sup>32</sup> *Kramer*, 96 Nev. at 762.

<sup>33</sup> *See Foster v. Dingwall*, 126 Nev. 49, (2010) (motion for remand denied because motion for NRCP 60(b) relief was untimely—“despite the district court’s certification of its intent to grant the requested NCP 60(b)(2) relief”).

<sup>34</sup> *Kramer*, 96 Nev. at 762.

Court, to wit: seeking to invalidate Rodney's Answer and Stipulated Decree based upon the claim that "Rodney was incompetent at the time he signed the Answer, entered into the Agreement with Tessie, and signed the Stipulated Decree.

Failing to disclose the prior proceeding to the lower court was a violation of the duty of candor owed the court. Ignoring the doctrine of collateral estoppel and its application to this case cannot be maintained. Rodney's actions are barred by collateral estoppel and it would be patently unfair and unjust to allow Rodney to so flagrantly ignore the prior ruling of the District Court (in an action *he* initiated, no less, for his own financial gain) and in so doing, make a mockery of the judicial system as he forces Tessie to incur substantial and needless attorney's fees relitigating the very issue already adjudicated by the District Court.

The hearing before the lower court should be stayed pending determination of this Writ, and the action dismissed in its entirety once this Court's decision is rendered and it is determined that Sheryl/Rodney are disallowed from relitigating the issue of Rodney's competency at the time in question and from setting aside the Stipulated Decree of Divorce.

DATED this 22<sup>nd</sup> day of October, 2021.

RESPECTFULLY SUBMITTED

/s/ *Bradley J. Hofland*  
**Bradley J. Hofland, Esq.** (Bar # 6343)  
HOFLAND & TOMSHECK  
*Attorneys for Petitioner*

AFFIDAVIT OF COUNSEL

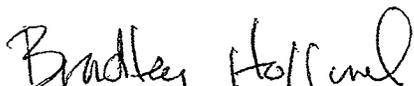
STATE OF NEVADA    }  
COUNTY OF CLARK   }

BRADLEY J. HOFLAND, ESQ., being first duly sworn, deposes and says:

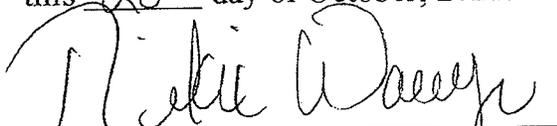
1. I am an attorney license to practice law in the State of Nevada, and the United States District Court, State of Nevada, I am employed by Hofland & Tomscheck and am one of the Nevada attorneys for Petitioner Nicholson, the Petitioner in this action.

2. I have read the above and foregoing *Petition for Writ of Mandamus or Prohibition*, know the contents thereof, and that the same is true of my own knowledge, except as to those matters therein stated on information and belief, and as to those matters, I believe them to be true.

DATED this 22<sup>nd</sup> day of October, 2021.

  
\_\_\_\_\_  
BRADLEY J. HOFLAND, ESQ.

SIGNED and SWORN to before me  
this 22 day of October, 2021.

  
\_\_\_\_\_  
NOTARY PUBLIC in and for said  
County and State



## Certificate of Compliance

1. I hereby certify that this writ 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) because:

[ X ] This brief has been prepared in a proportionally spaced typeface using **Microsoft Word 2010 Times New Roman 14—point font.**

2. I further certify that this Petition for Writ of mandamus or Prohibition *complies* with the page or type -volume limitations of NRAP 32(a)(7). Excluding the parts of the writ exempted by NRAP 32(a)(7)(C), it is

**6,941 words**

3. 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 further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 21(e), which requires every assertion in the Petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying appendix is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 22<sup>nd</sup> day of October, 2021.

/s/ Bradley J. Hofland  
**Bradley J. Hofland, Esq.** (Bar # 6343)  
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*Attorneys for Petitioner*

## CERTIFICATE OF SERVICE

Pursuant to Nevada Rules of Appellate Procedure 25(c), that I am an employee of Hofland & Tomsheck, and that on this day, the 22<sup>nd</sup> of October, 2021, I filed the foregoing PETITION FOR WRIT OF MANDAMUS OR PROHIBITION with the Clerk of the Nevada Supreme Court and served same by personal service upon the following:

The Hon. Dawn R. Throne  
Department U  
Clark County District Court Family Division  
601 North Pecos  
Las Vegas, Nevada 89101

James W. Kwon, Esq.  
James Kwon, LLC  
6280 Spring Mountain Rd., Suite 100  
Las Vegas, NV 89146  
Attorney for all real parties in interest

/s/ Nikki Warren  
Nikki Warren  
An employee of Hofland & Tomsheck