IN THE

SUPREME COURT OF THE STATE OF NEVADA

ESTATE OF MICHAEL DAVID ADAMS, BY AND THROUGH HIS MOTHER JUDITH ADAMS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE, Petitioner, v. FIFTH JUDICIAL DISTRICT COURT, NYE COUNTY, NEVADA, Respondent, and SUSAN FALLINI, Real Party in Interest.	Supreme Court No.: District Court Case No.: CV24539 **PETITION FOR EXTRAORDINARY WRIT RELIEF**

Petitioner ESTATE OF MICHAEL DAVID ADAMS, BY AND THROUGH HIS MOTHER JUDITH ADAMS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE ("Plaintiff" or "Petitioner"), by and through its attorney of record, John P. Aldrich, Esq. of the Aldrich Law Firm, Ltd., petitions this Court to issue an extraordinary writ of mandamus and/or prohibition, as appropriate, vacating the Court Order granting Real Party in Interest SUSAN FALLINI's ("Defendant" or "Fallini") Motion for Relief from Judgment Pursuant to NRCP 60(b) of Respondent Fifth Judicial District Court (the Honorable Robert W. Lane). The District Court granted Fallini's motion and set aside Plaintiffs' Judgment based on an allegation of fraud on the court by Plaintiff's counsel, an issue that has already been decided by this Court as part of Defendant Fallini's first appeal. Indeed, in her Opening Brief of her direct appeal, Defendant Fallini raised identical arguments regarding the alleged misconduct of Plaintiff's counsel, allegations Plaintiff's counsel vehemently denies and which the record makes clear are a farse. Fallini and her husband, Joe Fallini, filed a Complaint for Declaratory Relief in Tonopah, Nevada. (PA II, 0346-0355.) The defendants in

that action included Plaintiff's counsel, John P. Aldrich, Esq., and The Hon. Robert W. Lane. The allegations included claims that Mr. Aldrich's pleadings in this case "contained allegations that were false, misleading, and/or have no evidentiary support, in violation of Nevada law." Thus, Defendant has litigated the issues upon which the District Court based its ruling at least twice already – once on direct appeal. The District Court also erred by setting aside the judgment against Defendant for a myriad of substantive reasons, as set forth more fully herein.

The Court should intervene now to overturn the District Court's Order and reinstate the Judgment against Fallini.

DATED this 17th day of September, 2014.

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POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

A. Factual History

Michael David Adams ("Michael") was born on May 10, 1972. He was the only child of the marriage between Judith and Tony Adams. Michael was an extremely loving child, and grew into an extremely loving man. (PA II, 0206.) Michael worked as a staff geologist for Southern California Geotechnical Inc., making approximately $45,000.00 per year plus benefits. (PA II, 0230.)

On July 7, 2005 at around 9:00 p.m., Michael was driving his 1994 Jeep Wrangler on SR 375 highway in Nye County, Nevada. (PA I, 0003.) As Michael drove, a Hereford cow suddenly appeared in Michael's travel lane, blocking his path. (PA I, 0003.) Michael was unable to avoid colliding with the cow and he hit it head-on. Michael's Jeep rolled over and left the paved highway. Sadly, Michael died at the scene. (PA I, 0003.)

Defendant Fallini was the owner of the cow which was in Michael's travel lane and caused his death. (PA I, 0002.) The cow was many miles away from the owner's ranch at the time of the incident. (PA I, 0004.) Further, Defendant Fallini had taken no precautions to keep the cow from the highway where the collision occurred. (PA I, 0003.) As a direct and proximate result of Defendant Fallini's negligence, Michael was killed. (PA I, 0003.)

As set forth below in the procedural history of this case, Defendant Fallini was sent discovery requests, including Requests for Admission. Defendant Fallini never responded to any of these requests. Due to the fact Defendant Fallini failed to respond to the Request for Admissions within 30 days of service (or ever), the following facts were conclusively established:

1. That Defendant Fallini's property is not located within "open range."
2. That Defendant Fallini is the owner of the cow that is mentioned in the Complaint.
3. That it is the common practice of Nye County ranchers to mark their cattle with reflective or luminescent tags.
4. That the subject cow was not marked with a reflective or luminescent tag.
5. That the subject cow crossed a fence to arrive at the location of the subject accident described in the Complaint.
6. That Defendant Fallini's cattle have previously been involved in incidents with motor vehicles on the roadway.

7. That Defendant Fallini does not track the location of her cattle while they are grazing away from her property.

8. That Defendant Fallini does not remove her cattle from the roadway when notified that the cattle are in a roadway.

9. That the subject cow was not visible at night.

10. That Defendant Fallini was aware that the subject cow was not visible at night prior to the incident that is the subject of the Complaint.

11. That the subject cow was in the roadway of SR 375 at the time of the incident that is the subject of the Complaint.

12. That the subject cow's presence in the roadway of SR 375 was the cause of the motor vehicle accident that is the subject of the Complaint.

13. That Defendant Fallini did not know the location of the subject cow at the time of the incident that is the subject of the Complaint.

14. That the presence of a reflective or luminescent tag on the subject cow would have made the subject cow visible at the time of the incident that is the subject of the Complaint.

(PA I, 0024-0028.)

B. Procedural History Before the First Appeal

Plaintiff filed a lawsuit in Clark County, Nevada. The case was later transferred to Pahrump, Nye County, upon Defendant's request and re-filed on **January 31, 2007** in Pahrump, Nye County, Nevada. (PA I, 0001-0006.) Defendant filed her Answer and Counterclaim (seeking to recover the value of the cow) on **March 14, 2007**. (PA I, 0007-0011.)

On **October 31, 2007**, Plaintiff submitted interrogatories to Defendant. Those interrogatories were never answered. (PA I, 0053-0062.) Plaintiff also submitted requests for admission and its first set of requests for production of documents on **October 31, 2007**. (PA I, 0038-0041; PA I, 0043-0051.) A second set of requests for production of documents were submitted to Defendant on **July 2, 2008**, requesting

information as to Defendant's insurance policies and/or carriers that may provide coverage for damages that occurred as a result of the incident. (PA I, 0064-0069.)

Defendant **never** responded to any of these requests, completely stifling the discovery process. On or about **May 16, 2008**, Plaintiff filed a Motion for Partial Summary Judgment. (PA I, 0012-0023.) Defendant **did not oppose** that motion and the Court granted that Motion on **July 30, 2008**. (PA I, 0026-0028.) Notice of Entry of the Order Granting Plaintiff's Motion for Summary Judgment was served on Defendant on **August 15, 2008**. (PA I, 0024-0025.)

Plaintiff attempted to amicably resolve the discovery dispute and obtain a copy of Defendant's applicable insurance policies, but to no avail. On **February 24, 2009**, Plaintiff sent a letter to Defendant's counsel seeking responses to the discovery. (PA I, 0077.)

Plaintiff's counsel, Mr. Aldrich, attempted to discuss this discovery issue with Defendant's counsel, Mr. Kuehn, as well. On or about **March 6, 2009**, Plaintiff's counsel contacted the office of Defendant's counsel. Mr. Aldrich was informed that Mr. Kuehn was not available. Mr. Aldrich left a message with Mr. Aldrich's phone number and asked that Mr. Kuehn return the call. No return call ever came. (PA I, 0079-0081.)

On **March 18, 2009**, Mr. Aldrich again contacted the office of Mr. Kuehn. Mr. Aldrich was informed that Mr. Kuehn was not available. Mr. Aldrich left a message with Mr. Aldrich's phone number and asked that Mr. Kuehn return the call. No return call ever came. (PA I, 0079-0081.)

On **March 23, 2009** – nearly nine months after propounding the discovery – Plaintiff filed a Motion to Compel Defendant's Production of Documents, including information regarding any insurance policies that may provide coverage for the incident as contemplated in the Plaintiff's second request for documents. (PA I, 0029-0081.) Defendant did not oppose the Motion to Compel in writing. This motion was heard on **April 27, 2009**. Defendant's attorney, Mr. Kuehn, attended the

hearing. The Court granted the Motion to Compel and awarded John Aldrich, Esq., $750.00 in sanctions for having to bring the motion. (PA I, 0085-0086.) A Notice of Entry of Order on the Order Granting Plaintiff's Motion to Compel Defendant's Production of Documents was entered on **May 18, 2009** and was served by mail on Defendant's counsel. Defendant never complied with the Order. (PA I, 0082-0083.)

On **June 16, 2009**, Plaintiff filed a Motion to Strike Defendant's Answer and Counterclaim due to Defendant's complete failure to respond to discovery requests or to comply with the Court's Order. (PA I, 0087-0093.) Defendant's counsel again failed to oppose the motion in writing but attended the hearing, and again provided no explanation as to why Defendant failed to respond to all discovery requests, but stated Defendant would respond to the discovery requests. The Court denied Plaintiff's Motion to Strike based on Defendant's counsel's promises to comply. The Court did, however, order Defendant to comply with the Order granting Plaintiff's Motion to Compel and to respond to Plaintiff's discovery requests by **August 12, 2009** or Defendant's Answer and Counterclaim would be stricken. The Court also ordered Defendant to pay an additional $1,000.00 sanction. (PA I, 0147-0148.)

Defendant still did not comply with the Court's Order and failed to respond to Plaintiff's discovery requests. On **August 31, 2009**, Plaintiff brought an Ex Parte Motion for Order to Show Cause Why Defendant Susan Fallini and Her Counsel Should Not Be Held in Contempt. (PA I, 0149-0155.) The Court issued an Order Regarding Order to Show Cause Why Defendant Susan Fallini and Her Counsel Should Not Be Held In Contempt of Court, dated **October 8, 2009**, that Defendant must produce all documents responsive to Plaintiff's discovery requests by **October 12, 2009**. The Court further ordered that if Defendant did not supply the requested information by October 12, 2009, Defendant's counsel would be held in contempt of court and would be fined $150.00 a day, beginning **October 13, 2009**. Further, the Court ordered that if the requested information was not provided by October 12, 2009, the Court would strike Defendant's pleadings in their entirety. (PA I, 0163-

0164.)

On **November 4, 2009**, an order was entered striking Defendant's pleadings. Because Defendant's Answer had been stricken, all the allegations of the Complaint were deemed to be true. (PA I, 0165-0170.) On **February 4, 2010**, the Clerk of the Court entered Default against Defendant. (PA I, 0171-0175.)

Despite repeated requests, Defendant failed and refused to provide insurance information, or a response that Defendant had no insurance. Consequently, Plaintiff was again forced to bring yet another Ex Parte Motion for Order to Show Cause Why Defendant Fallini and Her Counsel Should Not Be Held in Contempt and Possible Sanctions Be Imposed. (PA I, 0176-0187.) The Order to Show Cause was granted, and another contempt hearing was held on **May 24, 2010**. Neither Defendant nor her counsel, Harry Kuehn, appeared at the hearing. However, Thomas Gibson, Esq., the law partner to Mr. Kuehn, appeared at the hearing. (PA I, 0194.) Following argument by counsel, the Court made substantial findings of fact and conclusions of law. The Court also yet again held Defendant and her counsel in contempt of court and sanctioned them an additional $5,000.00. (PA I, 0191-0201.) Further, the Court again ordered Defendant to provide the information that had been ordered on several prior occasions, and imposed a $500.00 per day sanction, beginning **June 1, 2010**, if Defendant did not respond as ordered. (PA I, 0191-0201.)

On **June 17, 2010**, Defendant filed a substitution of attorneys, substituting Marvel & Kump and John Ohlson, Esq. for the firm of Gibson & Kuehn. (PA I, 0202-0203.)

On **June 21, 2010**, Plaintiff filed an Application for Default Judgment. (PA II, 0204-0265.) On **June 23, 2010**, Defendant filed an Opposition to the Application for Default Judgment, arguing that the Judgment should not be entered because Defendant had only recently been apprised on the status of the case and it would be an injustice to her to allow Default Judgment to be entered. (PA II, 0266-0268.)

On **July 2, 2010**, Defendant filed a Motion to Reconsider Prior Orders, asking

the Court to reconsider the Order granting summary judgment and the Order striking the Answer and Counterclaim. (PA II, 0269-0295.) In that Motion, Defendant, through her counsel, argued that "the Court was forced to accept the false factual premise due to Kuehn's failures." (PA II, 0278.) Defendant went on to explain how Mr. Kuehn had breached his duty of professional responsibility to his client. (PA II, 0279) There is no mention of any alleged "fraud on the Court" by Plaintiff's counsel, Mr. Aldrich.

On **July 19, 2010**, a hearing was held on Defendant's Motion for Reconsideration of Prior Orders. That motion was denied and the Court proceeded with a prove up hearing. At the hearing, the District Court allowed Defendant's counsel to cross-examine witnesses and call his own witness – Defendant Fallini – despite the fact that Defendant's Answer had been stricken and default had been entered against her. Defendant testified that the incident occurred in open range land. (PA II, 0322.) Further, after Plaintiff's counsel objected to the question by *Defendant's* attorney whether the incident occurred in open range land, the following exchange occurred:

> THE COURT: **It doesn't matter. I'm aware that it is.**
>
> Go ahead.
>
> MR. OHLSON: **If you are, Your Honor, you'll take judicial notice of that?**
>
> THE COURT: **That'll be fine.**

(PA II, 0322 (emphasis added).) Thus, the District Court confirmed it knew where the incident occurred and took judicial notice that the incident occurred in open range land. **As will be explained more fully below, this brief exchange becomes extremely important to this writ.**

On **August 18, 2010**, an Order was entered on this matter wherein the Court awarded Plaintiff $1,000,000.00 in damages for grief, sorrow and loss of support, $1,640,696.00 in damages for future lost earnings, $50,000.00 in attorney's fees,

$35,000.00 in sanctions levied against Defendant, and $5,188.85 in funeral and other related expenses. (PA II, 0335-0341.) On **September 7, 2010**, Defendant filed a Notice of Appeal. (PA II, 0342-0344.)

C. Procedural History While First Appeal Pending

On **September 20, 2010**, a Notice of Referral to Settlement Program and Suspension of Rules was filed by the Nevada Supreme Court. (PA II, 0345.)

On **January 31, 2011**, Susan and Joe Fallini filed a Complaint for Declaratory Relief in Tonopah, Nevada. (PA II, 0346-0355.) The defendants in that action included Plaintiff's counsel, John P. Aldrich, Esq., and The Hon. Robert W. Lane. The allegations included claims that Mr. Aldrich's pleadings in this case "contained allegations that were false, misleading, and/or have no evidentiary support, in violation of Nevada law." (PA II, 0351.) Mr. Aldrich filed a Motion to Dismiss on March 25, 2011. (PA III, 0360-0453.) A hearing was held on June 6, 2011 in Tonopah, Nevada, and the case was dismissed. The Order granting Aldrich's Motion to Dismiss was entered on June 26, 2014, after the court clerk lost multiple submissions of the Order for signature. (PA VI, 1119-1122.)

On **February 15, 2011**, a Settlement Program Status Report was filed, advising the Supreme Court that the Settlement Judge recommended removal of the case from the settlement program because a settlement conference would be "unworkable." (PA II, 0365.) On **March 2, 2011**, this Court entered an Order Reinstating Briefing, giving Defendant Fallini 15 days to file a transcript request form and 90 days to file an opening brief and appendix. On **March 10, 2011**, Defendant Fallini filed a Certificate of No Transcript Available. (PA II, 0357-0359.)

On or about **May 31, 2011**, Defendant filed her first Opening Brief. (PA III, 0497-0518.) Defendant filed an Amended Certificate of Service of Appellant's Opening Brief on or about **June 7, 2011**. (PA III, 0519-0521.) In her first Opening Brief, Defendant Fallini argued that counsel for Plaintiff, John P. Aldrich, had violated Nevada Rules of Professional Conduct 3.1, 3.3, and 8.4. Despite the fact that

Defendant had admitted the subject facts by failing to respond to discovery over a period of years, Defendant asserted that Aldrich asserted facts that he knew or should have known were false. (PA III, 0510-0511.) Defendant further asserted that the Honorable Robert W. Lane had violated the Code of Judicial Conduct. (PA III, 0511.)

On **June 28, 2011**, the Supreme Court entered an Order Granting Telephonic Extension, making Plaintiff/Respondent's Answering Brief due July 8, 2011. On **July 8, 2011**, Plaintiff filed her Respondent's Answering Brief. (PA III, 0525-0556.) Plaintiff clearly and methodically responded to each unfounded assertion of Aldrich's alleged misconduct and provided the Supreme Court with extensive case law setting forth the law regarding NRCP 36 admissions – that matters admitted therein are conclusively established in the case. (PA III, 0545-0546.)

On **July 29, 2011**, Defendant filed Appellant's Reply Brief. (PA III, 0557-0576.) Defendant again addressed the alleged misconduct by Aldrich. (PA III, 0568-0569.) On **August 19, 2011**, the Supreme Court filed an Order Submitting Appeal for Decision Without Oral Argument. (PA III, 0577.)

On or about **October 5, 2011**, Defendant/Respondent filed a Motion for Order Allowing Supplementation of Appendix and Re-Opening of Briefs. (PA IV, 0578-0586.) Attached to said motion was a transcript of the prove-up hearing. (PA IV, 0588-0626.) On or about **October 17, 2011**, Plaintiff filed Respondents' Opposition to Motion for Order Allowing Supplementation of Appendix and Re-Opening of Briefs. (PA IV, 0627-0651.) Ultimately, Defendant's Motion was granted on **October 24, 2011**. (PA IV, 0652-0653.) The parties were given additional time to file their respective briefs. (PA IV, 0652-0653.)

On or about **November 17, 2011**, Defendant filed her Amended Opening Brief. In her Amended Opening Brief, Defendant Fallini repeated her arguments that counsel for Plaintiff had violated Nevada Rules of Professional Conduct 3.1, 3.3, and 8.4, and that the Honorable Robert W. Lane had violated the Code of Judicial

Conduct. (PA IV, 0654-0676.) Defendant further noted that the District Court had taken judicial notice of the location of the incident – and concluded that it had indeed occurred in open range. (PA IV, 0661-0662.) Despite the District Court's taking judicial notice of the location of the incident, Defendant persisted in her position that Aldrich had somehow "allow[ed] misrepresentations to stand perpetrating misconduct of his own." (PA IV, 0667.) Defendant asserted that the District Court "failed to uphold the 'integrity of the tribunal.'" (PA IV, 0668.)

On or about **December 27, 2011**, Plaintiff filed her Amended Answering Brief. (PA IV, 0677-0713.) Plaintiff again responded to each unfounded assertion of Aldrich's alleged misconduct. (PA IV, 0698.) On or about **January 10, 2012**, Defendant filed her Appellants' [sic] Amended Reply Brief. (PA IV, 0714-0730.)

On **February 15, 2013**, the Supreme Court entered an Order Submitting Appeal for Decision Without Oral Argument. (PA IV, 0731.) On **March 29, 2013**, the Nevada Supreme Court entered an Order Affirming in Part, Reversing in Part, and Remanding. (PA IV, 0732-0738.) The Court specifically addressed the arguments of Defendant related to her own admissions, and expressly found those arguments to be unpersuasive. (PA IV, 0733.) More specifically, the Supreme Court stated:

> Fallini argues that the district court erred in denying her motion for reconsideration because the partial summary judgment was based on false factual premises regarding whether the accident occurred on open range. We disagree.
>
> . . . .
>
> In Nevada, a defendant has 30 days to respond to a plaintiff's request for admission. NRCP 36(a). Failure to do so may result in the requests being deemed "conclusively established." NRCP 36(b). It is well settled that unanswered requests for admission may be properly relied upon as a basis for granting summary judgment, and that the district court is allowed considerable discretion in determining whether to do so. Wagner v. Carex Investigations & Sec., 93 Nev. 627, 631, 572 P.2d 921, 923 (1977) (concluding that summary judgment was properly based on admissions stemming from a party's unanswered request for admission under NRCP 36, even where such admissions were contradicted by previously filed answers to interrogatories); Smith v. Emery, 109 Nev. 737, 742, 856 P.2d 1386, 1390 (explaining that [] "failure to respond to a request for admissions will result in those matters being deemed conclusively established...even if the established

matters are ultimately untrue")(citation omitted).

> Here, Fallini's argument is unpersuasive because she has not raised a new issue of fact or law. The question of whether the accident occurred on open range was expressly disputed in Fallini's answer, but she subsequently failed to challenge this issue through Adams' requests for admissions. Fallini has presented no evidence on appeal to alter the conclusive impact of admissions under NRCP 36 as a basis for partial summary judgment. Wagner, 93 Nev. at 631, 572 P.2d at 923. Moreover, the fact that these admissions may ultimately be untrue is irrelevant. Smith, 109 Nev. at 742, 856 P.2d at 1390. Finally, the district court had discretion to treat Fallini's failure to file an opposition to partial summary judgment as "an admission that the motion [was] meritorious and a consent to granting the motion." King v. Cartlidge, 121 Nev. 926, 927, 124 P.3d 1161, 1162 (2005)(citing D.C.R. 13(3)).
>
> Thus, the district court did not err in refusing to reconsider its prior orders.

(PA IV, 0733-0735.)

Significantly, the Supreme Court also addressed, in a footnote, the argument that Defendant should be relieved from the judgment due to her prior counsel's inaction, stating:

> We also reject Fallini's attempt to distinguish herself from her prior counsel's ineptitude. "It is a general rule that the negligence of an attorney is imputable to his client, and that the latter cannot be relieved from a judgment taken against [her], in consequence of the neglect, carelessness, forgetfulness, or inattention of the former." [Citations omitted.]

(PA IV, 0735, footnote 2.)

D. Procedure After Order Affirming in Part, Reversing in Part, and Remanding But Before Entry of Final Judgment

On **April 9, 2013**, Defendant filed Appellant's Petition for Rehearing. (PA IV, 0739-0757.) That Petition raised the exact same issues that had already been considered by the Supreme Court in Defendant's appeal, including the allegations of alleged fraud against Mr. Aldrich. (PA IV, 0753-0754.) An Order Denying Rehearing was entered on **June 3, 2013**. (PA IV, 0758.)

To further stall these proceedings, on **June 5, 2013**, Defendant filed Appellant's Petition for En Banc Reconsideration. (PA IV, 0759-0778.) That Petition was nearly identical to the Petition for Rehearing, and again included the

allegations of fraud against Mr. Aldrich. (PA IV 0773-0775.) On **July 18, 2013**, the Supreme Court entered an Order Denying En Banc Consideration. (PA IV, 0779-0780.)

On **August 14, 2013**, the Supreme Court entered Remittitur. (PA IV, 0781.)

On or about **August 15, 2013**, Defendant filed a Motion to Disqualify Judge Robert W. Lane from Any Further Proceedings in This Case and to Transfer This Case to the Hon. Kimberly A. Wanker. (PA IV, 0782-0787.) In that Motion, Defendant asserted that Judge Lane violated his duty of impartiality, noting that he "acknowledged that the portion of the highway on which the accident in which the Adams' son was killed occurred was open range – *a fact that is a substantive and complete defense to Adams' claims of liability against Fallini.*" (PA IV, 0784 (emphasis in original).) Defendant then argued that Judge Lane should recuse himself because Defendant had sued him (and presumably could no longer be impartial) and because "the judgment reflects a failure by Judge Lane to uphold and apply the law and to act in a manner that promotes public confidence in the integrity of the judiciary where there is clear evidence of *egregious* misconduct by an officer of the Court. . . ." (PA IV, 0785 (emphasis in original).)

On or about **September 4, 2013**, Plaintiff filed her Opposition to Motion to Disqualify Judge Robert W. Lane from Any Further Proceedings in This Case and to Transfer This Case to the Hon. Kimberly A. Wanker. (PA V, 0788-0834.) On **September 5, 2013**, the District Court entered an order denying Defendant's motion. (PA V, 0835-0845.) On or about **September 6, 2013**, Defendant filed her Reply to that motion. (PA V, 0846-0849.) Defendant apparently simultaneously filed a Request for Submission of the motion. (PA V, 0850-0852.) On **September 23, 2013**, the Court entered a Supplemental Order, noting that it had reviewed Defendant's Reply, and again denied the Motion to Disqualify. (PA V, 0853-0854.)

On or about **September 25, 2013**, Plaintiff filed a Motion to Enter Final Judgment Following Remittitur. (PA V, 0855-0882.) On or about **September 30,**

2013, Defendant opposed the Motion, noting that there were no instructions regarding interest. (PA V, 0883-0894.) Plaintiff filed a Reply on or about **October 7, 2013**, advising the District Court that Plaintiff had sought clarification from the Supreme Court. (PA V, 0901-0903.) The hearing on that motion was postponed pending further motion practice before the Supreme Court.

After receiving Defendant's objection and noticing the need for correcting the Remittitur, on or about **October 7, 2013**, Plaintiff filed a Motion to Reverse or Withdraw Remittitur and Clarify Instructions for Allowance of Interest. (PA V, 0895-0900.) On or about **October 14, 2013**, Defendant filed her Opposition to Motion to Withdraw Remittitur and Clarify Instructions for Allowance of Interest. (PA V, 0904-0907.) On or about **January 3, 2014**, the Supreme Court entered an Order Granting Motion to Recall Remittitur and to Modify March 29, 2013, Order for Allowance of Interest. (PA V, 0908-0911.) On **February 12, 2014**, the Court re-issued Remittitur. (PA V, 0912.) Following Remittitur, the District Court asked the parties to attempt to resolve the amount of interest to be applied. The parties could not agree.

For reasons not yet explained, on or about **March 11, 2014**, Defendant filed a Jury Demand. (PA V, 0913-0915.)

On **March 25, 2014**, Defendant filed her Objection to Proposed Judgment. (PA V, 0916-0924.) One of the exhibits to Defendant's Motion was a proposed judgment signed by Defendant's counsel. Plaintiff made a strategic decision, based on Defendant's dilution of assets, to stipulate to Defendant's proposed judgment. Plaintiff notified the District Court of this decision in her Reply filed April 10, 2014. (PA V, 0925-0926.)

E. Procedure Following Entry of Final Judgment

Final Judgment was entered on **April 28, 2014**; Notice of Entry was provided on **May 6, 2014**. (PA V, 0927-0930.)

On or about **May 20, 2014**, Defendant filed a Motion for Relief from Judgment

Pursuant to NRCP 60(b). (PA V, 0931-1008.) Defendant's Motion was based on the following alleged grounds:

1. "Opposing counsel [Aldrich], an officer of the court, knowingly forced fraudulent facts on the court and failed to correct misrepresentations thereby committing fraud upon the court;"
2. "Ms. Fallini's previous counsel's incompetence, neglect, and misconduct, denied Ms. Fallini an opportunity to advance her meritorious defenses;"
3. "[P]ublic policy strongly supports deciding cases on the merits;" and
4. "[T]he merits of this case, as known by all the parties *prior to filing suit in 2007*, provide Defendant with an absolute defense to liability." (PA V, 0932 (emphasis in original.)

Thus, although these allegations had already been addressed by the Nevada Supreme Court on appeal – three times if the Court counts its denial of Defendant's Petition for Rehearing and Petition for En Banc Reconsideration – Defendant was seeking to assert "fraud" as her grounds to set aside the judgment – in hopes that she could overcome the fact that the Motion was brought four years after the original judgment was entered. The second and third grounds have already been addressed during the lengthy history of this case and do not constitute fraud, and they were not the reason the Motion for Relief was granted. The fourth alleged ground is essentially the same as the fraud allegation.

The first alleged grounds for setting aside the judgment – Aldrich's alleged fraud – was already litigated before the District Court (through the Motion to Reconsider Prior Orders), the Nevada Supreme Court (asserted in both Opening Briefs and Replies on the direct appeal), and another judge in the Fifth Judicial District Court (through the separate lawsuit Fallini filed against Aldrich and Judge Lane in Tonopah, Nevada).

In the Motion for Relief from Judgment Pursuant to NRCP 60(b), Defendant

sought to introduce evidence of a police report and a website to overcome her admissions – which admissions are now **nearly seven years old**! Having lost multiple times – before the Nevada Supreme Court and before two different judges in the Fifth Judicial District – Defendant filed the Motion for Relief from Judgment Pursuant to NRCP 60(b) as a desperate, last-ditch attempt.

On or about **June 9, 2014**, Plaintiff filed a Countermotion to Strike Defendant's Motion for Relief from Judgment Pursuant to NRCP 60(b), or in the Alternative, Opposition to Motion for Relief from Judgment Under NRCP 60(b). (PA VI, 1009-1109.) In her pleading, Plaintiff pointed out that the Motion to Set Aside Judgment Pursuant to NRCP 60(b) was a fugitive document and should never have been filed. (PA VI, 1009.) Plaintiff also reminded the District Court that the fraud argument was untenable because the Nevada Supreme Court had already ruled on this issue. Plaintiff attached, as exhibits to the Countermotion and Opposition, Defendant's Motion to Reconsider Prior Orders, the separate Complaint filed by Defendant in Tonopah, and Defendant's appellate brief, indicating exactly where Defendant had already unsuccessfully raised the allegation of fraud on the court on multiple occasions. (PA VI, 1020-1109.)

On or about **June 16, 2014**, Defendant filed her Reply Memorandum in Support of Her Rule 60(b) Motion to Set Aside Judgment and Opposition to Plaintiff's Countermotion to Strike. (PA VI, 1110-1118.) In her Reply, Defendant ignored the prior procedural history of this case before both the District Court and Supreme Court, as well as the fact that she filed a separate action in Tonopah, Nevada – all of which specifically addressed alleged fraud on the court by Aldrich. The entire brief ignores the actual facts and procedure of the case, and pushes ahead to claim that this issue was only now being brought before the District Court.

A hearing was held on **Monday, July 28, 2014** regarding Defendant's Motion to Set Aside Judgment and Opposition to Plaintiff's Countermotion to Strike. The District Court chose to entertain Defendant's Motion. What should have been a very

routine hearing with just a few minutes of argument quickly turned into a circus. Defendant Fallini, a rancher, brought 60 or so "concerned citizens" with her. These "concerned citizens" were all ranchers and voters in Nye County, and this is an election year.

Defendant's "supporters" were a topic of conversation at various times throughout the hearing. (PA VI, 1126, ls. 20-23; 1156, l. 19 through 1157, l. 1; 1176, l. 9 through 1177, l. 3; 1189, l. 2 through 1191, l. 2.) The Judge then entered into a lengthy discussion in which he addressed the large crowd in many respects. (PA VI, 1191 through 1202, l. 24.)

At the hearing, Defendant's new attorney argued that Mr. Aldrich "blatantly ignored and violated his duty of candor and committed fraud upon the Court...," (PA VI, 1127, ls. 24-25) and asserted that "it's not the Court's fault because the Court relied on fraudulent representations. The Court did its job. It trusted the lawyers in this case." (PA VI, 1128, l. 23 through 1129, l. 1.) Defendant's new attorney asserted that "what followed was a pattern of overzealousness and deceit on the part of opposing counsel...," (PA VI, 1131, ls. 4-6) due to "fraudulent discovery requests and motion practiced[sic] by opposing counsel." (PA VI, 1131, ls. 8-10.) Defendant's new counsel essentially repeated and rehashed these same arguments over and over again throughout the lengthy hearing and then tried to admit evidence that was new to the case, and not authenticated. The Court acknowledged that "at some point in the litigation I learned this was open range...." (PA VI, 1194, ls. 6-7.) In commenting on the prior appeal, the Court stated "and this case was appealed up to the Supreme Court by good attorneys who made full arguments to the Supreme Court about why Judge Lane should be reversed, he was wrong. And I wasn't wrong." (PA VI, 1196, ls. 19-23.) The Court further commented "I think the main attacks were that we should have known it was open range, and I'm embarrassed to admit I didn't. I didn't know it was open range at the beginning..." (PA VI, 1197, ls. 11-14) "and I was like oh, sure. That's open range. What's that mean? And I'm

learning, oh, crud, she shouldn't have lost this case..." (PA VI, 1197, ls. 17-20) and "even if I had known it was open range, I can't kick it out." (PA VI, 1197, ls. 24-25.)

The Court continued:

> "if you take this up to the Supremes – if I rule in your favor and I say fraud on the Court and excusable neglect, and we'll send it up to the Supremes where they've got seven judges who can take a year with 14 law clerks and a staff of attorneys to decide if it's the right call or not, we'll let the Supreme Court decide, and they'll make the right decision, even though I don't think you're going to prevail, and I think the Supreme Court will agree with my gut feeling right now, which is it's not there.
>
> ...
>
> So let's give them a shot. Let's let the Supreme Court decide if this was fraud on the Court based on your definitions. I don't think it was."

(PA VI, 1203, ls. 3-13, 16-19.) In fairness to the District Court, he later commented that he could "go back and do some more research on it, rather than to just turning it over to the Supremes and letting them decide." (PA VI, 1204, 1. 24 through 1205, l. 2.) After some discussion with Defendant's new attorney about whether Defendant could appeal, the Court took the matter under advisement. (PA VI, 1205-1206.)

Following the hearing on July 28, 2014, the Court entered a Court Order on August 6, 2014. Notice of Entry of Order was provided on or about August 13, 2014. (PA VI, 1218-1233.) The Court granted Defendant's Motion for Relief from Judgment Pursuant to NRCP 60(b) and set aside the four-year-old judgment. (PA VI, 1231, ls. 25-26.)

II.

ISSUES PRESENTED

1. Did the Nevada Supreme Court's Order Affirming in Part, Reversing in Part, and Remanding constitute issue preclusion and law of the case for the issues raised in Defendant's Motion to Set Aside Judgment Pursuant to NRCP 60(b)?

2. Did the District Court err when it granted Defendant's Motion to Set Aside Judgment Pursuant to NRCP 60(b) and ignored admissions made by Defendant pursuant to NRCP 36 nearly seven years before the hearing on Defendant's Motion to Set Aside Judgment Pursuant to NRCP 60(b)?

III.

RELIEF REQUESTED

Petitioner seeks a writ of mandamus and/or prohibition, as appropriate, compelling the District Court to vacate its Order granting Defendant Fallini's Motion for Relief from Judgment Pursuant to NRCP 60(b), including all Findings of Fact and Conclusions of Law therein, and reinstating the Final Judgment entered on April 28, 2014, as directed previously by the Nevada Supreme Court. Petitioner further seeks a specific finding by this Court that her counsel has not perpetrated a fraud upon the court nor violated any rules of ethics, but rather, acted properly and zealously on behalf of Petitioner, along with whatever further relief the Court deems proper under the circumstances.

IV.

TIMING OF THIS PETITION

A writ for extraordinary relief must be timely sought, although there is no strict deadline. A Writ filed seven (7) months after the District Court entered its Order is not considered unreasonable delay. Moseley v. District Court, 124 Nev. Adv. Op. No. 61, 188 P.3d 1136, 1140 n. 6 (Jul. 3, 2008). In the present case, the District Court entered its Order granting Fallini's Motion for Relief from Judgment Pursuant to NRCP 60(b) on **August 6, 2014**. Plaintiff requested the video of the hearing immediately, obtained the recording of the hearing on **August 12, 2014**, and promptly sought a court reporter to transcribe it. The transcript was received in the office of Plaintiff's counsel on **August 29, 2014**. There was an error in the transcript that required correction, and Plaintiff's counsel immediately requested that the transcript be corrected. Plaintiff's counsel received the certified transcript on **September 15, 2014**. Thus, because this writ petition was filed just over thirty (30) days after notice of entry of the August 6, 2014 Order, and just two (2) days after the corrected transcript was received, Plaintiff's request is timely.

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V.

SUMMARY OF REASONS WHY EXTRAORDINARY RELIEF IS APPROPRIATE

A. Legal Standard for Extraordinary Relief

A writ of mandamus may be issued by the supreme court or a district court "to compel the performance of an act" of an inferior state tribunal, corporation, board or person. *See* NRS 34.160; *see also* Howell v. Ricci, 124 Nev. Adv. Op. 99, 197 P.3d 1044, 1049 (2008); Cote H. V. Eighth Judicial Dist. Court, 124 Nev. 36, 175 P.3d 906, 908 (2008). NRS 34.170 states that a writ of mandamus "shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." Petitions for writs of mandamus can be used to control discretionary acts when the discretion has been **manifestly abused** or is **exercised in an arbitrary and capricious manner**. *See:* Desert Fireplaces Plus, Inc. v. Eighth Jud. Dist. Ct. Ex rel. County of Clark, 120 Nev. 613, 618, 97 P.3d 594, 597 (2004), *overruled on other grounds by* Abbott v. State, 122 Nev. 715, 138 P.3d 462, 464 (2006) (emphasis added). Extraordinary writ relief may be appropriate when judicial economy and sound judicial administration require it, or when an important issue of law requires clarification. Scarbo v. District Court, 125 Nev. Adv. Op. 12, 206 P.3d 975, 977 (Apr. 30, 2009). This Court has also granted extraordinary writ relief when no factual disputes exist and the District Court is obligated to act pursuant to clear authority under a statute or rule. Advanced Countertop Design, Inc. v. District Court, 115 Nev. 268, 270, 984 P.2d 756, 758 (1999). Additionally, this Court has also granted extraordinary writ relief when sound judicial economy and administration militate in favor to prevent a **gross miscarriage of justice**. Smith v. Eighth Judicial Dist. Court, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997) (emphasis added); State v. Babayan, 106 Nev. 155, 176, 787 P.2d 805, 819 (1990).

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B. Extraordinary Relief Is Warranted With Respect to Petitioner's District Court's Order granting Defendant Fallini's Motion for Relief from Judgment Pursuant to NRCP 60(b)

With respect to the District Court's Order granting Defendant Fallini's Motion for Relief from Judgment Pursuant to NRCP 60(b), none of the material facts in the instant case are disputed, this Court's prior Order *in this case* and this Court's prior case law in other cases unequivocally support Petitioner's request, and failure to grant Petitioner's request will result in a gross miscarriage of justice to Plaintiff.

The Nevada Supreme Court's Order Affirming in Part, Reversing in Part, and Remanding, entered on **March 29, 2013**, constitutes issue preclusion and law of the case for the issues raised in Defendant's Motion to Set Aside Judgment Pursuant to NRCP 60(b). Defendant did not raise any new issues in her Motion to Set Aside Judgment Pursuant to NRCP 60(b). Rather, Defendant regurgitated her arguments and brought a slew of "friends" to intimidate the District Court into a finding that was contrary to law but favorable for Defendant.

The District Court acted contrary to law when it granted Defendant's Motion to Set Aside Judgment Pursuant to NRCP 60(b), despite the fact that the grounds set forth in the Defendant's Motion had already been litigated before the District Court in this case, a separate District Court Judge in the Fifth Judicial District, and most importantly, the Nevada Supreme Court on direct appeal. The District Court ignored the Supreme Court's prior Order in this case, as well as the well-established law regarding admissions pursuant to NRCP 36.

Further, the District Court erred when it entered conclusions of law (a) that Mr. Aldrich violated his duty of candor under Nevada Rules of Professional Conduct 3.3 and (b) that Plaintiff somehow "violated Rule 60(b)" and "perpetrat[ed] a fraud upon the court" by sending a request for admission as part of the discovery process. Plaintiff and her counsel did not violate any ethics rule, nor did they perpetrate fraud on the court. To the contrary, at the prove-up hearing on **July 19, 2010**, the District Court admitted it **knew** where the incident occurred, and ***at the request of Defendant***,

the Court ***took judicial notice*** that the incident occurred on open range. (PA II, 0322.) Consequently, there could be no fraud on the court.

Finally, the District Court erred when it made findings and conclusions that were contrary to the admissions made by Defendant pursuant to NRCP 36 nearly seven years before the hearing on Defendant's Motion to Set Aside Judgment Pursuant to NRCP 60(b). Those admissions were made in 2007 and remain as admissions in this case, as affirmed by the Nevada Supreme Court. No amount of unauthenticated and belatedly-provided evidence Defendant produces now can overcome her admissions made nearly seven years ago – even if they were admissions by non-responsiveness.

VI.

REASONS WHY A WRIT SHOULD ISSUE

A. The Nevada Supreme Court's Order Affirming in Part, Reversing in Part, and Remanding, entered on March 29, 2013, constitutes issue preclusion and law of the case for the issues raised in Defendant's Motion to Set Aside Judgment Pursuant to NRCP 60(b).

In her Amended Opening Brief in her direct appeal before the Nevada Supreme Court, Defendant Fallini argued that counsel for Plaintiff had violated Nevada Rules of Professional Conduct 3.1, 3.3, and 8.4, and that the Honorable Robert W. Lane had violated the Code of Judicial Conduct. (PA IV, 0654-0676.) Defendant further noted that the District Court *had taken judicial notice* – at Defendant's request – of the location of the incident – and concluded that it had indeed occurred in open range. (PA IV, 0661-0662.) Despite the District Court's taking judicial notice of the location of the incident, Defendant persisted in her position that Aldrich had somehow "allow[ed] misrepresentations to stand perpetrating misconduct of his own." (PA IV, 0667.) Defendant asserted that the District Court "failed to uphold the 'integrity of the tribunal.'" (PA IV, 0668.)

The Supreme Court specifically addressed the arguments raised by Defendant in her Motion for Relief from Judgment related to her own admissions – nearly

identical assertions to those raised in Defendant's appeal – and expressly found those arguments to be unpersuasive. (PA IV, 0732-0738.) More specifically, the Supreme Court stated:

> Fallini argues that the district court erred in denying her motion for reconsideration because the partial summary judgment was based on false factual premises regarding whether the accident occurred on open range. We disagree.
>
> . . . .
>
> In Nevada, a defendant has 30 days to respond to a plaintiff's request for admission. NRCP 36(a). Failure to do so may result in the requests being deemed "conclusively established." NRCP 36(b). It is well settled that unanswered requests for admission may be properly relied upon as a basis for granting summary judgment, and that the district court is allowed considerable discretion in determining whether to do so. Wagner v. Carex Investigations & Sec., 93 Nev. 627, 631, 572 P.2d 921, 923 (1977) (concluding that summary judgment was properly based on admissions stemming from a party's unanswered request for admission under NRCP 36, even where such admissions were contradicted by previously filed answers to interrogatories); Smith v. Emery, 109 Nev. 737, 742, 856 P.2d 1386, 1390 (explaining that [] "failure to respond to a request for admissions will result in those matters being deemed conclusively established . . . even if the established matters are ultimately untrue")(citation omitted).
>
> Here, Fallini's argument is unpersuasive because she has not raised a new issue of fact or law. The question of whether the accident occurred on open range was expressly disputed in Fallini's answer, but she subsequently failed to challenge this issue through Adams' requests for admissions. Fallini has presented no evidence on appeal to alter the conclusive impact of admissions under NRCP 36 as a basis for partial summary judgment. Wagner, 93 Nev. at 631, 572 P.2d at 923. Moreover, the fact that these admissions may ultimately be untrue is irrelevant. Smith, 109 Nev. at 742, 856 P.2d at 1390. Finally, the district court had discretion to treat Fallini's failure to file an opposition to partial summary judgment as "an admission that the motion [was] meritorious and a consent to granting the motion." King v. Cartlidge, 121 Nev. 926, 927, 124 P.3d 1161, 1162 (2005)(citing D.C.R. 13(3)).
>
> Thus, the district court did not err in refusing to reconsider its prior orders.

(PA IV, 0733-0735.) At the hearing on Defendant's Motion to Set Aside Judgment Pursuant to NRCP 60(b) on **July 28, 2014**, and in the Court Order entered on **August 6, 2014**, the District Court completely ignored the Nevada Supreme Court's prior decision on these issues.

In Recontrust Company, N.A., et al v. Zhang, 317 P.3d 814, 818 (Nev. 2014),

the Nevada Supreme Court discussed the law-of-the-case doctrine:

> The law-of-the-case doctrine "refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided (i.e., established as law of the case) by that court or a higher one in earlier phases." Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 739, 311 U.S. App. D.C. 1 (D.C. Cir. 1995). Normally, "for the law-of-the-case doctrine to apply, the appellate court must actually address and decide the issue explicitly or by necessary implication." Dictor v. Creative Mgmt. Servs., L.L.C., 126 Nev. __, __, 223 P.3d 332, 334 (2010); see Wheeler Springs Plaza, L.L.C. v. Beemon, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003) ("The doctrine only applies to issues previously determined, not to matters left open by the appellate court.").

317 P.3d at 818. The crux of the issue alleged by Defendant in her Motion for Relief from Judgment Pursuant to NRCP 60(b) is the same as the issues raised on appeal: Plaintiff and her counsel allegedly perpetrated a fraud on the court by sending a request for admission that Defendant alleges Plaintiff or her counsel knew or should have known was a false fact. (PA V, 0931-0954.) The Nevada Supreme Court has already ruled on those arguments, and the District Court acted contrary to the law of the case when it granted Defendant's Motion to Set Aside Judgment Pursuant to NRCP 60(b).

Further, the doctrine of issue preclusion also precluded the District Court from granting Defendant's Motion to Set Aside. As explained to the District Court in Plaintiff's Opposition, the four elements for issue preclusion are:

(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.

See Alcantara v. Wal-Mart Stores, Inc., 321 P.3d 912, 916 (Nev. 2014).

Issue preclusion applied to Defendant's Motion to Set Aside. Regarding the first element, the issues Defendant raised were argued on direct appeal before the Supreme Court and affirmed. These issues were also litigated in the other action filed

by Defendant (as a plaintiff against Aldrich and Judge Lane) in Tonopah, Nevada. Indeed Defendant Fallini (as a plaintiff in that matter) alleged that Aldrich had misinformed the court using allegedly false requests for admission. (PA II, 0348, 0351.) That action was dismissed after both Aldrich and Judge Lane filed motions to dismiss. (PA III, 0360-0453, 0454-0496, 0522-0524; PA VI, 1119-1122.) This element supports the application of issue preclusion.

The second element also supports implementation of the doctrine of issue preclusion. The court in Tonopah dismissed the case, which was fully litigated. (PA III, 0522-0524; PA VI 1119-1122.) The ruling in this case became final when this Court found in Plaintiff's favor more than a year ago. (PA IV, 0732-0738.)

The third element is met as well. Fallini was a party to the Tonopah lawsuit, which was dismissed. Further, Fallini was and is a party to the this lawsuit. As for her attorney's failure to represent her in this case, which led to the trial judge granting partial summary judgment and striking Defendant's Answer and Counterclaim, it should be emphasized that Mr. Ohlson, not Fallini's prior counsel, Mr. Kuehn, represented the Defendant on the Opposition to Default Judgment, Motion for Reconsideration and in the appeal. Mr. Ohlson also represented Defendant Fallini in the Tonopah action (naming Aldrich and Judge Lane as defendants).[1] This element supports the application of issue preclusion.

The fourth factor is present as well. These matters have been actually and necessarily litigated in this case before the Supreme Court, and in the separate lawsuit against Aldrich and Judge Lane. When the Nevada Supreme Court affirmed the merits of the judgment (after considering the same arguments brought by Defendant

[1] Mr. Ohlson and Defendant's new counsel, Mr. Hague, have filed frivolous motion after frivolous motion in this case and a frivolous lawsuit in Tonopah, generally citing no legal basis for the relief sought, causing unnecessary attorney's fees and costs, waste of judicial resources, and the like.

in her Motion to Set Aside), every issue that could have ever been brought was fully litigated and finally adjudicated.

In short, Defendant's counsel ignored the Supreme Court's decision and attempted to resurrect the merits of the underlying case, despite the fact that the issues Defendant raised in the Motion to Set Aside are absolutely identical to those originally raised on appeal and in a separate court in Tonopah. The initial ruling was not only on the merits and became a final judgment, but it was also affirmed by the Nevada Supreme Court. This case is squarely within the Nevada case law regarding the cessation of cases that have claim or issue preclusion.

This District Court's Order granting Defendant's Motion to Set Aside was contrary to the law of the case, and contrary to law.

B. Even if the Doctrines of Issue Preclusion and Law of the Case Do Not Apply, The District Court acted contrary to law when it granted Defendant's Motion to Set Aside Judgment Pursuant to NRCP 60(b) and ignored admissions made by Defendant pursuant to NRCP 36 nearly seven years before the hearing on Defendant's Motion to Set Aside Judgment Pursuant to NRCP 60(b)

The grounds set forth in the Defendant's Motion had already been litigated before the District Court in this case, a separate District Court Judge in the Fifth Judicial District, and most importantly, the Nevada Supreme Court. Even so, there were several grounds – all of which have already been before the Nevada Supreme Court – upon which the Final Judgment was properly entered. In granting Defendant's Motion for Relief from Judgment Pursuant to NRCP 60(b), the District Court erred in several respects. Plaintiff asserts the Order as a whole is improper; because of space limitations, Plaintiff will highlight the most glaring errors.[2] Those include the following:

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[2] In Finding 9, there is a typo. At the line located between line numbers 5 and 6, it says "At the hearing, Kuehn requested additional sanctions...." (PA VI, 1225.) It should say "At the hearing, **Aldrich** requested additional sanctions...."

1. **The District Court erred by considering new, irrelevant evidence at the July 28, 2014 hearing**

The Court makes several Findings of Fact in the Order. Findings 3 and 4 are particularly problematic. These are findings that are based on new evidence presented in the Motion to Set Aside, and are not based on any evidence properly before the Court. In addition, as Mr. Aldrich explained with respect to Finding number 3, he was not in possession of the purported report attached to the Motion to Set Aside by Defendant. This was a version he had never seen before, as explained at the hearing, and has not been properly authenticated.

Similarly, in Finding number 4, the District Court referenced an alleged website that was allegedly constructed by Plaintiff. This "evidence" was not properly before the District Court because that "evidence" sought to contradict Defendant's own admissions pursuant to NRCP 36.

Besides the fact that this was not an evidentiary hearing, this new "evidence" was irrelevant. See Smith v. Emery, 109 Nev. 737, 856 P.2d 1386 (1993).

NRCP 36 provides, in pertinent part:

> . . . .that the matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, or the parties may agree in writing,... the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney.

In Smith v. Emery, 109 Nev. 737, 856 P.3d 1386 (1993), the Nevada Supreme Court found that failure to timely respond to requests for admission will result in those matters being **conclusively established**, and this is the case **even if the established matters are ultimately untrue**. Id. The Court explained:

> "[E]ven if a request is objectionable, if a party fails to object and fails to respond to the request, that party should be held to have admitted the matter." Jensen v. Pioneer Dodge Center, Inc., 702 P.2d 98, 100-01 (Utah 1985) (citing Rutherford v. Bass Air Conditioning Co., 38 N.C.App. 630, 248 S.E.2d 887 (1978)). It is well settled that failure to respond to a request for admissions will result in those matters **being deemed conclusively established**. Woods, 107 Nev. at 425, 812 P.2d at 1297; Dzack, 80 Nev. at 347, 393 P.2d at 611. This is so **even if the established matters are ultimately untrue**. Lawrence v. Southwest

> Gas Corp., 89 Nev. 433, 514 P.2d 868 (1973); Graham v. Carson-Tahoe Hosp., 91 Nev. 609, 540 P.2d 105 (1975). Emery's failure to respond or object to the Smiths' request for admissions entitles the Smiths to have the assertions contained therein conclusively established.

Id. at 742-43 (emphasis added).

The evidence presented to the Court nearly six years ago in Plaintiff's Motion for Partial Summary Judgment included the conclusively proven facts that had been admitted by Defendant in the Requests for Admission. It is well settled law in Nevada that such admissions may properly serve as the basis for summary judgment against the party who failed to serve a timely response. See Wagner v. Carex Investigations & Sec., 93 Nev 627, 572 P.2d 921 (1977)(concluding that summary judgment was properly based on admissions stemming from a party's unanswered request for admission under NRCP 36, ***even where such admissions were contradicted by previously filed answers to interrogatories***) (emphasis added).

Moreover, Defendant Fallini did not oppose Judith's Motion for Partial Summary Judgment, and the Motion was properly granted. Nevada District Court Rule 13 addresses this exact situation. Nevada District Court Rule 13(3) provides, in pertinent part:

> Within 10 days after the service of the motion, the opposing party shall serve and file his written opposition thereto, together with a memorandum of point and authorities and supporting affidavits, if any, stating facts showing why the motion should be denied. Failure of the opposing party to serve and file his written opposition may be construed as an admission that the motion is meritorious and a consent to granting the same.

Even without the Requests for Admission, the district court properly granted the Motion for Partial Summary Judgment. This action by the district court was permitted by District Court Rule 13 and clearly was within the discretion of the District Court several years ago.

The District Court also ignored the fact that it had properly ***stricken*** Defendant's pleadings, awarded sanctions, and granted default judgment against Defendant due to Defendant's repeated and rampant discovery abuses.

The District Court's decision to grant Defendant relief from judgment once 60 or so "supporters" of Defendant flooded the courtroom was contrary to law and has resulted in a manifest injustice. This manifest injustice must be corrected by this Court.

2. Several of the District Court's conclusions were improper and based on "evidence" not relevant to the admitted facts of the case

On page 8 of the Court Order, the District Court concluded that "Mr. Aldrich knew or should have known that the accident occurred on open range," based on the following:

a. the Nevada Highway Patrol Accident Report,

b. a memorial website allegedly created by Plaintiff, and

c. the assertion of the open range affirmative defense in Defendant's Answer.

(PA VI, 1228, ls. 5-15.) This conclusion was reached "based on the totality of the circumstances." (PA VI, 1228, ls. 16-17.)

This finding is improper because Mr. Aldrich's knowledge of where the incident occurred is of no relevance because the facts were proven conclusively through discovery. See Section B(1) above. Further, Defendant's pleadings were stricken years ago in this matter, and Defendant has no right to submit new evidence to the District Court, although Defendant has done so repeatedly. The prove-up hearing occurred in 2010.

Later, the District Court concluded "At the bare minimum, Mr. Aldrich possessed enough information to conduct a reasonable inquiry into the open range status of the location where the accident occurred." (PA VI, 1228, ls. 18-20.) There is no citation to any law supporting this statement, and the Court failed to recognize that the sending of Requests for Admission is exactly the type of "reasonable inquiry" that the Court claims Mr. Aldrich did not conduct. Again, as set forth above, those

facts were conclusively proven, having been admitted by Defendant. See Section B(1) above.

The Court further concluded, with regard to the timing of the sending of the Requests for Admission, that "at this point in the case, Kuehn was failing to respond to various motions and requests to the extent the Aldrich knew or should have known that a response from Kuehn was unlikely." (PA VI, 1229, ls. 3-5.)

This conclusion is patently incorrect and contrary to the record. To begin with, this conclusion is inappropriate because there was no evidentiary hearing related to these facts and conclusions, nor were those facts even discussed at the July 28, 2014 hearing. Nevertheless, when Plaintiff's counsel sent the Requests for Admission on October 31, 2007, he had no reason to believe that Mr. Kuehn would not participate in the discovery process. Mr. Kuehn appeared in court and requested extension of time to respond on multiple occasions, which the District Court granted. Moreover, even assuming this conclusion to be true, nowhere in NRCP 36 or any case analyzing NRCP 36 does the law state an attorney cannot send discovery to the opposing side unless he knows that opposing counsel will timely respond. Such a requirement would completely emasculate NRCP 36. Nor is there any case law whatsoever cited by the District Court in its Order that indicates there is any duty on the part of Plaintiff's counsel to notify Defendant's counsel that Defendant's counsel has failed to do something in the case on behalf of the opposing party. Mr. Aldrich has a duty to represent his client diligently and zealously, as he did in this case.

3. The District Court erred when it entered conclusions of law (a) that Mr. Aldrich violated his duty of candor under Nevada Rules of Professional Conduct 3.3 and (b) that Plaintiff somehow "violated Rule 60(b)" and "perpetrat[ed] a fraud upon the court."

In finding Aldrich perpetrated a fraud on the court, the District Court stated the following:

a. On page 9 of its Order, the Court makes the following contradictory conclusions: "This is not to suggest that Mr. Aldrich is an unethical

attorney. For example, the record indicates that on numerous occasions, Mr. Aldrich granted Mr. Kuehn multiple extensions to provide discovery. The court believes that Mr. Aldrich was zealously representing his client." (PA VI, 1229, ls. 3-5.)

b. Then, however, contrary to those statements, the Court – again without any supporting case law – concludes that "As an officer of the court [,] however, Mr. Aldrich violated his duty of candor under Nevada Rules of Professional Conduct 3.3 by utilizing Defendant's denial that the accident occurred on open range to obtain a favorable ruling in the form of an unopposed award of summary judgment. Thus, the court finds Plaintiff violated Rule 60(b) as Plaintiff's request for admission of a known fact, a fact that was a central component of Defendant's case, was done when counsel knew or should have known that the accident did occur on open range, **thereby perpetrating a fraud upon the court**." (PA VI, 1229, ls. 9-17 (emphasis added).)

c. Interestingly, the Court, in its conclusion, notes "This court followed the law and proper procedure throughout this case, as affirmed by the Supreme Court of Nevada." (PA VI, 1230, ls. 18-20 (emphasis added).) The Court, apparently swayed by the presence of the 60 or so "concerned citizens" present at the hearing, goes on to state "however, one cannot ignore the apparent injustice that Defendant has suffered throughout this matter. Ms. Fallini is responsible for a multi-million dollar judgment without the merits of the case even being addressed." (PA VI, 1230, ls. 18-20.)

d. Again concluding that Mr. Aldrich "should have conducted a reasonable inquiry into the open range status prior to sending a request for admissions, and perhaps as early as prior to filing his Complaint" the Court completed its conclusions stating: "Finality has a particular

> importance in our legal system. The Supreme Court of Nevada has described a final judgment as one 'that disposes of the issues presented in the case, determines the costs, and leaves nothing for future consideration of the court.'" Alper v. Posin, 77 Nev. 328, 330, 363 P.2d 502, 503 (1961). In the matter before the bar however, the issues presented in this case were summarily disposed above due to the negligence of Defendant's counsel Mr. Kuehn. The merits of the case were never actually addressed. Had Mr. Kuehn properly denied Mr. Aldrich's request for admissions, the outcome may have been much different." (PA VI, 1231, ls. 12-20.)

The District Court's findings that Aldrich violated the Rules of Professional Conduct and "perpetrated a fraud upon the court" were gross error. The Nevada Supreme Court has held that "fraud upon the court" as used in NRCP 60(b) cannot be defined to mean "any conduct of a party or lawyer of which the court disapproves," because, among other things, such a definition would render the time limitation for motions under NRCP 60(b)(3) meaningless. NC-DSH, Inc. v. Garner, 125 Nev. 647, 654, 218 P.3d 853, 858 (2009). This Court has adopted a standard for "fraud on the court" that

> "embrace[s] only that species of fraud which does, or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases . . . and relief should be denied in the absence of such conduct."

Id. (quoting Demjanjuk v. Petrovsky, 10 F.3d 338, 352 (6th Cir. 1993)). Accordingly, cases require a party seeking to show fraud on the court – the Defendant in this case – to present clear and convincing evidence of the following elements: "(1) [conduct] on the part of an officer of the court; that (2) is directed to the judicial machinery itself; (3) is intentionally false, willfully blind to the truth, or is in reckless disregard of the truth; (4) is a positive averment or a concealment when one is under a duty to disclose; and (5) deceives the court." Johnson v. Bell, 605 F.3d 333, 339 (6th Cir.

2010); (quoting Carter v. Anderson, 585 F.3d 1007, 1011-12 (6th Cir. 2009)). "In practice, this means that even fairly despicable conduct will not qualify as fraud on the court." Moore's Federal Practice § 60.21[4][c] (collecting cases for the proposition that perjury and non-disclosure by a single litigant did not rise to the level of fraud on the court).

In this case, Plaintiff's counsel did nothing wrong, and it is abundantly clear that none of the final three elements are met. Mr. Aldrich did not conceal any facts, nor did he present intentionally false facts. To the contrary, Mr. Aldrich zealously advocated for his client, seeking to identify what facts and law would be at issue in the case by sending requests for admission to Defendant. Defendant did not respond, and those facts were deemed admitted.

Plaintiff then moved for partial summary judgment, advising the District Court that there were facts that had been admitted by Defendant by not responding to the requests for admission in a timely fashion. (PA I, 0014, ls. 25-26.) Plaintiff again notified the District Court that "[t]o date, the Requests for Admission have not been answered, and therefore are deemed admitted." (PA I, 0015, ls. 17-18.) Plaintiff then listed the items admitted by Defendant's non-response. Plaintiff cited NRCP 36 and again notified the District Court that Defendant had not responded to requests for admission, and again set forth the facts that had been conclusively proven. (PA I, 0018-0019.)

Defendant did not oppose the motion for partial summary judgment. Pursuant to DCR 13, the District Court properly granted partial summary judgment. Plaintiff continued to attempt to gather more information through discovery, but Defendant failed and refused to participate, resulting in Defendant's Answer being stricken. All of those events occurred properly under Nevada law. There was simply no fraud, no attempt to deceive the District Court, on the part of Plaintiff's counsel.

Regarding the fifth element of fraud on the court, the court ***must actually be deceived***. That unequivocally and undeniable ***did not happen*** in this case. Quite to

the contrary, the District Court had an abundance of information – despite the fact that Defendant's Answer had been stricken. In her Motion to Reconsider Prior Orders, Defendant's counsel attached a letter and four unsigned affidavits claiming that the location where the incident occurred was open range land – contrary to Defendant's admissions. On **July 19, 2010**, a hearing was held on Defendant's Motion for Reconsideration of Prior Orders. That motion was denied and the Court proceeded with a prove up hearing. At the hearing, the District Court allowed Defendant's counsel to cross-examine witnesses and call his own witness – Defendant Fallini – despite the fact that Defendant's Answer had been stricken and default had been entered against her. Defendant testified that the incident occurred in open range land. (PA II, 0322.) Further, after Plaintiff's counsel objected to the question whether the incident occurred in open range land, the following exchange occurred:

> THE COURT: **It doesn't matter. I'm aware that it is.**
>
> Go ahead.
>
> MR. OHLSON: **If you are, Your Honor, you'll take judicial notice of that?**
>
> THE COURT: **That'll be fine.**

(PA II, 0322 (emphasis added).) Thus, the District Court confirmed it knew where the incident occurred and took judicial notice that the incident occurred in open range land. Thus, the District Court was not deceived in any fashion. Of course, as set forth above and in the direct appeal, it really did not matter whether the District Court took judicial notice of that fact, because Defendant had already admitted the fact that the incident did not occur on open range, making the judicial notice irrelevant. See Section B(1) above.[3]

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[3] The Court once again denied Defendant's requested relief under the "excusable neglect" standard. The Court did so on a timeliness basis, rather than on the basis of law of the case, despite the fact that this issue had already been raised in

It is important to Plaintiff's counsel that this Court specifically find that he absolutely ***did not*** perpetrate a fraud on the court. His reputation is at stake, and the District Court's "finding" that he attempted to perpetrate a fraud on the court is just plain wrong and could be damaging to the reputation he has spent years building. Mr. Aldrich is a member of the bars in Nevada, Utah, and Idaho, and is concerned about the potential side effects of the District Court's "finding," such as insurance, pro hac vice applications, and the like. It is imperative that the Supreme Court make clear that Mr. Aldrich did not perpetrate a fraud on the court.

VII.

CONCLUSION

Petitioner seeks a writ of mandamus and/or prohibition, as appropriate, compelling the District Court to vacate its Order granting Defendant Fallini's Motion for Relief from Judgment Pursuant to NRCP 60(b).

Petitioner respectfully requests that a writ of mandamus and/or prohibition, as appropriate, issue directing the District Court to vacate its Order granting Fallini's Motion for Relief from Judgment Pursuant to NRCP 60(b), including all Findings of Fact and Conclusions of Law therein, and reinstating the Final Judgment entered on April 28, 2014, as directed previously by the Nevada Supreme Court. Petitioner further seeks a specific finding by this Court that her counsel has not perpetrated a fraud on the court nor violated any rules of ethics, but rather, acted properly and

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the same pleadings in which the alleged fraud on the court had also been raised and denied earlier in this case on direct appeal to the Supreme Court.

zealously on behalf of Petitioner, along with whatever further relief the Court deems proper under the circumstances.

DATED this 17th day of September, 2014.

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VERIFICATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, John P. Aldrich, Esq., hereby declare under penalty of perjury of the laws of Nevada, that I am counsel for Petitioner named in the foregoing Petition for Extraordinary Writ Relief and know that contents thereof, the pleading is true of my own knowledge, except as to those matters stated on information and belief, and that as to such matters, I believe them to be true.

Executed this 17th day of September, 2014.

JOHN P. ALDRICH, ESQ.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using WordPerfect 12 in Times New Roman 14 pt. font; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 12,395 words (1,283 lines of text); or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief 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 brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the Social Security Number of any person.

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed.

Petitioner:	ESTATE OF MICHAEL DAVID ADAMS, BY AND THROUGH HIS MOTHER JUDITH ADAMS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE
Represented by:	JOHN P. ALDRICH Nevada Bar No. 006877 ALDRICH LAW FIRM, LTD. 1601 S. Rainbow Blvd. Suite 160 Las Vegas, Nevada 89146 (702) 853-5490
Respondent:	FIFTH JUDICIAL DISTRICT COURT, NYE COUNTY, NEVADA
Represented by:	The Honorable Robert W. Lane Fifth Judicial District Court, Dept. 2 1520 East Basin Avenue, #105 Pahrump, NV 89060 (775) 751-4213
Real Party In Interest:	SUSAN FALLINI
Represented by:	John Ohlson, Esq. 275 Hill Street, Suite 230 Reno, NV 89501 (775) 323-2700 David R. Hague, Esq. FABIAN & CLENDENIN 215 S. State Street, Suite 1200 Salt Lake City, UT 84111 (801) 531-8900

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These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 17th day of September, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of September, 2014, I mailed a copy of the foregoing **PETITION FOR EXTRAORDINARY WRIT RELIEF**, in a sealed envelope, to the following address and that postage was fully paid thereon:

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