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, vs. FIFTH JUDICIAL DISTRICT COURT, NYE COUNTY, NEVADA, Respondent, and SUSAN FALLINI, Real Party in Interest.	Supreme Court No. 66521 District Court Case No. CV 24539 **REPLY TO PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE**

Real Party in Interest Susan Fallini ("Ms. Fallini"), by and through her attorney of record, David R. Hague, Esq., hereby files this reply to Petitioner's Response to Order to Show Cause electronically filed November 3, 2014.

Dated this 14th day of November, 2014.

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POINTS AND AUTHORITIES

The law in Nevada is clear: Mandamus is a drastic remedy reserved only for extraordinary cases. Generally, when a petitioner has a plain, speedy and adequate remedy at law mandamus relief is denied. Moreover, writ relief is not available to correct an untimely notice of appeal. The District Court's order granting Ms. Fallini's NRCP 60(b) motion was a final, appealable order. Thus, Petitioner, through immediate appeal, had an adequate remedy in the ordinary course of law. But Petitioner failed to timely file a notice of appeal. Accordingly, Petitioner's writ is simply an unallowable attempt to correct this failure. Further, because this Court is loath to allow writ relief in the face of a petitioner's plain remedy and Petitioner fails to demonstrate the extraordinary circumstances essential for exception, Petitioner's writ should be summarily denied.

I. PETITIONER HAD A DIRECT APPEAL RIGHT, AND BECAUSE THIS WRIT FOR EXTRAORDINARY RELIEF IS NOTHING MORE THAN AN ATTEMPT TO EXTEND THE DEADLINE FOR APPEAL, IT SHOULD BE DENIED.

If one has a plain remedy such as an immediate appeal to the Nevada Supreme Court, the Supreme Court will not entertain a writ petition. *See Columbia/HCA Healthcare v. Dist. Ct.*, 113 Nev. 521, 936 P.2d 844 (1997). The writ of mandamus should be resorted to only when the usual and ordinary remedies fail to afford adequate relief, and without it there would be a failure of justice. "[A]n adequate legal remedy is afforded through the right to appeal." *Otak Nevada, L.L.C. v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 86, 312 P.3d 491, 495 (2013). And "writ relief is not available to correct an untimely notice of appeal." *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 224–25, 88 P.3d 840, 841 (2004).

A. Petitioner had a plain remedy that was both adequate and speedy, making writ relief as a general rule improper.

Petitioner had the immediate right to appeal. An order granting or denying relief from final judgment under NRCP 60(b) is appealable, as it is a special order

following entry of judgment. The Nevada Rules of Appellate Procedure expressly list "[a] special order entered after final judgment . . . ." as appealable. NRAP 3A(b)(8). In reviewing an appeal from a district court denying a Rule 60(b) motion, this Court put it simply: "The order is appealable." *Memory Gardens of Las Vegas, Inc. v. Bunker Bros. Mortuary*, 91 Nev. 344, 345, 535 P.2d 1293, 1293 (1975); *see also Lindblom v. Prime Hospitality Corp.*, 120 Nev. 372, 374 n.1, 90 P.3d 1283, 1284 n.1 (2004); *Foster v. Dingwall*, 126 Nev. Adv. Op. 5 n.3, 228 P.3d 453 n.3 (2010). Because Petitioner in this case had a plain, adequate remedy—the legal right to appeal—this Court should deny the extraordinary writ.

Indeed, this Court specifically found that a trial court's denial of a 60(b) motion is not subject to review by mandamus. *Roventini v. First Jud. Dist. Ct.*, 81 Nev. 603, 407 P.2d 725 (1965). The Court reasoned that plain, speedy and adequate relief had not been precluded by the lower court's ruling because appeal from the order was available. *Id.* at 605. Further, because ruling on a 60(b) motion calls for an exercise of the District Court's discretion, the *Roventini* Court held that the motion was not subject to review by mandamus. *Id.* at 606. Accordingly, Petitioner's writ requesting review of District Court's grant of the 60(b) motion by mandamus should be denied.

B. Petitioner's writ is nothing more than an attempt to correct an untimely notice of appeal, making writ relief unavailable.

Not only did Petitioner have a plain remedy, making writ relief inappropriate, *Pan*, 120 Nev. at 225, Petitioner's writ displays numerous signs showing it to be an attempt to correct an untimely appeal. And "writ relief is not available to correct an untimely notice of appeal," *Id.* at 224–25. Therefore, writ relief is unavailable to Petitioner.

In *Bradford v. Eighth Judicial District Court*, a petitioning wife challenged a district court order finding that she and her husband were never legally married via a writ of mandamus. 129 Nev. Adv. Op. 60, 308 P.3d 122 (2013). The wife failed

to appeal or move to set aside the order, despite the fact that the lower court's order was appealable. *Id.* The Court reasoned that, although the Court has discretion, it has "consistently recognized that writ relief is available only when there is no plain, adequate, and speedy legal remedy." *Id.* Finding the right to appeal to be an adequate remedy, the Court reasoned further that "a writ petition is not a substitute for an untimely appeal." *Id.* Despite finding the lower court's order assailable substantively, and recognizing that the wife's failure to timely appeal left her without legal recourse, the Court declined to entertain the wife's petition. *Id.*

Petitioner failed to file a timely notice of appeal despite clear law stating that the order granting the motion to set aside is appealable. There is no case law that Ms. Fallini's counsel could uncover, and none that Petitioner put forth, that indicates inconsistent treatment or confusing case law regarding the ability to appeal an order granting or denying a 60(b) motion. In fact, the District Court indicated at the 60(b) hearing that its order would be appealable. *See* Pet'r App. VI at 1181. As such, there is no excuse for Petitioner's failure. This Court has stated that "writ relief is not available to correct an untimely notice of appeal." *Pan* 120 Nev. at 224–25. Therefore, Petitioner's writ should not be entertained.

Petitioner's writ is an attempt to avoid the appeal deadline. The timing as well as the language of the Petition support this conclusion. Petitioner filed for extraordinary relief 2 days after the 33-day appeal period had expired. Further, the Petition, presenting two issues for consideration, is formatted and reads like an appeal. *See* Pet. For Extraordinary Writ Relief, 18, Sept. 17, 2014. First, Petitioner asserts that issue preclusion and law of the case precluded the 60(b) motion: an appealable issue. *Id.* Petitioner also claims that the District Court acted contrary to law: again, an issue for appeal. *Id.* Second, Petitioner states that "the District Court erred" in entering its conclusions of law: a prototypical appeal phrase. *Id.* Finally, the writ itself admits to being an "appellate brief." *Id.* at 37. The arguments supporting the Petition are nothing more than arguments appropriate for appeal,

necessarily jammed into an extraordinary writ because Petitioner failed to file a timely notice of appeal. Petitioner's use of a writ to correct an untimely notice of appeal is improper and not allowed. Accordingly, Petitioner's writ should be denied.

II. THE DISTRICT COURT, ACTING PROPERLY WITHIN ITS EXTENSIVE DISCRETION, HAD JURISDICTION TO ENTERTAIN AND RULE ON MS. FALLINI'S 60(B) MOTION.

Without any support and contrary to law, Petitioner argues that the District Court did not have jurisdiction to grant Ms. Fallini's 60(b) motion. This is nothing more than a contrived attempt to fit within the narrow mold set forth by this Court necessary before entertaining a procedurally flawed writ. Petitioner's attempt fails.

The District Court had jurisdiction to entertain and grant Ms. Fallini's motion. In *Murphy v. Murphy*, this Court explained that a trial court has inherent jurisdiction to remedy fraud upon the court. 103 Nev. 185, 734 P.2d 738 (1987). In *Murphy*, a petitioner moved to set aside a divorce property distribution by filing an NRCP 60(b) motion for fraud on the court nearly a year after the distribution. *Id.* The district court, concluding that it lacked jurisdiction because more than six-months had elapsed since entry of the decree, dismissed the motion. *Id.* at 186. This Court reversed the district court. *Id.* The Court reasoned that the six-month limitation is inapplicable to fraud on the court. *Id.* Further, the Court determined that motion practice under NRCP 60(b) is an appropriate means to seek relief for fraud upon the court. *Id.* Consistent with the express language of NRCP 60(b)—and this Court's opinion in *Murphy*—the District Court properly entertained Ms. Fallini's motion and ruled on it.

Moreover, it is absolutely clear that the District Court has jurisdiction to entertain a motion seeking to alter, vacate, or otherwise change or modify an order—even during pendency of appeal. *Foster v. Dingwall*, 126 Nev. Adv. Op. 5, 228 P.3d 453 (2010). With no appeal pending, the District Court had jurisdiction to

both entertain Ms. Fallini's motion and rule on it. Accordingly, the preceding law verifies the procedural and jurisdictional soundness of the District Court's actions.

Additionally, "[t]he district court has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b)." *Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 307 (1993). Indeed, this Court has expressly stated that it will not overturn a district court's decision to set aside a judgment under NRCP 60(b) absent an abuse of discretion. *Id.; Britz v. Consol. Casinos Corp.*, 87 Nev. 441, 445, 488 P.2d 911, 914–15 (1971). Given the District Court's extensive discretion and the procedural inadequacy of Petitioner's writ, this Court should refuse to entertain the writ. *See Roventini*, 81 Nev. at 603.

Petitioner also asserts that the District Court overturned this Court by granting the motion to set aside judgment under NRCP 60(b). This is false. The District Court, based on new evidence before it, with inherent jurisdiction and within its discretion, *set aside* its own final judgment. The District Court did not attempt to overturn or otherwise overrule any law set forth by this Court's prior order. Petitioner misconstrues NRCP 60(b) by equating it to overturning or overruling law. Relief from a final judgment, order, or proceeding is allowed for the enumerated reasons set forth in NRCP 60(b) and is a collateral attack of a final judgment or order entered by a district court. *See* NRCP 60(b). Petitioner's misconstruing argument fails.

Finally, "[f]raud upon the court has been recognized for centuries as a basis for setting aside a *final judgment*, sometimes *even years after it was entered*." *NC-DSH, Inc. v. Garner*, 125 Nev. 647, 653, 218 P.3d 853, 858 (2009) (emphasis added). "[T]here is no time limitation." *Id.* at 659 *quoting Price v. Dunn*, 106 Nev. 100, 104, 787 P.2d 785, 787 (1990). The District Court had jurisdiction, acted properly, found that fraud had been perpetrated upon the court, and using its discretion set aside the final judgment that it had entered earlier against Ms. Fallini. Ct. Order, Aug. 6, 2014.

III. THE NEVADA SUPREME COURT, BEING LOATH TO EXERCISE JURISDICTION IN SIMILAR SITUATIONS, SHOULD NOT USE ITS INHERENT POWER TO ENTERTAIN PETITIONER'S WRIT.

Petitioner fails to show extraordinary circumstances for why this Court should depart from its general rule denying review of a writ where petitioner has an adequate remedy at law. Here, there is no unique opportunity to interpret new law. There is no public policy concern underlying this writ *that supports Petitioner*. Further, the interpretation or construction of the Nevada Constitution is not at stake. As this Court is loath to depart from the general rule, it should not exercise its inherent power to entertain this writ.

A. Petitioner's writ fails to advance a legitimate public policy concern or point out an important, unique opportunity to interpret new law.

This Court is loath to deviate from its general practice of denying a writ when a plain remedy at law exists. *Ashokan v. State, Dep't of Ins*., 109 Nev. 662, 667, 856 P.2d 244, 247 (1993). This Court deviates from the general rule only when circumstances reveal urgency or strong necessity. *Id.*; *Jeep Corp. v. District Court*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982). As such, the Court may entertain an otherwise inadequate writ if a unique question of law concerning a matter of first impression implicates a matter of public importance. *Diaz v. Eighth Jud. Dist. Ct.*, 116 Nev. 88, 993 P.2d 50; *Ashokan*, 109 Nev. 662.

In *Ashokan*, as Petitioner points out, this Court entertained a procedurally inadequate writ—but did so for specific and exceptional reasons. 109 Nev. 662. The *Ashokan* petitioner, a physician, failed to appeal a district court's determination that a confidential report prepared by a hospital would not be stricken from a medical malpractice complaint. *Id.* Instead the physician filed an extraordinary writ. *Id.* Despite this procedural defect, the Court exercised its constitutional prerogative and entertained the writ. *Id.* at 667. The Court pointed out that it exercised its discretion for three reasons. *Id.* First, the petition provided a

unique opportunity to interpret the new code section NRS 49.265(1) that had not yet been interpreted by the Court. *Id.* Second, the interpretation was important to the public, as hospitals needed to understand the scope of the new statutory privilege granted by NRS 49.265(1). *Id.* And, third, the Court entertained the writ because the petition was ultimately denied, ensuring that the petitioner did not gain from its failure to follow procedure nor respondents suffer prejudice. *Id.*

In this case, Petitioner fails on all three *Ashokan* points. Therefore, this Court should not entertain the writ. First, unlike NRS 49.265(1), NRCP 60(b) is not faced with a dearth of treatment. The Nevada Supreme Court has given extensive coverage to NRCP 60(b), as indicated in the discussion above. Second, contrary to the hospitals that lacked necessary guidance in *Ashokan*, there is no pressing need for further interpretation of or guidance for NRCP 60(b). Finally, Ms. Fallini will suffer prejudice if the writ is granted, unless, like *Ashokan*, this Court entertains the writ and simultaneously denies it.

In *Diaz*, the Court explained that it may entertain a procedurally inadequate writ "where an important issue of law needs clarification *and* public policy is served." *Diaz*, 116 Nev. at 93 (emphasis added). Similar to *Ashokan*, the *Diaz* Court exercised its discretion to take up a procedurally inadequate writ because it provided a unique opportunity on first impression to determine the precise parameters of a privilege. *Id.* The Court denied the writ after so entertaining, thereby not allowing the petitioner to benefit from its procedural failure. *Id.*

In hopes to fit under *Diaz*, Petitioner claims that public interests are served by entertaining this writ because parties should not be allowed to intimidate judges. Petitioner's claim of intimidation is nothing more than Ms. Fallini's supportive friends and family attending a hearing at a courthouse open to the public. *See* Pet. App. VI at 1176–77. Judge Lane noted the supporters and stated that they would not impact his decision. *Id.* There was no misbehavior, threats made, or violence. Further, Judge Lane drafted his order after the hearing, days and miles removed

from what Petitioner labels as shenanigans. Not only is there absolutely nothing nefarious about filling an open courthouse, but public policy is *served*—not diminished or harmed—by ensuring that the judicial system is public, transparent, and accessible to all. Petitioner's argument is wholly unmeritorious, disingenuous to the true purpose of public courthouses, and lacking any support whatsoever.

What is more, the District Court simply set aside the earlier judgment entered against Ms. Fallini. The case is not over. It will proceed at the District Court *on the merits* following resolution of this writ. This Court has explained that "good public policy dictates that cases be adjudicated on their merits." *Kahn v. Orme*, 108 Nev. 510, 516, 835 P.2d 790, 794 (1992) (overturned in part). Further, this Court has a policy of upholding the setting aside of a default judgment:

> Finally we mention, as a proper guide to the exercise of discretion, the basic underlying policy to have each case decided upon its merits. In the normal course of events, justice is best served by such a policy. Because of this policy, the general observation may be made that an appellate court is more likely to affirm a lower court ruling *setting aside* a default judgment than it is to affirm a *refusal* to do so. In the former case a trial upon the merits is assured, whereas in the latter it is denied forever. *Hotel Last Frontier Corp. v. Frontier Properties, Inc.*, 79 Nev. 150, 155–56, 380 P.2d 293, 295 (1963).

Therefore, justice is best served by denying Petitioner's writ and allowing the case to be resolved upon the merits. Indeed, "when a judgment is shown to have been procured by fraud upon the court, no worthwhile interest is served in protecting the judgment." *NC-DSH, Inc. v. Garner*, 125 Nev. 647, 653, 218 P.3d 853, 858 (2009). Despite Petitioner's warped protestations, no worthwhile interest is served in protecting the underlying judgment. Just the opposite is true: Justice is served by denying the writ.

B. Petitioner's procedurally flawed writ fails to raise pressing issues directly involving the Nevada Constitution and should be denied.

Next, this Court may exercise its discretion and take up a procedurally flawed writ to interpret pressing issues directly involved with the Nevada

Constitution. *Bus. Computer Rentals v. State Treasurer*, 114 Nev. 63, 953 P.2d 13 (1998). In *Business Computer Rentals*, the Court defined the scope of "public debt" as it relates to article 9, section 3 of the Nevada Constitution. *Id.* at 65. The Court entertained a deficient writ, reasoning that the petition "raises pressing issues involving the Nevada Constitution *and* the public policy of this state." *Id.* at 67 (emphasis added).

Petitioner attempts to leverage arguments of issue preclusion and jurisdictional deficiency to allow exception for its procedurally flawed writ. But *Business Computer Rentals* requires both that the Nevada Constitution be directly involved to the extent of defining the scope and meaning of language in the Constitution *and* that the public policy of Nevada be at issue. Petitioner fails to satisfy both prongs. First, issue preclusion is established law not implicating the need to define language in the Constitution, and Petitioner's argument that the District Court violated article 6, section 4 of the Nevada Constitution by entertaining and ruling on the 60(b) motion fails, as discussed above the District Court did have jurisdiction. Second, the public policy of this state is advanced by denying the writ, also discussed above. Therefore, *Business Computer Rentals* does not support Petitioner. The writ should be denied.

C. The District Court did not sanction Petitioner's non-party attorney, and Petitioner fails to show extraordinary circumstances sufficient to depart from the general rule.

Non-party attorney has no protectable rights as he faces no sanctions by the District Court. Non-party attorney did not receive monetary sanctions or non-monetary sanctions. Petitioner cites to *Albany v. Arcata Association, Inc.* for support, where the court imposed monetary sanctions totaling $17,139.75, holding the attorney in that case and his client jointly and severally liable. 106 Nev. 688, 689, 799 P.2d 566, 567 (1990). Unlike the attorney in *Albany*, Petitioner's

attorney has no imposed court sanctions of any kind. Therefore, *Albany* is not applicable, and Petitioner's non-party attorney has no protectable rights.

Furthermore, indirect loss of money or indirect harm to reputation is a risk an attorney voluntarily faces in every case, which should not provide opportunity for mandamus review. For example, an attorney that loses a large, public case may face extreme stigma. This stigma will undoubtedly correspond with a monetary impact, reputational harm or both. But allowing such an attorney to independently attack the judgment or the district court would be chaotic and an improper exception to the general rule regarding mandamus. In these circumstances, no public policy concern is furthered. Additionally, judicial economy would be expended inefficiently and often unnecessarily.

In summary, Petitioner wholly fails to meet the heightened and extraordinary requirements present in those instances where this Court—although loath to do so—deviates from the general rule to entertain a procedurally inadequate writ. Specifically, Petitioner fails to show any meritorious public policy issues advanced by entertaining this writ. On the other hand, Ms. Fallini's arguments correspond with important public policy considerations. Therefore, this Court should summarily deny Petitioner's writ.

CONCLUSION

This Court should not allow Petitioner to side-step the appeal deadline, especially given that public policy supports deciding cases on their merits. Therefore, this Court should not entertain Petitioner's writ of mandamus.

DATED this 14th day of November, 2014.

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