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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, Appellant, v. SUSAN FALLINI, Respondent.	Supreme Court No.: 68033 District Court Case No.: CV24539 **RESPONSE TO DEFENDANT'S/ RESPONDENT'S MOTION TO DISMISS FOR LACK OF APPELLATE JURISDICTION**

Appellant Judith Adams, Individually and on Behalf of The Estate of Michael David Adams, ("Appellant"), by and through her attorney of record, John P. Aldrich, Esq. of the Aldrich Law Firm, Ltd., hereby responds to Defendant/Appellant's Motion to Dismiss for Lack of Appellate Jurisdiction.

I.

DEFENDANT'S MOTION TO DISMISS WAS ALREADY DENIED BY THIS COURT AND THAT DENIAL IS LAW OF THE CASE

On June 10, 2015, Plaintiff filed her Docketing Statement. On June 18, 2015, Defendant filed her Response to Appellant's Docketing Statement. In that Response, Defendant objected to what Defendant called "Appellant's mischaracterization of the issues on appeal." (Response, opening page[1].) Defendant

[1] Defendant's Response has no page number on the first page, says "Page 1 of 1" on the second page, and has no page number on the third page, which is a Certificate of Service. Therefore, Plaintiff will cite that document as "first page," for the first page and "p. 1" for the

further requested sanctions against Plaintiff and her counsel, as well as dismissal of the appeal. On Page 1 of 1, Defendant asserted essentially the same arguments, albeit more briefly, as she asserts in the current Motion to Dismiss.

Defendant's Response to Appellant's Docketing Statement resulted in this Court issuing an Order to Show Cause, instructing Appellant to "show cause why the issues in this appeal should not be limited to challenges to the final judgment entered April 17, 2015." (Order to Show Cause, p. 1.)

As instructed by the Court, Appellant filed a Response to Order to Show Cause. Appellant explained that all of the issues raised in Appellant's statements of the issues are direct challenges to the final judgment entered on April 17, 2015. Defendant Fallini's Motion for Entry of Final Judgment and Plaintiff's various Countermotions are essentially cross-motions which sought directly opposite relief related to Plaintiff's wrongful death/negligence claim. That is, on the one hand, Defendant's Motion for Entry of Final Judgment sought entry of final judgment in Defendant's favor and against Plaintiff. On the other hand, if granted, Plaintiff's Countermotions would have resulted in final judgment being entered against Defendant and in favor of Plaintiff. (See AA VII, 1237-1366.) Appellant incorporates the entire contents of her Response to Order to Show Cause as if fully set forth herein.

Respondent/Defendant Fallini filed a Reply to Appellant's Response to Order to Show Cause. In that Reply, Respondent made essentially the same arguments as set forth in the instant Motion to Dismiss; i.e., Respondent challenged the appellate jurisdiction of the issues raised on appeal.

After considering Respondent's arguments in the prior motion to dismiss, which are essentially the same as those raised in the instant Motion to Dismiss, this Court stated:

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page labeled "Page 1 of 1."

> [W]e conclude that the appeal is not limited to the order entered April 17, 2015, and that this court has jurisdiction to consider challenges to the order entered August 6, 2014, as an interlocutory order. *See American Ironworks & Erectors, Inc. v. North Am. Constr. Corp.*, 248 F.3d 892, 897 (9th Cir. 2001) (noting that "a party may appeal interlocutory orders after entry of a final judgment because those orders merge into that final judgment"); *Consol. Generator-Nev., Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (noting that this court may review an interlocutory order in the context of an appeal from a final judgment).

(Order Reinstating Briefing, p. 1.) Therefore, this Court has already decided this issue, and this Court's decision is law of the case. Respondent concedes this point in her Motion to Dismiss. Pages 7-10 of Respondent's Motion to Dismiss is a essentially a motion for reconsideration. In seeking this second bite at the apple, Respondent now argues that this Court erred in its Order Reinstating Briefing.

"The law of the case doctrine, a judicial invention, aims to promote the efficient operation of the courts." Hall v. City of Los Angeles, 697 F.3d 1059, 1067 (9th Cir. 2012) (citing Milgard Tempering, Inc. v. Selas Corp. of Am., 902 F.2d 703, 715 (9th Cir. 1990)). "It generally preludes a court from reconsidering an issue decided previously by the same court or by a higher court in the identical case." Id. (citing United States v. Lummi Indian Tribe, 235 F.3d 443, 452 (9th Cir. 2000)). "The issue in question must have been decided explicitly or by necessary implication in the previous disposition." Id.

This Court already denied Respondent's Motion to Dismiss and that denial is law of the case. The Court should deny Respondent's latest motion and this appeal should proceed.

II.

THIS SECOND MOTION TO DISMISS WAS FILED NINE MONTHS AFTER THE DEADLINE SET FORTH IN NRAP 14(f)

In the opening paragraph of the instant Motion, Respondent cites only a portion of NRAP 14(f). The entire content of that rule is as follows:

> **Response by Respondent(s).** Respondent, **within 7 days after service of the docketing statement**, may file an original and 1 copy of a single-page response, together with proof of service on all parties,

> if respondent strongly disagrees with appellant's statement of the case or issues on appeal. If respondent believes there is a jurisdictional defect, respondent should file a motion to dismiss. In cases involving more than one respondent, any number of respondents may join in a single response. Multiple respondents are encouraged to consult with each other and, whenever possible, file only one response.

NRAP 14(f) (emphasis added). Thus, by rule, Respondent had to file her Motion to Dismiss within seven days after Appellant filed her Docketing Statement. As set forth above, Respondent indeed moved to dismiss, and that motion was denied. The instant Motion to Dismiss was filed approximately nine months after the Docketing Statement was filed. This Court should decline to consider the instant Motion to Dismiss, as it was filed nine months after the docketing statement.

Moreover, Appellant asks this Court to take note of Respondent's conduct and timing in bringing this second Motion to Dismiss. After litigating this exact issue, and this Court reinstating the briefing, on February 11, 2016, Appellant filed her Opening Brief and a seven-volume appendix. Appellant drafted her brief based on the status of the case at the time the Opening Brief was due. Respondent has now read through the brief and apparently determined she needed to renew her motion to dismiss.

Finally, on March 3, 2016, Respondent's counsel sent an e-mail to Appellant's counsel and asked if Appellant's counsel would "grant us a 30-day extension to respond to your opening brief." (See Declaration of John P. Aldrich, Esq., attached hereto as Exhibit 1; E-mail from David Hague, Esq., to John P. Aldrich, Esq., dated March 3, 2016, attached hereto as Exhibit 2.) The next day, Respondent's counsel called Appellant's counsel to reiterate the request. At no time in either the e-mail or during the telephone conference did Respondent's counsel disclose that he intended to file a motion to dismiss after the original deadline had passed, and then further seek to delay this appeal by requesting a stay, once again, of the briefing schedule. (Exhibit 1.) Consequently, as a professional courtesy, Appellant's counsel agreed to the extension, and this Court approved the stipulation. (Exhibit 1.) The stipulation changed the due date of Respondent's Opening Brief

from March 14, 2016 to April 13, 2016. The instant Motion to Dismiss was filed on March 18, 2016 – four business days after the original due date of Respondent's Answering Brief. Had Appellant's counsel known of Respondent's true intentions, he would not have granted the professional courtesy. (Exhibit 1.)

III.

THE ISSUES RAISED ON APPEAL ARE PROPERLY BEFORE THIS COURT

A. The Issues Related to the Entry of Final Judgment and the Denial of Plaintiff's Countermotions Are Inextricably Intertwined

All of the issues raised in Plaintiff's appeal are direct challenges to the final judgment entered on April 17, 2015 and the denial of Plaintiff's various Countermotions. As explained in Section I above, Defendant Fallini's Motion for Entry of Final Judgment and Plaintiff's Countermotions are essentially cross-motions which sought directly opposite relief related to Plaintiff's wrongful death/negligence claim. Thus, the issues to be addressed by this Court are inextricably intertwined, requiring the Court to consider all applicable interlocutory orders as well.

The Order appealed from denied Plaintiff's Countermotions, granted Defendant's Motion for Entry of Final Judgment and dismissed Plaintiff's case with prejudice. (See AA VII, 1367-1371.) Consequently, the denial of Plaintiff's Countermotions, and the granting of Defendant's Motion, resulted in final judgment being entered against Plaintiff/Appellant. The denial of Plaintiff's Countermotions is directly appealable pursuant to NRAP 3A because it concerns the same subject matter as the district court considered and addressed in granting Defendant's Motion for Entry of Final Judgment and denying Plaintiff's Countermotions. Plaintiff did not raise any issues in the appeal that had not been placed in consideration before the district court entered its Order Granting Motion for Entry of Final Judgment and Dismissing Case with Prejudice. The issues raised that relate to the denial of Plaintiff's Countermotions are the same issues raised by an appeal of the granting

of Defendant's Motion, and are appropriately before this Court.

B. The August 6, 2016 Order Was an Interlocutory Order That Merged into the Final Judgment

As noted above, this Court has already found that the August 6, 2014 Order was interlocutory in nature. (See Section I, supra.) Appellant has already expounded upon this issue in her Response to Order to Show Cause.

Black's Law Dictionary defines "interlocutory" as "Provisional; interim; temporary; not final. Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy." Black's Law Dictionary, p. 815 (6th Edition, 1990). Black's Law Dictionary defines an "interlocutory decision" as "[a]ny decision prior to a final decision." *Id.*

Although Respondent asserts that this Court erred when it made that finding, even the case cited by Respondent, Hall v. City of Los Angeles, 697 F.3d 1059 (9th Cir. 2012), supports the conclusion that the August 6, 2014 Order was interlocutory in nature. While considering whether the denial of a motion for leave to amend was properly before it, the Ninth Circuit discussed interlocutory orders as follows:

> "Such orders, as a class, contemplate further proceedings in the district court, and [we] ha[ve] previously held that review is available after the final judgment, into which they merge." *Id.* Once a district court enters final judgment and a party appeals, however, those earlier, non-final orders become reviewable. *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984) ("An appeal from a final judgment draws in question all earlier, non-final orders and rulings which produced the judgment."). This is so because the earlier non-final orders merge with the judgment. Bradshaw, 662 F.2d at 1304.
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> . . . . By appealing the final judgment, [appellant] implicitly brought all of the district court's subordinate orders within the jurisdiction of our court. *Chacon v. Wood*, 36 F.3d 1459, 1468 (9th Cir. 1994) ("When reviewing final judgments in civil proceedings we have jurisdiction to review any interlocutory orders or other rulings that may have affected the outcome below."), *superseded on other grounds by* 28 U.S.C. § 2253(c); *U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1103 (9th Cir. 1985) ("While we recognize the importance of correcting erroneous interlocutory rulings as early as possible, the failure to challenge an erroneous interlocutory ruling does not make the error appeal proof when the final judgment comes before this court for re-view."), *superseded on other grounds by* 28 U.S.C. § 2253(c).
> . . .

Id. at 1070. See also Munoz v. Small Bus. Admin., 644 F.2d 1361, 1364 (9th Cir. 1981) (holding that "an appeal from the final judgment draws in question all earlier non-final orders and all rulings which produced the judgment" and also that a second judgment calls into question the propriety of the first, giving the court jurisdiction over both).

As already ruled on by this Court, the August 6, 2014 Order was not a final order and it merged into the final judgment. Indeed, once it was entered, Respondent had to bring a separate motion for entry of final judgment based on the district court's August 6, 2014 Order.

IV.

CONCLUSION

This Court already denied Respondent's first motion to dismiss, which asserted essentially the same arguments, and that dismissal is law of the case. Further, the instant Motion to Dismiss was filed nine months after the deadline set forth in NRAP 14(f) and after the expiration of the original deadline for filing Respondent's Answering Brief. While Appellant's counsel concedes he granted an extension as a professional courtesy, he did so after being asked if he would "grant us [Respondent] a 30-day extension to respond to your opening brief," without any mention of additional motion practice or a request to stay briefing. Finally, all

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issues raised in the appeal are properly before this Court. Consequently, Respondent's Motion to Dismiss should be denied.

DATED this 25th day of March, 2016.

Respectfully submitted,

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Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing **RESPONSE TO DEFENDANT'S/ RESPONDENT'S MOTION TO DISMISS FOR LACK OF APPELLATE JURISDICTION** was filed electronically with the Nevada Supreme Court on the 25th day of March, 2016.

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

David R. Hague
Fabian VanCott
215 S. State Street, Suite 1200
Salt Lake City, UT 84111-2323
Attorney for Respondent

An employee of Aldrich Law Firm, Ltd.

EXHIBIT 1

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DECLARATION OF JOHN P. ALDRICH

State of Nevada)
)ss:
County of Clark)

Pursuant to NRS 53.045, Declarant hereby declares and states the following:

1. I, John P. Aldrich, am an attorney licensed to practice in the State of Nevada. I am currently a shareholder in Aldrich Law Firm, Ltd.

2. My current office address is 1601 S. Rainbow Boulevard, Suite 160, Las Vegas, Nevada 89146.

3. I have personal knowledge of the contents of this document, or where stated upon information and belief, I believe them to be true, and I am competent to testify to the facts set forth herein.

4. On March 3, 2016, Respondent's counsel sent an e-mail to me and asked if I would "grant us [Respondent] a 30-day extension to respond to your opening brief."

5. The next day, Respondent's counsel called me to reiterate the request. At no time in either the e-mail or during the telephone conference did Respondent's counsel disclose that he intended to file a motion to dismiss after the original deadline had passed, and then further seek to delay this appeal by requesting a stay, once again, of the briefing schedule.

6. Consequently, as a professional courtesy, I agreed to the extension, and this Court approved the stipulation.

7. The stipulation changed the due date from March 14, 2016 to April 13, 2016.

8. The instant Motion to Dismiss was filed on March 18, 2016 – four business days after the original due date of Respondent's Answering Brief.

9. Had Appellant's counsel known of Respondent's intentions, he would not have granted the professional courtesy.

10. I drafted the Appellant's Opening Brief based on the issues as they existed at the time the brief was due, as this Court had already ruled on the jurisdiction issue Respondent raised for the second time in the instant Motion to Dismiss.

Pursuant to NRS 53.045, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 25th day of March, 2016.

JOHN P. ALDRICH

EXHIBIT 2

EXHIBIT 2

John Aldrich

From: David R. Hague [dhague@fabianvancott.com]
Sent: Thursday, March 03, 2016 9:49 AM
To: John P. Aldrich
Cc: James C. Waddoups; Andy Sellers
Subject: Fallini--Appeal Extension

John:

Will you please grant us a 30-day extension to respond to your opening brief? If so, I will prepare a stipulation for your review.

Thanks,

Dave

DAVID R. HAGUE
FabianVanCott
Mobile: 801.558.2822