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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,

vs.

SUSAN FALLINI,

Respondent.

Supreme Court No. 68033
District Court Case No. CV 24539
Electronically Filed
Mar 31 2016 04:28 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

**REPLY TO APPELLANT'S
RESPONSE TO MOTION TO
DISMISS FOR LACK OF
APPELLATE JURISDICTION**

13 Respondent, Susan Fallini, by and through her attorney of record, David R.
14 Hague, hereby respectfully submits this Reply to Appellant's Response to Motion
15 to Dismiss for Lack of Appellate Jurisdiction.

16 **I. LAW OF THE CASE DOES NOT PRECLUDE THIS COURT**
17 **TO REVISIT THE DETERMINATION AS TO ITS JURISDICTION TO**
18 **ENTERTAIN APPEAL OF THE 60(B) ORDER.**

19 This Court lacks jurisdiction to entertain an appeal of the district court order
20 entered August 6, 2014 ("**60(b) Order**"), despite one order to the contrary. (Order
21 Reinstating Briefing 1 Dec. 2, 2015 ("**Order Reinstating Briefing**"). Because
22 that order is erroneous, Respondent filed the Motion to Dismiss and explained that
23 this Court has the power to revisit its earlier decision. (Mot. Dismiss Lack
24 Appellate Jurisdiction 7-10, March 18, 2016, 16-08619 ("**Motion to Dismiss**"));
see *Bejarano v. State*, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006).

25 Law of the case, which is not a jurisdiction rule, *Hsu v. County of Clark*, 123
26 Nev. 625, 630, 173 P.3d 724, 728 (2007), does not bar the Motion to Dismiss. The
27 doctrine "merely expresses the practice of courts *generally* to refuse to reopen
28 what has been decided: *it is not a limit to their power.*" *Id.* (emphasis added).

1 Significantly, review of appellate jurisdiction is expressly excepted from the
2 general doctrine. The Ninth Circuit made this clear. In reasoning that appeal
3 deadlines are “mandatory and jurisdictional” such that the court is “obligated to
4 dismiss whenever it becomes apparent that [the court] lacks jurisdiction,” the
5 *Houser* court revisited a ruling made by a prior panel, taking on its “independent
6 duty to decide” the timeliness of the appeal. *United States v. Houser*, 804 F.2d 565
7 (9th Cir. 1986). The circuit outright rejects the “contention that the law of the case
8 doctrine prevents reconsideration of the issue of our appellate jurisdiction.”
9 *Malone v. Avenenti*, 850 F.2d 569, 571 (9th Cir. 1988) (emphasis added).¹ Thus,
10 because the doctrine is discretionary and expressly excepts reconsideration of
11 appellate jurisdiction, it is proper to entertain the Motion to Dismiss.

12 Furthermore, because there are two contradicting orders, the Court should
13 exercise its discretionary power and revisit the issue of jurisdiction. Namely, in the
14 Order Denying Petition for Extraordinary Writ, this Court determined that the
15 60(b) Order was directly appealable as a “substantively appealable order” under
16 NRAP 3A(b)(8) and that petitioner failed to file a timely appeal. (Order Den. Pet.
17 Extraordinary Writ Relief 2 Jan. 15, 2015, No. 66521, 15-01698 (“**Order Denying**
18 **Writ Relief**”). This Court has stated repeatedly that “claims that are appropriate
19 for a direct appeal must be pursued on direct appeal, or they will be considered
20 waived in subsequent proceedings,” *Franklin v. State*, 110 Nev. 750, 752, 877 P.2d
21 1058, 1059 (1994), *overruled on other grounds by Thomas v. State*, 115 Nev. 148,
22 979 P.2d 222 (1999).² Contrary to its holding in the Order Denying Writ Relief and
23 *Franklin*, this Court held that it had jurisdiction to entertain an appeal of the 60(b)
24 Order in its Order Reinstating Briefing. (Order Reinstating Briefing 1 Dec. 2,

26 ¹ See also *Hoyt v. Hildreth*, 2006 WL 1795423 (D. Nev. June 28, 2006) (stating
27 that “[t]he law of the case doctrine does not prevent reconsideration of issues
concerning appellate jurisdiction . . .”).

28 ² See also *Ellis v. State*, 125 Nev. 1033 (2009), *unpublished*.

1 2015). Because these two orders are directly at odds, and in light of the case law
2 and arguments in the Motion to Dismiss, this Court should revisit its decision.

3 In short, the Court erred in holding it has appellate jurisdiction over the
4 60(b) Order. Appellate jurisdiction is excepted from the law of the case doctrine.
5 Further, “[t]he doctrine of the law of the case is not absolute.” *Bejarano*, 122 Nev.
6 at 1074. The Court may and should revisit and resolve the contradicting orders.

7 **II. THE MOTION TO DISMISS WAS TIMELY; JURISDICTION**
8 **MAY BE CHALLENGED BY ANY PARTY AT ANY TIME.**

9 The limited appellate jurisdiction of this Court, being subject matter
10 jurisdiction, is not waivable; therefore, a motion to dismiss for lack of appellate
11 jurisdiction is not governed by N.R.A.P. 14(f)’s deadline. Appellant asserts—
12 without any cited support—to the contrary: Appellant’s proposition fails.

13 Appellate jurisdiction is subject matter jurisdiction, being “the Court’s
14 authority to render a judgment in a particular category or case.” *Landreth v. Malik*,
15 127 Nev. 175, 179, 251 P.3d 163, 166 (2011); *Bergenfield v. BAC Home Loans*
16 *Servicing*, 131 Nev. Adv. Op. 68, 354 P.3d 1282, 1283 (2015). For instance, the
17 *Bergenfield* court in reviewing its appellate jurisdiction sua sponte cited to
18 *Landreth* in reasoning that “[w]hether a court lacks subject matter jurisdiction can
19 be raised by the parties at any time, or *sua sponte* by a court of review....” *Id.*

20 “[A] challenge to a court’s subject matter jurisdiction is not waivable . . . and
21 can be raised at any time, or reviewed sua sponte by an appellate court.”
22 *Holdaway-Foster v. Brunell*, 130 Nev. Adv. Op. 51, 330 P.3d 471, 474 (2014). A
23 time limit implies, if not expressly sets out, a condition of waiver. Appellate
24 jurisdiction, being a court’s jurisdiction over the subject matter of an appeal, can be
25 challenged at any time, and lack of subject matter jurisdiction makes a court’s
26 determination void. *Landreth*, 251 P.3d at 166; *Houser*, 804 F.2d 565. Thus, the 7-
27 day deadline cannot apply to the Motion to Dismiss, being incongruous with the
28 nature of, and ability to challenge at any time, subject matter jurisdiction.

1 Respondent’s purposeful decision not to quote the entirety of N.R.A.P. 14(f) was
2 proper: the portion of the rule regarding the docketing statement response deadline
3 is not relevant to the Motion to Dismiss.

4 As to counsel’s conduct, Appellant’s counsel asserts that he granted a
5 “professional courtesy” in stipulating to an extension. (Resp. Def.’s/Resp’t Mot.
6 Dismiss Lack of Appellate Jurisdiction 4 March 25, 2016, 16-09478). Counsel for
7 Respondent has a different point of view. Appellant’s counsel did not allow for an
8 extension as a courtesy. Instead, Appellant’s counsel exploited Respondent’s
9 extension request to obtain an agreement to stay any collection efforts of
10 Respondent if the district court were to award attorneys’ fees. (Declaration of
11 David R. Hague and email from John P. Aldrich, Esq. dated March 4, 2016,
12 attached as Exhibit 1). The stipulated extension, therefore, was no courtesy at all
13 but a negotiated agreement. Appellant’s material omission strikes Respondent’s
14 counsel as purposeful deception to paint Respondent’s counsel in poor light.

15 **III. THE 60(B) ORDER IS NOT PROPERLY BEFORE THIS**
16 **COURT AND THE FACT THAT THE COUNTERMOTIONS ARE**
17 **APPEALABLE IS IRRELEVANT TO THAT CONCLUSION.**

18 Appellant expounds on an irrelevant issue regarding the appeal of the April
19 17, 2015 final judgment and the related countermotions. The countermotions
20 consist of the following motions filed by Appellant: (1) a motion to reconsider, (2)
21 a motion for relief under NRCP 60(b), and (3) a countermotion for final judgment
22 in favor of Plaintiff. The countermotions are appealable. The 60(b) Order,
23 however, is a separate, directly appealable order, and not a subordinate order of the
24 final judgment. (Mot. Dismiss Lack Appellate Jurisdiction 8-10).

25 The 60(b) Order, being directly appealable back in September of 2014, is not
26 now appealable. *Franklin*, 110 Nev. at 752. The appeal right has been waived. *Id.*
27 Additionally, the 60(b) Order has no bearing on whether the District Court erred in
28 denying Appellant’s countermotions. Neither did the 60(b) Order produce the final
judgment. It merely allowed the Court to reach the merits of the case. On the

1 merits, Appellant loses. To illustrate, analyze the Opening Brief: a single page
2 relates to the Final Judgment and counter motions. (Appellant's Opening Br. 41).
3 As Appellant's only path forward mandates avoiding the merits of the case,
4 Appellant's entire case now hinges on appeal of the 60(b) Order and reinstatement
5 of the default judgment. But Appellant failed to timely appeal, waiving the appeal
6 right and eliminating this Court's appellate jurisdiction.

7 Appellant cites to *Hall v. City of Los Angeles*, 697 F.3d 1059 (9th Cir. 2012),
8 as support for the proposition that the 60(b) Order is interlocutory and merges into
9 the Final Judgment. But, as outlined in the Motion to Dismiss, careful reading
10 supports the opposite. Indeed, Appellant's quoted language states that applicable
11 interlocutory orders "*become* reviewable" through merger. *Id.* at 1070. Thus,
12 review of such interlocutory orders *first* arises after final judgment. *Id.* Crucially,
13 the *Hall* court first noted that the applicable order "is not appealable" before
14 analyzing merger. *Id.*

15 Here, however, the Order Denying Writ Relief holds that the 60(b) Order
16 *was* directly appealable and thus *became* reviewable upon service of the notice of
17 entry of that order. It is not an interlocutory order subject to merger under *Hall*.
18 This Court has stated repeatedly that "claims that are appropriate for a direct
19 appeal must be pursued on direct appeal, or they will be considered waived in
20 subsequent proceedings." *Franklin* 110 Nev. at 752. Thus, the issue of appellate
21 jurisdiction must be revisited. And the Court should find a lack of appellate
22 jurisdiction to entertain the untimely appeal of the 60(b) Order.

23
24 **FABIAN VANCOTT**
25 /s/ David R. Hague
26 David R. Hague, Esq.
27 Nevada Bar No.12389
28 215 South State Street, Ste. 1200
Salt Lake City, Utah 84111-2323
Telephone: (801) 531-8900

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of March, 2016, I caused a true and correct copy of the foregoing **REPLY TO APPELLANT'S RESPONSE TO MOTION TO DISMISS FOR LACK OF APPELLATE JURISDICTION** to be served via U.S. mail, postage prepaid as follows:

John P. Aldrich, Esq.
Aldrich Law Firm, Ltd.
1601 S. Rainbow Blvd., Ste. 160
Las Vegas, NV 89146



An employee of Fabian VanCott

EXHIBIT 1

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DECLARATION OF DAVID R. HAGUE

State of Nevada)
)ss:
County of Clark)

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

1. Declarant is an attorney licensed to practice in the State of Nevada.

2. Declarant's office address is 215 S. State Street, Suite 1200, Salt Lake City, Utah 84111.

3. I, David R. Hague, have personal knowledge of the contents of this document and I am competent to testify to the facts set forth herein.

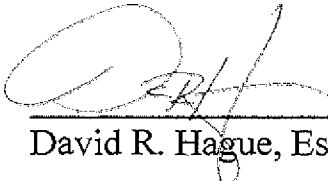
4. On March 3, 2016, I requested of Appellant's counsel an extension to the due date for Respondent's Answering Brief.

5. On March 4, 2016, Appellant's counsel sent an email setting forth the terms upon which he would grant an extension to the filing deadline of Respondent's Answering Brief.

6. A true and correct copy of the March 4, 2016 email from Appellant's counsel is attached.

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 30 day of March, 2016



David R. Hague, Esq.

From: John Aldrich <jaldrich@johnaldrichlawfirm.com>
Sent: Friday, March 4, 2016 12:13 PM
To: David R. Hague
Cc: James C. Waddoups; Andy Sellers; 'Eleanor Engebretson'
Subject: RE: Fallini--Appeal Extension

David,

This e-mail will confirm our conversation today. As I explained, I am generally not opposed to granting such a courtesy. In this instance, I have a concern. If Judge Lane were to grant an attorney fee award against me or my client, the extension could then become a problem. I explained that I would agree to the 30-day extension so long as you will agree not to execute on an attorney fee award, should one be entered, until after the decision on the appeal. You and I have agreed to those terms.

I will watch for the stipulation. I am out this afternoon and I have an arbitration hearing on Monday, but I will return it as soon as possible.

Thanks.

John P. Aldrich, Esq.
ALDRICH LAW FIRM, LTD.
1601 S. Rainbow Blvd., Suite 160
Las Vegas, Nevada 89146
702.853.5490 Telephone
702.227.1975 Fax

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From: David R. Hague [mailto: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

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