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 **RESPONDENT'S ANSWERING BRIEF**

N.R.A.P. 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are person and entities as described in N.R.A.P. 26.1(a), and must be disclosed.

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DATED this 14th day of April, 2016.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases (Cont'd.)

Cases (Cont'd.)

Cases (Cont'd.)

Rules

Nevada Rules of Appellate Procedure

Nevada Rules of Civil Procedure

Nevada Rules of Professional Conduct

Statutes

Nevada Revised Statutes

JURISDICTIONAL STATEMENT

On March 18, 2016, Respondent filed with this Court a *Motion to Dismiss for Lack of Appellate Jurisdiction* (the "**Motion to Dismiss**") pursuant to N.R.A.P. 27 and Nevada case law and in accordance with N.R.A.P. 14(f), which provides that "[i]f respondent believes there is a jurisdictional defect, respondent should file a motion to dismiss." N.R.A.P. 14(f). By this reference, Respondent incorporates the Motion to Dismiss and does not waive any of those issues or arguments therein by failing to address them again in Respondent's Answering Brief, nor does Respondent, by filing her Answering Brief, consent to this Court's appellate jurisdiction to review the 60(b) Order as defined below.

The Nevada Supreme Court does not have appellate jurisdiction to review the August 6, 2014 Order in which the District Court granted relief from judgment pursuant to N.R.C.P. 60(b) based upon finding fraud upon the court (the "**60(b) Order**"). The appellate jurisdiction of the Nevada Supreme Court is limited. *Brown v. MHC Stagecoach*, 129 Nev. Adv. Op. 37, 301 P.3d 850, 851 (2013); *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 444, 874 P.2d 729, 732 (1994). "The right to appeal is statutory." *KDI Sylvan Pools, Inc. v. Workman*, 107 Nev. 340, 343, 810 P.2d 1217, 1219 (1991); *see Taylor Constr. Co. v. Hilton Hotels*, 100 Nev. 207, 678 P.2d 1152 (1984). Further, "[a]n untimely notice of appeal fails to vest jurisdiction in the court to entertain the appeal." *In re Miller*, 111 Nev. 1, 10, 888 P.2d 433, 438 (1995). The 60(b) Order is an appealable order. N.R.A.P. 3A(b)(8); *Foster v.*

Dingwall, 126 Nev 49, 228 P.3d 453 n.3 (2010); *Lindbolm v. Prime Hospitality Corp.*, 120 Nev. 372, 374 n.1, 90 P.3d 1283, 1284 n.1 (2004). Specifically, this Court held that the 60(b) order was an appealable order. (Order Denying Petition for Extraordinary Writ Relief 2 Jan. 15, 2015). The time set for appeal of the 60(b) Order is the 30-day period after notice of entry of judgment. *Paradise Palms Community Ass'n v. Paradise Homes*, 86 Nev. 859, 861, 477 P.2d 859, 860 (1970). "The 30-day period is jurisdictional." *Id.* (emphasis added). In other words, "service of the notice of appeal within the prescribed statutory time is mandatory and jurisdictional." *Rogers v. Thatcher*, 70 Nev. 98, 100 255 P.2d 731, 732 (1953). Because appellant failed to file a timely notice of appeal as to the 60(b) Order within the mandatory and statutory prescribed period following notice of that order's entry, Appellant's May 15, 2015 notice of appeal, being 242 days past the statutory prescribed period, fails to vest jurisdiction in this Court to entertain the appeal of the 60(b) Order.

However, the Nevada Supreme Court has jurisdiction, pursuant to N.R.A.P. 3A(b)(1), to review the final judgment dismissing Appellant's case entered on April 17, 2015 by the District Court (the "**Final Judgment**"). Notice of entry of the Final Judgment was served on Appellant April 21, 2015, and Appellant filed a notice of appeal on May 15, 2015 within the mandatory and statutory prescribed 30-day period. Appellant filed a timely notice of appeal as to the Final Judgment, which

vests jurisdiction in this Court to entertain the appeal of the Final Judgment and only the Final Judgment.

To the extent that this Court determines that it has appellate jurisdiction to review the 60(b) Order, which appeal period has lapsed, and applying the same principles and analysis set forth by this Court in an earlier order (Order Reinstating Briefing 1 Dec. 2, 2015), this Court must also have jurisdiction to entertain the interlocutory order in which the district court denied Respondent's Motion for Reconsideration. (Order after Hr'g Aug. 12, 2010, AA, II, 0338-0341) (the "**Order Denying Reconsideration**"). Therefore, if this Court entertains an appeal of the 60(b) Order, this Court must also entertain appeal of the Order Denying Reconsideration.

STATEMENT OF THE ISSUES

A. Whether the District Court properly set aside the original default judgment entered against Respondent in this matter pursuant to Rule 60(b) of the Nevada Rules of Civil Procedure and in accordance with its inherent authority to set aside judgments obtained via fraud on the court.

B. After setting aside the default judgment, whether the District Court properly entered final judgment in favor of Respondent and dismissed the case with prejudice.

C. Whether the District Court erred (i) in denying Respondent's Motion for Reconsideration or (ii) not looking to the substance of the Motion for Reconsideration and failing to treat it as a timely motion for relief from default judgment pursuant to N.R.C.P. 60(b)(1) for excusable neglect.

COUNTER-STATEMENT OF THE CASE

This appeal arises out of an automobile accident on "open range" in which Appellant's son, Michael Adams, hit one of Ms. Fallini's cows. Appellant filed a complaint for wrongful death against Ms. Fallini in January 2007. The district court entered default judgment against Ms. Fallini based on false facts contrived by Appellant and her counsel, which were deemed admitted and which were subsequently used as grounds to obtain a favorable award of summary judgment.

As a result of misdeeds of Appellant's counsel and the fraudulent procurement of the judgment, on May 21, 2014, Ms. Fallini filed a Motion for Relief from Judgement Pursuant to N.R.C.P. 60(b). Ms. Fallini alleged that Appellant's counsel, as an officer of the court, knowingly forced fraudulent facts on the district court and failed to correct misrepresentations, thereby committing fraud upon the court. The district court agreed, and made the following factual findings which were never properly challenged by Appellant: (1) Appellant's counsel knew or should have known that the accident at issue occurred on "open range;" (2) Appellant's counsel was in possession of an accident report prior to his request for admission, which clearly states that the collision occurred on "open range;" (3) Appellant created a memorial website expressly advocating against "open range" laws shortly after the accident and years before the request for admission; (4) Appellant's counsel received Ms. Fallini's answer that contained an "open range" affirmative defense; (5) Appellant's counsel knew or should have known that a response from Ms. Fallini's

attorney was unlikely; (6) even if Appellant's counsel was not aware the area was on "open range," he likely discovered it was open range afterwards and instead of correcting the falsehood, he utilized the admission that this area was not open range to obtain a favorable judgment; and (7) Appellant's counsel violated his duty of candor under N.R.P.C 3.3.

Consequently, on August 6, 2014, the district court granted Ms. Fallini's motion and set aside the improper judgment by way of the 60(b) Order, concluding that "Mr. Aldrich violated his duty of candor under N.R.P.C. 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." Rather than file a timely appeal with this Court, however, Appellant filed a Petition for Extraordinary Relief (No. 66521), challenging the 60(b) Order (the "**Writ**"). The Writ, which was filed to correct Appellant's untimely appeal, requested the identical relief that Appellant now seeks in this appeal. This Court properly denied the Writ as it challenged a substantively appealable order. In particular, the Court found that "[w]hile the order granting relief from the judgment based on a finding of fraud was subject to challenge by appeal, notice of that order's entry was served by mail on August 13, and petitioner did not file a notice of appeal within the 33-day appeal period." (Order Denying Petition for Extraordinary Relief Jan. 15, 2015) (emphasis added). Finding that writ relief was not available to correct an untimely notice of appeal, this Court declined to consider the merits of Appellant's writ petition.

In this appeal, Appellant argues (1) that the district court improperly set aside the original default judgment pursuant to N.R.C.P. 60(b) and (2) even if it was properly set aside, the district court improperly entered final judgment in favor of Ms. Fallini. The district court did not err or abuse its discretion. It had both statutory and inherent jurisdiction to remedy the fraud committed upon the court and it was not compelled to reach a different result under law of the case, rule of mandate, or issue preclusion because neither this Court nor the district court previously decided whether Appellant's counsel committed a fraud upon the court. Further, entry of final judgment in Ms. Fallini's favor was appropriate because N.R.C.P. 60(b) and the 60(b) Order are meant to provide relief. The only possible relief was to set aside the fraudulent judgment. Additionally, all prior non-final orders and judgments merged into the final judgment that was set aside.

Furthermore, to the extent this Court entertains an appeal of the 60(b) Order, it must also entertain an appeal of the order that denied Respondent's Motion for Reconsideration.[1] Subsequent to the first appeal, the district court stated that it did not know or properly apply "open range" law. (Hr'g 34:1-4 April 11, 2015). In the district court's own words, abuse of discretion is evident: "And I'm learning, oh,

[1] That order, as an interlocutory order, has also merged into the Final Judgment. Therefore, to the extent the 60(b) Order is appealable, this Court may and should review this decision and overturn the district court's order that denied reconsideration.

crud, she [Ms. Fallini] shouldn't have lost this case." (Hr'g 75:12-75:20 July 28, 2014, AA, VI, 1197) (emphasis added). Further, the district court erred in not analyzing the motion for reconsideration, based upon the substance of that motion, under N.R.C.P. 60(b)(1) for excusable neglect.

Accordingly, Ms. Fallini is entitled to relief from the default judgment due to (i) Mr. Aldrich's fraud on the court, which was not timely appealed; (ii) based upon the district court's clearly erroneous denial of the Motion for Reconsideration either (a) due to the district court's self-admitted failure to understand, know, and apply open range law or (b) due to the district court's failure to analyze the motion to reconsider under N.R.C.P. 60(b)(1) for excusable neglect. And, finally, the entry of final judgment upon the merits of the case in favor of Ms. Fallini was proper.

STATEMENT OF FACTS

Mr. Aldrich committed fraud on the court. (AA, VI, 1222-1232, 60(b) Order). Appellant hired Mr. Aldrich on contingency and brought suit against Ms. Fallini following the accident between her son and Ms. Fallini's cow on open range. (AA, I, 1-6). Perhaps Appellant believed that Mr. Aldrich took this case to fight open range law in furtherance of Appellant's crusade against that very law, as documented on Mr. Adam's memorial website. (AA, V, 995-1008). Instead, Mr. Aldrich subverted the justice system despite being an officer of the court. (AA, VI, 1222-1232, 60(b) Order).

Aldrich is an officer of the court. (Id.) This office includes duties owed to the court and carries with it power and responsibility. That Mr. Aldrich is an officer of the court is material to the district court's finding of fraud on the court. (Id.)

Mr. Aldrich was no doubt informed by his clients that the accident occurred on open range. (See Id.) Mr. Aldrich possessed the Nevada highway patrol traffic report stating that the accident occurred on open range. (Id.) He had Ms. Fallini's answer alleging the statutory defense of open range. (Id.) Nonetheless, Mr. Aldrich exploited the procedural rules to obtain a monetary judgment—not in furtherance of Appellant's aims against open range law—in contravention of the facts he knew to be true. (Id.)

Mr. Aldrich advanced outlandish facts in an attempt to fabricate a theory of negligence. (Id.). He conjured a false industry practice—luminescent tagging of cows. (Id.) Industry experts explain such a practice "is simply unheard of." (AA, V, 989-993). Although fencing cattle in Tonopah, Nevada is impossibly expensive, Mr. Aldrich advanced the fact that the cow had crossed a fence to get to the accident site. (AA, VI, 1222-1232, 60(b) Order). With contravening evidence in hand, advancing made-up and absurd facts, despite having the mantel of an officer of the court, Mr. Aldrich sent requests for admissions to Ms. Fallini's counsel, Harold Kuehn ("**Kuehn**"), knowing in advance that Kuehn would not answer. (AA, VI, 1222-1232, 60(b) Order).

The case was filed January 31, 2007 in Nye County. (AA, I, 1-6). Prior to that filing, Appellant originally filed in the Eighth Judicial District Court on November 29, 2006. (AA, I, 14). Mr. Aldrich conferred with Kuehn and they stipulated to dismiss that action to allow the matter to be heard in Nye County. (Id.) Thus, for just under a year, Mr. Aldrich interacted with Kuehn regarding this case before sending the request for admissions on October 31, 2007. (Id.) Kuehn was already failing to respond and communicate. Mr. Aldrich had certainly noticed Kuehn's pattern of misconduct.[2] Only after nearly a year and multiple interactions with Kuehn did Mr. Aldrich send the fraudulent requests for admissions, only after knowing that Kuehn would not respond. (AA, VI, 1222-1232, 60(b) Order)

In a torturous twist, the traffic report and death report uncover facts relating to fault. Mr. Aldrich possessed both reports prior to sending the request for admissions. (Id.). Mr. Adams was driving drunk.[3] (AA, V, 978, 986). Mr. Adams was speeding.[4] (AA, V, 957-978). Mr. Adams negligently drove on a road that he

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[2] Kuehn was disbarred in 2015 and the Court cited to Kuehn's pattern of misconduct in determining that disbarment was the proper discipline.

[3]The "Death Investigation Report" number 05-2339 with an official blood test of the deceased showed that his blood "contained a concentration of ethanol of 0.08 gram per 100 milliliters of blood. . ."

[4] According to the accident report, the vehicle's speed exceeded the posted limit of 70 MPH. The accident report found that at the time of side slipping, "not tak[ing] into account any braking that may have been applied" or speed lost as the vehicle struck the cow, the vehicle was traveling at a "speed of 73.52 miles per hour to 79.42 miles per hour."

knew was open range at night, drunk, and speeding.[5] (Id.) Fortunately, Mr. Adams did not hit another car. Unfortunately, Mr. Adams struck a cow and died. (Id.)

As the District Court expressly found, Aldrich knew the accident occurred on open range. (AA, VI, 1222-1232, 60(b) Order). Mr. Aldrich was faced with a choice: (1) combat the applicable open range law or (2) subvert the court system to obtain a monetary judgment because he already knew his counterpart would not respond to requests for admission. He chose poorly and took the path of least resistance unbecoming of an officer of the court. (Id.)

In his requests for admission, Mr. Aldrich requested that Ms. Fallini admit that the "Fallini's property is not located within an "open range" as it is defined in NRS 568.355." (AA, I, 15). Mr. Aldrich researched the law sufficient to know the citation of Ms. Fallini's statutory defense. (See Id.) He knew the property was on open range. (AA, VI, 1222-1232, 60(b) Order)).

Now, Mr. Aldrich improperly cites to this Court the fraudulent facts that are currently and properly set aside due to his fraud on the court. (Appellant's Opening Br. 5). He also asserts that neither this Court nor the district court has the power to unwind his fraud. (Id.) The cited facts are not only false and fraudulently advanced, but have been set aside. The true facts of the case at hand are as follows:

1. The accident happened on open range.

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[5]The accident report marked the deceased as "At Fault."

2. Mr. Adams was driving drunk.
3. Mr. Adams was driving at night through an area prominently marked as open range.
4. Mr. Adams was speeding.
5. Mr. Adams struck a cow and died.
6. Mr. Aldrich knew the accident occurred on open range prior to sending requests for admission stating the opposite.

Simply, the accident occurred on open range and due to Mr. Adams' negligence. Open range law provides that those that own domestic animals do not have a duty to keep those animals off highways located on open range. (Id.) Thus, Ms. Fallini expected to have a perfect statutory defense. However, Mr. Aldrich's fraud on the court succeeded in defeating the merits of the case up until the district court properly set aside the default judgment. (Id.)

As a direct result of Mr. Aldrich's fraud on the court, Ms. Fallini became subject to a multi-million-dollar judgment. (AA, II, 335-341; AA, VI, 1222-1232, 60(b) Order). This judgment was not a product of sanctions. (AA, II, 339). That would be an onerous and abusive penalty. She was subject to the default judgment because of the fraudulent facts manipulated to be deemed admitted by the scheme of Mr. Aldrich. (Id.; AA, II, 330).

Mr. Aldrich developed his case on Kuehn's failure to respond. (AA, VI, 1222-1232, 60(b) Order). Mr. Aldrich saw the pattern of misconduct and dereliction. (See

Id.). He saw opportunity. (Id.) Mr. Aldrich analyzed a year's worth of history with Kuehn, and he knew his false requests would be deemed admitted by virtue of Kuehn's inaction. (Id.)

Default judgment was entered February 4, 2010. (AA, I, 174-175). Thereafter, Ms. Fallini was informed of the default judgment. Having been told by Kuehn that her case with the Adams was resolved in her favor, Ms. Fallini was shocked to learn the true state of affairs. (AA, II, 278). Facing a multi-million-dollar default judgment, Ms. Fallini immediately filed a substitution of attorneys. (AA, II, 269-295). On July 2, 2010, merely 2 weeks after the substitution of counsel and within the 6-month time period required under N.R.C.P. 60(b)(1) to obtain relief from default judgment due to excusable neglect, Ms. Fallini filed a Motion for Reconsideration, setting forth the details of Kuehn's utter failure to represent her. (Id.)

In the hearing regarding Ms. Fallini's Motion for Reconsideration, the district court took judicial notice that the accident occurred on open range. (AA, II, 322). Again, open range law provides that those that own domestic animals do not have a duty to keep those animals off highways located on open range. (AA, VI, 1222-1232, 60(b) Order). Failing to apply the law, the district court denied the Motion for Reconsideration because the district court failed to understand the legal ramifications of "open range":

"I didn't know it was open range at the beginning. It wasn't until a year

> or two into the litigation that somebody—might have been your motion for reconsideration where you said take judicial notice it's open range. 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." (AA, VI, 1197; Hr'g 75:12-75:20 July 28, 2014) (emphasis added).

Additionally, the Motion for Reconsideration sets forth all the required elements for relief under N.R.C.P. 60(b)(1) for excusable neglect. (AA, II, 269-295). Ms. Fallini filed timely under rule N.R.C.P. 60(b)(1), as notice of default was served February 8, 2010 and the motion for reconsideration was entered July 2, 2010. (AA, I, 172; AA, II, 269-270). The district court failed to analyze the Motion for Reconsideration, despite knowing of Kuehn's derelictions and failures, under N.R.C.P. 60(b)(1). (AA, II, 335-341)

After the fraud perpetrated by Mr. Aldrich took hold, this Court was hamstrung. The Court made a ruling, as Mr. Aldrich expected, based upon the procedural guise by which Mr. Aldrich advanced known-false facts. (AA, IV, 732-738). This Court's decision was based almost exclusively upon procedural rules.[6] (Id.) The district court and this Court have been unable to function properly because of the fraud on the court. (See AA, VI, 1193-1194). Mr. Aldrich utilized the procedural rules of the court, despite being an officer of the court, to advance facts

[6] The Court in footnote rejected the argument of Ms. Fallini regarding negligence of her prior attorney based on law that has been abrogated and which did not relate to N.R.C.P. 60(b)(1) (as set forth below). No mention is made regarding alleged misconduct of Mr. Aldrich in the order.

that he knew to be false. (AA, VI, 1222-1232, 60(b) Order). He lied to the court. (Id.). He bolstered that lie with and shrouded that lie in the procedural rules.

Mr. Aldrich again attempts to bury his fraud with procedural arguments, citing issue preclusion and rule of mandate. (Opening Br. 23-29). But the Supreme Court has not made any findings or rulings regarding the existence of fraud on the court. (AA, IV, 732-738). Indeed, new facts were put forth for the district court to consider. (Respd't Answering Br. 4-6). Everything prior to the 60(b) Order was decided upon procedural grounds relating to the effects of request for admissions, (AA, VI, 1193), which procedural rules materially supported the conclusion that the district court did not err in denying Ms. Fallini's Motion for Reconsideration. (AA, IV, 732-738). Subsequently, however, the district court analyzed the assertions of Mr. Aldrich's misconduct for the first time following Ms. Fallini's 60(b) Motion. (AA, V-VI, 931-1233). After weighing the evidence and the law, the district court determined that Mr. Aldrich committed fraud on the court. (AA, VI, 1222-1232, 60(b) Order).

Crucially, at no point was the fact of open range uncertain to Aldrich. (Id.) Thus, the request for admissions was a fraudulent effort to use the court system and procedural rules to obtain a monetary judgment, knowing that a response from Kuehn would not come, as Kuehn was already failing to respond to various motions and requests. (Id. at 1229)

The 60(b) Order opened up for the first time the opportunity to get a decision on the merits of the case. Mr. Aldrich's fraud on the court was properly unwound.

(Id.) Kuehn's derelictions and gross failures were no longer imputed to Ms. Fallini. (Id.) Everything prior to the 60(b) Order was obtained through procedural means. (AA, I-IV, 1-738). Thus, everything from the default judgment was upheld on procedural grounds. (Id.) No case, decision, order or finding prior to the 60(b) Order hinged upon, spoke to, or even remotely relied upon a finding of or absence of fraud upon the court. (Id.) After the 60(b) Order allowed for the merits, (Id.), the final judgment made a ruling based upon the merits. (AA, VII, 1367-1371).

Aldrich has not denied the crucial facts upon which the district court found that he committed fraud on the court. (AA, VI, 1222-1232, 60(b) Order). Aldrich has never disputed that he had a version of the accident report. (AA, VI, 1167). He stated that the report had more information than the one he had access to, but he also said of the report submitted by Ms. Fallini, "I don't have a reason to dispute it or not." (Id.) Aldrich never denied that he knew of Mr. Adams' memorial website and the information it contained about open range and has only stated that the evidence supporting the website is hearsay, although he failed to object. (AA, VI, 1215, Hr'g 93:15-94:10 July 28, 2015; Appellant's Opening Br 36). Having weighed the evidence, including Mr. Aldrich's denial that he knew the accident occurred on open range, after looking at the law and arguments, the district court determined that Mr. Aldrich committed fraud upon the court by advancing known-false facts. (AA VI 1206; AA, VI, 1222-1232, 60(b) Order). Thereby, Mr. Aldrich, an officer of the

court, misled the court and failed to correct misrepresentations. (AA, VI, 1222-1232, 60(b) Order).

In the district court's own words at the hearing on the 60(b) Order, Judge Lane said that he did not know the accident occurred on open range: "I think the main attacks were that we should have known it was open range, and I'm embarrassed to admit I didn't." (AA, VI, 1197). Judge Lane may have taken judicial notice, (AA, II, 322), but he only did so after the fraud was fully ripe—that is after the request for admissions had garnered Appellant and Mr. Aldrich Summary Judgment—(AA, I, 12-28), and further, Judge Lane did not know even know what taking judicial notice meant. (AA, VI, 1197).

The Court discussed its reasoning in its initial reaction following the hearing (AA, VI, 1197-1205). Judge Lane talked through the issues for his own benefit to clear his mind. (Id.) Judge Lane voiced a feeling that perhaps Mr. Aldrich's conduct was not fraud on the court. (AA, VI, 1203). But importantly, all of those discussions the court had with itself were not how the district court ruled. (AA, VI, 1222-1232, 60(b) Order) In fact, Judge Lane, in his own words, had made a rash ruling earlier in his career by failing to apply the law and instead ruling by his gut and handing the case over to this Court. (AA, VI, 1200-1202). He made that mistake and learned from it (Id.) Judge Lane did not make a rash ruling based upon a gut feeling from the bench at the hearing. (Id. at 1206). Instead, Judge Lane took the motion and arguments made under consideration and issued his decision from his chambers,

away from court observers, away from the attorneys and with ample time to research, review and consider the facts, arguments and the law. (Id.) Here, the district court considered the arguments, weighed the evidence, analyzed the applicable law to which officers of the court are subject, and determined that Mr. Aldrich committed fraud on the court. (AA, VI, 1222-1232, 60(b) Order).

Expressing his intent to analyze and apply the law, Judge Lane said to Mr. Aldrich "If I am confident that based on the laws that you've cited and the things you've cited in your brief that there was no fraud committed by you by asking for an admission that it was open range when you knew it wasn't, then I'll deny [the] motion." (AA, VI, 1207). The court analyzed the law and reached the opposite conclusion granting the 60(b) motion. (AA, VI, 1222-1232, 60(b) Order).

The method for submitting evidentiary support regarding Mr. Aldrich's fraud was chosen by the district court, within its broad discretion. (AA, VI, 1215-1216). Mr. Aldrich had an opportunity to object to the method of evidentiary proceedings. (Id.) Mr. Aldrich failed to object. (Id.) The district court asked Mr. Aldrich if he wanted to object. (Id.) Mr. Aldrich chose not to object. (Id.)

> The Court: Mr. Aldrich, I proceeded today upon the evidentiary standard of them presenting evidence that you committed fraud upon the Court based on their representations as officers of the court, and therefore, we didn't have an evidentiary hearing with people under oath and so forth.
>
> We just made arguments that as officers of the court, if you misrepresent something, you make fraud upon the court. And that's how I proceeded today. <u>You don't have any kick against that, do you?</u>

Aldrich: No.

(AA, VI, 1215-16) (emphasis added).

Having failed to object, the new facts from the 60(b) hearing were properly before the district court. After reviewing these facts, the district court found that Mr. Aldrich "knew or should have known" that the accident occurred on open range because (1) he was in possession of the accident report that stated the accident occurred on open range approximately seven miles past an open range warning sign, (2) Appellant operated a memorial webpage prior to the lawsuit the stated that the accident occurred in "open range county and the cows have the right of way" and generally advocating against open range law; (3) Ms. Fallini's answer asserted the affirmative defense of open range. (AA, VI, 1222-1232, 60(b) Order).

Finally, the district court explained the impact of granting the 60(b) motion at the hearing. (AA, VI, 1214). The district court analyzed the issue of fraud upon the court under the premise that if the 60(b) motion were granted then the case would proceed to the merits: "That's his motion. He wants us to reverse our prior decision and take this to trial because he committed fraud on the court. . . . . So I'm either going to have to say, yes, I find that you did commit fraud on the Court and therefore we're reversing everything from the last four years and we're going to start back at the beginning. . . ." (Id.)

Excepting only the appeal, the district court has experienced everything first hand. (AA, I-VI, 1-1374). Additionally, the district court was challenged

continuously by Ms. Fallini, who went so far as to have her previous counsel Mr. Ohlson seek disqualification citing to "egregious misconduct" of Judge Lane. (AA, IV, 782-787). Despite this, and to the district court's credit, the district court took an unbiased stance and ruled in favor of Ms. Fallini when in the face of the evidence it was clear that Mr. Aldrich committed fraud on the court. (AA, VI, 1222-1232, 60(b) Order). That the district court experienced the hearing first hand and has had continual contact with Mr. Aldrich and each of the attorneys that were Ms. Fallini's counsel throughout this proceeding cannot be overstated. The district court determined that a fraud was committed upon it. (Id.) This finding must stand.

Mr. Aldrich failed to timely appeal the 60(b) Order. (AA, VII, 1234-1236). The law is clear and straightforward on the right to directly appeal the 60(b) Order. (Id.) Even the district court discussed this direct appeal at the hearing. (AA, VI, 1181, 1205) But Mr. Aldrich failed to appeal timely following notice of entry of judgment for the 60(b) Order. (AA, VI, 1218-1233). This Court also found the 60(b) Order as substantively directly appealable. (AA, VII, 1234-1236).

After the time for appeal of the 60(b) Order had run, Ms. Fallini filed her motion for final judgment. (AA, VII, 1237-1240). The district court made a simple finding in her favor, as expected, because the accident occurred on open range. (AA, VII, 1367-1371). The accident occurred on open range and the death of Mr. Adams, while tragic, was entirely his fault.

SUMMARY OF ARGUMENTS

This Court lacks appellate jurisdiction to review the 60(b) Order because Appellant failed to file a timely notice of appeal as to the 60(b) Order within the mandatory and statutory prescribed period following notice of that order's entry. Appellant's timely appeal of the Final Judgment fails to vest jurisdiction in this Court to entertain the appeal of the 60(b) Order. All issues relating to the 60(b) Order raised by Appellant on appeal should be stricken as outside of this Court's limited jurisdiction. If this Court, however, entertains Appellant's appeal of the 60(b) Order, this Court must also entertain Respondent's challenge of the Order Denying Reconsideration.

The district court had inherent jurisdiction and authority to enter the 60(b) Order and remedy the fraud upon the court. Fraud on the court has been recognized for centuries as a basis for setting aside a final judgment and there is no time limit or limit on the power of a court to relieve a party from a judgment for fraud on the court. Law of the case and the rule of mandate did not compel the district court to deny Ms. Fallini's Motion for Relief from Judgment Pursuant to N.R.C.P. 60(b) because this Court had not previously considered, addressed or decided the issues of Mr. Aldrich's misconduct or fraud on the court. Further, issue preclusion is not applicable as fraud on the court is expressly excluded from the doctrine and issue preclusion only applies after an issue is actually litigated and necessarily decided.

Prior to the 60(b) Order, the issue of fraud on the court had not been actually litigated or necessarily decided—it had not been addressed by any court.

An officer of the court is held to a higher standard of conduct. Because simple dishonesty of an officer of the court is so damaging and prevents the judicial machinery from perfuming its impartial task of adjudging cases in the usual manner, attorneys are subject to greater scrutiny. Here, Mr. Aldrich knew that the accident occurred on open range but decided to utilize the rules of procedure inappropriately to advance a known-false fact to obtain a monetary judgment. These actions undermined the court's ability to properly adjudge the case at hand.

The district court, who suffered the fraud and was involved in this case from the beginning, did not abuse its broad discretion when it set aside the default judgment for fraud on the court. Setting aside the fraudulently obtained judgment was appropriate and necessary to preserve and protect the judicial process. Further, the district court properly considered the victim in this case—finding that Ms. Fallini had suffered an injustice, which resulted in a multi-million-dollar judgment without the merits of case being addressed.

This Court must affirm the Final Judgment entered by the district court because the Final Judgment is based on and consistent with Nevada law and the undisputed fact that the accident occurred on open range. The 60(b) Order was meant to provide relief and get to the merits of the case. Whenever possible, cases should

be heard and decided on the merits. Accordingly, the Final Judgment should be affirmed.

STANDARD OF REVIEW

Appellant erroneously states that "[a]ll decisions of the district court following this Court's Order Affirming in Part, Reversing in Part, and Remanding are subject to de novo review." (Appellant's Opening Br 22). That is incorrect. The Court's review of the Order entered on August 6, 2014 in response to Ms. Fallini's Motion for Relief from Judgment pursuant to N.R.C.P. 60(b) is subject to the abuse of discretion standard of review. *Bianchi v. Bank of Am., N.A.*, 124 Nev. 472, 474, 186 P.3d 890, 892 (2008) ("Motions under N.R.C.P. 60(b) are within the sound discretion of the district court, and this court will not disturb the district court's decision absent an abuse of discretion."). The Supreme Court's review, should it determine the 60(b) Order is subject to appeal, should be deferential to the district court, utilizing an abuse of discretion standard. *Bonnell v. Lawrence*, 128 Nev. Adv. Op 37, 282 P.3d 712, 716 (2012). "[T]he question on appeal is not how this court would have ruled as an original matter on the facts presented, but whether the district court abused its discretion in ruling as it did." *NC-DSH, Inc. v. Garner*, 125 Nev. 647, 657 n. 4, 218 P.3d 853, 860 n. 4 (2009).

The standard of review for an order denying a motion to reconsider is likewise an abuse of discretion standard. *See AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010).

This Court reviews subject matter jurisdiction as a question of law subject to de novo review. *Am. First Fed. Credit Union v. Soro*, 131 Nev. Adv. Op. 73, 359 P.3d 105, 106 (2015).

The appeal of the Final Judgment is subject to an abuse of discretion standard or de novo review depending on whether the question at hand is one of fact or of law. A district court's legal conclusions are reviewed de novo. *Otak Nevada, L.L.C. v. Eight Jud. Dist. Ct.*, 129 Nev. Adv. Op. 86, 312 P.3d 491, 497 (2013). Factual determinations are reviewed under abuse of discretion standard such that factual findings of the district court will only be overturned if they are clearly erroneous. *Garventa v. Gardella*, 63 Nev. 304, 310, 169 P.2d 540, 543 (1946). "An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under similar circumstances." *Leavitt v. Siems*, 130 Nev. Adv. Op. 54, 330 P.3d 1, 5 (2014) (emphasis added). The determination that the accident occurred on open range is a question of fact subject to abuse of discretion review. The application of that fact pursuant to Chapter 568 of the Nevada Revised Statutes to dismiss Appellant's claim with prejudice is a question of law subject to de novo review.

Evidentiary determinations as to process and acceptable evidence are reviewed for an abuse of discretion. *Boulder City v. Cinnamon Hills Assoc*., 110 Nev. 238, 244, 871 P.2d 320, 324 (1994).

ARGUMENT AND ANALYSIS

I. THE DISTRICT COURT HAD JURISDICTION TO ENTER THE 60(B) ORDER AND WAS NOT COMPELLED TO REACH A DIFFERENT RESULT.

A. Jurisdiction to Remedy Fraud is Both Statutory and Inherent

The district court had jurisdiction and power to set aside the default judgment for fraud upon the court. "Fraud 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.*, 125 Nev. at 653 (emphasis added). "[T]here is no time limitation." *Id.* at 862 *quoting Price v. Dunn*, 106 Nev. 100, 104, 787 P.2d 785, 787 (Nev. 1990). Indeed, N.R.C.P. 60(b)'s savings clause says, "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court." N.R.C.P. 60(b) (emphasis added). And while finality of judgment matters, "[w]hen a judgement is shown to have been procured by fraud upon the court, no worthwhile interest is served in protecting the judgment." *NC-DSH, Inc.*, 125 Nev. at 653.

Moreover, this Court has held that a trial court has inherent jurisdiction to remedy fraud upon the court, and the court can proceed even in the absence of further action by a party. *Murphy v. Murphy*, 103 Nev. 185, 734 P.2d 738 (1987). In *Murphy*, a petitioner moved to set aside a divorce property distribution by filing an N.R.C.P. 60(b) motion for fraud on the court nearly a year after the distribution. *Id.* A domestic relations referee heard the matter and concluded that the district court lacked jurisdiction because more than six months had elapsed since entry of the decree. *Id.*

at 186. The district court, adopting that conclusion, dismissed the motion, but this Court reversed. *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 N.R.C.P. 60(b) is an appropriate means to seek relief for fraud upon the court. *Id.* The Nevada Supreme Court is not alone in its holding on this matter. Courts throughout the country have dismissed, defaulted, and sanctioned litigants for fraud on the court, often citing the inherent power given to all courts to fashion appropriate remedies and sanctions for conduct which abuses the judicial process. *See, e.g.*, *Brockton Savings Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5, 11-12 (1st Cir. 1985) (affirming district court's entry of default judgment under court's inherent powers in response to defendant's abusive litigation practices); *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir. 1983) ("courts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice."); *Eppes v. Snowden*, 656 F. Supp. 1267, 1279 (E.D. Ky. 1986) (where fraud committed, court has "inherent power [to dismiss] . . . to protect the integrity of its proceedings").

Consistent with the express language of N.R.C.P. 60(b)—and this Court's opinion in *Murphy*—the District Court properly entertained Ms. Fallini's motion and ruled on it.

B. Law of the Case and The Rule of Mandate Did Not Compel the District Court to Deny Fallini's Motion for Relief.

It was proper for the District Court to entertain Fallini's Motion for Relief from Judgment Pursuant to N.R.C.P. 60(b) and allow her an opportunity to present additional facts and evidence in support thereof.

The law of the case doctrine precludes a court from reconsidering an issue decided previously by the same court or by a higher court in the identical case. *United States v. Lummi Indian Tribe,* 235 F.3d 443, 452 (9th Cir. 2000). "Application of the doctrine is discretionary." *Hall v. City of Los Angeles,* 697 F.3d 1059, 1067 (9th Cir. 2012). Further, "[t]he doctrine only applies to issues previously determined, not to matters left open by the appellate court." *Wheeler Springs Plaza, LLC v. Beemon,* 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003). Importantly, "for the law-of-the-case doctrine to apply, the appellate court must actually address and decide the issue explicitly or by necessary implication." *Reconstrust Co. v. Zhang,* 130 Nev. Adv Op. 1, 317 P.3d 814, 818 (2014).

"The rule of mandate is similar to, but broader than, the law of the case doctrine." *United States v. Cote,* 51 F.3d 178, 181 (9th Cir. 1990). The rule of mandate provides that any "district court that has received the mandate of an appellate court cannot vary or examine that mandate for any purpose other than executing it." *Hall v. City of Los Angeles,* 697 F.3d 1059, 1067 (9th Cir. 2012).

However, "although lower courts are obliged to execute the terms of a mandate, they are free as to 'anything not foreclosed by the mandate.'" *United States v. Kellington*, 217 F.3d 1084, 1092-93 (9th Cir. 2000) (citing *Herrington v. County of Sonoma,* 12 F.3d 901, 904 (9th Cir. 1993) (emphasis added)). *Kellington* noted that "[o]n remand, courts are often confronted with issues that were never considered by the remanding court.'" *Id., citing Biggins v. Hazen Paper Co.,* 111 F.3d 205, 209 (1st Cir. 1997), cert denied, 522 U.S. 952 (1997) (emphasis added). "In such cases, '[b]roadly speaking, mandates require respect for what the higher court decided, not for what it did not decide.'" *Id.*, *citing Biggins* at 209 (*citing Rogers v. Hill*, 289 U.S. 582, 587-88, (1933)) (additional citations omitted). In other words, it "leaves to the [lower] court any issue not expressly or impliedly disposed of on appeal." *Nguyen v. United States,* 792 F.2d 1500, 1502 (9th Cir. 1986) (citation omitted).

The district court did not violate the law of the case, nor did the district court violate the rule of mandate. On March 29, 2013, the Nevada Supreme Court entered its *Order Affirming in Part, Reversing in Part and Remanding*. (AA, IV, 732-38). In that Order, this Court considered (1) whether the district court erred in denying Fallini's motion for reconsideration; (2) whether the district court erred in vacating the jury trial; and (3) whether the district court erred in its award of damages. (Id.) But whether Appellant and her attorney committed a fraud on the court was never decided, explicitly or implicitly, by this Court or any other court. (Id.) Whether these arguments were raised is irrelevant to the application of law of the case: Reviewing

or even considering an issue is not remotely equal to actually and explicitly addressing and deciding an issue. Neither the issue of misconduct of Mr. Aldrich nor fraud on the court were actually addressed. Therefore, the law of the case doctrine is not applicable.

As it relates to Fallini's 60(b) Motion, this Court simply considered the broader impact of failing to respond to requests for admission. (Id.) It held, "Fallini's argument is unpersuasive because she has not raised a new issue of fact or law . . . [and] "has presented no evidence on appeal to alter the conclusive impact of admissions under N.R.C.P. as a basis for partial summary judgment." (Id.) But the Court never held that Fallini should be precluded from filing motions or presenting "new issues of fact or law" or other evidence in support of a claim for fraud on the court. The district court recognized this as well:

> As a matter of fact, back when we were doing this case four years ago and so forth, if I remember correctly, we never even got into the facts of the case. I know I didn't. I never saw any driving report, I never heard anybody was drunk. I don't think I was even sure about where the accident occurred at. All I saw in the complaint was at some highway out in rural Nevada, and we never got into the facts of this case. Never during the four years it's been litigated have we gotten into the facts of this case. It's a blank slate to me. Everything that's occurred in this case has occurred procedurally.

(Hr'g 70-71 July 28, 2014, AA, VI, 1123-1217) (emphasis added)).

Consequently, this Court never considered, and certainly did not address or decide, the factual findings subsequently made by the district court: (1) That "Mr.

Aldrich knew or should have known that the accident occurred on open range." (2) That Mr. Aldrich was in possession of the accident report prior to his request for admissions, which clearly states that the collision occurred on open range. (3) That Appellant created a memorial website advocating against open range laws shortly after the accident in 2005. (4) That Mr. Aldrich received Ms. Fallini's answer that contained an open range affirmative defense. (5) That even if Mr. Aldrich was not aware the area was open range in 2007, he likely discovered it was open range afterwards and instead of correcting this alleged known falsehood, he utilized Fallini's admission that this area was not open range as grounds to obtain a favorable award of summary judgment. (AA, VI, 1218-1233, 60(b) Order).

These additional facts, alone, are sufficient to extinguish Appellant's rule of mandate and law of the case assertions. And simply put, because Fallini never moved to set aside the judgment because of a fraud on the court until after this Court entered its mandate, it was impossible for this Court to have reached the merits of that argument.

Accordingly, the rule of mandate did not compel or preclude the result reached by the district court that a fraud on the court was committed. *See Hall*, 697 F.3d at 1067 (holding that where appellate court reversed an order granting summary judgment to defendants on certain issues, the rule of mandate did not require the district court to deny the defendants' subsequent motion for summary judgment on the same issues); *United States v. Kellington*, 217 F.3d 1084, 1095 (holding that

where appellate court reversed a judgment of acquittal but did not rule on a motion for new trial, the rule of mandate did not require the district to deny the new trial motion).

C. Issue Preclusion Is Not Applicable.

First, fraud on the court is an exception to issue preclusion. Second, the general application of issue preclusion does not apply to preclude issues that have merely been raised and never decided. Therefore, the 60(b) Order was not subject to issue preclusion.

1. Fraud on the Court is Excepted from the Doctrine of Issue Preclusion

Fraud on the court is excepted from the issue preclusion because the judgment's legitimacy is called into question. *Calderon v. Thompson*, 523 U.S. 538 (1998). Indeed, an action to set aside a judgment for fraud on the court demands a departure from the doctrine of issue preclusion. *NC-DSH, Inc.*, 123 Nev. at 653. "[N]o worthwhile interest is served" in protecting a judgment procured by fraud. *Id.*

Furthermore, N.R.C.P. 60(b) unequivocally states that finality does not hinder relief: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment . . . ." N.R.C.P. 60(b) (emphasis added).[7] Obviously, finality precedes a motion for relief. It therefore cannot bar

[7] Additionally, "[a] motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation." N.R.C.P. 60(b). The rule therefore

application of N.R.C.P. 60(b). Such an argument eviscerates any application of the rule. Simply, finality is a condition necessarily preceding every motion or independent action for relief from judgment; it cannot be a bar.

2. The Elements of Issue Preclusion are not Met

Issue preclusion, which was formerly referred to as the doctrine of collateral estoppel, "precludes parties . . . from re-litigating a cause of action or an issue which has been finally determined by a court . . . ." *Univ. of Nev. v. Tarkanian,* 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994). Issue preclusion requires that: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action;[8] (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. *Five Star Capital Corp. v. Ruby,* 124 Nev. 1048, 194 P.3d 709 (2008).

Issue preclusion does not apply because the issue of fraud on the court was never actually and necessarily litigated, nor has that claim ever been decided. (AA, IV, 732-738). Nevada courts require that the exact issue at hand be decided previously in a prior proceeding: "For issue preclusion to attach, the issue decided

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contemplates finality twice, indicating both times that it is not a bar to the filing of a motion.

[8] Where is prior litigation between Ms. Fallini and Appellant? There is none.

in the prior proceeding must be identical to the issue presented in the current proceeding." *Alcantara v Wal-Mart Stores, Inc.*, 130 Nev. Adv. Op 28, 321 P.3d 912, 916 (2014). The complete allegations of opposing counsel's fraud on the court have not been expressly claimed, litigated, or reviewed at any point in a prior proceeding or any related proceeding. (AA, I-VII, 1-1374). This simple fact alone puts an end to Appellant's claim and issue preclusion argument.

Furthermore, merely raising an issue is not the same as that issue being actually and necessarily decided. *See Wabakken v. Cal. Dept. Corrs. Rehab.*, 801 F.3d 1143, 1148 (9th Cir. 2015) (holding that "[a]n issue is actually litigated when it is properly raised, by the pleadings or otherwise, **and** is submitted for determination, **and** is determined") (underline emphasis in original) (bold emphasis added) (*quoting People v. Sims*, 651 P.2d 321 (Cal. 1982). For instance, as common sense dictates, when a court makes "no express finding in respect to [an issue,] we cannot conclude the [] court considered and decided the issue." *In re Harmon*, 250 F.3d 1240 (9th Cir. 2001).

Indeed, the requirement for issue preclusion is that the issue be actually and necessarily litigated, meaning that the decision be "necessary to the judgment in the earlier suit." *Frei ex rel. Litem v. Goodsell*, 129 Nev. Adv. Op. 43, 305 P.3d 70, 72 (2013). In the first appeal, this Court did nothing more than determine that the denial of the motion to reconsider was not improper citing to procedural rules governing

requests for admission. (Order Affirming in Part, Reversing in Part and Remanding, AA, IV, 732-738).

And, although marginally related, the procedural path of this case is not at issue. The uncontroverted material facts that opposing counsel (1) knew the accident was on open range, (2) purposefully and calculatingly misled this tribunal, (3) failed to correct purposeful misstatements at multiple necessary and opportune instances, and (4) manipulated and withheld evidence to further this scheme are at issue. Clearly, this issue—that Appellant's counsel utterly ignored and violated his duty of candor and committed fraud upon the court such that the very temple of justice has been defiled—has not been decided in prior litigation.

Further, although Ms. Fallini, through separate counsel, asserted that Judge Lane violated his duty of impartiality, (AA, IV, 782-787), that issue (1) was never actually litigated as it was rightfully dismissed on judicial immunity grounds and (2) is completely distinct from opposing counsel committing fraud upon the court. As a hypothetical example, if Tommy brings a negligence action against Sam and that action is dismissed and then Tommy brings a negligence action for the same injury against Bill, the two claims are distinct. Likewise, Ms. Fallini's argument that opposing counsel committed fraud upon the court is distinct and novel compared to any other claim or argument filed in this or any other related proceeding.

Next, issue preclusion cannot apply if there "was no [prior] litigation of the actual merits." *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008).

The actual merits at issue center on the impropriety of counsel's behavior and newly discovered information of a scheme to mislead and abuse the machinery of justice. Concerning that matter, no merits have been litigated and a prior ruling is nonexistent.

To conclude, to be actually and necessarily litigated, the matter must be properly raised and submitted for determination. *Alcantara*, 321 P.3d at 918. In *Alcantara*, Wal-Mart successfully litigated a wrongful death claim in which a jury found Wal-Mart not liable. *Id.* at 914. Necessary to that judgment, the jury determined Wal-Mart not negligent. *Id.* Therefore, the court reasoned that because Wal-Mart's negligence was necessary to determine liability in the prior case, issue preclusion denied re-litigating Wal-Mart's negligence in a subsequent proceeding. *Id.* at 918. Here, contrary to Wal-Mart, opposing counsel has neither a previously litigated case nor the specific and necessary finding regarding opposing counsel's calculated misleading of or scheme to force fraudulent facts on the court. "Whether the issue was necessarily litigated turns on whether the common issue was necessary to the judgment in the earlier suit." *Id.* (quotations omitted) (emphasis in original). Now, rings the death knell. In what earlier suit has opposing counsel's alleged fraud upon the court been necessarily litigated? No earlier suit exists that has actual and necessary litigation related to opposing counsel's fraud on the court.

D. The Fraudulent Facts are Not Conclusively Established.

Appellant argues that the fraudulent facts Appellant's attorney injected into the court are "conclusively established." (Appellant Opening Br. 5-6). Appellant cites *Smith v. Avery*, 109 Nev. 737, 742, 856 P.2d 1386, 1390 (1993) for the proposition 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." (Id. at 33-34) (emphasis added). Appellant's argument is unpersuasive. The issue that this Court discussed in *Smith v. Avery* was the finality of admitted facts. This Court did not discuss, and has never considered in this case, whether an attorney commits fraud on the court by using the discovery process to advance false facts.

The word "ultimately" means "at the end of a process, period of time, etc." Merriam-Webster, http://www.merriam-webster.com/dictionary/ultimately, (last visited April 12, 2016). Thus, the words "ultimately untrue" mean if the matter is found to be untrue at the end of some process or investigation. There is a profound distinction between a fact that is "ultimately untrue" and one that is simply "untrue" and known to be untrue from the very outset of the discovery process. This distinction avoids the "conclusively established" label without disturbing current legal precedent. If the attorney knows a fact to be false and advances the fact in a request for admission, the above rule is no longer applicable because the attorney,

as an officer of the court, violated his professional obligations and committed fraud upon the court. (AA, VI, 1218-1233).

If the *Smith* case were read the way Appellant would like this Court to interpret it, it would open up a Pandora's box of abusive discovery. For example, in *McCollough v. Johnson, Rodenburg & Lauinger, LLC,* 637 F.3d 939 (9th Cir. 2011), the Ninth Circuit found that the district court "correctly held that JRL's service of false requests for admission violated the FDCPA as a matter of law because the request for admission asked the other side "to admit facts that were not true" and that the requesting party "had information in its possession that demonstrated the untruthfulness of the requested admissions." *Id.* at 952. Under Appellant's reading of *Smith,* there would be no violation. But that is not what *Smith* stands for. *Smith* presupposes that the attorney making the request for admission has complied with rules of civil procedure and rules of professional conduct—*i.e.*, that the attorney does not have information in his or her possession that would demonstrate the untruthfulness of the requested admissions. As the Eleventh Circuit properly noted with regard to requests for admission:

> Essentially, Rule 36 is a time-saver, designed to expedite the trial and to relieve the parties of the cost of proving *facts that will not be disputed at trial.* That is, when a party uses the rule to establish uncontested facts and to narrow the issues for trial, then the rule functions properly. When a party like Perez, however, uses the rule to harass the other side or, as in this case, with the wild-eyed hope that the other side will fail to answer and therefore admit essential elements (that the party has already denied in its answer), the rule's time-saving function ceases;

> the rule instead becomes a weapon, dragging out the litigation and wasting valuable resources.
>
> This is especially true here, where the defendants had denied Perez's core allegations—that the County had a practice, custom, or policy of running down suspects in police cars and that Allsbury intentionally struck Perez—in the answers and again at the scheduling conference. Perez's continued service of the same request for admission in the face of these denials was an abuse of Rule 36. *Perez v. Miami-Dade County*, 297 F.3d 1255, 1268-69 (11th Cir. 2002).

Because opposing counsel knew that the accident happened on open range, he committed fraud on the court by advancing a fraudulent fact through the very procedures of the court. What opposing counsel no doubt considers clever lawyering and proficient advocacy, is nothing other than fraud on the court. Request for admissions cannot be used to force fraudulent facts on the court. That is not the purpose of the rules of civil procedure. The rules were not designed to manufacture claims and facts and then use those artificial claims and facts to blindside opposing parties and deceive the court. Clearly, it is against public policy to hold hostage the judicial process through abuse of the discovery rules. This is exactly what Appellant's attorney did. The *Sierra Glass* court put it plainly: "an act which [is] calculated to mislead the tribunal" is not clever lawyering and proficient advocacy; it "is nothing other than a fraud on the court. . . ." *Sierra Glass & Mirror v. Viking Industries*, 107 Nev. 119, 126, 808 P.2d 512, 516 (1991).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT SET ASIDE THE JUDGMENT.

A. The District Court Has Broad Discretion to Fashion a Judicial Response Warranted by the Fraudulent Conduct.

A "district court has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under N.R.C.P. 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 the district court's decision absent an abuse of discretion. *Id.; Britz v. Consol. Casinos Corp.,* 87 Nev. 441, 445, 488 P.2d 911, 914–15 (1971) ("[T]he trial judge is free to judiciously and reasonably exercise discretion in determining whether a default judgment should be set aside.").

At the hearing on Fallini's Rule 60(b) Motion, the district court stated "I'm presiding over what you call an injustice, and it is an injustice. There's got to be a way to remedy this. I've lost sleep over it also." (AA, VI, 1194, Hr'g July 28 2014 72:8-11) (emphasis added). Pursuant to the district court's inherent power to remedy fraud on the court, it certainly had and has the power and discretion to provide the relief granted in the 60(b) Order and as described at the July 28, 2014 hearing.

B. Setting Aside the Default Judgment for Fraud on the Court Was the Appropriate Remedy.

"Fraud upon the court" has been recognized for centuries as a basis for setting aside a final judgment, sometimes years after it was entered. *Hazel-Atlas Co. v. Hartford Co.,* 322 U.S. 238 (1944). "[A] case of fraud upon the court [calls] into

question the very legitimacy of the judgment." *Calderon v. Thompson,* 523 U.S. 538 (1998). In other words, "[w]hen a judgment is shown to have been procured by fraud on the court, no worthwhile interest is served in protecting the judgment." *NC-DSH, Inc.*, 125 Nev. at 653.

The concept of "fraud upon the court," which the Nevada Supreme Court has adopted, includes "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. *Id.* at 654.

This Court's opinion in *NC-DSH, Inc.* focuses heavily on attorney conduct. It recognized that "[a]lthough not present in all fraud on the court cases, attorney involvement in the fraud is a signal characteristic of many. *Id.* at 655. That is because "[a]n attorney is an officer of the court." *Id.* at 654. As an officer of the court, a lawyer owes a duty of "loyalty to the court, as an officer thereof, that demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates fraud upon the court." *Id.* In that same opinion, the Court cited several times the Second Circuit's decision in *Kupferman v. Consol. Research & Mfr. Corp* 459 F.2d 1072, 1078 (2d Cir. 1972) as persuasive authority on the issue of fraud upon the court. *Id.* In *Kupferman*, the court stated that

> [w]hile an attorney should represent his client with singular loyalty that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from the standard in the conduct of a case he perpetrates fraud upon the court.

Kupferman, 459 F.2d at 1078 (2d Cir. 1972). In other words, "[s]ince attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court." *H.K Porter Co. Inc. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976); *NC-DSH, Inc.*, 125 Nev. 647 (stating that "[w]here a judgment is obtained by fraud perpetrated by an attorney acting as an officer of the court, the judgment may be attacked for fraud on the court.").

There are other rules that govern attorney conduct and which were designed to prevent abusive practice by attorneys. N.R.C.P. 26(g), for example, requires that an attorney of record sign discovery-related filings, and prescribes that the signature certifies that "to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry," the discovery request is "consistent with these rules and warranted by existing law . . . ." N.R.C.P. 26(g). The signature also certifies that the request is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation. *Id.* Accordingly, Rule 26 obligates each attorney to "stop and think about the legitimacy of a discovery request, a response thereto, or an objection" and to make a reasonable inquiry into the factual and legal basis of his response, request, or objection. *See*

Fed. R. Civ. P. 26(g) advisory committee's note to 1983 amendment. The Nevada Rules of Professional Conduct provide further mandates.

Here, the winding trail of litigation, complicated procedural path, the judicial resources wasted, and the towers of legal fees over a near decade long period highlights the cost of an attorney's dishonesty to the tribunal and departure from the N.R.C.P. and N.R.P.C. mandates. It puts concrete focus on the damage an officer of the court can cause by purposeful manipulation of the machinery of justice. The request for admission sent by Appellant's counsel to Ms. Fallini was entirely inconsistent with the rules of civil procedure, including N.R.C.P. 26, and not warranted by existing law. Accordingly, as an officer of the court, similar to many other raised standards for attorneys, simple dishonesty may constitute fraud on the court. Here, the district court properly determined that Mr. Aldrich's conduct constituted a fraud on the court.

Further, lawyers are professionally and ethically responsible for accuracy in their representations to the court. N.R.P.C.. 3.1 states that lawyers "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . ." N.R.P.C. 3.1. Similarly, Rule 3.3 provides that "[a] lawyer shall not knowingly . . . [m]ake a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . ." N.R.P.C. 3.3.

Thus, knowingly advancing false statements of fact to a tribunal, even if doing so through the guise of the discovery process, is fraud on the court and violates the rules of civil procedure and the rules of professional conduct. And using court processes to accomplish the foregoing is more deplorable because it attempts to force the court to be party to the fraud.

C. The District Court Did Not Abuse Its Discretion by Finding a Fraud on the Court.

Judge Lane has been the presiding judge of this case since its inception. He was in the best position—and probably the only position—to determine whether a fraud had been committed on his court. For this reason, his findings of fact and conclusions of law should not be disturbed. Additionally, the standard of review requires that this Court find an abuse of discretion. *Bonnell*, 282 P.3d at 716. "[T]he question on appeal is not how this court would have ruled as an original matter on the facts presented, but whether the district court abused its discretion in ruling as it did." *NC-DSH, Inc.*, 125 Nev. at 657 n. 4. If Judge Lane found and believed Appellant's counsel caused the court not to perform in the usual manner its impartial task of adjudging cases, this finding must stand.

Importantly, before focusing on the conduct at issue, the district court specifically focused on Mr. Aldrich's role as an officer of the court. It noted that "as an officer of the court, [he] had a duty to not mislead the court or fail to correct a misrepresentation." (AA, VI, 1222-1233, 60(b) Order). It held that "[s]imple

dishonesty of an attorney is so damaging on courts and litigants that it is considered fraud upon the court." *Id.* And, citing to the rules of professional conduct, the court further held that "[a]n officer of the court perpetrates fraud on the court a) through an act that is calculated to mislead the court or b) by failing to correct a misrepresentation or retract false evidence submitted to the court." *Id.*

The district court next focused on the conduct at issue. After considering the pleadings, papers, evidence and arguments, the court found that Mr. Aldrich "knew or *should have known* that the accident occurred on open range prior to filing his request for admissions." *Id.* The court made several factual findings, none of which Mr. Aldrich controverted at the hearing or in his papers filed with the district court. Specifically, the court found that Mr. Aldrich "was in possession of the Nevada Highway Patrol Accident Report prior to his request for admissions." The district court found that "[p]age 4 of the Accident Report clearly states that the "collision occurred on open range." It then cited the report (NHP Accident Report NHP-E2005-00779). *Id.* It also found that "Plaintiff Adams created a memorial website advocating against open range laws shortly after accident in 2005 and prior to the requests for admissions. *Id.* The court quoted the website, which states, "He encountered a cow crossing the road between mile marker 34-33 East side of the road. This is open range country and the cows have the right of way." *Id.* Finally, the court found that Mr. Aldrich received Fallini's answer that contained the open range affirmative defense. *Id.*

Based on this uncontroverted evidence, of which Mr. Aldrich and Appellant had the opportunity to object to its admissibility and authenticity. (AA, VI, 1215). Appellant has asserted that it was improper of the court to consider hearsay and unauthenticated documents at the hearing. Appellant, however, failed to object to the evidence when it was introduced at the hearing and failed to contest it when it was attached to Ms. Fallini's pleadings. This failure to object, of course, constitutes a waiver of the right to complain on appeal about the admissibility of the evidence. NRS 47.040(1)(a); *Old Aztec Mine, Inc. v. Brown*, 97, Nev. 49, 623 P.2d 981 (1981) (failure to object below bars review on appeal). Further, hearsay was not at issue, since none of the documents and/or statements were ever offered to show the truth of the matter asserted, but instead were simply offered to show that the statement was made or that the documents exist. *See Wallach v. State*, 796 P.2d 224 (1990). Next, it is important to note that the method the district court determines to admit facts and evidence is subject to an abuse of discretion standard. *Boulder City v. Cinnamon Hills Assocs*., 110 Nev. 238, 244, 871 P.2d 320, 324 (1994) (analyzing a district court's denial of live testimony under an abuse of discretion standard). Here, the district court determined to accept affidavits and then proceeded with the arguments and testimony given at the July 28, 2014 hearing. (AA, VI, 1215, Hr'g 93:15-94:10 July 28, 2015). Lastly and determinatively, the district court judge asked Appellant's lawyer whether he was okay with how evidence was submitted without an evidentiary hearing, and Mr. Aldrich consented. *Id.*

The court found that 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." *Id.* Despite this knowledge, the district court found that Mr. Aldrich sought an admission from Fallini stating that the area where the accident occurred was not open range, a false fact that was deemed admitted when Fallini's attorney failed to respond. Further, the court found that even if Mr. Aldrich did not know this area was open range in 2007—which he clearly did—"he likely discovered it was open range afterwards." And, "[i]nstead of correcting this alleged known falsehood, Mr. Aldrich utilizes Ms. Fallini's admission that this area was not open range as grounds to obtain a favorable judgment." (AA, VI, 1222-1232, 60(b) Order).

The district court's finding was not in clear error: Mr. Aldrich was no doubt informed by his clients that the accident occurred on open range. Mr. Aldrich possessed the Nevada highway patrol traffic report stating that the accident occurred on open range. He had Ms. Fallini's answer alleging the statutory defense of open range. Nonetheless, Mr. Aldrich exploited the procedural rules to obtain a monetary judgment in contravention of the facts he knew to be true. *Id.*

Mr. Aldrich advanced outlandish facts in an attempt to fabricate his theory of negligence. He conjured a false industry practice—luminescent tagging of cows—which industry experts explain "is simply unheard of." (AA, V, 989-993). Although fencing cattle in Tonopah, Nevada is impossibly expensive, Mr. Aldrich advanced

the fact that the cow had crossed a fence to get to the accident site. With contravening evidence in hand, advancing made-up and absurd facts, despite having the mantel of an officer of the court, Mr. Aldrich sent requests for admissions to Ms. Fallini's counsel, Harold Kuehn, knowing in advance that Kuehn would not answer. (AA, VI, 1222-1232, 60(b) Order).

Thus, the district court held, as an officer of the court, "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." *Id*. Consequently, the court found a violation of Rule 60 because "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 not occur on open range, thereby perpetrating fraud upon the court." *Id.* In other words, Mr. Aldrich asked an innocent party to admit known falsehoods and then intentionally injected those falsehoods into the court system to support a motion for summary judgment. This abusive conduct undoubtedly caused the court not to perform in the usual manner its impartial task of adjudging cases. *NC-DSH, Inc.*, 125 Nev. at 654.

The district court also appropriately considered the victim in this case—Ms. Fallini. It noted that the attorney who committed the fraud on the court "may argue that all [Fallini's prior attorney] had to do was simply 'deny' the request for admissions." While this might be true, the court took special consideration of the

fact that Fallini's prior attorney failed "to respond to various motions and requests to the extent that [Mr. Aldrich] knew or should have known that a response from [Fallini's attorney] was unlikely." (AA, VI, 1218-1233, 60(b) Order).

The court also recognized the maxim the Supreme Court expressed in *Hazel Atlas*: the fraud-on-the-court rule should be characterized by flexibility and an ability to meet new situations demanding equitable intervention. Because simple dishonesty of an officer of the court is so damaging and prevents the judicial machinery from perfuming its impartial task of adjudging cases in the usual manner, attorneys are subject to greater scrutiny. *NC-DSH, Inc.*, 125 Nev. at 654. The district court properly applied greater scrutiny to Mr. Aldrich's actions and correctly considered the inequities of the case, as it acknowledged that "one cannot ignore the apparent injustice that Defendant has suffered throughout this matter. Ms. Fallini [was] responsible for a multi-million-dollar judgment without the merits of the case even being addressed."

III. ENTRY OF FINAL JUDGMENT WAS PROPER

Appellant asserts that the 60(b) Order does not actually provide relief to Ms. Fallini because of the procedural posture of the case. This argument fails for two reasons. First, N.R.C.P. 60(b) and the 60(b) Order are meant to provide relief. Second, all prior non-final orders and judgments merged into the final judgment that was set aside.

A. The Court's 60(b) Order Grants Relief from Final Judgment

Rule 60(b) is a remedial provision. *La-Tex P'ship v. Deters*, 111 Nev. 471, 475–76, 893 P.2d 361 (1995). It is to be construed liberally. *Id.* Once granted, rule 60(b)'s primary purpose is to relieve and redress any and all related wrongs. "The salutary purpose of Rule 60(b) is to redress any injustices that may have resulted because of . . . the wrongs of an opposing party." *Nev. Indus. Dev., Inc. v. Benedetti*, 103 Nev. 360, 364, 741 P.2d 802 (1987) (citing *Mendenhall v. Kingston*, 610 P.2d 1287, 1289 (Utah 1980) (emphasis added)).

Appellant argues that Ms. Fallini may have won her motion, but that she somehow is not entitled to relief. (Appellant Opening Br. 41). The statute itself rebuffs Appellant's procedural argument quickly and simply: "On motion and upon such terms as are just, the court may **relieve** a party or a party's legal representative from a final judgment, order, or proceeding. . . ." N.R.C.P. 60(b) (emphasis added). The terms of the 60(b) Order that Appellant purports as binding are in no sense just. Appellant argues that Ms. Fallini is to receive no relief. In fact, what Appellant really wanted is for the district court to completely ignore its prior order under rule 60(b) and then use that very rule, which is purely remedial, to grant Appellant the same relief that the district court already found constitutes fraud upon the court. (AA, VII, 1248-1249). This argument is entirely frivolous and contrary to law. As such, in the face of the plain language and primary purpose of N.R.C.P. 60(b), Appellant's procedural posture arguments must fail.

Instead, the terms of the 60(b) Order are as described by the district court at the 60(b) Order's hearing, namely, that upon grant of the motion all orders, proceedings and judgments would be unwound such that the merits would finally come to bear:

> THE COURT: So I'm either going to have to say, yes, I find that you did commit fraud on the Court and therefore we're reversing everything from the last four years and we're going to start back at the beginning, or I'm going to have to deny [the] motion. (Hr'g 92:19–24 July 28, 2014).

The court granted the motion and, therefore, ruled that the parties would be required to "start back at the beginning." *Id.* The argument that the partial summary judgment dated August 15, 2008 is still binding as well as other orders and sanctions is nonsense.

B. Because All Prior Interlocutory Summary Judgments or Orders Merge into the Final Judgment, Appellant's Proposed Procedural Posture Must Fail.

A partial summary judgment and all other interlocutory orders merge into the final judgment, even if the final judgment makes no mention of the interlocutory one. *Adkins v. Mireles*, 526 F.3d 531, 538 (9th Cir. 2008). Simply, "[a] ruling on a motion for partial summary judgment merges with the final judgment." *Id.*

The partial summary judgment and August 12, 2010 order along with the June 2, 2010 order and all other previous interlocutory orders merged into the final judgment. Therefore, as both a procedural matter and inherent obviousness, the

partial summary judgment does not survive after the final judgment is set aside because "[w]hen a district court enters a final judgment, all prior non-final orders and rulings which produced the judgment are merged into the judgment. . . ." *Barfield v. Brierton*, 883 F.2d 923, 930 (11th Cir. 1989). Instead, consistent with the purpose behind Rule 60(b), in accord with the law regarding a final judgment's impact on interlocutory judgments and orders, and, most importantly, as explained by the Court at the July 28, 2014 hearing, everything is set aside upon setting aside the final judgment.

Appellant's arguments—that Ms. Fallini gets no relief, is still liable, cannot defend herself because her answer is stricken, faces a partial summary judgment (which was begotten from the request for admissions at the center of the fraud upon the court and merged with the final judgment), and that this Court is bound to award judgment in Appellant's favor—all have absolutely no basis in law or fact. Appellant cites to no law to lend support to this theory. (Appellant Opening Br. 40-41). Thus, the district court correctly determined that the 60(b) Order provide actual relief and allowed for final determination to be made on the merits.

IV. FOLLOWING THE COURT'S OWN PRONOUNCEMENT, THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

If the Court determines that the 60(b) Order is appealable, it must also consider whether the district court erred in denying Ms. Fallini's Motion for

Reconsideration in its order dated August 12, 2010 (Order after Hr'g Aug. 12, 2010). Appeal of this order is available to the same extent that appeal of the 60(b) Order is available, as the August 12, 2010 must also be an interlocutory order that merges into the Final Judgment. *See Arnold v. Kip*, 123 Nev. 410, 416-17, 168 P.3d 1050, 1054 (2007).

"A district court may reconsider a previously decided issue if . . . the decision is clearly erroneous." *Masonry and Tile v. Jolley, Urga & Wirth*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). Here, we have the district court admitting that it did not know or apply the law properly. There can be no better source to determine the state of mind and knowledge of a judge than that very judge.

The district court expressly acknowledged that it erred: "I'm mad at myself, and I have been for years because I wish I would have known about open range and if you hit a cow and you die you can't sue and all this, I wish I'd have known." (Hr'g 34:1-4 April 11, 2015). And later, to Ms. Fallini, "I'm sorry that you got sued when you shouldn't have been because of open range. . . ." *Id.* at 35:8-10. These admissions that the Court did not apply the binding law show a clear abuse of discretion. Any judge that understands and applies open range law in analyzing the Motion for Reconsideration will invariable grant relief. Thus, it was an abuse of discretion and clear error to have denied the Motion for Reconsideration.

Further, the district court expressly stated that Ms. Fallini should not have lost her case in the first place:

> "I didn't know it was open range at the beginning. It wasn't until a year or two into the litigation that somebody—might have been your motion for reconsideration where you said take judicial notice it's open range. 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." (Hr'g 75:12-75:20 July 28, 2014) (emphasis added).

Per its own statements, the court's abuse of discretion is evident. The court failed to apply the law, and should have granted Ms. Fallini's motion. Indeed, the court's language shows that the court would have granted the motion had it known and applied the law. "[O]ne cannot ignore the apparent injustice that Defendant has suffered through this matter." (Order 9 Aug. 6, 2014). Because Judge Lane proclaimed his errors at the July 28, 2014 hearing, he himself states and proves clear error and abuse of discretion in denying the Motion for Reconsideration.

Additionally, the district court erred in not applying binding law under N.R.C.P. 60(b), which provides relief for excusable neglect. Where the facts and circumstances indicate, a motion for reconsideration should be construed as made pursuant to N.R.C.P. 60(b). *La-Tex Partnership v. Deters*, 111 Nev. 471, 474, 893 P.2d 361, 364 (1995); [9] The arguments regarding the Motion for Reconsideration focus squarely on "Kuehn's failures" and "derelictions" and informed the court that

[9] In *La-Tex Partnership*, this Court analyzed and recast a motion for reconsideration as being made pursuant to N.R.C.P. 60(b), "[a]lthough not styled as such*." Id.; See also Western Employers Ins. Co. v. Jefferies & Co.,* Inc., 958 F.2d 258, 261 (9th Cir. 1992) ("we have held in related contexts that 'nomenclature is not controlling.'") (quoting Sea Ranch Ass'n v. Cal. Coastal Zone Conservation Comm'ns, 537 F.2d 1058, 1061 (9th Cir. 1976)).

Ms. Fallini had been lied to regarding the status of her case. (AA, II, 278-280). Additionally, the motion was timely under N.R.C.P. 60(b).[10]

Mr. Kuehn was engaged to represent Ms. Fallini and in so doing failed utterly. Ms. Fallini was unknowingly deprived of effective representation, which, pursuant to the law, provides her with excusable neglect relief. In *Staschel v. Weaver Bros., Ltd.*, the Nevada Supreme Court was faced with a similar scenario. 98 Nev. 559, 559-60, 655 P.2d 518, 518–19 (1982). In *Staschel*, following service of the answer, the attorney "failed to answer respondent's interrogatories, respond to the court order directing him to answer, or attend the hearing on damages following entry of the default judgment." *Id.* The defendant did not learn of the default judgment until six months after it was entered. *Id.* The Nevada Supreme court stated that the attorney's conduct constituted "actual misconduct" and that the defendant "should have his day in court." *Id.* The *Staschel* Court's statements are particularly instructive in this case. The Court stated:

> Thus, *where a client is unknowingly deprived of effective representation* by counsel's failure to serve process, to appear at the pretrial conference, to communicate with the court, client, and other counsel, and the action is dismissed by reason of the attorney's misrepresentation, *the client will not be charged with responsibility for the misconduct of nominal counsel of record*, providing the client acts with due diligence in moving for relief after discovery of the attorney's

[10] The motion for reconsideration was filed prior to the end of the 6-month time period following notice of entry of default as required under N.R.C.P. 60(b)(1). Indeed, the application for default judgment was entered June 21, 2010 and the motion for reconsideration was filed July 6, 2010.

> neglect, and the opposing party's rights will not be prejudiced nor suffer injustice as a result of the granting of relief.

Id. at 560 (emphasis added) (*quoting Orange Empire Nat. Bank v. Kirk*, 259 Cal. App. 2d 347, 353, 66 Cal. Rptr. 240, 244 (Cal. Ct. App. 1968)). Accordingly, Ms. Fallini should not be punished for the misconduct of Kuehn and should have had her day in court. The district court abused its discretion and denied the Motion for Reconsideration despite knowing of Kuehn's utter failure and the timeliness of Ms. Fallini's motion.

In *Passarelli v. J-Mar Dev., Inc.*, a defendant's counsel was suffering from substance abuse such that the counsel's law practice disintegrated to the point of missing court appointments. 102 Nev. 283, 285, 720 P.2d 1221, 1223 (1986). In analyzing this situation, this Court held that "[c]ounsel's failure to meet his professional obligations constitutes excusable neglect." *Id.* at 286 (emphasis added). And that defendant "was effectually and unknowingly deprived of legal representation." *Id.* (emphasis added). The court determined that "it would be unfair to impute such conduct to [defendant] and thereby deprive him of a full trial on the merits." *Id.*

Ms. Fallini's case is no different from those cited above. In fact, it is even more compelling. Kuehn's misconduct, also apparently a result of substance abuse, was not just negligent—it was outrageous. Kuehn failed to answer requests for admissions. Kuehn also failed to respond to, or oppose, the motion for summary

judgment, failed to appear at the hearing on that motion, and failed to respond to supplemental requests. Kuehn ignored, disregarded, and abandoned Ms. Fallini and her case, failing to meet his professional and ethical obligations.

Indeed, all of the misconduct by Kuehn that resulted in default entered against Ms. Fallini occurred after Kuehn told her that the case was over and that she prevailed. Ms. Fallini relied upon the representations of her counsel and had no reason to expect or inquire about continued litigation in this case. If ever there was a case where excusable neglect as to a defendant was present, this is it. Like the cases above, Ms. Fallini "was effectually and unknowingly deprived of legal representation." *Passarelli*, 102 Nev. at 286 (emphasis added). What is more, the district court knew these facts but still denied the Motion for Reconsideration, thereby clearly abusing its discretion.

The failure of counsel to meet professional obligations constitutes excusable neglect. *Id.* Further, public policy supports determining cases on the merits. *Id.* Notwithstanding, the district court erred and abused its discretion in denying the August 2010 Motion for Reconsideration. This was clearly erroneous in light of the facts and law. Furthermore, this Court is in a unique situation in which the district court itself pronounced that it failed to properly know and apply the law. Accordingly, the August 12, 2010 order denying Ms. Fallini's Motion for Reconsideration should be overturned.

CONCLUSION

This Court is one of limited jurisdiction, and an untimely notice of appeal fails to vest jurisdiction in this Court. Importantly, the 60(b) Order is immediately appealable and Appellant failed to appeal with the statutory and mandatory period. Thus, review of the 60(b) Order is unavailable.

Mr. Aldrich, an officer of the court, committed fraud on the court. Mr. Aldrich was no doubt informed by his clients that the accident occurred on open range. Nonetheless, Mr. Aldrich exploited the procedural rules to obtain a monetary judgment in contravention of known facts. With contravening evidence in hand, advancing made-up and absurd facts, despite having the mantel of an officer of the court, Mr. Aldrich sent requests for admissions to Ms. Fallini's counsel, knowing in advance that no answer would come.

The district court experienced the fraud first hand. At the July 28, 2015 hearing Judge Lane discusses how difficult this case has been. In other words, the judicial machinery could not perform in the usual manner its impartial task of adjudging the case because of the actions of Mr. Aldrich.

Finally, at the district court's own word, it abused its discretion in failing to grant Ms. Fallini's Motion for Reconsideration. Additionally, Ms. Fallini argued the substance of relief due to excusable neglect under N.R.C.P 60(b)(1) in that very motion, which was timely filed to allow such relief. Notwithstanding this, the district

court failed to grant relief although Ms. Fallini was effectually and unknowingly deprived of legal representation. Under both lines of argument, this Court should overturn the district court's denial of the Motion for Reconsideration.

Ms. Fallini is entitled to her day in court, and there are a multitude of avenues by which Ms. Fallini gets there. The district court properly allowed her this day in court and then properly ruled in her favor.

Dated this 14th day of April, 2016.

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ATTORNEY CERTIFICATE

1. I hereby certify that this brief complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font size Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the brief exempted by N.R.A.P. 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 13,979 words and 1,120 lines of text.

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 N.R.A.P. 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.

Dated this 14th day of April, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 2106, I caused a true and correct copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** to be served via U.S. mail, postage prepaid as follows:

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/s/ Cathy Murdock
An employee of Fabian VanCott