IN THE SUPREME COURT OF THE STATE OF NEVADA

ESTATE OF MICHAEL DAVID ADAMS, BY AND THROUGH HIS MOTHER JUDITH ADAMS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE, Appellant, v. SUSAN FALLINI, Respondent.	Supreme Court No.: 68033 District Court Case No.: CV24539

Appeal from the Fifth Judicial District Court of the State of Nevada in and for the County of Nye

The Honorable Robert W. Lane, District Judge

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

Appellant:	ESTATE OF MICHAEL DAVID ADAMS, BY AND THROUGH HIS MOTHER JUDITH ADAMS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE
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These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 11th day of May, 2016.

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Defendant's Answering Brief ignores what happened in this case. While it is true that Plaintiff won partial summary judgment on the issue of liability back in 2008 (AA I, 0026-28), the judgment that was later set aside by the district court's August 6, 2014 Order was a default judgment (AA II, 0335-0341). Default judgment was entered as a *sanction* against Defendant for her *repeated* and *consistent* refusal to abide by the district court's orders and provide discovery responses. The Default Judgment was not based on Defendant's admissions, i.e., the Default Judgment was not based on the location of the incident. All of that is explained in Appellant's Opening Brief at pages 4-11.

Moreover, in deciding the first appeal in this case, this Honorable Court specifically addressed the arguments of Defendant related to her own admissions, and expressly found such arguments to be unpersuasive. (AA IV, 0733.) More specifically, the Supreme Court stated:

> Fallini argues that the district court erred in denying her motion for reconsideration because the partial summary judgment was based on false factual premises regarding whether the accident occurred on open range. We disagree.
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> . . .
>
> In Nevada, a defendant has 30 days to respond to a plaintiff's request for admission. NRCP 36(a). Failure to do so may result in the requests being deemed "conclusively established." NRCP 36(b). It is well settled that unanswered requests for admission may be properly relied upon as a basis for granting summary judgment, and that the district court is allowed considerable discretion in determining whether to do so. *Wagner v. Carex Investigations & Sec.*, 93 Nev. 627, 631, 572 P.2d 921, 923 (1977) (concluding that summary judgment was properly based on admissions stemming from a party's unanswered request for

admission under NRCP 36, even where such admissions were contradicted by previously filed answers to interrogatories); *Smith v. Emery,* 109 Nev. 737, 742, 856 P.2d 1386, 1390 (explaining that [] "failure to respond to a request for admissions will result in those matters being deemed conclusively established...even if the established matters are ultimately untrue") (citation omitted).

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

Thus, the district court did not err in refusing to reconsider its prior orders.

(AA IV, 0733-0735.) This is also set forth in Appellant's Opening Brief at pages 13-14. This Honorable Court's citation to *Wagner v. Carex Investigations & Sec.,* 93 Nev. 627, 631, 572 P.2d 921, 923 (1977) also easily disposes of Defendant's claim that Mr. Aldrich perpetrated a fraud on the court. In *Wagner,* the plaintiff failed to timely respond to requests for admission that "were contradicted by previously filed answers to interrogatories...." *Id.* at 628, 631. That is, after a party had already provided sworn testimony regarding a contested issue, the attorney for the opposing party sent requests for admission that were contrary to the prior answers to

interrogatories. Those admissions went directly to the legal and factual issues in the case, and this Court upheld the granting of summary judgment against the plaintiff because the admissions "leave no room for conflicting inferences, and they are dispositive of the case." *Id.* There certainly was no fraud on the part of the attorney or party sending the requests for admission.

This Honorable Court also affirmed the granting of summary judgment on a separate basis. Defendant failed to respond to the Motion for Summary Judgment, which amounts to "an admission that the motion [was] meritorious and a consent to granting the motion...." (AA IV, 734 (citation omitted).)

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

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

(AA IV, 0735, footnote 2.)

Consequently, the admissions, while still effective in the case, were not a relevant basis for the judgment. Of course, because Defendant still has never sought to set them aside, the admissions constituted Defendant's "conclusively established" admission of facts. Pursuant to NRCP 36, they were not representations made by

Plaintiff's counsel, but admissions by Defendant. NRCP 36(b). Defendant has cited no new case authority, no new facts, and no new circumstances that the Supreme Court has not already considered.

This is essentially all this Honorable Court needs to know to decide this appeal and overturn and/or vacate the findings of the district court's August 6, 2014 Order, and issue specific findings: (1) that the Nevada Supreme Court had already decided the issues raised by Defendant in her Motion for Relief from Judgment Pursuant to Rule 60(b), (2) that Plaintiff and her counsel absolutely did not perpetrate a fraud on the Court, and (3) that the judgment entered in Plaintiff's favor on April 28, 2014 be reinstated in its entirety as if the district court had not acted inappropriately. Further, Plaintiff respectfully requests that this Honorable Court overturn and/or vacate all orders subsequent to the August 6, 2014 Order, including the district court's improper and unlawful dismissal of the case in the Order entered on April 17, 2015.

A. This Court Has Jurisdiction to Hear This Appeal

Defendant continues to assert that this Court does not have jurisdiction to consider this appeal. However, this Court has twice ruled that it does. After considering Respondent's arguments in her first motion to dismiss, which are essentially the same as those raised in the second Motion to Dismiss and Respondent's Answering Brief, this Court stated:

> [W]e conclude that the appeal is not limited to the order entered April 17, 2015, and that this court has jurisdiction to consider challenges to the order entered August 6, 2014, as an interlocutory order. *See American Ironworks & Erectors, Inc. v. North Am. Constr. Corp.,* 248 F.3d 892,

> 897 (9th Cir. 2001) (noting that "a party may appeal interlocutory orders after entry of a final judgment because those orders merge into that final judgment"); *Consol. Generator-Nev., Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (noting that this court may review an interlocutory order in the context of an appeal from a final judgment).

(Order Reinstating Briefing, p. 1.) Additionally, on May 4, 2016, this Court once again found that it has jurisdiction and denied Defendant's second Motion to Dismiss. Therefore, this Court's prior two orders are law of the case and the Court can ignore Defendant's jurisdictional arguments.

B. There Was No Fraud on the Court

A party seeking to show fraud on the court to present *clear and convincing evidence* of the following elements: "(1) [conduct] on the part of an officer of the court; that (2) is directed to the judicial machinery itself; (3) is intentionally false, willfully blind to the truth, or is in reckless disregard of the truth; (4) is a positive averment or a concealment when one is under a duty to disclose; and (5) deceives the court." *Johnson v. Bell*, 605 F.3d 333, 339 (6th Cir. 2010); (quoting *Carter v. Anderson,* 585 F.3d 1007, 1011-12 (6th Cir. 2009)).

As pointed out in Appellant's Opening Brief, the district court was never deceived in any way, shape, or form. (Appellant's Opening Brief, pp. 30-33.)

C. Defendant's Third Listed Issue Was Decided in Plaintiff's Favor in the First Appeal

In her Answering Brief, Defendant lists her third issue as follows:

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.

(Respondent's Answering Brief, p. xii.) This issue apparently relates to the Order entered on or about August 12, 2010, which was clearly the subject of the first appeal in this matter. Defendant concedes that this Court already considered the denial of the Motion for Reconsideration of Prior Orders. On page 24 of Respondent's Answering Brief, Defendant acknowledges that this Court's decision in the first appeal of this case, which resulted in the Order Affirming in Part, Reversing in Part and Remanding (AA IV, 732-38), "considered (1) whether the district court erred in denying Fallini's motion for reconsideration...." (Respondent's Answering Brief, p. 24.) Clearly, that issue is controlled by the law of the case doctrine and cannot be relitigated. *Recontrust Company, N.A., et al v. Zhang,* 317 P.3d 814, 818 (Nev. 2014).

D. Inaccurate or Misleading Statements by Defendant in the Answering Brief

Despite repeatedly accusing Plaintiff's counsel of fraud, Defendant Fallini makes several false and/or misleading statements in her Answering Brief, makes multiple assertions that have no citation to case law or statute and are not the law, and tries to resurrect issues that this Court long ago decided in Plaintiff's favor. Defendant ignores the history of the case and also takes inconsistent positions related to the August 6, 2014 Order that is part of this appeal and the Order denying all prior motions from back in August 2010. Plaintiff has identified twenty-two (22)

statements that are particularly troubling. Plaintiff will address these items, as asserted in Respondent's Answering Brief, in turn. Each numbered item is a quote of the misleading statement, followed by a cite to the Answering Brief where the statement appears.[1] Following the statement (or group of statements), Plaintiff explains why the statement is misleading or inaccurate.

1. "Mr. Aldrich conferred with Kuehn and they stipulated to dismiss that action to allow the matter to be heard in Nye County. (Id. [prior cite is AA, I, 14.) 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. [No cite.]" **(Respondent's Answering Brief, p. 6.)**

This is inaccurate. As this Court can see from the record, when the case was filed in Nye County on January 31, 2007, Mr. Aldrich was not counsel of record for Plaintiff. (AA I, 0001-06.) Mr. Aldrich substituted into the case some time after March 13, 2007 (the date of the Certificate of Service of Fallini's Answer and Counterclaim). (AA I, 0011.) While the amount of time that Mr. Aldrich had interacted with Mr. Kuehn before sending the requests for admission is irrelevant to any issue in this appeal, at the time the requests for admission were sent, Mr. Kuehn was counsel of record for Defendant, and service of discovery on him was not only proper but required. NRCP 5.

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[1] The citation inside the quotation marks is the citation to the record that is included by Defendant in Respondent's Answering Brief, allegedly in support of the statement. The bold citation following each excerpt is the citation to where in the Answering Brief the quoted statement can be found.

2. Mr. Aldrich researched the law sufficient to know the citation of Ms. Fallini's statutory defense. (See Id. [prior cite was to AA, I, 15].) He knew the property was on open range. (AA, VI, 1222-1232, 60(b) Order))." **(Respondent's Answering Brief, p. 7.)**

Whether the incident occurred in "open range" was certainly an issue – Defendant had included three affirmative defense in her Answer that specifically referenced NRD 568.355, as well as a Counterclaim. (AA I, 0008-10.) Page 15 of the record (to which Defendant cited), was a recitation of the requests for admission that Defendant had not answered. The language in the requests for admission tracks very closely the language of the affirmative defenses asserted by Defendant. (AA I, 0008-09, 0015.) The requests were entirely proper.

Further, this Court has already ruled that whether Plaintiff's counsel knew the property was in open range is completely irrelevant. (AA IV, 0733-0735.) The specific language of this Court's prior ruling is quoted on page 1 above.

3. "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)." **(Respondent's Answering Brief, p. 7.)**

Defendant insinuates that Mr. Aldrich has engaged in nefarious conduct by reciting to this Court the extensive history of this case. Page 5 of the Opening Brief is an accurate explanation of what Defendant admitted by not responding to the requests for admission. This is entirely appropriate, and this Court has already held Defendant admitted the contents of the requests by failing to answer. (AA IV, 733-34.) Reciting to this Court the accurate procedure and facts of the case is exactly

what counsel is supposed to do, and it is exactly what Plaintiff's counsel has done.

> 4. "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)." **(Respondent's Answering Brief, p. 8.)**

This statement is false. The default judgment was indeed the result of a sanction. The district court struck Defendant's Answer and Counterclaim after she repeatedly violated court orders. (AA I, 164, 170, 171-175, 204.) Default was entered on February 4, 2008. (AA I, 171-175.) Ultimately, the judgment that was entered was a default judgment entered after a prove-up hearing on July 19, 2010. (AA II, 0335-341.)

Page 330 of the record is the transcript from the July 19, 2010 prove up hearing. Defendant's counsel asserted that the district court should reduce any amount awarded due to comparative fault. In response, although he mentioned the conclusively proven facts, Mr. Aldrich explained that comparative fault was an affirmative defense, and because the Answer and Counterclaim had been stricken (AA I, 170), there were no affirmative defenses to consider. (AA II, 330.) Again, this Court has already held that the conclusively proven facts were admitted by Defendant. (AA IV, 0732-738.)

> 5. "Default judgment was entered February 4, 2010. (AA, I, 174-75)." **(Respondent's Answering Brief, p. 9.)**

This statement is inaccurate. Default – not default judgment – was entered on

February 4, 2010. (AA I, 174-175.)

> 6. "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.) ... 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...." **(Respondent's Answering Brief, p. 9.)**

The Application for Default Judgment was filed in June 2010. (AA II, 0204-65.) The hearing on the Application for Default Judgment was held on July 19, 2010. (AA II, 297.) Thus, when the Motion for Reconsideration Defendant references was filed, Default Judgment had not yet been entered. The district court was being asked to reconsider its prior orders, including the sanction order. (AA II, 269-295.)

This Court has already addressed the Motion for Reconsideration during the first appeal in this case. (AA IV 0733-34.) The Court noted that Defendant's argument was that "partial summary judgment was based on false factual premises regarding whether the accident occurred on open range." (AA IV, 0733.) This Court disagreed with Defendant and found in Plaintiff's favor. This Court stated:

> The question of whether the accident occurred on open range was expressly disputed in Fallini's answer, but she subsequently failed to challenge this issue through Adams' requests for admissions. Fallini has presented no evidence on appeal to alter the conclusive impact of admission under NRCP 36 as a basis for partial summary judgment....Moreover, the fact that these admissions may ultimately be untrue is irrelevant....Finally, the district court had discretion to treat Fallini's failure to file an opposition to partial summary judgment as "an

> admission that the motion [was] meritorious and a consent to granting the motion.

(AA IV, 0734 (internal case citations omitted).) Once again, this issue is controlled by the law of the case doctrine and cannot be relitigated. *Recontrust Company, N.A., et al v. Zhang,* 317 P.3d 814, 818 (Nev. 2014).

7. "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, 335-41[.])" **(Respondent's Answering Brief, p. 10.)**

See also analysis in the section analyzing Statement #6 above. Additionally, this Court already addressed "Kuehn's derelictions and failures." The Supreme Court stated:

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

(AA IV, 0735, footnote 2.)

8. "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. (Id.) The district court and this Court have been unable to function properly because of the fraud on the court. (See AA IV, 1193-1194)." **(Respondent's Answering Brief, p. 10.)**

9. "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. [prior cite was the district court's August 6, 2014 Order], at 1229)[.]" **(Respondent's Answering Brief, p. 11.)**

There was simply no fraud at any level. Nothing Mr. Aldrich did was improper, and this Court was well aware of the facts and circumstances of this case on the first appeal. This Court stated:

> Respondent Judith Adams brought suit against appellant Susan Fallini for the death of her son after he struck one of Fallini's cattle that was in the roadway. Fallini, through her previous counsel, repeatedly failed to answer various requests for admission, resulting in a conclusive admission of negligence pursuant to NRCP 36. Namely Fallini was deemed to have admitted that the accident did not occur on open range, which rendered her affirmative defense under NRS 568.360(1) inapplicable. These admissions lead to a partial summary judgment in Adams' favor on the issue of liability.

(AA IV, 0732.) Even if Mr. Kuehn was not participating in the case, service of the requests for admission was not only proper but required. NRCP 5. Again, this Court has already addressed Mr. Kuehn's negligence in this matter. *See also* analysis in the section analyzing Statement #7 above.

Finally, as this Court noted when it affirmed Plaintiff's judgment during the first appeal, summary judgment is "properly based on admissions stemming from a party's unanswered request for admission under NRCP 36, even where such admissions were contradicted by previously filed answers to interrogatories." (AA

I 733-34)(citing *Wagner v. Carex Investigations & Sec.*, 93 Nev. 627, 631, 572 P.2d 921, 923 (1977)).

10. "He [Aldrich] lied to the court." **(Respondent's Answering Brief, p. 11.)**

This personal attack on Mr. Aldrich is simply untrue. Mr. Aldrich has been 100% forthright with this Court and the district court.

11. "But the Supreme Court has not made any findings or rulings regarding the existence of fraud on the court." **(Respondent's Answering Brief, p. 11.)**

12. "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-IVm 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)." **(Respondent's Answering Brief, p. 12.)**

13. 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." **(Respondent's Answering Brief, pp. 24-25.)**

These statements are incorrect. The alleged misrepresentations by Mr. Aldrich were at issue on the prior appeal. That is the same conduct about which Defendant complained when she went before the district court and sought to have the judgment set aside pursuant to NRCP 60(b).

On or about **November 17, 2011**, Defendant filed her Amended Opening Brief in the first appeal of this case. Defendant Fallini repeated her arguments that counsel for Plaintiff had violated Nevada Rules of Professional Conduct 3.1, 3.3, and 8.4, and that the Honorable Robert W. Lane had violated the Code of Judicial Conduct. (AA IV, 0654-0676.) Defendant further noted that the district court had taken judicial notice of the location of the incident – and concluded that it had indeed occurred in open range. (AA IV, 0661-0662.) Despite the district court's taking judicial notice of the location of the incident, during the first appeal, Defendant persisted in her argument that Mr. Aldrich had somehow "allow[ed] ***misrepresentations*** to stand perpetrating misconduct of his own." (AA IV, 0667 (emphasis added).) Defendant also asserted that the district court had "failed to uphold the 'integrity of the tribunal."' (AA IV, 0668.) The conduct about which Defendant now complains is the exact same conduct – alleged misrepresentations by Mr. Aldrich – about which Defendant complained during the first appeal of this case.

Plaintiff refers this Court to the arguments regarding law of the case and rule of mandate set forth in Appellant's Opening Brief. (Appellant's Opening Brief, pp. 24-29.) In addition, the United States Supreme Court stated long ago:

> There must be an end of litigation some time. To allow a second appeal to a court of last resort, on the same questions which were open to dispute on the first, would lead to endless litigation. It is said by this court, in *Martin v. Hunter*, (1 Wheat. 355,) "A final judgment of the court is conclusive upon the rights which it decides, and no statute has provided any process by which this court can revise its judgment." *See, also, Sibbald v. United States*, 12 Pet. 488.
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> ....
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> Whatever was formerly before the court, and was disposed of by its decree, is considered as finally disposed of.... [citations omitted].

Corning v. Troy Iron & Nail Factory, 15 How. 451, 456, 14 L.Ed. 768 (1854).

Significantly, there is no citation to the proposition in Statement #13 that "Reviewing or even considering an issue is not remotely equal to actually and explicitly addressing and deciding an issue." That is because there is no legal precedent supporting that statement. The exact conduct about which Defendant now complains – the alleged misrepresentations of Mr. Aldrich – was already considered by this Court.

> 14. "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, 7352-738)." **(Respondent's Answering Brief, p. 11.)**
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> 15. As it relates to Fallini's 60(b) Motion, this Court simply considered the broader impact of failing to respond to requests for admission." **(Respondent's Answering Brief, p. 25.)**

The second portion of Statement #14 concedes that this Court properly concluded that the district court properly denied the Motion for Reconsideration back

in 2010. Indeed, this Court has already addressed that issue in the Order Affirming in Part, Reversing in Part and Remanding. (AA IV, 732-34.)

Further, on page 24 of Respondent's Answering Brief, Defendant acknowledges that this Court's decision in the first appeal of this case, "considered (1) whether the district court erred in denying Fallini's motion for reconsideration...." (Respondent's Answering Brief, p. 24.) Clearly, that issue is controlled by the law of the case doctrine. *Recontrust Company, N.A., et al v. Zhang*, 317 P.3d 814, 818 (Nev. 2014).

Finally, Defendant cites no case law or statute that supports an argument that deciding an issue "upon procedural grounds" is somehow inappropriate. The Nevada Rules of Civil Procedure are considered Nevada law. NRCP 1; NRS 2.120. Defendant's assertion that this Court only considered the "broader impact of failing to respond to requests for admissions" contains no citations to law and is absurd.

> 16. "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 – (AAA, I, 12-28), and further, Judge Lane did not know even know [sic] what taking judicial notice meant. (AA, VI, 1197)." **(Respondent's Answering Brief, p. 13.)**

Judge Lane took judicial notice of the location of the accident during the prove-up hearing. (AA IV, 0331-662.) At that point, the location of the incident did not matter because Defendant's Answer and Counterclaim had long since been stricken as a discovery sanction. (AA I, 164, 170, 171-175.) Moreover, the argument that the

district court did not know what it meant to take judicial notice is absurd. At the time the prove-up hearing took place in July 2010, the district court judge had been on the bench at least ten years.[2] (AA VI, 1194.) Surely the district court knew what it meant to take judicial notice of something – and if he did not, Mr. Aldrich is not at fault for that. Regardless, whether the district court knew what it meant to take judicial notice is not relevant to any issue on appeal.

17. While discussing issue preclusion and the requirement that an issue in prior litigation be identical to the issue being litigated in the instant action, Defendant asserts in a footnote: "Where is prior litigation between Ms. Fallini and Appellant? There is none." **(Respondent's Answering Brief, p. 28, fn. 8.)**

18. While discussing issue preclusion, Defendant makes three troubling assertions:
    a. "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." (Respondent's Answering Brief, p. 30.)
    b. Defendant goes on to state: "Concerning that matter [the alleged impropriety of counsel's behavior], no merits have been litigated and a prior ruling is nonexistent." (Respondent's Answering Brief, p. 31.)
    c. Finally, Defendant asserts: "Now, rings the death knell. In what earlier suit has opposing counsel's alleged fraud upon the court been necessarily litigated?" **(Respondent's Answering Brief, p. 31.)**

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[2] At the hearing on July 28, 2014, the district court said he had been on the bench for fourteen years. The prove-up hearing occurred in July 2010.

This issue has been litigated twice already. While the first appeal was pending, Susan and Joe Fallini filed a Complaint for Declaratory Relief in Tonopah, Nevada. (AA II, 0346-0355.) The defendants who had been named in that action included Plaintiff's counsel, John P. Aldrich, Esq., and The Hon. Robert W. Lane. Included in those claims was an accusation that Mr. Aldrich's pleadings in this case "contained allegations that were false, misleading, and/or have no evidentiary support, in violation of Nevada law." (AA II, 0351.) Mr. Aldrich filed a Motion to Dismiss on **March 25, 2011**. (AA III, 0360-0453.) A hearing was held on **June 6, 2011** in Tonopah, Nevada. At the conclusion of that hearing, the case was dismissed with prejudice. The Order granting Aldrich's Motion to Dismiss was entered on **June 26, 2014**. (AA VI, 1119-1122.)

Although the Tonopah action was filed after this action, the issue raised is the same issue Defendant raises now – that Mr. Aldrich made misrepresentations to the district court. This issue has been decided in the Tonopah case, as well as by this Court in the first appeal – and the argument has no merit. *See also* analysis in the section analyzing Statements #11, 12, and, 13 above.

19. "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.... 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." **(Respondent's Answering Brief, p. 32.)**

This statement is misleading – it was not Plaintiff who was citing *Smith v. Avery*. Rather, at pages 33-34 of Appellant's Opening Brief, Plaintiff is describing and directly quoting the Nevada Supreme Court's prior decision in this matter. (Appellant's Opening Brief, pp. 33-34.) Plaintiff certainly agrees with this Court's reliance on *Smith v. Avery*, and its prior decision. In its prior decision, this Court acknowledged Defendant's claim that "the partial summary judgment was based on false factual premises regarding whether the accident occurred on open range." (AA IV, 0733.) The court flatly rejected that assertion. (AA IV, 0732-0738.)

> 20. 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 on the court. **(Respondent's Answering Brief, pp. 32.)**

Not surprisingly, there is no citation to case law or statute in support of these assertions. That is because there is no case law anywhere to support these statements. Moreover, even if Defendant could find some obscure court decision to support these statements, Nevada case law contradicts this statement.

As described above, in *Wagner v. Carex Investigations & Security, Inc.*, 93 Nev. 627, 572 P.2d 921 (1977), the plaintiff failed to timely respond to requests for admission that "were contradicted by previously filed answers to interrogatories...." *Id.* at 628, 631. This Court upheld the granting of summary judgment against the

plaintiff. *Id.;* (AA IV, 733-34.)

In the instant case, Plaintiff sent requests for admission at the very beginning of discovery that went directly to the substance of an affirmative defense that *Defendant* raised in her Answer and Counterclaim. (AA I, 0007-11.) The requests were absolutely proper, and sending them was in no way fraud on the court.

Finally, the Court should not forget that the default judgment was the result of Defendant's Answer and Counterclaim being stricken as a *sanction* for Defendant's repeated refusal to abide by the district court's orders. The admissions were not even relevant at that point.

> 21. 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. **(Respondent's Answering Brief, p. 38.)**

Again, there is no citation to case law or statute in support of these assertions because there is no case law anywhere to support these statements. Similar arguments were made to this Court in the prior appeal, when Defendant alleged Plaintiff's counsel had made misrepresentations to the court. At that time, Defendant alleged

breach of the Nevada Rules of Professional Conduct, rather than calling it "fraud," but the allegations were the same – that counsel made alleged ***misrepresentations*** to the district court. (AA IV, 667-68.)

In the paragraph immediately following the above quote, Defendant recites her arguments from the first appeal wherein Defendant alleges Mr. Aldrich violated NRPC 3.1 and 3.3. (Respondent's Answering Brief, p. 38.) These are the exact same arguments Defendant asserted in the first appeal. (AA IV, 666-67.) Consequently, these arguments are barred by the law of the case doctrine. *See also* analysis in the section analyzing Statements #11, 12, and, 13 above.

> 22. 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. **(Respondent's Answering Brief, p. 39.)**

Again, no citation to case law or statute because these allegations are not what the law, the rules of civil procedure, or the rules of professional conduct say.

It is important to note that Plaintiff and her counsel made no statements related to the facts Defendant admitted by not responding to the requests for admission. By not responding to the requests for admission, those facts were admitted *by Defendant*; Plaintiff did not have to make any representations about the substance of the admissions. Those facts were deemed admitted pursuant to NRCP 36 – they are not Plaintiff counsel's representations.

23. "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. [Citation omitted.]" **(Respondent's Answering Brief, p. 41.)**

Nothing could be further from the truth. Defendant attached various documents to her Motion for Relief pursuant to Rule 60(b), based her arguments on what was in the police report and allegedly on a website (AA V, 0931-1008), and Defendant and the district court relied on the truth of the matter asserted in the documents to set aside the prior Default Judgment that had already been affirmed on appeal. (AA VI, 1222-1232.) Defendant then cites six facts in her brief that have no citation to the record whatsoever, but appear to be included because of what was contained in the inadmissible hearsay documents submitted to the district court. (Respondent's Answering Brief, pp. 7-8.)

CONCLUSION

The district court's Order granting Defendant's Motion for Relief from Judgment, entered on August 6, 2014, is void, was contrary to the law of the case, and is contrary to Nevada law. The district court exceeded its authority when it entered the August 6, 2014 Order. As a result, all subsequent orders are also void because all the remaining orders stem directly from the district court's August 6, 2014 Order.

Consequently, Plaintiff respectfully requests that this Court overturn and/or vacate the findings of the district court's August 6, 2014 Order, and issue specific findings: (1) that the Nevada Supreme Court had already decided the issues raised

by Defendant in her Motion for Relief from Judgment Pursuant to Rule 60(b), (2) that Plaintiff and her counsel absolutely did not perpetrate a fraud on the Court, and (3) that the judgment entered in Plaintiff's favor on April 28, 2014 be reinstated in its entirety as if the district court had not acted inappropriately. Further, Plaintiff respectfully requests that this Honorable Court overturn and/or vacate all orders subsequent to the August 6, 2014 Order, including the district court's improper and unlawful dismissal of the case in the Order entered on April 17, 2015.

DATED this 11th day of May, 2016.

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VERIFICATION

STATE OF NEVADA)
)
COUNTY OF CLARK)

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

DATED this 11th day of May, 2016.

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CERTIFICATE OF COMPLIANCE

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

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

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

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

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 6,218 words (602 lines of text); or

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

[ ] Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every

assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

AFFIRMATION

Pursuant to NRS 239B.030

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

Dated this 11th day of May, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of May, 2016, I mailed a copy of the foregoing APPELLANT'S REPLY BRIEF, in a sealed envelope, to the following address and that postage was fully paid ther eon:

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