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.: CV38529

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

PETITION FOR EN BANC RECONSIDERATION

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TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (cont'd)

SUMMARY OF THE ARGUMENT

Pursuant to NRAP 40A, Appellant petitions for en banc reconsideration of the December 29, 2016 Opinion ("the Opinion") issued in this matter. En banc reconsideration is required to maintain uniformity of decisions by this Court. The decision is inconsistent with longstanding precedent related to the use and effect of requests for admissions pursuant to NRCP 36, and substantially modifies the prior holdings in a long line of cases addressing requests for admission. The Opinion transforms the use of this routine discovery practice into a risky venture that could result in a claimed "fraud on the court" by parties who refuse to participate in litigation in good faith. Further, by promoting such a transformation, the Opinion also modifies longstanding precedent defining the facts necessary to support a finding of a fraud on the court. Most importantly, the Opinion does not acknowledge that the actual basis for Plaintiff's default judgment was a sanction for the Respondent's discovery violations, and thus, was issued for reasons wholly unrelated to the claimed "fraud." Nor does the Opinion acknowledge that the district court took judicial notice of the fact that the incident occurred on "open range," the very fact Defendant now claims was fraudulently advanced. In the original appeal in this matter, this Court affirmed the district court's sanction, with full knowledge of the purportedly "fraudulent" conduct. Accordingly, the Opinion is also inconsistent with this Court's longstanding precedent regarding issue preclusion. For all of the above reasons, en banc reconsideration should be granted.

Plaintiff sought reconsideration of the panel's Opinion. The Petition for Rehearing was filed on January 31, 2017. The Petition was denied on March 21, 2017.

SUMMARY OF THE DECEMBER 29, 2016 OPINION

In its December 29, 2016 Opinion, the panel first addressed the appealability of an order granting a motion to set aside a final judgment under NRCP 60(b), holding that such an order is interlocutory in nature. (Opinion, pp. 5, 11.) Then, considering the substance of the appeal, the panel held:

- "But here, the Estate's counsel seized on that abandonment as an opportunity to create a false record and present that record to the district court as the basis for judgment." (Opinion, pp. 7-8.)

- "[W]e hold that counsel may not rely on the deemed admission of a known false fact to achieve a favorable ruling." (Opinion, p. 8.)

- "However, despite clear indication that the accident occurred on open range, the Estate's counsel propounded his request for admissions in 2007, sought partial summary judgment in 2008, and applied for default judgment in 2010, all based on the false premise that the accident did not occur in open range. Thus, the district court did not abuse its discretion in finding that the Estate's counsel knew or should have known that the accident occurred on open range when he used the deemed admission to the contrary to secure a judgment for the Estate." (Opinion, pp. 9-10.)

- "[T]he Estate's counsel's duty of candor required him to refrain from relying on opposing counsel's default admission that the accident did not occur on open range, when he knew or should have known that it was false, and that the district court did not abuse its discretion in finding the Estate's counsel committed fraud upon the court when he failed to fulfill his duties as an officer of the court with candor."

(Opinion, p. 10.)

ARGUMENT

This matter must be reviewed by the en banc Court, pursuant to NRAP 40A, which provides, in pertinent part:

> **(a) Grounds for En Banc Reconsideration.** En banc reconsideration of a decision of a panel of the Supreme Court is not favored and ordinarily will not be ordered except when (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue. . . . .

I. EN BANC RECONSIDERATION IS NECESSARY TO SECURE OR MAINTAIN UNIFORMITY OF DECISIONS OF THE SUPREME COURT

A. En Banc Reconsideration Is Necessary to Maintain Uniformity of the Supreme Court's Prior Decisions Regarding Admissions Sent Pursuant to NRCP 36

The Opinion fundamentally changes decades of black letter law regarding the use of requests for admission pursuant to NRCP 36. Specifically, the Opinion places a burden on the requesting party to determine that unanswered admissions are, in fact, true before such unanswered admissions may be proffered in support of a judgment. (Opinion, p. 8.) Placement of such a burden is not only contrary to the express language of NRCP 36 itself, but is also inconsistent with decisions of this Court dating back more than fifty years.

For example, in *Dzack v. Marshall*, 80 Nev. 345, 393 P.2d 610 (1964), this Court held that a party's failure to respond to requests for admission resulted in a mandatory duty by the district court to accept the admissions:

> It was incumbent upon the respondent court, therefore, to accept such admissions together with the affidavits of petitioners in support of the motion for summary judgment, and ***to disregard the unverified complaint***. . . .

80 Nev. at 349 (emphasis added and citations omitted). The Court was clearly concerned about efficient litigation of matters – the purpose of NRCP 36. The Court noted that if it did not provide relief to the defendant petitioner, the petitioner would be forced into pre-trial discovery, including depositions to which they would have to travel from out of state, and additional attorney's fees and expenses related to trial, as well as substantial travel expenses. *Id.* at 348. The Court then held that under circumstances where the affidavits and admissions resolved all liability issues, the district court was required to enter summary judgment. *Id.* at 349.

Four years later, in *Western Mercury v. Rix Co.,* 84 Nev. 218, 438 P.2d 792 (1968), this Court reiterated that rule, further noting that the admissions may be deemed true even when the non-responding party had later submitted interrogatory responses that contradicted the unanswered admissions. 84 Nev. at 222. And, five years after that, this Court clarified that when responses to admissions are merely untimely, rather than non-existent, the requests may still be deemed admitted. *Lawrence v. Southwest Gas Corp.,* 89 Nev. 433, 514 P.2d 868 (1973). In a footnote,

this Court observed that "[a]ny matter admitted under this rule is conclusively established unless the court ***on motion*** permits withdrawal or amendment of the admission," and upheld the district court's granting of summary judgment in the defendant's favor. *Id.* (emphasis added).

This Court held to this doctrine even when the requests that were deemed admitted because the responses thereto were ***late, rather than non-existent,*** negated the existence of a plaintiff's cause of action, and upheld summary judgment against the non-responding party. *Graham v. Carson-Tahoe Hosp.*, 91 Nev. 609, 610, 540 P.2d 105 (1975). And shortly thereafter, this Court further maintained this position even where responses to interrogatories submitted prior to the issuance of the requests for admission had contradicted the facts contained in the requests. This Court upheld the summary judgment granted on the basis of the facts deemed admitted, citing to the comments to the federal version of NRCP 36:

> According to the federal Advisory Committee Notes, the rule was intended to clarify that "[i]n form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party," and therefore ***is not rebuttable by contradictory testimony of the admitting party***.

Wagner v. Carex Investigations & Sec. Inc., 93 Nev. 627, 631, 572 P.2d 921, 924 (1977), citing 4A Moore's Fed.Prac. P 36.01(7), at 36-13 (1974).

Furthermore, even if the request for admission is purportedly objectionable, if no timely answer or objection was made, this Court held that such unanswered

request are deemed admitted. *Smith v. Emery,* 109 Nev. 737, 856 P.2d 1386 (1993). In such an instance, this Court in *Smith v. Emery* directed that *Morgan v. Demille*, 106 Nev. 671, 799 P.2d 561 (1990), which discussed the propriety of types of requests for admission, did not apply if no objection is made. Significantly, this Court stated:

> It is well settled that failure to respond to a request for admissions will result in those matters being deemed conclusively established. . . . ***This is so even if the established matters are ultimately untrue***.

Smith v. Emery, 109 Nev. 737, 742, 856 P.2d 1386, 1390 (1993) (emphasis added).

The cases above represent decades of precedent, and each case conforms to the plain language of NRCP 36, which states "[t]he matter is admitted," unless a timely denial or objection is made or the non-responding party moves to set aside the admission. Yet the Opinion holds that presenting a position based on the rule in *Smith v. Emery* constitutes a fraud on the court. In short, the Opinion approves a determination that reliance on this Court's precedent can constitute a "fraud on the court." Such a conclusion seriously threatens the uniformity of decisions by this Court. Whereas the Court's prior longstanding precedent provided a bright-line rule for practitioners to follow, the new standard set forth in the Opinion adds a debate over the types of admission that the propounding party may ask, and later rely upon, and presents a new inquiry for district courts when it receives a motion for summary judgment: is the admission sought false and did the propounding party have reason to know it was false?

B. En Banc Reconsideration Is Necessary to Maintain Uniformity of the Supreme Court's Prior Decision Regarding NRCP 37

The panel Opinion also seems to stray from the long-standing law related to NRCP 37 and the district court's explicit power to sanction a party who fails to comply with the rules or participate in good faith. NRCP 37(b)(2)(c), permits "an order striking out pleadings or parts thereof," for discovery abuses. "Selection of a particular sanction for discovery abuses under NRCP 37 is generally a matter committed to the sound discretion of the district court." *Stubli v. Big Int'l Trucks, Inc.*, 107 Nev. 209, 312-313, 810 P.2d 785 (1991) (citing *Fire Ins. Exchange v. Zenith Radio Corp.*, 103 Nev. 648, 649, 747 P.2d 911, 912 (1987) and *Kelly Broadcasting v. Sovereign Broadcast*, 96 Nev. 188, 192, 606 P.2d 1089, 1092 (1980)).

The Nevada Supreme Court held that default judgments will be upheld where "the normal adversary process has been halted due to an unresponsive party, because diligent parties are entitled to be protected against interminable delay and uncertainty as to their legal rights." *Hamlett v. Reynolds*, 114 Nev. 863, 963 P.2d 457 (1998) (citing *Skeen v. Valley Bank of Nevada*, 89 Nev. 301, 303, 511 P.2d 1053, 1054 (1973)). Defendant in this matter halted the discovery process and repeatedly failed to comply with court orders compelling discovery responses, leading to multiple sanctions and the striking of Defendant's Answer and Counterclaim. (AAI, 194-201.) Respectfully, because the panel's Opinion does not consider the true basis for the default judgment, it creates a significant incentive for parties to refuse to participate

in good faith and then later allege "fraud upon the court" as a basis to set aside a default judgment.

C. En Banc Reconsideration Is Necessary to Maintain Uniformity of the Supreme Court's Prior Decision in this Matter

The panel's Opinion failed to recognize its own precedent in this very case. In the March 29, 2013 Opinion, this Court specifically noted that Defendant "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." (AA IV, 0733.) After analyzing the law related to NRCP 36 admissions, the Court held that "the fact that these admissions may ultimately be untrue is **irrelevant**." (AA IV, 734 (emphasis added).) The panel acknowledged that the prior March 29, 2013 Opinion "affirmed in substance" the default judgment, but then the panel in the December 29, 2016 Opinion seemingly disregarded this Court's prior holding in this very case. What was "irrelevant" in the March 29, 2013 Opinion is now "fraud on the court" according to the December 29, 2016 Opinion. Allowing a party to use the same facts but argue an allegedly different legal theory to the district court, after the Supreme Court has already ruled on those facts, is contrary to long-standing Nevada law and the law of the case. (Appellant's Opening Brief, 23-29.)

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II. EN BANC RECONSIDERATION IS NECESSARY BECAUSE THIS CASE INVOLVES A SUBSTANTIAL PRECEDENTIAL AND PUBLIC POLICY ISSUE

The impact of the panel's decision beyond the litigants involved in this case is substantial. This impact is felt in several areas, as set forth below.

A. The Brightline Standard Regarding Rule 36 Admissions Has Been Blurred, and the Consequences Reach Far Beyond the Parties to this Case

Reverberations of the panel's Opinion reach every practitioner of litigation in Nevada. Sending NRCP 36 requests for admission is now a risky endeavor unless the sending attorney can already prove that a fact set forth in the requests is true. This greatly decreases the efficiency with which parties can litigate. Moreover, there is now an incentive for the receiving party *not* to respond to requests for admission, as explained in Section I above.

But the consequences flow to the district court and clerk's offices too. As the Court is likely aware, there is a common practice by litigators (often in defense of a personal injury claim) that when an opposing party's attorney withdraws, and that opposing party is left without counsel, the litigator will send to the opposing party a set of requests for admission that go directly to the liability and damages issues. This is done for multiple reasons, including (1) because the litigator has a duty to diligently prosecute the matter on the client's behalf, *see* NRPC 1.3, 3.2, or (2) to obtain a resolution in expedited fashion on behalf of the litigator's client, which saves attorney's fees and costs, and often eliminates exposure for the client. Under

longstanding precedent, *see* Section I *supra*, when the opposing party does not respond, those requests are deemed admitted, and the litigator fulfills his duty to his client (and avoids committing malpractice) by filing a dispositive motion, which often goes unopposed. The court then grants summary judgment because the facts are deemed admitted under Rule 36 and because the motion is unopposed under Rule 56 (and/or a similar local rule). Under the plain language of Rule 56 (and/or a similar local rule), and based on the substantial precedent discussed above, the granting of summary judgment is not discretionary but mandatory. *See, e.g., Dzack v. Marshall,* 80 Nev. 345, 393 P.2d 610 (1964). This scenario is similar to what occurred in this case.

Court rules and legal precedent allow for this scenario to occur because it keeps litigation moving and prevents cases from languishing on dockets for years when a party fails or refuses to retain a new attorney or participate in litigation. Based on the panel's Opinion, however, every case that was resolved in this fashion is now subject to being re-opened based on alleged "fraud on the court" by the litigator who sent the requests for admission. Moreover, the litigator who diligently prosecuted his client's case by sending the requests for admission, and his client, may be subject to attorney's fees and costs as a result of their use of Rules 36 and 56 in accordance with their plain language and the long-established case law. This could result in the re-opening of hundreds, if not thousands, of cases at the district court level.

This is all true even in the absence of a situation where, as here, the district court took judicial notice of the very fact that Defendant now claims was fraudulent – regardless of and contrary to the admissions – before entering default judgment following the striking of Defendant's pleadings as a discovery sanction.

Finally, as mentioned in Section I above, the district court also has a new inquiry it must conduct in order to determine whether the admission is true and the level of knowledge of the sending party's counsel regarding the admitted fact. These results are not consistent with the purpose and policy of NRCP 36 and efficient litigation.

B. As a General Policy, Non-Complying Parties Should Not Be Permitted to Halt the Litigation Process Through Their Inaction or Refusal to Comply with Court Orders

Another consequence of the panel's decision that goes well beyond the litigants involved is that the Opinion rewards the party who thwarts the litigation process by refusing to participate in the discovery process and/or refuses to comply with orders compelling discovery. This result is contrary to well-established precedent and represents less-than-ideal public policy.

As set forth in the record on appeal, Defendant repeatedly failed and refused to respond or object to discovery requests, completely stifling the discovery process. (Appellant's Opening Brief, 6-9; AA I, 53-201.) The district court said "Defendant has been given ample opportunity to comply with the Court's Orders, and striking

Defendant's Answer and Counterclaim is appropriate under the circumstances." (AA I, 0170, ls. 3-4.)

On February 4, 2010, the district court entered default against Defendant, stating:

> Defendant and her counsel have not participated in this matter in good faith and both have been found in contempt of Court. Based on the Findings of Fact and Conclusions of Law, on November 4, 2009, it was ordered that Defendant's Answer and Counterclaim be stricken and the Court Clerk enter a Default against Defendant Susan Fallini. Default is so entered. (AA I, 0174-175.)

Notice of Entry of Default was served on February 8, 2010. (AA I, 0171-172.)

In an Order entered on June 2, 2017, after setting forth the longstanding law on discovery sanctions, the district court concluded:

> 6. Defendant has provided no responses whatsoever, nor has Defendant objected to any request. Defendant has failed on at least four occasions to comply with this Court's Order. At no time has Defendant or her counsel given any excuse or justification for their failure and refusal to abide by the Court's orders.
>
> 7. Defendant has been given ample opportunity to comply with the Court's Orders. Defendant has halted the litigation process and the additional sanctions of $5,000.00 immediately and $500.00 per day beginning June 1, 2010, if Defendant does not comply with the Court's prior orders, are appropriate under the circumstances.

(AA I, 200.) Defendant has never abided by the district court's order compelling responses to discovery, nor has Defendant ever paid the many thousands of dollars in sanctions levied against her so many years ago.

If the Court does not reconsider the published Opinion of the panel, a district court's ability to sanction defiant, irresponsible, and bad faith behavior by litigants will be compromised. There will be a substantial incentive for a non-responding party to refuse to litigate in a matter, or to litigate in bad faith, because once the sending party obtains judgment based on requests for admission that the non-responding party failed or refused to answer, the non-responding party will simply move to set aside the judgment based on fraud and seek attorney's fees against the sending party and counsel due to the alleged fraud. This emasculates NRCP 37 and gives the offending party the power to stifle the litigation, depriving the complying party of justice.

C. The New Standard for Fraud on the Court Makes Engaging in Formerly Routine Discovery Practices a Potentially Perilous Endeavor

As noted above, the Opinion represents a radical departure from this Court's prior interpretations of NRCP 36. This Court does, of course, have the authority to depart from precedent and reverse its prior decisions. However, the Court should not permit a failure by Plaintiff's counsel to *anticipate* such a substantial change in the law to be reconstituted into a "fraud on the Court."[1] Indeed, such a transformation

[1] Moreover, given that here, the judgment that issued in the district court was not actually based on the fact deemed admitted, but instead, was a *default judgment* entered after the Respondent's Answer, affirmative defenses, and counterclaim had been stricken as a discovery sanction, which discovery sanction was upheld by this Court in the original appeal, holding that counsel's conduct constituted a fraud on the Court is extremely severe.

of routine litigation practice into a "fraud on the Court" represents another departure from precedent, this time from that setting forth the requirements for a finding of a fraud upon the court. Significantly, in *NC-DSH, Inc. v. Garner*, this Court described "fraud on the court" as

> only that species of 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 . . . .

125 Nev. 647, 654, 218 P.3d 853, 858 (2009). In *NC-DSH*, the culpable attorney misrepresented his client's agreement to a settlement, resulting in dismissal of the client's claim, and then absconded with the settlement funds.

Here, in contrast, Plaintiff's counsel engaged in discovery practices that are routine in personal injury cases, presenting a full panoply of written discovery that addressed Plaintiff's allegations and Defendant's affirmative defenses and counterclaim. While the apparent refusal of Defendant's original counsel to respond to such discovery took this matter off the routine procedural path, Plaintiff's counsel conformed his conduct in seeking sanctions in a manner at all times consistent with this Court's precedent and Rules of Civil Procedure 36 and 37. Thus, in conformity with *Smith v. Emery, supra,* the unanswered requests for admission were submitted to support a *partial* summary judgment motion.

However, the judgment that ultimately issued below had nothing to do with that partial summary judgment motion. Instead, a *default* judgment was entered as a

sanction against the Respondent because of her and/or her counsel's failure to participate in *any* discovery. Accordingly, the action of Plaintiff's counsel in following this Court's precedent in *Smith v. Emery, supra*, even now that such case has been *implicitly* overturned, cannot be said to have prevented the judicial machinery from performing in the usual manner its impartial task of adjudging cases. No conduct of Plaintiff's counsel contributed to the discovery failures of Defendant's counsel. Accordingly, there was no basis for finding that Plaintiff's counsel committed a fraud on the court, and no basis for vacating that default judgment.

Significantly, under the new case law, an attorney who attempts to address an issue raised by the opposing party, and which the district court represents is a fact known to the court, could be subject to a finding of fraud on the court if the opposing party refuses to respond to discovery requests and later moves to set aside a default judgment. Besides creating a nebulous fraud standard that is not based on clear and convincing evidence, the result is contrary to public policy because of the disincentive the non-responding party has to engage in good faith discovery.

Moreover, the public policy implications of the Opinion are severe. The prudent attorney cannot safely rely on this Court's precedent as guidance for conduct regarding NRCP 36 admissions because the bright-line rule no longer exists.

D. Clearly Defined Duties of Parties' Counsel and the Court Are What Make the System Function Properly and Efficiently

The panel's decision imposed upon Plaintiff's counsel the duties of defense counsel and the district court. Defendant asserted the "open range" affirmative

defense in her Answer and Counterclaim. A defendant has the burden of proving facts to support the affirmative defenses it asserts. *Univ. & Comm. College System of Nevada v. Farmer,* 113 Nev. 90, 930 P.2d 730 (1997). The requests for admission (and accompanying interrogatories and requests for production of documents) addressed the specific affirmative defenses and counterclaims asserted by Defendant, but Defendant never responded to the requests for admission. Defendant was repeatedly sanctioned both monetarily and by having her Answer and Counterclaim stricken because she failed and refused to respond to discovery. It was Defendant and her counsel's inaction that resulted in the admissions.

Further, the panel imposed the duties of the district court on Plaintiff's counsel as well. Four years after the district court took judicial notice of the *fact* that the incident occurred on open range, the district court claimed it did not understand the *legal consequence* of that determination, despite the fact that the open range defense was quoted in the Answer and Counterclaim. (AAI, 8-9.) Indeed, the panel noted in footnote 4 that the district court confirmed it knew the *fact* that the incident occurred open range but did not know the *legal consequences* of that fact. (Opinion, p. 10, fn. 4.) But the district court is charged with knowing the law, and it is the district court's duty to learn the law if it does not know the law. Nevada Code of Judicial Conduct 2.5 and comments. Even Defendant conceded in the first appeal of this matter that it was "commonly known in Nye County, in which the District Court sat," "...that the incident occurred on open range." (AA IV, 667.) And in order to know the

consequences of the incident occurring in open range, all the district court had to do was read the Answer and Counterclaim because it was set forth in its entirety therein. (AAI, 0008.)

Thus, the panel's decision leaves the prudent, conscientious attorney in a difficult position because it requires the attorney to undertake not only his own duties to his clients, but also the opposing attorney's duties to the opposing party and the court's duties to the parties and public at large.

CONCLUSION

Based on the foregoing, Appellant respectfully asserts that the December 29, 2016 Opinion issued by a panel of this Court needs to be reevaluated and analyzed with regard to how it modifies longstanding published precedent, as well as its impact beyond the litigants in this case and public policy in general.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing/reconsideration or answer 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] It has been prepared in a proportionally spaced typeface using WordPerfect 12 in Times New Roman 14 pt. font; or

[ ] It 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 40 because it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 4,322 words (requiring that a petition for en banc reconsideration contain no more than 4,667 words); or

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

[ ] Does not exceed ___ pages.

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 3rd day of May, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of May, 2017, I mailed a copy of the foregoing **PETITION FOR EN BANC RECONSIDERATION**, in a sealed envelope, to the following address and that postage was fully paid thereon:

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