

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUSAN FALLINI,

Appellant,

vs.

Estate of MICHAEL DAVID ADAMS,
By and through his mother JUDITH ADAMS,
Individually and on behalf of the Estate,

Respondent.

Supreme Court No.: 56840

FILED

MAY 31 2011

TRACIE K LINDEMAN
CLERK OF SUPREME COURT
BY *Almond*
DEPUTY CLERK

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

APPELLANTS' OPENING BRIEF

John Ohlson, Esq.
Bar Number 1672
275 Hill Street, Suite 230
Reno, Nevada 89501
(775) 323-2700

Jeff Kump, Esq.
Bar Number 5694
MARVEL & KUMP, LTD.
217 Idaho Street
Elko, Nevada 89801
(775) 777-1204
Counsel for Appellants

RECEIVED
MAY 31 2011
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUSAN FALLINI,

Supreme Court No.: 56840

Appellant,

vs.

Estate of MICHAEL DAVID ADAMS,
By and through his mother JUDITH ADAMS,
Individually and on behalf of the Estate,

Respondent.

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

APPELLANTS' OPENING BRIEF

John Ohlson, Esq.
Bar Number 1672
275 Hill Street, Suite 230
Reno, Nevada 89501
(775) 323-2700

Jeff Kump, Esq.
Bar Number 5694
MARVEL & KUMP, LTD.
217 Idaho Street
Elko, Nevada 89801
(775) 777-1204
Counsel for Appellants

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

JURISDICTIONAL STATEMENT.....5-6

STATEMENT OF ISSUES PRESENTED FOR REVIEW6

STATEMENT OF THE CASE.....6-8

RELEVANT FACTS.....8-11

SUMMARY OF ARGUMENT11

ARGUMENT 12-19

 I. THE DISTRICT COURT ERRED IN DENYING FALLINI’S MOTION FOR
 RECONSIDERATION.12

 A. The Order Granting Motion for Partial Summary Judgment was Clearly
 Erroneous.....12-15

 B. Allowing the Order Granting Motion for Partial Summary Judgment
 to stand worked a Manifest Injustice.....15-16

 II. THE DISTRICT COURT ERRED WHEN IT DISMISSED THE JURY TRIAL, AND
 DETERMINING DAMAGES.....17

 III. THE DISTRICT COURT ERRED WHEN IN AWARDING EXCESSIVE
 DAMAGES WIHTOUT LEGAL BASIS.....18-19

CONCLUSION.....19

CERTIFICATE OF COMPLIANCE.....19

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<u>CASES</u>	<u>Page</u>
<i>Alper v. Posin</i> , 77 Nev. 328, 344 P.2d 676 (1959).....	5-6
<i>Arnold v. Kip</i> , 123 Nev. 410, 168 P3d 1050 (2007).....	12
<i>City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper</i> , 254 F.3d 882, 885 (9th Cir.2001).....	12
<i>Cornea v. Wilcox</i> , 898 P.2d 1379, 1386 (Utah 1995).....	19
<i>Lakin v. Senco Products, Inc.</i> , 987 P.2d 463, 470, 329 Or. 62, (1999).....	17
<i>Little Earth v. Department of Housing</i> , 807 Fed 2d 1433 (8 th Cir. 1986).....	12
<i>Masonry and Tile Contractors v. Jolley</i> , 113 Nev. 737, 941 P 2d 486, 489 (1997).....	12
<i>Molodyh v. Truck Insurance Exchange</i> , 744 P.2d 992, 304 Or. 290, 297-298 (1987).....	17
<i>Mullally v. Jones</i> , 2010 WL 3359333 (D.Nev.).....	12
<i>Penrod v. Carter</i> , 737 P.2d 199, 200 (Utah 1987).....	19
<i>Perkins v. Sierra Nevada Silver Minng Co.</i> , 10 Nev. 405 (1876).....	5
<i>Rees v. Intermountain Health Care, Inc.</i> , 808 P.2d 1069, 1072 (Utah 1991).....	19
<i>TXO Production Corp. v. Alliance Resources Corp.</i> , 509 U. S. 443, 454 (1993).....	18
<i>United States v. California Mobile Home Management Park Co.</i> , 107 F.3d 1374, 1377 (9th Cir. 1997).....	17
<i>United States v. Serpa</i> , 930 Fed. 2d 639 (8 th Cir., 1991).....	12
 <u>BOOKS</u>	
Charles T. McCormick, <i>Handbook on the Law of Damages</i> 24 (1935).....	17
 <u>STATUTES</u>	
Nevada State Constitution Article 1, Section 3.....	17
 <u>COURT RULES</u>	
DCR 13(7).....	12
NRAP 3.....	6
NRAP 3A(b)(1).....	5-6
NRAP 4(a).....	6
NRAP 28(a).....	5

1	NRCP 36.....	8
2	Nevada Code of Judicial Conduct Canon 1.....	14
3	Nevada Code of Judicial Conduct Rule 2.15.....	16
4	Nevada Rules of Professional Conduct Rule 1.1.....	15-16
5	Nevada Rules of Professional Conduct Rule 3.1.....	13
6	Nevada Rules of Professional Conduct Rule 3.3.....	13
7	Nevada Rules of Professional Conduct Rule 8.4.....	13
8	<u>JURY INSTRUCTIONS</u>	
9	Nev. J.I 10.13.....	18
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 SUSAN FALLINI,

Supreme Court No.: 56840

3 Appellant,

4 vs.

**APPELLANT'S
OPENING BRIEF**

5 Estate of MICHAEL DAVID ADAMS,
6 By and through his mother JUDITH ADAMS,
7 Individually and on behalf of the Estate,

8 Respondent.

9 _____ /
10 Pursuant to NRAP 28(a), Appellant, Susan Fallini, hereby submits Appellant's
11 Opening Brief:

12 **JURISDICTIONAL STATEMENT**

13 An aggrieved party may take an appeal from a "final judgment entered in an action
14 or proceeding . . ." NRAP 3A(b)(1). A final Judgment in an action or proceeding is
15 essentially one that disposes of the issues presented in the case, determines the costs, and
16 leaves nothing for future consideration of the court. *Alper v. Posin*, 77 Nev. 328, 344 P.2d
17 676 (1959). When no further action of the court is required in order to determine the
18 rights of the parties in the action the order or judgment is final; when the case is retained
19 for further action, it is interlocutory. *Perkins v. Sierra Nevada Silver Mining Co.*, 10 Nev.
20 405 (1876).

21 On August 12, 2010, the Fifth Judicial District Court of the State of Nevada
22 entered an Order After Hearing, denying Defendant's Motion for Reconsideration,
23 granting the Plaintiff damages in the principal amount of \$1,000,000 for grief, sorrow and
24 loss of support together with damages for future lost earnings in the amount of
25 \$1,640,696, attorney's fees in the amount of \$50,000, sanctions in the amount of \$35,000
26 and funeral expenses in the amount for \$5,188.85, and cancelling the trial that had been
27 scheduled (*See Order After Hearing entered August 12, 2010, Jt. Appx. II, 222-225*¹). All

28 ¹ References to pages in Joint Appendix will be in the form "Jt. Appx. [volume].[page(s)]". Thus "Jt. Appx. II., 222-225", above, refers to volume II, pages 222-225, in Appellants' Appendix.

1 other issues had been resolved previously in this case through the entry of partial
2 summary judgment, the striking of Susan Fallini's Answer and Counterclaim and entry of
3 a default. Jt. Appx. II, 55-57, 26-31, and 41-42.

4 NRAP 4 requires that "the notice of appeal required by Rule 3 shall be filed with
5 the district court clerk . . . after entry of a written judgment or order, and no later than 30
6 days after the date that written notice of entry of the judgment or order appealed from is
7 served." NRAP 4(a). On August 18, 2010, Plaintiff, Estate of Michael David Adams, by
8 and through his mother Judith Adams, Individually and on behalf of the Estate
9 (hereinafter Adams) filed a Notice of Entry of Order, which was mailed to Susan Fallini
10 (hereinafter Fallini) on August 17, 2010. Fallini filed her Notice of Appeal and Case
11 Appeal Statement on September 10, 2010.

12 This court may properly hear this matter as the District Court's August 12, 2010,
13 Order After Hearing was a final judgment as defined in NRAP3A(b)(1) and *Alper v.*
14 *Posin, supra*, and a Notice of Appeal was properly filed September 10, 2010, along with a
15 Case Appeal Statement in conformance with NRAP 3, NRAP 3A(a) and NRAP 4.

16 **ISSUES PRESENTED FOR REVIEW**

- 17 (1) Whether the district court committed a reversible error in denying Defendant's
18 Motion for Reconsideration.
19 (2) Whether the district court erred in vacating the jury trial, and determining damages.
20 (3) Whether damages awarded by the district court were excessive, and without a legal
21 basis.

22 **STATEMENT OF CASE**

23 The action arose out of wrongful death claims asserted by Plaintiff, Adams against
24 Defendant, Fallini. Jt. Appx. I, 1-6. Michael David Adams (hereinafter Michael) was
25 driving his car on July 7, 2005, when he hit a cow owned by Fallini, and died. Jt. Appx. I,
26 3. The complaint was filed on January 31, 2007. Jt. Appx. I, 1. Fallini filed her Answer
27 and Counterclaim on March 14, 2007. Jt. Appx. I, 10. Soon after the Answer and
28 Counterclaim were filed, Fallini's attorney Harold Kuehn (hereinafter Kuehn) failed to

1 take further necessary action including the failure to respond to discovery requests such as
2 the request for admissions. Jt. Appx. II, 91-95.

3 As a result of Kuehn's failure to answer the requests for admissions, inaccurate
4 statements establishing Fallini's liability were deemed admitted. Jt. Appx. I, 55-57. On
5 July 30, 2008 the District Court entered an Order Granting Plaintiffs' Motion for Partial
6 Summary Judgment establishing Fallini's liability leaving only the issue of damages left
7 to be heard. Jt. Appx. I, 55-57. Notice of Entry of that Order was filed on August 15,
8 2008. Jt. Appx. I, 58-62. On June 16, 2009, Plaintiff moved to Strike Defendant's Answer
9 and Counterclaim, which Kuehn opposed requesting that the court "decline to strike the
10 answer and counterclaim in favor of imposing further monetary sanction against him." Jt.
11 Appx. I, 224-231. Kuehn declared to the Court that the discovery noncompliance was
12 "absolutely not the fault of the party and the blame should be attributed to counsel in full."
13 Jt. Appx. I, 226. On July 17, 2009, the Court denied Plaintiff's Motion to Strike
14 Defendant's Answer and Counterclaim. Jt. Appx. I, 232-233. However, on November 4,
15 2009, after repeatedly sanctioning Kuehn for his continued failure to respond to discovery
16 requests and orders, the Court entered a Findings of Fact, Conclusions of Law and Order
17 Striking Answer and Counterclaim of Defendant Fallini and Holding Defendant's
18 Counsel in Contempt of Court. Jt. Appx. II, 26-31. Notice of entry of that Order was filed
19 on November 9, 2009, and a Default was entered by the clerk of the court pursuant to that
20 Order on February 4, 2010. Jt. Appx. II, 32-33, 41.

21 On June 16, 2010, Fallini substituted counsel replacing Kuehn. Jt. Appx. II, 87-88.
22 On June 24, 2010, Adams filed an Application for Default Judgment Against Defendant
23 Susan Fallini. Jt. Appx. II, 89-129. This Motion was opposed that same day (*See*
24 *Opposition*, Jt. Appx. II, 130-132). Fallini then filed a Motion for Leave to File a Motion
25 for Reconsideration that Adams opposed. (*See Motion for Reconsideration "MFR"*,
26 attached as Exhibit 1 thereto, Jt. Appx. II, 138-159) Adams' Application and Fallini's
27 Motion were heard on July 19, 2010, resulting in the final Order After Hearing entered
28 August 12, 2010, granting Adams' Application, denying Fallini's Motion, and granting

1 Adams a total of \$2,730,884.85 in damages and attorney's fees, which Fallini Appeals
2 from (*See Order After Hearing entered August 12, 2010, Jt. Appx. II, 222-225*).

3 RELEVANT FACTS

4 On July 7, 2005 around 9:00 p.m. Michael was driving on SR 375 highway in Nye
5 County, Nevada, when he hit a Herford cow, owned by Fallini, killing both Michael and
6 the cow. Jt. Appx. I, 2. On November 29, 2006 Adams filed his Complaint in Clark
7 County Nevada. Fallini retained Harry Kuehn, Esq. of the law firm Gibson & Kuehn, to
8 represent her as the Defendant in the wrongful death case; Adams, et al v. Fallini. Jt.
9 Appx. I, 14. The action in Clark County was dismissed and subsequently re-filed in Nye
10 County in the Fifth Judicial District Court of Nevada (Pahrump). Jt. Appx. I, 18-20.
11 Kuehn accepted service on behalf of Fallini on March 1, 2007. Jt. Appx. I, 8-9. Fallini
12 filed her Answer and Counterclaim on March 14, 2007. Fallini had a complete defense to
13 the lawsuit, as the cow was on the highway in an "open range" part of Nevada (*See MFR*
14 *Jt. Appx. II, 138-159*). The fact that the part of the highway where the accident occurred
15 was "open range" is commonly known in that area (*See MFR Jt. Appx. II, 138-159 and*
16 *Opposition to Application for Default, Jt. Appx. II, 130-132*).

17 Sometime in June, 2007, Fallini called Kuehn to inquire about the case, as she had
18 not heard from Kuehn. Kuehn informed Fallini that the case was "over," and that she had
19 prevailed. That was not true, Kuehn had filed an answer, and the case was just beginning
20 (*See Opposition to Application for Default, Jt. Appx. II, 130-132*).

21 On or about October 31, 2007, Kuehn was served with discovery requests
22 including Requests for Admission by Adams. Jt. Appx. I, 40-51. Kuehn failed to respond
23 to said Requests for Admission before the expiration of 30 days, and, in fact, never
24 responded to the requests. Jt. Appx. I, 40-51. As a direct result of Kuehn's failure to
25 respond to the Requests for Admission the requests were deemed admitted by default
26 pursuant to NRCP 36. Jt. Appx. I, 71-74. Thus, Fallini "admitted" that: the area of the
27 accident was **not** open range; that Fallini had failed to follow the custom and practice of
28 ranchers in the area of tagging cattle with luminous tags so that they could be seen at night

1 on the roadway (a practice that has never existed); and other statements that established
2 Fallini's liability in the matter and extinguished her defenses. Kuehn never informed
3 Fallini of the discovery requests. Jt. Appx. I, 71-74.

4 On July 2, 2008, Adams served a second set of request for production of
5 documents on Kuehn. Kuehn failed to responded to these discovery requests as well. Jt.
6 Appx. I, 41-46.

7 On April 7, 2008 (and again on May 14, 2008 with a certificate of service) Adams
8 filed their Motion for Partial Summary Judgment. Jt. Appx. I, 40. Kuehn failed to oppose
9 this motion. Jt. Appx. I, 71-74. The Motion was based primarily on the admissions
10 contained in the request for admissions. Jt. Appx. I, 41-49. A hearing on the Motion was
11 held on July 14, 2008, which Kuehn failed to appear at and the motion was granted (*See*
12 court minutes in Case Summary, Jt. Appx. II, 240-244). The Court entered its Order
13 Granting Plaintiff's Motion for Partial Summary Judgment on July 30, 2008. Jt. Appx. I,
14 55-57. Notice of entry of that Order was served on Kuehn on August 15, 2008. Jt. Appx.
15 I, 58-62.

16 On March 23, 2009, Adams filed a Motion to Compel Defendant's Production of
17 Documents. A hearing on that motion was held on April 27, 2009, wherein Kuehn
18 appeared and stated that his office dropped the ball and did not oppose the motion (*See*
19 *See* court minutes in Case Summary, Jt. Appx. II, 240-244). The Court issued an Order
20 Granting Plaintiff's Motion and ordering Fallini to pay \$750.00 in attorney's fees. Kuehn
21 continued to fail to produce the discovery requests, and on June 16, 2009, Adams filed a
22 Motion to Strike Defendant's Answer and Counterclaim. Jt. Appx. I, 160-170. Kuehn
23 opposed requesting that the court "decline to strike the answer and counterclaim in favor
24 of imposing further monetary sanction against him." Jt. Appx. I, 224-231. Kuehn
25 declared to the Court that the discovery noncompliance was "absolutely not the fault of
26 the party and the blame should be attributed to counsel in full." Jt. Appx. I, 226. On July
27 13, 2009, the Court heard and denied Plaintiff's Motion to Strike Defendant's Answer and
28 Counterclaim and imposed additional sanctions on Kuehn. Jt. Appx. I, 232-233.

1 Because of Kuehn's repeated failure to comply with discovery requests, Adams
2 filed numerous Motions for Order to Show Cause and Orders to Show Cause were issued.
3 Jt. Appx. I, 91-143, 148-149, 160-219, II, 1-12, 17-19, 20-21, 26-31, 48-58 and 68-75.
4 Kuehn was repeatedly sanctioned by the Court. Jt. Appx. I, 148-149, 220-223, 232-233,
5 II, 20-21, 26-31, 59-61, 68-75 and 222-225. In the face of these sanctions, Kuehn
6 promised to comply, but never did. Jt. Appx. II, 89-129. Despite the imposition of
7 sanctions, which accrued daily, Kuehn never responded.

8 On November 4, 2009, after repeatedly sanctioning Kuehn for his continued failure
9 to respond to discovery requests and orders the Court entered a Findings of Fact,
10 Conclusions of Law and Order Striking Answer and Counterclaim of Defendant Susan
11 Fallini and Holding Defendant's Counsel in Contempt of Court. Jt. Appx. II, 26-31.
12 Notice of entry of that Order was filed on November 9, 2009. Jt. Appx. II, 32-40. Default
13 was entered by the clerk of the court pursuant to that Order on February 4, 2010. Jt. Appx.
14 II, 41-42. On June 2, 2010, the Court entered another Findings of Fact, Conclusions of
15 Law and Order Holding Defendant's Counsel in Contempt of Court, this time fining
16 Kuehn \$5,000.00 plus an additional \$500.00 per day for every day after the 30th day
17 following the entry of that Order that Kuehn continued to fail to respond to Discovery
18 requests. Jt. Appx. II, 68-75. Kuehn, nonetheless maintained his inaction.

19 The Order for Partial Summary Judgment established Fallini's liability in this
20 matter, and the Order Striking Answer and Counterclaim left Fallini in the position of
21 default. The default stripped Fallini of all defenses (*See MFR Jt. Appx. II, 138-159*). Still,
22 Kuehn did not notify Fallini of the status of the case. Kuehn failed to inform Fallini about
23 these circumstances, having previously told her that the case was "over" (*See MFR, Jt.*
24 *Appx. II, 138-159*). Kuehn never brought Fallini to any of the hearings and repeatedly
25 told the Court that the responsibility for the inaction was his alone (*See court minutes in*
26 *Case Summary, Jt. Appx. II, 240-244*). Finally, in June of 2010, Kuehn's partner, Tom
27 Gibson, Esq. discovered the status of the case and contacted Fallini, informing her of what
28 had transpired over the preceding three years (*See MFR, Jt. Appx. II, 138-159*). Gibson

1 informed Fallini that Kuehn has bi-polar disorder, and “went off his meds” (See MFR Jt.
2 Appx. II, 138-159). Fallini immediately hired new counsel filing a Substitution of
3 Counsel on June 16, 2010, replacing Kuehn with the undersigned counsel. Jt. Appx. II,
4 87-88. On June 24, 2010, Adams filed an Application for Default Judgment Against
5 Defendant Susan Fallini. Jt. Appx. II, 89-129. This Application was opposed that same
6 day (See Opposition, Jt. Appx. II, 130-132). Fallini’s new counsel then filed a Motion for
7 Leave to File a Motion for Reconsideration that Adams opposed (See MFR, Jt. Appx. II,
8 138-159). Adams’ Application and Fallini’s Motion were heard on July 19, 2010,
9 resulting in the final Order After Hearing entered August 12, 2010, granting Adams’
10 Application, denying Fallini’s Motion, and proceeding with a prove up hearing granting
11 Adams a total of \$2,730,884.85 in damages and attorney’s fees, from which Fallini
12 Appeals (See Order After Hearing, Jt. Appx. II, 222-225 and court minutes in Case
13 Summary, Jt. Appx. II, 240-244).

14 SUMMARY OF ARGUMENTS

15 I. Denying Fallini’s Motion for Reconsideration was reversible error as the
16 Orders entered of which Fallini was requesting reconsideration were clearly erroneous,
17 based on “facts” known to be untrue but established by default, and manifested injustice,
18 holding Fallini liable for an accident that she was in no way responsible for to the tune of
19 2.7 million dollars.

20 II. Dismissing the jury trial was reversible error because it deprived Defendant
21 of her constitutional right and the determination of damages is an issue of fact that should
22 have been resolved by the jury.

23 III. The damages awarded to Adams by the District Court were excessive and
24 were not supported by any legal basis or calculations supported by evidence.

25 The District Court’s Order After Hearing should be reversed and the case
26 remanded, with instructions to reconsider previous orders and have all issues of fact tried
27 by a jury.

28

1 Nevada Rule of Professional Conduct 3.1 provides in relevant part: "A lawyer shall
2 not ... assert or controvert an issue ... unless there is a basis in law *and fact* for doing so
3 that is not frivolous . . ." (emphasis added).

4 Rule 3.3. provides in relevant part:

5 (a) A lawyer shall not knowingly:

6 (1) Make a false statement of fact or law to a tribunal or fail to
7 correct a false statement of material fact or law previously made to
8 the tribunal by the lawyer; . . .or

9 (3) Offer evidence that the lawyer knows to be false. If a lawyer, the
10 lawyer's client, or a witness called by the lawyer, has offered
11 material evidence and the lawyer comes to know of its falsity, the
12 lawyer shall take reasonable remedial measures, including, if
13 necessary, disclosure to the tribunal...

14 Rule 8.4. provides in relevant part that it is professional misconduct for a lawyer to:

15 (a) Violate or attempt to violate the Rules of Professional Conduct,
16 knowingly assist or induce another to do so, or do so through the acts
17 of another; . . .

18 (c) Engage in conduct involving dishonesty, fraud, deceit or
19 misrepresentation;

20 (d) Engage in conduct that is prejudicial to the administration of
21 justice . .

22 Plaintiff achieved victory in this matter due to Kuehn's failure to deny requests for
23 admission. Jt. Appx. I, 55-57. The essential subject matter of which established liability
24 and provided that the area of highway on which the accident occurred in this case was **not**
25 open range. Jt. Appx. II, 89-129. It was further established, through failure to deny, that
26 Defendant failed in her responsibility to attached reflective tags to her cows, as is the
27 custom in that part of Nye County. Jt. Appx. I, 55-57.

28 Both propositions of fact are false and therefore clearly erroneous. The area in
which the accident occurred in Nye County, Nevada was, in fact, open range, a fact
commonly known in Nye County, in which the District Court sat (*See* MFR, Jt. Appx. II,
138-159 and/or Opposition to Application for Default, Jt. Appx. II, 130-132). On the
subject of reflective strips, no such custom and practice exists among ranchers in Nye
County (*See* MFR, Jt. Appx. II, 138-159 and/or Opposition to Application for Default, Jt.
Appx. II, 130-132). Plaintiff's counsel knew or should have known that these contentions

1 were false, as it was common knowledge in Nye County, yet he still presented these
2 statement as “facts” to the Court, allowing misrepresentations to stand perpetrating
3 misconduct of his own.

4 Because Kuehn failed to deny the Plaintiff’s request for admission, the questions
5 were deemed admitted (*See* Jt. Appx. I, 55-57). To compound matters, Kuehn failed to
6 oppose Plaintiff’s motion for summary judgment, violating Rule 1.1 of the Code of
7 Professional Conduct requiring that counsel provide competent representation (*See* Jt.
8 Appx. I., 55-57). The Court then granted the unopposed motion for summary judgment,
9 even though the factual premise therefore was and is patently untrue (*See* MFR, Jt. Appx.
10 II, 138-159).

11 The first Canon of the Code of Judicial Conduct provides:

12 A judge shall uphold and promote the independence, integrity, and
13 impartiality of the judiciary and shall avoid impropriety and the appearance
14 of impropriety.

15 Although there is no transcript of the final hearing in front of the District Court,
16 Fallini recalls the Honorable Robert Lane stating that he knew the area where the accident
17 occurred to be “open range.” Yet the Court accepted as fact that it was not open range
18 and made rulings consistent therewith, detracting from the integrity of the tribunal. By
19 accepting facts as true, which were known or should have been known to be false the trial
20 court failed to uphold the “integrity of the tribunal.”

21 Had Fallini been properly represented, the District Court may well have taken
22 judicial notice that the area in question in this case was open range. The Court began the
23 final Hearing inclined to grant Fallini’s Motion for Reconsideration (*See* court minutes in
24 Case Summary, Jt. Appx. II, 240-244). Instead, the Court accepted a false factual premise
25 due to Kuehn’s failures, ultimately ratifying that acceptance in its final order despite
26 knowing the facts supporting the order were false (*See* Order after Hearing, Jt. Appx. II,
27 222-225).

28 Because the Partial Summary Judgment rested on factual falsehoods, it was **clearly**

1 **erroneous.** The first prong for the Court to have reconsidered and rescinded previous
2 orders was met.

3 ***B. Allowing the Order Granting Motion for Partial Summary Judgment to stand***
4 ***worked a Manifest Injustice***

5 Promptly after this case was initiated, Fallini retained Kuehn to represent her in the
6 defense of this action (*See* Jt. Appx. I, 8-9). Kuehn accepted service for Fallini on
7 February 22, 2007 (*See* Proof of Service, Jt. Appx. I, 8-9). Until approximately June 2,
8 2010 Kuehn failed to communicate the status of the case, **except to tell Defendant that**
9 **the case was “over and had been taken care of”** (*See* MFR Jt. Appx. II, 138-159).
10 Finally, Mr. Tom Gibson (apparently having been apprised of Kuehn’s many derelictions
11 in this case) contacted Fallini and apprised her of the true status of her case (*See* MFR Jt.
12 Appx. II, 138-159).

13 Fallini had no idea that she had been served with discovery requests, that among
14 those requests were Requests for Admissions, or that the failure to deny those had become
15 case determinative (*See* Opposition to Application for Default Jt. Appx. II, 130-132).
16 Fallini had been completely unaware that the lawyer she had hired and paid had failed so
17 miserably to protect her interests or that every motion made by Adams had gone
18 unopposed (*See* court minutes in Case Summary, Jt. Appx. II, 240-244). Further, Fallini
19 was ignorant of the fact that her lawyer had repeatedly exposed them to contempt citations
20 (which were never served on her personally) (*See* MFR Jt. Appx. II, 138-159, Opposition
21 to Application for Default, Jt. Appx. II, 130-132 and Certificate of Service attached to
22 Orders or Notice’s of Entry, Jt. Appx. II, 23, 33, 63, and 77).

23 As soon as Fallini discovered her lawyer had failed to competently represent her
24 and had been the engine of this disaster, she consulted long time counsel who referred her
25 to new counsel without delay (*See* Jt. Appx. II, 87-88, and Opposition to Application for
26 Default, Jt. Appx. II, 130-132). If Kuehn was the engine for this disaster then the District
27 Court was the conductor, and this disaster could have been and should have been stopped
28 from barreling down this track at a much earlier time.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Rule 1.1 of the Nevada Rules of Professional Conduct provides as follows:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 2.15 of the Nevada Code of Judicial Conduct provides in relevant part as follows:

... (B) A judge having knowledge that a lawyer has committed a violation of the Nevada Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority. . . (D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Nevada Rules of Professional Conduct shall take appropriate action.

Kuehn's utter failure to provide competent representation and be honest with Fallini not only brought this unjust result upon Fallini, but the District Court, despite its obvious knowledge of Kuehn's misconduct (shown by the numerous and hefty fines imposed on Kuehn) failed to notify the appropriate authority or Fallini, and instead enter decisions based entirely on his failures, and not on sound factual premises. The District Court had a duty to report Kuehn to the State Bar for his gross and obvious dereliction of duty, and should have required Kuehn to at least bring his client to one or more of the hearings where her rights were being foreclosed upon (*See* court minutes in Case Summary, Jt. Appx. II, 240-244). Kuehn subverted the administration of justice and the court allowed this subversion to continue in violation of numerous rules of professional conduct and the code of judicial conduct.² If this case does not represent the "manifest injustice" of which the Supreme Court speaks, then manifest injustice does not exist.

Because the Orders that Fallini moved the court to reconsider were clearly erroneous and leaving them in place perpetuated a manifest injustice, the District Court erred in denying Fallini's Motion for Reconsideration.

² Code of Judicial Conduct Canon 1: A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.

1 II. **THE DISTRICT COURT ERRED WHEN IT DISMISSED THE JURY**
2 **TRIAL AND DETERMINED DAMAGES**

3 This matter was set for a jury trial when the District Court vacated that jury trial
4 setting and determining damages from the bench (*See* Jt. Appx. I, 221-224, and Order
5 After Hearing, Jt. Appx. II, 222-225) Article 1, Section 3 of the Nevada Constitution
6 provides:

7 **Trial by jury; waiver in civil cases.** The right of trial by Jury shall be
8 secured to all and remain inviolate forever; but a Jury trial may be waived
9 by the parties in all civil cases in the manner to be prescribed by law; and in
10 civil cases, if three fourths of the Jurors agree upon a verdict it shall stand
11 and have the same force and effect as a verdict by the whole Jury, Provided,
12 the Legislature by a law passed by a two thirds vote of all the members
13 elected to each branch thereof may require a unanimous verdict
14 notwithstanding this Provision.

15 The unconstitutional denial of a jury trial must be reversed unless the error was
16 harmless. *United States v. California Mobile Home Management Park Co.*, 107 F.3d
17 1374, 1377 (9th Cir. 1997). The right to jury trial includes having a jury determine all
18 issues of fact. *Molodyh v. Truck Insurance Exchange*, 744 P.2d 992, 304 Or. 290, 297-298
19 (1987). "The amount of damages *** from the beginning of trial by jury, was a 'fact' to
20 be found by the jurors." *Lakin v. Senco Products, Inc.*, 987 P.2d 463, 470, 329 Or. 62,
21 Quoting Charles T. McCormick, *Handbook on the Law of Damages* 24 (1935).

22 This matter was set to be tried by a jury. Jt. Appx. I, 220-223. Factual
23 determinations remained as to damages, even though the Court struck the Defendant's
24 answer and entered default (*See* Opposition to Application for Default Jt. Appx. II, 130-
25 132). The Court's determination of damages from the bench, after striking the jury trial,
26 violated Defendant's right to a jury trial secured by the above cited section of the Nevada
27 Constitution. The Damages awarded by the District Court in total exceeded 2.7 million
28 dollars, making the error very harmful to Fallini (*See* Order After Hearing, Jt. Appx. II,
222-225). Thus, this Court must reverse the District Court's decision.

////

////

1 **III. THE DISTRICT COURT ERRED WHEN IT AWARDED**
2 **EXCESSIVE DAMAGES WIHTOUT LEGAL BASIS**

3 Damages were awarded in this case without a legal basis, and were excessive. The
4 Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a
5 “grossly excessive” punishment on a tortfeasor. *TXO Production Corp. v. Alliance*
6 *Resources Corp.*, 509 U. S. 443, 454 (1993). Nevada Pattern Civil Jury Instruction No.:
7 Nev. J.I 10.13 explains that damages are determined to make a Plaintiff whole, and
8 compensate for loss, and provides as follows:

9 The heir’s loss of probable support, companionship, society, comfort and
10 consortium. In determining that loss, you may consider the financial support, if
11 any, which the heir would have received from the deceased except for his death,
12 and the right to receive support, if any, which the heir has lost by reason of his
13 death.

14 [The right of one person to receive support from another is not destroyed by
15 the fact that the former does not need the support, nor by the fact that the latter has
16 not provided it.]

17 You may also consider:

- 18 1. The age of the deceased and of the heir;
19 2. The health of the deceased and of the heir;
20 3. The respective life expectancies of the deceased and of the heir;
21 4. Whether the deceased was kindly, affectionate or otherwise;
22 5. The disposition of the deceased to contribute financially to support the
23 heir;
24 6. The earning capacity of the deceased;
25 7. His habits of industry and thrift; and
26 8. Any other facts shown by the evidence indicating what benefits the heir
27 might reasonably have been expected to receive from the deceased had
28 he lived.

 With respect to life expectancies, you will only be concerned with the
shorter of the two, that of the heir whose damages you are evaluating or that
of the decedent, as one can derive a benefit from the life of another only so
long as both are alive.

 A calculation of damages should only be upheld if there is competent evidence to

1 sustain it. *Cornea v. Wilcox*, 898 P.2d 1379, 1386 (Utah 1995) citing *Rees v.*
2 *Intermountain Health Care, Inc.*, 808 P.2d 1069, 1072 (Utah 1991); *Penrod v. Carter*, 737
3 P.2d 199, 200 (Utah 1987). In this matter, there was no showing that Plaintiff's suffered
4 any economic loss from the death of their son. Only the estate damages related to funeral
5 expenses were shown constituting compensable damage (*See Order After Hearing, Jt.*
6 *Appx. II, 222-225*).

7 **CONCLUSION**

8 This cataclysmic, train wreck of a case was occasioned by the blatant malpractice
9 of Appellant Fallini's first lawyer, compounded by Adam's attorney's misconduct, which
10 caused the entry of partial summary judgment, the striking of Appellant's answer, and the
11 entry of default. But for the attorney misconduct and allowance by the District Court,
12 Appellant should have prevailed. The District Court committed reversible error when it
13 denied Fallini's Motion for Reconsideration, vacated the jury trial and awarded excessive
14 damages to Adams.

15 Now Appellant faces a huge (\$2.7 million) damages award. This court should
16 reverse the District Court's decision and remand the case directing the lower Court to
17 reconsider its earlier orders and allow Appellant her defense.

18 **CERTIFICATE OF COMPLIANCE**

19 I hereby certify that I have read this appellate brief, and to the best of my
20 knowledge, information, and belief it is not frivolous or interposed for any improper
21 purpose. I further certify that this brief complies with all applicable Nevada Rules of
22 Appellate Procedure, including the requirement of N.R.A.P. 28(e), which requires that
23 every assertion in the briefs regarding matters in the record be supported by a reference to
24 the page of the transcript or appendix where the matter relied on is to be found. I
25 understand that I may be subject to sanctions in the event that the accompanying brief is

26 ////

27 ////

28

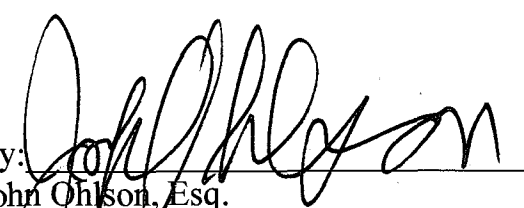
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 21 day of May, 2011.

By: 
John Ohlson, Esq.
Bar Number 1672
275 Hill Street, Suite 230
Reno, Nevada 89501
(775) 323-2700

Jeff Kump, Esq.
Bar Number 5694
MARVEL & KUMP, LTD.
217 Idaho Street
Elko, Nevada 89801
(775) 777-1204

CERTIFICATE OF SERVICE

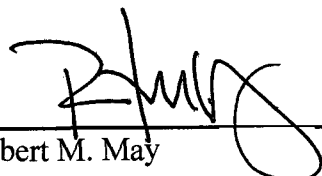
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I hereby certify that I am an employee of JOHN OHLSON, and that on this date I personally served a true copy of the foregoing **APPELLANT'S OPENING BRIEF**, by the method indicated and addressed to the following:

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

- Via U.S. Mail
- Via Overnight Mail
- Via Hand Delivery
- Via Facsimile
- Via ECF

DATED this 27 day of May, 2011.



Robert M. May