

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

2  
3            SUSAN FALLINI,

4                                    Appellant,

5 vs.

6            ESTATE OF MICHAEL DAVID  
7            ADAMS, BY AND THROUGH HIS  
8            MOTHER JUDITH ADAMS,  
9            INDIVIDUALLY AND ON BEHALF  
                    OF THE ESTATE

   Respondents.

CASE NO. 56840

District Court Case No.: CV00224539

**FILED**

**JUL 11 2011**

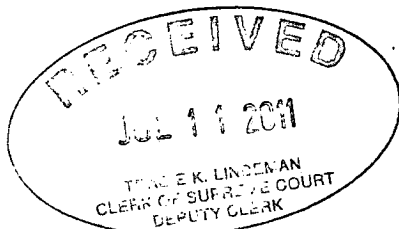
TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

10  
11            Appeal from the Fifth Judicial District Court of the State of Nevada in and for the  
   County of Nye

12            • The Honorable Robert W. Lane, District Judge

13  
14  
15                                    **RESPONDENT'S ANSWERING BRIEF**

16  
17            JOHN P. ALDRICH, ESQ.  
18            Nevada Bar No. 006877  
19            CATHERINE HERNANDEZ, ESQ  
20            Nevada Bar No. 008410  
21            ALDRICH LAW FIRM, LTD.  
22            1601 S. Rainbow Blvd. Suite 160  
23            Las Vegas, Nevada 89146  
24            Telephone (702) 853-5490  
25            Attorney for Respondents



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

2  
3                   SUSAN FALLINI,

4                                   Appellant,

5                   vs.

6                   ESTATE OF MICHAEL DAVID  
7                   ADAMS, BY AND THROUGH HIS  
8                   MOTHER JUDITH ADAMS,  
                  INDIVIDUALLY AND ON BEHALF  
                  OF THE ESTATE

9                                   Respondents.

CASE NO. 56840

District Court Case No.: CV00224539

10  
11                   Appeal from the Fifth Judicial District Court of the State of Nevada in and for the  
  County of Nye  
12                                   The Honorable Robert W. Lane, District Judge

13  
14                                   **RESPONDENT'S ANSWERING BRIEF**

15  
16  
17                   JOHN P. ALDRICH, ESQ.  
18                   Nevada Bar No. 006877  
19                   CATHERINE HERNANDEZ, ESQ  
20                   Nevada Bar No. 008410  
21                   ALDRICH LAW FIRM, LTD.  
22                   1601 S. Rainbow Blvd. Suite 160  
                  Las Vegas, Nevada 89146  
                  Telephone (702) 853-5490  
                  Attorney for Respondents

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

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	iii
STATUTES AND REGULATIONS	v
I. STATEMENT OF THE ISSUES	1
II. STATEMENT OF THE CASE	2
III. STATEMENT OF THE FACTS	5
IV. STANDARD OF REVIEW	8
V. LEGAL ARGUMENT	10
A. Defendant Fallini's Motion to Reconsider Prior Orders Was Properly Denied, As She Presented No New Law or Fact Justifying Rehearing	16
B. The Prior Orders Are Not Clearly Erroneous	12
1. The Motion for Partial Summary Judgement Was Properly Granted	12
2. The Facts Submitted in the Requests for Admission Are Conclusively Proven	12
3. The Order Striking Answer and Counterclaim Was Properly Entered	15
C. Defendant Fallini Shirked Her Responsibilities as a Party to the Litigation	15
1. Mr. Kuehn's Alleged Negligence Is Imputed to Her	15

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

2.	Notice to the Attorney Constitutes Notice to the Client	17
3.	Defendant Fallini Is Estopped from Raising These Issues Due to the Actions (and/or Inactions) of Her Counsel	17
D.	The Only Manifest Injustice That Would Occur in This Case Is If Judith Had to Re-litigate This Case	18
E.	The District Court Properly Vacated the Trial Trial And Determined Damages	20
F.	The District Court Properly Awarded Damages	22
VI.	CONCLUSION	23
	CERTIFICATE OF COMPLIANCE	24
	CERTIFICATE OF MAILING	25

1 **TABLE OF AUTHORITIES**

2 **CASES**

3 Aldabe v. Adams, 81 Nev. 280, 402, P.2d 34 (1965).....17

4

5 Allianz Ins., Co., v. Gagnon, 109 Nev. 990, 997, 860 P.2d 720, 724 (1993).....22

6 Baumgartner v. Whinney, 39 A.2d 738 (Pa. 1944) .....18

7

8 Burroughs Corp. v. Century Steel Inc., 99 Nev. 464, 470, 664 P.2d 354,  
358 (1983).....11

9 Combs' Admr. V. Virginia Iron, Coal & Coke Co., 33 SW 2d 649  
10 (Ky. 1930).....18

11 Geller v. McCowan, 64 Nev. 106, 178 P.2d 380 (1947).....11

12

13 Halaco Eng'g Co. v. Costle, 843 F.2d 376, 379 (9th Cir. 1988).....8

14 In re Ross, 99 Nev. 657, 668 P.2d 1089 (1983).....11

15 Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).....8

16 Koshatka v. Philadelphia Newspapers, Inc., 762 F.2d 329, 333  
17 (3<sup>rd</sup> Cir. 1985).....8

18 Kreis v. Kreis, 57 SW2d 1107 (1933 Tex Civ App)  
19 *error dismissed*, former app 36 SW2d 82.....18

20 Kroger Properties & Development Inc., v. Silver State Title Co.,  
21 715 P.2d 1328, 1330, 102 Nev. 112, 114 (1986).....19

22 Lakin v. Senco Products, 987 P.2d 463, 470 (1935).....21

23

24 Lang v. Hickman, 92 Nev. 41, 544 P.2d 1208 (1976).....17

25

26

27

28

1	<u>Little Earth of United Tribes v. Department of Housing</u> , 807 F.2d 1433, 1441	
2	(8 <sup>th</sup> Cir. 1986).....	11
3	<u>Malone v. United States Postal Serv.</u> , 833 F.2d 128, 130 (9th Cir. 1987).....	9
4	<u>Masonry and Tile Contractors Ass'n v. Jolley, Urga &amp; Wirth Ltd.</u> ,	
5	113 Nev. 737, 941 P.2d 486, at 489 (1997).....	11
6	<u>Milner v. Dudrey</u> , 77 Nev. 256, 362 P.2d 439 (1961).....	17
7	<u>Molodyh v. Truck Insurance Exchange</u> , 744 P.2d 992, 304 (Or. 1987).....	21
8	<u>Montesano v. Donrey Media Group</u> , 99 Nev. 644, 650, 668 P.2d 1081, 1085	
9	(1983).....	9, 13, 19, 20
10	<u>Moore v. Cherry</u> , 90 Nev. 390, 528 P.2d 1018 (1974).....	15
11	<u>Moore v. City of Las Vegas</u> , 92 Nev. 402, 551 P.2d 244 (1976).....	11
12	<u>Noah v. Metzker</u> , 85 Nev. 57, 450 P.2d 141 (1969).....	17
13	<u>Smith v. Emery</u> , 109 Nev. 737, 856 P.3d 1386 (1993) .....	14
14	<u>State ex rel. Copeland v. Woodbury</u> , 17, Nev. 337, 30 P. 1006 (1883).....	11
15	<u>Tahoe Village Realty v. DeSmet</u> , 95 Nev. 131, 590 P.2d 1158, 1161.....	15
16	<u>United States v. California Moblie Home Management Park Co.</u> ,	
17	107 F.3d 1374, 1377 (9th Cir. 1997).....	21
18	<u>Wagner v. Carex Investigations &amp; Sec., Inc.</u> , 93 Nev. 627, 572 P.2d 921	
19	(1977).....	17
20	<u>Weber v. State</u> , 119 P.3d 107, 119 (2005).....	9, 22, 23
21	<u>Wood v. Safeway</u> , 121 Nev. 724, 121 P.3d 1026 (2005).....	9
22		
23		
24		
25		
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

**STATUTES**

NDCR 13(3).....13

NRAP 28(e).....8, 22

NRAP 28(a)(8)(B).....8

NRCP 36 .....14

NRCP 55(b).....23

NRS 51.035.....11

NRS 51.065.....11

I.

**STATEMENT OF THE ISSUES**

Respondents disagree with the Appellant's Statement of the Issues. Respondents propose the following Statement of the Issues:

1. In 2007, Defendant Fallini did not respond to Requests for Admission and in 2008, she did not oppose a Motion for Partial Summary Judgment. Then in 2009, Defendant Fallini did not comply with various orders of the district court, and her Answer and Counterclaim were stricken after several opportunities to comply with the orders of the district court. When Defendant Fallini finally decided to seek relief from the court, Defendant Fallini provided no case law or admissible evidence in support of her Motion to Reconsider Prior Orders. **Based on these facts, has Defendant Fallini failed to prove that the district court abused its discretion when it denied Defendant Fallini's Motion to Reconsider Prior Orders?**

2. Defendant Fallini did not even request a jury trial in the district court, nor did she object to the district court's vacating of the jury trial. **Because Defendant Fallini is raising this issue for the first time on appeal, should the Nevada Supreme Court decline to even consider this alleged point of error?**

3. Respondents moved for entry of default judgment in the district court and provided evidence in support thereof, both in the form of documentary evidence and live testimony. The district court held a prove up hearing, during which it took live testimony, considered the documentary evidence, and later awarded damages. Defendant Fallini has provided no transcript or record upon which to base her claims of error. **Based on these facts, has Defendant Fallini failed to prove that the district court abused its discretion when it awarded damages in excess of \$2.7 million to Respondents?**

///

///

///



1 II.

2 STATEMENT OF THE CASE

3 This case arose out of the wrongful death of Michael David Adams on July 7, 2005.  
4 On that date, Michael was driving on State Route 375 in Nye County, Nevada, when a cow  
5 owned by Appellant Susan Fallini, (hereinafter "Defendant Fallini") suddenly appeared on  
6 the roadway. Michael's vehicle hit the cow and Michael was killed. (Jt Appx. I, 3.)  
7 Respondent, the Estate of Michael David Adams by and through his mother Judith Adams,  
8 individually and on behalf of the Estate, (hereinafter "Judith") filed a lawsuit in Clark  
9 County, Nevada. The case was later transferred to Pahrump, Nye County, and re-filed on  
10 January 31, 2007 in Pahrump, Nye County, Nevada. (Jt. Appx. I, 1-6.) Defendant Fallini  
11 filed her Answer and Counterclaim (seeking to recover the value of the cow) on March 14,  
12 2007. (Jt. Appx. I, 10-14.)

13 On October 31, 2007, Judith submitted interrogatories to Defendant Fallini. Those  
14 interrogatories were never answered. (Jt. Appx. I, 115-124.) Judith also submitted requests  
15 for admission and its first set of requests for production of documents on October 31, 2007.  
16 (Jt. Appx. I, 110-113.) A second set of requests for production of documents were  
17 submitted to Defendant Fallini on July 2, 2008, requesting information as to Defendant  
18 Fallini 's insurance policies and/or carriers that may provide coverage for damages that  
19 occurred as a result of the incident. (Jt. Appx. I, 126-131.)

20 Defendant Fallini never responded to any of these requests. On or about April 7,  
21 2008 (and served on May 14, 2008 with a Certificate of Service), Judith filed a Motion for  
22 Partial Summary Judgment. (Jt. Appx. I, 40-51.) Defendant Fallini did not oppose that  
23 motion and the Court granted that Motion on July 30, 2008. (Jt. Appx. I, 55-57.) Notice of  
24 Entry of the Order Granting Judith's Motion for Summary Judgment was served on  
25 Defendant Fallini on August 15, 2008. (Jt. Appx. I, 58-62.)

26 Judith attempted to amicably resolve the discovery dispute and obtain a copy of  
27 Defendant Fallini 's applicable insurance policies, but to no avail. On February 28, 2009,  
28 Judith sent a letter to Defendant Fallini 's counsel seeking responses to the discovery. (Jt.

1 Appx. I, 39.)

2 Judith's counsel, Mr. Aldrich, attempted to discuss this discovery issue with  
3 Defendant Fallini's counsel, Mr. Kuehn, as well. On or about March 6, 2009, Judith's  
4 counsel contacted the office of Appellant's counsel. Mr. Aldrich was informed that Mr.  
5 Kuehn was not available. Mr. Aldrich left a message with Mr. Aldrich's phone number and  
6 asked that Mr. Kuehn return the call. No return call ever came. (Jt. Appx. I, 141-143.)

7 On March 18, 2009, Mr. Aldrich again contacted the office of Mr. Kuehn. Mr. Aldrich was  
8 informed that Mr. Kuehn was not available. Mr. Aldrich left a message with Mr. Aldrich's  
9 phone number and asked that Mr. Kuehn return the call. No return call ever came. (Jt.  
10 Appx. I, 141-143.)

11 On March 23, 2009 – nearly nine months after propounding the discovery – Judith  
12 filed a Motion to Compel Defendant Fallini's Production of Documents, including  
13 information regarding any insurance policies that may provide coverage for the incident as  
14 contemplated in the Judith's second request for documents. (Jt. Appx. I, 91-98.) Defendant  
15 Fallini did not oppose the Motion to Compel in writing. This motion was heard on April  
16 27, 2009. Defendant Fallini's attorney, Mr. Kuehn, attended the hearing. The Court  
17 granted the Motion to Compel and awarded John Aldrich, Esq., \$750.00 in sanctions for  
18 having to bring the motion. (Jt Appx. I, 148-149.) A Notice of Entry of Order on the order  
19 granting the motion to compel was entered on May 18, 2009 and was served by mail on  
20 Defendant Fallini's counsel. Defendant Fallini never complied with the Order. (Jt. Appx.  
21 I, 152-153.)

22 On June 16, 2009, Judith filed a Motion to Strike Defendant Fallini's Answer and  
23 Counterclaim due to Defendant Fallini's complete failure to respond to discovery requests  
24 or to comply with the Court's Order. (Jt. Appx. I, 160-166.) Defendant Fallini's counsel  
25 again failed to oppose the motion in writing but attended the hearing, and again provided  
26 no explanation as to why Defendant Fallini failed to respond to all discovery requests, but  
27 stated Defendant Fallini would respond to the discovery requests. The Court denied  
28 Judith's Motion to Strike based on Defendant Fallini's counsel's promises to comply. The

1 Court did, however, order Defendant Fallini to comply with the Order granting Judith's  
2 Motion to Compel and to respond to Judith's discovery requests by July 12, 2009 or  
3 Defendant Fallini's Answer and Counterclaim would be stricken. The Court also ordered  
4 Defendant Fallini to pay an additional \$1,000 sanction. (Jt. Appx. I, 232-233.)

5 Defendant Fallini still did not comply with the Court's Order and failed to respond  
6 to Judith's discovery requests. On August 31, 2009, Judith brought an Ex Parte Motion for  
7 Order to Show Cause Why Defendant Susan Fallini and Her Counsel Should Not Be Held  
8 in Contempt. (Jt. Appx. II, 1-7.) The Court issued an Order on Judith's Order to Show  
9 Cause, dated October 8, 2009, that Susan Fallini must produce all documents responsive  
10 to Judith's discovery requests by October 12, 2009. The Court further ordered that if  
11 Defendant Fallini did not supply the requested information by October 12, 2009, Defendant  
12 Fallini's counsel would be held in contempt of court and would be fined \$150.00 a day,  
13 beginning October 13, 2009. Further, the Court ordered that if the requested information  
14 was not provided by October 12, 2009, the Court would strike Defendant Fallini's  
15 pleadings in their entirety. (Jt. Appx. II, 20-23.)

16 On November 4, 2009, an order was entered striking Defendant Fallini's pleadings.  
17 Because Defendant Fallini's Answer had been stricken, all the allegations of the Complaint  
18 were deemed to be true. (Jt. Appx. II, 26-33.) On February 4, 2010, the Clerk of the Court  
19 entered Default against Defendant Fallini. (Jt. Appx. II, 43-47.)

20 Despite repeated requests, Defendant Fallini failed and refused to provide insurance  
21 information, or a response that Defendant Fallini had no insurance. Consequently, Judith  
22 was again forced to bring yet another Ex Parte Motion for Order to Show Cause Why  
23 Defendant Fallini and Her Counsel Should Not Be Held in Contempt. (Jt. Appx. II, 48-61.)  
24 The Order to Show Cause was granted, and another contempt hearing was held on May 24,  
25 2010. Neither Defendant Fallini nor her counsel, Harry Kuehn, appeared at the hearing.  
26 However, Thomas Gibson, Esq., the law partner to Mr. Kuehn, appeared at the hearing. (Jt.  
27 Appx. II, 79.) Following argument by counsel, the Court made substantial findings of fact  
28 and conclusions of law. The Court also yet again held Defendant Fallini and her counsel

1 in contempt of court and sanctioned them an additional \$5,000.00. (Jt. Appx. II, 76-86.)  
2 Further, the Court again ordered Defendant Fallini to provide the information that had been  
3 ordered on several prior occasions, and imposed a \$500.00 per day sanction, beginning June  
4 1, 2010, if Defendant Fallini did not respond as ordered. (Jt. Appx. II, 76-86.)

5 On June 17, 2010, Defendant Fallini filed a substitution of attorneys, substituting  
6 Marvel & Kump and John Olsen, Esq. for the firm of Gibson & Kuehn. (Jt. Appx. II, 87-  
7 88.)

8 On June 21, 2010, Judith filed an Application for Default Judgment. (Jt. Appx. II,  
9 88-129.) On June 23, 2010, Defendant Fallini filed an Opposition to the Application for  
10 Default Judgment, arguing Judgment should not be entered because Defendant Fallini had  
11 only recently been apprised on the status of the case and it would be injustice to her to  
12 allow Default Judgment. (Jt. Appx. II, 130-132.)

13 On July 2, 2010, Defendant Fallini filed a Motion for Reconsideration, asking the  
14 Court to reconsider the Order granting summary judgment and the Order striking the  
15 Answer and Counterclaim. (Jt. Appx. II, 133-159.)

16 On July 19, 2010, a hearing was held on Fallini's Motion for Reconsideration of  
17 Prior Orders. That motion was denied and the Court proceeded with a prove up hearing.  
18 On August 18, 2010, an Order was entered on this matter wherein the Court awarded Judith  
19 \$1,000,000.00 in damages for grief, sorrow and loss of support, \$1,640,696 in damages for  
20 future lost earnings, \$50,000 in attorney's fees, \$35,000 in sanctions levied against  
21 Defendant Fallini, and \$5,188.85 in funeral and other related expenses. (Jt. Appx. II., 229-  
22 232.) On September 7, 2010, Defendant Fallini filed a Notice of Appeal.

### 23 III.

#### 24 STATEMENT OF FACTS

25 Michael David Adams was born on May 10, 1972. He was the only child of the  
26 marriage between Judith and Tony Adams. Michael was an extremely loving child, and  
27 grew into an extremely loving man. (Jt. Appx. II, 91.) Michael worked as a staff geologist  
28

1 for Southern California Geotechnical Inc., making approximately \$45,000.00 per year plus  
2 benefits. (Jt. Appx. II, 115.)

3 On July 7, 2005 at around 9:00 p.m., Michael was lawfully driving his 1994 Jeep  
4 Wrangler on SR 375 highway in Nye County, Nevada. (Jt. Appx. I, 3.) As Michael drove,  
5 a Hereford cow suddenly appeared in Michael's travel lane, blocking his path. (Jt. Appx.  
6 I, 3.) Although Michael was driving at a lawful rate of speed, it was not possible for him  
7 to avoid colliding with the cow and he hit it head-on. Michael's Jeep rolled over and left  
8 the paved highway. Sadly, Michael died at the scene. (Jt. Appx. I, 3.)

9 Defendant Fallini was the owner of the cow which was in Michael's travel lane and  
10 caused his death. (Jt. Appx. I, 2.) The cow was many miles away from the owner's ranch  
11 at the time of the incident. (Jt. Appx. I, 4.) Further, Defendant Fallini had taken no  
12 precautions to keep the cow from the highway where the collision occurred. (Jt. Appx. I,  
13 3.) As a direct and proximate result of Defendant Fallini's negligence, Michael was killed.  
14 (Jt. Appx. I, 3.)

15 As set forth above in Judith's Statement of the Case, Defendant Fallini was sent  
16 discovery requests, including Request for Admissions. Defendant Fallini never responded  
17 to any of these requests. Due to the fact Defendant Fallini failed to respond to the Request  
18 for Admissions within 30 days of service (or ever) the following facts were conclusively  
19 established:

- 20 1. That Defendant Fallini's property is not located within "open range."
- 21 2. That Defendant Fallini is the owner of the cow that is mentioned in of the  
22 Complaint on file herein.
- 23 3. That it is the common practice of Nye County ranchers to mark their cattle  
24 with reflective or luminescent tags.
- 25 4. That the subject cow was not marked with a reflective or luminescent  
26 tag.
- 27 5. That the subject cow crossed a fence to arrive at the location of the  
28 subject accident described in the Complaint on file herein.

1           6.     That Defendant Fallini's cattle have previously been involved in incidents  
2           with motor vehicles on the roadway.

3           7.     That Defendant Fallini does not track the location of her cattle while they are  
4           grazing away from her property.

5           8.     That Defendant Fallini does not remove her cattle from the roadway when  
6           notified that the cattle are in a roadway.

7           9.     That the subject cow was not visible at night.

8           10.    That Defendant Fallini was aware that the subject cow was not visible at  
9           night prior to the incident that is the subject of the Complaint on file herein.

10          11.    That the subject cow was in the roadway of SR 375 at the time of the incident  
11          that is the subject of the Complaint on file herein.

12          12.    That the subject cow's presence in the roadway of SR 375 was the cause of  
13          the motor vehicle accident that is the subject of the Complaint on file herein.

14          13.    That Defendant Fallini did not know the location of the subject cow at the  
15          time of the incident that is the subject of the Complaint on file herein.

16          14.    That the presence of a reflective or luminescent tag on the subject cow would  
17          have made the subject cow visible at the time of the incident that is the  
18          subject of the Complaint on file herein.

19    (Jt. Appx. I, 58-62.)

20    **Disputed Facts**

21           Defendant Fallini claims in her Opening Brief that she was informed her prior  
22           counsel, Harry Kuehn, Esq., was bipolar and "went off his meds." (Appellant's Opening  
23           Brief, p. 11, l. 1.) However, after close scrutiny of the record, there is absolutely no  
24           evidence in the record that Mr. Kuehn had a mental disorder that required medication in the  
25           first place. While Defendant Fallini cites to the record in an attempt to support this fact,  
26           the citation in no way establishes or even mentions that Harry Kuehn has bipolar disorder  
27           or any other mental condition. The citation to Joint Appendix, Volume II, pp. 138-159,  
28           simply does not support the proposition that Mr. Kuehn was "off his meds." Rather, that

1 very broad, 21-page citation is to Defendant Fallini's Motion to Reconsider Prior Orders.  
2 There is no mention of Mr. Kuehn being "off his meds" in the body of the Motion, or in the  
3 unsigned, inadmissible affidavits attached to Defendant Fallini's Motion. This is in direct  
4 violation of Nevada Rule of Appellate Procedure 28(e).

5 The reality is there was no mention, no intimation, and no claim to the district court  
6 that Attorney Kuehn had bipolar disorder or was "off his meds." In fact, Mr. Kuehn  
7 regularly appeared for hearings. This is a new, unfounded "theory" Defendant Fallini raises  
8 for the first time on appeal. Further, Defendant Fallini presents no evidence that Attorney  
9 Kuehn was under investigation by the State Bar of Nevada or that he has been found  
10 incompetent by any medical professional.

#### 11 IV.

#### 12 STANDARD OF REVIEW

13 Pursuant to Nevada Rules of Appellate Procedure 28(a)(8)(B), Defendant Fallini  
14 was required to provide the applicable standard of review for each issue presented.  
15 However, Defendant Fallini failed to provide the standard of review. As such, Judith  
16 provides the applicable standard of review below.

#### 17 Denial of Motion for Reconsideration and Entry of Default Judgment

18 Generally, the denial of a motion for reconsideration is reviewed for an abuse of  
19 discretion. Koshatka v. Philadelphia Newspapers, Inc., 762 F.2d 329, 333 (3d Cir.1985).  
20 "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if  
21 it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998,  
22 1000 (2001).

23 The same standard applies for the default judgment. The district judge's factual  
24 findings are reviewed under the clearly erroneous standard, and the judge's decision to order  
25 default judgment is reviewed for an abuse of discretion. See Halaco Eng'g Co. v. Costle,  
26 843 F.2d 376, 379 (9th Cir. 1988). "The question is not whether this court would have, as  
27 an original matter, imposed the sanctions chosen by the trial court, but whether the trial  
28 court exceeded the limits of its discretion." Halaco Eng'g, 843 F.2d at 379. Under this

1 deferential standard, we will overturn a court's decision to order default judgment as a  
2 sanction for misconduct "only if we have a definite and firm conviction that it was clearly  
3 outside the acceptable range of sanctions." Malone v. United States Postal Serv., 833 F.2d  
4 128, 130 (9th Cir. 1987). Importantly, the Appellant carries the heavy burden of showing  
5 the court abused its discretion, Weber v. State, 119 P.3d 107, 119 (2005).

6 It is important to note that Defendant Fallini did not appeal the granting of partial  
7 summary judgment, which would require de novo review. Wood v. Safeway, 121 Nev.  
8 724, 121 P.3d 1026 (2005).

9 In the present case, not only did the district court stay well within its discretion, it  
10 followed clear Nevada law. In 2007, Defendant Fallini did not respond to Requests for  
11 Admission, or any discovery for that matter. (Jt. Appx., I, 110-131.) In 2008, she did not  
12 oppose a Motion for Partial Summary Judgment. (Jt. Appx. I, 55-57.) In 2009 and 2010,  
13 she did not provide discovery responses and her Answer and Counterclaim were stricken  
14 after several opportunities to comply with orders of the district court. (Jt. Appx. II., 26-33.)  
15 The district court properly granted Judith's unopposed Motion for Partial Summary  
16 Judgment, both because Defendant Fallini did not oppose the motion and because the  
17 Requests for Admission were properly deemed admitted pursuant to NRCP 36. The district  
18 court properly granted Judith's unopposed Motion for Sanctions and Motions for Order to  
19 Show Cause, also because they were unopposed, and because Defendant Fallini, through  
20 her attorney, Mr. Kuehn, offered nothing to rebut the meritorious nature of the motions.  
21 As such, the district court did not abuse his discretion in denying Defendant Fallini's  
22 Motion for Reconsideration, and the district court's decision should be affirmed.

### 23 Alleged Error Regarding Vacating Jury Trial

24 This argument is raised for the first time on appeal, so the Court should not even  
25 consider it. It is the long-standing law of Nevada that arguments raised for the first time  
26 on appeal need not be considered by the court. Montesano v. Donrey Media Group, 99  
27 Nev. 644, 650, 668 P.2d 1081, 1085 (1983).



V.

LEGAL ARGUMENT

1  
2  
3 Defendant Fallini argues that, many months (or years) after their entry, the district  
4 court should have reconsidered two of the district court's prior rulings: the July 29, 2008  
5 Order Granting Judith's Motion for Partial Summary Judgment, and the November 4, 2009  
6 Order Striking Answer and Counterclaim. However, Defendant Fallini then fails to address  
7 her Motion to Reconsider Prior Orders. Instead, Defendant Fallini asserts that the Order  
8 Granting Partial Summary Judgment was clearly erroneous (Opening Brief, p. 12) and that  
9 the allowing the Order Granting Partial Summary Judgment to stand would result in  
10 manifest injustice (Opening Brief, p. 15).

11 Tellingly, Defendant Fallini does not address the denial of the Motion to Reconsider  
12 Prior Orders or the abuse of discretion standard -- and the fact that Defendant Fallini can  
13 present no evidence in the record that the district court abused its discretion in any respect.

14 Defendant Fallini blames her former attorney, Mr. Kuehn, Judith's attorney, Mr.  
15 Aldrich, and the judge himself for these "discovery abuses" and argues the prior decisions  
16 were "clearly erroneous" and would serve a manifest injustice.

17 The reality is that Mr. Kuehn's negligence is imputed to her and Defendant Fallini  
18 herself took a "head in the sand" approach. Neither Mr. Aldrich nor the district court did  
19 anything wrong during the lengthy proceedings below. The Orders are not clearly  
20 erroneous. To the contrary, they are based on clear Nevada law **and the established facts**  
21 **in this case**, and there is no manifest injustice to Defendant Fallini. Further, Defendant  
22 Fallini is a litigation-savvy woman who had years to become apprised of the happenings  
23 in her case.

24 **A. Defendant Fallini's Motion to Reconsider Prior Orders Was Properly Denied,**  
25 **as She Presented No New Law or Fact Justifying Rehearing**

26 Defendant Fallini seeks a "second bite at the apple" — an apple that had and has  
27 long since rotted. Unfortunately for Defendant Fallini, the law does not support her  
28 attempt.

1 Rehearings are not granted as a matter of right and are not allowed for the purpose  
2 of reargument unless substantially different evidence is subsequently introduced or the  
3 original decision of the Court was clearly erroneous. Masonry and Tile Contractors Ass'n  
4 v. Jolley, Urga & Wirth, Ltd, 113 Nev. 737, 941 P.2d 486, 489 (1997) *citing with approval*,  
5 Little Earth of United Tribes v. Department of Housing, 807 F.2d 1433, 1441 (8th Cir.  
6 1986). See also, Geller v. McCowan, 64 Nev. 106, 178 P.2d 380 (1947); State ex rel.  
7 Copeland v. Woodbury, 17 Nev. 337, 30 P. 1006 (1883). Prior decisions are not clearly  
8 erroneous unless there is no evidence to support the lower court's findings. Burroughs  
9 Corp. v. Century Steel Inc., 99 Nev. 464, 470, 664 P.2d 354, 358 (1983). Only in very rare  
10 instances, in which new issues of law or fact are raised supporting a ruling contrary to the  
11 ruling already reached, should a motion for rehearing be granted. Moore v. City of Las  
12 Vegas, 92 Nev. 402, 551 P.2d 244 (1976). Moreover, a party may not raise a new point for  
13 the first time on rehearing. In re Ross, 99 Nev. 657, 668 P.2d 1089 (1983).

14 Defendant Fallini is attempting to completely circumvent the finality of the summary  
15 judgment rulings that had long ago been made by the district court in this case. Defendant  
16 Fallini is trying to revisit factual and legal matters that were *conclusively* established as far  
17 back as 2007 -- three years before Defendant's Motion to Reconsider Prior Orders.

18 Moreover, Defendant Fallini has provided no evidence whatsoever that the district  
19 court abused its discretion. Defendant Fallini ignores the substance of her Motion to  
20 Reconsider Prior Order, probably because it completely lacked any merit or any substantive  
21 evidence in support of itself. In the pleading portion of her Motion to Reconsider Prior  
22 Orders, Defendant Fallini claims her attorney had previously represented to her that the  
23 case was over. (Jt. Appx., Vol. II, p. 142.) Of course, it is worth noting that this statement  
24 was not -- and is not now -- supported by admissible evidence. Rather, Exhibit 2 to  
25 Defendant Fallini's Motion to Reconsider Order is an *unsigned* affidavit in which she  
26 makes that claim. The district court could not consider Exhibits 1-5 to Defendant Fallini's  
27 Motion to Reconsider Prior Orders because they were inadmissible hearsay. NRS 51.035  
28 and 51.065.

1           The reality is that the district court absolutely *could not* grant Defendant Fallini's  
2 Motion to Reconsider Prior Orders -- to do so would have been an abuse of discretion  
3 because there was no evidence to meet the standard Defendant Fallini had to meet.  
4 Consequently, it is evident that the district court acted well within its discretion -- and  
5 within the law -- when it denied Defendant Fallini's Motion to Reconsider Prior Orders.  
6 Accordingly, this Court should affirm the denial of Defendant Fallini's Motion to  
7 Reconsider Prior Orders.

8       **B.    The Prior Orders Are Not Clearly Erroneous**

9           Defendant Fallini's appeal is of the denial of the Motion to Reconsider Prior Orders.  
10 Consequently, it is Judith's position that this Court need not consider the propriety of the  
11 prior orders -- Defendant Fallini did not appeal the entry of those orders. Nevertheless,  
12 should the Court wish to consider the prior orders, Respondent will address them  
13 individually.

14           Defendant Fallini argues that the facts deemed to be admitted in Judith's Requests  
15 for Admission, namely that the area where the accident occurred was not open range, and  
16 that the fact that Defendant Fallini failed to attach reflective strips to her cows, are clearly  
17 erroneous. Defendant Fallini claims, therefore, that the Order granting Partial Summary  
18 Judgment and should be reconsidered. However, it is clear and well-established law in  
19 Nevada that failure to oppose a motion is, standing alone, sufficient grounds upon which  
20 the district court can grant the requested relief. Further, the failure to timely respond to  
21 requests for admission deems the facts admitted, and this is true even if the fact later  
22 appears to be untrue. Moreover, it is worth noting that there is no dispute as to the facts of  
23 this case -- Defendant Fallini has not provided any admissible evidence or testimony to  
24 refute what was proven through requests for admission and through documents and  
25 testimony at the prove up hearing.

26       **1.    The Motion for Partial Summary Judgment Was Properly Granted**

27           Defendant Fallini alleges that the granting of Judith's Motion for Summary  
28 Judgment was brought about by Judith's attorney misrepresenting facts to the tribunal. That

1 allegation is simply not true. In addition, there was absolutely no mention of any alleged  
2 misrepresentation in any motion brought by Defendant Fallini before the district court.  
3 Rather, Defendant Fallini raises this point for the first time on appeal. It is the long settled  
4 law in Nevada that arguments raised for the first time on appeal need not be considered by  
5 the court. Montesano v. Donrey Media Group, 99 Nev. 644, 650, 668 P.2d 1081, 1085  
6 (1983). As such, this argument should not be considered by the Court and all prior orders  
7 entered by the district court should be affirmed.

8 To begin with, Defendant Fallini did not oppose Judith's Motion for Partial  
9 Summary Judgment, and the Motion was properly granted. Nevada District Court Rule 13  
10 addresses this exact situation. Nevada District Court Rule 13(3) provides in pertinent part

11 Within 10 days after the service of the motion, the opposing party shall serve  
12 and file his written opposition thereto, together with a memorandum of point  
13 and authorities and supporting affidavits, if any, stating facts showing why  
14 the motion should be denied. Failure of the opposing party to serve and file  
15 his written opposition may be construed as an admission that the motion is  
16 meritorious and a consent to granting the same.

17 Even without the Requests for Admission, the district court properly granted the Motion  
18 for Partial Summary Judgment. This action by the district court was permitted by District  
19 Court Rule 13 and clearly was within the discretion of the District Court.

20 Moreover, there is not one shred of evidence that Judith's attorney misrepresented  
21 facts to the tribunal. The sole basis of Defendant Fallini's claims of alleged  
22 misrepresentation by Attorney Aldrich is the allegation, for the first time on appeal, that he  
23 presented false facts in pleadings, with no evidentiary support

24 Many of these facts were admitted to by Defendant Fallini, whether she now likes  
25 it or not, and this argument is without any basis in law. Attorney Aldrich submitted the  
26 *admitted* facts to the Court. Attorney Aldrich sent Requests for Admission to Defendant  
27 Fallini, seeking to have Defendant Fallini respond, and answer whether they were true or  
28 false. However, Defendant Fallini never responded. Therefore, as stated above, due to  
Defendant Fallini's failure to respond to the requests, they were deemed admitted. It is well  
settled law in Nevada that such admissions may properly serve as the basis for summary

1 judgment against the party who failed to serve a timely response. Wagner v. Carex  
2 Investigations & Sec., Inc., 93 Nev. 627, 572 P.2d 921 (1977).

3 Of course, Defendant Fallini has failed to provide any testimony or actual admissible  
4 evidence in this appeal to refute any of the evidence the district court considered in  
5 reaching its decisions. This obvious failure is fatal to Defendant Fallini's appeal.  
6 Consequently, this Court should affirm all prior orders.

7 2. The Facts Submitted in the Requests for Admission Are Conclusively  
8 Proven

9 NRCP 36 provides, in pertinent part:

10 . . . . that the matter is admitted unless, within 30 days after  
11 service of the request, or within such shorter or longer time as  
12 the court may allow, or the parties may agree in writing, . . . the  
13 party to whom the request is directed serves upon the party  
14 requesting the admission a written answer or objection  
15 addressed to the matter, signed by the party or by the party's  
16 attorney.

17 In Smith v. Emery, 109 Nev. 737, 856 P.3d 1386 (1993), the Nevada Supreme Court  
18 found that failure to timely respond to requests for admission will result in those matters  
19 being **conclusively established**, and this is the case **even if the established matters are**  
20 **ultimately untrue**. Id. The Court explained:

21 “[E]ven if a request is objectionable, if a party fails to object and  
22 fails to respond to the request, that party should be held to have  
23 admitted the matter.” Jensen v. Pioneer Dodge Center, Inc., 702  
24 P.2d 98, 100-01 (Utah 1985) (citing Rutherford v. Bass Air  
25 Conditioning Co., 38 N.C.App. 630, 248 S.E.2d 887 (1978)). It  
26 is well settled that failure to respond to a request for admissions  
27 will result in those matters **being deemed conclusively**  
28 **established**. Woods, 107 Nev. at 425, 812 P.2d at 1297; Dzack,  
80 Nev. at 347, 393 P.2d at 611. This is so **even if the**  
**established matters are ultimately untrue**. Lawrence v.  
Southwest Gas Corp., 89 Nev. 433, 514 P.2d 868 (1973);  
Graham v. Carson-Tahoe Hosp., 91 Nev. 609, 540 P.2d 105  
(1975). Emery's failure to respond or object to the Smiths'  
request for admissions entitles the Smiths to have the assertions  
contained therein conclusively established.

Id. at 742-43 (emphasis added).

The evidence presented to the Court nearly three years ago in Judith's Motion for  
Partial Summary Judgment included the conclusively proven facts that had been admitted

1 in the Requests for Admission. Those facts are set forth in the Statement of Facts above  
2 and in the appendix. (Jt. Appx. I, 58-62.)

3 **3. The Order Striking Answer and Counterclaim Was Properly**  
4 **Entered**

5 The Order Striking Defendant Fallini's Answer and Counterclaim was also properly  
6 entered. The lengthy procedural history is set forth in numerous court motions filed by Ms.  
7 Adams and the district court's orders. Defendant Fallini has conceded that the history set  
8 forth in those documents is accurate, in that a motion was filed, there was no opposition,  
9 Mr. Kuehn promised to comply, and there was no compliance. The striking of Defendant  
10 Fallini's Answer and Counterclaim, and the holding of Defendant Fallini and her counsel  
11 in contempt, is entirely proper, if for no other reason than the Motion was not opposed. But  
12 there was more than just the fact that the various motions to compel and for sanctions were  
13 not opposed. Defendant Fallini and her counsel repeatedly ignored the district court's  
14 orders to respond to discovery. This Court imposed appropriately progressive sanctions  
15 before striking the Answer and Counterclaim. (Jt. Appx. I, 152-153.)

16 More importantly, Defendant Fallini has not provided any evidence in the record  
17 whatsoever to demonstrate that the district court abused its discretion. Indeed, Defendant  
18 Fallini has admitted that the history of this case, as set forth by Judith in pleadings before  
19 the district court, is accurate. Accordingly, this Court should affirm all prior orders.

20 **C. Defendant Fallini Shirked Her Responsibilities as a Party to the Litigation**

21 **1. Mr. Kuehn's Alleged Negligence Is Imputed to Her**

22 The crux of Defendant Fallini's argument is that the district court's prior rulings  
23 should be reconsidered because they are based on failures and discovery abuses of her prior  
24 counsel. However, "[i]t is a general rule that the negligence of an attorney is imputable to  
25 his client, and that the latter cannot be relieved from a judgment taken against him, in  
26 consequence of the neglect, carelessness, forgetfulness, or inattention of the former."  
27 Tahoe Village Realty v. DeSmet, 95 Nev. 131, 590 P.2d 1158, 1161 (1979). In Moore v.  
28 Cherry, 90 Nev. 390, 528 P.2d 1018 (1974), the Nevada Supreme Court stated as follows:

1                   There is certainly no merit to the contention that  
2                   dismissal of petitioner's claim because of his counsel's  
3                   unexcused conduct imposes an unjust penalty on the  
4                   client. Petitioner voluntarily chose this attorney as his  
5                   representative in the action, and he cannot now avoid the  
6                   consequences of the acts or omissions of this freely  
7                   selected agent. Any other notion would be wholly  
8                   inconsistent with our system of representative litigation,  
9                   in which each party is deemed bound by the acts of his  
10                   lawyer-agent, and is considered to have 'notice of all  
11                   facts, notice of which can be charged upon the attorney.

12                   Id, 90 Nev. at 395 (quoting Link v. Wabash Railroad Company, 370 U.S. 626, 82 S.Ct 1386

13                   (1962)(emphasis added)).

14                   Therefore, even assuming Defendant Fallini's inadmissible statement that Mr. Kuehn  
15                   had advised her the case was "over" is true, Mr. Kuehn's alleged inattention and  
16                   carelessness in responding to discovery is imputed to Defendant Fallini. She cannot now  
17                   seek reconsideration of valid orders based on her attorney's negligence and her purported  
18                   blamelessness.

19                   Defendant Fallini was personally served with the lawsuit and voluntarily selected  
20                   the attorney she wanted to represent her interests and to defend her in the action. Defendant  
21                   Fallini was not only personally aware that the lawsuit had been filed against her, but she  
22                   also authorized her attorney to counter-sue to recover the value of the beef she allegedly  
23                   lost when Mr. Adams' Jeep struck the cow. (Jt. Appx. I, 10-14.)

24                   At a minimum, Defendant Fallini was obligated to ask about the status of her case,  
25                   the defenses that were being raised, the actions that were being taken by her counsel, and  
26                   the rulings the Court was making. In the pleading portion of her Motion to Reconsider  
27                   Prior Orders, Defendant Fallini claims her attorney had previously represented to her that  
28                   the case was over. (Jt. Appx., Vol. II, p. 142.) Of course, it is worth noting that this  
                    statement was not -- and is not now -- supported by admissible evidence. Rather, Exhibit  
                    2 to Defendant Fallini's Motion to Reconsider Order is an *unsigned* affidavit in which she  
                    makes that claim. The district court could not consider Exhibits 1-5 to Defendant Fallini's  
                    Motion to Reconsider Prior Orders because they were inadmissible hearsay. NRS 51.035  
                    and 51.065.

1           However, even if this Court determined to consider this argument, Defendant Fallini  
2 could have – and should have – requested written confirmation that this case really was  
3 concluded. Further, Defendant Fallini is litigation-savvy, having been a party to litigation  
4 and hired attorneys in the past. Even the most cursory internet search revealed that  
5 Defendant Fallini has been involved in other lawsuits. This information was also provided  
6 to the district court. Defendant Fallini is well aware of how this process works, and she  
7 cannot take a “head in the sand” approach and then go before the Court just before  
8 judgment is to be entered and ask for a “do over.” (Jt. Appx. II, 194-201.)

9           **2. Notice to the Attorney Constitutes Notice to the Client**

10           Notice to the attorney of any matter relating to the business of the client in which the  
11 attorney is engaged constitutes notice to the client. Milner v. Dudrey, 77 Nev. 256, 362  
12 P.2d 439 (1961); Aldabe v. Adams, 81 Nev. 280, 402 P.2d 34 (1965); Noah v. Metzker, 85  
13 Nev. 57, 450 P.2d 141 (1969); Lange v. Hickman, 92 Nev. 41, 544 P.2d 1208 (1976).  
14 Service of very pleading that was filed in this case, including the written discovery,  
15 summary judgment motion, discovery and sanction motions, and subsequent orders of the  
16 Court, on Mr. Kuehn, constituted legal service on Defendant Fallini. NRCP 5. Defendant  
17 Fallini cannot now come before the Court and claim she had no idea what was going on,  
18 and then make a request for what amounts to a new trial on issues that were long ago  
19 conclusively resolved and established as a matter of law. More importantly, Defendant  
20 Fallini has not even tried to explain why these circumstances demonstrate that the district  
21 court abused its discretion when it entered any of the orders in this case. Again, Defendant  
22 Fallini has not made any showing in the record that there was an abuse of discretion by the  
23 district court.

24           Defendant Fallini has failed in her burden to show the district court abused its  
25 discretion. Accordingly, this Court should affirm the district court's orders.

26           **3. Defendant Fallini Is Estopped from Raising These Issues Due to the**  
27 **Actions (and/or Inactions) of Her Counsel**

28           Ratification of an attorney's conduct can occur through negligence, inattention, or



1 the failure to express disapproval by his client, as it's the client's duty, having knowledge  
2 of the case, to express her disapproval within a reasonable time, under the equitable  
3 doctrine of laches. Comb's Admr. v. Virginia Iron, Coal & Coke Co., 33 SW 2d 649 (Ky.  
4 1930); Baumgartner v. Whinney, 39 A.2d 738 (Pa. 1944); Kreis v. Kreis, 57 S.W.2d 1107  
5 (1933 Tex. Civ. App.), *error dismissed*, former app. 36 S.W.2d 821.

6 Defendant Fallini was personally served with the lawsuit and voluntarily selected  
7 the attorney she wanted to represent her interests and to defend her in the action that had  
8 been filed. Defendant Fallini was not only personally aware of the lawsuit that had been  
9 filed against her, but she also knew that her attorney was counter-suing to recover the value  
10 of the beef she lost when Mr. Adams' Jeep struck the cow. (Jt. Appx. I, 10-14.) As noted  
11 above, Defendant Fallini is a litigation-savvy client who should have wondered why she  
12 had not heard anything regarding the case in several years, or if her attorney really did tell  
13 her the case was "over," she should have requested documentation to substantiate that  
14 claim. (Jt. Appx. II, 194-201.)

15 At a minimum, Defendant Fallini was obligated to ask about the status of her case,  
16 the defenses that were being raised, the actions that were being taken by her counsel, and  
17 the rulings the Court was making. Most importantly, Defendant Fallini could have – and  
18 should have – requested written confirmation that both portions of this case (the claim and  
19 counterclaim) were actually concluded, as she now claims her attorney had previously  
20 represented to her.

21 **D. The Only Manifest Injustice That Would Occur in this Case Is if Judith Had**  
22 **to Re-Litigate This Case**

23 Defendant Fallini argues a manifest injustice would occur if the Orders entered by  
24 the district court were to stand in this case. Defendant Fallini asserts the manifest injustice  
25 is due in part because the district court failed to notify the proper authorities regarding  
26 Attorney Kuehn's conduct. However, Defendant Fallini cites no relevant authority in  
27 support of this proposition.

28 Further, Defendant Fallini raises this point for the first time on appeal. Arguments

1 raised for the first time on appeal need not be considered by the court. Montesano v.  
2 Donrey Media Group, 99 Nev. 644, 650, 668 P.2d 1081, 1085 (1983). This argument is a  
3 *red herring* and is not related to the issues on appeal.

4       Regardless, Defendant Fallini can show no manifest injustice occurred. Manifest  
5 injustice requires that "the verdict or decision, strikes the mind, at first blush, as manifestly  
6 and palpably contrary to the evidence." Kroger Properties & Development Inc. v. Silver  
7 State Title Co., 715 P.2d 1328, 1330, 102 Nev. 112, 114 (1986). The decision in this case  
8 is completely in line with the evidence. The Motion to Reconsider Prior Orders was not  
9 supported with admissible evidence. If there was an argument that the district court should  
10 have notified the proper authorities regarding Mr. Kuehn, Defendant Fallini should have  
11 provided admissible evidence -- or at least raised the issue -- in her Motion to Reconsider  
12 Prior Orders. She failed to do so.

13       Further, as set forth above, all the prior orders were properly entered, and Defendant  
14 Fallini has entirely failed in her burden to establish that the district court abused its  
15 discretion in some fashion. The Motion for Partial Summary Judgment was properly  
16 granted based on Defendant Fallini's failure to respond to Requests for Admission and to  
17 oppose the motion itself. Defendant Fallini's Answer was properly stricken based on her  
18 and her counsel's repeated refusal to abide by the district court's Orders.

19       The only way a manifest injustice would result is if this decision were reversed. Ms.  
20 Adams should not be penalized for a situation that Defendant Fallini and her former  
21 counsel created, nor should Defendant Fallini be rewarded for engaging in stall tactic and  
22 a "head in the sand" approach that got her where she is today.

23       On a policy note, if the Court were to overturn the default judgment because of Mr.  
24 Kuehn's alleged negligence or inattentiveness, it would be opening the floodgates of  
25 litigation. Every client who lost a case would then assert his client was ineffective and the  
26 judgement should be overturned. This would be disastrous. There is no guarantee of  
27 effective assistance of counsel in a civil case.

28       Finally, Defendant Fallini has a remedy. She has legal recourse against her former

1 attorney in the form of a malpractice action.

2 Defendant Fallini has not established her claim of manifest injustice. Consequently,  
3 this Court should affirm the district court's default judgment in its entirety.

4 **E. The District Court Properly Vacated the Trial**

5 Defendant Fallini argues she had a right to a jury trial. However, consistent with  
6 most of the other arguments on this appeal, Defendant Fallini did not raise this issue below.  
7 Rather, Defendant Fallini raises this point for the first time on appeal. Arguments raised  
8 for the first time on appeal need not be considered by the court. Montesano v. Donrey  
9 Media Group, 99 Nev. 644, 650, 668 P.2d 1081, 1085 (1983).

10 However, should this Court decide to hear this issue is it without merit. Defendant  
11 Fallini never asked for a jury trial at the beginning of the case. There is no evidence in the  
12 record that Defendant Fallini requested a jury trial after the district court vacated the jury  
13 trial (with no objection from Judith or her counsel, who had requested it) and proceeded  
14 with a prove up hearing.

15 This matter was originally set for a jury trial. (Jt. Appx. I, 220-222.) However, on  
16 November 4, 2009, an order was entered Striking Defendant Fallini's pleadings. Because  
17 Defendant Fallini's Answer had been stricken, all the allegations of the Complaint were  
18 deemed to be true. (Jt. Appx. II, 26-33.) On February 4, 2010, the Clerk of the Court  
19 entered Default against Defendant Fallini. (Jt. Appx. II, 43-47.) Therefore, due to the fact  
20 Default had been entered against Defendant Fallini, and without objection from Judith, the  
21 district court vacated the jury trial and determined damages by way of a prove up hearing.  
22 Defendant Fallini is not entitled to a jury trial she never requested.

23 Pursuant to NRCP 55(b) (2), judgment by default may be entered as follows:

24 **(2) By the Court.** In all other cases the party entitled to a  
25 judgment by default shall apply to the court therefor . . . If the  
26 party against whom judgment by default is sought has  
27 appeared in the action, the party (or, if appearing by  
28 representative, the party's representative) shall be served with  
written notice of the application for judgment at least 3 days  
prior to the hearing on such application. *If, in order to enable  
the court to enter judgment or to carry it into effect, it is  
necessary to take an account or to determine the amount of*

1 *damages or to establish the truth of any averment by evidence*  
2 *or to make an investigation of any other matter, the court **may***  
3 *conduct such hearings or order such references **as it deems***  
4 ***necessary and proper and shall** accord a right of trial by jury*  
5 *to the parties **when and as required by any statute of the***  
6 ***State.***

7 NRCP 55(b)(2)(emphasis added).

8 In the present case the Court properly conducted a prove up hearing to determine the  
9 amount of damages. As default was already entered against Defendant Fallini, a jury trial  
10 is only accorded when required by statute. Defendant Fallini has pointed to no applicable  
11 statute that requires a jury trial in the present case.

12 Further, Defendant Fallini cites no applicable case law to support she has a right to  
13 a jury trial. Defendant Fallini attempts to cite United States v. California Moblie Home  
14 Management Park Co., 107 F.3d 1374, 1377 (9th Cir. 1997), for the proposition that the  
15 unconstitutional denial of a jury trial must be reversed unless the error was harmless.  
16 However, United States v. California Moblie Home Management Park Co., specifically  
17 states the denial of a jury trial was found to be unconstitutional because trial by jury was  
18 required by the applicable Fair Housing Act. Again, in the present case, Defendant Fallini  
19 has pointed to no appliable statute or law that requires a jury trial in the present case, and  
20 there is no applicable Fair Housing Act that requires trial by jury.

21 Defendant Fallini further cites Molodyh v. Truck Insurance Exchange, 744 P.2d  
22 992, 304 (Or. 1987), for the proposition that the right to a jury trial includes having the jury  
23 decide all issues of fact. In Molodyh, the plaintiff did in fact request a jury trial and it was  
24 denied, and further, default was never entered. The facts in the present case are clearly  
25 inopposite. Defendant Fallini never requested a jury trial. Further, Defendant Fallini fad  
26 default entered against her.

27 Finally, Defendant Fallini cited Lakin v. Senco Products, 987 P.2d 463, 470 (1935),  
28 to support the proposition that the amount of damages is a fact to be determined by the jury.  
However, in Lakin, a jury trial was requested and did occur. The dispute was as to whether  
the jury should determine damages. In the present case, Defendant Fallini, did not request

1 a jury trial. Further, she had default entered against her which, pursuant to NRCp 55(b)(2),  
2 negates any right to a jury trial unless required by statute, and Defendant Fallini has pointed  
3 to no applicable statute.

4 **F. The District Court Properly Awarded Damages**

5 The Defendant Fallini argues that the damages awarded to Judith for future wage  
6 loss were excessive and that there was no showing that Judith suffered any economic loss  
7 from the death of her son. However, the Appellant carries the heavy burden of showing the  
8 court abused its discretion, Weber v. State, 119 P.3d 107, 119 (2005). In the present case  
9 there is no transcript from the hearing. Defendant Fallini has not cited anything in the  
10 record to support the contention that Judith presented no evidence of economic loss, or that  
11 the district court somehow abused its discretion in entering default judgment. (Appellant's  
12 Opening Brief, p. 19, ls. 3-4.) Nevada Rules of Appellate Procedure 28(e)(1) provides:

13 (e) References in Briefs to the Record.

14 (1) Every assertion in briefs regarding matters in the  
15 record shall be supported by a reference to the page and  
16 volume number, if any, of the appendix where the  
17 matter relied on is to be found. A party referring to  
18 evidence whose admissibility is in controversy must  
19 cite the pages of the appendix or of the transcript at  
20 which the evidence was identified, offered, and  
21 received or rejected.

22 The court need not consider the contentions of an appellant where the appellant's opening  
23 brief fails to cite to the record on appeal. Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 997,  
24 860 P.2d 720, 724 (1993).

25 In the present case, there is no record of the prove up hearing, and therefore, it is  
26 impossible for this Court to determine what evidence was presented to support future  
27 economic loss, and what evidence Defendant Fallini now wishes to object to. Any  
28 contentions of Defendant Fallini regarding what Judith testified to at the prove up hearing  
has not been supported by the record and should not be considered.

///

///

V.

**CONCLUSION**

Defendant Fallini carries the heavy burden of showing the court abused its discretion, Weber v. State, 119 P.3d 107, 119 (2005). Defendant Fallini has absolutely failed to demonstrate the district court abused its discretion in any respect. She failed to respond to Request for Admissions and a Motion for Partial Summary Judgment. She also failed to comply with orders of the district court. Defendant Fallini now raises several arguments on appeal for the first time, and the Court should not consider them. Nevertheless, Defendant Fallini chose her attorney and ratified her attorney's conduct. As such, the prior orders of the district court are not clearly erroneous and do not result in a manifest injustice.

The district court did not error in vacating the jury trial and proceeding with a prove up hearing, as default had been entered against Appellant. Further, Defendant Fallini has failed to demonstrate that the damages awarded to Respondent constitute an abuse of discretion. As such, Appellant's appeal is without merit and the District Court's Orders should not be reversed.

Respectfully submitted 8<sup>th</sup> day of July, 2011.

**ALDRICH LAW FIRM, LTD.**

By: John P. Aldrich  
John P. Aldrich, Esq.  
Nevada Bar No. 6877  
1601 S. Rainbow Blvd., Suite 160  
Las Vegas, NV 89146  
(702) 853-5490  
(702) 227-1975  
*Attorneys for Respondents*

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

**CERTIFICATE OF COMPLIANCE**

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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8<sup>th</sup> day of July, 2011.

**ALDRICH LAW FIRM, LTD.**

By: *John P. Aldrich*  
John P. Aldrich, Esq.  
Nevada Bar No. 6877  
1601 S. Rainbow Blvd., Suite 160  
Las Vegas, NV 89146  
(702) 853-5490  
(702) 227-1975  
*Attorneys for Respondents*

