IN THE SUPREME COURT OF THE STATE OF NEVADA

SUSAN FALLINI,

Appellant,

Supreme Court No.: 56840

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' AMENDED 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

Page

TABLE OF AUTHORITIES

JURY INSTRUCTIONS

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

APPELLANT'S AMENDED OPENING BRIEF

Pursuant to NRAP 28(a), Appellant, Susan Fallini, hereby submits Appellant's Amended Opening Brief[1]:

JURISDICTIONAL STATEMENT

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

On August 12, 2010, the Fifth Judicial District Court of the State of Nevada entered an Order After Hearing, denying Defendant's Motion for Reconsideration, granting the Plaintiff damages in the principal amount of $1,000,000 for grief, sorrow and loss of support together with damages for future lost earnings in the amount of $1,640,696, attorney's fees in the amount of $50,000, sanctions in the amount of $35,000 and funeral expenses in the amount for $5,188.85, and cancelling the trial that had been

[1] Pursuant to this Court's Order of October 24, 2011.

scheduled (*See* Order After Hearing entered August 12, 2010, Jt. Appx. II, 222-225[2]). All other issues had been resolved previously in this case through the entry of partial summary judgment, the striking of Susan Fallini's Answer and Counterclaim and entry of a default. Jt. Appx. II, 55-57, 26-31, and 41-42.

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

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

ISSUES PRESENTED FOR REVIEW

(1) Whether the district court committed a reversible error in denying Defendant's Motion for Reconsideration.

(2) Whether the district court erred in vacating the jury trial, and determining damages.

(3) Whether damages awarded by the district court were excessive, and without a legal basis.

STATEMENT OF CASE

The action arose out of wrongful death claims asserted by Plaintiff, Adams against Defendant, Fallini. Jt. Appx. I, 1-6. Michael David Adams (hereinafter Michael) was driving his car on July 7, 2005, when he hit a cow owned by Fallini, and died. Jt. Appx. I,

[2] 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.

3. The complaint was filed on January 31, 2007. Jt. Appx. I, 1. Fallini filed her Answer and Counterclaim on March 14, 2007. Jt. Appx. I, 10. Soon after the Answer and Counterclaim were filed, Fallini's attorney Harold Kuehn (hereinafter Kuehn) failed to take further necessary action including the failure to respond to discovery requests such as the request for admissions. Jt. Appx. II, 91-95.

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

On June 16, 2010, Fallini substituted counsel replacing Kuehn. Jt. Appx. II, 87-88. On June 24, 2010, Adams filed an Application for Default Judgment Against Defendant Susan Fallini. Jt. Appx. II, 89-129. This Motion was opposed that same day (*See*

[3] *See* references to the trial court's recognition, in fact judicial notice that the accident happened in "open range." *Infra*, footnote 4.

Opposition, Jt. Appx. II, 130-132). Fallini then filed a Motion for Leave to File a Motion for Reconsideration that Adams opposed. (*See* Motion for Reconsideration "MFR", attached as Exhibit 1 thereto, Jt. Appx. II, 138-159) Adams' Application and Fallini's Motion were heard on July 19, 2010, resulting in the final Order After Hearing entered August 12, 2010, granting Adams' Application, denying Fallini's Motion, and granting Adams a total of $2,730,884.85 in damages and attorney's fees, which Fallini Appeals from (*See* Order After Hearing entered August 12, 2010, Jt. Appx. II, 222-225).

RELEVANT FACTS

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

[4] The trial court made several references to the open range status of the accident site: The Court stated "You should be aware that out here in the rurals, cows run on highways" (page 3, l.24-p.4 l.1, Transcript of hearing for Application for Default Judgment). In addition, counsel asked the Court to take judicial notice of the fact of open range during this colliquey:

Q: Do you know of your own personal knowledge whether that stretch of highway is designated as open range?

A: It is.

MR. ALDRICH: I object to relevance. It's prove up.

THE COURT: It doesn't matter. I'm aware that it is.

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

On or about October 31, 2007, Kuehn was served with discovery requests including Requests for Admission by Adams. Jt. Appx. I, 40-51. Kuehn failed to respond to said Requests for Admission before the expiration of 30 days, and, in fact, never responded to the requests. Jt. Appx. I, 40-51. As a direct result of Kuehn's failure to respond to the Requests for Admission the requests were deemed admitted by default pursuant to NRCP 36. Jt. Appx. I, 71-74. Thus, Fallini "admitted" that: the area of the accident was **not** open range; that Fallini had failed to follow the custom and practice of ranchers in the area of tagging cattle with luminous tags so that they could be seen at night on the roadway (a practice that has never existed); and other statements that established Fallini's liability in the matter and extinguished her defenses. Kuehn never informed Fallini of the discovery requests. Jt. Appx. I, 71-74.

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

On April 7, 2008 (and again on May 14, 2008 with a certificate of service) Adams filed their Motion for Partial Summary Judgment. Jt. Appx. I, 40. Kuehn failed to oppose this motion. Jt. Appx. I, 71-74. The Motion was based primarily on the admissions contained in the request for admissions. Jt. Appx. I, 41-49. A hearing on the Motion was held on July 14, 2008, which Kuehn failed to appear at and the motion was granted (*See*

Go ahead.

MR. OHLSON: If you are, Your Honor, you'll take judicial notice of that?

THE COURT: **That'll be fine.** (emphasis added)

(p.27, ll.2-13, Transcript of hearing for Application for Default Judgment)

court minutes in Case Summary, Jt. Appx. II, 240-244). The Court entered its Order Granting Plaintiff's Motion for Partial Summary Judgment on July 30, 2008. Jt. Appx. I, 55-57. Notice of entry of that Order was served on Kuehn on August 15, 2008. Jt. Appx. I, 58-62.

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

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

On November 4, 2009, after repeatedly sanctioning Kuehn for his continued failure to respond to discovery requests and orders the Court entered a Findings of Fact, Conclusions of Law and Order Striking Answer and Counterclaim of Defendant Susan Fallini and Holding Defendant's Counsel in Contempt of Court. Jt. Appx. II, 26-31.

Notice of entry of that Order was filed on November 9, 2009. Jt. Appx. II, 32-40. Default was entered by the clerk of the court pursuant to that Order on February 4, 2010. Jt. Appx. II, 41-42. On June 2, 2010, the Court entered another Findings of Fact, Conclusions of Law and Order Holding Defendant's Counsel in Contempt of Court, this time fining Kuehn $5,000.00 plus an additional $500.00 per day for every day after the 30th day following the entry of that Order that Kuehn continued to fail to respond to Discovery requests. Jt. Appx. II, 68-75. Kuehn, nonetheless maintained his inaction.

The Order for Partial Summary Judgment established Fallini's liability in this matter, and the Order Striking Answer and Counterclaim left Fallini in the position of default. The default stripped Fallini of all defenses (*See* MFR Jt. Appx. II, 138-159). Still, Kuehn did not notify Fallini of the status of the case. Kuehn failed to inform Fallini about these circumstances, having previously told her that the case was "over" (*See* MFR, Jt. Appx. II, 138-159). Kuehn never brought Fallini to any of the hearings and repeatedly told the Court that the responsibility for the inaction was his alone (*See* court minutes in Case Summary, Jt. Appx. II, 240-244). Finally, in June of 2010, Kuehn's partner, Tom Gibson, Esq. discovered the status of the case and contacted Fallini, informing her of what had transpired over the preceding three years (*See* MFR, Jt. Appx. II, 138-159). Gibson informed Fallini that Kuehn has bi-polar disorder, and "went off his meds" (*See* MFR Jt. Appx. II, 138-159). Fallini immediately hired new counsel filing a Substitution of Counsel on June 16, 2010, replacing Kuehn with the undersigned counsel. Jt. Appx. II, 87-88. On June 24, 2010, Adams filed an Application for Default Judgment Against Defendant Susan Fallini. Jt. Appx. II, 89-129. This Application was opposed that same day (*See* Opposition, Jt. Appx. II, 130-132). Fallini's new counsel then filed a Motion for Leave to File a Motion for Reconsideration that Adams opposed (*See* MFR, Jt. Appx. II, 138-159). Adams' Application and Fallini's Motion were heard on July 19, 2010, resulting in the final Order After Hearing entered August 12, 2010, granting Adams' Application, denying Fallini's Motion, and proceeding with a prove up hearing granting Adams a total of $2,730,884.85 in damages and attorney's fees, from which Fallini

Appeals (*See* Order After Hearing, Jt. Appx. II, 222-225 and court minutes in Case Summary, Jt. Appx. II, 240-244).

SUMMARY OF ARGUMENTS

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

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

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

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

ARGUMENTS

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

Since the Fifth Judicial District has not enacted local rules of practice, the first inquiry on the subject of motions to reconsider rulings should be to the District Court Rules, and particularly Rule 13(7), which provides as follows:

> No motion once heard and disposed of shall be renewed in the same cause, nor shall the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties.

The Supreme Court has recognized the propriety of motions for reconsideration under DCR 13(7). See *Arnold v. Kip*, 123 Nev. 410, 168 P3d 1050 (2007). So long as it retains jurisdiction over a case, a trial court "possesses the inherent procedural power to

reconsider, rescind, or modify an interlocutory order for cause seen by the court to be sufficient." *Mullally v. Jones*, 2010 WL 3359333 (D.Nev.), citing *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir.2001).

A trial court should reconsider, and reverse prior rulings made prior to final judgment when the prior decision is clearly erroneous and the order, if left in place, would cause manifest injustice. *Masonry and Tile Contractors v. Jolley,* 113 Nev. 737, 941 P 2d 486, 489 (1997) citing *Little Earth v. Department of Housing,* 807 Fed 2d 1433 (8th Cir. 1986); *United States v. Serpa,* 930 F.2d 639 (8th Cir., 1991). The Court's ability to reconsider is not hampered by the "law of the case doctrine" when the order reconsidered would work a manifest injustice. *U.S. v. Serpa,* at 640.

A. The Order Granting Plaintiff's Motion for Partial Summary Judgment was Clearly Erroneous

The Granting of Plaintiff's Motion for Partial Summary Judgment was brought about through a breach of the rules of professional conduct by both attorney's and breach of the code of judicial conduct by the District Court.

Attorney's have a duty not to present frivolous contentions to the tribunal and are required to be candid in their presentation of the facts.

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

Rule 3.3. provides in relevant part:

> (a) A lawyer shall not knowingly:
> (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . .or
> (3) Offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal...

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

> (a) Violate or attempt to violate the Rules of Professional Conduct,

> knowingly assist or induce another to do so, or do so through the acts of another; . . .
> (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
> (d) Engage in conduct that is prejudicial to the administration of justice . .

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

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).[5] 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 were false, as it was common knowledge in Nye County, yet he still presented these statement as "facts" to the Court, allowing misrepresentations to stand perpetrating misconduct of his own.

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

[5] *See* footnote 4 above.

The first Cannon of the Code of Judicial Conduct provides:

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

The Honorable Robert Lane stated that he knew the area where the accident occurred to be "open range." Yet the Court accepted as fact that it was not open range and made rulings consistent therewith, detracting from the integrity of the tribunal. By accepting facts as true, which were known or should have been known to be false the trial court failed to uphold the "integrity of the tribunal."

Further, the District Court took judicial notice that the area in question in this case was open range (*See* footnote 4 herein). The Court began the final Hearing inclined to grant Fallini's Motion for Reconsideration (*See* court minutes in Case Summary, Jt. Appx. II, 240-244 and Transcript for Application of Default Judgment). Instead, the Court accepted a false factual premise due to Kuehn's failures, ultimately ratifying that acceptance in its final order despite knowing the facts supporting the order were false (*See* Order after Hearing, Jt. Appx. II, 222-225).

Because the Partial Summary Judgment rested on factual falsehoods, it was **clearly erroneous**. The first prong for the Court to have reconsidered and rescinded previous orders was met.

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

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

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

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

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.[6] 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.

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

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

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

The unconstitutional denial of a jury trial must be reversed unless the error was

[6] 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.

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

This matter was set to be tried by a jury. Jt. Appx. I, 220-223. Factual determinations remained as to damages, even though the Court struck the Defendant's answer and entered default (*See* Opposition to Application for Default Jt. Appx. II, 130-132). The Court's determination of damages from the bench, after striking the jury trial, violated Defendant's right to a jury trial secured by the above cited section of the Nevada Constitution. The Damages awarded by the District Court in total exceeded 2.7 million 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.

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

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

> The heir's loss of probable support, companionship, society, comfort and consortium. In determining that loss, you may consider the financial support, if any, which the heir would have received from the deceased except for his death, and the right to receive support, if any, which the heir has lost by reason of his death.
>
> [The right of one person to receive support from another is not destroyed by the fact that the former does not need the support, nor by the fact that the latter has

not provided it.]

You may also consider:

1. The age of the deceased and of the heir;
2. The health of the deceased and of the heir;
3. The respective life expectancies of the deceased and of the heir;
4. Whether the deceased was kindly, affectionate or otherwise;
5. The disposition of the deceased to contribute financially to support the heir;
6. The earning capacity of the deceased;
7. His habits of industry and thrift; and
8. Any other facts shown by the evidence indicating what benefits the heir might reasonably have been expected to receive from the deceased had 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 sustain it. *Cornea v. Wilcox*, 898 P.2d 1379, 1386 (Utah 1995) citing *Rees v. Intermountain Health Care, Inc.*, 808 P.2d 1069, 1072 (Utah 1991); *Penrod v. Carter*, 737 P.2d 199, 200 (Utah 1987). In this matter, there was no showing that Plaintiff's suffered any economic loss from the death of their son. Only the estate damages related to funeral expenses were shown constituting compensable damage (*See* Order After Hearing, Jt. Appx. II, 222-225).[7] So, it was clearly established that, except for funeral expensed, the

[7] At the prove-up hearing, plaintiff, Judith Adams testified that:

MR. OHLSON: Objection. Relevance.

THE COURT: Overruled.

How old was he at the time he died?

MS. ADAMS: Thirty-three.

THE COURT: And no wife or kids?

MS. ADAMS: No.

THE COURT: And he didn't live at home with you, right?

plaintiff's suffered no economic loss due to the death of their son. Ye the trial court allowed damages of **$1,640,696** in lost volume to plaintiffs, when the plaintiffs lost no income or support by virtue of their child's death. Even the court's award to plaintiffs for **$1,000,000** included dames for "loss of support" when the evidence the court had clearly demonstrated that plaintiffs did not rely on the deceased for "support."

CONCLUSION

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

The trial court refused to allow this matter to be resolved on the merits, even though it knew that the case lacked merit. The court knew (in fact took judicial notice) that the basic premise of liability-non open range-was false. The court heard evidence at the prove-up hearing that the plaintiffs had no economic loss (except funeral expenses), yet awarded $1,640,696 for lost income. Rather than allow the case to proceed to a trial

---

MS. ADAMS: No.

THE COURT: Okay.

(p.15, 11.11-20, Transcript of hearing for Application for Default Judgment).

Q: And when your son died, you and your husband were not financially dependent upon him, were you?

A: Financially dependent?

Q: Yes.

A: No, we are not.

(p.20 l.25-p.21, 1-4, Transcript of hearing for Application for Default Judgment).

on the merits (scheduled to proceed in approximately 2 months), the Court not only concluded the matter based on the defaults of appellant's former counsel, but determined erroneous damages.

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

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, including the requirement of N.R.A.P. 28(e), which requires that every assertion in the briefs regarding matters in the record be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is

////

////

////

////

not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 17 day of November, 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

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 AMENDED 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

__X_ Via U.S. Mail
____ Via Overnight Mail
____ Via Hand Delivery
____ Via Facsimile
____ Via ECF

DATED this 17 day of November, 2011.

Robert M. May