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 Respondents.	CASE NO. 56840 District Court Case No.: CV00224539

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

RESPONDENT'S AMENDED ANSWERING BRIEF

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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. **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?**

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II.

STATEMENT OF THE CASE

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

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

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

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

Appx. I, 39.)

Judith's counsel, Mr. Aldrich, attempted to discuss this discovery issue with Defendant Fallini 's counsel, Mr. Kuehn, as well. On or about March 6, 2009, Judith's counsel contacted the office of Appellant's counsel. Mr. Aldrich was informed that Mr. Kuehn was not available. Mr. Aldrich left a message with Mr. Aldrich's phone number and asked that Mr. Kuehn return the call. No return call ever came. (Jt. Appx. I, 141-143.) On March 18, 2009, Mr. Aldrich again contacted the office of Mr. Kuehn. Mr. Aldrich was informed that Mr. Kuehn was not available. Mr. Aldrich left a message with Mr. Aldrich's phone number and asked that Mr. Kuehn return the call. No return call ever came. (Jt. Appx. I, 141-143.)

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

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

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

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

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

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

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

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

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

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

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

On September 7, 2010, Defendant Fallini filed a Notice of Appeal. On November 9, 2010, the case was assigned to the settlement program. On February 15, 2011, Settlement Judge Carolyn Worrell recommended that the case be removed from the settlement conference program, explaining that a third-party insurance carrier was declining to participate, making the settlement conference unworkable. On March 2, 2011, the Nevada Supreme Court filed its Order Reinstating Briefing. That Order gave Appellant fifteen days to file the request for transcript and ninety days

to provide an Opening Brief and appendix.

On or about March 10, 2011, Appellant Fallini filed a Certificate indicating that no transcript of the proceedings below was available, and as such, she would not be filing a request for transcript. Significantly, Appellant Fallini did not request a transcript as required by NRAP 9. Appellant Fallini filed her Opening Brief on May 31, 2011. Respondent Adams' Answering Brief was filed on July 11, 2011. Appellant Fallini then filed her Reply Brief on July 28, 2011. Thus, all briefing in this case was completed by **July 28, 2011**. Subsequently, on August 19, 2011, this Court advised the parties that there would be no oral argument and the case would be decided on the briefs alone.

On October 5, 2011 – well over two months after briefing closed in this appeal, and six weeks after this Court notified the parties there would be no oral argument – Appellant Fallini brought a Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs. Attached to Appellant's Motion was an affidavit of John Ohlson, Esq., counsel for Appellant, and a copy of a transcript purportedly from the prove up hearing that occurred on July 19, 2010.[1]) Respondent Adams opposed the Motion.

On October 13, 2011, Respondent's counsel, Mr. Aldrich, contacted Mr. Ohlson's office and spoke with Rob May. Mr. May subsequently provided to Mr. Aldrich, by email, the email address and telephone number of DanRa Boscovich, the court reporter who prepared the purported transcript that is attached as Exhibit 2 to Appellant's Motion. (Affidavit of John P. Aldrich, attached to Respondents' Opposition to Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs.) Mr. Aldrich called Ms. Boscovich on the phone and Ms. Boscovich freely spoke with Mr. Aldrich for several minutes. Mr. Aldrich asked Ms. Boscovich about the circumstances of the transcript's preparation. (Exhibit D to Respondents' Opposition to Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs.)

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[1] The Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs and the related pleadings and Order have not been made a part of the Joint Appendix. Therefore, Ms. Adams will refer to these documents as they were attached to the pleadings related to Appellant's Motion.

Ms. Boscovich explained that Joe Fallini, the husband of Appellant Susan Fallini, is a "good friend" of hers. Mr. Fallini had obtained a disk that included a recording of the hearing from July 19, 2010. Ms. Boscovich said that the quality of the disk obtained by Mr. Fallini was "bad." (Exhibit D, Respondents' Opposition to Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs.) Ms. Boscovich then went personally to the Court and obtained a second copy of the hearing, which she described as "better." (Exhibit D to Respondents' Opposition to Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs.) Ms. Boscovich explained that Mr. Fallini was "desperate" to have the hearing transcribed, and she worked to quickly assist him. (Exhibit D to Respondents' Opposition to Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs.)

Ms. Boscovich told Mr. Aldrich that from the time Mr. Fallini brought her the first disk to the time that she completed the transcription was less than one (1) week. (Exhibit D to Respondents' Opposition to Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs) Therefore, given the date of August 27, 2011 on page 39 of the transcript, it appears that Mr. Fallini approached Ms. Boscovich on or after August 20, 2011.

Mr. Aldrich inquired of Ms. Boscovich if Mr. Fallini paid Ms. Boscovich for her services, to which she responded "absolutely not." She also explained that she felt very sorry for the Fallinis' situation, and reiterated that the Fallinis are very long-time friends. (Exhibit D to Respondents' Opposition to Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs.)

At best, the transcript is incomplete. Conspicuously absent from the transcript is the portion of the hearing dealing with the motion for reconsideration. Further, the authenticity and accuracy of the transcript is also in question, as it was prepared by a "good friend" of Appellant and her husband, as a favor (i.e., no compensation was paid), by someone who felt sorry for Appellant's situation. Of course, Appellant Fallini proceeded to attach the transcript to the Motion even before the Court determined whether to allow the transcript to become part of the record.

On October 17, 2011 Respondents filed an Opposition to Motion for Order Allowing

Supplementation of Appendix and for Re-Opening of Briefs. On October 24, 2011 the Court issued an Order Granting Motion to Supplement Appendix and Reopen Briefing and issued an amended briefing schedule. Appellants' Amended Opening Brief was filed on or about November 17, 2011. Respondents obtained a telephonic extension, making Respondents' Amended Answering Brief due December 27, 2011.

III.

STATEMENT OF FACTS

Michael David Adams was born on May 10, 1972. He was the only child of the marriage between Judith and Tony Adams. Michael was an extremely loving child, and grew into an extremely loving man. (Jt. Appx. II, 91.) Michael worked as a staff geologist for Southern California Geotechnical Inc., making approximately $45,000.00 per year plus benefits. (Jt. Appx. II, 115.)

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

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

As set forth above in Judith's Statement of the Case, Defendant Fallini was sent discovery requests, including Request for Admissions. Defendant Fallini never responded

to any of these requests. Due to the fact Defendant Fallini failed to respond to the Request for Admissions within 30 days of service (or ever) the following facts were conclusively established:

1. That Defendant Fallini's property is not located within "open range."
2. That Defendant Fallini is the owner of the cow that is mentioned in of the Complaint on file herein.
3. That it is the common practice of Nye County ranchers to mark their cattle with reflective or luminescent tags.
4. That the subject cow was not marked with a reflective or luminescent tag.
5. That the subject cow crossed a fence to arrive at the location of the subject accident described in the Complaint on file herein.
6. That Defendant Fallini'scattle have previously been involved in incidents with motor vehicles on the roadway.
7. That Defendant Fallini does not track the location of her cattle while they are grazing away from her property.
8. That Defendant Fallini does not remove her cattle from the roadway when notified that the cattle are in a roadway.
9. That the subject cow was not visible at night.
10. That Defendant Fallini was aware that the subject cow was not visible at night prior to the incident that is the subject of the Complaint on file herein.
11. That the subject cow was in the roadway of SR 375 at the time of the incident that is the subject of the Complaint on file herein.
12. That the subject cow's presence in the roadway of SR 375 was the cause of the motor vehicle accident that is the subject of the Complaint on file herein.
13. That Defendant Fallini did not know the location of the subject cow at the time of the incident that is the subject of the Complaint on file herein.
14. That the presence of a reflective or luminescent tag on the subject cow would

have made the subject cow visible at the time of the incident that is the subject of the Complaint on file herein.

(Jt. Appx. I, 58-62.)

Disputed Facts

Defendant Fallini claims in her Opening Brief that she was informed her prior counsel, Harry Kuehn, Esq., was bipolar and "went off his meds." (Appellant's Amended Opening Brief, p. 11, l. 18.) However, after close scrutiny of the record, there is absolutely no evidence in the record that Mr.Kuehn had a mental disorder that required medication in the first place. While Defendant Fallini cites to the record in an attempt to support this fact, the citation in no way establishes or even mentions that Harry Kuehn has bipolar disorder or any other mental condition. The citation to Joint Appendix, Volume II, pp. 138-159, simply does not support the proposition that Mr. Kuehn was "off his meds." Rather, that very broad, 21-page citation is to Defendant Fallini's Motion to Reconsider Prior Orders. There is no mention of Mr. Kuehn being "off his meds" in the body of the Motion, or in the unsigned, inadmissible affidavits attached to Defendant Fallini's Motion. This is in direct violation of Nevada Rule of Appellate Procedure 28(e).

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

IV.

STANDARD OF REVIEW

Pursuant to Nevada Rules of Appellate Procedure 28(a)(8)(B), Defendant Fallini was required to provide the applicable standard of review for each issue presented. However, as she did in her initial Appellant Opening Brief, Defendant Fallini failed to provide the standard of review. As such, Judith again provides the applicable standard of

review below.

Denial of Motion for Reconsideration and Entry of Default Judgment

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

The same standard applies for the default judgment. The district judge's factual findings are reviewed under the clearly erroneous standard, and the judge's decision to order default judgment is reviewed for an abuse of discretion. See Halaco Eng'g Co. v. Costle, 843 F.2d 376, 379 (9th Cir. 1988). "The question is not whether this court would have, as an original matter, imposed the sanctions chosen by the trial court, but whether the trial court exceeded the limits of its discretion." Halaco Eng'g, 843 F.2d at 379. Under this deferential standard, the Court will overturn a court's decision to order default judgment as a sanction for misconduct "only if [it has] a definite and firm conviction that it was clearly outside the acceptable range of sanctions." Malone v. United States Postal Serv., 833 F.2d 128, 130 (9th Cir. 1987). Importantly, the Appellant carries the heavy burden of showing the court abused its discretion, Weber v. State, 119 P.3d 107, 119 (2005).

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

In the present case, not only did the district court stay well within its discretion, it followed clear Nevada law. In 2007, Defendant Fallini did not respond to Requests for Admission, or any discovery for that matter. (Jt. Appx., I, 110-131.) In 2008, she did not oppose a Motion for Partial Summary Judgment. (Jt. Appx. I, 55-57.) In 2009 and 2010, she did not provide discovery responses – despite repeatedly being ordered to do so – and her Answer and Counterclaim were stricken after several opportunities to comply with orders of the district court. (Jt. Appx. II., 26-33.) The district court properly granted

Judith's unopposed Motion for Partial Summary Judgment, both because Defendant Fallini did not oppose the motion and because the Requests for Admission were properly deemed admitted pursuant to NRCP 36. The district court properly granted Judith's unopposed Motion for Sanctions and Motions for Order to Show Cause, also because they were unopposed, and because Defendant Fallini, through her attorney, Mr. Kuehn, offered nothing to rebut the meritorious nature of the motions. As such, the district court did not abuse his discretion in denying Defendant Fallini's Motion for Reconsideration, and the district court's decision should be affirmed.

Alleged Error Regarding Vacating Jury Trial

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

V.

LEGAL ARGUMENT

Defendant Fallini argues that, many months (or years) after their entry, the district court should have reconsidered two of the district court's prior rulings: the July 29, 2008 Order Granting Judith's Motion for Partial Summary Judgment, and the November 4, 2009 Order Striking Answer and Counterclaim. However, Defendant Fallini then fails to address her Motion to Reconsider Prior Orders. Instead, Defendant Fallini asserts that the Order Granting Partial Summary Judgment was clearly erroneous (Amended Opening Brief, pp. 12-15) and that the allowing the Order Granting Partial Summary Judgment to stand would result in manifest injustice (Amended Opening Brief, pp. 15-16).

Tellingly, Defendant Fallini does not address the denial of the Motion to Reconsider Prior Orders or the abuse of discretion standard -- and the fact that Defendant Fallini can present no evidence in the record that the district court abused its discretion in any respect. Fallini failed to address this issue, despite the fact that it was raised in the initial

Respondents' Answering Brier, and Fallini received a second opportunity to address this issue.

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

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

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

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

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

Vegas, 92 Nev. 402, 551 P.2d 244 (1976). Moreover, a party may not raise a new point for the first time on rehearing. In re Ross, 99 Nev. 657, 668 P.2d 1089 (1983).

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

Moreover, Defendant Fallini has provided no evidence whatsoever that the district court abused its discretion. Defendant Fallini ignores the substance of her Motion to Reconsider Prior Order, probably because it completely lacked any merit or any substantive evidence is support of itself. In the pleading portion of her Motion to Reconsider Prior Orders, Defendant Fallini claims her attorney had previously represented to her that 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.

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

B. The Prior Orders Are Not Clearly Erroneous

Defendant Fallini's appeal is of the denial of the Motion to Reconsider Prior Orders. Consequently, it is Judith's position that this Court need not consider the propriety of the

prior orders -- Defendant Fallini did not appeal the entry of those orders. Nevertheless, should the Court wish to consider the prior orders, Respondent will address them individually.

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

1. <u>The Motion for Partial Summary Judgment Was Properly Granted</u>

Defendant Fallini alleges that the granting of Judith's Motion for Summary Judgment was brought about by Judith's attorney misrepresenting facts to the tribunal. That allegation is simply not true. In addition, there was absolutely no mention of any alleged misrepresentation in any motion brought by Defendant Fallini before the district court. Rather, Defendant Fallini raises this point for the first time on appeal. It is the long settled law in Nevada that arguments raised for the first time on appeal need not be considered by the court. <u>Montesano v. Donrey Media Group</u>, 99 Nev. 644, 650, 668 P.2d 1081, 1085 (1983). As such, this argument should not be considered by the Court and all prior orders entered by the district court should be affirmed.

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

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

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

Moreover, there is not one shred of evidence that Judith's attorney misrepresented facts to the tribunal. The sole basis of Defendant Fallini's claims of alleged misrepresentation by Attorney Aldrich is the allegation, for the first time on appeal, that he presented false facts in pleadings, with no evidentiary support. Moreover, it is worth noting that Defendant Fallini did not bring a motion for relief pursuant to NRCP 60 before the District Court.

Many of these facts were admitted to by Defendant Fallini, whether she now likes it or not, and this argument is without any basis in law. Attorney Aldrich submitted the *admitted* facts to the Court. Attorney Aldrich sent Requests for Admission to Defendant Fallini, seeking to have Defendant Fallini respond, and answer whether they were true or false. However, Defendant Fallini *never* responded and never moved to withdraw the admissions. 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 judgment against the party who failed to serve a timely response. Wagner v. Carex Investigations & Sec., Inc., 93 Nev. 627, 572 P.2d 921 (1977).

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

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

NRCP 36 provides, in pertinent part:

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

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

> "[E]ven if a request is objectionable, if a party fails to object and fails to respond to the request, that party should be held to have admitted the matter." Jensen v. Pioneer Dodge Center, Inc., 702 P.2d 98, 100-01 (Utah 1985) (citing Rutherford v. Bass Air Conditioning Co., 38 N.C.App. 630, 248 S.E.2d 887 (1978)). It is well settled that failure to respond to a request for admissions will result in those matters **being deemed conclusively 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 in the Requests for Admission. Those facts are set forth in the Statement of Facts above and in the appendix. (Jt. Appx. I, 58-62.)

3. The Order Striking Answer and Counterclaim Was Properly Entered

The Order Striking Defendant Fallini's Answer and Counterclaim was also properly entered. The lengthy procedural history is set forth in numerous court motions filed by Ms. Adams and the district court's orders. Defendant Fallini has conceded that the history set

forth in those documents is accurate, in that a motion was filed, there was no opposition, Mr. Kuehn promised to comply, and there was no compliance. The striking of Defendant Fallini's Answer and Counterclaim, and the holding of Defendant Fallini and her counsel in contempt, is entirely proper, if for no other reason than the Motion was not opposed. But there was more than just the fact that the various motions to compel and for sanctions were not opposed. Defendant Fallini and her counsel repeatedly ignored the district court's orders to respond to discovery. This Court imposed appropriately progressive sanctions before striking the Answer and Counterclaim (Jt. Appx. I, 152-153), and even after the Answer and Counterclaim were stricken, Defendant Fallini failed for months to take any steps to remedy any perceived impropriety, including failing to seek relief under NRCP 60.

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

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

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

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

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his

lawyer-agent, and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.

Id, 90 Nev. at 395 (quoting Link v. Wabash Railroad Company, 370 U.S. 626, 82 S.Ct 1386 (1962)(emphasis added)).

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

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

At a minimum, Defendant Fallini was obligated to ask about the status of her case, the defenses that were being raised, the actions that were being taken by her counsel, and the rulings the Court was making. In the pleading portion of her Motion to Reconsider Prior Orders, Defendant Fallini claims her attorney had previously represented to her that 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.

However, even if this Court determined to consider this argument, Defendant Fallini could have – and should have – requested written confirmation that this case really was concluded. Further, Defendant Fallini is litigation-savvy, having been a party to litigation and hired attorneys in the past. Even the most cursory internet search revealed that

Defendant Fallini has been involved in other lawsuits. This information was also provided to the district court. Defendant Fallini is well aware of how this process works, and she cannot take a "head in the sand" approach and then go before the Court just before judgment is to be entered and ask for a "do over." (Jt. Appx. II, 194-201.)

2. Notice to the Attorney Constitutes Notice to the Client

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

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

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

Ratification of an attorney's conduct can occur through negligence, inattention, or the failure to express disapproval by his client, as it's the client's duty, having knowledge of the case, to express her disapproval within a reasonable time, under the equitable doctrine of laches. Comb's Admr. v. Virginia Iron, Coal & Coke Co., 33 SW 2d 649 (Ky. 1930); Baumgartner v. Whinney, 39 A.2d 738 (Pa. 1944); Kreis v. Kreis, 57 S.W.2d 1107

(1933 Tex. Civ. App.), *error dismissed*, former app. 36 S.W.2d 821.

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

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

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

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

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

Regardless, Defendant Fallini cannot show any manifest injustice occurred.

Manifest injustice requires that "the verdict or decision, strikes the mind, at first blush, as manifestly and palpably contrary to the evidence." Kroger Properties & Development Inc. v. Silver State Title Co., 715 P.2d 1328, 1330, 102 Nev. 112, 114 (1986). The decision in this case is completely in line with the evidence. The Motion to Reconsider Prior Orders was not supported with admissible evidence. If there was an argument that the district court should have notified the proper authorities regarding Mr. Kuehn, Defendant Fallini should have provided admissible evidence -- or at least raised the issue -- in her Motion to Reconsider Prior Orders. She failed to do so.

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

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

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

Finally, Defendant Fallini has a remedy. She has legal recourse against her former attorney in the form of a malpractice action.

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

E. The District Court Properly Vacated the Trial

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

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

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

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

> **(2) By the Court.** In all other cases the party entitled to a judgment by default shall apply to the court therefor . . . .If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by 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 damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court* ***may*** *conduct such hearings or order such references* ***as it deems necessary and proper*** *and* ***shall*** *accord a right of trial by jury to the parties* ***when and as required by any statute of the State.***

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

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

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

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

Finally, Defendant Fallini cited Lakin v. Senco Products, 987 P.2d 463, 470 (1935), 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 a jury trial. Further, she had default entered against her which, pursuant to NRCP 55(b)(2), negates any right to a jury trial unless required by statute, and Defendant Fallini has pointed to no applicable statute.

F. The Amount Awarded by the District Court Was Appropriate, But Even if the District Court Improperly Awarded Damages For Future Lost Earnings, Plaintiff Was Entitled to More for Loss of Support, Etc., as Well as Hedonic Damages, and Therefore, the Award Was Proper

Defendant Fallini argues that the damages awarded to Judith for future wage loss were excessive and that there was no showing that Judith suffered any economic loss from the death of her son. In her two-page argument on this issue, Defendant Fallini cites various statutes and case law, as well as a brief portion of the transcript she belatedly obtained. Defendant Fallini then dedicates approximately one sentence each to the issues of lost consortium/loss of support, and lost income. (Appellant's Amended Opening Brief, pp. 18-20.)

Funeral Expenses

Defendant Fallini does not take issue with the award of funeral expenses in the amount of $5,188.85. (Appellant's Opening Brief, p. 19.)

Loss of Grief, Sorrow and Support

Defendant Fallini asserts that the award of $1,000,000 in "Damages for Grief, Sorrow, and loss of support" (Jt. Appx. II, p. 230) is inappropriate. (Appellant's Opening Brief, p. 20.) Defendant Fallini cites no authority in support of this proposition; she simply states it in a one-sentence passing shot near the end of her brief. Defendant Fallini fails to even attempt to support her position because the award of $1,000,000 is entirely appropriate under the law.

NRS 41.085 provides, in pertinent part:

> . . .
> 4. The heirs may prove their respective damages in the action brought pursuant to subsection 2 and the court or jury may award each person pecuniary damages for the person's **grief or sorrow, loss of probable support, companionship, society, comfort and consortium**, and damages for pain, suffering or disfigurement of the decedent. The proceeds of any judgment for damages awarded under this subsection are not liable for any debt of the decedent.
>
> 5. The damages recoverable by the personal representatives of a decedent on behalf of the decedent's estate include:
>
> (a) Any special damages, such as medical expenses, which

> the decedent incurred or sustained before the decedent's death, and funeral expenses; and
>
> (b) Any penalties, including, but not limited to, exemplary or punitive damages, that the decedent would have recovered if the decedent had lived,
>
> but do not include damages for pain, suffering or disfigurement of the decedent. The proceeds of any judgment for damages awarded under this subsection are liable for the debts of the decedent unless exempted by law.

NRS 41.085(4) and (5) (emphasis added). Thus, the award of $1,000,000 for "Damages for Grief, Sorrow, and loss of support" (Jt. Appx. II, p. 230) is provided for by Nevada law. The only argument to be made is that the amount awarded is too low for what it encompassed. That will be addressed to some degree below.

The Award of $1.640.696.00 Should Be Upheld

Defendant Fallini argues that the award of $1,640696.00 is inappropriate and not supported by law. Defendant Fallini also cites portions of a purported incomplete transcript from the prove-up hearing. However, the total award of damages was proper, even if not attributed to a particular category of damages because the Court very easily could have awarded an additional $1,640,696.00 in damages for "grief or sorrow, loss of probable support, companionship, society, comfort and consortium," or substantially more than that as hedonic damages. Judith had asked for $2,500,000, and the evidence certainly would have supported such an award.

At the hearing, Judith described her son as a very loving son who often helped with tasks around her house, provided support when Mr. Adams was ill, etc. (Partial Transcript of Prove-Up Hearing, attached to Defendant Fallini's Motion for Order Allowing Supplementation of Appendix and to Re-Open Briefing, pp. 13-15, 17 of transcript.) The District Court was also presented with additional testimony by letter. (Jt. Appx. II, pp. 103-105.)

The award of damages should be upheld because Respondents are entitled to hedonic damages, which were not awarded but should have been. It is well settled law that a correct decision will be upheld, even though it is based on the wrong reason. Sengel v.

IGT, 116 Nev. 565, 2 P.3d 258, 261.

Judith presented evidence to the District Court that she was entitled to hedonic damages. However, the District Court specifically denied hedonic damages without explanation. Hedonic damages have been specifically recognized by the Nevada Supreme Court. In Banks v. Sunrise Hospital, 120 Nev.822, 102 P.3d 52 (2004), the Nevada Supreme Court noted that "[h]edonic damages are therefore monetary remedies awarded to compensate injured persons for their noneconomic loss of life's pleasures or the loss of enjoyment of life." Id. Quoting the Supreme Court of South Carolina, the Court explained how hedonic damages are different from damages for pain and suffering:

> An award for pain and suffering compensates the injured person for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself. Separate damages are given for mental anguish where the evidence shows, for example, that the injured person suffered shock, fright, emotional upset, and/or humiliation as the result of the defendant's negligence.
>
> On the other hand, damages for "loss of enjoyment of life" compensate for the limitations, resulting from the defendant's negligence, on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his talents, recreational interests, hobbies, or avocations.

Id. (quoting Boan v. Blackwell, 541 S.E.2d 242, 244 (S.C. 2001)).

Michael has been deprived of so much life. As his parents have noted, he will not have the opportunity to marry or experience the joys that come with that sacred institution. Michael will never have the opportunity to father children – no witnessing his child's first words, no kindergarten graduation, no coaching little league. Finally, while some might consider elderly parents a burden, it is clear that Michael would have viewed his parents' aging as an opportunity to tenderly give back to his parents some of the love they had shown him during his short life. Michael will not be able to participate in so many of the things that really matter in life. (Partial Transcript from hearing on Application for Default Judgment, pp. 11-17.)

Hedonic damages are difficult to measure because so many of the things listed above are priceless; i.e., they are nearly impossible to value in monetary terms. Although expert

witness testimony regarding hedonic damages is permitted, see Banks, expert testimony is not necessary. Despite the fact that expert testimony is not necessary, the Banks court discussed the expert witness in that case, and those comments are instructive here.

The expert in Banks examined the value of hedonic damages using two methods – the "survey method" and the "wage-risk method." Id. Using these methods, the expert opined that the tangible value of a person's life is somewhere between $2.5 million on the low end, $8.7 million on average, and literally priceless (i.e., impossible to value) on the high end. Id. Noting that the defendant had appealed the district court's decision to allow the expert to testify at trial, the Nevada Supreme Court held that the expert testimony was proper. Id.

The expert in Banks was analyzing the life of a 52-year-old man who was left in a vegetative state following surgery. In this case, Michael was 33 years old at the time of his death and engaged to be married. Clearly, Michael was a wonderful human being who would have enjoyed a fulfilling life with deep relationships. Unfortunately, due to the Defendant's negligence, none of that can ever come to be. Judith is entitled to hedonic damages well in excess of the $1, 640,696.00 awarded for lost career earnings. Even if this Court concluded that the District Court improperly awarded damages for future lost earnings, Judith was entitled to hedonic damages well in excess of the amount awarded, and thus, the award of $1,640,696.00 should be upheld, even if awarded for the wrong reason.

Awards for Attorneys' Fees and Sanctions

The District Court awarded $50,000 in attorneys' fees and $35,000 in sanctions. Defendant Fallini does not dispute the awards for attorneys' fees and sanctions.

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 be affirmed.

Respectfully submitted 27th day of December, 2011.

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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 27th day of December, 2011.

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CERTIFICATE OF MAILING

The undersigned does hereby certify that on the 27th day of December, 2011, a true and correct copy of this **RESPONDENTS' ANSWERING BRIEF** was deposited for mailing in the United States Mail, first class postage prepaid, to the following:

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