IN THE SUPREME COURT OF THE STATE OF NEVADA

SUSAN FALLINI,

Supreme Court No.: 56840

Appellant,

vs.

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

Respondent.

/

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

APPELLANTS' AMENDED REPLY BRIEF

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APPELLANT'S AMENDED REPLY BRIEF

Pursuant to NRAP 28(a), and this Court's Order of October 24, 2011, Appellant, Susan Fallini, hereby submits Appellant's Amended Reply Brief:

ISSUES PRESENTED FOR REVIEW

Combining the issues presented for review as stated in Appellants Opening Brief with the issues as stated in Respondent's Answering Brief the issues are as follows:

(1) Did the district court abuse its discretion and commit reversible when it denied Defendant's Motion for Leave to File Motion for Reconsideration?

(2) May this court consider whether the district court committed reversible error by vacating the jury trial, and determining damages?

(3) May the Supreme Court consider whether the district court properly awarded damages in excess of $2.7 million to Respondents, Adams.

DISPUTED FACTS

The procedural history and statement of facts have been laid out in detail in the previous briefs filed, thus only the disputed facts laid out in Respondent's Answering Brief will be addressed. Upon filing of the underlying action, Fallini acted prudently and hired a lawyer who accepted responsibility for the case. She acted prudently again and inquired about the case and was told it was "over." She went back to her life as a rancher, wife, mother and grandmother. Appellant was sued in a dispute in which she had a

perfect defense.[1] She had every right to assume that the matter would be routine. Her lawyer then inexplicably, embarked on a course of inaction which resulted in her answer being stricken, her default taken, her jury trial right being abrogated, and a massive judgment entered against her. The judgment was awarded to the deceased's parents, whose only economic loss was funeral expenses.

Fallini would emphasize that she did not discover Kuehn's malpractice until June 2, 2010, at which point she promptly fired Kuehn and hired new counsel. Jt. Appx. II, 142-143. New counsel appeared for Fallini on June 17, 2010. Jt. Appx. II, 87-88. In the next 32 days a litany of motions were filed and the final hearing held on July 19, 2010. Jt. Appx. II, 242-244. The July 19, 2010, hearing resulted in the final order that is appealed from, denied the motion for reconsideration, dismissed the trial, and continued with the prove up hearing. Jt. Appx. II, 242. In that hearing Susan Fallini was present and sworn in to testify. Jt. Appx. II, 242, and p.26-27 Transcript of hearing for Application for Default Judgment.

The District Court had discretion to give her relief, but abused that discretion. Regardless of pending malpractice actions and proceedings before the state bar, she has been left with the prospect of financial ruin because of the actions of a member of the bar

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[1] 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.

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)

of this state. All this, and no issue in this case has ever been tried on the merits.

REPLY ARGUMENTS

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED FALLINI'S MOTION FOR RECONSIDERATION.

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). Thus the denying or granting of a motion for reconsideration is within the trial court's discretion. Discretion is abused 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).

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 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. Fallini is not asking this court to reverse the District Court's ruling on its granting of summary judgment but must show that reconsideration should have been granted of that order and the Order Striking Fallini's Answer and Counterclaim. A plenary review displays the District Court's denial of Fallini's Motion for Reconsideration to be arbitrary, ignoring facts presented and unreasonably bounding its judgment by procedural default rather that the merits of the case.

A. The Motion for Reconsideration Should Have been Granted as New Facts and Circumstances Existed Justifying Rehearing.

A district court may reconsider a previously decided issue if substantially different

evidence is introduced or the decision is clearly erroneous. *Masonry and Tile Contractors Ass'n of Southern Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 941 P.2d 486 (1997) citing with approval *Little earth of United Tribes v. Department of Housing 807 F. 2d 1433, 1441* (8th Cir. 1986). Rehearing should be granted where new issues of fact or law are raised supporting a ruling contrary to the ruling already reached have been presented. *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P. 2d 244, 246 (1976).

Fallini's Motion for Reconsideration raised new issues of fact showing that it was common knowledge that the area where the cow was hit was free range, in direct opposition to what had previously been established through default.[2] Jt. Appx. II, 149. It also established that Fallini had been lied to near the beginning of the case and told by her attorney that the case was over. Jt. Appx. II, 151-152. Although the Affidavits attached to Fallini's Motion for Reconsideration were unsigned they were accompanied by a signed affidavit from Fallini's newly retained counsel, detailing that signed affidavits would be produced as soon as they were received back. Unfortunately, given that the hearing on this motion was held thirteen days later, Fallini did not have the signed affidavits back prior to the motion being denied. Jt. Appx. II. 242-244. It is important to note that Susan Fallini was sworn in to testify at that hearing, and testified regarding open range, p.26-27 Transcript of hearing for Application for Default Judgment, Jt. Appx. II, 242. Further, the fact that the area where the cow was hit was open range was supported not only by unsigned affidavits but a signed letter from Deputy Attorney General, Gilbert R. Garcia on State of Nevada Office of the Attorney General letterhead written on behalf of the Nevada Department of Transportation, stating that not only was the road where the accident occurred in open range but it was clearly marked as such. Jt. Appx. II., 149. This letter would have been properly considered by the District Court because the circumstances are sufficient to show its accuracy. NRS 51.075. Also, the Court acknowledged that the area was open range. Footnote 1, infra.

[2] See footnote 1, infra, and Susan Fallini's testimony, p.26-27 Transcript of hearing for Application for Default Judgment

Because the new facts presented to the court showed the prior rulings to be clearly erroneous the District Court abused its discretion when it arbitrarily denied Fallini's Motion for Reconsideration.

B. The Order Granting Partial Summary Judgment and the Order Striking Answer and Counterclaim were Erroneous and Manifested Injustice.

The Orders that Fallini requested be reconsidered were granted at the time they were entered as the district court was forced to enter decisions based entirely upon Kuehn's repeated and blatant inaction, and not on sound factual basis and legal premises. Jt Appx. II, 143. The longstanding policy of law favors the disposition of cases on their merits. *Moore v. Cherry*, 90 Nev. 390, 393-394, 528 P.2d 1018, 1021 (1974) citing *Richman v. General Motors Corp.*, 437 F. 2d 196 (CA. 1st Cir. 1971); *Bauwens v. Evans*, 109 Nev. 537, 539, 853 P.2d 121, 122 (1993). The orders entered were entered based on Kuehn's procedural failures and not on the merits of the case.

The "facts" on which the Order Granting Partial Summary Judgment was based were "conclusively established" through Kuehn's failure to respond to Adams' Request for Admissions. Jt. Appx. I, 55-57. Although, failure to respond to requests for admissions will result in those matters being deemed conclusively established even if the established matters are ultimately untrue (*Lawrence v. Southwest Gas Corp.*, 89 Nev. 433, 514 P.2d 868 (1973)) that rule should not be extended to establish "facts" purported that were known to be false when propounded. A Court's interpretation of rules and law "should be in line with what reason and public policy would indicate the legislature intended, and should avoid absurd results." *State v. Quinn*, 30 P.3d 1117, 1120, 117 Nev. 709 (2001), quoting *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599-600, 959 P.2d 519, 521 (1998). The method by which the "facts" were established previously, could also "conclusively establish" that grass grows pink. Furthermore, the fact that the area where the cow was struck was open range was and is common knowledge in Nye County and the road on which the accident took place was marked with signs showing it to be open range. Jt. Appx. II., 149. By continuing to allow a fact to stand, the opposite of

which is truth commonly known and could have been established through judicial notice if litigated on the merits, the District Court is encouraging attorneys to engage in unethical conduct in violation of the Nevada Rules of Professional Conduct, specifically Nevada Rule of Professional Conduct 3.3.

The commonly known fact that the area where the accident occurred is open range renders the Order Granting Summary Judgment erroneous. Holding Fallini liable for more than $2.7 million resulting from the misconduct of the attorney's involved is manifestly unjust. The District Court has a duty to exercise discretion to seek truth and justice. When serious misconduct occurs a trial judge has an obligation to intervene sua sponte to protect litigants' rights to a fair trial. *DeJesus v. Flick*, 116 Nev. 812, 7 P.3d 459, 466 (2000), Papez D.J., concurring. By denying Fallini's Motion for Reconsideration the District Court abused its discretion and failed to uphold the integrity of the court. Code of Judicial Conduct Canon 1.

C. Fallini Should not be Bound by the Negligence of Her Attorney as She Too Was a Victim of His Negligence and in no Way Ratified his Actions or Inactions.

Adams argues that Fallini shirked her responsibilities as a party to the litigation and that Kuehn's negligence is imputed to her. In support of this proposition Adams cites *Tahoe Village Realty v. DeSmet*, 95 Nev. 131, 590 P.2d 1158, 1161 (1979) overruled on other grounds, and *Moore v. Cherry,* 90 Nev. 390, 528 P.2d 1018 (1974). In *Tahoe Village* the appellants' attorney withdrew without filing a responsive pleading. A month later a default was entered against them. Appellants did not retain new counsel until four months after their first counsel withdrew and three months after the entry of default. *Tahoe Village* supra at 133. In *Moore v. Cherry* the appellants retained the same counsel to represent them in the appeal that they had in the lower court, whose negligence and disregard of the rules caused their action to be dismissed. *Moore v. Cherry* supra at 395.

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."** Jt. Appx. II., 142, 151. Finally, Mr. Tom Gibson contacted Fallini and apprised her of the

true status of her case. Jt. Appx. II., 142, 151. As soon as Fallini discovered Kuehn's negligence, she was referred to and retained new counsel without delay. Jt. Appx. II, 151. Unlike the appellants in *Tahoe Village*, Fallini had no time during the lower court proceedings where she was representing herself and would have had reason to check the status of the litigation herself as opposed to trusting the representations made to her by her attorney. Further, unlike the appellants in *Moore*, as soon as Fallini was informed of her attorney's failures she immediately sought replacement counsel to begin challenging the miscarriage of the case. In no way did Fallini ratify the inaction of her counsel.

Although, notice of the motions and orders were given to Kuehn, like all other aspects of the litigation, Kuehn failed to pass on service to Fallini. Due to the extremity of the dereliction of duty shown by Kuehn in these proceedings it must be noted that Fallini never received notice of the course or continued existence of the proceedings until Kuehn's law partner Gibson informed her of such. Jt. Appx. II, 151.

Adams further contends that despite Fallini's lack of knowledge or action ratifying her attorney's behavior she is estopped from raising the issues appealed due to the actions and or inactions of Kuehn. Adams states that '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. Repondent's brief, p. 17-18. Based on this definition Fallini in no way ratified Kuehn's actions or inactions because she expressed her disapproval immediately upon her being informed of his negligence, firing him, replacing him as counsel and pleading to the court for reconsideration of the orders granted as a result of his inactions. Jt. Appx. II, 76-86, 130-132, 133-152, 241-244. As Fallini was being misled by Kuehn through the majority of the proceedings, kept under the belief that the case was over, she was the greatest victim of Kuehn's malpractice and it would be grossly unjust to hold her

accountable or infer that she in any way ratified his negligence.

For the foregoing reasons the District Court had the discretion to and under the circumstances of this case should have granted Fallini's Motion for Reconsideration. In denying that Motion the District Court abused its discretion, allowing the perpetuation of erroneous orders manifesting injustice, committing reversible error.

On a policy note, because of the extreme nature of Kuehn's dereliction of duties, and the commonly known easily established fact of the area being open range contradicting the results of this case a remand of this case with directions for reconsideration would not open floodgates. Rather, it would affirm prior holdings of this court where new trials have been granted to remedy attorney misconduct where the misconduct so permeates the proceedings and/or where absent the misconduct the verdict would have been different. *Loice v. Cohen*, 124 Nev. 1, 174 P.3d 970, 978-982 (2008). If this is not a case where attorney misconduct warrants a rehearing then the court will be hard pressed to find one. Another troubling aspect of this case is the level of negligence Kuehn was able to reach without an authority involved notifying Fallini of the circumstances. When serious misconduct occurs a trial judge has an obligation to intervene sua sponte to protect litigants' rights to a fair trial. *DeJesus v. Flick*, 116 Nev. 812, 7 P.3d 459, 466 (2000), Papez D.J., concurring. Arguments in derogation of professional conduct rules should not be condoned by a court even absent objection. *Id.* citing *Wanner v. Keenan*, 22 Ill.App.3d 930, 317 N.E.2d 114 (1974). The trial judge is responsible for the justice of his judgments and has a duty to control proceedings to ensure a just result. *Id.* citing *Paulsen v. Gateway Transportation Co.*, 114 Ill.App.2d 241, 252 N.E.2d 406 (1969).

II. THIS COURT CAN PROPERLY DETERMINE THAT THE TIRAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DISMISSED THE JURY TRIAL AND DETERMINED DAMAGES

Although the issue of the dismissal of the jury trial is raised for the first time on appeal and arguments raised for the first time need not be considered (*Montesano v.*

Donrey Media Group, 99 Nev. 644, 650, 688 P. 2d 1081, 1085 (1983) citing *Williams v. Zellhoefer*, 89 Nev. 579, 517 P.2d 789 (1973)) the court may consider argument raised for the first time on appeal when appellant presents argument or authorities in support of an alleged error in the court below, or the error is so unmistakable that it reveals itself by a casual inspection of the record. *Williams v. Zellhoefer*, 89 Nev. 579, 517 P.2d 789 (1973) citing *Allison v. Hagan*, 12 Nev. 38, 42 (1877); *Gardner v. Gardner*, 23 Nev. 207, 45 P. 139 (1896); *Candler v. Ditch Co.*, 28 Nev. 151, 80 P. 751 (1905); *Riverside Casino v. J. W. Brewer Co.*, 80 Nev. 153, 390 P.2d 232 (1964); *Smithart v. State*, 86 Nev. 925, 478 P.2d 576 (1970). This matter was set for a jury trial when the district Court vacated that jury trial setting and determined damages from the bench. Jt. Appx. II, 242.

This case is unique in that Fallini did not request the jury trial. However defendant Fallini did not have time to request a jury trial as the jury trial that was scheduled was vacated in the final hearing. Jt. Appx. II, 223. Immediately following the decision to grant default the District Court inquired as to who was going to determine damages and amounts, Attorney Aldrich told the court it should go forward with the hearing that day and determine damages. A directive the court obviously followed. Jt. Appx. II, 223, 242. Not only was Fallini not afforded an opportunity to request a jury trial but forced to immediately argue damages at a hearing scheduled to determine an Application for Default and her Motion for Reconsideration.

Adams contends that the District Court properly dismissed the trial and proceed with a prove up hearing as it was allowed to do by virtue of the default it had entered previously pursuant to NRCP 55(b)(2). In cases where the court has entered default it still must accord a right of trial by jury to the parties when and as required by any statute of the State. NRCP 55(b)(2). 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.

Although no statute exists requiring that damages be determined by a jury, Fallini still had her constitutional right to a jury trial which she never waived or had opportunity to assert. Further, it is well established law that 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).

Factual determinations remained as to damages, even though the Court struck the defendant's answer and entered default. The Court's unexpected and immediate determination of damages from the bench, after striking the jury trial, violated Fallini'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, making the error very harmful to Fallini. Jt. Appx. II, 2222-223. Thus, the District Court committed reversible error when it dismissed the jury trial and determined damages without affording Fallini the opportunity to secure much less waive her right.

III. THE SUPREME COURT MAY DETERMINE THE TRIAL COURT ERRED WHEN IT AWARDED EXCESSIVE DAMAGES WIHTOUT LEGAL BASIS

Although this issue is brought up on appeal for the first time the and the Supreme court need not consider it may do so as the error is so unmistakable that it reveals itself by a casual inspection of the record. *Williams v. Zellhoefer*, 89 Nev. 579, 517 P.2d 789 (1973) citing *Allison v. Hagan*, 12 Nev. 38, 42 (1877); *Gardner v. Gardner*, 23 Nev. 207, 45 P. 139 (1896); *Candler v. Ditch Co.*, 28 Nev. 151, 80 P. 751 (1905); *Riverside Casino v. J.W. Brewer Co.*, 80 Nev. 153, 390 P.2d 232 (1964); *Smithart v. State*, 86 Nev. 925, 478 P.2d 576 (1970). A casual inspection of the record in this case shows a distinct lack of record/evidence.

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 is no record of a showing that plaintiff's suffered any economic loss from the death of their son. The only tangible damages for which evidence can be inferred are the funeral expenses. Jt. Appx. II, 222-223, 242.

CONCLUSION

This case is an example of the absolute worst dereliction that a member of the lay public can suffer at the hands of a lawyer. Lawyers are supposed to represent clients competently and diligently.

Respondents seek to sustain the unsupportable-a decision arrived not on the merits, but on procedural default. A decision leaving appellant ruined, and respondent with an undeserved windfall.

Is this just? Maintaining the status quo here only works to promote a vision of the law, lawyers and the system itself as unfair, unjust and irrational. This matter should be returned to the district with Appellant's answer and counterclaim restored and the matter set back on track for trial on the merits.

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

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

Dated this 10th day of January, 2012.

By: _____

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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 REPLY BRIEF**, by the method indicated and addressed to the following:

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

DATED this 10th day of January, 2012.

Robert M. May