

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

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3  
4           SUSAN FALLINI,

5                           Appellant,

6                           vs.

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

10                          Respondent.

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

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17   **APPELLANT’S PETITION FOR REHEARING**  
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**TABLE OF CONTENTS**

1		
2		
3	<b>I. OVERVIEW.....</b>	<b>1</b>
4	<b>II. POINTS TO BE ADDRESSED ON REHEARING.....</b>	<b>3</b>
5	<b>III. ARGUMENT.....</b>	<b>3</b>
6	<b>A. <i>Fallini is Entitled to This Court’s Reconsideration</i></b>	
7	<b><i>of its Decision Affirming the District Court’s Order</i></b>	
8	<b><i>Denying her Request for Reconsideration of its</i></b>	
9	<b><i>Orders Imposing Liability on her Based on the</i></b>	
10	<b><i>Gross and Egregious Misconduct of her Attorney.....</i></b>	<b>4</b>
11	<b>B. <i>Consideration of the Obligations of Counsel for</i></b>	
12	<b><i>Adams and the District Court is Warranted.....</i></b>	<b>11</b>
13	<b>C. <i>A Rehearing of the Order Striking the Jury Trial</i></b>	
14	<b><i>is Appropriate.....</i></b>	<b>13</b>
15	<b>IV. CONCLUSION.....</b>	<b>13</b>
16	<b>CERTIFICATE OF COMPLIANCE.....</b>	<b>13</b>
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

**TABLE OF AUTHORITIES**

***Case Law***

*Bauwens v. Evans*  
109 Nev. 537, 853 P.2d 121 (1993)..... 7

*Community Dental Services v. Tani*  
282 F.3d 1164 (9<sup>th</sup> Cir. 2002)..... 8, 9, 10

*Dejesus v. Flick*  
116 Nev. 812, 7 P.3d 459 (2000)..... 12

*Gallagher v. City of Las Vegas*  
114 Nev. 595, 959 P.2d 519 (1998)..... 7

*Holland v. Florida*  
560 U.S. \_\_\_\_\_, 130 S.Ct. 2549 (2010)..... 10

*Maples v. Thomas*  
565 U.S. \_\_\_\_\_, 132 S.Ct. 912 (2012)..... 10

*Moore v. Cherry*  
90 Nev. 390, 528 P.2d 1018 (1974)..... 7

*Moore v. United States*  
262 F. App'x 828 (9th Cir. 2008)..... 9, 10

*Spates-More v. Henderson*  
305 F.App'x 449 (9<sup>th</sup> Cir. 2008)..... 8

*Spitsyn v. Moore*  
345 F.3d 796 (9<sup>th</sup> Cir. 2003)..... 10

*State v. Quinn*  
117 Nev. 709, 30 P.3d 1117 (2001)..... 7

*Tahoe Village Realty v. DeSmet*  
95 Nev. 131, 590 P.2d 1158 (1979)..... 4, 6, 7

***Rules and Statutes***

FRCP 60..... 10

Nevada Constitution, Art. I, § 3..... 13

Nevada Code of Judicial Conduct Canon 1..... 12

Nevada Code of Judicial Conduct Rule 2.15..... 12

1	Nevada Rules of Professional Conduct Rule 3.1.....	11
2	Nevada Rules of Professional Conduct Rule 3.3.....	11
3	Nevada Rules of Professional Conduct Rule 8.4.....	11
4	NRAP 28.....	14
5	NRAP 32.....	14
6	NRAP 40.....	1, 3, 14
7	NRCP 11.....	11
8	NRCP 36.....	2, 4
9	NRCP 60.....	10
10	NRS 568.360(1).....	1, 7, 11

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1 Appellant Susan Fallini, by and through her counsel, and pursuant to  
2 NRAP 40, petitions this court for a rehearing of its March 29, 2013, Order  
3 Affirming in Part, Reversing in Part, and Remanding the district court’s orders  
4 and judgment in the underlying case.

5 **I. OVERVIEW**

6 In the underlying case to this appeal, Respondent Judith Adams (“Adams”)   
7 sued Appellant Susan Fallini (“Fallini”) for the death of her son after he struck   
8 one of Fallini’s cows that was on the highway, *located on open range*, on which   
9 he was driving. Fallini retained Harold Kuehn, Esq. (“Kuehn”) to represent and   
10 defend her in that suit, pursuant to which Kuehn filed and answer and   
11 counterclaim on Fallini’s behalf, and shortly thereafter told Fallini that the case   
12 was over and that she had prevailed. Unbeknownst to Fallini, however, the case   
13 was not over. Rather, litigation continued by way of discovery requests and   
14 motion practice by counsel for Adams, but Kuehn failed to – among many other   
15 things – answer various requests for admissions, oppose a motion for summary   
16 judgment based on those unanswered requests for admissions, appear for a   
17 hearing on the motion for summary judgment, or respond to other discovery   
18 requests. Ultimately, the court entered partial summary judgment in which it   
19 imposed liability on Fallini for the accident. In particular, Fallini was deemed to   
20 have admitted that the accident did not occur on open range, which obviated her   
21 *complete defense* to the action pursuant to NRS 568.360(1) (those who own   
22 domestic animals running on open range do not have a duty to keep the animal   
23 off the highway traversing or located on the open range and are not liable for   
24 damages to property or for injury caused by a collision between a motor vehicle   
25 and the animal occurring on such highway). The Court later held Kuehn in   
26 contempt of court and repeatedly imposed significant sanctions for his failure to   
27 appear and comply with its orders in the case. It was in this context – in June   
28 2010, three years after Kuehn told Fallini that the case was over and that she had

1 prevailed – that Fallini learned the true status of her case when Kuehn’s law  
2 partner, Tom Gibson, Esq. (“Gibson”), discovered and advised Fallini what had  
3 truly happened in her case. In immediate response to Gibson’s news, Fallini  
4 retained new counsel and moved for reconsideration of the district court’s orders  
5 based upon the accident having occurred on highway that traversed through open  
6 range, the contrary admission by default pursuant to NRC 36 having been a  
7 direct result of her counsel’s misconduct. Adams, however, sought a default  
8 judgment based upon the order granting summary judgment. The district court  
9 denied Fallini’s motion for reconsideration, granted Adams’ application for  
10 default, vacated the jury trial, and, after a prove-up hearing, imposed damages  
11 against Fallini in the amount that exceeded \$2.7 million.

12 In her appeal from the district court’s imposition of liability and damages,  
13 Fallini challenged the false factual bases on which the district court entered its  
14 orders (that the accident did *not* occur on open range), specifically addressing the  
15 incomprehensible nature and extent of the misconduct by her former attorney that  
16 was unbeknownst to her and was contrary to the affirmative representations he  
17 made to her very early on in the case that it was over and she had prevailed.  
18 Fallini also challenged the district court’s order vacating the jury trial on the  
19 factual issue of damages. Despite the undisputed attorney misconduct that  
20 resulted in the assessment of liability and damages against Fallini and that a jury  
21 request was in place at the time the district court vacated jury trial, this Court has  
22 affirmed the district court’s orders that denied Fallini’s efforts to seek  
23 reconsideration of the summary judgment on liability that was entered against her  
24 and that vacated the jury trial to consider damages, but reversed and remanded  
25 the district court’s award of damages against Fallini. Based on the nature of this  
26 Court’s decision in the context of the underlying misconduct that resulted in the  
27 imposition of liability and damages on Fallini, and given the deep public policy  
28 considerations and relevant case law that are inherently at issue in this case but

1 appear to have been overlooked or otherwise disregarded by this Court, Fallini  
2 requests that this Court reconsider the portion of its decision addressing the  
3 rulings of the district court on the issue of liability.

## 4 **II. POINTS TO BE ADDRESSED ON REHEARING**

5 NRAP 40(c)(2) permits this Court to consider rehearing a case when it has:

- 6 - overlooked or misapprehended a material fact in the record or a  
7 material question of law in the case; or
- 8 - overlooked, misapplied or failed to consider a statute, procedural rule,  
9 regulation or decision directly controlling a dispositive issue in the  
10 case.

11 In this case, this Court's decision affirming the district court's orders that  
12 resulted in the imposition of liability and damages on Fallini overlooked the  
13 significance and nature of Kuehn's misconduct and either failed to consider,  
14 misapplied, misapprehended, or overlooked the significant and deep public  
15 policy considerations, as reflected in applicable and relevant authority and  
16 principles, that require that relief be granted to a party that has been the victim of  
17 egregious misconduct and gross negligence of his or her attorney. Moreover, this  
18 Court did not address the obligations of counsel for Adams and the district court  
19 as it concerned Kuehn's misconduct. Finally, this Court's decision affirming the  
20 district court's order striking the jury trial on the issue of damages creates a  
21 disconnect between the parties' right to a jury trial on issues of fact and what  
22 happened in this case. As a consequence, Fallini requests that this Court  
23 reconsider its decision and the basis on which it was made in the context of the  
24 facts and principles applicable in this case.

## 24 **III. ARGUMENT**

25 Fallini is entitled to this Court's reconsideration of its decision affirming  
26 the district court's order denying her request for reconsideration of its orders  
27 imposing liability on her based on the gross and egregious misconduct of her  
28 attorney. Moreover, consideration of the obligations of counsel for Adams and

1 the district court and a rehearing of the decision to strike the jury trial are  
2 warranted. Thus, Fallini requests that this Court grant her petition for rehearing.

3  
4 ***A. Fallini is Entitled to This Court’s Reconsideration of its Decision***  
5 ***Affirming the District Court’s Order Denying her Request for***  
6 ***Reconsideration of its Orders Imposing Liability on her Based on***  
7 ***the Gross and Egregious Misconduct of her Attorney.***

8 In its determination that the district court properly denied Fallini’s motion  
9 for reconsideration, this Court took a straight-line, hyper-technical approach that  
10 put the laser focus of the inquiry on Fallini’s failure to answer requests for  
11 admissions that, among other things, admitted that the accident did not happen on  
12 open range.<sup>1</sup> To that end, this Court addressed only the provisions of NRCP 36  
13 and its interpretive case law that generally permits unanswered requests for  
14 admissions to be deemed established and relied upon as a basis for granting  
15 summary judgment with virtually no consideration of the underlying  
16 circumstances that resulted in the unanswered requests for admissions. While  
17 this court superficially acknowledged Fallini’s recitation of the outrageous  
18 misconduct by Kuehn as her effort to “...attempt to distinguish herself from her  
19 prior counsel’s inaptitude” (March 29, 2013, Decision at 4, fn. 2), it summarily  
20 rejected the attorney misconduct issue that resulted in, among many other things,  
21 the unanswered requests for admissions by applying the general rule that “the  
22 negligence of an attorney is imputable to his client, and that the latter cannot be  
23 relieved from a judgment taken against [her], in consequence of the neglect,  
24 carelessness, forgetfulness, or inattention of the former” (*Id.*, citing *Tahoe*  
*Village Realty v. DeSmet*, 95 Nev. 131, 134, 590 P.2d 1158, 1161 (1979))

25  
26 <sup>1</sup> Although there were a number of admissions-by-default that are disputed  
27 by Fallini (Opening Brief at 9, citing *Jt. Appx. I* at 71-74), the open range issue, as  
28 acknowledged by this Court, is the most determinative of them, as it is a complete  
defense to the underlying case. As a consequence, it is the admission on which this  
petition will focus for purposes of highlighting the importance of the relief to which  
Fallini is entitled.



1 (emphasis added). Based on the egregious nature of Kuehn’s misconduct, which  
2 is essentially undisputed in this case and ratified by the extent and number of  
3 sanctions that were imposed based upon Kuehn’s repeated contempt of court, in  
4 light of the district court’s judicial notice of the complete defense to the case *as a*  
5 *matter of law*, this Court’s summary, footnote-disposal of the attorney  
6 misconduct issue in this case and the authority on which it relies warrants  
7 reconsideration.

8 As comprehensively outlined by Fallini in her briefing before this Court,  
9 Kuehn’s misconduct was not just negligent. It was outrageous. Kuehn did not  
10 *just* fail to answer requests for admissions. Over the period of about a year and a  
11 half after he answered the complaint, Kuehn also failed to respond to or oppose  
12 the motion for summary judgment that was filed by counsel for Adams based on  
13 the unanswered requests for admissions, failed to appear at the hearing on that  
14 motion, and failed to respond to supplemental discovery requests. *See* Amended  
15 Opening Brief at 7-8 (*citing to* Jt. Appx. I at 55-57, 224-231, Jt. Appx. II at 26-  
16 31, 41, 91-95), 9-11 (*citing to* Jt. Appx. I at 40-51, 55-62, 71-74, 91-143, 148-  
17 149, 160-219, 220-233; Jt. Appx. II at 1-12, 17-19, 20-21, 26-31, 48-61, 68-75,  
18 222-225, 240-244; MFR Jt. Appx. II at 138-159), 14 (*citing to* Jt. Appx. I at 55-  
19 57; Jt. Appx. II at 89-129, 130-132; MFR Jt. Appx. II at 138-159), 15-16 (*citing*  
20 *to* Jt. Appx. II at 130-132; MFR Jt. Appx. II at 138-159), 17; Amended Reply  
21 Brief at 10 (*citing to* Jt. Appx. II at 142, 151), 11-12 (*citing to* Jt. Appx. II at 76-  
22 86, 130-132, 133-152, 241-244). In fact, other than filing the initial answer to  
23 the complaint and counterclaim in March 2007 and then telling Fallini in June  
24 2007 that the case was over and she prevailed, former counsel for Fallini did  
25 *nothing* in her case until he finally appeared intermittently in mid-2009 to deflect  
26 any responsibility for his failure to respond to discovery away from Fallini. *Id.*  
27 He otherwise ignored, disregarded, and abandoned Fallini and her case, his  
28 professional and ethical obligations, and the repeated and mounting sanctions

1 that were imposed against him for his failure to respond to discovery. *Id.* By the  
2 time the district court entered its final judgment that, in conjunction with the  
3 order granting summary judgment, left Fallini in default, everyone involved in  
4 the case *except for Fallini* was fully apprised and knew of the gross misconduct  
5 by Kuehn. *Id.*

6 Indeed, all of the misconduct by Kuehn that resulted in summary judgment  
7 and, ultimately, default entered against Fallini occurred *after* Kuehn told Fallini  
8 that the case was over and that she prevailed.<sup>2</sup> Amended Opening Brief at 9 (Jt.  
9 Appx. I at 40-51, 71-74; Jt. Appx. II at 130-132), 15-16 (Jt. Appx. II at 130-132,  
10 240-244; MFR Jt. Appx. II at 138-159); Amended Reply Brief at 5-6 (Jt. Appx. I  
11 at 142-143), 10-11 (Jt. Appx. II at 142, 151). At that point, Fallini had no reason  
12 to expect or inquire about continued litigation in the case. *Id.* Kuehn’s  
13 misconduct, which is undisputed in this case (Amended Answering Brief at 2-5),  
14 transcends far beyond the “neglect, carelessness, forgetfulness, or inattention”  
15 that was cited by this Court via *Tahoe Vista Realty, supra*, in its footnote-  
16 disregard of the attorney misconduct to which Fallini attributes the underlying  
17 summary judgment and default against her. Rather, it rises to a level of  
18 misconduct for which equitable considerations are required to protect an  
19 unsuspecting and unknowing litigant from the unreasonable result of holding her  
20 responsible for the extraordinary abuses of her attorney.

21 Initially, *Tahoe Vista Realty, supra*, is inapposite and cannot provide the  
22 foundation on which this Court could summarily dismiss the attorney misconduct  
23 Fallini asserts as the basis for her appeal. *Tahoe Vista Realty* did not address the  
24 blatant and egregious misconduct of an attorney who misrepresented the status of  
25 the case, abandoned his client and her case, violated his ethical and professional  
26

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27 <sup>2</sup> Given the open range defense that Kuehn asserted on behalf of Fallini in  
28 the answer to Adams’ complaint, that was the outcome that should have occurred and,  
therefore, it was reasonable for Fallini to have believed Kuehn.

1 responsibilities, and was repeatedly sanctioned and fined for being in contempt of  
2 court as has been established in this case. Rather, it focuses on the delay of the  
3 defendants in seeking new counsel after their former counsel withdrew before  
4 filing a responsive pleading, which resulted in a default. Moreover, this Court  
5 found it significant in *Tahoe Vista Realty* that the defendants *failed to set out a*  
6 *meritorious defense to the claims against them. Tahoe Vista Realty*, 590 P.2d at  
7 1160. In this case, Fallini has offered, *and the district court took judicial notice*  
8 *of*, a fact that provided a complete defense to her case as a matter of law – that  
9 the accident took place in open range. Amended Opening Brief at 8-9 (including  
10 fn. 4), *citing* MFR Jt. Appx. II, 138-159, Opposition to Application for Default,  
11 Jt. Appx. II, 130-132, and Transcript of Hearing for Application of Default  
12 Judgment at 3-4. *See also* NRS 568.360(1), *supra*. But for Kuehn’s despicable  
13 professional misconduct, it is a defense that would have, and should have,  
14 resulted in the resolution of the case in favor of Fallini.

15       Moreover, the egregious nature of Kuehn’s conduct required that the  
16 district court reconsider its order granting summary judgment against Fallini on  
17 the issue of liability and prohibited it from entering her default, and that this  
18 Court reverse the district court’s denial of that request, because it was an  
19 opportunity for the court to hear the case on the merits and avoid the absurd  
20 result of a \$2.7 million damage award despite an undisputed fact that provide a  
21 complete defense to the case. Notably absent from this Court’s March 29, 2013,  
22 Decision is any mention, or even a nod, to the longstanding policy of this Court  
23 favoring the disposition of cases on their merits (*Moore v. Cherry*, 90 Nev. 390,  
24 393-394, 528 P.2d 1018, 1021 (1974); *Bauwens v. Evans*, 109 Nev. 537, 539,  
25 853 P.2d 121, 122 (1993), *cited at* Amended Reply Brief at 9) and the  
26 requirement that this Court interpret rules and laws in line with what reason and  
27 public policy would indicate the legislature intended and that avoid absurd results  
28 (*State v. Quinn*, 117 Nev. 709, 30 P.3d 1117, 1120 (2001), *quoting Gallagher v.*

1 *City of Las Vegas*, 114 Nev. 595, 599-600, 959 P.2d 519, 521 (1998), *cited at*  
2 Amended Reply Brief at 9). If ever there was a case that required a sincere  
3 consideration of an order based upon erroneous and false facts that resulted from  
4 *exceptional* circumstances – a \$2.7 million judgment against a defendant as a  
5 direct result of egregious attorney misconduct and who, as a matter of law,  
6 cannot be held liable in the underlying case – this is it.

7       Indeed, this Court’s policy and preference of the disposition of cases on  
8 the merits and of avoiding absurd results is echoed by the federal courts in cases  
9 involving the gross negligence of an attorney and the resulting unreasonable  
10 impact on that attorney’s client. For instance, the Ninth Circuit has held that  
11 Rule 60(b)(6) of the Federal Rules of Civil Procedure, which allows a district  
12 court to grant relief from a judgment or order for any reason that is justified, is  
13 available in extraordinary circumstances that prevented a party from taking  
14 timely action to prevent or correct an erroneous judgment, including an  
15 attorney’s gross negligence in handling a case. *See Community Dental Services*  
16 *v. Tani*, 282 F.3d 1164, 1167 (9<sup>th</sup> Cir. 2002). In *Tani*, a defense attorney was  
17 found to have committed gross negligence when he “abandoned his duties as an  
18 attorney” by failing to file papers, failing to oppose a motion to strike his answer,  
19 and failing to attend hearings. *Tani*, 282 F.3d at 1171. His conduct was so  
20 egregious that it could not be characterized as simple attorney error or mere  
21 neglect. *Id.* As a consequence, the Court granted relief from a default judgment  
22 entered against the defendant holding that “where the client has demonstrated  
23 gross negligence on the part of his counsel, a default judgment against the client  
24 may be set aside pursuant to Rule 60(b)(6).” *Id.* at 1169. The court noted that  
25 “judgment by default is an extreme measure and a case should, whenever  
26 possible, be decided on the merits” and therefore Rule 60(b), as applied to default  
27 judgments, is “remedial in nature and must be liberally applied.” *Id.* at 1169-70  
28 (quotation and citations omitted).

1           The Ninth Circuit has since extended its holding in *Tani* to a non-default  
2 judgment context. In *Spates-More v. Henderson*, 305 F.App'x 449 (9<sup>th</sup> Cir.  
3 2008), an unpublished, but deeply relevant case, the Ninth Circuit remanded a  
4 case in which the district court had failed to consider the gross negligence  
5 standard and application of Rule 60(b)(6) to an order granting summary  
6 judgment on the basis of the opposing party's non-opposition to the motion.  
7 Although the case did not involve default judgment, it involved a judgment  
8 predicated upon a basis similar to default — "an innocent party is forced to  
9 suffer drastic consequences" due to the failure of the party to properly prosecute  
10 or defend her case. *Tani*, 282 F.3d at 1170. The court noted that the plaintiff's  
11 attorney had "effectively abandoned his client" by, among other things, twice  
12 failing to timely oppose motions to dismiss, failing to return phone calls, failing  
13 to attend a required pre-trial meeting, failing to file an opposition to summary  
14 judgment, and failing to move for relief from summary judgment until more than  
15 seventy days after judgment was entered. *Henderson*, 305 F.App'x at 451. The  
16 Ninth Circuit concluded that

17  
18           "[i]t is unreasonable to hold the client responsible for his acts in these  
19 circumstances. These failures went far beyond simple attorney error  
20 and perhaps constituted gross negligence and extraordinary  
21 circumstances sufficient to justify relief under 60(b)(6)."

22 *Id.*

23           Similarly, in *Moore v. United States*, 262 F. App'x 828 (9<sup>th</sup> Cir. 2008), the  
24 Ninth Circuit concluded that a district court "erred in denying relief under Rule  
25 60(b)(6)" where an attorney's gross neglect resulted in the granting of summary  
26 judgment based on the defaulting party's failure to respond to the summary  
27 judgment motion. *Id.* at 829. The court held that the attorney virtually  
28 abandoned his clients by failing to respond to the motion for summary judgment,  
even after being warned that such an omission would result in a summary grant  
of the motion, and concluded that the attorney abandoned his advocacy of his

1 clients' cause and crossed the line into the gross negligence described in  
2 *Tani*." *Id.* Thus, the Ninth Circuit has sanctioned the application of Rule  
3 60(b)(6) where an attorney's gross neglect results in the ultimate consequence —  
4 a judgment not predicated upon the actual merits of the case, but rather upon the  
5 party's failure to prosecute or defend his case.<sup>3</sup>

6 Indeed, the requests by Fallini in the district court to reconsider its orders  
7 that imposed liability by default and resulted in a default being entered against  
8 her were strongly analogous to a request to set those orders aside pursuant to  
9 NRCP 60(b), which is substantially similar to FRCP 60(b).<sup>4</sup> At the very least,  
10 the underlying policy considerations at work in *Tani*, *Henderson*, and *Moore* are  
11 directly applicable to and should have driven the consideration given to this case  
12 in the context of Fallini's request that the district court reconsider its orders  
13 imposing liability on her by default under the undisputed circumstances under  
14 which those orders were obtained and the *undisputed complete defense to this*  
15 *case*. To saddle Fallini with the burden and consequences of such egregious  
16 attorney misconduct in this case – a case in which she should have prevailed  
17 based on the open range defense – is an absurd result given the public policies  
18 and relevant authority. Under the circumstances, this is a case that is entitled to

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19 <sup>3</sup> An attorney's gross or egregious negligence is also grounds for relief  
20 from the strict application of the time limitations governing habeas cases to justify  
21 equitable tolling. *See, i.e., Spitsyn v. Moore*, 345 F.3d 796 (9<sup>th</sup> Cir. 2003)  
22 (sufficiently egregious misconduct by counsel, such as wholly deficient performance,  
23 may justify equitable tolling). In *Maples v. Thomas*, 565 U.S. \_\_\_, 132 S.Ct. 912,  
24 923 (2012), the Court explained that if the facts show that counsel abandoned a  
25 client, *common sense dictates that a litigant cannot be held constructively*  
26 *responsible for the conduct of any attorney who is not operating as his agent in any*  
27 *meaningful sense of that word*. *Id.*, 132 S.Ct. at 923, quoting *Holland v. Florida*,  
28 560 U.S. \_\_\_, 130 S.Ct. 2549, 2568 (2010) (Alito, J., concurring).

25 <sup>4</sup> Although NRCP 60(b) does not have the "catchall" provision stated in  
26 FRCP 60(b)(6), it is otherwise essentially identical to FRCP 60(b), and this Court has  
27 repeatedly acknowledged the district court's broad discretion to determine a motion  
28 for relief from a judgment. *See, i.e., Duarte v. Mri Mobile Imaging, LLC*, 281 P.3d  
1169 (2009). Moreover, Fallini's request that the district court reconsider its orders  
based on her attorney's default and failure to respond include several bases on which  
a motion pursuant to NRCP 60(b) would also have been appropriate.

1 be heard on its merits.

2  
3 ***B. Consideration of the Obligations of Counsel for Adams and the  
District Court is Warranted.***

4 In addition to its summary disposal of the gross negligence and misconduct  
5 by Kuehn, this Court did not address the obligations of counsel for Adams in  
6 alleging and then seeking an admission that the area in which the accident  
7 occurred was not open range, or the district court's obligations to Fallini to  
8 protect her interest in light of clear and evidence attorney misconduct and what it  
9 knew to be the true facts in the case. *See* Amended Opening Brief at 13-17;  
10 Amended Reply Brief at 10. They, too, are points worthy of consideration.

11 By signing the complaint that he filed on behalf of Adams, counsel for  
12 Adams *certified* that, to the best of his knowledge, information and belief,  
13 ***formed after reasonable inquiry***, the allegations and other factual contentions  
14 had evidentiary support or were likely to have evidentiary support after a  
15 reasonable opportunity for further investigation or discovery. *See* NRC  
16 11(b)(3). In response to his complaint, counsel for Adams received an answer  
17 that included an affirmative defense that the accident occurred on open range.  
18 Pursuant to NRS 568.360(1), that was a *complete defense* to the Adams'  
19 complaint. Indeed, a *modicum* of the inquiry that was required of counsel for  
20 Adams into that asserted defense would have quickly revealed to him that his  
21 allegation that the accident did not occur on open range was, in fact, false (Jt.  
22 Appx. II at 130-132; MFR Jt. Appx. II at 138-159) and that his complaint on  
23 behalf of the Adams not only violated NRC 11, it also violated Nevada's Rules  
24 of Professional Conduct 3.1 (a lawyer shall not assert an issue unless there is a  
25 basis in law and fact for doing so that is not frivolous), 3.3 (a lawyer shall not  
26 make a false statement of fact or law to a tribunal or fail to correct a false  
27 statement of material fact or law previously made to the tribunal, or offer  
28 evidence the lawyer knows to be false), and 8.4 (it is professional misconduct for

1 a lawyer to violate the rules of professional conduct, engage in conduct involving  
2 dishonesty, fraud, deceit or misrepresentation, and engage in conduct that is  
3 prejudicial to the administration of justice). A similar inquiry regarding his  
4 assertion that Nye County ranchers place reflective strips on their cattle would  
5 have also revealed that no such custom or practice exists. Jt. Appx. II at 130-  
6 132; MFR Jt. Appx. II at 138-159. To that end, counsel for Adams was obligated  
7 to correct his misstatement, but instead sidestepped those obligations to  
8 undertake a reasonable inquiry or further investigation of that expressly stated  
9 defense by seeking an admission that his allegations were true. Nevertheless,

10 Similarly, the district court had a duty to seek truth and justice, and to  
11 intervene when serious and evidence misconduct occurs in a case before it in  
12 order to protect the litigants' rights to a fair trial. *Dejesus v. Flick*, 116 Nev. 812,  
13 7 P.3d 459, 466 (2000) (Papez, D.J., concurring) (*cited*, Amended Reply Brief at  
14 10). Indeed, the district court took judicial notice of the fact that the location in  
15 which the accident occurred was open range. Amended Opening Brief at 8, fn. 4  
16 (*citing to* Transcript of hearing for Application for Default Judgment at 3-4). As  
17 a consequence, Fallini could not, as a matter of law (*see supra*), be liable for  
18 injuries caused by an accident between a motor vehicle and her cow. By holding  
19 Fallini liable for the accident because of what was clearly egregious and gross  
20 negligence by Kuehn – as established by the district court's numerous orders  
21 holding him in contempt and fining him – the district court entered orders that  
22 were clearly erroneous, and ignored its obligations to promote, among other  
23 things, the integrity of the judiciary (*see* the First Canon of the Code of Judicial  
24 Conduct, cited at Amended Opening Brief at 15) and to act in response to  
25 violations by an attorney to the Nevada Rules of Professional conduct (Rule 2.15  
26 of the Nevada Code of Judicial Conduct, cited at Amended Opening Brief at 16-  
27 17). It also reveals a case in which a litigant was the victim of a systemic failure  
28 of the justice system to honor the rights of its litigants.



1           **C.     *A Rehearing of the Order Striking the Jury Trial is Appropriate.***

2           Finally, in its decision affirming the district court’s order striking the jury  
3 trial, this Court faulted Fallini for not requesting a jury trial and, on that basis,  
4 found that she waived her right to have the damages issue decided by the jury.  
5 Its summary reasoning, however, creates a disconnect between the parties’ right  
6 to a trial by jury on issues of fact and what happened in the district court. As  
7 explained in Fallini’s briefing and acknowledged by this Court, the request for a  
8 jury on the damages issue ***had been made by Adams and was already in place***  
9 when the district court unilaterally vacated the jury trial and then, at the same  
10 time, conducted its own prove-up hearing on damages. Jt. Appx. I at 221-224, Jt.  
11 Appx. II at 222-225, 242. Because the jury request had already been made and  
12 was in place, there was no reason for Fallini to request a jury trial, and when the  
13 district court vacated the jury trial and immediately commenced the prove up  
14 hearing, Fallini had no opportunity to make a jury request. Indeed, neither the  
15 district court’s order nor this court’s decision affirming that order reconcile how  
16 they are consistent with the parties’ right to a jury trial on the factual issue of  
17 damages. *See* Nevada Constitution, Art. I, § 3, *cited in* Amended Opening Brief  
18 at 17; Amended Reply Brief at 13. Thus, Fallini requests that this Court  
19 reconsider Fallini’s challenge to the order striking the jury on the issue of  
20 damages.

21 **IV.   CONCLUSION**

22           It is *inconceivable* that this Court intends to ratify the outcome of the  
23 underlying case given the extraordinary circumstances under which the result  
24 was obtained and the undisputed erroneous factual basis on which it was decided.  
25 Therefore, under the totality of the circumstances in this case, Fallini requests  
26 that this Court reconsider the portions of its March 29, 2013, Decision affirming  
27 the district court’s orders.

1 CERTIFICATE OF COMPLIANCE

2 1. I hereby certify that this brief complies with the formatting  
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5)  
4 and the type style requirements of NRAP 32(a)(6) because this brief has been  
5 prepared in a proportionally spaced typeface using Microsoft Word in 14-point  
6 Times New Roman.

7 2. I further certify that this brief complies with the page- or type-volume  
8 limitations of NRAP 40(b)(3) because, excluding the parts of the brief exempted  
9 by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or  
10 more, and, including footnotes, contains 4,603 words (NRAP 40(b)(3) (requiring  
11 that a petition for rehearing contain no more than 4,667 words).

12 3. Finally, I hereby certify that I have read this appellate brief, and to the  
13 best of my knowledge, information, and belief, it is not frivolous or interposed  
14 for any improper purpose. I further certify that this brief complies with all  
15 applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1),  
16 which requires every assertion in the brief regarding matters in the record to be  
17 supported by a reference to the page and volume number, if any, of the transcript  
18 or appendix where the matter relied on is to be found. I understand that I may be  
19 subject to sanctions in the event that the accompanying brief is not in conformity  
20 with the requirements of the Nevada Rules of Appellate Procedure.

21 Respectfully submitted this 8<sup>th</sup> day of April, 2013.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of JOHN OHLSON, and that on this  
3 date I personally caused to be served a true and correct copy of the foregoing  
4 **APPELLANT’S PETITION FOR REHEARING** by the method indicated and  
5 addressed to the following:  
6

7 John P. Aldrich, Esq.  
8 Aldrich Law Firm, Ltd.  
9 1601 S. Rainbow Blvd., Ste. 160  
10 Las Vegas, NV 89146

- \_\_\_ Via U.S. Mail
- \_\_\_ Via Overnight Mail
- \_\_\_ Via Hand Delivery
- \_\_\_ Via Facsimile
- X Via ECF

11 DATED this 8<sup>th</sup> day of April, 2013.

13 /s/ Robert M. May  
14 Robert M. May