IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

SUSAN FALLINI,

Appellant,

vs.

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

Respondent.
_____/

Case No. 56840

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

APPELLANT'S PETITION FOR EN BANC RECONSIDERATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Rules and Statutes

Pursuant to NRAP 40A, Appellant Susan Fallini petitions this court for En Banc Reconsideration of the panel's June 3, 2013, Order summarily denying rehearing of its March 29, 2013, Order Affirming in Part, Reversing in Part, and Remanding the district court's orders and judgment in the underlying case on grounds that the proceeding involves a substantial precedential, constitutional, or public policy issues, as follows:

I. OVERVIEW

In the underlying case to this appeal, Respondent Judith Adams ("Adams") sued Appellant Susan Fallini ("Fallini") for the death of her son after he struck one of Fallini's cows that was on the highway, *located on open range,* on which he was driving. Fallini hired Harold Kuehn, Esq. ("Kuehn") to represent and defend her in that suit, pursuant to which Kuehn filed and answer and counterclaim on Fallini's behalf. Shortly thereafter, Kuehn told Fallini that the case was over and that she had prevailed.

Unbeknownst to Fallini, the case, in fact, was not over. Rather, litigation continued by way of discovery requests and motion practice by counsel for Adams, but Kuehn failed to – among many other things – answer various requests for admissions, oppose a motion for summary judgment based on those unanswered requests for admissions, appear for a hearing on the motion for summary judgment, or respond to other discovery requests. Ultimately, the court entered partial summary judgment in which it imposed liability on Fallini for the accident. Fallini was deemed to have admitted that the accident did not occur on open range, which obviated her *complete defense* to the action pursuant to NRS 568.360(1) (those who own domestic animals running on open range do not have a duty to keep the animal off the highway traversing or located on the open range and are not liable for damages to property or for injury caused by a collision between a motor vehicle and the animal occurring on such highway). The district court later held Kuehn in contempt of court and repeatedly imposed significant

sanctions for his failure to appear and comply with its orders. It was in this context – in June 2010, three years after Kuehn told Fallini that the case was over and that she had prevailed – that Fallini learned the true status of her case when Kuehn's law partner, Tom Gibson, Esq. ("Gibson"), discovered and advised Fallini what had truly happened in her case. In immediate response to Gibson's news, Fallini retained new counsel and moved for reconsideration of the district court's orders based upon the accident having occurred on highway that traversed through open range, the contrary admission by default pursuant to NRCP 36 having been a direct result of her counsel's misconduct. Adams, however, sought a default judgment based upon the order granting summary judgment. The district court denied Fallini's motion for reconsideration, granted Adams' application for default, vacated the jury trial, and, after a prove-up hearing, imposed damages against Fallini in the amount that exceeded $2.7 million.

In her appeal from the district court's imposition of liability and damages, Fallini challenged the false factual bases on which the district court entered its orders (that the accident did *not* occur on open range), specifically addressing the nature and extent of Kuehn's misconduct that was unbeknownst to her and was contrary to the representations he made to her very early on in the case that it was over and she had prevailed. Fallini also challenged the district court's order vacating the jury trial on the factual issue of damages. Despite the undisputed attorney misconduct that resulted in the assessment of liability and damages against Fallini and that a jury request was in place at the time the district court vacated jury trial, this Court has affirmed the district court's orders that imposed liability on Fallini and that vacated the jury trial to consider damages, but reversed and remanded the district court's award of damages against Fallini. On June 3, 2013, the same panel summarily denied Fallini's Petition for Rehearing.

During the pendency of the proceedings before this Court, two separate, but related, actions concerning Kuehn's conduct were completed:

- In the Federal District Court of Nevada, Kuehn's malpractice insurer sought *and obtained* declaratory relief that it was not obligated to pay Fallini's malpractice claim against Kuehn because coverage for this situation was excluded and not covered by the policy. *See Colony Ins. Co. v. Kuehn,* District Court Case No. 2:10-CV-01943-KJD-GWF (September 12, 2012, Order granting Colony Insurance Company's motion for summary judgment).

- On April 18, 2013, in the disciplinary proceedings against Kuehn based on his professional misconduct in this case, the State Bar recommended that Kuehn's license to practice law be suspended for 5 years, that he be required to re-take the bar examination, and that he undergo a psychological evaluation before re-admission.

Based on the nature of this Court's panel decisions in the context of the underlying attorney misconduct that resulted in the imposition of liability and damages on Fallini (and then disciplinary sanctions against Kuehn), and given the deep public policy considerations and relevant case law that are inherently at issue in this case but appear to have been disregarded by this Court, Fallini requests that this Court reconsider its panel's decisions addressing the rulings of the district court in the underlying case.

II. POINTS TO BE ADDRESSED ON EN BANC RECONSIDERATION

En banc reconsideration of this Court's June 3, 2013, panel decision summarily denying rehearing of its Order affirming the district court's orders that resulted in the imposition of liability and damages on Fallini is appropriate and warranted. This Court's panel decisions related to the district court's orders:

1. Overlooked the significance and nature of Kuehn's misconduct and failed to consider the significant and deep public policy considerations, as reflected in applicable and relevant authority and principles, that require that relief be granted to a party that has been the victim of egregious misconduct and gross negligence of his or her attorney.

2. Failed to address the obligations of counsel for Adams and the district court as it concerned Kuehn's misconduct.

3. Created a disconnect between the parties' constitutional right to a jury trial on issues of fact in light of what happened in this case.

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III. ARGUMENT

Fallini is entitled to this Court's en ban reconsideration of the summary panel decision denying rehearing of its Order affirming the district court's order denying her request for reconsideration of its orders imposing liability on her based on the gross and egregious misconduct of her attorney. Moreover, reconsideration of the obligations of counsel for Adams and the district court and of the decision to strike the jury trial are warranted. Thus, Fallini requests that this Court grant her petition for en banc reconsideration.

A. Fallini is Entitled to En Banc Reconsideration of This Court's Panel Decision Summarily Denying Rehearing of its Order Affirming the District Court's Orders Imposing Liability on her Based on the Gross and Egregious Misconduct of her Attorney.

In its decision affirming the district court's imposition of liability on Fallini in the underlying case, this Court took a straight-line, hyper-technical approach that put the laser focus of the inquiry on Fallini's failure to answer requests for admissions that, among other things, admitted that the accident did not happen on open range.[1] To that end, this Court addressed only the provisions of NRCP 36 and its interpretive case law that generally permits unanswered requests for admissions to be deemed established and relied upon as a basis for granting summary judgment with virtually no consideration of the underlying circumstances that resulted in the unanswered requests for admissions. While this court superficially acknowledged Fallini's recitation of Kuehn's outrageous misconduct as her effort to "…attempt to distinguish herself from her prior counsel's inaptitude" (March 29, 2013, Decision at 4, fn. 2), it summarily rejected the attorney misconduct issue that resulted in, among many other things,

[1] Although there were a number of admissions-by-default that are disputed by Fallini (Opening Brief at 9, *citing* Jt. Appx. I at 71-74), the open range issue, as 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.

the unanswered requests for admissions by applying the 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 [her], in consequence of the neglect, carelessness, forgetfulness, or inattention of the former" (*Id.*, *citing Tahoe Vista Realty v. DeSmet,* 95 Nev. 131, 134, 590 P.2d 1158, 1161 (1979)) (emphasis added). Based on the egregious nature of Kuehn's undisputed misconduct in the underlying case in light of the district court's judicial notice of the complete defense to the case *as a matter of law,* this Court's summary, footnote-disposal of the attorney misconduct issue in this case and the authority on which it relies warrants reconsideration.

As comprehensively outlined by Fallini in her briefing before this Court and as evidenced by the subsequent disciplinary proceedings before the Nevada State Bar, Kuehn's misconduct was not just negligent. ***It was outrageous***. Kuehn did not *just* fail to answer requests for admissions. Over the period of about a year and a half after he answered the complaint, Kuehn also failed to respond to or oppose the motion for summary judgment that was filed by counsel for Adams based on the unanswered requests for admissions, failed to appear at the hearing on that motion, and failed to respond to supplemental discovery requests. *See* Amended Opening Brief at 7-11 (*citing to* Jt. Appx. I at 40-51, 55-62, 71-74, 91-143, 148-149, 160-219, 220-233; Jt. Appx. II at 1-12, 17-19, 20-21, 26-31, 41, 48-61, 68-75, 91-95, 222-225, 240-244; MFR Jt. Appx. II at 138-159), 14-17 (*citing to* Jt. Appx. I at 55-57; Jt. Appx. II at 89-129, 130-132; MFR Jt. Appx. II at 138-159); Amended Reply Brief at 10-12 (*citing to* Jt. Appx. II at 76-86, 130-152, 241-244). In fact, other than filing the initial answer to the complaint and counterclaim in March 2007 and then telling Fallini in June 2007 that the case was over and she prevailed, Kuehn did <u>*nothing*</u> in Fallini's case until he finally appeared intermittently in mid-2009 to deflect any responsibility for his failure to respond to discovery away from Fallini. *Id.* He otherwise ignored,

disregarded, and abandoned Fallini and her case, his professional and ethical obligations, and the repeated and mounting sanctions that were imposed against him for his failure to respond to discovery. *Id.* By the time the district court entered its final judgment that, in conjunction with the order granting summary judgment, left Fallini in default, everyone involved in the case ***except for Fallini*** was fully apprised and knew of the gross misconduct by Kuehn. *Id.*

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

Initially, *Tahoe Vista Realty, supra,* is inapposite and cannot provide the foundation on which this Court could summarily dismiss the attorney misconduct Fallini asserts as the basis for her appeal. *Tahoe Vista Realty* did not address the blatant and egregious misconduct of an attorney who misrepresented the status of

[2] Given the open range defense that Kuehn asserted on behalf of Fallini in the answer to Adams' complaint, that was the outcome that should have occurred and, therefore, it was reasonable for Fallini to have believed Kuehn.

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

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

(*State v. Quinn,* 117 Nev. 709, 30 P.3d 1117, 1120 (2001), *quoting Gallagher v. City of Las Vegas,* 114 Nev. 595, 599-600, 959 P.2d 519, 521 (1998), *cited at* Amended Reply Brief at 9). If ever there was a case that required a sincere consideration of an order based upon erroneous and false facts that resulted from *exceptional* circumstances – a $2.7 million judgment against a defendant as a direct result of egregious attorney misconduct and who, as a matter of law, cannot be held liable in the underlying case – this is it.

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

(quotation and citations omitted).

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

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

Id.

Similarly, in *Moore v. United States,* 262 F. App'x 828 (9th Cir. 2008), the Ninth Circuit concluded that a district court "erred in denying relief under Rule 60(b)(6)" where an attorney's gross neglect resulted in the granting of summary judgment based on the defaulting party's failure to respond to the summary judgment motion. *Id.* at 829. The court held that the attorney virtually 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 clients' cause and crossed the line into the gross negligence described in *Tani.*" *Id.* Thus, the Ninth Circuit has sanctioned the application of Rule 60(b)(6) where an attorney's gross neglect results in the ultimate consequence — a judgment not predicated upon the actual merits of the case, but rather upon the party's failure to prosecute or defend his case.[3]

Indeed, the requests by Fallini in the district court to reconsider its orders that imposed liability by default and resulted in a default being entered against her were strongly analogous to a request to set those orders aside pursuant to NRCP 60(b), which is substantially similar to FRCP 60(b).[4] At the very least, the underlying policy considerations at work in *Tani, Henderson,* and *Moore* are directly applicable to and should have driven the consideration given to this case in the context of Fallini's request that the district court reconsider its orders imposing liability on her by default under the undisputed circumstances under which those orders were obtained and the *undisputed complete defense to this case.* To saddle Fallini with the burden and consequences of such egregious attorney misconduct in this case – a case in which she should have prevailed as a matter of law based on the open range defense – is an absurd result given the

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

[4] Although NRCP 60(b) does not have the "catchall" provision stated in FRCP 60(b)(6), it is otherwise essentially identical to FRCP 60(b), and this Court has repeatedly acknowledged the district court's broad discretion to determine a motion 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.

public policies and relevant authority. Under the circumstances, this is a case that is entitled to be heard on its merits.

B. Reconsideration of the Obligations of Counsel for Adams and the District Court is Warranted.

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

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

statement of material fact or law previously made to the tribunal, or offer evidence the lawyer knows to be false), and 8.4 (it is professional misconduct for a lawyer to violate the rules of professional conduct, engage in conduct involving dishonesty, fraud, deceit or misrepresentation, and engage in conduct that is prejudicial to the administration of justice). A similar inquiry regarding his assertion that Nye County ranchers place reflective strips on their cattle would have also revealed that no such custom or practice exists. Jt. Appx. II at 130-132; MFR Jt. Appx. II at 138-159. To that end, counsel for Adams was obligated to correct his misstatement, but instead sidestepped those obligations to undertake a reasonable inquiry or further investigation of that expressly stated defense by seeking an admission that his allegations were true.

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

17). It also reveals a case in which a litigant was the victim of a systemic failure of the justice system to honor the rights of its litigants.

C. Reconsideration of the Order Striking the Jury Trial is Appropriate.

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

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IV. CONCLUSION

It is *inconceivable* that this Court intends to ratify the outcome of the underlying case given the extraordinary circumstances under which the result was obtained and the undisputed erroneous factual basis on which it was decided. Therefore, under the totality of the circumstances in this case and based upon the significant public policy at issue, Fallini requests that this Court reconsider its panel's decisions affirming the district court's orders.

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40A(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and, including footnotes, contains 4,662 words (NRAP 40A(d) (requiring that a petition for rehearing contain no more than 4,667 words)).

3. Finally, I hereby certify that I have read this 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted this 5th day of June, 2013.

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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 caused to be served a true and correct copy of the foregoing **APPELLANT'S PETITION FOR EN BANC RECONSIDERATION** by the method indicated and addressed to the following:

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DATED this 5th day of June, 2013.

/s/ Robert M. May
Robert M. May