

II.

STATEMENT OF THE CASE

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

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

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

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

1 Appx. I, 39.)

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

11 On March 23, 2009 – nearly nine months after propounding the discovery – Judith
12 filed a Motion to Compel Defendant Fallini's Production of Documents, including
13 information regarding any insurance policies that may provide coverage for the incident as
14 contemplated in the Judith's second request for documents. (Jt. Appx. I, 91-98.) Defendant
15 Fallini did not oppose the Motion to Compel in writing. This motion was heard on April
16 27, 2009. Defendant Fallini's attorney, Mr. Kuehn, attended the hearing. The Court
17 granted the Motion to Compel and awarded John Aldrich, Esq., \$750.00 in sanctions for
18 having to bring the motion. (Jt. Appx. I, 148-149.) A Notice of Entry of Order on the order
19 granting the motion to compel was entered on May 18, 2009 and was served by mail on
20 Defendant Fallini's counsel. Defendant Fallini never complied with the Order. (Jt. Appx.
21 I, 152-153.)

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

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

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

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

20 Despite repeated requests, Defendant Fallini failed and refused to provide insurance
21 information, or a response that Defendant Fallini had no insurance. Consequently, Judith
22 was again forced to bring yet another Ex Parte Motion for Order to Show Cause Why
23 Defendant Fallini and Her Counsel Should Not Be Held in Contempt. (Jt. Appx. II, 48-61.)
24 The Order to Show Cause was granted, and another contempt hearing was held on May 24,
25 2010. Neither Defendant Fallini nor her counsel, Harry Kuehn, appeared at the hearing.
26 However, Thomas Gibson, Esq., the law partner to Mr. Kuehn, appeared at the hearing. (Jt.
27 Appx. II, 79.) Following argument by counsel, the Court made substantial findings of fact
28 and conclusions of law. The Court also yet again held Defendant Fallini and her counsel

1 in contempt of court and sanctioned them an additional \$5,000.00. (Jt. Appx. II, 76-86.)
2 Further, the Court again ordered Defendant Fallini to provide the information that had been
3 ordered on several prior occasions, and imposed a \$500.00 per day sanction, beginning June
4 1, 2010, if Defendant Fallini did not respond as ordered. (Jt. Appx. II, 76-86.)

5 On June 17, 2010, Defendant Fallini filed a substitution of attorneys, substituting
6 Marvel & Kump and John Olsen, Esq. for the firm of Gibson & Kuehn. (Jt. Appx. II, 87-
7 88.)

8 On June 21, 2010, Judith filed an Application for Default Judgment. (Jt. Appx. II,
9 88-129.) On June 23, 2010, Defendant Fallini filed an Opposition to the Application for
10 Default Judgment, arguing Judgment should not be entered because Defendant Fallini had
11 only recently been apprised on the status of the case and it would be injustice to her to
12 allow Default Judgment. (Jt. Appx. II, 130-132.)

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

16 On July 19, 2010, a hearing was held on Fallini's Motion for Reconsideration of
17 Prior Orders. That motion was denied and the Court proceeded with a prove up hearing.

18 On August 18, 2010, an Order was entered on this matter wherein the Court awarded Judith
19 \$1,000,000.00 in damages for grief, sorrow and loss of support, \$1,640,696 in damages for
20 future lost earnings, \$50,000 in attorney's fees, \$35,000 in sanctions levied against
21 Defendant Fallini, and \$5,188.85 in funeral and other related expenses. (Jt. Appx. II, 229-
22 232.) On September 7, 2010, Defendant Fallini filed a Notice of Appeal.

23 III.

24 STATEMENT OF FACTS

25 Michael David Adams was born on May 10, 1972. He was the only child of the
26 marriage between Judith and Tony Adams. Michael was an extremely loving child, and
27 grew into an extremely loving man. (Jt. Appx. II, 91.) Michael worked as a staff geologist
28

1 for Southern California Geotechnical Inc., making approximately \$45,000.00 per year plus
2 benefits. (Jt. Appx. II, 115.)

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

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

15 As set forth above in Judith's Statement of the Case, Defendant Fallini was sent
16 discovery requests, including Request for Admissions. Defendant Fallini never responded
17 to any of these requests. Due to the fact Defendant Fallini failed to respond to the Request
18 for Admissions within 30 days of service (or ever) the following facts were conclusively
19 established:

- 20 1. That Defendant Fallini's property is not located within "open range."
- 21 2. That Defendant Fallini is the owner of the cow that is mentioned in of the
22 Complaint on file herein.
- 23 3. That it is the common practice of Nye County ranchers to mark their cattle
24 with reflective or luminescent tags.
- 25 4. That the subject cow was not marked with a reflective or luminescent
26 tag.
- 27 5. That the subject cow crossed a fence to arrive at the location of the
28 subject accident described in the Complaint on file herein.

- 1 6. That Defendant Fallini's cattle have previously been involved in incidents
- 2 with motor vehicles on the roadway.
- 3 7. That Defendant Fallini does not track the location of her cattle while they are
- 4 grazing away from her property.
- 5 8. That Defendant Fallini does not remove her cattle from the roadway when
- 6 notified that the cattle are in a roadway.
- 7 9. That the subject cow was not visible at night.
- 8 10. That Defendant Fallini was aware that the subject cow was not visible at
- 9 night prior to the incident that is the subject of the Complaint on file herein.
- 10 11. That the subject cow was in the roadway of SR 375 at the time of the incident
- 11 that is the subject of the Complaint on file herein.
- 12 12. That the subject cow's presence in the roadway of SR 375 was the cause of
- 13 the motor vehicle accident that is the subject of the Complaint on file herein.
- 14 13. That Defendant Fallini did not know the location of the subject cow at the
- 15 time of the incident that is the subject of the Complaint on file herein.
- 16 14. That the presence of a reflective or luminescent tag on the subject cow would
- 17 have made the subject cow visible at the time of the incident that is the
- 18 subject of the Complaint on file herein.

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

20 **Disputed Facts**

21 Defendant Fallini claims in her Opening Brief that she was informed her prior
22 counsel, Harry Kuehn, Esq., was bipolar and "went off his meds." (Appellant's Opening
23 Brief, p. 11, l. 1.) However, after close scrutiny of the record, there is absolutely no
24 evidence in the record that Mr. Kuehn had a mental disorder that required medication in the
25 first place. While Defendant Fallini cites to the record in an attempt to support this fact,
26 the citation in no way establishes or even mentions that Harry Kuehn has bipolar disorder
27 or any other mental condition. The citation to Joint Appendix, Volume II, pp. 138-159,
28 simply does not support the proposition that Mr. Kuehn was "off his meds." Rather, that

1 very broad, 21-page citation is to Defendant Fallini's Motion to Reconsider Prior Orders.
2 There is no mention of Mr. Kuehn being "off his meds" in the body of the Motion, or in the
3 unsigned, inadmissible affidavits attached to Defendant Fallini's Motion. This is in direct
4 violation of Nevada Rule of Appellate Procedure 28(e).

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

11 IV.

12 STANDARD OF REVIEW

13 Pursuant to Nevada Rules of Appellate Procedure 28(a)(8)(B), Defendant Fallini
14 was required to provide the applicable standard of review for each issue presented.
15 However, Defendant Fallini failed to provide the standard of review. As such, Judith
16 provides the applicable standard of review below.

17 Denial of Motion for Reconsideration and Entry of Default Judgment

18 Generally, the denial of a motion for reconsideration is reviewed for an abuse of
19 discretion. Koshatka v. Philadelphia Newspapers, Inc., 762 F.2d 329, 333 (3d Cir.1985).
20 "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if
21 it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998,
22 1000 (2001).

23 The same standard applies for the default judgment. The district judge's factual
24 findings are reviewed under the clearly erroneous standard, and the judge's decision to order
25 default judgment is reviewed for an abuse of discretion. See Halaco Eng'g Co. v. Costle,
26 843 F.2d 376, 379 (9th Cir. 1988). "The question is not whether this court would have, as
27 an original matter, imposed the sanctions chosen by the trial court, but whether the trial
28 court exceeded the limits of its discretion." Halaco Eng'g, 843 F.2d at 379. Under this

1 deferential standard, we will overturn a court's decision to order default judgment as a
2 sanction for misconduct "only if we have a definite and firm conviction that it was clearly
3 outside the acceptable range of sanctions." Malone v. United States Postal Serv., 833 F.2d
4 128, 130 (9th Cir. 1987). Importantly, the Appellant carries the heavy burden of showing
5 the court abused its discretion, Weber v. State, 119 P.3d 107, 119 (2005).

6 It is important to note that Defendant Fallini did not appeal the granting of partial
7 summary judgment, which would require de novo review. Wood v. Safeway, 121 Nev.
8 724, 121 P.3d 1026 (2005).

9 In the present case, not only did the district court stay well within its discretion, it
10 followed clear Nevada law. In 2007, Defendant Fallini did not respond to Requests for
11 Admission, or any discovery for that matter. (Jt. Appx., I, 110-131.) In 2008, she did not
12 oppose a Motion for Partial Summary Judgment. (Jt. Appx. I, 55-57.) In 2009 and 2010,
13 she did not provide discovery responses and her Answer and Counterclaim were stricken
14 after several opportunities to comply with orders of the district court. (Jt. Appx. II., 26-33.)
15 The district court properly granted Judith's unopposed Motion for Partial Summary
16 Judgment, both because Defendant Fallini did not oppose the motion and because the
17 Requests for Admission were properly deemed admitted pursuant to NRCP 36. The district
18 court properly granted Judith's unopposed Motion for Sanctions and Motions for Order to
19 Show Cause, also because they were unopposed, and because Defendant Fallini, through
20 her attorney, Mr. Kuehn, offered nothing to rebut the meritorious nature of the motions.
21 As such, the district court did not abuse his discretion in denying Defendant Fallini's
22 Motion for Reconsideration, and the district court's decision should be affirmed.

23 Alleged Error Regarding Vacating Jury Trial

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

V.

LEGAL ARGUMENT

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

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

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

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

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

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

1 Rehearings are not granted as a matter of right and are not allowed for the purpose
2 of reargument unless substantially different evidence is subsequently introduced or the
3 original decision of the Court was clearly erroneous. Masonry and Tile Contractors Ass'n
4 v. Jolley, Urga & Wirth, Ltd., 113 Nev. 737, 941 P.2d 486, 489 (1997) *citing with approval*,
5 Little Earth of United Tribes v. Department of Housing, 807 F.2d 1433, 1441 (8th Cir.
6 1986). See also, Geller v. McCowan, 64 Nev. 106, 178 P.2d 380 (1947); State ex rel.
7 Copeland v. Woodbury, 17 Nev. 337, 30 P. 1006 (1883). Prior decisions are not clearly
8 erroneous unless there is no evidence to support the lower court's findings. Burroughs
9 Corp. v. Century Steel Inc., 99 Nev. 464, 470, 664 P.2d 354, 358 (1983). Only in very rare
10 instances, in which new issues of law or fact are raised supporting a ruling contrary to the
11 ruling already reached, should a motion for rehearing be granted. Moore v. City of Las
12 Vegas, 92 Nev. 402, 551 P.2d 244 (1976). Moreover, a party may not raise a new point for
13 the first time on rehearing. In re Ross, 99 Nev. 657, 668 P.2d 1089 (1983).

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

18 Moreover, Defendant Fallini has provided no evidence whatsoever that the district
19 court abused its discretion. Defendant Fallini ignores the substance of her Motion to
20 Reconsider Prior Order, probably because it completely lacked any merit or any substantive
21 evidence in support of itself. In the pleading portion of her Motion to Reconsider Prior
22 Orders, Defendant Fallini claims her attorney had previously represented to her that the
23 case was over. (Jt. Appx., Vol. II, p. 142.) Of course, it is worth noting that this statement
24 was not -- and is not now -- supported by admissible evidence. Rather, Exhibit 2 to
25 Defendant Fallini's Motion to Reconsider Order is an *unsigned* affidavit in which she
26 makes that claim. The district court could not consider Exhibits 1-5 to Defendant Fallini's
27 Motion to Reconsider Prior Orders because they were inadmissible hearsay. NRS 51.035
28 and 51.065.

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

8 **B. The Prior Orders Are Not Clearly Erroneous**

9 Defendant Fallini's appeal is of the denial of the Motion to Reconsider Prior Orders.
10 Consequently, it is Judith's position that this Court need not consider the propriety of the
11 prior orders -- Defendant Fallini did not appeal the entry of those orders. Nevertheless,
12 should the Court wish to consider the prior orders, Respondent will address them
13 individually.

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

26 **1. The Motion for Partial Summary Judgment Was Properly Granted**

27 Defendant Fallini alleges that the granting of Judith's Motion for Summary
28 Judgment was brought about by Judith's attorney misrepresenting facts to the tribunal. That

1 allegation is simply not true. In addition, there was absolutely no mention of any alleged
2 misrepresentation in any motion brought by Defendant Fallini before the district court.
3 Rather, Defendant Fallini raises this point for the first time on appeal. It is the long settled
4 law in Nevada that arguments raised for the first time on appeal need not be considered by
5 the court. Montesano v. Donrey Media Group, 99 Nev. 644, 650, 668 P.2d 1081, 1085
6 (1983). As such, this argument should not be considered by the Court and all prior orders
7 entered by the district court should be affirmed.

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

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

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

20 Moreover, there is not one shred of evidence that Judith's attorney misrepresented
21 facts to the tribunal. The sole basis of Defendant Fallini's claims of alleged
22 misrepresentation by Attorney Aldrich is the allegation, for the first time on appeal, that he
23 presented false facts in pleadings, with no evidentiary support

24 Many of these facts were admitted to by Defendant Fallini, whether she now likes
25 it or not, and this argument is without any basis in law. Attorney Aldrich submitted the
26 *admitted* facts to the Court. Attorney Aldrich sent Requests for Admission to Defendant
27 Fallini, seeking to have Defendant Fallini respond, and answer whether they were true or
28 false. However, Defendant Fallini never responded. Therefore, as stated above, due to
Defendant Fallini's failure to respond to the requests, they were deemed admitted. It is well
settled law in Nevada that such admissions may properly serve as the basis for summary

1 judgment against the party who failed to serve a timely response. Wagner v. Carex
2 Investigations & Sec., Inc., 93 Nev. 627, 572 P.2d 921 (1977).

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

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

9 NRCP 36 provides, in pertinent part:

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

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

21 "[E]ven if a request is objectionable, if a party fails to object and
22 fails to respond to the request, that party should be held to have
23 admitted the matter." Jensen v. Pioneer Dodge Center, Inc., 702
24 P.2d 98, 100-01 (Utah 1985) (citing Rutherford v. Bass Air
25 Conditioning Co., 38 N.C.App. 630, 248 S.E.2d 887 (1978)). It
26 is well settled that failure to respond to a request for admissions
27 will result in those matters **being deemed conclusively**
28 **established**. Woods, 107 Nev. at 425, 812 P.2d at 1297; Dzack,
80 Nev. at 347, 393 P.2d at 611. This is so **even if the**
established matters are ultimately untrue. Lawrence v.
Southwest Gas Corp., 89 Nev. 433, 514 P.2d 868 (1973);
Graham v. Carson-Tahoe Hosp., 91 Nev. 609, 540 P.2d 105
(1975). Emery's failure to respond or object to the Smiths'
request for admissions entitles the Smiths to have the assertions
contained therein conclusively established.

Id. at 742-43 (emphasis added).

26 The evidence presented to the Court nearly three years ago in Judith's Motion for
27 Partial Summary Judgment included the conclusively proven facts that had been admitted
28

1 in the Requests for Admission. Those facts are set forth in the Statement of Facts above
2 and in the appendix. (Jt. Appx. I, 58-62.)

3 **3. The Order Striking Answer and Counterclaim Was Properly**
4 **Entered**

5 The Order Striking Defendant Fallini's Answer and Counterclaim was also properly
6 entered. The lengthy procedural history is set forth in numerous court motions filed by Ms.
7 Adams and the district court's orders. Defendant Fallini has conceded that the history set
8 forth in those documents is accurate, in that a motion was filed, there was no opposition,
9 Mr. Kuehn promised to comply, and there was no compliance. The striking of Defendant
10 Fallini's Answer and Counterclaim, and the holding of Defendant Fallini and her counsel
11 in contempt, is entirely proper, if for no other reason than the Motion was not opposed. But
12 there was more than just the fact that the various motions to compel and for sanctions were
13 not opposed. Defendant Fallini and her counsel repeatedly ignored the district court's
14 orders to respond to discovery. This Court imposed appropriately progressive sanctions
15 before striking the Answer and Counterclaim. (Jt. Appx. I, 152-153.)

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

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

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

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

1 There is certainly no merit to the contention that
2 dismissal of petitioner's claim because of his counsel's
3 unexcused conduct imposes an unjust penalty on the
4 client. Petitioner voluntarily chose this attorney as his
5 representative in the action, and he cannot now avoid the
6 consequences of the acts or omissions of this freely
7 selected agent. Any other notion would be wholly
8 inconsistent with our system of representative litigation,
9 in which each party is deemed bound by the acts of his
10 lawyer-agent, and is considered to have notice of all
11 facts, notice of which can be charged upon the attorney.

12 Id. 90 Nev. at 395 (quoting Link v. Wabash Railroad Company, 370 U.S. 626, 82 S.Ct 1386
13 (1962)(emphasis added)).

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

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

24 At a minimum, Defendant Fallini was obligated to ask about the status of her case,
25 the defenses that were being raised, the actions that were being taken by her counsel, and
26 the rulings the Court was making. In the pleading portion of her Motion to Reconsider
27 Prior Orders, Defendant Fallini claims her attorney had previously represented to her that
28 the case was over. (Jt. Appx., Vol. II, p. 142.) Of course, it is worth noting that this
statement was not -- and is not now -- supported by admissible evidence. Rather, Exhibit
2 to Defendant Fallini's Motion to Reconsider Order is an *unsigned* affidavit in which she
makes that claim. The district court could not consider Exhibits 1-5 to Defendant Fallini's
Motion to Reconsider Prior Orders because they were inadmissible hearsay. NRS 51.035
and 51.065.

1 However, even if this Court determined to consider this argument, Defendant Fallini
2 could have – and should have – requested written confirmation that this case really was
3 concluded. Further, Defendant Fallini is litigation-savvy, having been a party to litigation
4 and hired attorneys in the past. Even the most cursory internet search revealed that
5 Defendant Fallini has been involved in other lawsuits. This information was also provided
6 to the district court. Defendant Fallini is well aware of how this process works, and she
7 cannot take a “head in the sand” approach and then go before the Court just before
8 judgment is to be entered and ask for a “do over.” (Jt. Appx. II, 194-201.)

9 **2. Notice to the Attorney Constitutes Notice to the Client**

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

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

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

28 Ratification of an attorney's conduct can occur through negligence, inattention, or

1 the failure to express disapproval by his client, as it's the client's duty, having knowledge
2 of the case, to express her disapproval within a reasonable time, under the equitable
3 doctrine of laches. Comb's Admr. v. Virginia Iron, Coal & Coke Co., 33 SW 2d 649 (Ky.
4 1930); Baumgartner v. Whinney, 39 A.2d 738 (Pa. 1944); Kreis v. Kreis, 57 S.W.2d 1107
5 (1933 Tex. Civ. App.), *error dismissed*, former app. 36 S.W.2d 821.

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

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

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

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

28 Further, Defendant Fallini raises this point for the first time on appeal. Arguments

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

4 Regardless, Defendant Fallini can show no manifest injustice occurred. Manifest
5 injustice requires that "the verdict or decision, strikes the mind, at first blush, as manifestly
6 and palpably contrary to the evidence." Kroger Properties & Development Inc. v. Silver
7 State Title Co., 715 P.2d 1328, 1330, 102 Nev. 112, 114 (1986). The decision in this case
8 is completely in line with the evidence. The Motion to Reconsider Prior Orders was not
9 supported with admissible evidence. If there was an argument that the district court should
10 have notified the proper authorities regarding Mr. Kuehn, Defendant Fallini should have
11 provided admissible evidence -- or at least raised the issue -- in her Motion to Reconsider
12 Prior Orders. She failed to do so.

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

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

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

28 Finally, Defendant Fallini has a remedy. She has legal recourse against her former

1 attorney in the form of a malpractice action.

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

4 **E. The District Court Properly Vacated the Trial**

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

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

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

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

24 **(2) By the Court.** In all other cases the party entitled to a
25 judgment by default shall apply to the court therefor. . . . If the
26 party against whom judgment by default is sought has
27 appeared in the action, the party (or, if appearing by
28 representative, the party's representative) shall be served with
written notice of the application for judgment at least 3 days
prior to the hearing on such application. *If, in order to enable
the court to enter judgment or to carry it into effect, it is
necessary to take an account or to determine the amount of*

1 *damages or to establish the truth of any averment by evidence*
2 *or to make an investigation of any other matter, the court may*
3 *conduct such hearings or order such references as it deems*
4 *necessary and proper and shall accord a right of trial by jury*
5 *to the parties when and as required by any statute of the*
6 *State.*

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

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

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

21 Defendant Fallini further cites Molodyh v. Truck Insurance Exchange, 744 P.2d
22 992, 304 (Or. 1987), for the proposition that the right to a jury trial includes having the jury
23 decide all issues of fact. In Molodyh, the plaintiff did in fact request a jury trial and it was
24 denied, and further, default was never entered. The facts in the present case are clearly
25 inopposite. Defendant Fallini never requested a jury trial. Further, Defendant Fallini had
26 default entered against her.

27 Finally, Defendant Fallini cited Lakin v. Senco Products, 987 P.2d 463, 470 (1935),
28 to support the proposition that the amount of damages is a fact to be determined by the jury.
However, in Lakin, a jury trial was requested and did occur. The dispute was as to whether
the jury should determine damages. In the present case, Defendant Fallini, did not request

1 a jury trial. Further, she had default entered against her which, pursuant to NRCP 55(b)(2),
2 negates any right to a jury trial unless required by statute, and Defendant Fallini has pointed
3 to no applicable statute.

4 **F. The District Court Properly Awarded Damages**

5 The Defendant Fallini argues that the damages awarded to Judith for future wage
6 loss were excessive and that there was no showing that Judith suffered any economic loss
7 from the death of her son. However, the Appellant carries the heavy burden of showing the
8 court abused its discretion, Weber v. State, 119 P.3d 107, 119 (2005). In the present case
9 there is no transcript from the hearing. Defendant Fallini has not cited anything in the
10 record to support the contention that Judith presented no evidence of economic loss, or that
11 the district court somehow abused its discretion in entering default judgment. (Appellant's
12 Opening Brief, p. 19, ls. 3-4.) Nevada Rules of Appellate Procedure 28(e)(1) provides:

13 (e) References in Briefs to the Record.

14 (1) Every assertion in briefs regarding matters in the
15 record shall be supported by a reference to the page and
16 volume number, if any, of the appendix where the
17 matter relied on is to be found. A party referring to
18 evidence whose admissibility is in controversy must
19 cite the pages of the appendix or of the transcript at
20 which the evidence was identified, offered, and
21 received or rejected.

22 The court need not consider the contentions of an appellant where the appellant's opening
23 brief fails to cite to the record on appeal. Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 997,
24 860 P.2d 720, 724 (1993).

25 In the present case, there is no record of the prove up hearing, and therefore, it is
26 impossible for this Court to determine what evidence was presented to support future
27 economic loss, and what evidence Defendant Fallini now wishes to object to. Any
28 contentions of Defendant Fallini regarding what Judith testified to at the prove up hearing
has not been supported by the record and should not be considered.

///

///

V.

CONCLUSION

Defendant Fallini carries the heavy burden of showing the court abused its discretion, Weber v. State, 119 P.3d 107, 119 (2005). Defendant Fallini has absolutely failed to demonstrate the district court abused its discretion in any respect. She failed to respond to Request for Admissions and a Motion for Partial Summary Judgment. She also failed to comply with orders of the district court. Defendant Fallini now raises several arguments on appeal for the first time, and the Court should not consider them. Nevertheless, Defendant Fallini chose her attorney and ratified her attorney's conduct. As such, the prior orders of the district court are not clearly erroneous and do not result in a manifest injustice.

The district court did not error in vacating the jury trial and proceeding with a prove-up hearing, as default had been entered against Appellant. Further, Defendant Fallini has failed to demonstrate that the damages awarded to Respondent constitute an abuse of discretion. As such, Appellant's appeal is without merit and the District Court's Orders should not be reversed.

Respectfully submitted 8th day of July, 2011.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of July, 2011.

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4 **IN THE SUPREME COURT OF THE STATE OF NEVADA**
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Supreme Court No.: 56840

FILED

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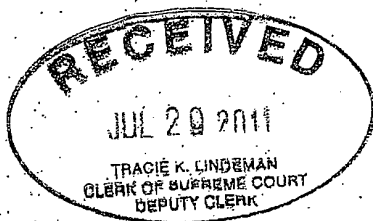
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

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

19 **APPELLANTS' REPLY BRIEF**
20 _____

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

2 SUSAN FALLINI,

Supreme Court No.: 56840

3 Appellant,

4 vs.

APPELLANT'S REPLY BRIEF

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

8 Respondent.

9 Pursuant to NRAP 28(a), Appellant, Susan Fallini, hereby submits Appellant's
10 Reply Brief:

11 **ISSUES PRESENTED FOR REVIEW**

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

- 14 (1) Did the district court abuse its discretion and commit reversible when it denied
15 Defendant's Motion for Leave to File Motion for Reconsideration?
16 (2) May this court consider whether the district court committed reversible error by
17 vacating the jury trial, and determining damages?
18 (3) May the Supreme Court consider whether the district court properly awarded
19 damages in excess of \$2.7 million to Respondents, Adams.

20 **DISPUTED FACTS**

21 The procedural history and statement of facts have been laid out in detail in the
22 previous briefs filed, thus only the disputed facts laid out in Respondent's Answering
23 Brief will be addressed. Fallini was told by Kuehn's partner that he was suffering from a
24 mental condition and it was expected that had Fallini been given the opportunity to
25 present her case in a hearing, Kuehn and his partner Gibson would be subpoenaed to shed
26 light on that matter. Jt. Appx. II, 143. Further, it must be noted that not only did Kuehn
27 fail to respond or in any way reply to almost every motion or discovery request filed in the
28 district court, he also failed to appear at numerous hearings, including the hearing to grant

1 partial summary judgment, the hearing on the motion to reopen discovery, and the Order
2 to Show Cause. Jt. Appx. II, 240-241. At the hearings Kuehn did attend he offered no
3 rebuttal to arguments but sated that his office "dropped the ball" or pleaded with the court
4 to simply impose greater sanctions. Jt. Appx. II, 241. In one Order to Show Cause
5 Hearing Mr. Gibson, Kuehn's partner, appeared for Kuehn and requested "a closed
6 courtroom to disclose the issues regarding Attorney Harry Kuehn. Mr. Gibson [then]
7 informe[d] the court of Harry Kuehn's issues with depression." Jt. Appx. II, 241-242.

8 It would be nice if there were a more complete record of the District Court's
9 hearings especially the final hearing, however as no transcript was made of any of the
10 hearings, counsel must cite to the vague record to support statements and recollection of
11 proceedings.

12 Finally, Fallini would emphasize that she did not discover Kuehn's malpractice
13 until June 2, 2010, at which point she promptly fired Kuehn and hired new counsel. Jt.
14 Appx. II, 142-143. New counsel appeared for Fallini on June 17, 2010. Jt. Appx. II, 87-88.
15 In the next 32 days a litany of motions were filed and the final hearing held on July 19,
16 2010. Jt. Appx. II, 242-244. The July 19, 2010, hearing resulted in the final order that is
17 appealed from, denied the motion for reconsideration, dismissed the trial, and continued
18 with the prove up hearing. Jt. Appx. II, 242. In that hearing Susan Fallini was present and
19 sworn in to testify. Jt. Appx. II, 242. It is unfortunate that there is no transcript of that
20 hearing, like all other hearings, but it can be inferred from the Motion for Leave to File
21 Motion for Reconsideration that Susan Fallini testified to the contents of her unsigned
22 affidavit attached to that motion. Jt. Appx. II, 145, 151-152.

23 STANDARD OF REVIEW

24 Fallini would like to take this chance to remedy her failure to clearly delineate the
25 standard of review applicable to each issue presented to the court.

26 (1) A motion for reconsideration is properly treated as a motion under Rule
27 59(e), FRCP., to alter or amend the judgment. *Huff v. Metropolitan Life Insurance Co.*,
28 675 F.2d 119, 122-23 & n. 5 (6th Cir.1982). Although the appropriate standard of review

1 for a motion to reconsider is generally whether the district court abused its discretion, if
2 the court's denial was based upon the interpretation and application of a legal precept,
3 review is plenary. See *Huff*, 675 F.2d at 122-23 n. 5; 6A J. Moore, *Moore's Federal*
4 *Practice* p 59.15 (2d ed. 1984); see also, *Cowger v. Arnold*, 460 F.2d 219, 220 (3d
5 Cir.1972) (Rule 59(a) motion for a new trial also reviewed on basis of underlying final
6 judgment). Here, because the district court's denial of Fallini's motion to reconsider was
7 in part based upon an improper determination of the law in granting Adams summary
8 judgment, review of this denial is plenary. Thus, the merits of Fallini's contentions must
9 be explored. *Koshatka v. Philadelphia Newspapers, Inc.*, 723 F.2d 329, 333 (3rd Cir.
10 1985).

11 (2) Although the issue of the dismissal of the jury trial is raised for the first time
12 on appeal and arguments raised for the first time need not be considered (*Montesano v.*
13 *Donrey Media Group*, 99 Nev. 644, 650, 688 P. 2d 1081, 1085 (1983) citing *Williams v.*
14 *Zellhoefer*, 89 Nev. 579, 517 P.2d 789 (1973)) the court may consider argument raised for
15 the first time on appeal when appellant presents argument or authorities in support of an
16 alleged error in the court below, or the error is so unmistakable that it reveals itself by a
17 casual inspection of the record. *Williams v. Zellhoefer*, 89 Nev. 579, 517 P.2d 789 (1973)
18 citing *Allison v. Hagan*, 12 Nev. 38, 42 (1877); *Gardner v. Gardner*, 23 Nev. 207, 45 P.
19 139 (1896); *Candler v. Ditch Co.*, 28 Nev. 151, 80 P. 751 (1905); *Riverside Casino v. J.*
20 *W. Brewer Co.*, 80 Nev. 153, 390 P.2d 232 (1964); *Smithart v. State*, 86 Nev. 925, 478
21 P.2d 576 (1970). The unconstitutional denial of a jury trial must be reversed unless the
22 error was harmless. *United States v. California Mobile Home Management Park Co.*, 107
23 F.3d 1374, 1377 (9th Cir. 1997).

24 (3) This issue also is brought up for the first time on appeal however, due to the
25 progressions of the proceedings the evidence considered in the calculation and award of
26 damages was unknown at the time when objection could have been made on the record.
27 It. Appx. II, 242. A calculation of damages should only be upheld if there is competent
28 evidence to sustain it. *Cornea v. Wilcox*, 898 P.2d 1379, 1386 (Utah 1995) citing *Rees v.*

1 *Intermountain Health Care, Inc.*, 808 P.2d 1069, 1072 (Utah 1991); *Penrod v. Carter*, 737
2 P.2d 199, 200 (Utah 1987). In general, an award of damages will be affirmed on appeal if
3 they are based upon substantial evidence in the record. *Dow Chemical Co. v. Mahlum*, 114
4 Nev. 1468, 970 P.2d 98 (1998), citing *Prabhu v. Levine*, 112 Nev. 1538, 1543, 930 P.2d
5 103, 107 (1996). "Substantial evidence has been defined as that which 'a reasonable mind
6 might accept as adequate to support a conclusion.'" *Prabhu*, supra at 1543 (quoting *State*,
7 *Emp. Security v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

8 SUMMARY OF REPLY ARGUMENTS

9 I. Denying Fallini's Motion for Reconsideration was an abuse of discretion by
10 the District Court because under a plenary review the Orders entered for which Fallini was
11 requesting reconsideration were clearly erroneous, based on "facts" known to be untrue
12 but established by default, and resulted in manifest injustice. New facts were presented
13 to the District Court warranting reconsideration of the past orders, rendering the past
14 orders, of which Fallini was requesting reconsideration, erroneous and unjust.

15 II. Dismissing the jury trial was reversible error because it deprived defendant
16 of their constitutional right and the determination of damages is an issue of fact that
17 should have been resolved by a jury.

18 III. The damages awarded to Adams by the District Court were excessive and
19 are not supported by evidence in the record.

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

23 ///

24 ///

25 ///

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 than 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*

1 *Ass'n of Southern Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 941 P.2d 486
2 (1997) citing with approval *Little earth of United Tribes v. Department of Housing* 807 F.
3 2d 1433, 1441 (8th Cir. 1986). Rehearing should be granted where new issues of fact or
4 law are raised supporting a ruling contrary to the ruling already reached have been
5 presented. *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P. 2d 244, 246 (1976).

6 Fallini's Motion for Reconsideration raised new issues of fact showing that it was
7 common knowledge that the area where the cow was hit was free range, in direct
8 opposition to what had previously been established through default. *Jt. Appx. II*, 149. It
9 also established that Fallini had been lied to near the beginning of the case and told by her
10 attorney that the case was over. *Jt. Appx. II*, 151-152. Although the Affidavits attached to
11 Fallini's Motion for Reconsideration were unsigned they were accompanied by a signed
12 affidavit from Fallini's newly retained counsel, detailing that signed affidavits would be
13 produced as soon as they were received back. Unfortunately, given that the hearing on
14 this motion was held thirteen days later, Fallini did not have the signed affidavits back
15 prior to the motion being denied. *Jt. Appx. II*. 242-244. It is important to note that Susan
16 Fallini was sworn in to testify at that hearing and could have given sworn testimony on the
17 contents of her affidavit for the courts consideration. *Jt. Appx. II*, 242. Further, the fact
18 that the area where the cow was hit was open range was supported not only by unsigned
19 affidavits but a signed letter from Deputy Attorney General, Gilbert R. Garcia on State of
20 Nevada Office of the Attorney General letterhead written on behalf of the Nevada
21 Department of Transportation, stating that not only was the road where the accident
22 occurred in open range but it was clearly marked as such. *Jt. Appx. II*, 149. This letter
23 would have been properly considered by the District Court because the circumstances are
24 sufficient to show its accuracy. NRS 51.075.

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

28 ///

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

3 The Orders that Fallini requested be reconsidered were granted at the time they
4 were entered as the district court was forced to enter decisions based entirely upon
5 Kuehn's repeated and blatant inaction, and not on sound factual basis and legal premises.
6 Jt Appx. II, 143. The longstanding policy of law favors the disposition of cases on their
7 merits. *Moore v. Cherry*, 90 Nev. 390, 393-394, 528 P.2d 1018, 1021 (1974) citing
8 *Richman v. General Motors Corp.*, 437 F. 2d 196 (CA. 1st Cir. 1971); *Bauwens v. Evans*,
9 109 Nev. 537, 539, 853 P.2d 121, 122 (1993). The orders entered were entered based on
10 Kuehn's procedural failures and not on the merits of the case.

11 The "facts" on which the Order Granting Partial Summary Judgment was based
12 were "conclusively established" through Kuehn's failure to respond to Adams' Request
13 for Admissions. Jt. Appx. I, 55-57. Although, failure to respond to requests for
14 admissions will result in those matters being deemed conclusively established even if the
15 established matters are ultimately untrue (*Lawrence v. Southwest Gas Corp.*, 89 Nev. 433,
16 514 P.2d 868 (1973)) that rule should not be extended to establish "facts" purported that
17 were known to be false when propounded. A Court's interpretation of rules and law
18 "should be in line with what reason and public policy would indicate the legislature
19 intended, and should avoid absurd results." *State v. Quinn*, 30 P.3d 1117, 1120, 117 Nev.
20 709 (2001), quoting *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599-600, 959 P.2d
21 519, 521 (1998). The method by which the "facts" were established previously, could
22 also "conclusively establish" that grass grows pink. Furthermore, the fact that the area
23 where the cow was struck was open range was and is common knowledge in Nye County
24 and the road on which the accident took place was marked with signs showing it to be
25 open range. Jt. Appx. II., 149. By continuing to allow a fact to stand, the opposite of
26 which is truth commonly known and could have been established through judicial notice
27 if litigated on the merits, the District Court is encouraging attorneys to engage in unethical
28 conduct in violation of the Nevada Rules of Professional Conduct, specifically Nevada

1 Rule of Professional Conduct 3.3.

2 The commonly known fact that the area where the accident occurred is open range
3 renders the Order Granting Summary Judgment erroneous. Holding Fallini liable for
4 more than \$2.7 million resulting from the misconduct of the attorney's involved is
5 manifestly unjust. The District Court has a duty to exercise discretion to seek truth and
6 justice. When serious misconduct occurs a trial judge has an obligation to intervene sua
7 sponte to protect litigants' rights to a fair trial. *DeJesus v. Flick*, 116 Nev. 812, 7 P.3d 459,
8 466 (2000), Papez D.J., concurring. By denying Fallini's Motion for Reconsideration the
9 District Court abused its discretion and failed to uphold the integrity of the court. Code of
10 Judicial Conduct Canon 1.

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

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

23 Until approximately June 2, 2010, Kuehn failed to communicate the status of the
24 case, **except to tell defendant that the case was "over and had been taken care of."** Jt.
25 Appx. II., 142, 151. Finally, Mr. Tom Gibson contacted Fallini and apprised her of the
26 true status of her case. Jt. Appx. II., 142, 151. As soon as Fallini discovered Kuehn's
27 negligence, she was referred to and retained new counsel without delay. Jt. Appx. II, 151.
28 Unlike the appellants in *Tahoe Village*, Fallini had no time during the lower court

1 proceedings where she was representing herself and would have had reason to check the
2 status of the litigation herself as opposed to trusting the representations made to her by her
3 attorney. Further, unlike the appellants in *Moore*, as soon as Fallini was informed of her
4 attorney's failures she immediately sought replacement counsel to begin challenging the
5 miscarriage of the case. In no way did Fallini ratify the inaction of her counsel.

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

11 Adams further contends that despite Fallini's lack of knowledge or action ratifying
12 her attorney's behavior she is estopped from raising the issues appealed due to the actions
13 and or inactions of Kuehn. Adams states that 'ratification of an attorney's conduct can
14 occur through negligence, inattention, or the failure to express disapproval by his client, as
15 it's the client's duty, having knowledge of the case, to express her disapproval within a
16 reasonable time, under the equitable doctrine of laches.' *Comb's Admr v. Virginia Iron,*
17 *Coal & Coke Co.*, 33 SW 2d 649 (Ky. 1930); *Baumgartner v. Whinney*, 39 A.2d 738 (Pa.
18 1944); *Kreis v. Kreis*, 57 S.W.2d 1107 (1933 Tex. Civ. App.) error dismissed, former app.
19 36 S.W.2d 821. Repondent's brief, p. 17-18. Based on this definition Fallini in no way
20 ratified Kuehn's actions or inactions because she expressed her disapproval immediately
21 upon her being informed of his negligence, firing him, replacing him as counsel and
22 pleading to the court for reconsideration of the orders granted as a result of his inactions.
23 Jt. Appx. II, 76-86, 130-132, 133-152, 241-244. As Fallini was being misled by Kuehn
24 through the majority of the proceedings, kept under the belief that the case was over, she
25 was the greatest victim of Kuehn's malpractice and it would be grossly unjust to hold her
26 accountable or infer that she in any way ratified his negligence.

27 For the foregoing reasons the District Court had the discretion to and under the
28 circumstances of this case should have granted Fallini's Motion for Reconsideration. In

1 denying that Motion the District Court abused its discretion, allowing the perpetuation of
2 erroneous orders manifesting injustice, committing reversible error.

3 On a policy note, because of the extreme nature of Kuehn's dereliction of duties,
4 and the commonly known easily established fact of the area being open range
5 contradicting the results of this case a remand of this case with directions for
6 reconsideration would not open floodgates. Rather, it would affirm prior holdings of this
7 court where new trials have been granted to remedy attorney misconduct where the
8 misconduct so permeates the proceedings and/or where absent the misconduct the verdict
9 would have been different. *Loice v. Cohen*, 124 Nev. 1, 174 P.3d 970, 978-982 (2008). If
10 this is not a case where attorney misconduct warrants a rehearing then the court will be
11 hard pressed to find one. Another troubling aspect of this case is the level of negligence
12 Kuehn was able to reach without an authority involved notifying Fallini of the
13 circumstances. When serious misconduct occurs a trial judge has an obligation to
14 intervene sua sponte to protect litigants' rights to a fair trial. *DeJesus v. Flick*, 116 Nev.
15 812, 7 P.3d 459, 466 (2000), Papez D.J., concurring. Arguments in derogation of
16 professional conduct rules should not be condoned by a court even absent objection. *Id.*
17 citing *Wanner v. Keenan*, 22 Ill.App.3d 930, 317 N.E.2d 114 (1974). The trial judge is
18 responsible for the justice of his judgments and has a duty to control proceedings to
19 ensure a just result. *Id.* citing *Paulsen v. Gateway Transportation Co.*, 114 Ill.App.2d 241,
20 252 N.E.2d 406 (1969).

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

24 Although the issue of the dismissal of the jury trial is raised for the first time on
25 appeal and arguments raised for the first time need not be considered (*Montesano v.*
26 *Donrey Media Group*, 99 Nev. 644, 650, 688 P. 2d 1081, 1085 (1983) citing *Williams v.*
27 *Zellhoefer*, 89 Nev. 579, 517 P.2d 789 (1973)) the court may consider argument raised for
28 the first time on appeal when appellant presents argument or authorities in support of an

1 alleged error in the court below, or the error is so unmistakable that it reveals itself by a
2 casual inspection of the record. *Williams v. Zellhoefer*, 89 Nev. 579, 517 P.2d 789 (1973)
3 citing *Allison v. Hagan*, 12 Nev. 38, 42 (1877); *Gardner v. Gardner*, 23 Nev. 207, 45 P.
4 139 (1896); *Candler v. Ditch Co.*, 28 Nev. 151, 80 P. 751 (1905); *Riverside Casino v. J.*
5 *W. Brewer Co.*, 80 Nev. 153, 390 P.2d 232 (1964); *Smithart v. State*, 86 Nev. 925, 478
6 P.2d 576 (1970). This matter was set for a jury trial when the district Court vacated that
7 jury trial setting and determined damages from the bench. Jt. Appx. II, 242.

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

17 Adams contends that the District Court properly dismissed the trial and proceed
18 with a prove up hearing as it was allowed to do by virtue of the default it had entered
19 previously pursuant to NRCP 55(b)(2). In cases where the court has entered default it still
20 must accord a right of trial by jury to the parties when and as required by any statute of
21 the State. NRCP 55(b)(2). Article 1, Section 3 of the Nevada Constitution provides:

22 **Trial by jury; waiver in civil cases.** The right of trial by Jury shall be
23 secured to all and remain inviolate forever; but a Jury trial may be waived
24 by the parties in all civil cases in the manner to be prescribed by law; and in
25 civil cases, if three fourths of the Jurors agree upon a verdict it shall stand
26 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.

27 Although no statute exists requiring that damages be determined by a jury, Fallini
28 still had her constitutional right to a jury trial which she never waived or had opportunity

1 to assert. Further, it is well established law that the right to jury trial includes having a
2 jury determine all issues of fact. *Molodyh v. Truck Insurance Exchange*, 744 P.2d 992,
3 304 Or. 290, 297-298 (1987). "The amount of damages *** from the beginning of trial by
4 jury, was a 'fact' to be found by the jurors." *Lakin v. Senco Products, Inc.*, 987 P.2d 463,
5 470, 329 Or. 62, Quoting Charles T. McCormick, *Handbook on the Law of Damages* 24
6 (1935).

7 Factual determinations remained as to damages, even though the Court struck the
8 defendant's answer and entered default. The Court's unexpected and immediate
9 determination of damages from the bench, after striking the jury trial, violated Fallini's
10 right to a jury trial secured by the above cited section of the Nevada Constitution. The
11 Damages awarded by the District Court in total exceeded \$2.7 million, making the error
12 very harmful to Fallini. *Jt. Appx. II*, 2222-223. Thus, the District Court committed
13 reversible error when it dismissed the jury trial and determined damages without affording
14 Fallini the opportunity to secure much less waive her right.

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

18 Although this issue is brought up on appeal for the first time the and the Supreme
19 court need not consider it may do so as the error is so unmistakable that it reveals itself by
20 a casual inspection of the record. *Williams v. Zellhoefer*, 89 Nev. 579, 517 P.2d 789
21 (1973) citing *Allison v. Hagan*, 12 Nev. 38, 42 (1877); *Gardner v. Gardner*, 23 Nev. 207,
22 45 P. 139 (1896); *Candler v. Ditch Co.*, 28 Nev. 151, 80 P. 751 (1905); *Riverside Casino*
23 *v. J. W. Brewer Co.*, 80 Nev. 153, 390 P.2d 232 (1964); *Smithart v. State*, 86 Nev. 925,
24 478 P.2d 576 (1970). A casual inspection of the record in this case shows a distinct lack
25 of record/evidence.

26 A calculation of damages should only be upheld if there is competent evidence to
27 sustain it. *Cornea v. Wilcox*, 898 P.2d 1379, 1386 (Utah 1995) citing *Rees v.*
28 *Intermountain Health Care, Inc.*, 808 P.2d 1069, 1072 (Utah 1991); *Penrod v. Carter*, 737

1 P.2d 199, 200 (Utah 1987). In this matter, there is no record of a showing that plaintiffs
2 suffered any economic loss from the death of their son. The only tangible damages for
3 which evidence can be inferred are the funeral expenses. Jt. Appx. II, 222-223, 242.

4 CONCLUSION

5 This cataclysmic, train wreck of a case was occasioned by the blatant malpractice
6 of Appellant's first lawyer, which cause the entry of partial summary judgment, the
7 striking of Appellant's answer, and the entry of default against Appellant, has resulted in
8 judgment in contravention of the actual facts. The District Court abused its discretion and
9 committed reversible error when it unreasonably denied Appellant, Fallini's Motion for
10 Reconsideration, vacated the jury trial and awarded excessive damages to Adams.

11 Now Appellant faces a huge (\$2.7 million) uninsured damage award. This court
12 should reverse the District Court's decision and remand the case, directing the lower
13 Court to reconsider its earlier orders and allow Appellant her defense.

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Dated this 28 day of July, 2011.

Jeff Kump, Esq.
Bar Number 5694
MARVEL & KUMP, LTD.
217 Idaho Street
Elko, Nevada 89801
(775) 777-1204

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2
3 CERTIFICATE OF SERVICE

4 I hereby certify that I am an employee of JOHN OHLSON, and that on this date I
5 personally served a true copy of the foregoing APPELLANT'S REPLY BRIEF, by the method
6 indicated and addressed to the following:

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

☒ Via U.S. Mail
☐ Via Overnight Mail
☐ Via Hand Delivery
☐ Via Facsimile
☐ Via ECF

10
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12 DATED this 29 day of July, 2011.

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15 Robert M. May
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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.

No. 56840

FILED

AUG 19 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER SUBMITTING APPEAL FOR DECISION
WITHOUT ORAL ARGUMENT

Oral argument will not be scheduled in this appeal, and it shall stand submitted on the record and the briefs filed herein, as of the date of this order. NRAP 34(f).

It is so ORDERED.

Dwyer, C.J.

cc: Marvel & Kump, Ltd.
John Ohlson
Aldrich Law Firm, Ltd.

1 IN THE
2 SUPREME COURT OF THE STATE OF NEVADA

3 ESTATE OF MICHAEL DAVID
4 ADAMS, BY AND THROUGH HIS
5 MOTHER JUDITH ADAMS,
6 INDIVIDUALLY AND ON BEHALF
7 OF THE ESTATE,

8 Appellant,

9 v.

10 SUSAN FALLINI,

11 Respondent.

Supreme Court No.: 68033 Electronically Filed
District Court Case No.: CV24539 Feb 11, 2016 09:40 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

12 **APPELLANT'S APPENDIX, VOLUME III**

13 **(Bates Nos. 0360-0577)**

14
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APPELLANT’S APPENDIX

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1 MOT

John P. Aldrich, Esq.

2 Nevada State Bar No. 6877

ALDRICH LAW FIRM, LTD.

3 1601 S. Rainbow Blvd., Suite 160

Las Vegas, Nevada 89146

4 (702) 853-5490

Attorneys for John P. Aldrich

5 *and Tony and Judith Adams*

FILED

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NYE COUNTY CLERK
BY DEPUTY

6 THE FIFTH JUDICIAL DISTRICT COURT
7 THE STATE OF NEVADA
8 COUNTY OF NYE

9 SUSAN FALLINI, and JOE FALLINI,

10 Plaintiffs,

Case No.: CV31449

Dept. No.: 1

11 v.

12 THE HONORABLE ROBERT W.
13 LANE, TONY ADAMS, JUDITH ADAMS,
14 JOHN P. ALDRICH, ESQ., HAROLD
KUEHN, ESQ. ; DOES I through V, jointly and
severally,

15 Defendants.
16

17 MOTION TO DISMISS

18 Defendants JOHN P. ALDRICH, TONY ADAMS, and JUDITH ADAMS, by and through their
19 attorney of record, John P. Aldrich, of Aldrich Law Firm Ltd., hereby move to dismiss the Complaint for
20 Declaratory Relief filed by Plaintiffs.

21 ///

22 ///

23 ///

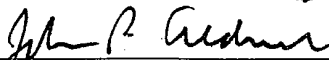
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1 This Motion is made and based upon the attached memorandum of Points and Authorities, the
2 attached exhibits, and any testimony or other evidence the Court will entertain or consider at the hearing
3 on this matter.

4 DATED this 21st day of March, 2011.

5 ALDRICH LAW FIRM, LTD.

6
7 
8 John P. Aldrich, Esq.
9 Nevada Bar No.: 6877
10 1601 S. Rainbow Blvd., Suite 160
11 Las Vegas, Nevada 89146
12 (702) 853-5490
13 Attorney for Defendants John P. Aldrich,
14 Tony Adams and Judith Adams

15 **NOTICE OF MOTION**

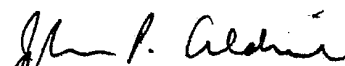
16 TO: Plaintiffs Susan and Joe Fallini;

17 TO: John Ohlson, Esq. and Jeff Kump, Esq., attorneys for Plaintiffs.

18 PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion to Dismiss on for
19 hearing before the above entitled Court on the 9th day of May, 2011, at the hour of 11:00 Am., or as soon thereafter as counsel may be heard.

20 DATED this 21st day of March, 2011.

21 ALDRICH LAW FIRM, LTD.

22 
23 John P. Aldrich, Esq.
24 Nevada Bar No.: 6877
25 1601 S. Rainbow Blvd., Suite 160
26 Las Vegas, Nevada 89146
27 (702) 853-5490
28 Attorney for Defendants John P. Aldrich,
Tony Adams and Judith Adams

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Page 3 of 16

1 and caused his death. The cow was many miles away from the owners' ranch at the time of the
2 incident. Further, the Fallinis had taken no precautions to keep the cow from the highway where the
3 collision occurred, including failing to put a florescent tag on the cow so it would be visible at night
4 As a direct and proximate result of the Fallinis' negligence, Michael was killed.

5 **Procedural History of the Underlying Case**

6 On or about **November 29, 2006**, Judith Adams filed a lawsuit in Clark County, Nevada. Susan
7 Fallini, one of the Plaintiffs in this case, was duly served with a copy of the Summons and Complaint
8 on **March 1, 2007**, and an Answer and Counterclaim (seeking to recover the value of the cow) were
9 filed on **March 14, 2007**.

10 The case was later transferred to Pahrump, Nye County, Nevada. Some time around **April 25,**
11 **2007**, counsel for the Estate of Michael David Adams, Katherine Peck, Esq., appeared to defend
12 against the counterclaim.

13 Plaintiff Susan Fallini challenged the venue in Pahrump, Nevada, instead asking the Court
14 to transfer the case to Tonopah, Nevada, which is still in the Fifth Judicial District and still in Nye
15 County, Nevada. Ms. Adams opposed the motion through her counsel at the time, Edward Achrem,
16 Esq. (Opposition to Defendant Susan Fallini's Objection to Pahrump as Forum and Motion to Have
17 Matter Heard in Tonopah, attached hereto as Exhibit A.) Ultimately, on **April 30, 2007**, the Court
18 denied Plaintiff Susan Fallini's objection and kept the matter in Pahrump, Nevada. Again, the
19 underlying case is titled Adams v. Fallini, Fifth Judicial District Court Case No. CV24539, Dept. 2P.

20 The early case conference was held on or about **June 15, 2007**. Ms. Peck attended at Mr.
21 Aldrich's office; Mr. Kuehn, counsel for current Plaintiff Susan Fallini, did not attend, nor did he call
22 in at the designated time (the parties had agreed to allow Mr. Kuehn to appear telephonically).
23 However, Mr. Kuehn later telephoned Mr. Aldrich. Several attempts to obtain the signature of Mr.
24 Kuehn on the Joint Case Conference were unsuccessful, so the Case Conference Report was filed
25 without Mr. Kuehn's signature.

26 On **October 31, 2007**, Plaintiff submitted interrogatories to Fallini. Those interrogatories
27 were never answered. Adams also submitted requests for admission and its first set of requests for
28

1 production of documents on **October 31, 2007**. Pursuant to the Requests for Admission¹ that Susan
2 Fallini never answered, Ms. Fallini admitted the following:

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

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26 ¹ The Requests for Admission are an exhibit to the Motion for Summary Judgment, which is
27 attached hereto as Exhibit _____. They are not attached here so as to avoid redundancy.

that is the subject of the Complaint on file herein.

14. That the presence of a reflective or luminescent tag on the subject cow would have made the subject cow visible at the time of the incident that is the subject of the Complaint on file herein.

(Plaintiff's First Set of Requests for Admission to Defendant Fallini, attached hereto as Exhibit B.)

A second set of requests for production of documents were submitted to Susan Fallini on **July 2, 2008**, requesting information as to Ms. Fallini's insurance policies and/or carriers that may provide coverage for damages that occurred as a result of the incident. Susan Fallini never responded to any of the written discovery requests; the discovery period lapsed without any responses being provided by or on behalf of Susan Fallini.

On or about **April 7, 2008** (and again on **May 14, 2008** with a Certificate of Service), Ms. Adams and the Estate filed a Motion for Partial Summary Judgment. Susan Fallini did not oppose that motion and the Court granted that Motion on **July 30, 2008**. (Motion for Partial Summary Judgment (pleading only, no exhibits), attached hereto as Exhibit C.) Notice of entry of the Order Granting Plaintiff's Motion for Partial Summary Judgment was served on Defendant on **August 15, 2008**. (Notice of Entry of Order and Order Granting Plaintiff's Motion for Partial Summary Judgment, attached hereto as Exhibit D.)

Ms. Adams' counsel attempted to amicably resolve the discovery dispute and obtain a copy of Ms. Fallini's applicable insurance policies, but to no avail. On **February 24, 2009**, Ms. Adams' counsel sent letters to Ms. Fallini's counsel seeking responses to the discovery.

Ms. Adams' and the Estate's counsel, Mr. Aldrich, attempted to discuss this discovery issue with Ms. Fallini's counsel, Mr. Kuehn, as well. On or about **March 6, 2009**, Mr. Aldrich contacted the office of Mr. Kuehn. Mr. Aldrich was informed that Mr. Kuehn was not available. Mr. Aldrich left a message with Mr. Aldrich's phone number and asked that Mr. Kuehn return the call. No return call ever came. On **March 18, 2009**, Mr. Aldrich again contacted the office of Mr. Kuehn. Mr. Aldrich was informed that Mr. Kuehn was not available. Mr. Aldrich left a message with Mr. Aldrich's phone number and asked that Mr. Kuehn return the call. No return call ever came.

1 On **March 23, 2009** – nearly nine months after propounding the discovery – Mr. Aldrich filed
2 a Motion to Compel Defendant's Production of Documents, including information regarding any
3 insurance policies that may provide coverage for the incident as contemplated in the Plaintiff's second
4 request for documents. This motion was heard on **April 27, 2009**. Ms. Fallini's attorney, Mr. Kuehn,
5 attended the hearing. Mr. Kuehn did not oppose the motion to compel and agreed at the hearing it was
6 warranted. Mr. Kuehn agreed sanctions were warranted, however, he disputed the amount of sanctions
7 requested. Th Honorable Robert Lane granted the Motion to Compel and awarded John Aldrich, Esq.,
8 \$750.00 in sanctions for having to bring the motion. A Notice of Entry of Order on the order granting
9 the Motion to Compel was entered on May 18, 2009. (Notice of Entry of Order and accompanying
10 Order, attached hereto as Exhibit E.) It was served by mail on Defendant on May 14, 2009. Defendant
11 never complied with the Order.

12 On **June 16, 2009**, Mr. Aldrich filed a Motion to Strike Defendant's [Fallini's] Answer and
13 Counterclaim due to Susan Fallini's complete failure to comply with discovery requests and the Court's
14 Order. Mr. Kuehn again attended the hearing and again provided no explanation as to why Ms. Fallini
15 failed to respond to all discovery requests, but stated Ms. Fallini would comply and respond to the
16 discovery requests. The Court denied Adams' and the Estate's Motion to Strike based on Mr. Kuehn's
17 promises to comply. The Court did, however, order Ms. Fallini and her counsel to comply with the
18 Order granting Plaintiff's Motion to Compel and to respond to Ms. Adams' and the Estate's discovery
19 requests by **July 12, 2009** or Ms. Fallini's Answer and Counterclaim would be stricken. The Court also
20 ordered Ms. Fallini to pay a \$1,000 sanction. (Order Denying Plaintiff's Motion to Strike Defendant's
21 Answer and Counterclaim, attached hereto as Exhibit F.)

22 Ms. Fallini still did not comply with the Court's Order and failed to respond to the discovery
23 requests. On **August 31, 2009**, Plaintiff brought an Ex Parte Motion for Order to Show Cause Why
24 Defendant Susan Fallini and Her Counsel Should Not be Held in Contempt. The Court issued an
25 Order on Plaintiff's Order to Show Cause, dated **October 8, 2009**, that Susan Fallini must produce all
26 documents responsive to the outstanding discovery requests by **October 12, 2009**. The Court further
27 ordered that if Ms. Fallini did not supply the requested information by October 12, 2009, Ms. Fallini's
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1 counsel would be held in contempt of court and would be fined \$150.00 a day, beginning October 13,
2 2009. Further the Court ordered that if the requested information was not provided by October 12,
3 2009, the Court would strike Ms. Fallini's pleadings in their entirety. (Order to Show Cause, attached
4 hereto as Exhibit G.)

5 Ms. Fallini never did respond to Plaintiff's discovery requests. However, Mr. Kuehn's partner,
6 Thomas Gibson, Esq., notified Mr. Aldrich by phone and by letter that there was no insurance available.

7 On **November 4, 2009**, the Court entered its Findings of Fact, Conclusions of Law and Order
8 striking Ms. Fallini's Answer and Counterclaim and directing the Court Clerk to enter Default against
9 Susan Fallini. (Findings of Fact, Conclusions of Law and Order Striking Answer and Counterclaim
10 of Defendant Susan Fallini and Holding Defendant's Counsel in Contempt of Court, attached hereto
11 as Exhibit H.) Because Ms. Fallini's Answer has been stricken, all the allegations of the Complaint
12 were deemed to be true. On **February 4, 2010**, the Clerk of the Court entered Default against
13 Defendant. (Exhibit I.)

14 Despite repeated requests, Fallini continued to fail and refuse to provide insurance information,
15 or a response that Fallini had no insurance. Consequently, Mr. Aldrich was again forced to bring yet
16 another Ex Parte Motion for Order to Show Cause Why Defendant and Her Counsel Should Not Be
17 Held in Contempt. The Order to Show Cause was granted, and another contempt hearing was held on
18 **May 24, 2010**. (Findings of Fact, Conclusions of Law and Order Holding Defendant's Counsel in
19 Contempt of Court, attached hereto as Exhibit J.) Neither Ms. Fallini nor her counsel, Harry Kuehn,
20 appeared at the hearing. However, Thomas Gibson, Esq., the law partner to Mr. Kuehn, appeared at
21 the hearing. Following argument by counsel, the Court made substantial findings of fact and
22 conclusions of law. The Court also held Mr. Kuehn in contempt yet again held Ms. Fallini and her
23 counsel in contempt of court and sanctioned them an additional \$5,000.00. Further, the Court again
24 ordered Ms. Fallini to provide the information that had been ordered on several prior occasions, and
25 imposed a \$500.00 per day sanction, beginning June 1, 2010, if Fallini did not respond as ordered.
26 (Exhibit J.)

27 ///

1 On June 24, 2010, Defendant Judith Adams, through her counsel John Aldrich, Esq., filed an
2 Application for Default Judgment. Ms. Adams sought a total of more than \$9,000,000.00 in damages.
3 A hearing was held on July 19, 2010 before Judge Lane, and Ms. Adams and Ms. Fallini both appeared
4 with counsel. Ultimately, Judge Lane awarded Ms. Adams the following:

5 Damages for grief, sorrow and loss of support:	\$1,000,000.00
6 Damages for future lost earnings	\$1,640,696.00
7 Attorneys' fees	\$50,000.00
8 Sanctions levied against Mr. Kuehn	\$35,000.00
9 Funeral expenses	\$5,188.85
10 TOTAL	\$2,730,884.80

11 The Court denied Ms. Adams' request for hedonic damages. (*See* Order After Hearing, attached
12 hereto as Exhibit K.)

13 Plaintiff Susan Fallini filed a Notice of Appeal on or about September 7, 2010. (Notice of
14 Appeal, attached hereto as Exhibit L.) On or about September 29, 2010, Ms. Fallini filed her Docketing
15 Statement, in which she listed the issues for appeal. (Docketing Statement (without attachments),
16 attached hereto as Exhibit M.) The issues on appeal, as listed in Ms. Fallini's Docketing Statement,
17 are the following:

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

20 (2) Whether the district court erred [sic] vacating the jury trial herein, and determining damages.

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

22 (Exhibit M, p. 3.) Conspicuously absent from the list of issues presented to the Nevada Supreme Court
23 is the allegation of fraud on the court.

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II.

LEGAL ANALYSIS

A. This Matter Is Frivolous and Has No Basis in Law

NRCP 12(b) provides:

(b) **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) insufficiency of process, (4) insufficiency of service of process, (5) failure to state a claim upon which relief can be granted, (6) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

[As amended; effective September 27, 1971.]

Defendants John P. Aldrich, Esq., Tony Adams and Judith Adams acknowledge that they have provided evidence outside the pleadings, and that the Court should therefore treat this as a motion for summary judgment. Nevertheless, this Court does not have jurisdiction to make the declaration Plaintiffs seek, and Plaintiffs have failed to state a claim upon which relief can be granted.

B. Plaintiffs' Claims Are Procedurally Barred

Plaintiffs are clearly attempting to have this district court rule in its favor before the Nevada Supreme Court has a chance to rule against it and affirm the judgment. Plaintiff Susan Fallini filed a Notice of Appeal on or about September 7, 2010. (Exhibit L.) On or about September 29, 2010, Ms. Fallini filed her Docketing Statement, in which she listed the issues for appeal. (Exhibit M.) The issues

1 on appeal, as listed in Ms. Fallini's Docketing Statement, are the following:

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

4 (2) Whether the district court erred [sic] vacating the jury trial herein, and determining damages.

5 (3) Whether damages awarded by the district court were excessive, and without a legal basis.
6
7 (Exhibit M, p. 3.) Conspicuously absent from the list of issues presented to the Nevada Supreme Court
8 is the allegation of fraud on the court.

9
10 Plaintiffs should not be permitted to file an appeal of the judgment in the underlying case, and
11 before the Supreme Court has an opportunity to rule on the matter, file a separate action to challenge
12 the judgment under NRCP 60(b), as Plaintiffs have done here. The filing of an appeal supercedes the
13 separate action under NRCP 60(b). Further, there is no new evidence that has come to light since the
14 filing of the appeal upon which to base this independent action. Consequently, this Complaint for
15 Declaratory Relief should be dismissed.

16
17 **C. Because There Has Been No Fraud on the Court, This Case Should Be Dismissed**

18 1. *Mr. Aldrich Has Not Committed Fraud upon the Court*

19 Plaintiffs should have brought a motion to set aside the judgment, pursuant to NRCP 60(b), in
20 the underlying action. However, they chose not to do so. Rather, they decided to appeal the entry of
21 the judgment. That matter is still on appeal; briefs have not even been submitted yet.

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1 While it is true that NRCP 60 seems to permit a separate action to challenge a judgment, such
2 a challenge is only permitted if there has been "fraud upon the court." NRCP 60(b). "Fraud upon the
3 court" requires:

4
5 that species of fraud which does, or attempts to, subvert the integrity of the
6 court itself, or is a fraud perpetrated by officers of the court so that the judicial
7 machinery cannot perform in the usual manner its impartial task of adjudicating
8 cases... and relief should be denied in the absence of such conduct.

9 *NC-DSH, INC. v. Garner*, 218 P.3d 853, 858 (2009)

10 The details of the underlying action have been set forth in extensive detail above, and the
11 appropriate documentation has been provided to support what the Court did in the underlying action.
12 There simply was no fraud on the Court. To the contrary, the Court was well advised of what was going
13 on in the underlying case. The Court was well aware that Ms. Fallini had not responded to discovery,
14 and that as a result of Ms. Fallini's failure to respond, certain facts were deemed admitted for purposes
15 of the litigation. There can be no fraud when Attorney Aldrich was merely following clear Nevada
16 law. Fallini was sent Requests for Admissions in the underlying action. Fallini failed to respond to
17 the Requests for Admission. Therefore, pursuant to NRCP 36, all matters in the Request for
18 Admissions were deemed admitted by the Court. NRCP 36 provides, in pertinent part:

19 (a) A party may serve upon any other party a written request for the admission,
20 for the purposes of the pending action only, of the truth of any matters within
21 the scope of Rule 26(b) set forth in the request that relate to statements or opinions
22 of fact or the application of law to fact....

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

29 ///

1 In *Smith v. Emery*, 109 Nev. 737, 856 P.3d 1386 (1993), the Nevada Supreme Court found that
2 failure to timely respond to requests for admission will result in those matters being conclusively
3 established, and this holds true even if the established matters are ultimately untrue. *Id.* Further, it is
4 well settled law in Nevada that such admissions may properly serve as the basis for summary judgment
5 against the party who failed to serve a timely response. *Wagner v. Carex Investigations & Sec., Inc.*,
6 93 Nev. 627, 572 P.2d 921 (1977). The Court in the underlying action properly granted an unopposed
7 motion for summary judgment based on the failure of Fallini to respond to Requests for Admission and
8 the motion itself.
9

10
11 The sole basis of Plaintiffs' claims of misrepresentation by Attorney Aldrich are that he
12 presented false facts in pleadings, with no evidentiary support. Specifically, the Fallinis allege that Mr.
13 Aldrich misrepresented the facts deemed admitted that Defendant's property is not located within "open
14 range," and that it is the common practice of Nye County ranchers to mark their cattle with reflective
15 or luminescent tags.
16

17 This argument is without any basis in law. Attorney Aldrich merely sent Requests for
18 Admission to Ms. Fallini, seeking to have Fallini respond, and answer whether they were true or false.
19 However, Ms. Fallini never responded. Therefore, as stated above, due to Ms. Fallini's failure to
20 respond to the requests, they were deemed admitted.
21

22 Under Nevada law it does not matter if the facts admitted are ultimately untrue. *Smith v. Emery*,
23 109 Nev. 737, 856 P.3d 1386 (1993). For the purposes of that litigation, the facts are deemed admitted.
24 Therefore, Attorney Aldrich was merely following the Nevada Rules of Civil Procedure and it clearly
25 was not fraud on the court by Attorney Aldrich, to present facts that were deemed admitted by the Court
26 due to Fallini's failure to respond in various pleadings.
27

1 2. *Mr. Achrem, Ms. Adams' Prior Counsel, Did Not Commit Fraud upon the Court*

2 One of the statements with which Plaintiffs take issue was a statement by Ms. Adams' prior
3 counsel, Edward Achrem, Esq., regarding where Plaintiffs' ranch was located. In the Opposition to
4 Fallini's Motion to Change Venue to Tonopah, Mr. Achrem stated "Defendant [Fallini] lives equally
5 distant between Pahrump and Tonopah in the Amargosa Valley. . . ." (Exhibit A, p. 2.) Ms. Fallini's
6 counsel had ample opportunity to rebut that assertion and the matter was fully briefed before Judge
7 Lane. Further, the case was still heard in the Fifth Judicial District Court, and the ultimate outcome of
8 the underlying case was exactly the same as it would have been if the matter had been heard in
9 Tonopah. In short, this statement is not even close to the high standard required to establish fraud on
10 the court.
11

12 3. *There Is No Allegation of Fraud by Judith or Tony Adams*

13 Plaintiffs have not even asserted Mr. or Mrs. Adams did anything fraudulent. It appears they
14 are named because Mrs. Adams is the Plaintiff in the underlying action and Mr. Adams is her husband.
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III.

CONCLUSION

Plaintiffs simply cannot prove fraud on the court. This was a case that was fully and finally litigated, as set forth painstakingly above. Plaintiffs have failed to state a claim upon which relief can be granted. As such, the Complaint for Declaratory Relief should be dismissed.

Respectfully submitted this 21st day of March, 2011.

ALDRICH LAW FIRM, LTD.



John P. Aldrich, Esq.

Nevada Bar No.: 6877

1601 S. Rainbow Blvd., Suite 160

Las Vegas, Nevada 89146

(702) 853-5490

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of March, 2011, I mailed a copy of the
MOTION TO DISMISS in a sealed envelope, to the following and that postage was fully paid thereon:

John Ohlson, Esq.
275 Hill Street, Ste 230
Reno, NV 89501

Jeff Kump, Esq.
Marvel & Kump
217 Idaho Street
Elko, NV 89801

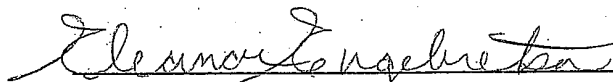

An employee of Aldrich Law Firm, Ltd.

EXHIBIT A

EXHIBIT A

ORIGINAL

CASE NO: CV24539
DEPT NO: 2P

FIFTH JUDICIAL DISTRICT COURT

MAR 26 2007

AB Nye County Clerk
Deputy

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN
AND FOR THE COUNTY OF NYE

ESTATE OF MICHAEL DAVID ADAMS,)
by and through his mother)
JUDITH ADAMS, individually)
and on behalf of the ESTATE,)

Plaintiffs,)

vs)

SUSAN FALLINI, DOES I-X and)
ROE CORPORATIONS I-X,)
inclusive,)

Defendants.)

PLAINTIFFS' OPPOSITION TO
DEFENDANT SUSAN FALLINI'S
OBJECTION TO PAHRUMP AS FORUM
AND MOTION TO HAVE MATTER
HEARD IN TONOPAH

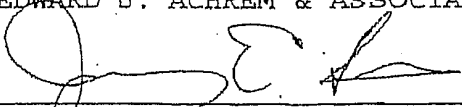
Date of Hearing: 4/³⁰20/07
Time of Hearing: 4:00 pm

Plaintiffs, The Estate of Michael David Adams and Judith
Adams, by and through their attorneys, EDWARD J. ACHREM &
ASSOCIATES, LTD., hereby oppose the Defendant's Objection To
Pahrump As Forum and Motion To Have Matter Heard In Tonopah.

This opposition is made and based upon the pleadings and
papers on file, the points and authorities submitted herewith
and such other evidence as will be presented at the hearing on
this matter.

DATED: This 21 day of March, 2007

EDWARD J. ACHREM & ASSOCIATES, LTD.


Edward J. Achrem, Esq.
Nevada Bar No. 2281
James E. Smith, Esq.
Nevada Bar No. 0052
512 S. Tonopah Drive, #100
Las Vegas, Nevada 89106
(702) 734-3936
Attorneys for Plaintiffs

Edward J. Achrem & Associates
512 South Tonopah Drive, Suite 100 - Las Vegas, Nevada 89106
(702) 734-3936

POINTS AND AUTHORITIES

1 Plaintiff Judith Adams is in Orange County, California.
2 The undersigned attorneys are in Clark County, Nevada. Although
3 venue is proper in Nye County, Nevada, where Defendant lives, it
4 would be a much more convenient forum for Plaintiff and her
5 attorney to try the case in Pahrump rather than Tonopah.
6 Furthermore, Defendant lives equally distant between Pahrump and
7 Tonopah in the Armagosa Valley, and so it would not be any
8 hardship on her to travel to Pahrump for trial. Also, now that
9 Defendant has filed a Counterclaim, the insurance company for
10 the decedent, Geico, will be in Las Vegas and likely hire a Las
11 Vegas attorney to defend on the Counterclaim.

12 It is interesting that Defendant's counsel relies on ex
13 parte conversations with Court personnel as authority for his
14 motion. Be that as it may, this case does not involve real
15 estate at Twin Springs Ranch, but a traffic accident involving a
16 car and a cow which had wandered far off the ranch. The most
17 convenient forum for this case would be Pahrump, which is a one
18 hour drive from Las Vegas and a four hour drive from Orange
19 County as opposed to Tonopah which is a four hour drive from Las
20 Vegas and an eight hour drive from Orange County.

21 The trial judge should balance several factors in deciding
22 the proper forum for a trial. In Eaton v. Second Judicial
23 Court, et. al., 96 Nev. 773, 616 P.2d 400 (1980), the Supreme
24 Court stated that the doctrine of forum non conveniens involves
25 a balancing approach involving several factors: public and
26 private interests, access to sources of proof, availability of a
27 view of the scene of the accident, availability of compulsory
28 process for unwilling witnesses, costs of obtaining testimony

for unwilling witnesses, and the enforceability of the judgment.
Of course the Court has also a duty to prevent the Defendant
from harassment or inconvenience as well.

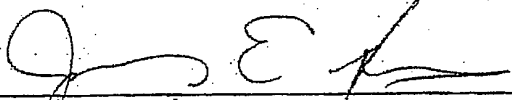
In the instant case Plaintiff Judith Adams, mother of the
decedent, lives in Orange County, California. Undersigned
counsel lives in Las Vegas, as will likely the insurance defense
attorney who will be handling the Counterclaim. The defense
attorney has his office in Pahrump. Defendant has equal
distance to travel to Pahrump or Tonopah.

CONCLUSION

Based upon the foregoing Plaintiffs respectfully request
that this Court deny Defendant's motion to change the forum and
keep the case in the District Court in Pahrump.

DATED this 7 day of March, 2007.

EDWARD J. ACHREM & ASSOCIATES, LTD.


Edward J. Achrem, Esq.
Nevada Bar No. 2281
James E. Smith, Esq.
Nevada Bar No. 0052
512 S. Tonopah Drive, #100
Las Vegas, Nevada 89106
(702) 734-3936
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that I am an employee of EDWARD J. ACHREM &
ASSOCIATES, LTD., and that on this 27th day of March, 2007, I
caused a true and correct copy of the foregoing document
entitled: PLAINTIFFS' OPPOSITION TO DEFENDANT SUSAN FALLINI'S
OBJECTION TO PAHRUMP AS FORUM AND MOTION TO HAVE MATTER HEARD IN
TONOPAH to be served on all parties as follows:



VIA U.S. MAIL by placing a true copy thereof enclosed in a
sealed envelope with the postage thereon fully prepaid,
addressed as indicated on the attached service list in the
United States mail.

Edward J. Achrem & Associates
512 South Tonopah Dr., Suite 100 • Las Vegas, Nevada 89106
(702) 734-3936



VIA FACSIMILE: by causing a true copy thereof to be telecopied to the number indicated on the attached service list.



VIA PERSONAL DELIVERY: by causing a true copy hereof to be hand delivered on this date to the addressee(s) at the address(es) set forth on the attached service list.

SERVICE LIST

Attorney	Party
Harold Kuehn, Esq. EARNEST GIBSON & KUEHN 921 S. Hwy. 160, #203 Pahrump, NV 89048 Fax: #775-751-1910	Attorneys for Defendant

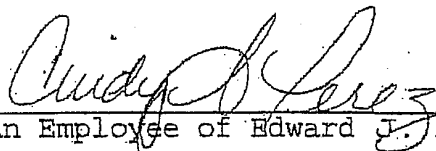

An Employee of Edward J. Achrem & Assoc

EXHIBIT B

EXHIBIT B

1 **REQT**

2 John P. Aldrich
3 Nevada Bar No. 6877
4 Stacy D. Harrop
5 Nevada Bar No. 9826
6 **ALDRICH & BRYSON LLP**
7 1601 S. Rainbow Blvd., Suite 160
8 Las Vegas, Nevada 89146
9 (702) 853-5490
10 (702) 853-5491 (fax)
11 *Attorneys for Plaintiffs*

12
13 **THE FIFTH JUDICIAL DISTRICT COURT**
14 **THE STATE OF NEVADA**
15 **COUNTY OF NYE**

16 Estate of MICHAEL DAVID ADAMS,
17 by and through his mother JUDITH
18 ADAMS, individually and on behalf of the
19 Estate,

20 Plaintiffs,

21 vs.
22 SUSAN FALLINI, DOES I-X and ROE
23 CORPORATIONS I-X, inclusive,

24 Defendants.

25 SUSAN FALLINI,

26 Counterclaimant,

27 vs.

28 Estate of MICHAEL DAVID ADAMS,
by and through his mother JUDITH
ADAMS, individually and on behalf of the
Estate,

Counterdefendants.

Case No.: CV24-539
Dept.: 2P

29 **PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSION TO DEFENDANT**
30 **FALLINI**

31 **TO: SUSAN FALLINI, Defendant/Counterclaimant**

32 **TO: HAROLD KUEHN, ESQ., attorney for Defendant/Counterclaimant**

33 Plaintiffs, Estate of MICHAEL DAVID ADAMS, by and through his mother JUDITH
34 ADAMS, by and through their attorneys, Aldrich & Bryson, LLP, hereby request that Defendant,
35 pursuant to Nev. R. Civ. P. 36 respond to the following Requests for Admission within thirty (30)
36 days of service hereof:

1 **REQUEST FOR ADMISSION NO. 1:**

2 Admit that your property is not located within "open range."

3 NOTE: As used throughout these requests "open range" is to be defined as set forth in NRS
4 568.355.

5 **REQUEST FOR ADMISSION NO. 2:**

6 Admit that you are the owner of the cow that is mentioned in of the Complaint on file herein
7 (hereafter "subject cow").

8 **REQUEST FOR ADMISSION NO. 3:**

9 Admit that it is the common practice of Nye County ranchers to mark their cattle with
10 reflective or luminescent tags.

11 **REQUEST FOR ADMISSION NO. 4:**

12 Admit that the subject cow was not marked with a reflective or luminescent tag.

13 **REQUEST FOR ADMISSION NO. 5:**

14 Admit that the subject cow crossed a fence to arrive at the location of the subject accident
15 described in the Complaint on file herein.

16 **REQUEST FOR ADMISSION NO. 6:**

17 Admit that your cattle have previously been involved in incidents with motor vehicles on the
18 roadway.

19 **REQUEST FOR ADMISSION NO. 7:**

20 Admit that you do not track the location of your cattle while they are grazing away from your
21 property.

22 **REQUEST FOR ADMISSION NO. 8:**

23 Admit that you do not remove your cattle from the roadway when notified that the cattle are
24 in a roadway.

25 **REQUEST FOR ADMISSION NO. 9:**

26 Admit that the subject cow was not visible at night.

27 **REQUEST FOR ADMISSION NO. 10:**

28 Admit that you were aware that the subject cow was not visible at night prior to the incident

1 that is the subject of the Complaint on file herein.

2 **REQUEST FOR ADMISSION NO. 11:**

3 Admit that the subject cow was in the roadway of SR 375 at the time of the incident that is
4 the subject of the Complaint on file herein.

5 **REQUEST FOR ADMISSION NO. 12:**

6 Admit that the subject cow's presence in the roadway of SR 375 was the cause of the motor
7 vehicle accident that is the subject of the Complaint on file herein.

8 **REQUEST FOR ADMISSION NO. 13:**

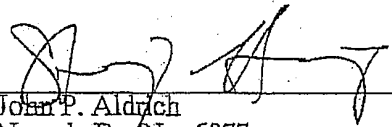
9 Admit that you did not know the location of the subject cow at the time of the incident that
10 is the subject of the Complaint on file herein.

11 **REQUEST FOR ADMISSION NO. 14:**

12 Admit that the presence of a reflective or luminescent tag on the subject cow would have
13 made the subject cow visible at the time of the incident that is the subject of the Complaint on file
14 herein.

15 DATED this 31st day of October, 2007.

16 **ALDRICH & BRYSON, LLP**

17 
18 Joan P. Aldrich
19 Nevada Bar No. 6877
20 Stacy D. Harrop
21 Nevada Bar No. 9826
22 1601 S. Rainbow Blvd., Suite 160
23 Las Vegas, Nevada 89146
24 (702) 853-5490
25 (702) 853-5491 (fax)
26 Attorneys for Plaintiffs
27
28

CERTIFICATE OF MAILING

I hereby certify that on this 31st day of October, 2007, service of the foregoing
PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSION TO DEFENDANT FALLINI
was made this date by depositing a true and correct copy of the same for mailing in Las Vegas,
Nevada, addressed to:

Harold Kuehn, Esq.
Gibson, & Kuehn
921 S. Highway 160, #203
Pahrump, NV 89048

P.O. Box 1411
Tonopah, NV 89049
Attorney for Defendant/Counterclaimant

Katherine M. Peck, Esq.
Peck Law Offices
701 Bridger Ave, Ste. 500
Las Vegas, NV 89106
*Attorney for Counterdefendant
Estate of Michael David Adams*



An employee of ALDRICH & BRYSON, LLP

EXHIBIT C

EXHIBIT C

9

BLACK & LOBELLO
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
(702) 869-8801

MOT
John P. Aldrich, Esq.
Nevada State Bar No. 6877
Adrianne C. Duncan, Esq.
Nevada State Bar No. 9797
BLACK & LOBELLO
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
(702) 869-8801
Attorneys for Plaintiffs

Michelle A. Thorn

THE FIFTH JUDICIAL DISTRICT COURT
THE STATE OF NEVADA
COUNTY OF NYE

Estate of MICHAEL DAVID ADAMS,
by and through his mother JUDITH ADAMS,
individually and on behalf of the Estate,

Plaintiffs,

v.

SUSAN FALLINI, DOES I-X and ROE
CORPORATIONS I-X, inclusive

Defendants

SUSAN FALLINI,

Counter-claimant,

v.

Estate of MICHAEL DAVID ADAMS,
by and through his mother JUDITH ADAMS,
individually and on behalf of the Estate,

Counter-defendants

Case No.: CV24539
Dept. No.: 2P

MOTION FOR PARTIAL SUMMARY
JUDGMENT

Date of Hearing:
Time of Hearing:

Plaintiffs, Estate of MICHAEL DAVID ADAMS, by and through his mother JUDITH
ADAMS, individually and on behalf of the Estate, by and through their attorneys of record JOHN

CALENDARED

on:

FILED

MAY 20 2008

2008 MAY 16 P 2:17

NYE COUNTY CLERK
BY DEPUTY

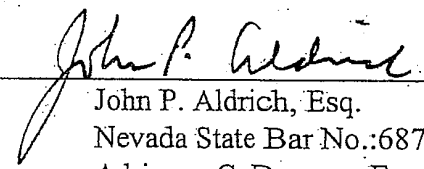
1 P. ALDRICH, ESQ., and ADRIANNE C. DUNCAN, ESQ. and the law firm of BLACK &
2 LoBELLO, hereby present their *MOTION FOR PARTIAL SUMMARY JUDGMENT*.

3 This Motion is made and based upon the papers and pleadings on file herein, the attached
4 affidavit of John P. Aldrich, Esq., and exhibits and any and all oral argument or testimony that the
5 Court may entertain at the hearing of this Motion.
6

7 DATED this 14th day of May, 2008.

8 **BLACK & LOBELLO**

9
10 By


John P. Aldrich, Esq.
Nevada State Bar No.: 6877
Adrianne C. Duncan, Esq.
Nevada State Bar No.: 9797
10777 West Twain Avenue, Suite 300
Las Vegas, NV 89135
Attorneys for Plaintiffs

11
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15 **NOTICE OF MOTION**

16 PLEASE TAKE NOTICE that on the 14 day of July 2008, at the hour of
17 9am, or as soon thereafter as counsel may be heard, in Department 2 Plaintiffs, by and
18 through their attorneys, John P. Aldrich, Esq. and Adrianne C. Duncan, Esq. and the law firm of
19 Black & LoBello will bring the foregoing MOTION on for hearing.
20

21 DATED this 14th day of May, 2008.

22 **BLACK & LOBELLO**

23
24 By


John P. Aldrich Esq.
Nevada State Bar No.: 6877
Adrianne C. Duncan, Esq.
Nevada State Bar No.: 9797
10777 West Twain Avenue, Suite 300
Las Vegas, NV 89135
Attorneys for Plaintiffs

1
2 POINTS AND AUTHORITIES

3 I.

4 **PROCEDURAL HISTORY**

5 On November 29, 2006, Plaintiffs Estate of MICHAEL DAVID ADAMS, by and through
6 his mother JUDITH ADAMS ("Judith"), individually and on behalf of the Estate, filed a complaint
7 in the Eighth Judicial District Court, Clark County, Nevada, alleging, among other things, the
8 wrongful death of Michael David Adams ("Michael").
9

10 On December 29, 2006, Defendant Susan Fallini ("Fallini"), filed a Demand and Motion for
11 Mandatory Change of Venue. Subsequently, the parties, by and through their counsel, stipulated and
12 agreed to dismiss the pending action in Clark County, Nevada, without prejudice, so that the matter
13 could be heard in Nye County, Nevada.
14

15 On March 14, 2007, Defendant Fallini, filed an Answer to Plaintiffs' Complaint and a
16 Counterclaim in Nye County, Nevada. On March 30, 2007, Plaintiffs filed a Reply to Defendant's
17 Counterclaim. Subsequently, Fallini filed an objection to Pahrump as the forum for the litigation
18 and a Motion to have the matter heard in Tonopah. However, that Motion was denied and the case
19 proceeded in Pahrump.
20

21 The Early Case Conference in this matter was held on June 15, 2007. The parties, by and
22 through their respective counsel, filed a Joint Case Conference Report on October 23, 2007.
23 Thereafter, on October 31, 2007, Plaintiffs served the Defendant with written discovery requests,
24 including Requests for Admission, Requests for Production of Documents, and Interrogatories. (See
25 Exhibit 1). To date, Defendant has not responded to the written discovery requests, nor has
26 Defendant requested an extension in which to respond.
27

28 ///

II.

STATEMENT OF FACTS

At the time of his death, Michael was 33 years old and a resident of Orange County, California. He was unmarried and had no natural or adopted children. His mother, Judith, is the administrator of her son's estate and also a resident of Orange County, California. The incident that caused Michael's death occurred in Nevada.

Defendant Fallini, is the owner of a Hereford red cow that was wandering freely on SR 375 highway, at Nye mile marker 33, in Nye County, Nevada on or about July 7, 2005. On said date at approximately 9:00 p.m., Michael was lawfully driving his 1994 Jeep Wrangler on SR 375. The Hereford cow suddenly appeared in the travel portion of the roadway, blocking Michael's path. Although Michael was traveling at a lawful rate of speed, it was not possible for him to avoid the head-on collision with the cow. As a direct and proximate result of the collision, Michael's Jeep rolled over and left the paved highway. Michael died at the scene.

On October 31, 2007, Plaintiffs served Fallini with Requests for Admission. To date, the Requests for Admission have not been answered, and therefore are deemed admitted. Therefore, the following are additional facts that must be taken into consideration by the court:

1. Fallini's property is not located within an "open range" as it is defined in NRS 568.355.
2. Fallini is the owner of the cow that is mentioned in the Plaintiff's Complaint on file herein ("subject cow").
3. It is the common practice of Nye County, Nevada ranchers to mark their cattle with reflective or luminescent tags.
4. The subject cow was not marked with a reflective or luminescent tag.
5. The subject cow crossed a fence to arrive at the location of the subject accident described in the Complaint on file herein.

6. Fallini's cattle had previously been involved in incidents with motor vehicles on the roadway.
7. Fallini does not track the location of her cattle while they are grazing away from her property.
8. Fallini does not remove her cattle from the roadway when notified that the cattle are in a roadway.
9. The subject cow was not visible at night.
10. Fallini was aware that the subject cow was not visible at night prior to the incident that is the subject of the Complaint on file herein.
11. The subject cow was in the roadway of SR 375 at the time of the incident that is the subject matter of the Complaint on file herein.
12. The subject cow's presence in the roadway of SR 375 was the cause of the motor vehicle accident that is the subject of the Complaint on file herein.
13. Fallini did not know the location of the subject cow at the time of the incident that is the subject of the Complaint on file herein.
14. The presence of a reflective or luminescent tag on the subject cow would have made the subject cow visible at the time of the incident that is the subject of the Complaint on file herein.

III.

LEGAL ARGUMENT

A. STANDARD OF REVIEW.

Pursuant to NRCP 56(c), a Motion for Summary Judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." NRCP 56(c). A genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Posadis v. City of Reno*, 109 Nev. 448, 851 P. 2d 438 (1983). In the present matter, there are no genuine issues as to any material fact, and therefore, Plaintiffs are entitled to summary judgment.

1 Although the non-moving party is entitled to have the evidence and all reasonable inferences
2 accepted as true, See City of Boulder City v. State of Nevada, 106 Nev. 390, 793 P. 2d 845 (1990),
3 citing, Wiltsie v. Baby Grand Corp., 105 Nev. 291, 774 P. 2d 432 (1989), if the moving party is able
4 to “show that one of the elements is clearly lacking as a matter of law,” then summary judgment is
5 appropriate. Joynt v. California Hotel & Casino, 108 Nev. 539, 542, 835 P. 2d 799, 801 (1992).
6 (internal quotations and citations omitted).
7

8 When a motion for summary judgment is made and supported as provided in Rule 56, the
9 adverse party may not rest upon mere allegations of his pleading, but must, by affidavit or otherwise,
10 set forth specific facts demonstrating the existence of a genuine issue for trial. See NGA #2, LLC
11 v. Rains, 113 Nev. 1151, 1157, 946 P. 2d 163, 167 (1997); Boland v. Nevada Rock & Sand, Co.,
12 Nev. 108, 894 P. 2d 988, 990 (1995). The non-moving party “is not entitled to build a case on the
13 gossamer threads of whimsey, speculation, and conjecture.” Collins v. Union Fed Savings & Loan,
14 99 Nev. 284, 302, 662 P. 2d 610, 621 (1983), quoting, Hahn v. Sargent 523 F. 2d 461, 469 (1st Cir.
15 1975), cert. denied, 425 U.S. 904, 95 S. Ct. 1495, 47 L. Ed. 2d 754 (1976). A party opposing
16 summary judgment may not rely on the allegations of his pleadings to raise a material issue of fact
17 where the moving party supports his motion with competent evidence. Garvey v. Clark County, 91
18 Nev. 127, 130, 523 P. 2d 269, 271 (1975).
19

20 Here, the Plaintiffs support their motion with competent evidence, and the Defendant may
21 not simply rely on the allegations set forth in her pleadings to raise material issues of fact. Therefore,
22 based upon the facts and argument set forth below, Plaintiffs are entitled to summary judgment.
23

24 **B. PLAINTIFFS' REQUESTS FOR ADMISSION TO DEFENDANT, SUSAN FALLINI,**
25 **MUST BE DEEMED ADMITTED.**

26 NRCp 36 provides in relevant part:

27 (a) ... The matter is admitted unless, within 30 days after service of the request, or
28

1 within such shorter or longer time as the court may allow, or the parties may agree
2 to in writing, subject to Rule 29, the party to whom the request is directed serves
3 upon the party requesting the admission a written answer or objection addressed to
the matter, signed by the party or by the party's attorney. ...

4 (b) Effect of Admission. Any matter admitted under this rule is conclusively
5 established unless the court on motion permits withdrawal or amendment of the
6 admission. ... Any admission made by a party under this rule is for the purpose of the
7 pending action only and is not an admission for any other purpose nor may it be used
against the party in any other proceeding.

8 Written discovery requests were served upon the Defendant on October 31, 2007. (See
9 Exhibit 1). Pursuant to NRCP 36(a), Defendant had 30 days to respond to Plaintiffs' Requests for
10 Admission, or the Requests for Admission are deemed admitted. Allowing three days for mailing,
11 the discovery responses were due no later than December 3, 2007, four months ago. To date,
12 Defendant has neither responded to the Requests for Admission, nor has she requested an extension
13 to respond to the same. As such, the Requests for Admission are deemed admitted pursuant to
14 NRCP 36. Pursuant to NRCP 36(b), the admissions made by the Defendant are conclusively
15 established.
16

17 Therefore, the following statements are conclusively established as undisputed facts in this
18 case:

- 19 1. Fallini's property is not located within an "open range" as it is defined in
20 NRS 568.355.
- 21 2. Fallini is the owner of the cow that is mentioned in the Plaintiff's Complaint on file
22 herein ("subject cow").
- 23 3. It is the common practice of Nye County, Nevada ranchers to mark their cattle with
24 reflective or luminescent tags.
- 25 4. The subject cow was not marked with a reflective or luminescent tag.
- 26
- 27
- 28

5. The subject cow crossed a fence to arrive at the location of the subject accident described in the Complaint on file herein.
6. Fallini's cattle had previously been involved in incidents with motor vehicles on the roadway.
7. Fallini does not track the location of her cattle while they are grazing away from her property.
8. Fallini does not remove her cattle from the roadway when notified that the cattle are in a roadway.
9. The subject cow was not visible at night.
10. Fallini was aware that the subject cow was not visible at night prior to the incident that is the subject of the Complaint on file herein.
11. The subject cow was in the roadway of SR 375 at the time of the incident that is the subject matter of the Complaint on file herein.
12. The subject cow's presence in the roadway of SR 375 was the cause of the motor vehicle accident that is the subject of the Complaint on file herein.
13. Fallini did not know the location of the subject cow at the time of the incident that is the subject of the Complaint on file herein.
14. The presence of a reflective or luminescent tag on the subject cow would have made the subject cow visible at the time of the incident that is the subject of the Complaint on file herein.

C. NEGLIGENCE.

A claim for negligence must be based on (1) an existing duty of care, (2) breach, (3) legal causation, and (4) damages. *Jordan v. State ex rel. Dept. of Motor Vehicles and Public Safety*, 121

1 Nev. 44, 51 (2005). In the instant matter, the Defendant owed Michael a duty of care to control her
2 cattle and to prevent the cattle from endangering the lives of others. Defendant owed Michael a duty
3 to mark her cattle with reflective or luminescent tags.

4
5 Defendant breached the duty of care that she owed to Michael because the subject cow was
6 not marked with a reflective or luminescent tag. Fallini was put on notice that her cattle were
7 endangering people's lives because the cattle had previously been involved in incidents with motor
8 vehicles on the roadway. However, Fallini continued not to track the location of her cattle while they
9 are grazing away from her property. Defendant further breached the duty of care that she owed to
10 Michael because the subject cow was not visible at night, and Fallini was aware that the subject cow
11 was not visible at night prior to the incident that is the subject of the Complaint on file herein.

12
13 Fallini's negligence was the direct and proximate cause of Michael's death. The subject cow
14 was in the roadway of SR 375 when Michael was traveling on SR 375. The subject cow's presence
15 on SR 375 was the cause of the motor vehicle accident that killed Michael. Defendant admits that
16 the presence of a reflective or luminescent tag on the subject cow would have made the subject cow
17 visible at night and the accident that caused Michael's death could have been avoided. Thus,
18 Fallini's negligence was the cause of Michael's untimely death. As such, summary judgment is
19 proper with regard to all elements except damages. Damages need to be proven up at a hearing on
20 the matter. Fallini's negligence caused Michael's death, but that is not the full extent of the damages
21 caused by Fallini's negligence.
22

23
24 **D. WRONGFUL DEATH/ LOSS OF CONSORTIUM.**

25 **NRS 41.085 provides in relevant part:**

26
27 2. When the death of any person, whether or not a minor, is caused by the wrongful
28 act or neglect of another, the heirs of the decedent and the personal representatives
of the decedent may each maintain an action for damages against the person who

1 caused the death, or if the wrongdoer is dead, against his personal representatives,
2 whether the wrongdoer died before or after the death of the person he injured. If any
3 other person is responsible for the wrongful act or neglect, or if the wrongdoer is
4 employed by another person who is responsible for his conduct, the action may be
maintained against that other person, or if he is dead against his personal
representatives.

5 3. An action brought by the heirs of a decedent pursuant to subsection 2 and the cause
6 of action of that decedent brought or maintained by his personal representatives
which arose out of the same wrongful act or neglect may be joined.

7 4. The heirs may prove their respective damages in the action brought pursuant to
8 subsection 2 and the court or jury may award each person pecuniary damages for his
9 grief or sorrow, loss of probable support, companionship, society, comfort and
10 consortium, and damages for pain, suffering or disfigurement of the decedent. The
proceeds of any judgment for damages awarded under this subsection are not liable
for any debt of the decedent.

11 5. The damages recoverable by the personal representatives of a decedent on behalf
of his estate include:

12 (a) Any special damages, such as medical expenses, which the decedent
13 incurred or sustained before his death, and funeral expenses; and

14 (b) Any penalties, including, but not limited to, exemplary or punitive
15 damages, that the decedent would have recovered if he had lived, but do not
16 include damages for pain, suffering or disfigurement of the decedent. The
proceeds of any judgment for damages awarded under this subsection are
liable for the debts of the decedent unless exempted by law.

17 As set forth above, the Defendant's negligence is the cause of Michael's death. Michael's
18 death caused his mother, Judith, to suffer immense sorrow and grief. Michael's mother has forever
19 lost the companionship, society, and comfort of her son's presence. As a result, Judith requests that
20 the Defendant be held accountable for Michael's wrongful and untimely death, and that her Motion
21 for Partial Summary Judgment be granted. However, the extent of the damages caused by Fallini's
22 negligence is an issue for the trier of fact, because Michael's untimely death is but one of the
23 consequences of Fallini's negligence.
24

25 ///

26 ///

27 ///

28 ///

IV.

CONCLUSION

Accordingly, based upon the foregoing, Plaintiffs hereby respectfully request that the Court enter partial summary judgment against Defendant, finding Defendant liable for Michael's death. Damages will be shown at a prove-up hearing to be set at a later date..

DATED this 14th day of May, 2008.

BLACK & LOBELLO

By: John P. Aldrich
John P. Aldrich, Esq.
Nevada State Bar No.: 6877
Adrianne C. Duncan, Esq.
Nevada State Bar No.: 9797
10777 West Twain Avenue, Suite 300
Las Vegas, NV 89135
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2008, I served a true and correct copy of the foregoing MOTION FOR PARTIAL SUMMARY JUDGMENT, by first class mail, postage prepaid, addressed as follows:

Harold Kuehn, Esq.
EARNEST, GIBSON & KUEHN
921 S. Hwy 160, #203
Pahrump, NV 89048
Attorney for Defendant/Counterclaimant
Susan Fallini

Katherine M. Barker, Esq.
701 Bridger Avenue, Suite 500
Las Vegas, NV 89101
Attorneys for Counter-Defendant
Estate of Michael David Adams

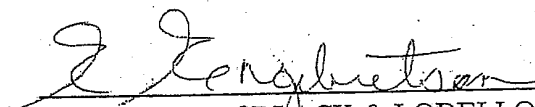

An Employee of BLACK & LOBELLO

EXHIBIT D

EXHIBIT D

1 **NEO**

2 John P. Aldrich, Esq.
3 Nevada State Bar No. 6877
4 Adrianne C. Duncan, Esq.
5 Nevada State Bar No. 9797

6 **BLACK & LOBELLO**

7 10777 West Twain Avenue, Suite 300
8 Las Vegas, Nevada 89135
9 (702) 869-8801
10 *Attorneys for Plaintiffs*

FILED

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NYE COUNTY CLERK
BY DEPUTY

Linda Um

THE FIFTH JUDICIAL DISTRICT COURT
THE STATE OF NEVADA
COUNTY OF NYE

10 Estate of MICHAEL DAVID ADAMS,
11 by and through his mother JUDITH
12 ADAMS, individually and on behalf of the
13 Estate,

Plaintiffs,

vs.

14 SUSAN FALLINI, DOES I-X and ROE
15 CORPORATIONS I-X, inclusive,

Defendants.

17 SUSAN FALLINI,

Counterclaimant,

vs.

20 Estate of MICHAEL DAVID ADAMS,
21 by and through his mother JUDITH
22 ADAMS, individually and on behalf of the
23 Estate,

Counterdefendants.

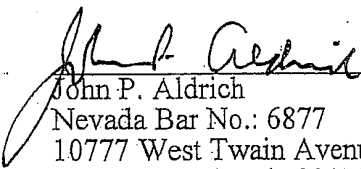
24 **NOTICE OF ENTRY OF ORDER**

25 PLEASE TAKE NOTICE that on the 30th day of July, 2008 an Order Granting Plaintiffs'
26 Motion for Partial Summary Judgement was entered in the above-captioned matter,

1 a copy of which is attached hereto.

2 DATED this 13th day of August, 2008.

3 **BLACK & LOBELLO**

4
5 
6 John P. Aldrich

7 Nevada Bar No.: 6877

8 10777 West Twain Avenue, Suite 300

9 Las Vegas, Nevada 89135

10 (702) 869-8801

11 (702) 869-2669 (Fax)

12 **CERTIFICATE OF SERVICE**

13 I hereby certify that on the 13th day of August, 2008 a true and correct copy of the foregoing

14 **NOTICE OF ENTRY OF ORDER** was deposited into the U.S. mail at Las Vegas, Nevada, first-
15 class postage fully prepaid, addressed to the following person(s):

16 Harold Kuehn, Esq.

17 Gibson & Kuehn, LLP

18 1601 E. Basin Avenue, Ste. 101

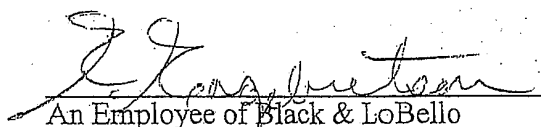
19 Pahrump, NV 89060

20 Katherine M. Barker, Esq.

21 Law Office of Katherine M. Barker

22 701 Bridger Avenue, Suite 500

23 Las Vegas, NV 89101

24 
25 An Employee of Black & LoBello

FILED
DEBRA BENNET
2008 JUL 30 P 3:30
NYE COUNTY CLERK
BY DEPUTY

1 **ORDR**

John P. Aldrich, Esq.

2 Nevada State Bar No. 6877

Adrianne C. Duncan, Esq.

3 Nevada State Bar No. 9797

BLACK & LOBELLO

4 10777 West Twain Avenue, Suite 300

Las Vegas, Nevada 89135

5 (702) 869-8801

Attorneys for Plaintiffs

THE FIFTH JUDICIAL DISTRICT COURT
THE STATE OF NEVADA
COUNTY OF NYE

10 Estate of MICHAEL DAVID ADAMS,)
by and through his mother JUDITH)
11 ADAMS, individually and on behalf of the)
Estate,)

12 Plaintiffs,

13 vs.

14 SUSAN FALLINI, DOES I-X and ROE)
15 CORPORATIONS I-X, inclusive,)

16 Defendants.

17 SUSAN FALLINI,

18 Counterclaimant,

19 vs.

20 Estate of MICHAEL DAVID ADAMS,)
by and through his mother JUDITH)
21 ADAMS, individually and on behalf of the)
Estate,)

22 Counterdefendants.

24 **ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

25 THIS MATTER having come on for hearing on Monday, July 14, 2008, on Plaintiff's Motion
26 for Partial Summary Judgment before the Honorable Robert W. Lane, and John P. Aldrich, Esq.
27 appearing on behalf of the Plaintiffs, no other counsel present, the court having reviewed the Motion
28

1 for Partial Summary Judgment and the Joinder to the Motion for Partial Summary Judgment, having
2 reviewed all pleadings and papers on file herein, and having heard the arguments of present counsel;
3 and good cause appearing therefore,

4 **THE COURT HEREBY ENTERS THE FOLLOWING FINDINGS OF FACT:**

- 5 1. Fallini's property is not located within an "open range" as it is defined in
6 NRS 568.355.
- 7 2. Fallini is the owner of the cow that is mentioned in the Plaintiff's Complaint on file
8 herein ("subject cow").
- 9 3. It is the common practice of Nye County, Nevada ranchers to mark their cattle with
10 reflective or luminescent tags.
- 11 4. The subject cow was not marked with a reflective or luminescent tag.
- 12 5. The subject cow crossed a fence to arrive at the location of the subject accident
13 described in the Complaint on file herein.
- 14 6. Fallini's cattle had previously been involved in incidents with motor vehicles on the
15 roadway.
- 16 7. Fallini does not track the location of her cattle while they are grazing away from her
17 property.
- 18 8. Fallini does not remove her cattle from the roadway when notified that the cattle are
19 in a roadway.
- 20 9. The subject cow was not visible at night.
- 21 10. Fallini was aware that the subject cow was not visible at night prior to the incident
22 that is the subject of the Complaint on file herein.
- 23 11. The subject cow was in the roadway of SR 375 at the time of the incident that is the
24 subject matter of the Complaint on file herein.
- 25 12. The subject cow's presence in the roadway of SR 375 was the cause of the motor
26 vehicle accident that is the subject of the Complaint on file herein.
- 27 13. Fallini did not know the location of the subject cow at the time of the incident that
28 is the subject of the Complaint on file herein.

14. The presence of a reflective or luminescent tag on the subject cow would have made the subject cow visible at the time of the incident that is the subject of the Complaint on file herein.

THE COURT HEREBY ENTERS THE FOLLOWING CONCLUSIONS OF LAW:

1. Defendant Fallini had and duty to ensure that the subject cow was not in the roadway at the time of the incident described in the Complaint.
2. Defendant Fallini had a duty to follow the common practice of Nye County, Nevada ranchers and to mark her cow with reflecting or lumination tags.
3. Defendant Fallini breached the duty of care to the decedent, as set forth in the Findings of Fact and Conclusions of Law.
4. As a result of Defendant Fallini's breach, the decedent, Michael David Adams, was killed.
5. Defendant Fallini is liable for the damages to which Plaintiff is entitled, in an amount to be determined at a later time.

IT IS HEREBY ORDERED that Plaintiffs' Motion for Partial Summary Judgment as to the issue of Defendant's duty and breach of duty is hereby GRANTED.

DATED this 29 day of July, 2008.

ROBERT W. LANE

DISTRICT COURT JUDGE

Submitted By:

BLACK & LOBELLO

John P. Aldrich
John P. Aldrich
Nevada Bar No.: 6877
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
(702) 869-8801
(702) 869-2669 (Fax)

EXHIBIT E

EXHIBIT E

1 NEO

John P. Aldrich, Esq.

2 Nevada Bar No. 6877

ALDRICH LAW FIRM, LTD.

3 1601 S. Rainbow Blvd., Suite 160

Las Vegas, Nevada 89146

4 (702) 853-5490

(702) 227-1975 fax

5 Attorneys for Plaintiff

FILED

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Shella Winn

NYE COUNTY CLERK
BY DEPUTY

6
7 THE FIFTH JUDICIAL DISTRICT COURT
8 THE STATE OF NEVADA
9 COUNTY OF NYE

10 Estate of MICHAEL DAVID ADAMS,
11 by and through his mother JUDITH
12 ADAMS, individually and on behalf of the
13 Estate,

14 Plaintiffs,

15 vs.

16 SUSAN FALLINI, DOES I-X and ROE
17 CORPORATIONS I-X, inclusive,

18 Defendants.

19 SUSAN FALLINI,

20 Counterclaimant,

21 vs.

22 Estate of MICHAEL DAVID ADAMS,
23 by and through his mother JUDITH
24 ADAMS, individually and on behalf of the
25 Estate,

26 Counterdefendants.

27 NOTICE OF ENTRY OF ORDER

28 ///


///

///

1 PLEASE TAKE NOTICE that an Order was entered in the above-entitled matter on April
2 27, 2009, a copy of which is attached hereto as Exhibit 1.

3 DATED this 14th day of May, 2009.

4 ALDRICH LAW FIRM, LTD.

5 
6 John P. Aldrich, Esq.
7 Nevada State Bar No. 6877
8 1601 S. Rainbow Blvd., Suite 160
9 Las Vegas, Nevada 89146
10 (702) 853-5490
11 (702) 227-1975
12 Attorneys for Plaintiff

13 CERTIFICATE OF SERVICE

14 I HEREBY CERTIFY that on the 14th day of May, 2009, I mailed a copy of the
15 NOTICE OF ENTRY OF ORDER, in a sealed envelope, to the following and that postage was fully
16 paid thereon:

17 Harold Kuehn, Esq.
18 Gibson, & Kuehn
19 1601 E. Basin Avenue, Suite 101
20 Pahrump, NV 89060
21 Attorney for Defendant/Counterclaimant

22 Katherine M. Barker, Esq.
23 Law Office of Katherine M. Barker
24 701 Bridger Ave, Ste. 500
25 Las Vegas, NV 89101
26 Attorney for Counterdefendant
27 Estate of Michael David Adams

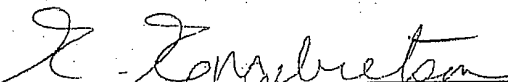
28 
An employee of Aldrich Law Firm, Ltd.

EXHIBIT 1

ORIGINAL

1 ORDER

2 John P. Aldrich
3 Nevada Bar No.: 6877
4 Catherine Hernandez
5 Nevada Bar No. 8410
6 ALDRICH LAW FIRM, LTD.
7 1601 S. Rainbow Blvd., Suite 160
8 Las Vegas, Nevada 89146
9 (702) 853-5490
10 Attorneys for Plaintiff

FILED
FIFTH JUDICIAL DISTRICT

APR 27 2009

Nye County Clerk

Deputy

THE FIFTH JUDICIAL DISTRICT COURT
THE STATE OF NEVADA
COUNTY OF NYE

10 Estate of MICHAEL DAVID ADAMS, by
11 and through his mother JUDITH ADAMS,
12 individually and on behalf of the Estate,

13 Plaintiff,

14 v.

15 SUSAN FALLINI, ; DOES I-X, and ROE
16 CORPORATIONS I-X, inclusive,

17 Defendants.

18 SUSAN FALLINI,

19 Counterclaimant,

20 vs.

21 Estate of MICHAEL DAVID ADAMS, by
22 and through his mother JUDITH ADAMS,
23 individually and on behalf of the Estate

24 Counterdefendants.

Case No.: CV24539
Dept. No.: 2P

25 ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL DEFENDANT'S
26 PRODUCTION OF DOCUMENTS

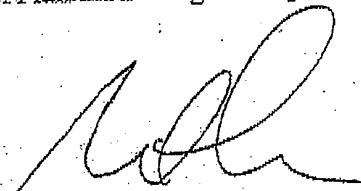
27 THIS MATTER having come on for hearing on Monday, April 27, 2009, on Plaintiff's
28 Motion to Compel Defendant's Production of Documents before the Honorable Robert W. Lane, and

1 Catherine Hernandez, Esq., of Aldrich Law Firm, Ltd., appearing on behalf of the Plaintiffs, no other
2 counsel present, the court having reviewed all pleadings and papers on file herein, no opposition
3 having been presented, and good cause appearing therefore:
4

5 **IT IS HEREBY ORDERED** that Plaintiff's Motion to Compel Defendant's Production of
6 Documents is GRANTED. Defendant SUSAN FALLINI shall produce all documents responsive
7 to Plaintiff's discovery requests pursuant to NRCP 16.1, 26,33,34 and NRCP 37 within ten (10)
8 days of Notice of Entry of this Order.

9 **IT IS FURTHER ORDERED** that Defendant shall pay \$1,650.00 for related attorney's fees
10 and costs for failing to comply with discovery rules and for Plaintiff having to bring this motion, also
11 within ten (10) days of Notice of Entry of this Order.

12 DATED this 27 day of April, 2009.

13 
14 DISTRICT COURT JUDGE

15 Respectfully submitted by:

16 **ALDRICH LAW FIRM, LTD.**

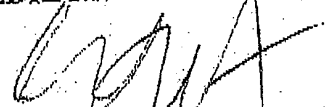
17 
18 John P. Aldrich, Esq.
19 Nevada Bar No. 6877
20 Catherine Hernandez, Esq.
21 Nevada Bar No. 8410
22 1601 S. Rainbow Blvd., Suite 160
23 Las Vegas, NV 89146
24 (702) 853-5491
25 Attorneys for Plaintiff
26
27
28

EXHIBIT F

EXHIBIT F

1 **ORDER**

John P. Aldrich

2 Nevada Bar No.: 6877

ALDRICH LAW FIRM, LTD.

3 1601 S. Rainbow Blvd., Suite 160

Las Vegas, Nevada 89146

4 (702) 853-5490

Attorneys for Plaintiff

FILED

2009 JUL 17 A 9:41

Shelia Winn
NYE COUNTY CLERK
BY DEPUTY

6 **THE FIFTH JUDICIAL DISTRICT COURT**
7 **THE STATE OF NEVADA**
8 **COUNTY OF NYE**

9 Estate of MICHAEL DAVID ADAMS, by
and through his mother JUDITH ADAMS,
10 individually and on behalf of the Estate,

11 **Plaintiff,**

12 v.

13 SUSAN FALLINI, ; DOES I-X, and ROE
14 CORPORATIONS I-X, inclusive,

15 **Defendants.**

16
17 SUSAN FALLINI,

18 **Counterclaimant,**

19 vs.

20 Estate of MICHAEL DAVID ADAMS, by
and through his mother JUDITH ADAMS,
21 individually and on behalf of the Estate

22 **Counterdefendants.**

Case No.: CV24539

Dept. No.: 2P

24 **ORDER DENYING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S ANSWER**
25 **AND COUNTERCLAIM**

26 THIS MATTER having come on for hearing on Monday, July 13, 2009, on Plaintiff's
27 Motion to Strike Defendant's Answer and Counterclaim, before the Honorable Robert W. Lane, and
28 John P. Aldrich, Esq., of Aldrich Law Firm, Ltd., appearing on behalf of the Plaintiffs, with Harry

1 Kuehn, Esq., appearing on behalf of Defendant, the Court having reviewed all pleadings and papers
2 on file herein, and good cause appearing therefore:

3 **IT IS HEREBY ORDERED** that Plaintiff's Motion to Strike Defendant's Answer and
4 Counterclaim is DENIED at this time.

5 **IT IS FURTHER ORDERED** that Defendant SUSAN FALLINI shall produce all
6 documents responsive to Plaintiff's discovery requests pursuant to NRCP 16.1, 26,33,34 and NRCP
7 37 within thirty (30) days of the hearing of Plaintiff's Motion to Strike Defendant's Answer and
8 Counterclaim. Thus, the date by which Defendant must provide said documents is August 12, 2009.

9 **IT IS FURTHER ORDERED** that in the event Defendant SUSAN FALLINI does not
10 produce all documents responsive to Plaintiff's discovery requests pursuant to NRCP 16.1, 26,33,34
11 and NRCP 37 within thirty (30) days of the hearing of Plaintiff's Motion to Strike Defendant's
12 Answer and Counterclaim, the Court will grant the relief sought by Plaintiff and strike Defendant's
13 Answer and Counterclaim.

14 **IT IS FURTHER ORDERED** that Defendant shall pay a monetary sanction of \$1,000.00
15 for related attorney's fees and costs for failing to comply with discovery rules and the Court's prior
16 Order granting Plaintiff's Motion to Compel, and for Plaintiff having to bring this motion.

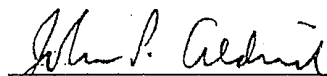
17 DATED this 17 day of July, 2009.

18 **ROBERT W. LANE**

19 DISTRICT COURT JUDGE

20
21 Respectfully submitted by:

22 **ALDRICH LAW FIRM, LTD.**

23 

24 John P. Aldrich, Esq.
25 Nevada Bar No. 6877
26 1601 S. Rainbow Blvd., Suite 160
27 Las Vegas, NV 89146
28 (702) 853-5491
Attorneys for Plaintiff

EXHIBIT G

EXHIBIT G

1 **ORDER**

2 John P. Aldrich, Esq.
3 Nevada Bar No. 6877
4 **ALDRICH LAW FIRM, LTD.**
5 1601 S. Rainbow Blvd., Suite 160
6 Las Vegas, Nevada 89146
7 (702) 853-5490
8 (702) 227-1975 fax
9 *Attorneys for Plaintiff*

FILED

2009 OCT -8 P 1:26

NYE COUNTY CLERK
BY DEPUTY

6 THE FIFTH JUDICIAL DISTRICT COURT
7 THE STATE OF NEVADA, COUNTY OF NYE

Linda Whi

8 Estate of MICHAEL DAVID ADAMS,
9 by and through his mother JUDITH
10 ADAMS, individually and on behalf of the
11 Estate,

Case No.: CV24539
Dept.: 2P

12 Plaintiffs,

13 vs.

14 SUSAN FALLINI, DOES I-X and ROE
15 CORPORATIONS I-X, inclusive,

16 Defendants.

17 SUSAN FALLINI,

18 Counterclaimant,

19 vs.

20 Estate of MICHAEL DAVID ADAMS,
21 by and through his mother JUDITH
22 ADAMS, individually and on behalf of the
23 Estate,

24 Counterdefendants.

25 **ORDER REGARDING ORDER TO SHOW CAUSE WHY DEFENDANT SUSAN**
26 **FALLINI AND HER COUNSEL SHOULD NOT BE HELD IN CONTEMPT OF COURT**

27 THIS MATTER having come on for hearing on Monday, September 28, 2009, a conference
28 having been held in Chambers before the Honorable Robert W. Lane, and John P. Aldrich, Esq., of
Aldrich Law Firm, Ltd., appearing on behalf of the Plaintiffs, with Harry Kuehn, Esq., appearing on
behalf of Defendant, the Court hereby orders as follows:

1 IT IS HEREBY ORDERED that Defendant's counsel shall have until close of business on
2 October 12, 2009, to comply with the Order Granting Plaintiff's Motion to Compel and provide
3 responses to Plaintiff's Request for Production of Documents, including the requested insurance
4 information.

5 IT IS FURTHER ORDERED that if Defendant does not provide the above-described
6 information by October 12, 2009, Defendant's counsel will be held in contempt of court and will be
7 fined \$150.00 per day, beginning October 13, 2009, until said information is provided. The days
8 shall be calculated on a seven-day week.

9 IT IS FURTHER ORDERED that if the above-described information is not provided by
10 October 12, 2009, the Court will strike defendant's pleadings in their entirety. Plaintiff will not need
11 to renew any motion regarding its request to strike defendant's pleadings; Plaintiff will be able to
12 simply submit an Order Striking the Pleadings for signature by the Court.

13 DATED this 8 day of October, 2009.

14
15 **ROBERT W. LANE**
16 DISTRICT COURT JUDGE

17 Submitted by:

18 **ALDRICH LAW FIRM, LTD.**

19 John P. Aldrich
20 John P. Aldrich, Esq.
21 Nevada Bar No.: 6877
22 1601 S. Rainbow Blvd., Suite 160
Las Vegas, Nevada 89146
Attorneys for Plaintiff

EXHIBIT H

EXHIBIT H

1 **ORDER**

2 John P. Aldrich, Esq.
3 Nevada Bar No. 6877
4 **ALDRICH LAW FIRM, LTD.**
5 1601 S. Rainbow Blvd., Suite 160
6 Las Vegas, Nevada 89146
7 (702) 853-5490
8 (702) 227-1975 fax
9 *Attorneys for Plaintiff*

FILED
FIFTH JUDICIAL DISTRICT

NOV 04 2009

Michelle A. Thore *Nye County Clerk*
Deputy

6 **THE FIFTH JUDICIAL DISTRICT COURT**
7 **THE STATE OF NEVADA, COUNTY OF NYE**

8 Estate of MICHAEL DAVID ADAMS,
9 by and through his mother JUDITH
10 ADAMS, individually and on behalf of the
11 Estate,

12 **Plaintiffs,**

13 **vs.**

14 SUSAN FALLINI, DOES I-X and ROE
15 CORPORATIONS I-X, inclusive,

16 **Defendants.**

17 **SUSAN FALLINI,**

18 **Counterclaimant,**

19 **vs.**

20 Estate of MICHAEL DAVID ADAMS,
21 by and through his mother JUDITH
22 ADAMS, individually and on behalf of the
23 Estate,

24 **Counterdefendants.**

25 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER STRIKING ANSWER**
26 **AND COUNTERCLAIM OF DEFENDANT SUSAN FALLINI AND HOLDING**
27 **DEFENDANT'S COUNSEL IN CONTEMPT OF COURT**

28 THIS MATTER having come on for hearing on Monday, September 28, 2009, a conference
having been held in Chambers before the Honorable Robert W. Lane, and John P. Aldrich, Esq., of
Aldrich Law Firm, Ltd., appearing on behalf of the Plaintiffs, with Harry Kuehn, Esq., appearing on
behalf of Defendant, the Court hereby orders as follows:

1 FINDINGS OF FACT

2 The Court, having been presented the following facts by Plaintiff's counsel and having
3 received no opposition to the facts by Defendant, makes the following findings of fact:

4 1. This lawsuit arises out of an incident that occurred on or about July 7, 2005. At
5 approximately 9:00 p.m. on that day, MICHAEL DAVID ADAMS ("Adams") was driving his 1994
6 Jeep Wrangler on SR 375 highway in Nye County, when he collided with a Hereford cow ("cow")
7 owned by Defendant SUSAN FALLINI ("Fallini"). Adams died at the scene as a result of the
8 impact.

9 2. The decedent's mother, JUDITH ADAMS ("Judith"), filed a complaint on behalf of
10 Adams' mother and his estate on November 29, 2006 and properly served Fallini with process.
11 Fallini filed her Answer and Counterclaim on March 14, 2007.

12 3. On October 31, 2007, Plaintiff submitted interrogatories to Fallini. Those
13 interrogatories were never answered. Adams also submitted requests for admissions and its first set
14 of requests for production of documents on October 31, 2007. A second set of requests for
15 production of documents were submitted to Fallini on July 2, 2008, requesting information as to
16 Fallini's insurance policies and/or carriers that may provide coverage for damages that occurred as
17 a result of the incident.

18 4. Fallini never responded to any of these requests. To this date, Fallini has not
19 produced any responses of any kind to Plaintiff's written discovery requests. Despite an extension
20 requested by Plaintiff and granted by the Court, the discovery period has lapsed without any
21 responses being provided by Defendant.

22 5. On or about April 7, 2008 (and again on May 14, 2008 with a Certificate of Service),
23 Plaintiff filed a Motion for Partial Summary Judgment. Defendant did not oppose that motion and
24 the Court granted that Motion on July 30, 2008. Notice of entry of the Order Granting Plaintiff's
25 Motion for Summary Judgment was served on Defendant on August 15, 2008.

26 6. Plaintiff attempted to amicably resolve the discovery dispute and obtain a copy of
27
28

1 Defendant's applicable insurance policies, but to no avail. On February 24, 2009, Plaintiff sent
2 letters to Defendant's counsel seeking responses to the discovery.

3 7. Plaintiff's counsel, Mr. Aldrich, attempted to discuss this discovery issue with
4 Defendant's counsel, Mr. Kuehn, as well. On or about March 6, 2009, Plaintiff's counsel contacted
5 the office of Defendant's counsel. Mr. Aldrich was informed that Mr. Kuehn was not available. Mr.
6 Aldrich left a message with Mr. Aldrich's phone number and asked that Mr. Kuehn return the call.
7 No return call ever came.

8 8. On March 18, 2009, Mr. Aldrich again contacted the office of Mr. Kuehn. Mr.
9 Aldrich was informed that Mr. Kuehn was not available. Mr. Aldrich left a message with Mr.
10 Aldrich's phone number and asked that Mr. Kuehn return the call. No return call ever came.
11 (Exhibit 1.)

12 9. On March 23, 2009, Plaintiff filed a Motion to Compel Defendant's Production of
13 Documents, including information regarding any insurance policies that may provide coverage for
14 the incident as contemplated in the Plaintiff's second request for documents. This motion was heard
15 on April 27, 2009. The Defendant's attorney, Mr. Kuehn, attended the hearing. Mr. Kuehn did not
16 oppose the motion to compel and agreed at the hearing it was warranted. Mr. Kuehn provided no
17 explanation as to why Defendant failed to respond to all discovery requests. Mr. Kuehn agreed
18 sanctions were warranted, however, he disputed the amount of sanctions.

19 10. At the hearing on April 27, 2009, this Court granted the Motion to Compel and
20 awarded John Aldrich, Esq., \$750.00 in sanctions for having to bring the motion. A Notice of Entry
21 of Order on the order granting the motion to compel was entered on May 18, 2009. It was served
22 by mail on Defendant on May 14, 2009. Defendant never complied with the Order.

23 11. On June 16, 2009 Plaintiff filed a Motion to Strike Defendant's Answer and
24 Counterclaim due to Defendants complete failure to comply with discovery requests and this Court's
25 Order. The Defendant's counsel again attended the hearing and again provided no explanation as
26 to why Defendant failed to respond to all discovery requests, but stated Defendant would comply
27

1 with discovery requests.

2 12. The Court denied Plaintiff's Motion to Strike based on Defendant's counsel's
3 promises to comply. This Court did, however, order Defendant to comply with the Order granting
4 Plaintiff's Motion to Compel and to respond to Plaintiff's discovery requests by August 12, 2009
5 or Defendant's Answer and Counterclaim would be stricken. The Court also ordered Defendant to
6 pay a \$1,000 sanction.

7 13. To date, Defendant has failed to comply with the order of this Honorable Court and
8 respond to Plaintiff's discovery requests. Defendant's counsel has paid the \$1,750.00 in sanctions
9 as ordered by the Court.

10 14. Plaintiff is entitled to the discovery responses, and in fact, Defendant has admitted
11 as much on more than one occasion. Nevertheless, Defendant refused and continues to refuse to
12 respond.

13 15. Because Defendant failed and refused to follow this Court's order and provide the
14 requested information, Plaintiff brought an Ex Parte Motion for Order to Show Cause Why
15 Defendant and Her Counsel Should Not Be Held in Contempt. The Order to Show Cause was
16 granted, and a hearing was scheduled on September 28, 2009. A conference was held in chambers,
17 so as to avoid embarrassment to Defendant's counsel. Following the conference, the Court ordered:

18 (A) That Defendant's counsel shall have until close of business on October 12,
19 2009, to comply with the Order Granting Plaintiff's Motion to Compel and
20 provide responses to Plaintiff's Request for Production of Documents,
21 including the requested insurance information.

22 (B) That if Defendant does not provide the above-described information by
23 October 12, 2009, Defendant's counsel will be held in contempt of court and
24 will be fined \$150.00 per day, beginning October 13, 2009, until said
25 information is provided. The days shall be calculated on a seven-day week.

26 (C) That if the above-described information is not provided by October 12, 2009,
27

1 the Court will strike defendant's pleadings in their entirety. Plaintiff will not
2 need to renew any motion regarding its request to strike defendant's
3 pleadings; Plaintiff will be able to simply submit an Order Striking the
4 Pleadings for signature by the Court.

5 CONCLUSIONS OF LAW

6 Based on the Findings of Fact, as set forth above, the Court makes the following conclusions
7 of law:

8 1. Pursuant to NRCP 34, Plaintiff has the right to request documents which are
9 discoverable pursuant to NRCP 26. According to NRCP 34, Defendant has 30 days from receipt of
10 the requests for production of documents to provide appropriate responses.

11 2. NRCP 34(b) permits a party to seek relief under NRCP 37(a) if the party who receives
12 discovery requests fails to respond appropriately. NRCP 37(a) provides that the Court may enter an
13 order compelling a non-responsive party to disclose the requested information.

14 3. This Court has at least three times entered an order compelling Defendant to respond
15 to Discovery requests.

16 4. NRCP 37(b)(2)(c), permits "an order striking out pleadings or parts thereof," for
17 discovery abuses. "Selection of a particular sanction for discovery abuses under NRCP 37 is
18 generally a matter committed to the sound discretion of the district court." *Stubli v. Big Int'l Trucks,*
19 *Inc.*, 107 Nev. 309, 312-313, 810 P.2d 785 (1991) (citing *Fire Ins. Exchange v. Zenith Radio Corp.*,
20 103 Nev. 648, 649, 747 P.2d 911, 912 (1987) and *Kelly Broadcasting v. Sovereign Broadcast*, 96
21 Nev. 188, 192, 606 P.2d 1089, 1092 (1980.))

22 5. The Nevada Supreme Court held that default judgments will be upheld where "the
23 normal adversary process has been halted due to an unresponsive party, because diligent parties are
24 entitled to be protected against interminable delay and uncertainty as to their legal rights." *Hamlett*
25 *v. Reynolds*, 114 Nev. 863, 963 P.2d 457 (1998) (citing *Skeen v. Valley Bank of Nevada*, 89 Nev.
26 301, 303, 511 P.2d 1053, 1054 (1973).

6. Defendant has provided no responses whatsoever, nor has Defendant objected to any request. Defendant has failed on at least three occasions to comply with this Court's Order.

7. Defendant has been given ample opportunity to comply with the Court's Orders, and striking Defendant's Answer and Counterclaim is appropriate under the circumstances.

ORDER

Based on the Findings of Fact and Conclusions of Law, as set forth above:

IT IS HEREBY ORDERED that Defendant's Answer and Counterclaim shall be stricken, and the Court Clerk is directed to enter Default against Defendant Susan Fallini.

IT IS FURTHER ORDERED that Defendant's Counterclaim, having been stricken, shall be dismissed with prejudice.

IT IS FURTHER ORDERED that Defendant's counsel, Harold Kuehn, Esq., is in contempt of Court and must pay to Plaintiff's counsel, John P. Aldrich, Esq., \$150.00 per day, beginning October 13, 2009, and continuing to accrue until the information described above is provided. The days shall be calculated on a seven-day week, and this Order shall constitute a judgment upon which Mr. Aldrich can execute. Interest on unpaid balances shall accrue at the statutory rate.

IT IS SO ORDERED.

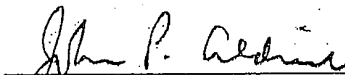
DATED this 4 day of November, 2009.

ROBERT W. LAKE

DISTRICT COURT JUDGE

Submitted by:

ALDRICH LAW FIRM, LTD.



John P. Aldrich, Esq.
Nevada Bar No.: 6877
1601 S. Rainbow Blvd., Suite 160
Las Vegas, Nevada 89146
Attorneys for Plaintiff

EXHIBIT I

EXHIBIT I

FILED

2010 FEB -4 P 2:27
RACHEL ALDANA
NYE COUNTY CLERK
BY DEPUTY

1 DFLT
John P. Aldrich, Esq.
2 Nevada Bar No. 6877
ALDRICH LAW FIRM, LTD.
3 1601 S. Rainbow Blvd., Suite 160
Las Vegas, Nevada 89146
4 (702) 853-5490
(702) 227-1975 fax
5 Attorneys for Plaintiff

6
7 THE FIFTH JUDICIAL DISTRICT COURT
THE STATE OF NEVADA
8 COUNTY OF NYE

9 Estate of MICHAEL DAVID ADAMS,
10 by and through his mother JUDITH
ADAMS, individually and on behalf of the
11 Estate,

Case No.: CV24539
Dept.: 2P

12 Plaintiffs,

13 vs.

14 SUSAN FALLINI, DOES I-X and ROE
CORPORATIONS I-X, inclusive,

15 Defendants.

16 SUSAN FALLINI,

17 Counterclaimant,

18 vs.

19 Estate of MICHAEL DAVID ADAMS,
20 by and through his mother JUDITH
ADAMS, individually and on behalf of the
21 Estate,

22 Counterdefendants.

23 DEFAULT

24 It appearing from the files and records in the above-entitled action that Defendant SUSAN
25 FALLINI, being duly served with a copy of the Summons and Complaint on the 1st day of March,
26 2007, and that an Answer and Counterclaim were filed on March 14, 2007. Defendant and her
27

1 counsel have not participated in this matter in good faith and both have been found in contempt of
2 Court. Based on the Findings of Fact and Conclusions of Law, on November 4, 2009, it was ordered
3 that Defendant's Answer and Counterclaim be stricken and the Court Clerk enter a Default against
4 Defendant Susan Fallini. Default is so entered.

5 DATED this 4th day of February, 2010.

6 CLERK OF THE COURT

7 RACHEL ALDANA

8 By: _____
9 Deputy Clerk

10 The undersigned hereby requests
11 and directs the entry of default.

12 ALDRICH LAW FIRM, LTD.

13
14 John P. Aldrich
15 John P. Aldrich, Esq.
16 Nevada Bar No.: 6877
17 1601 S. Rainbow Blvd., Suite 160
18 Las Vegas, Nevada 89146
19 Attorney for Plaintiffs
20
21
22
23
24
25
26
27
28

EXHIBIT J

EXHIBIT J

FILED

2010 JUN -2 A 8:57

REBECCA BALLARD
NYE COUNTY CLERK
BY DEPUTY

1 **ORDER**

2 John P. Aldrich, Esq.
3 Nevada Bar No. 6877
4 **ALDRICH LAW FIRM, LTD.**
5 1601 S. Rainbow Blvd., Suite 160
6 Las Vegas, Nevada 89146
7 (702) 853-5490
8 (702) 227-1975 fax
9 *Attorneys for Plaintiff*

6 THE FIFTH JUDICIAL DISTRICT COURT
7 THE STATE OF NEVADA, COUNTY OF NYE

8 Estate of MICHAEL DAVID ADAMS,
9 by and through his mother JUDITH
10 ADAMS, individually and on behalf of the
11 Estate,

12 Plaintiffs,

13 vs.

14 SUSAN FALLINI, DOES I-X and ROE
15 CORPORATIONS I-X, inclusive,

16 Defendants.

17 SUSAN FALLINI,

18 Counterclaimant,

19 vs.

20 Estate of MICHAEL DAVID ADAMS,
21 by and through his mother JUDITH
22 ADAMS, individually and on behalf of the
23 Estate,

24 Counterdefendants.

25 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER HOLDING**
26 **DEFENDANT'S COUNSEL IN CONTEMPT OF COURT**

27 THIS MATTER having come on for hearing on Monday, May 24, 2010, a hearing having
28 been held before the Honorable Robert W. Lane, and John P. Aldrich, Esq., of Aldrich Law Firm,
Ltd., appearing on behalf of the Plaintiffs, with Thomas Gbson, Esq., appearing on behalf of
Defendant, the Court hereby orders as follows:

FINDINGS OF FACT

The Court, having been presented the following facts by Plaintiff's counsel and having received no opposition to the facts by Defendant, makes the following findings of fact:

1. This lawsuit arises out of an incident that occurred on or about July 7, 2005. At approximately 9:00 p.m. on that day, MICHAEL DAVID ADAMS ("Adams") was driving his 1994 Jeep Wrangler on SR 375 highway in Nye County, when he collided with a Hereford cow ("cow") owned by Defendant SUSAN FALLINI ("Fallini"). Adams died at the scene as a result of the impact.

2. The decedent's mother, JUDITH ADAMS ("Judith"), filed a complaint on behalf of Adams' mother and his estate on November 29, 2006 and properly served Fallini with process. Fallini filed her Answer and Counterclaim on March 14, 2007.

3. On October 31, 2007, Plaintiff submitted interrogatories to Fallini. Those interrogatories were never answered. Adams also submitted requests for admissions and its first set of requests for production of documents on October 31, 2007. A second set of requests for production of documents were submitted to Fallini on July 2, 2008, requesting information as to Fallini's insurance policies and/or carriers that may provide coverage for damages that occurred as a result of the incident.

4. Fallini never responded to any of these requests. To this date, Fallini has not produced any responses of any kind to Plaintiff's written discovery requests. Despite an extension requested by Plaintiff and granted by the Court, the discovery period has lapsed without any responses being provided by Defendant.

5. On or about April 7, 2008 (and again on May 14, 2008 with a Certificate of Service), Plaintiff filed a Motion for Partial Summary Judgment. Defendant did not oppose that motion and the Court granted that Motion on July 30, 2008. Notice of entry of the Order Granting Plaintiff's Motion for Summary Judgment was served on Defendant on August 15, 2008.

6. Plaintiff attempted to amicably resolve the discovery dispute and obtain a copy of

1 Defendant's applicable insurance policies, but to no avail. On February 24, 2009, Plaintiff sent
2 letters to Defendant's counsel seeking responses to the discovery.

3 7. Plaintiff's counsel, Mr. Aldrich, attempted to discuss this discovery issue with
4 Defendant's counsel, Mr. Harry Kuehn, as well. On or about March 6, 2009, Plaintiff's counsel
5 contacted the office of Defendant's counsel. Mr. Aldrich was informed that Mr. Kuehn was not
6 available. Mr. Aldrich left a message with Mr. Aldrich's phone number and asked that Mr. Kuehn
7 return the call. No return call ever came.

8 8. On March 18, 2009, Mr. Aldrich again contacted the office of Mr. Kuehn. Mr.
9 Aldrich was informed that Mr. Kuehn was not available. Mr. Aldrich left a message with Mr.
10 Aldrich's phone number and asked that Mr. Kuehn return the call. No return call ever came.
11 (Exhibit 1.)

12 9. On March 23, 2009, Plaintiff filed a Motion to Compel Defendant's Production of
13 Documents, including information regarding any insurance policies that may provide coverage for
14 the incident as contemplated in the Plaintiff's second request for documents. This motion was heard
15 on April 27, 2009. The Defendant's attorney, Mr. Kuehn, attended the hearing. Mr. Kuehn did not
16 oppose the motion to compel and agreed at the hearing it was warranted. Mr. Kuehn provided no
17 explanation as to why Defendant failed to respond to all discovery requests. Mr. Kuehn agreed
18 sanctions were warranted, however, he disputed the amount of sanctions.

19 10. At the hearing on April 27, 2009, this Court granted the Motion to Compel and
20 awarded John Aldrich, Esq., \$750.00 in sanctions for having to bring the motion. A Notice of Entry
21 of Order on the order granting the motion to compel was entered on May 18, 2009. It was served
22 by mail on Defendant on May 14, 2009. Defendant never complied with the Order.

23 11. On June 16, 2009 Plaintiff filed a Motion to Strike Defendant's Answer and
24 Counterclaim due to Defendants complete failure to comply with discovery requests and this Court's
25 Order. The Defendant's counsel again attended the hearing and again provided no explanation as
26 to why Defendant failed to respond to all discovery requests, but stated Defendant would comply
27

1 with discovery requests.

2 12. The Court denied Plaintiff's Motion to Strike based on Defendant's counsel's
3 promises to comply. This Court did, however, order Defendant to comply with the Order granting
4 Plaintiff's Motion to Compel and to respond to Plaintiff's discovery requests by August 12, 2009
5 or Defendant's Answer and Counterclaim would be stricken. The Court also ordered Defendant to
6 pay a \$1,000 sanction.

7 13. To date, Defendant has failed to comply with the order of this Honorable Court and
8 respond to Plaintiff's discovery requests. Defendant's counsel has paid the \$1,750.00 in sanctions
9 as ordered by the Court.

10 14. Plaintiff is entitled to the discovery responses, and in fact, Defendant has admitted
11 as much on more than one occasion. Nevertheless, Defendant refused and continues to refuse to
12 respond.

13 15. Because Defendant failed and refused to follow this Court's order and provide the
14 requested information, Plaintiff brought its first Ex Parte Motion for Order to Show Cause Why
15 Defendant and Her Counsel Should Not Be Held in Contempt. The Order to Show Cause was
16 granted, and a hearing was scheduled on September 28, 2009. A conference was held in chambers,
17 so as to avoid embarrassment to Defendant's counsel. Following the conference, the Court ordered:

18 (A) That Defendant's counsel shall have until close of business on October 12,
19 2009, to comply with the Order Granting Plaintiff's Motion to Compel and
20 provide responses to Plaintiff's Request for Production of Documents,
21 including the requested insurance information.

22 (B) That if Defendant does not provide the above-described information by
23 October 12, 2009, Defendant's counsel will be held in contempt of court and
24 will be fined \$150.00 per day, beginning October 13, 2009, until said
25 information is provided. The days shall be calculated on a seven-day week.

26 (C) That if the above-described information is not provided by October 12, 2009,
27
28

1 the Court will strike defendant's pleadings in their entirety. Plaintiff will not
2 need to renew any motion regarding its request to strike defendant's
3 pleadings; Plaintiff will be able to simply submit an Order Striking the
4 Pleadings for signature by the Court.

5 16. Defendant and her counsel failed to provide the information at issue by October 12,
6 2009. Consequently, on or about November 4, 2009, the Court entered its Findings of Fact,
7 Conclusions of Law and Order Striking Answer and Counterclaim of Defendant Susan Fallini and
8 Holding Defendant's Counsel in Contempt of Court. Pursuant to said Order, Defendant's counsel,
9 Harold Kuehn, Esq., was held in contempt of Court and was ordered to pay to Plaintiff's counsel,
10 John P. Aldrich, Esq., \$150.00 per day, beginning October 13, 2009, and continuing to accrue until
11 the information described above is provided. The Order provided that the days shall be calculated
12 on a seven-day week, and that the Order shall constitute a judgment upon which Mr. Aldrich can
13 execute. Interest on unpaid balances was ordered to accrue at the statutory rate.

14 17. Again in contravention of the Court's orders, Defendant and her counsel have failed
15 and refused to provide the information they have been ordered to provide. Defendant's counsel's
16 utter refusal to abide by the Court's orders has stalled and frustrated the litigation process.

17 18. On or about April 7, 2010, Plaintiff again brought an Ex Parte Motion for Order to
18 Show Cause Why Defendant Susan Fallini and Her Counsel Should Not Be Held in Contempt of
19 Court and Possible Sanctions Be Imposed. On or about April 19, 2010, the Court entered the Order
20 to Show Cause and set a hearing for Monday, May 24, 2010.

21 19. As with the prior Order to Show Cause (and several other motions), despite personal
22 service on Defendant's counsel, neither Defendant nor her counsel responded in writing to the Order
23 to Show Cause.

24 20. The Court held a hearing on Monday, May 24, 2010. Thomas Gibson, Esq., the law
25 partner to Harry Kuehn, Esq., appeared on behalf of Defendant. Defendant Susan Fallini did not
26 appear at the hearing.

1 21. During the hearing, Mr. Gibson indicated he had not seen the file and provided no
2 valid excuse for Defendant's or Defendant's counsel's failure and refusal to abide by the Court's
3 prior orders. Mr. Aldrich also advised the Court that over 220 days had passed since the Court-
4 imposed sanction began to accrue, and that over \$30,000.00 was now due pursuant to that sanction.

5 22. Mr. Gibson made specific representations to the Court that the client, Defendant
6 Susan Fallini, was unaware of the status of this case. Mr. Gibson also made specific representations
7 that he would obtain the information at issue immediately and provide it to Plaintiff. Mr. Aldrich
8 requested that the Court impose a \$5,000.00 sanction, as well as a \$500.00 per day sanction, starting
9 on May 25, 2010, until Defendant provides the information. The Court imposed the \$5,000.00
10 sanction upon Defendant's counsel. The Court advised both counsel that the Court would give
11 Defendant until June 1, 2010 to comply with the Court's prior orders before increasing the daily
12 sanction from \$150.00 per day to \$500.00 per day.

13 23. Plaintiff's counsel also requested that the Court issue a bench warrant for Defendant
14 Susan Fallini, given her failure to appear as ordered by the Court on two occasions. The Court
15 declined to do so at the hearing on May 24, 2010, but indicated it may be willing to do so if
16 Defendant does not comply this time.

17 CONCLUSIONS OF LAW

18 Based on the Findings of Fact, as set forth above, the Court makes the following conclusions
19 of law:

20 1. Pursuant to NRCP 34, Plaintiff has the right to request documents which are
21 discoverable pursuant to NRCP 26. According to NRCP 34, Defendant has 30 days from receipt of
22 the requests for production of documents to provide appropriate responses.

23 2. NRCP 34(b) permits a party to seek relief under NRCP 37(a) if the party who receives
24 discovery requests fails to respond appropriately. NRCP 37(a) provides that the Court may enter an
25 order compelling a non-responsive party to disclose the requested information.

26 3. This Court has at least four times entered an order compelling Defendant to respond
27

1 to Discovery requests.

2 4. NRCp 37(b)(2)(c), permits "an order striking out pleadings or parts thereof," for
3 discovery abuses. "Selection of a particular sanction for discovery abuses under NRCp 37 is
4 generally a matter committed to the sound discretion of the district court." *Stubli v. Big Int'l Trucks,*
5 *Inc.*, 107 Nev. 309, 312-313, 810 P.2d 785 (1991) (citing *Fire Ins. Exchange v. Zenith Radio Corp.*,
6 103 Nev. 648, 649, 747 P.2d 911, 912 (1987) and *Kelly Broadcasting v. Sovereign Broadcast*, 96
7 Nev. 188, 192, 606 P.2d 1089, 1092 (1980.))

8 5. The Nevada Supreme Court held that default judgments will be upheld where "the
9 normal adversary process has been halted due to an unresponsive party, because diligent parties are
10 entitled to be protected against interminable delay and uncertainty as to their legal rights." *Hamlett*
11 *v. Reynolds*, 114 Nev. 863, 963 P.2d 457 (1998) (citing *Skeen v. Valley Bank of Nevada*, 89 Nev.
12 301, 303, 511 P.2d 1053, 1054 (1973).

13 6. Defendant has provided no responses whatsoever, nor has Defendant objected to any
14 request. Defendant has failed on at least four occasions to comply with this Court's Order. At no
15 time has Defendant or her counsel given any excuse or justification for their failure and refusal to
16 abide by the Court's orders.

17 7. Defendant has been given ample opportunity to comply with the Court's Orders.
18 Defendant has halted the litigation process and the additional sanctions of \$5,000.00 immediately
19 and \$500.00 per day beginning June 1, 2010, if Defendant does not comply with the Court's prior
20 orders, are appropriate under the circumstances.

21 ORDER

22 Based on the Findings of Fact and Conclusions of Law, as set forth above:

23 IT IS HEREBY ORDERED that Defendant's counsel, Harold Kuehn, Esq., is in contempt
24 of Court and must pay to Plaintiff's counsel, John P. Aldrich, Esq., \$5,000.00, in addition to the
25 \$150.00 per day that began accruing on October 13, 2009, and which continues to accrue until the
26 Defendant and her counsel comply with the Court's prior orders, including providing the information
27

1 sought by Plaintiff.

2 IT IS FURTHER ORDERED that Defendant shall provide the information sought by
3 Plaintiff, and which Defendant and her counsel have been ordered to provide, by June 1, 2010. In
4 the event Defendant does not comply with the Court's prior orders by June 1, 2010, Mr. Kuehn will
5 be held in contempt of Court again and must pay to Plaintiff's counsel, John P. Aldrich, Esq.,
6 \$500.00 per day, beginning June 1, 2010, and continuing to accrue until the information described
7 above is provided. The days shall be calculated on a seven-day week, and this Order shall constitute
8 a judgment upon which Mr. Aldrich can execute. Interest on unpaid balances shall accrue at the
9 statutory rate.

10 IT IS SO ORDERED.

11 DATED this 2 day of June, 2010.

12 **ROBERT W. LANE**

13

DISTRICT COURT JUDGE

14 Submitted by:

15 **ALDRICH LAW FIRM, LTD.**

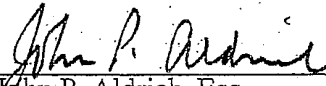
16
17 
18 John P. Aldrich, Esq.
19 Nevada Bar No.: 6877
19 1601 S. Rainbow Blvd., Suite 160
20 Las Vegas, Nevada 89146
20 *Attorneys for Plaintiff*

EXHIBIT K

EXHIBIT K

FILED

Case No. CV 24539
Dept. 2P

2010 AUG 12 A 9:00

REBECCA BALLARD

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA, IN AND FOR THE COUNTY OF NYE

ESTATE OF MICHAEL DAVID ADAMS,
by and through his mother JUDITH
ADAMS, individually and on behalf of the
Estate

Plaintiff,

vs.

SUSAN FALLINI; DOES I-X, and ROE
CORPORATIONS I-X, inclusive

Defendants.

ORDER AFTER HEARING

This matter is regarding a motor vehicle accident involving Michael Adams and a Hereford Cow owned by the Defendant. On June 24, 2010, Plaintiff filed an Application for Default Judgment against Defendant Susan Fallini. Plaintiff requested \$2,500,000 for grief, sorrow, loss of support; \$1,640,696 for lost career earnings; \$5,000,000 for hedonic damages loss of life's pleasure and enjoyment; \$35,000 for Sanctions already levied against Defendants; \$50,000 for attorney's fees; and \$5,188.85 for funeral and other related expenses for a total of \$9,230,884.85. Defendants filed an Opposition on June 24, 2010. A hearing was held on this matter on July 19, 2010, in which Plaintiff and Defendants appeared with their counsels. After hearing arguments from both sides regarding the Defendant's violation of procedural rules, the Court denied Defendant's

FIFTH JUDICIAL DISTRICT COURT

ESMERALDA, MINERAL AND NYE COUNTIES





1
2 Motion for Reconsideration and proceeded with the Prove Up Hearing and Canceled the
3 Trial scheduled for August 2010. Judith Adams, Anthony Adams, and Susan Fallini were
4 sworn in and testified. The parties' counsel gave their closing statements. The Court
5 heard testimony, counsels' statements and arguments, and reviewed the pleadings on file
6 herein. This Order follows.

7
8 ORDER

9 IT IS HEREBY ORDERED that the Defendant's Motion for Reconsideration is
10 DENIED.

11 IT IS FURTHER ORDERED that the Court grants the Plaintiff \$1,000,000 in
12 Damages for Grief, Sorrow, and loss of support.

13 IT IS FURTHER ORDERED that the Court grants the Plaintiff \$1,640,696 in
14 Damages for future lost earnings.


15 IT IS FURTHER ORDERED that the Court grants the Plaintiff \$50,000 in
16 Attorney's Fees.

17 IT IS FURTHER ORDERED that the Court grants the Plaintiff \$35,000 in
18 sanctions levied against the Defendant.

19 IT IS FURTHER ORDERED that the Court grants the Plaintiff \$5,188.85 in
20 funeral and other related expenses.

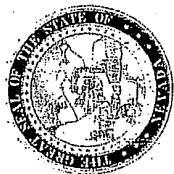
21 IT IS FURTHER ORDERED that Plaintiff's request for Hedonic damages is
22 DENIED.
23
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2 DATED this 12th day of August 2010.
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6 DISTRICT JUDGE
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FIFTH JUDICIAL DISTRICT COURT

ESMERELDA, MINERAL AND NYE COUNTIES





1
2 CERTIFICATION OF MAILING

3 The undersigned hereby certifies that on the 12th day of August 2010, he mailed
4 copies of the foregoing ORDER AFTER HEARING to the following:

5 John P. Aldrich, Esq.
6 ALDRICH LAW FIRM, LTD.
7 1601 S. Rainbow Blvd., Suite 160
8 Las Vegas, NV 89146

9 John Ohlson, Esq.
10 BOWEN, HALL, OHLSON & OSBORNE
11 555 South Center Street
12 Reno, NV 89501

13 Katherine M. Barker, Esq.
14 LAW OFFICE OF KATHERINE M. BARKER
15 823 S. Las Vegas Blvd., Ste. 300
16 Las Vegas, NV 89101

17 C. PAUL TECHO
18 Law Clerk to
19 DISTRICT JUDGE
20
21
22
23
24
25
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27
28

EXHIBIT L

EXHIBIT L

1 John Ohlson, Esq.
2 Bar Number 1672
3 275 Hill Street, Suite 230
4 Reno, Nevada 89501
5 Telephone: (775) 323-2700

6 Jeff Kump, Esq.
7 Bar Number 5694
8 Marvel & Kump, Ltd.
9 Elko, Nevada 89801
10 Telephone: (775) 777-1204
11 *Attorneys for Susan Fallini*

12 **FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
13 **IN AND FOR THE COUNTY OF NYE**

14 * * * * *

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

18 Plaintiff,

Case No.: CV24539

19 vs.

Dept. No.: 2P

20 SUSAN FALLINI, DOES I-X, and
21 ROE CORPORATIONS I-X, inclusive,

22 Defendant.

23 AND ALL RELATED CLAIMS.

24 **NOTICE OF APPEAL**

25 TO: Plaintiff, and her counsel of record, John Aldrich, Esq.

26 Notice is given that Defendant SUSAN FALLINI, appeals to the Supreme Court of

27 ////

28 ////

////


1 Nevada from: (1) the August 12, 2010 Order After Hearing.

2 DATED this 7 day of September, 2010.

3
4 **AFFIRMATION**
5 **Pursuant to NRS 239B.030**

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

8 Dated this 7 day of September, 2010.

9
10
11 By: 
12 John Ohlson, Esq.
13 Bar Number 1672
14 275 Hill Street, Suite 230
15 Reno, Nevada 89501
16 Telephone: (775) 323-2700

17 Jeff Kump, Esq.
18 Bar Number 5694
19 Marvel & Kump, Ltd.
20 Elko, Nevada 89801
21 Telephone: (775) 777-1204
22 *Attorneys for Susan Fallini*
23
24
25
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2
3 **CERTIFICATE OF SERVICE**

4 Pursuant to NRCP 5(b), I hereby certify that I am an employee of JOHN OHLSON, and
5 that on this date I personally served a true copy of the foregoing **NOTICE OF APPEAL**, by the
6 method indicated and addressed to the following:

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

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☒ Via U.S. Mail
☐ Via Overnight Mail
☐ Via Hand Delivery
☒ Via Facsimile
☐ Via ECF

DATED this 7 day of September, 2010.

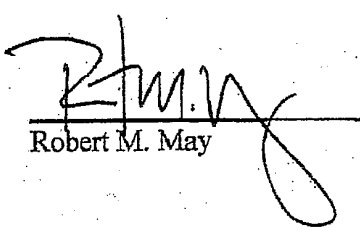

Robert M. May

EXHIBIT M

EXHIBIT M

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

SUSAN FALLINI,

Appellant(s),

No. 568440

vs.

ESTATE OF MICHAEL ADAMS,

BY AND THROUGH HIS MOTHER JUDITH ADAMS,

INDIVIDUALLY AND ON BEHALF OF THE ESTATE.

DOCKETING STATEMENT
CIVIL APPEALS

Respondent(s),

GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. Id. Failure to attach documents as requested in this statement, completely fill out the statement, or to fail to file it in a timely manner, will constitute grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Syivan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District FIFTH Department 2 County NYE
Judge Robert W. Lane District Court Docket No. CV0024539

2. Attorney filing this docket statement:

Attorney John Ohlson, Esq. Telephone (775) 323-2700

Firm John Ohlson

Address 275 Hill Street, Suite 230, Reno, Nevada 89501

Client(s) Susan Fallini

If this is a joint statement completed on behalf of multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondent(s):

Attorney John Aldrich, Esq. Telephone (702) 853-5490

Firm Aldrich Law Firm, Ltd.

Address 1601 S. Rainbow Blvd., Suite 160, Las Vegas, Nevada 89146

Client(s) Estate of Michael Adams, By and Through his Mother Judith Adams, Individually and on Behalf of the Estate.

4. Nature of disposition below (check all that apply):

☐ Judgment after bench trial

☐ Judgment after jury verdict

☐ Summary judgment

☒ Default Judgment

☐ Dismissal

☐ Lack of jurisdiction

☐ Failure to state a claim

☐ Failure to prosecute

☐ Other (specify)

☐ Grant/Denial of NRCP 60(b) relief

☐ Grant/Denial of injunction

☐ Grant/Denial of declaratory relief

☐ Review of agency determination

☐ Divorce decree:

☐ Original ☐ Modification

☐ Other disposition (specify):

5. Does this appeal raise issues concerning any of the following: No.

☐ Child custody

☐ Venue

☐ Adoption

☐ Termination of parental rights

☐ Grant/Denial of injunction or TRO

☐ Juvenile matters

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

N/A

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

N/A

8. Nature of the action. Briefly describe the nature of the action, including a list of the causes of action pleaded, and the result below:

This action arises out of damage claims for wrongful *death due to alleged negligence* asserted by Plaintiff Estate of MICHAEL DAVID ADAMS, by and through his mother JUDITH ADAMS, Individually and on behalf of the Estate against Defendant Susan Fallini, as a result of a July 7, 2005 automobile versus cow accident, wherein Michael Adams died. The action proceeded to default, including the granting of a partial summary judgment and the striking of Defendant Susan Fallini's Answer and Counterclaim. Further, the District Judge vacated the trial and returned an award in favor of Plaintiff and against Defendant Susan Fallini. An Order was entered on August 12, 2010 in the principal amount of \$1,000,000 for damages for grief, sorrow and loss of support together with damages for future lost earnings in the amount of \$1,640,696, attorney's fees in the amount of \$50,000, sanctions in the amount of \$35,000 and funeral expenses in the amount of \$5,188.85. This appeal is from the August 12, 2010 Order After Hearing.

9. Issues on appeal. State concisely the principal issue(s) in this appeal:

- (1) Whether the district court committed a reversible error in denying Defendant's Motion for Reconsideration.
- (2) Whether the district court erred vacating the jury trial herein, and determining damages.
- (3) Whether damages awarded by the district court were excessive, and without a legal basis.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceeding presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket number and identify the same or similar issues raised:

The undersigned is not aware of any proceeding presently pending before this court which raise the

same or similar issues to those raised in the present appeal.

11. **Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

N/A X Yes _____ No _____

If not, explain _____

12. **Other issues.** Does this appeal involve any of the following issues?

- ☐ Reversal of well-settled Nevada precedent (on an attachment, identify the case(s))
- ☐ An issue arising under the United States and/or Nevada Constitutions
- ☐ A substantial issue of first-impression
- ☐ An issue of public policy
- ☐ An issue where an amicus consideration is necessary to maintain uniformity of this court's decisions
- ☐ A ballot question

If so, explain _____

13. **Trial.** If this action proceeded to trial, how many days did the trial last? N/A

Was it a bench or jury trial? _____

14. **Judicial disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal. If so, which Justice?

N/A

TIMELINESS OF NOTICE OF APPEAL

~~15. Date of entry of written judgment or order appealed from August 12, 2010 (Attached as Exhibit 1).~~

Attach a copy. If more than one judgment or order is appealed from, attach copies of each judgment or order from which an appeal is taken.

(a) If no written judgment or order was filed in the district court, explain the basis for seeking appellate review: _____

16. Date written notice of entry of judgment or order served August 17, 2010 (Attached as Exhibit 2).
Attach a copy, including proof of service, for each order or judgment appealed from.

(a) Was service by delivery _____ or by mail by United States Postal Service (specify).

17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59),

(a) Specify the type of motion, and the date and method of service of the motion, and date of filing.

NRCP 50(b) _____ Date served _____ By delivery _____ or by mail _____ Date of filing _____

NRCP 52(b) _____ Date served _____ By delivery _____ or by mail _____ Date of filing _____

NRCP 59 _____ Date served _____ By delivery _____ or by mail _____ Date of filing _____

Attach copies of all post-trial tolling motions.

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration do not toll the time for filing a notice of appeal.

(b) Date of entry of written order resolving tolling motion _____. **Attach a copy.**

(c) Date written notice of entry of order resolving motion served _____. **Attach a copy, including proof of service.**

(i) Was service by delivery _____ or by mail _____ (specify).

18. Date notice of appeal was filed September 10, 2010.

(a) If more than one party has appealed from the judgment or order, list date each notice of appeal was filed and identify by name the party filing the notice of appeal:

19. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a), NRS 155.190, or other:

NRAP 4(a), NRS155.190

SUBSTANTIVE APPEALABILITY

20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

NRAP 3A(b)(1) X NRS 155.190 _____ (specify subsection)

NRAP 3A(b)(2) _____ NRS 38.205 _____ (specify subsection)

NRAP 3A(b)(3) _____ NRS 703.376

Other (specify) _____

Explain how each authority provides a basis for appeal from the judgment or order:

The district court's order vacating a jury trial, denying defendant's motion for reconsideration and awarding damages to the plaintiff resolved, finally, the action below, was a final judgment against defendant, for which defendant has no recourse in district court.

21. List all parties involved in the action in the district court:

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

Defendant Susan Fallini

(a) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims or third-party claims, and the trial court's disposition of each claim, and how each claim was resolved (i. e., order, judgment, stipulation), and the date of disposition of each claim. Attach a copy of each disposition.

Plaintiff's Claims: Wrongful Death.

Defendant's Cross-Claims: Destruction of Property.

See disposition of Plaintiff's claims in Order After Hearing, dated August 12, 2010 (Attached as Exhibit 1).

See disposition of Defendant's counterclaim in Findings of Fact, Conclusions of Law and Order Striking Answer and Counterclaim dated November 4, 2009 (Attached as Exhibit 3).

23. Attach copies of the last-filed version of all complaints, counterclaims, and/or cross-claims filed in the district court.

Complaint (Attached as Exhibit 4)

Answer and Counterclaim (Attached as Exhibit 5)

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action below:

Yes X No

25. If you answered "No" to the immediately previous question, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCF 54(b):

Yes _____ No _____ If "Yes," attach a copy of the certification or order, including any notice of entry and proof of service.

(d) Did the district court make an express determination, pursuant to NRCF 54(b), that there is no just reason for delay and an express direction for the entry of judgment:

Yes _____ No _____

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRCF 3A(b)):

VERIFICATION

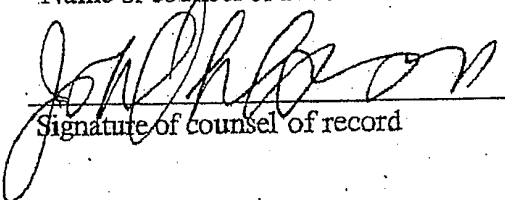
I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Susan Fallini
Name of Appellant

Date

9/29/10

John Ohlson, Esq. & Jeff Kump, Esq.
Name of counsel of record


Signature of counsel of record

Nevada, Washoe County
State and county where signed

CERTIFICATE OF SERVICE

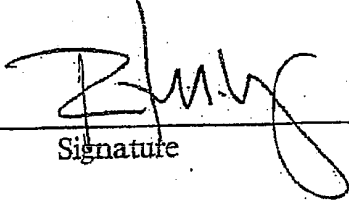
I certify that on the 29 day of SEPTEMBER, 2010, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first-class mail with sufficient postage prepaid to the following address(es):

John Aldrich, Esq.
ALDRICH LAW FIRM
1601 S. Rainbow Rd., Suite 160
Las Vegas, NV 89146

Dated this 29 day of SEPTEMBER, 2010.


Signature

1 CASE NO. CV-31449

2 DEPT. I

FILED

2011 APR -5 P 2:38

NYE COUNTY CLERK
BY DEPUTY

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6 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF NYE

8
9 SUSAN FALLINI and JOE FALLINI,

10 Plaintiffs,

11 vs.

12 THE HONORABLE ROBERT W. LANE,
13 TONY ADAMS, JUDITH ADAMS, JOHN P.
14 ALDRICH, ESQ., HAROLD KUEHN, ESQ.,
and Does I through V, jointly and severally,

15 Defendants.

DEFENDANT HON. ROBERT W. LANE'S
MOTION TO DISMISS COMPLAINT
FOR DECLARATORY RELIEF

16 Defendant HONORABLE ROBERT W. LANE (Judge Lane), by and through his
17 attorneys CATHERINE CORTEZ MASTO, Attorney General of the State of Nevada and
18 Solicitor General C. WAYNE HOWLE, submits this Motion to Dismiss Plaintiffs Susan Fallini
19 and Joe Fallini's [Fallinis] Complaint for Declaratory Relief on the basis of Rules 12(b)(1) and
20 12(b)(5) of the Nevada Rules of Civil procedure and the following points and authorities.

21 **I. BACKGROUND**

22 Suit against a judge with whose judgment the plaintiff disagrees, though common
23 enough,¹ is improper. Judges, as demonstrated below, are absolutely immune from suit.
24 Further, in this instance the proceeding is anomalous and unheard-of: although styled a
25 complaint, it might be better characterized as a fugitive appeal or request for rehearing not

26
27 ¹ Just in undersigned counsel's recent practice, the following suits against judges have
28 been dismissed: *Bax v. Hon. Janet Berry*, Case no. 3:10-CV-00605 (D. Nev.), *Beckner v. Hon. Susan Johnson, et al.*, Case no. CV08-7504 AG (JWJ) (C.D. Cal.), *Ogilvie v. Hon. Linda Gardner*, Case no. 3:09-CV-00270 (D. Nev.).

1 provided for in the rules. As a de facto collateral attack on a judgment, it also affronts judicial
2 repose. Finally, a pending appeal at the Nevada Supreme Court precludes the action. There
3 are thus multiple reasons it should be dismissed.

4 The matter at which this action is targeted is a separate docket in Department 2 of this
5 same court. In *Estate of Michael David Adams v. Susan Fallini*, Case No. CV-0024539, claim
6 was made for damages arising when a vehicle struck a domestic cow on a highway in 2005.
7 A death resulted from the collision.

8 The complaint was filed four years ago, in April of 2007. As the Court's docket sheet
9 shows, see Attachment 1, the litigation was joined and the parties—both represented by
10 counsel—engaged over many months.

11 As recounted in the detailed findings and conclusions filed in CV-0024539 on June 2,
12 2010, see Attachment 2, Susan Fallini's counsel was remiss in the litigation and unresponsive
13 to the Court on numerous occasions, leading to a finding of contempt. Preceding the
14 contempt finding, consequences from Fallini's counsel's inaction included an award of partial
15 summary judgment on July 29, 2008, and an award of summary judgment against Fallini on
16 her counterclaim on October 16, 2008. Ultimately default was entered against Fallini on
17 February 4, 2010. Attachment 3. Default judgment was entered on August 12, 2010 following
18 a hearing at which new counsel for Fallini appeared. Attachment 4. The new counsel's
19 argument was that his predecessor had "suffered some sort of mental breakdown, and
20 allowed this case . . . to become the 'train wreck' that it is, without informing his client, Ms.
21 Fallini." Attachment 5.

22 **II. APPLICABLE LEGAL STANDARD**

23 The court in this case should dismiss the Fallinis' complaint if it lacks jurisdiction over
24 the subject matter. NRCP Rule 12(b)(1)

25 The court may also dismiss the complaint "pursuant to NRCP 12(b)(5), but only if it
26 appears to a certainty that a plaintiff can prove no set of facts which would entitle [them] to
27 relief. All allegations pled must be accepted as true." *Bergmann v. Boyce*, 109 Nev. 670, 674-
28 75, 856 P.2d 560 (1993) (internal citations omitted). Dismissal is appropriate when the

allegations in the complaint are insufficient to establish the elements of a claim for relief. *Stockmeier v. Nevada Dept. of Corrections Psychological Review Panel*, ___ Nev. ___, 183 P.3d 133, 135 (2008).

Under these standards, the Fallinis' complaint should be dismissed.

III. ARGUMENT

A. JUDGE LANE IS ABSOLUTELY IMMUNE FROM SUIT.

1. The Fallinis' Claims are Barred by the Doctrine of Judicial Immunity.

It is well established that judges cannot be sued for their judicial acts. *Mireles v. Waco*, 502 U.S. 9, 9 and 11(1991), *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978). "Disagreement with the action taken by the judge . . . does not justify depriving that judge of his immunity. . . . [T]he doctrine of judicial immunity is thought to be in the best interests of the proper administration of justice." *Id.* at 363. See also *Marvin v. Fitch*, 126 Nev. ___, 232 P.3d 425, 429 (2010) ("[a]bsolute immunity protects judicial officers from collateral attack and recognizes that appellate procedures are the appropriate method of correcting judicial error").

The policy of extending judicial immunity ensures independent and disinterested decision-making, and the availability of the immunity is broadly construed. *Ashelman v. Pope*, 793 F.2d 1072, 1078-79 (9th Cir. 1986). See also *Bradley v. Fisher*, 80 U.S. 335 (1871); *Mullis v. United States Bankruptcy Court for the District of Nevada*, 828 F.2d 1385 (9th Cir. 1987). Although Judge Lane in this case maintains that all actions taken were proper, this absolute immunity insulates judges even when the plaintiff alleges the judge's acts are due to malicious or corrupt motives or when "the exercise of judicial authority is 'flawed by the commission of grave procedural errors.'" *In re Castillo*, 297 F.3d 940, 946 (9th Cir. 2002) (quoting *Stump*, 435 U.S. at 359). Judicial immunity applies "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff."

///

///

///

1 *Ashelman*, 793 F.2d at 1075 (quoting *Cleavinger v. Saxner*, 474 U.S. 193, 199-200 (1985)).²

2 2. Judge Lane Is Not a Proper Party Defendant.

3 As a corollary to the doctrine of absolute judicial immunity, it is also the rule that a
4 judge is not a proper party defendant in an action brought by a party dissatisfied with a
5 proceeding. "When judges adjudicate, they are not proper parties to a lawsuit." *Fellows v.*
6 *Raymond*, 842 F.Supp. 1470, 1471 (D. Maine 1994). If the rule were otherwise, a judge might
7 be embroiled in litigation every time a party disagreed with his decision in a case. He would
8 be required to find counsel, answer, sit for deposition, conduct discovery, and be subject to
9 diverse other aspects of litigation, which is not rightly his burden. Shielding judges from these
10 untoward functions is part of the reason for the rule of absolute judicial immunity described
11 above. "Like other forms of official immunity, judicial immunity is an immunity from suit, not
12 just from ultimate assessment of damages." *Mireles v. Waco*, 502 U.S. 9 at 11.

13 In the instant matter, it is clear that Judge Lane has taken no action other than as a
14 District Court Judge, pursuant to statute, in the underlying case. Consequently, Judge Lane is
15 entitled to absolute immunity, and the Fallinis have failed to state a claim against him upon
16 which relief may be granted. The Complaint against him must be dismissed.

17 B. THE FALLINIS' PENDING APPEAL IN THE NEVADA SUPREME COURT
18 DEPRIVES THIS COURT OF JURISDICTION.

19 The instant action seeks declaratory judgment on the same issues now pending on appeal in
20 the Nevada Supreme Court. See Attachment 6, Notice of Appeal. This Court, respectfully,
21 therefore lacks jurisdiction to decide the issues. The Nevada Supreme Court "has
22 consistently explained that 'a timely notice of appeal divests the district court of jurisdiction to
23 act and vests jurisdiction in this court.'" *Mack-Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d
24 525, 529 (2006). In *Huneycutt v. Huneycutt*, 94 Nev. 79, 80, 575 P.2d 585 (1978), the Court
25 "expressly adopted for civil cases the rule that a 'district court has no authority to grant a new
26

27 ² In the context of federal civil rights, judicial immunity may not extend to declaratory
28 relief. See *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S.
719, 735-37 (1980) (considering § 1983 action "challenging the Virginia Court's disciplinary
rules governing the conduct of attorneys").

1 trial once the notice of appeal has been filed.” *Smith v. Emery*, 109 Nev. 737, 740, 856 P.2d
2 1386 (1993).

3 Simply, this action is not viable while the appeal is pending. The Fallinis may wish to
4 pursue every conceivable remedy, but their approach in this action is at odds with the law and
5 should be dismissed under NRCP Rule 12(b)(1).

6 C. FALLINIS’ ATTORNEY’S NEGLIGENCE IS ATTRIBUTED TO THEM; THEIR
7 RECOURSE IS AGAINST THEIR COUNSEL, NOT JUDGE LANE.

8 A client is bound by the acts of the counsel whom they choose to represent them in an
9 action. *Masden v. Nevada*, 99 Fed.Appx. 144 (9th Cir. 2004); *cf. Five Star Capital Corp. v.*
10 *Ruby*, 124 Nev. ___, 194 P.3d 709, 710 (2008) (considering whether claim preclusion
11 prevented a party from bringing a second lawsuit when the first lawsuit was dismissed under a
12 local court rule for failure to attend a pretrial calendar call).

13 Although the Fallinis urge that the consequences of their counsel’s neglect during the
14 litigation should not be visited on them, the law is otherwise. “Notice to an attorney is, in legal
15 contemplation, notice to his client. The attorney’s neglect is imputed to his client, and the
16 client is held responsible for it. The client’s recourse is an action for malpractice.” *Lange v.*
17 *Hickman*, 92 Nev. 41, 43, 544 P.2d 1208 (1976) (internal citations omitted).

18 The same is true here as in *Lange*:

19 Petitioner voluntarily chose this attorney as his representative in
20 the action, and he cannot now avoid the consequences of the acts
21 or omissions of this freely selected agent. Any other notion would
22 be wholly inconsistent with our system of representative litigation,
23 in which each party is deemed bound by the acts of his lawyer-
24 agent and is considered to have notice of all facts, notice of which
25 can be charged upon the attorney.

26 *Link v. Wabash R. Co.*, 370 U.S. 626, 633-634 (1962), (quoted in *Pioneer Inv. Services Co. v.*
27 *Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 397 (1993)).

28 As in *Lange*, the relief available to Fallinis is against their counsel. It does not lie
against Judge Lane.

D. DECLARATORY JUDGMENT IS NOT A SUBSTITUTE FOR APPEAL.

The Fallinis’ action for declaratory relief in reality seeks a rehearing and

1 redetermination of a previous outcome in the CV-0024539 docket. In effect, they are
2 appealing to the other department of this court to provide a different result.

3 It is universally the rule that declaratory judgment does not provide a substitute for
4 appeal. See e.g. *O'Callahan v. U.S.*, 293 F.Supp. 122 (D.C.Minn. 1968), *Grand Trunk*
5 *Western R. Co. v. Consolidated Rail Corp.*, 746 F.2d 323 (6th Cir. 1984), *Shannon v.*
6 *Sequeechi*, 365 F.2d 827 (10th Cir. 1966), *Baier v. Parker*, M.D.La.1981, 523 F.Supp. 288,
7 *Savini v. Sheriff of Nassau County*, E.D.N.Y.1962, 209 F.Supp. 946. Thus the Fallinis' action
8 is improper as an ersatz appeal from the decision in their case in Department 2.

9 If not a de facto appeal, then the Fallinis' action is an attempt to simply retry the matter.
10 They are, however, left with the result that was obtained in the first round of litigation. That
11 round was conclusive. In *Five Star Capital Corp.*, 194 P.3d 709, the Court considered and
12 affirmed the claim preclusive effect of a dismissal on procedural grounds.³ Significantly, it
13 stated "whether a decision is correct does not affect its preclusive effect." *Id.*, 194 P.3d at
14 714, n.41. It also does not matter whether the result was "not a decision on the merits." *Id.* at
15 715. This rule is necessary "to prevent a party from continually filing additional lawsuits until it
16 obtains the outcome it desires." *Id.* at 716. The same rule applies in this action, and requires
17 its dismissal.

18 IV. CONCLUSION

19 This action suffers from many infirmities. With respect to Judge Lane as a named
20 defendant, the most salient problems are that (1) Judge Lane is absolutely immune from suit;
21 (2) the matter—through docket no. CV-0024539—is presently on appeal, thus depriving this
22 Court of jurisdiction; (3) the Fallinis are bound by the acts of their prior counsel; and (4) a

23 ///

24 ///

25 ///

27 ³ "For claim preclusion to apply the following factors must be met: (1) the same parties
28 or their privies are involved in both cases, (2) a valid final judgment has been entered, and (3)
the subsequent action is based on the same claims or any part of them that were or could
have been brought in the first case." *Five Star Capital Corp.*, 194 P.3d at 714.

1 declaratory judgment action is not proper as an appeal from a prior decision. As a result of
2 these deficiencies, the action ought to be dismissed both for lack of jurisdiction and for failure
3 to state a claim upon which relief can be granted. Respectfully, therefore, Judge Lane
4 requests that his motion to dismiss be granted.

5 DATED this 4th day of April 2011.

6 CATHERINE CORTEZ MASTO
7 Attorney General for the State of Nevada

8
9 By: 

10 C. Wayne Howle
11 Solicitor General
12 Nevada State Bar No. 3443
13 Appellate Division
14 100 N. Carson Street
15 Carson City, Nevada 89701
16 (775) 684-1227; Fax (775) 684-1108
17 Attorneys for Defendant Robert W. Lane
18
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27
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Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

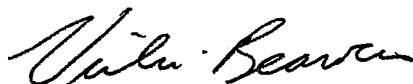
CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 4th day of April 2010, I served a copy of the foregoing Defendant Robert W. Lane's Answer to Complaint for Declaratory Relief by mailing a true copy to the following:

John Ohlson, Esq.
275 Hill Street, Suite 230
Reno, NV 89501

Jeff Kump, Esq.
Marvel & Kump, Ltd.
217 Idaho Street
Elko, NV 89801

Attorneys for Plaintiffs



Vicki Beavers, an employee of the
Nevada Attorney General's Office

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document filed in case number CV-31449, does not contain the personal information of any person.

DATED this 4th day of April 2011.

CATHERINE CORTEZ MASTO,
Attorney General for the State of
Nevada

By: 

C. Wayne Howle
Solicitor General

ATTACHMENT 1

ATTACHMENT 1

Case #: CV-0024539Judge: ROBERT W. LANEDate Filed: 01/31/07 Department: 02Case Type: NEGOTH TORT/OTHER NEGLIGENCETitle/Caption: ESTATE OF MICHAEL DAVID ADAMS, by and
through his mother JUDITH ADAMS,
individually and on behalf of the ESTATE
VS.
SUSAN FALLINI, DOES I-X and
ROE CORPORATIONS I-X, inclusiveCOMMENT: FILE IN PAHRUMP

<u>Parties:</u>	<u>Name(s)</u>	<u>Attorney(s)</u>
Plaintiff(s)	ESTATE OF MICHAEL DAVID ADAMS	JOHN P. ALDRICH
	ADAMS, JUDITH	JOHN P. ALDRICH
Defendant(s)	FALLINI, SUSAN	KUMP, JEFF

Hearings:

<u>Date</u>	<u>Time</u>	<u>Event</u>	<u>Reference</u>
04/30/07	9:00	OBJECTION TO PAHRUMP AS FORUM AND MOTION... JUDGE: ROBERT W. LANE CLERK: SHEILA WINN CLERK: RACHEL ALDANA BAILIFF: GERALD (BEAR) SMITH APP: HARRY KUEHN ON BEHALF OF THE DEFENDANTS KUEHN STATES THAT THIS MATTER WAS INITIALLY F IN CLARK COUNTY AND THEN WAS MOVED HERE. MR. ARGUES THAT THE DEFENSE HAS THE RIGHT TO LITI IN THE COUNTY SEAT. THE COURT CLARIFIES MR. KU ARGUMENT. JOHN ALDRICH IS PRESENT FOR JUDITH AND HE STATES THAT PAHRUMP IS A NICE MIDDLE G FOR EVERYBODY. THE RELEVANT PARTIES LIVE IN T SEPARATE AREAS, ONE IN SOUTHERN CALIFORNIA AN IN TONOPAH. IT SEEMS TO HIM THAT AS LONG AS I THE CORRECT FORUM, IT SHOULD BE ALLOWED TO PR HERE IN PAHRUMP. THE COURT NEEDS CLARIFICATIO THE RULE THAT THE DEFENDANT HAS A RIGHT TO CH VENUE AND WILL REVIEW THAT RULE FURTHER. MR. OFFERS FURTHER ARGUMENT. THE COURT WILL ISSUE RULING WITHIN A FEW DAYS.	. MR. ILED KUEHN GATE EHN'S ADAMS ROUND WO D ONE T IS OCEED N OF ANGE KUEHN A
07/14/08	9:00	MOTION FOR PARTIAL SUMMARY JUDGMENT JUDGE: ROBERT W. LANE CLERK: RACHEL ALDANA BAILIFF: GERALD (BEAR) SMITH APP: JOHN ALDRICH IS PRESENT FOR THE PLAINTIF MR. ALDRICH BRIEFS THE COURT THAT THERE HAS B NO RESPONSE FROM THE DEFENDANT, AND CLARIFIES THAT THE DEFENDANT RECIEVED NOTICE. COURT GRA THE MOTION AND NOTES THAT THAT THERE IS NO OR	5/19 ELEANOR F. EEN NTS DER

Case #: CV-0024539

11/10/08 1:15 AND WILL SIGN ORDER UPON SUBMITTING.
MOTION TO REOPEN DISCOVERY & FOR AN EXTENSION
JUDGE: ROBERT W. LANE
CLERK: RACHEL ALDANA
BAILIFF: GERALD (BEAR) SMITH
APP: JOHN ALDRICH IS PRESENT FOR THE PLAINTIFF F.
MR. ALDRICH OUTLINES THAT SINCE HE CHANGED FI RMS
HE WAS UNCLEAR OF THE DISCOVERY DATE AND OFFE RS
EXPLANATION IN REGARDS TO EXTENSION. MR. ALDR ICH
NOTES NO OPPOSITION AND REVIEWS CASE HISTORY.
COURT GRANTS WITH NO OPPOSITION AND WILL SIGN
THE ORDER WHEN SUBMITTED.

04/27/09 9:00 MOTION TO COMPEL DEFENDANT'S PRODUCTION OF DO CS...
JUDGE: ROBERT W. LANE
CLERK: RACHEL ALDANA
BAILIFF: STEPHEN (JAMIE) DAVIS
APP: CATHERINE HERNANDEZ IS PRESENT FOR THE P LAINTIFF;
HARRY KUEHN IS PRESENT FOR THE DEFENDANTS. MS .
HERNANDEZ BRIEFS HER MOTION AND REVIEWS THAT THEY
REQUESTED THIS INFORMATION A YEAR AGO. MR. KU EHN
STATES NO OPPOSITION AND OUTLINES THAT HIS OF FICE
DROPPED THE BALL AND NOTES THAT OPPOSING PART Y IS
REQUESTING ATTORNEY FEES. COURT GRANTS THE MO TION
AND \$750 IN ATTORNEY FEES. MS. HERNANDEZ SUBM ITS
ORDER TO THE COURT. COURT SIGNS THE ORDER.

06/22/09 4:30 CALENDAR CALL
07/13/09 1:15 PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S ANSW ER..
JUDGE: ROBERT LANE
CLERK: MICHELLE THORN
BAILIFF: JAMIE DAVIS
APP: JOHN ALDRICH PRESENT FOR THE PLAINTIFF. HARRY KUEHN PRESENT FOR THE
DEFENDANT. MR. ALDRICH ARGUES HIS MOTION TO STRIKE, ADDING AT THE PREVIOUS
HEARING THE DEFENSE WAS NEGLIGENT IN PROVIDING THE DISCOVERY FROM THE
INSURANCE COMPANY & IMPOSING SANCTIONS DID NOT WORK. MR. ALDRICH ARGUES THE
COURT IMPOSED SANCTIONS OF \$750 PREVIOUSLY & THEY STILL HAVE NOT BEEN PAID &
HE HAS STILL NOT RECEIVED THE INSURANCE DISCOVERY. MR. KUEHN PLEADS WITH THE
COURT REQUESTING ADDITIONAL SANCTIONS BE IMPOSED, NOTING HE HAS A CHECK IN
HAND TO PRESENT TO OPPOSING COUNSEL TODAY. COURT REVIEWS ARGUMENT & IMPOSES
A \$1000 SANCTION THIS TIME AROUND & DEFENSE HAS 30 DAYS TO PROVIDE THE
PREVIOUSLY ORDER INFORMATION/DISCOVERY REGARDING INSURANCE TO MR. FITTS. MR.
KUEHN ACKNOWLEDGES.

05/24/10 9:00 ORDER TO SHOW CAUSE
JUDGE: ROBERT LANE
CLERK: RACHEL ALDANA
BAILIFF: DEPUTY J. MURPHY
APP: JOHN ALDRICH PRESENT FOR THE PLAINTIFF; THOMAS GIBSON IN FOR HARRY KUEHN,
PRESENT FOR THE DEFENDANTS. MR. ALDRICH BRIEFS THE ORDER TO SHOW CAUSE AND
OUTLINES CASE HISTORY. MR. ALDRICH CONTINUES TO PROVIDE ARGUMENT IN REGARDS
TO OPPOSING COUNSEL FAILING TO COMPLY WITH THE SANCTIONS THAT WERE ISSUED
BY THE COURT AND STATES THAT THERE IS STILL NO DISCOVERY PRODUCED. MR.
ALDRICH REQUESTS A \$5,000 SANCTION AND \$500 A DAY UNTIL THE DISCOVERY IS
BROUGHT FOWARD AND REQUESTS THE COURT ISSUE A BENCH WARRANT FOR THE
DEFENDANT. MR. GIBSON PROVIDES REBUTTAL ARGUMENT AND REQUESTS A CLOSED
COURTROOM TO DISCLOSE THE ISSUES REGARDING ATTORNEY HARRY KUEHN. MR. GIBSON

Case #: CV-0024539

INFORMS THE COURT OF HARRY KUEHN'S ISSUES WITH DEPRESSION. COURT ISSUES THE \$5,000 SANCTIONS AND ORDERS THAT HARRY KUEHN PAY THE \$500 A MONTH STARTING JUNE 1, 2010 AND HOLDS HARRY KUEHN IN CONTEMPT OF COURT AND STATES THAT THE \$5,000 WILL GO TOWARD THE FEES AND COSTS OF OPPOSING COUNSEL. PARTIES CONTINUE TO PROVIDE ARGUMENT.

07/19/10 9:00 APPLICATION FOR DEFAULT JUDGMENT

JUDGE: ROBERT W. LANE

CLERK: PATTI ABERNATHY

BAILIFF: STEPHEN (JAMIE) DAVIS

APPEARANCES: JOHN ALDRICH PRESENT WITH JUDITH AND ANTHONY ADAMS. JOHN OHLSON AND JEFF KUMP PRESENT WITH SUSAN FALLINI.

ATTORNEY ALDRICH TOLD THE COURT THE MATTERS ON TODAY ARE HIS APPLICATION FOR DEFAULT JUDGMENT AND ATTORNEY OHLSON'S OPPOSITION TO THE APPLICATION FOR DEFAULT JUDGMENT AND MOTION FOR RECONSIDERATION. THE COURT TOLD THE PARTIES HE WAS INCLINED TO GRANT THE MOTION FOR RECONSIDERATION BUT WOULD LIKE TO HEAR ARGUMENTS FROM BOTH SIDES BEFORE DECIDING. ATTORNEY ALDRICH ARGUES THERE IS NO LEGAL BASIS TO SET ASIDE WHAT HAS ALREADY BEEN DONE IN THIS CASE AND OUTLINES THE HISTORY OF THIS CASE. ATTORNEY ALDRICH TOLD THE COURT IT SHOULD GO FORWARD WITH APPLICATION FOR DEFAULT JUDGMENT TODAY AND HAVE JUDGMENT ENTERED TODAY. THE COURT ASKED WHO WAS GOING TO DETERMINE DAMAGES AND AMOUNTS. ATTORNEY ALDRICH TOLD THE COURT IT SHOULD GO FORWARD WITH THE HEARING TODAY AND THE COURT SHOULD DETERMINE THE AMOUNT OF DAMAGES. ATTORNEY OHLSON OUTLINES THE HISTORY OF DEFENDANT'S REPRESENTATION BY ATTORNEY KUEHN AND BEING TOLD IN THE PAST THAT THE CASE WAS OVER AND DID NOT KNOW UNTIL JUNE OF THIS YEAR THAT THE CASE WAS STILL PENDING. ATTORNEY OHLSON PROVIDES REBUTTAL TO ATTORNEY ALDRICH'S ARGUMENTS. AFTER HEARING ARGUMENTS FROM BOTH SIDES, THE COURT DENIED THE MOTION FOR RECONSIDERATION AND PROCEEDED WITH THE PROVE UP HEARING TODAY AND SCRATCHED THE TRIAL SCHEDULED FOR AUGUST. MR. OLSON TOLD THE COURT HE WILL HOLD HIS MOTIONS TO THE END OF THE TESTIMONY AND ARGUED COMPARATIVE FAULT. ATTORNEY ALDRICH OFFERED REBUTTAL. JUDITH ADAMS WAS SWORN AND TESTIFIED. ANTHONY ADAMS WAS SWORN AND TESTIFIED. SUSAN FALLINI WAS SWORN AND TESTIFIED. MR. OLSON ASKED THE COURT TO TAKE JUDICIAL NOTICE THE ACCIDENT OCCURRED IN OPEN RANGE. AFTER HEARING CLOSING ARGUMENTS FROM BOTH SIDES, THE COURT TOLD THE PARTIES A DECISION WOULD BE MADE IN A COUPLE DAYS.

07/19/10 9:00 CALENDAR CALL - 8/25-28/2010

JURY DRAW - 120 JURORS - FILE TO CINDY

7/19/10

JUDGE: ROBERT W. LANE

CLERK: MICHELLE THORN

BAILIFF: STEPHEN (JAMIE) DAVIS

APP: COURT BRIEFS HE MET WITH COUNSELS IN CHAMBERS & PARTIES STIPULATE TO ALLOW MR. KUEHN 2 WEEKS PROVIDE THE INFORMATION REQUESTED & FAILURE TO PROVIDE SAID DISCOVERY WILL RESULT IN THE COURT STRIKING DEFENDANTS PLEADING RESULTING IN A DEFAULT. COURT ORDERS \$150 A DAY FOR EACH DAY THE ANSWERS TO THE INTERROGATORIES ARE NOT FILED. COUNSELS WERE NOT PRESENT UPON THIS COURT BRIEFING THE RECORD.

JURY TRIAL - D2P - 3 DAYS

8/25/10 CRT

09/28/09 9:00 ORDER TO SHOW CAUSE (SUSAN FALLINI & COUNSEL)

12/23/09 9:00 SETTLEMENT CONFERENCE

Filings:

Date	Pty	Action	Fees
01/31/07	P	COMPLAINT	156.00
01/31/07	P	INITIAL APPEARANCE FEE DISCLOSURE STATEMENT	
01/31/07	C	SUMMONS (ISSUED)	

Case #: CV-0024539

03/14/07	D	DEFENDANT SUSAN FALLINI'S OBJECTION TO PAHRUMP AS FORUM AN	79.00
03/14/07	D	MOTION TO HAVE MATTER HEARD IN TONOPAH	79.00
03/14/07	D	SUSAN FALLINI'S ANSWER AND COUNTERCLAIM	
03/26/07	P	PLAINTIFFS' OPPOSITION TO DEFENDANT SUSAN FALLINI'S	
03/26/07	P	OBJECTION TO PAHRUMP AS FORUM AND MOTION TO HAVE MATTER	
03/26/07	P	HEARD IN TONOPAH	
03/30/07	P	REPLY TO COUNTERCLAIM	
04/30/07	C	ORDER DENYING DEFENDANT'S MOTION TO HAVE MATTER HEARD IN	
04/30/07	C	TONOPAH	
05/02/07	P	NOTICE OF REPRESENTATION BY ATTORNEY (COUNTERDEFENDANTS)	
06/14/07	P	NOTICE OF EARLY CASE CONFERENCE	
10/23/07	P	PLAINTIFF'S & COUNTERDEFENDANT'S CASE CONFERENCE REPORT	
03/26/08	P	NOTICE OF CHANGE OF FIRM NAME	
04/07/08	P	MOTION FOR PARTIAL SUMMARY JUDGMENT	
05/16/08	P	MOTION FOR PARTIAL SUMMARY JUDGMENT	
05/30/08	D	COUNTERDEFENDANT, ESTATE OF MICHAEL DAVID ADAMA, BY AND	
	D	THROUGH HIS MOTHER, JUDITH ADAMS, INDIVIDUALLY AND ON	
	D	BEHALF OF THE ESTATE, JOINDER TO PLAINTIFF'S MOTION FOR	
	D	PARTIAL SUMMARY JUDGMENT	
07/30/08	C	ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY	
	C	JUDGMENT	
08/15/08	P	NOTICE OF ENTRY OF ORDER	
09/22/08	P	MOTION TO REOPEN DISCOVERY & FOR EXTENSION OF TIME TO	
	P	COMPLETE DISCOVERY (FIRST REQUEST)	
10/23/08	C	ORDER GRANTING MOTION FOR SUMMARY JUDGMENT IN FAVOR OF	
	C	COUNTERDEFENDANT, ESTATE OF MICHAEL DAVID ADAMS	
10/27/08	P	COUNTERDEFENDANT, ESTATE OF MICHAEL DAVID ADAMS, BY AND	
	P	THROUGH HIS MOTHER, JUDITH ADAMS, INDIVIDUALLY & ON	
	P	BEHALF OF THE ESTATE, NOTICE OF NON-OPPOSITION TO	
	P	PLAINTIFF'S MOTION TO REOPEN DISCOVERY	
11/13/08	P	NOTICE OF ENTRY OF ORDER	
12/10/08	P	SUBSTITUTION OF ATTORNEYS	
02/17/09	C	ORDER GRANTING PLAINTIFFS' MOTION TO REOPEN DISCOVERY & FO	
	C	AN EXTENSION OF TIME TO COMPLETE DISCOVERY	
02/20/09	P	NOTICE OF ENTRY OF ORDER	
03/03/09	P	LIEN FOR ATTORNEY'S FEES	
03/09/09	P	NOTICE OF CHANGE OF ADDRESS	
03/23/09	P	PLAINTIFF'S MOTION TO COMPEL DEFENDANT'S PRODUCTION OF	
	P	DOCUMENTS	
03/25/09	P	NOTICE OF MOTION TO COMPEL DEFENDANT'S PRODUCTION OG	
	P	DOCUMENTS	
04/06/09	P	CERTIFICATE OF MAILING	
04/27/09	C	ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL DEFENDANT'S	
	C	PRODUCTION OF DOCUMENTS	
05/05/09	P	DEMAND FOR JURY TRIAL	360.00
05/18/09	P	NOTICE OF ENTRY OF ORDER	
05/18/09	P	REQUEST FOR TRIAL SETTING	
05/20/09	C	ORDER TO SET TRIAL	
06/16/09	P	INFORMATION QUESTIONNAIRE	
06/16/09	D	INFORMATION QUESTIONNAIRE	
06/16/09	P	PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S ANSWER AND	
	P	COUNTERCLAIM	
06/22/09	D	INFORMATION QUESTIONNAIRE	
06/24/09	C	ORDER SETTING JURY TRIAL	

Case #: CV-0024539

07/13/09 D OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S
D ANSWER AND COUNTERCLAIM

07/17/09 C ORDER DENYING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S
ANSWER AND COUNTERCLAIM

08/26/09 P NOTICE OF ENTRY OF ORDER

08/31/09 P PLAINTIFF'S EX PARTE MOTION FOR ORDER TO SHOW CAUSE WHY
DEFENDANT SUSAN FALLINI AND HER COUNSEL SHOULD NOT BE HEL
IN CONTEMPT OF COURT

09/10/09 P RECEIPT OF COPY OF ORDER TO SHOW CAUSE WHY DEFENDANT SUSAN
FALLINI & HER COUNSEL SHOULD NOT BE HELD IN CONTEMPT OF
COURT

09/10/09 P RECEIPT OF COPY OF PLAINTIFF'S EX PARTE MOTION FOR ORDER
TO SHOW CAUSE WHY DEFENDANT SUSAN FALLINI & HER COUNSEL
SHOULD NOT BE HELD IN CONTEMPT OF COURT

10/08/09 C ORDER REGARDING ORDER TO SHOW CAUSE WHY DEFENDANT SUSAN
FALLINI AND HER COUNSEL SHOULD NOT BE HELD IN CONTEMPT OF
COURT

10/14/09 P NOTICE OF ENTRY OF ORDER

11/04/09 C FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER STRIKING ANSW
& COUNTERCLAIM OF DEFENDANT SUSAN FALLINI & HOLDING
DEFENDANT'S COUNSEL IN CONTEMPT OF COURT

11/09/09 P NOTICE OF ENTRY OF ORDER

02/04/10 C DEFAULT (PER ORDER FILED 11/4/09)

02/11/10 P NOTICE OF ENTRY OF DEFAULT

04/07/10 P PLAINTIFF'S EX PARTE MOTION FOR ORDER TO SHOW CAUSE WHY
DEFENDANT SUSAN FALLINI AND HER COUNSEL SHOULD NOT BE HEL
IN CONTEMPT OF COURT AND POSSIBLE SANCTIONS BE IMPOSED

04/19/10 C ORDER TO SHOW CAUSE WHY DEFENDANT SUSAN FALLINI AND HER
COUNSEL SHOULD NOT BE HELD IN CONTEMPT OF COURT AND
POSSIBLE SANCTIONS BE IMPOSED

04/26/10 P NOTICE OF ENTRY OF ORDER

06/02/10 P FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER HOLDING
DEFENDANT'S COUNSEL IN CONTEMPT OF COURT

06/04/10 P NOTICE OF ENTRY OF ORDER

06/17/10 D SUBSTITUTION OF ATTORNEYS

06/24/10 P OPPOSITION TO APPLICATION FOR DEFAULT JUDGMENT AGAINST
DEFENDANT SUSAN FALLINI

06/24/10 P APPLICATION FOR DEFAULT JUDGMENT AGAINST DEFENDANT SUSAN
FALLINI

06/24/10 P MEMORANDUM OF COSTS AND DISBURSEMENTS

06/30/10 P AMENDED CERTIFICATE OF SERVICE

07/06/10 D MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION

07/21/10 P REPLY TO FALLINI'S OPPOSITION TO APPLICATION FOR DEFAULT
JUDGMENT AGAINST DEFENDANT SUSAN FALLINI

07/21/10 P OPPOSITION TO FALLINI'S MOTION FOR LEAVE TO FILE MOTION FO
RECONSIDERATION

07/21/10 P SUPPLEMENT TO APPLICATION FOR DEFAULT JUDGMENT AGAINST
DEFENDANT SUSAN FALLINI

08/12/10 C ORDER AFTER HEARING

08/16/10 D NOTICE OF CHANGE OF FIRM AND CONTACT INFORMATION

08/18/10 P NOTICE OF ENTRY OF ORDER

09/08/10 P DECLARATION OF JOHN P. ALDRICH IN SUPPORT OF EX PARTE MOTI
ORDER ALLOWING EXAMINATION OF JUDGMENT DEBTOR

09/09/10 P PLAINTIFFS' EX PARTE MOTION FOR ORDER ALLOWING EXAMINATION

Case #: CV-0024539

OF JUDGMENT DEBTOR

09/10/10	D	NOTICE OF APPEAL
09/10/10	D	CASE APPEAL STATEMENT
09/14/10	P	CERTIFICATE OF SERVICE
09/22/10	R	RECEIPT FOR DOCUMENTS

Total: 674.00

Events:

Date	Time	Code	Event
08/23/10			CHNG DISP CODE WAS CHANGED FROM 'SMJD' TO 'SMJD'.

ATTACHMENT 2

ATTACHMENT 2

1 **ORDR**

John P. Aldrich, Esq.

2 Nevada Bar No. 6877

ALDRICH LAW FIRM, LTD.

3 1601 S. Rainbow Blvd., Suite 160

Las Vegas, Nevada 89146

4 (702) 853-5490

(702) 227-1975 fax

5 *Attorneys for Plaintiff*

FILED

2010 MAY -21 A 8:56

REBECCA BALLAR

CLERK

6 **THE FIFTH JUDICIAL DISTRICT COURT**
7 **THE STATE OF NEVADA, COUNTY OF NYE**

8 Estate of MICHAEL DAVID ADAMS,
9 by and through his mother JUDITH
ADAMS, individually and on behalf of the
Estate,

10 **Plaintiffs,**

11 **vs.**

12 **SUSAN FALLINI, DOES I-X and ROE**
13 **CORPORATIONS I-X, inclusive,**

14 **Defendants.**

15 **SUSAN FALLINI,**

16 **Counterclaimant,**

17 **vs.**

18 Estate of MICHAEL DAVID ADAMS,
19 by and through his mother JUDITH
ADAMS, individually and on behalf of the
Estate,

20 **Counterdefendants.**

Case No.: CV24539

Dept.: 2P

21 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER HOLDING**
22 **DEFENDANT'S COUNSEL IN CONTEMPT OF COURT**

23 THIS MATTER having come on for hearing on Monday, May 24, 2010, a hearing having
24 been held before the Honorable Robert W. Lane, and John P. Aldrich, Esq., of Aldrich Law Firm,
25 Ltd., appearing on behalf of the Plaintiffs, with Thomas Gibson, Esq., appearing on behalf of
26 Defendant, the Court hereby orders as follows:

FINDINGS OF FACT

The Court, having been presented the following facts by Plaintiff's counsel and having received no opposition to the facts by Defendant, makes the following findings of fact:

1. This lawsuit arises out of an incident that occurred on or about July 7, 2005. At approximately 9:00 p.m. on that day, MICHAEL DAVID ADAMS ("Adams") was driving his 1994 Jeep Wrangler on SR 375 highway in Nye County, when he collided with a Hereford cow ("cow") owned by Defendant SUSAN FALLINI ("Fallini"). Adams died at the scene as a result of the impact.

2. The decedent's mother, JUDITH ADAMS ("Judith"), filed a complaint on behalf of Adams' mother and his estate on November 29, 2006 and properly served Fallini with process. Fallini filed her Answer and Counterclaim on March 14, 2007.

3. On October 31, 2007, Plaintiff submitted interrogatories to Fallini. Those interrogatories were never answered. Adams also submitted requests for admissions and its first set of requests for production of documents on October 31, 2007. A second set of requests for production of documents were submitted to Fallini on July 2, 2008, requesting information as to Fallini's insurance policies and/or carriers that may provide coverage for damages that occurred as a result of the incident.

4. Fallini never responded to any of these requests. To this date, Fallini has not produced any responses of any kind to Plaintiff's written discovery requests. Despite an extension requested by Plaintiff and granted by the Court, the discovery period has lapsed without any responses being provided by Defendant.

5. On or about April 7, 2008 (and again on May 14, 2008 with a Certificate of Service), Plaintiff filed a Motion for Partial Summary Judgment. Defendant did not oppose that motion and the Court granted that Motion on July 30, 2008. Notice of entry of the Order Granting Plaintiff's Motion for Summary Judgment was served on Defendant on August 15, 2008.

6. Plaintiff attempted to amicably resolve the discovery dispute and obtain a copy of

1 Defendant's applicable insurance policies, but to no avail. On February 24, 2009, Plaintiff sent
2 letters to Defendant's counsel seeking responses to the discovery.

3 7. Plaintiff's counsel, Mr. Aldrich, attempted to discuss this discovery issue with
4 Defendant's counsel, Mr. Harry Kuehn, as well. On or about March 6, 2009, Plaintiff's counsel
5 contacted the office of Defendant's counsel. Mr. Aldrich was informed that Mr. Kuehn was not
6 available. Mr. Aldrich left a message with Mr. Aldrich's phone number and asked that Mr. Kuehn
7 return the call. No return call ever came.

8 8. On March 18, 2009, Mr. Aldrich again contacted the office of Mr. Kuehn. Mr.
9 Aldrich was informed that Mr. Kuehn was not available. Mr. Aldrich left a message with Mr.
10 Aldrich's phone number and asked that Mr. Kuehn return the call. No return call ever came.
11 (Exhibit 1.)

12 9. On March 23, 2009, Plaintiff filed a Motion to Compel Defendant's Production of
13 Documents, including information regarding any insurance policies that may provide coverage for
14 the incident as contemplated in the Plaintiff's second request for documents. This motion was heard
15 on April 27, 2009. The Defendant's attorney, Mr. Kuehn, attended the hearing. Mr. Kuehn did not
16 oppose the motion to compel and agreed at the hearing it was warranted. Mr. Kuehn provided no
17 explanation as to why Defendant failed to respond to all discovery requests. Mr. Kuehn agreed
18 sanctions were warranted, however, he disputed the amount of sanctions.

19 10. At the hearing on April 27, 2009, this Court granted the Motion to Compel and
20 awarded John Aldrich, Esq., \$750.00 in sanctions for having to bring the motion. A Notice of Entry
21 of Order on the order granting the motion to compel was entered on May 18, 2009. It was served
22 by mail on Defendant on May 14, 2009. Defendant never complied with the Order.

23 11. On June 16, 2009 Plaintiff filed a Motion to Strike Defendant's Answer and
24 Counterclaim due to Defendants complete failure to comply with discovery requests and this Court's
25 Order. The Defendant's counsel again attended the hearing and again provided no explanation as
26 to why Defendant failed to respond to all discovery requests, but stated Defendant would comply
27

1 with discovery requests.

2 12. The Court denied Plaintiff's Motion to Strike based on Defendant's counsel's
3 promises to comply. This Court did, however, order Defendant to comply with the Order granting
4 Plaintiff's Motion to Compel and to respond to Plaintiff's discovery requests by August 12, 2009
5 or Defendant's Answer and Counterclaim would be stricken. The Court also ordered Defendant to
6 pay a \$1,000 sanction.

7 13. To date, Defendant has failed to comply with the order of this Honorable Court and
8 respond to Plaintiff's discovery requests. Defendant's counsel has paid the \$1,750.00 in sanctions
9 as ordered by the Court.

10 14. Plaintiff is entitled to the discovery responses, and in fact, Defendant has admitted
11 as much on more than one occasion. Nevertheless, Defendant refused and continues to refuse to
12 respond.

13 15. Because Defendant failed and refused to follow this Court's order and provide the
14 requested information, Plaintiff brought its first Ex Parte Motion for Order to Show Cause Why
15 Defendant and Her Counsel Should Not Be Held in Contempt. The Order to Show Cause was
16 granted, and a hearing was scheduled on September 28, 2009. A conference was held in chambers,
17 so as to avoid embarrassment to Defendant's counsel. Following the conference, the Court ordered:

18 (A) That Defendant's counsel shall have until close of business on October 12,
19 2009, to comply with the Order Granting Plaintiff's Motion to Compel and
20 provide responses to Plaintiff's Request for Production of Documents,
21 including the requested insurance information.

22 (B) That if Defendant does not provide the above-described information by
23 October 12, 2009, Defendant's counsel will be held in contempt of court and
24 will be fined \$150.00 per day, beginning October 13, 2009, until said
25 information is provided. The days shall be calculated on a seven-day week.

26 (C) That if the above-described information is not provided by October 12, 2009,
27

1 the Court will strike defendant's pleadings in their entirety. Plaintiff will not
2 need to renew any motion regarding its request to strike defendant's
3 pleadings; Plaintiff will be able to simply submit an Order Striking the
4 Pleadings for signature by the Court.

5 16. Defendant and her counsel failed to provide the information at issue by October 12,
6 2009. Consequently, on or about November 4, 2009, the Court entered its Findings of Fact,
7 Conclusions of Law and Order Striking Answer and Counterclaim of Defendant Susan Fallini and
8 Holding Defendant's Counsel in Contempt of Court. Pursuant to said Order, Defendant's counsel,
9 Harold Kuehn, Esq., was held in contempt of Court and was ordered to pay to Plaintiff's counsel,
10 John P. Aldrich, Esq., \$150.00 per day, beginning October 13, 2009, and continuing to accrue until
11 the information described above is provided. The Order provided that the days shall be calculated
12 on a seven-day week, and that the Order shall constitute a judgment upon which Mr. Aldrich can
13 execute. Interest on unpaid balances was ordered to accrue at the statutory rate.

14 17. Again in contravention of the Court's orders, Defendant and her counsel have failed
15 and refused to provide the information they have been ordered to provide. Defendant's counsel's
16 utter refusal to abide by the Court's orders has stalled and frustrated the litigation process.

17 18. On or about April 7, 2010, Plaintiff again brought an Ex Parte Motion for Order to
18 Show Cause Why Defendant Susan Fallini and Her Counsel Should Not Be Held in Contempt of
19 Court and Possible Sanctions Be Imposed. On or about April 19, 2010, the Court entered the Order
20 to Show Cause and set a hearing for Monday, May 24, 2010.

21 19. As with the prior Order to Show Cause (and several other motions), despite personal
22 service on Defendant's counsel, neither Defendant nor her counsel responded in writing to the Order
23 to Show Cause.

24 20. The Court held a hearing on Monday, May 24, 2010. Thomas Gibson, Esq., the law
25 partner to Harry Kuehn, Esq., appeared on behalf of Defendant. Defendant Susan Fallini did not
26 appear at the hearing.

21. During the hearing, Mr. Gibson indicated he had not seen the file and provided no valid excuse for Defendant's or Defendant's counsel's failure and refusal to abide by the Court's prior orders. Mr. Aldrich also advised the Court that over 220 days had passed since the Court-imposed sanction began to accrue, and that over \$30,000.00 was now due pursuant to that sanction.

22. Mr. Gibson made specific representations to the Court that the client, Defendant Susan Fallini, was unaware of the status of this case. Mr. Gibson also made specific representations that he would obtain the information at issue immediately and provide it to Plaintiff. Mr. Aldrich requested that the Court impose a \$5,000.00 sanction, as well as a \$500.00 per day sanction, starting on May 25, 2010, until Defendant provides the information. The Court imposed the \$5,000.00 sanction upon Defendant's counsel. The Court advised both counsel that the Court would give Defendant until June 1, 2010 to comply with the Court's prior orders before increasing the daily sanction from \$150.00 per day to \$500.00 per day.

23. Plaintiff's counsel also requested that the Court issue a bench warrant for Defendant Susan Fallini, given her failure to appear as ordered by the Court on two occasions. The Court declined to do so at the hearing on May 24, 2010, but indicated it may be willing to do so if Defendant does not comply this time.

CONCLUSIONS OF LAW

Based on the Findings of Fact, as set forth above, the Court makes the following conclusions of law:

1. Pursuant to NRCP 34, Plaintiff has the right to request documents which are discoverable pursuant to NRCP 26. According to NRCP 34, Defendant has 30 days from receipt of the requests for production of documents to provide appropriate responses.

2. NRCP 34(b) permits a party to seek relief under NRCP 37(a) if the party who receives discovery requests fails to respond appropriately. NRCP 37(a) provides that the Court may enter an order compelling a non-responsive party to disclose the requested information.

3. This Court has at least four times entered an order compelling Defendant to respond

1 to Discovery requests.

2 4. NRCP 37(b)(2)(c), permits "an order striking out pleadings or parts thereof," for
3 discovery abuses. "Selection of a particular sanction for discovery abuses under NRCP 37 is
4 generally a matter committed to the sound discretion of the district court." *Stubli v. Big Int'l Trucks,*
5 *Inc.*, 107 Nev. 309, 312-313, 810 P.2d 785 (1991) (citing *Fire Ins. Exchange v. Zenith Radio Corp.*,
6 103 Nev. 648, 649, 747 P.2d 911, 912 (1987) and *Kelly Broadcasting v. Sovereign Broadcast*, 96
7 Nev. 188, 192, 606 P.2d 1089, 1092 (1980.))

8 5. The Nevada Supreme Court held that default judgments will be upheld where "the
9 normal adversary process has been halted due to an unresponsive party, because diligent parties are
10 entitled to be protected against interminable delay and uncertainty as to their legal rights." *Hamlett*
11 *v. Reynolds*, 114 Nev. 863, 963 P.2d 457 (1998) (citing *Skeen v. Valley Bank of Nevada*, 89 Nev.
12 301, 303, 511 P.2d 1053, 1054 (1973).

13 6. Defendant has provided no responses whatsoever, nor has Defendant objected to any
14 request. Defendant has failed on at least four occasions to comply with this Court's Order. At no
15 time has Defendant or her counsel given any excuse or justification for their failure and refusal to
16 abide by the Court's orders.

17 7. Defendant has been given ample opportunity to comply with the Court's Orders.
18 Defendant has halted the litigation process and the additional sanctions of \$5,000.00 immediately
19 and \$500.00 per day beginning June 1, 2010, if Defendant does not comply with the Court's prior
20 orders, are appropriate under the circumstances.

21 ORDER

22 Based on the Findings of Fact and Conclusions of Law, as set forth above:

23 IT IS HEREBY ORDERED that Defendant's counsel, Harold Kuehn, Esq., is in contempt
24 of Court and must pay to Plaintiff's counsel, John P. Aldrich, Esq., \$5,000.00, in addition to the
25 \$150.00 per day that began accruing on October 13, 2009, and which continues to accrue until the
26 Defendant and her counsel comply with the Court's prior orders, including providing the information
27

1 sought by Plaintiff.

2 IT IS FURTHER ORDERED that Defendant shall provide the information sought by
3 Plaintiff, and which Defendant and her counsel have been ordered to provide, by June 1, 2010. In
4 the event Defendant does not comply with the Court's prior orders by June 1, 2010, Mr. Kuehn will
5 be held in contempt of Court again and must pay to Plaintiff's counsel, John P. Aldrich, Esq.,
6 \$500.00 per day, beginning June 1, 2010, and continuing to accrue until the information described
7 above is provided. The days shall be calculated on a seven-day week, and this Order shall constitute
8 a judgment upon which Mr. Aldrich can execute. Interest on unpaid balances shall accrue at the
9 statutory rate.

10 IT IS SO ORDERED.

11 DATED this 2 day of June, 2010.

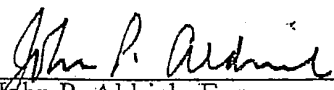
12 **ROBERT W. LANE**

13

DISTRICT COURT JUDGE

14 Submitted by:

15 **ALDRICH LAW FIRM, LTD.**

16
17 
18 John P. Aldrich, Esq.
19 Nevada Bar No.: 6877
20 1601 S. Rainbow Blvd., Suite 160
Las Vegas, Nevada 89146
Attorneys for Plaintiff

ATTACHMENT 3

ATTACHMENT 3

ORIGINAL

DFLT

John P. Aldrich, Esq.
Nevada Bar No. 6877
ALDRICH LAW FIRM, LTD.
1601 S. Rainbow Blvd., Suite 160
Las Vegas, Nevada 89146
(702) 853-5490
(702) 227-1975 fax
Attorneys for Plaintiff

FILED
2007 MAR -14 P 2:27
John P. Aldrich

THE FIFTH JUDICIAL DISTRICT COURT
THE STATE OF NEVADA
COUNTY OF NYE

Estate of MICHAEL DAVID ADAMS,
by and through his mother JUDITH
ADAMS, individually and on behalf of the
Estate,

Plaintiffs,

vs.

SUSAN FALLINI, DOES I-X and ROE
CORPORATIONS I-X, inclusive,

Defendants.

SUSAN FALLINI,

Counterclaimant,

vs.

Estate of MICHAEL DAVID ADAMS,
by and through his mother JUDITH
ADAMS, individually and on behalf of the
Estate,

Counterdefendants.

Case No.: CV24539
Dept.: 2P

DEFAULT

It appearing from the files and records in the above-entitled action that Defendant SUSAN FALLINI, being duly served with a copy of the Summons and Complaint on the 1st day of March, 2007, and that an Answer and Counterclaim were filed on March 14, 2007. Defendant and her

1 counsel have not participated in this matter in good faith and both have been found in contempt of
2 Court. Based on the Findings of Fact and Conclusions of Law, on November 4, 2009, it was ordered
3 that Defendant's Answer and Counterclaim be stricken and the Court Clerk enter a Default against
4 Defendant Susan Fallini. Default is so entered.

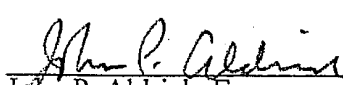
5 DATED this 14 day of February, 2010.

6 CLERK OF THE COURT

7
8 By: 
9 Deputy Clerk

10 The undersigned hereby requests
11 and directs the entry of default.

12 **ALDRICH LAW FIRM, LTD.**

13
14 
15 John P. Aldrich, Esq.
16 Nevada Bar No.: 6877
17 1601 S. Rainbow Blvd., Suite 160
18 Las Vegas, Nevada 89146
19 Attorney for Plaintiffs
20
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28

ATTACHMENT 4

ATTACHMENT 4



Case No. CV 24539
Dept. 2P

2010 JUL 20
Sharon S. Delaney
2010 JUL 20

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA, IN AND FOR THE COUNTY OF NYE

ESTATE OF MICHAEL DAVID ADAMS,
by and through his mother JUDITH
ADAMS, individually and on behalf of the
Estate

Plaintiff,

vs.

SUSAN FALLINI; DOES I-X, and ROE
CORPORATIONS I-X, inclusive

Defendants.

ORDER AFTER HEARING

This matter is regarding a motor vehicle accident involving Michael Adams and a Hereford Cow owned by the Defendant. On June 24, 2010, Plaintiff filed an Application for Default Judgment against Defendant Susan Fallini. Plaintiff requested \$2,500,000 for grief, sorrow, loss of support; \$1,640,696 for lost career earnings; \$5,000,000 for hedonic damages loss of life's pleasure and enjoyment; \$35,000 for Sanctions already levied against Defendants; \$50,000 for attorney's fees; and \$5,188.85 for funeral and other related expenses for a total of \$9,230,884.85. Defendants filed an Opposition on June 24, 2010. A hearing was held on this matter on July 19, 2010, in which Plaintiff and Defendants appeared with their counsels. After hearing arguments from both sides regarding the Defendant's violation of procedural rules, the Court denied Defendant's



1
2 Motion for Reconsideration and proceeded with the Prove Up Hearing and Canceled the
3 Trial scheduled for August 2010. Judith Adams, Anthony Adams, and Susan Fallini were
4 sworn in and testified. The parties' counsel gave their closing statements. The Court
5 heard testimony, counsels' statements and arguments, and reviewed the pleadings on file
6 herein. This Order follows.

7
8 ORDER

9 IT IS HEREBY ORDERED that the Defendant's Motion for Reconsideration is
10 DENIED.

11 IT IS FURTHER ORDERED that the Court grants the Plaintiff \$1,000,000 in
12 Damages for Grief, Sorrow, and loss of support.

13 IT IS FURTHER ORDERED that the Court grants the Plaintiff \$1,640,696 in
14 Damages for future lost earnings.

15 IT IS FURTHER ORDERED that the Court grants the Plaintiff \$50,000 in
16 Attorney's Fees.

17 IT IS FURTHER ORDERED that the Court grants the Plaintiff \$35,000 in
18 sanctions levied against the Defendant.

19 IT IS FURTHER ORDERED that the Court grants the Plaintiff \$5,188.85 in
20 funeral and other related expenses.

21 IT IS FURTHER ORDERED that Plaintiff's request for Hedonic damages is
22 DENIED.
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DATED this 12th day of August 2010.


DISTRICT JUDGE

Fifth Judicial District Court
ESMERELDA, MINERAL AND NYE COUNTIES





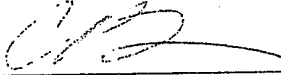
CERTIFICATION OF MAILING

The undersigned hereby certifies that on the 12th day of August 2010, he mailed
copies of the foregoing ORDER AFTER HEARING to the following:

John P. Aldrich, Esq.
ALDRICH LAW FIRM, LTD.
1601 S. Rainbow Blvd., Suite 160
Las Vegas, NV 89146

John Ohlson, Esq.
BOWEN, HALL, OHLSON & OSBORNE
555 South Center Street
Reno, NV 89501

Katherine M. Barker, Esq.
LAW OFFICE OF KATHERINE M. BARKER
823 S. Las Vegas Blvd., Ste. 300
Las Vegas, NV 89101


C. PAUL TECHIO
Law Clerk to
DISTRICT JUDGE

ATTACHMENT 5

ATTACHMENT 5

ORIGINAL

John Ohlson, Esq.
Bar Number 1672
BOWEN HALL OHLSON & OSBORNE
555 South Center Street
Reno, Nevada 89501
Telephone: (775) 323-8678
Attorneys for Susan Fallini

RECEIVED
JAN 24 2010
CLERK

FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

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

Plaintiff,

Case No.: CV24539

Dept. No.: 2P

vs.

SUSAN FALLINI, DOES I-X, and
ROECORPORATIONS I-X, inclusive,

Defendant.

AND ALL RELATED CLAIMS.

OPPOSITION TO APPLICATION FOR DEFAULT JUDGMENT
AGAINST DEFENDANT SUSAN FALLINI

Comes Now, Defendant SUSAN FALLINI, by and through her counsel of record, John Ohlson, Esq. and hereby submits the within opposition to application for default judgment as follows:

1. Undersigned Counsel was just retained to represent defendants herein, and just received the Application for Default from former counsel on today's date.
2. On information and belief, the defendant Susan Fallini learned of the status of this case last week. She promptly sought new counsel.

- 1 3. Plaintiff's Counsel has accurately described the procedural history of this case beginning
2 at page 3 of his motion, and continuing through page 7.
- 3 4. On information and belief, defendant's former counsel, Mr. Kuehn suffered some sort of
4 mental breakdown, and allowed this case, and others in his office to become the "train
5 wreck " that it is, without informing his client, Ms Fallini.
- 6 5. Undersigned counsel is working as quickly as possible to prepare and file a motion with
7 this Court seeking redress on behalf of the defendant who is blameless in this disaster.
- 8 6. It is the understanding that a status conference is set before this Court on July 19, 2010. It
9 is planned that Defendant's motions will be filed in sufficient time for opposition thereto
10 to be made before that status conference and the Court's hearing of this application and
11 other matters at the Status conference.
- 12 7. It would aggravate the injustice that has been visited on all parties and the Court by Mr.
13 Kuehn to continue to proceed in the default of the defendant, without giving the defendant
14 an opportunity to be heard.

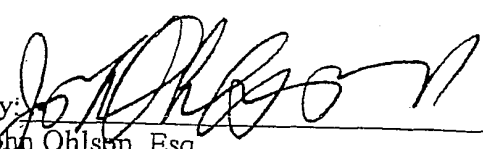
15 Based on the foregoing, it is respectfully requested that the Court defer ruling on the
16 plaintiff's Application For Default until the matter comes before the Court on July 19, 2010 or
17 until such other time as the Court fixes for a hearing to be had hereon.

18 **AFFIRMATION**
19 **Pursuant to NRS 239B.030**

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

22 Dated this 23 day of June, 2010.

23 **BOWEN HALL OHLSON & OSBORNE**

24
25
26 By: 
27 John Ohlson, Esq.
28 Bar Number 1672
555 S. Center Street
Reno, Nevada 89501
Telephone: (775) 323-8678

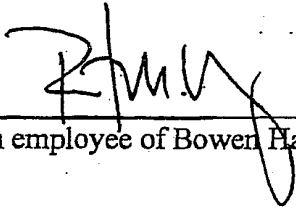
1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of BOWEN, HALL,
3 OHLSON, & OSBORNE, and that on this date I personally served a true copy of the foregoing
4
5 **OPPOSITION TO APPLICATION FOR DEFAULT JUDGMENT AGAINST**
6 **DEFENDANT SUSAN FALLINI**, by the method indicated and addressed to the following:

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

☒ Via U.S. Mail
☐ Via Overnight Mail
☐ Via Hand Delivery
☒ Via Facsimile
☐ Via ECF

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12 DATED this 23 day of June, 2010.

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15 An employee of Bowen Hall
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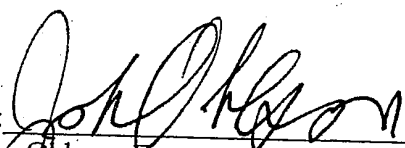
1 Nevada from: (1) the August 12, 2010 Order After Hearing.

2 DATED this 7 day of September, 2010.

3
4 **AFFIRMATION**
5 **Pursuant to NRS 239B.030**

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

8 Dated this 7 day of September, 2010.

9
10
11 By: 
12 John Olson, Esq.
13 Bar Number 1672
14 275 Hill Street, Suite 230
15 Reno, Nevada 89501
16 Telephone: (775) 323-2700

17 Jeff Kump, Esq.
18 Bar Number 5694
19 Marvel & Kump, Ltd.
20 Elko, Nevada 89801
21 Telephone: (775) 777-1204
22 *Attorneys for Susan Fallini*
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), 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 **NOTICE OF APPEAL**, by the method indicated and addressed to the following:

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

☒ Via U.S. Mail
☐ Via Overnight Mail
☐ Via Hand Delivery
☒ Via Facsimile
☐ Via ECF

DATED this 7 day of September, 2010.


Robert M. May

ATTACHMENT 6

ATTACHMENT 6

1 John Ohlson, Esq.
2 Bar Number 1672
3 275 Hill Street, Suite 230
4 Reno, Nevada 89501
5 Telephone: (775) 323-2700

6 Jeff Kump, Esq.
7 Bar Number 5694
8 Marvel & Kump, Ltd.
9 Elko, Nevada 89801
10 Telephone: (775) 777-1204
11 *Attorneys for Susan Fallini*

P. Aldrich

12 **FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
13 **IN AND FOR THE COUNTY OF NYE**

14 * * * * *

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

18 Plaintiff,

Case No.: CV24539

19 vs.

Dept. No.: 2P

20 SUSAN FALLINI, DOES I-X, and
21 ROE CORPORATIONS I-X, inclusive,

22 Defendant.

23 AND ALL RELATED CLAIMS.

24 **NOTICE OF APPEAL**

25 TO: Plaintiff, and her counsel of record, John Aldrich, Esq.

26 Notice is given that Defendant SUSAN FALLINI, appeals to the Supreme Court of

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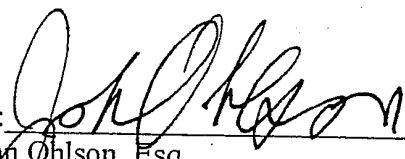
1 Nevada from: (1) the August 12, 2010 Order After Hearing.

2 DATED this 7 day of September, 2010.

3
4 **AFFIRMATION**
5 **Pursuant to NRS 239B.030**

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

8 Dated this 7 day of September, 2010.

9
10
11 By: 
12 John Ohlson, Esq.
13 Bar Number 1672
14 275 Hill Street, Suite 230
15 Reno, Nevada 89501
16 Telephone: (775) 323-2700

17 Jeff Kump, Esq.
18 Bar Number 5694
19 Marvel & Kump, Ltd.
20 Elko, Nevada 89801
21 Telephone: (775) 777-1204
22 *Attorneys for Susan Fallini*
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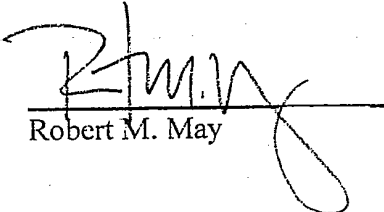
1
2
3 **CERTIFICATE OF SERVICE**

4 Pursuant to NRCP 5(b), I hereby certify that I am an employee of JOHN OHLSON, and
5 that on this date I personally served a true copy of the foregoing **NOTICE OF APPEAL**, by the
6 method indicated and addressed to the following:

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

☒ Via U.S. Mail
☐ Via Overnight Mail
☐ Via Hand Delivery
☒ Via Facsimile
☐ Via ECF

9
10
11 DATED this 7 day of September, 2010.

12
13 
14 Robert M. May
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2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**
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4 **SUSAN FALLINI,**

5
6 **Appellant,**

7 **vs.**

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

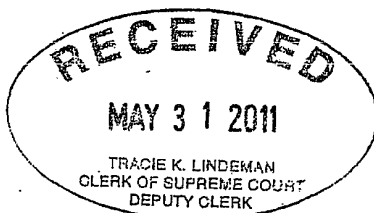
11 **Respondent.**
12
13

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

17 **APPELLANTS' OPENING BRIEF**
18
19

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Supreme Court No.: 56840

FILED

MAY 31 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

11-16235

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11 By and through his mother JUDITH ADAMS,
12 Individually and on behalf of the Estate,
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14 Respondent.
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18 and for the County of Nye
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1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2 SUSAN FALLINI,

Supreme Court No.: 56840

3 Appellant,

4 vs.

**APPELLANT'S
OPENING BRIEF**

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

8 Respondent.
9 _____ /

10 Pursuant to NRAP 28(a), Appellant, Susan Fallini, hereby submits Appellant's
11 Opening Brief:

12 **JURISDICTIONAL STATEMENT**

13 An aggrieved party may take an appeal from a "final judgment entered in an action
14 or proceeding . . ." NRAP 3A(b)(1). A final Judgment in an action or proceeding is
15 essentially one that disposes of the issues presented in the case, determines the costs, and
16 leaves nothing for future consideration of the court. *Alper v. Posin*, 77 Nev. 328, 344 P.2d
17 676 (1959). When no further action of the court is required in order to determine the
18 rights of the parties in the action the order or judgment is final; when the case is retained
19 for further action, it is interlocutory. *Perkins v. Sierra Nevada Silver Mining Co.*, 10 Nev.
20 405 (1876).

21 On August 12, 2010, the Fifth Judicial District Court of the State of Nevada
22 entered an Order After Hearing, denying Defendant's Motion for Reconsideration,
23 granting the Plaintiff damages in the principal amount of \$1,000,000 for grief, sorrow and
24 loss of support together with damages for future lost earnings in the amount of
25 \$1,640,696, attorney's fees in the amount of \$50,000, sanctions in the amount of \$35,000
26 and funeral expenses in the amount for \$5,188.85, and cancelling the trial that had been
27 scheduled (*See* Order After Hearing entered August 12, 2010, Jt. Appx. II, 222-225¹). All

28 ¹ References to pages in Joint Appendix will be in the form "Jt. Appx. [volume].[page(s)]". Thus "Jt. Appx. II., 222-
225", above, refers to volume II, pages 222-225, in Appellants' Appendix.

1 other issues had been resolved previously in this case through the entry of partial
2 summary judgment, the striking of Susan Fallini's Answer and Counterclaim and entry of
3 a default. Jt. Appx. II, 55-57, 26-31, and 41-42.

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

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

16 ISSUES PRESENTED FOR REVIEW

- 17 (1) Whether the district court committed a reversible error in denying Defendant's
18 Motion for Reconsideration.
- 19 (2) Whether the district court erred in vacating the jury trial, and determining damages.
- 20 (3) Whether damages awarded by the district court were excessive, and without a legal
21 basis.

22 STATEMENT OF CASE

23 The action arose out of wrongful death claims asserted by Plaintiff, Adams against
24 Defendant, Fallini. Jt. Appx. I, 1-6. Michael David Adams (hereinafter Michael) was
25 driving his car on July 7, 2005, when he hit a cow owned by Fallini, and died. Jt. Appx. I,
26 3. The complaint was filed on January 31, 2007. Jt. Appx. I, 1. Fallini filed her Answer
27 and Counterclaim on March 14, 2007. Jt. Appx. I, 10. Soon after the Answer and
28 Counterclaim were filed, Fallini's attorney Harold Kuehn (hereinafter Kuehn) failed to

1 take further necessary action including the failure to respond to discovery requests such as
2 the request for admissions. Jt. Appx. II, 91-95.

3 As a result of Kuehn's failure to answer the requests for admissions, inaccurate
4 statements establishing Fallini's liability were deemed admitted. Jt. Appx. I, 55-57. On
5 July 30, 2008 the District Court entered an Order Granting Plaintiffs' Motion for Partial
6 Summary Judgment establishing Fallini's liability leaving only the issue of damages left
7 to be heard. Jt. Appx. I, 55-57. Notice of Entry of that Order was filed on August 15,
8 2008. Jt. Appx. I, 58-62. On June 16, 2009, Plaintiff moved to Strike Defendant's Answer
9 and Counterclaim, which Kuehn opposed requesting that the court "decline to strike the
10 answer and counterclaim in favor of imposing further monetary sanction against him." Jt.
11 Appx. I, 224-231. Kuehn declared to the Court that the discovery noncompliance was
12 "absolutely not the fault of the party and the blame should be attributed to counsel in full."
13 Jt. Appx. I, 226. On July 17, 2009, the Court denied Plaintiff's Motion to Strike
14 Defendant's Answer and Counterclaim. Jt. Appx. I, 232-233. However, on November 4,
15 2009, after repeatedly sanctioning Kuehn for his continued failure to respond to discovery
16 requests and orders, the Court entered a Findings of Fact, Conclusions of Law and Order
17 Striking Answer and Counterclaim of Defendant Fallini and Holding Defendant's
18 Counsel in Contempt of Court. Jt. Appx. II, 26-31. Notice of entry of that Order was filed
19 on November 9, 2009, and a Default was entered by the clerk of the court pursuant to that
20 Order on February 4, 2010. Jt. Appx. II, 32-33, 41.

21 On June 16, 2010, Fallini substituted counsel replacing Kuehn. Jt. Appx. II, 87-88.
22 On June 24, 2010, Adams filed an Application for Default Judgment Against Defendant
23 Susan Fallini. Jt. Appx. II, 89-129. This Motion was opposed that same day (*See*
24 *Opposition*, Jt. Appx. II, 130-132). Fallini then filed a Motion for Leave to File a Motion
25 for Reconsideration that Adams opposed. (*See Motion for Reconsideration "MFR"*,
26 attached as Exhibit 1 thereto, Jt. Appx. II, 138-159) Adams' Application and Fallini's
27 Motion were heard on July 19, 2010, resulting in the final Order After Hearing entered
28 August 12, 2010, granting Adams' Application, denying Fallini's Motion, and granting

1 Adams a total of \$2,730,884.85 in damages and attorney's fees, which Fallini Appeals
2 from (*See* Order After Hearing entered August 12, 2010, Jt. Appx. II, 222-225).

3 **RELEVANT FACTS**

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

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

21 On or about October 31, 2007, Kuehn was served with discovery requests
22 including Requests for Admission by Adams. Jt. Appx. I, 40-51. Kuehn failed to respond
23 to said Requests for Admission before the expiration of 30 days, and, in fact, never
24 responded to the requests. Jt. Appx. I, 40-51. As a direct result of Kuehn's failure to
25 respond to the Requests for Admission the requests were deemed admitted by default
26 pursuant to NRCP 36. Jt. Appx. I, 71-74. Thus, Fallini "admitted" that: the area of the
27 accident was not open range; that Fallini had failed to follow the custom and practice of
28 ranchers in the area of tagging cattle with luminous tags so that they could be seen at night

1 on the roadway (a practice that has never existed); and other statements that established
2 Fallini's liability in the matter and extinguished her defenses. Kuehn never informed
3 Fallini of the discovery requests. Jt. Appx. I, 71-74.

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

7 On April 7, 2008 (and again on May 14, 2008 with a certificate of service) Adams
8 filed their Motion for Partial Summary Judgment. Jt. Appx. I, 40. Kuehn failed to oppose
9 this motion. Jt. Appx. I, 71-74. The Motion was based primarily on the admissions
10 contained in the request for admissions. Jt. Appx. I, 41-49. A hearing on the Motion was
11 held on July 14, 2008, which Kuehn failed to appear at and the motion was granted (*See*
12 court minutes in Case Summary, Jt. Appx. II, 240-244). The Court entered its Order
13 Granting Plaintiff's Motion for Partial Summary Judgment on July 30, 2008. Jt. Appx. I,
14 55-57. Notice of entry of that Order was served on Kuehn on August 15, 2008. Jt. Appx.
15 I, 58-62.

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

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

8 On November 4, 2009, after repeatedly sanctioning Kuehn for his continued failure
9 to respond to discovery requests and orders the Court entered a Findings of Fact,
10 Conclusions of Law and Order Striking Answer and Counterclaim of Defendant Susan
11 Fallini and Holding Defendant's Counsel in Contempt of Court. Jt. Appx. II, 26-31.
12 Notice of entry of that Order was filed on November 9, 2009. Jt. Appx. II, 32-40. Default
13 was entered by the clerk of the court pursuant to that Order on February 4, 2010. Jt. Appx.
14 II, 41-42. On June 2, 2010, the Court entered another Findings of Fact, Conclusions of
15 Law and Order Holding Defendant's Counsel in Contempt of Court, this time fining
16 Kuehn \$5,000.00 plus an additional \$500.00 per day for every day after the 30th day
17 following the entry of that Order that Kuehn continued to fail to respond to Discovery
18 requests. Jt. Appx. II, 68-75. Kuehn, nonetheless maintained his inaction.

19 The Order for Partial Summary Judgment established Fallini's liability in this
20 matter, and the Order Striking Answer and Counterclaim left Fallini in the position of
21 default. The default stripped Fallini of all defenses (*See* MFR Jt. Appx. II, 138-159). Still,
22 Kuehn did not notify Fallini of the status of the case. Kuehn failed to inform Fallini about
23 these circumstances, having previously told her that the case was "over" (*See* MFR, Jt.
24 Appx. II, 138-159). Kuehn never brought Fallini to any of the hearings and repeatedly
25 told the Court that the responsibility for the inaction was his alone (*See* court minutes in
26 Case Summary, Jt. Appx. II, 240-244). Finally, in June of 2010, Kuehn's partner, Tom
27 Gibson, Esq. discovered the status of the case and contacted Fallini, informing her of what
28 had transpired over the preceding three years (*See* MFR, Jt. Appx. II, 138-159). Gibson

1 informed Fallini that Kuehn has bi-polar disorder, and "went off his meds" (*See* MFR Jt.
2 Appx. II, 138-159). Fallini immediately hired new counsel filing a Substitution of
3 Counsel on June 16, 2010, replacing Kuehn with the undersigned counsel. Jt. Appx. II,
4 87-88. On June 24, 2010, Adams filed an Application for Default Judgment Against
5 Defendant Susan Fallini. Jt. Appx. II, 89-129. This Application was opposed that same
6 day (*See* Opposition, Jt. Appx. II, 130-132). Fallini's new counsel then filed a Motion for
7 Leave to File a Motion for Reconsideration that Adams opposed (*See* MFR, Jt. Appx. II,
8 138-159). Adams' Application and Fallini's Motion were heard on July 19, 2010,
9 resulting in the final Order After Hearing entered August 12, 2010, granting Adams'
10 Application, denying Fallini's Motion, and proceeding with a prove up hearing granting
11 Adams a total of \$2,730,884.85 in damages and attorney's fees, from which Fallini
12 Appeals (*See* Order After Hearing, Jt. Appx. II, 222-225 and court minutes in Case
13 Summary, Jt. Appx. II, 240-244).

14 SUMMARY OF ARGUMENTS

15 I. Denying Fallini's Motion for Reconsideration was reversible error as the
16 Orders entered of which Fallini was requesting reconsideration were clearly erroneous,
17 based on "facts" known to be untrue but established by default, and manifested injustice,
18 holding Fallini liable for an accident that she was in no way responsible for to the tune of
19 2.7 million dollars.

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

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

25 The District Court's Order After Hearing should be reversed and the case
26 remanded, with instructions to reconsider previous orders and have all issues of fact tried
27 by a jury.
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1 Nevada Rule of Professional Conduct 3.1 provides in relevant part: "A lawyer shall
2 not ... assert or controvert an issue ... unless there is a basis in law *and fact* for doing so
3 that is not frivolous . . ." (emphasis added).

4 Rule 3.3. provides in relevant part:

5 (a) A lawyer shall not knowingly:

6 (1) Make a false statement of fact or law to a tribunal or fail to
7 correct a false statement of material fact or law previously made to
8 the tribunal by the lawyer; . . . or

9 (3) Offer evidence that the lawyer knows to be false. If a lawyer, the
10 lawyer's client, or a witness called by the lawyer, has offered
11 material evidence and the lawyer comes to know of its falsity, the
12 lawyer shall take reasonable remedial measures, including, if
13 necessary, disclosure to the tribunal...

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

15 (a) Violate or attempt to violate the Rules of Professional Conduct,
16 knowingly assist or induce another to do so, or do so through the acts
17 of another; . . .

18 (c) Engage in conduct involving dishonesty, fraud, deceit or
19 misrepresentation;

20 (d) Engage in conduct that is prejudicial to the administration of
21 justice ..

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

28 Both propositions of fact are false and therefore clearly erroneous. The area in
which the accident occurred in Nye County, Nevada was, in fact, open range, a fact
commonly known in Nye County, in which the District Court sat (*See MFR*, Jt. Appx. II,
138-159 and/or Opposition to Application for Default, Jt. Appx. II, 130-132). On the
subject of reflective strips, no such custom and practice exists among ranchers in Nye
County (*See MFR*, Jt. Appx. II, 138-159 and/or Opposition to Application for Default, Jt.
Appx. II, 130-132). Plaintiff's counsel knew or should have known that these contentions

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

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

11 The first Canon of the Code of Judicial Conduct provides:

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

15 Although there is no transcript of the final hearing in front of the District Court,
16 Fallini recalls the Honorable Robert Lane stating that he knew the area where the accident
17 occurred to be "open range." Yet the Court accepted as fact that it was not open range
18 and made rulings consistent therewith, detracting from the integrity of the tribunal. By
19 accepting facts as true, which were known or should have been known to be false the trial
20 court failed to uphold the "integrity of the tribunal."

21 Had Fallini been properly represented, the District Court may well have taken
22 judicial notice that the area in question in this case was open range. The Court began the
23 final Hearing inclined to grant Fallini's Motion for Reconsideration (*See* court minutes in
24 Case Summary, Jt. Appx. II, 240-244). Instead, the Court accepted a false factual premise
25 due to Kuehn's failures, ultimately ratifying that acceptance in its final order despite
26 knowing the facts supporting the order were false (*See* Order after Hearing, Jt. Appx. II,
27 222-225).

28 Because the Partial Summary Judgment rested on factual falsehoods, it was clearly

1 erroneous. The first prong for the Court to have reconsidered and rescinded previous
2 orders was met.

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

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

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

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

1 Rule 1.1 of the Nevada Rules of Professional Conduct provides as follows:

2 A lawyer shall provide competent representation to a client. Competent
3 representation requires the legal knowledge, skill, thoroughness and
4 preparation reasonably necessary for the representation.

5 Rule 2.15 of the Nevada Code of Judicial Conduct provides in relevant part as
6 follows:

7 ... (B) A judge having knowledge that a lawyer has committed a
8 violation of the Nevada Rules of Professional Conduct that raises a
9 substantial question regarding the lawyer's honesty, trustworthiness,
10 or fitness as a lawyer in other respects shall inform the appropriate
11 authority. . . (D) A judge who receives information indicating a
12 substantial likelihood that a lawyer has committed a violation of the
13 Nevada Rules of Professional Conduct shall take appropriate action.

14 Kuehn's utter failure to provide competent representation and be honest with
15 Fallini not only brought this unjust result upon Fallini, but the District Court, despite its
16 obvious knowledge of Kuehn's misconduct (shown by the numerous and hefty fines
17 imposed on Kuehn) failed to notify the appropriate authority or Fallini, and instead enter
18 decisions based entirely on his failures, and not on sound factual premises. The District
19 Court had a duty to report Kuehn to the State Bar for his gross and obvious dereliction of
20 duty, and should have required Kuehn to at least bring his client to one or more of the
21 hearings where her rights were being foreclosed upon (*See court minutes in Case*
22 *Summary, Jt. Appx. II, 240-244*). Kuehn subverted the administration of justice and the
23 court allowed this subversion to continue in violation of numerous rules of professional
24 conduct and the code of judicial conduct.² If this case does not represent the "manifest
25 injustice" of which the Supreme Court speaks, then manifest injustice does not exist.

26 Because the Orders that Fallini moved the court to reconsider were clearly
27 erroneous and leaving them in place perpetuated a manifest injustice, the District Court
28 erred in denying Fallini's Motion for Reconsideration.

² Code of Judicial Conduct Canon 1: A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.

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

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

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

15 The unconstitutional denial of a jury trial must be reversed unless the error was
16 harmless. *United States v. California Mobile Home Management Park Co.*, 107 F.3d
17 1374, 1377 (9th Cir. 1997). The right to jury trial includes having a jury determine all
18 issues of fact. *Molodyh v. Truck Insurance Exchange*, 744 P.2d 992, 304 Or. 290, 297-298
19 (1987). "The amount of damages *** from the beginning of trial by jury, was a 'fact' to
20 be found by the jurors." *Lakin v. Senco Products, Inc.*, 987 P.2d 463, 470, 329 Or. 62,
21 Quoting Charles T. McCormick, *Handbook on the Law of Damages* 24 (1935).

22 This matter was set to be tried by a jury. Jt. Appx. I, 220-223. Factual
23 determinations remained as to damages, even though the Court struck the Defendant's
24 answer and entered default (*See* Opposition to Application for Default Jt. Appx. II, 130-
25 132). The Court's determination of damages from the bench, after striking the jury trial,
26 violated Defendant's right to a jury trial secured by the above cited section of the Nevada
27 Constitution. The Damages awarded by the District Court in total exceeded 2.7 million
28 dollars, making the error very harmful to Fallini (*See* Order After Hearing, Jt. Appx. II,
222-225). Thus, this Court must reverse the District Court's decision.

////

////

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

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

9 The heir’s loss of probable support, companionship, society, comfort and
10 consortium. In determining that loss, you may consider the financial support, if
11 any, which the heir would have received from the deceased except for his death,
12 and the right to receive support, if any, which the heir has lost by reason of his
13 death.

14 [The right of one person to receive support from another is not destroyed by
15 the fact that the former does not need the support, nor by the fact that the latter has
16 not provided it.]

17 You may also consider:

- 18 1. The age of the deceased and of the heir;
19 2. The health of the deceased and of the heir;
20 3. The respective life expectancies of the deceased and of the heir;
21 4. Whether the deceased was kindly, affectionate or otherwise;
22 5. The disposition of the deceased to contribute financially to support the
23 heir;
24 6. The earning capacity of the deceased;
25 7. His habits of industry and thrift; and
26 8. Any other facts shown by the evidence indicating what benefits the heir
27 might reasonably have been expected to receive from the deceased had
28 he lived.

29 With respect to life expectancies, you will only be concerned with the
30 shorter of the two, that of the heir whose damages you are evaluating or that
31 of the decedent, as one can derive a benefit from the life of another only so
32 long as both are alive.

33 A calculation of damages should only be upheld if there is competent evidence to

1 sustain it. *Cornea v. Wilcox*, 898 P.2d 1379, 1386 (Utah 1995) citing *Rees v.*
2 *Intermountain Health Care, Inc.*, 808 P.2d 1069, 1072 (Utah 1991); *Penrod v. Carter*, 737
3 P.2d 199, 200 (Utah 1987). In this matter, there was no showing that Plaintiff's suffered
4 any economic loss from the death of their son. Only the estate damages related to funeral
5 expenses were shown constituting compensable damage (See Order After Hearing, Jt.
6 Appx. II, 222-225).

7 CONCLUSION

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

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

18 CERTIFICATE OF COMPLIANCE

19 I hereby certify that I have read this appellate brief, and to the best of my
20 knowledge, information, and belief it is not frivolous or interposed for any improper
21 purpose. I further certify that this brief complies with all applicable Nevada Rules of
22 Appellate Procedure, including the requirement of N.R.A.P. 28(e), which requires that
23 every assertion in the briefs regarding matters in the record be supported by a reference to
24 the page of the transcript or appendix where the matter relied on is to be found. I
25 understand that I may be subject to sanctions in the event that the accompanying brief is

26 ////

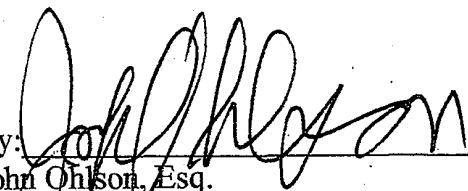
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1 not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

2
3 **AFFIRMATION**
4 **Pursuant to NRS 239B.030**

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

7 Dated this 21 day of May, 2011.

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

John P. Aldrich, Esq.
Aldrich Law Firm, Ltd.
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☒ Via U.S. Mail
☐ Via Overnight Mail
☐ Via Hand Delivery
☐ Via Facsimile
☐ Via ECF

DATED this 27 day of May, 2011.


Robert M. May

Electronically Filed
Jun 07 2011 01:58 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

OFFICE OF THE CLERK

* * * * *

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.

AMENDED CERTIFICATE OF SERVICE

I hereby certify that I am an employee of JOHN OHLSON, and that on June 1, 2011 I personally served a true copy of **APPELLANT'S OPENING BRIEF**, by the method indicated and addressed to the following:

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4 Las Vegas, NV 89146

____ Via U.S. Mail
 X Via Overnight Mail (FedEx)
____ Via Hand Delivery
____ Via Facsimile
____ Via ECF

5 **AFFIRMATION**
6 **Pursuant to NRS 239B.030**

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

9 DATED this 7th day of June, 2011.

10 /s/ Robert M. May
11 Robert M. May
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John P. Aldrich, Esq.
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Las Vegas, NV 89146

DATED this 7th day of June, 2011.

- 3 -

1 CASE NO. CV-31449

2 DEPT. I

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NYE COUNTY CLERK

3
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5
6 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF NYE

8
9 SUSAN FALLINI and JOE FALLINI,

10 Plaintiffs,

ORDER

11 vs.

12 THE HONORABLE ROBERT W. LANE,
13 TONY ADAMS, JUDITH ADAMS, JOHN P.
ALDRICH, ESQ., HAROLD KUEHN, ESQ.,
and Does I through V, jointly and severally,

14 Defendants.

15
16 The Motion to Dismiss made by the HON. ROBERT W. LANE, Defendant, having come
17 before the court for decision, the court having reviewed the presentments of the parties and
18 having heard argument in open court in Tonopah, Nevada, on June 6, 2011, and the Court
19 deeming itself fully advised in the premises and good cause appearing;

20 IT IS HEREBY ORDERED that the Motion to Dismiss should be, and hereby is,
21 GRANTED. Judges cannot be sued for their judicial acts and are entitled to absolute immunity.
22 *Mireles v. Waco*, 502 U.S. 9, 9 and 11(1991), *Stump v. Sparkman*, 435 U.S. 349, 355-56
23 (1978). Cf. *Marvin v. Fitch*, 126 Nev. ___, 232 P.3d 425, 429 (2010) ("[a]bsolute immunity
24 protects judicial officers from collateral attack and recognizes that appellate procedures are the
25 appropriate method of correcting judicial error").

26 ///

27 ///

28 ///

1 Accordingly, dismissal is appropriate pursuant to NRCP 12(b)(1) and 12(b)(5).

2 DATED this 5th day of July, 2011.

3
4
5 
6 Justice Miriam Shearing

7
8 RESPECTFULLY SUBMITTED BY:
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the 14th day of June 2011, I served a true and correct copy of the foregoing proposed Order by mailing said document via the United States Postal Service first class mail and, properly addressed with postage prepaid, to the following:

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Employee of the State of Nevada
Office of the Attorney General

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2
3 SUSAN FALLINI,

4 Appellant,

5 .VS.

6 ESTATE OF MICHAEL DAVID
7 ADAMS, BY AND THROUGH HIS
8 MOTHER JUDITH ADAMS,
9 INDIVIDUALLY AND ON BEHALF
10 OF THE ESTATE

11 Respondents.

CASE NO. 56840

District Court Case No.: CV00224539

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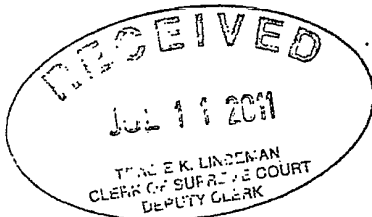
JUL 11 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

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

15 RESPONDENT'S ANSWERING BRIEF

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11-20641

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

2
3 SUSAN FALLINI,

4 Appellant,

5 vs.

6 ESTATE OF MICHAEL DAVID
7 ADAMS, BY AND THROUGH HIS
8 MOTHER JUDITH ADAMS,
9 INDIVIDUALLY AND ON BEHALF
10 OF THE ESTATE

11 Respondents.

CASE NO. 56840

District Court Case No.: CV00224539

12 Appeal from the Fifth Judicial District Court of the State of Nevada in and for the
13 County of Nye

14 The Honorable Robert W. Lane, District Judge

15 **RESPONDENT'S ANSWERING BRIEF**

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TABLE OF AUTHORITIES

CASES

<u>Aldabe v. Adams</u> , 81 Nev. 280, 402, P.2d 34 (1965).....	17
<u>Allianz Ins., Co., v. Gagnon</u> , 109 Nev. 990, 997, 860 P.2d 720, 724 (1993).....	22
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<u>Jackson v. State</u> , 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).....	8
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I.

STATEMENT OF THE ISSUES

Respondents disagree with the Appellant's Statement of the Issues. Respondents propose the following Statement of the Issues:

1. In 2007, Defendant Fallini did not respond to Requests for Admission and in 2008, she did not oppose a Motion for Partial Summary Judgment. Then in 2009, Defendant Fallini did not comply with various orders of the district court, and her Answer and Counterclaim were stricken after several opportunities to comply with the orders of the district court. When Defendant Fallini finally decided to seek relief from the court, Defendant Fallini provided no case law or admissible evidence in support of her Motion to Reconsider Prior Orders. **Based on these facts, has Defendant Fallini failed to prove that the district court abused its discretion when it denied Defendant Fallini's Motion to Reconsider Prior Orders?**

2. Defendant Fallini did not even request a jury trial in the district court, nor did she object to the district court's vacating of the jury trial. **Because Defendant Fallini is raising this issue for the first time on appeal, should the Nevada Supreme Court decline to even consider this alleged point of error?**

3. Respondents moved for entry of default judgment in the district court and provided evidence in support thereof, both in the form of documentary evidence and live testimony. The district court held a prove up hearing, during which it took live testimony, considered the documentary evidence, and later awarded damages. Defendant Fallini has provided no transcript or record upon which to base her claims of error. **Based on these facts, has Defendant Fallini failed to prove that the district court abused its discretion when it awarded damages in excess of \$2.7 million to Respondents?**

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