II.

STATEMENT OF THE CASE

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

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

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

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

Appx. I, 39.)

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

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

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

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

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

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

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

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

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

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

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

On July 19, 2010, a hearing was held on Fallini's Motion for Reconsideration of Prior Orders. That motion was denied and the Court proceeded with a prove up hearing. On August 18, 2010, an Order was entered on this matter wherein the Court awarded Judith $1,000,000.00 in damages for grief, sorrow and loss of support, $1,640,696 in damages for future lost earnings, $50,000 in attorney's fees, $35,000 in sanctions levied against Defendant Fallini, and $5,188.85 in funeral and other related expenses. (Jt. Appx. II, 229-232.) On September 7, 2010, Defendant Fallini filed a Notice of Appeal.

III.

STATEMENT OF FACTS

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

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

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

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

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

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

6. That Defendant Fallini'scattle have previously been involved in incidents with motor vehicles on the roadway.

7. That Defendant Fallini does not track the location of her cattle while they are grazing away from her property.

8. That Defendant Fallini does not remove her cattle from the roadway when notified that the cattle are in a roadway.

9. That the subject cow was not visible at night.

10. That Defendant Fallini was aware that the subject cow was not visible at night prior to the incident that is the subject of the Complaint on file herein.

11. That the subject cow was in the roadway of SR 375 at the time of the incident that is the subject of the Complaint on file herein.

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

13. That Defendant Fallini did not know the location of the subject cow at the time of the incident that is the subject of the Complaint on file herein.

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

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

Disputed Facts

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

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

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

IV.

STANDARD OF REVIEW

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

Denial of Motion for Reconsideration and Entry of Default Judgment

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

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

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

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

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

Alleged Error Regarding Vacating Jury Trial

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

V.

LEGAL ARGUMENT

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

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

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

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

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

B. The Prior Orders Are Not Clearly Erroneous

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

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

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

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

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

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

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

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

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

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

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

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

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

NRCP 36 provides, in pertinent part:

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

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

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

Id. at 742-43 (emphasis added).

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

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

3. The Order Striking Answer and Counterclaim Was Properly Entered

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

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

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

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

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

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

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

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

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

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

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

2. Notice to the Attorney Constitutes Notice to the Client

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

attorney in the form of a malpractice action.

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

E. The District Court Properly Vacated the Trial

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

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

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

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

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

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

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

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

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

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

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

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

F. The District Court Properly Awarded Damages

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

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

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

In the present case, there is no record of the prove up hearing, and therefore, it is impossible for this Court to determine what evidence was presented to support future economic loss, and what evidence Defendant Fallini now wishes to object to. Any 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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CERTIFICATE OF MAILING

The undersigned does hereby certify that on the 8th day of July, 2011, a true and correct copy of this **RESPONDENTS' ANSWERING BRIEF** was deposited for mailing in the United States Mail, first class postage prepaid, to the following:

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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.

Supreme Court No.: 56840

FILED
JUL 29 2011
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

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

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11-22900

IN THE SUPREME COURT OF THE STATE OF NEVADA

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IN THE SUPREME COURT OF THE STATE OF NEVADA

SUSAN FALLINI,

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vs.

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

Respondent.

Supreme Court No.: 56840

APPELLANT'S REPLY BRIEF

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

ISSUES PRESENTED FOR REVIEW

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

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

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

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

DISPUTED FACTS

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

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

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

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

STANDARD OF REVIEW

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

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

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

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

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

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

SUMMARY OF REPLY ARGUMENTS

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

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

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

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

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REPLY ARGUMENTS

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

So long as it retains jurisdiction over a case, a trial court "possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by the court to be sufficient." *Mullally v. Jones*, 2010 WL 3359333 (D.Nev.), citing *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir.2001). Thus the denying or granting of a motion for reconsideration is within the trial court's discretion. Discretion is abused if the District Court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. *Jackson v. State*, 117 Nev. 116, 120, 17 P. 3d 998, 1000 (2001).

A trial court should reconsider, and reverse prior rulings made prior to final judgment when the prior decision is clearly erroneous and the order, if left in place, would manifest injustice. *Masonry and Tile Contractors v. Jolley*, 113 Nev. 737, 941 P 2d 486, 489 (1997) citing *Little Earth v. Department of Housing*, 807 Fed 2d 1433 (8th Cir. 1986); *United States v. Serpa*, 930 F.2d 639 (8th Cir., 1991).The Court's ability to reconsider is not hampered by the "law of the case doctrine" when the order reconsidered would work a manifest injustice. *U.S. v. Serpa*, at 640. Fallini is not asking this court to reverse the District Court's ruling on its granting of summary judgment but must show that reconsideration should have been granted of that order and the Order Striking Fallini's Answer and Counterclaim. A plenary review displays the District Court's denial of Fallini's Motion for Reconsideration to be arbitrary, ignoring facts presented and unreasonably bounding its judgment by procedural default rather that the merits of the case.

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

A district court may reconsider a previously decided issue if substantially different evidence is introduced or the decision is clearly erroneous. *Masonry and Tile Contractors*

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

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

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

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

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

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

Rule of Professional Conduct 3.3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> **Trial by jury; waiver in civil cases.** The right of trial by Jury shall be secured to all and remain inviolate forever; but a Jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law; and in civil cases, if three fourths of the Jurors agree upon a verdict it shall stand and have the same force and effect as a verdict by the whole Jury, Provided, the Legislature by a law passed by a two thirds vote of all the members elected to each branch thereof may require a unanimous verdict notwithstanding this Provision.

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

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

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

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

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

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

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

CONCLUSION

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

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

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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, including the requirement of N.R.A.P. 28(e), which requires that every assertion in the briefs regarding matters in the record be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28 day of July, 2011.

By: _____

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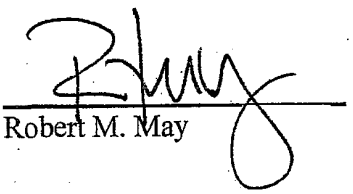
CERTIFICATE OF SERVICE

I hereby certify that I am an employee of JOHN OHLSON, and that on this date I personally served a true copy of the foregoing **APPELLANT'S REPLY BRIEF**, 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	_X_ Via U.S. Mail ___ Via Overnight Mail ___ Via Hand Delivery ___ Via Facsimile ___ Via ECF

DATED this 29 day of July, 2011.



Robert M. May

An unpublished order shall not be regarded as precedent and shall not be cited as legal authority. SCR 123.

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.

Douglas, C.J.

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

11-25253

IN THE

SUPREME COURT OF THE STATE OF NEVADA

ESTATE OF MICHAEL DAVID ADAMS, BY AND THROUGH HIS MOTHER JUDITH ADAMS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE, Appellant, v. SUSAN FALLINI, Respondent.	Supreme Court No.: 68033 District Court Case No.: CV24539

Electronically Filed
Feb 11 2016 09:40 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

APPELLANT'S APPENDIX, VOLUME III

(Bates Nos. 0360-0577)

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Jury Demand (3/11/14)	**V**	**0913-0915**
Motion for Entry of Final Judgment (1/28/15)	**VII**	**1237-1240**
Motion for Leave to File Motion for Reconsideration (7/6/10)	**II**	**0269-0295**
Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs (10/5/11)	**IV**	**0578-0626**
Motion for Partial Summary Judgment (5/16/08)	**I**	**0012-0023**
Motion for Relief From Judgment Pursuant to NRCP 60(b) (5/20/14)	**V**	**0931-1008**
Motion to Dismiss (3/25/11)	**III**	**0360-0453**
Motion to Disqualify Judge Robert W. Lane From Any Further Proceedings In This Case and to Transfer This Case For Further Consideration to Hon. Kimberly A. Wanker (8/15/13)	**IV**	**0782-0787**
Motion to Enter Final Judgment Following Remittitur (9/25/13)	**V**	**0855-0882**
Motion to Reverse or Withdraw Remittitur and Clarify Instructions For Allowance of Interest (10/7/13)	**V**	**0895-0900**

Notice of Appeal (9/7/10)	**II**	**0342-0344**
Notice of Appeal (5/15/15)	**VII**	**1372-1374**
Notice of Entry of Default (2/11/10)	**I**	**0171-0175**
Notice of Entry of Judgment (5/7/14)	**V**	**0927-0930**
Notice of Entry of Order (8/15/08) [Order Granting Plaintiffs' Motion for Partial Summary Judgment (7/30/08)]	**I**	**0024-0028**
Notice of Entry of Order (5/18/09) [Order Granting Plaintiff's Motion to Compel Defendant's Production of Documents (4/27/09)]	**I**	**0082-0086**
Notice of Entry of Order (10/14/09) [Order Regarding Order to Show Cause Why Defendant Susan Fallini and Her Counsel Should Not Be Held in Contempt of Court (10/8/09)]	**I**	**0161-0164**
Notice of Entry of Order (6/4/10) [Findings of Fact, Conclusions of Law and Order Holding Defendant's Counsel in Contempt of Court (6/2/10)]	**I**	**0191-0201**
Notice of Entry of Order (8/18/10) [Order After Hearing (8/12/10)]	**II**	**0335-0341**
Notice of Entry of Order (6/26/14) [Order Granting Defendants Tony Adams, Judith Adams, and John P. Aldrich, Esq.'s Motion to Dismiss and Order Denying Defendants Tony Adams, Judith Adams, and John P. Aldrich, Esq.'s Motion for Sanctions Pursuant to NRCP 11 (6/23/14)]	**VI**	**1119-1122**
Notice of Entry of Order (8/13/14) [Court Order (8/6/14)]	**VI**	**1218-1233**

Notice of Entry of Order (4/21/15) [Order Granting Motion for Entry of Final Judgment and Dismissing Case with Prejudice (4/17/15)]	**VII**	**1367-1371**
Notice of Referral to Settlement Program and Suspension of Rules (9/20/10)	**II**	**0345**
Opposition to Application for Default Judgment Against Defendant Susan Fallini (6/23/10)	**II**	**0266-0268**
Opposition to Motion for Entry of Order (9/30/13)	**V**	**0883-0894**
Opposition to Motion to Disqualify Judge Robert W. Lane From Any Further Proceedings In This Case and to Transfer This Case For Further Consideration to Hon. Kimberly A. Wanker (9/4/13)	**V**	**0788-0834**
Opposition to Motion to Withdraw Remittitur and Clarify Instructions For Allowance of Interest (10/14/13)	**V**	**0904-0907**
Order (6/11/11)	**III**	**0522-0524**
Order Affirming In Part, Reversing In Part and Remanding (3/29/13)	**IV**	**0732-0738**
Order Denying En Banc Reconsideration (7/18/13)	**IV**	**0779-0780**
Order Denying Petition for Extraordinary Writ Relief (1/15/15)	**VII**	**1234-1236**
Order Denying Plaintiff's Motion to Strike Defendant's Answer and Counterclaim (7/17/09)	**I**	**0147-0148**
Order Denying Rehearing (6/3/13)	**IV**	**0758**

Order Granting Motion to Recall Remittitur and to Modify March 29, 2013, Order for Allowance of Interest (1/3/14)	**V**	**0908-0911**
Order Granting Motion to Supplement Appendix and Reopen Briefing (10/24/11)	**IV**	**0652-0653**
Order Submitting Appeal for Decision Without Oral Argument (8/19/11)	**III**	**0577**
Order Submitting for Decision Without Oral Argument (2/15/13)	**IV**	**0731**
Order to Show Cause Why Defendant Susan Fallini and Her Counsel Should Not Be Held in Contempt of Court and Possible Sanctions Be Imposed (4/19/10)	**I**	**0188-0190**
Plaintiff's *Ex Parte* Motion for Order to Show Cause Why Defendant Susan Fallini and Her Counsel Should Not Be Held in Contempt of Court (8/31/09)	**I**	**0149-0160**
Plaintiff's *Ex Parte* Motion for Order to Show Cause Why Defendant Susan Fallini and Her Counsel Should Not Be Held in Contempt of Court and Possible Sanctions Be Imposed (4/7/10)	**I**	**0176-0187**
Plaintiff's Motion to Compel Defendant's Production of Documents (3/23/09)	**I**	**0029-0081**
Plaintiff's Motion to Strike Defendant's Answer and Counterclaim (6/16/09)	**I**	**0087-0146**

Plaintiff's Opposition to Defendant's Motion for Entry of Final Judgment and Countermotion to Reconsider and/or for Rehearing of Order Entered on August 6, 2014, or Alternatively, Countermotion to Set Aside Order Entered on August 6, 2014, or Alternatively, for Entry of Final Judgment (2/9/15)	**VII**	**1241-1366**
Remittitur (8/14/13)	**IV**	**0781**
Remittitur (2/12/14)	**V**	**0912**
Reply in Support of Motion to Disqualify Judge Robert W. Lane From Any Further Proceedings In This Case and to Transfer This Case For Further Consideration to Hon. Kimberly A. Wanker (9/6/13)	**V**	**0846-0849**
Reply to Defendant's Objection to Proposed Judgment (4/10/14)	**V**	**0925-0926**
Reply to Opposition to Motion to Enter Final Judgment Following Remittitur (10/8/13)	**V**	**0901-0903**
Request for Submission (9/6/13)	**V**	**0850-0852**
Respondent's Amended Answering Brief (12/27/11)	**IV**	**0677-0713**
Respondent's Answering Brief (7/8/11)	**III**	**0525-0556**
Respondent's Opposition to Appellant's Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs (10/17/11)	**IV**	**0627-0651**
Settlement Program Status Report (2/15/11)	**II**	**0356**
Substitution of Attorneys (6/11/10)	**I**	**0202-0203**
Supplemental Court Order (9/23/13)	**V**	**0853-0854**

Susan Fallini's Reply Memorandum in Support of Her Rule 60(b) Motion to Set Aside Judgment and Opposition to Plaintiff's Countermotion to Strike (6/16/14)	**VI**	**1110-1118**
Transcript of Proceedings (Application for Default Judgment) (7/19/10)	**II**	**0296-0334**
Transcript of Proceedings (Motion for Relief From Judgment Pursuant to NRCP 60(b)) (7/28/14)	**VI**	**1123-1217**

MOT
John P. Aldrich, Esq.
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Attorneys for John P. Aldrich and Tony and Judith Adams

FILED

2011 MAR 25 P 12:37

NYE COUNTY CLERK
BY DEPUTY

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

SUSAN FALLINI, and JOE FALLINI, Plaintiffs, v. THE HONORABLE ROBERT W. LANE,TONY ADAMS, JUDITH ADAMS, JOHN P. ALDRICH, ESQ., HAROLD KUEHN, ESQ. ; DOES I through V, jointly and severally, Defendants.	Case No.: CV31449 Dept. No.: 1

MOTION TO DISMISS

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

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

DATED 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 Defendants John P. Aldrich, Tony Adams and Judith Adams

NOTICE OF MOTION

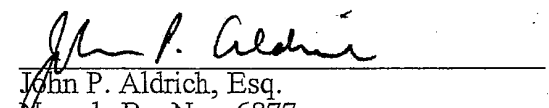
TO: Plaintiffs Susan and Joe Fallini;

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

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

DATED this 21st day of March, 2011.

ALDRICH LAW FIRM, LTD.



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INTRODUCTION

This Complaint for Declaratory Relief against The Honorable Robert W. Lane, John Aldrich, Esq., Tony Adams, Judith Adams, and Plaintiffs' former attorney, Harold Kuehn, Esq., has no basis in law or fact and is nothing more than a blatant attempt on the part of Plaintiffs to judge shop. Plaintiffs have already filed an appeal currently before the Nevada Supreme Court on the same issues. The matter is still on appeal; briefs have not even been submitted yet.

The naming of Defendants John P. Aldrich, Esq., Tony Adams, and Judith Adams (not to mention Judge Lane) is an abuse of process, and this lawsuit is frivolous. Consequently, this Motion to Dismiss should be granted.

MEMORANDUM OF POINTS AND AUTHORITY

I.

STATEMENT OF FACTS

There is a long and somewhat complicated history to the case that resulted in the judgment Plaintiffs seek to have declared null and void (the "underlying case"). The underlying case is titled Adams v. Fallini, Fifth Judicial District Court **Case No. CV24539, Dept. 2P**. It will be very helpful to the Court, in deciding this case, to understand the "ins and outs" of that case.

The Underlying Incident

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

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

Plaintiffs Susan and Joe Fallini were the owner of the cow which was in Michael's travel lane

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

Procedural History of the Underlying Case

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

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

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

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

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

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

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

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[1] The Requests for Admission are an exhibit to the Motion for Summary Judgment, which is 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.

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

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

Ms. Fallini still did not comply with the Court's Order and failed to respond to the discovery requests. On **August 31, 2009**, Plaintiff brought an Ex Parte Motion for Order to Show Cause Why Defendant Susan Fallini and Her Counsel Should Not be Held in Contempt. The Court issued an Order on Plaintiff's Order to Show Cause, dated **October 8, 2009**, that Susan Fallini must produce all documents responsive to the outstanding discovery requests by **October 12, 2009**. The Court further ordered that if Ms. Fallini did not supply the requested information by October 12, 2009, Ms. Fallini's

counsel would be held in contempt of court and would be fined $150.00 a day, beginning October 13, 2009. Further the Court ordered that if the requested information was not provided by October 12, 2009, the Court would strike Ms. Fallini's pleadings in their entirety. (Order to Show Cause, attached hereto as Exhibit G.)

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

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

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

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

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

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

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

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

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

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

(Exhibit M, p. 3.) Conspicuously absent from the list of issues presented to the Nevada Supreme Court 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.
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> [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

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

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

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

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

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

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

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

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

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

> that species of fraud which does, or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudicating cases... and relief should be denied in the absence of such conduct.
> *NC-DSH, INC. v. Garner*, 218 P.3d 853, 858 (2009)

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

> (a) A party may serve upon any other party a written request for the admission, for the purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or the application of law to fact....
> . . . .The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, or the parties may agree in writing,... the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. . . .

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

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

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

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

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

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

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

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

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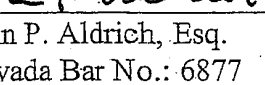
III.

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

Eleanor Engelbretson
An employee of Aldrich Law Firm, Ltd.

EXHIBIT A

EXHIBIT A

ORIGINAL

FIFTH JUDICIAL DISTRICT

MAR 26 2007

Nye County Clerk

PB Deputy

CASE NO: CV24539
DEPT NO: 2P

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/~~20~~30/07 Time of Hearing: 9:00 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 Dr., Suite 100 - Las Vegas, Nevada 89106
(702) 734-3936

POINTS AND AUTHORITIES

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

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

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

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

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.

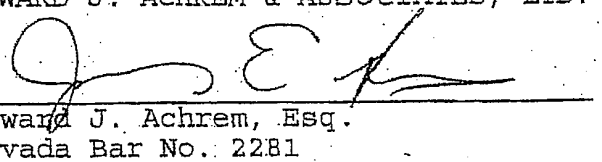
In the instant case Plaintiff Judith Adams, mother of the decedent, lives in Orange County, California. Undersigned counsel lives in Las Vegas, as will likely the insurance defense attorney who will be handling the Counterclaim. The defense attorney has his office in Pahrump. Defendant has equal distance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

CERTIFICATE OF SERVICE

I certify that I am an employee of EDWARD J. ACHREM & ASSOCIATES, LTD., and that on this 22nd 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:

[X] **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

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

EXHIBIT B

EXHIBIT B

REQT
John P. Aldrich
Nevada Bar No. 6877
Stacy D. Harrop
Nevada Bar No. 9826
ALDRICH & BRYSON LLP
1601 S. Rainbow Blvd., Suite 160
Las Vegas, Nevada 89146
(702) 853-5490
(702) 853-5491 (fax)
Attorneys for Plaintiffs

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.	Case No.: CV24539 Dept.: 2P
SUSAN FALLINI, Counterclaimant, vs. Estate of MICHAEL DAVID ADAMS, by and through his mother JUDITH ADAMS, individually and on behalf of the Estate, Counterdefendants.	

PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSION TO DEFENDANT FALLINI

TO: SUSAN FALLINI, Defendant/Counterclaimant

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

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

REQUEST FOR ADMISSION NO. 1:

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

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

REQUEST FOR ADMISSION NO. 2:

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

REQUEST FOR ADMISSION NO. 3:

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

REQUEST FOR ADMISSION NO. 4:

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

REQUEST FOR ADMISSION NO. 5:

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

REQUEST FOR ADMISSION NO. 6:

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

REQUEST FOR ADMISSION NO.7:

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

REQUEST FOR ADMISSION NO. 8:

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

REQUEST FOR ADMISSION NO. 9:

Admit that the subject cow was not visible at night.

REQUEST FOR ADMISSION NO. 10:

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

that is the subject of the Complaint on file herein.

REQUEST FOR ADMISSION NO. 11:

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

REQUEST FOR ADMISSION NO. 12:

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

REQUEST FOR ADMISSION NO. 13:

Admit that you 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.

REQUEST FOR ADMISSION NO. 14:

Admit 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.

DATED this 31st day of October, 2007.

ALDRICH & BRYSON, LLP

John P. Aldrich
Nevada Bar No. 6877
Stacy D. Harrop
Nevada Bar No. 9826
1601 S. Rainbow Blvd., Suite 160
Las Vegas, Nevada 89146
(702) 853-5490
(702) 853-5491 (fax)
Attorneys for Plaintiffs

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

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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

CALENDARED
on:
MAY 2 8 2008

FILED
2008 MAY 16 P 2:17
NYE COUNTY CLERK
BY DEPUTY

Michelle A. Thorn

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

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	Case No.: CV24539 Dept. No.:2P **MOTION FOR PARTIAL SUMMARY JUDGMENT** Date of Hearing: Time of Hearing:
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	

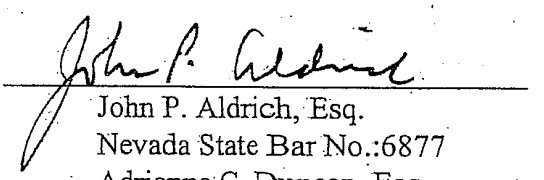
Plaintiffs, Estate of MICHAEL DAVID ADAMS, by and through his mother JUDITH ADAMS, individually and on behalf of the Estate, by and through their attorneys of record JOHN

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

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

DATED this 14th day of May, 2008.

BLACK & LOBELLO

By 

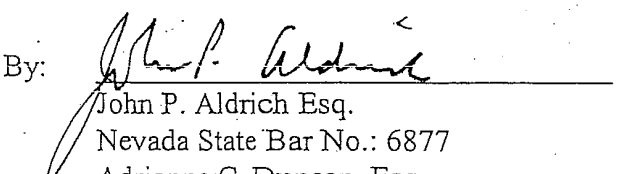
John P. Aldrich, Esq.
Nevada State Bar No.:6877
Adrianne C. Duncan, Esq.
Nevada State Bar No.: 9797
10777 West Twain Avenue, Suite 300
Las Vegas, NV 89135
Attorneys for Plaintiffs

NOTICE OF MOTION

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

DATED this 14th day of May, 2008.

BLACK & LOBELLO

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

POINTS AND AUTHORITIES

I.

PROCEDURAL HISTORY

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

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

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

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

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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.

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

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

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

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

NRCP 36 provides in relevant part:

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

> within such shorter or longer time as the court may allow, or the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. ...
>
> (b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. ... Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

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

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

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.

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

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

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

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

D. WRONGFUL DEATH/ LOSS OF CONSORTIUM.

NRS 41.085 provides in relevant part:

> 2. When the death of any person, whether or not a minor, is caused by the wrongful 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

caused the death, or if the wrongdoer is dead, against his personal representatives, whether the wrongdoer died before or after the death of the person he injured. If any other person is responsible for the wrongful act or neglect, or if the wrongdoer is 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.

3. An action brought by the heirs of a decedent pursuant to subsection 2 and the cause 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.

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

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

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

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

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

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///

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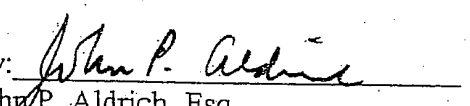
IV.

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: 

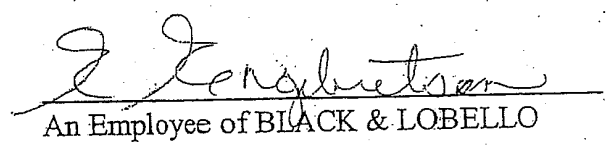
John P. Aldrich, Esq.
Nevada State Bar No.: 6877
Adrianne C. Duncan, Esq.
Nevada State Bar No.: 9797
10777 West Twain Avenue, Suite 300
Las Vegas, NV 89135
Attorneys for Plaintiff

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

NEO
John P. Aldrich, Esq.
Nevada State Bar No. 6877
Adrianne C. Duncan, Esq.
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BLACK & LOBELLO
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Las Vegas, Nevada 89135
(702) 869-8801
Attorneys for Plaintiffs

FILED

2008 AUG 15 P 2:44

NYE COUNTY CLERK
BY DEPUTY

Linda [illegible]

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.	Case No.: CV24539 Dept.: 2P
SUSAN FALLINI, Counterclaimant, vs. Estate of MICHAEL DAVID ADAMS, by and through his mother JUDITH ADAMS, individually and on behalf of the Estate, Counterdefendants.	

NOTICE OF ENTRY OF ORDER

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

a copy of which is attached hereto.

DATED this 13th day of August, 2008.

BLACK & LOBELLO

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

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of August, 2008 a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER** was deposited into the U.S. mail at Las Vegas, Nevada, first-class postage fully prepaid, addressed to the following person(s):

Harold Kuehn, Esq.
Gibson & Kuehn, LLP
1601 E. Basin Avenue, Ste. 101
Pahrump, NV 89060

Katherine M. Barker, Esq.
Law Office of Katherine M. Barker
701 Bridger Avenue, Suite 500
Las Vegas, NV 89101

An Employee of Black & LoBello

ORDR
John P. Aldrich, Esq.
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Attorneys for Plaintiffs

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

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.	Case No.: CV24539 Dept.: 2P
SUSAN FALLINI, Counterclaimant, vs. Estate of MICHAEL DAVID ADAMS, by and through his mother JUDITH ADAMS, individually and on behalf of the Estate, Counterdefendants.	

ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

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

THE COURT HEREBY ENTERS THE FOLLOWING FINDINGS OF FACT:

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.

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 decendent, 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
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

NEO
John P. Aldrich, Esq.
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(702) 853-5490
(702) 227-1975 fax
Attorneys for Plaintiff

FILED

2009 MAY 18 Sheila Winn

NYE COUNTY CLERK
BY DEPUTY

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.	Case No.: CV24539 Dept.: 2P
SUSAN FALLINI, Counterclaimant, vs. Estate of MICHAEL DAVID ADAMS, by and through his mother JUDITH ADAMS, individually and on behalf of the Estate, Counterdefendants.	

NOTICE OF ENTRY OF ORDER

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

DATED this 14th day of May, 2009.

ALDRICH LAW FIRM, LTD.

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

CERTIFICATE OF SERVICE

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

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

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

An employee of Aldrich Law Firm, Ltd.

EXHIBIT 1

ORIGINAL

ORDR
John P. Aldrich
Nevada Bar No.: 6877
Catherine Hernandez
Nevada Bar No. 8410
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(702) 853-5490
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

Estate of MICHAEL DAVID ADAMS, by and through his mother JUDITH ADAMS, individually and on behalf of the Estate, Plaintiff, v. SUSAN FALLINI, ; DOES I-X, and ROE CORPORATIONS I-X, inclusive, Defendants.	Case No.: CV24539 Dept. No.: 2P
SUSAN FALLINI, Counterclaimant, vs. Estate of MICHAEL DAVID ADAMS, by and through his mother JUDITH ADAMS, individually and on behalf of the Estate Counterdefendants.	

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

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

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

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

IT IS FURTHER ORDERED that Defendant shall pay ~~$1,650.00~~ 750.00 for related attorney's fees and costs for failing to comply with discovery rules and for Plaintiff having to bring this motion, also within ten (10) days of Notice of Entry of this Order.

DATED this 27 day of April, 2009.

DISTRICT COURT JUDGE

Respectfully submitted by:

ALDRICH LAW FIRM, LTD.

John P. Aldrich, Esq.
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Catherine Hernandez, Esq.
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EXHIBIT F

EXHIBIT F

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Attorneys for Plaintiff

FILED
2009 JUL 17 A 9:41
Sheila Winn
NYE COUNTY CLERK
BY DEPUTY

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, Plaintiff, v. SUSAN FALLINI, ; DOES I-X, and ROE CORPORATIONS I-X, inclusive, Defendants.	Case No.: CV24539 Dept. No.: 2P
SUSAN FALLINI, Counterclaimant, vs. Estate of MICHAEL DAVID ADAMS, by and through his mother JUDITH ADAMS, individually and on behalf of the Estate Counterdefendants.	

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

THIS MATTER having come on for hearing on Monday, July 13, 2009, on Plaintiff's Motion to Strike Defendant's Answer and Counterclaim, 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 having reviewed all pleadings and papers on file herein, and good cause appearing therefore:

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

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

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

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

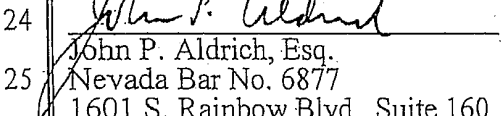
DATED this 17 day of July, 2009.

ROBERT W. LANE

DISTRICT COURT JUDGE

Respectfully submitted by:

ALDRICH LAW FIRM, LTD.



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Las Vegas, NV 89146
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Attorneys for Plaintiff

EXHIBIT G

EXHIBIT G

ORDR
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Attorneys for Plaintiff

FILED

2009 OCT -8 P 1:26

NYE COUNTY CLERK
BY DEPUTY
Linda Uhl

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.	Case No.: CV24539 Dept.: 2P
SUSAN FALLINI, Counterclaimant, vs. Estate of MICHAEL DAVID ADAMS, by and through his mother JUDITH ADAMS, individually and on behalf of the Estate, Counterdefendants.	

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

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:

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

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

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

DATED this 8 day of October, 2009.

ROBERT W. LANE
DISTRICT COURT JUDGE

Submitted by:

ALDRICH LAW FIRM, LTD.

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Las Vegas, Nevada 89146
Attorneys for Plaintiff

EXHIBIT H

EXHIBIT H

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FILED
FIFTH JUDICIAL DISTRICT
NOV 04 2009
Michelle A. Thore Nye County Clerk
_____ Deputy

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.	Case No.: CV24539 Dept.: 2P
SUSAN FALLINI, Counterclaimant, vs. Estate of MICHAEL DAVID ADAMS, by and through his mother JUDITH ADAMS, individually and on behalf of the Estate, Counterdefendants.	

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

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:

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 decent'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

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

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

8. 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. (Exhibit 1.)

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

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

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

with discovery requests.

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

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

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

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

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

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

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

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

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 three times entered an order compelling Defendant to respond to Discovery requests.

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

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

ROBERT W. LANE
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

5

DFLT
John P. Aldrich, Esq.
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Attorneys for Plaintiff

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

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.	Case No.: CV24539 Dept.: 2P
SUSAN FALLINI, Counterclaimant, vs. Estate of MICHAEL DAVID ADAMS, by and through his mother JUDITH ADAMS, individually and on behalf of the Estate, Counterdefendants.	

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

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

DATED this 4th day of February, 2010.

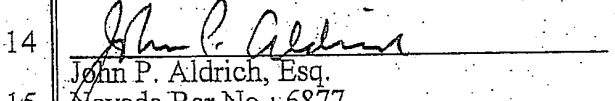
CLERK OF THE COURT

RACHEL ALDANA

By:_____
Deputy Clerk

The undersigned hereby requests
and directs the entry of default.

ALDRICH LAW FIRM, LTD.



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

EXHIBIT J

EXHIBIT J

ORDR
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

2010 JUN -2 A 8:57

REBECCA BALLARD
NYE COUNTY CLERK
BY DEPUTY

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.	Case No.: CV24539 Dept.: 2P
SUSAN FALLINI, Counterclaimant, vs. Estate of MICHAEL DAVID ADAMS, by and through his mother JUDITH ADAMS, individually and on behalf of the Estate, Counterdefendants.	

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

THIS MATTER having come on for hearing on Monday, May 24, 2010, a hearing having 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 decent'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

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

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

8. 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. (Exhibit 1.)

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

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

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

with discovery requests.

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

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

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

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

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

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

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

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

16. Defendant and her counsel failed to provide the information at issue by October 12, 2009. Consequently, on or about November 4, 2009, the Court entered its Findings of Fact, Conclusions of Law and Order Striking Answer and Counterclaim of Defendant Susan Fallini and Holding Defendant's Counsel in Contempt of Court. Pursuant to said Order, Defendant's counsel, Harold Kuehn, Esq., was held in contempt of Court and was ordered to 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 Order provided that the days shall be calculated on a seven-day week, and that the Order shall constitute a judgment upon which Mr. Aldrich can execute. Interest on unpaid balances was ordered to accrue at the statutory rate.

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

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

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

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

to Discovery requests.

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

5. The Nevada Supreme Court held that default judgments will be upheld where "the normal adversary process has been halted due to an unresponsive party, because diligent parties are entitled to be protected against interminable delay and uncertainty as to their legal rights." *Hamlett v. Reynolds*, 114 Nev. 863, 963 P.2d 457 (1998) (citing *Skeen v. Valley Bank of Nevada*, 89 Nev. 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 four occasions to comply with this Court's Order. At no time has Defendant or her counsel given any excuse or justification for their failure and refusal to abide by the Court's orders.

7. Defendant has been given ample opportunity to comply with the Court's Orders. Defendant has halted the litigation process and the additional sanctions of $5,000.00 immediately and $500.00 per day beginning June 1, 2010, if Defendant does not comply with the Court's prior orders, are 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 counsel, Harold Kuehn, Esq., is in contempt of Court and must pay to Plaintiff's counsel, John P. Aldrich, Esq., $5,000.00, in addition to the $150.00 per day that began accruing on October 13, 2009, and which continues to accrue until the Defendant and her counsel comply with the Court's prior orders, including providing the information

sought by Plaintiff.

IT IS FURTHER ORDERED that Defendant shall provide the information sought by Plaintiff, and which Defendant and her counsel have been ordered to provide, by June 1, 2010. In the event Defendant does not comply with the Court's prior orders by June 1, 2010, Mr. Kuehn will be held in contempt of Court again and must pay to Plaintiff's counsel, John P. Aldrich, Esq., $500.00 per day, beginning June 1, 2010, 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 2 day of June, 2010.

ROBERT W. LANE
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 K

EXHIBIT K

FILED

2010 AUG 12 A 9:00

REBECCA BALLARD
CLERK
BY DEPUTY

Case No. CV 24539
Dept. 2P

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
ESMERELDA, MINERAL AND NYE COUNTIES

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

ORDER

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

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

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

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

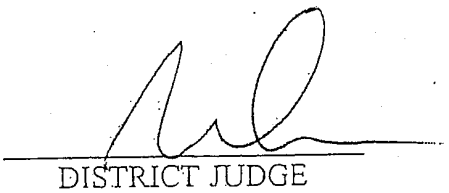
IT IS FURTHER ORDERED that the Court grants the Plaintiff $35,000 in sanctions levied against the Defendant.

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

IT IS FURTHER ORDERED that Plaintiff's request for Hedonic damages is DENIED.

FIFTH JUDICIAL DISTRICT COURT
ESMERELDA, MINERAL AND NYE COUNTIES

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 TECHO
Law Clerk to
DISTRICT JUDGE

FIFTH JUDICIAL DISTRICT COURT
ESMERELDA, MINERAL AND NYE COUNTIES

EXHIBIT L

EXHIBIT L

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

Jeff Kump, Esq.
Bar Number 5694
Marvel & Kump, Ltd.
Elko, Nevada 89801
Telephone: (775) 777-1204
Attorneys for Susan Fallini

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,

Defendant.

AND ALL RELATED CLAIMS.

Case No.: CV24539

Dept. No.: 2P

NOTICE OF APPEAL

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

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

////

////

////

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

DATED this 7 day of September, 2010.

AFFIRMATION
Pursuant to NRS 239B.030

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

Dated this 7 day of September, 2010.

By: _____
John Ohlson, Esq.
Bar Number 1672
275 Hill Street, Suite 230
Reno, Nevada 89501
Telephone: (775) 323-2700

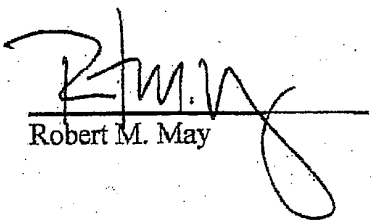
Jeff Kump, Esq.
Bar Number 5694
Marvel & Kump, Ltd.
Elko, Nevada 89801
Telephone: (775) 777-1204
Attorneys for Susan Fallini

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	_X_ Via U.S. Mail ____ Via Overnight Mail ____ Via Hand Delivery _X_ 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 Sylvan 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 cases(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 banc 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 NRCP 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 NRCP 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 NRAP 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

9/29/10
Date

Nevada, Washoe County
State and county where signed

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

Signature of counsel of record

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

CASE NO. CV-31449

DEPT. I

FILED

2011 APR -5 P 2:38

NYE COUNTY CLERK
BY DEPUTY

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

SUSAN FALLINI and JOE FALLINI,

Plaintiffs,

vs.

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

Defendants.

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

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

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

I. BACKGROUND

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

[1] Just in undersigned counsel's recent practice, the following suits against judges have 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.).

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

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

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

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

II. APPLICABLE LEGAL STANDARD

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

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

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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.'"

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

2. Judge Lane Is Not a Proper Party Defendant.

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

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

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

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

[2] In the context of federal civil rights, judicial immunity may not extend to declaratory 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").

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

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

C. FALLINIS' ATTORNEY'S NEGLECT IS ATTRIBUTED TO THEM; THEIR RECOURSE IS AGAINST THEIR COUNSEL, NOT JUDGE LANE.

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

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

The same is true here as in *Lange*:

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

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

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

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

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

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

IV. CONCLUSION

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

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[3] "For claim preclusion to apply the following factors must be met: (1) the same parties 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.

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

DATED this 4th day of April 2011.

CATHERINE CORTEZ MASTO
Attorney General for the State of Nevada

By: _____
C. Wayne Howle
Solicitor General
Nevada State Bar No. 3443
Appellate Division
100 N. Carson Street
Carson City, Nevada 89701
(775) 684-1227; Fax (775) 684-1108
Attorneys for Defendant Robert W. Lane

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

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

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

Nevada Office of the Attorney General
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Carson City, NV 89701-4717

ATTACHMENT 1

ATTACHMENT 1

Case #: CV-0024539

Judge: ROBERT W. LANE

Date Filed: 01/31/07 Department: 02

Case Type: NEGOTH TORT/OTHER NEGLIGENCE

Title/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, inclusive

COMMENT: FILE IN PAHRUMP

Parties:

	Name(s)	Attorney(s)
Plaintiff(s)	ESTATE OF MICHAEL DAVID ADAMS	JOHN P. ALDRICH
	ADAMS, JUDITH	JOHN P. ALDRICH
Defendant(s)	FALLINI, SUSAN	KUMP, JEFF

Hearings:

Date	Time	Event	Reference
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 . MR. KUEHN STATES THAT THIS MATTER WAS INITIALLY F ILED IN CLARK COUNTY AND THEN WAS MOVED HERE. MR. KUEHN ARGUES THAT THE DEFENSE HAS THE RIGHT TO LITI GATE IN THE COUNTY SEAT.THE COURT CLARIFIES MR. KU EHN'S ARGUMENT. JOHN ALDRICH IS PRESENT FOR JUDITH ADAMS AND HE STATES THAT PAHRUMP IS A NICE MIDDLE G ROUND FOR EVERYBODY. THE RELEVANT PARTIES LIVE IN T WO SEPARATE AREAS, ONE IN SOUTHERN CALIFORNIA AN D ONE IN TONOPAH. IT SEEMS TO HIM THAT AS LONG AS I T IS THE CORRECT FORUM, IT SHOULD BE ALLOWED TO PR OCEED HERE IN PAHRUMP. THE COURT NEEDS CLARIFICATIO N OF THE RULE THAT THE DEFENDANT HAS A RIGHT TO CH ANGE VENUE AND WILL REVIEW THAT RULE FURTHER. MR. KUEHN OFFERS FURTHER ARGUMENT. THE COURT WILL ISSUE A RULING WITHIN A FEW DAYS.	
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 F. MR. ALDRICH BRIEFS THE COURT THAT THERE HAS B EEN NO RESPONSE FROM THE DEFENDANT, AND CLARIFIES THAT THE DEFENDANT RECIEVED NOTICE. COURT GRA NTS THE MOTION AND NOTES THAT THAT THERE IS NO OR DER	5/19 ELEANOR

Case #: CV-0024539

AND WILL SIGN ORDER UPON SUBMITTING.

11/10/08 1:15 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 PLAINTIF 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 ARGUEMENT & 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 ISSSUES 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 ARUGES 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 FOWARD 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 JUDGEMENT 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

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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

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

FILED
2010 JUN -2 A 8:56
REBECCA BALLARD
CLERK

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.	Case No.: CV24539 Dept.: 2P
SUSAN FALLINI, Counterclaimant, vs. Estate of MICHAEL DAVID ADAMS, by and through his mother JUDITH ADAMS, individually and on behalf of the Estate, Counterdefendants.	

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

THIS MATTER having come on for hearing on Monday, May 24, 2010, a hearing having 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 decent'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

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

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

8. 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. (Exhibit 1.)

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

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

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

with discovery requests.

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

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

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

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

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

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

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

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

16. Defendant and her counsel failed to provide the information at issue by October 12, 2009. Consequently, on or about November 4, 2009, the Court entered its Findings of Fact, Conclusions of Law and Order Striking Answer and Counterclaim of Defendant Susan Fallini and Holding Defendant's Counsel in Contempt of Court. Pursuant to said Order, Defendant's counsel, Harold Kuehn, Esq., was held in contempt of Court and was ordered to 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 Order provided that the days shall be calculated on a seven-day week, and that the Order shall constitute a judgment upon which Mr. Aldrich can execute. Interest on unpaid balances was ordered to accrue at the statutory rate.

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

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

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

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

to Discovery requests.

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

5. The Nevada Supreme Court held that default judgments will be upheld where "the normal adversary process has been halted due to an unresponsive party, because diligent parties are entitled to be protected against interminable delay and uncertainty as to their legal rights." *Hamlett v. Reynolds*, 114 Nev. 863, 963 P.2d 457 (1998) (citing *Skeen v. Valley Bank of Nevada*, 89 Nev. 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 four occasions to comply with this Court's Order. At no time has Defendant or her counsel given any excuse or justification for their failure and refusal to abide by the Court's orders.

7. Defendant has been given ample opportunity to comply with the Court's Orders. Defendant has halted the litigation process and the additional sanctions of $5,000.00 immediately and $500.00 per day beginning June 1, 2010, if Defendant does not comply with the Court's prior orders, are 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 counsel, Harold Kuehn, Esq., is in contempt of Court and must pay to Plaintiff's counsel, John P. Aldrich, Esq., $5,000.00, in addition to the $150.00 per day that began accruing on October 13, 2009, and which continues to accrue until the Defendant and her counsel comply with the Court's prior orders, including providing the information

sought by Plaintiff.

IT IS FURTHER ORDERED that Defendant shall provide the information sought by Plaintiff, and which Defendant and her counsel have been ordered to provide, by June 1, 2010. In the event Defendant does not comply with the Court's prior orders by June 1, 2010, Mr. Kuehn will be held in contempt of Court again and must pay to Plaintiff's counsel, John P. Aldrich, Esq., $500.00 per day, beginning June 1, 2010, 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 2 day of June, 2010.

ROBERT W. LANE

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

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

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.	Case No.: CV24539 Dept.: 2P
SUSAN FALLINI, Counterclaimant, vs. Estate of MICHAEL DAVID ADAMS, by and through his mother JUDITH ADAMS, individually and on behalf of the Estate, Counterdefendants.	

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

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

DATED this 4 day of February, 2010.

CLERK OF THE COURT

By: _____
Deputy Clerk

The undersigned hereby requests and directs the entry of default.

ALDRICH LAW FIRM, LTD.

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

ATTACHMENT 4

ATTACHMENT 4

Case No. CV 24539
Dept. 2P

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
ESMERELDA, MINERAL AND NYE COUNTIES

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

ORDER

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

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

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

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

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

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

IT IS FURTHER ORDERED that Plaintiff's request for Hedonic damages is DENIED.

FIFTH JUDICIAL DISTRICT COURT
ESMERELDA, MINERAL AND NYE COUNTIES

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 TECHO
Law Clerk to
DISTRICT JUDGE

FIFTH JUDICIAL DISTRICT COURT
ESMERELDA, MINERAL AND NYE COUNTIES

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

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
ROECORPORATIONS I-X, inclusive,

Defendant.

Case No.: CV24539

Dept. No.: 2P

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.

3. Plaintiff's Counsel has accurately described the procedural history of this case beginning at page 3 of his motion, and continuing through page 7.

4. On information and belief, defendant's former counsel, Mr. Kuehn suffered some sort of mental breakdown, and allowed this case, and others in his office to become the "train wreck " that it is, without informing his client, Ms Fallini.

5. Undersigned counsel is working as quickly as possible to prepare and file a motion with this Court seeking redress on behalf of the defendant who is blameless in this disaster.

6. It is the understanding that a status conference is set before this Court on July 19, 2010. It is planned that Defendant's motions will be filed in sufficient time for opposition thereto to be made before that status conference and the Court's hearing of this application and other matters at the Status conference.

7. It would aggravate the injustice that has been visited on all parties and the Court by Mr. Kuehn to continue to proceed in the default of the defendant, without giving the defendant an opportunity to be heard.

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

AFFIRMATION
Pursuant to NRS 239B.030

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

Dated this 23 day of June, 2010.

BOWEN HALL OHLSON & OSBORNE

By: _____
John Ohlson, Esq.
Bar Number 1672
555 S. Center Street
Reno, Nevada 89501
Telephone: (775) 323-8678

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of BOWEN, HALL, OHLSON, & OSBORNE, and that on this date I personally served a true copy of the foregoing **OPPOSITION TO APPLICATION FOR DEFAULT JUDGMENT AGAINST DEFENDANT SUSAN FALLINI**, 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	_X_ Via U.S. Mail ____ Via Overnight Mail ____ Via Hand Delivery _X_ Via Facsimile ____ Via ECF

DATED this 23 day of June, 2010.

An employee of Bowen Hall

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

DATED this 7 day of September, 2010.

AFFIRMATION
Pursuant to NRS 239B.030

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

Dated this 7 day of September, 2010.

By: _____

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

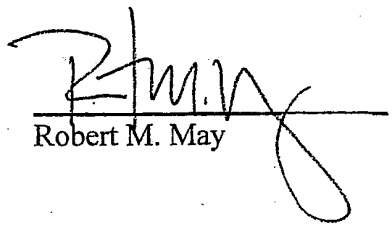
Jeff Kump, Esq.
Bar Number 5694
Marvel & Kump, Ltd.
Elko, Nevada 89801
Telephone: (775) 777-1204
Attorneys for Susan Fallini

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	_X_ Via U.S. Mail ___ Via Overnight Mail ___ Via Hand Delivery _X_ Via Facsimile ___ Via ECF

DATED this 7 day of September, 2010.



Robert M. May

ATTACHMENT 6

ATTACHMENT 6

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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
ROE CORPORATIONS I-X, inclusive,

Defendant.

_____/

AND ALL RELATED CLAIMS.

_____/

NOTICE OF APPEAL

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

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

///

///

///

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

DATED this 7 day of September, 2010.

AFFIRMATION
Pursuant to NRS 239B.030

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

Dated this 7 day of September, 2010.

By: _____
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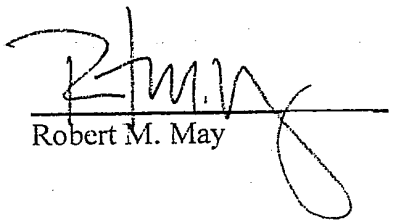
Attorneys for Susan Fallini

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

DATED this 7 day of September, 2010.



Robert M. May

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.

Supreme Court No.: 56840

FILED
MAY 31 2011
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

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

APPELLANTS' OPENING BRIEF

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11-16835

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUSAN FALLINI,

Supreme Court No.: 56840

Appellant,

vs.

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

Respondent.

_____/

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

APPELLANTS' OPENING BRIEF

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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.

Supreme Court No.: 56840

APPELLANT'S OPENING BRIEF

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

JURISDICTIONAL STATEMENT

An aggrieved party may take an appeal from a "final judgment entered in an action or proceeding . . ." NRAP 3A(b)(1). A final Judgment in an action or proceeding is essentially one that disposes of the issues presented in the case, determines the costs, and leaves nothing for future consideration of the court. *Alper v. Posin*, 77 Nev. 328, 344 P.2d 676 (1959). When no further action of the court is required in order to determine the rights of the parties in the action the order or judgment is final; when the case is retained for further action, it is interlocutory. *Perkins v. Sierra Nevada Silver Mining Co.*, 10 Nev. 405 (1876).

On August 12, 2010, the Fifth Judicial District Court of the State of Nevada entered an Order After Hearing, denying Defendant's Motion for Reconsideration, granting the Plaintiff damages in the principal amount of $1,000,000 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 for $5,188.85, and cancelling the trial that had been scheduled (*See* Order After Hearing entered August 12, 2010, Jt. Appx. II; 222-225[1]). All

[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.

other issues had been resolved previously in this case through the entry of partial summary judgment, the striking of Susan Fallini's Answer and Counterclaim and entry of a default. Jt. Appx. II, 55-57, 26-31, and 41-42.

NRAP 4 requires that "the notice of appeal required by Rule 3 shall be filed with the district court clerk . . . after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served." NRAP 4(a). On August 18, 2010, Plaintiff, Estate of Michael David Adams, by and through his mother Judith Adams, Individually and on behalf of the Estate (hereinafter Adams) filed a Notice of Entry of Order, which was mailed to Susan Fallini (hereinafter Fallini) on August 17, 2010. Fallini filed her Notice of Appeal and Case Appeal Statement on September 10, 2010.

This court may properly hear this matter as the District Court's August 12, 2010, Order After Hearing was a final judgment as defined in NRAP3A(b)(1) and *Alper v. Posin, supra*, and a Notice of Appeal was properly filed September 10, 2010, along with a Case Appeal Statement in conformance with NRAP 3, NRAP 3A(a) and NRAP 4.

ISSUES PRESENTED FOR REVIEW

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

(2) Whether the district court erred in vacating the jury trial, and determining damages.

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

STATEMENT OF CASE

The action arose out of wrongful death claims asserted by Plaintiff, Adams against Defendant, Fallini. Jt. Appx. I, 1-6. Michael David Adams (hereinafter Michael) was driving his car on July 7, 2005, when he hit a cow owned by Fallini, and died. Jt. Appx. I, 3. The complaint was filed on January 31, 2007. Jt. Appx. I, 1. Fallini filed her Answer and Counterclaim on March 14, 2007. Jt. Appx. I, 10. Soon after the Answer and Counterclaim were filed, Fallini's attorney Harold Kuehn (hereinafter Kuehn) failed to

take further necessary action including the failure to respond to discovery requests such as the request for admissions. Jt. Appx. II, 91-95.

As a result of Kuehn's failure to answer the requests for admissions, inaccurate statements establishing Fallini's liability were deemed admitted. Jt. Appx. I, 55-57. On July 30, 2008 the District Court entered an Order Granting Plaintiffs' Motion for Partial Summary Judgment establishing Fallini's liability leaving only the issue of damages left to be heard. Jt. Appx. I, 55-57. Notice of Entry of that Order was filed on August 15, 2008. Jt. Appx. I, 58-62. On June 16, 2009, Plaintiff moved to Strike Defendant's Answer and Counterclaim, which Kuehn opposed requesting that the court "decline to strike the answer and counterclaim in favor of imposing further monetary sanction against him." Jt. Appx. I, 224-231. Kuehn declared to the Court that the discovery noncompliance was "absolutely not the fault of the party and the blame should be attributed to counsel in full." Jt. Appx. I, 226. On July 17, 2009, the Court denied Plaintiff's Motion to Strike Defendant's Answer and Counterclaim. Jt. Appx. I, 232-233. However, on November 4, 2009, after repeatedly sanctioning Kuehn for his continued failure to respond to discovery requests and orders, the Court entered a Findings of Fact, Conclusions of Law and Order Striking Answer and Counterclaim of Defendant Fallini and Holding Defendant's Counsel in Contempt of Court. Jt. Appx. II, 26-31. Notice of entry of that Order was filed on November 9, 2009, and a Default was entered by the clerk of the court pursuant to that Order on February 4, 2010. Jt. Appx. II, 32-33, 41.

On June 16, 2010, Fallini substituted counsel replacing Kuehn. Jt. Appx. II, 87-88. On June 24, 2010, Adams filed an Application for Default Judgment Against Defendant Susan Fallini. Jt. Appx. II, 89-129. This Motion was opposed that same day (*See* Opposition, Jt. Appx. II, 130-132). Fallini then filed a Motion for Leave to File a Motion for Reconsideration that Adams opposed. (*See* Motion for Reconsideration "MFR", attached as Exhibit 1 thereto, Jt. Appx. II, 138-159) Adams' Application and Fallini's Motion were heard on July 19, 2010, resulting in the final Order After Hearing entered August 12, 2010, granting Adams' Application, denying Fallini's Motion, and granting

Adams a total of $2,730,884.85 in damages and attorney's fees, which Fallini Appeals from (*See* Order After Hearing entered August 12, 2010, Jt. Appx. II, 222-225).

RELEVANT FACTS

On July 7, 2005 around 9:00 p.m. Michael was driving on SR 375 highway in Nye County, Nevada, when he hit a Herford cow, owned by Fallini, killing both Michael and the cow. Jt. Appx. I, 2. On November 29, 2006 Adams filed his Complaint in Clark County Nevada. Fallini retained Harry Kuehn, Esq. of the law firm Gibson & Kuehn, to represent her as the Defendant in the wrongful death case; Adams, et al v. Fallini. Jt. Appx. I, 14. The action in Clark County was dismissed and subsequently re-filed in Nye County in the Fifth Judicial District Court of Nevada (Pahrump). Jt. Appx. I, 18-20. Kuehn accepted service on behalf of Fallini on March 1, 2007. Jt. Appx. I, 8-9. Fallini filed her Answer and Counterclaim on March 14, 2007. Fallini had a complete defense to the lawsuit, as the cow was on the highway in an "open range" part of Nevada (*See* MFR Jt. Appx. II, 138-159). The fact that the part of the highway where the accident occurred was "open range" is commonly known in that area (*See* MFR Jt. Appx. II, 138-159 and Opposition to Application for Default, Jt. Appx. II, 130-132).

Sometime in June, 2007, Fallini called Kuehn to inquire about the case, as she had not heard from Kuehn. Kuehn informed Fallini that the case was "over," and that she had prevailed. That was not true, Kuehn had filed an answer, and the case was just beginning (*See* Opposition to Application for Default, Jt. Appx. II, 130-132).

On or about October 31, 2007, Kuehn was served with discovery requests including Requests for Admission by Adams. Jt. Appx. I, 40-51. Kuehn failed to respond to said Requests for Admission before the expiration of 30 days, and, in fact, never responded to the requests. Jt. Appx. I, 40-51. As a direct result of Kuehn's failure to respond to the Requests for Admission the requests were deemed admitted by default pursuant to NRCP 36. Jt. Appx. I, 71-74. Thus, Fallini "admitted" that: the area of the accident was **not** open range; that Fallini had failed to follow the custom and practice of ranchers in the area of tagging cattle with luminous tags so that they could be seen at night

on the roadway (a practice that has never existed); and other statements that established Fallini's liability in the matter and extinguished her defenses. Kuehn never informed Fallini of the discovery requests. Jt. Appx. I, 71-74.

On July 2, 2008, Adams served a second set of request for production of documents on Kuehn. Kuehn failed to responded to these discovery requests as well. Jt. Appx. I, 41-46.

On April 7, 2008 (and again on May 14, 2008 with a certificate of service) Adams filed their Motion for Partial Summary Judgment. Jt. Appx. I, 40. Kuehn failed to oppose this motion. Jt. Appx. I, 71-74. The Motion was based primarily on the admissions contained in the request for admissions. Jt. Appx. I, 41-49. A hearing on the Motion was held on July 14, 2008, which Kuehn failed to appear at and the motion was granted (*See* court minutes in Case Summary, Jt. Appx. II, 240-244). The Court entered its Order Granting Plaintiff's Motion for Partial Summary Judgment on July 30, 2008. Jt. Appx. I, 55-57. Notice of entry of that Order was served on Kuehn on August 15, 2008. Jt. Appx. I, 58-62.

On March 23, 2009, Adams filed a Motion to Compel Defendant's Production of Documents. A hearing on that motion was held on April 27, 2009, wherein Kuehn appeared and stated that his office dropped the ball and did not oppose the motion (*See See* court minutes in Case Summary, Jt. Appx. II, 240-244). The Court issued an Order Granting Plaintiff's Motion and ordering Fallini to pay $750.00 in attorney's fees. Kuehn continued to fail to produce the discovery requests, and on June 16, 2009, Adams filed a Motion to Strike Defendant's Answer and Counterclaim. Jt. Appx. I, 160-170. Kuehn opposed requesting that the court "decline to strike the answer and counterclaim in favor of imposing further monetary sanction against him." Jt. Appx. I, 224-231. Kuehn declared to the Court that the discovery noncompliance was "absolutely not the fault of the party and the blame should be attributed to counsel in full." Jt. Appx. I, 226. On July 13, 2009, the Court heard and denied Plaintiff's Motion to Strike Defendant's Answer and Counterclaim and imposed additional sanctions on Kuehn. Jt. Appx. I, 232-233.

Because of Kuehn's repeated failure to comply with discovery requests, Adams filed numerous Motions for Order to Show Cause and Orders to Show Cause were issued. Jt. Appx. I, 91-143, 148-149, 160-219, II, 1-12, 17-19, 20-21, 26-31, 48-58 and 68-75. Kuehn was repeatedly sanctioned by the Court. Jt. Appx. I, 148-149, 220-223, 232-233, II, 20-21, 26-31, 59-61, 68-75 and 222-225. In the face of these sanctions, Kuehn promised to comply, but never did. Jt. Appx. II, 89-129. Despite the imposition of sanctions, which accrued daily, Kuehn never responded.

On November 4, 2009, after repeatedly sanctioning Kuehn for his continued failure to respond to discovery requests and orders the Court entered a Findings of Fact, Conclusions of Law and Order Striking Answer and Counterclaim of Defendant Susan Fallini and Holding Defendant's Counsel in Contempt of Court. Jt. Appx. II, 26-31. Notice of entry of that Order was filed on November 9, 2009. Jt. Appx. II, 32-40. Default was entered by the clerk of the court pursuant to that Order on February 4, 2010. Jt. Appx. II, 41-42. On June 2, 2010, the Court entered another Findings of Fact, Conclusions of Law and Order Holding Defendant's Counsel in Contempt of Court, this time fining Kuehn $5,000.00 plus an additional $500.00 per day for every day after the 30th day following the entry of that Order that Kuehn continued to fail to respond to Discovery requests. Jt. Appx. II, 68-75. Kuehn, nonetheless maintained his inaction.

The Order for Partial Summary Judgment established Fallini's liability in this matter, and the Order Striking Answer and Counterclaim left Fallini in the position of default. The default stripped Fallini of all defenses (*See* MFR Jt. Appx. II, 138-159). Still, Kuehn did not notify Fallini of the status of the case. Kuehn failed to inform Fallini about these circumstances, having previously told her that the case was "over" (*See* MFR, Jt. Appx. II, 138-159). Kuehn never brought Fallini to any of the hearings and repeatedly told the Court that the responsibility for the inaction was his alone (*See* court minutes in Case Summary, Jt. Appx. II, 240-244). Finally, in June of 2010, Kuehn's partner, Tom Gibson, Esq. discovered the status of the case and contacted Fallini, informing her of what had transpired over the preceding three years (*See* MFR, Jt. Appx. II, 138-159). Gibson

informed Fallini that Kuehn has bi-polar disorder, and "went off his meds" (*See* MFR Jt. Appx. II, 138-159). Fallini immediately hired new counsel filing a Substitution of Counsel on June 16, 2010, replacing Kuehn with the undersigned counsel. Jt. Appx. II, 87-88. On June 24, 2010, Adams filed an Application for Default Judgment Against Defendant Susan Fallini. Jt. Appx. II, 89-129. This Application was opposed that same day (*See* Opposition, Jt. Appx. II, 130-132). Fallini's new counsel then filed a Motion for Leave to File a Motion for Reconsideration that Adams opposed (*See* MFR, Jt. Appx. II, 138-159). Adams' Application and Fallini's Motion were heard on July 19, 2010, resulting in the final Order After Hearing entered August 12, 2010, granting Adams' Application, denying Fallini's Motion, and proceeding with a prove up hearing granting Adams a total of $2,730,884.85 in damages and attorney's fees, from which Fallini Appeals (*See* Order After Hearing, Jt. Appx. II, 222-225 and court minutes in Case Summary, Jt. Appx. II, 240-244).

SUMMARY OF ARGUMENTS

I. Denying Fallini's Motion for Reconsideration was reversible error as the Orders entered of which Fallini was requesting reconsideration were clearly erroneous, based on "facts" known to be untrue but established by default, and manifested injustice, holding Fallini liable for an accident that she was in no way responsible for to the tune of 2.7 million dollars.

II. Dismissing the jury trial was reversible error because it deprived Defendant of her constitutional right and the determination of damages is an issue of fact that should have been resolved by the jury.

III. The damages awarded to Adams by the District Court were excessive and were not supported by any legal basis or calculations supported by evidence.

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

ARGUMENTS

I. THE DISTRICT COURT ERRED IN DENYING FALLINI'S MOTION FOR RECONSIDERATION.

Since the Fifth Judicial District has not enacted local rules of practice, the first inquiry on the subject of motions to reconsider rulings should be to the District Court Rules, and particularly Rule 13(7), which provides as follows:

> No motion once heard and disposed of shall be renewed in the same cause, nor shall the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties.

The Supreme Court has recognized the propriety of motions for reconsideration under DCR 13(7). See *Arnold v. Kip*, 123 Nev. 410, 168 P3d 1050 (2007). 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).

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 cause 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.

A. The Order Granting Plaintiff's Motion for Partial Summary Judgment was Clearly Erroneous

The Granting of Plaintiff's Motion for Partial Summary Judgment was brought about through a breach of the rules of professional conduct by both attorney's and breach of the code of judicial conduct by the District Court.

Attorney's have a duty not to present frivolous contentions to the tribunal and are required to be candid in their presentation of the facts.

Nevada Rule of Professional Conduct 3.1 provides in relevant part: "A lawyer shall not ... assert or controvert an issue ... unless there is a basis in law *and fact* for doing so that is not frivolous . . ." (emphasis added).

Rule 3.3. provides in relevant part:

> (a) A lawyer shall not knowingly:
> (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . .or
> (3) Offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal...

Rule 8.4. provides in relevant part that it is professional misconduct for a lawyer to:

> (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; . . .
> (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
> (d) Engage in conduct that is prejudicial to the administration of justice . .

Plaintiff achieved victory in this matter due to Kuehn's failure to deny requests for admission. Jt. Appx. I, 55-57. The essential subject matter of which established liability and provided that the area of highway on which the accident occurred in this case was **not** open range. Jt. Appx. II, 89-129. It was further established, through failure to deny, that Defendant failed in her responsibility to attached reflective tags to her cows, as is the custom in that part of Nye County. Jt. Appx. I, 55-57.

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

were false, as it was common knowledge in Nye County, yet he still presented these statement as "facts" to the Court, allowing misrepresentations to stand perpetrating misconduct of his own.

Because Kuehn failed to deny the Plaintiff's request for admission, the questions were deemed admitted (*See* Jt. Appx. I, 55-57). To compound matters, Kuehn failed to oppose Plaintiff's motion for summary judgment, violating Rule 1.1 of the Code of Professional Conduct requiring that counsel provide competent representation (*See* Jt. Appx. I., 55-57). The Court then granted the unopposed motion for summary judgment, even though the factual premise therefore was and is patently untrue (*See* MFR, Jt. Appx. II, 138-159).

The first Cannon of the Code of Judicial Conduct provides:

> A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.

Although there is no transcript of the final hearing in front of the District Court, Fallini recalls the Honorable Robert Lane stating that he knew the area where the accident occurred to be "open range." Yet the Court accepted as fact that it was not open range and made rulings consistent therewith, detracting from the integrity of the tribunal. By accepting facts as true, which were known or should have been known to be false the trial court failed to uphold the "integrity of the tribunal."

Had Fallini been properly represented, the District Court may well have taken judicial notice that the area in question in this case was open range. The Court began the final Hearing inclined to grant Fallini's Motion for Reconsideration (*See* court minutes in Case Summary, Jt. Appx. II, 240-244). Instead, the Court accepted a false factual premise due to Kuehn's failures, ultimately ratifying that acceptance in its final order despite knowing the facts supporting the order were false (*See* Order after Hearing, Jt. Appx. II, 222-225).

Because the Partial Summary Judgment rested on factual falsehoods, it was **clearly**

erroneous. The first prong for the Court to have reconsidered and rescinded previous orders was met.

B. Allowing the Order Granting Motion for Partial Summary Judgment to stand worked a Manifest Injustice

Promptly after this case was initiated, Fallini retained Kuehn to represent her in the defense of this action (*See* Jt. Appx. I, 8-9). Kuehn accepted service for Fallini on February 22, 2007 (*See* Proof of Service, Jt. Appx. I, 8-9). Until approximately June 2, 2010 Kuehn failed to communicate the status of the case, **except to tell Defendant that the case was "over and had been taken care of"** (*See* MFR Jt. Appx. II, 138-159). Finally, Mr. Tom Gibson (apparently having been apprised of Kuehn's many derelictions in this case) contacted Fallini and apprised her of the true status of her case (*See* MFR Jt. Appx. II, 138-159).

Fallini had no idea that she had been served with discovery requests, that among those requests were Requests for Admissions, or that the failure to deny those had become case determinative (*See* Opposition to Application for Default Jt. Appx. II, 130-132). Fallini had been completely unaware that the lawyer she had hired and paid had failed so miserably to protect her interests or that every motion made by Adams had gone unopposed (*See* court minutes in Case Summary, Jt. Appx. II, 240-244). Further, Fallini was ignorant of the fact that her lawyer had repeatedly exposed them to contempt citations (which were never served on her personally) (*See* MFR Jt. Appx. II, 138-159, Opposition to Application for Default, Jt. Appx. II, 130-132 and Certificate of Service attached to Orders or Notice's of Entry, Jt. Appx. II, 23, 33, 63, and 77).

As soon as Fallini discovered her lawyer had failed to competently represent her and had been the engine of this disaster, she consulted long time counsel who referred her to new counsel without delay (*See* Jt. Appx. II, 87-88, and Opposition to Application for Default, Jt. Appx. II, 130-132). If Kuehn was the engine for this disaster then the District Court was the conductor, and this disaster could have been and should have been stopped from barreling down this track at a much earlier time.

Rule 1.1 of the Nevada Rules of Professional Conduct provides as follows:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 2.15 of the Nevada Code of Judicial Conduct provides in relevant part as follows:

> ... (B) A judge having knowledge that a lawyer has committed a violation of the Nevada Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority. . . (D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Nevada Rules of Professional Conduct shall take appropriate action.

Kuehn's utter failure to provide competent representation and be honest with Fallini not only brought this unjust result upon Fallini, but the District Court, despite its obvious knowledge of Kuehn's misconduct (shown by the numerous and hefty fines imposed on Kuehn) failed to notify the appropriate authority or Fallini, and instead enter decisions based entirely on his failures, and not on sound factual premises. The District Court had a duty to report Kuehn to the State Bar for his gross and obvious dereliction of duty, and should have required Kuehn to at least bring his client to one or more of the hearings where her rights were being foreclosed upon (*See* court minutes in Case Summary, Jt. Appx. II, 240-244). Kuehn subverted the administration of justice and the court allowed this subversion to continue in violation of numerous rules of professional conduct and the code of judicial conduct.[2] If this case does not represent the "manifest injustice" of which the Supreme Court speaks, then manifest injustice does not exist.

Because the Orders that Fallini moved the court to reconsider were clearly erroneous and leaving them in place perpetuated a manifest injustice, the District Court 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.

II. THE DISTRICT COURT ERRED WHEN IT DISMISSED THE JURY TRIAL AND DETERMINED DAMAGES

This matter was set for a jury trial when the District Court vacated that jury trial setting and determining damages from the bench (*See* Jt. Appx. I, 221-224, and Order After Hearing, Jt. Appx. II, 222-225) Article 1, Section 3 of the Nevada Constitution provides:

> **Trial by jury; waiver in civil cases.** The right of trial by Jury shall be secured to all and remain inviolate forever; but a Jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law; and in civil cases, if three fourths of the Jurors agree upon a verdict it shall stand and have the same force and effect as a verdict by the whole Jury, Provided, the Legislature by a law passed by a two thirds vote of all the members elected to each branch thereof may require a unanimous verdict notwithstanding this Provision.

The unconstitutional denial of a jury trial must be reversed unless the error was harmless. *United States v. California Mobile Home Management Park Co.*, 107 F.3d 1374, 1377 (9th Cir. 1997). The right to jury trial includes having a jury determine all issues of fact. *Molodyh v. Truck Insurance Exchange,* 744 P.2d 992, 304 Or. 290, 297-298 (1987). "The amount of damages *** from the beginning of trial by jury, was a 'fact' to be found by the jurors." *Lakin v. Senco Products, Inc.*, 987 P.2d 463, 470, 329 Or. 62, Quoting Charles T. McCormick, *Handbook on the Law of Damages* 24 (1935).

This matter was set to be tried by a jury. Jt. Appx. I, 220-223. Factual determinations remained as to damages, even though the Court struck the Defendant's answer and entered default (*See* Opposition to Application for Default Jt. Appx. II, 130-132). The Court's determination of damages from the bench, after striking the jury trial, violated Defendant's right to a jury trial secured by the above cited section of the Nevada Constitution. The Damages awarded by the District Court in total exceeded 2.7 million 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.

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III. THE DISTRICT COURT ERRED WHEN IT AWARDED EXCESSIVE DAMAGES WIHTOUT LEGAL BASIS

Damages were awarded in this case without a legal basis, and were excessive. The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a "grossly excessive" punishment on a tortfeasor. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U. S. 443, 454 (1993). Nevada Pattern Civil Jury Instruction No.: Nev. J.I 10.13 explains that damages are determined to make a Plaintiff whole, and compensate for loss, and provides as follows:

> The heir's loss of probable support, companionship, society, comfort and consortium. In determining that loss, you may consider the financial support, if any, which the heir would have received from the deceased except for his death, and the right to receive support, if any, which the heir has lost by reason of his death.
>
> [The right of one person to receive support from another is not destroyed by the fact that the former does not need the support, nor by the fact that the latter has not provided it.]
>
> You may also consider:
>
> 1. The age of the deceased and of the heir;
> 2. The health of the deceased and of the heir;
> 3. The respective life expectancies of the deceased and of the heir;
> 4. Whether the deceased was kindly, affectionate or otherwise;
> 5. The disposition of the deceased to contribute financially to support the heir;
> 6. The earning capacity of the deceased;
> 7. His habits of industry and thrift; and
> 8. Any other facts shown by the evidence indicating what benefits the heir might reasonably have been expected to receive from the deceased had he lived.
>
> With respect to life expectancies, you will only be concerned with the shorter of the two, that of the heir whose damages you are evaluating or that of the decedent, as one can derive a benefit from the life of another only so long as both are alive.

A calculation of damages should only be upheld if there is competent evidence to

sustain it. *Cornea v. Wilcox*, 898 P.2d 1379, 1386 (Utah 1995) citing *Rees v. Intermountain Health Care, Inc.*, 808 P.2d 1069, 1072 (Utah 1991); *Penrod v. Carter*, 737 P.2d 199, 200 (Utah 1987). In this matter, there was no showing that Plaintiff's suffered any economic loss from the death of their son. Only the estate damages related to funeral expenses were shown constituting compensable damage (*See* Order After Hearing, Jt. Appx. II, 222-225).

CONCLUSION

This cataclysmic, train wreck of a case was occasioned by the blatant malpractice of Appellant Fallini's first lawyer, compounded by Adam's attorney's misconduct, which caused the entry of partial summary judgment, the striking of Appellant's answer, and the entry of default. But for the attorney misconduct and allowance by the District Court, Appellant should have prevailed. The District Court committed reversible error when it denied Fallini's Motion for Reconsideration, vacated the jury trial and awarded excessive damages to Adams.

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

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of N.R.A.P. 28(e), which requires that every assertion in the briefs regarding matters in the record be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is

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

AFFIRMATION
Pursuant to NRS 239B.030

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

Dated this 27 day of May, 2011.

By: _____
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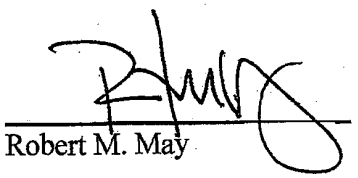
CERTIFICATE OF SERVICE

I hereby certify that I am an employee of JOHN OHLSON, and that on this date I personally served a true copy of the foregoing **APPELLANT'S OPENING BRIEF**, 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	_X_ Via U.S. Mail ___ Via Overnight Mail ___ Via Hand Delivery ___ Via Facsimile ___ Via ECF

DATED this 27 day of May, 2011.



Robert M. May

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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,

Appellant,

vs.

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

Respondent.

_____/

Supreme Court No.: 56840

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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Docket 56840 Document 2011-16713

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AFFIRMATION
Pursuant to NRS 239B.030

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

DATED this 7th day of June, 2011.

/s/ Robert M. May
Robert M. May

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 **AMENDED CERTIFICATE OF SERVICE**, by the method indicated and addressed to the following:

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DATED this 7th day of June, 2011.

/s/ Robert M. May
Robert M. May

CASE NO. CV-31449

DEPT. I

FILED

2011 JUL 11 P 4:41

NYE COUNTY CLERK

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

SUSAN FALLINI and JOE FALLINI, Plaintiffs, vs. THE HONORABLE ROBERT W. LANE, TONY ADAMS, JUDITH ADAMS, JOHN P. ALDRICH, ESQ., HAROLD KUEHN, ESQ., and Does I through V, jointly and severally, Defendants.	**ORDER**

The Motion to Dismiss made by the HON. ROBERT W. LANE, Defendant, having come before the court for decision, the court having reviewed the presentments of the parties and having heard argument in open court in Tonopah, Nevada, on June 6, 2011, and the Court deeming itself fully advised in the premises and good cause appearing;

IT IS HEREBY ORDERED that the Motion to Dismiss should be, and hereby is, GRANTED. Judges cannot be sued for their judicial acts and are entitled to absolute immunity. *Mireles v. Waco*, 502 U.S. 9, 9 and 11(1991), *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978). *Cf. 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").

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///

Accordingly, dismissal is appropriate pursuant to NRCP 12(b)(1) and 12(b)(5).

DATED this 5th day of July, 2011.

Justice Miriam Shearing

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
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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

Respondents.

CASE NO. 56840

District Court Case No.: CV00224539

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

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11-20641

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUSAN FALLINI, Appellant, vs. ESTATE OF MICHAEL DAVID ADAMS, BY AND THROUGH HIS MOTHER JUDITH ADAMS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE Respondents.	CASE NO. 56840 District Court Case No.: CV00224539

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

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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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