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

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

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

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

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

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

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

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

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

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

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

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

notwithstanding this Provision.

Although no statute exists requiring that damages be determined by a jury, Fallini still had her constitutional right to a jury trial which she never waived or had opportunity to assert. Further, it is well established law that the right to jury trial includes having a jury determine all issues of fact. *Molodyh v. Truck Insurance Exchange,* 744 P.2d 992, 304 Or. 290, 297-298 (1987). "The amount of damages *** from the beginning of trial by jury, was a 'fact' to be found by the jurors." *Lakin v. Senco Products, Inc.*, 987 P.2d 463, 470, 329 Or. 62, Quoting Charles T. McCormick, *Handbook on the Law of Damages* 24 (1935).

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

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

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

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

sustain it. *Cornea v. Wilcox*, 898 P.2d 1379, 1386 (Utah 1995) citing *Rees v. Intermountain Health Care, Inc.*, 808 P.2d 1069, 1072 (Utah 1991); *Penrod v. Carter*, 737 P.2d 199, 200 (Utah 1987). In this matter, there is no record of a showing that plaintiff's suffered any economic loss from the death of their son. The only tangible damages for which evidence can be inferred are the funeral expenses. Jt. Appx. II, 222-223, 242.

CONCLUSION

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

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

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

CERTIFICATE OF COMPLIANCE

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

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

Dated this 10th day of January, 2012.

By: _____

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CERTIFICATE OF SERVICE

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

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 10th day of January, 2012.

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.

No. 56840

FILED

FEB 15 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY D. Malone
DEPUTY CLERK

ORDER SUBMITTING FOR DECISION WITHOUT ORAL ARGUMENT

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

It is so ORDERED.

Pickering, C.J.

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

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a final judgment in a wrongful death action. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Respondent Judith Adams brought suit against appellant Susan Fallini for the death of her son after he struck one of Fallini's cattle that was in the roadway.[1] Fallini, through her previous counsel, repeatedly failed to answer various requests for admission, resulting in a conclusive admission of negligence pursuant to NRCP 36. Namely, Fallini was deemed to have admitted that the accident did not occur on open range, which rendered her affirmative defense under NRS 568.360(1) inapplicable. These admissions lead to a partial summary judgment in Adams' favor on the issue of liability.

[1]As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

Approximately three years after Adams filed her complaint, Fallini retained new counsel and immediately filed a motion for reconsideration of prior orders, arguing that the accident had in fact occurred on open range. The district court denied Fallini's motion for reconsideration, vacated the jury trial, and proceeded to a prove-up hearing where it awarded damages to Adams in excess of $2.5 million.

Fallini appealed, challenging the district court's decision to (1) deny her motion for reconsideration; (2) vacate the jury trial; and (3) award over $2.5 million in damages. We conclude that Fallini's first two arguments are unpersuasive and affirm in part the district court's order. However, we reverse and remand in part the district court's award of damages.

The district court properly denied Fallini's motion for reconsideration

Fallini argues that the district court erred in denying her motion for reconsideration because the partial summary judgment was based on false factual premises regarding whether the accident occurred on open range. We disagree.

"A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." Masonry and Tile v. Jolley, Urga & Wirth, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997); see also Moore v. City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) ("Only in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted.")

In Nevada, a defendant has 30 days to respond to a plaintiff's request for admission. NRCP 36(a). Failure to do so may result in the requests being deemed "conclusively established." NRCP 36(b). It is well

settled that unanswered requests for admission may be properly relied upon as a basis for granting summary judgment, and that the district court is allowed considerable discretion in determining whether to do so. Wagner v. Carex Investigations & Sec., 93 Nev. 627, 631, 572 P.2d 921, 923 (1977) (concluding that summary judgment was properly based on admissions stemming from a party's unanswered request for admission under NRCP 36, even where such admissions were contradicted by previously filed answers to interrogatories); Smith v. Emery, 109 Nev. 737, 742, 856 P.2d 1386, 1390 (1993) (explaining that that "failure to respond to a request for admissions will result in those matters being deemed conclusively established . . . even if the established matters are ultimately untrue") (citation omitted).

Here, Fallini's argument is unpersuasive because she has not raised a new issue of fact or law. The question of whether the accident occurred on open range was expressly disputed in Fallini's answer, but she subsequently failed to challenge this issue through Adams' requests for admissions. Fallini has presented no evidence on appeal to alter the conclusive impact of admissions under NRCP 36 as a basis for partial summary judgment. Wagner, 93 Nev. at 631, 572 P.2d at 923. Moreover, the fact that these admissions may ultimately be untrue is irrelevant. Smith, 109 Nev. at 742, 856 P.2d at 1390. Finally, the district court had discretion to treat Fallini's failure to file an opposition to partial summary judgment as "an admission that the motion [was] meritorious and a consent to granting the motion." King v. Cartlidge, 121 Nev. 926, 927, 124 P.3d 1161, 1162 (2005) (citing D.C.R. 13(3)).

Thus, the district court did not err in refusing to reconsider its prior orders.[2]

The district court did not err in vacating the jury trial

Fallini argues that the district court's decision to vacate the jury trial violated her rights under Article 1, Section 3 of the Nevada Constitution. We disagree.

Following entry of a default judgment, the district court may conduct hearings to determine the amount of damages "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). "The failure of a party to serve a demand [for a jury trial] . . . constitutes a waiver by the party of trial by jury." NRCP 38(d). Generally, "'[w]hen the right to a jury trial is waived in the original case by failure to timely make the demand, . . . the right is not revived by the ordering of a new trial.'" Executive Mgmt. v. Ticor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (quoting 8 James Wm. Moore et al., Moore's Federal Practice § 38.52[7][c] (3d ed. 2001)).

Here, the parties initially determined in 2007 that a jury trial was not required for resolution of this case. Upon Fallini's default on the

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[2]We also reject Fallini's attempt to distinguish herself from her prior counsel's inaptitude. "'It 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 [her], in consequence of the neglect, carelessness, forgetfulness, or inattention of the former.'" Tahoe Village Realty v. DeSmet, 95 Nev. 131, 134, 590 P.2d 1158, 1161 (1979) (quoting Guardia v. Guardia, 48 Nev. 230, 233-34, 229 P. 386, 387 (1924)), abrogated on other grounds by Ace Truck v. Kahn, 103 Nev. 503, 507, 746 P.2d 132, 135 (1987), abrogated on other grounds by Bongiovi v. Sullivan, 122 Nev. 556, 583, 138 P.3d 433, 452 (2006).

partial summary judgment motion, Adams demanded a jury trial on the issue of damages. Following the district court's order to strike Fallini's pleadings, the district court vacated the jury trial and proceeded to determine damages by way of a prove-up hearing. Although both parties were present at the hearing, neither party objected to these proceedings. The record shows that Fallini did not object when the district court vacated the jury trial and proceeded with a prove-up hearing. She did not argue her right to a jury trial in her motion for reconsideration. Nor did she demand a jury trial prior to her argument on appeal.

Thus, we conclude that Fallini waived her right to a jury trial by failing to make a timely demand. The district court was within its authority to proceed with the prove-up hearing for a determination of damages. NRCP 55(b).

The district court erred in its award of damages

Fallini argues that the district court's damages award was excessive because there is no evidence that Adams suffered any economic loss from the death of her son.

The record indicates that Adams originally sought over $9 million in damages, including $2.5 million for grief, sorrow, and loss of support;. $1,640,696 for lost career earnings; and $5 million for hedonic damages. Adams and her husband both testified that while they were not financially dependent on the decedent, they remained extremely close until the time of his death. Adams testified that her son often helped with physical tasks around the house and provided support while the couple coped with health problems. The record on appeal does not include any evidence regarding the decedent's salary, earning history, or future earning potential. Ultimately, the district court granted Adams damages in the reduced amount of $1 million for grief, sorrow, and loss of support

as well as $1,640,696 for lost career earnings.[3] The district court denied Adams' request for hedonic damages.

"[T]he district court is given wide discretion in calculating an award of damages, and this award will not be disturbed on appeal absent an abuse of discretion." Diamond Enters., Inc. v. Lau, 113 Nev. 1376, 1379, 951 P.2d 73, 74 (1997). An heir in a wrongful death action may broadly recover "pecuniary damages for the person's grief or sorrow, loss of probable support, companionship, society, comfort and consortium, and damages for pain, suffering or disfigurement of the decedent." NRS 41.085(4); see also Moyer v. United States, 593 F. Supp. 145, 146-47 (D. Nev. 1984) (recognizing that regardless of whether a parent was dependent on the decedent child for support, the parent is entitled to recovery for the loss of probable support based on contributions (such as time and services) that "would naturally have flowed from . . . feelings of affection, gratitude and loyalty"). However, while "heirs have a right to recover for 'loss of probable support[,]' [t]his element of damages translates into, and is often measured by, the decedent's lost economic opportunity." Alsenz v. Clark Co. School Dist., 109 Nev. 1062, 1064-65, 864 P.2d 285, 286-87 (1993) (indicating that a duplicative award of damages already available under NRS 41.085(4) would be absurd).

We conclude that the district court acted within its discretion to award damages to Adams based on loss of probable support despite evidence that Adams was not financially dependent on her son. NRS 41.085(4). However, we conclude that the district court abused its

[3]The district court also awarded Adams $5,188.85 for funeral expenses and $85,000 in sanctions and attorney fees. This award is not challenged on appeal.

discretion by awarding separate damages for both loss of probable support and lost economic opportunity, as there is neither a legal basis nor evidentiary support for the award of $1,640,696 in lost career earnings.[4] Alsenz, 109 Nev. at 1065, 864 P.2d at 287. Accordingly we,

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cherry

cc: Hon. Robert W. Lane, District Judge
Carolyn Worrell, Settlement Judge
Marvel & Kump, Ltd.
John Ohlson
Aldrich Law Firm, Ltd.
Nye County Clerk

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[4]Adams argues that even if the district court erred in attributing her award to a particular category of damages, the total award should be upheld because she is entitled to hedonic damages. Because hedonic damages are often available in wrongful death cases only as an element of pain and suffering (which is included in the award under NRS 41.085(4)), we conclude this argument similarly fails. Banks v. Sunrise Hospital, 120 Nev. 822, 839, 102 P.3d 52, 63-64 (2004); Pitman v. Thorndike, 762 F. Supp. 870, 872 (D. Nev. 1991) (indicating that hedonic damages in Nevada are an element of the pain and suffering award).

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

SUSAN FALLINI,

Appellant,

vs.

Case No. 56840

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

Respondent.
_____/

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

APPELLANT'S PETITION FOR REHEARING

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TABLE OF AUTHORITIES

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

I. OVERVIEW

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

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

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

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

II. POINTS TO BE ADDRESSED ON REHEARING

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

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

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

III. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

be heard on its merits.

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

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

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

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

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

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

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

IV. CONCLUSION

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

CERTIFICATE OF COMPLIANCE

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

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

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

Respectfully submitted this 8th day of April, 2013.

By: /s/ John Ohlson

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CERTIFICATE OF SERVICE

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

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

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

DATED this 8th day of April, 2013.

/s/ Robert M. May
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.

No. 56840

FILED

JUN 03 2013

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

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Hardesty, J.

Parraguirre, J.

Cherry, J.

cc: Hon. Robert W. Lane, District Judge
Marvel & Kump, Ltd.
John Ohlson
Aldrich Law Firm, Ltd.
Nye County Clerk

13-16207

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

SUSAN FALLINI,

Appellant,

vs.

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

Respondent.
_____/

Case No. 56840

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

APPELLANT'S PETITION FOR EN BANC RECONSIDERATION

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

I. OVERVIEW

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

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

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

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

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

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

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

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

II. POINTS TO BE ADDRESSED ON EN BANC RECONSIDERATION

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

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

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

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

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/ / /

III. ARGUMENT

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

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

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

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

the unanswered requests for admissions by applying the general rule that "the negligence of an attorney is imputable to his client, and that the latter cannot be relieved from a judgment taken against [her], in consequence of the neglect, carelessness, forgetfulness, or inattention of the former" (*Id.*, *citing Tahoe Vista Realty v. DeSmet,* 95 Nev. 131, 134, 590 P.2d 1158, 1161 (1979)) (emphasis added). Based on the egregious nature of Kuehn's undisputed misconduct in the underlying case in light of the district court's judicial notice of the complete defense to the case *as a matter of law,* this Court's summary, footnote-disposal of the attorney misconduct issue in this case and the authority on which it relies warrants reconsideration.

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

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

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

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

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

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

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

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

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

(quotation and citations omitted).

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

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

Id.

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

of the motion, and concluded that the attorney abandoned his advocacy of his clients' cause and crossed the line into the gross negligence described in *Tani*." *Id.* Thus, the Ninth Circuit has sanctioned the application of Rule 60(b)(6) where an attorney's gross neglect results in the ultimate consequence — a judgment not predicated upon the actual merits of the case, but rather upon the party's failure to prosecute or defend his case.[3]

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

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

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

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

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

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

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

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

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

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

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

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

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IV. CONCLUSION

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

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CERTIFICATE OF COMPLIANCE

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

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

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

Respectfully submitted this 5th day of June, 2013.

By: /s/ John Ohlson
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of JOHN OHLSON, and that on this date I personally caused to be served a true and correct copy of the foregoing **APPELLANT'S PETITION FOR EN BANC RECONSIDERATION** by the method indicated and addressed to the following:

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

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

DATED this 5th day of June, 2013.

/s/ Robert M. May
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.

No. 56840

FILED

JUL 18 2013

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

ORDER DENYING EN BANC RECONSIDERATION

Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Cherry, J.
Cherry

Saitta, J.
Saitta

cc: Hon. Robert W. Lane, District Judge
Marvel & Kump, Ltd.
John Ohlson
Aldrich Law Firm, Ltd.
Nye County Clerk

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.

FILED
Supreme Court No. 56840
District Court Case No. CV0024539
2013 AUG 14 P 1:40

NYE COUNTY CLERK
BY DEPUTY

FILED
AUG 20 2013
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

REMITTITUR

TO: Sandra L. Merlino, Nye County Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: August 12, 2013

Tracie Lindeman, Clerk of Court

By: Rory Wunsch
Deputy Clerk

Remittitur Recalled per order filed 1/3/14

cc (without enclosures):
Hon. Robert W. Lane, District Judge
John Ohlson
Marvel & Kump, Ltd.
Aldrich Law Firm, Ltd.

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on Aug 14, 2013

District Court Clerk

RECEIVED
AUG 19 2013
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

13-23550

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Attorneys for Susan Fallini

IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR NYE COUNTY, STATE OF NEVADA

* * * * *

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.

/

Case No. CV 24539

Dept. No. 2P

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

Defendant Susan Fallini, by and through her counsel, John Ohlson, moves this Court for an order disqualifying Judge Robert W. Lane in Department 2 from any further proceedings in this case and to transfer this case for further consideration to the Honorable Kimberly A. Wanker in Department 1. This motion is made and based upon the Nevada Rules of Judicial Conduct, and is further supported by the following points and authorities.

SUPPORTING POINTS AND AUTHORITIES

I. OVERVIEW

In January 2007, Plaintiff Judith Adams ("Adams") sued Defendant Susan Fallini ("Fallini") for the death of her son after he struck one of Ms. Fallini's cows that was on the highway, located on open range, on which he was driving. Fallini hired attorney Harold Kuehn ("Kuehn") to represent and defend her in that suit, pursuant to which Kuehn filed an answer and counterclaim on Fallini's behalf. In her answer, Fallini listed as an affirmative defense NRS 568.360(1), which provides that those who own domestic animals running on open range do not have a duty to keep the animal off the highway traversing or located on the open range and are not liable for the damages to property or for injury caused by a collision between a motor vehicle and the animal occurring on such highway.

In June 2007, shortly after Kuehn filed Fallini's answer, he lied to her and told her that the case was over and that she had prevailed. Unbeknownst to Fallini, however, the case was not over. In fact, litigation continued by way of discovery requests and motion practice by counsel for Adams, but Kuehn failed to, among other things, answer various requests for admission, oppose a motion for summary judgment based on those unanswered requests for admissions, appear for a hearing on the motion for summary judgment or respond to other discovery requests. Fallini never received notice of any of the foregoing—not by her attorney, not by opposing counsel, and not by the Court. Nevertheless, Judge Lane entered partial summary judgment in which he imposed liability on Fallini for the accident. In particular, Fallini was *deemed* to have admitted that the accident did *not* occur on open range—which obviated her *complete defense* to the action pursuant to NRS 568.360(1)—even though in her answer she had already asserted that defense as one of her affirmative defenses. Judge Lane later held Kuehn in contempt of court and repeatedly imposed significant sanctions for his failure to appear and comply with its orders in the case. But despite these court-imposed sanctions, Fallini was still not informed of the status of her case, nor was she informed that her attorney was being sanctioned for his deliberate failure to represent her. Neither Judge Lane nor counsel for Adams ever sent documents to Fallini, called Fallini or otherwise put Fallini on notice regarding the true status of the case (*i.e.*, that her

attorney had failed her and that Adams' counsel was taking advantage of Kuehn's absence and complete nonresponsiveness). It was not until June 2010—three years after Kuehn told Fallini that the case was over and that she had prevailed—that Fallini learned the true status of her case when Kuehn's law partner, Tom Gibson ("Gibson"), discovered and advised Fallini what had truly happened with her case.

In immediate response to Gibson's news, Fallini retained new counsel. In the meantime, Adams sought a default judgment based upon the order granting summary judgment. The Court granted Adams' application for default, vacated the jury trial and, after a prove-up hearing, and imposed damages against Fallini in an amount that exceeded $2.7 million.

Fallini appealed Judge Lane's order and the Supreme Court of the State of Nevada reversed and remanded the Court's award of damages against Fallini. Remittitur issued on August 12, 2013. Fallini requests that Judge Lane disqualify himself from entering any further orders in this case pursuant to the Nevada Supreme Court's Order and remittitur and defer any further consideration of this case to the Hon. Kimberly A. Wanker in Department 1.

II. ARGUMENT

Judges are generally required to comply with the law, uphold and apply the law, and act at all times in a manner that promotes public confidence in the independent, integrity, and impartiality of the judiciary. *See* Nevada Code of Judicial Conduct ("NCJC"), Rule 1.1, 1.2, and 2.2. A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. NCJC Rule 2.11 (requiring the disqualification of a judge whenever the judge's impartiality might reasonably be questioned). In this case, Judge Lane acknowledged that the portion of the highway on which the accident in which Adams' son was killed occurred was open range – *a fact that is a substantive and complete defense to Adams' claims against Fallini*. By his repeated orders sanctioning Kuehn and holding him in contempt for his failures to appear and comply with its orders in this case, Judge Lane also knew that Kuehn's conduct in this case was in gross violation of his professional and ethical responsibilities

to Fallini, this Court, and this case.[1] Nevertheless, Judge Lane entered a multi-million dollar judgment in favor of Adams on her legally baseless claims against Fallini.

Fallini not only appealed Judge Lane's judgment, which has resulted in an order remanding this case on the issue of damages, she has sued Judge Lane over its judgment that was entered in violation of the absolute defense to this case as a matter of law and despite knowing that it was a result of the unethical and unprofessional conduct by counsel for Fallini. Because the judgment that is subject to further consideration by this Court pursuant to the Nevada Supreme Court's order is the subject of a lawsuit between Fallini and Judge Lane, and because the judgment reflects a failure by Judge Lane to uphold and apply the law and to act in a manner that promotes public confidence in the integrity of the judiciary where there is clear evidence of *egregious* misconduct by an officer of the Court, Fallini requests that Judge Lane recuse himself from any further proceedings in this case, and defer and further consideration of and orders entered in this case to the Honorable Kimberly A. Wanker in Department 1 of this Court.

III. CONCLUSION

Under the circumstances, Judge Lane is invested in the outcome of this case such that he is prohibited from being able to preside over any further proceedings consistent with the Nevada Code of Judicial Conduct. As a consequence, and so that the integrity and impartiality of the judiciary can be maintained as this case proceeds through post-appeal determinations, Fallini requests that Judge Lane be disqualified from this case, and that it be transferred to the Honorable Kimberly A. Wanker in Department 1.

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

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 15 day of August, 2013.

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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 served a true and correct copy of the foregoing **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** by the method indicated and addressed to the following:

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Aldrich Law Firm, Ltd.
1601 S. Rainbow Blvd., Suite 160
Las Vegas, NV 89146

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

DATED this 15 day of August, 2013

Robert M. May

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

APPELLANT'S APPENDIX, VOLUME IV

(Bates Nos. 0578-0787)

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IN THE SUPREME COURT OF THE STATE OF NEVADA

OFFICE OF THE CLERK

* * * * *

SUSAN FALLINI,

Supreme Court No.: 56840

Appellant,

vs.

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

Respondent.
_____/

MOTION FOR ORDER ALLOWING SUPPLEMENTATION OF APPENDIX AND FOR RE-OPENING OF BRIEFS

COMES NOW, appellant, Susan Fallini, by and through her undersigned counsel of record and moves this Court for its orders allowing appellant to supplement the Appendix herein to include the newly produced transcript of proceedings in the district court, and to allow supplementation of appellant's briefs herein in relation to said transcripts. This motion is made and based upon the points and authorities and affidavit submitted herewith, and all the records files and pleadings on file herein.

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Points and Authorities

I.
History

As a result of the failure of her original counsel to represent her in the district court proceedings, appellant suffered a $2.75 million default judgment, after a hearing in the district court.[1]

Prior to the commencement of the hearing on plaintiff's motion for default judgment, undersigned counsel (as is his custom) approached the Court reporter and introduced himself. He gave the reporter a card and asked her to send a transcript and a bill to him. He then took his place in line on the motion calendar and waited.[2]

The hearing was held in which both testimony and arguments were had. The matter was submitted to the Court for decision. Judgment was eventually entered in favor of the plaintiffs and against appellant and this appeal ensued.

During the process of assembling the record in this appeal, undersigned's office contacted the court reporter present from Depo International to request a transcript of the default hearing. My office was told that there would be no transcript because the hearing was not reported. This appeal then proceeded to full briefing and submission to the Court without a transcript.

On September 29, 2011 appellant contacted my office and informed that she had received a daft transcript of the default hearing in the mail. I caused an original to be prepared, a copy of which is attached to my affidavit submitted herewith. Up until this time, I believed that no transcript existed and none could exist.

Significantly, the transcript contains the testimony of Judith Adams, mother of the

[1] For a complete recitation of events leading up to the default judgment, see Appellant's opening brief. Those facts are not necessary here for the purposes of this motion.

[2] For a full explanation, see counsel's affidavit with the transcript exhibit.

deceased, Anthony Adams, father of the deceased, and the appellant, Susan Fallini. Significantly, Ms. Adams testified that neither she nor her husband was financially dependent on the deceased at the time of his death. (tr. p.21, ll. 1-4).

Appellant testified that the area in which the accident occurred was "open range." (tr. p. 27, ll. 2-5)[3]

Because appellant operated on the belief that the hearing had not been reported, and that no transcript could be produced, this appeal was prosecuted without the benefit of a transcript. If the transcript had been available when this matter was briefed, significant arguments could have been made relating to the district court's knowledge of the open range status of the accident site, and the bearing that knowledge had on the district court's refusal to allow a re-opening of the proceedings for an adjudication on the merits.

II.
Argument

Rule 10(a) NRAP provides:

> The trial court record consists of the papers and exhibits filed in the district court, the **transcript of the proceedings**, if any, the district court minutes, and the docket entries made by the district court clerk. (emphasis added)

Rule 13 NRAP places the responsibility for the production of the transcript squarely on the court reporters shoulders, and provides for sanctions against a court reporter who fails in that responsibility. Here, the court reporter clearly failed in her responsibility. As a result this appeal was required to go forward without the benefit of the entire proceedings below. Appellant has been handicapped. Respondent has been handicapped. This Court has been restricted in its ability

[3] In response to objection, the court stated "It doesn't matter. I'm aware that it is." This is an astonishing statement on behalf of the Court. Plaintiff's recovery on the merits of this case is entirely dependent on the accident site **not** being open range. Underscored now is the fact that appellant has suffered a ruinous, $2.75 million judgment as a result of a completely meritless lawsuit.

to render a just decision based on the entire record.

III.
Conclusions

This Court should enter its orders:

1. Allowing the record to be supplemented by the inclusion of the transcript in the appendix herein;

2. Allowing appellant to supplement her opening brief (and reply brief as necessary) to argue the transcript, as relevant;

3. Allowing Respondent the reciprocal privilege.

Dated this 5 day of October, 2011.

By: _____

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

Jeff Kump, Esq.
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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 **MOTION FOR ORDER ALLOWING SUPPLEMENTATION OF APPENDIX AND FOR RE-OPENING OF BRIEFS**, 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 5 day of October, 2011.

Robert M. May

SCHEDULE OF EXHIBITS

EXHIBIT 1: Affidavit of John Ohlson, Esq.

EXHIBIT 1

EXHIBIT 1

AFFIDAVIT OF JOHN OHLSON, ESQ.

STATE OF NEVADA)
)ss.
COUNTY OF WASHOE)

I, John Ohlson, Esq., being first duly sworn, do hereby affirm under penalty of perjury that the assertions of this affidavit are true, that I have personal knowledge of the matters stated in this affidavit, except as to those matters stated on information and belief, and as to those matters, I believe them to be true, and that if called as a witness, I could competently testify to the matters contained herein.

1. Affiant is an attorney licensed to practice law, in good standing, in the State of Nevada.
2. Affiant has been a member in good standing of the bar of this Court since September, 1972, and makes this affidavit in support of the within motion and on behalf of appellant herein.
3. Affiant succeeded Harry Kuehn as counsel for appellant in the district court proceedings. In that capacity, affiant represented appellant in a hearing before the district court on July 19, 2010. The hearing was had on Respondents motion for default judgment.
4. Prior to the hearing, affiant approached the court reporter whom affiant had never before met. I introduced myself and gave the court reporter a card, indicating that the transcript and a bill should be sent to me. I then took my place in line for the motion calendar to await the calling of this case.
5. During the hearing, I noticed the court reporter was not taking the matter down (or was not present, I don't recall which), and remarked accordingly to the Court. Judge Lane assured me that the proceedings were being video-taped, and I proceeded.
6. After the proceedings, my office contacted the court reporter and asked for a transcript. My assistant was told that there was no transcript of the proceedings, and that one could

not be produced because I had not specifically (in those words) asked the reporter to report the hearing. Subsequently, this appeal was taken without the benefit of a transcript, because of my belief that a transcript was unavailable.

7. On September 29, 2011, appellant sent a draft of a transcript to my office, saying that it had been sent to her directly by a court reporter not even present at the hearing. My office followed up and contacted the court reporter and asked her to prepare a final, original transcript. Exhibit A hereto is a copy of the final sent to me by the court reporter.

8. I have never been given an explanation as to why I was misinformed about the ability of the court reporter to prepare a transcript from video tapes or even that videos of the proceeding existed. I have never been informed why the court reporter told my office that a transcript of the default hearing could not be prepared. I have further not been informed why the transcript appeared so suddenly now. I believe that the inclusion of the transcript of the default hearing would be useful to the parties and the Court.

JOHN OHLSON, ESQ.

SUBSCRIBED and SWORN to me this
5 DAY OF OCTOBER, 2011.

NOTARY PUBLIC

ROBERT M. MAY
NOTARY PUBLIC
STATE OF NEVADA
MY COMMISSION EXPIRES: 8-12-2012
COMMISSION NO: 04-91310-2

EXHIBIT A

EXHIBIT A

CASE NO. CV 24539

DEPARTMENT 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.	*	APPLICATION FOR DEFAULT JUDGMENT

. . . . . .

* * *

The above-entitled cause of action came on regularly for hearing before the Honorable Judge Robert W. Lane at Pahrump, Nevada on July 19, 2010.

APPEARANCES

For the Plaintiff: JOHN P. ALDRICH, Esq.
1601 S. Rainbow Blvd.
Suite 160
Las Vegas, Nevada 89146

For the Defendant: JOHN OHLSON, Esq.
555 South Center Street
Reno, Nevada 89501

* * * * *

THE COURT: All right, let's get started. Prove up real quick and do what you need to do.

MR. ALDRICH: (Inaudible) I don't think I'll take all that long. I have two witnesses. I know that Mr. Ohlson has an issue he wanted to address before we started.

MR. OHLSON: I'll reserve it for the finish of the live testimony. It relates to the matters that were filed.

THE COURT: Very good.

MR. OHLSON: And also relates to an issue I want to raise and that is since the answer and counter claim are stricken, can you still consider comparative fault?

THE COURT: I probably would have unless I now hear an argument that I can't because I like to consider everything but you're not going to open a door after we hear all the live testimony and have to reopen up the live testimony again, are you?

MR. ALDRICH: So save the argument for comparative fault now or later?

THE COURT: I'd probably do it now.

MR. ALDRICH: Comparative fault based on what? An affirmative defense? (Inaudible.)

THE COURT: You should be aware that out

here in the rurals, cows run on highways.

MR. ALDRICH: Sure, but my position is, based on what? An affirmative defense as asserted in the case? I mean, what happens in these situations is a prove up (inaudible). I'm here to prove up the damages. We're going to hear from Mr. and Ms. Adams for a few minutes. I've attached some other documents. We're going to talk about those a little bit and then we're going to ask the Court to enter a judgment.

If the Court's going to diminish that judgment, it needs to be based on evidence. Well, what evidence would that be? If affirmative defense that was asserted, there aren't any, so --

THE COURT: Are you asserting right now that at this prove up, the other side isn't allowed to present evidence or argue or anything at this time? They have to remain silent so you can ask for half a billion dollars and that's the evidence, that you're asking for half a billion right now, and they're not allowed to say a word and I don't have anything in opposition so I have to give you a half a billion?

MR. ALDRICH: Well, I certainly have taken that position in my pleadings and I could ask for half a billion dollars but --

THE COURT: How do I know that the half

a million you're going to ask for isn't any more unreasonable than half a billion?

MR. ALDRICH: Just a couple of things to touch on that I addressed in my -- I guess it was a reply to their opposition to the application for default judgment. Sort of losing track of --

THE COURT: Say that again. I'm kidding.

MR. ALDRICH: But the bottom line is that in the -- I cited one case in the reply and I'll just read the one sentence from it and it's Young versus Johnny Robero Building, 106 Nevada 88, and it says that the defaulting party gives up the right to object to all but the most patent and fundamental defects in the accounting in default judgment.

So -- and I go into here a little bit about -- I think was this motion -- about whether or not they're entitled to participate in hearing, to cross examine, to do anything, and it's my position that they're not.

Now the case that's cited in here talks about a situation where there was an application for default judgment that was going forward and the parties had agreed that they would be able to cross examine, the defendant would, but not present evidence and that type of thing, and then apparently that stipulation didn't work out and

they weren't allowed to do that and they went forward, but it talks about how the Court certainly has the discretion to allow that to happen.

My position here is they haven't identified witnesses in the case or anything like that. I've done the proof that's necessary when there is no opposition to the other side and in their opposition to my application for default judgment, they didn't take any issue at all (inaudible).

THE COURT: You cited a case a moment ago that said the most patent and what?

MR. ALDRICH: Fundamental defects in the accounting.

THE COURT: Okay. Now I'm not going to let them get a windfall, right? Right?

MR. ALDRICH: Sure.

THE COURT: So there's naturally going to be questions on my mind. When they say they want half a million for such and such, I'm going to think to myself, is that reasonable, and you're going to argue it is.

Let's say hypothetically -- I don't know -- we have it written here -- loss of consortium or something, I don't know, and you say, well, half a million's -- you didn't bring in your experts, right?

MR. ALDRICH: I did not bring my experts (inaudible).

THE COURT: Right.

And so let's say hypothetically you say loss of education, or loss of -- let's do loss of income, there we go. That's a good one. You've got lost earnings, one-point-six million. Now --

MR. ALDRICH: I do have an expert for that number.

THE COURT: Figures.

But, anyway, let's say hypothetically that I'm sitting here saying to myself, wow, one-point-six, that seems kind of high and I'm not sure that's the right thing to give him or not. What am I going to base my decision on, on whether to give it or not, unless I allow the other side an opportunity to ask some questions about it, which would help me, and that's why I'm inclined to say, well, let's let them ask some questions to help me so I'm not just picking figures out of the air and saying one-point-six million, no, I think he would have lost his job in three years, I'm going to give him a hundred thousand and so forth.

MR. ALDRICH: Well, Your Honor is the finder of fact and certainly the case law indicates --

THE COURT: Well, you were basically arguing

that they shouldn't really be allowed to ask, where I'm more inclined to let them.

MR. ALDRICH: I understand.

THE COURT: Okay.

MR. ALDRICH: I'm simply conceding to the Court that, yes, you're going to have to make that difficult decision. My position is that they shouldn't be able to present evidence.

THE COURT: Well, I don't know if they have any evidence to present.

MR. ALDRICH: I don't know if they do either because I haven't received any notice of any --

THE COURT: I doubt they're going to have their own expert to tell us what his loss of income was but they can ask reasonable questions of whoever it is that's going to testify to loss of income.

MR. ALDRICH: And that's the Court's discretion. I think that the case law says that we present it to the Court. The Court certainly, on it's own, can say, you know, my request for one-point-six million in lost earnings is too high. Certainly, at least on that one, I have an expert for. I asked for five million in hedonic damages and the Court can take a look at that and reduce or increase it if it felt like that was what it need to do.

THE COURT: All right. I just feel funny that sometimes on occasion I'm asked to pick numbers out of the air. I'd prefer it would be based on evidence but at the same time if somebody comes forward to me in a civil action and they say, well, we think it's worth three million -- here's what our expert said, it's worth three million, and in my head I'm, no, it's more like seven hundred and fifty thousand, and now I'm picking the thing out of the air but I know three million's not reasonable and so forth, but go ahead and present your evidence and we'll figure it out as we go along.

MR. ALDRICH: Fair enough.

THE COURT: Go ahead.

MR. ALDRICH: All right. I want to start with calling Judith Adams.

THE COURT: All right.

Ms. Adams, if you can come up here please to this witness stand.

There's a little ramp. Be cautious walking up it.

(Whereupon the witness was sworn by the clerk.)

THE COURT: Thank you. Have a seat.

JUDITH ADAMS,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ALDRICH:

Q. All right, Ms. Adams, if you would just state your name please for the record.

A. Judith Adams.

Q. And are you married?

A. Yes, I am.

Q. And to whom are you married?

A. Anthony Adams.

Q. Okay. Is that the gentlemen next to me here?

A. Yes, it is.

Q. All right. And just a little bit of background for the Court, do you currently work?

A. Yes, I do.

Q. Where do you work?

A. I work for the Social Security Administration.

Q. And what do you do there?

A. I'm an operations supervisor.

Q. How long have you been employed in that capacity?

A. Forty years.

Q. I imagine you could tell us a little bit about social security.

A. I could.

Q. And do you have any children?

A. I had one child, Michael Adams.

Q. Okay. And you know we're here to talk about the case involving Michael's death, right?

A. Yes.

Q. Okay. What I would like to do is to have you tell the Judge a little bit about Michael and I want to help you. I know that's a broad question so what I'd like for you to do is give him some information about Michael and maybe start and go chronologically. Maybe that would help.

MR. OHLSON: Your Honor, I object to the form of the question. It is overly broad and we ought to stick -- try to stick to admissible evidence.

THE COURT: And it's twenty to twelve, so tell me about your son, well, he was born in this hospital and on we go for the next few hours.

MR. ALDRICH: It certainly will be shorter than that but I'm happy to narrow it down. I didn't want to lead too much but (inaudible).

THE COURT: Thank you.

Q. (By Mr. Aldrich) What was Michael like as a

child?

A. He was a wonderful child. He was very good. He was very loving. He had an enormous number of friends. He was involved in a tremendous amount of activities.

Q. And what were his hobbies?

A. He liked sports. He liked reading. It would be hard to kind of pinpoint hobbies as such. There was hardly any aspect of daily life that he wasn't interested in.

Q. And how was your relationship with Michael when he was young?

A. Excellent.

Q. Tell me a little bit about Michael's education.

A. He went to high school. He graduated from high school. He went to university. He took a break from his university studies to go into the Marine Reserves. He was in the Reserves for six months. When he left the Reserves, he resumed his education. He graduated with a degree in geology and started working in that field.

Q. And what was he doing for work at the time of his death?

A. He was working as a staff geologist.

Q. And for what company, if you know?

A. Actually at the time that he died, he was working for a company called Horizon Well Logging. He

had just previously worked for Southern California -- I think -- Geotechnical, and he went back to work for Horizon Well Logging.

Q. And how was your relationship with Michael in the, let's say, two or three years before his passing?

A. At that point in time he was not living at home so we spoke on the phone frequently. I often said that the cell phone must be an appendage of his. If we didn't speak on the phone because he was working in an area that was out of range, he would e-mail frequently.

Q. And did you communicate with him often?

A. Very often. Probably even -- he probably communicated with my husband more frequently.

Q. And in -- let's just keep it at the two or three years before his passing, did he help out around your house?

A. He did, if needed, and there were probably things to do in the house that might have been too difficult for either my husband or I to accomplish so if we needed help in terms, you know, say physical labor, he'd certainly come over and helped us with that. He helped me with some technical issues, you know. Every time I would get on the cell phone, it was like, okay, show me how to use this, so little things like that.

Q. And your son passed away approximately five

years ago. Is that correct?

A. It was five years ago the beginning of this month.

Q. And is your need for his assistance at this time greater than it was five years ago?

A. Well, as I see that both of us are getting older, certainly there's more times that I would probably think to call on him. There's probably less physical things that neither one of us could accomplish now and certainly he would have helped me. My husband's had a number of illnesses. He certainly would have been at my side, supportive, you know, as I was going through those issues with my husband.

Q. And have you actually had times then in your life when there were problems with your husband and Michael would come and help you?

A. Absolutely.

Q. Tell us about that.

Q. My husband suffered a heart attack in 1992 and at that time he came up from school to be with us. He came to the hospital every day. He relieved me, you know -- in intensive care, even though you get excellent care, someone still needs to be there, so he would come and relieve me, so we would take turns sitting next to Tony in the hospital.

Q. Okay. How's your husband's health now?

A. His health has not improved since then. He's had a second open heart surgery and, in November, he suffered a cardiac arrest that he was in the hospital for about two and a half weeks. At that time he needed to have a defibrillator implant so this is always, you know, something that's on my mind.

Q. I want to call your attention to the approximate time that Michael passed away. How did you find out that he had passed away?

MR. OHLSON: Objection. Relevance.

THE COURT: Overruled.

How old was he at the time he died?

MS. ADAMS: Thirty-three.

THE COURT: And no wife or kids?

MS. ADAMS: No.

THE COURT: And he didn't live at home with you, right?

MS. ADAMS: No.

THE COURT: Okay.

All right. Go ahead. It's overruled.

A. (By Ms. Adams) Um, two policemen from the police department in the city where we live came to our door and, at first, you know, you wonder why are policemen at your door, and as soon as he said, "Are

you the parents of Michael Adams," I immediately knew that obviously they were telling me something about him but this was later in the day. From what I understand, he was pronounced dead in the morning and we did not find out until the evening.

MR. ALDRICH: May I approach the witness? I just want to show her the exhibits and authenticate that.

THE COURT: That'll be fine.

Q. (By Mr. Aldrich) I'm showing you what we've marked as Exhibit 1 to our application for default judgment. And do you recognize this document?

A. Yes.

Q. Okay. And then I'm going to flip to the third page on that document. Is that your signature?

A. Yes, it is.

Q. Okay. And is the information that you have provided to the Court in this letter true and correct?

A. Yes, it is.

Q. And I also want to draw your attention to Exhibit 4, and we'll let the Court know that Exhibit 3 has its own Exhibit 4, so I'm actually going to refer to the Gunter's Funeral Home (inaudible). Do you know what that is?

A. Yes.

Q. Can you tell us what that is?

A. That is the bill for the funeral arrangements and cremation.

Q. And did you actually have to pay that bill?

A. Yes, I did.

Q. All right. Thank you.

Now I'd like for you to tell us how Michael's death has affected your life.

A. Well, there isn't a day that goes by that I don't think about him and even when thinking about him or talking about him, it's exceedingly difficult. If you would understand the medical terminology stress cardiomyopathy, it's sort of called broken heart syndrome, and, for me, it feels like -- when I think about Michael -- like someone has their hands around your heart and starts squeezing it and just tighter and tighter. Just even sitting in the courtroom this morning, you know, I'm overcome with this, and knowing how it affects my husband is increasingly distressing for me, and realizing that he was an only child and at some point in time, you know, I may be facing, you know, widowhood and realizing that I'm not going to have Michael to help me, you know, as I get older is, you know -- it's unimaginable.

Q. And just so we can understand a little bit about

Michael's relationships, I understand he had a fiancée but he was not engaged at the time he passed away.

A. That is correct.

Q. Okay. And he did not have any children.

A. No.

Q. Okay. Did he have friends?

A. Many friends.

Q. Did anything happen today that indicates the relationship he had with friends --

MR. OHLSON: Objection. Relevance.

THE COURT: What's the relevance of that?

MR. ALDRICH: For the Court to have an understanding of what Michael was like.

THE COURT: I just -- when you say he had a lot of friends, I believe you. Are you asking her to talk about the kind of friendship or --

MR. ALDRICH: Maybe as an offer of proof, she's indicated to me that he's had a big influence on friends and that they do things still repeatedly to remember him. I wanted to give her a chance to explain that.

THE COURT: Do they?

MS. ADAMS: Yes.

Each year on his birthday, they all get together. They invite my husband and I and we celebrate

Michael's life and we do this on a regular basis. His friends, to this day, call me to see just, you know, how I'm doing. His friends would -- in one of the documents that I provided to you, one of his friends referred to Michael as the glue that kept their group together. He was the one that organized activities for them and it was very hard for them afterwards to get together and organize things because Michael wasn't there to do it for them.

Q. (By Mr. Aldrich) I think I've covered -- I'm trying to remember if there was anything else you wanted to let the Court know about Michael.

A. Well, I think most of, you know, what I covered was in my statement. It's just -- it's very hard to realize that you've lost your only child, to realize that you'll never have grandchildren, how difficult it is when people come up and ask, "Oh, do you have children," or when my contemporaries are talking about their grandchildren, it's not a conversation that I can participate in.

Q. All right.

MR. ALDRICH: Those are all the questions I have, Your Honor.

THE COURT: Thank you very much.

Did you have any questions?

MR. OHLSON: I do.

THE COURT: Really? Okay.

CROSS EXAMINATION

BY MR. OHLSON:

Q. Ma'am, you brought this lawsuit on behalf of the estate of your son. Is that correct?

A. Correct.

Q. Not on behalf of you and your husband individually. I mean, that's what it says.

A. Okay.

MR. ALDRICH: I think I'm going to object because it says -- the pleading says individually and on behalf of the estate.

MR. OHLSON: All right. I stand corrected.

Q. (By Mr. Ohlson) When your son died, you were living in what city and state?

A. Cyprus, California.

Q. And where was your son living?

A. He lived in Seal Beach, California.

Q. And what was he doing in this part of the country when he died? Do you know?

A. He was working outside of Rachel for Horizon Well Logging.

Q. And when your son died, you and your husband

were not financially dependent upon him, were you?

A. Financially dependent?

Q. Yes.

A. No, we are not.

MR. OHLSON: That's all I have.

THE COURT: Anything else?

MR. ALDRICH: No, Your Honor.

THE COURT: All right.

Thank you. You can step down.

MR. ALDRICH: And I would just like to call Anthony Adams to testify.

THE COURT: All right.

If you can come up here to the witness stand please.

You look like you're in pretty good shape for all the medical problems you've had.

MR. ADAMS: That's what my doctor says too.

THE COURT: Raise your right hand.

(Whereupon the witness was sworn by the clerk.)

THE COURT: Thank you, sir. Have a seat.

ANTHONY ADAMS,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ALDRICH:

Q. Sir, would you please state your name?

A. Anthony Adams.

Q. And as -- we heard this before so I'll be really quick, obviously you're married to Judith Adams. Correct?

A. Correct.

Q. And Michael Adams was your son?

A. Yes.

Q. Okay. And I just want to let the Court get to know you a little bit. Do you currently work?

A. No, I retired now.

Q. Okay. Where did you work when you worked?

A. I had my own business. I manufactured shoes and distribute them.

Q. Okay. Now obviously you know we're here to talk about Michael and his death. I sort of want to short circuit if I can. Is there anything about his childhood or education that your wife mentioned that you wanted to add to?

A. No. Michael played baseball. He played soccer. His team won the championship when he played soccer. He just was active. He took judo, was in the Marines, went to England to play soccer, went to Hawaii to play soccer, just everything. He was a reader. We'd discuss astrophysics. We could discuss baseball. We could discuss the Lakers. When they would win -- Lakers made their draft, I'd have ten calls in the matter of an hour.

I mean, Michael was my son which -- he was my friend. I can't add a lot to that.

Q. And I know this is difficult so I'll just -- tell us how your life is different without Michael.

A. Well, you'd have to lose a child to know what it is to lose a child that you love. Okay?

If anyone wants to know what Michael was like, go to michaeldavidadams.net. There you'll see all his friends that have left comments and everything else.

He was just a remarkable person. That's all you can say.

When we had a service for Michael, one of the men said that they would actually bid lower just to work with him.

MR. ALDRICH: May I approach the witness, Your Honor?

THE COURT: Yes.

Q. (By Mr. Aldrich) I'm going to show you what we've marked as Exhibit 2 to the application for default judgment.

I can see you're getting some glasses out.

I'd ask you to take a look at that. Is that your signature there at the end?

A. Yes, it is.

Q. Is everything in this letter true and correct?

A. Yes.

Q. Okay. And have you participated in the celebrations that your wife talked about?

A. Yes. In fact, we have a chili cook off Saturday where all of his friends will get together. It was called Mike's (inaudible) chili and we've been doing it every year since Michael died.

Q. Is there anything else that you would like the Judge to know about Michael that we haven't talked about here today?

A. I couldn't even describe Michael because he was just -- he was just Michael. He was just -- there are just no words. Okay?

Q. All right. Thank you.

MR. ALDRICH: Those are all the questions that I have.

THE COURT: Anything?

MR. OHLSON: No, thank you, Your Honor.

THE COURT: All right.

Thank you for testifying. You can step down.

THE COURT: Anything else, Counsel?

MR. ALDRICH: No, Your Honor. Those are the witnesses that I have. Obviously we can talk about argument if the Court wants to hear. I don't know if you want to address the issues in the (inaudible) that I attached to my supplement now or do you want me just to talk for a second.

THE COURT: We're going to read through them very carefully, of course, when we sit down to figure out how much damages.

Counsel?

MR. OHLSON: I have a witness, if you'll permit me to call the defendant.

THE COURT: All right.

MR. OHLSON: Ms. Fallini, will you step forward please?

And will you face the clerk and raise your right hand?

Ma'am? Ms. Fallini? Will you raise your right hand and be sworn?

(Whereupon the witness was sworn by the

clerk.)

SUSAN FALLINI,

called as a witness on behalf of the defense being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. OHLSON:

Q. What is your name?

A. Susan Fallini.

Q. Are you the defendant in this case?

A. Yes, sir.

Q. Do you know the location at which the accident in this case occurred?

A. Yes, I do.

Q. Where was it?

A. It's on Highway 375. I'm not aware of the marker post but it's between two of our wells, water wells, by a hard pan lake.

Q. If we asked you to, could you take us to the very place right now?

A. Absolutely. There's a marker. They have planted a marker there and we fenced it in so the cows wouldn't

knock it down.

Q. Do you know of your own personal knowledge whether that stretch of highway is designated as open range?

A. It is.

MR. ALDRICH: I object to relevance. It's prove up.

THE COURT: It doesn't matter. I'm aware that it is.

Go ahead.

MR. OHLSON: If you are, Your Honor, you'll take judicial notice of that?

THE COURT: That'll be fine.

MR. OHLSON: That's all I have.

MS. FALLINI: That's it?

THE COURT: Thank you for testifying.

MS. FALLINI: Uh-huh.

THE COURT: Anything else?

MR. ALDRICH: I've got some argument if the Court wants to hear it.

THE COURT: You're welcome to make argument. We're going to read through your brief and I've got the notes from the hearing today and you're welcome to add anything you want to.

MR. ALDRICH: Thank you.

And I wanted to address some of the things that the Court commented on earlier, especially sort of pulling numbers out of the sky.

This is not your typical application for default judgment. Normally you see it, it's a breach of a copier lease or breach of a car lease or something like that and you've got a document that says, you know, you're supposed to make three-hundred-dollar-a-month payments for five years and you didn't and here's the number and there you go. This is different than that and so it requires some extra care.

I wanted to just address each of the issues that I raised in here briefly.

We've got -- we're asking for grief, sorrow, loss of probable support, companionship, society, comfort, consortium and so on the issues, I've put in here we've asked for two and a half million dollars. I'll be the first one to stand here and tell you that's a very difficult number to define and really define.

But when you think about it, and you've heard the testimony from them and what Michael meant to them, two and a half million dollars is a fair number in my opinion. Now obviously the Court's going to do what the Court does but this is not a number that I threw in so it would be a big number.

You sit down and you think about it because a lot of times, you'll see those Visa commercials and it ends with, you know, this much to do this and this much to do that and this experience is priceless. That's really what it comes down to. They're not going to have grandchildren. There's literally an end to a family line right there. What is that worth? I don't know but it's at least two and a half million dollars.

I comment on the lost earnings. We've attached the wage information and we have an expert for that number and so I think we've got some hard numbers there.

Hedonic damages. Hedonic damages are monetary remedies awarded to compensate injured persons for their non-economic loss of life's pleasures or loss and enjoyment of life. All this information about what Michael was and who he was and friends that still, in his honor, hold chili cookoffs and all these different things, that matters and it matters to the Court's determination of hedonic damages.

Michael literally lost a life. He lost the opportunity to be a father. He lost the opportunity to be a grandfather. He lost the opportunity to help his parents in their old age. He lost a lot of opportunities that the rest of us are fortunate enough to have and so,

you know, we have -- the number we came up with for hedonic damages was five million dollars.

Now the case law that I read on hedonic damages talks about how you can have an expert to testify to that but you don't have to. Obviously we're relying on the Court. I cited the case that talked about how different people have valued that. It comes back to my comment before. What is the value of not being able to do all these things and yet being killed? I don't know the answer to that but, again, when you consider the things that he lost, I believe five million dollars is a number that is fair. Okay?

Obviously we've got the expenses in there associated with his death and then I also have -- I want to at least comment on it -- the sanction issue. You know, I assume the Court will add that into the judgment. I think it should be added into the judgment. It's my position that because the discovery that's still outstanding has not been responded to, that that number just kicks up by five hundred dollars every day.

I certainly, in candor to the Court, will advise the Court that I received that information in a letter, that there was no insurance apparently for Ms. Fallini, and that was sometime in early June but, again, I believe that Foriter says that they're supposed to

respond to discovery and they have not.

And so, having made those comments, I'm happy to entertain any questions the Court might have.

THE COURT: I don't have any.

Counsel, anything you want to say?

MR. OHLSON: There is, Your Honor.

Counsel's right. This is an unusual case.

First of all, when you are considering this case for your ruling, and I'm assuming you're taking the case under submission, please consider that the experts' calculations and the documents at this point and made in this forum are hearsay.

Counsel and plaintiff could have brought the witnesses to this hearing. They knew it was a prove up hearing and I assume they came here expecting to prevail on the underlying issues. Right now they're not properly before the Court but, be that as it may, I've been practicing law as long as Mr. Chantiel has been.

I just noticed we don't have a court reporter.

THE COURT: That's correct. The parties have to request one but we are video taping and taping the proceedings.

MR. OHLSON: We are otherwise recording the proceedings.

THE COURT: Correct.

MR. OHLSON: But I was in practice in September of '72 and (inaudible) criminal practice like Mr. Chantiel. As a matter of fact, we're friends with each other, and I've defended a number of murder cases in which I've heard the parents of the deceased speak to the courtroom at sentencing and the same things always occur to me and that is, as powerful as a trial level judge is, there's nothing in the world you can do to bring back the deceased or to fix the pain on losing a child.

Simple matter is we're not supposed to survive our children. They're supposed to survive us. This is a pain that the plaintiff and her husband are going to bear until their last days and there's no amount of money that's going to fix this pain, no amount of money.

So what are we doing here? We're here because the whole body of tort law has said that in circumstances such as this, we -- the Court should make a prevailing plaintiff whole. As a matter of fact, when you instruct juries, you instruct them that if they find personal issue of liability, then after that, they should consider damages and then you tell them what damages they can consider.

Well, in this case, there were no financial dependents so the issue of the income and how many years of income remains -- is not relevant to any issue in the case because there are no financial dependents that are deprived of the income. The plaintiffs were never financially dependent upon the deceased, nor did he have children or a spouse.

They ask funeral expenses. There were apparently those last expenses and I acknowledge that the -- there is emotional pain and suffering but, once again, how do you make a person whole for that? I suggest to you, Your Honor, that you don't. You don't.

If you give the plaintiffs ten million dollars, are they going to feel any better? No, they're not going to feel any better. Are they going to feel any better than if you give them fifty thousand dollars? They're not going to feel any better. They're devastated and they're going to remain devastated and, for that, you have my sincere condolences.

So what to decide. You have before you and the Court's acknowledged that the area in which this accident happened was open range. Well, the way a jury would do it and the way you would instruct a jury would be to first determine the amount of damages and then, after that's determined, a percentage of which the

plaintiff was at fault, in this case considering open range, who takes the percentage, and the Court would apply that percentage to the amount of damages. If the percentage exceeded fifty percent, the damages would be zero. Less than fifty percent, well (inaudible).

Your Honor, the system has come under a lot of scrutiny lately and a lot of criticism and a lot of well-founded criticism, criticism from all parts about outlandish results and outlandish verdicts and outstanding amounts of money, and I think, in part, because in many of these cases, the amounts of money that are awarded don't rationally and reasonably relate to the loss and to making whole.

Certainly you wouldn't replace the deceased's income. Do you make him whole? Do you make anybody whole? No, you're not.

We request that Your Honor consider a result in this case that acknowledges the plaintiffs' loss. Yes, we knew you lost and, yes, we know that no amount of money can ever relieve the pain from you, no amount of money. Take this amount of money as a recognition on our part that you have lost and you've lost greatly and deeply and then let the parties go their way.

THE COURT: Thank you.

Anything else?

MR. ALDRICH: I do. Just a couple of comments.

First of all, the open range issue. There are facts in this case that have been conclusively determined and if the Court follows those facts as they've been conclusively determined in this case, there's not going to be a finding of any comparative fault on the part of Michael Adams.

Secondly, comparative fault and affirmative defense (inaudible) asserted and everyone's on notice of when they come to trial. There is no affirmative defense here. It is not appropriate for the Court to consider comparative fault and I have seen no case law. Now in the interest of candor to the Court, I haven't looked for case law on that issue because today's the first day I heard of it. I hadn't thought of that, quite frankly.

Obviously Mr. Ohlson is capable and has brought that issue before the Court. I also suspect, however, if there were actually case law to support that, that would be here too, so having said that, I think that those arguments do not hold water, so to speak.

The next comment that I have is about Exhibit 3 which is the calculation of lost wages. I would have brought the guy here to testify in person but there was no objection to him in the first place and you

hate to pay somebody all that money to come all the way out here when there's not an objection.

There was an opposition to my application, no mention of an objection to the evidence or the state of the evidence. Certainly there's no evidence in opposition to that to say that he's wrong or anything else, so we do ask the Court to consider that. And I will note that our argument is that that is part of special damages and is permitted to be recovered.

You know, the other issue, I guess, we run into, as Mr. Ohlson was arguing today, is you can't make them whole so don't give them very much or you can't make them whole, so punt.

We've gone through and been very meticulous about how we've reached the number that we're asking for and, you know, I'm here to say, I admit it to the Court, there's not a definitive number necessarily but you think this stuff through and you think about what sons mean to parents and things like that and it is worth a lot if you're trying to do that.

To do anything but to try to compensate them for their loss would be wrong and, of course, if the Court awarded ten million dollars and there was ten million dollars sitting on this table right here today and they had a choice of ten million dollars or Michael walking

through that door over there, of course, they're going to say have Michael walk through that door. They don't want ten million dollars. They want Michael back but he can't come back. We can't do that.

So what does the court system do? It allows us to try to compensate people from a financial perspective when you can't bring back their loved one, so we would ask the court to take that into consideration and award a substantial amount. We've got the numbers that we've given to the Court and that's what we're asking for.

THE COURT: Thank you, sir.

You don't have any more, do you?

MR. OHLSON: Just one point, if I might, so that I'm clear on an argument. It's our position that no plaintiff in this case has suffered the loss of the deceased's income. He had no financial dependents.

THE COURT: Thank you.

All right, we'll have the decision for you in a few days. Thank you for coming in.

MR. OHLSON: Thank you, Your Honor.

MR. ALDRICH: Thank you. We appreciate your time.

THE COURT: Thank you.

Is there anything else we needed to do?

THE CLERK: (Inaudible.)

THE COURT: All right, we'll go ahead and recess then.

* * * * *

CERTIFICATE

I, DanRa Boscovich, certify that I am a Certified Court Reporter in the State of Nevada; that I reported and transcribed the above-entitled hearing from an electronic recording; and that the foregoing constitutes a transcript as full and correct as the electronic recording would allow.

Dated: August 27, 2011.

DanRa Boscovich, CCR 218

IN THE SUPREME COURT OF THE STATE OF NEVADA

OFFICE OF THE CLERK

*****

SUSAN FALLINI

Appellant,

v.

ESTATE OF MICHAEL DAVID ADAMS, BY AND THROUGH HIS MOTHER JUDITH ADAMS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE,

Respondent.

Supreme Court No.: 56840

District Court Case No.: CV00224539

RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION FOR ORDER ALLOWING SUPPLEMENTATION OF APPENDIX AND FOR RE-OPENING OF BRIEFS

Respondent ESTATE OF MICHAEL DAVID ADAMS, BY AND THROUGH HIS MOTHER JUDITH ADAMS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE (hereafter "Respondent Adams" or "Ms. Adams"), by and through her counsel of record, Aldrich Law Firm, Ltd., hereby opposes Appellant's Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs. This Opposition is made and based upon the attached memorandum of points and authorities, the exhibits attached hereto, the records and pleadings on file herein, and, if necessary, any argument the Court may allow.

DATED this 17th day of October, 2011.

ALDRICH LAW FIRM, LTD.

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

POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

By bringing this Motion, Appellant continues the obvious pattern of delay and disregard for the rules in this appeal. This has been Appellant's/Defendant's course of conduct throughout this litigation before the district court, and it now continues on appeal. Appellant has disregarded her duties with regard to this litigation throughout, and has repeatedly failed to cite any valid authority for the relief she seeks. Appellant failed in her duties with regard to obtaining a transcript of the July 19, 2010 hearing and now uses that as an excuse to cause further delay in this action. This pattern of blatant disregard for court rules is unacceptable, and the Court should deny Appellant's Motion.

A. Procedural History at District Court Level

In the Answering Brief, Respondent Adams sets forth, over the course of nearly four pages, the lengthy procedural history of this case. In an effort to be brief in this Opposition, Respondent Adams will not repeat the entire history here. However, suffice to say that Appellant Fallini has repeatedly ignored court rules, refused to participate in the litigation process, and worked to delay this case. Further, when Appellant Fallini decided to participate by filing pleadings, she has repeatedly failed to cite any pertinent authority or provide any admissible evidence to support the requested relief.

In short, Appellant Fallini failed to respond to written discovery, including requests for admission. She then failed to respond to a Motion for Partial Summary Judgment, and partial summary judgment was entered way back in July 2008. Appellant Fallini failed to respond to routine discovery and repeated motions to compel and/or motions for order to show cause why Fallini and her counsel should not be held in contempt. Ultimately, Appellant Fallini and her counsel were held in contempt, Appellant's answer and counterclaim were stricken, and they racked up tens of thousands of dollars in sanctions for their refusal to comply with court rules or participate in the litigation process.

Following Appellant Fallini and her counsel's repeated thumbing of their noses at the district court's authority, on June 21, 2010, Judith Adams filed an Application for Default Judgment. (Jt. Appx.

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

On July 2, 2010, Appellant 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.) Attached to that Motion was an affidavit signed by Mr. Ohlson, Appellant's counsel (which added nothing to the admissibility of the other exhibits), a letter to Appellant's husband purportedly from a Deputy Attorney General, but which was not authenticated in any fashion, and three unsigned affidavits. (Jt. Appx. II, 149-159.)

On July 19, 2010, a hearing was held on Fallini's Motion for Reconsideration. Said 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.)

B. Procedural History on Appeal

Appellant Fallini filed her Notice of Appeal on or about September 10, 2011. (Jt. Appx. II, 233-235.) On November 9, 2010, the case was assigned to the settlement program. On February 15, 2011, Settlement Judge Carolyn Worrell recommended that the case be removed from the settlement conference program, explaining that a third-party insurance carrier was declining to participate, making the settlement conference unworkable. (Settlement Program Status Report, attached hereto as Exhibit A.) On March 2, 2011, the Nevada Supreme Court filed its Order Reinstating Briefing. (Order Reinstating Briefing, attached hereto as Exhibit B.) That Order gave Appellant fifteen days to file the request for transcript and ninety days to provide an Opening Brief and appendix. (Exhibit B.)

On or about March 10, 2011, Appellant Fallini filed a Certificate indicating that no transcript was available, and as such, she would not be filing a request for transcript. (Certificate, attached hereto as

Exhibit C.) Significantly, Appellant Fallini did not request a transcript as required by NRAP 9. Appellant Fallini filed her Opening Brief on May 31, 2011. Respondent Adams' Answering Brief was filed on July 11, 2011. Appellant Fallini then filed her Reply Brief on July 28, 2011. Thus, all briefing in this case was completed by **July 28, 2011**. Subsequently, on August 19, 2011, this Court advised the parties that there would be no oral argument and the case would be decided on the briefs alone.

C. Appellant's Latest Motion

On October 5, 2011 – well over two months after briefing closed in this appeal, and six weeks after this Court notified the parties there would be no oral argument – Appellant Fallini brought the instant motion. Attached to Appellant's Motion is an affidavit of John Ohlson, Esq., counsel for Appellant, and a copy of a transcript purportedly from the prove up hearing that occurred on July 19, 2010. In Mr. Ohlson's Affidavit in Support of the Motion, he asserts that "[p]rior to the hearing, affiant approached the court reporter whom affiant had never before met. I introduced myself and gave the court reporter a card, indicating that the transcript and a bill should be sent to me. I then took my place in line for the motion calendar to await the calling of this case." (Exhibit 1 to Appellant's Motion, ¶4.)

Contrary to what Mr. Ohlson describes, counsel for Respondent, Mr. Aldrich, notes in his Affidavit that his experience is different than what Mr. Ohlson explained. In each of his approximately 10 trips to Pahrump, Mr. Aldrich has learned that on the district court civil calendar, there is not a court reporter unless one of the parties makes arrangements for a court reporter to be present. Mr. Aldrich does not recall there being a court reporter present to whom Mr. Ohlson could have given his card. (Affidavit of John P. Aldrich, attached hereto as Exhibit D. ¶6.)

In paragraph 6 of Mr. Ohlson's affidavit, he comments "my assistant was told that there was no transcript of the proceedings, and that one could not be produced because I had not specifically (in those words) asked the reporter to report the hearing." (Exhibit 1 to Appellant's Motion, ¶6.) Mr. Ohlson includes this statement in his Affidavit in an attempt to have it considered as "evidence" by this Court. However, this statement is obvious hearsay, as Mr. Ohlson was not party to that conversation. Mr. Ohlson then goes on to explain that his appeal was taken without the benefit of a transcript. (Exhibit 1

to Appellant's Motion, ¶6.)

In paragraph 7 of his Affidavit, Mr. Ohlson states that on September 29, 2011 – two months after briefing closed in this case – he received the purported hearing transcript, which is attached to Appellant's Motion as Exhibit 2, from his client, who had received it from a court reporter who was not present at the hearing. Mr. Ohlson then claims that he followed up with the court reporter and asked her to prepare a "final, original transcript." Significantly, the "final, original transcript" that purports to be the transcript of the hearing, is dated August 27, 2011 – more than a month before Mr. Ohlson states he first received a draft transcript.

In paragraph 8 of Mr. Ohlson's affidavit, he explains that he has never been given an explanation as to why he was misinformed about the possibility of obtaining a transcript, that he has never been informed why the "court reporter" told his office that the transcript of the default hearing could not be prepared, and that he has not been informed "why the transcript appeared so suddenly now." Conspicuously absent from Mr. Ohlson's affidavit is any indication that he ever asked these questions in the first place, or whether he followed up and asked why he has never been informed or given any explanation as to these items.

On October 13, 2011, Respondent's counsel, Mr. Aldrich, contacted Mr. Ohlson's office and spoke with Rob May. Mr. May subsequently provided to Mr. Aldrich, by email, the email address and telephone number of DanRa Boscovich, the court reporter who prepared the purported transcript that is attached as Exhibit 2 to Appellant's Motion. (Affidavit of John P. Aldrich, attached hereto as Exhibit D, ¶10.) Mr. Aldrich called Ms. Boscovich on the phone and Ms. Boscovich freely spoke with Mr. Aldrich for several minutes. Mr. Aldrich asked Ms. Boscovich about the circumstances of the transcript's preparation. (Exhibit D, ¶11.)

Ms. Boscovich explained that Joe Fallini, the husband of Appellant Susan Fallini, is a "good friend" of hers. Mr. Fallini had obtained a disk that included a recording of the hearing from July 19, 2010. Ms. Boscovich said that the quality of the disk obtained by Mr. Fallini was "bad." (Exhibit D, ¶12.) Ms. Boscovich then went personally to the Court and obtained a second copy of the hearing, which she described as "better." (Exhibit D, ¶13.) Ms. Boscovich explained that Mr. Fallini was "desperate"

to have the hearing transcribed, and she worked to quickly assist him. (Exhibit D, ¶14.)

Ms. Boscovich told Mr. Aldrich that from the time Mr. Fallini brought her the first disk to the time that she completed the transcription was less than one (1) week. (Exhibit D, ¶15.) Therefore, given the date of August 27, 2011 on page 39 of the transcript, it appears that Mr. Fallini approached Ms. Boscovich on or after August 20, 2011.

Mr. Aldrich inquired of Ms. Boscovich if Mr. Fallini paid Ms. Boscovich for her services, to which she responded "absolutely not." She also explained that she felt very sorry for the Fallinis' situation, and reiterated that the Fallinis are very long-time friends. (Exhibit D, ¶16.)

At best, the transcript is incomplete. Conspicuously absent from the transcript is the portion of the hearing dealing with the motion for reconsideration. Further, the authenticity and accuracy of the transcript is also in question, as it was prepared by a "good friend" of Appellant and her husband, as a favor (i.e., no compensation was paid), by someone who felt sorry for Appellant's situation. Of course, Appellant Fallini proceeded to attach the transcript to the Motion even before the Court determined whether to allow the transcript to become part of the record.

II.

LEGAL ARGUMENT

A. As with Her Other Motions and Briefing in this Case, Appellant Fallini Again Provided No Legal Basis in Support of the Requested Relief, and the Motion Should Be Denied

Appellant's paltry "Argument"-section consists of one paragraph, a quotation of NRAP 10(a), and a passing reference to NRAP 13. Neither reference to the Nevada Rules of Appellate Procedure is helpful or relevant to the position taken by Appellant in her Motion, and is a blatant *red herring*. Appellant simply ignores NRAP 9 and blames an unidentified court reporter for Appellant's failure to obtain a copy of the transcript, arguing that the court reporter has a duty, pursuant to NRAP 13, to complete a transcript. (Appellant's Motion, p. 3.) This is simply incorrect.

Appellant Fallini's attempt to blame the unidentified court reporter is misplaced. NRAP 9 provides, in pertinent part:

(a) Counsel's Duty to Request Transcript.

(1) Necessary Transcripts.

. . . .

(B) Except as provided in Rule 3C(j)(2), the **appellant** shall file a transcript request form in accordance with Rule 9(a)(3) when a verbatim record was made of the district court proceedings and the necessary portions of the transcript were not prepared and filed in the district court before the appeal was docketed under Rule 12.

(C) If no transcript is to be requested, the **appellant** shall file and serve a certificate to that effect within the period set forth in Rule 9(a)(3) for the filing of a transcript request form. Such a certificate shall substantially comply with Form 14 in the Appendix of Forms.

. . .

(3) Transcript Request Form.

(A) Filing. The **appellant** shall file an original transcript request form with the district court clerk and 1 file-stamped copy of the transcript request form with the clerk of the Supreme Court no later than 15 days from the date that the appeal is docketed under Rule 12.

(B) Service and Deposit. The **appellant** shall serve a copy of the transcript request form on the court reporter or recorder who recorded the proceedings and on all parties to the appeal within the time provided in subparagraph (A). The **appellant** must pay an appropriate deposit to the court reporter or recorder at the time of service, unless appellant is proceeding in forma pauperis or is otherwise exempt from payment of the fees. Where several parties appeal from the same judgment or any part thereof, or there is a cross-appeal, the deposit shall be borne equally by the parties appealing, or as the parties may agree.

. . . .

(6) Consequences of Failure to Comply. A party's failure to comply with the provisions of this Rule may result in the imposition of sanctions, including dismissal of the appeal.

(b) Duty of the Court Reporter or Recorder.

(1) Preparation, Filing, and Delivery of Transcripts.

(A) Time to File and Deliver Transcripts. Upon receiving a transcript request form and the required deposit, the court reporter or recorder shall promptly prepare or arrange for the preparation of the transcript. Except as provided in Rule 9(b)(1)(B) and (b)(4), the court reporter or recorder **shall—within 30 days after the date that a request form is served**:

(i) file the original transcript with the district court clerk; and

(ii) deliver to the party ordering the transcript 1 certified copy and an additional certified copy for the appendix.

> **(B) Appellant's Failure to Pay Deposit.** The court reporter or recorder is not obligated to prepare the transcript until receipt of the deposit required by Rule 9(a)(3)(B). If appellant fails to timely pay the deposit, the court reporter or recorder must—no later than 30 days from the date that the transcript request form is served:
>
> (i) file with the clerk of the Supreme Court a written notice that the deposit has not been received, setting forth the full amount of the deposit and the amount that remains unpaid; and
>
> (ii) serve a copy of the notice on counsel for the party requesting the transcript.
>
> **(2) Notice to Supreme Court.** Within 10 days after the transcript is filed with the district court and delivered to the requesting party, the court reporter or recorder shall file with the clerk of the Supreme Court a notice that the completed transcript has been filed and delivered. The notice shall specify the transcripts that have been filed and delivered and the date that those transcripts were filed and delivered. Form 15 in the Appendix of Forms is a suggested form of certificate of delivery.
>
> . . . .
>
> **(5) Sanctions for Failure to Comply.** A court reporter or recorder who fails to file and deliver a timely transcript without sufficient cause as provided in Rule 9(b)(4) may be subject to sanctions under Rule 13.

NRAP 9 (emphasis added).

Pursuant to this rule, the duty to request a transcript lies squarely on the shoulders of the appellant's counsel. NRAP 9(a)(1)(B). If appellant's counsel determines not to request a transcript, he must file a certificate that he will not be requesting a transcript – precisely what was done here. On or about March 10, 2011, despite having first-hand knowledge that the July 19, 2010 hearing had been video taped, Appellant Fallini filed a Certificate indicating that no transcript was available, and as such, she would not be filing a request for transcript. (Exhibit C.) Significantly, Appellant Fallini did not request a transcript as required by NRAP 9.

In her Motion, Appellant Fallini asserts that "Rule 13 NRAP [sic] places the responsibility for the production of the transcript squarely on the court reporters [sic] shoulders, and provides for sanctions against a court reporter who fails in that responsibility. Here, the court reporter clearly failed in her responsibility" (Motion, p. 3.) This suggestion is absurd and clearly contrary to the rule. Even a cursory review of NRAP 9 demonstrates that the duty of the court reporter is conditioned upon the filing of a

request for transcript. NRAP 9(b)(1)(A) clearly sets forth that the court reporter's duty arises "**[u]pon receiving a transcript request form and the required deposit**...." Thus, an appellant has two conditions she must meet before the court reporter has any duty to do anything: (1) the appellant must file a transcript request form; and (2) the appellant must pay the required deposit. In this matter, Appellant failed to accomplish either prerequisite. NRAP 9(b).

Moreover, if Appellant believed the record was somehow incomplete, she could have provided her own summary of the evidence, subject to Respondent's objections. NRAP 9(c) provides:

> **(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable.** If a hearing or trial was not recorded, or if a transcript is unavailable, the **appellant may** prepare a statement of the evidence or proceedings from the best available means, **including the appellant's recollection**. The statement shall be served on the respondent, who may serve objections or proposed amendments within 10 days after being served. The statement and any objections or proposed amendments shall then be submitted to the district court for settlement and approval. As settled and approved, the statement shall be included by the district court clerk in the trial court record, and the appellant shall include a file-stamped copy of the statement in an appendix filed in the Supreme Court.

NRAP 9(c)(emphasis added). Appellant Fallini failed to provide any statement of the evidence either. Instead, after conferring, the parties agreed to the entire contents of the record before this Court and filed a Joint Appendix.

Appellant Fallini closed the record by submitting the Joint Appendix with the consent of Respondent's counsel. The parties engaged in extensive briefing, which closed back on July 28, 2011 with the filing of Appellant's Reply Brief. Apparently, after reading the briefing from Respondent, Appellant Fallini (or her husband) determined that she was about to lose her appeal, so she decided to attempt to supplement the record somehow, went out and obtained a favor from a long-time friend, and tried to cause further delay in the litigation process. This apparently occurred around August 20, 2011, three weeks after briefing closed. (Exhibit D, ¶15.)

Significantly, Appellant has provided no pertinent legal authority to support the requested relief in her Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs. Of course, this has been Appellant's standard course of dealings in this case. Appellant has stalled the

process over and over by failing in her duties or not even responding, and then when she did respond, her pleadings fail to cite relevant supportive authority for the relief sought.

In actuality, the Nevada Rules of Appellate Procedure are clear that the duty to order a transcript lies squarely on the shoulders of the appellant's counsel. Counsel must both request and pay for the transcript before the court reporter has any duty whatsoever. There is simply no basis for Appellant's Motion, and it should be denied.

B. As with Her Other Motions and Briefing in this Case, Appellant Fallini Again Provided No Admissible Evidence in Support of the Requested Relief, and the Motion Should Be Denied

As for the "evidence" provided by Appellant, the Affidavit of Mr. Ohlson excludes substantial important information. First of all, Mr. Ohlson claims he gave his card to a court reporter before court started. He does not identify who this alleged court reporter was, nor does he provide a copy of the court reporter's card. Given the fact that Mr. Ohlson's secretary allegedly contacted a court reporter about the transcript, as explained in paragraph 6 of Mr. Ohlson's affidavit, one can only assume he knew the identity of this person. Significantly, Mr. Aldrich's recollection and experience varies greatly from Mr. Ohlson's recollection of events – Mr. Aldrich does not recall a court reporter being present before the July 19, 2010 hearing began, and his experience is that in district court civil matters in that department, the party who wants a court reporter must provide one. (Exhibit D, ¶6.)

Further, conspicuously absent from Mr. Ohlson's affidavit is any reference to any attempt to contact the department's court recorder. Mr. Ohlson acknowledged that he noticed a court reporter was not taking down the proceedings. Indeed he did – more than three quarters of the way through the hearing.[1] At page 31 of the purported transcript, Mr. Ohlson commented that he "just noticed" there was no court reporter. (Exhibit 2 to Appellant's Motion, p. 31.) He made no comment that he had given his card to a court reporter before the hearing. Instead, after being assured by the district court that the hearing was being video taped, he continued willingly. (Exhibit 2 to Appellant's Motion, p. 31.) Thus,

[1] If the Court takes into consideration that prior to the prove up hearing there was argument on Ms. Fallini's Motion for Reconsideration, it was actually very near the end of a lengthy hearing that Mr. Ohlson finally made the comment that the hearing was not being recorded.

Mr. Ohlson – as well as his client, who was also present in person at the hearing – was aware on July 19, 2010 that a transcript would be available through video if necessary.

Portions of Mr. Ohlson's affidavit are inadmissible as well. Mr. Ohlson's weak explanation that his assistant contacted the court reporter and was informed that there was no transcript is inadmissible hearsay. "Hearsay" is "a statement offered in evidence to prove the truth of the matter asserted." NRS 51.035. Hearsay is inadmissible. NRS 51.065. Mr. Ohlson was not a party to those conversations, and without an affidavit of the assistant who allegedly engaged in the conversation, this information is inadmissible and should not be considered by the Court. This reference to inadmissible evidence is consistent with Appellant's attempt to have the district court consider inadmissible evidence at the district court level (and consequently, again on appeal) by attaching purported affidavits that were unsigned and letters that were not authenticated. (Jt. Appx. 149-159.) There is no basis for the relief requested in Appellant's Motion, and Respondent Adams respectfully requests that this Court deny the Motion.

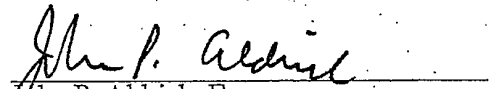
III.

CONCLUSION

Appellant Fallini has provided no law or facts to support her requested relief. She has not done so because none exists. Respondent Adams respectfully requests that this Court deny Appellant Fallini's Motion in its entirety.

DATED this 17th day of October, 2011.

ALDRICH LAW FIRM, LTD.



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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of October, 2011, I mailed a copy of the in a sealed envelope, to the following and that postage was fully paid thereon:

Jeffrey Kump, Esq.
Marvel & Kump
217 Idaho Street
Elko, Nevada 89801

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

Eleanor Knowlton
Employee of Aldrich Law Firm, Ltd.

EXHIBIT A

EXHIBIT A

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

FEB 15 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

SETTLEMENT PROGRAM STATUS REPORT

A settlement conference was held in this matter on _____, 201____.

I file the following report of the proceedings:

/ / The parties have agreed to a settlement of this matter.

/ / The parties were unable to agree to a settlement of this matter.

/ / The settlement conference is continued as follows:

Date: _____ Time: _____

Location: _____

/ / Other: The settlement judge recommends that this case be removed from the settlement program and returned to the appellate process. Counsel are waiting to determine if an insurance carrier that is not a party but indispensable for settlement was willing to participate in settlement negotiations. The carrier has declined to participate, making a settlement conference unworkable.

Additional Comments: _____

Carolyn A. Worrell
Settlement Judge

- The settlement judge shall file this report with the Supreme Court within 10 days from the date of any settlement conference. *See* NRAP 16(e)(3).
- A final status report is due within 180 days from assignment date. *See* NRAP 16(f)(1).
- For cases involving child custody, visitation, relocation or guardianship, a final status report is due within 120 days from the assignment date. *See* NRAP 16(f)(1).

RECEIVED
FEB 14 2011
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

AT THE TIME OF FILING, THE CLERK'S OFFICE WILL MAIL THIS REPORT AND ATTACHMENTS TO ALL COUNSEL AND TO THE SETTLEMENT JUDGE.

11-04620

EXHIBIT B

EXHIBIT B

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

MAR 02 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER REINSTATING BRIEFING

Pursuant to NRAP 16, the settlement judge has filed a report with this court indicating that the parties were unable to agree to a settlement. Accordingly, we reinstate the deadlines for requesting transcripts and filing briefs. See NRAP 16.

Appellant shall have 15 days from the date of this order to file and serve a transcript request form. See NRAP 9(a).[1] Further, appellant shall have 90 days from the date of this order to file and serve the opening brief and appendix.[2] Thereafter, briefing shall proceed in accordance with NRAP 31(a)(1).

It is so ORDERED.

_____, C.J.

cc: Carolyn Worrell, Settlement Judge
John Ohlson
Marvel & Kump, Ltd.
Aldrich Law Firm, Ltd.

[1] If no transcript is to be requested, appellant shall file and serve a certificate to that effect within the same time period. NRAP 9(a).

[2] In preparing and assembling the appendix, counsel shall strictly comply with the provisions of NRAP 30.

EXHIBIT C

EXHIBIT C

IN THE SUPREME COURT OF THE STATE OF NEVADA

OFFICE OF THE CLERK

* * * * *

SUSAN FALLINI,

Supreme Court No.: 56840

Appellant,

vs.

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

Respondent.
_____/

CERTIFICATE

COMES NOW, appellant SUSAN FALLINI, by and through her counsel JOHN OHLSON and JEFF KUMP, and hereby serves notice upon this Court and the attorneys of record in this case that no transcript is available and as such, no transcript is being requested pursuant to

////

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NRAP 9.

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 10th day of March, 2011.

By: */s/ John Ohlson*
John Ohlson, Esq.
Bar Number 1672
275 Hill Street, Suite 230
Reno, NV 89501
Telephone: (775) 323-2700
Facsimile: (775) 323-2705

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

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 **CERTIFICATE**, 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 10th day of March, 2011.

/s/ Robert M. May
Robert M. May

EXHIBIT D

EXHIBIT D

IN THE SUPREME COURT OF THE STATE OF NEVADA

OFFICE OF THE CLERK

* * * * *

SUSAN FALLINI

Appellant,

v.

ESTATE OF MICHAEL DAVID ADAMS, BY AND THROUGH HIS MOTHER JUDITH ADAMS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE,

Respondent.

Supreme Court No.: 56840

District Court Case No.: CV00224539

AFFIDAVIT OF JOHN P. ALDRICH IN SUPPORT OF OPPOSITION TO MOTION FOR ORDER ALLOWING SUPPLEMENTATION OF APPENDIX AND FOR RE-OPENING OF BRIEFS

State of Nevada)
) ss:
County of Clark)

Affiant, being first duly sworn, deposes and states the following:

1. I, John P. Aldrich, am an attorney licensed to practice in the State of Nevada and a partner in Aldrich Law Firm, Ltd..
2. My office address is 1601 S. Rainbow Blvd., Suite 160, Las Vegas, Nevada 89146.
3. I am counsel for Plaintiff/Respondent in this matter.
4. I have personal knowledge of the contents of this document, or where stated upon information and belief, I believe them to be true, and I am competent to testify to the facts set forth herein.
5. Appellant's Motion has an accompanying affidavit of John Ohlson, Esq., as well as a transcript which purports to be a transcript of the hearing at the district court level of this matter that occurred on July 19, 2010.

6. In Mr. Ohlson's Affidavit in Support of the Motion, he asserts that "[p]rior to the hearing, affiant approached the court reporter whom affiant had never before met. I introduced myself and gave the court reporter a card, indicating that the transcript and a bill should be sent to me. I then took my place in line for the motion calendar to await the calling of this case." I note that my experience is different than what Mr. Ohlson explained. I have been to Pahrump approximately 10 times and have learned that on the district court civil calendar, there is not a court reporter unless the parties make arrangements for a court reporter to be present. I do not recall there being a court reporter present to whom Mr. Ohlson could have given his card.

7. In paragraph 6 of Mr. Ohlson's affidavit, he comments "my assistant was told that there was no transcript of the proceedings, and that one could not be produced because I had not specifically (in those words) asked the reporter to report the hearing." I note that this is obvious hearsay, as Mr. Ohlson was not party to that conversation. Mr. Ohlson then goes on to explain that his appeal was taken without the benefit of a transcript. I also am concerned that there is no identification of the person to whom Mr. Ohlson's assistant spoke, nor any indication of when or where the conversation took place.

8. Mr. Ohlson then explains in paragraph 7 that on September 29, 2011, he received the purported hearing transcript from his client, who had received it from a court reporter who was not present at the hearing. Mr. Ohlson then claims that he followed up with the court reporter and asked her to prepare a "final, original transcript." I note that the "final, original transcript" that Mr. Ohlson asserts is the transcript of the hearing, is dated August 27, 2011.

9. In paragraph 8 of Mr. Ohlson's affidavit, he explains that he has never been given an explanation as to why he was misinformed about the possibility of obtaining a transcript, that he has never been informed why the "court reporter" told his office that the transcript of the default hearing could not be prepared, and that he has not been

informed "why the transcript appeared so suddenly now." Conspicuously absent from Mr. Ohlson's affidavit is any indication that he ever asked those questions in the first place or ever followed up and asked why he has never been informed or given any explanation.

10. On October 13, 2011, I contacted Mr. Ohlson's office and spoke with Rob May. Mr. May subsequently provided to me, by e-mail, the e-mail address and telephone number of DanRa Boscovich, the court reporter who prepared the purported transcript.

11. I called Ms. Boscovich on the phone and she freely spoke with me for several minutes. I asked Ms. Boscovich about the circumstances of the transcript's preparation.

12. Ms. Boscovich explained that Joe Fallini, the husband of Appellant Susan Fallini, is a "good friend" of hers. Mr. Fallini had obtained a disk that included a recording of the hearing from July 19, 2010. Ms. Boscovich said that the quality of the disk obtained by Mr. Fallini was "bad."

13. Ms. Boscovich then went herself to the Court and obtained a second copy of the hearing, which she described as "better."

14. Ms. Boscovich explained that Mr. Fallini was "desperate" to have the hearing transcribed, and she worked to quickly assist him.

15. Ms. Boscovich told me that from the time Mr. Fallini brought her the first disk to the time that she completed the transcription was less than one (1) week. Therefore, given the date of August 27, 2001 on page 39 of the transcript, I concluded that Mr. Fallini approached Ms. Boscovich on or after August 20, 2011.

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16. I inquired of Ms. Boscovich if Mr. Fallini paid her for her services, to which she responded "absolutely not." She also explained that she felt very sorry for the Fallinis' situation, and reiterated that the Fallinis are very good, long-time friends.

17. At best, the transcript is incomplete. Conspicuously absent from the transcript is the portion of the hearing dealing with the motion for reconsideration. Further, the authenticity and accuracy of the transcript is also in question, as it was prepared by a "good friend" of Appellant and her husband, as a favor (i.e., no compensation was paid), by someone who felt sorry for Appellant's situation.

18. I also note that the list of appearances only lists myself and Mr. Ohlson. Also present at the hearing were my client, Judith Adams, her husband Tony Adams, Appellant Susan Fallini, and Jeff Kump, Esq., another attorney for Ms. Fallini.

Dated this 17th day of October, 2011.

John P. Aldrich

JOHN P. ALDRICH

Subscribed & sworn to before me
this 17th day of October, 2011.

Eleanor Engebretson

NOTARY PUBLIC

ELEANOR ENGEBRETSON
Notary Public-State of Nevada
APPT. NO. 98-49282-1
My App. Expires October 03, 2013

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

OCT 24 2011

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

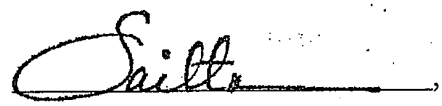
ORDER GRANTING MOTION TO SUPPLEMENT APPENDIX AND REOPEN BRIEFING

This matter was submitted for a decision without oral argument on August 19, 2011. On October 5, 2011, appellant filed a motion to supplement the joint appendix with a hearing transcript and to reopen briefing to include argument and references to the transcript. According to appellant, the court reporter previously indicated that the hearing was not reported, but on September 29, 2011, a copy of the hearing transcript was sent directly to appellant without explanation. Respondent opposes the motion.[1] Having considered the motion and

[1]Respondent states that appellant's conduct in this matter has been dilatory and it is unclear whether the transcript is complete and accurate. Appellant's motion, however, is supported by her attorney's affidavit stating that the transcript was only recently provided and the transcript contains the court reporter's certificate, certifying that she reported and transcribed the hearing from an electronic recording, and that the transcription is as full and correct as the electronic recording would allow.

opposition thereto, we grant the motion. Accordingly, the clerk of this court shall detach and file the supplement attached to the October 5 motion. Appellant shall have 30 days from the date of this order to file and serve an amended opening brief. Thereafter, respondent shall have 30 days to file and serve an amended answering brief, and appellant shall have 15 days from service of the amended answering brief to file and serve any amended reply brief.

It is so ORDERED.[2]

 , C.J.

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

[2]Once briefing is complete, the clerk of this court shall resubmit this matter for a decision.

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUSAN FALLINI,

Appellant,

Supreme Court No.: 56840

vs.

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

Respondent.

_____/

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

APPELLANTS' AMENDED OPENING BRIEF

John Ohlson, Esq.
Bar Number 1672
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(775) 323-2700

Jeff Kump, Esq.
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MARVEL & KUMP, LTD.
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(775) 777-1204
Counsel for Appellants

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TABLE OF AUTHORITIES

JURY INSTRUCTIONS

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUSAN FALLINI,

Supreme Court No.: 56840

Appellant,

vs.

APPELLANT'S AMENDED OPENING BRIEF

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

Respondent.
_____/

Pursuant to NRAP 28(a), Appellant, Susan Fallini, hereby submits Appellant's Amended Opening Brief[1]:

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

[1] Pursuant to this Court's Order of October 24, 2011.

scheduled (*See* Order After Hearing entered August 12, 2010, Jt. Appx. II, 222-225[2]). All 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,

[2] 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.

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.[3] 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*

[3] *See* references to the trial court's recognition, in fact judicial notice that the accident happened in "open range." *Infra*, footnote 4.

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).[4]

[4] The trial court made several references to the open range status of the accident site: The Court stated "You should be aware that out here in the rurals, cows run on highways" (page 3, l.24-p.4 l.1, Transcript of hearing for Application for Default Judgment). In addition, counsel asked the Court to take judicial notice of the fact of open range during this colliquey:

Q: Do you know of your own personal knowledge whether that stretch of highway is designated as open range?

A: It is.

MR. ALDRICH: I object to relevance. It's prove up.

THE COURT: It doesn't matter. I'm aware that it is.

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*

Go ahead.

MR. OHLSON: If you are, Your Honor, you'll take judicial notice of that?

THE COURT: **That'll be fine.** (emphasis added)

(p.27, ll.2-13, Transcript of hearing for Application for Default Judgment)

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).[5] 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).

[5] *See* footnote 4 above.

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.

The Honorable Robert Lane stated 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."

Further, the District Court took judicial notice that the area in question in this case was open range (*See* footnote 4 herein). 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 and Transcript for Application of Default Judgment). 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.[6] 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.

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

[6] 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.

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.

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).[7] So, it was clearly established that, except for funeral expensed, the

[7] At the prove-up hearing, plaintiff, Judith Adams testified that:

MR. OHLSON: Objection. Relevance.

THE COURT: Overruled.

How old was he at the time he died?

MS. ADAMS: Thirty-three.

THE COURT: And no wife or kids?

MS. ADAMS: No.

THE COURT: And he didn't live at home with you, right?

plaintiff's suffered no economic loss due to the death of their son. Ye the trial court allowed damages of **$1,640,696** in lost volume to plaintiffs, when the plaintiffs lost no income or support by virtue of their child's death. Even the court's award to plaintiffs for **$1,000,000** included dames for "loss of support" when the evidence the court had clearly demonstrated that plaintiffs did not rely on the deceased for "support."

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.

The trial court refused to allow this matter to be resolved on the merits, even though it knew that the case lacked merit. The court knew (in fact took judicial notice) that the basic premise of liability-non open range-was false. The court heard evidence at the prove-up hearing that the plaintiffs had no economic loss (except funeral expenses), yet awarded $1,640,696 for lost income. Rather than allow the case to proceed to a trial

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MS. ADAMS: No.

THE COURT: Okay.

(p.15, 11.11-20, Transcript of hearing for Application for Default Judgment).

Q: And when your son died, you and your husband were not financially dependent upon him, were you?

A: Financially dependent?

Q: Yes.

A: No, we are not.

(p.20 l.25-p.21, 1-4, Transcript of hearing for Application for Default Judgment).

on the merits (scheduled to proceed in approximately 2 months), the Court not only concluded the matter based on the defaults of appellant's former counsel, but determined erroneous damages.

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 17 day of November, 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 AMENDED OPENING BRIEF**, by the method indicated and addressed to the following:

John P. Aldrich, Esq.
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1601 S. Rainbow Blvd., Ste. 160
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__X_ Via U.S. Mail
____ Via Overnight Mail
____ Via Hand Delivery
____ Via Facsimile
____ Via ECF

DATED this 17 day of November, 2011.

Robert M. May

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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

RESPONDENT'S AMENDED ANSWERING BRIEF

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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. **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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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. On November 9, 2010, the case was assigned to the settlement program. On February 15, 2011, Settlement Judge Carolyn Worrell recommended that the case be removed from the settlement conference program, explaining that a third-party insurance carrier was declining to participate, making the settlement conference unworkable. On March 2, 2011, the Nevada Supreme Court filed its Order Reinstating Briefing. That Order gave Appellant fifteen days to file the request for transcript and ninety days

to provide an Opening Brief and appendix.

On or about March 10, 2011, Appellant Fallini filed a Certificate indicating that no transcript of the proceedings below was available, and as such, she would not be filing a request for transcript. Significantly, Appellant Fallini did not request a transcript as required by NRAP 9. Appellant Fallini filed her Opening Brief on May 31, 2011. Respondent Adams' Answering Brief was filed on July 11, 2011. Appellant Fallini then filed her Reply Brief on July 28, 2011. Thus, all briefing in this case was completed by **July 28, 2011**. Subsequently, on August 19, 2011, this Court advised the parties that there would be no oral argument and the case would be decided on the briefs alone.

On October 5, 2011 – well over two months after briefing closed in this appeal, and six weeks after this Court notified the parties there would be no oral argument – Appellant Fallini brought a Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs. Attached to Appellant's Motion was an affidavit of John Ohlson, Esq., counsel for Appellant, and a copy of a transcript purportedly from the prove up hearing that occurred on July 19, 2010.[1]) Respondent Adams opposed the Motion.

On October 13, 2011, Respondent's counsel, Mr. Aldrich, contacted Mr. Ohlson's office and spoke with Rob May. Mr. May subsequently provided to Mr. Aldrich, by email, the email address and telephone number of DanRa Boscovich, the court reporter who prepared the purported transcript that is attached as Exhibit 2 to Appellant's Motion. (Affidavit of John P. Aldrich, attached to Respondents' Opposition to Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs.) Mr. Aldrich called Ms. Boscovich on the phone and Ms. Boscovich freely spoke with Mr. Aldrich for several minutes. Mr. Aldrich asked Ms. Boscovich about the circumstances of the transcript's preparation. (Exhibit D to Respondents' Opposition to Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs.)

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[1] The Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs and the related pleadings and Order have not been made a part of the Joint Appendix. Therefore, Ms. Adams will refer to these documents as they were attached to the pleadings related to Appellant's Motion.

Ms. Boscovich explained that Joe Fallini, the husband of Appellant Susan Fallini, is a "good friend" of hers. Mr. Fallini had obtained a disk that included a recording of the hearing from July 19, 2010. Ms. Boscovich said that the quality of the disk obtained by Mr. Fallini was "bad." (Exhibit D, Respondents' Opposition to Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs.) Ms. Boscovich then went personally to the Court and obtained a second copy of the hearing, which she described as "better." (Exhibit D to Respondents' Opposition to Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs.) Ms. Boscovich explained that Mr. Fallini was "desperate" to have the hearing transcribed, and she worked to quickly assist him. (Exhibit D to Respondents' Opposition to Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs.)

Ms. Boscovich told Mr. Aldrich that from the time Mr. Fallini brought her the first disk to the time that she completed the transcription was less than one (1) week. (Exhibit D to Respondents' Opposition to Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs) Therefore, given the date of August 27, 2011 on page 39 of the transcript, it appears that Mr. Fallini approached Ms. Boscovich on or after August 20, 2011.

Mr. Aldrich inquired of Ms. Boscovich if Mr. Fallini paid Ms. Boscovich for her services, to which she responded "absolutely not." She also explained that she felt very sorry for the Fallinis' situation, and reiterated that the Fallinis are very long-time friends. (Exhibit D to Respondents' Opposition to Motion for Order Allowing Supplementation of Appendix and for Re-Opening of Briefs.)

At best, the transcript is incomplete. Conspicuously absent from the transcript is the portion of the hearing dealing with the motion for reconsideration. Further, the authenticity and accuracy of the transcript is also in question, as it was prepared by a "good friend" of Appellant and her husband, as a favor (i.e., no compensation was paid), by someone who felt sorry for Appellant's situation. Of course, Appellant Fallini proceeded to attach the transcript to the Motion even before the Court determined whether to allow the transcript to become part of the record.

On October 17, 2011 Respondents filed an Opposition to Motion for Order Allowing

Supplementation of Appendix and for Re-Opening of Briefs. On October 24, 2011 the Court issued an Order Granting Motion to Supplement Appendix and Reopen Briefing and issued an amended briefing schedule. Appellants' Amended Opening Brief was filed on or about November 17, 2011. Respondents obtained a telephonic extension, making Respondents' Amended Answering Brief due December 27, 2011.

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 Amended Opening Brief, p. 11, l. 18.) 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, as she did in her initial Appellant Opening Brief, Defendant Fallini failed to provide the standard of review. As such, Judith again 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, the Court will overturn a court's decision to order default judgment as a sanction for misconduct "only if [it has] 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 followed 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 – despite repeatedly being ordered to do so – 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 (Amended Opening Brief, pp. 12-15) and that the allowing the Order Granting Partial Summary Judgment to stand would result in manifest injustice (Amended Opening Brief, pp. 15-16).

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. Fallini failed to address this issue, despite the fact that it was raised in the initial

Respondents' Answering Brier, and Fallini received a second opportunity to address this issue.

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 in this case as far back as 2007 -- three years before Defendant's Motion to Reconsider Prior Orders.

Moreover, Defendant Fallini has provided no evidence whatsoever that the district court abused its discretion. Defendant Fallini ignores the substance of her Motion to Reconsider Prior Order, probably because it completely 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. The Motion for Partial Summary Judgment Was Properly Granted

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. Moreover, it is worth noting that Defendant Fallini did not bring a motion for relief pursuant to NRCP 60 before the District Court.

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 and never moved to withdraw the admissions. 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.

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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 sanctions 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), and even after the Answer and Counterclaim were stricken, Defendant Fallini failed for months to take any steps to remedy any perceived impropriety, including failing to seek relief under NRCP 60.

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 every 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 cannot show any 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, all 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 that she respond to discovery requests.

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 open the floodgates of litigation. Every client who lost a case would then assert his counsel 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 in 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, it is without merit. Defendant Fallini never asked for a jury trial. 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) 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 trial 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 her assertion that 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 unconstitutional because trial by jury was *required* by the applicable Fair Housing Act. Id. Again, in the present case, Defendant Fallini has pointed to no applicable 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 for Defendant Fallini in this case.

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 inapposite. Defendant Fallini never requested a jury trial. Further, Defendant Fallini had 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 Amount Awarded by the District Court Was Appropriate, But Even if the District Court Improperly Awarded Damages For Future Lost Earnings, Plaintiff Was Entitled to More for Loss of Support, Etc., as Well as Hedonic Damages, and Therefore, the Award Was Proper

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. In her two-page argument on this issue, Defendant Fallini cites various statutes and case law, as well as a brief portion of the transcript she belatedly obtained. Defendant Fallini then dedicates approximately one sentence each to the issues of lost consortium/loss of support, and lost income. (Appellant's Amended Opening Brief, pp. 18-20.)

Funeral Expenses

Defendant Fallini does not take issue with the award of funeral expenses in the amount of $5,188.85. (Appellant's Opening Brief, p. 19.)

Loss of Grief, Sorrow and Support

Defendant Fallini asserts that the award of $1,000,000 in "Damages for Grief, Sorrow, and loss of support" (Jt. Appx. II, p. 230) is inappropriate. (Appellant's Opening Brief, p. 20.) Defendant Fallini cites no authority in support of this proposition; she simply states it in a one-sentence passing shot near the end of her brief. Defendant Fallini fails to even attempt to support her position because the award of $1,000,000 is entirely appropriate under the law.

NRS 41.085 provides, in pertinent part:

> . . .
>
> 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 the person's **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 the decedent's estate include:
>
> (a) Any special damages, such as medical expenses, which

> the decedent incurred or sustained before the decedent's death, and funeral expenses; and
>
> (b) Any penalties, including, but not limited to, exemplary or punitive damages, that the decedent would have recovered if the decedent 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.

NRS 41.085(4) and (5) (emphasis added). Thus, the award of $1,000,000 for "Damages for Grief, Sorrow, and loss of support" (Jt. Appx. II, p. 230) is provided for by Nevada law. The only argument to be made is that the amount awarded is too low for what it encompassed. That will be addressed to some degree below.

The Award of $1,640,696.00 Should Be Upheld

Defendant Fallini argues that the award of $1,640696.00 is inappropriate and not supported by law. Defendant Fallini also cites portions of a purported incomplete transcript from the prove-up hearing. However, the total award of damages was proper, even if not attributed to a particular category of damages because the Court very easily could have awarded an additional $1,640,696.00 in damages for "grief or sorrow, loss of probable support, companionship, society, comfort and consortium," or substantially more than that as hedonic damages. Judith had asked for $2,500,000, and the evidence certainly would have supported such an award.

At the hearing, Judith described her son as a very loving son who often helped with tasks around her house, provided support when Mr. Adams was ill, etc. (Partial Transcript of Prove-Up Hearing, attached to Defendant Fallini's Motion for Order Allowing Supplementation of Appendix and to Re-Open Briefing, pp. 13-15, 17 of transcript.) The District Court was also presented with additional testimony by letter. (Jt. Appx. II, pp. 103-105.)

The award of damages should be upheld because Respondents are entitled to hedonic damages, which were not awarded but should have been. It is well settled law that a correct decision will be upheld, even though it is based on the wrong reason. Sengel v.

IGT, 116 Nev. 565, 2 P.3d 258, 261.

Judith presented evidence to the District Court that she was entitled to hedonic damages. However, the District Court specifically denied hedonic damages without explanation. Hedonic damages have been specifically recognized by the Nevada Supreme Court. In Banks v. Sunrise Hospital, 120 Nev.822, 102 P.3d 52 (2004), the Nevada Supreme Court noted that "[h]edonic damages are therefore monetary remedies awarded to compensate injured persons for their noneconomic loss of life's pleasures or the loss of enjoyment of life." Id. Quoting the Supreme Court of South Carolina, the Court explained how hedonic damages are different from damages for pain and suffering:

> An award for pain and suffering compensates the injured person for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself. Separate damages are given for mental anguish where the evidence shows, for example, that the injured person suffered shock, fright, emotional upset, and/or humiliation as the result of the defendant's negligence.
>
> On the other hand, damages for "loss of enjoyment of life" compensate for the limitations, resulting from the defendant's negligence, on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his talents, recreational interests, hobbies, or avocations.

Id. (quoting Boan v. Blackwell, 541 S.E.2d 242, 244 (S.C. 2001)).

Michael has been deprived of so much life. As his parents have noted, he will not have the opportunity to marry or experience the joys that come with that sacred institution. Michael will never have the opportunity to father children – no witnessing his child's first words, no kindergarten graduation, no coaching little league. Finally, while some might consider elderly parents a burden, it is clear that Michael would have viewed his parents' aging as an opportunity to tenderly give back to his parents some of the love they had shown him during his short life. Michael will not be able to participate in so many of the things that really matter in life. (Partial Transcript from hearing on Application for Default Judgment, pp. 11-17.)

Hedonic damages are difficult to measure because so many of the things listed above are priceless; i.e., they are nearly impossible to value in monetary terms. Although expert

witness testimony regarding hedonic damages is permitted, see Banks, expert testimony is not necessary. Despite the fact that expert testimony is not necessary, the Banks court discussed the expert witness in that case, and those comments are instructive here.

The expert in Banks examined the value of hedonic damages using two methods – the "survey method" and the "wage-risk method." Id. Using these methods, the expert opined that the tangible value of a person's life is somewhere between $2.5 million on the low end, $8.7 million on average, and literally priceless (i.e., impossible to value) on the high end. Id. Noting that the defendant had appealed the district court's decision to allow the expert to testify at trial, the Nevada Supreme Court held that the expert testimony was proper. Id.

The expert in Banks was analyzing the life of a 52-year-old man who was left in a vegetative state following surgery. In this case, Michael was 33 years old at the time of his death and engaged to be married. Clearly, Michael was a wonderful human being who would have enjoyed a fulfilling life with deep relationships. Unfortunately, due to the Defendant's negligence, none of that can ever come to be. Judith is entitled to hedonic damages well in excess of the $1, 640,696.00 awarded for lost career earnings. Even if this Court concluded that the District Court improperly awarded damages for future lost earnings, Judith was entitled to hedonic damages well in excess of the amount awarded, and thus, the award of $1,640,696.00 should be upheld, even if awarded for the wrong reason.

Awards for Attorneys' Fees and Sanctions

The District Court awarded $50,000 in attorneys' fees and $35,000 in sanctions. Defendant Fallini does not dispute the awards for attorneys' fees and sanctions.

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 be affirmed.

Respectfully submitted 27th day of December, 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 27th day of December, 2011.

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CERTIFICATE OF MAILING

The undersigned does hereby certify that on the 27th day of December, 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,

Supreme Court No.: 56840

Appellant,

vs.

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

Respondent.

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

APPELLANTS' AMENDED REPLY BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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APPELLANT'S AMENDED REPLY BRIEF

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

Respondent.

/

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

ISSUES PRESENTED FOR REVIEW

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

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

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

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

DISPUTED FACTS

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

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

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

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

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[1] The trial court made several references to the open range status of the accident site: The Court stated "You should be aware that out here in the rurals, cows run on highways" (page 3, l.24-p.4 l.1, Transcript of hearing for Application for Default Judgment). In addition, counsel asked the Court to take judicial notice of the fact of open range during this colliquey:

Q: Do you know of your own personal knowledge whether that stretch of highway is designated as open range?

A: It is.

MR. ALDRICH: I object to relevance. It's prove up.

THE COURT: It doesn't matter. I'm aware that it is.

Go ahead.

MR. OHLSON: If you are, Your Honor, you'll take judicial notice of that?

THE COURT: **That'll be fine.** (emphasis added)

(p.27, ll.2-13, Transcript of hearing for Application for Default Judgment)

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

REPLY ARGUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Until approximately June 2, 2010, Kuehn failed to communicate the status of the case, **except to tell defendant that the case was "over and had been taken care of."** Jt. Appx. II., 142, 151. Finally, Mr. Tom Gibson contacted Fallini and apprised her of the