and this Court's judicial notice of the complete defense to the case *as a matter of law*, this Court should set aside the judgment.

CONCLUSION

In conclusion, Plaintiff knew that the accident was on open range. Opposing counsel knew the accident was on open range. The deceased, who drove past 14 open range signs on July 7, 2005, knew that he was on open range. Defendant knew that the accident was on open range. This Court took judicial notice of the fact that the location in which the accident occurred was open range. As a consequence, Ms. Fallini could not, as a matter of law, be liable for injuries caused by an accident between a motor vehicle and her cow.

Here, Opposing counsel, as an officer of the court, advanced known falsehoods through the very mechanisms that are meant to work justice. The fraud on the court centers on the utmost material fact of the case. This underscores the severity of the knowingly false filings and failure to correct the false assertion. There can be no doubt that "the judicial machinery cannot perform in the usual manner its impartial task of adjudging" this case because of the actions of opposing counsel. Fortunately, this fraud upon the court can be undone to allow the resolution of this case to accord with knowledge of *every* party involved.

Finally, Ms. Fallini was tragically let down by her attorney and is eligible to have this default judgment set aside for excusable neglect. Kuehn's misconduct robbed Ms. Fallini of her complete defense. This egregious and excusable neglect provides this Court a second option to grant relief and set aside the default judgment.

As set forth above, it would be a clear abuse of discretion to permit a judgment of this nature to stand and thereby deny Ms. Fallini her day in court. Accordingly, the Court should set

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aside the judgment pursuant to NRCP 60(b).

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 20th day of May, 2014.

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

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 FOR RELIEF FROM JUDGEMENT PURSUANT TO NRCP 60(b)** by the method indicated and addressed to the following:

John P. Aldrich, Esq.
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 20th day of May, 2014.

Robert M. May

SCHEDULE OF EXHIBITS

EXHIBIT 1: State of Nevada Traffic Accident Report

EXHIBIT 2: Nye County Sheriff's Office Death Investigation Report

EXHIBIT 3: Affidavits

EXHIBIT 4: Website Pages

EXHIBIT 1

EXHIBIT 1

Event Number: 0507080188
Code Revision: 01/14/2004

STATE OF NEVADA
TRAFFIC ACCIDENT REPORT
SCENE INFORMATION SHEET
Revised 1/14/04

Accident Number: NHP-E2005-00779
☐ Property ☐ Injury ☒ Fatal

☐ 1) Urban ☒ 2) Rural
☐ 1) Emergency Use ☐ 2) Office Report
☐ 1) Preliminary Report ☐ 3) Resubmission ☒ 2) Initial Report ☐ 4) Supplement Report
☐ 1) Hit and Run ☐ 2) Private Property

Agency Name: 1 - DPS NEVADA HIGHWAY PATROL

Collision Date	Time	Day	Beat / Sector	
7/7/2005	21:00	THURSDAY	CP87	☒ County ☐ City NYE

Mile Marker	# Vehicles	# Non Motorists	# Occupants	# Fatalities	# Injured	# Restrained
33	1	0	1	1	0	1

Surface: ☒ 1) Asphalt ☐ 2) Concrete ☐ 3) Gravel ☐ 4) Dirt ☐ 5) Other

Intersection: ☐1) Four Way ☐2) > Four Way ☐3) T ☐4) Y ☐5) Roundabout ☐6) Other

Paddle Markers: ☐1) None ☐2) Left Side ☐3) Right Side ☒4) Both Side ☐5) Unknown

Occurred On: *(Highway # or Street Name)*
☐ 1) Parking Lot SR 375

Access Control: ☒1) None ☐2) Full ☐3) Partial

☐1) At Intersection With:
☒2) Or 1682 ☒3) Feet ☐4) Miles ☐5) Approximate SOUTH *Of (Cross Street)* SR 375 NYE MILE MARKER 33

Roadway Character: ☐1) Curve & Grade ☐2) Curve & Hillcrest ☐3) Curve & Level ☐4) Straight & Grade ☐5) Straight & Hillcrest ☒6) Straight & Level ☐7) Unknown ☐8) Other

Roadway Conditions: ☒ 1) Dry ☐ 2) Icy ☐ 3) Wet ☐ 4) Snow ☐ 5) Sand / Mud / Oil / Dirt / Gravel ☐ 6) Other ☐ 7) Slush ☐ 8) Standing Water ☐ 9) Moving Water ☐ 10) Unknown

Total Thru Lanes: Main Road ☐1) One ☒2) Two ☐3) Three ☐4) Four ☐5) Five ☐6) > 5
Total All Lanes: 2

Average Roadway Widths: Travel Lane 12 Ft; Storage / Turn Lane Ft; Median Ft
Paved Shoulder: Inside 2; Outside 2

Roadway Grade: ☐1) Not Determined ☒2) Relatively Level Roadway ☐3) Up Slope (+) ☐4) Down Slope (-)
Relative To
Grade %

Pavement Markings and Type
1 1) Centerline, Broken Yellow
2) Centerline, Solid Yellow
3) Centerline, Double Yellow
4) Lane Line, Broken White
5) Lane Line, Solid White
6) No Passing, Either Direction
7) Turn Arrow Symbols
8) Center Turn Lane Line
9) Edge Line, Left, Yellow
1 10) Edge Line, Right, White
11) Other
☐ 12) None ☐ 13) Unknown

Highway Description: ☒1) Two-Way, Not Divided ☐2) Two-Way, Div.,Unpro,Median ☐3) Two-Way, Div.,Median Barrier ☐4) One-Way, Not Div. ☐5) Unknown ☐6) Off Road

Weather Conditions: ☒1) Clear ☐2) Cloudy ☐3) Snow ☐4) Rain ☐5) Blowing Sand, Dirt, Soil, Snow ☐6) Other ☐7) Fog, Smog, Smoke, Ash ☐8) Severe Crosswinds ☐9) Sleet / Hail ☐10) Unknown

Light Conditions: ☐1) Dusk ☐2) Dawn ☐3) Daylight ☐4) Unknown ☐5) Other ☒6) Dark - No Roadway Lighting ☐7) Dark - Spot Roadway Lighting ☐8) Dark - Continuous Roadway Lighting ☐9) Dark - Unknown Roadway Lighting

Vehicle Collision Type: ☐1) Head On ☐2) Rear End ☐3) Backing ☐4) Angle ☐5) Rear to Rear ☐6) Sideswipe - Meeting ☐7) Sideswipe - Overtaking ☒8) Non - Collision ☐9) Unknown

Location of First Event: ☒1) Travel Lane ☐2) Turn Lane ☐3) Gore ☐4) Median ☐5) Inside Shoulder ☐6) Outside Shoulder ☐7) Intersection ☐8) Private Property ☐9) Roadside ☐10) Other ☐11) Ramp ☐12) Unknown

Highway / Environment Factors: ☒1) None ☐2) Weather ☐3) Debris ☐4) Glare ☐5) Other Highway ☐6) Other Environmental ☐7) Shoulders ☐8) Road Obstruction ☐9) Worn Traffic Surface ☐10) Wet, Icy, Snow, Slush ☐11) Ruts, Holes, Bumps ☐12) Active Work Zone ☐13) Inactive Work Zone ☐14) Animal In Roadway ☐15) Unknown

Property Damage To Other Than Vehicle
Describe Property Damage: ONE RED COW
Owner's Name (Last First Middle): FALLINI SUSAN ☒1) Owner Notified
Owner's Address: (Street Address City, State Zip) TWIN SPRINGS RANCH HC 76 BOX 1100 TONOPAH NV 89049

First Harmful Event
Code #: 206 Description: 206 CATTLE

Description of Accident / Narrative
SEE ATTACHED SUPPLEMENTAL.

Investigation Complete	Photos Taken	Scene Diagram	Statements	Date Notified	Time Notified	Arrival Date	Arrival Time
☒1) Yes ☐2) No	☒1) Yes ☐2) No	☒1) Yes ☐2) No	☐1) Yes ☒2) No #	7/8/2005	07:05	7/8/2005	07:05

Investigator(s)	ID Number	Date	Reviewed By	Date Reviewed	Page
399 MIKE S. SIMON	399	7/8/2005		07-27-05	1 of 21

STATE OF NEVADA
TRAFFIC ACCIDENT REPORT
VEHICLE INFORMATION SHEET
Revised 1/14/04

Event Number: 0507080188

Accident Number: NHP-E2005-00779

Agency Name: 1 - DPS NEVADA HIGHWAY PATROL

Vehicle #	# Occupants	
1	1	☒ 1) At Fault ☐ 2) Non Contact

Direction of Travel: ☒ 1) North ☐ 2) South ☐ 3) East ☐ 4) West ☐ 5) Unknown Vehicle

Highway / Street Name: SR 375

Travel Lane #: 1

Vehicle Action: ☒ 1) Straight ☐ 2) Backing ☐ 3) Left Turn ☐ 4) Right Turn ☐ 5) U-Turn ☐ 6) Parked ☐ 7) Wrong Way ☐ 8) Stopped (#) ☐ 9) Passing ☐ 10) Racing ☐ 11) Leaving Parked ☐ 12) Entering ☐ 13) Leaving Lane ☐ 14) Other Turning ☐ 15) Enter Parked ☐ 16) Driverless Vehicle ☐ 17) Lane Change ☐ 18) ☐ 19) Unknown

Driver: (Last Name, First Name, Middle Name Suffix) ADAMS MICHAEL DAVID

Transported By: ☐ 1) Not Transported ☐ 2) EMS ☐ 3) Police ☐ 4) Unknown ☒ 5) Other DEAN GLASFORD

Street Address: SEAL BEACH BLVD APT C

Transported To: GUNTERS FUNERAL HOME

City: SEAL BEACH **State / Country:** CA ☐ 1) NV **Zip Code:** 90740

Person Type: 1 **Seating Position:** 01 **Occupant Restraints:** 7

☒ 1) Male ☐ 2) Female ☐ 3) Unknown **DOB:** 5/10/1972 **Phone Number:**

Injury Severity: K **Injury Location:** 1 7

OLN: A4031957 **State:** ☐ 1) NV CA ☐ 1) CDL ☒ 2) DL **License Status:** 0

Airbags: 1 **Airbag Switch:** 1 **Ejected:** 0 **Trapped:** 2

Compliance: ☒ 1) Restrict ☒ 2) Endorse

Endorsements: 0

Restrictions:

Alcohol/Drug Involvement: ☐ 1) Not Involved ☐ 2) Suspected Impairment ☐ 3) Alcohol ☐ 4) Drugs ☒ 5) Unknown

Method of Determination (check up to 2): ☐ 1) Field Sobriety Test ☐ 2) Evidentiary Breath ☐ 3) Driver Admission ☐ 4) Urine Test ☒ 5) Blood Test ☐ 6) Preliminary Breath

Test Results: PEND

Driver Factors
☐ 1) Apparently Normal ☐ 2) Had Been Drinking ☐ 3) Drug Involvement ☐ 4) Apparently Fatigued / Asleep ☐ 5) Obstructed View ☐ 6) Driver Ill / Injured ☐ 7) Other Improper Driving ☐ 8) Driver Inattention / Distracted ☐ 9) Physical Impairment ☒ 10) Unknown

Vehicle Year: 1994 **Vehicle Make:** JEEP **Vehicle Model:** WRANGLER **Vehicle Type:** LL

Plate / Permit No.: 3RTA070 **State:** ☐ 1) NV CA **Expiration Date:** 07/08/2006 **Vehicle Color:** GREEN

Vehicle Identification Number: 1J4FY19P5RP470855

Registered Owner Name: ☒ 1) Same As Driver

Registered Owner Address: SEAL BEACG BLVD APT C SEAL BEACH,CA,90740

Vehicle Factors
☐ 1) Failed To Yield Right Of Way ☐ 2) Disregard Control Device ☐ 3) Too Fast For Conditions ☐ 4) Exceeding Speed Limit ☐ 5) Wrong Way / Direction ☐ 6) Mechanical Defects ☐ 7) Drove Left Of Center ☐ 9) Failed To Maintain Lane ☐ 10) Following Too Close ☐ 11) Unsafe Lane Change ☐ 12) Made Improper Turn ☐ 13) Over Correct/Steering ☐ 14) Other Improper Driving ☐ 15) Aggressive / Reckless / Careless ☐ 16) Driverless Vehicle ☐ 17) Unsafe Backing ☒ 18) Ran Off Road ☐ 19) Hit and Run ☐ 20) Road Defect (*) ☐ 21) Object Avoidance ☐ 22) Unknown (#)
8) Other COW

Insurance Company Name: ☒ 1) Insured GEICO

Policy Number: 4026-52-93-64 **Effective:** 5/5/2005 **To:** 11/5/2005

Insurance Company Address or Phone Number: 1-800-42GEICO

☒ 1) Vehicle Towed **Towed By:** PRO TOW - ALAMO

Removed To: ALAMO NEVADA

1st Contact
☐ 2 ☐ 3 ☐ 4
☒ 1 — ☐ 5
☐ 8 ☐ 7 ☐ 6
☐ 1) Override ☐ 2) Under Ride

Damaged Areas
☒ 1) Front ☒ 2) Right Side ☒ 3) Left Side ☐ 4) Rear ☐ 5) Right Front ☐ 6) Right Rear ☒ 7) Top ☒ 8) Under Carriage ☐ 9) Left Front ☐ 10) Left Rear ☐ 11) Unknown ☐ 12) Other

Traffic Control
F 1) Speed Zone
2) Signal Light
3) Flashing Light
4) School Zone
5) Ped. Signal
6) No Passing
7) No Controls
F 8) Warning Sign
9) Turn Signal
10) Other
11) Stop Sign
12) Yield Sign
13) R. R. Sign
14) R. R. Gates
15) R. R. Signal (#)
16) Marked Lanes
17) Tire Chains/Snow Req.
18) Permissive Green
☐ 19) Unknown

Distance Traveled After Impact	Speed Estimate From	To	Limit
287 (1 - FEET)	72	79	70

Extent Of Damage: ☐ 1) Minor ☐ 2) Moderate ☐ 3) Major ☒ 4) Total ☐ 5) None ☐ 6) Unknown

Sequence Of Events

	Code #	Description	Collision With Fixed Object	Most Harmful Event
1st	206	206 CATTLE	☐	☐
2nd	108	108 RAN OFF ROADWAY, RIGHT	☐	☐
3rd	101	101 OVERTURN / ROLLOVER	☐	☒
4th			☐	☐
5th			☐	☐

	Violation	NOC	Citation Number
☐ 1) NRS ☐ 2) CFR ☐ 3) CC / MC ☐ 4) Pending (1)			
☐ 1) NRS ☐ 2) CFR ☐ 3) CC / MC ☐ 4) Pending (2)			

Investigator(s)	ID Number	Date	Reviewed By	Date Reviewed	Page
399 MIKE S. SIMON	399	7/8/2005			2 of 2

NEVADA
HIGHWAY PATROL

REPORT IS: Supplemental
TO: Accident

ACCIDENT NUMBER: **E2005-00779**
CITATION NUMBER: .
OTHER NUMBER: 0507080188

1. Facts:

Dispatch and Arrival

On July 8th, 2005 at approximately 0705 hours, Trooper Guy Davis #6485 traveled upon a single vehicle crash involving a fatality on SR 375 at Nye mile marker 33. Trooper Davis requested that the Central Command SIRT Team be dispatched to the scene. See Trooper Davis's supplemental report for details of his involvement. At approximately 0726 hours I was notified at my residence by Nevada Highway Patrol (NHP) Dispatch in Elko. I was en-route to the accident scene at approximately 0810 hours. I arrived at the accident scene at approximately 0957 hours.

Scene

I approached the accident scene from the south on SR 375. The accident occurred on a straight portion of SR 375. As I approached the accident scene I observed Trooper Davis's patrol unit on the east gravel shoulder with his emergency lights activated. North of Trooper Davis's patrol unit and on the east shoulder, I observed a green Jeep Wrangler sitting on its left side. Across the highway from the Jeep and on the west gravel shoulder facing north was Trooper Bill West's (6648) patrol unit. In front of Trooper West's patrol unit was a Nye County Sheriffs unit. Across the highway from the Nye County unit and on the east gravel shoulder was Pro Towing's tow truck. I observed that the scene had been secured by Trooper Davis. I parked my patrol unit behind Trooper Davis's patrol unit.

Weather

Reading Date:	07/07/05	07/08/05
Reading Time:	0000 hours	0705 hours
Temperature:	55 degrees Fahrenheit	60 degrees Fahrenheit
Skies:	Clear	Clear
Barometer:	30.17 inches	30.17 inches
Visibility:	10 + miles	10 + miles
Wind Velocity:	Southeast at 3 mph	Southeast at 6 mph
Humidity:	25%	25%
Sunset:	2013 hours (07/07/05)	
Sunrise:	0532 hours (07/07/05)	

ARRESTING/REPORTING OFFICER: **Trooper M. Scott Simon** I.D. NO.: 6399 DATE AND TIME REPORT PREPARED: 07/08/05 @ 1600 hours APPROVED BY:

NHP FORM 4 (REV. 09-94)

Roadway

SR 375 is a north/south roadway. The road is a two lane, two directional highway of asphalt construction, being 28 feet from pavement edge to pavement edge. Each travel lane is 12 feet for a total of 24 feet. The shoulders are paved, being 2 feet wide each. The highway is divided by a broken yellow paint strip, indicating a lawful passing zone for northbound and southbound traffic.

Lighting

The accident occurred during the hours of darkness. There is no artificial lighting in the area of the accident. The only illumination would be from the headlamps of V-1.

Roadway Marks/Description of Evidence

Refer to attached diagram.

Traffic Control/Special Highway Conditions

The posted speed limit for SR 375 in the area of the accident is 70 miles per hour. There are several warning signs indicating that SR 375 was designated as Open Range. The nearest Open Range sign is located approximately 7 miles south of the accident scene. There were no special highway conditions present at the time of the crash. There were no visual obstructions observed at the scene.

Photographs

Initial photographs were taken by Trooper Davis. Trooper Davis used his division issued camera. See Trooper Davis's supplemental report for his camera information. Additional scene photographs were taken by me. The type of camera that I used was a Sony DSC-P51, digital still camera. The camera has a 2X Optical Zoom Lens. The digital camera has a built in flash.

Measurements

Measurements of the accident scene were taken by this reporting officer and Trooper Bill West #6648. The Instrument used to take measurements was a Leica Total Station. I operated the total station, while Trooper West operated the prism at my direction.

Vehicle Damage Inspection, Vehicle 1 (V-1)

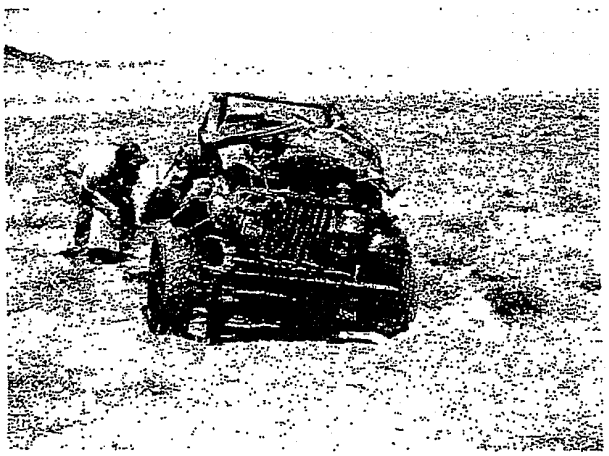
V-1 was a green, 1994 Jeep Wrangler, bearing California registration **3RTA070** (Vehicle Identification Number

1J4FY19P5RP470855). V-1 was registered to **Michael David Adams** at Seal Beach Blvd APT C , in Seal Beach California 90740. I performed a vehicle inspection at the scene. The vehicle was not weighed following the collision. A curb weight of 3,082 pounds was obtained from the vehicle database section in the Microsurvey Mapscenes software for the same year, make and model as V-1.

Note: The photographs of V-1 were taken after it was turned upright by the tow service.

Body of Vehicle:

Front Damage: The front of V-1 shows contact damage. The right front of V-1 is pushed rearward into the engine compartment and to the left from V-1 striking a cow. The right front is also pushed upward. The right front headlamp was broke as V-1 struck the cow. The left front of V-1 shows induced damage. The left front is pushed forward and downward. See attached photograph.



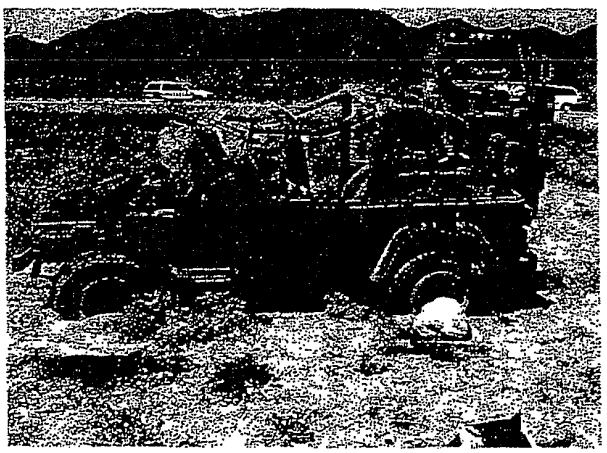
Rear Damage: The rear of V-1 shows some induced damage, indicated by rippled sheet metal. The right rear of V-1 is pushed upward and the left rear of v-1 is pushed downward. See attached photograph.

NEVADA HIGHWAY PATROL

REPORT IS: Supplemental
TO: Accident

ACCIDENT NUMBER: **E2005-00779**
CITATION NUMBER: .
OTHER NUMBER: 0507080188

Left Side: The left side of V-1 shows some contact damage. The driver's side door is pushed slightly rearward and outward towards the left. The door was pinned shut and could not be opened. The roll bar on the top of the left side is pushed downward toward the passenger compartment. See attached photograph.



ARRESTING/REPORTING OFFICER: **Trooper M. Scott Simon** M. Scott Simon
I.D. NO.: 6399
DATE AND TIME REPORT PREPARED: 07/08/05 @ 1600 hours
APPROVED BY:

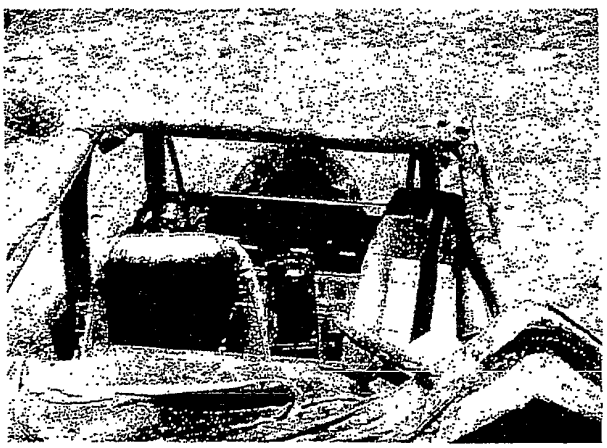
NHP FORM 4 (REV. 09-94)

REPORT IS: Supplemental
TO: Accident

ACCIDENT NUMBER: **E2005-00779**
CITATION NUMBER: .
OTHER NUMBER: 0507080188

Right Side: The right side of V-1 shows contact damage. The right front of V-1 is pushed rearward and into the right front passenger door. The right front is also pushed upward. The right front passenger door was found opened. The sheet metal of the door is pushed inward towards the passenger compartment. The door is pushed downward and inward toward the passenger compartment. The right rear shows induced damage, indicated by rippled sheet metal. The roll bar on the top of the right side is pushed downward towards the passenger compartment. The right rear is pushed upward. The entire right side of V-1 is pushed toward the left. See attached photograph.

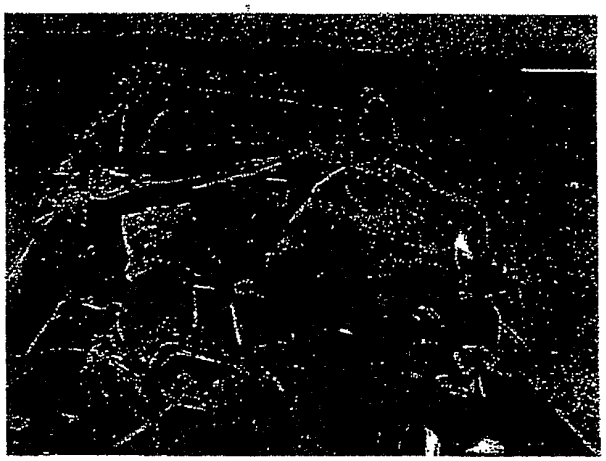
Roof: V-1 did not have a roof. V-1 was equipped with a roll bar. The roll bar was pushed downward into the passenger compartment on the left and right sides of V-1. There were large tears in the padding that surrounds the roll bar. See attached photograph.



ARRESTING/REPORTING OFFICER: **Trooper M. Scott Simon** M. Scott Simon I.D. NO.: 6399 DATE AND TIME REPORT PREPARED: 07/08/05 @ 1600 hours APPROVED BY:

NHP FORM 4 (REV. 09-94)

Hood: The hood of V-1 shows contact damage from V-1 striking a cow. The hood is pushed rearward and into the windshield of V-1. The right side of the hood is pushed downward into the engine compartment. The left side of the hood is pushed upward and to the left. See attached photograph.



Windows and Windshield: The windshield of V-1 was broke from the hood of V-1 being pushed rearward. The windshield compartment was found folded forward and was lying on the rear portion of the hood. V-1 was not equipped with any windows.

Lighting (Headlamps, Tail Lamps and Marker Lamps)

The right rear and left rear tail lamps of V-1 were intact. The left front headlamp was intact. The right front headlamp was broke out of V-1. The marker lights were intact. The electrical system of V-1 was not tested to see if the lamps functioned properly.

Interior Inspection:

The interior of V-1 was strewn with dust and debris. The climate control was set with the fan off and the temperature selector was at the coldest setting. The fan was set to distribute air from the dash vents. The headlamp switch was in the "on" position at the time of inspection. The stereo was in the "on" position and on a medium volume setting. The key was in the "on" position. The odometer reading was 163,457.

REPORT IS: Supplemental
TO: Accident

ACCIDENT NUMBER: E2005-00779
CITATION NUMBER: .
OTHER NUMBER: 0507080188

Seat Position

The front seats in V-1 were vinyl bucket style seats with a center console. The driver seat was found near the rear of its range of motion with the backrest being reclined approximately 15 degrees. The right front seat was in an opened position. The seat was pushed forward into the dashboard and was pushed upward. V-1 was not equipped with a rear seat.

Accelerator Pedal/Brake Pedal/Clutch Pedal

The accelerator, brake and the clutch pedals appeared to be undamaged and moved appropriately when pressure was applied.

Transmission

This vehicle was equipped with a manual transmission, with the gear selector located on the center floor board, just in front of the center console. The gear shift was found in the "N" position indicating that the vehicle was in neutral. The transmission was not inspected; however there was no evidence to indicate any damage to the transmission prior to the crash.

Steering

The steering wheel was a two-spoke wheel. The wheel and column appeared to be undamaged and the wheel moved appropriately when pressure was applied.

Seatbelts / Child Restraints / Air Bags

All seating positions in V-1 were equipped with three point lap and shoulder restraints. The driver was found still buckled in the seatbelt. The seatbelt was cut to remove the driver. There were no child restraints located in V-1. This vehicle was not equipped with supplemental air bags.

Wheels and Tires:

All the tires on V-1 were Pathfinder Trail A/P, mud and snow tubeless radial tires, mounted on factory, 15 inch alloy wheels. The size of the tires was 30 x 9.50 R15 LT. The Department of Transportation (DOT) number

for these tires was E13007372. These tires had a maximum load rating of 1990 pounds at a maximum pressure of 50 pounds per square inch (PSI). These tires were constructed with 4 plies on the tread (2 polyester and 2 steel). The sidewall was constructed of 2 plies of polyester. The tread depths, air pressure and any damage to the tires or wheels were as follows:

Left front: The left front tire was found deflated (0 PSI). There was no damage noted to the tire or wheel. The tread depths of this tire were found to be 8/32" on the outside, 8/32" in the middle and 8/32" on the inside.

Right front: The right front tire was found partially inflated (10 PSI). There was no damage noted to the tire or wheel. The tread depths of this tire were found to be 7/32" on the outside, 6/32" in the middle and 7/32" on the inside.

Left rear: The left rear tire was found deflated (0 PSI). There was no damage noted to the tire or wheel. The tread depths of this tire were found to be 5/32" on the outside, 5/32" in the middle and 5/32" on the inside.

Left front: The left front tire was found deflated (0 PSI). There was no damage noted to the tire or wheel. The tread depths of this tire were found to be 8/32" on the outside, 8/32" in the middle and 8/32" on the inside.

Driver 1 (D-1), Location and Condition:

The driver of V-1 was identified to me as **Michael David Adams** (date of birth, May 10, 1972) by Deputy Duane Downing of the Nye County Sheriffs Department. Deputy Downing was the Deputy Coroner and had Mr. Adams California driver's license. Mr. Adams was found in the driver's seat of V-1, still buckled in the seatbelt. Mr. Adams was partially pinned under the left side roll bar of V-1. Mr. Adams was pronounced deceased at the scene by Deputy Downing at 0815 hours on July 8th, 2005. Mr. Adams was transported to Gunters Funeral Home in Hawthorne Nevada by Dean Glasford.

Passengers:

There were no passengers in V-1.

NEVADA
HIGHWAY PATROL

REPORT IS: Supplemental
TO: Accident

ACCIDENT NUMBER: E2005-00779
CITATION NUMBER: .
OTHER NUMBER: 0507080188

Involved Personnel:

Nevada Highway Patrol

Myself, Trooper M. Scott Simon #6399, Primary Investigator.
Trooper Guy Davis #6485, Assisting Officer.
Trooper Bill West #6648, Assisting Officer.

Nye County Sheriffs Department

Deputy Duane Downing, Deputy Coroner.

Gunters Funeral Home

Dean Glasford

Pro Towing

Marshall Davis

---

2. Statements:

There were no witnesses to this accident and there were not any statements collected.

---

3. Background on Driver (D-1):

On July 8th, 2005 at approximately 2200 hours, I was contacted by Deputy Duane Downing of the Nye County Sheriffs Office. Deputy Downing informed me that Michael David Adams (D-1) was working on a drill rig in Nyala, which is located approximately 19 miles east of SR 375. Mr. Adams got off of work at approximately 1700 hours on July 7th, 2005 and drove to Rachel, Nevada. Rachel is located approximately 55 miles south of Nyala. Mr. Adams had a receipt from the Little Alien Inn, which is located in Rachel. Mr. Adams left the Little Alien Inn at approximately 2000 hours and was traveling back to Nyala. It is estimated that this crash occurred at approximately 2100 hours on July 7th, 2005, given the distance from Rachel to the scene of the accident.

ARRESTING/REPORTING OFFICER: Trooper M. Scott Simon M. Scott Simon
I.D. NO.: 6399
DATE AND TIME REPORT PREPARED: 07/08/05 @ 1600 hours
APPROVED BY:

NHP FORM 4 (REV. 09-94)

REPORT IS: Supplemental
TO: Accident

ACCIDENT NUMBER: E2005-00779
CITATION NUMBER: .
OTHER NUMBER: 0507080188

4. Other Necessary Information:

A records check through NHP dispatch revealed that Mr. Adams had a valid driver's license out of California. As stated before Mr. Adams was wearing his seatbelt and he was found still restrained in the driver's seat of V-1. Trooper Guy Davis drove upon the accident scene. See Trooper Davis's supplement for further detail. V-1 was located approximately 100 feet from the west edge of SR 375 on its left side. The headlamps of V-1 were damaged and were not working due to the collision with the cow. It was dark at the time of the crash and V-1 could not have easily been seen until daylight, due to the darkness and the limited motorists traveling SR 375. The vehicle was found by a passerby, only known as Lonny from Cedar City, Utah. Lonny drove upon the accident scene and notified the rancher Mr. Fallini at the Twin Springs Ranch. The accident was reported to the Nye County Sheriffs Office at approximately 0640 hours.

A blood sample was collected from Mr. Adams at Gunters Funeral Home and the results are pending at this time. The results of the blood draw will later be attached to this supplemental report.

5. Conclusion:

On July 7th, 2005, V-1, a green 1994 Jeep Wrangler, driven by Michael David Adams (D-1), was traveling northbound on SR 375. A red cow was in the northbound travel lane. V-1 struck the cow with the right front of V-1, causing V-1 to rotate clockwise. V-1 then traveled out of the northbound travel lane and onto the east gravel shoulder. V-1 then furrowed-in and overturned. V-1 traveled in a northeasterly direction as it overturned. V-1 came to rest on its left side facing south. As V-1 overturned, Mr. Adams suffered fatal injures and was pronounced deceased at the accident scene at approximately 0815 hours on July 8th, 2005 by Deputy Duane Downing.

Technical Follow Up:

A speed estimate was calculated based on the sideslip velocity formula from Northwestern University Center for Public Safety. The radius of the sideslip was found to be 604.71 feet. To find the radius for the sideslip, I tracked the center of mass at several points as V-1 was side slipping. To track the center of mass, I utilized the Micro-survey Map-scenes forensic mapping software. To calculate the drag factor for V-1 as it was side slipping, I took the sine of the sideslip angle at several points throughout the rotation and multiplied it times the coefficient of friction for the surface. I used a range for the coefficient of friction of .60 to .70. These ranges were taken from published data. Using the above, I calculated the velocity of V-1 during the sideslip, using the formula:

ARRESTING/REPORTING OFFICER: Trooper M. Scott Simon M. Scott Simon | I.D. NO.: 6399 | DATE AND TIME REPORT PREPARED: 07/08/05 @ 1600 hours | APPROVED BY:

NHP FORM 4 (REV. 09-94)

REPORT IS: Supplemental
TO: Accident

ACCIDENT NUMBER: **E2005-00779**
CITATION NUMBER: .
OTHER NUMBER: 0507080188

$$V = \sqrt{gr\,\mu}$$

Where V = velocity (?), g = gravity, a constant 32.2 fps/s, and μ = coefficient of friction. This resulted in the velocity of V-1 to be 108.08 feet per second to 116.74 feet per second at the point V-1 began to sideslip. Converting these velocities to speed requires them to be divided by 1.47 which gives a speed of 73.52 miles per hour to 79.42 miles per hour. This speed does not take into account any braking, that may have been applied by D-1 as it was rotating or the speed V-1 lost as it struck the cow.

Recommendations:

None

ARRESTING/REPORTING OFFICER: **Trooper M. Scott Simon** M. Scott Simon I.D. NO.: 6399

DATE AND TIME REPORT PREPARED: 07/08/05 @ 1600 hours

APPROVED BY:

NHP FORM 4 (REV. 09-94)

REPORT IS: SUPPLEMENTAL
TO: ACCIDENT

NEVADA HIGHWAY PATROL

ACCIDENT NUMBER: E2005-00779-F
CITATION NUMBER: NONE
OTHER NUMBER: P.G. 14 OF 21

On July 08th, 2005, I was northbound SR-375, en-route to Tonopah for training. At 0705 hours, approximately 1600 feet South of SR-375 MM 33 Nye, I observed a dead cow laying on the East dirt shoulder. I observed tire marks in the northbound travel lane that began near the cow. The tire marks traveled Northeast, off the East roadway edge. The tire marks continued in a Northeasterly direction and traveled onto the East dirt shoulder. A path of debris and depressions lead to a green Jeep bearing California registration # 3RTA070.

The Jeep came to rest on its left side, facing south. I observed the Jeep to have major front end damage. As I walked around the vehicle, checking for occupants, I observed a male subject seat belted in the driver seat. The subjects legs were pinned under the left side of the jeep. I checked the subject, he was cool to the touch and had no detectable pulse. I observed a laceration on the subjects head and obvious trauma to his head and face area.

The engine was cold and the negative battery cable was detached from the battery, all electronics were off. The ignition was found in the run position and the transmission appeared to be in neutral.

I took photographs of the scene, sixty four images, using a Nevada Highway Patrol issued, Sony digital camera.

A Nye County Coroner was requested and I was told that he was already en-route. The Nye County Deputy / Coroner arrived on scene. The Deputy / Coroner found a wallet in the subjects rear pants pocket. The wallet contained a California drivers license and a number of credit cards. The California drivers license identified the subject as Michael David Adams. The Nye County Deputy / Coroner took custody of the wallet and all contents. A digital camera found on scene was also taken by the Nye County Deputy / Coroner for safe keeping.

I conducted a vehicle inventory and completed the tow sheet. Accident re-constructionist, Trooper S. Simon #399 arrived on scene. I gave the tow sheet and information I obtained from the scene to Trooper Simon.

ARRESTING/REPORTING OFFICER:	I.D. NO.:	DATE AND TIME REPORT PREPARED:	APPROVED BY:
G. DAVIS	6485	07-12-05 @ 1500 HRS	

NHP FORM 4 (REV. 08-94)

NEVADA
HIGHWAY PATROL

15 of 21

REPORT IS: Supplemental
TO: Accident

ACCIDENT NUMBER: E2005-00779
CITATION NUMBER:
OTHER NUMBER: 0507080188

On 07/08/2005 at 0800 hours I was dispatched to assist with a fatal accident on A.R. 375 M.M. 33 NY. I arrived on scene at approximately 0850 hours. As I arrived on scene I met Trooper G. Davis (485) and Deputy D. Downing (North 10) of Nye County Sheriff's Office. I observed one Hereford cow laying on it's right side in the north dirt shoulder, debris from the accident, and 1 jeep on it's left side occupied by one white male adult in the north desert. The male adult was later identified as Michael David Adams by his California driver's license. I assisted Trooper Davis in securing the scene until Trooper M. Simon (399) arrived on scene. Trooper Davis left the scene at 1006 hours. I assisted Trooper Simon in diagramming the scene, taking photos, and the vehicle inspection. I cleared the scene at approximately 1150 hours. This concludes my involvement in this case.

ARRESTING/REPORTING OFFICER:	I.D. NO.:	DATE AND TIME REPORT PREPARED:	APPROVED BY:
Trooper William West W.L. West	648	07/09/2005 1030 hours	

NHP FORM 4 (REV. 09-94)

Refer:
Accident No. E2005-00779-F
Citation No.
Other (specify) 05.07080186 (CAD)

NEVADA HIGHWAY PATROL
VEHICLE REPORT

Dr. No. 16 of 21
Date 07-08-05
Approved by

Impounded ☐ Stored ☒ Recovered ☐

Description of vehicle GRN (Color) 94 (Year) JEEP (Make) LL (Model) 3RTA070 (Lic. No.) CA (State) 07/06 (Year)

Vehicle identification number 1J4FY19P5RP470855 Speedometer reading 163457.

Legal owner (Name) (Address)

Registered owner ADAMS, MIKE (Name) 6152 ROSEMARY DR, CYPRESS, CA 90630 (Address)

Has legal owner been notified of action taken? NHP Form 33 completed?

Has registered owner been notified of action taken? Y NHP Form 33 completed? Y

If stolen or embezzled, has reporting agency been advised of recovery? N/A

Circumstances surrounding impound, recovery and storage:
INVOLVED IN 1050-F.

Vehicle towed by PRO TOWING Date 07-08-05 Time 1000 HRS

Vehicle towed from SR-375 MM NYE 33

Vehicle stored or impounded at PRO TOWING ALAMO, NV

Release conditions INVESTIGATION

VEHICLE INVENTORY

	Yes	No		Yes	No		Condition
Cushion (front)	X		Spotlight(s)		X	L.F. tire	FLAT
Cushion (rear)		X	Foglight(s)		X	R.F. tire	FAIR (SOME AIR)
Rear view mirror	X		Bumper (front)	X		L.R. tire	FLAT
Side view mirror	X		Bumper (rear)	X		R.R. tire	FLAT
Cigar lighter		X	Motor	X		Spare tire	
Radio	X		Battery	X		Wheels	CUSTOM
Clock		X	Air conditioner		X	Fenders	
Heater	X		Hub caps	X		Body, hood	DAMAGED IN ACCIDENT
Keys	X		Fender pants		X	Top	
Registration	X		Transmission	X		Grill	
Windshield wiper	X		Jack	X		Upholstery	

List property, tools, other items: *(Complete NHP Form 35 if estimated value exceeds $100.)*

1- RED GAS CAN
1- WHITE ICE CHEST W/RED TOP
CDS - WHITE
1- BLK CAP.
1- GRN VISOR.
1- BLACK SCARF.
MISC. NUTS + GRAIN BARS
1- PAIR GRN TIMBER SHOES.
1 PAIR BLU NIKE.
1 PAIR GRY SHOES.
1- SIRIUS RADIO.
1 PAIR RED/WHITE SHOES.
1 PAIR BLU SANDALS
1 BLK VANS.
1- BOOK.

Signature of officer ordering vehicle stored

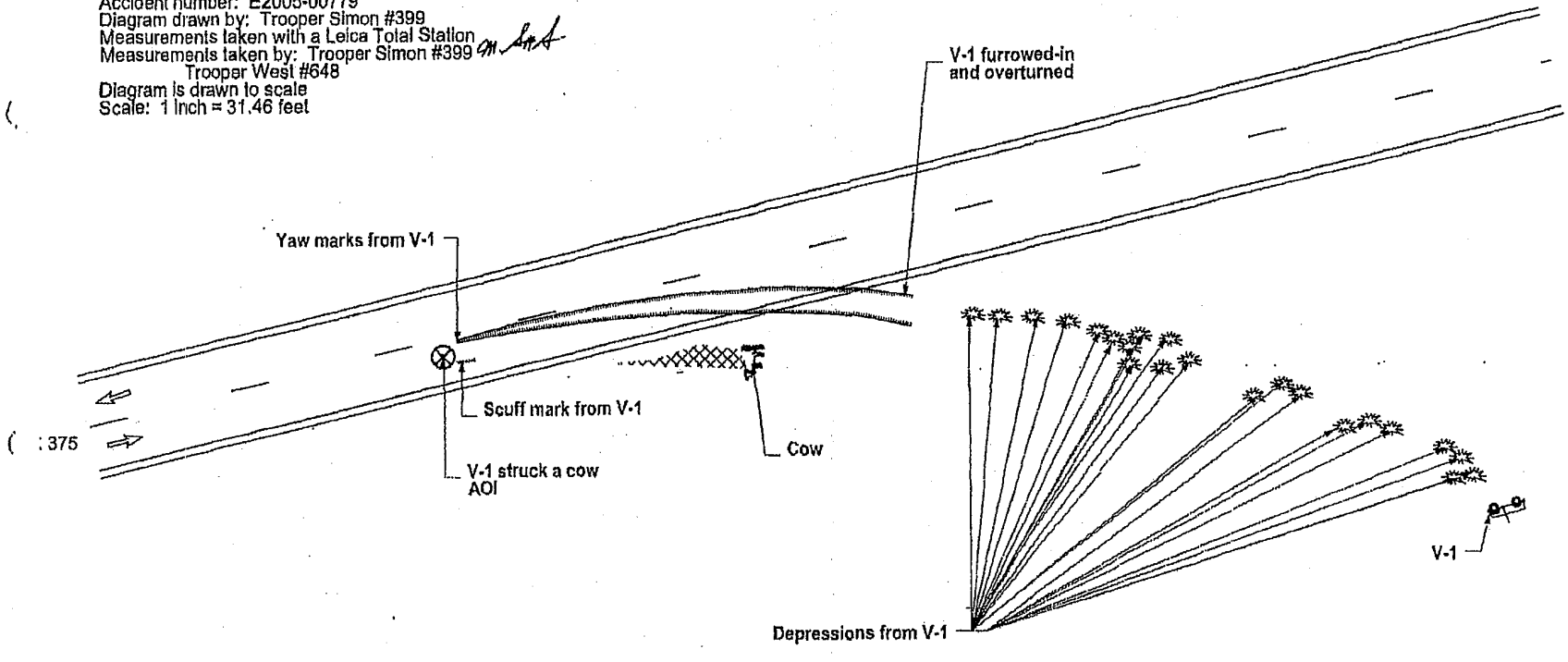
Signature of garage principal or agent storing vehicle

WHITE—Zone Files; PINK—Officer Files; CANARY—Towing Agency

NHP 9 (Rev. 10-91) (DI-3831)

17 of 21

Legend
Date: 07/08/05
Time: 1027 hours
Accident number: E2005-00779
Diagram drawn by: Trooper Simon #399
Measurements taken with a Leica Total Station
Measurements taken by: Trooper Simon #399
Trooper West #648
Diagram is drawn to scale
Scale: 1 inch = 31.46 feet



page 1 of 2

Page 2 of 2

on A4

C:\FORENSIC SCENES\TROOPER SCOTT SIMON\779F Job Description:
15:31:28 07/10/05

Traverse Print Out

Job Description: Crew: Inst: Temp: Press:

Continue File 779f0.raw 10:27:39 AM 7/8/05

Setup	Backsight	BS Azimuth	BS Reading	Instrument Height
1	99	N/A	104.3411	5.400

1 N: 0.000 E: 0.000 El: 0.000 D: RP
99 N: 36.219 E: 0.000 El: -0.188 D: RM

Pt#	HZAngle	SlpDist	VTAng	ParOff	PerpOff	TgtHt	Description
101	3.4054	70.057	89.1417	0.000	0.000	5.000	EP
102	5.3619	69.997	89.0527	0.000	0.000	5.000	FL
103	15.3829	72.202	88.5247	0.000	0.000	5.000	CL
104	24.3940	75.798	89.0925	0.000	0.000	5.000	FL
105	26.1803	76.724	89.2256	0.000	0.000	5.000	EP
106	155.2711	35.767	88.5431	0.000	0.000	5.000	SM
107	155.2712	35.754	88.5433	0.000	0.000	5.000	SM
108	163.1647	32.441	89.0146	0.000	0.000	5.000	SM
109	157.5855	30.748	88.5017	0.000	0.000	5.000	AOI
110	166.1233	36.984	89.1012	0.000	0.000	5.000	SM
111	162.3123	49.807	89.1945	0.000	0.000	5.000	SM
112	164.1000	49.310	89.1951	0.000	0.000	5.000	SM
113	168.3157	70.038	89.3858	0.000	0.000	5.000	SM
114	170.5720	69.271	89.4039	0.000	0.000	5.000	SM
115	173.1004	94.019	89.5240	0.000	0.000	5.000	SM
116	175.5511	93.061	89.5546	0.000	0.000	5.000	SM
117	175.2423	107.246	89.5719	0.000	0.000	5.000	SM
118	178.0356	104.897	90.0234	0.000	0.000	5.000	SM
119	176.4841	117.799	90.0003	0.000	0.000	5.000	SM
120	179.3524	115.517	90.1326	0.000	0.000	5.000	SM
121	179.4319	138.706	90.1144	0.000	0.000	5.000	SM
122	182.1234	135.963	90.3658	0.000	0.000	5.000	SM
123	181.5350	153.694	90.3151	0.000	0.000	5.000	SM
124	184.3807	151.666	90.4953	0.000	0.000	5.000	SM
125	185.2609	107.916	89.4642	0.000	0.000	5.000	E
126	184.5021	169.188	90.4739	0.000	0.000	5.000	E
127	185.3317	175.024	90.4631	0.000	0.000	5.000	E
128	185.5527	184.258	90.4856	0.000	0.000	5.000	E
129	186.4407	193.122	90.4305	0.000	0.000	5.000	E
130	187.4112	200.682	90.4702	0.000	0.000	5.000	E
131	188.2359	204.246	90.4527	0.000	0.000	5.000	E
132	189.0613	208.406	90.4515	0.000	0.000	5.000	E
133	188.2452	211.639	90.4702	0.000	0.000	5.000	E
134	190.2437	208.654	90.4711	0.000	0.000	5.000	E
135	191.0145	216.485	90.4750	0.000	0.000	5.000	E
136	189.0804	219.630	90.4643	0.000	0.000	5.000	E
137	190.2230	224.124	90.4543	0.000	0.000	5.000	E
138	193.0614	240.766	90.4759	0.000	0.000	5.000	E
139	192.2615	248.805	90.4458	0.000	0.000	5.000	E
140	192.5544	252.548	90.4342	0.000	0.000	5.000	E

141	194.5716	264.456	90.4531	0.000	0.000	5.000	E
142	194.3900	271.589	90.4236	0.000	0.000	5.000	E
143	194.5945	276.571	90.4241	0.000	0.000	5.000	E
144	196.0615	291.501	90.4458	0.000	0.000	5.000	E
145	196.3757	295.211	90.4222	0.000	0.000	5.000	E

C:\FORENSIC SCENES\TROOPER SCOTT SIMON\779F Job Description:
15:31:29 07/10/05 Page No.: 2

146	197.3224	294.576	90.4449	0.000	0.000	5.000	E
147	197.2943	297.478	90.4338	0.000	0.000	5.000	E
148	199.2250	303.780	90.4220	0.000	0.000	5.000	E
149	198.4139	310.815	90.4140	0.000	0.000	5.000	E
150	180.4046	332.434	90.1843	0.000	0.000	5.000	EP
151	180.1201	326.266	90.1646	0.000	0.000	5.000	FL
152	178.0136	326.553	90.1339	0.000	0.000	5.000	CL
153	175.5246	327.671	90.1559	0.000	0.000	5.000	FL
154	175.2847	328.109	90.1838	0.000	0.000	5.000	EP
155	181.2000	69.679	90.2447	0.000	0.000	5.000	E
156	182.2217	80.201	90.4816	0.000	0.000	5.000	E
157	182.4721	90.817	90.5613	0.000	0.000	5.000	E
158	184.3501	104.281	90.5820	0.000	0.000	5.000	E

Setup	Backsight	BS Azimuth	BS Reading	Instrument Height
1	99	N/A	104.3153	5.400

1 N: 0.000 E: 0.000 El: 0.000 D: RP
99 N: 36.219 E: 0.000 El: -0.188 D: RM
Continue File 779f0.raw 2:12:50 PM 7/8/05

REPORT IS: Supplemental TO: Accident	**NEVADA HIGHWAY PATROL**	ACCIDENT NUMBER: **E2005-00779** CITATION NUMBER: OTHER NUMBER: 0507080188

On July 8th, 2005 I investigated a fatal motor vehicle collision on State Route 375 at Nye mile marker 33. A Mr. Michael David Adams was the driver and sole occupant of the vehicle. Mr. Adams suffered fatal injuries, due to the collision. A blood sample was collected from Mr. Adams and sent to Quest Diagnostics for testing. The result of the blood test indicated that Mr. Adams had 0.08% of Ethanol Alcohol in his blood. The blood results also indicate that Mr. Adams had not used any drugs. A copy of the blood results are attached to this supplemental report.

ARRESTING/REPORTING OFFICER:	I.D. NO.:	DATE AND TIME REPORT PREPARED:	APPROVED BY:
Trooper M. Scott Simon	399	08/31/05 @ 1215 hours	

NHP FORM 4 (REV. 09-94)

EXHIBIT 2

EXHIBIT 2

Nye County Sheriff's Office

Death Investigation Report

Event Number: 05-2339

Page: 1 of 5

Type of Death: ☐ Natural ☑ Accident ☐ Homicide ☐ Suicide ☐ Undetermined

Name of Deceased: ADAMS, MICHAEL DAVID

Address: 257 SEAL BEACH BLVD APT C City: SEAL BEACH State: CA

Date of Birth: 05-10-1972 Social Security No.: 545-53-7622 Sex: M Race: C Height: 5-09
Weight: 165 Eyes: GRN Hair: BRN

Scars/Marks/Tattoos: NONE

Marital Status: ☐ Married ☑ Single ☐ Divorced ☐ Widowed ☐ Unknown

Date and Time Pronounced: JULY 8, 2005 0815 Actual Time of Death: UNKNOWN

Deceased last seen alive by: PAT DAVIS Deceased last seen alive on: 7-7-05 2000

Deceased last seen alive at: LITTLE ALIEN INN RACHEL, NV

Place of Death: SR 375 MM 33 NYE COUNTY, NV

Place of Injury or Illness: SR 375 MM 33 NYE COUNTY, NV

Occupation: GEOLOGIST Death occurred on job: ☐ Yes ☑ No

Name and address of employer: HORIZON WELL LOGGING INC. 711 SAINT ANDREWS WAY LOMPOC, CA 93436

Reported by: GLENN ROBBINS Date: 7-8-05 Time: 0710

Deceased identified by: CALIFORNIA DRIVER'S LICENSE

Body removed by: GUNTERS FUNERAL HOME Who: DEAN Time: 1130

Toe tag on Body: ☐ Yes ☑ No Seal on body bag: ☐ Yes ☑ No Seal #:

Autopsy Authorized by: N/A Place of Autopsy: N/A

If no autopsy, state cause of death and how determination was made: BLUNT FORCE TRAUMA FROM MOTOR VEHICLE ACCIDENT

Consulting Physician name and address: N/A

Other agencies involved: ☑ Sheriff ☑ N.H.P. ☐ Fire/Ambulance ☐ F.B.I. ☐ B.I.A. ☐ Other
List the full names and agency affiliated with in the narrative section of report

Detective Notified: N/A Date: Time:

Investigated by: DUANE DOWNING Date: 7-8-05 Approved by:

Nye County Sheriff's Office

Event Number: 05-2339

Page: 2 of 5

Next of Kin: ANTHONY ADAMS Relationship: FATHER

Address: 6152 ROSEMARY DRIVE CYPRESS, CA 90636 Phone: (714) 828-6997

Notification made by and how:

Disposition of personal effects: PLACED INTO EVIDENCE 7-8-05

Narrative Summary: (Include a complete medical history and circumstances surrounding death)

MICHAEL D. ADAMS WAS DRIVING HIS 94 JEEP WRANGLER ON SR 375 WEST BOUND. AT MILE MARKER 33 MR. ADAMS HIT A COW THAT WAS STANDING IN THE ROADWAY. THE VEHICLE WENT OFF OF THE ROADWAY ON THE RIGHT SIDE OF THE ROAD AND ROLLED OVER APPROXIMATELY 3 TIMES. THE VEHICLE CAME TO REST ON THE DRIVER'S SIDE AND FACING EAST. MR. ADAMS WAS FOUND IN THE DRIVER'S SEAT STILL SEAT BELTED IN THE SEAT ALTHOUGH BOTH LEGS WERE PINNED UNDER THE DRIVER'S SIDE OF THE VEHICLE. AT TIME OF ARRIVAL, MR. ADAMS HAD NO PULSE AND THE ONSET OF RIGOR MORTIS AND LIVIDITY WERE VERY EVIDENT. MR. ADAMS WAS PRONOUNCED DEAD AT 0815 ON 7-8-05.

AT APPROXIMATELY 1100 HOURS THE VEHICLE WAS RIGHTED AND THE MR. ADAMS WAS EXTRICATED FROM THE VEHICLE. AT APPROXIMATELY 1115 HOURS GUNTER'S FUNERAL HOME TOOK POSSESSION OF MR. ADAMS AND TRANSPORTED HIM TO THE FUNERAL HOME IN HAWTHORNE, NV.

Investigated by: DUANE DOWNING Date: 7-8-05 Approved by:

Nye County Sheriff's Office

Deceased Name: ADAMS, MICHAEL DAVID Event Number: 05-2339

Date of Death: JULY 8, 2005 Page: 3 of 5

Inventory of Property or Personal Effects

1. Coins:	14. Jacket:	23. Blouse:
2. Currency: 24.00	15. Shirt:	24. Bra:
3. Wallet: X	16. Trousers:	25. Skirt:
4. Purse:	17. Belt:	26. Dress:
5. Credit Card: 2-MC 5-VISA	18. Shoes/Boots:	27. Slips:
6. Watch:	19. Undershirt:	28. Stockings:
7. Bracelet:	20. Undershorts:	29. Panties:
8. Rings:	21. Socks:	30. Scarf:
9. Keys:	22. Tie:	31. Hat:
10. Erring:		
11. Knife:	32. Other: SONY DIG CAMERA	33. Other:
12. Pen/pencil:		
13. Lighter:		

The above is a complete list of all property found upon the body or retained by the Coroner in the presence of witness signed below.

Coroner – Investigator: DUANE DOWNING

Witness: TROOPER M. SCOTT SIMON NEVADA HIGHWAY PATROL Date: 7-8-05

Date:

Received from the Nye County Coroner the above items numbered: 24.00 IN CURRENCY, ONE BLACK WALLET, 2 MASTERCARD, 5 VISA CREDIT CARDS, AND A SONY DIGITAL CAMERA

as next of kin or agent of:

ADAMS, MICHAEL DAVID Deceased.

Name:

Address: City:

State: Relationship:

Date:

Received from the Nye County Coroner the above items numbered:

as funeral director representing:

Name:

Funeral Director: Mortuary:

Nye County Sheriff's Office / Death Investigation

Event Number: 05-2339

Medication Activity Log

Medication Name & Strength	RX. No.:	RX. Date Filled	No. Tablets when taken into Custody	Pharmacy	Dose Orders
NONE					

All medications should be disposed of as soon as possible after the investigation is completed

Collected by: _____ Disposed by: _____ Date: _____ Witness by: _____

Nye County Sheriff's Office / Death Investigation

Event Number: 05-2339

Medication Activity Log

Medication Name & Strength	RX. No:	RX. Date Filled	No. Tablets when taken into Custody	Pharmacy	Dose Orders
NONE					

All medications should be disposed of as soon as possible after the investigation is completed

Collected by: _____ Disposed by: _____ Date: _____ Witness by: _____

Office of the
Nye County Sheriff

Nye County Courthouse
Post Office Box 831
Tonopah, Nevada 89049

Anthony L. DeMeo
Sheriff

05-2339

On, _____ (Date), I _____ (Print Agents Name),

Received from _____, a Deputy Coroner of Nye County Sheriff's Office,

The following numbered items:

_____

_____

I am taking possession of the items in the capacity as agent for the next of kin of:

_____ Deceased;

or, as acting Funeral Director representing _____ (Mortuary)

_____ Agent

_____ Address

_____ City

_____ State, Zip Code

_____ Relationship

DUANE DOWNING
Coroner / Investigator

5

AREA		OFFICE:	PHONE:	FAX:
Tonopah	P.O. Box 831	Tonopah, Nevada 89049	(775) 482-8101	(775) 482-8195
Beatty	P.O. Box 805	Beatty, Nevada 89003	(775) 553-2345	(775) 553-2588
Amargosa	P.O. Box 66	Amargosa Valley, Nevada 89020	(775) 372-5345	(775) 553-2586
Pahrump	1520 E. Basin Ave.	Pahrump, Nevada 89060	(775) 751-7000	(775) 751-4672
Mercury	P.O. Box 378	Mercury, Nevada 89023	(702) 295-6600	(702) 295-7871

Quest Diagnostics Incorporated

4230 Burnham Avenue
Las Vegas, NV 89119
702.733.7866
www.questdiagnostics.com

05 2339

Quest Diagnostics FORENSIC LABORATORY REPORT OF EXAMINATION

NAME: ADAMS, MICHAEL D

CASE#: UNKNOWN

LAB#: 050024112

AGENCY: NYE COUNTY SHERIFF

ANALYSIS DATE: 08/01/2005 & 08/09/2005

COLLECTED: 07/08/2005

OFFICER: UNKNOWN

I, Kimberly A. Brockman, do hereby declare:

That I am a Forensic Technician employed by Quest Diagnostics Incorporated.

That on September 17, 2003, I qualified in the Eighth Judicial District Court in Clark County, Nevada, as an expert witness regarding the presence of alcohol and controlled substance in the blood of a person.

That I received a sealed blood collection kit bearing the above name, containing a sample of whole blood;

That I completed an analysis on the above sample and determined that the blood contained a concentration of ethanol of **0.08** gram per 100 milliliters of blood and **no controlled substances;**

That I returned the sample to the designated locked storage located at Quest Diagnostics Incorporated;

That the evidence was in my custody or control from the time I first obtained it until it was resealed and stored, at which time it was in substantially the same condition as when I first obtained it.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: August 9, 2005

Kimberly A. Brockman
Forensic Technician

Witness

Quest Diagnostics

4230 Burnham Ave.
Las Vegas, Nevada 89119
(702) 733-3780 • (800) 433-2750

James A. Bourland, Ph.D., DABFT
Technical Director, Toxicology

CAP No. 8910?-004-011

PATIENT	ADAMS, MICHAEL D	ROUTE	MAIL
		REFERRED BY	NYE COUNTY SHERIFF'S OFFICE
AGE/SEX	32Y M	ACCESSION NO.	01252494
COLLECTED	07/08/2005 14:10	MED. RECORD NO.	0017377725
ACCESSIONED	07/29/2005 15:53	CHART NO.	
TOXICOLOGY NO.	05002411?2 LEGAL	SS NO.	

P.O. BOX 831
TONOPAH, NV 89049

TOXICOLOGY REPORT

FORENSIC DRUG SCREEN, BLD

RESULTS: ETHANOL = 0.08 GRAM%
08-01-05

RESULT: NO DRUGS OF ABUSE, OTHER THAN ETHANOL, IDENTIFIED IN BLOOD.
08-09-05

ANALYST: KIMBERLY A. BROCKMAN

THIS SPECIMEN HAS BEEN SCREENED FOR THE FOLLOWING DRUGS:

Amobarbital	Amphetamine	Butabarbital
Butalbital	Chlordiazepoxide	Cocaine
Codeine	Diazepam	Dihydromorphinone
Diphenhydramine	Ethchlorvynol	Glutethimide
Hydromorphone	Meperidine	Mephobarbital
Meprobamate	Methadone	Methamphetamine
Methaqualone	Methprylon	Morphine
Nordiazepam	Oxazepam	Oxycodone
Pentazocine	Pentobarbital	Phencyclidine
Phenobarbital	Phenylpropanolamine	Propoxyphene
Secobarbital	THC - Carboxylic Acid	

INFORMATION TAKEN FROM RECEIVED PAPERWORK:
OFFICER:UNKNOWN
CASE:UNKNOWN

PRINTED: 08/09/05 18?30

EXHIBIT 3

EXHIBIT 3

AFFIDAVIT OF CHRIS COLLIS

STATE OF Nevada)
) ss.
COUNTY OF White Pine)

I, Chris Collis 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. I have been involved, in one way or another, with ranching in Nevada for most of my life.
2. I worked for the Nevada Department of Agriculture as a brand inspector, district supervisor of brand inspections, and administrator. I retired chief administrator of the State Brand Inspection Division in 2010.
3. Most of my experience has been in Nye County, Nevada ranching. I have a B.S. from UNR, and have taken post graduate courses. I am familiar will all aspects of cattle ranching in Nye County, including customs and practices, and open range laws.
4. The area of highway on State Route 375 from milepost 0 to 49.4 is, and has been for many years, open range. That area of highway is posted as such to warn motorists. Anyone making a reasonable inquiry as to whether or not that stretch of highway is open range would find that it is open range.
5. There is not now, nor has there ever been a common practice among ranchers in Nye County to affix luminescent or reflective markers on cattle. In fact, I have never even heard of such a practice being common in the State of Nevada. Anyone making a reasonable inquiry as to this fact would find that it is not common practice in Nye County to affix luminescent or reflective markers on cattle.

6. If called in this matter, I will testify consistently herewith.

Chris Collis

Chris Collis

SUBSCRIBED AND SWORN TO THIS

21st DAY OF March, 2014

NOTARY PUBLIC

AMY L. GARCIA
Notary Public, State of Nevada
Appointment No. 00-60899-17
My Appt. Expires Dec 16, 2016

AFFIDAVIT OF RAYMOND E. KRETSCHMER

STATE OF Nevada)
) ss
COUNTY OF Nye)

I, Raymond E. Kretschmer 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. I have been involved, in one way or another, with ranching in Nevada for most of my life.
2. I work for the Nevada Department of Agriculture as a Deputy 1 brand inspector in Nye County.
3. I am familiar will all aspects of cattle ranching in Nye County, including customs and practices, and open range law.
4. The stretch of highway on State Route 375 between Warm Springs, the intersection of Hwy 375 and Hwy 6, and Rachael, NV. is in fact open range. There are numerous open range warning signs located on this stretch of highway.
5. It is not common practice for ranchers in Nye County to affix luminescent or reflective markers on cattle.
6. If a person made a reasonable inquiry, they would find the facts in statements 4 and 5 to be true.

7. If called in this matter, I will testify consistently herewith.

Raymond E. Kretschmer

SUBSCRIBED AND SWORN TO THIS
20 DAY OF March 2014

NOTARY PUBLIC

PAMELA DUNN
NOTARY PUBLIC
STATE OF NEVADA
APPT. No. 12-8709-14
MY APPT. EXPIRES AUG. 7, 2016

AFFIDAVIT OF TONY LESPERANCE

STATE OF Nevada)
) ss
COUNTY OF Humboldt)

I, Tony Lesperance 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. I have served as the Director of the Nevada Department of Agriculture. I formerly taught at the University of Nevada, Reno's school of agriculture, and I have been involved in agriculture in Nevada for more than 60 years.
2. I am familiar with Nevada's open range laws and know that SR 375, as pertinent to this case, is open range.
3. I am also well acquainted with the customs and practices of cattle ranchers in Nye County, Nevada. The idea that a Nevada cattle rancher would tag his/her cattle with luminescent tags to aid in the cow being seen at night on a roadway is simply unheard of.
4. Anybody making a reasonable inquiry would easily find the statements I have made above to be true.
5. If called in this matter, I will testify consistently herewith.

Tony Lesperance
TONY LESPERANCE

SUBSCRIBED AND SWORN TO THIS
26th DAY OF March ,2014
Frances R Peterson
NOTARY PUBLIC

FRANCES R. PETERSON
Notary Public, State of Nevada
Appointment No. 93-1790-9
My Appt. Expires Oct 24, 2017

EXHIBIT 4

EXHIBIT 4

In Loving Memory

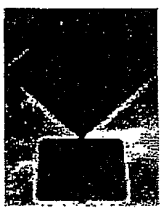
Michael David Adams

May 10th 1972 - July 8th 2005

Unfair Open Range Laws

Write your Senator

Write your Representatives

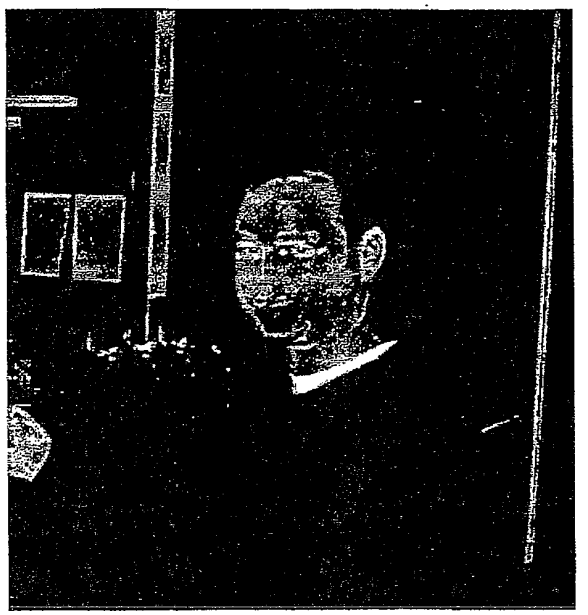


Laws that are over 100 years old should be modernized.

People against open range laws

Unfair Open Range Sites

Open - Range Forum



Michael was taken far too soon. He leaves behind a loving family and wonderful friends who mourn his loss deeply. However, Mike would not want us to grieve and feel sadness. He would want to be remembered for the joyful person he was and to be comforted by cherished memories that we all have.

If ever anyone truly lived the expression "Carpe Diem" it was Mike. There were times when he told us that he wanted to do something and our reply might be ...take it easy or why not wait on it... but in retrospect I'm glad he did not always take our advise. During his short life he was able to experience more than some people who live twice as many years.

contact info:

At the Chili Cook-Off last year I had a talk with Karen Chavez that made me think about how to put Mike's life in perspective. After some time I shared the following with her:

I was thinking about our talk on Saturday and what the owner of the restaurant in Rachel said and tried to give meaning to Mike's life and death. Perhaps his purpose was to leave us these important messages:

1. There is nothing more important than the love of family and friends.
2. Friends are far more valuable than material possessions.

Sign the Guest Book

View Pictures Of Mike

2005 Chili Cook off

Pictures Of Memorial

View Michael's Video

2005 Fantasy Football

Travel Bug Found!

Mike's Memorial Marker
ET Highway - Rachel, NV

We have placed a Geo Cache by Mike's Marker. To find out more about geocaching click here

Click here to visit Mike's Geo Cache

Mike's Travel Bug

What's Travel Bug?

Tony Adams

3. Follow your dreams and live each day to its fullest since you never know how long you have.

From a headstone in Ireland:

Death leaves a heartache no one can heal,
Love leaves a memory no one can steal.

Last year Mike 's good friends Sean and Julie Kelly welcomed a new Michael with the birth of their son, Michael Joseph Kelly on August 25th.

Memorial Marker

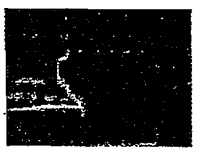
Mike died on Nevada state route 375 the famous ET Highway. He was traveling at night towards Warm Springs, Nevada. He encountered a cow crossing the road between mile marker 34-33 East side of the road. This is open range county and the cows have the right of way. We have placed a marker where the Jeep came to rest. As he was a Geologist we are asking everyone to place a rock at the marker.

We decided to place a Memorial Marker where Michael died. When we arrived, three storm cells circled the site of where we were about to placed the marker. Then suddenly the thunder and lighting circled us in all directions. As soon as the marker was placed the storm drifted away. The Marker is a 5 foot steel post with Mike's birth sign; Taurus the Bull on top. To place the marker we brought 180 pounds of cement along with ten gallons of water and a post digger. The marker is located on state route 375; mile marker 33, outside Rachel, NV. It's ironic that Michael was 33 and that his birth sign was "Taurus the Bull" Special thanks to Phil Coward to help me place the Marker and was there for me.

Entering ET Highway

The long road on ET Highway

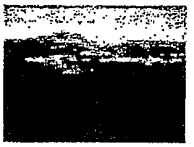
A huge strom is approaching.



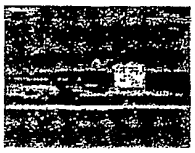
Lighting nearby

View to the North

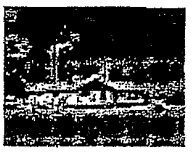
View to the West



View to the East



The famus Flying Saucer



Alien Inn

Beautiful downtown Rachel, NV

My rental before the Carwash

After 3 times through the carwash

Recent Picture Someone stop by and placed a rock at the Marker.

In Loving Memory
Michael David Adams

[home]

There are 22 guestbook entries in 3 pages and you are on page number 1

Comments by **Judi Adams** on Sunday, May 10, 2009 at 22:34 IP Logged

Effective with the month we will be discontinuing entries to Mike's guestbook. We want to thank everyone for their kind words and thoughts. If you would like to leave a comment please get in touch with Tony II or Judi.

United States

Comments by **Kellie** on Tuesday, August 21, 2007 at 19:33 IP Logged

Mike, I have been trying to work through hearing about your death and have come to the realization that I don't think I will ever understand how this could have happened to you. I also don't think I knew how much I loved and continued to love you until I heard that you had passed away. I am so sad for you family. For your mom and dad, your brother, Amanda and Andy, and your friends. I can't imagine what this has been like for them. My heart is just so incredibly sad that the world has to continue without you here. You had so much life in you. You were the funnest person I have ever met. This is just not right. I had to tell my mom and Jen, Stacie, Kevin, Bree, and my dad. I still have to tell Cheryl, she is going to be especially sad because she was so close to you at one time. Down here in San Diego we all are talking about our favorite memories of you. I think Jennifer's favorites are taking you backstage to meet Jimmy Buffett and going snowboarding, especially at Mount Baldy. My little brother and sister have the sweetest memories of you because they were younger when you lived here. As for my memories a lot of them are for you and me, but I think my favorite that I can share here is when we first started dating we both gained ten pounds from eating so much ice cream. I think we single handedly kept Baskin-Robbins in business. I know for me I will always hold you close in my heart. I am just so sorry I can't say that to you one more time. I will always love you, Kellie

United States

Comments by **JAYSEN KITCHENS** on Thursday, April 19, 2007 at 18:39 IP Logged

After about 7 years of being away from my friends, I was found and given the worst news about Mike. Mike and I were good friends during high school and

We urge you to write your Senator and Representatives about how antiquated these laws are. Think back over 100 years when these laws came into effect. The fastest moving vehicle was a horse and carriage traveling about 5 miles per hour. To have open range on a Highway where deaths occur on a monthly basis is just too much. I have listed several articles about loss of life and how the cattle ranchers have the power of money on their side. These laws must be updated. Why not have reflective collars? I am sure that if enough people were involved we can change these outdated laws. The journey of a 1,000 miles, start with one small single step....

Open Range Forum - Share your thoughts and experiences

Idaho Livestock Laws

IDAHO CODE GENERAL LAWS
TITLE 25. ANIMALS
CHAPTER 21. ANIMALS RUNNING AT LARGE

25-2118. Animals on open range -- No duty to keep from highway
No person owning, or controlling the possession of, any domestic animal running on open range, shall have the duty to keep such animal off any highway on such range, and shall not be liable for damage to any vehicle or for injury to any person riding therein, caused by a collision between the vehicle and the animal. "Open range" means all uninclosed lands outside of cities, villages and herd districts, upon which cattle by custom, license, lease, or permit, are grazed or permitted to roam.

25-2119. Owner or possessor of animal not liable for animal on highway
No person owning, or controlling the possession of, any domestic animal lawfully on any highway, shall be deemed guilty of negligence by reason thereof

These laws go back over 80 years!

The Lewiston Morning Tribune

Common compassion should end the roaming of cattle across Idaho highways even if the open range law isn't changed. Lincoln County officials, in the wake of another traffic fatality, are looking into making it against the law

for cattle owners to let their cattle stray. But you would think the occasional death of a motorist caused by wandering cattle would get the attention of cattle owners and take care of that problem without any change in the law.

The open range status of Idaho officially excuses cattle owners from fencing in their animals. Many fence them in anyway. But those who don't, while potentially open to civil suits, are not breaking the law.

The open range law once made a lot more sense. Hardly anybody ever died from running into a cow while riding a horse or driving a horse and buggy.

But this is the era of the automobile and the truck. Unless you adopt and enforce a statewide speeding law of 10 miles an hour, letting cattle run free in the vicinity of public highways is going to kill people. It's just a matter of time.

Some in the cattle industry protest that some drivers -- especially out in the wider and more open spaces of cattle country -- drive ridiculously fast. And they do. If you run into a cow at 100 miles an hour and die, are you or the cow's owner to blame?

Probably some of both. Even a driver going an insane rate of speed probably should be able to stupidly expect he won't encounter a cow wandering down the highway.

But the fact is, cattle in the highway can be a threat to the life and limb of motorists traveling within the legal limits. How can any one business or industry claim a right to present the public with that much danger no matter what the now-irrelevant historic basis of a lethal open range law?

The range isn't open anymore. Idaho isn't open. For better or for worse, more than a million people and their [redacted] permit herds of cattle roaming here and there the way they did 100 years ago.

Have the people who claim otherwise lost all purchase on reality? -- ***Bill Hall***

Arizona's open range laws are profitable for ranchers, but dangerous for property owners.

by: Danny Fite, posted 8/30/03 (originally submitted to *Eastern Arizona Courier*)

In 1993 I was arrested and charged with the killing of livestock. One of many, very similar to several people who are forced to submit to laws that violates a persons private property rights, as well as a persons right to protect themselves from harm and physical injury.

Having lived East of Snowflake, in the then not very populated area of Cedar hills (or the then known name of The Ranch of the Golden Horse area) for the better part of 14 years, I have learned the dangers of living around cattle, which LEGALLY roam free. The free part only applies to the irresponsible ranchers who own the cattle. It is certainly not free for the owners of purchased land. My family and I have had to repeatedly repair fences around our property, Replant gardens destroyed or eaten by these unsupervised creatures, and once even had to

replace 15 feet of Television cable eaten by one single cow. How do I know it was a cow? I saw it chewing with 8 inches of cable still hanging from its mouth. I'll bet that would have been one tough cud to chew. It bewilders me that a rancher can not feed his cattle well enough but that one must come through the fence or over a cattle guard to eat 15 feet of coax. But the expenses are far greater than these typical scenarios.

In 1993 while on the property of a girlfriend I was confronted with a large danger. A 950 lb. Bull charging directly at me after attempts to herd around 12 cows off the property. Yes, the gate was left open, but I still don't feel that gives a creature of that magnitude the justification to try and charge me down. I say try because I didn't allow it to succeed. I shot at it. After three attempts from a 41 magnum it finally ran in a different direction, away from me, and back onto the property. I was not aware of its death, until it was found three days latter by my girlfriends baby sitter, who was very close with the owner of the cow, Ira Willis. To make a long story short, I was to blame. To make a long story sad, is that I would still be to blame if the cow had accomplished its initial attack.

I was charged with the felony shooting of livestock. But do to many Sheriffs officers mistakes, they were forced to drop the charges to a misdemeanor. I had to pay for the cow. But, not just one, the ONE that I shot, but three. Yes, Arizona's treble damage law, $2500.00. That's why ranchers really like the killing of their cows. It profits them three fold, and they don't even have to clean up the carcass. The livestock inspector, and the Navajo county Sheriffs office does everything for them. It really does not even matter how the cow, or why the cow was killed. Whether by an unsuspecting motorist who feels that fences really keep cows off the road, or by self defense. Either way you are at fault by the law. Innocent citizen 0, irresponsible rancher 2500. You lose.

With the population in the area, now more than tripled since 1993, the dangers present are even far greater. Reforms to these laws are beyond compromise. They MUST be changed. This is no longer the wild wild west, it's a community with thousands of people and hundreds of children. I have heard the saying , rules are meant to be broken, yet I believe some laws are meant to be broken, changed, modified and reformed. Especially the open range laws. We need to protect people, not cows. It's sad when here in America, the land of the free, a place where our money states in God we trust, cows have more rights through dumb laws and irresponsible ranchers than humans do. Maybe our money should read "In Cows we Trust."

Danny Fite

Fatal road mix: Cars, livestock
Michael Ferraresi
The Arizona Republic
Nov. 16, 2004 12:00 AM

The death of a woman who struck and killed two wandering horses with her BMW on a road connecting Rio Verde and Scottsdale highlights the conflict between urban sprawl and open range communities.

Rio Verde Drive, where the weekend accident occurred, is nicknamed "the Highway" for drivers who travel faster than the 50 mph speed limit and ignore open range signs illustrated with a cow symbol.

Horses and cattle roam freely on both sides of the two-lane road, and neighbors have long worried about an influx of speeding drivers meeting with livestock as more commuters use the road to get to their upscale gated communities on the outskirts of the city.

Those who petitioned for zoning changes said unfortunately it took a fatal accident to draw attention to Arizona open range laws, which allow livestock to roam freely while making drivers liable.

Kathleen J. Norwood Hines, 29, was killed shortly before another car struck a third horse late Saturday night, leading a Maricopa County Sheriff's Posse to her mangled convertible more than 300 yards off the road.

Hines, a Fountain Hills resident, was not the first driver to encounter livestock in the largely equestrian area along Rio Verde Drive east of Scottsdale.

"This is the first (accident) that got all the notoriety, but it happens all the time," said Nena Henry, founding president of the Rio Verde Horseman's Association, who lives off Rio Verde Drive.

"We had a case a couple months back where an open range mare was killed, and it was just so gory. It's awful."

Henry and other neighbors of Rio Verde Foothills, a 20-square-mile Maricopa County island, have also complained about livestock owner George Williams, a longtime resident of the area.

The three horses killed in Saturday's accidents belonged to Williams, who allows livestock to roam from his ranch on 132nd Street in Scottsdale as far as 160th Street, where the accidents occurred.

Williams did not return calls for comment Monday.

Maricopa County Sheriff Joe Arpaio said electronic signs will be added and patrols

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By Alan Burkhart

Holy Cows?

December 04, 2005 09:34 AM EST

With so many different issues facing American society these days it's easy to let a few of them slip through the cracks – until one of them hits close to home. Those good folks in New London, CT probably never thought about eminent domain abuse until they found out their homes were being stolen by the city government.

Few parents in Texas were aware of the fact of their children's school records being public domain information, until concerns of pedophiles brought the issue to the forefront.

And me? I'd have never given a moment's thought to the Open Range laws in some western states if not for making a friend who is under attack for defending his home and family against a greedy rancher. Now that friend is facing felony charges and could end up in prison.

In 2003, Kent Knudson of Snowflake, AZ rushed his mother to the hospital when she suffered a stroke. In his haste to get medical care for his mom, who was an Alzheimer's patient, he forgot to close the gate to his property. When he returned three days later, approximately 30 cows belonging to a nearby rancher were in his

yard. They had broken a sewer line, trampled his garden, and left a mine field of "cow patties" all over his property.

Kent called the rancher, Dee Johnson, and asked him for assistance. Johnson essentially dismissed Kent's request and told him that it would be the next day before he could remove his cattle. Kent went back outside and tried to shoo the cattle through the gate without success. He then fired warning shots with a .22 caliber rifle. He had no intention of killing or injuring any of the cows, which is why he was using such a small-caliber gun. Kent has larger guns.

Perhaps it was an untimely coincidence. Perhaps the gunshot frightened the cow to death. Whatever the reason, one of the cows fell dead on the spot. The cow had a bullet in its lung. According to Kent the bullet doesn't match his gun. I would tend to agree, since it'd be just about impossible to kill a grown cow with so small a gun. You'd have to poke the muzzle in its ear or eye and pull the trigger. A .22 caliber slug simply isn't capable of journeying all the way into the lung of so large an animal.

That doesn't seem to matter to the authorities or the rancher. Kent's attorneys have made every effort to pay for the cow and settle the case, but these people evidently plan to make an example of him. His trial is finally taking place December 21st. He faces a possible 2 years in prison and thousands of dollars in fines. And since this is a felony, he could also lose his voting rights.

Let's consider this objectively. While I can understand his distress over his mother's condition, he should have remembered to close the gate. And, perhaps it was a bit imprudent to fire the gun near the cattle. But does he deserve to go to prison for such a thing? Kent Knudson isn't a raging extremist with an arsenal in his home. He's a mild-mannered amateur photographer who has spent years caring for his disabled mother.

The real question here should be whether the archaic Open Range laws are still practical in modern times. With the exception of Montana, all of the states that have Open Range laws currently contain more people than cattle. Automobiles travel much faster than sixty or seventy years ago. People also do more nighttime driving. Should a Black Angus bull have the right of way at midnight on a busy highway? Where is the consideration for people? A 2000 pound Angus bull, struck at 60 mph by the average automobile could wipe out an entire family.

The state of Montana recently passed a new law amending existing legislation. This new legislation reaffirms existing law stating that except in cases of intentional neglect or abuse, a livestock owner has no duty to keep his cows and horses off public highways. So, if you manage to survive a collision with a horse, you're not only without a vehicle... you also bought yourself a dead horse.

There is, finally, some hope on the horizon. In September of 2005 a series of livestock-related accidents has prompted residents of Maricopa County, Arizona to demand changes in the Open range laws there. Beginning in 2006, a 20 square mile area of that county will not allow Open Range grazing due to the density of the human population. One can only hope that people in other areas will see this bit of progress and demand similar changes. In Arizona, cattle owners are outnumbered by "non-cattle owners" by a ratio of 5000 to 1. Does it make sense that this tiny minority should be able to endanger so many people?

The very idea of people dying in crashes to save ranchers a few bucks in fence-building money is beyond offensive. It's both vulgar and profane. The Wild West needs to join the 21st Century.

Related Reading:

http://www.21stcenturycares.org/ranchers.htm **Great Site!**

Alan Burkhart is a freelance political writer, cross-country trucker, and proud citizen of the reddest of the Red States - Mississippi. You can reach him via e-mail at: alan@alanburkhart.com or by visiting his website: www.alanburkhart.com.

Return to Home Page

even closer afterwards. We had worked together in Blockbuster along with Sean & Dave Kelly. We were both in the military basic training at the same time, where he was in the Marines, and I was in the Army. We would send each other letters bragging about who's branch of service was better. Every letter I sent him had some type of doodle art on it, and one had the words on the back "OOSHAA!!", which was the sound of Artillery going off. He wrote back asking me what that meant, because his drill instructors made him do push ups till he had that answer. lol. I wish I still had those letters, but the memories in my mind will just have to do. The mischief things we did in high school and the BBQ's we had afterwards was always something to remember, so I will never forget you Mike! Love ya brotha!!

Jaysen

United States

Comments by **Fran and David Kalish** on Friday, December 01, 2006 at 09:23 IP Logged

We came to know Michael late in his life. We became friends with Tony and Judi and through them became acquainted with Michael. We soon came to know how special he was. He lit up a room when he entered. He was instantly friends with everyone he met, not just because he wanted to be but because they did. We participated in his chili cooking (as tasters) and just enjoyed him as human being. We miss him like we would a son.

United States

Comments by **Michael Pando** on Monday, November 27, 2006 at 08:57 IP Logged

Shortly after Mike's passing, I was suddenly struck with a memory. It was a memory from when I was five; I was playing soccer, and as I ran after the ball a little blond haired kid, named Mike Adams, ran up to me and said, "You wanna come over to my house after the game and play?" Of course I missed the ball, but more importantly, I had made a new friend. I went to Mike's house that day, and we became best friends for a short time. At the time of this memory I had not heard of Mike's passing, and in fact, I hadn't heard from him in years. So I logged on to the net and started searching for him. Within minutes of this memory and my internet search, the phone rang... It was another old friend whom I hadn't spoken too for a while as well. He was calling to tell me that Mike had passsed away in a car accident. I truly believe Mike visited me that day to say goodbye, and I am happy that I have found this website so that I can share this story with his family and friends. I will never forget the times we spent playing together, upstairs in his childhood home.

United States

Comments by **James M. Ogden** on Saturday, October 14, 2006 at 12:25 IP Logged

A friend to be remembered for his honesty, intergerity and love of life.One who

accomplished many endeavors and then moved on bigger and better things. A fine young man that is greatly missed by family and many friends.10
United States

Comments by **Shane** on Friday, October 06, 2006 at 23:51 IP Logged

There simply are no words... I've given up trying to find them... It's been a never ending roller coaster ride, since I heard. Heard; not found out. It's not a concept I've accepted; don't know if I ever will. I do know I'll never understand, get, or grasp it. It's taken me over a year to even post something here, although I view this site often. I lived with Mike for over 5 years. Seems a lifetime including working, jogging, philosophizing, movie making, debating, partying, traveling, conspiring, double dating, bar hopping, card playen, and conducting business, with him. Know one was ever as fun, as enlightening, or as witty, to hang out with. He was a walking party; simply a blast, and the epitome of excitement, to be in his presence. He had me on the floor, uncontrollably laughing, many a time. He is one of the most unique, one of a kind, people I've ever met, and had the most extraordinary take on people and life. He was like a brother to me. I still talk to him. I think of him everyday. Strangely, I see his resemblance in strangers quite often. I thank God, I was one of the more fortunate ones to have known him. I thank God for all the extraordinary memories I shared with him. I try to find solace with other people whom known him, but realize everyone's memories are unique. Different people got to know different sides of Mike in his complexity. I've tried everything I can think of to relieve the pain of his absence; nothing has worked. I finally now understand its something to carry for the rest of your life. And, he's a memory to strive to keep

and to make him proud. Since the last thing we talked about was a wine trip to Santa Barbara when he got back, when I have a drink, it is always toasted to him. Where ever you are buddy, I miss ya... Shane
United States

Comments by **tony meredyk** on Sunday, August 13, 2006 at 21:47 IP Logged

i new mike from first grade to graduation we had a lot of good times. he will be missed. my family send there condolences. always in our hearts.
United States

Comments by **Judi Adams** on Thursday, July 27, 2006 at 14:09 IP Logged

Our special thanks to all the Chili cooks and helpers in the booth. I'm sure Michael gives you a big "thumbs up".
Tony and Judi
United States

Comments by **Kerry Burns** on Saturday, July 08, 2006 at 01:07 IP Logged

Sean and I watched your video tonight.I am lucky to be one of the poeple that can look at those pictures and tell the stories. Love you.

United States

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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 V

(Bates Nos. 0788-1008)

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Attorneys for Plaintiff

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

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

Plaintiff,

v.

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

Defendants.

SUSAN FALLINI,

Counterclaimant,

vs.

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

Counterdefendants.

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

OPPOSITION TO MOTION TO DISQUALIFY JUDGE ROBERT W. LANE FROM ANY FURTHER PROCEEDINGS IN THIS CASE AND TO TRANSFER THIS CASE FOR FURTHER CONSIDERATION TO HON. KIMBERLY A. WANKER

Plaintiff JUDITH ADAMS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF MICHAEL DAVID ADAMS, by and through her attorney of record, John P. Aldrich, of Aldrich Law

Firm Ltd., hereby submits this Opposition to Defendant's 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. The Opposition is based upon the attached memorandum of Points and Authorities, the attached exhibits, and any testimony or argument the Court will entertain at the hearing on this matter.

DATED this 30th day of ~~September~~ August, 2013.

ALDRICH LAW FIRM, LTD.

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Attorney for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITY

I.

CASE BACKGROUND

A. Factual Statement

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

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. As Michael drove, a Hereford cow suddenly appeared in Michael's travel lane, blocking his path. Although Michael was driving at a lawful rate of speed, it was not possible for him to avoid colliding with the cow and he hit it head-on. Michael's Jeep rolled over and left the paved highway. Sadly, Michael died at the scene.

Defendant was the owner of the cow which was in Michael's travel lane and caused his death.

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

B. Procedural History

On or about **November 29, 2006**, Plaintiff/Respondent filed a lawsuit in Clark County, Nevada. Defendant SUSAN FALLINI was duly served with a copy of the Summons and Complaint on **March 1, 2007**, and an Answer and Counterclaim (seeking to recover the value of the cow) were filed on **March 14, 2007**. The case was later transferred to Pahrump, Nye County, Nevada.

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

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), Plaintiff /Respondent filed a Motion for Partial Summary Judgment. Defendant/Appellant did not oppose that motion and the Court granted that Motion on **July 30, 2008**. Notice of entry of the Order Granting Plaintiff's Motion for Summary Judgment was served on Defendant/Appellant on **August 15, 2008**.

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

Plaintiff's/Respondent's counsel, Mr. Aldrich, attempted to discuss this discovery issue with Defendant's/Appellant's counsel, Mr. Kuehn, as well. On or about **March 6, 2009**, Plaintiff'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.

On **March 18, 2009**, Mr. Aldrich again contacted the office of Mr. Kuehn. Mr. Aldrich was informed that Mr. Kuehn was not available. Mr. Aldrich left a message with Mr. Aldrich's phone number and asked that Mr. Kuehn return the call. No return call ever came.

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

The Court granted the Motion to Compel and awarded John Aldrich, Esq., $750.00 in sanctions for having to bring the motion. A Notice of Entry of Order on the order granting the motion to compel was entered on May 18, 2009 and was served by mail on Defendant/Appellant. Defendant/Appellant never complied with the Order.

On **June 16, 2009**, Plaintiff /Respondent filed a Motion to Strike Defendant's Answer and Counterclaim due to Defendant's complete failure to comply with discovery requests and the Court's Order. The Defendant/Appellant's counsel again attended the hearing and again provided no explanation as to why Defendant /Appellant failed to respond to all discovery requests, but stated Defendant would comply with discovery requests. The Court denied Plaintiff's Motion to Strike based on Defendant's counsel's promises to comply. The Court did, however, order Defendant/Appellant to comply with the Order granting Plaintiff's Motion to Compel and to respond to Plaintiff's discovery requests by **July 12, 2009** or Defendant's Answer and Counterclaim would be stricken. The Court also ordered Defendant to pay an additional $1,000 sanction.

Defendant/Appellant still did not comply with the Court's Order and failed to respond to Plaintiff/Respondent's discovery requests. On **August 31, 2009**, Plaintiff brought an Ex Parte Motion

for Order to Show Cause Why Defendant Susan Fallini and Her Counsel Should Not be Held in Contempt. The Court issued an Order on Plaintiff's Order to Show Cause, dated **October 8, 2009**, that Susan Fallini must produce all documents responsive to Plaintiffs discovery requests by **October 12, 2009**. The Court further ordered that if Defendant did not supply the requested information by October 12, 2009, Defendant'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's pleadings in their entirety.

On **November 4, 2009**, an order was entered Striking Defendant's/Appellant's pleadings. Because Defendant's Answer has been stricken, all the allegations of the Complaint were deemed to be true. On **February 4, 2010**, the Clerk of the Court entered Default against Defendant/Appellant.

Despite repeated requests, Defendant/Appellant failed and refused to provide insurance information, or a response that Defendant/Appellant had no insurance. Consequently, Plaintiff/Respondent was again forced to bring yet another Ex Parte Motion for Order to Show Cause Why Defendant and Her Counsel Should Not Be Held in Contempt. The Order to Show Cause was granted, and another contempt hearing was held on **May 24, 2010.** Neither Defendant/Appellant nor her counsel, Harry Kuehn, appeared at the hearing. However, Thomas Gibson, Esq., the law partner to Mr. Kuehn, appeared at the hearing. Following argument by counsel, the Court made substantial findings of fact and conclusions of law. The Court also yet again held Defendant and her counsel in contempt of court and sanctioned them an additional $5,000.00. Further, the Court again ordered Defendant 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 did not respond as ordered.

On **June 17, 2010,** Defendant/Appellant Fallini filed a substitution of attorneys, substituting Marvel & Kump and John Olsen, Esq. for the firm of Gibson & Kuehn.

On **June 21, 2010**, Plaintiff/Respondent filed an Application for Default Judgment. On **June 23, 2010**, Fallini filed an Opposition to the Application for Default Judgment, arguing Judgment should not be entered because Fallini had only recently been apprised on the status of the case and it would be injustice to her to allow Default Judgment.

On **July 2, 2010**, Fallini filed a Motion for Reconsideration, asking the Court to reconsider the Order granting summary judgment and the Order striking the Answer and Counterclaim.

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 Plaintiff $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, and $5,188.85 in funeral and other related expenses.

On **September 7, 2010**, Fallini filed a Notice of Appeal. The parties briefed the matter not once, but twice, due to the fact that after the first round of briefing was completed, Defendant moved to re-open the briefing to submit the transcript of the prove-up hearing. The briefing was re-opened and the parties submitted a second round of briefing.

Following the second round of briefing, on **March 29, 2013**, the Nevada Supreme Court issued its Order Affirming in Part, Denying in Part and Remanding this case. Although the Judgment was reduced by $1,640,696.00, the remainder of the Judgment was upheld. (See Exhibit 1.)

Unwilling to accept the Nevada Supreme Court's decision, on **April 9, 2013**, Defendant filed a Petition for Rehearing. On **June 3, 2013**, the Nevada Supreme Court issued an Order Denying Rehearing. (See Exhibit 2.)

Still refusing to accept the Nevada Supreme Court's decision, on **June 5, 2013**, Defendant filed a Petition for *En Banc* Reconsideration. As it had done before, the Nevada Supreme Court issued an Order Denying *En Banc* Consideration on **July 18, 2013**. (See Exhibit 3.)

The Nevada Supreme Court affirmed this Court's decision to (1) deny Fallini's Motion for Reconsideration and (2) vacate the jury trial. The Nevada Supreme Court determined that Judge Lane's decision to deny Fallini's Motion for Reconsideration was proper. Fallini argued that the District Court erred in denying her motion for reconsideration because partial summary judgment was based on false factual premises regarding whether the accident occurred on open range. The Nevada Supreme Court flatly rejected this argument and affirmed Judge Lane's order in this regard. (See Nevada Supreme Court Order, attached hereto as Exhibit 1.) Thus, it is incomprehensible how Fallini can bring another Motion

before this Court arguing that this Judge should recuse himself because he failed to uphold the law.

Further, in an attempt to create a conflict with Judge Lane (and Mr. Aldrich), who had ruled against Defendant, Defendant brought a separate lawsuit against Judge Lane in Tonopah, Case No. CV31499, alleging Judge Lane's judgment was entered in spite of an absolute defense to this case – an issue that was already before the Nevada Supreme Court on appeal, and an argument which the Nevada Supreme Court flatly rejected. The Court in the frivolous case against Judge Lane (and Mr. Aldrich) granted Judge Lane's Motion to Dismiss and rightfully found no merit to the case. (See Fallini's Declaratory Relief Complaint, Judge Lane's Motion to Dismiss Complaint for Declaratory Relief, and the Order granting Motion to Dismiss, attached hereto as Exhibits 4, 5, and 6, respectively.)

II.

LEGAL ARGUMENT

A. Defendant Has Set Forth No Facts to Support Her Request

Defendant cites NCJC Rule 2.11 for the proposition that a judge shall disqualify himself if his impartiality might reasonably be questioned. Defendant then argues that Judge Lane cannot be impartial (1) because he entered a multi-million dollar judgment in favor of Adams on an allegedly baseless claim; (2) Fallini appealed this order which resulted in an order remanding the case on the issue of damages; and (3) Fallini has sued Judge Lane over its judgment that was entered apparently in violation of the absolute defense to this case as a matter of law.

Defendant's claims fail for a couple of different reasons. First of all, the Judgment against Defendant has been upheld, albeit reduced. The Nevada Supreme Court Order directly affirmed Judge Lane's Order in this regard and stated, "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." (Exhibit 1, p. 2.) Thus, Judge Lane did not enter judgment that was based on legally baseless claims. Fallini's arguments in this regard are in complete contradiction to an issue already addressed in the Order by the Nevada Supreme Court, and consequently, should result in Rule 11 sanctions.

Further, the lawsuit between Fallini and Judge Lane was frivolous from its inception, has been

dismissed for years, and was found to have no merit. Indeed, it appears that the Defendant intentionally used the lawsuit to judge-shop, given that Defendant already lost before Judge Lane.

Finally, contrary to Fallini's assertions, there is no substantive legal judgment that remains in the case. The judgment in this case was merely sent back to Judge Lane so the damages could be adjusted to reflect a deduction of $1,640,696 from the award. There is almost nothing left in this case for the Judge to consider beyond a Motion to Conduct Judgment Debtor's Exam.

The instant Motion is nothing more than attempt to stall judgment be entered against Fallini and a blatant attempt to forum shop.

III.

CONCLUSION

Defendant has set forth no basis in law or fact for even filing a Motion to Disqualify Judge Lane. As such Defendant's Motion should be denied. Plaintiff further requests attorney's fees for having to oppose this Motion and appear at a hearing. Plaintiff requests leave to file a subsequent motion for attorney's fees if the Court is inclined to grant this request.

DATED this 30th day of ~~September~~ August, 2013.

Respectfully Submitted,

ALDRICH LAW FIRM, LTD.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of August, 2013, I mailed a copy of the Opposition to Motion to Disqualify Judge Lane, in a sealed envelope, to the following and that postage was fully paid thereon:

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

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

Eleanor Engleston
An employee of Aldrich Law Firm, Ltd.

EXHIBIT 1

EXHIBIT 1

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 2 9 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

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

"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).

EXHIBIT 2

EXHIBIT 2

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: K. Matsuura
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

I Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Cherry, J.
Cherry

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

SUPREME COURT
OF
NEVADA

(O) 1947A

13-16207

EXHIBIT 3

EXHIBIT 3

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.

Hardesty, J.
Hardesty

Parraguirre, J.

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

EXHIBIT 4

EXHIBIT 4

CASE NO. CV 31449

DEPT. NO. I

FILED

2011 JAN 31 P 12:01

C. Uribe

NYE COUNTY CLERK
BY DEPUTY

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

SUSAN FALLINI, and JOE FALLINI

Plaintiffs,

vs.

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

Defendants.

COMPLAINT FOR DECLARATORY RELIEF

COMES NOW, Plaintiffs SUSAN FALLINI and JOE FALLINI, by and through their attorneys Jeff Kump, Esq., of the law firm of Marvel & Kump, Ltd., of Elko, Nevada, and John Ohlson, Esq. of Reno, Nevada, and complain for Declaratory Relief against the Defendants, THE HONORABLE ROBERT W. LANE, TONY ADAMS, JUDITH ADAMS, JOHN P. ALDRICH, ESQ. and HAROLD KUEHN, ESQ., and allege as follows.

Nature of the Action

1. Plaintiffs, SUSAN FALLINI and JOE FALLINI, seek a declaration that a judgment entered against them in the total sum of $2,730,884.85, in the matter of Estate of MICHAEL DAVID ADAMS, By and through his mother JUDITH ADAMS, Individually and on behalf of the Estate vs. SUSAN FALLINI, case number CV24539, Department 2, in the Fifth Judicial District Court of Nevada, is null, void and of no effect, and should be set aside and vacated. Said judgment was entered here on August 12, 2010, a copy of which is attached hereto as Exhibit 1.

Parties

2. That at all times mentioned herein, Plaintiffs, Susan Fallini and Joe Fallini, husband and wife, were residents of the State of Nevada.

3. That at all times mentioned herein, Defendants, Robert Lane, John Aldrich, and Harold Kuehn, were officers of the court of the State of Nevada, and residents of said State.

4. On information and belief, that Defendants Judith Adams and Tony Adams, are residents of the State of California.

General Allegations

5. That on or about January 31, 2007 a Complaint was filed, naming Susan Fallini as the Defendant, that alleged negligence resulting in the death of Michael Adams. Fallini promptly retained a local attorney, Defendant Harry Kuehn and an Answer and Counterclaim was filed on March 14, 2007 together with an Objection to Pahrump as Forum and Motion to have Matter Heard in Tonopah. Defendant John Aldrich opposed Defendant's Motion to have the Matter Heard in Tonopah and the information in the responsive pleading misinformed the Court that Defendant "lives equally distant between Pahrump and Tonopah in the Armagosa Valley..." Counsel for Fallini, Harold Kuehn of Gibson & Kuehn, failed to correct the false statement and the Court denied Fallini's motion regarding change of venue.

6. That on or about June 14, 2007 a Early Case Conference was scheduled and on June 15, 2007 all parties attended. On October 23, 2007 Plaintiff filed Plaintiff's and Counter-Defendant's Case Conference Report that was not signed by Susan Fallini's Counsel.

7. That on or about October 31, 2007, Adams sent counsel for Fallini written discovery requests, including Requests for Admission, Requests for Production of Documents, and Interrogatories. Counsel for Fallini did not respond.

8. That on or about April 7, 2008 Adams filed a Motion for Partial Summary Judgment alleging that on October 31, 2007 Fallini was served with written discovery requests, including Requests for Admission, Requests for Production of Documents, and Interrogatories. Again counsel for Fallini did not respond. On July 30, 2008, the Court issued an Order Granting Adam's Motion for Partial Summary Judgment. Notice of Entry of Order was filed on August 15, 2008.

9. That on or about July 14, 2008 there was a hearing before the Honorable Robert W. Lane.

Adam's counsel, John P. Aldrich was present but Fallini's counsel was not present, the Court having entered its Order Granting Plaintiff's Motion for Partial Summary Judgment on July 29, 2008 containing fourteen separate findings of fact and the following Conclusions of Law:

1. Defendant Fallini had a duty to ensure that the subject cow was not in the roadway at the time of the incident described in the Complaint.

2. Defendant Fallini had a duty to follow the common practice of Nye County, Nevada ranchers and to mark her cow with reflecting or lamination tags.

3. Defendant Fallini breached the duty of care to the decedent, as set forth in the findings of Fact and Conclusions of Law.

4. As a result of Defendant Fallini's breach, the decedent, Michael David Adams, was killed.

5. Defendant Fallini is liable for the damages to which Plaintiff is entitled, in an amount to be determined at a later time.

10. On September 22, 2008, Adams filed a Motion to Reopen Discovery and for an Extension of Time to Complete Discovery for the purpose of retaining an expert and establishing an opinion as to decedent's lost earning capacity.

11. That on or about March 23, 2009 Adams filed a Motion to compel Fallini's Production of Documents. Plaintiff alleged that "to this date, Fallini has not produced any responses of any kind to Plaintiff's written discovery requests." Adams alleged that he had sent letters to Fallini's attorney that went unanswered and made phone calls to Fallini's attorney that also went without return call.

12. That on or about April 27, 2009 the Court heard Adams' Motion to Compel Defendant's Production of Documents. Fallini's attorney, Kuehn, attended the hearing and did not oppose Adams' motion to compel and in fact agreed at the hearing it was warranted. Mr. Kuehn provided no explanation as to why he had failed to respond to all discovery requests.

13. That on or about May 18, 2009 Adams filed a Request for Trial Setting and the Order to Set Trial was filed May 20, 2009.

14. That on or about June 16, 2009 Adams filed a Motion to Strike Defendant's Answer and Counterclaim.

15. That on or about July 13, 2009 Fallini's Counsel filed an Opposition to Adams' Motion to Strike Defendant's Answer and Counterclaim in favor of a monetary sanction against Defendant's counsel. Mr. Kuehn wrote: "The discovery non-compliance set out in plaintiff's motion is absolutely not the fault of the party and the blame should be attributed to counsel in full."

16. The Court denied Plaintiff's Motion to Strike Defendant's Answer and Counterclaim by Order dated July 17, 2009. The court sanctioned Mr. Kuehn $1,000.00, ordered discovery completed by August 12, 2009 or the Court would grant Plaintiff's Motion to Strike.

17. That on or about August 31, 2009 Adams filed an Ex Parte Motion for Order to Show Cause Why Defendant Susan Fallini and Her Counsel Should Not Be Held In Contempt of Court. Plaintiff alleged that "to date, Defendant has failed to comply with the order of this Honorable Court and respond to Plaintiff's discovery requests. Defendant's counsel has paid the $1,750 in sanctions as ordered by the Court."

18. By Order dated September 1, 2009 the Court ordered Susan Fallini and her counsel to appear September 28, 2009 at 9:00 a.m. Susan Fallini did not appear. John P. Aldrich, Counsel for Plaintiff, and Mr. Kuehn for Defendant appeared in chambers. The Court ordered that Defense counsel had until October 12, 2009 to comply with the Court Order Granting Plaintiff's counsel John P. Aldrich's Motion to Compel and if Defendant failed to do so the Court would strike defendant's pleadings in their entirety and Defense counsel would be held in contempt and fined $150 per day until the information was provided.

19. Defense counsel, Mr. Kuehn, did not comply as ordered. On November 4, 2009 the Court struck the Defendant's answer and counterclaim and held defendant's counsel, Mr. Kuehn, in contempt. Notice of Entry of Order was filed on November 9, 2009.

20. Default was filed on February 4, 2010; Notice of Entry of Default was filed February 11, 2010.

21. That on or about April 7, 2010 Plaintiff's counsel John P. Aldrich filed an Ex Parte Motion for Order to Show Cause Why Defendant Susan Fallini and Her Counsel Should Not Be Held In Contempt of Court and Possible Sanctions be Imposed. Plaintiff's counsel John P. Aldrich suggested that the Court refer this matter to the State Bar and that the Court impose stiff sanctions: $5,000 immediately and $500 per day until Defendant complies and "if both Defendant and her counsel are not present in Court, Plaintiff will

request that the Court issue a bench warrant until Defendant complies."

22. By Order dated April 19, 2010 the Court ordered Susan Fallini and her counsel to appear May 24, 2010 at 9:00 a.m.

23. That on May 24, 2010 Plaintiff's counsel John P. Aldrich and Thomas Gibson on behalf of Fallini appeared for hearing. As with the prior Orders, neither Fallini nor her counsel responded. Mr. Gibson indicated he had not seen the file and provided no valid excuse. Mr. Gibson made specific representations to the Court that "the client, Defendant Susan Fallini, was unaware of the status of this case."

24. On June 24, 2010 Plaintiff filed an Application for Default Judgment against Fallini. On July 6, 2010, Defendant Fallini, through new counsel, filed a Motion for Leave to file a Motion for Reconsideration of prior orders. A Hearing was held on July 19, 2010, wherein Defendant's Motion for Reconsideration was Denied. Further, Defendant Fallini was left in a position of default. The Court entered its Order After Hearing on August 12, 2010 and awarded damages to Plaintiff and judgment was entered therein.

Defendant Kuehn

25. Plaintiffs reallege and incorporate by reference all preceding paragraphs as though fully set forth herein.

26. "The rule that attorney's negligence may be imputed to his client and prevent the latter from relying on that ground for opening or vacating a judgment does not necessarily prevail in the event of the attorney's abandonment or withdrawal from the case." (114 ALR 279 (1938); St. John Medical Center v. Brown, 125 P.3d 700 (OKLA 2005); Yusem v. Butler, 683 So. 2d 1170 (FLA. 1996); Myers v. All-West Transport, 766 P. 2d 864 (MT 1988); Boeckmann v. Smith, 189 S.W. 2d 449 (MO 1945); Stub v. Harrison, 96 P.2d 979 (CA. 1939).

27. The Defense counsel, Mr. Kuehn's action, providing no notice to his client was one of wilful abandonment.

28. Defense counsel, Mr. Kuehn, secreted himself and his failure to act was a circumstance beyond the control of his client, Mrs. Fallini.

29. Plaintiff's counsel John P. Aldrich took advantage of the defense attorney's failures.

30. The record also reflects that despite being ordered to produce his client, defense counsel, Mr.

Kuehn, refused, and neglected to do as a further act of abandonment.

31. Mrs. Fallini was not aware that a single hearing was held or that there was even a single discovery request.

32. Under the rare circumstances of this case, Mrs. Fallini should not be charged with the conduct of her counsel. This was a gross dereliction of duty and consequences should not have been directed to the innocent client. Mrs. Fallini was, in effect, not represented by counsel in the underlying proceedings.

Defendant Aldrich

33. Plaintiffs reallege and incorporate by reference all preceding paragraphs as though fully set forth herein.

34. Plaintiff's counsel John P. Aldrich misinformed the Court, of the specifics as set forth herein in Paragraph 9 verbatim, in clear violation of SCR 172, and NRCP 11.

35. Plaintiff's counsel John P. Aldrich's pleadings and motions, as set forth herein in Paragraph 9 verbatim, to which the Court relied, contained allegations that were false, misleading, and/or have no evidentiary support, in violation of Nevada law.

36. NRCP 11 provides that by presenting pleadings and written motions and attorney is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the allegations and other factual contentions have evidentiary support.

37. On or about October 31, 2007, Plaintiff's counsel John P. Aldrich sent Defense counsel, Mr. Kuehn written discovery requests, including Requests for Admission, Requests for Production of Documents, and Interrogatories. As expected, Mr. Kuehn did not respond, and on April 7, 2008 Plaintiff's counsel John P. Aldrich filed a Motion for Partial Summary Judgment alleging that Requests for Admissions not being answered must be deemed admitted.

38. The following alleged material facts are false, misleading, and have no evidentiary support, but were deemed admitted by the Court for defense counsel's failure to respond:

a. Fallini's property is not located within an "open range" as it is defined in NRS 568.355;

b. It is the common practice of Nye County, Nevada ranchers to mark their cattle with reflective or luminescent tags;[1]

39. There is no evidentiary support for the facts put forward by Plaintiff that Fallini's property is not located within an "open range" as it is defined in NRS 568.355 and that it is the common practice of Nye County, Nevada ranchers to mark their cattle with reflective or luminescent tags. At all times herein, defendant Aldrich acted on behalf of his clients, defendants Tony and Judith Adams.

Defendant Lane

40. Plaintiffs reallege and incorporate by reference all preceding paragraphs as though fully set forth herein.

41. Whenever any officer of the Court commits fraud during a proceeding in the court, he/she is engaged in "fraud upon the court." In Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir. 1985), the Court stated "Fraud upon the court is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. . . . It is where the court or a member is corrupted or influenced or influence is attempted or **where the judge has not performed his judicial function** - - - thus where the impartial function of the court have been directly corrupted."

42. The Supreme Court has ruled and has reaffirmed the principle that "justice must satisfy the appearance of justice", Levine v. United States, 362 U.S. 610, 80 S.Ct. 1038 (1960), citing Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1954).

43. The court failed to follow the law as to notice with respect to non-represented litigants.

44. The court accepted the statements made by plaintiff as true, knowing the statement to be false, in granting the plaintiff's motion for summary judgment.

45. The Court relied on defendant's alleged facts, false facts, that were deemed admitted for defense counsel's failure to respond in granting Plaintiff's Motion for Summary Judgment.

46. The judge failed to perform his judicial functions in the underlying matter herein, and in so failing violated The Nevada Code of Judicial Conduct in the following particulars:

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[1] Also, When Defendant initially moved for the matter to be heard in Tonopah, Plaintiff misinformed the Court that Defendant lived in "Armagosa Valley."

a. Rule 2.5 Competence, Diligence, and Copperarion, in that Judge Lane failed to act competently and diligently in the face of obvious dereliction of Attorney Kuehn;

b. Rule 2.6 Ensuring the Right to be Heard. When it became obvious that Attorney Kuehn had abandoned his client, plaintiff Fallini, Judge Lane failed to employ the resources available to him in suspending Kuehn from practice before him, and notifying plaintiff;

c. Rule 2.16 Responding to Judicial and Lawyer Misconduct by failing to notify the appropriate authority regarding Kuehn's misconduct, dereliction, and abandonment of plaintiffs.

47. All of the foregoing resulted in a miscarriage of justice, and the resultant void judgment against plaintiff.

Conclusions

48. Accordingly, a real, substantial, and justiciable controversy has arisen, and now exists between plaintiffs and defendants, which controversy is subject to resolution by this Court.

49. Based on the foregoing, plaintiffs are entitled to a declaration that the judgment against them, as described herein, is null, void, and of no effect.

WHEREFORE, Plaintiffs pray for a judgment as follows:

1. That the judgement against plaintiff in the total sum of $2,730,884.85, in the matter of Estate of MICHAEL DAVID ADAMS, By and through his mother JUDITH ADAMS, Individually and on behalf of the Estate vs. SUSAN FALLINI, case number CV24539, Department 2, in the Fifth Judicial District Court of Nevada, is null, void, and of no effect;

2. For attorneys' fees, costs, and disbursements incurred by Plaintiffs herein;

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3. For such additional and further relief as this Court deems just and proper.

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 27th day of January, 2011.

By _____

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Telephone: (775) 323-2700

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Telephone: (775) 777-1204

Attorneys for Plaintiffs

SCHEDULE OF EXHIBITS

EXHIBIT 1: August 12, 2010 Order

EXHIBIT 5

EXHIBIT 5

CASE NO. CV-31449

DEPT. I

FILED

2011 APR -5 P 2:38

NYE COUNTY CLERK
BY DEPUTY

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

SUSAN FALLINI and JOE FALLINI,

Plaintiffs,

vs.

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

Defendants.

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

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

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

I. BACKGROUND

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

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

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

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

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

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

II. APPLICABLE LEGAL STANDARD

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

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

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

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

III. ARGUMENT

A. JUDGE LANE IS ABSOLUTELY IMMUNE FROM SUIT.

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

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

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

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

2. Judge Lane Is Not a Proper Party Defendant.

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

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

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

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

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

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

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

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

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

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

The same is true here as in *Lange*:

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

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

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

D. DECLARATORY JUDGMENT IS NOT A SUBSTITUTE FOR APPEAL.

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

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

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

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

IV. CONCLUSION

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

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

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

DATED this 4th day of April 2011.

CATHERINE CORTEZ MASTO
Attorney General for the State of Nevada

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

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

CERTIFICATE OF SERVICE

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

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

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

Attorneys for Plaintiffs

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

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

AFFIRMATION

Pursuant to NRS 239B.030

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

DATED this 4th day of April 2011.

CATHERINE CORTEZ MASTO,
Attorney General for the State of Nevada

By: _____
C. Wayne Howle
Solicitor General

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

EXHIBIT 6

EXHIBIT 6

CASE NO. CV-31449

DEPT. I

FILED

2011 JUL 11 P 4:41

BY: COUNTY CLERK

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

SUSAN FALLINI and JOE FALLINI,

Plaintiffs,

vs.

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

Defendants.

ORDER

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

IT IS HEREBY ORDERED that the Motion to Dismiss should be, and hereby is, GRANTED. Judges cannot be sued for their judicial acts and are entitled to absolute immunity. *Mireles v. Waco*, 502 U.S. 9, 9 and 11(1991), *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978). *Cf. Marvin v. Fitch*, 126 Nev. ___, 232 P.3d 425, 429 (2010) ("[a]bsolute immunity protects judicial officers from collateral attack and recognizes that appellate procedures are the appropriate method of correcting judicial error").

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

DATED this 5th day of July, 2011.

Justice Miriam Shearing

RESPECTFULLY SUBMITTED BY:
CATHERINE CORTEZ MASTO
Attorney General
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Attorneys for Honorable Robert Lane

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the 14th day of June 2011, I served a true and correct copy of the foregoing proposed Order by mailing said document via the United States Postal Service first class mail and, properly addressed with postage prepaid, to the following:

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

and via Reno/Carson Messenger Service to:

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

and via email delivery to:

Honorable Robert W. Lane
rlane@co.nye.nv.us

Employee of the State of Nevada
Office of the Attorney General

FILED
REBECCA BALLARD
2013 SEP -5 A 9:54
NYE COUNTY CLERK
BY DEPUTY

Case No. CV 24539
Dept. 2P

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

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

Plaintiff,

vs.

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

Defendants.

COURT ORDER

FIFTH JUDICIAL DISTRICT COURT
ESMERALDA, MINERAL AND NYE COUNTIES

PROCEDURAL HISTORY

On or about November 29, 2006, Plaintiff filed a **Complaint** in Clark County. On January 31, 2007, the case was transferred to this Court. On March 14, 2007, Defendant filed an **Answer** and Counterclaim. On March 14, 2007, Defendant also filed a motion to change the forum to Tonopah. Plaintiff filed an opposition on March 26, 2007. A hearing was held on April 30, 2007 and an order denying motion to change forum was filed.

On March 30, 2007, Plaintiff filed a Reply to the counterclaim. On October 23, 2007, Plaintiff filed a case conference report. On April 7, 2008, Plaintiff filed a **Motion for Partial Summary Judgment**. On May 16, 2008, Plaintiff filed a Motion for Partial Summary Judgment. Joinders were made on May 20, 2008. No opposition was filed. A hearing was held July 14, 2008. On July 30, 2008, an Order granting Partial Summary Judgment was filed.

On September 22, 2008, Plaintiff filed Motions regarding discovery. Various motions to compel, liens, notices etc. were filed through March 2009. A hearing was held November 10, 2008, and more time was given. A hearing was held on April 27, 2009, and defendant's counsel was sanctioned $750 held in abeyance, and an Order granting Motion to Compel discovery was granted.

On May 5, 2009, Plaintiff filed a demand for jury trial. An order setting trial was filed on May 20, 2009 and June 24, 2009. On June 16, 2009, Plaintiff filed a **Motion to Strike defendant's Answer and Counterclaim**. Defendant filed an Opposition on July 13, 2009. A hearing was held on July 13, 2009. Defendant's counsel was sanctioned $750 from the previous

hearing and $1000. An Order denying plaintiff's motion to strike was filed on July 17, 2009.

On August 31, 2009, Plaintiff filed a Motion for an Order to Show Cause why Defendant should not be held in contempt. It was granted on October 8, 2009. On November 4, 2009, an Order was filed striking defendant's answer and counterclaim. On February 4, 2010, a **Default** was filed.

On April 7, 2010, Plaintiff filed a Motion for an Order to Show Cause why defendant should not be held in contempt. An order was granted on April 26, 2010. A hearing was held on May 24, 2010. Tom Gibson appeared for Harry Kuehn. Defendant's counsel was sanctioned $5000 and $500 per month until he gave discovery. An Order was filed on June 2, 2010.

On June 17, 2010, John Ohlson substituted for Harry Kuehn. On June 24, 2010, an Application for Default was filed. An **Opposition** to default was filed that same day. A Reply was filed on July 21, 2010. On July 6, 2010, a **Motion for Reconsideration** was filed.

A hearing was held on July 19, 2010, re: application for default, opposition to application and defendant's motion for reconsideration. Default was granted and reconsideration denied. On July 21, 2010, Plaintiff

filed a reply to defendant's opposition for default; and an Opposition to plaintiff's motion for reconsideration.

On August 12, 2010, an Order granting default and denying reconsideration was filed.

On September 10, 2010, Defendant filed a notice of **Appeal**. On March 29, 2013, the Supreme Court issued an Order affirming the District Court, but remanding for a new hearing regarding part of the damages awarded. An order denying rehearing was filed on June 3, 2013. An order denying en banc reconsideration was denied on July 18, 2013. An order denying rehearing was filed on August 14, 2013.

On August 20, 2013, Defendant filed a **Motion to Disqualify** Judge Lane.

This order follows.

DEFENDANT'S ARGUMENT

In her Motion to Disqualify, Fallini argues the following:

1. That the Court wrongly ruled against Fallini in this matter, because she had an affirmative defense which sets forth that she is not liable for damages (Motion p. 2, lines 7, 20-24; p. 3, lines 21-24).
2. That the Court wrongly failed to notice Fallini that her attorney Kuehn was being negligent (Motion p. 2, lines 18-19, 25-28).
3. That despite knowledge that Kuehn was negligent, the Court wrongly entered judgment against Fallini (Motion p. 2, lines 12-17, 23-25; p.3-4, lines 24- line 2).
4. That on appeal, the Supreme Court remanded this case on the issue of damages (Motion p. 4, lines 3-4, 7).

5. That Fallini has sued Judge Lane (Motion p. 4, lines 4-6, 8).
6. That the judgment by the Court reflects a failure 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, and so the integrity and impartiality of the judiciary can be maintained through post-appeal proceedings (Motion p.4, lines 9-11, 17-19).
7. That the Court is invested in the outcome of the case (Motion p. 4, line 15).

NEVADA RULES OF JUDICIAL CONDUCT

Defendant moves the Court to disqualify pursuant to the Nevada Rules of Judicial Conduct Rules 1.1, 1.2, 2.2, and 2.11, which state as follows:

> A judge shall comply with the law, including the Code of Judicial Conduct. (1.1) A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety. (1.2) A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially. (2.2)
>
> **Disqualification.**
> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
> (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.
> (2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:
> (a) a party to the proceeding or an officer, director, general partner, managing member, or trustee of a party;
> (b) acting as a lawyer in the proceeding;
> (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
> (d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding.

(4) [Reserved.]

(5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge:

(a) served as a lawyer in the matter in controversy or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household. (2.11)

HOLDING

The Court will address each of Defendant's arguments.

1. That the Court wrongly ruled against Fallini.

In its Order of March 29, 2013, the Nevada Supreme Court affirmed the District Court's determination in this matter. A party is not allowed to re-litigate the issue in a post-Appeal motion. This argument is moot.

2. That the Court wrongly failed to notice Fallini that her attorney Kuehn was being negligent.

The Court had no duty to personally notify Fallini, and Fallini has failed to cite to a statute or case law that sets forth such a legal requirement. If such a duty exists, it would have been helpful to cite it to the District Court during Fallini's Motion for Reconsideration, or to the Supreme Court on Appeal. This is a matter that should have been argued on Appeal. Failure to do so has waived the issue.

3. That despite knowledge that Kuehn was negligent, the Court wrongly entered judgment against Fallini.

In its Order of March 29, 2013, the Nevada Supreme Court affirmed the District Court's determination in this matter. A party is not allowed to re-litigate the issue in a post-Appeal motion. This argument is moot.

4. That on appeal, the Supreme Court remanded this case on the issue of damages.

In its Order of March 29, 2013, the Nevada Supreme Court affirmed the District Court's in all legal issues. In determination of damages the Court was upheld in part, and remanded in part to correct the award of separate damages for loss of probable support and lost economic opportunity. A remand to re-determine part of the damages is insufficient grounds for disqualification.

5. That Fallini has sued Judge Lane.

On January 31, 2011, Fallini sued Judge Lane in case no. CV 31449. On July 11, 2011, Judge Lane was summarily dismissed from that lawsuit on the grounds that judges cannot be sued for their judicial acts and are entitled to absolute immunity. A party is not allowed to forum shop for a different judge by filing a frivolous law suit against the judge in order to force the judge to recuse from their case. See *U.S. v. Studley*, 783 F.2d 934, 940 (9th Cir. 1986), "a judge is not disqualified by a litigant's suit or threatened suit against him." This argument lacks merit.

6. That the judgment by the Court reflects a failure to uphold and apply the law; to act in a manner that promotes public confidence in the integrity of the judiciary; and so the integrity and impartiality of the judiciary can be maintained through post-appeal proceedings.

This Court upheld and applied the law, as affirmed by the Supreme Court's Order of March 29, 2013. This Court promoted public confidence in the integrity of the judiciary, by ruling pursuant to the law, as affirmed by the Supreme Court's Order.

It should be noted that all the parties in this matter were strangers to the Court, except attorney Harry Kuehn who has practiced in this

jurisdiction for over 20 years and with whom the court has had a friendly and respectful relationship. In the course of the litigation, it became known to the Court that the Fallini's owned a ranch in this jurisdiction. This Court made multiple attempts in this matter to motivate Kuehn to act properly, in part thanks to the courteous patience of the opposing side's counsel. Accordingly, it could be argued that if the Court would have been biased in any way, it would have been for Keuhn and the Fallini's, not the strangers appearing from outside the jurisdiction. But the Court has no bias or appearance of bias.

By following the law, the Court demonstrated its integrity and impartiality. This Court will continue to uphold the integrity and impartiality of the judiciary through post-appeal proceedings, by following the law. This argument lacks merit.

7. That the Court is invested in the outcome of the case.

The Court has no invested interest in this matter, and Fallini fails to cite what that interest would be. The Court has only followed the law. It has no self-interest in who prevails.

This is a limited remand by the Nevada Supreme Court, and the remaining duty for the Court as set forth in the Supreme Court Order of March 29, 2013, is to correct the award of separate damages for both loss of probable support and lost economic opportunity. This is a simple issue, and the Court will continue to ethically apply the law to the facts in this matter. This argument lacks merit.

CONCLUSION

As shown above, having failed to set forth any sufficient grounds, Defendant's Motion to Disqualify is HEREBY DENIED

DATED this 5th day of September, 2013.

DISTRICT JUDGE

FIFTH JUDICIAL DISTRICT COURT
ESMERALDA, MINERAL AND NYE COUNTIES

CERTIFICATION OF MAILING

The undersigned hereby certifies that on the 5th day of September, 2013, he mailed copies of the foregoing COURT ORDER to the following:

JOHN P. ALDRICH, ESQ.
ALDRICH LAW FIRM, LTD.
1601 S. RAINBOW BLVD., SUITE 160
LAS VEGAS, NV 89146

JOHN OHLSON, ESQ.
275 HILL ST., SUITE 230
RENO, NV 89501

Tanner L. Sharp, Esq.
Law Clerk to Judge Robert W. Lane

AFFIRMATION

The undersigned hereby affirms that this Court Order does not contain the social security number of any person.

Tanner L. Sharp, Esq.
Law Clerk to Judge Robert W. Lane

John Ohlson, Esq.
NV Bar No. 1672
275 Hill St., Suite 230
Reno, Nevada 89501
Reno, Nevada 89501
(775) 323-2700

Jeff Kump, Esq.
NV Bar No. 5694
Marvel & Kump, Ltd.
Elko, Nevada 89801
(775) 777-1204

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

REPLY IN SUPPORT OF MOTION TO DISQUALIFY JUDGE ROBERT W. LANE FROM ANY FURTHER PROCEEDINGS IN THIS CASE AND TO TRANSFER THIS CASE FOR FURTHER CONSIDERATION TO HON. KIMBERLY A. WANKER

Defendant Susan Fallini, by and through her counsel, John Ohlson, replies in support of her motion 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 reply 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

Fallini has moved this Court for an order that disqualifies Judge Lane from presiding over any further proceedings in this case and that this case be transferred to the Honorable Kimberly A. Wanker in Department 1. In support of her motion, Fallini cites to the applicable rules of the Nevada Code of Judicial Conduct (Rules 1.1, 1.2, 2.2, and 2.11) in the context of Judge Lane's apparent impartiality in this case based upon a number of events, not the least of which were his failure to apply the undisputed law to facts that he acknowledged in the underlying case and Fallini's lawsuit against him based on the judgment he entered in this case.

In her opposition to Fallini's request, Plaintiff Judith Adams ("Adams") summarily concludes that Fallini's motion should be denied because Judge Lane's judgment was affirmed (in part) by the Nevada Supreme Court, Fallini's lawsuit against Judge Lane has been dismissed (characterizing it as "frivolous"), and there is little left for the Court to do in response to the Supreme Court's order reversing a portion of Judge Lane's judgment. Adams' conclusory assertions, however, further establish the basis on which Judge Lane should be disqualified.

As stated in Fallini's motion, Rule 2.11 of the Nevada Code of Judicial Conduct *requires* the disqualification of a judge whenever the judge's impartiality ***might*** *reasonably be questioned.* Based on this motion dialog, there is no dispute that, in addition to the partial reversal of Judge Lane's judgment by the Nevada Supreme Court, *Judge Lane and Fallini were adverse parties to each other regarding the judgment Judge Lane entered in this case.* Contrary to Adams' characterization of the lawsuit as frivolous, Fallini stands by the validity of her claims against Judge Lane. Moreover, given the serious post-judgment discipline of Harold Kuehn by the State Bar of Nevada in *direct response* to his conduct in this case in the context this Court's entry of a multi-million dollar default judgment against Fallini despite *knowing* that her attorney's conduct was grossly incompetent and his acknowledgment of the facts that constituted an *absolute defense* to Adams' claims necessarily establishes that Judge Lane did not honor his obligations to uphold and apply the law, and to act in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary as required by Rules 1.1, 1.2, and 2.2 of the Nevada Code of Judicial Conduct. Indeed, under the circumstances, there can be no dispute that Judge

Lane's impartiality in this case *"might reasonably be questioned"* under the circumstances. Thus, Rule 2.11 of the Nevada Code of Judicial Conduct *requires* an order disqualifying him from presiding over any further proceedings in this case, and Fallini requests that this Court enter an order accordingly and transfers this case to the Honorable Kimberly A. Wanker in Department 1.

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 6 day of September, 2013.

By: _____
John Ohlson, Esq.
NV Bar No. 1672
275 Hill Street, Suite 230
Reno, Nevada 89501
(775) 323-2700

Jeff Kump, Esq.
NV Bar No. 5694
Marvel & Kump, Ltd.
Elko, Nevada 89801
(775) 777-1204

Attorneys for Susan Fallini

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of JOHN OHLSON, and that on this date, I served a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO DISQUALIFY JUDGE ROBERT W. LANE FROM ANY FURTHER PROCEEDINGS IN THIS CASE AND TO TRANSFER THIS CASE FOR FURTHER CONSIDERATION TO HON. KIMBERLY A. WANKER** by the method indicated and addressed to the following:

John P. Aldrich, Esq.
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 9 day of September, 2013

Robert M. May

John Ohlson, Esq.
NV Bar No. 1672
275 Hill St., Suite 230
Reno, Nevada 89501
Reno, Nevada 89501
(775) 323-2700

Jeff Kump, Esq.
NV Bar No. 5694
Marvel & Kump, Ltd.
Elko, Nevada 89801
(775) 777-1204

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

REQUEST FOR SUBMISSION

Defendant, by and through their counsel JOHN OHLSON, ESQ., hereby request that the *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* filed herein on August 20, 2013, the opposition thereto and the reply, be submitted to the Court for

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////

////

9/6

decision.

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 12 day of September, 2013.

By _____
John Ohlson, Esq.
NV Bar No. 1672
275 Hill Street, Suite 230
Reno, Nevada 89501
(775) 323-2700

Jeff Kump, Esq.
NV Bar No. 5694
Marvel & Kump, Ltd.
Elko, Nevada 89801
(775) 777-1204

Attorneys for Susan Fallini

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of JOHN OHLSON, and that on this date, I served a true and correct copy of the foregoing **REQUEST FOR SUBMISSION** by the method indicated and addressed to the following:

John P. Aldrich, Esq.
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 9 day of September, 2013

Robert M. May

FILED
REBECCA BALLARD
2013 SEP 23 P 1:08
COUNTY CLERK
DEPUTY

Case No. CV 24539
Dept. 2P

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

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

Plaintiff,

vs.

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

Defendants.

SUPPLEMENTAL COURT ORDER

This Court, having received Defendant's Reply in Support of Motion to Disqualify after the Court issued its Order denying the Motion; and after having reviewed Defendant's Reply, this Court finds that Defendant again fails to set forth any sufficient grounds upon which the Motion may be granted. Therefore,

IT IS HEREBY ORDERED that Defendant's Motion to Disqualify is again **DENIED**

DATED this 23rd day of September, 2013.

DISTRICT JUDGE

FIFTH JUDICIAL DISTRICT COURT
ESMERALDA, MINERAL AND NYE COUNTIES

FIFTH JUDICIAL DISTRICT COURT
ESMERALDA, MINERAL AND NYE COUNTIES

CERTIFICATION OF MAILING

The undersigned hereby certifies that on the 23rd day of September, 2013, he mailed copies of the foregoing COURT ORDER to the following:

JOHN P. ALDRICH, ESQ.
ALDRICH LAW FIRM, LTD.
1601 S. RAINBOW BLVD., SUITE 160
LAS VEGAS, NV 89146

JOHN OHLSON, ESQ.
275 HILL ST., SUITE 230
RENO, NV 89501

Tanner L. Sharp, Esq.
Law Clerk to Judge Robert W. Lane

AFFIRMATION

The undersigned hereby affirms that this Court Order does not contain the social security number of any person.

Tanner L. Sharp, Esq.
Law Clerk to Judge Robert W. Lane

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

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

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

Plaintiff,

v.

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

Defendants.

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

SUSAN FALLINI,

Counterclaimant,

vs.

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

Counterdefendants.

MOTION TO ENTER FINAL JUDGMENT FOLLOWING REMITTITUR

Plaintiff JUDITH ADAMS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF MICHAEL DAVID ADAMS, by and through her attorney of record, John P. Aldrich, of Aldrich Law Firm Ltd., hereby submits this Motion to Enter Final Judgment Following Remittitur. The Motion is

based upon the attached memorandum of Points and Authorities, the attached exhibits, and any testimony or argument the Court will entertain at the hearing on this matter.

DATED this 23rd day of September, 2013.

ALDRICH LAW FIRM, LTD.

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

NOTICE OF MOTION

TO: SUSAN FALLINI, Defendant;

TO: JOHN OHLSON, ESQ., counsel for Defendant.

PLEASE TAKE NOTICE that on the 25th day of Nov., 2013, at the hour of 9:00 a.m., before the above-referenced department of the Fifth Judicial District Court, State of Nevada, County of Nye, located at 1520 E. Basin Avenue, Pahrump, Nevada, 89060, Plaintiff will bring the foregoing Motion on for hearing.

DATED this 23rd day of September, 2013.

ALDRICH LAW FIRM, LTD.

John P. Aldrich
Nevada Bar No. 6877
ALDRICH LAW FIRM, LTD.
1601 S. Rainbow Blvd., Ste. 160
Las Vegas, Nevada 89146
Telephone: (702) 853-5490
Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITY

I.

CASE BACKGROUND

A. **Procedural History**

On or about **November 29, 2006**, Plaintiff/Respondent filed a lawsuit in Clark County, Nevada. Defendant SUSAN FALLINI was duly served with a copy of the Summons and Complaint on **March 1, 2007**, and an Answer and Counterclaim (seeking to recover the value of the cow) were filed on **March 14, 2007**. The case was later transferred to Pahrump, Nye County, Nevada.

On **October 31, 2007**, Plaintiff /Respondent submitted interrogatories to Fallini. Those interrogatories were never answered. Plaintiff/Respondent also submitted requests for admissions and its first set of requests for production of documents on October 31, 2007 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), Plaintiff /Respondent filed a Motion for Partial Summary Judgment. Defendant/Appellant did not oppose that motion and the Court granted that Motion on **July 30, 2008**. On **March 23, 2009** Plaintiff/Respondent filed a Motion to Compel Defendant's Production of Documents, including information regarding any insurance policies that may provide coverage for the incident as contemplated in the Plaintiff's second request for documents. This motion was heard on **April 27, 2009**. The Court granted the Motion to Compel and awarded John Aldrich, Esq., $750.00 in sanctions for having to bring the motion. A Notice of Entry of Order on the order granting the motion to compel was entered on May 18, 2009 and was served by mail on Defendant/Appellant. Defendant/Appellant never complied with the Order.

On **June 16, 2009**, Plaintiff /Respondent filed a Motion to Strike Defendant's Answer and Counterclaim due to Defendant's complete failure to comply with discovery requests and the Court's Order. The Defendant/Appellant's counsel again attended the hearing and again provided no explanation as to why Defendant /Appellant failed to respond to all discovery requests, but stated Defendant would comply with discovery requests. The Court denied Plaintiff's Motion to Strike based on Defendant's counsel's promises to comply. The Court did, however, order Defendant/Appellant to comply with the Order granting Plaintiff's Motion to Compel and to respond to Plaintiff's discovery requests by **July 12, 2009** or Defendant's Answer and Counterclaim would be stricken. The Court also ordered Defendant to pay an additional $1,000 sanction. Defendant/Appellant still did not comply with the Court's Order and

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

On **November 4, 2009**, an order was entered Striking Defendant's/Appellant's pleadings. Because Defendant's Answer has been stricken, all the allegations of the Complaint were deemed to be true. On **February 4, 2010**, the Clerk of the Court entered Default against Defendant/Appellant.

On **June 21, 2010**, Plaintiff/Respondent filed an Application for Default Judgment. On **June 23, 2010**, Fallini filed an Opposition to the Application for Default Judgment, arguing Judgment should not be entered because Fallini had only recently been apprised on the status of the case and it would be injustice to her to allow Default Judgment.

On **July 2, 2010**, Fallini filed a Motion for Reconsideration, asking the Court to reconsider the Order granting summary judgment and the Order striking the Answer and Counterclaim.

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 Plaintiff $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, and $5,188.85 in funeral and other related expenses. (See Exhibit 1)

On **September 7, 2010**, Fallini filed a Notice of Appeal. The parties briefed the matter not once, but twice, due to the fact that after the first round of briefing was completed, Defendant moved to re-open the briefing to submit the transcript of the prove-up hearing. The briefing was re-opened and the parties submitted a second round of briefing.

Following the second round of briefing, on **March 29, 2013**, the Nevada Supreme Court issued

its Order Affirming in Part, Denying in Part and Remanding this case. Although the Judgment was reduced by $1,640,696.00, the remainder of the Judgment was upheld. (See Exhibit 2.)

A Remittitur was issued in the above entitled case on August 14, 2013. (See Exhibit 3).

II.

LEGAL ARGUMENT

A. Pursuant to the Order Issued by the Nevada Supreme Court a Judgment in the Amount of $1,090,188.80 Plus Interest in the Amount of $428,341.93 and Continuing Until Paid, Should Be Issued Against Defendant

On August 14, 2013 the Nevada Supreme Court issued a Remittitur in the above entitled case directing this Court to enter Judgment pursuant to the Nevada Supreme Court Order issued on March 29, 2013. This Nevada Supreme Court Order reduced the judgment entered on August 18, 2010 by $1,640,696.00. Thus, Judgment should now be entered in the amount of $1,090,188.80, plus interest at the statutory rate.

Pursuant to NRS 17.130, when no interest is specified in the judgment, the judgment draws interest from the time of service of the summons and complaint until satisfied, at a rate equal to the prime rate at the largest bank in Nevada on July 1 or January 1 whatever the case may be, immediately proceeding the date of judgment, plus 2 percent. The rate must be adjusted accordingly on each January 1 and July 1 until the judgment if satisfied. Therefore in the above entitled case interest should be calculated as follows:

Summons and Complaint served on March 1, 2007.

3/1/07 to 6/30/07 = 122 days
Judgment Amount= $1,090,188.80
Interest rate = 8.25 + 2 = 10.25
1,090,188.8 x .1025 = 111,744.35
111,744.35/365 = 306.15 a day x 122 days = **$37,350.30**

7/1/07 to 12/31/07 = 184 days
Judgment Amount= $1,090,188.80
Interest rate = 8.25 + 2 = 10.25
1,090,188.8 x .1025 = 111,744.35
111,744.35/365 = 306.15 a day x 184 days = **$56,331.60**

1/1/08 to 6/30/08 = 182 days
Judgment Amount= $1,090,188.80

Interest rate = 7.25 + 2 = 9.25
1,090,188.8 x .0925 = 100,842.46
100,842.46/365 = 276.28 a day x 182 days = **$50,282.96**

7/1/08 to 12/31/08 = 184 days
Judgment Amount= $1,090,188.80
Interest rate = 5.00 + 2 = 7.00
1,090,188.8 x .07 = 76,313.22
76,313.22/365 = 209.08 a day x 184 days = **$38,470.72**

1/1/09 to 6/30/09 = 181 days
Judgment Amount= $1,090,188.80
Interest rate = 3.25 + 2 = 5.25
1,090,188.8 x .0525 = 57,234.91
57,234.91/365 = 156.81 a day x 181 days = **$28,382.61**

7/1/09 to 12/31/09 = 184 days
Judgment Amount= $1,090,188.80
Interest rate = 3.25 + 2 = 5.25
1,090,188.8 x .0525 = 57,234.91
57,234.91/365 = 156.81 a day x 184 days = **$28,853.04**

1/1/10 to 6/30/10 = 181 days
Judgment Amount= $1,090,188.80
Interest rate = 3.25 + 2 = 5.25
1,090,188.8 x .0525 = 57,234.91
57,234.91/365 = 156.81 a day x 181 days = **$28,382.61**

7/1/10 to 12/31/10 = 184 days
Judgment Amount= $1,090,188.80
Interest rate = 3.25 + 2 = 5.25
1,090,188.8 x .0525 = 57,234.91
57,234.91/365 = 156.81 a day x 184 days = **$28,853.04**

1/1/11 to 6/30/11 = 181 days
Judgment Amount= $1,090,188.80
Interest rate = 3.25 + 2 = 5.25
1,090,188.8 x .0525 = 57,234.91
57,234.91/365 = 156.81 a day x 181 days = **$28,382.61**

7/1/11 to 12/31/11 = 184 days
Judgment Amount= $1,090,188.80
Interest rate = 3.25 + 2 = 5.25
1,090,188.8 x .0525 = 57,234.91
57,234.91/365 = 156.81 a day x 184 days = **$28,853.04**

1/1/12 to 6/30/12 = 182 days
Judgment Amount= $1,090,188.80

Interest rate = 3.25 + 2 = 5.25
1,090,188.8 x .0525 = 57,234.91
57,234.91/365 = 156.81 a day x 182 days = **$28,539.42**

7/1/12 to 12/31/12 = 184 days
Judgment Amount= $1,090,188.80
Interest rate = 3.25 + 2 = 5.25
1,090,188.8 x .0525 = 57,234.91
57,234.91/365 = 156.81 a day x 184 days = **$28,853.04**

1/1/13 to 6/30/13 = 181 days
Judgment Amount= $1,090,188.80
Interest rate = 3.25 + 2 = 5.25
1,090,188.8 x .0525 = 57,234.91
57,234.91/365 = 156.81 a day x 181 days = **$28,382.61**

7/1/13 to 9/30/13 = 92 days
Judgment Amount= $1,090,188.80
Interest rate = 3.25 + 2 = 5.25
1,090,188.8 x .0525 = 57,234.91
57,234.91/365 = 156.81 a day x 92 days = **$14,426.52**

TOTAL= $454,344.12

Thus, Plaintiff is entitled to a judgment against the Defendant in the amount of $1,090,188.80 plus interest in the amount of $454,344.12 and continuing at the statutory rate until satisfied.

III.

CONCLUSION

Judgment should be entered against Defendant and on behalf of Plaintiff in the amount of $1,090,188.80 plus interest in the amount of $454,344.12 and continuing at the statutory rate until satisfied.

DATED this 23rd day of September, 2013.

Respectfully Submitted,

ALDRICH LAW FIRM, LTD.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of September, 2013, I mailed a copy of the **MOTION TO ENTER FINAL JUDGMENT FOLLOWING REMITTITUR**, in a sealed envelope, to the following and that postage was fully paid thereon:

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

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

An employee of Aldrich Law Firm, Ltd.

EXHIBIT 1

EXHIBIT 1

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

FILED
2010 AUG 18 P 2:11
REBECCA BALLARD
NYE COUNTY CLERK
BY DEPUTY

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

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

Plaintiffs,

vs.

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

Defendants.

Case No.: CV24539
Dept.: 2P

SUSAN FALLINI,

Counterclaimant,

vs.

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

Counterdefendants.

NOTICE OF ENTRY OF ORDER

///

///

///

PLEASE TAKE NOTICE that an Order After Hearing was entered in the above-entitled matter on August 12, 2010, a copy of which is attached hereto as Exhibit 1.

DATED this 17th day of August, 2010.

ALDRICH LAW FIRM, LTD.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of August, 2010, I mailed a copy of the NOTICE OF ENTRY OF ORDER, in a sealed envelope, to the following and that postage was fully paid thereon:

John Ohlson, Esq.
275 Hill Street, Suite 230
Reno, Nevada 89501
Attorney for Defendant/Counterclaimant

Katherine M. Barker, Esq.
Law Office of Katherine M. Barker
823 S. Las Vegas Blvd., Ste. 300
Las Vegas, NV 89101
Attorney for Counterdefendant
Estate of Michael David Adams

An employee of Aldrich Law Firm, Ltd.

EXHIBIT 1

EXHIBIT 1

FILED

2010 AUG 12 A 9:00

REBECCA BALLARD

CLERK

Case No. CV 24539
Dept. 2P

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

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

Plaintiff,

vs.

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

Defendants.

ORDER AFTER HEARING

FIFTH JUDICIAL DISTRICT COURT
ESMERELDA, MINERAL AND NYE COUNTIES

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

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

ORDER

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

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

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

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

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

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

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

DATED this 12th day of August 2010.

DISTRICT JUDGE

FIFTH JUDICIAL DISTRICT COURT
ESMERELDA, MINERAL AND NYE COUNTIES

FIFTH JUDICIAL DISTRICT COURT
ESMERELDA, MINERAL AND NYE COUNTIES

CERTIFICATION OF MAILING

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

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

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

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

C. PAUL TECHO
Law Clerk to
DISTRICT JUDGE

EXHIBIT 2

EXHIBIT 2

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 29 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

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 Mover 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

---

[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).

EXHIBIT 3

EXHIBIT 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUSAN FALLINI,
Appellant,
vs.
ESTATE OF MICHAEL DAVID ADAMS, BY AND THROUGH HIS MOTHER JUDITH ADAMS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE;
Respondent.

Supreme Court No. 56840
District Court Case No. CV0024539

FILED
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

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

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUSAN FALLINI,
Appellant,
vs.
ESTATE OF MICHAEL DAVID ADAMS, BY AND THROUGH HIS MOTHER JUDITH ADAMS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE;
Respondent.

Supreme Court No. 56840
District Court Case No. CV0024539

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"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."

Judgment, as quoted above, entered this 29th day of March, 2013.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"Rehearing Denied".

Judgment, as quoted above, entered this 3rd day of June, 2013.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER denying En Banc Reconsideration."

Judgment, as quoted above, entered this 18th day of July, 2013.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this August 12, 2013.

Tracie Lindeman, Supreme Court Clerk

By: Rory Wunsch
Deputy Clerk

John Ohlson, Esq.
NV Bar No. 1672
275 Hill St., Suite 230
Reno, Nevada 89501
Reno, Nevada 89501
(775) 323-2700

Jeff Kump, Esq.
NV Bar No. 5694
Marvel & Kump, Ltd.
Elko, Nevada 89801
(775) 777-1204

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

OPPOSITION TO MOTION FOR ENTRY OF ORDER

Remittitur was issued by the Nevada Supreme Court on August 14, 2013. The judgment originally entered by the Supreme Court was "modified or reversed" with a direction that a judgment be entered by the District Court (see Ex. 1 attached, the Supreme Court's Order). Rule 37(b), NRAP provides as follows:

> *When the court reverses.* If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest.

Plaintiff asks that the new, modified and reversed judgment herein bear interest from the date of the issuance of the summons and complaint, all in violation of 37(b) NRAP.

The "mandate" in this case did not contain instructions about the allowance of interest. This Court's new judgment cannot contain any direction about interest, until the Supreme Court has spoken on the issue. Plaintiff must apply to the Supreme Court for instructions, or any order from this Court relating to interest will be void.

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 30 day of September, 2013.

By: _____
John Ohlson, Esq.
NV Bar No. 1672
275 Hill Street, Suite 230
Reno, Nevada 89501
(775) 323-2700

Jeff Kump, Esq.
NV Bar No. 5694
Marvel & Kump, Ltd.
Elko, Nevada 89801
(775) 777-1204

Attorneys for Susan Fallini

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of JOHN OHLSON, and that on this date, I served a true and correct copy of the foregoing **OPPOSITION TO MOTION FOR ENTRY OF ORDER** by the method indicated and addressed to the following:

John P. Aldrich, Esq.
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 30 day of September, 2013

Robert M. May

SCHEDULE OF EXHIBITS

EXHIBIT 1: Order

EXHIBIT 1

EXHIBIT 1

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 29 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

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

---

[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.

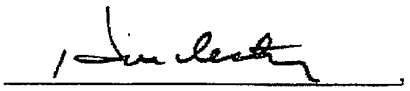
"[T]he district court is given wide discretion in calculating an award of damages, and this award will not be disturbed on appeal absent an abuse of discretion." Diamond Enters., Inc. v. Lau, 113 Nev. 1376, 1379, 951 P.2d 73, 74 (1997). An heir in a wrongful death action may broadly recover "pecuniary 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 Mover 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.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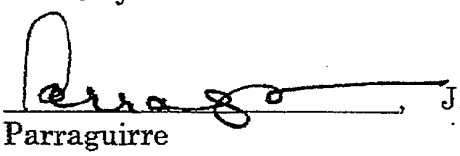
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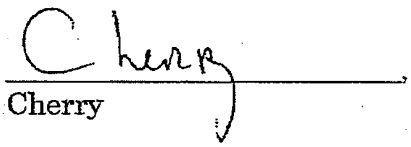
J.
Cherry

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).

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

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

MOTION TO REVERSE OR WITHDRAW REMITTITUR AND CLARIFY INSTRUCTIONS FOR ALLOWANCE OF INTEREST

Respondent JUDITH ADAMS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF MICHAEL DAVID ADAMS, by and through her attorney of record, John P. Aldrich, of Aldrich Law Firm Ltd., hereby submits this Motion to Revesrse or Withdraw Remittitur and Clarify Instructions for Allowance of Interest. The Motion is based upon the attached memorandum of Points and Authorities, the attached exhibits, and testimony or argument the Court will entertain at the hearing on

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this matter.

DATED this 7th day of October, 2013.

ALDRICH LAW FIRM, LTD.

John P. Aldrich, Esq.
Nevada Bar No.: 6877
1601 S. Rainbow Blvd., Suite 160
Las Vegas, Nevada 89146
(702) 853-5490
Attorney for Respondent

MEMORANDUM OF POINTS AND AUTHORITY

I.

CASE BACKGROUND

A. Procedural History in District Court

On or about **November 29, 2006**, Plaintiff/Respondent filed a lawsuit in Clark County, Nevada. Defendant SUSAN FALLINI was duly served with a copy of the Summons and Complaint on **March 1, 2007**, and an Answer and Counterclaim (seeking to recover the value of the cow) were filed on **March 14, 2007**. The case was later transferred to Pahrump, Nye County, Nevada.

On **October 31, 2007**, Plaintiff /Respondent submitted interrogatories to Fallini. Those interrogatories were never answered. Plaintiff/Respondent also submitted requests for admissions and its first set of requests for production of documents on October 31, 2007 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), Plaintiff /Respondent filed a Motion for Partial Summary Judgment. Defendant/Appellant did not oppose that motion and the Court granted that Motion on **July 30, 2008**. On **March 23, 2009** Plaintiff/Respondent filed a Motion to Compel Defendant's Production of Documents, including information regarding any insurance policies that may provide coverage for the incident as contemplated in the Plaintiff's second request for documents. This motion was heard on April

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

On **June 16, 2009**, Plaintiff /Respondent filed a Motion to Strike Defendant's Answer and Counterclaim due to Defendant's complete failure to comply with discovery requests and the Court's Order. The Defendant/Appellant's counsel again attended the hearing and again provided no explanation as to why Defendant /Appellant failed to respond to all discovery requests, but stated Defendant would comply with discovery requests. The Court denied Plaintiff's Motion to Strike based on Defendant's counsel's promises to comply. The Court did, however, order Defendant/Appellant to comply with the Order granting Plaintiff's Motion to Compel and to respond to Plaintiff's discovery requests by **July 12, 2009** or Defendant's Answer and Counterclaim would be stricken. The Court also ordered Defendant to pay an additional $1,000 sanction. Defendant/Appellant still did not comply with the Court's Order and failed to respond to Plaintiff/Respondent's discovery requests. On **August 31, 2009**, Plaintiff brought an Ex Parte Motion for Order to Show Cause Why Defendant Susan Fallini and Her Counsel Should Not be Held in Contempt. The Court issued an Order on Plaintiff's Order to Show Cause, dated **October 8, 2009**, that Susan Fallini must produce all documents responsive to Plaintiffs discovery requests by **October 12, 2009**. The Court further ordered that if Defendant did not supply the requested information by October 12, 2009, Defendant'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's pleadings in their entirety.

On **November 4, 2009**, an order was entered Striking Defendant's/Appellant's pleadings. Because Defendant's Answer has been stricken, all the allegations of the Complaint were deemed to be true. On **February 4, 2010**, the Clerk of the Court entered Default against Defendant/Appellant.

On **June 21, 2010**, Plaintiff/Respondent filed an Application for Default Judgment. On **June 23, 2010**, Fallini filed an Opposition to the Application for Default Judgment, arguing Judgment should not be entered because Fallini had only recently been apprised on the status of the case and it would be

injustice to her to allow Default Judgment.

On **July 2, 2010**, Fallini filed a Motion for Reconsideration, asking the Court to reconsider the Order granting summary judgment and the Order striking the Answer and Counterclaim.

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 Plaintiff $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, and $5,188.85 in funeral and other related expenses.

B. Proceedings Before Supreme Court

On **September 7, 2010**, Fallini filed a Notice of Appeal. The parties briefed the matter not once, but twice, due to the fact that after the first round of briefing was completed, Defendant moved to re-open the briefing to submit the transcript of the prove-up hearing. The briefing was re-opened and the parties submitted a second round of briefing.

Following the second round of briefing, on **March 29, 2013**, the Nevada Supreme Court issued its Order Affirming in Part, Denying in Part and Remanding this case. Although the Judgment was reduced by $1,640,696.00, the remainder of the Judgment was upheld. However, the Order does not contain instructions about the allowance of interest (See Exhibit 1.)

A Remittitur was issued in the above entitled case on August 14, 2013. (See Exhibit 2).

II.

LEGAL ARGUMENT

A. This Court Issued an Order For Judgment in the Amount of $1,090,188.80 Against Defendant, As Such This Court Must Issue an Order Containing Instructions for the Allowance of Interest

On **March 29, 2013**, the Nevada Supreme Court issued its Order Affirming in Part, Denying in Part and Remanding this case. Although the Judgment was reduced by $1,640,696.00, the remainder of the Judgment was upheld. Remitttur was issued by this Court on August 14, 2013. However, the Order does not contain instructions about the allowance of interest (See Exhibit 1). NRAP 37(b) provides

> If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance interest.

Plaintiff requests this Court, pursuant to NRAP 37(b) issue an order containing instruction regarding the allowance of interest in the March 29, 2013 Order.

III.

CONCLUSION

This Court's March 29, 2013 Order did not contain instructions for the allowance of interest. As such, Plaintiff now moves this Court to reverse or withdraw remittitur and for an Order containing instructions for the allowance of interest.

DATED this 7th day of October, 2013.

Respectfully Submitted,

ALDRICH LAW FIRM, LTD.

John P. Aldrich, Esq.
Nevada Bar No.: 6877
1601 S. Rainbow Blvd., Suite 160
Las Vegas, Nevada 89146
(702) 853-5490
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of October, 2013, I mailed a copy of the Motion to Reverse or Withdraw Remittitur and Clarify Instructions for Allowance of Interest, in a sealed envelope, to the following and that postage was fully paid thereon:

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

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

An employee of Aldrich Law Firm, Ltd.

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

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

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

Plaintiff,

v.

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

Defendants.

SUSAN FALLINI,

Counterclaimant,

vs.

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

Counterdefendants.

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

REPLY TO OPPOSITION TO MOTION TO ENTER FINAL JUDGMENT FOLLOWING REMITTITUR

Plaintiff JUDITH ADAMS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF MICHAEL DAVID ADAMS, by and through her attorney of record, John P. Aldrich, of Aldrich Law Firm Ltd., hereby submits this Reply to Opposition to Motion to Enter Final Judgment Following

Remittitur. The Reply is based upon the attached memorandum of Points and Authorities, the attached exhibits, and any testimony or argument the Court will entertain at the hearing on this matter.

DATED this 7th day of October, 2013.

ALDRICH LAW FIRM, LTD.

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

MEMORANDUM OF POINTS AND AUTHORITY
II.
LEGAL ARGUMENT

On **March 29, 2013**, the Nevada Supreme Court issued its Order Affirming in Part, Denying in Part and Remanding this case. Although the Judgment was reduced by $1,640,696.00, the remainder of the Judgment was upheld. Remitttur was issued by this Court on August 14, 2013. However, the Order does not contain instructions about the allowance of interest (See Exhibit 1). NRAP 37(b) provides

> If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance interest.

Thus Plaintiff has requested the Nevada Supreme Court, pursuant to NRAP 37(b) reverse or withdraw Remittitur and clarify instructions for allowance of interest. The Motion is now pending before the Nevada Supreme Court. As such, Plaintiff does not object to this Court holding off on deciding Plaintiff's Motion to Enter Judgment until after the Nevada Supreme Court orders instructions about the allowance of interest. Plaintiff will notify the Court once that has occurred by way of supplement to this motion.

III.

CONCLUSION

Plaintiff currently has a Motion before the Nevada Supreme Court requesting that the Court enter instructions on how to calculate interest. As such, Plaintiff does not object to this Court holding off on deciding Plaintiff's Motion to Enter Judgment until after the Nevada Supreme Court orders instructions about the allowance of interest. Plaintiff will notify the Court once that has occurred by way of supplement to this motion.

DATED this 7th day of October, 2013.

Respectfully Submitted,

ALDRICH LAW FIRM, LTD.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of October, 2013, I mailed a copy of the **REPLY TO OPPOSITION TO MOTION TO ENTER FINAL JUDGMENT FOLLOWING REMITTITUR**, in a sealed envelope, to the following and that postage was fully paid thereon:

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

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

An employee of Aldrich Law Firm, Ltd.

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.
_____/

OPPOSITION TO MOTION TO WITHDRAW REMITTITUR AND CLARIFY INSTRUCTIONS FOR ALLOWANCE OF INTEREST

I.
Relevant History

This appeal was commenced by Mrs. Fallini on September 7, 2010. After re-opening and a second round of briefing this Court entered its order reversing in part and affirming in part on March 29, 2013. The remittitur was issued on August 14, 2013, almost two months before the filing of the instant motion.

II.
Motion is Untimely

Respondent's motion can only be considered one for rehearing under NRAP 40. No other

rule allows for a motion to this Court for a change to, or modification of a decision after it has been made. NRAP 40(a)(1) provides:

> *Time*. Unless the time is shortened or enlarged by order, a petition for rehearing may be filed within 18 days after the filing of the court's decision under Rule 36.

The last day for seeking a rehearing of the Courts decision (which did not grant interest on that portion of the judgment affirmed) was April 16, 2013. After that date the within motion became time barred.

Whether or not NRAP 37 affirmatively requires this Court to award interest on the modified judgment herein is not the issue. The issue is whether the Rules of Appellate Procedure regarding finality (such as NRAP 40(a) (1)) are to be taken seriously. At some time, the litigation must end. In this case it ended on April 16, 2013.

Respondent offers no explanation of good cause why he did not react timely to this Court's Order which contained no order regarding post judgment interest. Even if he had, NRAP 40 provides no exceptions for good cause lateness. The Rule, of course, provides for enlargement of time by order. But that should have been done before the time had run.

III.
Conclusion

Finality and the ultimate conclusion of litigation is a long and time honored policy of the law. How long would Respondent have this litigation remain open? It has already been an open wound for seven years. The mistakes and malfeasance of her counsel have been visited on Appellant by virtue of unbending Rule. Respondent has sat on this Court's Order for two months.

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His motion is untimely and must be denied.

Dated this 14th day of October, 2013.

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

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

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 **OPPOSITION TO MOTION TO WITHDRAW REMITTITUR AND CLARIFY INSTRUCTIONS FOR ALLOWANCE OF INTEREST,** 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 14th day of October, 2011.

__/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

ORDER GRANTING MOTION TO RECALL REMITTITUR AND TO MODIFY MARCH 29, 2013, ORDER FOR ALLOWANCE OF INTEREST

Respondent has filed a motion to recall the remittitur and clarify instructions for the allowance of interest, arguing that when this court entered a dispositive order resolving this appeal on March 29, 2013, reducing respondent's judgment, the order neglected to instruct the district court about the allowance of interest on the modified judgment. *See* NRAP 37(b) (providing that if this court "modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest"). Appellant opposes the motion, arguing that it should be treated as a petition for rehearing under NRAP 40, and denied as untimely.

Having considered the parties' arguments, we grant respondent's motion. *See Bancamerica Commercial Corp. v. Mosher Steel of Kan., Inc.*, 103 F.3d 80, 81 n.1 (10th Cir. 1996) (applying FRAP 37, which is identical to NRAP 37, in explaining that when an appellate court's mandate overlooks interest, recall and reformation of the mandate is appropriate to answer the question of how interest should be applied).

In resolving this appeal, this court concluded that the district court acted within its discretion in awarding damages to respondent based

14-00180

on loss of probable support, but that it abused its discretion by awarding separate damages for both loss of probable support and lost economic opportunity because the loss of probable support element of damages "'translates into, and is often measured by, the decedent's lost economic opportunity.'" *See Fallini v. Adams*, Docket No. 56840 (Order Affirming in Part, Reversing in Part, and Remanding, March 29, 2013) (quoting *Alsenz v. Clark Co. School Dist.*, 109 Nev. 1062, 1064-65, 864 P.2d 285, 286-87 (1993) (explaining that in a wrongful death action, the estate could not recover for both lost economic opportunities of the decedent and loss of probable support, as this would amount to a double recovery)). This court therefore affirmed the wrongful death judgment to the extent that it awarded damages for grief, sorrow, and loss of support, but reversed the portion of the judgment that awarded additional damages for lost career earnings. *Id.*

Since the district court's judgment was partially reversed only to the extent that it awarded duplicative damages for lost career earnings and thus the partial reversal was grounded on the judgment's dollar value and reduced accordingly, interest on the modified judgment shall accrue from the date of the district court's original judgment. *See Bancamerica Commercial Corp.*, 103 F.3d at 81 (noting that "[i]n determining whether postjudgment interest should accrue from the date of the district court's original judgment or the date of a later judgment," an appellate court examines "'the extent to which the case was reversed'" (quoting *N. Natural Gas Co. v. Hegler*, 818 F.2d 730, 737 (10th Cir. 1987))). In analyzing the extent to which a case was reversed, the Third Circuit Court of Appeals in *Dunn v. HOVIC*, concluded that the post-judgment interest calculation should begin on the date when the jury verdict was originally entered, since the "jury's decision was never overturned and the matter was never

retried," noting that on appeal, "the entire award was not vacated, but was merely reduced." 13 F.3d 58, 61-62 (3d Cir. 1993) (awarding a plaintiff post-judgment interest from the original judgment's date, even though the original judgment was $26.3 million and the ultimate judgment after appeal and remittiturs was $1.5 million); *see also Cordero v. De Jesus-Mendez*, 922 F.2d 11, 16 (1st Cir. 1990) (explaining that "where the original judgment is basically sound but is modified on remand, post-judgment interest accrues from the date of the first judgment"); *N. Natural Gas Co.*, 818 F.2d at 737 (mandating interest to accrue from the date when the first judgment was awarded because the reversal of the first judgment "was not on any basic liability errors or errors in procedure which affected the basic issues but on a dollar value, a matter of degree"). Accordingly, we recall the remittitur and amend the mandate in the March 29, 2013, order to include instructions for the allowance of post-judgment interest on the modified judgment to accrue from the date of the original judgment. *Dunn*, 13 F.3d at 61-62; *N. Natural Gas Co.*, 818 F.2d at 737.

It is so ORDERED.

Pickering, C.J.

Gibbons, J.

Hardesty, J.

Parraguirre, J.

Douglas, J.

Cherry, J.

Saitta, J.

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

FILED

FEB 12 2014

TRACIE LINDEMAN
CLERK OF SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUSAN FALLINI,
Appellant,
vs.
ESTATE OF MICHAEL DAVID ADAMS, BY AND THROUGH HIS MOTHER JUDITH ADAMS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE,
Respondent.

Supreme Court No. 56840
District Court Case No. CV0024539

FILED
2014 JAN 31 P 2:00
NYE COUNTY CLERK
BY DEPUTY

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: January 28, 2014

Tracie Lindeman, Clerk of Court

By: Rory Wunsch
Deputy Clerk

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 JANUARY 31, 2014.

District Court Clerk

RECEIVED
FEB 05 2014
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

Case No.: CV 24539

Dept. No.: 2P

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.

_____/

JURY DEMAND

TO THE CLERK OF THE ABOVE ENTITLED COURT:

COMES NOW, Defendant SUSAN FALLINI by and through her counsel JOHN OHLSON, ESQ., and hereby demands that all issues relating to the entry of judgment after appeal of the above-entitled action be heard before a jury.

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Tender is herewith made of the sum of $360.00 for the first day of jury fees.

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 11th day of March, 2014.

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

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 **JURY DEMAND** by the method indicated and addressed to the following:

John P. Aldrich, Esq.
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 11th day of March, 2014.

Robert M. May

Case No.: CV 24539

Dept. No.: 2P

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.

_____/

DEFENDANT'S OBJECTION TO PROPOSED JUDGMENT

Defendant, Susan Fallini by and through her counsel of record John Ohlson, Esq., hereby objects to Plaintiffs' proposed Judgment as follows:

First, Plaintiffs' proposed Final Judgment incorrectly states the prejudgment interest is to be applied to the award of damages. Awarding prejudgment interest is in direct conflict with the Nevada Supreme Courts instructions given to Plaintiff in this case, which state "Accordingly, we recall the remittitur and amend the mandate in the March 29, 2013, order to include instructions for the allowance of post-judgment interest on the modified judgment to accrue from the date of the original judgment." *See Fallini v. Adams*, Docket No. 56840 (Order Granting Motion to Recall Remittitur and to Modify March 29, 2013) emphasis added. On October 7, 2013, Plaintiff filed a "Motion To Reverse Or Withdraw Remittitur And Clarify Instructions For Allowance Of

Interest" with the Nevada Supreme Court. *See Fallini v. Adams*, Docket No. 56840 (Motion to Reverse or Withdraw Remittitur and Clarify Instructions for Allowance of Interest). Plaintiff specifically sought clarification and instruction from the Nevada Supreme Court on the allowance of interest and was given instruction that post-judgment interest was to apply from the date of the original judgment. The fact that Plaintiff now, through an ex-parte motion for final judgment attempts to be awarded prejudgment interest in direct conflict with the very instructions the Plaintiff sought, and obtained, from the Nevada Supreme Court is not only offensive, but improper and should be sanctioned as in direct violation with the instructions of the Nevada Supreme Court. The original judgment in this case was entered on August 12, 2010. Accordingly, post-judgment interest should be calculated as of such date in accordance with the Nevada Supreme Court instructions.

Second, even if prejudgment interest were to be awarded in direct conflict with the specific instructions of the Nevada Supreme Court, Plaintiffs' proposed Final Judgment incorrectly states the prejudgment interest rate to be applied is a periodic biannual rate of interest in effect between March 1, 2007 and February 3, 2014 varying between 10.25% and 5.25% instead of the correct single rate of 5.25% in effect on the date of judgment. Plaintiff is incorrect for the simple reason that the Nevada Supreme Court has held that under the plain language of NRS 17.130(2) prejudgment interest is calculated at the single rate in effect immediately preceding the date of judgment. Lee v. Ball, 121 Nev. 391, 396, 116 P.3d 64, 67 (2005). Like Plaintiff, the district court in Lee "calculated the rate of prejudgment interest using periodic biannual legal rates of interest in effect between May 27, 199 and March 24, 2003." Lee, 121 Nev. at 396, 116 P.3d at 67. The Nevada Supreme Court found "This was error. Under the plain language of NRS 17.130(2), the district court should have calculated prejudgment interest at the single rate in effect on the date of judgment." Lee, 121 Nev. at 396, 116 P.3d at 67. The interest rate in effect immediately before the date of judgment in this case is 5.25% (prime rate of 3.25%

plus 2%), which is the single rate to be applied for prejudgment interest from the date of service of the summons and complaint.

Defendant has filed concurrently with this Objection a proposed judgment which sets the correct post-judgment interest; Defendant asks the Court to issue this corrected form when entering judgment.

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 25th day of March, 2014.

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

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 **DEFENDANT'S OBJECTION TO PROPOSED JUDGMENT** by the method indicated and addressed to the following:

John P. Aldrich, Esq.
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 25th day of March, 2014.

Robert M. May

SCHEDULE OF EXHIBITS

EXHIBIT 1: Defendant's Proposed Judgment

EXHIBIT 1

EXHIBIT 1

Case No.: CV 24539

Dept. No.: 2P

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.

/

Plaintiff having applied for a default judgment against Defendant, the Court having entered an Order After Hearing on August 12, 2010, awarding Plaintiff damages in the total sum of $2,730,884.85, including $1,640,696.00 in damages for lost future earnings, the Nevada Supreme Court having reversed award for lost future earnings and affirmed the judgment in the sum of $1,090,188.85, and the Nevada Supreme Court having directed the Court to enter a judgment in the amount of $1,090,188.85, plus post-judgment interest on the sum of $1,090,188.85,

Final Judgment is hereby entered in favor of Plaintiff and against Defendant Susan Fallini, and the Court ORDERS as follows:

1. IT IS ORDERED THAT Plaintiff is granted a judgment and shall recover from

Susan Fallini the sum of $1,090,188.85.

2. IT IS ORDERED THAT Plaintiff is granted a judgment and shall recover from Susan Fallini post-judgment interest in the sum of $203,853.00, calculated as follows:

Original Judgment entered on August 12, 2010

8/12/10 to 12/31/10 = 142 days
Judgment Amount = $1,090,188.80
Interest rate = 3.25 + 2 = 5.25
1,090,188.8 X .0525 57,234.91
57,234.91/365 = 156.81 a day x 142 days = $22,267.02

1/1/11 to 6/30/11 = 181 days
Judgment Amount = $1,090,188.80
Interest rate = 3.25 + 2 = 5.25
1,090,188.8 X .0525 = 57,234.91
57,234.91/365= 156.81 a day x 181 days = $28,382.61

7/1/11 to 12/31/11 = 184 days
Judgment Amount= $1,090,188.80
Interest rate 3.25 + 2 = 5.25
1,090,188.8 X .0525 = 57,234.91
57,234.91/365 = 156.81 a day x 184 days = $28,853.04

1/1/12 to 6/30/12 = 182 days
Judgment Amount= $1,090,188.80
Interest rate 3.25 + 2 = 5.25
1,090,188.8 X .0525 57,234.91
57,234.91/365 = 156.81 a day x 182 days = $28,539.42

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7/1/13 to 12/31/13 184 days
Judgment Amount = $1,090,188.85
Interest Rate= 3.25 +.2 5.25
1,090,188.85 X .525 = 57,234.91
57,234.91/365 = 156.81 per day x 184 days = $28,853.04

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1/1/14 to 2/3/14 = 62 days
Judgment Amount = $1,090,188.85
Interest Rate = 3.25 + 2 = 5.25
1,090,188.85 X .525 57,234.91
57,234.91/365 = 156.81 per day x 15 days = $9,722.22

TOTAL = $203,853.00

3. IT IS ORDERED THAT Plaintiff is granted a judgment and shall recover against Defendant in the amount of $1,090,188.80, plus interest in the amount of $203,853.00 (through March 3, 2014), for a total of $1,294,041.85, and post-judgment interesting continuing to accrue at the statutory rate until satisfied.

DATED this _____day of _____, 2014.

_____
DISTRICT COURT JUDGE

Submitted by:

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

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

FILED
2014 APR 10 P 1:35
NYE COUNTY CLERK
BY DEPUTY

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

ESTATE OF MICHAEL DAVID ADAMS, by and through his mother JUDITH ADAMS, individually and on behalf of the Estate, Plaintiff, vs. SUSAN FALLINI; DOES I-X; and ROE CORPORATIONS I-X, inclusive, Defendants.	Case No.: CV24539 Dept. No.: 2 **REPLY TO DEFENDANT'S OBJECTION TO PROPOSED JUDGMENT**

Plaintiff JUDITH ADAMS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF MICHAEL DAVID ADAMS, by and through her attorney of record, John P. Aldrich, of the Aldrich Law Firm Ltd., hereby submits this Reply to Defendant's Objection to Proposed Judgment. Upon further consideration, Plaintiff agrees to the form and content of the Proposed Judgment submitted by Defendant's counsel as Exhibit 1 to Defendant's Objection to Proposed Judgment. Therefore, Plaintiff respectfully requests that this Court sign and enter said Judgment immediately and provide a copy of the same to the parties. Plaintiff will then file a Notice of Entry.

DATED this 9th day of April, 2014.

ALDRICH LAW FIRM, LTD.

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

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of April, 2014, I mailed a copy of the Reply to Defendant's Objection to Proposed Judgment in a sealed envelope, to the following and that postage was fully paid thereon:

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

An employee of Aldrich Law Firm, Ltd.

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

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.: CV24539

Dept. No.: 2

NOTICE OF ENTRY OF JUDGMENT

PLEASE TAKE NOTICE that an Order granting Plaintiff final judgment against Defendant was entered on April 28, 2014, a copy of which is attached hereto.

DATED this 6th day of May, 2014.

ALDRICH LAW FIRM, LTD.

#5919

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

Case No.: CV 24539

Dept. No.: 2P

FILED
2010 APR 28 A 8:02

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.

_____/

Plaintiff having applied for a default judgment against Defendant, the Court having entered an Order After Hearing on August 12, 2010, awarding Plaintiff damages in the total sum of $2,730,884.85, including $1,640,696.00 in damages for lost future earnings, the Nevada Supreme Court having reversed award for lost future earnings and affirmed the judgment in the sum of $1,090,188.85, and the Nevada Supreme Court having directed the Court to enter a judgment in the amount of $1,090,188.85, plus post-judgment interest on the sum of $1,090,188.85,

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DATED this 28th day of April, 2014.

DISTRICT COURT JUDGE

Submitted by:

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

Case No.: CV 24539

Dept. No.: 2P

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.

/

MOTION FOR RELIEF FROM JUDGEMENT PURSUANT TO NRCP 60(b)

Defendant, Susan Fallini, by and through her counsel, moves the Court to set aside the Default Judgment entered against her on April 28, 2014 (the "**Judgment**"), pursuant to Rule 60(b) of the Nevada Rules of Civil Procedure. As set forth in the Memorandum of Points and Authorities filed concurrently herewith, the Judgment should be set aside under Rule 60(b) for fraud upon the court. Ms. Fallini's motion is timely. As the Nevada Supreme Court has expressly acknowledged, there is no time limit on bringing a motion for fraud upon the court because no interest is served in protecting such judgment. Ms. Fallini also moves for relief based on "excusable neglect" and has filed this Motion well within six months of final entry of the Judgment as required by Rule 60(b).

Ms. Fallini respectfully requests that the Court schedule a hearing regarding this Motion,

which is based on the following points: (1) Opposing counsel, an officer of the court, knowingly forced fraudulent facts on the court and failed to correct misrepresentations thereby committing fraud upon the court; (2) Ms. Fallini's previous counsel's incompetence, neglect, and misconduct denied Ms. Fallini an opportunity to advance her meritorious defenses; (3) public policy strongly supports deciding cases on the merits; and (4) the merits of this case, as known by all parties *prior to filing the suit in 2007*, provide Defendant with an absolute defense to liability. This Motion is supported by a Memorandum of Points and Authorities filed concurrently herewith.

Defendant Susan Fallini respectfully submits this memorandum in support of her Rule 60(b) Motion to Set Aside Judgment (the "**Rule 60(b) Motion**").

Memorandum of Points and Authorities

INTRODUCTION

Plaintiff's attorney, despite being an officer of the court, utterly ignored and violated his duty of candor and committed fraud upon the court such that the very temple of justice has been defiled. Opposing counsel knew that the accident which gave rise to this entire lawsuit occurred on open range. And opposing counsel knew that because it occurred on open range, Ms. Fallini could not be liable for any damages caused by the accident. Despite this knowledge, as set forth below, Plaintiff's attorney abused the discovery process and the judicial system by, among other things, fabricating facts and forcing those fraudulent facts on the court. This scheme subverted the very integrity of the court itself.

Ms. Fallini, plagued with a disgraceful and despicable attorney who has now been suspended from practicing law as a result of his representation of Ms. Fallini, failed to answer a request for admission and was deemed to have admitted that a motor vehicle accident involving Michael Adams and a Hereford Cow owned by Ms. Fallini did not occur on open range, even though (1) it did, (2) Plaintiff and opposing counsel *knew* the accident was on open range, (3) Ms. Fallini affirmatively stated in her answer the open-range defense, and (4) this Court took judicial

notice that the accident occurred on open range. And it is that very fact—that the accident took place on *open range*—that would have, and should have, provided a complete defense to Ms. Fallini's case as a matter of law. Indeed, but for Ms. Fallini's attorney's appalling professional misconduct—and counsel for Plaintiff's calculated decision to capitalize on this extreme neglect to force fraudulent facts on the court—it is a defense that would have, and should have, resulted in the speedy resolution of the case in favor of Ms. Fallini.

The results of this case are astounding and against public policy, and there is no dispute that a manifest injustice has occurred. Remarkably, if Ms. Fallini had actually hired a competent attorney who did nothing more than respond to the request for admission with a simple "deny," Ms. Fallini would not be liable for a million-dollar-plus money judgment and the case would be over. But most importantly, if opposing counsel had properly refused to offer material evidence that he knew to be false, judicial resources could have been preserved and justice swiftly carried out. None of this happened.

Notwithstanding the absurd results of this case thus far, the Court is now in a position to correct all wrongdoing by setting aside the recent judgment entered against Ms. Fallini pursuant to Nevada Rule of Civil Procedure 60(b) ("Rule 60(b)"). Under Rule 60(b), a court may set aside a judgment for fraud on the court. The same rule allows the court to relieve a party from a judgment for mistake, inadvertence, surprise, or excusable neglect. As set forth below, Ms. Fallini is entitled to such relief and the Court should set aside the judgment.

MATERIAL FACTS

I. Fraud Upon the Court

1. On March 1, 2007, Judith Adams ("**Plaintiff**") served the complaint on Defendant Susan Fallini ("**Fallini**"), suing Ms. Fallini for the death of Plaintiff's son after he struck one of Ms. Fallini's cows that was on the highway SR 375.

2. In her answer, Ms. Fallini listed as an affirmative defense NRS 568.360(1), which expressly provides that those who own domestic animals do not have a duty to keep those animals off highways located on open range and are not liable for any damage or injury resulting from a collision between a motor vehicle and an animal on open range highways.

3. Plaintiff and opposing counsel obtained and reviewed the "Nevada Highway Patrol Traffic Report" number NHP-E2005-00779 (the "**Accident Report**") before an early case conference (signed by opposing counsel) in which the investigating officer reports on page 4 that the collision occurred on open range approximately 7 miles past an open range warning sign. (A copy of the Accident Report is attached hereto as "**Exhibit 1**").

4. According to the Accident Report, the vehicle's speed exceeded the posted limit. The Accident Report found that at the time of side slipping, "not tak[ing] into account any braking that may have been applied" or speed lost as the vehicle struck the cow, the vehicle was traveling at a "speed of 73.52 miles per hour to 79.42 miles per hour." (Accident Report at 13).

5. The Accident Report marked the deceased as "At Fault." (*Id.* at 2).

6. The Accident Report states that "[t]he result of the blood test indicated that Mr. Adams had 0.08% of Ethanol Alcohol in his blood." (*Id.* at 22).

7. Plaintiff and opposing counsel obtained and reviewed the "Death Investigation Report" number 05-2339 (the "**Death Report**") with an official blood test of the deceased, which "contained a concentration of ethanol of 0.08 gram per 100 milliliters of blood. . ." (A copy of the Death Report is attached hereto as "**Exhibit 2**").

8. In a subsequent case conference report filed on October 23, 2007, opposing counsel reviewed Ms. Fallini's answer that stated the accident occurred on "Open Range."

9. Prior to serving the complaint, the Plaintiff created a website (www.michaeldavidadams.net) admitting that the accident occurred on open range ("This is open

range county and the cows have the right of way.") and advocating against open range laws. (A copy of certain web pages from the site are attached hereto as "**Exhibit 3**").

10. Opposing counsel did not disclose or produce discovery materials concerning the website at any point during this suit.

11. On information and belief, opposing counsel, prior to filing Plaintiff's Motion to Strike Defendant's Answer and Countercomplaint that contained the open range affirmative defense, advised his client to discontinue activity on the website.

12. Despite his and Plaintiff's knowledge to the contrary, opposing counsel sent a request for admissions that included, among other things, a request to admit that "Fallini's property is not located within an "open range" as it is defined in NRS 568.355."

13. Plaintiff's counsel fabricated an industry practice in the request for admissions that cattle in the area are marked with reflective or luminescent tags.

14. As indicated in the affidavits of Chris Collis, Tony Lesperance and Raymond E. Kretschmer, it is not common practice to attach luminescent tags to cows in Nye County. (Affs. of Chris Collis, Tony Lesperance and Raymond E. Kretschmer attached hereto as "**Exhibit 4**"). In fact, "it is simply unheard of". (*Id.* Lesperance Aff.) And a reasonable inquiry would indicate that marking cows with reflective or luminescent tags is not common practice. (*Id.* Collis, Lesperance, and Kretschmer Affs.).

II. Excusable Neglect

15. Ms. Fallini retained Harold Kuehn ("**Kuehn**") to represent and defend her, pursuant to which Kuehn filed an answer and counterclaim on Fallini's behalf.

16. Ms. Fallini is not an attorney, and being over 60 years of age, completely relied on and trusted her attorney to resolve the legal dispute quickly, efficiently and competently.

17. In June 2007, shortly after Kuehn filed Ms. Fallini's answer, he lied to her and told her that the case was over and that she had prevailed.

18. Unbeknownst to Ms. Fallini, however, the case was not over. In fact, litigation continued by way of discovery requests and motion practice by counsel for Plaintiff, 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.

19. Ms. Fallini did not receive direct notice of the foregoing neglect of her attorney.

20. Nonetheless, the Court entered partial summary judgment in which it imposed liability on Ms. Fallini for the accident.

21. In particular, Ms. 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.

22. 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. But despite these court-imposed sanctions, Ms. 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 the Court nor counsel for Plaintiff ever sent documents to Ms. Fallini, called Ms. Fallini or otherwise put Ms. Fallini on notice regarding the true status of the case (*i.e.*, that her attorney had failed her and that Plaintiff's counsel was taking advantage of Kuehn's absence and complete nonresponsiveness).

23. It was not until June 2010—three years after Kuehn told Ms. Fallini that the case was over and that she had prevailed—that Ms. Fallini learned the true status of her case when Kuehn's law partner, Tom Gibson ("**Gibson**"), discovered and advised Ms. Fallini what had truly happened with her case.

24. In immediate response to Gibson's news, Ms. Fallini retained new counsel.

25. In the meantime, Plaintiff sought a default judgment based upon the order granting summary judgment. The Court granted Plaintiff's application for default, vacated the jury trial and, after a prove-up hearing, imposed damages against Ms. Fallini in an amount that exceeded $2.7 million.

26. Ms. Fallini appealed this Court's order and the Supreme Court of the State of Nevada reversed and remanded the Court's award of damages against Ms. Fallini.

27. On April 18, 2013, Kuehn was suspended by the Nevada State Bar, recommending a psychological exam prior to reinstatement and suspending Kuehn from practicing law for five years. Grievance No. SG-10-0648 Harold Kuehn.

28. April 28, 2014 this Court issued a *new* judgment against Ms. Fallini consistent with the ruling from the Supreme Court of the State of Nevada.

ARGUMENT

Under NRCP 60(b), a district court may "set aside a judgment for fraud upon the court." Nev. R. Civ. P. 60(b). Further, NRCP 60(b)(1) gives the court discretion to set aside a judgment for "excusable neglect." *Id.* Although a "district court has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b)," *Stoecklein v. Johnson Elec., Inc.*, 849 P.2d 305, 307 (Nev. 1993), the Supreme Court of Nevada has "repeatedly held that cases are to be heard on the merits if possible." *Passarelli v. J-Mar Dev., Inc.*. 720 P.2d 1221, 1223 (Nev. 1986). As set forth below, it would be a clear abuse of discretion to permit a judgment of this nature to stand and thereby deny Ms. Fallini her day in court.

I. THE JUDGMENT SHOULD BE SET ASIDE PURSUANT TO NRCP 60(b) FOR FRAUD UPON THE COURT.

Under NRCP 60(b), a district court may "set aside a judgment for fraud upon the court." NRCP 60(b). There is *no* 6-month time limit on bringing a motion for fraud upon the court. *NC-DSH, Inc. v. Garner*, 218 P.3d 853, 856 (Nev. 2009). In fact, the Nevada Supreme Court said

"that there is no time limitation." *Id.* at 862 *quoting Price v. Dunn*, 787 P.2d 785, 787 (Nev. 1990). "Fraud upon the court has been recognized for centuries as a basis for setting aside a final judgment, sometimes *even years after it was entered*" because "no worthwhile interest is served" in protecting such a judgment. *Id.* at 858 (emphasis added). The concept of fraud upon the court

> embrace[s] only that species of fraud which does, or attempts to, subvert the integrity of the court itself, *or* is a fraud perpetrated *by officers of the court* so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases ... and relief should be denied in the absence of such conduct. *Id.* (emphasis added) *cf.* NRCP 60(b)(3) (allowing relief for fraud "of an adverse party;").

Simply, "a case of fraud upon the court calls into question the very legitimacy of the judgment." *Id. quoting Calderon v. Thompson*, 523 U.S. 538, 557 (1998). The conduct in question must cause more than mere disapproval. *Id.* Simple dishonesty *of an attorney*, however, is so damaging on courts and litigants that it is considered fraud upon the court. *Id.* at 859 *citing United States v. Throckmorton*, 98 U.S. 61, 66 (1878); *Damnajuk v. Petrovsky*, 10 F.3d 338, 352 (6th Cir. 1993). An officer of the court perpetrates fraud on the court (A) through an act that is calculated to mislead the court or (B) by failing to correct a misrepresentation or retract false evidence submitted to the court. Opposing counsel, an officer of the court, is guilty of both.

A. Opposing Counsel Purposely Mislead the Court By Forcing Fraudulent Facts Upon the Court.

Any act by an attorney that is calculated to mislead the court is fraud upon the court. In *NC-DSH, Inc. v. Garner*, for example, the Nevada Supreme Court found fraud upon the court when an attorney acted dishonestly. *Id.* at 859. The attorney made a fraudulent misrepresentation to the court by passing off a forged settlement agreement as genuine. *Id.* In another similar case, the Nevada Supreme Court found fraud upon the court when an attorney knowingly misrepresented testimony. *Sierra Glass & Mirror v. Viking Indus., Inc.*, 808 P.2d 512 (Nev. 1991). In *Sierra*, the attorney read a deposition into the record and purposefully omitted a portion to further his client's position. *Id.* at 516. The court reasoned that this behavior was "nothing other

than a fraud on the court" despite opposing counsel's framing the behavior as "clever lawyering and proficient advocacy." *Id.* The court held that "an act which is calculated to mislead the tribunal" in violation of Nevada Rule of Professional Conduct 3.3 is fraud on the court. *Id.* (citing to Supreme Court Rule 172, which has been repealed and replaced with NV ST RPC Rule 3.3).

The above cases cite Nevada Rules of Professional Conduct ("NRPC"), Rule 3.3 (or its predecessor) which states in part that "[a] lawyer shall not knowingly [m]ake 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." Nev. R. Prof. Conduct 3.3. Knowingly advancing false statement of fact to a tribunal, even if doing so through the guise of the discovery process, is fraud on the court and violates of NRPC 3.3. And using court processes to accomplish the foregoing is more deplorable because it attempts to force the court to be party to the fraud. Opposing counsel's fraud on the court, common with the above cases, is evidenced by his violation NRCP 3.3.

Opposing counsel, despite his knowledge to the contrary, advanced false facts using the discovery process in a calculated attempt to mislead the court. There can be no dispute that opposing counsel shirked his duty of candor. And there is no dispute that opposing counsel is an officer of the court. Plaintiff's counsel advanced the falsehoods that (1) the use of luminescent tags on cattle is common practice to falsely prove negligence and (2) that the accident did not occur on open range to avoid Ms. Fallini's absolute defense. Most importantly, Plaintiff's counsel did so knowing that the accident was on open range and that luminescent tagging is not common practice.

First, Plaintiff was in possession of the Accident Report as early as 2007. And although the Accident Report was listed on discovery production prior to the request for admissions, Ms. Fallini only recently obtained this report through her own efforts. This Accident Report clearly and unequivocally states that the accident was on open range. (Accident Report at 4). Second, Plaintiff created a memorial website advocating against open range law shortly after the accident

in 2005 (prior to filing the lawsuit). The website states that "Mike died on the famous ET Highway. The marker is located on state route 375; 27 miles North of Rachel, NV. He was traveling at night towards Warm Springs, Nevada. He encountered a cow crossing the road between mile marker 34-33 East side of the road. *This is open range county and the cows have the right of way*. We have placed a marker where the Jeep came to rest. As he was a Geologist we are asking everyone to place a rock at the marker." http://www.michaeldavidadams.net/Memorial%20Pictures.htm (last visited 4/2/2014) (emphasis added) (attached as Exhibit 3).

Despite the unequivocal statements contained in the Accident Report and his client's own admissions to the contrary as evidenced by the website, opposing counsel requested that Ms. Fallini admit that the accident was *not* on open range. This request came only *after* Ms. Fallini's counsel repeatedly neglected to attend hearings and respond to pleadings. In conflict with ethical rules, procedural rules, and equitable principles, opposing counsel sought admission of *known false* facts. In other words, Plaintiff's counsel abused the discovery process in a calculated maneuver to force fraudulent facts on the court. Plaintiff's counsel has subverted the integrity of the court calling into question the very legitimacy of the judgment.

Similar to the attorney in *Sierra Glass & Mirror* that knowingly omitted portions of a deposition in a calculated decision to further his client's interests, opposing counsel knowingly advanced falsehoods through the discovery process. This scheme was calculated to mislead the court, and to this point, has successfully done so *in spite of this court taking judicial notice that the accident was on open range*. Again and again, Plaintiff's counsel has passed off as genuine his *manufactured fraud* similar to the attorney in *NC-DSH, Inc. v. Garner*. Despite opposing counsel's knowledge to the contrary, in clear violation of professional responsibilities, and perpetrating a fraud on the court, opposing counsel made the calculated decision to employ procedural tools to advance the material falsehoods.

Plaintiff's counsel will undoubtedly argue that the fraudulent facts are "conclusively

established" and that Supreme Court disposed of the above argument. This is wrong. The issue that the Supreme Court discussed was the finality of admitted facts. The Supreme Court did not discuss and has never considered in this case whether an attorney commits fraud on the court by using the discovery process to advance false facts.

In fact, the language of the applicable legal rule supports Ms. Fallini's position. The General rule is that failure to timely respond to requests for admissions will result in those matters being conclusively established, and "[t]his is the case even if the established matters are *ultimately* untrue." *Smith v. Emerey*, 109 Nev. 177, 856 P.3d 1386 (1993) (emphasis added). [1] The word "ultimately" means "at the end of a process, period of time, etc." Merriam-Webster, http://www.merriam-webster.com/dictionary/ultimately, (last visited March 24, 2014). Thus, the words "ultimately untrue" mean if the matter is found to be untrue *at the end* of some process or investigation. There is a profound distinction between a fact that is "*ultimately* untrue" and one that is simply "untrue" from the very outset of the discovery process. This distinction avoids the "conclusively established" label without disturbing current legal precedent. If the attorney knows a fact to be false and advances the fact in a request for admission, the above rule is no longer applicable because the attorney, as an officer of the court, violated his professional obligations and committed fraud upon the court.

Because opposing counsel knew that the accident happened on open range, he committed fraud on the court by advancing a fraudulent fact through the very procedures of the court. What opposing counsel no doubt considers clever lawyering and proficient advocacy, as was argued in the *Sierra Glass & Mirror* case and rejected by the Nevada Supreme Court, is nothing other than fraud on the court. Request for admissions cannot be used to force fraudulent facts on the court.

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[1] *Conlon v. United States*, 474 F.3d 616, 622 (9th Cir. 2007) ("The rule is not to be used in an effort to 'harass the other side' or in the hope that a party's adversary will simply concede essential elements. Rather, the rule seeks to serve two important goals: truth-seeking in litigation and efficiency in dispensing justice.") (citations omitted).

That is not the purpose of the rules of civil procedure. The rules were not designed to manufacture claims and facts and then use those artificial claims and facts to blindside opposing parties and deceive the court. Clearly, it is against public policy to hold-hostage the judicial process through abuse of the discovery rules. This is exactly what Plaintiff's attorney did. The *Sierra Glass* court put it plainly: "an act which [is] calculated to mislead the tribunal" is not clever lawyering and proficient advocacy; it "is nothing other than a fraud on the court. . . ." *Sierra Glass & Mirror*, 808 P.2d at 516.

Additionally, Plaintiff's counsel willfully ignored his obligations under NRCP 11. By signing the complaint that he filed on behalf of Plaintiff, counsel for Plaintiff *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). Plaintiff's counsel was in possession of the Accident Report, which expressly stated that the accident occurred on open range. Pursuant to NRS 536.360(1), that was a *complete defense* to Plaintiff's complaint. Additionally, Plaintiff's website itself stated that the accident occurred on open range "on the famous ET Highway." Finally, as indicated in the attached affidavits, a simple call to the applicable regulatory agency or visit to the area would also provide opposing counsel with the simple truth that the accident occurred on open range. (Collis, Lesperance, and Kretschmer Affs. ("Anyone making a reasonable inquiry as to whether or not that stretch of highway is open range would find that it is open range.")).

Plaintiff's counsel not only failed to perform a reasonable inquiry before filing the complaint, he ignored his own client's admission and other evidence that made the suit frivolous. Further, Ms. Fallini's answer listed open range as an affirmative defense. Once faced with this *complete* defense, possessing the corroborating evidence, opposing counsel failed to retract the frivolous complaint and instead filed for summary judgment after distorting the facts through an

abuse of the discovery process not only violating NRCP 11, but also violating Nevada Rules of Professional Conduct 3.1. And opposing counsel did this when he knew that Ms. Fallini was no longer being represented and was not in a position to respond.

Nevada Rules of Professional Conduct 3.1 provides that a lawyer shall not assert an issue unless there is a basis in law and fact for doing so that is not frivolous. Again, the Accident Report, the website, the famousness of the ET Highway location of the accident, and finally, a simple inquiry to the applicable agency *all clearly indicate* that the accident happened on open range. Further, Plaintiff's counsel advanced luminescent tagging as common practice, which is another falsehood relied upon by the court to find Ms. Fallini liable. There can be no doubt that Plaintiff's counsel knew that his assertions were false. To that end, Plaintiff's counsel was obligated to accept known facts pursuant to Professional Conduct and Civil Procedure Rules while advocating zealously, but he instead sidestepped those obligations of an officer of the court and forced fraudulent facts on the Court by seeking an admission that his allegations were true, even when *he knew* they were not.

Opposing counsel's actions were calculated to mislead the court and have defiled the temple of justice. Despite opposing counsel's scheme, this Court took judicial notice that the accident was on open range. (Hr'g 7/19/2010). Judicial notice is not taken lightly or capriciously. There has never been a similar situation where a court took judicial notice of a fact in unequivocal contradiction of a deemed admitted fact. Alone, this ultimately unique circumstance highlights the inability of the court to "perform in the usual manner its impartial task," the severity of the fraud by opposing counsel, and the necessity to remediate.

Opposing counsel's list of ethical and professional violations leaves no doubt that fraud has been perpetrated on the court such "that the court is plainly unable to perform in the usual manner its impartial task of adjudging this case." *DSH, Inc.*, 218 P.3d at 858. Plaintiff's counsel violated his obligations under NRCP 11. Plaintiff violated Nevada Rules of Professional Conduct

3.1. Finally, abusing the discovery rules, opposing counsel violated his duty of candor under Nevada Rules of Professional Conduct 3.3. In sum, these violations were calculated manipulations of the judicial machinery itself to force fraudulent facts on the court subverting the very integrity of the court. Opposing counsel manufactured the blatantly false common practice of luminescent tagging to advance a frivolous lawsuit. Opposing counsel—by forcing the court to pronounce a clear lie that the accident was not on open range—has defiled the temple of justice. This utmost material fact was known by all parties *before the suit was even filed*, and it is a shame that opposing counsel's misplaced ethical considerations have advanced his client's frivolous claim so far.

B. Opposing Counsel's Failure to Correct His Misstatements and Misrepresentations is Fraud Upon the Court.

An attorney who fails to correct a misrepresentation or retract false evidence commits fraud on the court. In *Sierra Glass & Mirror v. Viking Industries, Inc.* discussed above, the Court reasoned that "[p]erhaps the most egregious action that Viking's counsel took was their failure to correct the misstatement once it was brought to their attention." *Id.* In that case, the attorney confused the concepts of effective advocacy and fraud and decided to file its brief despite knowing it contained a false representation. *Id.* at 517. Fortunately for the innocent party, the court found that the misrepresentation did not change the outcome of the case. *Id.* Because the attorney knew a representation in his filing was false, the Court labeled the filing a fraud on the court and sanctioned the attorney. *Id.*

Here, opposing counsel failed on multiple occasions to correct the misrepresentations of material fact. Opposing counsel moved to set-aside Ms. Fallini's answer, filed for summary judgment, opposed the motion to reconsider, and submitted briefs to the Nevada Supreme Court. All of these filings along with the accompanying hearings perpetuated the known falsehoods. This repetition only adds to the severity of the fraud.

Specifically, opposing counsel asserted that "Michael was lawfully driving . . ." (Mot. Summ. J at 4) despite holding evidence that the deceased was "At Fault", traveling at 73.52 miles per hour to 79.42 miles per hour (Accident Report at 2, 13 "this speed does not take into account any braking . . . or the speed lost as [it] struck the cow"), and had an alcohol blood level of .08. (Death Report at 7). The posted speed limit was 70 miles per hour. Thus, the deceased was not driving lawfully. Driving while intoxicated is illegal as "it is unlawful for any person who has a concentration of alcohol of 0.08 or more in his or her blood or breath to drive." NRS 484C.110. Opposing counsel knew that the deceased's blood alcohol level exceeded the legal limit, but instead represented to the court that "Michael was lawfully driving. . ." (Mot. Summ. J. at 4). Again, opposing counsel represented to the court in his capacity as an officer of the court that "Michael was traveling at a lawful rate of speed. . ." (*Id.*). Holding the contradicting Accident Report and having no evidence to support his assertions, opposing counsel thought it "clever lawyering and proficient advocacy" to mislead this tribunal concerning material facts that would otherwise provide Ms. Fallini a comparative negligence defense.

Further, opposing counsel manufactured false evidence using the discovery process. In fact, opposing counsel took affirmative steps to forward this fraud by counseling his client to deactivate the memorial website for her son that discusses open range laws and states the fact that the deceased's accident was on open range. Even after this court took judicial notice that the accident was on open range, opposing counsel failed to retract its manufactured and known false evidence to the contrary. This behavior alone is sufficient to grant Ms. Fallini's motion to set aside the default judgment.

In conclusion, counsel for Plaintiff capitalized on Ms. Fallini's lack of notice and the true status of her case. Counsel was well aware of Ms. Fallini's complete defense that would have resulted in the resolution of the case in Ms. Fallini's favor, but he was also aware of Kuehn's complete nonresponsiveness to the lawsuit. This created the perfect setup for Plaintiff: a lawsuit

that would otherwise never have survived a motion to dismiss, but an attorney who decided to completely abandon his client without telling her. Counsel for Plaintiff seized the moment, aggressively moved forward with the litigation, and continued to send pleadings directly to counsel for Ms. Fallini with full knowledge that Ms. Fallini had been abandoned by her counsel and was being deprived of legal representation. This scheme was formed and executed despite opposing counsel's knowledge that the accident was on open range, the deceased was driving unlawfully, and "luminescent tagging" was a fraudulent concoction. Such acts coupled with such knowledge should not be condoned by this Court and the judgment should be set aside.

II. THE JUDGMENT SHOULD BE SET ASIDE PURSUANT TO NRCP 60(b)(1).

Under NRCP 60(b)(1), a district court may relieve a party from a judgment on the grounds of "mistake, inadvertence, surprise or excusable neglect." The Supreme Court of Nevada has "repeatedly held that cases are to be heard on the merits if possible." *Passarelli v. J-Mar Dev., Inc.*, 720 P.2d 1221, 1223 (Nev. 1986).

> If there is a refusal to set aside a default, a ruinous judgment may be sustained against a party who, upon hearing, might have interposed a perfectly good defense. By sustaining the default, he would forever be debarred the right of a hearing.... this court ought not be very anxious to help him keep an advantage he has obtained, not through the justice or strength of his cause, but by the accidental blunder of his opponent.

Price v. Dunn, 787 P.2d 785, 788 (Nev. 1990) (quoting *Hotel Last Frontier Corp. v. Frontier Properties, Inc.*, 380 P.2d 293, 295 (Nev. 1963)). As set forth below, it would be a clear abuse of discretion to permit a judgment of this nature to stand and thereby deny Ms. Fallini her day in court.

The Supreme Court of Nevada has established guidelines for lower courts to examine a NRCP 60(b)(1) claim. The district court must analyze whether the movant: "(1) promptly applied to remove the judgment; (2) lacked intent to delay the proceedings; (3) demonstrated good faith; [and] (4) lacked knowledge of procedural requirements." *Bauwens v. Evans*, 853 P.2d 121 (Nev.

1993); *Epstein v. Epstein*, 950 P.2d 771, 773 (overturning meritorious defense requirement). Ms. Fallini has demonstrated these necessary elements *and* has multiple meritorious defenses.

Here, Ms. Fallini has promptly objected to the judgment—the court entered the judgment on April 28, 2014, and Ms. Fallini mailed her Rule 60(b) motion for filing on May 20, 2014. Unlike setting aside a judgment for fraud upon the court, NRCP 60(b)(1) must be filed with within six months of entry of judgment. NRCP 60(b). Nonetheless, Ms. Fallini has complied with that mandate. While the Nevada Supreme Court held in *Foster v. Dingwall* that this period is not tolled by the timely filing of a notice of appeal, that case had nothing to do with a party filing a Rule 60(b) motion based on a new judgment entered by the lower court. 228 P.3d 453. Here, because a new judgment was entered on April 28, 2014, the six-month time limit is renewed and Ms. Fallini's motion is timely.

Additionally, the record does not reflect that Ms. Fallini filed any motions to unnecessarily delay or prolong the matter. In fact, she moved as expeditiously as possible in hiring new counsel once she realized she had been abandoned by her attorney and unfairly blindsided by opposing counsel with contrived facts. Moreover, the record contains no indicia of bad faith on Ms. Fallini's part. Rather, Ms. Fallini has acted in good faith in bringing this motion and has acted honestly and without intent to cause harm or defraud. *See Stoecklein v. Johnson Elec. Inc.*, 849 P.2d 305, 309 (Nev. 1993). Furthermore, although unnecessary, a review of the record in this case reveals the clear existence of multiple meritorious defenses. And these defenses provide further weight to Ms. Fallini's claim to relief under NRCP 60(b), which is meant to ensure judgments on the merits.

First and most profound, in her answer, Ms. 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. There is no factual dispute that the accident at issue took place on open range. Open range provides a complete defense to Ms. Fallini as a matter of law and should have resulted in the resolution of the case in her favor.

Second, despite the unavailability and incompetence of her attorney during the discovery process, Ms. Fallini has recently uncovered evidence to advance a comparative fault defense. The Accident Report, which Plaintiff and opposing counsel possessed from the inception of the case, and the Death Report state that the deceased had a blood alcohol level of .08, which is beyond the legal limit. (Accident Report at 22) (Death Report at 7). Additionally, the Accident Report indicates that the driver was "At Fault" and was exceeding the legal speed limit at the time of the collision. (Accident Report at 2, 13). Importantly, the Accident Report states that an "Open Range sign is located approximately 7 miles south of the accident scene" (deceased was traveling northbound) (*Id.* at 4).

The remaining issue to be addressed is whether relief is available to Ms. Fallini pursuant to NRCP 60(b)(1). The facts in this case are strikingly similar to the facts in other cases where Nevada courts have set aside judgments. In *Staschel v. Weaver Bros., Ltd.*, the Nevada Supreme Court was faced with a nearly identical factual scenario. 655 P.2d 518–19 (1982). In *Staschel*, the defendant was served with process and a local attorney filed an answer and counterclaim. *Id.* The attorney then "failed to answer respondent's interrogatories, respond to the court order directing him to answer, or attend the hearing on damages following entry of the default judgment." *Id.* The defendant did not learn of the default judgment until six months after it was entered and after assuring the defendant that everything would be okay for several months, the attorney eventually informed the defendant that he was giving up the practice of law. *Id.* The Nevada Supreme court stated that the attorney's conduct constituted "actual misconduct" and that the defendant "should have his day in court." *Id.*

The *Stachel* Court's statements are particularly instructive in this case. The Court stated:

> Thus, *where a client is unknowingly deprived of effective representation* by counsel's failure to serve process, to appear at the pretrial conference, to communicate with the court, client, and other counsel, and the action is dismissed by reason of the attorney's misrepresentation, *the client will not be charged with responsibility for the misconduct of nominal counsel of record*, providing the client acts with due diligence in moving for relief after discovery of the attorney's neglect, and the opposing party's rights will not be prejudiced nor suffer injustice as a result of the granting of relief.

Id. at 519 (emphasis added) (quoting *Orange Empire Nat. Bank v. Kirk*, 259 Cal. App. 2d 347, 353, 66 Cal. Rptr. 240, 244 (1968)). This statement of the law makes it clear that Ms. Fallini should not be punished for the misconduct of Kuehn and that Ms. Fallini must have her day in court.

In *Passarelli*, the defendant had engaged the services of a local attorney to assist with litigation. 720 P.2d at 1223. Trial was scheduled for November 28, 1984, but neither defendant nor his attorney made an appearance. *Id.* After reviewing the documents and hearing the testimony of witnesses, the lower court entered judgment against the defendant. *Id.* Defendant moved to set aside the judgment entered against him and grant a new trial. *Id.* The district court denied defendant's motion, and he appealed. The Supreme Court of Nevada reversed. A review of the record in the *Passarelli* case revealed that defendant's then attorney was the victim of substance abuse. *Id.* As a result, the attorney's law practice had disintegrated and his performance became erratic and progressively worse. *Id.* Eventually, the attorney stopped coming to the office and was missing most appointments. *Id.* The Supreme Court of Nevada stated that it was "now the responsibility of this court to determine whether the conduct of [defendant's] counsel is to be imputed to [defendant]. *Id.* In answering that question, the court held that "to do so would be improper." *Id.* It found that "[c]ounsel's *failure to meet his professional obligations constitutes excusable neglect*." *Id.* at 1224 (emphasis added). And that defendant "*was effectually and unknowingly deprived of legal representation.*" *Id.* (emphasis added). The court determined that "it would be unfair to impute such conduct to [defendant] and thereby deprive him of a full trial on the merits." *Id.*

M-R Sign Co., Inc. v. Avery, 496 P.2d 756 (Nev. 1972) is also instructive. There, the district court found excusable neglect as defendant, after being served with a copy of plaintiff's complaint, forwarded the pleading to his counsel in Minnesota and "*relied upon the representations of that counsel*" that the matter properly belonged before the Minnesota courts and would be disposed of there. *Id.* at 757 (emphasis added). The defendant, in failing to file a responsive pleading, had no intent to delay the proceedings. *Id.* "He was unfamiliar with the procedural aspects of a lawsuit and *he relied upon representations of his counsel in Minnesota.*" *Id.* (emphasis added). Furthermore, there were allegations in defendant's motion to set aside the default judgment, regarding shifting of a liability on a promissory note, which, if proven, would tend to establish a defense to the action. *Id.* In affirming the district court's judgment to set aside, the Supreme Court of Nevada found that the record contained sufficient evidence upon which the district court could base its findings of excusable neglect and a meritorious defense. *Id.*

Finally, in *Ogle v. Miller*, 491 P.2d 40 (Nev. 1971), the defendant moved for an order setting aside a default judgment that had been entered against him for wages. The district court set aside the judgment and the Supreme Court of Nevada affirmed, finding excusable neglect under NRCP 60(b)(1). It held:

> In the instant case Miller, upon being served with process, contacted Attorney Michael Wendell, a friend, who also represented a codefendant. Mr. Wendell advised Miller that he would 'suggest to Mr. Cassin that we, Feature Attractions (the codefendant), take care of this obligation.' Believing the matter was settled, Miller did nothing further until he received notice that a whopping judgment—many, many times the amount of the original claim—had been entered against him. He then engaged his own attorney, who, after several months of negotiations with counsel for appellants, moved to set aside the default judgment. The district judge, under the facts presented, certainly did not abuse his discretion finding that Miller's failure to answer was excusable neglect on his part.

Id. at 42.

Ms. Fallini's case is no different from those cited above. In fact, it is even more compelling. Ms. Fallini's attorney's misconduct was not just negligent—it was outrageous. Kuehn did not just fail to answer requests for admissions. Rather, over the period of about a year

and 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 Plaintiff based on the unanswered requests for admissions, failed to appear at the hearing on that motion, and failed to respond to supplemental requests. In fact, other than filing the initial answer to the complaint and counterclaim in March 2007, and then telling Ms. Fallini in June 2007 that the case was over and she prevailed, former counsel for Ms. 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 Ms. Fallini. He otherwise ignored, disregarded, and abandoned Ms. 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. By the time this Court entered its original judgment that, in conjunction with the order granting summary judgment, left Ms. Fallini in default, everyone involved in the case, *except for Ms. Fallini,* was fully apprised and knew of the gross misconduct.

Indeed, all of the misconduct by Kuehn that resulted in summary judgment and, ultimately, default entered against Ms. Fallini occurred *after* Kuehn told Ms. Fallini that the case was over and that she prevailed. Ms. Fallini relied upon the representations of her counsel and at that point, Ms. Fallini had no reason to expect or inquire about continued litigation in this case. If ever there was a case where excusable neglect as to a defendant was present, this is it. Like the cases above, Ms. Fallini "*was effectually and unknowingly deprived of legal representation.*" *Passarelli v. J-Mar Dev., Inc.,* 720 P.2d 1221, 1224 (Nev. 1986). (emphasis added). And like the court above, this Court should find that "it would be unfair to impute such conduct to [Ms. Fallini] and thereby deprive [her] of a full trial on the merits." *Id.*

In short, based on the egregious nature of Ms. Fallini's attorney's misconduct, which is undisputed in this case and ratified by the extent and number of sanctions that were imposed based upon his repeated contempt of court and his eventual suspension from the practice of law,