IN THE SUPREME COURT OF THE STATE OF NEVADA

ENRIQUE RODRIGUEZ, AN INDIVIDUAL, Appellant, vs. FIESTA PALMS, LLC, A NEVADA LIMITED LIABILITY COMPANY, D/B/A PALMS CASINO RESORT, N/K/A FCH1, LLC, A NEVADA LIMITED LIABILITY COMPANY, Respondents.	Case No.: 72098 Appeal from the Eighth Judicial District Court, The Honorable Joe Hardy Presiding

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Appellant, Enrique Rodriguez ("Rodriguez"), is an individual.

2. Rodriguez was previously represented in prior proceedings in this Court and in the District Court by Bertoldo, Baker, Carter & Smith; Hutchison & Steffen; Paul Padda Law; April N. Bonifatto, Esq.; Selik Law Offices; and Marquis Aurbach Coffing.

Dated this 31st day of July, 2017.

MARQUIS AURBACH COFFING

By /s/ Micah S. Echols
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I. JURISDICTIONAL STATEMENT

Appellant, Enrique Rodriguez ("Rodriguez"), appeals from an order denying his motion for NRCP 60 relief, which was filed on December 28, 2016. Appellant's Appendix ("AA")5:966–972. Rodriguez timely filed his notice of appeal on January 5, 2017. AA5:973–975. Rodriguez has appealed from a special order entered after final judgment, which is appealable according to NRAP 3A(b)(8). *Ford v. Branch Banking & Trust Co.*, 353 P.3d 1200, 1202 (Nev. 2015).

II. ROUTING STATEMENT

This case is presumptively retained by the Supreme Court per NRAP 17(a)(13) and (14) because it involves issues of first impression that are of statewide public importance. This case involves unique issues regarding pro se plaintiffs and case-concluding discovery sanctions, including the application of the factors outlined in *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990). This case also involves a legal question regarding an NRCP 60(b) motion that was filed in a "reasonable time," as outlined in NRCP 60(b), specifically as to a party's diligence when a newly-appearing attorney prepares an NRCP 60(b) motion. Finally, this case involves important issues pertaining to NRCP 60(b) motions outside the context of default judgments for failure to answer.

III. ISSUES ON APPEAL

A. WHETHER THE DISTRICT COURT ERRED BY DENYING NRCP 60(b) RELIEF TO RODRIGUEZ WHEN:

(1) RODRIGUEZ DEMONSTRATED EXCUSABLE NEGLECT DUE TO THE LACK OF NOTICE FOR HEARING DATES, THE WITHDRAWAL OF HIS ATTORNEY LESS THAN TWO MONTHS PRIOR TO TRIAL, AND HIS SEVERE HEALTH PROBLEMS WHILE HE DILIGENTLY SOUGHT NEW COUNSEL;

(2) THE DISTRICT COURT FAILED TO ADEQUATELY CONSIDER THE FACTS AND CIRCUMSTANCES SURROUNDING PADDA'S WITHDRAWAL;

(3) RODRIGUEZ TIMELY FILED HIS NRCP 60(b) MOTION, WHICH THE DISTRICT COURT ERRONEOUSLY DEEMED "UNREASONABLE"; AND

(4) THE DISTRICT COURT CHARACTERIZED THE CASE-CONCLUDING DISMISSAL AS A DISCOVERY SANCTION BUT DID NOT CONSIDER THE *YOUNG* FACTORS.

B. WHETHER THE DISTRICT COURT ERRED BY FAILING TO DISQUALIFY ITSELF OR TO PROVIDE THE PARTIES AN OPPORTUNITY TO EVALUATE A POSSIBLE CONFLICT OUTSIDE THE PRESENCE OF THE JUDGE, WHEN THE JUDGE'S LAW CLERK PREVIOUSLY WORKED AS A LAW CLERK FOR DEFENSE COUNSEL'S LAW FIRM.

IV. STATEMENT OF THE CASE

In this appeal, Rodriguez challenges the District Court's denial of his NRCP 60(b) motion, which requested that the District Court set aside the orders dismissing his case and granting 16 motions in limine as unopposed, shortly after the withdrawal of Rodriguez's former attorney, which was only two months before

trial. Rodriguez's case arises from an incident at the Palms Resort (a.k.a. Fiesta Palms, hereinafter the "Palms") in which a blindfolded "Palms girl" threw promotional materials into a crowd of people in a sports bar, and a patron dove into Rodriguez, resulting in severe injuries to Rodriguez. AA1:20–29. After the District Court, as the trier of fact, awarded Rodriguez over $6 million, the Palms appealed the decision based on evidentiary errors, and in the prior appeal to this Court, the District Court's decision was reversed and remanded for a new trial. AA1:98–117. After the remand to the District Court, Rodriguez's former trial counsel withdrew, and Rodriguez obtained new trial counsel. AA1:118–134, 143–144, 155.

After an approximately 18-week delay in obtaining a trial date due to multiple department reassignments (AA1:146, 163), the District Court granted the Palms' motion for jury trial (AA1:182–186), converting this bench trial case into a jury trial case. The Palms further delayed the trial date by two months, at which point Rodriguez's former attorney, Paul Padda, Esq. ("Padda"), filed a motion to withdraw as counsel a mere two months before trial because preparing the case for a three-week jury trial would be a financial burden. AA1:197–211, 226–227.

After filing his motion to withdraw, but before the District Court had granted his withdrawal, Padda did not attend a pre-trial conference in which the trial date was set. AA1:212–220. With his attorney not in attendance, only a minimal

continuance was provided to Rodriguez for trial, even though he now needed to obtain a new attorney to get up to speed for a jury trial on a 10-year case—within only a matter of weeks.

The District Court granted Padda's motion to withdraw, which erroneously stated that Padda's withdrawal only two months before the jury trial would not be prejudicial to Rodriguez and that the Palms had agreed to some undefined "continuance" of the trial date. AA2:206–211. Despite EDCR 7.40(c) prohibiting the withdrawal of counsel if it will result in delay of the trial, Rodriguez was abandoned two months before a jury trial, with incomplete discovery and nothing but a request for a trial continuance submitted by his former attorney.

Less than two weeks after the order granting Padda's motion to withdraw (AA1:223–227), the Palms filed 18 motions, including 16 motions in limine, a motion for partial summary judgment, and a motion to dismiss. AA1:228–4:721. These motions included motions in limine to prevent testimony by Rodriguez's physicians, motions to bar evidence on certain damages, and, significantly, motions to bar testimony by the risk manager and the marketing director of the Palms, the two witnesses who were of critical importance to Rodriguez's prior bench trial. AA2:299–390, 398–404; AA3:471–495, 496–709. The motions in limine, in light of their content, would essentially eliminate Rodriguez's chances for success at a jury trial.

Rodriguez continued to search for an attorney. He appeared in the District Court for both the hearing on the motion to dismiss and the motions in limine to request continuances. AA4:722–728, 759–767. Regarding the motions in limine, Rodriguez explained to the District Court that he did not receive the motions in the mail, but the District Court determined that because Rodriguez appeared for the hearing, the motions must have been served upon him. AA4:736–737. Regarding the dispositive motions, Rodriguez believed that an attorney would attend the hearing for him and had confirmed the day before, but the attorney did not appear at the hearing. AA4:760–761. Rodriguez requested a continuance of "maybe a week" for the District Court to decide the dispositive motions. *Id.*

All 16 motions in limine were granted as unopposed, effectively destroying Rodriguez's case for trial. AA4:734; 4:769–775. Three days later, the District Court dismissed the entire case for failure to comply with discovery requirements. AA1:234; AA4:780–784. Yet, the case-concluding discovery sanctions were never brought to the Discovery Commissioner (EDCR 2.34(a)), and the District Court did not weigh the *Young* factors. *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990); *Chamberland v. Labarbera*, 110 Nev. 701, 704–705, 877 P.2d 523, 525 (1994) (applying the *Young* factors where sanctions are severe and effectively terminate the legal proceedings).

After the dismissal of his case, Rodriguez spent several months seeking counsel to assist him. He found a new attorney, Joel Selik, Esq. ("Selik"), who prepared an NRCP 60(b) motion based upon excusable neglect and mistake. AA4:788–871. Selik also submitted evidence including a declaration from Rodriguez's caretaker, explaining that Rodriguez needed assistance with even basic activities of daily living, such as cooking and showering. The declaration also explained that Rodriguez struggled with both his physical and mental health. AA4:868–871. The NRCP 60(b) motion argued that Rodriguez had no intent to delay the proceedings, had acted in good faith, and should have his case heard on the merits after actively and diligently prosecuting his case for ten years through trial and an appeal. AA4:788–871. The motion explained how Rodriguez contacted more than 20 law offices, and no attorney accepted the case so near to a jury trial with such a voluminous record. AA4:796–800, 806–808.

Despite the unusual facts and circumstances of this case, the District Court refused to grant NRCP 60(b) relief. The order denying relief concluded that Rodriguez's motion for relief was untimely because, although it was filed within six months from the dismissal order, Rodriguez allegedly "did nothing" for six months and did not file it in a "reasonable time" as required under NRCP 60(b). AA5:971. Rodriguez now appeals from the order denying his NRCP 60(b) motion.

V. STANDARDS OF REVIEW

This Court reviews a district court's decision "to grant or deny a motion to set aside a judgment under NRCP 60(b)" for an abuse of discretion. *Cook v. Cook*, 112 Nev. 179, 181–182, 912 P.2d 264, 265 (1996). However, the Court reviews de novo a district court's interpretation of the Nevada Rules of Civil Procedure. *Moseley v. Dist. Ct.*, 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008).

The review of discovery abuse sanctions is deferential. *Havas v. Bank of Nevada*, 96 Nev. 567, 570, 613 P.2d 706, 707–708 (1980). Nevada's policy favoring disposition on the merits requires a heightened standard of review where a sanction imposed is liability-determining. *Id.*

VI. FACTUAL AND PROCEDURAL BACKGROUND

A. THE INCIDENT.

On November 22, 2004, Rodriguez was watching a football game in the sports bar/book at the Palms. AA1:4, ¶9. During half-time, women known as the "Palms girls" were throwing souvenirs to patrons while blindfolded. *Id*. A Palms girl, later identified as Brandy Beavers ("Beavers"), threw a souvenir while blind-folded. AA1:22–24. A customer dove for the thrown souvenir and hit Rodriguez's extended left knee. Rodriguez then struck the person next to him, hitting the left side of his head, and fell down. *Id.*, ¶11. Rodriguez sustained severe injuries from the incident.

B. THE EARLY CASE HISTORY, BENCH TRIAL, AND JUDGMENT IN FAVOR OF RODRIGUEZ.

On November 15, 2006, Rodriguez filed a complaint in the District Court against the Palms. AA1:1–10. Rodriguez amended the complaint to include Beavers as a defendant after her identity was discovered. AA1:20–29. Rodriguez was represented by attorneys from the law firm Benson, Bertoldo, Baker & Carter n/k/a Bertoldo, Baker, Carter & Smith ("Baker"). A default against Beavers was entered in 2010. AA1:36–37, 87.

A bench trial was held in late 2010. AA1:39; AA3:661. After the close of evidence in the bench trial, the Palms moved for a mistrial, which was denied. AA1:43–47. At the conclusion of the bench trial, the District Court Judge Jessie Walsh granted Rodriguez's Rule 52 motion on liability against Palms. AA1:52–53. This ruling was based on trial evidence, including Palms employees' testimony stating: (1) throwing promotional items was inappropriate because it constituted a safety issue which foreseeably could cause injury to an individual; (2) meetings had been held to tell staff that items should not be thrown into crowds during promotional events; (3) the injuries suffered by Rodriguez were exactly the type that staff was concerned would occur if items were thrown; (4) Risk Manager testimony that throwing items into a crowd could foreseeably cause injury to someone in the audience, and throwing items into the crowd was inappropriate,

wrong and beneath the standard of care for the hotel in protecting the safety of their patrons on the premises. AA1:50. The Risk Manager also stated that she would have expected hotel security to stop anyone from throwing items. AA1:51. The District Court determined, as a matter of law, that the unequivocal testimony and undisputed facts established liability. AA1:51.

Following the bench trial, the judgment on the verdict was entered against the Palms and Beavers, jointly and severally, for $6,051,589. AA1:73–75, 87–89. The findings of fact and conclusions of law in support of the verdict set forth Rodriguez's damages, including past and future medical expenses, pain and suffering, and lost income. AA1:79–81.

C. THE PALMS APPEALS THE JUDGMENT, AND THE CASE IS REVERSED AND REMANDED FOR A NEW TRIAL IN LATE 2014.

The Palms appealed the judgment based upon claimed evidentiary errors and the exclusion of expert witnesses, which was docketed as Case No. 59630. AA1:99–115. In 2014, this Court reversed and remanded for reassignment to a new District Court Judge and a new trial. AA1:112. The remittitur issued on November 4, 2014, nearly eight years after Rodriguez's complaint was filed. AA1:117.

D. RODRIGUEZ'S BENCH TRIAL ATTORNEYS WITHDRAW, AND RODRIGUEZ STRUGGLES TO FIND NEW COUNSEL.

Despite previously obtaining a $6 million verdict, Rodriguez was faced with a pending new trial, and his trial attorneys withdrew from the case in December 2014. AA1:127–134. In early 2015, one month after the withdrawal of his attorney, a status check was held for a trial setting. AA1:135. Rodriguez requested a continuance to retain counsel, which the District Court granted. AA1:137. In this hearing, Judge Carolyn Ellsworth stated that she did not know if the parties wanted to move for a jury trial. AA1:139. She noted that Rodriguez's counsel had previously indicated that he had prepared the case as a bench trial, and it would be prejudicial to change that designation at the last minute. *Id*.

One month later, in February 2015, Rodriguez had just received his case file from his trial attorneys, Baker, and attended a status check and trial setting hearing. AA1:142. Rodriguez explained that he had met with attorneys but did not have his case file (over 50,000 pages) for the prospective attorneys to review. However, Rodriguez had meetings scheduled with Padda and another attorney, and Rodriguez believed Padda would be associating with attorney Robert Vannah. AA1:144. Rodriguez requested an additional 30 days for the prospective counsel to review the case documents. Counsel for the Palms, Justin Smerber, Esq. ("Smerber"), opposed Rodriguez's request, insisting upon a trial setting. The

bench trial was placed on the August 2015 stack. AA1:146, 147. Notably, this trial stack was less than six months away, and Rodriguez remained unrepresented but scheduled meetings with attorneys. AA1:135, 144, 146. The District Court suggested that a motion for a jury trial be filed as soon as possible and stated that she would "be happy to have it as a jury trial." AA1:147.

Rodriguez filed a peremptory challenge of Judge Ellsworth pro se, and the case was reassigned to Judge Abbi Silver. AA1:151. In late March 2015 and April 2015, Padda specially appeared with Rodriguez and requested continuances for more time to discuss matters with Rodriguez, and mentioned that Robert Vannah might also appear in the case. Padda noted that Rodriguez was trying to obtain the funds needed to proceed with his case and the possibility of a settlement conference. During this period, the Palms' counsel informed the District Court that the Palms planned to file a motion for jury trial. AA1:153–154.

E. PADDA APPEARS AS COUNSEL FOR RODRIGUEZ IN MAY 2015, AND TRIAL IS SET FOR DECEMBER 2015.

Padda appeared in the District Court on May 12, 2015. AA1:155. But, the case had been reassigned to Judge Richard Scotti. However, this assignment was also short-lived, as Judge Scotti disqualified himself because he had worked on the case with his former firm, which had represented the Palms. AA1:157. The case

was then reassigned to Judge Joe Hardy. AA1:158. This was the fifth reassignment of the case between the remittitur in November 2014 and May 2015.

In a hearing on June 15, 2015, Judge Hardy disclosed that his law clerk "previously worked for the Moran firm once upon a time" but did "not recall ever having worked on this particular case." AA 1:165. Smerber stated that the law clerk, Mr. Beckstead, was not with the Moran law firm when the case was assigned to the firm, so he did not see how it would be a conflict. AA1:165. But, the Moran law firm appeared in the case as defense counsel since the outset of the case in 2007. AA1:11–19.

Prior to the reassignment, this case was set for an August 3, 2015 trial. AA1:146. Due to the department reassignment, the trial date was reset to a December 14, 2015 jury trial on a stack, with this case being number one on the stack. AA1:163. **The change in department, therefore, delayed the trial date for four and one-half months in late 2015.** AA1:146, 163. Smerber requested three weeks for the jury trial. AA1:175. In July 2015, the District Court granted the Palms' motion for jury trial. AA1:182–186.

F. THE PALMS REQUESTS A CONTINUANCE OF TRIAL DUE TO A PERSONAL MATTER OF ITS COUNSEL, AND THE TRIAL IS CONTINUED TO A STACK BEGINNING FEBRUARY 2016.

The parties appeared for a status check in late September 2015, when the trial date was set for December 2015. AA1:188, 163. The Palms' counsel, Smerber, explained that he had a personal matter that was going to take him out of the office for most of December, so Palms was "requesting a continuance beyond the new year." AA1:189. The District Court suggested a stack in late January, and counsel for the Palms asked for "the next one." AA1:190. A fifth amended order setting civil jury trial was entered on September 29, 2015, resetting trial for February 28, 2016. **This continuance, requested by the Palms, delayed the case from a December 14, 2015 trial stack to a February 22, 2016 trial stack, delaying the case more than two months.** AA1:163, 194–195.

G. PADDA FILES A MOTION TO WITHDRAW AS COUNSEL FOR RODRIGUEZ IN JANUARY 2016.

Approximately eight months after appearing as counsel for Rodriguez, and only five weeks before the February 2016 trial date, Padda filed a motion to withdraw as counsel. AA1:194–195, 197–211. Padda's stated reason for withdrawing was that as an owner of a small firm, he was limited in how much he could financially "invest" in the prosecution of certain cases, and the costs of a jury trial were different from a bench trial. AA1:199. Padda stated that he told

Rodriguez about the financial cost of a jury trial after the motion for jury trial was granted, and "**Mr. Rodriguez requested that I not withdraw from his case until he could locate other counsel**." *Id.*, ¶4. Padda's declaration explained that he informed Rodriguez in December 2015 that he could no longer remain in the case. Padda's declaration states, "**Mr. Rodriguez again requested I not withdraw** and notified me during our meeting that another attorney would be 'stepping in' to replace me." *Id.*, ¶5. Padda admitted that he had not been contacted by any other attorney, and the trial was "looming at the end of February 2016," (one month from the date the motion was filed), but Padda submitted his motion to withdraw. AA1:199.

Padda's declaration also stated:

> Mr. Rodriguez will experience no material or adverse prejudice by undersigned counsel's withdrawal, since he previously acknowledged in a December 18, 2015 communication to undersigned counsel his understanding that this motion would eventually be filed.

AA1:200, ¶9. However, Padda requested the Court "continue the trial date to a reasonable time for Mr. Rodriguez to locate replacement counsel" and stated that the Palms' attorney "indicated he does not oppose this request." *Id.* Padda's motion to withdraw was based on NRPC 1.16(b)(7), "other good cause for withdrawal exists." AA1:201. Padda's motion argued that the withdrawal would

not "have any material or adverse effect on Mr. Rodriguez's interests, especially given opposing counsel's consent to a continuation of the trial date." *Id.*

H. PADDA FAILS TO ATTEND RODRIGUEZ'S PRE-TRIAL CONFERENCE IN FEBRUARY 2016.

Although Padda had submitted his motion to withdraw on January 19, 2016, an order had not been entered for the withdrawal in early February 2016. Nonetheless, Padda did not appear for the pre-trial conference on February 1, 2016. AA1:212–213. Smerber attempted to email Padda and call his office several times at the time of the pre-trial conference, and Padda's assistant stated that Padda was "in a meeting." AA1:212, 214. Smerber said he was willing to continue the trial date, but he would not waive the three-year rule or the five-year rule. AA1:215. The District Court reset the trial initially only one stack later, but Smerber explained he had previously agreed to provide Padda time to withdraw and new counsel to come on, so a new trial date was set for a stack beginning May 2, 2016, a continuance of approximately two months. AA1:215, 219–221. The sixth amended order setting civil jury trial was entered on February 4, 2016, and served upon Padda by email. AA1:221.

Padda's motion to withdraw was granted on February 16, 2016. AA1:223.[1] Neither the order granting Padda's withdrawal nor his motion to withdraw advised Rodriguez of the trial dates. There is no evidence that after his attorney withdrew, from February 16, 2016, forward, from the time Rodriguez was representing himself, that Rodriguez was provided notice of the trial dates.

After Padda withdrew, Rodriguez spoke to April N. Bonifatto, Esq. ("Bonifatto") and signed a retainer with her on February 10, 2016. AA4:762–763. Bonifatto told Rodriguez that she would try to settle the case, but if she could not, another attorney would help her try the case. AA4:806, ¶7.

I. THE PALMS FILES A MOTION TO DISMISS, A MOTION FOR PARTIAL SUMMARY JUDGMENT, AND 16 MOTIONS IN LIMINE SHORTLY AFTER PADDA'S WITHDRAWAL.

Three weeks after the withdrawal order was entered and before Rodriguez had obtained new counsel, the Palms filed a motion to dismiss. AA1:228–235. The Palms' motion was based on Rodriguez's failure to make pre-trial disclosures under NRCP 16.1 and failure to initiate a pre-trial conference under EDCR 2.67, after Rodriguez's counsel did not appear at the pre-trial conference. AA1:232–233. The Palms also argued that NRCP 37 sanctions were appropriate, and

[1] A minute order was issued on February 9, 2016, but the minute order was only provided to Padda and counsel for the Palms and was never mailed to Rodriguez. Rodriguez was only served with the order granting the motion to withdraw, which was mailed on February 16, 2016. AA1:222–227.

dismissal of the complaint was a permissible sanction for failure to comply with NRCP 16.1. AA2:234. The Palms stated that it "contacted Plaintiff on March 7, 2016 for the purposes of discussing EDCR 2.67; however, Plaintiff did not answer Defense Counsel's call." AA1:232. Notably, the motion to dismiss was filed that very same day when the Palms did not reach Rodriguez with apparently a single telephone attempt. AA1:228.

The same day, the Palms also filed a motion for partial summary judgment and 16 motions in limine. AA2:236–4:721. Motion in limine No. 1 attaches an unsigned, undated, and un-notarized "affidavit," in which Smerber stated he did not ever make contact with Rodriguez but "attempted in good faith to comply with EDCR 2.47." AA1:302–303. Smerber incorporated this unsigned, un-notarized "affidavit" to all 16 motions in limine by reference. AA2:393, 400.

J. THE DISTRICT COURT DENIES RODRIGUEZ'S REQUEST FOR MORE TIME TO RESPOND.

In April 2016, a hearing was held on the motions in limine. AA4:722–723. Rodriguez requested an extension to respond at the hearing because Padda had withdrawn from the case and was without counsel. *Id.* Rodriguez explained that he had been diligently looking for counsel since March, and it was difficult to find an attorney who was able to get up to speed on a case set for trial with such a large record. AA4:726:2–11. Rodriguez reminded the District Court that the Palms

requested an extension of the trial due to Palms' counsel having an ill family member, and Rodriguez did not object. AA4:727. Counsel for the Palms argued, "I represented the defendants throughout the time that Mr. Padda was on the case. **We didn't request any continuance.** . . . **At no point have we requested a continuance."** AA4:728. Smerber instead argued that Rodriguez was referring to a "pretrial conference," and Smerber had only "mentioned to Mr. Padda" that he would like trial to be bumped to the next stack due to a family member who was ill and later passed away. AA4:731–732. Smerber's statement in 2016 unambiguously contradicts the record from the status check hearing from September 2015 when Smerber then stated that the Palms was "**requesting a continuance beyond the new year**" (AA1:189:11–25), rejected the next stack beginning in late January, and requested "the next one" for a late February 2016 trial date. AA1:187, 190:8–12. Smerber continued to erroneously attribute all of the delay upon Rodriguez:

> As the Court's aware, we've been very patient—you know, when we came on the case at the end of 2014, **we were in the same position we're in right now**. Mr. Rodriguez was in proper person. He was saying he needed time to get counsel. He did that. We continued. We're a year later—over a year later and now he wants to continue the trial another six months. I just think, at this point, we're not agreeable to anymore [sic] extensions, Your Honor.

AA 4:729. Rodriguez explained that he was seeking an extension because Padda withdrew two months before trial, and reminded the District Court that an

extension was granted to accommodate Smerber's family emergency. AA4:727–728. The case was complex with over 70,000 pages of documents (AA4:726), and Rodriguez's health was also a factor. AA4:728. Rodriguez made clear this was not in the "same position" as at the end of the 2014, because although he was without counsel again, it was because his 2015 attorney, Padda, withdrew after telling Rodriguez he would take the case to trial. AA4:729.

Rodriguez attempted to explain his situation and the case history, but he had difficulty maneuvering court procedure when he was permitted to speak. AA4:734, 735. Several times, the Judge stopped Rodriguez and said he either needed to listen to the Judge, or he was not permitted to speak at that time. *Id.*

K. THE DISTRICT COURT GRANTS ALL 16 MOTIONS IN LIMINE BASED ON NON-OPPOSITION.

The District Court denied Rodriguez's request for an extension, focusing on the "ten years" since the case was filed, despite Rodriguez's argument that demonstrated much of that "ten years" was related to Defendants appealing Rodriguez's $6 million verdict. AA4:730 ("THE COURT: "[A]s I pointed out again, the case is filed…10 years ago." MR. RODRIGUEZ: "[I]t went to appeals….My case was good and that's what put this into the Supreme Court and the appeals. That was their decision.").

The District Court granted all sixteen motions in limine pursuant to EDCR 2.20(e) because no opposition was filed. AA4:723, 734. Rodriguez attempted to explain that he had not received the motions in the mail, and he could not respond to something he never received, but the Judge said he was "done." AA4:735–736. The Judge pointed out that Rodriguez had come to the hearing and requested that fact to be included in the order. AA4:736–737.

L. PRE-TRIAL CONFERENCE ON APRIL 11, 2016.

Four days after the hearing on the motions in limine, on April 11, 2016, a pre-trial conference was held with an appearance by Smerber for the Palms, and no appearance for Rodriguez—due to his lack of notice. Defense counsel requested dismissal of the case at this hearing, but the District Court declined to accelerate a dismissal because he wanted to see if Rodriguez appeared later that week for the motion to dismiss hearing. AA4:754–756.

M. THE DISTRICT COURT HEARS THE MOTION TO DISMISS AND DISMISSES RODRIGUEZ'S CASE.

On April 14, 2016, Defendant's motion to dismiss was heard. AA4: 759–767, 843–850. Rodriguez believed he had new local counsel, Jared Johnson, Esq. ("Johnson"), who told Rodriguez he would appear with him at the hearing. AA4:760. Rodriguez called Johnson prior to leaving his home in Riverside, California the day prior to the hearing and confirmed Johnson would attend the

hearing, but at the last minute, Johnson apparently did not attend the hearing. *Id.* Rodriguez requested the District Court postpone the hearing on the motion to dismiss for "maybe a week" to be able to attend a hearing with counsel. AA4:760–761.

The District Court granted the motion to dismiss and denied the motion for partial summary judgment, despite stating that he "sympathize[d] greatly" with Rodriguez's struggles with attorneys. The order dismissing the case was entered on April 21, 2016. AA4:782–783. In the order, the District Court concluded that Rodriguez failed to comply with NRCP 16.1, EDCR 2.67, and EDCR 2.68. *Id.*

N. SELIK APPEARS FOR RODRIGUEZ AND FILES AN NRCP 60(b) MOTION.

On October 14, 2016, Selik appeared for Rodriguez for purposes of filing an NRCP 60(b) motion. AA4:785–787. Rodriguez requested relief from the order dismissing the case as well as the order granting the 16 motions in limine. AA4:788–871. The motion was based upon excusable neglect, inadvertence, or mistake under NRCP 60(b). The Palms opposed Rodriguez's NRCP 60(b) motion. AA5:872–937. The Palms argued that Rodriguez received notice of all filings, delayed the filing of his NRCP 60(b) motion, and had delayed the case in general for 10 years. After a hearing on November 15, 2016 (AA5:949–962), the District

Court denied the motion for relief "for all the reasons set forth in the Opposition." AA5:960.

VII. LEGAL ARGUMENT

Rodriguez asks this Court to reverse the District Court's order denying him relief under NRCP 60(b) from both the final judgment and the order granting the Palms' motions in limine. Under the NRCP 60(b) standard, Rodriguez demonstrated excusable neglect because he did not have notice of all the hearing dates, his attorney withdrew less than two months prior to trial, and Rodriguez experienced severe health problems while he diligently sought new counsel. The District Court also failed to adequately consider the facts and circumstances surrounding Padda's withdrawal. Rodriguez timely filed his NRCP 60(b) motion, which should not have been deemed "unreasonable." Even though the District Court characterized the case-concluding dismissal as a discovery sanction, it did not consider the *Young* factors. Based on any of these reasons, the Court should reverse the order denying NRCP 60(b) relief.

Alternatively, the Court should vacate the order denying NRCP 60(b) relief because of the District Court's conflict of interest. If this Court determines that the District Court actually had a conflict of interest, the order denying NRCP 60(b) relief and all prior orders should be vacated. If the Court cannot make a determination as to the conflict of interest, the Court should instead remand the

case for factual findings to be made by a disinterested District Court Judge. Upon any of these grounds, Rodriguez urges this Court to grant him relief.

A. THE DISTRICT COURT ERRED BY DENYING NRCP 60(b) RELIEF TO RODRIGUEZ.

Under NRCP 60(b)(1), the District Court may relieve a party from a final judgment on grounds of mistake, inadvertence, surprise, or excusable neglect. To determine whether the requirements of the rule have been satisfied, Nevada courts look for the presence of the following factors: "(1) a prompt application to remove the judgment; (2) an absence of an intent to delay the proceedings; (3) a lack of knowledge of the procedural requirements on the part of the moving party; and (4) good faith." *Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 307 (1993); *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). A showing of a meritorious defense to the action is also required. *Id.* (citing *Deros v. Stern*, 87 Nev. 148, 152, 483 P.2d 648, 650 (1971)). Finally, the District Court must consider the underlying policy of deciding a case on the merits whenever possible. *Kahn v. Orme*, 108 Nev. 510, 513, 835 P.2d 790, 793 (1992).

1. Rodriguez Demonstrated Excusable Neglect Due to the Lack of Notice for Hearing Dates, the Withdrawal of His Attorney Less Than Two Months Prior to Trial, and His Severe Health Problems While He Diligently Sought New Counsel.

Excusable neglect depends on the facts of each case. *Stoecklein*, 109 Nev. at 273, 849 P.2d at 308. For example, a lack of procedural knowledge on the part of the moving party has always been given weight, but is not always necessary to show excusable neglect under NRCP 60(b)(1). *Stoecklein*, 109 Nev. at 273, 849 P.2d at 308. For example, in *Stoecklein*, this Court held that, although a party was a licensed attorney with knowledge of procedural requirements, lack of notice of the trial date provided a critical factor for excusable neglect. *Id.* In his NRCP 60(b) motion, Rodriguez set forth several grounds for his excusable neglect that resulted in the orders granting dismissal of his case and granting the Palms' 16 motions in limine. AA4:788–781.

It is a firmly established policy in Nevada that courts prefer that controversies be resolved on their merits whenever possible. *Hotel Last Frontier v. Frontier Properties, Inc.*, 79 Nev. 150, 380 P.2d 293 (1963); *Gutenberger v. Contl. Thrift & Loan Co.*, 94 Nev. 173, 175, 576 P.2d 745 (1978). In *Gutenberger*, 94 Nev. at 175, 576 P.2d at 746, this Court found that the trial court abused its discretion by failing to set aside a default judgment. This Court determined that the record was "replete with evidence satisfying the requirements" of NRCP 60(b).

Id. In that case, this Court concluded that the appellants "evidenced repeated good faith efforts" to act on the repayments that were the basis of, and therefore might prevent, the lawsuit. This Court also recognized that the appellants were offered opinions about the "vitality of the respondent's claim" and were advised that repayment might obviate the necessity of suit. *Id.* This Court recognized that reliance on the advice, and perhaps in spite of the advice, indicated that the appellants lacked the "**culpability which this Court considers a serious disregard of the judicial process**." *Id.* (emphasis added.)

While *Union Petrochemical Corp. of Nevada v. Scott*, 96 Nev. 337, 609 P.2d 323 (1980) contrasted its facts to the *Gutenberger* facts, *Gutenberger* is more similar to this case because *Union Petrochemical* involved a corporate party, represented by counsel, that did not respond to the court's orders arguably due to the headquarters' location in Texas and a stated lack of understanding of procedure. Here, Rodriguez acted in good faith throughout this litigation. While he appeared without counsel for the hearing on the motions in limine, at that time, he did not recognize that the Court would not grant a continuance based on his lack of counsel and his lack of ability to respond to 16 motions in limine, related to complex details of the case such as expert testimony, excluding the primary witnesses for Rodriguez's case, and damages. AA2:299–390, 398–404; AA3:471–495, 496–709). Furthermore, the Palms did not demonstrate good faith in

(1) failing to meet and confer with Rodriguez prior to filing the motion to dismiss, but making a single, unanswered telephone call on the day the motion was filed (AA1:228); and (2) failing to even sign the declaration for the Palms' 16 motions in limine. AA2:302–303, 393, 440. The District Court overlooked the failures of the Palms' experienced counsel to comply with the rules, while refusing to recognize Rodriguez's good faith efforts.

Rodriguez did not exhibit "serious disregard for the judicial process," but a good faith belief that the Court would see the complex predicament he was in: attempting to find new counsel for a fast-approaching three-week jury trial, with 18 motions on file without the physical, mental, or procedural understanding to represent himself. *Cf. Estate of Adams v. Fallini*, 386 P.3d 621, 625 (Nev. 2016) (upholding grant of NRCP 60(b) relief when an attorney took advantage of an opposing pro per litigant to create a false record). Rodriguez believed he found an attorney to attend the motion to dismiss hearing, who confirmed he would appear the afternoon before the hearing. AA4:760. Rodriguez understood that motions had been filed and not responded to, but he had not seen the motions or received them in the mail. AA4:735. Rodriguez acted with diligence to attempt to arrange an appearance of an attorney, but, unfortunately, the attorney did not appear. Again, Rodriguez acted with diligence and good faith and believed he was respecting the District Court's warning at the motions in limine hearing, when the

Judge said even though the deadline to respond may have passed, Rodriguez must "pursue this case" and attend the hearing. AA4:735.

In his NRCP 60(b) motion, Rodriguez presented detailed facts that supported his motion under the *Yochum* factors (98 Nev. at 487, 653 P.2d at 1217). AA4:788–871. These included the prompt application to remove the judgment, the absence of intent to delay the proceedings, a lack of knowledge of procedural requirements, good faith, and the underlying policy of resolving cases on the merits. AA4:788–802. Rodriguez did not exhibit "an intent to delay the proceedings." *Stretch v. Montezuma Min. Co*., 29 Nev. 163, 86 P. 445, 447 (1906) ("Every case depends largely upon its own facts, but courts are liberal in relieving defendants from defaults when they offer a good defense and have not been guilty of **inexcusable** delay."). Rodriguez himself did not display **an intent** to delay proceedings, nor was he guilty of "**inexcusable** delay." Rodriguez acted with diligence as could reasonably be expected from an individual in his circumstances, and, after many years of diligently pursuing his case, he did not display an **intent** to delay based on his conduct in the final few months of this case. His conduct in seeking counsel and requesting continuances was excusable and reasonable, considering that the District Court case had previously been delayed four and one-half months due to department transfers and two and one-half months for Palms' counsel's family medical emergency.

Second, under the *Yochum* criteria, Rodriguez also lacked knowledge of the procedural requirements. Rodriguez knew he must pursue his case, the District Court informed him there was a motion to dismiss hearing, and Rodriguez may have missed the deadline to file a written opposition. However, Rodriguez lacked knowledge of what was specifically required of him as a pro se defendant seeking counsel when he had already missed a deadline. These arguments were clearly presented in Rodriguez's NRCP 60(b) motion. AA4:798–799.

Furthermore, Rodriguez was not properly served with notice of the trial dates and the briefing schedule after his attorney of record missed the February 1, 2016 pre-trial conference and the trial dates and deadlines were changed. Rodriguez was never properly served with these dates after the time when he knew with certainty that he was without counsel.

Finally, the underlying public policy of the state of Nevada favors resolving cases on the merits whenever possible. *Yochum*, 98 Nev. at 487, 653 P.2d at 1217; *Hotel Last Frontier*, 79 Nev. 150, 380 P.2d 293. This Court noted in *Hotel Last Frontier*, "[A]n appellate court is more likely to affirm a lower court ruling *setting aside* a default judgment than it is to affirm a *refusal* to do so. In the former case a trial upon the merits is assured, whereas in the latter it is denied forever." *Id.*, 79 Nev. at 155–156, 380 P.2d at 295 (emphasis in original); *cf. Wylie v. Glenncrest*, 143 A.3d 73, 82 (D.C. App. 2016) ("Because the Court of Appeals universally

favors trial on the merits, even a slight abuse of discretion in refusing to set aside a default judgment may justify reversal."). Like the appellants in *Yochum*, 98 Nev. at 487, 653 P.2d at 1217, and *Gutenberger*, 94 Nev. at 175, 576 P.2d at 745, Rodriguez did not demonstrate a "serious disregard of the judicial process." Rodriguez appeared for two hearings in one week, despite living in California. He attempted to retain counsel and twice, after Padda's withdrawal, believed he had an attorney who would appear at the hearings on his behalf and provided the names of the attorneys to the District Court.

Rodriguez's ten-year case, including a trial and an appeal, should be decided on its merits, rather than dismissed as a result of opposing counsel filing 18 motions within two weeks of the withdrawal of Rodriguez's attorney. Rodriguez had counsel and diligently met all deadlines in this case from 2006, prior to filing his complaint, to 2016, when his attorney withdrew. The District Court did not adequately consider the facts and circumstances presented by Rodriguez, but instead simply adopted "all of the reasons" in the Palms' motion in its order denying the NRCP 60(b) motion.

2. The District Court Failed to Adequately Consider the Facts and Circumstances Surrounding Padda's Withdrawal.

The facts and procedural history surrounding Padda's withdrawal were not adequately considered by the District Court in reviewing the NRCP 60(b) motion.

Padda withdrew from this case two months prior to the scheduled trial, with nothing but a non-specific verbal agreement with the Palms' counsel that the parties would continue the trial to allow time for Padda to withdraw and for Rodriguez to find counsel. AA1:200, 197–204. While Padda's declaration states he asked defense counsel to continue the trial date due to the withdrawal, Padda did not agree to a length of the extension prior to withdrawal, and did not even appear for the pre-trial conference prior to his withdrawal when a new trial date was set. AA1:200, 212, 213–218.

EDCR 7.40(c) states:

> (c) No application for withdrawal or substitution may be granted if a delay of the trial or of the hearing of any other matter in the case would result.

Padda's motion to withdraw specifically stated that the withdrawal would not prejudice Rodriguez because he understood that the "motion would eventually be filed" and the Palms did not oppose a trial continuance for Rodriguez to locate replacement counsel. AA1:200, 201. The District Court's grant of Padda's motion to withdraw, which was explicitly based upon a need for a continued trial date, foreseeably resulted in the dismissal of this case and Rodriguez's procedural conundrum, facing sixteen motions in limine, a motion for partial summary judgment, and a motion to dismiss weeks before trial. Padda's abandonment of the case and the District Court permitting him to do so resulted in the dismissal of the

case, considering both Padda and the District Court were aware of the status of the case including the incomplete discovery with a quickly approaching trial date.

The Nevada Rules of Professional Conduct, Rule 1.16(b) defines an attorney's obligations when requesting permission to withdraw from a case. Padda requested withdrawal pursuant to NRPC 1.16(b)(7) based on "other good cause for withdrawal exists." AA1:201:11–23. Padda's abandonment of the case because a jury trial would be financially burdensome was not "good cause" under the circumstances of this case, nor did Padda actually set forth any disagreement about how to proceed with the case other than a general statement that he had a "difference of opinion regarding this case." AA1:220, ¶¶6, 10.

The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 44 (1996) explains,

> **[W]ithdrawal is not warranted simply because a client disagrees with a lawyer**, expresses worry or suspicion, **or refuses to accept the lawyer's advice about a decision that is to be made by the client**….Withdrawal is permissible, for example, if the client's refusal to disclose facts to the lawyer threatens to involve the lawyer in fraud or other unlawful acts, compromises the lawyer's professional reputation, or otherwise renders the representation **unreasonably difficult**.

The record does not reflect any evidence that Padda actually satisfied this standard beyond simply stating the standard language that he disagreed with Rodriguez.

This bare reason was not enough for the District Court to leave Rodriguez abandoned.

Additionally, Padda's financial burden did not outweigh the materially adverse consequences to his client. The RESTATEMENT, § 44 explains:

> Continuing to represent a client might impose on a lawyer an unreasonable financial burden **unexpected by client and lawyer at the outset of the representation**. That is **relevant** to good cause **but not conclusive**. Ordinarily, **lawyers are better suited than clients to foresee and provide for the burdens of representation**. **The burdens of uncertainty should therefore ordinarily fall on lawyers rather than on clients unless they are attributable to client misconduct**. **That a representation will require more work than the lawyer contemplated when the fee was fixed is not ground for withdrawal**."

(emphases added). After the case was remanded, Padda, as an experienced trial attorney, was in a better position than Rodriguez to understand the rules of civil procedure, the possibility that a new trial could be a jury trial rather than a bench trial, and the resulting financial consequences. Nevertheless, Padda agreed to represent Rodriguez and to take this case to trial. Padda did not even attend calendar call to explain that a longer period for a continuance was required due to Rodriguez's difficulty in finding a lawyer just two months before a three-week jury trial. AA1:212–217. Yet, the District Court permitted him to withdraw, to the great, foreseeable detriment to Rodriguez.

In summary, the facts and circumstances surrounding Padda's withdrawal were not adequately considered by the District Court in the context of Rodriguez's NRCP 60(b) motion. The public policy in Nevada favors cases being tried on their merits. Here, in light of the facts and circumstances of Rodriguez's case, the District Court abused its discretion in failing to adequately consider these facts and circumstances and instead simply agreeing with "all of the reasons" presented by the Palms' opposition. AA5:960.

3. Rodriguez Timely Filed His NRCP 60(b) Motion, Which the District Court Erroneously Deemed "Unreasonable."

The District Court improperly determined, as a matter of law, that Rodriguez had not filed his motion for relief from judgment in a timely manner, without reviewing the facts and circumstances or evidence presented as to the "reasonableness" and "diligence" of Rodriguez's actions. NRCP 60(b) requires that the motion for relief be filed in a "reasonable time…not more than 6 months after the proceeding was taken or the date that written notice of entry of the judgment or order was served." Rodriguez was pro se when the orders granting the motions in limine and dismissing his case were entered. He was in poor physical and mental health. AA4:808. He resided outside of Nevada, and he was required to locate and hire local counsel because the injury occurred in Nevada. *See id.* Any prospective attorney Rodriguez could find to even consider assisting him was

required to: (1) review a voluminous file from a lengthy and procedurally complex case; (2) obtain evidence related to the facts surrounding the dismissal; and (3) prepare a detailed NRCP 60(b) motion analyzing several factors based on this complex factual and procedural history. AA4:798. The District Court erred by determining that five months and three weeks to perform these tasks was not "prompt" and was "unreasonable," without examining Rodriguez's reasons for the timing of the filing of his motion. AA5:969.

The District Court, without sufficient evaluation of the factors relevant to the motion for relief from judgment, erred by assessing the timeliness of the motion. The District Court relied upon *Union Petrochemical*, 96 Nev. 337, 609 P.2d 323, to support its conclusion that six months is an outer limit for filing for relief of judgment, and "want of diligence" in a request to set aside a default judgment is sufficient to deny the motion for relief. However, *Union Petrochemical* involved a default judgment entered against a corporate entity, which was represented by counsel. *Id.*; EDCR 7.42(b). The orders interpreting *Union Petrochemical* to uphold dismissal of cases have not applied *Union Petrochemical* to dismiss cases where the application for relief was prior to six months, but in situations involving parties that filed an NRCP 60(b) motion for relief from a default often several months or years **after** the six-month limit provided in NRCP 60(b). *Hansen v. Aguilar*, 64239, 2016 WL 3136154, at *2 (Nev. App. May 25, 2016) (declining to

set aside judgment due to untimely motion where party waited more than three years to seek NRCP 60(b) relief). While "diligence" with respect to NRCP 60(b) motions has not been discussed in detail in Nevada case law, other jurisdictions have provided some guidance. Utah courts have required evidence to support the exercise of sufficient diligence to justify granting relief from a judgment entered as a result of his neglect. *Harrison v. Thurston*, 258 P.3d 665 (Utah App. 2011); *Menzies v. Galetka*, 150 P.3d 480 (Utah 2006) (citations omitted) ("Due diligence is 'conduct that is consistent with the manner in which a reasonably prudent [person] under similar circumstances would have acted.'").

Rather than comparing Rodriguez to a corporate party represented by counsel, as in the *Union Petrochemical* case, looking to case law on NRCP 60(b) relief under similar facts is instructive. In 2016, the District of Columbia Court of Appeals reviewed the denial of a Rule 60(b) motion filed by an unrepresented tenant who had a delay of two and one-half months before filing her 60(b) motion. *Wylie v. Glenncrest*, 143 A.3d 73 (D.C. App. 2016). In that case, the trial court determined that the tenant, Wylie, had "not acted promptly in seeking relief from default judgment." *Id.* at 87. On appeal, the court reversed and emphasized the importance of the circumstances of the case to determine whether an action was reasonably prompt. *Id.* The *Wylie* court considered the facts which related to the two-and-a-half months delay, namely, the tenant was evicted, "tried unsuccessfully

to get a lawyer," and then pro se tried to determine how to undo the judgment utilizing a landlord-tenant resource center. Further, the tenant was a working single parent with four children. On appeal, the D.C. appellate court concluded that the trial court abused its discretion in its denial of the 60(b) motion: "[J]ust as the court inadequately evaluated other factors relevant to Ms. Wylie's motion…the trial court inadequately assessed the timeliness of Ms. Wylie's motion. **Preliminarily, if the court was not persuaded** by Ms. Wylie's representations **that she was diligent in her efforts to seek relief from default judgment, it should have permitted Ms. Wylie to present the evidence she said she had in hand to substantiate those representations**." *Id.* at 88 (emphasis added). The appellate court noted that the relevant circumstances included the tenant's eviction, being unrepresented by counsel, and working full-time as a single parent to four children and that "three months hardly seems an inordinate amount of time for her to return to court." *Id.* The *Wylie* case was reversed and remanded for a full consideration of Rule 60(b)(1) and 60(b)(6) where the trial court's inquiry was initially too cursory to fulfill the court's responsibility, and the appellate court noted the trial court "should have held an evidentiary hearing to resolve material issues of fact and to make credibility determinations." *Id.* at 89.

Similarly, the Utah courts have overturned a trial court's denial of a Rule 60(b) motion involving the dismissal of a case of an unrepresented party,

when the circumstances leading to the dismissal were beyond the party's control. *Harrison v. Thurston*, 258 P.3d 665, 670–671 (Utah 2011). In *Harrison*, the Utah court explained:

> [A]lthough the district court has broad discretion in ruling on a rule 60(b) motion, we believe the district court's finding of insufficient diligence is unsupported because it ignores undisputed affidavit evidence and actions [plaintiff] took during the relevant period of time in which her suit was dismissed, and because it fails to consider the fact that the ultimate root of her problem—[her attorney's] suspension and the trustee's involvement in taking over her case—were factors beyond her control and not of her creation that no level of diligence on her part could have changed….

Id.

NRCP 60(b) is modeled on FRCP 60(b), as written before the latter's amendment in 2007. *Bonnell v. Lawrence*, 282 P.3d 712, 714 (Nev. 2012). NRCP 60(b) is, therefore, very similar to FRCP 60(b) in its language "within a reasonable time," with the exception of the six-month limit in Nevada and the one-year limit under the federal rules. Therefore, this Court may look to federal case law for guidance in interpreting this rule.[2] *Nelson v. Heer*, 121 Nev. 832, 834, 122

[2] FRCP 60(c)(1): "Timing. A motion under Rule 60(b) **must be made within a reasonable time**—and for reasons (1), (2), and (3) **no more than a year after** the entry of the judgment or order or the date of the proceeding."

NRCP 60(b): "The motion **shall be made within a reasonable time**, and for reasons (1), (2), and (3) **not more than 6 months after** the proceeding was taken or the date that written notice of entry of the judgment or order was served."

P.3d 1252, 1253 (2005); 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE, § 2851 at 227 (1995). Here, the District Court failed to even attempt any balance and quickly moved on to simply end the litigation, without adequate consideration of the facts and circumstances of this case.

Under federal case law, what constitutes a "reasonable time" "depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir. 1981). While some federal cases have concluded that a motion filed within the one-year federal rule limitation was not in a reasonable time, frequently these cases involve a party that did not set forth any reason for a delay. *Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 906 (6th Cir. 2006); *Million (Far E.) Ltd. v. Lincoln Provisions Inc. USA*, 581 Fed. Appx. 679, 681 (9th Cir. 2014); *Parts Pro Automotive Warehouse v. Summers*, 4 N.E.3d 1054, 1061 (Ohio 2013).

Here, Rodriguez, unlike the corporate party in *Union Petrochemical*, was pro se, and, therefore, his discovery of the "grounds for relief" of both an order granting dismissal and an order granting 16 motions in limine was not immediately understood on the day the order was entered. While Rodriguez likely had a sense that the dismissal was unfair to him, he did not know the specific grounds under

the law to seek relief. Further, Rodriguez is not a typical pro se defendant litigating his own case, as he never sought to litigate a multi-million dollar personal injury lawsuit on his own, and he was represented for nearly ten years on this case. Thus, unlike other case law considering pro se defendants who had filed motions and fully understood the legal issues and arguments in their case to request 60(b) relief (e.g., *Million*), Rodriguez simply recognized that he required counsel if he was going to do anything about the dismissal because he was physically and mentally unable to litigate a request for relief from judgment without understanding of the law.

Unlike the parties in federal case law, Rodriguez provided several reasons for his delay, such as his limited physical and mental health capacities compounded by living outside of Nevada. Rodriguez also explained that he needed: (1) time to find an attorney to pursue the 60(b) motion; (2) time for his **new** attorney to review a very large file with a complex procedural history; (3) time to obtain documents for preparation of the motion, which included submitted declarations and documents on his health needs; and (4) time for his new attorney to prepare a complex motion.

Additionally, the complexity of the NRCP 60(b) motion was not adequately considered. The orders in this case were for dismissal based on failure to perform specific discovery requirements and orders granting 16 motions in limine. The

preparation of an NRCP 60(b) motion was more complex and time consuming than a request for relief from a default judgment, as in the *Union Petrochemical* case, 96 Nev. at 338, 609 P.2d at 323.

The District Court abused its discretion by failing to adequately consider the evidence presented regarding Rodriguez's diligent actions, his reasons for delay and his absence of intent to delay the proceedings during the five and one-half months between the order and the filing of the 60(b) motion. The District Court's failure to consider these facts is evident from the Court's order denying 60(b) relief, which concluded Rodriguez "again **did nothing** to rectify the situation until nearly six (6) months after his case was dismissed," despite the clear evidence before the Court to the contrary. AA5:966–972.

4. The District Court Characterized the Case-Concluding Dismissal as a Discovery Sanction But Did Not Consider the *Young* Factors.

a. The Palms failed to bring the discovery violation issues to the Discovery Commissioner as required by EDCR 2.34.

The order granting the Palms' motion to dismiss states that dismissal was based upon NRCP 16.1 and NRCP 37. AA2:233–234. The District Court erred by considering this requested discovery sanction since it was never brought to the Discovery Commissioner. EDCR 2.34(a). "Any issue that was 'presentable' to the discovery commissioner but was not first raised to the discovery commissioner is

waived and cannot thereafter be raised in district court." *Valley Health System, L.L.C. v. Dist. Ct.*, 127 Nev. 167, 173, 252 P.3d 676, 680 (2011). C*f. Fitzpatrick v. Fitzpatrick*, 127 Nev. 1134, 373 P.3d 913 (2011) (citing EDCR 2.34(a) and concluding that the district court did not abuse its discretion by declining to consider appellant's motion for sanctions and default judgment related to discovery violations, as appellant did not present her discovery disputes to the discovery commissioner prior to filing the motion). Therefore, the Court should first conclude that the District Court was without authority to consider a discovery sanction when the Palms failed to first raise such issues with the Discovery Commissioner.

b. The District Court erred by failing to consider the *Young* factors while imposing case-concluding sanctions against Rodriguez.

The District Court erred by failing to provide relief from judgment when the orders granted case-concluding sanctions were entered without addressing the *Young* factors. The Palms' motion to dismiss was based on Rodriguez's failure to make pre-trial disclosures under NRCP 16.1 and his failure to initiate a pre-trial conference under EDCR 2.67. AA1:232–233. The Palms argued that dismissal was an appropriate sanction pursuant to NRCP 37(b)(2) because the District Court may impose any sanction pursuant to Rule 37(b)(2) and Rule 37(f) for failure to comply with NRCP 16.1. AA1:234.

An analysis of the factors in *Young*, 106 Nev. 88, 787 P.2d 777, was required for consideration of the sanction of dismissal. *Young* instructs that a district court should enter specific findings and conclusions when dismissing a party from a legal proceeding under NRCP 37. *Id.* at 780. The *Young* factors include:

> Degree of willfulness of the offending party,
>
> the extent to which the non-offending party would be prejudiced by a lesser sanction,
>
> the severity of the sanction of dismissal relative to the severity of the discovery abuse,
>
> whether any evidence has been irreparably lost,
>
> the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to the improperly withheld or destroyed evidence to be admitted by the offending party,
>
> the policy favoring adjudication on the merits,
>
> whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney,
>
> and the need to deter both the party and future litigants from similar abuses.

Young, 106 Nev. at 93, 787 P.2d at 780.

Nevada case law has applied the *Young* factors beyond dismissal with prejudice when sanctions are severe and effectively terminate the legal proceedings. *Chamberland*, 110 Nev. at 704–705, 877 P.2d at 525. Here, the

order was granted "without prejudice," but clearly was case-concluding in 2016, given this injury occurred in 2004 and this case was filed in 2006, and the statute of limitations would prohibit filing a new complaint. AA1:1–10.

In *Chamberland*, the district court sanctioned a party under Rule 22, refusing a trial de novo, where the party had not acted in good faith in arbitration. *Chamberland*, 110 Nev. at 704–705. In expanding that application of the *Young* requirements beyond the exact factual and procedural circumstances of *Young*, this Court stated:

> Although the procedural and factual climate of *Young* is different from the case at bar, the sanction at issue is the same. In the present case, the district court terminated the legal proceedings due to Chamberland's alleged misconduct. ***The magnitude of the sanction brings the action under the purview of Young***. *Young* instructs that the district court must enter specific findings and conclusions when dismissing a party from a legal proceeding under NRCP 37. This not only facilitates appellate review, but also impresses upon the district court the severity of such a sanction.

Chamberland, 110 Nev. at 704–705 (emphasis added).

In the dissenting opinion of *Bahena*, Justice Pickering explained that even the sanction of striking an answer could be a case concluding sanction:

> While the majority distinguishes this case from *Nevada Power* [*v. Fluor Illinois*, 108 Nev. 638, 645, 837 P.2d 1354, 1359 (1992)] by characterizing the sanctions as 'non-case concluding,' the reality is that striking Goodyear's answer did effectively conclude this case. The sanction resulted in a default liability judgment against Goodyear and left Goodyear with the ability to defend on the amount of damages only. Liability was seriously in dispute in this case, but

> damages, once liability was established, were not, given the catastrophic injuries involved. Thus, striking Goodyear's answer was akin to a case concluding sanction, placing this case on the same footing as *Nevada Power*.

Bahena v. Goodyear Tire & Rubber Co., 126 Nev. 243, 235 P.3d 592, 602–603 (2010) (Pickering, J., dissenting).

This Court has stated before entering a case-concluding sanction, the district court is required to hold an evidentiary hearing on the issue of sanctions. *McDonald v. Shamrock Investments*, LLC, 127 Nev. 1158, 373 P.3d 941 (2011); *Nevada Power v. Fluor Illinois*, 108 Nev. 638, 645, 837 P.2d 1354, 1359 (1992) ("If the party against whom dismissal may be imposed raises a question of fact as to any of [the *Young*] factors, the court must allow the parties to address the relevant factors in an evidentiary hearing."); *Young*, 106 Nev. at 93, 787 P.2d at 780.

Rodriguez also raised questions of fact on some of the *Young* factors on his own behalf during the hearing on the motion to dismiss. Specifically, Rodriguez explained the dismissal was unfairly penalizing him for the conduct of his attorneys. AA4:762–763. Then, in his NRCP 60(b) motion, Rodriguez challenged the District Court's interpretation of several factors that should have been analyzed under *Young* prior to dismissal, including the "[d]egree of willfulness of the offending party," as Rodriguez maintained his discovery failures were not willful

but related to the unusual circumstances of his case, his pro se status, and his physical and mental ability to pursue the case on his own when he was without counsel. Rodriguez also raised the issue of the severity of dismissal relative to the severity of the discovery abuse, the extent to which the Palms would be prejudiced by a lesser sanction, the policy favoring adjudication on the merits, and whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney. *Young*, 106 Nev. at 93, 787 P.2d at 780. Rodriguez requested consideration of the relevant criteria, which the District Court refused. In sum, the District Court erred by failing to consider the *Young* factors and hold an evidentiary hearing.

B. THE DISTRICT COURT ERRED BY FAILING TO DISQUALIFY ITSELF OR TO PROVIDE THE PARTIES AN OPPORTUNITY TO EVALUATE A POSSIBLE CONFLICT OUTSIDE THE PRESENCE OF THE JUDGE, WHEN THE JUDGE'S LAW CLERK PREVIOUSLY WORKED AS A LAW CLERK FOR DEFENSE COUNSEL'S LAW FIRM.

During the June 15, 2015 District Court hearing, the Judge disclosed that his law clerk had previously worked at defense counsel's law firm. AA1:165. The District Court erred by failing to either disqualify itself or to provide the parties an opportunity to evaluate a possible conflict outside the presence of the Judge. Although the attorneys were informed that the law clerk did not have a recollection of the case, no additional specific information was provided to Rodriguez such as

what dates the law clerk worked for defense counsel's firm, if there was a possibility of employment with the law firm after the clerkship, or whether the law clerk remained in social or professional contact with the attorneys or law clerks he worked with at the firm. This information was important because both Padda and Judge Hardy were new to the case—while the Moran law firm had been involved in the case from the outset. AA1:11–19.

Pursuant to the Nevada Code of Judicial Conduct, court staff such as law clerks must "act in a manner consistent with the judge's obligations" under the code of judicial conduct. CJC 2.12(A). A judge is required to perform all duties of judicial office fairly and impartially. CJC 2.2. In addition, a judge "shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment." CJC 2.4. "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…
>
> ….
>
> (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

CJC 2.11(A)(1)&(6). The comments to this rule clarify that a judge **is disqualified whenever** the judge's **impartiality might reasonably be questioned**, regardless of whether the specific provisions in paragraphs (A)(1) through (6) apply. CJC 2.11, cmt. 1. The comments provide the example of a judge "in the process of negotiating for employment with a law firm," who would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure. *Id.*

The Code of Judicial Conduct further states if a judge is subject to disqualification under the Rule, other than for bias or prejudice under (A)(1), the judge:

> may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, **outside the presence of the judge and court staff, court officials and others subject to the judge's direction and control, whether to waive disqualification**. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court staff, court officials and others subject to the judge's direction and control, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

CJC 2.11(C).

Case law in Nevada reflects that even an appearance at an arraignment, prior to becoming a judge, is sufficient to disqualify a judge based on implied bias and because the judge's impartiality might reasonably be questioned. *Turner v. State*, 114 Nev. 682, 962 P.2d 1223 (1998). In *Turner*, the party initially waived the recusal, but later believed implied bias warranted recusal of the judge. The party filed a motion which was not the correct procedure, as it did not comply with NRS 1.235(1) requiring an affidavit or certificate of good faith. *Turner*, 144 Nev. at 688, 962 P.2d at 1226. Nonetheless, the Court concluded the judge erred by failing to recuse himself, and this error mandated "automatic reversal" in that case of implied bias. *Id.* In explaining the automatic reversal rather than harmless error analysis, this Court stated,

> The Preamble to the NCJC states: "[J]udges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system." The United States Supreme Court has held that 28 U.S.C. § 455(a), a statute similar to Canon 3E, is designed to "avoid even the appearance of partiality." *Liljeberg v. Health Services Acquisition* Corp., 486 U.S. 847, 860, 108 S.Ct. 2194 [ ] (1988). We conclude that it would be inconsistent with these goals to apply a harmless error analysis to a judge's improper failure to recuse himself.

Id. Other jurisdictions have examined the issue of judicial law clerks working on cases where the clerk's future law firm employer is serving as counsel. *Hunt v. American Bank & Trust Co. of Baton Rouge, La*., 783 F.2d 1011 (11th Cir. 1986). In *Hunt*, the court examined whether a judge was required to recuse himself when

his law clerks accepted offers of employment from a law firm representing defendants. The Eleventh Circuit explained that one must look to whether a reasonable person, knowing all the circumstances, would harbor doubts about the judge's impartiality. *Id.* at 1015. There, the Eleventh Circuit explained that a "reasonable person might wonder about a law clerk's impartiality in cases in which his future lawyer is serving as counsel. Clerk's should not work on such cases….A clerk is forbidden to do all that is prohibited to the judge." *Id.* That case focused on the disqualification of the clerk, and explained that a reasonable person would not doubt the judge's impartiality so long as the clerk refrains from participating in cases involving the firm in question. *Id.* at 1016 (citing *Miller Industries, Inc. v. Caterpillar Tractor Co.*, 516 F.Supp. 84, 89 (S.D. Ala. 1980) (judge was disqualified where a clerk continued to work on a case involving a future employer).

Here, the District Court Judge's impartiality might reasonably be questioned, and the failure to recuse himself is a judicial error subject to automatic reversal. The law clerk continued to work on the case, most likely assisting in the research and development of critical decisions as well as the drafting of orders in the case, despite having previously worked at the firm that was requesting dismissal of a case spanning ten years, with a value of millions of dollars. Critical facts such as whether the judicial law clerk was seeking or hoping to be employed by his former

firm after completing the judicial clerkship, and whether the law clerk remained in close personal or professional contact with attorneys at the firm, may bear on his impartiality and were never provided to the parties in this case.

Without evaluation of facts to determine whether there is a reasonable concern as to the impartiality of the Judge and his law clerk in this case, the law clerk should have been screened from the case. Because the law clerk continued to work on this case, this raises a reasonable question, ultimately, about the Judge's impartiality as the law clerk is bound by the code that applies to the Judge. The judgment should be reversed in light of the judge failing to: (1) recuse himself based on the reasonable appearance of impartiality or bias; (2) require his law clerk to provide sufficient facts for the parties to, outside of the presence of the judge, evaluate the conflict; or (3) disqualify the law clerk from working on the case. A judge **is disqualified whenever** the judge's **impartiality might reasonably be questioned**, regardless of whether the specific provisions in paragraphs (A)(1) through (6) apply. CJC 2.11, cmt. 1. Impartiality might reasonably be questioned here, and the District Court erred in failing to take action to disqualify itself or the law clerk, provide sufficient information, and provide the parties a reasonable amount of time, outside of the presence of the Judge, to evaluate the conflict. If the Court determines that the District Court Judge, indeed, should have recused himself, the proper remedy is to vacate the offending orders. *Liljeberg v. Health*

Servs. Acquisition Corp., 486 U.S. 847, 867–868, 108 S.Ct. 2194, 2206–2207 (1988). Alternatively, if the Court believes that there are factual issues that need to be weighed to determine recusal, the proper remedy is a remand to an impartial and disinterested District Court Judge. *Ryan's Express v. Amador Stage Lines*, 279 P.3d 166, 172–173 (Nev. 2012).

VIII. CONCLUSION

In summary, Rodriguez asks this Court to reverse the District Court's order denying him relief under NRCP 60(b) from both the final judgment and the order granting the Palms' motions in limine. Under the NRCP 60(b) standard, Rodriguez demonstrated excusable neglect because he did not have notice of all the hearing dates, his attorney withdrew less than two months prior to trial, and Rodriguez experienced severe health problems while he diligently sought new counsel. The District Court also failed to adequately consider the facts and circumstances surrounding Padda's withdrawal. Rodriguez timely filed his NRCP 60(b) motion, which should not have been deemed "unreasonable." Even though the District Court characterized the case-concluding dismissal as a discovery sanction, it did not consider the *Young* factors. Based on any of these reasons, the Court should reverse the order denying NRCP 60(b) relief.

Alternatively, the Court should vacate the order denying NRCP 60(b) relief because of the District Court's conflict of interest. If this Court determines that the

District Court actually had a conflict of interest, the order denying NRCP 60(b) relief and all prior orders should be vacated. If the Court cannot make a determination as to the conflict of interest, the Court should instead remand the case for factual findings to be made by a disinterested District Court Judge. Upon any of these grounds, Rodriguez urges this Court to grant him relief.

Dated this 31st day of July, 2017.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 12,127 words; or

☐ does not exceed _____ pages.

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

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 31st day of July, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S OPENING BRIEF and APPELLANT'S APPENDIX, VOLUMES 1-5**, were filed electronically with the Nevada Supreme Court on the 31st day of July, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Lew Brandon, Esq.
Robert Eisenberg, Esq.

I further certify that I served a copy of this document and an electronic copy of Appellant's Appendix on disk by mailing a true and correct copy thereof, postage prepaid, addressed to:

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