IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * *

ENRIQUE RODRIGUEZ, AN INDIVIDUAL,

Appellant,

vs.

NO. 72098

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.

_____/

RESPONDENTS' ANSWERING 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. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock:

Fiesta Palms, LLC, was the original appellant in the previous appeal, No. 59630. On July 16, 2012, this court entered an order granting a motion to change

the caption in No. 59630, to reflect FCH1, LLC, as the new name for the appellant in that appeal docket.

The caption in the present appeal identifies former Fiesta Palms entities, and the caption states that the Fiesta Palms is now known as (N/K/A) FCH1, LLC.

FCH1, LLC, had been acquired by FP Holdings, LP, whose current parent corporation is Red Rock Resorts, Inc., which is a publicly-held company (NASDAQ: RRR).

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

Lemons, Grundy & Eisenberg
Moran Law Firm, LLC
Archer Norris
Lionel Sawyer & Collins
Stephenson & Dickinson, P.C.
Kemp, Jones & Coulthard

3. If litigant is using a pseudonym, the litigant's true name: None

DATED: Aug. 25, 2017

Robert L. Eisenberg

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Introduction

"There are certainly reasons, in the case at bar, to deny this motion for relief, . . ."

This is from Plaintiff's own motion for NRCP 60(b) relief. 4 A.App. 801:7.

"Defendant's points [in the opposition] are certainly well taken, and a strong argument can be made to not grant the relief, . . ."

This is from Plaintiff's own reply in support of his motion for relief. 5 A.App. 940:13-14.

A reversal of an order denying Plaintiff's motion for relief in this case will "*not be likely.*"

This quoted language is from Plaintiff's own reply on his motion for relief. 5 A.App. 940:7.

"Well, let us have a fourth out."

This is a quote from Plaintiff's own counsel at the hearing on the motion for relief. 5 A.App. 951:3. Counsel said his motion was like a baseball game in which a team gets a third out in the bottom of the ninth inning, but the team turns to the umpire and asks for a fourth out. 5 A.App. 950:24 through 951:5.

"It's the Hail Mary pass."

This is a quote from Plaintiff's own counsel at the hearing on the motion for relief, describing his own motion. 5 A.App. 951:21-22.

In addition to Plaintiff's correct characterizations of his motion as a request for a fourth out at the end of a baseball game, or as a desperate Hail Mary pass by a losing team at the end of a football game, another analogy is also appropriate: Plaintiff's motion requested a litigation mulligan. But as this court has recognized, such a do-over is only available for a golfer who hits a poorly executed tee-shot on a golf course; it does not apply in a litigation setting. *Huckabay Props. v. NC Auto Parts,* 130 Nev. Adv. Op. 23, 322 P.3d 429, 436 (2014).

Routing Statement

The Palms agrees with Plaintiff's position (AOB 1) that this case should be retained by the supreme court.

Statement of Issues

The only issue in this appeal is whether the district court abused its discretion by denying Plaintiff's motion for relief under NRCP 60(b).

Statement of Facts

1. Facts prior to reversal

Detailed facts regarding the incident at the Palms sportsbook are provided in the briefs in the prior appeal, Docket No. 59630, and will not be repeated here. In short, Plaintiff was allegedly injured while watching a televised football game at the Palms, when a harmless promotional item landed near him, and an unknown patron unexpectedly dove for the item and bumped into Plaintiff's leg. 5 A.App. 874.

Plaintiff sued the Palms, alleging negligence. 1 A.App. 1. Judge Walsh, sitting without a jury, ruled in Plaintiff's favor. 1 A. App. 82-83. The Palms appealed, and this court reversed the judgment due to prejudicial errors regarding admission and exclusion of evidence. The court remanded for a new trial and reassignment to another judge. *FCH1, LLC v. Rodriguez*, 130 Nev. Adv. Op. 46, 335 P.3d 183 (2014).

2. Proceedings after first appeal

Shortly after the reversal and the remand, Plaintiff's first attorney, Steven Baker, withdrew as counsel due to a breakdown in communications with Plaintiff. 1 A.App. 122. On December 4, 2014, the court issued an order scheduling a status check for January 9, 2015. 1 A.App. 130. The order was served on Plaintiff at his address in Riverside, California. *Id.* The district court granted Baker's motion to withdraw (1 A.App. 131), and Plaintiff personally appeared at the court status check. 1 A.App. 136. Plaintiff requested a 30-day continuance, which the court granted, continuing the matter until February 13, 2015. 1 A.App. 136-40.

At the continued status check on February 13, 2015, Plaintiff personally appeared again and asked for more time. 1 A.App. 143-46. The district court accommodated him again, setting a new status check for July 24, 2015, with a calendar call for trial on a stack scheduled for August 3, 2015. *Id.* This gave Plaintiff approximately five additional months to deal with his case.

After two hearings with Judge Ellsworth, Plaintiff filed a preemptory challenge against the judge. 1 A.App. 149. Plaintiff eventually hired attorney Padda. There were three hearings in March and April of 2015, all resulting in further delays at Padda's requests. 1 A.App. 153.

The case was eventually assigned to Judge Hardy, who had his first hearing in the case on June 15, 2015. 1 A.App. 164. Padda appeared on behalf of Plaintiff. *Id.* Judge Hardy started the hearing by disclosing that his law clerk previously worked for the Moran firm (defense counsel) "once upon a time," but the clerk did not recall ever having worked on this case. 1 A.App. 165:11-14. The judge indicated that he did not see this as a reason to recuse himself, but he wanted to make counsel aware of the situation. 1 A.App. 165:13-15. Padda thanked the judge and said "I appreciate that," without asking for any more information, and without suggesting that the judge should recuse himself. 1 A.App. 165:16-17.

At that point, defense counsel noted that the law clerk was not actually with defense counsel's firm during the relevant time, and the judge commented that this would explain why the clerk did not recall the case. 1 A.App. 165:18-25.[1] Again,

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[1] The transcript has the judge saying: "That would explain why I didn't recall the case, then." 1 A.App. 165:24-25. This is obviously a typographical error, in light of the context of the judge's comment moments earlier. The word "I" in the transcript clearly should have been "he," referring to the law clerk who did not recall the case.

Padda did not ask for any additional information, did not suggest that the judge had a conflict, and did not indicate that the judge should recuse himself. The hearing went forward, and nobody raised the subject again. 1 A.App. 165-76.

At the hearing on June 15, 2015, the district court suggested an October 2015 trial stack, but Padda indicated he had other trials that would interfere with the court's suggested trial stack. 1 A.App. 172-73. Padda did **not** indicate that he was unable to stay on the case because the case had changed from a bench trial to a jury trial; he only indicated that he needed time to prepare and he needed the trial date "pushed out." 1 A.App. 172:1-7. The court scheduled a pretrial conference, a calendar call, and a trial stack in December 2015. 1 A.App. 175-76, 178.

On September 28, 2015, the court held a hearing, at which the parties stipulated to a continuance of the trial to February 2016. 1 A.App. 189-90. Attorney Padda did not say anything about his inability to handle the jury trial, or anything about financial constraints in the case. 1 A.App. 189-91.

In January of 2016, Padda moved to withdraw. The AOB states that Padda's reason for withdrawing was that he had a small firm, and he was limited financially because the case was a jury trial. AOB 13-14. Although financial reasons were mentioned in Padda's motion to withdraw, the **real** reason was that he and plaintiff had a "difference of opinion on how to best proceed in this litigation." 1 A.App. 199:18-19; 201:19-20. Padda explained to Plaintiff that "due to our difference of

opinion regarding this case, I can no longer effectively represent his interests." 1 A.App. 199:21-22. Padda had a meeting with Plaintiff on December 7, 2015, at which Plaintiff stated that another attorney would be stepping in to replace Padda. 1 A.App. 199:15-19.

A pretrial conference had been scheduled for February 1, 2016, but at that time neither Plaintiff nor an attorney on his behalf appeared at the hearing. 1 A.App. 213. Defense counsel Smerber explained that he had tried to contact Padda, without success. 1 A.App. 214. Smerber explained that he held off filing pretrial motions, as a courtesy to Padda. 1 A.App. 215:1-3. Smerber recommended that the case be placed on the next stack, to give Plaintiff time to obtain new counsel. 1 A.App. 215:4-7. The court rescheduled the pretrial conference, the calendar call and the trial stack. 1 A.App. 217:2-6. A copy of the court's scheduling order, which contained the new dates, was mailed to Plaintiff at his Riverside, California address. 1 A.App. 219-21.

Shortly thereafter, the court granted Padda's motion to withdraw, and a copy of the order was mailed to Plaintiff. 1 A.App. 223-24.

The Palms filed its motion to dismiss on March 7, 2016, nearly three months after Plaintiff met with Padda regarding Plaintiff retaining a new attorney. 1 A.App. 228. A copy of this motion, which included the hearing date (1 A.App.

230:3-5) was mailed to Plaintiff. 1 A.App. 235. The motion was based upon Plaintiff's failure to comply with mandatory rules. 1 A.App. 232-34.

On the same date, the Palms filed and served multiple motions in limine, all of which were mailed to Plaintiff. 2 A.App. 317, 397, 404, 410, 416, 423, 430, 436, 443, 449, 456, 463, 470; 3 A.App. 479, 502; 4 A.App. 717. Plaintiff's brief does not expressly accuse the Palms of filing the motions in limine improperly, but the brief seems to suggest that the Palms was taking advantage of Plaintiff's proper person status, or that the Palms was unfairly piling on multiple motions in limine. All motions in limine were required to be filed by March 7, 2016. 1 A.App. 219:25-26. The Palms was simply complying with this court-ordered deadline, by filing the motions on that date.

Plaintiff's brief points out that defense counsel's affidavit in support of the motions in limine was not signed, dated or notarized. AOB 17. Plaintiff is raising this point for the first time on appeal. If Plaintiff had raised the point in his motion for NRCP 60(b) relief, defense counsel would have had a fair opportunity to explain the situation regarding the affidavit—most likely just a clerical error. In any event, Plaintiff's brief fails to explain how his point regarding the affidavit has any relevance whatsoever on the only issue in this appeal, i.e., whether the district court abused its discretion by denying the NRCP 60(b) motion.

The court held a hearing on the motions in limine on April 7, 2016, and Plaintiff personally appeared. 4 A.App. 724. Plaintiff indicated he was still trying to obtain counsel. 4 A.App. 726:2-18. The court noted that Plaintiff had not filed opposition to the motions in limine, and the court granted the motions for this reason. 4 A.App. 725:13-18, 734:17-23. The district court warned Plaintiff about the need to do something in the case, and that a hearing was scheduled for the next week on the defense motion to dismiss. 4 A.App. 735:2-12.

At the hearing on April 7, 2016, Plaintiff tried to convince the court that he had not received court papers. He said that "[n]othing was received at my home," and he argued that he had not signed anything acknowledging receipt of papers. 4 A.App. 736:8-16. The judge was not convinced, informing Plaintiff that nothing needed to be signed for acknowledgement of receiving mail. 4 A.App. 736:13-15. Furthermore, Plaintiff's contention that he did not receive notices was obviously bogus, because he had appeared at the hearing, so he obviously received papers with the date and time of the hearing, as the judge noted with the rhetorical question: "Of course, that begs the question how are you here today?" 4 A.App. 736:20-21.

The next week, the court convened for a pretrial conference, but Plaintiff did not appear. 4 A.App. 754. This was despite the fact that a scheduling order had been mailed to Plaintiff, informing him of the hearing date. 1 A.App. 219-21. Defense counsel requested dismissal of the case, due to Plaintiff's failure to appear.

4 A.App. 755:11-14. The district court accommodated Plaintiff's proper person status, declining to grant the defense request for dismissal, and deciding to hold off on any rulings until another hearing the next week. 4 A.App. 756:5-16.

A hearing on the motion to dismiss was held on April 14, 2016, and Plaintiff attended the hearing. 4 A.App. 759. The court noted that Plaintiff had not filed opposition. 4 A.App. 760:10-15. Plaintiff indicated he was still trying to get counsel. 4 A.App. 760-63. The district court granted the motion, noting that Plaintiff was required to follow rules. 4 A.App. 765-66.

An order granting the defense motions in limine was entered on April 14, 2016, and notice of entry was served on Plaintiff on April 15, 2016. 4 A.App. 769-71. An order granting the motion to dismiss was entered on April 20, 2016, and notice of entry was served on Plaintiff the next day. 4 A.App. 780-82.

3. Plaintiff's motion for NRCP 60(b) relief

Plaintiff did not file an appeal from the dismissal order. Instead, he waited until October 14, 2016, at which time his new attorney, Mr. Selik, filed a motion under NRCP 60(b). 4 A.App. 788. This was exactly six months to the day since the hearing on the defense motion to dismiss; only seven days less than six months since notice of entry of the order of dismissal; and only two days less than six months since notice of entry on the orders in limine. Plaintiff admitted that he filed his motion "on the cusp of the six-month time limitation." 4 A.App. 798:2.

Plaintiff's motion falsely stated that Plaintiff had not been advised of, or given notice of, the trial date and related dates. E.g., 4 A.App. 790:13-24. This was demonstrably false, because Plaintiff had been given notice of the relevant dates, as noted above, and he had even appeared at hearings for which notices had been mailed to him.

Although Plaintiff's brief in this appeal places blame squarely on the Palms and its attorneys for Plaintiff's problems after the reversal and remand, Plaintiff's motion took the opposite view. The motion stated: "Plaintiff is seeking relief, **not for anything defendants did**, . . ." 4 A.App. 790:25 (emphasis added). The motion also stated: "It should be said at the outset, that **defendants have not done anything wrong in regards to this matter**, and this request is an imposition on them, . . ." 790:27-791:2 (emphasis added). At the hearing on the motion, Plaintiff's counsel told the court that the defendants are "**completely blameless**." 5 A.App. 951:9-10 (emphasis added).

Plaintiff's motion conceded that various notices were mailed to him, but he argued that such mailing was a "nullity" because Padda was technically still Plaintiff's counsel of record. 4 A.App. 791:17-18. Plaintiff cited no legal authority for the proposition that such a mailing is a nullity. Plaintiff argued that "technically, Plaintiff was never given proper notice of the trial dates, . . ." 4

A.App. 792:12-13. Plaintiff observed: "Plaintiff admits that the notice issue may be a technicality. . ." 4 A.App. 792:25.

Plaintiff's motion told the district court: "None of the prior attorneys withdrew having anything to do with Mr. Rodriguez, but withdrew for reasons of their own." 4 A.App. 796:27. This was false. There were two withdrawals in the record, **both** had everything to do with Plaintiff, including breakdowns in communication with him, and differences of opinion on how best to proceed in the litigation. 1 A.App. 122, 199, 201.

Plaintiff's motion made only vague and general references to his alleged difficulty in finding an attorney after the dismissal. 4 A.App. 798:12-16, 807:7-10. He provided no specifics about what he actually did during that six-month time frame before he filed his motion; he did not even indicate when he hired attorney Selik to file the motion. *Id.*

Plaintiff's motion also made a huge concession after recognizing that the motion was purely discretionary with the district court. Plaintiff conceded: "There are certainly reasons, in the case at bar, to deny this motion for relief, . . ." 4 A.App. 801:7.

The Palms filed an opposition to the motion. 5 A.App. 872. Plaintiff filed a reply. 5 A.App. 938. His reply admitted that the dismissal in this case, from which Plaintiff sought relief, was "certainly lawful." 5 A.App. 938:20. He also

asked the rhetorical question of "how many chances should a pro per litigant be given." 5 A.App. 939:10. He conceded that he already "did have several chances," and that "Plaintiff was given chances, even repeatedly, . . ." 5 A.App. 939:13-14, 18. Yet he asked the district court to give him "one more chance." 5 A.App. 939:22.

As noted above, Plaintiff's reply also conceded that if the district court denied relief, a reversal would "not be likely." 5 A.App. 940:7. And he conceded that the points made in the defense opposition to the motion were "certainly well taken, and a strong argument can be made to not grant the relief, . . ." 5 A.App. 940:13-14.

The district court held a hearing on the motion on November 15, 2016. 5 A.App. 949. As noted earlier in this reply brief, Plaintiff's counsel correctly characterized his motion as similar to requesting a "fourth out" in the bottom of the ninth inning of a baseball game, or making a Hail Mary desperation pass at the end of a football game. 5 A.App. 950-51. Although counsel requested the district court to grant relief from the dismissal order, counsel also conceded that "Your Honor's dismissal of the case at that time was well within your discretion." 5 A.App. 951:16-17. Counsel provided no real argument establishing grounds for Rule 60(b) relief, other than a desperate plea to give Plaintiff "one more chance." 5 A.App. 952:15. Counsel then conceded that the district court's ruling on the motion for relief was "clearly in Your Honor's discretion." 5 A.App. 959:18-19. The

district court exercised its discretion by denying the motion. 5 A.App. 960-61, 968-72. This appeal followed.

Argument

1. Standard of Review

Plaintiff asserts that this court reviews an NRCP 60(b) ruling for abuse of discretion. AOB 7. We agree. Plaintiff also contends, however, that this court reviews a district court's interpretation of NRCP provisions *de novo*. AOB 7. Although this might be correct in the abstract, it is not applicable here. Plaintiff's Rule 60(b) motion did not ask the district court to interpret any NRCP provisions, and the district court did not do so. Additionally, Plaintiff's motion asserted: "On appeal, the appellate court uses the 'abuse of discretion' standard of review." 4 A.App. 795:6-7. At the hearing on the motion, Plaintiff's counsel argued that the decision on the motion was "clearly in Your Honor's discretion." 5 A.App. 959:18-19. In fact, Plaintiff's counsel even argued that the district court's earlier order dismissing the case "was well within your discretion." 5 A.App. 951:17.

Therefore, the only standard of review applicable here is abuse of discretion.

2. Plaintiff improperly relies on Judge Walsh's award.

Judge Walsh awarded $6 million after a bench trial, and Plaintiff's brief repeatedly refers to the award, as if it somehow reflects the strength or value of Plaintiff's case. E.g., AOB 3, 10, 19. The award was meaningless, irrelevant and

fatally flawed. This court unanimously reversed the award in *FCH1*, where the court found that Judge Walsh erroneously refused to consider admissible testimony of two defense witnesses, and she erroneously considered inadmissible testimony of three expert witnesses for Plaintiff.

Judge Walsh applied a wrong standard for expert witnesses, and she improperly struck and refused to consider testimony of the key defense expert on liability. This court noted that Plaintiff "did not present any expert testimony to the contrary," and the defense expert's testimony "could reasonably have shifted the district court's verdict in the Palms' favor." *FCH1* at ___, 335 P.3d at 188. The defense expert "offered a definitive opinion based on research and expertise, not speculation," and Judge Walsh's order striking his testimony was prejudicial error, because "it is probable that but for this erroneous ruling a different result might have been reached on the matter of Palms' breach." *Id.* at ___, 335 P.3d at 188-89.

Judge Walsh also erroneously struck and refused to consider the testimony of a defense economist, whose testimony attacked Plaintiff's evidence on damages; and the judge erroneously admitted and considered testimony by three of Plaintiff's treating physicians. *Id.* at ___, 335 P.3d at 189-90. Judge Walsh's award was so infected with error that this court took the unusual step of ordering the case assigned to a different judge on remand. *Id.* at ___, 335 P.3d at 190.

Under these circumstances, Judge Walsh's award deserves no weight whatsoever, and this court should ignore Plaintiff's reliance on the award as somehow indicating that Plaintiff has a legitimate multimillion dollar case.

3. The district judge did not err by failing to disqualify himself.

At the hearing on June 15, 2015, the district judge voluntarily disclosed information regarding his law clerk. The entire colloquy between the judge and counsel is as follows:

> THE COURT: Okay. Before we begin, I need to disclose that my Law Clerk previously worked for the Moran firm once upon a time. Does not recall ever having worked on this particular case. So, I don't see that as a reason to recuse myself but need to make you aware of that.
>
> MR. PADDA: Thank you, Your Honor. I appreciate that.
>
> MR. SMERBER: I can also represent to the Court, Mr. Beckstead was actually not with our firm when we had this case assigned to us.
>
> THE COURT: Oh. Okay.
>
> Mr. SMERBER: So, I don't see how that would be in conflict.
>
> THE COURT: That would explain why I [he] didn't recall the case, then. Thank you.

1 A.App. 165:11-25.

Plaintiff's attorney did not ask for any additional information, and he did not ask for an opportunity to evaluate a possible conflict. The topic was dropped, and it was never mentioned again at that hearing or anywhere else in the 1,004 pages in

Plaintiff's appendix in this appeal. Importantly, Plaintiff never filed a motion to disqualify the judge, and the issue was not raised in Plaintiff's NRCP 60(b) motion.

Plaintiff's brief now argues that the district court erred by failing to disqualify himself, or by failing to provide the parties an opportunity to evaluate a possible conflict. AOB 45-51. The issue was not preserved for appeal, and the issue is frivolous.

a. The issue was not preserved for appeal.

This court does not consider issues raised for the first time on appeal. See *Old Aztec Mine, Inc. v. Brown,* 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). This rule applies to appellate contentions dealing with disqualification of judges, because these contentions can and should be raised initially in the district court. See *Teagues v. State,* 2016 WL 3213541 *1, fn.1 (Nev. Ct. App.; unpublished; No. 68327; May 26, 2016); see also *State v. Rizzo,* 31 A.3d 1094, 1125 (Conn. 2011) (appellate courts do not review judicial disqualification claims raised for the first time on appeal, because the parties, by failing to object, are deemed to have consented to participation of the judge).

In *Brown v. Federal Sav. & Loan Ins. Corp.,* 105 Nev. 409, 777 P.2d 361 (1989), the trial judge's daughter was employed as a law clerk at the firm representing a party in a case pending before the judge. The appellants were defendants in the case. Although other co-defendants filed a motion for recusal,

appellants did not file their own motion, and they did not join in the other defendants' motion. This court held that the appellants failed to preserve the issue for appeal, and waived the issue, as a result of their failure to file a motion for recusal. *Id.* at 412, 777 P.2d at 363.

In the present case, Padda did not object or request additional information when the judge disclosed the law clerk's previous work for the Moran firm. As such, Padda consented to Judge Hardy's participation. Moreover, Plaintiff never filed a motion for recusal, and he thereby waived the issue, as in *Brown.* If Plaintiff had an excuse for consenting to Judge Hardy's participation or for not filing a motion for recusal before the dismissal, Plaintiff should have raised the issue in his NRCP 60(b) motion, which he did not do.

In summary, attorney Padda did not object when Judge Hardy made the initial disclosure or at any of the other proceedings while Padda was representing Plaintiff; Judge Hardy made numerous rulings while Plaintiff was representing himself, and Plaintiff never raised the issue; and even when Plaintiff retained attorney Selik for the NRCP 60(b) motion, Selik never raised the issue of disqualification in his motion, his reply, or at the hearing.

The only issue in this appeal is whether Judge Hardy abused his discretion by denying Plaintiff's NRCP 60(b) motion. Because Plaintiff did not raise the recusal issue in the motion, his argument on appeal is improper and should be ignored.

b. The issue is frivolous anyway.

Even if this court decides to consider the disqualification issue, Plaintiff's contention is frivolous. Plaintiff's brief starts by arguing that when the judge made his disclosure, no additional information was provided, such as the law clerk's date of employment with defense counsel's firm, whether there was a "possibility" of employment with the firm after the clerkship, or whether the clerk maintained contact with the firm. AOB 45-46. The brief ignores the fact that nobody requested the information.

The brief nevertheless argues that the information was important, because "the Moran law firm had been involved in the case from the outset." AOB 46 (citing 1 A.App. 11-19). This is highly misleading, as is the brief's previous statement that "the Moran law firm appeared in the case as defense counsel since the outset of the case in 2007." AOB 12. These statements incorrectly imply that the Moran firm was involved in the case continuously from 2007.

Although it is true that the Moran firm made an initial appearance for the Palms in April 2007 (1 A.App. 11), the firm was removed from the case by the Palms' insurance company in early 2008. 1 R.App. 4-5. This was all explained in a motion filed by the Moran law firm on January 27, 2012, after an attorney in that firm discovered that a Substitution of Attorneys form had not been filed by the Palms' new attorney in 2008, even though the form had been signed and sent to the

new attorney for filing. 1 R.App. 4-6. The Moran firm's motion asked for clarification of the record regarding the fact that the firm had not been in the case since early 2008. The district court granted the motion, ordering the court's record to reflect that the Moran firm was "effectively substituted out as Fiesta Palms LLC's counsel of record as of April 2008 and the record shall so reflect." 1 R.App. 22. The firm did not participate again until after the 2014 reversal and remand.

Plaintiff did not include these documents in his appendix, although they were accessible on the district court's website. In any event, it is simply not accurate for the opening brief to assert that the Moran firm represented the Palms throughout the litigation. And even if information regarding the Moran's firm was important, as Plaintiff now belatedly contends at AOB 46, all Padda needed to do was ask for more information at the hearing. He did not do so.

Plaintiff contends that a judge is disqualified whenever the judge's impartiality might reasonably be questioned. AOB 47. Nothing in this record suggests that Judge Hardy's impartiality might reasonably be questioned. He disclosed that his law clerk previously worked for the Moran firm, and that the law clerk did not recall ever having worked on the case. Defense counsel told the judge that the law clerk was not even with the firm when the case was assigned to the firm. 1 A.App. 165:11-20. Without more, this record does not establish any basis for questioning Judge Hardy's partiality.

Plaintiff relies on *Turner v. State,* 114 Nev. 682, 962 P.2d 1223 (1998). AOB 48. In that case, however, the judge himself had previously served as a deputy district attorney in the very criminal case in which the judge was presiding. Of course, the *Turner* court held that disqualification was mandatory. *Id.* at 687-88, 962 P.2d at 1226. *Turner* is inapplicable here.

Plaintiff also relies on *Hunt v. American Bank & Trust Co. of Baton Rouge,* 783 F.2d 1011 (11th Cir. 1986). AOB 48-49. The *Hunt* court held that if a law clerk has a conflict, it is the clerk, not the judge, who must be disqualified. *Id.* at 1016. In the present case, the record does not reflect that Judge Hardy's clerk worked for the Moran firm during any relevant time frame, or that the clerk ever worked on this case either at the law firm or while working for the judge. *Hunt* is therefore not applicable.

Plaintiff cites *Miller Industries, Inc. v. Caterpillar Tractor Co.,* 516 F.Supp. 84 (S.D. Ala. 1980). AOB 49. In that case, the judge's law clerk accepted a job at a firm representing one of the parties, but then the law clerk continued to work on the case with the judge for the next seven months, including when the judge heard the bench trial. The court held that the judge's impartiality was reasonably questioned, because of the law clerk's extensive participation with the judge on the case for seven months after accepting a job at the firm representing a party. *Id.* at 88-90. In the present case, there is absolutely no evidence that Judge Hardy's law

clerk had any expectation of working for the Moran firm while the clerk worked for the judge, or that the law clerk even worked on this case while he was employed by the judge.

Plaintiff's brief cites no case in which a court held that a judge is necessarily disqualified on a case merely because the judge's law clerk previously worked for one of the firms on the case. The opinions cited in Plaintiff's brief hold that a judge might be disqualified where the law clerk continues to work on a case pending with the judge after the law clerk has accepted future employment with a law firm representing a party in the case. This is not the situation here.

Plaintiff's brief baldly asserts that Judge Hardy's law clerk "continued to work" on this case while working for Judge Hardy. AOB 49-50. The brief fails to provide an appendix citation, because there is none. The judge's comment at the June 15, 2015 hearing certainly does not support the AOB's statement. 1 A.App. 165:11-25. Nothing else in the record, anywhere, supports the brief's statement.

Plaintiff's brief also speculates that the law clerk in question "most likely" assisted in research, development of critical decisions, and drafting of orders in this case. AOB 49. Again, not a word in the record supports this speculation.[2]

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[2] Other than some standard-form procedural scheduling orders, which were most likely prepared by the judge's clerical staff, all of Judge Hardy's substantive orders on motions were prepared by the attorneys for the parties, not by the (continued)

Even a judge's own prior professional relationship with a party in the case, or a relative of the party, does not demonstrate bias sufficient to warrant disqualification, without more. *Jacobson v. Manfredi,* 100 Nev. 226, 230-31, 679 P.2d 251, 254 (1984) (judge did not need to recuse himself in case in which he had prior working relationships with parties' principals). And in *Brown, supra*, the judge's daughter worked as a law clerk for a firm that was litigating the case pending with the judge. The judge's daughter had been screened by the law firm from any matters pending before her father, and there was "no need to disqualify the trial judge" under these circumstances. *Brown*, 97 Nev. at 412, 777 P.2d at 363.

Accordingly, any issue regarding Judge Hardy's failure to recuse himself was waived. And even if this court considers the issue, Plaintiff's contentions are frivolous and wholly unsupported by the record or the law.

4. The district court did not abuse its discretion by denying NRCP 60(b) relief.

Under NRCP 60(b), a party may move for relief from a judgment or order for various reasons specified in the rule, including mistake, inadvertence, surprise or excusable neglect. A motion asserting one of these reasons must be filed "within a

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(continued) judge's law clerk. E.g., 1 A.App. 226 (prepared by Plaintiff's counsel); 4 A.App. 782 (prepared by Defendant's counsel).

reasonable time," and "not more than 6 months" after notice of entry of the judgment or order being challenged.

As noted earlier, and as Plaintiff's counsel conceded in his motion and at the hearing, a decision on a motion for NRCP 60(b) relief is entirely within the trial court's discretion. In the present case, the district court was thoroughly familiar with the factual and procedural background. The judge had personally warned Plaintiff about the need to follow rules and obey orders, and about the need to be diligent in obtaining counsel.

For example, Judge Hardy's scheduling order of February 4, 2016, which was served on Plaintiff himself, stated: "**Failure of the designated trial attorney *or any party appearing in proper person* to appear for any court appearances or to comply with this Order shall result in any of the following: (1) *dismissal of the action* . . .**" 1 A.App. 220:6-8 (bold emphasis in original; italics emphasis added). Also, at a hearing in open court, Judge Hardy warned Plaintiff about the need to do something and the need to follow the rules. 4 A.App. 735:2-12.

The district court gave Plaintiff one break after another, until finally dismissing Plaintiff's case. Even later, when Plaintiff filed his motion for relief on the cusp of the six-month limit, the district court thoroughly considered and evaluated the motion, ultimately ruling against Plaintiff. This was a purely discretionary decision, which should be affirmed.

a. Plaintiff's case citations do not support a reversal.

Plaintiff's brief cites numerous cases dealing with NRCP 60(b) relief. Cases granting relief have involved extreme situations that are not applicable here. For example, *Stoecklein v. Johnson Elec., Inc.,* 109 Nev. 268, 849 P.2d 305 (1993), cited at AOB 23, was a case where the defendant's attorneys withdrew, but the court had a wrong address for the defendant. Consequently, there was no evidence that the defendant ever had any notice of the trial date. Further, the defendant filed his motion for relief promptly, only 35 days after judgment was entered. Relief from the judgment was allowed in that compelling situation, which is nothing at all like the present case.

Similarly, in *Yochum v. Davis,* 98 Nev. 484, 653 P.2d 1215 (1982), cited at AOB 23, a default judgment was entered after the defendant was served by publication. The defendant did not receive any actual notice of the case prior to the default judgment. Additionally, the defendant promptly filed the motion for relief, with a proposed answer.

It is apparent that neither *Stocklein* nor *Yochum* were similar to the present case, where Plaintiff did have actual notice of court proceedings, he appeared in court, and he filed his NRCP 60(b) motion at the last possible moment.

Plaintiff also relies on *Hotel Last Frontier v. Frontier Properties,* 79 Nev. 150, 380 P.2d 293 (1963) and *Gutenberger v. Contl. Thrift & Loan Co.,* 94 Nev.

173, 576 P.2d 745 (1978), at AOB 24. In *Hotel Last Frontier,* the defense counsel was having discussions with the plaintiff, to resolve the lease disputes in question, and he reasonably assumed a default would not be taken. The plaintiff entered a surprise default, and the defendant filed a motion for relief only one day later. Thus, relief was justified.[3]

In *Gutenberger*, the defendants were defaulted, but they had been advised by a bankruptcy attorney that the debt was discharged. They were in the process of negotiating with the plaintiff for a payment plan, and they had legitimate reasons to believe that no formal response was necessary. They moved for relief only one day after the default was entered. This situation justified relief, unlike the situation in the present case.

Plaintiff attempts to distinguish the present case from *Union Petrochemical Corp. of Nevada v. Scott,* 96 Nev. 337, 609 P.2d 323 (1980), where the defendant's excuse for not answering the lawsuit was primarily based on the fact that the defendant's corporate headquarters were located in Texas, and the corporation was

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[3] *Hotel Last Frontier* catalogued several cases decided before the date of that decision in 1963, many of which were cases where default judgments were set aside and the rulings were reversed on appeal, and cases where judgments were not set aside and the rulings were affirmed. 79 Nev. at 153, 380 P.2d at 294.

not familiar with Nevada procedural requirements. The district court denied NRCP 60(b) relief, and this court affirmed.

Plaintiff now attempts to distinguish *Union Petrochemical,* primarily because the defendant in *Union Petrochemical* was a corporation, and Plaintiff here is an individual. AOB 25. Even if this distinction is legitimate, which it is not, *Union Petrochemical* stands for an important legal proposition involving motions for NRCP 60(b) relief. Specifically, *Union Petrochemical* emphasized that such motions must be filed within a reasonable time, and not more than six months after the judgment being attacked. The opinion did not state precisely when the defendant filed its motion for relief, other than indicating that the motion was filed "almost" six months after the judgment was entered. 96 Nev. at 338, 609 P.2d at 323. The court held that the six-month period only establishes the extreme limit of reasonableness. *Id.* at 339, 609 P.2d at 324. The court held that lack of diligence in filing a motion for relief is enough itself to justify denial. *Id.*

In the present case, Plaintiff obtained an attorney, Mr. Selik, who filed the motion exactly six months after the hearing on the motion to dismiss, which was only two days short of six months after notice of entry of the order on motions in limine, and only seven days short of six months after notice of entry of the order dismissing the case. The motion provided no specific information about Plaintiff's efforts to obtain counsel during that critical six-month time frame, and no hint as to

when Selik was retained or what efforts Selik made to file the motion promptly after he was retained. The district court applied *Union Petrochemical,* determining that Plaintiff did not make a prompt application for relief. 5 A.App. 969-70. The court was well within its discretion, and this alone provides a basis for affirmance in this case.

Plaintiff cites this court's recent opinion in *Estate of Adams v. Fallini*, 132 Nev. Adv. Op. 81, 386 P.3d 621 (2016). AOB 26. *Estate of Adams* upheld an order granting NRCP 60(b) relief, but in that case the defendant was abandoned by her attorney, and the attorney was disbarred. In the meantime, the plaintiff's attorney committed fraud on the court by orchestrating a false scenario regarding accident facts. Relief was appropriate under those highly unusual circumstances, which are nothing at all like the circumstances in the present case.

Plaintiff also cites and relies upon *Stretch v. Montezuma Min. Co.,* 29 Nev. 163, 86 P. 445 (1906). AOB 27. In that case, the defendant's corporate manager absconded with corporate money, and he could not be found. A lawsuit against the defendant was served, but the papers were forwarded to the missing corporate manager by an attorney who was unaware of the manager's flight. This caused the defendant's failure to answer on time. The court held that this was excusable, and relief from the default should have been granted. *Stretch* provides no support for Plaintiff's position in this case.

Plaintiff relies on *Harrison v. Thurston,* 258 P.3d 665 (Utah App. 2011). AOB 35. The need for relief from the judgment was manifest in that case. The plaintiff was abandoned by an attorney who was eventually suspended from the practice of law, and who closed his law practice. A trustee took 500 files from the attorney's office, and gave them to clients, but the plaintiff was not notified of the need to appear or to obtain new counsel. The plaintiff's case was dismissed, and she promptly filed a motion for relief. The plaintiff was three minutes late for the hearing, due to an unfortunate series of events, and the trial court denied the motion moments before the plaintiff arrived. The *Harrison* court understandably reversed, holding that the plaintiff diligently pursued her motion for relief, and that other factors weighed heavily in granting relief. *Id.* at 670-71. *Harrison* is nothing at all like the present case, where Plaintiff failed to show excusable neglect.

Plaintiff also relies on *Wylie v. Glenncrest,* 143 A.3d 73 (D.C. App. 2016). AOB 35. In that case, a working single mother of four children was evicted after eight years in her home. When she moved for relief from the eviction judgment, the trial court failed to conduct an adequate inquiry as required by local law; and the trial court did not give the defendant an opportunity to present her evidence regarding her lack of notice or the fact that she had receipts showing she had actually paid the rent that the landlord claimed was unpaid. She demonstrated excusable neglect in these circumstances, and her motion was timely. The *Wylie* court held

that the trial court's consideration of the defendant's motion was too cursory to comply with court requirements. *Id.* at 89. Therefore, the case was remanded for full consideration of the motion.

Plaintiff's reliance on *Wylie* is unfounded. The defendant in *Wylie* did not have notice, and the trial court did not follow mandatory procedures for a motion for relief. This is why the trial court's ruling was reversed. But even then, the appellate court did not remand with instructions for the trial judge to set aside the judgment. Rather, the case was remanded for another hearing on the motion.

One of Plaintiff's key arguments is that he was not properly served with notice of the trial dates and the briefing schedule. AOB 28. This is false. The following documents were served on Plaintiff at his address in Riverside, California:

1. Scheduling Order filed February 4, 2016, containing dates of pretrial conference, calendar call and trial stack. 1 A.App. 219-21
2. Motion to dismiss filed on March 7, 2016, containing hearing date and time. 1 A.App. 228-35.
3. Motion for partial summary judgment, showing hearing date and time. 2 A.App. 236-48.
4. All motions in limine, showing hearing dates and times. [See page 7 above]
5. Defendant's pretrial memorandum filed April 8, 2016. 4 A.App. 739-52.
6. Notice of entry of order on motions in limine, filed April 15, 2006. 4 A.App. 860-66.

7. Notice of entry of order on motion for partial summary judgment on punitive damages, filed April 20, 2016. 4 A.App. 776-79.
8. Notice of entry of order granting motion to dismiss, filed April 21, 2016. 4 A.App. 780-84.

Additionally, Plaintiff personally appeared in court for hearings on January 9, 2015 (1 A.App. 136), February 13, 2015 (1 A.App. 142), April 7, 2017 (4 A.App. 724), and April 14, 2016 (4 A.App. 759). With all of these papers having been mailed to Plaintiff's address of record, and with Plaintiff personally appearing at multiple hearings, it is obvious that he was receiving notice of dates and deadlines, despite the AOB's contrary assertion.

b. *Stocklein* and *Yochum* do not help Plaintiff.

Plaintiff contends that the district court abused its discretion in the evaluation of the four factors identified in *Stoecklein* and *Yochum.* These factors are: (1) a prompt application to remove the judgment; (2) the absence of an intent to delay the proceedings; (3) a lack of knowledge of procedural requirements; and (4) good faith. *Stoecklein*, 109 Nev. at 271, 849 P.2d at 307; *Yochum,* 98 Nev. at 486, 653 P.2d at 1216. AOB 23.

(1) Prompt application

This factor is already discussed earlier in this brief. Plaintiff's motion was filed at the very last moment within the six-month time frame. This was addressed in *Union Petrochemical,* where the court held:

> To condone the actions of a party who has sat on its rights only to make a last-minute rush to set aside judgment would be to turn NRCP 60(b) into a device for delay rather than the means for relief from an oppressive judgment that it was intended to be.

Union Petrochemical, 96 Nev. at 339, 609 P.2d at 324.

Plaintiff offers no plausible excuse for his nearly six-month delay in filing his NRCP 60(b) motion. After the district court dismissed Plaintiff's case, all he needed to do was to find an attorney who could file and handle an appeal from the dismissal order, or an attorney who could review limited documents and file a timely NRCP 60(b) motion for relief. He did not need to find a lawyer who would take the entire case, including the thousands of pages of trial transcripts and medical records, or including working up for another trial. Plaintiff was able to obtain Mr. Selik to handle the motion for relief, and Mr. Echols to handle this appeal. In his motion and his reply, Plaintiff failed to explain his efforts to obtain counsel for these limited tasks after the district court dismissed the case.

Thus, the district court did not abuse its discretion by determining that Plaintiff failed to make a prompt application for relief within a reasonable time, under NRCP 60(b). 5 A.App. 969-70. This alone calls for affirmance. *Union Petrochemical,* 96 Nev. at 339, 609 P.2d at 234 (lack of diligence in seeking to set aside a judgment is ground enough for denial of the motion).

(2) Delay in proceedings

The district court found that Plaintiff's actions resulted in delay of the case and prejudice to the defense, and that granting relief from the dismissal would create further delay and prejudice. 5 A.App. 970:7-8. The district court did not abuse its discretion in this finding. Plaintiff's delays were catalogued in the Palms' opposition to Plaintiff's motion, which is in the appendix at 5 A.App. 880-81:

- January 9, 2015 status check where Plaintiff requested a continuance to obtain counsel;
- March 25, 2015 status check where Plaintiff requested a continuance to obtain counsel;
- April 1, 2015 status check where Plaintiff requested a continuance to obtain counsel;
- April 8, 2015 status check where Plaintiff requested a continuance to obtain counsel;
- April 22, 2015 status check where Plaintiff requested a continuance to obtain counsel;
- April 29, 2015 status check where Plaintiff requested a continuance to obtain counsel;
- June 15, 2016 [sic] Paul Padda, Esq. officially appeared as counsel and a Trial date was set;
- September 28, 2015 the Trial date was moved 68 days due to a death in Defense counsel's family;
- February 1, 2016 the Trial date was moved to allow Plaintiff to obtain new counsel; and

- April 7, 2016 Plaintiff asked for six month extension and the Court denied same.

In addition to these delays, Plaintiff delayed another six months before filing his motion for relief. With all of these delays, the record shows Plaintiff's willful indifference to deadlines and the concept of speedy justice. Even if he did not consciously think to himself "I intend to delay this case," his actions and inactions speak for themselves.[4]

(3) Knowledge of procedural requirements

Plaintiff contends that he lacked knowledge of procedural requirements. AOB 28. Although he may not have known as much as an attorney, the district court's scheduling orders were crystal clear. Also, the district court accommodated Plaintiff and told him what he needed to do, warning him about failure to comply. Although proper person litigants are given some leeway, they are expected to comply with fundamental rules. *Bonnell v. Lawrence,* 128 Nev. Adv. Op. 37, 282 P.3d 712, 718 (2012) (holding that fundamental rules governing judgments cannot be applied differently, merely because a party is acting pro se), citing *Raymond J. German, Ltd. v. Brossart,* 816 N.W.2d 47, 50 (N.D. 2012), *Gleash v. Yuswak,* 308

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[4] To the extent that Plaintiff asserts financial hardship as a possible reason for his delay in obtaining a new attorney, the record shows that Plaintiff received a partial settlement of $1 million after the first trial, and this was non-refundable. 5 A.App. 936-37.

F.3d 758, 761 (7th Cir. 2002) ("Even pro se litigants must follow the rules."), and *Vanisi v. State,* 117 Nev. 330, 340, 22 P.3d 1164, 1171 (2001) (proper person party must comply with relevant rules of procedural and substantive law).

Here, the district court found that Plaintiff had sufficient knowledge of procedural requirements. 5 A.App. 970-71. The record supports this finding.

(4) Good faith

Although the district court did not make an express determination of Plaintiff's bad faith in pursuing this litigation, such a finding can reasonably be inferred from the district court's other findings of unreasonable delay and failing to comply with procedural requirements and orders. In this appeal, Plaintiff's brief seems to ignore the fourth *Yochum* factor, instead arguing public policy in favor of resolving cases on the merits whenever possible. AOB 28. No Nevada case holds that this public policy overrides or supplants the other factors. After all, if the public policy of deciding cases on their merits constituted a deciding consideration—outweighing all other considerations—no motion for relief could ever be denied.

The public policy favoring an adjudication on the merits has its limits, and the public policy does not imply that trial judges should always grant relief. *Kahn v. Orme,* 108 Nev. 510, 516, 835 P.2d 790, 794 (1992). Other factors may warrant a denial of a motion for relief from a judgment, despite the public policy favoring

adjudication of cases on their merits. *Id.* In *Kahn*, for example, this court affirmed a denial of NRCP 60(b) relief, notwithstanding the fact that this result eliminated an adjudication on the merits of the case.

c. The district court did not err regarding Padda's withdrawal.

Plaintiff's brief argues that the district court erred by not adequately considering the facts and circumstances surrounding Padda's withdrawal, in reviewing the NRCP 60(b) motion. AOB 29-33. But Plaintiff's motion did not request the district court to do so. Although the motion mentioned Padda's withdrawal as part of the background facts, the motion never asked the district court to determine that Padda's withdrawal was improper or unethical, as Plaintiff now contends in this appeal.

Plaintiff's motion only sought NRCP 60(b) relief from the order on the motions in limine and the order of dismissal. The motion did not request NRCP 60(b) relief from the order granting the motion to withdraw. Plaintiff's belated contention now is a clear violation of the rule prohibiting issues from being raised for the first time on appeal. *Old Aztec Mine, supra.*

Even if this court considers Plaintiff's newly-raised argument, the court should reject it. Padda's motion was supported by his sworn declaration and legal arguments. 1 A.App. 197-202. The motion explained that Plaintiff and Padda had

"a difference of opinion on how best to proceed in this litigation." 1 A.App. 199:18-19. Padda explained to Plaintiff that Padda "must withdraw and that due to our difference of opinion regarding this case, I can no longer effectively represent his interests." 1 A.App. 199:21-22. The motion requested the district court to allow a reasonable time for Plaintiff to obtain replacement counsel, and the motion indicated that defense counsel did not oppose the request. 1 A.App. 200:10-12. The motion was served on Plaintiff at his Riverside, California address. 1 A.App. 203-04.

In short, Padda's motion was more than adequate; the district court properly granted the motion; and the district court did not err by failing to second-guess the withdrawal *sua sponte* when considering Plaintiff's motion for NRCP 60(b) relief.

d. The district court did not err regarding the *Young* factors.

Plaintiff contends that the district court erred by not adequately considering factors established in *Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 88, 787 P.2d 777 (1990), when deciding the motion to dismiss. AOB 40-45. Plaintiff starts by arguing that the Palms should have requested dismissal from the discovery commissioner, not the district judge, because the dismissal was essentially a discovery sanction. AOB 40-41. Like most other issues, Plaintiff is raising this issue for the first time on appeal. The argument was never raised in Plaintiff's

NRCP 60(b) motion or anywhere else. The contention cannot be raised now. *Old Aztec Mines, supra.*

In any event, Plaintiff relies on EDCR 2.34(a), which requires "discovery disputes" to be heard by the discovery commissioner. The motion to dismiss in the present case, however, was based upon multiple grounds that were not discovery disputes, and the motion was within the district court's purview.

For example, the motion alleged Plaintiff's failure to comply with EDCR 2.67 (1 A.App. 231-32), which requires a plaintiff to initiate a pretrial meeting for the exchange of trial witness lists and trial exhibits. It does not deal with discovery. The motion was also based on EDCR 2.68 and the part of NRCP 16 dealing with pretrial conferences. 1 A.App. 232-33. The motion did not complain of any discovery dispute regarding these rules. And the motion asserted Plaintiff's failure to comply with NRCP 16.1(a)(3), which deals with pretrial disclosures required shortly before trial, to facilitate smooth processing of evidence at trial. None of these grounds for dismissal really constituted "discovery disputes" within the authority of the discovery commissioner. They were all within the district court's authority for dismissal.[5]

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[5] Plaintiff's brief provides a quotation allegedly taken from *Valley Health System, LLC v. District Court,* 127 Nev. 167, 252 P.3d 676 (2011). AOB 40(bottom) – 41(top). The quoted language does not appear in that case. (Continued)

Plaintiff's brief next argues that the district court erred by failing to consider the *Young* factors while imposing case-concluding sanctions against Plaintiff. AOB 41-45. Once again, this is a new issue that was never raised anywhere in the district court, including Plaintiff's NRCP 60(b) motion. Therefore, the contention cannot be made on appeal. *Old Aztec Mine, supra.*

Plaintiff attempts to avoid the rule against raising new issues on appeal by arguing that he raised the *Young* factors at the hearing on the motion to dismiss, and that his NRCP 60(b) motion asked the district court to consider the *Young* factors. This contention is wrong. Plaintiff never made the arguments regarding the *Young* factors. In fact, his brief argues that, in his NRCP 60(b) motion, he argued the *Young* factor involving the "degree of willfulness of the offending party." This language is quoted in Plaintiff's brief at AOB 44. But Plaintiff's quoted language was not actually in his motion.

(Continued) Furthermore, *Valley Health* is distinguishable. In that case a discovery motion was filed with the discovery commissioner, who held a hearing and made a recommendation. The *Valley Health* court determined that a party cannot wait to find out the commissioner's ruling, and then raise new arguments for the first time on a challenge to the commissioner's recommendation. *Valley Health* does not hold that a party waives a contention by failing to file a motion to dismiss with the discovery commissioner in the first instance.

Plaintiff also argues that his motion raised issues involving the severity of dismissal, the extent of prejudice, and other *Young* factors. AOB 45. Again, there is no discussion of the *Young* factors anywhere in Plaintiff's motion.

And finally, Plaintiff argues that the district court erred by failing to hold an evidentiary hearing on the *Young* factors. AOB 45. Yet he never requested the district court to hold such a hearing.

This court should also note that Plaintiff's argument in this appeal would require a judge considering an NRCP 60(b) motion to sit as a one-judge appellate court, reconsidering and second-guessing all earlier rulings in the case, even though the moving party never appealed. The present appeal is not an appeal from the order dismissing Plaintiff's case. It is only an appeal from the order denying NRCP 60(b) relief. If Plaintiff had filed a timely appeal from the judgment/order of dismissal, he could have attacked any interlocutory rulings leading to the final judgment. See *Consol. Generator-Nevada, Inc. v. Cummins Engine Co.,* 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998). Yet he did not appeal from the dismissal. In the present appeal from the denial of the NRCP 60(b) motion, the only issue is whether the district court abused its discretion in denying the motion for relief. E.g., *Union Petrochemical, supra.*

In *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co., Inc.,* 909 F.2d 1437 (10th Cir. 1990), the district court dismissed an action with prejudice, for failure of

the plaintiffs to comply with discovery and scheduling deadlines, and failure to appear at a settlement conference. The plaintiffs filed an untimely notice of appeal, resulting in dismissal of the direct appeal. They then filed a motion for relief under FRCP 60(b), requesting the district court to consider whether the sanction of dismissal was appropriate. The district court denied the motion, and the Plaintiffs appealed.

The *Bud Brooks* court held that if the case had been a direct appeal from the dismissal, the plaintiffs might have a stronger position to argue that the dismissal order was too harsh; however, "the posture of this appeal requires review of a different discretionary decision by the district court, i.e., the denial of the motion under Rule 60(b)." *Id.* at 1439. The court then held: "The hurdle plaintiffs must overcome is higher because a Rule 60(b) motion is not a substitute for an appeal." *Id.* at 1440. Accordingly, the appeal did not raise the underlying judgment of dismissal as an appropriate issue for review on the appeal from the denial of Rule 60(b) relief. *Id.*

Similarly, in *Johnsson v. Steege,* 2015 W.L. 5730067 (N.D. Ill. 2015), a bankruptcy court order approved a settlement agreement. The bankruptcy petitioner filed a Rule 60(b) motion for relief from the order, and the bankruptcy court denied relief. The bankruptcy petitioner appealed. The court first noted that a majority of the appellant's briefing was spent discussing errors with the bankruptcy

court's approval of the settlement agreement, not with the bankruptcy court's denial of the Rule 60(b) motion. "These issues, which should have been raised on direct appeal, are not reviewable on appeal of a Rule 60(b) motion and are thus not properly before this Court." *Id.* at *3. A Rule 60(b) motion is not a substitute for an appeal, and the appeal is limited to the narrow question of whether the Rule 60(b) determination was an abuse of discretion, not a review of the merits of the underlying judgment. *Id.*

In the present case, Plaintiff did not appeal from the original judgment of dismissal. Six months later, however, he filed his NRCP 60(b) motion. Yet he now attacks the dismissal, on its merits, on the ground that the dismissal did not comply with the *Young* factors. This is virtually identical to *Bud Brooks* and *Johnsson*. Plaintiff should not be allowed to boot-strap his appeal from the NRCP 60(b) denial into a late appeal from the appealable dismissal order.

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Conclusion

This court should refuse to consider all of the numerous contentions that Plaintiff has raised for the first time on appeal. The court's only focus should be the district court's discretionary ruling on Plaintiff's motion for relief under NRCP 60(b). The district court did not abuse its discretion, and the order denying relief should be affirmed.

DATED this 25th day of August, 2017

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CERTIFICATE OF COMPLIANCE

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 Times New Roman in 14 point font size.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7)(A)(ii) because it contains 9,915 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume numbers, 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: Aug. 25, 2017

Robert L. Eisenberg

ROBERT L. EISENBERG
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date Respondents' Answering Brief and Appendix were filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Lew Brandon
Micah Echols
Adele Karoum

I further certify that on this date I served a copy of the Answering Brief and a disk of the Appendix, postage prepaid, by U.S. Mail to:

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DATED: 8/25/17

Vicki Shapiro, Assistant to
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