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

Electronically Filed
Oct 10 2017 09:32 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S REPLY BRIEF

Marquis Aurbach Coffing
Micah S. Echols, Esq.
Nevada Bar No. 8437
Adele V. Karoum, Esq.
Nevada Bar No. 11172
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
mechols@maclaw.com
akaroum@maclaw.com
Attorneys for Appellant,
Enrique Rodriguez

MAC:14659-001 3188915_3

TABLE OF CONTENTS

I. INTRODUCTION 1

II. LEGAL ARGUMENT 4

A. THE PALMS MISAPPREHENDS THE PROPER STANDARD OF REVIEW FOR CERTAIN ISSUES PRESENTED IN THIS APPEAL. 4

B. THE DISTRICT COURT ERRED BY DENYING RODRIGUEZ 60(b) RELIEF SINCE HE DEMONSTRATED EXCUSABLE NEGLECT. 5

1. Rodriguez did not intend to delay the proceedings. 7

2. Rodriguez's cited case law supports his 60(b) motion. 8

3. The District Court erred by concluding that less than six months was unreasonable for Rodriguez to file his 60(b) motion. 11

4. The circumstances surrounding Padda's withdrawal were improperly neglected by the District Court. 17

5. The District Court's denial of 60(b) relief was an abuse of discretion for failure to consider the *Young* factors. 20

C. THE PALMS IMPROPERLY MAKES JUDICIAL DISQUALIFICATION THE SOLE RESPONSIBILITY OF THE ATTORNEY RATHER THAN A REQUIREMENT UPON THE DISTRICT COURT. 25

1. Factual issues surrounding the disqualification issue. 26

2. This issue is properly raised on appeal. 27

III. CONCLUSION 31

TABLE OF AUTHORITIES

CASES

AA Primo Builders v. Washington,
126 Nev. 578, 245 P.3d 1190 (2010) 4

Ariza v. Rose,
2017 WL 4158132, No. 71541 (Nev. Sept. 19, 2017) (unpublished) 4, 5

Bergmann v. Boyce,
109 Nev. 670, 856 P.2d 560 (1993) 4

Brown v. Federal Sav. & Loan Ins. Corp.,
105 Nev. 409, 777 P.2d 361 (1989) 28

Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co., Inc.,
909 F.2d 1437 (10th Cir. 1990) 23, 24, 25

Deal v. Baines,
110 Nev. 509, 874 P.2d 775 (1994) 11

Epstein v. Epstein,
113 Nev. 1401, 950 P.2d 771 (1997) 5

Estate of Adams v. Fallini,
386 P.3d 621 (Nev. 2016) 19

Gutenberger v. Contl. Thrift & Loan Co.,
94 Nev. 173, 576 P.2d 745 (1978) 8, 10

Harrison v. Thurston,
258 P.3d 665 (Utah App. 2011) 14

Hotel Last Frontier v. Frontier Properties, Inc.,
79 Nev. 150, 380 P.2d 293 (1963) 8, 9, 10

Johnsson v. Steege,
2015 WL 5730067 (N.D. Ill. 2015) 24

Kahn v. Orme,
108 Nev. 510, 835 P.2d 790 (1992) 5

Liljeberg v. Health Services Acq. Corp.,
486 U.S. 847, 108 S.Ct. 2194 (1988) 30

Lopez Dominguez v. Gulf Coast Marine & Associates, Inc.,
607 F.3d 1066 (5th Cir. 2010) 30

McDonald v. Shamrock Investments, LLC,
127 Nev. 1158, 373 P.3d 941 (2011) 21, 25

Moseley v. Dist. Ct.,
124 Nev. 654, 188 P.3d 1136 (2008) 4, 11

Nevada Power v. Fluor Illinois,
108 Nev. 638, 837 P.2d 1354 (1992) 21, 25

Peralta v. Heights Medical Center, Inc.,
485 U.S. 80 (1988) 5

Petersen v. Petersen,
105 Nev. 133, 771 P.2d 159 (1989) 12

Ryan's Express v. Amador Stage Lines,
279 P.3d 166 (Nev. 2012) 25, 31

State v. Rizzo,
31 A.3d 1094 (Conn. 2011) 27, 28

Stoecklein v. Johnson Elec., Inc.,
109 Nev. 268, 849 P.2d 305 (1993) 5, 6, 7, 9, 13, 15

Stretch v. Montezuma Min. Co.,
29 Nev. 163, 86 P. 445 (1906) 8

Teagues v. State,
No. 68327, 2016 WL 3213541 (Nev. Ct. App. May 26, 2016) 27

Union Petrochemical v. Scott,
96 Nev. 337, 609 P.2d 323 (1980) 12, 14

Yochum v. Davis,
98 Nev. 484, 653 P.2d 1215 (1982) 5, 7, 16

Young v. Johnny Ribeiro Bldg., Inc.,
106 Nev. 88, 787 P.2d 777 (1990) 3, 20, 21, 22, 23, 24, 25, 31

<u>RULES</u>

CJC 2.11(A)(1) 29

CJC 2.11(A)(6) 29

EDCR 2.47(b) 2

NRCP 16 23

NRCP 16.1 .... 22, 23

NRCP 16.1(a)(3). 20

NRCP 37 .... 1, 3, 22, 23, 25

NRCP 37(b)(2) 22

NRCP 37(b)(2)(C) 20

NRCP 37(f) 22

NRCP 60(b) .... *passim*

NRCP 60(b)(1) 5

RPC 1.10(e) 28

RPC 1.11(b) 28

RPC 1.11(c) 28

RPC 1.12(c) 28

RPC 1.18(d) 28

STATUTES

28 U.S.C.A. §455 30

NRS 0.025(1)(d) 29

I. INTRODUCTION

NRCP 60(b) permits parties to file a motion for relief from a judgment for several reasons, including mistake, inadvertence, surprise, or excusable neglect. Rodriguez was severely injured in Nevada while on vacation at the Palms. During the dismissal of his case and the 60(b) motion, Rodriguez was unable to perform his activities of daily living. AA4:803–805, 808, ¶19, 868–871. After he was abandoned by his attorney shortly before trial and the dispositive motion deadlines due to "financial constraints," Rodriguez, in proper person, was unable to understand the procedural requirements to fully pursue his case. Rodriguez looked online to find hearing dates, but he was unable to fully comply. Rodriguez's case was dismissed, as a case-concluding sanction under NRCP 37 and after an order granted 16 motions in limine based on non-opposition.

Rodriguez then properly sought relief under NRCP 60(b) but required time given his circumstances. The Palms criticized Rodriguez for "doing nothing" (AA5:971:13–16), despite presenting no evidence of its own and despite Rodriguez presenting his own evidence to the contrary. AA4:807, ¶11; AA4:803–805, 808, ¶19, 868–871.

The Palms reduces the magnitude of its own delays and missteps to draw a double-standard expectation for compliance with rules, applied more harshly to a

disabled, proper person than to itself. The Palms excuses its own conduct, such as filing 16 motions in limine with an unsigned and undated declaration required by EDCR 2.47(b) (Respondent's Answering Brief ("RAB") 7), making a single phone call on a deadline as supposed "conferral" with Rodriguez, and requesting an extension of more than two months for its own family/health reasons. The Palms even excuses the conduct of Rodriguez's former attorney, Padda, in his abandonment of his client "with trial looming" by encouraging this Court to ignore Padda's stated reasons for withdrawing near trial and critical motions deadlines. Yet, the Palms comes out swinging at Rodriguez for pursuing his 60(b) motion, calling this a request for a "litigation mulligan" that only applies in golf and not litigation. Nevada permits "second chances" for mistake or excusable neglect if a party satisfies criteria, and where the policy of hearing a case on the merits is justified.

The Palms begins its answering brief with two sports analogies from Rodriguez's trial attorney: a "fourth out" in baseball and a "Hail Mary pass" taken out of context,[1] to argue that Rodriguez's 60(b) motion was a long-shot request for

---

[1] The actual statements by Rodriguez's attorney were: "There's no fourth outs in baseball….Well, **it does happen in court and...our situation here is that this is the time to do it**." AA5:951(emphasis added). Similarly, "It's the Hail Mary Pass....But there's good reasons for it here. We have a man who litigated this case for a long time who did everything that's right until the last minute when he lost

a "do-over." RAB1. Rodriguez's 60(b) motion was not an "unpermitted" request to an umpire for a fourth out, but a motion permitted under Nevada law.

The District Court's denial of 60(b) relief in this case was erroneous, based on: (A) Rodriguez's demonstration of excusable neglect; (B) the District Court's failure to consider all circumstances including the conditions of Padda's withdrawal; (C) the erroneous application of case law to conclude that Rodriguez's filing of his 60(b) motion was not reasonable; and (D) the District Court's failure to consider the *Young*[2] factors when granting case-concluding sanctions under Rule 37. Finally, as a separate issue, Rodriguez requests review of the District Court's error in failing to disqualify itself or provide the parties complete information and an opportunity to evaluate a possible conflict outside the presence of the District Court involving its law clerk's previous employment at defense counsel's firm. Based upon any of these reasons, the Court should reverse or vacate, and remand.

---

counsel for various reasons.... It is a request to give him one more chance so that this case be heard on...the merits." AA5:951–952.

[2] *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990).

II. LEGAL ARGUMENT

A. THE PALMS MISAPPREHENDS THE PROPER STANDARD OF REVIEW FOR CERTAIN ISSUES PRESENTED IN THIS APPEAL.

Rodriguez recognizes that some issues in this appeal are reviewed for an abuse of discretion, but other legal issues require de novo review, including interpretation of the NRCP provisions. The Palms has reduced Rodriguez's appeal to a single issue, the denial of NRCP 60(b) relief, under an abuse of discretion standard of review. RAB2, 13. The Palms argues in conclusory fashion that the de novo standard is "not applicable here," stating that *Moseley v. Dist. Ct.*, 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008) does not apply. RAB13. The Palms also argues that statements by trial counsel in the District Court dictate this Court's standard of review on all issues presented. Both arguments are incorrect.

Legal issues, including the interpretation of NRCP 60(b), are reviewed de novo. Furthermore, "[w]hile review for abuse of discretion is ordinarily deferential, deference is not owed to legal error." *AA Primo Builders v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010). A court may abuse its discretion when it acts "in clear disregard of the guiding legal principles." *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993); *Ariza v. Rose*, 2017 WL 4158132, No. 71541 (Nev. Sept. 19, 2017) (unpublished) (district court

abused its discretion by denying appellant's NRCP 60(b)(1) motion based on excusable neglect). Therefore, the Court should apply a de novo standard of review to the legal issues presented in this appeal.

B. THE DISTRICT COURT ERRED BY DENYING RODRIGUEZ 60(b) RELIEF SINCE HE DEMONSTRATED EXCUSABLE NEGLECT.

In his opening brief, Rodriguez presented factors for relief under NRCP 60(b)(1) including: "(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 was previously required in Nevada, but a meritorious defense is now not required to set aside a default judgment, based on the holding in *Epstein v. Epstein*, 113 Nev. 1401, 950 P.2d 771 (1997) and *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988). 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). *Stoecklein*, 109 Nev. at 271, 849 P.2d at 307. This Court has recently reiterated this policy in recently in granting 60(b) relief for excusable neglect. *Ariza*, 2017 WL 4158132,

at *1 (citing *Stoecklein*, 109 Nev. at 271, 849 P.2d at 307, on Nevada's "underlying basic policy of deciding a case on the merits **whenever possible**")(emphasis added).

Excusable neglect depends on the facts of each case. *Stoecklein*, 109 Nev. at 273, 849 P.2d at 308. In requesting 60(b) relief, Rodriguez outlined compelling facts and circumstances. AOB24–33. First, Rodriguez suffered from severe health problems and sought new counsel while in California to take his case. AA4:803–808, 868–871. Second, his attorney withdrew five weeks before trial and shortly before dispositive motion deadlines because taking the case to trial would be a financial burden. AA4:793, 795:17–24, 797:5–18; AA1:194–195, 197–211. Third, Rodriguez's request for 60(b) relief explained that he did not receive copies of the motions, and he was not informed of important deadlines and requirements by his attorney prior to withdrawal. AA5:807. Rodriguez "found out that hearings were listed online...and showed up to those hearings" (AA5:944), but Rodriguez's presence in court alone did not prove he received the motions only that he discovered the dates. Yet, the Palms argues that the facts described by Rodriguez were either irrelevant, not sufficiently comparable to case law with more "extreme" facts, or not properly presented in the 60(b) motion to be raised in this appeal. The Palms is incorrect on each of these arguments.

1. <u>Rodriguez did not intend to delay the proceedings.</u>

The *Stoecklein* factors require consideration of whether there was "an absence of an intent to delay the proceedings." *Stoecklein*, 109 Nev. at 271, 849 at 307; *Yochum*, 98 Nev. at 486, 653 at 1216; AOB23, 27. The Palms and the District Court, however, converted "intent to delay" into "actual delay of the case" in their analysis. RAB32; AA5:970. First, as to the actual (not intended) delays described, five out of ten of the continuances requested by Rodriguez occurred in approximately one month, between March 25, 2015 and April 29, 2015. RAB32.

Furthermore, the Palms inaccurately describes the timeline in March and April 2015. RAB32; AA1:153. The Palms cites to its own argument in opposition rather than to the record for this incorrect version of the procedural history. RAB32. The record does not indicate that Rodriguez requested continuances to obtain counsel at hearings between March 25 and April 9. On March 25, 2015, Padda attended a hearing with Rodriguez, and the District Court minutes reflect that Padda was "requesting more time to discuss with his client." AA1:153. Padda was "specially appearing for the Plaintiff" on April 29, 2015. *Id.* Thus, the Palms exaggerates the time Rodriguez requested to "obtain counsel." Yet, the Palms requested a **68-day** continuance in September 2015. RAB32; AA1:163, 194–195. There were, indeed, delays in this case caused by both parties and department

reassignments. Nevertheless, the Palms argues: "Even if he did not consciously think to himself 'I intend to delay this case,' his actions and inactions speak for themselves." RAB33.

In his opening brief, Rodriguez presents his lack of intent to delay. AOB27. Nevada courts are "liberal in relieving defendants from defaults when they offer a good defense and have not been guilty of **inexcusable** delay." *Stretch v. Montezuma Min. Co.*, 29 Nev. 163, 86 P. 445, 447 (1906). The Palms cannot change the standard from inexcusable intent to delay to actual delay, mischaracterize the record, and neglect its own delays in the analysis of this issue. However, the District Court followed the Palms in examining actual delay rather than intent. AA4:970.

2. <u>Rodriguez's cited case law supports his 60(b) motion.</u>

The Palms attempts to distinguish relevant case law on excusable neglect and relief from judgment cited by Rodriguez including *Hotel Last Frontier v. Frontier Properties, Inc.*, 79 Nev. 150, 380 P.2d 293 (1963) and *Gutenberger v. Contl. Thrift & Loan Co*., 94 Nev. 173, 175, 576 P.2d 745 (1978). For example, Palms argues that in *Frontier*, relief was justified because the default came as a surprise, and the defendant filed a motion more quickly than Rodriguez. RAB25. Similarly, the Palms distinguishes *Gutenberger* because the defendant there "had

legitimate reasons to believe no formal response was necessary." *Id.* The Palms also attempts to distinguish these cases because the motions were filed "only one day" after the default was entered in *Gutenberger* and *Frontier*. *Id.*

a. The Palms incorrectly assumes that Rodriguez's dismissal was not a surprise.

Rodriguez cited *Frontier* for the statement: "It is a firmly established policy in Nevada that courts prefer that controversies be resolved on their merits whenever possible." AOB24. In *Frontier*, the Court concluded,

> Finally we mention, as a proper guide to the exercise of discretion, the **basic underlying policy** to have each case decided upon its merits. In the normal course of events, justice is best served by such a policy.

Frontier, 380 P.2d at 295(emphasis added). First, the specific facts from *Frontier* do not make this **basic underlying policy** inapplicable to Rodriguez's case. Second, *Frontier* outlined factors as "persuasive" or to be "given weight" for setting aside a default judgment, similar to *Stoecklein,* 109 Nev. at 271, 849 P.2d at 307, including prompt application, good faith, absence of intent to delay, and lack of knowledge of procedural requirements. *Id.* Rodriguez addressed these factors in his 60(b) motion and his opening brief. *Frontier* stands for the principle that courts may consider a variety of factors to determine whether relief is justified, while maintaining the *basic underlying policy* to decide cases upon their merits.

The Palms also improperly assumes that the dismissal of Rodriguez's case was *not* a surprise to distinguish *Frontier* and *Gutenberger* which involved "unexpected" defaults. Rodriguez came to the motion to dismiss hearing from California, having confirmed that attorney Jared Johnson would also attend. AOB20–21. Rodriguez found out the same day that Jared Johnson could not attend the hearing. *Id.* Rodriguez, in proper person, is comparable to a defendant surprised by a default. Rodriguez's requested continuance for a decision on the Palms' motion to dismiss for "maybe a week" was denied, despite extensions being previously granted to both sides. Dismissal of this case was, for Rodriguez, as unexpected as in *Frontier*, where "counsel assumed that a default would not be taken." *Frontier*, 380 P.2d at 296, 79 Nev. at 157. Rodriguez had legitimate reasons to believe his response of traveling to a hearing with an attorney to assist was appropriate and would not result in a dismissal.

b. The very prompt applications for relief in Rodriguez's cited case law does not render Rodriguez's 60(b) motion unjustified.

The Palms also argues that the timing of the applications for relief in *Frontier* and *Gutenberger*, one day after default judgment, made granting 60(b) relief justified. RAB25. Both cases involved a default judgment. Rodriguez's application under Rule 60(b) for relief from an order granting 16 motions in limine

and an order dismissing a 10-year case is clearly more complex than a motion related to a default for failure to answer a complaint. While both cases note the response was "prompt," those cases do not suggest a less prompt response involving a more complex motion makes 60(b) relief unjustified, especially when NRCP 60(b) specifically allows for more time.

3. <u>The District Court erred by concluding that less than six months was unreasonable for Rodriguez to file his 60(b) motion.</u>

a. Standard of review for filing under NRCP 60(b).

In denying Rodriguez's 60(b) motion, the District Court interpreted the provision of NRCP 60(b) requiring that the motion "shall be made within a reasonable time...not more than 6 months...." by applying standards from case law on "prompt" applications for relief to facts of Rodriguez's case. AA5:969. This application requires a de novo review, as an interpretation of the rules. *Moseley*, 124 Nev. at 662, 188 P.3d at 1142.

Published cases in Nevada interpreting this provision of Rule 60(b) support Rodriguez's position that this interpretation carries a de novo review. Several cases interpreting "reasonable time" under NRCP 60(b) do not mention "abuse of discretion" but apply the facts of the timing of the motion. *Deal v. Baines*, 110 Nev. 509, 512, 874 P.2d 775, 778 (1994); *Petersen v. Petersen*, 105 Nev. 133, 135,

771 P.2d 159, 161 (1989). Therefore, the District Court's comparison of Rodriguez's case to Nevada case law should be reviewed de novo.

b. The Palms misstates Rodriguez's argument on the *Union Petrochemical* case.

The District Court's order relied upon *Union Petrochemical v. Scott*, 96 Nev. 337, 609 P.2d 323 (1980) (per curiam) for its conclusion that Rodriguez was not sufficiently prompt in filing his 60(b) motion five months and three weeks after the notice of entry of order. AA5:969–970. The Palms, in opposing the Rule 60(b) motion and now on appeal, relies heavily on *Union Petrochemical*, which held that a motion was untimely when filed "almost six months" after entry of the judgment. AA5:878, 883. In the answering brief, the Palms argues:

> Plaintiff now attempts to distinguish *Union Petrochemical*, primarily because the defendant in *Union Petrochemical* was a corporation, and the 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...motions must be filed within a reasonable time, and not more than six months after the judgment being attacked.

RAB26. The Palms misstates Rodriguez's argument (AOB34–35), which was that *Union Petrochemical* involved a **corporation represented by counsel**, whose only excuse for not filing a 60(b) brief sooner was that the headquarters was in Texas, and counsel claimed to not know Nevada's procedural rules. Rodriguez's argument was not about corporations versus individuals but that Union

Petrochemical was a corporation represented by counsel throughout the proceedings. *Id*. Union Petrochemical's justification for the timing of a 60(b) motion related to a default judgment was not even remotely similar to Rodriguez's 60(b) motion. Rodriguez was unable to care for himself, living out of state, and suffered from significant physical and emotional health issues that impacted his daily activities. AA4:803–805, 808, ¶19, 868–871. Rodriguez made extensive attempts to obtain counsel.[3] AA5:798, 806–808, 807, ¶11. These factors were not present in the *Union Petrochemical* case. Rodriguez was contesting a more complicated case dismissal and order granting 16 motions in limine, in a highly-contested case, not writing a simple motion related to a default judgment. Because excusable neglect depends on the facts of each case (*Stoecklein*, 109 Nev. at 273, 849 P.2d at 308), Rodriguez requests that this Court review the distinct facts upon which *Union Petrochemical* was based to reverse the District Court's denial of 60(b) relief. AA5:969–970.

---

[3] The Palms states that the 60(b) motion did not include specific information on when Selik was hired to prepare the 60(b) motion or the "specifics of what [Rodriguez] actually did during that six-month time frame." RAB 16. The Palms cites no case law that specific information of this type is required. The general information and affidavit are sufficient. AA5:578, 807–808.

c. Nevada case law has not defined the term "diligence" in the context of excusable neglect.

Rodriguez cited Utah case law, *Harrison v. Thurston*, 258 P.3d 665 (Utah App. 2011) to analyze the terms "diligence" and "due diligence" in a relief from judgment case. AOB35. Nevada case law has not discussed, specifically, what "diligence" means. *Id.* The District Court, in its dismissal order, relied upon *Union Petrochemical* to conclude "want of diligence" was sufficient to deny the motion for relief. AA5:979. Therefore, an inquiry into what constitutes "diligence" in the context of excusable neglect is a question of law for this Court. *Harrison* defined due diligence as "conduct that is consistent with the manner in which a reasonably prudent [person] under similar circumstances would have acted." 258 P.3d at 669. Under this "diligence" definition, Rodriguez would not be lacking diligence. A reasonably prudent person **under similar circumstances** to Rodriguez would have likely required a significant amount of time to locate a new attorney to prepare a 60(b) motion with new evidence. The Palms distinguishes the *Harrison* case on its facts (RAB28), rather than considering the "diligence" definition (AOB35).

d. The Palms improperly assumes that Rodriguez had procedural knowledge in pursuing 60(b) relief.

The Palms argues in its answering brief that "Plaintiff offers no plausible excuse for his nearly six-month delay in filing his NRCP 60(b) motion." RAB31. It is simple to conclude, for an appellate attorney, in hindsight, "all [Rodriguez] needed to do was to find 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 thousands of pages of trial transcripts and medical records, or including working up for another trial." *Id*. This argument assumes Rodriguez had the procedural knowledge that the Palms' counsel has, to say what Rodriguez could have or should have done. This is not the standard for excusable neglect, where lack of procedural knowledge is a factor under *Stoecklein*, 109 Nev. at 273, 849 P.2d at 308. Rodriguez did not know about an attorney's ability to represent him on a limited basis, or even how to ask an attorney what exactly he needed at that stage. Rodriguez's diligence, and how plausible his excuse was for his delay, should be viewed through a lens of what is reasonable to an individual under similar circumstances, not through the 20/20 hindsight vision of the Palms' counsel.

e. Bad faith cannot be "inferred."

In its answering brief section on "good faith," the Palms does not cite any case law for its argument that a bad faith finding can be inferred. RAB34. The Palms also erroneously argues that Rodriguez ignored good faith in this appeal. *Id.* In fact, Rodriguez addressed good faith. AOB25 ("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."); AOB27 ("In his NRCP 60(b) motion, Rodriguez presented detailed facts that supported his motion under the *Yochum factors*....These included...good faith."). All arguments regarding a lack of "culpability" or "serious disregard of the judicial process" were from *Gutenberger*'s analysis of "good faith." AOB24–25, 29. The District Court's findings on "unreasonable delay" and failure to comply with procedural requirements do not permit an inference of "bad faith," as the Palms suggests. AOB34. The Palms cites no case law that would allow such an inference, and it neglects Rodriguez's arguments.

4. **The circumstances surrounding Padda's withdrawal were improperly neglected by the District Court.**

The Palms argues that the facts and circumstances surrounding Padda's withdrawal are a new issue on appeal and that Padda's motion to withdraw was "adequate." AOB35–36. Rodriguez's 60(b) motion requested relief from the judgment, and he was not required to ask for a determination that Padda's withdrawal was improper to obtain 60(b) relief. Nevertheless, Rodriguez's 60(b) motion and reply *did* raise the facts surrounding Padda's withdrawal which weighed in favor of Rodriguez's showing of excusable neglect.

In his 60(b) motion, Rodriguez stated that Padda failed to provide Rodriguez notice of dates and procedural requirements. AA4:791:20–792:12. The 60(b) motion also stated, "Plaintiff's attorney Paul Padda filed a motion to withdraw, on short notice. **The reason for his withdrawal, per his declaration, that he could not afford to take this matter to trial, thus abandoning Plaintiff**" and further described Padda's failure to represent Rodriguez at required hearings prior to the order granting withdrawal. AA4:793(emphasis added). These facts were integral to the legal argument. AA4:795:17–24, 797:5–18 ("Padda decided he could not settle the case and **could not afford to take this case to trial**....")(emphasis added); 799 (Good faith: "It was only during 'crunch time' when his attorneys abandoned him").

The reply in support of the 60(b) motion also raised these issues. AA5:938:18–19 ("dropped by his attorney at the last minute, and the case being dismissed within a few months thereafter for Plaintiff's inability to understand the technical requirements"); AA5:938:22–23 (Padda's motion to withdraw indicated trial was "looming"). Therefore, this is clearly not a "new issue" on appeal.

The District Court abused its discretion in failing to consider these relevant facts. AOB29–33. The Palms' assertions that this argument should be "rejected" because Padda's motion to withdraw was "more than adequate" is questionable in light of the court rules outlined in the opening brief (AOB30–33) and the *complete* contents of the motion to withdraw. The Palms inexplicably wishes to remove the issue of Padda's financial constraints from the motion to withdraw. Padda's motion and declaration clearly state that this was the reason for withdrawal: "As the owner of a small firm, I am limited by the amount I can financially 'invest' in the prosecution of certain cases." AA1:199, ¶¶3–4 ("I met with Mr. Rodriguez and explained, once again, **that due to financial limitations I could no longer remain in this case**.")(emphasis added). Yet, the Palms instead focuses *exclusively* on two other sentences regarding a "difference of opinion on how to proceed" or a

"difference of opinion regarding the case." RAB35–36.[4] The Palms maintains "[a]lthough 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.'" RAB5. First, it is unclear why the Palms believes it knows the "real reason" and the other reason regarding financial stress was not the "real reason" for withdrawal. Second, the Palms fails to consider that the "difference of opinion" *was* whether the case should be brought to a jury trial or settled, as explained in Rodriguez's 60(b) motion. AA4:795, 797.

This appeal does not request findings on the adequacy of Padda's motion to withdraw. The issue here is when an attorney withdraws on the eve of trial, and those facts are in a 60(b) motion after dismissal of a pro se case, whether the District Court abused its discretion when it failed to consider those facts.

a. The recent *Estate of Adams v. Fallini* case is persuasive under the facts of this case.

In his opening brief, Rodriguez cites *Estate of Adams v. Fallini*, 386 P.3d 621, 625 (Nev. 2016) to explain that he did not have a serious disregard for the

[4] The Palms describes a meeting, it did not attend, in which "Plaintiff stated that another attorney would be stepping in to replace Padda." RAB 6. However, the declaration contained the following **complete** sentence: "Mr. Rodriguez **again requested I not withdraw** and notified me during our meeting that another attorney would be 'stepping in' to replace me." AA1:199(emphasis added). Thus, there was no indication that Rodriguez had found an attorney to step in.

judicial process but was under difficult circumstances. AOB26. The Palms, however, argues that *Adams* is not applicable because Rodriguez cannot demonstrate the "highly unusual circumstances" in *Adams*. RAB27. Rodriguez has similarly argued that his attorney abandoned him and possibly breached his professional obligations by abandoning Rodriguez near trial, discovery, and motion deadlines for financial reasons, and not even appearing for the pre-trial conference prior to his withdrawal. AOB29–33; AA1:200, 197–204, 212, 213–218. *Adams* is relevant to the Court's analysis of NRCP 60(b) motions: Nevada courts may grant 60(b) relief to get to the merits in a case, where the merits were not reached following abandonment by a party's attorney. *Id.* Thus, the Palms' avoidance of *Adams* is not justified.

5. The District Court's denial of 60(b) relief was an abuse of discretion for failure to consider the *Young* factors.

a. The standard of review for this *Young* issue.

Rodriguez submits that this issue requires de novo review. Specifically, to address this issue, the Court must interpret whether 60(b) relief may be denied when the *Young* factors are not considered in the underlying judgment. The *Young* factors must be considered when case-concluding sanctions are granted in a motion brought under NRCP 37(b)(2)(C) for failure to comply with NRCP 16.1(a)(3).

b. This issue is not a new issue on appeal because a request for consideration of the *Young* factors was presented to the District Court.

Rodriguez raised questions of fact on the *Young* factors on his own behalf during the hearing on the motion to dismiss and in his 60(b) motion. One of the *Young* factors is the "degree of willfulness of the offending party." *Young*, 106 Nev. at 93, 787 P.2d at 780. Another factor is "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." *Id.* Rodriguez raised questions of fact on the *Young* factors, which is the requirement in case law.[5] AA4:762–763.

Before entering a case-concluding sanction, a 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.")(emphasis added); *Young*, 106 Nev. at 93, 787 P.2d at

---

[5] The Palms argues that the quoted "degree of willfulness of the offending party" is "not actually in [Rodriguez's] motion." RAB38. The motion discussed that *factor*. The quoted words "degree of willfulness of the offending party" is quoted from *Young*. AOB42.

780. Here, Rodriguez raised a question of fact as to at least one of the *Young* factors, which is sufficient under Nevada law to trigger a court's requirement to consider the factors. The *Young* factors were also addressed in detail throughout the Rule 60(b) motion and hearing, including: (1) the willfulness/intent issues on why Rodriguez had not complied with court rules/deadlines, (2) the discussion of the severity of the sanction compared to the severity of the discovery abuse, the policy favoring adjudication on the merits, and (3) whether Rodriguez was being unfairly penalized for misconduct of his or her attorney. AA4:797–802.

c. The Palms filed its motion to dismiss under NRCP 37(b)(2) but now avoids the Rule.

In arguing that analysis of the *Young* factors was not required, the Palms now claims that its motion to dismiss was not based on a discovery sanction. RAB36–37. The answering brief completely avoids that the motion was filed under Rule 37. RAB36. The Palms now argues its motion was not related to "discovery," and therefore *Young* and the associated case law should not apply. Yet, the Palms requested dismissal as a sanction pursuant to NRCP 37(b)(2) because the District Court may impose sanctions pursuant to Rule 37(b)(2) and Rule 37(f) for failure to comply with NRCP 16.1. AA1:234. *Young* instructs that district courts should enter specific findings and conclusions when dismissing a party from a legal proceeding under NRCP 37. *Young*, 106 Nev. 88, 787 P.2d 780.

The dismissal in this case was a dismissal under NRCP 37 and made pursuant to NRCP 16 and NRCP 16.1. AA1:235. Rule 16.1, specifically stated as grounds for relief in the motion to dismiss, is for "Mandatory Pre-Trial **Discovery** Requirements." (emphasis added). As such, an analysis under *Young* was required.[6] The Palms cannot file a motion under NRCP 37, have that motion granted, and then argue that the motion was not actually related to discovery. Since the District Court neglected its own requirements under *Young* and declined to consider the mandatory factors, the District Court has abused its discretion.

d. The Palms' case law is not controlling on how this Court should consider the *Young* factors.

Contrary to the Palms' argument, *Bud Brooks*, a 1990 Tenth Circuit case, is not controlling in Nevada and is distinguishable on its facts. RAB39–40 (citing *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co., Inc.*, 909 F.2d 1437 (10th Cir. 1990)). *Bud Brooks* bears no factual similarity to this case. In *Bud Brooks*, the court stated that there were no claims that the plaintiffs were "unable to comply with discovery deadlines or to attend the settlement conference because of

[6] The Palms points to a quotation in the opening brief, AOB40–41, citing *Valley Health System LLC v. District Court*, 127 Nev. 167, 252 P.3d 676 (2011). This citation was a typographical/editing error. This citation error is not prejudicial to the respondents, as the primary source for this argument regarding the mandatory application of the *Young* factors appears in the opening brief at pages 41–45.

compelling circumstances beyond their control." *Id.* at 1440. Here, Rodriguez asserted in his 60(b) motion that he was unable to comply with discovery deadlines, lived in California, was having difficulty retaining new counsel, and had major health issues. Finally, in *Bud Brooks*, the 60(b) motion sought a determination of whether the dismissal was inappropriate. The court concluded that the judgment of dismissal was not an appropriate issue for review on that appeal. Here, however, Rodriguez does not request whether dismissal was appropriate, but whether, in light of the District Court's failure to consider the *Young* factors prior to dismissal as **required** by Nevada case law, the District Court abused its discretion by failing to grant 60(b) relief.

The *Bud Brooks* case did not involve a court's failure to consider factors required by law prior to dismissal, but an appeal asking the Court to reweigh factors similar to the *Young* factors within the appeal itself. Rodriguez does not ask this Court to review the *Young* factors and reverse the dismissal, but asks this Court to consider the District Court's insufficient procedure in denying 60(b) relief when the District Court failed to consider the required *Young* factors altogether.

Similarly, the Palms argues that an unpublished federal case from Illinois involving a bankruptcy court order is somehow relevant. RAB40 (citing *Johnsson v. Steege*, 2015 WL 5730067 (N.D. Ill. 2015)). This case is not factually or

procedurally similar to Rodriguez's case, and it analyzes federal issues. Yet, the Palms overstates the relevance of this case, arguing "This is virtually identical to *Bud Brooks* and *Johnsson*." RAB41.

In contrast, Rodriguez requests that the Court view this *Young* issue under Nevada law. Consideration of the *Young* factors is required prior to a dismissal based on Rule 37 for sanctions. *McDonald*; *Fluor*. Rodriguez requests that the Court reverse the denial of the 60(b) motion and remand.

C. THE PALMS IMPROPERLY MAKES JUDICIAL DISQUALIFICATION THE SOLE RESPONSIBILITY OF THE ATTORNEY RATHER THAN A REQUIREMENT UPON THE DISTRICT COURT.

The District Court erred by failing to disqualify itself or to provide the parties with an opportunity to evaluate the possible conflict outside its presence. The Palms places the responsibility for judicial disqualification upon Rodriguez's attorney, to spot the conflict and immediately object, rather than upon the District Court itself. RAB16–17. The reason this issue was raised on appeal is no one disclosed the truth in any sufficient amount of detail in the District Court proceedings. Rodriguez requests that this Court vacate the 60(b) order, or, in the alternative, remand for findings on disqualification. *Ryan's Express v. Amador Stage Lines*, 279 P.3d 166, 173 (Nev. 2012). This issue is not "frivolous." RAB16.

1. Factual issues surrounding the disqualification issue.

The facts presented by the Palms do not change the analysis of this issue. The Moran law firm, although being served on pleadings for **nearly four years** claims it was actually not on this case from mid-April 2008 until January 25, 2012. The Moran firm filed documents to "correct the record" and to withdraw in 2012. Respondent's Appendix ("RA") 1:1–10. This is procedurally unusual, since most law firms would notice if they were "copied on all briefs, Scheduling Orders, etc." (RA 1:6) for several years when they were allegedly not involved with a case. The supposed inadvertent representation in a case for nearly four years, despite believing a substitution had occurred, all while receiving copies of the documents, does not mean the law clerk of the Moran law firm had no knowledge of this case.

The Palms also argues that the citations to the hearing transcript do not make clear that the District Court's law clerk did any work on this case. RAB20–21. The Palms argues that no one knows if the Judge's law clerk worked on this case at the law firm or in chambers. The law clerk spoke in the hearing: "THE CLERK: I think there's two matters on, Your Honor. One is resetting the trial and the other is for the Plaintiff's Motion." AA1:165:8–10. The District Court then said, before beginning, "I **need** to disclose that my Law Clerk previously worked for the Moran firm once upon a time." AA1:165:11–15(emphasis added). The law clerk, in

identifying the motions on calendar, was familiar with the motions, and the District Court stated he *needed* to disclose that his law clerk had worked for the defense firm. The transcript does not say "My law clerk reviewed the motion and works on this case," but it is clear from the transcript that there would be no need to disclose if the clerk had not worked on the case.

2. <u>This issue is properly raised on appeal.</u>

The Palms cites to two cases, one unpublished Nevada Court of Appeals case, and one case from Connecticut, to argue that disqualification of judges must be raised as an issue in the district court to be considered. RAB16 (citing *Teagues v. State*, No. 68327, 2016 WL 3213541, at *1 n.1 (Nev. Ct. App. May 26, 2016) and *State v. Rizzo*, 31 A.3d 1094, 1125 (Conn. 2011). First, unpublished Court of Appeals orders are not binding upon this court and cannot be cited under the most recent rule changes. ADKT 504: *In re Amendment to NRAP 36 and Repeal SCR 123*. Second, neither case is controlling or persuasive. *Teagues* involved the alleged general "bias" of a judge. In *Teagues*, a criminal defendant alleged, after a criminal trial, bias of some unspecified type. *Teagues*, 2016 WL 3213541, at *1. The lack of detail of the facts or law in this unpublished Court of Appeals order sheds no light upon the issues here.

Connecticut courts typically do not review disqualification claims raised for the first time on appeal because they are deemed to have consented to the participation of the judge. *Rizzo*, 31 A.3d at 1125. However, it is clear from the context and footnotes in *Rizzo* on this issue that the Connecticut Court of Appeal was focused on post-trial appeals, in which the judge had presided over the entire matter, and then a disqualification issue was raised. In this case, Rodriguez never reached trial before this District Court, making this Connecticut case even less applicable.

Turning to Nevada law, the Palms discusses *Brown v. Federal Sav. & Loan Ins. Corp*., 105 Nev. 409, 777 P.2d 361 (1989), involving appellants who failed to preserve a recusal issue. That case, however, involved a judge's daughter who was employed as a law clerk at a firm handling the case before the judge. The Court specifically noted that provisions had been made by the law firm to screen the daughter from any matters before, or likely to come before, her father. Here, there was no such screening. RPC 1.10(e); RPC 1.11(b)&(c); RPC 1.12(c); RPC 1.18(d).

Rodriguez's attorney did not object when the District Court disclosed that its law clerk "once upon a time" worked for the Moran firm. AA1:165. However, "once upon a time" may be suitable for fairy tales, but it is not suitable for the

District Court disclosing a possible conflict. Defense counsel also suggested that his firm was new to the case, even though it was counsel of record for several years. *Id.*; AA1:11–19. This District Court should have provided *sufficient* information such as when the law clerk position was held, whether future employment was possible, or whether the clerk, while working on the case, would be in contact with his colleagues at the Moran firm. Furthermore, time outside of the presence of the District Court should have been provided to evaluate the possible conflict. AOB47. The Palms, and this Court, should not put a Judge's obligations completely upon the shoulders of attorneys when they are unexpectedly provided incomplete information and expected to immediately evaluate and respond/object to an incomplete disclosure.

The Code of Judicial Conduct states, "A judge **shall disqualify himself** or herself in any proceeding in which the judge's **impartiality might reasonably be questioned**." AOB46–47 (discussing CJC 2.11(A)(1)&(6)). "'Shall' imposes a duty to act." NRS 0.025(1)(d). And law clerks must "act in a manner consistent with the judge's obligations" under CJC 2.21(A). AOB45–51. The District Court was required to disqualify itself if impartiality might reasonably be questioned, or

at a minimum, provide a full and complete disclosure since there was a doubt of whether impartiality might be questioned.

Federal rules on judicial recusals are similar, requiring recusal when a reasonable person would harbor doubts about the judge's impartiality. 28 U.S.C.A. §455. In *Lopez Dominguez v. Gulf Coast Marine & Associates, Inc.*, 607 F.3d 1066, 1074 (5th Cir. 2010), the Fifth Circuit concluded that §455 "neither prescribes nor prohibits any particular remedy" for recusal remedies, but has delegated to the judiciary the task of "fashioning remedies that will best serve the purpose of the legislation." *Id.* (citing *Liljeberg v. Health Services Acq. Corp.*, 486 U.S. 847, 862, 108 S.Ct. 2194, 2204 (1988)). In *Liljeberg*, the United States Supreme Court found that when a trial judge either knew or should have known that grounds for recusal existed, the adverse orders and findings were to be vacated. *Liljeberg*, 486 U.S. at 868, 108 S.Ct. at 2206; AOB50–51.

On this disqualification issue, Rodriguez requests alternative relief: (1) If the Court determines that the District Court should have recused itself, the proper remedy is to vacate the offending orders. *Liljeberg,* 486 U.S. at 867–868, 108 S.Ct. 2206–2207; or (2) If the Court believes there are factual issues to be weighed on recusal, the proper remedy is to remand to an impartial and disinterested

District Court Judge. *Ryan's Express*, 279 P.3d at 172–173. Therefore, at a minimum, the Court should vacate the order denying 60(b) relief and remand.

III. CONCLUSION

In summary, Rodriguez demonstrated excusable neglect under NRCP 60(b) due to his lack of notice for hearing dates, withdrawal of his attorney on the eve of trial and critical motion deadlines, and severe health problems while he diligently sought new counsel from out of state. The District Court also erred in its conclusion that Rodriguez's motion, filed within six months as required under Rule 60(b), was untimely based on "want of diligence," without sufficient analysis or a definition of "diligence." Additionally, the District Court abused its discretion in denying 60(b) relief when it failed to review the required factors under *Young* for case-concluding discovery sanctions. Finally, the District Court erred by failing to disqualify itself or to provide sufficient information, when its law clerk previously worked as a clerk for the defense firm.

Therefore, Rodriguez respectfully requests that this Court either reverse the District Court's order denying 60(b) relief or vacate the order and remand.

Dated this 9th day of October, 2017.

MARQUIS AURBACH COFFING

By Micah S. Echols
Micah S. Echols, Esq.
Nevada Bar No. 8437
Adele V. Karoum, Esq.
Nevada Bar No. 11172
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Appellant,
Enrique Rodriguez

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 6,985 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 9th day of October, 2017.

MARQUIS AURBACH COFFING

By /s/ Micah S. Echols
Micah S. Echols, Esq.
Nevada Bar No. 8437
Adele V. Karoum, Esq.
Nevada Bar No. 11172
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Appellant,
Enrique Rodriguez

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S REPLY BRIEF** was filed electronically with the Nevada Supreme Court on the 9th day of October, 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 by mailing a true and correct copy thereof, postage prepaid, addressed to:

Justin W. Smerber, Esq.
Moran Brandon Bendavid Moran
630 S. Fourth Street
Las Vegas, Nevada 89101
Attorneys for Respondents

/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing