IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; And OVERLAND DEVELOPMENT CORPORATION, a California corporation,

Appellants,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual,

Respondents.

No. 77780
District Court Case No. CV14-01712

APPEAL FROM ORDER DENYING NRCP 60(B) MOTION
SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE
HONORABLE LYNNE K. SIMONS

APPELLANTS' OPENING BRIEF

ROBERT L. EISENBERG
Nevada Bar No. 0950
Lemons, Grundy & Eisenberg
6005 Plumas Street, Third Floor
Reno, Nevada 89519
775-786-6868
rle@lge.net

RICHARD D. WILLIAMSON
Nevada Bar No. 9932
JONATHAN JOEL TEW
Nevada Bar No. 11874
Robertson, Johnson,
Miller & Williamson
50 West Liberty Street, Suite 600
Reno, Nevada 89501
775-329-5600
Rich@nvlawyers.com
Jon@nvlawyers.com

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 judges of this court may evaluate possible disqualification or recusal.

There are no parent corporations or publicly-held companies that own 10% or more of any of the Appellants.

The law firm of Lemons, Grundy & Eisenberg has represented the Appellants throughout this appeal.

The law firm of Robertson, Johnson, Miller & Williamson has been counsel of record in this case since March 26, 2018.

Prior to that date, Brian P. Moquin represented the Appellants as lead counsel and David C. O'Mara represented the Appellants as local counsel.

No Appellant is using a pseudonym.

DATED: August 26, 2019

/s/ Robert L. Eisenberg
ROBERT L. EISENBERG (Bar No. 0950)
Lemons, Grundy & Eisenberg

RICHARD D. WILLIAMSON (Bar No. 9932)
JONATHAN JOEL TEW (Bar No. 11874)
Robertson, Johnson, Miller & Williamson

ATTORNEYS FOR APPELLANTS

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INTRODUCTION

This is an extremely unfortunate case, where the Plaintiffs/Appellants – primarily a 77-year-old individual named Larry Willard – lost a $15,000,000 cut-and-dry breach of lease case because the Plaintiffs' attorney, Brian Moquin, suffered from bipolar disorder and abandoned his clients by failing to oppose dispositive motions. Even after Plaintiffs retained new counsel in an attempt to undo the devastation by filing a Rule 60(b) motion for relief, Moquin repeatedly made promises that he would help fix the problems he had caused, provide his case files, and continue to see the doctor who diagnosed him as bipolar. Consistent with his illness, Moquin never followed through. Instead, he became increasingly vulgar, hurling expletives at both Willard and present counsel, and viciously blaming his wife for his woes. He was also arrested for domestic violence in January of 2018.

The Defendants claim to have been harmed by Moquin's inaction as well – both in terms of time and attorneys' fees. But what they lost pales in comparison to what Larry Willard, a 77-year-old man, has lost.

Due to Moquin's abandonment of the Plaintiffs, the district court entered case-terminating sanctions. As this court will see, however, the district court erred for several, independently reversible reasons.

First, the district court should have issued a sanction more proportionate to Moquin's discovery failures and inability to oppose motions. The Defendants claimed prejudice because of Moquin's failure to produce discovery on various categories of damages, the amount of which Moquin could not keep consistent. Yet, this is a simple case involving the Defendants' strategic decision to breach a commercial lease and personal guarantee. A much more appropriate sanction would have been to prohibit Plaintiffs from utilizing an expert at trial, and limit Plaintiffs to establishing basic, breach of lease damages which an expert is not needed to establish. It is just simple math. Moreover, those basic damages were repeatedly disclosed to the Defendants. In fact, they were calculated and disclosed in the original Verified Complaint and again in the Verified First Amended Complaint.

Second, the district court erred in its application of the pertinent case-terminating sanctions factors, and failed to consider the most appropriate factor applicable to this case: whether sanctions unfairly operate to penalize a party for the misconduct of his attorney. The Defendants' Motion for Sanctions conveniently ignored this extremely relevant factor, and the district court's sanctions order ignored it as well. In the Rule 60(b) Order, which the Defendants drafted, the district court simply stated that the court was not required to consider

that factor. However, that factor should have been addressed by the district court, and the failure to do so constituted an error of law.

Third, the district court committed clear error in finding that Moquin did not abandon the Plaintiffs. Abandonment alone constitutes excusable neglect, and the evidence in this case demonstrates clear abandonment. Moquin failed to oppose dispositive motions despite repeatedly assuring Willard that he would, and, after the Plaintiffs retained new counsel, Moquin refused to provide any assistance to Willard or new counsel – including the fundamental, ethical obligation to provide his files.[1] Instead, he elected to profanely insult and disparage Willard and new counsel. Simply because an attorney is capable of performing *some* tasks in a case does not preclude a finding of constructive abandonment and excusable neglect, as the district court seems to have believed.

Fourth, the district court erred in excluding admissible evidence. While some of the evidence the Plaintiffs submitted was hearsay, each item of evidence met the requirements of various exceptions to the hearsay rule, and should have been considered. Relatedly, the district court was able to directly observe Moquin, and the procedural history of this case on its own established that Moquin was suffering from mental illness. This is not the typical sanctions case where a party

[1] See In re: Discipline of Brian Moquin, Esq. (Nev. Sup. Ct. Case No. 78946).

hides or destroys evidence; this is a case where *the attorney* simply could not function. This also justifies reversal.

Fifth, the district court committed clear error by not addressing any of the Rule 60(b) "excusable neglect" standards. Under established Nevada law, a district court must consider whether a party promptly applied for Rule 60(b) relief, lacked intent to delay the proceedings, lacked knowledge of the procedural requirements, and demonstrated good faith. Plaintiffs' Rule 60(b) Motion argued these factors at length, the Defendants' opposition brief simply ignored those required factors, and the district court's order failed to address them as well. This was clear error.

The Plaintiffs themselves did nothing wrong. They only ask for their day in court. Accordingly, Plaintiffs seek a reversal of the district court's orders dismissing the Plaintiffs' case and refusing to provide Rule 60 relief. *The Plaintiffs have stated their willingness to rectify any harm caused to the Defendants*, and reversal is appropriate so that the case can proceed on the merits.

JURISDICTIONAL STATEMENT

Pursuant to NRAP 3(b)(8) (special order after final judgment) and this court's Order Partially Dismissing Appeal and Reinstating Briefing filed on August 23, 2019, the only order being appealed is the district court's Order Denying Plaintiffs' Rule 60(b) Motion for Relief. The other orders mentioned in the notice of appeal were dismissed in the August 23, 2019 order. As stated in its

Order to Show Cause entered on August 8, 2019, this court has already determined that this appeal is timely and that it may proceed. (Order to Show Cause at 2, n.1.)

ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court under NRAP 17(a)(12) because the case presents issues of statewide public importance involving clarification of the law dealing with sanctions imposed on clients due solely to the derelictions of counsel with a mental health disorder. Clients rely on their attorneys to guide them through the legal system. When those attorneys utterly fail to do so despite repeated assurances that they would do so, innocent clients are harmed, guilty defendants are absolved of liability, and public trust in the judicial system weakens. In addition, district courts do struggle to reconcile the extent of the recognized exceptions to the attorney-agency rule. A published case applying the effect and extent of the abandonment exclusion to the rule of attorney agency would provide district courts with important guidance.

STATEMENT OF ISSUES

1. Did the district court err in choosing to enforce case-terminating sanctions rather than awarding a lesser sanction that would address the actual degree of prejudice that Defendants suffered?

2. Did the district court err in failing to assess all of the pertinent factors set forth in Young v. Johnny Ribeiro Bld., 106 Nev. 88, 92-93, 787 P.2d 777

(1990), such as whether sanctions unfairly operate to penalize a party for the misconduct of his attorney?

3. Did the district court err in failing to find that Plaintiffs' prior counsel abandoned them?

4. Did the district court err in excluding admissible evidence supporting relief under NRCP 60(b)?

5. Did the district court err in otherwise denying Appellants' motion for relief under NRCP 60(b)?

STATEMENT OF THE CASE

All of the Plaintiffs jointly filed a Verified Complaint on August 8, 2014, and then a Verified First Amended Complaint on January 21, 2015. (1 A.App. 1; 2 A.App. 232.) The operative complaint included claims for breaches of the Plaintiffs' respective lease agreements with Defendant/Respondent Berry-Hinckley Industries ("BHI"), breaches of the personal guarantees that the Plaintiffs received from Defendant/Respondent Jerry Herbst, a claim for attachment, and a claim for injunctive relief. (2 A.App. 234-244.) Due to attorney Moquin's failures in the case, the district court entered an order granting Respondents' motion for sanctions on January 4, 2018. (16 A.App. 3585.) The district court then entered findings of fact and conclusions of law on March 6, 2018, ordering that Plaintiffs' claims

against the Defendants/Respondents are dismissed with prejudice. (16 A.App. 3607, 3639.)

The Plaintiffs, after obtaining new counsel, promptly filed for Rule 60(b) relief on the basis of "excusable neglect." (16 A.App. 3675-3798.) The matter was fully briefed and oral argument was held on September 4, 2018. (17 A.App. 3799; 17 A.App. 3942; 19 A.App. 4332.) The district court denied Plaintiffs' Rule 60(b) Motion on November 30, 2018. (18 A.App. 4061.) This appeal now follows.

STATEMENT OF FACTS

Background Regarding the Lease and the Defendants' Breach[2]

On November 18, 2005, Plaintiffs/Appellants Larry J. Willard, individually and as Trustee of the Larry James Willard Trust Fund (collectively, "Willard") and Overland Development Corporation entered into a Purchase and Sale Agreement with P.A. Morabito and Co. Limited to purchase a commercial property (gas station, car wash, car service center, and retail store) located at 7695 and 7699 South Virginia Avenue, Reno, Nevada (the "Virginia Property") for a total purchase price of $17,750,000. (16 A.App. 3695.) Out of their own funds,

[2] To receive Rule 60(b) relief, the moving party is no longer required to demonstrate a meritorious claim or defense. Rodriguez v. Fiesta Palms, LLC, 134 Nev. Adv. Op. 78, 428 P.3d 255, 257 n.2 (2018) (citing Epstein v. Epstein, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997)). Nonetheless, the merits of this case further underscore the need for relief. Therefore, Plaintiffs will briefly describe the merits of the case and then provide facts surrounding their experience with prior counsel and the resulting excusable neglect.

Plaintiffs paid a total of $4,668,738.49 in earnest money for the Virginia Property. (Id.) Plaintiffs then borrowed $13,250,000 from South Valley National Bank ("South Valley") to pay the balance of the purchase price. (Id.) The Purchase and Sale Agreement contained a lease-back provision under which the seller or its assignee would lease the Virginia Property for a period of twenty years (20) years at a base annual rental rate of $1,464,375 with the annual rent increasing by two percent per year. (Id.)

The seller's affiliate, Defendant/Respondent BHI, became interested in leasing the business property from Willard, and on December 2, 2005, BHI, Overland, and Willard entered into a lease agreement (the "Virginia Lease") containing the lease-back provision mentioned above. (Id.) On February 21, 2006, BHI, Overland, and Willard entered into a Lease Subordination, Non-Disturbance and Attornment Agreement (the "Subordination Agreement"), which informed BHI that Willard was purchasing the Virginia Property with financing from South Valley. (Id.) In the Subordination Agreement, BHI: (1) expressly agreed not to terminate the Virginia Lease without obtaining the consent of South Valley; and (2) acknowledged that South Valley would not make the loan without the Subordination Agreement in place. (Id.) Accordingly, the Defendants would have been fully aware that breaching the Virginia Lease would have devastating consequences on Overland and Willard.

On March 16, 2006, Willard refinanced the South Valley loan with Telesis Community Credit Union for a total loan amount of $13,312,500. (16 A.App. 3696.) Under this loan, Overland and Willard were required to pay $87,077.52 per month to Telesis Community Credit Union's loan servicing agent, Business Partners, LLC. (Id.) On February 17, 2007, BHI sent an offer letter to Willard and other landlords indicating that Herbst intended to acquire BHI's convenience store assets, which included the Virginia Property. (Id.) In the offer letter, Herbst offered to personally guarantee BHI's payments and performance under the Virginia Lease. (Id.) Herbst materially supported the offer letter through representations that his net worth exceeded $200,000,000. (Id.) In reliance upon the Defendants' representations and Herbst's personal guarantee, Willard accepted Herbst's offer. (Id.)

The Defendants operated the Terrible Herbst automotive service business and stayed current on their rent obligations under the Virginia Lease until 2013. (Id.) On March 1, 2013, without any notice whatsoever, and without giving any reason, BHI defaulted on the Virginia Lease by not sending the monthly rental payment for March 2013. (Id.) On March 10, 2013, BHI's finance department disclosed to Willard that it would no longer pay any rent. (Id.) On April 12, 2013, Defendants' lawyers sent a letter indicating that BHI did not intend to cure the breach of the Virginia Lease and instead planned to vacate the Virginia Property on

April 30, 2013. (9 A.App. 1879.) They gave no reason for their decision to abandon the Virginia Lease, other than the fact that BHI was losing money. (Id.) In other words, this was an intentional strategic breach meant only to save the Defendants' money.

Under the Virginia Lease, the rent was accelerated upon BHI's breach. (16 A.App. 3696.) The amount owed, to date, exceeds $15,000,000. (Id.) Herbst personally guaranteed BHI's entire obligation under the Virginia Lease. (Id.) Due to BHI's breach, Herbst is also liable for an amount in excess of $15,000,000. (Id.)

Despite the Defendants' liability, Willard and the other Plaintiffs recognized they would have to mitigate their damages immediately. The Plaintiffs knew that because of their obligation to pay $87,077.52 per month to the Loan Servicing Agency, they could lose the Virginia Property due to BHI's sudden decision to breach the Lease and no longer pay the approximately $140,000 in rent that the Plaintiffs had been using to make payments on the loan. (16 A.App. 3697.) Willard coordinated with BHI to remain on the Virginia Property until he could find a replacement tenant. (Id.) Willard entered into an interim "Operation and Management Agreement" with BHI effective May 1, 2013, under which BHI agreed to continue active operations of the Virginia Property. (Id.) This Operation and Management Agreement did not excuse BHI's rent obligations, but provided

incentive for BHI to reduce its liability for damages to Willard and Overland while they attempted to locate a replacement tenant. (Id.)

Unfortunately, in late May 2013, Willard discovered that the Virginia Property was not fully operational and was actually in total disarray. (Id.) On June 1, 2013, BHI vacated the Virginia Property having paid no rent whatsoever since its sudden breach of the Virginia Lease on March 1, 2013. (Id.) In other words, they simply walked away from the lease and the Plaintiffs' property, without any legitimate reason. BHI never explained why it abandoned its obligations to the Plaintiffs and their property.

On June 14, 2013, Willard received a Notice of Intent to Foreclose from the loan servicing agent. (Id.) Following the breach, despite Willard's diligent efforts, he was unable to find a replacement tenant to lease the Virginia Property. (Id.) On February 14, 2014, Overland and Willard agreed to enter into an agreement with Longley Partners, LLC to purchase the Virginia Property via short sale. (Id.)

Due to the Defendants' breach, Willard lost his investment, the stream of rental income of approximately $140,000 a month, and the Virginia Property. (16 A.App. 3698.)

Willard's History with Prior Counsel

When BHI breached the Virginia Lease, Willard faced losing his substantial income and his personal retirement funds. (16 A.App. 3698.) Willard is a senior

citizen and was very much dependent on the income derived from the Virginia Property. (Id.) Willard's income not only provided for him, but also for his ex-wife and his blind father, who was 92 years old at the time of the breach and was in an assisted living facility. (Id.) Willard now has only a social security income of $1,630 per month. (Id.)

To try to avoid financial ruin, Willard pursued a lawsuit against BHI and its guarantor, Jerry Herbst. (Id.) Willard was living in the San Francisco Bay Area and originally retained an attorney there named Steven Goldblatt. (Id.) Goldblatt filed the case in California, and then had to withdraw because of a serious car accident. (Id.) Willard was thus forced to find another attorney to take his case and file it in the correct jurisdiction. (Id.) The Plaintiffs were directed to another California attorney, Brian Moquin. (Id.)

Upon reviewing Moquin's professional status and speaking to other people, Willard had every reason to believe that Moquin was qualified and would take this case very seriously. (Id.) Because of Willard's lack of income, Moquin agreed to take the case on a contingency fee. (16 A.App. 3699.)

On August 8, 2014, Willard and Overland, along with co-plaintiffs Edward E. Wooley and Judith A. Wooley, commenced the Nevada action against Herbst and BHI.[3] (1 A.App. 1.) At the onset, Moquin was busy cleaning up and

[3] The Wooley plaintiffs did not participate in the Rule 60 motion or this appeal.

assimilating the original lawsuit that the previous attorney had incorrectly filed in California, filing this current case in Reno, and subsequently amending the complaint in this case. (16 A.App. 3699.) Throughout 2015 and 2016, Willard believed Moquin was quite busy dealing with discovery demands, interrogatories, vetting, research, and culminating in a hearing regarding defendants' partial motion for summary judgment on certain issues. (Id.)

After some time, Willard realized that Moquin was having financial difficulties. (Id.) However, Moquin continued moving forward with this case, until some point in mid-to-late 2017. (Id.) As it turned out, Moquin was dealing with more than just financial problems. (Id.) Willard discovered that as much as Moquin wanted to respond to deadlines in a timely fashion, Moquin was dealing with mental health issues beyond his control. (Id.) Willard also discovered that Moquin was struggling with a constant marital conflict that greatly interfered with his work. (Id.) In addition, Moquin was suffering from bipolar disorder. (16 A.App. 3700; see also 16 A.App. 3761.)

Moquin's disorder is both severe and debilitating. (16 A.App. 3700.) Symptoms of Moquin's disorder manifest as apathy, an inability to concentrate, difficulty making decisions, an inability to accomplish tasks, missed work, lack of energy, and depressed mood. (Id.; see also 16 A.App. 3748.)

Willard now realizes that while Moquin was assuring him that he was working on the case, he was missing deadlines and failing to properly pursue the case.[4] (16 A.App. 3700.)

Moquin was not always responsive, but after having his total income dissipated after the Defendants' breach, Willard felt that his only option was to rely on Moquin. (16 A.App. 3701.) In addition, Moquin repeatedly assured Willard that he would prevail and that the case was proceeding fine. (Id.; see also 17 A.App. 3953.)

For his part, Willard made ongoing efforts on an almost daily basis to push the case forward, provide Moquin with what he needed, and to pursue the case against the Defendants for breach of the Virginia Lease and the personal guarantee. (16 A.App. 3701.) Willard was devastated to realize that Moquin had not been able to file timely oppositions and had failed to comply with various discovery

[4] In fact, Moquin's inability to meet deadlines and to comply with litigation obligations had become well known to defense counsel as early as May 2015. This was established in defense counsel's motion seeking a contempt finding and sanctions based upon attorney Moquin's litigation failures. (2 A.App. 308-382.) Defense counsel's motion asserted "Moquin's dilatory conduct" (2 A.App. 309) and Moquin's failure to provide documents by dates he had promised. (2 A.App. 311.) The motion asserted that one witness's failure to comply with a subpoena was "attributable to Mr. Moquin" (2 A.App. 312); that Moquin's false assurances regarding the litigation "have become a pattern" (id.); and that Moquin had made numerous somewhat far-fetched excuses for his failures to comply with discovery requirements. (2 A.App. 312-313.) Defense counsel's 2015 contempt motion placed the blame entirely on Moquin, without even a whisper that Larry Willard may have somehow been responsible for Moquin's litigation failures.

rules. (Id.) Moquin would continually provide anticipated completion dates of various documents, but then change those anticipated dates. (Id.) Moquin would alternate between cycles of optimism (mania) and then going days when he would not respond at all (depression). (Id.)

Moquin's court records reveal disastrous personal problems that clearly affected his ability to practice and also corroborate that his failures in this case were not isolated. In her Request for Domestic Violence Restraining Order, which is signed under penalty of perjury, Moquin's wife, Natasha Moquin, confirms that Moquin "was recently diagnosed with Bipolar disorder, has been paranoid and violent," and that Mrs. Moquin is concerned about triggering a psychotic reaction. (16 A.App. 3761.) Natasha Moquin also confirms that the worst abuse she suffered from Moquin was around September 2016 – showing that his personal problems have been in the background of all of the critical events in this case. (16 A.App. 3766.)

Natasha Moquin further reveals that for years she has been concerned that Moquin was failing to meet filing responsibilities in his cases. (16 A.App. 3767.)

Prior to filing for divorce, Natasha Moquin had already received an Emergency Protective Order against Moquin. (16 A.App. 3761; see also 16 A.App. 3751.) Moquin was even arrested pursuant to that Emergency Protective Order on January 23, 2018. (16 A.App. 3754; see also 17 A.App. 3956.)

The Plaintiffs did not discover Moquin's mental illness until January 2018, when it was too late. (16 A.App. 3701.) In retrospect, the history of Moquin's failures began much earlier than the Plaintiffs initially realized. (Id.)

Moquin's Failures and the Sanctions Orders

On December 2, 2016, Plaintiffs had disclosed Daniel Gluhaich as an un-retained expert witness. (12 A.App. 2813-2816.) On February 9, 2017, the parties signed and submitted a proposed *Stipulation and Order to Continue Trial (Third Request)*, which included an agreement that Plaintiffs would "serve Defendants with an updated initial expert disclosure of Dan Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26 within thirty (30) days of the date of the Order approving this Stipulation." (7 A.App. 1490.) On February 9, 2017, the district court approved and filed the *Stipulation and Order to Continue Trial (Third Request)*. (7 A.App. 1493.)

On May 30, 2017, this district court entered an *Order Granting Partial Summary Judgment in Favor of Defendants*, which denied Plaintiffs' claims for certain damages and further ordered Plaintiffs to serve an updated NRCP 16.1 damage disclosure. (7 A.App. 1517.)

On October 18, 2017, the Plaintiffs filed a *Motion for Summary Judgment of Plaintiffs Larry J. Willard and Overland Development Corporation*, which contained a detailed description of the damages they were seeking. (7 A.App.

1601-1605.) These damages included previously-disclosed rent damages and also damages for diminution in value and other categories of damages. (Id.) Some of these claimed damages were based upon the opinions of Gluhaich. (7 A.App. 1604-1605.)

On November 13, 2017, Defendants filed *Defendants'/Counterclaimants' Opposition to Larry Willard and Overland Development Corporation's Motion for Summary Judgment*. (10 A.App. 2284.) The next day, on November 14, 2017, Defendants filed a *Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich*, and a separate motion seeking permission for that motion to exceed the district court's page limits. (12 A.App. 2781-2803; 16 A.App. 3593.) The following day, on November 15, 2017, Defendants filed three more motions: *Defendants' Motion for Partial Summary Judgment*; *Defendants/ Counterclaimants' Motion to Exceed Page Limit on Defendants/Counterclaimants' Motion for Sanctions*; and *Defendants/Counterclaimants' Motion for Sanctions*. (See 13 A.App. 2880; 16 A.App. 3588; 13 A.App. 3021.)

On December 6, Plaintiffs filed a *Request for a Brief Extension of Time to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for Submission of Dispositive Motions*. (15 A.App. 3568.)

On December 12, 2017, the attorneys appeared for a Pre-Trial Conference. In that conference, they discussed the pending motions and Moquin's failure to file

oppositions. Moquin represented to the district court that on the day the oppositions were due he had computer problems and lost all of his work. (19 A.App. 4317.) Moquin requested additional time to respond in light of these circumstances. (Id.) Ultimately, the district court granted Moquin until December 18, 2017, in which to file oppositions to the Defendants' pending motions. (19 A.App. 4322.) Each party was represented by counsel, but Larry Willard and the other parties were not actually present at this conference. (19 A.App. 4305.)

Moquin never filed the oppositions in the time allowed. In fact, Moquin never filed another document in this case.

During this month of December, Willard attempted to communicate with Moquin on a daily basis, yet Moquin was highly unresponsive, and when he did respond, he would falsely assure Willard that everything was going fine. (17 A.App. 3954.) On January 4, 2018, the district court entered three orders. One of those orders granted *Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* pursuant to DCR 13(3). (16 A.App. 3590-3593.) A separate order granted *Defendants'/ Counterclaimants' Motion for Sanctions* pursuant to DCR 13(3). (16 A.App. 3585-3588.) A third order noted Plaintiffs' failure to respond, but found that *Defendants'/Counterclaimants' Motion for Summary Judgment* is moot. (19 A.App. 4355-4356.)

Defendants prepared and proposed Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions. (16 A.App. 3607.) Moquin did not object to those proposed findings. On March 6, 2018, pursuant to WDCR 9 and DCR 13(3), the district court entered the proposed *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions*. (16 A.App. 3607.)

On March 15, 2018, attorney David O'Mara filed a *Notice of Withdrawal of Local Counsel*, in which he explained:

> Counsel has had no contact with lead counsel Mr. Moquin for many months with a total failure just prior to the Court's first decisions being filed in this case. Mr. Moquin was unresponsive during the time in which this Court was deciding the pending motions, even after counsel begged him for a response to be filed with the Court and was told he would provide such response.

(16 A.App. 3654.)

Moquin's Refusal to Cooperate with Willard and New Counsel

In January 2018, Moquin was arrested related to charges of domestic violence. (16 A.App. 3754; see also 17 A.App. 3956.) Plaintiffs began looking for a new lawyer. (17 A.App. 3956.)

Around that same time, Moquin explained to Willard that a Dr. Mar had diagnosed him with bipolar disorder and that he needed money to pay Dr. Mar for treatment. (17 A.App. 3956.) After obtaining a loan from a friend, Willard arranged to pay Dr. Mar for his services. (Id.)

On March 13, 2018, Willard paid Dr. Mar's office $470 for Moquin's treatment so that Moquin could get well and help new counsel fix the case. (17 A.App. 3956; see also 17 A.App. 3977.)

Moquin was, in part, supposed to obtain a letter from Dr. Mar evidencing his diagnosis and treatment. (17 A.App. 3956.) Despite paying for Moquin's treatment, and despite numerous requests from Willard and the new attorneys, Moquin refused to provide Plaintiffs with the promised letter from Dr. Mar. (Id.)

In fact, new counsel repeatedly requested Moquin to comply with ethical obligations by providing his files and other important information. (17 A.App. 3956; see also 17 A.App. 3979-3982.)

Willard and his new lawyers repeatedly asked Moquin to provide a summary of the case, documents regarding his mental illness, and his case files. (17 A.App. 3956.) From January through March, 2018, Moquin repeatedly assured Willard that he would provide him with all of the information that his new attorneys needed to reinstate the case. (Id.)

On March 30, 2018, Moquin specifically assured Willard that Moquin will "get everything out the door before I leave today." (Id.) In response, Willard asked if he had obtained the requested documentation from Dr. Mar, and Moquin told Willard that he was playing phone tag with a person in Dr. Mar's office. (Id.) Willard then sent text messages on March 31, April 1, and April 2 desperately

urging Moquin to provide the new attorneys with everything they needed to try reinstate this case. (Id.)

Moquin then responded with an alarming rant, which included the following: "I'm not sure what part of '[expletive] off' you don't understand, but it is in your best interest to stop communicating with me at this point until I contact you." (17 A.App. 3957; see also 17 A.App. 3987-3988.)

Moquin's abusive and threatening language in his text dated April 2, 2018, is *just one* example of the abusive treatment Willard received from Moquin. (17 A.App. 3957.)

In early April 2018, Plaintiffs' new lawyers repeatedly asked Moquin for the various documents that he had still not provided. (17 A.App. 3957; see also 17 A.App. 3991-3994.)

Finally, exasperated with Moquin and his failure to cooperate and to provide the documents that he promised he would provide to fix the problems that he created, Willard and new counsel finally felt that they had no choice but to move forward without the documents that Moquin had promised. (17 A.App. 3957.) Moquin never gave new counsel his complete files. (Id.)

In addition to the numerous emails requesting the files, on May 14, 2018, new attorney Williamson sent Moquin a formal demand for the Plaintiffs' client files. (17 A.App. 3957; see also 17 A.App. 3996-3997.)

On Wednesday, May 23, 2018, Willard again wrote to Moquin, literally begging him to provide: (1) a diagnosis letter from Dr. Mar; (2) evidence Moquin claimed to possess to prove that he timely disclosed the damage calculations; and (3) an affidavit from Moquin explaining his personal situation and how it impacted his performance in this case. (17 A.App. 3957.) Moquin responded by claiming that he intended to provide all of the information Plaintiffs needed, but that he could not get to it until that weekend because he had a hearing in his criminal case on Thursday, May 24, 2018. (Id.) Moquin assured Willard that he should be able to provide an affidavit and supporting exhibits that weekend. (Id.)

When Willard tried to follow-up later that week, however, Moquin threatened Willard by stating that if Willard tried to communicate again before Moquin had provided the documents, that *Willard would never receive them.* (17 A.App. 3958.) By the afternoon of Monday, May 28, 2018, however, Moquin still had not provided the documents. (Id.; 17 A.App. 3999.) Therefore, Willard wrote to him again asking for the required documents. (17 A.App. 3958; 17 A.App. 3999.) Moquin quoted his previous threat and responded as follows: "'Communicate in ANY WAY with me again before I have sent you the declaration and supporting exhibits and you will receive neither.' ***So be it.***" (17 A.App. 3958; 17 A.App. 3999 (emphasis added).)

Moquin never provided the promised affidavit, the letter from Dr. Mar, other supporting exhibits, and damages disclosure information. Moquin never even provided the Plaintiffs' client files. (17 A.App. 3958.)

On April 18, 2018, new counsel filed the Rule 60(b) Motion and the matter was fully briefed. (16 A.App. 3675; 17 A.App. 3799; 17 A.App. 3942.) On Tuesday, September 4, 2018, the parties appeared and offered oral argument to the district court. (19 A.App. 4332.) On November 30, 2018, the district court entered its Order Denying Plaintiffs' Rule 60(b) Motion. (18 A.App. 4061.)

REQUEST FOR JUDICIAL NOTICE

Plaintiffs hereby request the court to take judicial notice of this court's docket No. 78946, which consists of disciplinary proceedings against attorney Moquin arising out of his representation of Plaintiffs in this case. Under NRS 47.130 and NRS 47.150, this court may take judicial notice of facts that are capable of verification from a reliable source, or where the facts are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

This court will invoke judicial notice to take cognizance of the record in another case, particularly where there is a close relationship between the two cases. See Mack v. Estate of Mack, 125 Nev. 80, 91-92, 206 P.3d 98, 106 (2009) (finding close relationship between murder case and deceased victim's estate case, and

therefore taking judicial notice of outcome of murder trial). In Cannon v. Taylor, 88 Nev. 89, 92, 493 P.2d 1313, 1314 (1972), this court took judicial notice of a related matter that involved "an incontrovertible fact, verifiable from records in the building where we sit." In the present case, we are requesting judicial notice of Moquin's disciplinary docket in the supreme court.

A court may take judicial notice of an attorney discipline case that is related to the pending case. For example, in the recent case of Kinder v. Legrand, 2019 WL 2450922 (U.S. Dist. Nev., June 12, 2019; unpublished decision), a criminal defendant's appeal was decided by the Nevada Supreme Court, but his attorney never advised him of the decision. In a subsequent federal habeas corpus petition, the federal court held that the statute of limitations was equitably tolled because of the attorney's abandonment of the defendant. *Id*. In so holding, the federal court took judicial notice of public records of the State Bar of Nevada, showing that the attorney had been disbarred. *Id*. The court noted that disciplinary records are accessible to the public, and that a court may take judicial notice of the State Bar's records of disciplinary action. *Id.*

In the present case, the proceedings on Plaintiffs' Rule 60 motion were conducted during April through November of 2018. At that time Moquin's disciplinary proceedings were incomplete and unavailable. Moquin's automatic disciplinary appeal was docketed as No. 78946 in this court on June 10, 2019.

That docket shows that on April 16, 2019, Moquin entered a conditional guilty plea arising out of his representation of Larry Willard in the present case. He pleaded guilty to violations involving diligence, communications, and obligations involving terminating representation. The guilty plea recites that for more than two years he failed to comply with discovery requirements and court orders; he evaded local counsel's efforts to obtain compliance; and Willard did not understand the consequences of Moquin's derelictions.

The guilty plea in the disciplinary docket also shows that Moquin stated that he had been diagnosed with bipolar disorder, and he had been arrested in California on charges of domestic violence. He also falsely told Willard's new counsel, multiple times, that he would cooperate and provide necessary information for new counsel's effort to obtain relief under NRCP 60, but he never provided the information. The guilty plea establishes that Larry Willard was injured by Moquin's violations of ethical requirements, because "the lawsuit dragged on for over four years and the client's claims were ultimately dismissed with prejudice based upon a sanction motion that Respondent [Moquin] failed to oppose."

The disciplinary docket also contains a separate document containing the State Bar's findings and conclusions, which recite clear and convincing evidence of Moquin's multiple and repeated violations of ethical requirements that lead to

dismissal of Willard's case. Among other sanctions, the State Bar has recommended a two-year injunction against Moquin practicing law in Nevada. Moquin failed to file an opening brief in the automatic appeal of his bar discipline case, and, as of the time of filing of the present opening brief in Plaintiffs' appeal, Moquin's disciplinary docket is under submission.

Attorney Moquin's disciplinary file is closely and entirely related to this appeal. Accordingly, this court should take judicial notice of the contents of docket No. 78946.

SUMMARY OF ARGUMENTS

There are several compelling reasons for reversal of the district court's Rule 60(b) denial. First, the district court applied a sanction that was not proportional to Moquin's failures due to mental illness and abandonment of the clients. Second, the district court, in assessing case-terminating sanctions, did not consider the factor most relevant and applicable to this case: whether sanctions unfairly operate to penalize a party for the misconduct of his attorney. Third, as the above facts clearly demonstrate, the district court erred by finding that Moquin did not abandon the Plaintiffs. Fourth, the district court erred by excluding admissible evidence demonstrating Moquin's undeniable mental illness and personal problems. Finally, the district court erred by not considering any of the mandatory "excusable neglect" factors.

STANDARD OF REVIEW

This appeal involves the district court's denial of Plaintiffs' Rule 60(b) Motion. As such, it is usually subject to review for abuse of discretion. Bonnell v. Lawrence, 128 Nev. 394, 400, 282 P.3d 712, 716 (2012). However, when the sanction imposed is dismissal with prejudice, *a heightened standard of review applies*. Young, 106 Nev. at 92, 787 P.2d at 779 ("Where the sanction is one of dismissal with prejudice, however, we believe that a somewhat heightened standard of review should apply."). Additionally, this court reviews *de novo* a district court's legal conclusions, including the interpretation of court rules. Casey v. Wells Fargo Bank, N.A., 128 Nev. 713, 715, 290 P.3d 265, 267 (2012). *De novo* review is appropriate for issues involving interpretation of NRCP 60(b). Ford v. Branch Banking & Tr. Co., 131 Nev. 526, 528, 353 P.3d 1200, 1202 (2015).

ARGUMENT

A. Plaintiffs Were Entitled to Rule 60(b) Relief Because the District Court Erred in Choosing to Impose Case-Terminating Sanctions Rather than Awarding a Lesser Sanction More Proportional to Any Harm Caused to the Defendants

On March 6, 2018, the district court entered its Sanctions Order, the substance of which Plaintiffs challenged in their motion for Rule 60(b) relief. The Sanctions Order dismissed Plaintiffs' claims with prejudice, and it was therefore a

case-terminating sanction. "'Because dismissal with prejudice is the most severe sanction that a court may apply . . . its use must be tempered by a *careful* exercise of judicial discretion.'" Hunter v. Gang, 123 Nev. 249, 260, 377 P.3d 448, 455-56 (Nev. Ct. App. 2016) (internal citations omitted) (emphasis in original). Further, a heightened standard of review applies to case-terminating sanctions. Young, 106 Nev. at 92-93, 787 P.2d at 780.

The district court entered a case-terminating sanction because of attorney Moquin's repeated failure to comply with discovery rules and the district court's orders. Moquin's failure to respond deprived the Plaintiffs of any opportunity to explain their position. Moreover, at the time, neither the parties nor the district court knew that these failures were caused by Moquin's psychological condition. When these facts are applied to the sanctions analysis required under Young, it becomes clear that Willard and Overland should receive relief from the Sanctions Order.

In Young, the Nevada Supreme Court explained the factors a court should consider when considering dismissal with prejudice as follows:

> The factors a court may properly consider include, but are not limited to, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, the policy favoring

> adjudication on the merits, **whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney**, and the need to deter both the parties and future litigants from similar abuses.

Young, 106 Nev. at 92-93, 787 P.2d at 780 (emphasis added).

i. Moquin's Inability to Comply with the Discovery Rules and District Court Orders Was Not Willful – and Plaintiffs Certainly Did Not Act Willfully in Any Way

"Sanctions may only be imposed where there has been willful noncompliance with a court order . . . ." GNLV Corp. v. Serv. Control Corp., 111 Nev. 866, 869, 900 P.2d 323 (1995). The Defendants assumed the Plaintiffs were engaged in willful misconduct, and even argued that Plaintiffs engaged in a bad faith attempt to sabotage them. (See 13 A.App. 3040, 3042, 3046.)

As this court can see, these allegations turned out to be 100% untrue. The Plaintiffs did not engage in any willful misconduct. Instead, Plaintiffs' failures are solely the result of Moquin's mental illness and other serious personal problems. Any other conclusion is belied by the factual evidence submitted in support of the Rule 60(b) Motion and Reply, and by plain reason. In light of what happened in this case, it strains credulity to conclude that Moquin was acting to strategically ambush the Defendants when he could not even oppose motions or timely file a request for submission of his own motions. There was no evidence to establish that Moquin or the Plaintiffs acted willfully or strategically.

Because there were no willful violations of orders or rules in this case, the district court should have granted Willard and Overland relief under Rule 60(b).

ii. Defendants' Prejudice, if Any, Was Much More Limited Than the Defendants Contended

Moquin's failures caused some delay and minor prejudice. However, delay alone is not generally considered substantial prejudice. Lemoge v. United States, 587 F.3d 1188, 1196 (9th Cir. 2009) ("[p]rejudice requires greater harm than simply that relief would delay resolution of the case."). Further, while the Defendants contended that the parties did not make any progress with discovery or move closer to trial readiness, that claim was inaccurate and overblown. The Defendants prevailed on one motion for partial summary judgment, and, more importantly, acknowledged that they had been able to prepare defenses to Plaintiffs' accelerated-rent damages, which exceed $15,000,000. (Compare 13 A.App. 3037 with 13 A.App. 3039.) Thus, if the district court had granted the Rule 60(b) Motion, trial could have been scheduled quickly.

Indeed, the crux of the Defendants' purported prejudice relates to Moquin's claim for "diminution in value" damages and reliance upon an inadequately-disclosed expert. Thus, a more proportional sanction due to Moquin's mental illness should focus on the "diminution of value" claim. See, e.g., Young, 106 Nev. at 92, 787 P.2d at 779-80 ("fundamental notions of due process require that the

discovery sanctions for discovery abuses be just and that the sanctions relate to the claims which were at issue in the discovery order which is violated.").

iii. Dismissal Was Too Severe of a Sanction

Dismissal of Plaintiff's case with prejudice was too severe of a sanction. As the record demonstrates, the Defendants' deliberate breach of the Virginia Lease financially destroyed Willard. This case unfortunately presents the only chance he has at age 77 to recover any financial compensation and live out his remaining years with some financial stability. If the Defendants face no responsibility for their intentional and unexcused breaches, and are absolved from liability, they will ultimately receive a windfall in excess of $15,000,000, all resulting from an attorney's personal and mental problems. Conversely, Willard – through no fault of his own – will be left in financial ruin.

The Defendants' Motion for Sanctions argued that dismissal with prejudice was not too severe of a sanction because of the willfulness of the violations and the need to deter future recalcitrant conduct. (13 A.App. 3050.) Yet, as was noted above, Plaintiffs' failures were not willful. Indeed, under Nevada law, they constituted excusable neglect. Thus, the dismissal sanction was clearly too severe.

Finally, there is no question that sanctions serve no deterrent purpose when the cause of a litigant's failures was the mental illness of his attorney.[5]

iv. The District Court Failed to Consider Nevada's Policy of Adjudicating Cases on the Merits, and Whether the Sanctions Unfairly Operate to Penalize Willard for Moquin's Conduct

The Nevada Supreme Court has repeatedly declared Nevada's policy that cases be adjudicated on the merits. Because of the clear excusable neglect, and the Defendants' acknowledgment of being prepared to assert defenses to Plaintiff's rent-based damages, the district court should have followed Nevada's policy and allowed the case to proceed to trial.

Without relief, the Plaintiffs will undoubtedly be unfairly penalized by Moquin's conduct caused by his mental condition. Moquin repeatedly assured Willard that the case was proceeding fine. It was only in late 2017 / early 2018 that it became clear to Willard that something was terribly wrong, and that Moquin was suffering from mental illness. Critically, Nevada Supreme Court precedent makes clear that it would be improper to impute Moquin's conduct to the Plaintiffs because of Moquin's mental illness. Passarelli v. J. Mar Dev., 102 Nev. 283, 286,

[5] For this reason, the Defendants' argument that dismissal with prejudice is necessary to deter similar abusive conduct does not apply. (See 13 A.App. 3051.)

720 P.2d 1221, 1224 (1986) (noting that it would be unfair to impute the attorney's conduct to the client and deprive the client of a "full trial on the merits.").

B. The District Court Erred By Not Considering Whether the Sanctions Unfairly Operated to Penalize the Plaintiffs for the Misconduct of Their Attorney

Under Young, 106 Nev. at 93, 787 P.2d at 780, a district court must consider "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." In its Rule 60(b) Order, the district court contended that the consideration of the Young factors are discretionary and simply concluded that "the Court addressed the factors it deemed appropriate." (18 A.App. 4090.) Respectfully, the district court erred for a very simple reason. The Nevada Supreme Court clearly included a list of the pertinent factors that it felt were appropriate to be considered when evaluating case-terminating sanctions. In many instances, a party's attorney may not be responsible for conduct resulting in the case-terminating sanctions. In such a case, the attorney's conduct would be irrelevant to the question of whether to assess case-terminating sanctions.

But this is not that case. Indeed, *no factor* could be more important, relevant, and applicable in the instant case regarding whether to assess case-terminating sanctions than Moquin's extreme behavior and abandonment of the

Plaintiffs. For this simple reason, the district court committed legal error. Plaintiffs are entitled to relief under Rule 60(b).

C. The District Court Erred in Failing to Find that the Plaintiffs' Prior Counsel Abandoned Them

Moquin's mental illness and abandonment of the Plaintiffs demonstrates clear excusable neglect.

Under Nevada law, where an attorney's mental illness causes procedural harm to his or her client, NRCP 60(b)(1) justifies granting relief to the client. See Passarelli, 102 Nev. at 286, 720 P.2d at 1224. Other courts are in accord. See United States v. Cirami, 563 F.2d 26, 34 (2d Cir. 1977) (where a psychological disorder led a party's attorney to neglect almost completely his clients' business while at the same time assuring them that he was attending to it, Rule 60(b) relief is appropriate); Boehner v. Heise, No. 03 CIV. 05453 (THK), 2009 WL 1360975, at *9 (S.D.N.Y. May 14, 2009) (counsel's psychological disorder justified relief under) (counsel's psychological disorder justified relief under Rule 60(b)); Cobos v. Adelphi Univ., 179 F.R.D. 381, 388 (E.D.N.Y. 1998) (where an attorney's mishandling of a movant's case stems from the attorney's mental illness, extraordinary circumstances may justify relief).

As the facts and evidence demonstrate, Moquin was suffering from a psychological disorder that caused him to abandon the case. Accordingly, the court

should find excusable neglect and grant the Plaintiffs relief from the district court's orders disposing of their claims.

The district court's Rule 60(b) Order claims that the facts of the case do not demonstrate "excusable neglect" because under Huckabay Props. v. NC Auto Parts, 130 Nev. 196, 322 P.3d 429 (2014), the only exceptions that matter are a lawyer's addictive disorder, abandonment of legal practice, or criminal conduct victimizing the client. (18 A.App. 4082.) The district court concluded that these factors did not apply to this case. This is inaccurate for several reasons. First, it is beyond argument that an "addictive disorder" constitutes a form of mental illness. Accordingly, to say that Moquin's bipolar disorder should not fall within the existing exceptions is inequitable and illogical.

Second, the record demonstrates that Moquin *unequivocally* abandoned the Plaintiffs. Quite remarkably, the district court took an extremely narrow view of abandonment, concluding that there is "no evidence of missed meetings or absences from the office" or that "he closed his legal practice." (18 A.App. 4083.) Yet, the evidence demonstrates that Moquin could not function and oppose dispositive motions, which is significantly worse than missing meetings or being absent from the office. The record also reflects that Moquin was often unresponsive to his clients' calls, texts, and emails, and when Moquin did respond, he simply made assurances that he would get work done that he never did. In

addition, Moquin's behavior from January through April shows that the abandonment continued *since he refused* to help Willard or new counsel by providing any affidavit, health report, or even the Plaintiffs' client files – again despite promising to do so. Ultimately, he told Willard he would get nothing from him. Certainly, abandonment is not limited to closing one's law practice.

Moreover, Moquin constructively closed his law practice to the Plaintiffs by taking these actions. A distinction should not be made between formally closing the doors of one's office and closing one's practice with respect to a particular client.

The district court also states that Moquin was still on active status with the California Bar. (18 A.App. 4083.) Yet, voluntarily closing one's practice and *being forced to close one's law practice* are two separate issues. As the evidence demonstrates, Moquin was recalcitrant. He destroyed Willard's life and has shown no sympathy about it whatsoever. Willard should not be punished again simply because Moquin has not voluntarily gone on disability inactive status.

The district court also relied on Passarelli to hold that the Plaintiffs cannot demonstrate excusable neglect because the record included evidence the attorney suffered from a substance abuse disorder, closed his law practice, and the attorney was placed on disability inactive status. (18 A.App. 4082-4083.) Yet, these are meaningless distinctions. In fact, Moquin's refusal to cooperate after admitting he

is bipolar, not trying to mitigate his harm, not placing himself on disability status, and not properly closing his practice shows that the facts of this case ***are egregiously worse*** than what happened in Passarelli. And, again, as a practical matter, he closed his office to the Plaintiffs and became inactive in this case.

The district court further argues that there was no abandonment because the Plaintiffs: (1) knew about the December filing deadlines; (2) communicated with Moquin about those deadlines; (3) continued to retain Moquin after learning he failed to meet those deadlines; (4) were given notice of the seriousness of the situation. (18 A.App. 4084-4086.)

The district court's analysis here misses the point. The Plaintiffs' knowledge of the December filing deadlines and communication about those deadlines simply shows the Plaintiffs' diligence in trying to prosecute the case. If anything, it demonstrates abandonment since Moquin failed to file the oppositions.

With respect to the Plaintiffs continuing to retain Moquin for a few weeks after he failed to oppose the motions, this is a hollow point. Even through Christmas, Willard was desperately trying to get Moquin to file oppositions – and Moquin was the only attorney with deep knowledge of the case. Again, Moquin failed to follow through, which also shows clear abandonment. Finally, the Defendants' claim – that the Plaintiffs were given notice by the district court of

how serious the situation was – is absolutely false. The Plaintiffs were not at the December 12, 2017 hearing where that warning was issued.

Next, the district court states that Moquin did not abandon the Plaintiffs because he: (1) appeared at status hearings; (2) participated in depositions; (3) filed motions and other papers; (4) participated in oral arguments; and (5) filed two summary judgment motions. (18 A.App. 4086.)

The district court's findings here are truly irrelevant to the abandonment issue. Abandonment can happen at any time, and simply because Moquin attended depositions, filed motions years before December 2017, and managed to file motions for summary judgment in October 2017, is not relevant to what happened from December 2017 afterwards. Indeed, Moquin did not even file replies to his summary judgment motions and never submitted them for decision, which is consistent with his failure to oppose the dispositive motions. This is abandonment. See, e.g., Maples v. Thomas, 565 U.S. 266, 282 (2012) ("'Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word.'" (internal citations omitted)); see also Boehner, 2009 WL 1360975, at *3-6 (attorney's ability to take a separate case to trial immediately prior to failing to respond to court orders - which resulted in dismissal of the case - did not preclude Rule 60(b) relief and a finding that attorney "constructively" abandoned his client).

The district court also made the inaccurate finding that the Plaintiffs knew of Moquin's psychiatric problems before the district court's January 4, 2018 Order Granting Motion to Strike and Sanctions Order and yet still allowed Moquin to represent them. (18 A.App. 4087.) This is also inaccurate. The Plaintiffs learned of Moquin's diagnosis after he was arrested on January 23, 2018. (17 A.App. 3956.)

The findings the Defendants prepared claimed that the Plaintiffs have to show diligence to inquire about their case, were aware of Moquin's non-responsiveness, and yet failed to rectify representation. (18 A.App. 4087-4088.) But this is not what the record actually shows. The record shows that Willard texted and emailed daily on the progress of the oppositions, and through Christmas, was still assured by Moquin that he would file the oppositions. Further, the Plaintiffs did locate substitute counsel and retained them *just a few weeks later*. As such, the Plaintiffs were extremely diligent.

D. The District Court Erred in Excluding Admissible Evidence Supporting Relief under NRCP 60(b)

The district court entirely ignored the most glaring evidence of Moquin's abandonment: his repeated refusal to cooperate with Plaintiffs in their attempts to reinstate the case. In addition, in its Rule 60(b) Order, the district court incorrectly held that the Plaintiffs' Rule 60(b) Motion and Reply were not supported by admissible evidence.

i The Challenge to Dr. Mar's Diagnosis

The district court ruled that Moquin's statement to Willard that Dr. Mar diagnosed Moquin with bipolar disorder is admissible hearsay with no exception under NRS 51.105(1) because the statement does not qualify as a "declaration of 'then existing state of mind, emotion, sensation, or other physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health.'" (18 A.App. 4075-4076.) Yet, Moquin's admissions that he has bipolar disorder are statements about his present condition, and are admissible.

The district court found that the statements were not "spontaneous." (18 A.App. 4076.) Yet, the treatise the district court relied upon merely states that the spontaneous quality of the declarations provides special reliability. Spontaneity is not an absolute requirement to admissibility under the state of mind exception, but is a factor to assess in weighing admissibility. Sec. Alarm Fin. Enterprises, LP v. Alarm Prot. Tech., LLC, 743 F. App'x 786, 788 (9th Cir. 2018). Moreover, Moquin's statement to Willard is evidence of Moquin's state of mind at the time of the conversation. Wagner v. Cty. of Maricopa, 747 F.3d 1048, 1053 (9th Cir. 2013). When Moquin admitted to Willard that he was bipolar, that is a spontaneous statement about his present condition at the very time he made the statement to Willard. It is also a statement against Moquin's interest as it could

have subjected him to possible civil liability or bar discipline. The statement was therefore admissible under NRS 51.345.

Finally, the special circumstances under which this statement was made offer assurances of accuracy that would not likely to have been enhanced by calling Moquin as a witness (and Moquin was unavailable to be called as a witness). Therefore, the district court should have concluded that this statement fell within the general exceptions of NRS 51.075(1) and NRS 51.315(1).

As such, the district court erred in its finding.[6]

ii Willard Can Testify as to Moquin's Mental Condition as a Lay Witness

The district court concluded that Willard cannot testify as a lay witness regarding Moquin's mental condition. (18 A.App. 4076.) The district court is simply wrong here. As one court carefully explained:

> Lay witnesses may testify upon observed symptoms of mental disease, because mental illness is characterized by departures from normal conduct. Normal conduct and abnormal conduct are matters of common knowledge, and so lay persons may conclude from observation that certain observed conduct is abnormal. Such witnesses may testify only upon the basis of facts known to them. They may testify as to their own observations and may then express an opinion based upon those observations. *Of course the testimony of a lay*

[6] The district court also made the generalized statement that the Willard Declaration and Willard Reply Declaration contain hearsay within hearsay. (18 A.App. 4076.) However, it is unclear which specific statements the court is referring to. Moreover, hearsay within hearsay is admissible if each part of the combined statements fits within an exception to the hearsay rule. NRS 51.067.

> *witness with training in this or related fields may have more value than the testimony of a witness with no such training*.

Carter v. U.S., 252 F.2d 608, 618 (D.C. Cir. 1957) (emphasis supplied).

Thus, lay witness testimony is actually very admissible, and indeed helpful, when it concerns mental illness. Further, Willard has a degree in psychology, which provides even more value – as the Carter court concluded. (Ex. 4 to Opp. at 13:19-20.)

iii The District Court's Ruling on Exhibits 6, 7 and 8 to the Rule 60(b) Motion Was Erroneous

The district court concluded that Exhibits 6, 7, and 8 to the Rule 60(b) Motion are not authentic and constitute inadmissible hearsay. This was error.

Exhibit 6 is an Emergency Protective Order entered against Moquin. (16 A.App. 3751.) Exhibit 7 is a Pre Booking Information Sheet regarding Moquin and his arrest. (16 A.App. 3754.) Exhibit 8 is a Request for Domestic Violence Restraining Order that Moquin's wife filed against him. (16 A.App. 3757-3769.)

All three exhibits are authentic. That is apparent from Willard's declaration, the documents' appearance, and their surrounding characteristics. See, e.g., NRS 52.015(1); NRS 52.025; NRS 52.055. Moreover, if the Defendants truly doubted the documents' authenticity, then the Defendants should have provided some

rebuttal "evidence or other showing sufficient to support a contrary finding" in their opposition. NRS 52.015(3). They did not do so.

Further, Defendants did not challenge that critical fact in their Opposition, other than to provide their own uncertified document stating that Moquin's bar license is still active. But Moquin's bar license is not the issue. Moreover, the best evidence of Moquin's failure to properly prosecute this case is capable of judicial notice: Moquin failed to file critical documents with the court. Notably, the district court refused to take judicial notice of these documents. (18 A.App. 4079.) Yet, the district court was willing to take judicial notice of Moquin's California Bar status from the California Bar website. (18 A.App. 4083.) It is unclear why genuinely-uncontested court documents are inauthentic and not susceptible of judicial notice while an attorney's bar status from a website is. This is an unfair double-standard, and the district court erred in finding Exhibits 6, 7, and 8 inadmissible.

The exhibits also do not constitute hearsay. Exhibits 6 and 7 were not offered for the truth of the facts stated in them, but rather as examples of the personal turmoil that Moquin was facing. Therefore, Exhibits 6 and 7 do not fall within the hearsay rule.

Exhibit 8 to the Rule 60(b) Motion presents a more difficult question. However, even if Mrs. Moquin's statements about Moquin's mental health would

constitute hearsay, that the general fact that she filed a request for a restraining order, and any inferences as to the effect that may have had on Moquin, do not constitute hearsay. Therefore, the district court should have admitted Exhibit 8 – either in full or for limited non-hearsay purposes, such as showing that there was turmoil in Moquin's home life.

As the factually-uncontested evidence shows, Moquin was suffering from a psychological disorder that caused him to abandon his clients. Accordingly, the district court should have found excusable neglect.

iv The Texts and Emails offered by Plaintiffs and Authored by Moquin and O'Mara are Admissible and Relevant

The district court concluded that Exhibits 5, 6, 7, 8, 9, and 10 to the Reply were not relevant because they occurred after the district court issued its Order Granting Motion to Strike, Order Granting Sanctions, and Sanctions Order. (18 A.App. 4080.) This was clear error.

Exhibit 5 is a copy of the receipt for Willard's payment of Moquin's mental health treatment with Dr. Mar. (17 A.App. 3977.) Exhibit 6 is email correspondence that occurred from February 5 through March 21, 2018, between Moquin and Willard's new attorneys. 17 A.App. 3979-3982.) Exhibit 7 contains text messages between Willard and Moquin dated from March 30 through April 2, 201. (17 A.App. 3984-3989.) Exhibit 8 is email correspondence dated April 2

through April 13, 2018, between Willard's new attorneys and Moquin. (17 A.App. 3991-3994.) Exhibit 9 is a letter from one of Willard's new attorneys to Moquin demanding the clients' files. (17 A.App. 3996-3997.) Finally, Exhibit 10 is email correspondence dated May 23 through May 28, 2018, between Moquin and Willard. (17 A.App. 3999-4000.)

The events that took place from January 2018 afterwards support the Plaintiffs' position that Moquin abandoned them and that he was suffering from mental illness. The communications demonstrate that Plaintiffs' attorney was acting highly abnormally. Among other repulsive behavior, he began to spew vulgarities at his clients and new counsel, and failed to provide files, supportive declarations, and a mental health letter. These documents are indisputably relevant to the issue of abandonment and excusable neglect.

Finally, the district court concluded that any of the emails or text messages from O'Mara or Moquin contained in Exhibits 3, 4, 7, 8, and 10 are inadmissible hearsay. (18 A.App. 4080.) Yet, these exhibits do not actually constitute hearsay. For instance, statements that Moquin was "close" to completing opposition briefs and that they "will be filed" on December 11, 2017, are plainly not offered for their truth, but to show the Plaintiffs' diligence and the effect of Moquin's statements on O'Mara and the Plaintiffs. Similarly, Moquin's abusive and combative statements toward Willard are also not offered for the truth of the underlying statements, but

as evidence of Moquin's abnormal conduct and mental health. Therefore, they do not constitute hearsay under NRS 51.035.

Ideally, the Plaintiffs would have provided a formal diagnosis from a psychiatrist or an affidavit from Moquin confirming that he suffers from bipolar disorder. Yet, the Plaintiffs had no means to compel discovery from Moquin in the context of this case. Moreover, as other courts have recognized, an affidavit from a client can be used to confirm that mental health problems justify a motion for relief based upon excusable neglect. See, e.g., Schumacher v. Schroeder, 414 N.W.2d 319 (Wis. Ct. App. 1987) (awarding relief from a judgment based in part upon an affidavit confirming that although the plaintiff and his spouse were aware of the attorney's "mental health problems, they had no idea that his health problems were seriously interfering with his ability to handle this case").

Willard's declarations alone, which are based on his personal knowledge and his own experiences with Moquin, substantiate the Plaintiffs' inadvertence, surprise, and excusable neglect:

> 67. I have learned that Mr. Moquin was apparently struggling with a constant marital conflict that greatly interfered with his work.
> 68. This culminated in Mr. Moquin suffering what I can only describe as a total mental breakdown.
> 69. After Mr. Moquin suffered this mental breakdown, I recommended that he visit Dr. Douglas Mar, who is well-respected psychiatrist in Campbell, California.
> 70. Mr. Moquin later explained to me that Dr. Mar had diagnosed him with bipolar disorder and that he needed money to pay Dr. Mar for treatment.

71. After obtaining a loan from a friend, I arranged to pay Dr. Mar for his services, but I do not know if Mr. Moquin has continued with any course of treatment.

. . .

76. I now see that Mr. Moquin was suffering from many of these symptoms throughout his work on my case.

77. There have also been periods when Mr. Moquin was unavailable.

78. I have learned that Mr. Moquin has been going through a bitter divorce with his wife and that at one point he was even arrested in conjunction with those proceedings.

. . .

80. Only now do I realize that while Mr. Moquin was assuring me that he was working on this case, he was missing deadlines and failing to properly pursue the case. At the time that they were occurring, I did not realize the extent of these circumstances, and they were completely out of our control.

. . .

83. For my part, I was making ongoing efforts on an almost daily basis to push the case forward, provide Mr. Moquin with what he needed, and to pursue our case against the Defendants for breach of lease agreements that were backed up with a personal guarantee.

. . .

87. Having now received Mr. Moquin's diagnosis and learning more about his personal problems, I can now see how Moquin's issues affected our case.

88. I can now see some of the apparent symptoms manifested in our communications with Mr. Moquin, including continually giving us anticipated dates by which he would finish projects and later having to change them, and alternating between cycles of irrepressible optimism and ideas (mania) and then going days when he would not respond at all (depression).

(16 A.App. 3699-3701.)

14. I now know that he was struggling with mental health and dealing with other personal crises in his life.

15. I have learned that Mr. Moquin and his wife, Natasha, were in a state of nearly constant marital conflict that greatly interfered with his work.

16. This culminated in Mr. Moquin suffering what I can only describe as a total mental breakdown in December 2017.

. . .

34. After having worked with him for years, and having met his wife and his family, I had terrible sympathy for all of them and wanted to help if I could. At the same time, it was becoming clear to me that Mr. Moquin's personal problems had interfered with his duties to me and the other plaintiffs.

35. After Mr. Moquin suffered this mental breakdown, I recommended that he visit Dr. Douglas Mar, who is well-respected psychiatrist in Campbell, California.

36. At this time, I also started looking for other attorneys who might be able to help.

37. In January 2018, Mr. Moquin was also arrested related to charges of domestic violence.

38. Around that same time, Mr. Moquin explained to me that Dr. Mar had diagnosed him with bipolar disorder and that he needed money to pay Dr. Mar for treatment.

39. After obtaining a loan from a friend, I arranged to pay Dr. Mar for his services, but I do not know if Mr. Moquin has continued with any course of treatment.

40. On March 13, 2018, I paid Dr. Mar's office $470 to pay for Mr. Moquin's treatment so that Mr. Moquin could get well and help us fix the case.

. . .

42. Mr. Moquin was also supposed to obtain a letter from Dr. Mar evidencing his diagnosis and treatment.

43. Despite paying for Mr. Moquin's treatment, and despite numerous requests from me and my new attorneys, Mr. Moquin still failed to provide us with that letter from Dr. Mar.

. . .

46. Mr. Williamson and I both repeatedly asked Mr. Moquin to provide a summary of the case, documents regarding his mental illness, and his case files.

47. From January through March, 2018, Mr. Moquin repeatedly assured me that he would provide me with all of the information that my new attorneys needed to reinstate the case.

> 48. On March 30, Mr. Moquin assured me that he will "get everything out the door before I leave today." In response, I asked if he had obtained the requested documentation from Dr. Mar, and Mr. Moquin told me that he was playing phone tag with a person in Dr. Mar's office. I then followed up to ask if he had advised Mr. Williamson of the status, and he assured me that he would.
> 49. I then sent text messages on March 31, April 1, and April 2 urging Mr. Moquin to provide Mr. Williamson with everything he needed to try and reinstate this case.
> 50. Mr. Moquin then responded with an alarming rant, which included the following: "I'm not sure what part of '[expletive] off' you don't understand, but it is in your best interest to stop communicating with me at this point until I contact you."
> . . .
> 52. Mr. Moquin's abusive and threatening language in his text dated April 2, 2018, is just one example of the abusive treatment I received from Mr. Moquin.
> . . .
> 66. Throughout my experience with him, Mr. Moquin was always so positive about our case and confident that everything would work out. Over the last six months, however, Mr. Moquin's emotional swings have become terrifying and impossible to predict.

(17 A.App. 3954-3959.)

> As one court explained in an analogous context:
>
> > It does not require medical expertise to know that when a competent veteran attorney suddenly fails to perform, and covers up his non-performance by lying to his clients and his colleagues, something is obviously wrong with him. There is no reason to demand medical proof when the facts speak for themselves.

In re Benhil Shirt Shops, Inc., 87 B.R. 275, 278 (S.D.N.Y. 1988); see also Boehner, 2009 WL 1360975, at *5 ("when an 'able attorney, which [f]ormer [c]ounsel appears to have been, suddenly ignores [c]ourt orders and is unable to be

reached despite diligent attempts, it does not require medical expertise to know that something is obviously wrong with counsel.'" (internal citations omitted)).

From a review of the case law, it is clear that the mental illness exception is not focused on the former attorney's specific diagnosis. Rather, the question is whether the client "was effectually and unknowingly deprived of legal representation." Passarelli, 102 Nev. at 286, 720 P.2d at 1224. In this case, the Plaintiffs were effectively deprived of legal representation.

At oral argument, Defendants argued that the district court should not look at Moquin's conduct "in a vacuum," and should also consider the actions or inactions of Willard and his local counsel, David O'Mara. While this may be true, the record demonstrates that Willard was still effectually and unknowingly deprived of legal representation. First, Willard's declarations show that he diligently attempted to ensure that Moquin would oppose the critical motions that ultimately ended the Plaintiffs' case. And second, while O'Mara owed various duties of advocacy under the Supreme Court Rules, the record reflects that he too was led to believe that Moquin would respond to the Defendants' motions and was effectively unaware that Moquin had abandoned the case. Again, Moquin expressly promised that "all three oppositions will be filed today. (17 A.App. 3964.) O'Mara and Willard justifiably relied on that promise. Moquin's false promise and failure to file those very oppositions is what led to the dismissal that is the subject of this appeal. See,

e.g., Coburn Optical Indus., Inc. v. Cilco, Inc., 610 F. Supp. 656, 660 (M.D.N.C. 1985) (recognizing "that local counsel must be able to rely to some extent on the representations of reputable out of state attorneys, especially when local counsel has no independent knowledge concerning the representations."); see also Scott v. Dalkon Shield Claimants' Tr., No. CIV.A. 85-1718, 1994 WL 321212, at *2 (E.D. La. June 23, 1994) (entering sanctions only against out-of-state counsel who mislead plaintiffs and their local counsel).

Based on the evidence and the other materials in the record, it is clear that the Plaintiffs promptly moved for relief, had no intent to delay these proceedings, lacked full knowledge of the procedural requirements at issue, and have been trying to proceed in good faith. Thus, the district court should have reinstated the case, especially in light of "the state's sound basic policy of resolving cases on their merits whenever possible." Stoecklein v. Johnson Elec., 109 Nev. 268, 274, 849 P.2d 305, 309 (1993).

Rule 60(b) is a remedial provision that district courts must construe liberally. La-Tex Pshp. v. Deters, 111 Nev. 471, 475-76, 893 P.2d 361, 365 (1995). "The term 'discretion' contemplates a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record, and yields a conclusion based on logic and founded on proper legal standards." January v.

Barnes, 621 So. 2d 915, 927 (Miss. 1992) (quoting Shuput v. Lauer, 325 N.W.2d 321, 328 (Wis. 1982)); Kelly v. State, 694 P.2d 126, 133 (Wyo. 1985).

E. The District Court Erred in Otherwise Denying Appellants' Motion for Relief under NRCP 60(b)

The district court failed to consider the excusable neglect factors. The Nevada Supreme Court established several factors to consider in determining whether relief should be granted based upon excusable neglect, including: (1) a prompt motion for relief, (2) absence of an intent to delay; (3) lack of knowledge of the procedural requirements, and (4) good faith. Yochum v. Davis, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). Moreover, Rule 60(b) is guided by the state's "policy of resolving cases on their merits whenever possible." Stoecklein, 109 Nev. at 274, 849 P.2d at 309.

The Plaintiffs' Rule 60(b) Motion established all four Yochum factors, and also explained why their claims are meritorious. Thus, they met their burden to show excusable neglect. By contrast, the Defendants' opposition did not even mention the Yochum factors or dispute the Plaintiffs' meritorious claims. Since those elements were undisputed, the district court should have granted the Rule 60(b) Motion.

Finally, in the Rule 60(b) Order, the district court very briefly attempted to claim that Yochum does not apply because it involves relief from a default

judgment and not an order. (18 A.App. 4091.) This was erroneous. Rule 60(b) and excusable neglect apply to both judgments and orders. Simply because Yochum references "judgment" instead of "order" does not affect the excusable neglect factors. They remain the same. In addition, in the Rule 60(b) Order, the district court cites to Polivka v. Kuller, 128 Nev. 926, 381 P.3d 651 (2012), *which sets forth the very same standard for excusable neglect*. Thus, the district court committed clear error.

F. O'Mara's Role as Local Counsel Does Not Prohibit a Finding of Excusable Neglect

The district court concluded that because O'Mara was required to actively participate in the case, Willard cannot demonstrate excusable neglect. (18 A.App. 4088.) Yet, there is no statute or case that suggests that local counsel's reliance on lead counsel's promises to handle critical oppositions prohibits a finding of excusable neglect. Indeed, Defendants' opposition highlights the fact that O'Mara participated in the case and was similarly misled by Moquin. (See 17 A.App. 3816.) That fact presents a sharp contrast to the facts in Huckabay Props. v. NC Auto Parts, 130 Nev. 196, 322 P.3d 429 (2014), on which the Defendants relied. O'Mara's notice of withdrawal corroborates how Moquin's situation affected the case. (16 A.App. 3654 (O'Mara "begged" Moquin to oppose the dispositive motions and Moquin assured him he would).)

Further, Plaintiffs were still effectually and unknowingly deprived of legal representation. First, Willard's declarations show that he diligently attempted to ensure that Moquin would oppose the critical motions that ultimately ended the Plaintiffs' case. And second, while O'Mara owed various duties of advocacy under the Supreme Court Rules, the record reflects that he too was led to believe that Moquin would respond to the Defendants' motions and was effectively unaware that Moquin's had abandoned the case. See Maples, 565 U.S. at 287 (litigant could not be held constructively liable for misconduct of lead attorney, despite presence of local counsel, where local counsel had no substantive involvement in the case). Accordingly, the district court erred in denying Plaintiffs' Rule 60(b) Motion.

CONCLUSION

This is not a typical case-terminating sanctions case. The record reflects that the Plaintiffs were not at all culpable. Indeed, the record plainly demonstrates that Moquin's mental health was the source of the problems that occurred in this case, and that he fully abandoned the Plaintiffs at the eleventh hour. Then, after the unspeakable damage was done, he continued his abandonment by refusing to do anything to help the Plaintiffs salvage what was left of their case. This case cries out for reversal of the order denying Rule 60(b) relief.

DATED: August 26, 2019

/s/ Robert L. Eisenberg
Robert L. Eisenberg (0950)

/s/ Richard D. Williamson
Richard D. Williamson (9932)
Jonathan Joel Tew (11874)

ATTORNEY'S 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 2010 in 14-point, Times New Roman type style.

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 proportionately spaced, has a typeface of 14 points, and contains 12,675 words.

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

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

DATED: August 26, 2019

/s/ Robert L. Eisenberg

ROBERT L. EISENBERG (Bar No. 0950)
Lemons, Grundy & Eisenberg
6005 Plumas Street, Third Floor
Reno, Nevada 89519
775-786-6868
rle@lge.net

/s/ Richard D. Williamson

RICHARD D. WILLIAMSON (Bar No. 9932)
JONATHAN JOEL TEW (Bar No. 11874)
Robertson, Johnson, Miller & Williamson
50 West Liberty Street, Suite 600
Reno, Nevada 89501
775-329-5600
Rich@nvlawyers.com
Jon@nvlawyers.com

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Robertson, Johnson, Miller & Williamson, over the age of 18, and not a party within this action.

I further certify that on the 26th day of August, 2019, I electronically filed the foregoing **APPELLANTS' OPENING BRIEF** with the Clerk of the Court by using the electronic filing system, which served the following parties electronically:

John P. Desmond, Esq.
Brian R. Irvine, Esq.
Anjali D. Webster, Esq.
Dickinson Wright
100 West Liberty Street, Suite 940
Reno, NV 89501
Attorneys Respondents

/s/ Stefanie Smith

An Employee of Robertson, Johnson, Miller & Williamson