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. CV 14-01712

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' REPLY BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the 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: November 19, 2019

/s/ Robert L. Eisenberg
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INTRODUCTION

Defendants/Respondents mischaracterize the record. They decry the omission of a damages calculation from Plaintiffs' NRCP 16.1 disclosure statement, while ignoring the fact that those damages had already been set forth in two verified complaints and discovery responses. Defendants blame Plaintiffs for every delay in this case, despite the fact that Defendants requested and benefitted from several delays and continuances.

Defendants even now assert there is no evidence to hold attorney Moquin responsible, although Defendants previously moved for sanctions against Moquin, and the record shows numerous instances of Moquin's dishonesty with Willard, Overland, and the district court. Through Moquin's personal crises and failures, Defendants deprived Plaintiffs of any determination on the merits of the case. Yet, fairness and Nevada's attorney abandonment doctrine do not support sacrificing an innocent, elderly man's livelihood due to Moquin's nonfeasance.

RESPONSE TO RESPONDENTS' STATEMENT OF FACTS

Defendants' statement of facts creates confusion as to the exact sequence of events. Therefore, Willard provides this short summary of the timeline of events:

- On November 18, 2005, Willard and Overland agreed to purchase a car service center and store in Reno (the "Virginia Property") from BHI's affiliate for $17,750,000. (16 A.App. 3695.)

- On December 2, 2005, BHI entered into a lease agreement with Willard and Overland for the Virginia Property. (Id.)
- On February 17, 2007, BHI sent a letter to Willard indicating that Herbst intended to acquire the Virginia Property. (16 A.App. 3696.) Herbst offered to personally guarantee the lease. (Id.) Herbst represented that his net worth exceeded $200,000,000. (Id.)
- From 2007 until 2013, BHI operated the Virginia Property. (Id.)
- On March 1, 2013, without any notice whatsoever, and without giving any reason, BHI defaulted on the lease by not sending the rent 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 revealing that BHI was strategically breaching the lease. (9 A.App. 1879.)
- Effective May 1, 2013, Willard and BHI entered into an interim "Operation and Management Agreement" under which BHI agreed to continue active operations of the Virginia Property until Willard could find a replacement tenant. (16 A.App. 3697.)
- In late May 2013, Willard discovered that the property was not fully operational and was in total disarray. (Id.)

- On June 1, 2013, BHI abandoned the property. (Id.)
- On June 14, 2013, with no tenant, Willard defaulted on his own loan on the property and received a foreclosure notice from the lender. (Id.)
- In the meantime, the plaintiffs sued Defendants in California. (3 A.App. 470.)
- On February 14, 2014, Overland and Willard agreed to a distressed "short sale" of the Virginia Property. (Id.)
- On May 19, 2014, Plaintiffs agreed to dismiss the California case and refile it in Nevada. (4 A.App. 797.)
- On August 8, 2014, the plaintiffs commenced this Nevada action against Herbst and BHI. (1 A.App. 1; filed by attorney Moquin.) The complaint provided a detailed calculation of damages. (See, e.g., 1 A.App. 3-7, 14-15.)
- On January 21, 2015, the plaintiffs filed an amended complaint, providing updated calculations to their damages disclosures. (2 A.App. 234-237, 244-245.)
- On July 9, 2015, Plaintiffs provided interrogatory responses, again disclosing damages of nearly $16,000,000. (3 A.App. 600-610.)
- On September 3, 2015, the parties stipulated to continue the trial. (2 A.App. 383.) Despite Defendants' claims in their Answering Brief, nothing in that stipulation provides that it was due to Plaintiffs' actions. (Compare RAB at

1 & 54 with 2 A.App. 384-385.) Rather, it was a joint stipulation to accommodate both sides. (Id.)

- Moquin continued moving forward with this case, until some point in mid-to-late 2017 when he told Willard that he needed money. (16 A.App. 3699.) Therefore, Willard borrowed money to pay for Mr. Moquin's personal expenses. (Id.)
- On May 2, 2016, the parties filed a stipulation to continue the trial. (2 A.App. 389.) The parties acknowledged that the Plaintiffs needed to provide Defendants with certain documents, but some of these documents solely applied to the Wooley plaintiffs (who are no longer involved in the case) and the parties also acknowledged that both sides "need to conduct significant additional discovery." (2 A.App. 390.)
- On December 2, 2016, Plaintiffs disclosed Daniel Gluhaich as an un-retained expert witness. (12 A.App. 2813-2816.)
- On February 9, 2017, the parties again stipulated to continue the trial, including an agreement that Plaintiffs would provide an updated initial expert disclosure regarding expert Gluhaich. (7 A.App. 1490.)
- On May 30, 2017, the district court granted partial summary judgment to Defendants on claims for certain damages and ordered Plaintiffs to serve an NRCP 16.1 damage disclosure. (7 A.App. 1517.)

- On October 18, 2017, Plaintiffs filed a motion for summary judgment, which contained a detailed description of damages they were seeking. (7 A.App. 1601-1605.)
- On November 14, 2017, Defendants moved to strike Gluhaich's testimony. (12 A.App. 2781-2803; 16 A.App. 3593.)
- On November 15, 2017, Defendants filed three more motions, seeking summary judgment, permission to exceed the page limit, and sanctions. (See 13 A.App. 2880; 16 A.App. 3588; 13 A.App. 3021.)
- On December 12, 2017, the attorneys appeared for a Pre-Trial Conference. Moquin represented to the district court that on the day his oppositions to the foregoing motions were due, he had computer problems and lost all of his work. (19 A.App. 4317.) The district court granted Moquin until December 18, 2017, in which to file oppositions to Defendants' pending motions. (19 A.App. 4322.)
- Throughout December 2017, Willard attempted to communicate with Moquin on a daily basis, but when Moquin responded, he falsely assured Willard that everything was going fine. (17 A.App. 3954.)
- On January 4, 2018, the district court entered three orders: striking Willard's expert witness; granting Defendants' motion for case-terminating sanctions;

and finding that the motion for summary judgment is moot. (16 A.App. 3585-3593; 19 A.App. 4355-4356.)

- On January 23, 2018, Moquin was arrested in California. (16 A.App. 3754; see also 17 A.App. 3956.)
- Around this same time, Willard learned that Moquin had been suffering from bipolar disorder. (17 A.App. 3956; see also 16 A.App. 3761.)
- On January 31, 2018, Moquin's wife, Natasha Moquin, filed a Request for Domestic Violence Restraining Order, asserting that Moquin "was recently diagnosed with Bipolar disorder, has been paranoid and violent," and that Mrs. Moquin was concerned about triggering a psychotic reaction. (16 A.App. 3761.)
- On March 6, 2018, the district court entered Defendants' unopposed Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions. (16 A.App. 3607.)
- On March 13, 2018, while urging Moquin to provide information and materials to support a Rule 60 motion, Willard agreed to pay for Moquin's treatment with Dr. M. Douglas Mar. (17 A.App. 3956; 17 A.App. 3977.)
- On March 15, 2018, attorney David O'Mara filed a Notice of Withdrawal of Local Counsel, in which he explained: "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.)

- At various times, including on February 5, 2018, February 20, 2018, and March 21, 2018, Willard's 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.)
- From January through March, 2018, Moquin repeatedly assured Willard that Moquin would provide him with a summary of the case, documents regarding his mental illness, his case files, and other information. (17 A.App. 3956.)
- On March 30, 2018, Moquin specifically assured Willard that Moquin will "get everything out the door before I leave today." (17 A.App. 3956.)
- On March 31, 2018, April 1, 2018, and April 2, 2018, Willard sent text messages desperately urging Moquin to provide documents needed to reinstate the case. (17 A.App. 3956.) Moquin then responded with an alarming text rant: **"Let's recount: conniving bitch [his wife] conspires to destroy my entire life, sabotages numerous cases, places me in imminent threat of incarceration and effectively quashes my ability to survive, fraudulently bars me from seeing my own children, sells off my possessions, and leaves me homeless. Meanwhile, I forego seeking a**

stable existence for your benefit, and in the midst of utterly crushing emotional and situational turmoil you have the gall to call me up and berate me despite my numerous warnings not to do so. I'm not sure what part of 'fuck 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. 3987-88 (emphasis added).)

- In 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.)
- On May 14, 2018, the new attorneys 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 wrote to Moquin 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.)
- That evening, 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 the following day. (17 A.App. 3957; 17 A.App. 3999.)

- Willard tried to follow-up, but Moquin threatened 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 May 28, 2018, however, Moquin still had not provided the documents. (Id.; 17 A.App. 3999.) Therefore, Willard again asked 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).)

REPLY IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE

In their opening brief, Plaintiffs requested judicial notice of this court's own docket no. 78946. That file consists of disciplinary proceedings against Moquin **arising out of this very case**. Since that request, this court entered an order on October 21, 2019, barring Moquin from practicing in Nevada for two years because:

> "Additionally, Moquin failed to adequately communicate with the client about the status of the case and after the client retained new counsel to pursue a motion for relief from the judgment, Moquin failed to provide new counsel with the client file and other documents that he had agreed to provide, which may have supported setting aside the judgment." (No. 78946; Order at 1-2)

Three justices dissented on the ground that the two-year suspension was not enough. As the dissent correctly observed, Moquin "failed to meaningfully respond to the client's numerous requests for his file and other documents," he "never gave the client the complete file or the documents to show that his neglect in handling the case may have been excusable," and Moquin's failures resulted in the district court's denial of Rule 60(b) relief and "the client was thus never able to test his complaint on the merits." (Order, dissent at 5).

Thus, because the Moquin disciplinary case has been reduced to a final order, it is now even more appropriate for this court to take judicial notice of its records in that directly-related 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 take judicial notice of the record in another case where there is a close relationship between the two cases. Mack v. Estate of Mack, 125 Nev. 80, 91-92, 206 P.3d 98, 106 (2009).

Courts may take judicial notice of an attorney discipline case that is related to the pending case. For example, the federal court took "judicial notice of the State Bar of Nevada's online records regarding attorney discipline actions" in

Kinder v. Legrand, No. 3:16-CV-0449-MMD-CBC, 2019 WL 2450922, at *1 (D. Nev. June 12, 2019).

"The salutary purpose of Rule 60(b) is to redress any injustices that may have resulted because of excusable neglect." Nev. Indus. Dev. v. Benedetti, 103 Nev. 360, 364, 741 P.2d 802, 805 (1987). The rule "should be liberally construed to effectuate that purpose." Id. In maintaining these goals, this court can take judicial notice of attorney discipline action in appropriate circumstances. Accord Bryan H. v. Kersten H., No. 17-0887, 2018 WL 6015817, at *2 (W. Va. Nov. 16, 2018) ("the family court did not abuse its discretion by taking judicial notice of the fact that respondent's counsel was disbarred shortly after the entry of the final order.").

Even the Answering Brief acknowledges that it is entirely appropriate for this court to take judicial notice of orders in another case. (RAB at 26 (citing In re W. States Wholesale Nat. Gas Antitrust Litig., 633 F. Supp. 2d 1151, 1168-69 (D. Nev. 2007).) In this case, the court should take judicial notice of stipulated facts as, due to the stipulation between the adverse parties, the facts are "not subject to reasonable dispute." NRS 47.130(2). In addition, the disciplinary panel's Findings of Fact, Conclusions of Law, and Recommendation After Formal Hearing note that the factual record set forth in paragraphs 1 through 43 of Moquin's conditional guilty plea "accurately reflects this Panel's findings regarding facts and

circumstances pertinent to these proceedings." (Findings at 2:17-21.) Therefore, this court should take judicial notice of its own files in docket No. 78946.

ARGUMENT

A. Plaintiffs Correctly Stated the Standard of Review

Defendants misunderstand the standards of review. As explained in the opening brief, a district court's denial of a Rule 60 motion "is usually subject to review for abuse of discretion. Bonnell v. Lawrence, 128 Nev. 394, 400, 282 P.3d 712, 716 (2012)." (AOB at 27.) But the discretion standard in a Rule 60(b) motion "is a legal discretion and cannot be sustained where there is no competent evidence to justify the court's action." Cook v. Cook, 112 Nev. 179, 182, 912 P.2d 264, 265 (1996). Even in assessing a Rule 60(b) motion, the court will "review de novo the district court's interpretation of the Nevada Rules of Civil Procedure." Casey v. Wells Fargo Bank, N.A., 128 Nev. 713, 715, 290 P.3d 265, 267 (2012) (this court reviews de novo a district court's legal conclusions, statutory interpretation, and application of court rules). Moreover, a heightened standard of review is appropriate when faced with dismissal. Dagher v. Dagher, 103 Nev. 26, 27-28, 731 P.2d 1329, 1330 (1987). Therefore, the heightened standard of review for case terminating sanctions stated in Young v. Johnny Ribeiro Bld., 106 Nev. 88, 787 P.2d 777 (1990) also applies here.

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

The district court improperly refused to consider several items of important evidence. (18 A.App. 4073-4081.)

i. The District Court Erred in Excluding Exhibits 6, 7 and 8 to the Rule 60(b) Motion

The district court abused its discretion by summarily concluding that Exhibits 6, 7, and 8 to the Rule 60(b) Motion are not authentic and constitute inadmissible hearsay.

Exhibit 6 is an Emergency Protective Order, which is on a Judicial Council of California official form, signed by a law enforcement officer, and bearing a law enforcement case number. (16 A.App. 3751.) Exhibit 7 is a Santa Clara County Pre Booking Information Sheet, signed by a law enforcement officer and listing a badge number. (16 A.App. 3754.) Exhibit 8 is a file-stamped Request for Domestic Violence Restraining Order bearing the signature of the clerk of court and a stamped case number. (16 A.App. 3757-3769.)

While it is true that these exhibits were not certified, there is also no genuine question that 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. Police reports are deemed

authentic when they contain "indicia of reliability" such as a signature, date stamps, and identification numbers. Francis v. Caribbean Transp. Ltd., 882 F. Supp. 2d 275, 281-82 (D.P.R. 2012).

Defendants could have provided rebuttal "evidence or other showing sufficient to support a contrary finding" in their opposition. NRS 52.015(3). They did not do so. This fact too should have been considered by the district court. Francis, 882 F. Supp. 2d at 281-82. In their Answering Brief, Defendants counter that they raised questions about Willard's personal knowledge and the lack of certification. But, as noted above, the lack of certification alone is not grounds to exclude evidence that contain indicia of reliability. In addition, merely questioning personal knowledge without offering evidence to rebut a witness' professed knowledge is insufficient. See, e.g., Edwards v. Toys "R" Us, 527 F. Supp. 2d 1197, 1202 (C.D. Cal. 2007) (rejecting objections to declarations where the objectors did not offer any rebuttal evidence to challenge the declarant's inferred personal knowledge). Thus, in the absence of a genuine dispute over the authenticity of Exhibits 6, 7, and 8, it was an abuse of discretion for the district court to refuse these exhibits.

The exhibits also do not constitute hearsay. The fact that the Moquins were the subject of domestic court disputes is not hearsay. See, e.g., In re Paysage Bords De Seine, 1879 Unsigned Oil Painting on Linen by Pierre-Auguste Renoir,

991 F. Supp. 2d 740, 747 (E.D. Va. 2014) (admitting a police report offered to show when that police report was filed); Knor v. Parking Co. of Am., 596 N.E.2d 1059, 1063 (Ohio Ct. App. 1991) (admitting police reports as "not hearsay" because they were not offered to prove the truth of the claimed criminal acts, but to show that there had been reports of criminal acts).

The fact that the police arrested Moquin is not hearsay. The general fact that Mrs. Moquin sought a restraining order against her husband is not hearsay. The documents are not hearsay as they are not offered to prove the content of the reports. Rather, they show the legal turmoil in which Moquin was mired. Therefore, the district court erred by treating Exhibits 6, 7, and 8 as hearsay.

ii. The District Court Erred in Excluding Evidence About Moquin Suffering from Bipolar Disorder

Defendants offer two arguments to justify the district court's exclusion of any evidence surrounding Moquin's bipolar disorder. First, they claim that Moquin's admission that Dr. Mar diagnosed him as bipolar is a "statement of memory or belief" under NRS 51.105(2) rather than a statement of his "then existing state of mind, emotion, . . . physical condition, mental feeling [or] bodily health" under NRS 51.105(1). (RAB at 14-15.) Second, they claim that a statement of Moquin's existing state of mind, emotion, physical condition, mental

feeling, or bodily health is required to be "spontaneous." (Id. at 15.) Both arguments are wrong.

For their first argument, Defendants rely upon a Delaware Superior Court case, Henry v. Nanticoke Surgical Assocs., P.A., 931 A.2d 460, 463 (Del. Super. Ct. 2007). The statements in that case were not actually offered to prove the declarant's state of mind. Rather, they were offered in an effort to prove that the decedent's doctor gave negligent medical advice. Henry, 931 A.2d at 463. Here, Willard is not claiming that Dr. Mar gave negligent medical advice, rather Willard is solely focused on Moquin's state of mind. Therefore, Henry has no application to this case.

Second, NRS 51.105(1) includes no spontaneity requirement. As explained in the Opening Brief, contemporaneous statements are not an absolute requirement to admissibility, but simply go to the weight of the evidence.

Moquin's admissions to Willard that Moquin has bipolar disorder are statements about his then-existing state of mind, emotion, physical condition, mental feeling, and bodily health. Moreover, the diagnosis itself is not the only relevant evidence. In fact, Moquin admits in Reply Exhibit 7 that he is "in the midst of utterly crushing emotional and situational turmoil . . . ." (17 A.App. 3987 (emphasis added).) All of these statements are admissible under NRS 51.105(1).

Defendants' arguments also ignore the central quandary in this case: how can a party prove the reasons why his attorney has abandoned him, when that attorney has completely abandoned him? Moquin is not a party, and Willard holds no subpoena power over Moquin. Thus, while there is plenty of evidence that Willard would have liked to gather, that is not the issue. The question is whether the actual evidence before the district court showed that Moquin abandoned Willard. The answer is yes.

Moquin's specific diagnosis is not the only relevant evidence. Willard provides his own observation that Moquin suffered "what I can only describe as a total mental breakdown." (16 A.App. 3700; 17 A.App. 3954.) Willard even personally "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." (17 A.App. 3956.) Willard also explained that, between December 2017 and May 2018, Moquin's "emotional swings" became "terrifying and impossible to predict." (17 A.App. 3958.) All of those statements are unequivocally based on Willard's personal knowledge – what he experienced and what he did – and they all provide uncontroverted proof that something was seriously wrong with Moquin.

iii. Moquin's Texts and Emails Are Admissible

a. Evidence Does Not Have an Expiration Date

The Defendants also make the curious argument that any evidence which occurred after Moquin's breakdown in December 2017 is irrelevant. (RAB at 23-24.) Under this absurd argument, confessing to a crime is always inadmissible, because the confession necessarily comes after the crime.

It is true that the main subjects of the Rule 60 Motion are Moquin's abandonment of Willard's case in December 2017 and Willard's excusable neglect in relying on him prior to the sanctions in January 2018. But evidence that is obtained after the fact is still relevant to show what transpired in December 2017 and January 2018.

Moquin's statements and actions in the days and weeks immediately following his abandonment are relevant to inform and illuminate what actually transpired in December 2017 and January 2018.

Indeed, evidence of subsequent acts or statements to prove prior events is a routine part of many cases. E.g., United States v. Mares, 441 F.3d 1152, 1157 (10th Cir. 2006); see also Sonnenschein v. Bartels, 60 N.W. 10, 11 (Neb. 1894) ("evidence of collateral facts, including subsequent events, will be received, provided they shed light upon the transaction involved, and tend to explain the motives of the parties").

Defendants misled the district court when they persuaded it to impose an absolute bar to any and all subsequent statements, admissions, and events. The district court should have properly analyzed and considered Reply Exhibits 5-10. Its failure to do so is a palpable abuse of discretion, which constitutes reversible error.

b. Moquin's Texts and Emails Are Not Hearsay

Nowhere in Moquin's texts and emails does he actually make the statement: "my mental instability caused me to abandon this case." Thus, most of his statements were not offered for the truth of the matters asserted. Rather, they were offered for other purposes, such as to show his mental instability (as demonstrated in his text message quoted above). In addition, some statements that are offered for their truth fall squarely within exceptions to the hearsay rule.

In Reply Exhibit 3, Moquin assured his clients and co-counsel that "all three oppositions will be filed today." (17 A.App. 3964.) That statement was not offered for its truth, since it was clearly false. Thus, it was not hearsay. In fact, Moquin's promise was a legally operative fact. Szymkowski v. Szymkowski, 432 N.E.2d 1209, 1212 (Ill. Ct. App. 1982). The next day, co-counsel O'Mara asked "Do we have a plan?" (Id.) Moquin bizarrely responded, "You mean a clue?" (Id.) Again, those statements were not offered for the truth of whether Moquin and O'Mara had either a plan or a clue. Therefore, they are not hearsay.

Moquin's statements in Exhibit 4 (texts) were also not offered for their truth:

- "yes. provided i can keep n out of my hair tonight, i should be able to pull it all together." (17 A.App. 3967.)
- "i am still on it." (17 A.App. 3971.)

Moquin did not "pull it all together" and he was clearly not "on it." Thus, these statements were not offered for their truth, and they were not hearsay. They were offered for the effect on the hearer, which was Willard, and to show that Willard was being a diligent litigant, but his attorney repeatedly assured him that everything was under control.

Exhibit 5 is a receipt that Willard received for paying Dr. Mar $470 on March 13, 2018, to treat Moquin. Willard separately testified based on his own personal knowledge to making that payment. Thus, that uncontroverted fact is in evidence through Willard's testimony. The receipt simply corroborates Willard's testimony.

Exhibit 7 contains many non-hearsay statements that Moquin made to Willard. For instance, Moquin's assurance that "I'll get everything out before I leave today" was not offered for the truth. (17 A.App. 3984.) Like the statements in Reply Exhibit 4, that statement shows the effect on Willard, who did everything reasonable to ensure documents were properly and timely filed in this case. By contrast, Moquin later admitted that he was "in the midst of utterly crushing

emotional and situational turmoil . . . ." (17 A.App. 3987.) This statement clearly falls within the hearsay exception for statements of the declarant's state of mind, emotion, physical condition, and mental feeling. NRS 51.105(1). Moquin's rant continues with, "I'm not sure what part of 'fuck off' you don't understand . . . ." (17 A.App. 3988.) This statement was not offered to prove the truth of the matter asserted. Rather, regardless of the truth, the text message shows that Moquin's mental state had unraveled and he had fully abandoned his client.

Reply Exhibit 10 statements were also not hearsay. They were offered not for their truth, but to show Moquin's erratic and malicious character. (17 A.App. 3999-4000.) State v. Losson, 865 P.2d 255, 259 (Mont. 1993) (statements that circumstantially show the speaker's state of mind are not hearsay).

The district court here erred in its application of the hearsay rules. It simply disregarded all of Moquin's statements as hearsay, despite the actual limitations of the hearsay rule. The district court's fundamental misapplication of the hearsay rules is reversible error.

C. O'Mara's Reliance on Moquin Does Not Prohibit a Finding of Excusable Neglect

Defendants claim that Willard "virtually ignores O'Mara's critical role in the analysis." (RAB at 12.) That claim, however, is unsupported by the actual record. Indeed, Appellants carefully analyzed the effect of O'Mara's role in their opening

brief. (AOB at 19, 45, 50, & 53-53.) Moreover, there is no law suggesting that local counsel's reliance on lead counsel's promises to handle critical oppositions prohibits a finding of excusable neglect.

Defendants rely on Walls v. Brewster, 112 Nev. 175, 912 P.2d 261 (1996). Yet, that case did not deal with local counsel. Rather, the two attorneys in that case were law partners. Id., 112 Nev. at 176, 912 P.2d at 262. Attorney Hamilton had been primarily handling the case after the initial complaint. Id. "Hamilton had requested two extensions, which gave him an additional six weeks to prepare and file the opposition; yet, without explanation, he failed to file the opposition by the March 28, 1994 deadline." Id., 112 Nev. at 178-79, 912 P.2d at 263. In addition, there were no allegations of mental illness, attorney personal misconduct, or abandonment. Thus, Walls has no bearing here.

Further, O'Mara himself was misled by Moquin's promises to perform. O'Mara took steps to ensure that Moquin would respond to critical motions in late 2017 and was repeatedly assured that everything was fine. Accordingly, Walls actually supports Willard's arguments concerning excusable neglect under the extraordinary facts of this case.

O'Mara was not in a position to know of Moquin's bipolar disorder or that Moquin's assurances were false. He was misled by Moquin. Defendants emphasize O'Mara's ethical obligations to be responsible for the case. Yet, they make no

effort to address Plaintiffs' argument regarding how Moquin's bipolar disorder affected both Willard's and O'Mara's actions.

Indeed, O'Mara and Willard all relied on Moquin's promises that he would timely file the necessary oppositions. As noted above, the disciplinary panel's findings incorporated stipulated facts in Moquin's conditional guilty plea. (Findings at 2:17-21.) Those stipulated facts include the following:

> 20. Between December 12, 2017 and December 18, 2017, **Respondent [Moquin] evaded local counsel's attempts to ensure that responses were filed.** (Emphasis added.)

Thus, the record shows that both Willard and O'Mara relied upon Moquin, and Moquin actually induced them both to rely on him. As such, Willard is entitled to Rule 60 relief.

D. The District Court Erred in Failing to Find that Moquin Abandoned the Plaintiffs

i. A Medical or Attorney Affidavit is Not Necessary to Establish Attorney Abandonment

Defendants argue that Plaintiffs' case law on abandonment is distinguishable because those cases involved sworn admissions from attorneys and/or reports from medical professionals evaluating the attorneys' medical conditions. (RAB at 38.) As was noted earlier, Plaintiffs have provided competent evidence of Moquin's condition. Additionally, Moquin's guilty plea in the disciplinary docket reveals

Moquin's admission that he had been diagnosed with bipolar disorder. (AOB at 25-26.)

Further, Moquin's abandonment of Willard is obvious – with or without a medical diagnosis. This court has already determined that Moquin failed to communicate with Willard about the case, or to assist present counsel with their Rule 60(b) briefing. Thus, Moquin clearly abandoned Plaintiffs.

Finally, Moquin's abandonment here is worse than those instances set forth in Defendants' supporting cases because in the cases cited, the attorneys who suffered from medical disorders actually cooperated with their clients to do what was right. In the instant case, Moquin misled, lied to, and then abandoned Willard. This truly unique situation cries out for reversal.

ii. Moquin's Failure to Oppose Dispositive Motions is Critical

Defendants contend that Moquin's abandonment is irrelevant because the district court was already going to enter case-terminating sanctions against Plaintiffs prior to Moquin's failure to oppose Defendants' motion for sanctions.[1]

[1] The Defendants' reliance on Gersing v. Real Vision, Inc., 817 S.E.2d 500 (N.C. Ct. App. 2018) for the proposition that no excusable neglect occurred here is misplaced. In Gersing, the lower court entered a deficiency judgment following a foreclosure sale of the defendant's property. Id. Defendant argued excusable neglect nine months later, due to his attorney failing to assert an anti-deficiency statute. The court refused to find excusable neglect because the defendant's attorney had withdrawn from the case and the defendant failed to retain new counsel. Id. Gersing bears no relationship whatsoever to this case. Gersing did not

(RAB at 39-40.) Moquin's failure to include a damages computation though a 16.1 disclosure, when Mouqin had provided such a calculation in the complaint and through other discovery, simply elevates form over substance. Certainly, this is not the type of repeated, willful discovery abuse that supports case-concluding sanctions and allows lessees and guarantors get away with a strategic breach of a lease. See, e.g., Staschel v. Weaver Bros., 98 Nev. 559, 561, 655 P.2d 518, 519-20 (1982) ("Dismissals for misconduct attributable to lawyers and in no wise to their clients invariably penalize the innocent and may let the guilty off scot-free." (internal citations omitted)).

In addition, Defendants suggest that the district court would have sanctioned Willard and dismissed his case because Moquin's pre-December 2017 actions were willful and strategically designed to "ambush" and prejudice the Defendants. (See RAB at 40.)

Defendants' willful ambush theory is absurd and unsupported. No attorney willfully attempts to "ambush" another party by failing to oppose dispositive motions that would defeat his or her client's case.

Indeed, Defendants' willful ambush theory is unsupported by the record. There is no question that Moquin's actions and inactions (and his text messages) demonstrate abandonment and that something was terribly wrong with him.

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involve attorney abandonment, mental illness, or an attorney's failure to oppose dispositive motions.

iii. Defendants' Argument that Moquin's Actions After the Sanctions Order Do Not Support Rule 60(b) Relief are Meritless

Defendants contend that Moquin's actions after the Sanctions Order cannot support a finding of excusable neglect. Defendants' argument lacks merit, especially when Moquin's 2018 conduct clearly helps to explain his 2017 conduct. Indeed, if evidence of excusable neglect following a dismissal were to be ignored as a matter of law, then parties discovering that their attorney suffered from a debilitating mental condition after a dismissal would have no ability to seek Rule 60(b) relief. This cannot be the case since such a finding which would undo the salutary purpose of Rule 60(b). See Nev. Indus. Dev, 103 Nev. at 364, 741 P.2d at 805 ("[t]he salutary purpose of Rule 60(b) is to redress any injustices that may have resulted because of excusable neglect.").

iv. Under Any Objective Analysis, Moquin Abandoned Willard

Defendants argue that the record "amply" demonstrates Willard was not abandoned because Moquin performed some tasks during the litigation. (RAB at 41.) If Defendants' position were adopted, under no circumstances could an attorney suffering from a medical disorder or sudden incapacitating illness abandon his or her client so long as up to the point of abandonment, that attorney had participated in the underlying litigation. The timing of abandonment is not

determinative if abandonment can be established. In fact, abandonment can only come after performance. Here, Moquin prepared a strong motion for summary judgment in October 2017, and then effectively disappeared from the case.

v. Local Counsel Does Not Prohibit a Finding of Abandonment

Defendants contend that per se, abandonment is impossible because of O'Mara's role as local counsel. Yet, there is no such per se rule concerning abandonment. Indeed, common sense dictates that a party can be abandoned, despite the presence of local counsel, when local counsel is also misled by the other attorney.

Defendants also suggest that abandonment cannot be established because of the Plaintiffs' supposed "ambush" of Defendants. Amazingly, Defendants accuse not only Moquin of such malicious lawyering, but also O'Mara. Defendants specifically state that: "Willard and his two separate attorneys simply chose to continually and repeatedly ignore the NRCP, the District Court's Orders, and Defendants' repeated requests, **only to ambush Defendants with their summary judgement motions [sic] . . . as detailed in the Sanctions Order**." (RAB at 42-43 (emphasis added).)

Defendants' argument, which the district court adopted, cannot withstand scrutiny. O'Mara was misled by Moquin and repeatedly pleaded with him to meet deadlines; O'Mara was not a conspirator in Defendants' far-fetched theory of a

bad-faith "ambush." Indeed, Defendants' contention that Moquin, O'Mara, and Willard conspired to ambush the Defendants, when the correspondence between the parties demonstrates the opposite, is completely meritless. (AOB at 25 (Moquin "evaded local counsel's efforts to obtain compliance; and Willard did not understand the consequences of Moquin's derelictions.").)

vi. Agency Principles Do Not Preclude a Finding of Abandonment

Defendants contend that under Passarelli v. J. Mar Dev., 102 Nev. 283, 720 P.2d 1221 (1986), the facts of the case do not justify deviation from general agency principles. (RAB 43-44.) Yet, each of the purportedly "distinguishable" averments Defendants make are superficial and do not preclude the Passarelli exception. Moquin's law practice has been closed and that he has been disciplined for abandoning Willard. Indeed, Moquin cannot practice law in Nevada for the next two years, and the three-justice dissenting opinion opined that the two-year suspension was not enough.

Further, Moquin abandoned Plaintiffs and there was no agency viable relationship when Plaintiffs' case was dismissed.

Finally, Defendants argue that "Willard's own knowledge and involvement precludes an abandonment finding." (RAB at 45.) Yet, the Defendants distort the record by arguing that Willard was aware of Moquin's issues in 2017 and did

nothing, which is false. (AOB at 14-15.) Willard repeatedly asked Moquin to perform, and Moquin repeatedly assured Willard that he would – all while Moquin either had no intention or no ability to perform, eventually telling his client to "fuck off."

E. This Court Can Review the District Court's Denial of Rule 60(b) Relief from its Sanctions Order

Defendants contend that Willard improperly challenged the district court's sanctions findings in his Rule 60(b) briefing, and that he cannot challenge any of the district court's Rule 60(b) sanctions findings on appeal. (RAB at 47-48.) The district court entered its Sanctions Order on March 6, 2018. Plaintiffs filed their Rule 60(b) Motion on April 18, 2018 – well within the six months provided for in Rule 60(b). Accordingly, it is baseless to allege that Willard "improperly" raised arguments challenging the Sanctions Order in the Rule 60(b) briefing, or that Willard cannot appeal the district court's refusal to find excusable neglect as a basis for relief from the Sanctions Order.

F. The District Court Erred in Refusing to Find Excusable Neglect

i. Willard Was Unduly Penalized

In Young, 106 Nev. at 93, 787 P.2d at 780, this court set forth the factors a district court should consider when deciding whether to enter case-terminating sanctions. In their opening brief, Plaintiffs argued that the district court erred in not

considering whether case-terminating sanctions would unfairly penalize Willard for Moquin's misconduct. In response, Defendants contend that the district court considered the sanctions factors it deemed appropriate. (RAB at 49.)

Defendants miss the point. The district court failed to carefully consider Moquin's misconduct and the evidence demonstrating that the sanctions unfairly operated to penalize Willard. (AOB at 33.) This was error.

Defendants also argue that under Huckabay, "a party cannot seek to avoid a dismissal based on arguments that his or her attorney's acts or omissions led to dismissal." (RAB at 49.) However, Huckabay did not change the court's holding in Young, and deals with the dismissal of an appellant's appeal for failure to timely file the opening brief and appendix. See Huckabay Props. v. NC Auto Parts, 130 Nev. 196, 198, 322 P.3d 429, 430 (2014). This court more recently held that when a district court considers discovery sanctions, "it should consider 'whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney.'" Valley Health Sys., LLC v. Estate of Doe by & through Peterson, 134 Nev. 634, 641, 427 P.3d 1021, 1028 (2018), as corrected (Oct. 1, 2018) (citing Young) (emphasis supplied).

Next, Defendants argue that Willard was not unduly penalized because the district court attributed sanctionable conduct to him personally. (RAB at 50.) Defendants' contention is baseless. While Willard may have attended a hearing

where Moquin was ordered to serve an updated NRCP 16.1 damages disclosure, it hardly follows that Willard willfully committed sanctionable misconduct by relying on his attorney. Indeed, Moquin gave misleading assurances – which duped both Willard and O'Mara – and Moquin admitted that (a) he failed to comply with discovery requirements and (b) Willard did not understand the consequences of Moquin's derelictions.

ii. The Sanction Was Grossly Disproportionate to the Offense

Defendants contend that "Willard's offenses were egregious and continuous." (RAB at 52.) However, Moquin provided Defendants with the damages calculations they sought – just not in the formal, 16.1 disclosure. And to the extent that Plaintiffs improperly disclosed their expert, that witness has been stricken. Accordingly, Defendants' argument that Willard's offenses were egregious is just more hyperbole.

iii. Willard Did Not Engage in Willful Misconduct

No objective observer could possibly conclude that Willard strategically endeavored to ambush Defendants by (a) filing, and not submitting, a motion for summary judgment, and (b) forgoing his claim for $15,000,000 by failing to oppose dispositive motions. A strategic ambush does not involve a deliberate effort to lose one's own case.

Further, Plaintiffs presented detailed evidence and communications which disprove the district court's findings of willfulness and strategic ambush. (17 A.App. 3954; 16 A.App. 3654.)

Finally, the district court could easily have concluded on its own that the strategical ambush theory was pure fantasy based upon Moquin's failure to submit his motion and failure to oppose dispositive motions. See, e.g., In re Benhil Shirt Shops, Inc., 87 B.R. at 278. By simply adopting the Defendants' overreaching, proposed order, the district court committed reversible error.

iv. Defendants' "Prejudice" is Actually a Windfall

Defendants claim prejudice because Plaintiffs' "strategic ambush" would require Defendants to engage in additional discovery. (RAB at 54.) However, any prejudice Defendants' claim they would have suffered could have easily been addressed through a lesser sanction; namely, striking any new category of damages presented and only allowing Plaintiffs to establish damages directly from Defendants' strategic breach of the lease and personal guarantee. The district court erred in not entering a lesser sanction.

Indeed, this is not a case where a defendant seeks to avoid liability on a claim by failing to provide discovery. This is a case where the Defendants intentionally and strategically breached a commercial lease and personal guarantee and, because of Moquin's mental health condition, avoided over $15,000,000 in

liability to an elderly plaintiff. Defendants have not been severely prejudiced by Moquin. In fact, Moquin has given them an unjust windfall.

What is more brazen about Defendants' claim of prejudice is that the they routinely and falsely accuse Willard of bad-faith misconduct when, indisputably, the Defendants willfully and strategically ambushed Willard by suddenly breaching the lease and refusing to honor the personal guarantee. The extreme injustice of this case justifies reversal.

CONCLUSION

Therefore, the court should reverse the judgment and remand for a trial on the merits.

DATED: November 19, 2019

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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 6,961 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.

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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 19th day of November, 2019, I electronically filed the foregoing APPELLANTS' REPLY BRIEF with the Clerk of the Court by using the electronic filing system, which served the following parties electronically:

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