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.	**SUPREME COURT NO. 77780** District Court Case No. CV14-01712

Electronically Filed
Aug 24 2020 05:13 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPEAL

From the Second Judicial District Court, Washoe County
The Honorable Lynne K. Simons, Department VI, District Judge
District Court Case No. CV14-01712

RESPONDENTS' PETITION FOR REHEARING

COMES NOW Defendants/Respondents Berry-Hinckley Industries and Jerry Herbst (collectively "Respondents"), by and though their counsel of record, Dickinson Wright PLLC, and petition this Court for rehearing in the above-

Docket 77780 Document 2020-31223

captioned case. This Petition is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 24th day of August, 2020.

Respectfully submitted,

/s/ Brian R. Irvine

DICKINSON WRIGHT PLLC
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 12515
100 W. Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (844) 670-6009

Attorneys for Respondents Berry-Hinckley Industries and Jerry Herbst

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

On August 6, 2020, this Court filed its Opinion reversing the District Court's order denying the NRCP 60(b)(1) motion filed by Appellants Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and Overland Development Corporation (collectively, "Willard"), and "remand[ed] for further proceedings consistent with [its] opinion." (Opinion at 9, on file herein).

In the proceedings below, "Willard alleged several causes of action arising out of the breach of a lease agreement for a commercial property in Reno." (*Id*. at 3). "Willard's counsel included Brian Moquin, a California-licensed attorney appearing pro hac vice, and David O'Mara, who served as local counsel." (*Id*.) After numerous discovery violations, the District Court granted Respondents' unopposed Motion for Sanctions, and the case was dismissed with prejudice. (*Id*. at 3-4). Willard then "retained new counsel and filed the NRCP 60(b)(1) motion, requesting that the district court set aside its sanctions order" based on "Moquin's alleged psychological disorder result[ing] in his abandonment of Willard, which justified NRCP(b)(1) relief based on excusable neglect." (*Id*. at 4). Willard couched his argument following the rubric espoused in *Yochum v. Davis*, 98 Nev. 484, 653 P.2d 1215 (1982). (*Id*.)

The District Court denied the NRCP 60(b)(1) Motion (the "Motion") on the basis that Willard failed to prove excusable neglect by a preponderance of the evidence. (*Id*. at 4-5). As part of its analysis, the District Court also explained that "*Yochum* involves relief from a default judgment and not an order, as here, where judgment has not been entered." (*Id*. at 4). The District also determined that "*Yochum* d[id] not preclude denial of the motion." (*Id*.)

In reversing the District Court's order denying the Motion, this Court held that (1) the District Court erred when it "reason[ed] that it need not apply the *Yochum* factors when determining the existence of sufficient grounds for NRCP 60(b)(1) relief from an order, as opposed to a judgment;" and (2) "district courts must issue explicit and detailed findings, preferably in writing, with respect to the four *Yochum* factors to facilitate this [C]ourt's appellate review of NRCP 60(b)(1) determinations for an abuse of discretion." (*Id*. at 6-8). This Court thus reversed based on its conclusion that the District Court failed to address the *Yochum* factors, and remanded for further proceedings consistent with its Opinion. (*Id*. at 8-9).

However, in doing so, this Court overlooked or misapprehended material facts in the record. On that basis, Respondents respectfully request rehearing in this appeal.

//

II. **Standard for Reconsideration**

"The court may consider rehearings . . . [w]hen the court has overlooked or misapprehended a material fact in the record or a material question of law in the case . . ." NRAP 40(c)(2)(A).

III. **Argument**

A. **This Court Overlooked or Misapprehended Material Facts in the Record**

In the Opening Brief, Willard dedicated just over one page to its argument that the District Court erred in failing to consider the *Yochum* factors in denying the Motion. Specifically, Willard argued, in conclusory fashion and without analysis, that its "Rule 60(b) Motion established all four of the *Yochum* factors, and also explained why [Willard's] claims are meritorious. Thus, [Willard] met [its] burden to show excusable neglect." (AOB at 52). Willard further argued that the District Court's conclusion that *Yochum* did not apply was erroneous because *Yochum's* reference to "judgments" instead of "orders" "does not affect the excusable neglect factors." (*Id*. at 53).

In their Answering Brief, Respondents highlighted that "the District Court did consider [the *Yochum*] factors such as Willard's awareness of key procedural rules and deadlines, and his lack of diligence in promptly informing the Court of any issues." (RAB at 12, n. 7). Willard did not discuss, or even cite to, the *Yochum* factors in the Reply. (*See generally*, Reply).

Notwithstanding this Court's determination that the District Court "fail[ed] to address the *Yochum* factors," as Respondents pointed out in their Answering Brief, the District Court did, in fact, consider each of the *Yochum* factors in the proceedings below.

1. The District Court Considered Whether Willard Promptly Applied to Remove the Judgment

Under the first *Yochum* factor, the movant must establish is whether there was a "prompt application to remove the judgment." *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 657, 428 P.3d 255, 257 (2018) (citing *Yochum*, 98 Nev. at 486, 653 P.2d at 1216). The District Court expressly addressed this factor in its Order denying the Motion. Specifically, the District Court found that:

- "Despite knowing no oppositions [to Respondents' Motion for Sanctions] had been filed, neither Mr. Willard (through Mr. O'Mara), Mr. Moquin, nor Mr. O'Mara contacted [Respondents'] counsel or this Court to address the status of the case." (18 AA 4085 ⁋ 53).
- "Plaintiffs did nothing to apprise this Court of any issues until they filed the Rule 60(b) Motion." (*Id.* ⁋ 54).
- "Plaintiffs knew timely oppositions were not filed." (*Id.* ⁋ 56).
- "Plaintiffs chose to retain Mr. Moquin and did not terminate his representation, even after becoming aware that he did not file a timely response to the Motion for Sanctions." (*Id.* ⁋ 57).

- "Mr. O'Mara was counsel of record and did not report any issues related to Mr. Moquin to this Court until the filing of his Notice [of Withdrawal of Local Counsel] in March." (18 AA 4086 ⁋ 60).
- "Plaintiffs did not file an opposition or response to the Motion to Strike or Motion for Sanctions by December 18, 2017 or any time thereafter, nor did Plaintiffs request any further extension). (18 AA 4067 ⁋ 25).

As the record clearly shows, the District Court determined, and explained in detail, that Willard did not promptly apply to remove the judgment. This conclusion is consistent with this Court's case law with respect to this factor. Indeed, although Willard filed his the Motion within the six-month "extreme limit of reasonableness," *Rodriguez*, 134 Nev. at 657, 428 P.3d at 257, the record clearly shows that Willard was aware that Respondents had filed their Motion for Sanctions, and "did nothing to apprise this Court of any issues until they filed the Rule 60(b) Motion." (18 AA 4085 ⁋ 53).

This delay, as recognized by the District Court, shows that Willard did not promptly seek relief from the Sanctions Order. *See Rodriguez*, 134 Nev. at 657, 428 P.3d at 257 (affirming district court holding that a five-month delay was not excusable where appellant "was personally present when the district court granted Fiesta Palms' motion to dismiss, and therefore evidently capable of acting on his

behalf.") Therefore, the District Court clearly considered, and addressed, the first *Yochum* factor.

2. The District Court Considered Whether there was an Absence of an Intent to Delay the Proceedings

Under the second *Yochum* factor, the movant must establish "the absence of an intent to delay the proceedings." *Rodriguez*, 134 Nev. at 657, 428 P.3d at 257 (citing *Yochum*, 98 Nev. at 486, 653 P.2d at 1216). The District Court expressly addressed this factor in its Order denying the Motion. Specifically, the District Court found that "Mr. Willard admit[ted] he was informed by Mr. O'Mara prior to the dismissal of the Plaintiffs' claims that Mr. Moquin was not responsive. Plaintiffs failed to replace Mr. Moquin or take other action due to perceived financial reasons. ***Plaintiffs' knowledge and inaction vitiates excuse for neglect***." (18 AA 4087) (emphasis added) (citation omitted). Moreover, the District Court also found that Respondents "agreed to give [Willard] several extensions of time to oppose the Motion to Strike and Sanctions Motion, but no oppositions were filed." (18 AA 4066 ⁋ 20). The District Court also found that it had given Willard additional time to respond to the outstanding motions, "over vehement objection by the [Respondents'] counsel." (*Id.* ⁋ 22). And, in its dismissal order, the District Court previously found that, due to Willard's numerous and ongoing discovery infractions, Respondents were forced to extend discovery and delay trial multiple times to give Willard

additional time to comply with basic discovery obligations. (16 AA 3611-12, 3616-20, 3635).

As recognized by this Court, Willard's conduct evidences an intent to delay the proceedings. *See Bryant v. Gibbs*, 69 Nev. 167, 168-70, 243 P.2d 1050, 1051-52 (1952) (affirming a denial of a motion to set aside because the movant did not explain why, after he received the complaint and summons and set them aside in his house, he did not rediscover them until after a default judgment was entered against him); *see also Rodriguez*, 134 Nev. at 658, 428 P.3d at 25 ("The facts of this case support an inference of an intent to delay [where] [Appellant] exhibited a pattern of repeatedly requesting continuances and filed his NRCP(60)(b)(1) motion just before the six-month outer limit."). Therefore, the District Court clearly considered, and addressed, the second *Yochum* factor.

3. The District Court Considered Whether Willard Lacked Knowledge of Procedural Requirements

Under the third *Yochum* factor, the movant must establish "a lack of knowledge of procedural requirements." *Rodriguez*, 134 Nev. at 657, 428 P.3d at 257 (citing *Yochum*, 98 Nev. at 486, 653 P.2d at 1216). The District Court made several express findings regarding Willard's knowledge of procedural requirements, both throughout the underlying proceedings and with respect to the Motion. (*See* sec. III(A)(1), *supra*). Specifically, the District Court found the following:

- "Plaintiffs had knowledge of the initial filing deadline. They were aware no opposition papers were filed…." (18 AA 4085).
- "Despite knowing no oppositions had been filed, neither Mr. Willard [nor his attorneys] contacted Defendants' counsel or this Court to address the status of this case." (*Id.*)
- "Plaintiffs knew timely oppositions were not filed." (*Id.*)
- "Plaintiffs chose to retain Mr. Moquin and did not terminate his representation, even after becoming aware that he did not file a timely response to the Motion for Sanctions." (*Id.*)
- "Mr. Willard was aware of Mr. Moquin's alleged problems prior to this Court's Order Granting Motion to Strike and Sanctions Order, yet continued to allow Mr. Moquin to represent Plaintiffs." (*Id.*)
- "Mr. Willard was aware of Mr. Moquin's inaction…. Mr. Willard knew of the actions that supported the Sanctions Order." (*Id.*)
- "Mr. Moquin admits he was informed by Mr. O'Mara prior to the dismissal of the Plaintiffs' claims that Mr. Moquin was not responsive…. Plaintiffs' knowledge and inaction vitiates excuse for neglect." (*Id.*)

Moreover, the District Court expressly addressed this factor at the hearing on the Motion, asking: "Has Mr. Willard or the plaintiffs been involved in litigation

previously?" (19 AA 4335). Willard's counsel responded: "They have, your Honor, and this is admitted. I'm going beyond our submissions but they have both been involved in litigation previously and have been represented by Mr. Moquin previously, and he successfully went through a trial." (*Id.*) Willard's counsel also admitted that this factor was "a difficult one" and that Willard "did, candidly know that things needed to be filed. He knew trial was coming up and he knew that they were both motions that he wanted to see filed and oppositions that he understood needed to be filed because ***he was an active participant in this case*** and he wants to continue to be." (*Id.*) Willard's counsel's statements at the hearing on the Motion is essentially a concession that Willard could not satisfy this factor.

Additionally, the District Court expressly found in its Order denying the Motion that it had previously admonished Willard, "stating 'you need to know going into these oppositions, that I'm very seriously considering granting all of it . . . I haven't decided it, but I need to see compelling opposition not to grant" the Motion for Sanctions. (18 AA 4067 ⁋ 24). Willard did not file an opposition or response to the Motion to Strike or the Motion for Sanctions, which sought dismissal of Willard's claims due to his repeated and willful violations of the NRCP and the District Court's Orders. (*Id.* ⁋ 25). This is precisely the type of conduct that this Court has found to militate against a finding that the movant lacked knowledge of procedural requirements. *See Rodriguez*, 134 Nev. at 658, 428 P.3d at 258.

("Rodriguez should have inferred the consequences of not opposing the motion to dismiss, especially in light of the court's express warning to take action.")

Therefore, the District Court clearly considered, and addressed, the third *Yochum* factor.

4. **The District Court Considered Whether Willard Acted in Good Faith**

Under the fourth *Yochum* factor, the movant must establish "good faith." *Rodriguez*, 134 Nev. at 657, 428 P.3d at 257 (citing *Yochum*, 98 Nev. at 486, 653 P.2d at 1216). The District Court expressly addressed this factor in its Order denying the Motion. Specifically, the District Court found that "Mr. Willard's claim that he had no choice but to continue working with Mr. Moquin due to financial issues lacks credibility as the admits he was able to borrow money to fund Mr. Moquin's personal life and medical treatment. It logically follows he had resources to retain new attorneys at the time." (18 AA 4088 ¶ 68). The District Court therefore determined that Willard had "not established by substantial evidence that they exercise[d] diligence to rectify representation in their case despite amply knowledge of Mr. Moquin's non-responsiveness." (*Id.* ¶ 69).

The District Court further determined that "[i]n light of the circumstances in this case, the dismissal of Plaintiffs' claims did not unfairly penalize Plaintiffs based on the factors analyzed in the *Sanctions Order*." (*Id.* ¶ 80). In its *Sanctions Order*, the District Court District Court that expressly found that Willard engaged in

"willful" misconduct, exhibited "bad faith motives," and strategically "ambush[ed]" Respondents. 16 AA 3630. Respondents discussed Willard's willful noncompliance at length in their Answering Brief. (*See* RAB at 49-53).

The District Court's findings and conclusions regarding Willard's failure to diligently prosecute the action is the type of conduct that this Court has recently found to show a lack of good faith. Indeed, in *Garrison v. Van Bueller Enterprises, LLC*, 460 P.3d 25 (Nev. Mar. 27, 2020) (unpublished), this Court determined that the appellant failed to establish good faith in the context of a NRCP 60(b) motion where evidence in the record suggested that appellants had failed to show that they diligently defended the action because they "were not too busy to conduct business, [and] knew of the proceedings much earlier than they claim[ed]." Here, the District Court made express findings that Willard was aware of the potential that the Motion for Sanctions would be granted, and Willard had access to financial resources to fund the opposition thereto.

Therefore, the District Court clearly considered, and addressed, the fourth *Yochum* factor.

IV. <u>Conclusion</u>

Based on the foregoing, this Court's conclusion "that the district court abused its discretion by failing to address the *Yochum* factors" is belied by the record below, and is, respectfully, based on a misapprehension of material facts in this appeal.

Moreover, the fact that the District Court considered, and addressed, each of the *Yochum* factors further supports affirmance. And, even if the District Court misapprehended the applicability of *Yochum* to Willard's request for relief under NRCP 60(b), it still found that Willard failed to support the Motion with any competent or admissible evidence (*see* 18 AA 4072-81), which is a threshold requirement under Nevada law. *Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 307 (1993) (while a "district court has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b),…this discretion is a legal discretion and cannot be sustained where there is no competent evidence to justify the court's action."); *see also Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013). This alone constitutes grounds for affirmance. *See Sengel v. IGT*, 116 Nev. 565, 570, 2 P.3d 258, 261 (2000) ("Because the district court arrived at the correct decision, even though based on the wrong standard, we affirm that decision."). And, in their Answering Brief, Respondents highlighted that "the District Court did consider [the *Yochum*] factors such as Willard's awareness of key procedural rules and deadlines, and his lack of diligence in promptly informing the Court of any issues." (RAB at 12, n. 7).

//

//

//

WHEREFORE, Respondents request that rehearing be granted.

Respectfully submitted this 24th day of August, 2020.

DICKINSON WRIGHT PLLC

/s/ Brian R. Irvine
DICKINSON WRIGHT PLLC
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 12515
100 W. Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (844) 670-6009

Attorneys for Respondents Berry-Hinckley Industries and Jerry Herbst

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Respondents' Petition for Rehearing 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:

[x] This Respondents' Petition for Rehearing has been prepared in a proportionally spaced typeface using Microsoft Word version 14.0.6129.5000 (2010) in 14 point Times New Roman font;

2. I further certify that this Respondents' Petition for Rehearing 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), it is:

[x] Proportionately spaced, has a typeface of 14 points or more and contains 2,750 words.

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

conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 24th day of August, 2020.

DICKINSON WRIGHT, PLLC

By: /s/ Brian R. Irvine
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 12515
100 W. Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (844) 670-6009

Attorneys for Berry-Hinckley Industries and Jerry Herbst

CERTIFICATE OF SERVICE

I certify that I am an employee of DICKINSON WRIGHT, PLLC, and that on this date, pursuant to NRAP 25(d), I am serving the attached **RESPONDENTS' PETITION FOR REHEARING** on the party(s) set forth below by:

☒ By electronic service by filing the foregoing with the Clerk of Court using the ECF Electronic Filing System, which will electronically mail the filing to the following individuals.

Robert L. Eisenberg
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street 3rd Floor
Reno, NV 89519
Telephone: (775) 786-6868
Fax: (775) 786-9716

Richard D. Williamson, Esq.,
Jonathan Joel Tew, Esq.
ROBERTSON, JOHNSON, MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
Reno, Nevada 89501
Telephone: (775) 329-5600
Fax: (775) 348-8300

DATED this 24th day of August, 2020

/s/ Mina Reel
An Employee of Dickinson Wright PLLC