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' ANSWER TO PETITION FOR REHEARING

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

INTRODUCTION

The petition for rehearing essentially argues one point: the panel overlooked or misapprehended the district court's analysis of the factors in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). The petition is wrong. The panel's opinion correctly summarized the record, and rehearing should be denied.

The District Court Did Not Address the Yochum Factors

The petition argues that the district court's Rule 60(b) Order (the Order) specifically addressed each of the four factors set forth in *Yochum*, and that the panel therefore erred by overlooking and misapprehending the district court's findings. (Pet. at 5.) The argument is incorrect and should be rejected.

First, the Order, in the **one** paragraph that references *Yochum*, not only fails to address the *Yochum* factors, it **expressly disclaims that *Yochum* applies –** thus contradicting the petition's argument. This court's opinion correctly provided the following quotation from the district court Order:

> Plaintiffs assert this Court must address the additional factors set forth in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). *Yochum* involves relief from a default judgment **and not an order**, **as here**, where judgment has not been entered. *Yochum* does not preclude denial of the motion.

(Op. at 4 (bold emphasis supplied).) In light of the district court's clear rejection of any application of *Yochum*, it is impossible to conclude that the panel overlooked or misapprehended the district court's failure to apply the *Yochum* factors.

Moreover, the Order: (1) does not reference the *Yochum* factors in the Legal Standard section; or (2) set forth, describe, or even in a cursory fashion analyze **any** of the *Yochum* factors. Thus, the Order that respondents drafted, and that the district court adopted, simply did not apply (or even consider) the *Yochum* factors, and the panel did **not** misapprehend anything.

In fact, the Order focused only on the following issues: (1) the evidence the Willard appellants offered; (2) excusable neglect under *Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 322 P.3d 429 (2014) and *Passarelli v. J. Mar Dev.*, 102 Nev. 283, 286, 720 P.2d 1221, 1224 (1986); (3) excusable neglect based on the (objectively false) claim that Willard was aware of Moquin's bipolar condition **before** the sanctions order; (4) O'Mara's role as local counsel; and (5) whether the sanctions order needed to consider whether Moquin's misconduct unfairly operated to penalize Willard. Noticeably absent are any explicit, detailed findings on the four *Yochum* factors. Instead, the Order disavowed the applicability of *Yochum* and its factors.

Despite the district court's disavowal of the *Yochum* factors, the petition only now – after an adverse ruling on appeal – attempts to retroactively graft a *Yochum* factor analysis into the Order.

Yet, the Order shows that it contains no *Yochum* analysis. The petition's attempt to reconstruct the Order is belied by the context from which each statement

that respondents rely upon was pulled. Stated differently, and as discussed in more detail below, the respondents cite certain paragraphs to claim that the Order addressed each *Yochum* factor, but the paragraphs they rely upon do **not** address *Yochum*. They support entirely different legal propositions and conclusions.

In sum, because (a) the respondents failed to argue the *Yochum* factors in the district court, and (b) the district court did not address each *Yochum* factor in its Order, respondents' petition does not support rehearing and should be denied.[1]

The Order Was Not Supported by Substantial Evidence

Unfortunately, the petition is a continuation of a pattern of overreaching advocacy. Due to Moquin's bipolar disorder, the respondents were able to take advantage of unopposed motions and proposed orders to advance hyperbolic narratives and inaccurate conclusions. But the truth came to light through the Moquin disciplinary file and guilty pleas (which simply validated and corroborated the admissible evidence Willard advanced in support of the Rule 60(b) Motion).

In any event, the petition fails to show that each of the four *Yochum* factors was explicitly addressed (or even considered) by the district court, as required by

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[1] This court's Opinion also emphasized that a district court abuses its discretion when it disregards established legal principles, and that Rule 60(b) operates as a remedial rule that gives due consideration to the state's preference to adjudicate cases on the merits. (Opinion at 5; *accord id.* at 6 (the "district court must also consider this state's bedrock policy to decide cases on their merits whenever feasible when evaluating an NRCP 60(b)(1) motion.").) Respondents' petition makes no effort to address this important point.

the panel's opinion, and the petition should therefore be summarily denied. Due to Mr. Willard's age, a prompt remand is essential if he is to receive any redress for the respondents' strategic breach of the lease and refusal to honor the personal guaranty (which damages approximate $15,000,000).

THERE ARE REMAINING ARGUMENTS THAT WILL NEED TO BE ADDRESSED

Even if the panel were to conclude that it somehow misapprehended the facts, Willard raised additional arguments that would still need to be decided by the panel before this appeal can be resolved. The opinion noted:

> Because the district court's failure to address the *Yochum* factors requires remand for further proceedings, we decline to consider Willard's additional arguments challenging the merits of the district court's excusable neglect determination.

(Opinion at 9, n.7.)

Willard's arguments in Appellants' Opening Brief ("AOB"), that the panel would still need to consider on rehearing, include:

(1) Whether Moquin abandoned Willard, for the numerous reasons discussed at AOB 34-39.

(2) Whether Moquin abandoned Willard under *Passarelli* (AOB 34) in light of the State Bar's findings and conclusions, which recite clear and convincing evidence of Moquin's multiple and repeated violations of ethical requirements that led to dismissal of the case (and which

this court affirmed in the disciplinary appeal, No. 78946, with three justices even dissenting because the discipline imposed against Moquin by the State Bar was insufficient).

(3) Whether the district court erred in excluding admissible evidence supporting relief under Rule 60(b). (AOB 39-44.)

(4) Whether the district court erred in failing to assess all the pertinent factors set forth in *Young v. Johnny Ribeiro Bld.*, 106 Nev. 88, 92-93, 787 P.2d 777 (1990).

(5) Whether the district court erred by imposing case-terminating sanctions rather than lesser sanctions.

Because the panel found other reversible error, the panel did not determine these issues. Accordingly, resolution of the petition in favor of the respondents will not be dispositive, and these remaining contentions would still need to be resolved.

ARGUMENTS

A. The Panel Did Not Overlook or Misapprehend Material Facts

1. The *Yochum* Factors Were Never Addressed in the Order

In the Order the respondents prepared, *Yochum* is mentioned in one short paragraph, which determines *Yochum* is inapplicable. (18 A.App. 4091.) The Order does not expressly analyze each *Yochum* factor or explain how Willard failed to meet the burden under *Yochum* for Rule 60(b) relief.

The panel's opinion made abundantly clear that this is insufficient, where it stated: "[w]e recognize that our dispositions may have implied that the district court need only demonstrate that it considered the *Yochum* factors – **as opposed to issuing factual findings for each factor** . . . . However, we now clarify that we require district courts to issue **explicit factual findings** in the first instance **on all four *Yochum* factors.**" (Opinion at 7, n.6 (emphasis supplied); *accord id.* at 8 ("district courts must issue **explicit and detailed findings**, preferably in writing, **with respect to the four *Yochum* factors**" (emphasis supplied)).)

The Order does not make explicit factual findings as to each of the four *Yochum* factors. It does not even reference the *Yochum* factors. Instead, it summarily rejected application of *Yochum*. Indeed, respondents' opposition to Willard's Rule 60(b) Motion merely recited the *Yochum* factors, but utterly failed to address Willard's arguments regarding application of those factors. (17 A.App. 3805-06.) Thus, between respondents' opposition and the Order itself, it is clear that the Order did not explicitly address the four factors, as the law requires.

Accordingly, the panel did not misapprehend or overlook anything in the Order, and the panel's opinion must stand. Respondents have failed to demonstrate that rehearing is even remotely warranted.

Indeed, the mere structure of the Order further evidences that the *Yochum* factors were not addressed. As noted above, the Order focuses exclusively on

other legal issues such as evidentiary support, the sanctions factors under *Young*, and abandonment under *Huckabay* and *Passarelli*.

Further, the first time respondents attempted to argue that the *Yochum* factors were adequately addressed was in **a single, short footnote** on appeal. That conclusory footnote states:

> Accordingly, Willard's argument that the District Court erred in purportedly failing to consider the *Yochum v. Davis*, 653 P.2d 1215 (1982), factors is misplaced, as Willard could not even satisfy his threshold evidentiary burden. AOB 52-53; *see also, e.g.*, 16 AA 3686 (arguing that "Mr. Moquin's mental illness demonstrates that the Willard Plaintiffs have at all times acted in good faith and without the intent to delay the proceedings."). Further, the District Court did consider 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. 18 AA 4085-88, 4064.

(RAB at 12, n.7.)

If the respondents truly believed the Order satisfied requirements for a thorough analysis of *Yochum* factors, respondents should have made their arguments in a non-conclusory argument in the answering brief – not for the first time on rehearing. *See* NRAP 40(c)(1) ("no point may be raised for the first time on rehearing").[2]

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[2] That the respondents failed to fully argue this point in their answering brief is not a basis for rehearing. "A petition for rehearing may not be utilized as a vehicle to reargue matters considered and decided in the court's initial opinion." *Matter of Estate of Herrmann*, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984); *accord City of N. Las Vegas v. 5th & Centennial*, 130 Nev. 619, 622, 331 P.3d 896, 898 (2014).

Finally, respondents attempt to discredit Willard's AOB arguments with respect to the *Yochum* factors by claiming they were conclusory and "without analysis." (Pet. at 5.) This argument is ironic since the respondents failed to oppose Willard's Rule 60(b) Motion's arguments as to the *Yochum* factors. (*Compare* 16 A. App. 3684, 3686 *with* 17 A. App. 3799-3819.) Thus, in the AOB, Willard demonstrated that the Rule 60(b) Motion established all four of the *Yochum* factors; respondents' opposition simply ignored that argument in the district court proceedings.[3]

2. The District Court Did Not Consider Whether Willard Promptly Applied to Remove the Judgment

On page six of their petition, the respondents begin to reference for the first time the actual *Yochum* factors. (Pet. at 6 ("Under the first *Yochum* factor, the movant must establish is [sic] whether there was a 'prompt application to remove the judgment.'").) Respondents claim this factor was, despite never being mentioned in the Order, "expressly addressed." (*Id.*) For support, the petition cites six findings – **none of which deal with the promptness of Willard's Rule 60(b) Motion**. (*Id.* at 6-7.)

Respondents argued *Yochum* in one sentence of a footnote in their answering brief. Now they seek to reargue it expansively. Reargument is improper, as is raising new arguments for the first time on rehearing.

[3] It is also ironic that the petition attempts to make much of the fact that Willard did not address the *Yochum* factors in the ARB, when the RAB simply made a conclusory argument on the point in a short footnote.

Indeed, one finding states that neither Willard nor his counsel provided the district court with a status update regarding Moquin's failure to oppose the motion for sanctions. (*Id.*) Another finding repeats the same claim that Willard did not apprise the Court of any issues until they filed their Rule 60(b) Motion. (*Id.*) The third finding states that Willard knew timely oppositions were not filed. (*Id.*) The fourth states that Willard did not terminate Moquin after he failed to oppose the motion for sanctions. (*Id.*) The fifth notes that O'Mara did not report any issues until his notice of withdrawal from the case. (Pet. at 7.) And the sixth states that Willard never filed an opposition to the motion for sanctions by the due date. (*Id.*)

None of these findings have anything to do with the *Yochum* factor of "promptly applying to remove a judgment" – which had not even been entered at the time of the events alleged in these allegations. Instead, these allegations show respondents' after-the-fact attempts to insert a *Yochum* argument into the Order.

Problematically for the respondents, the facts show Willard's tremendous diligence. The district court entered the sanctions order in January. The record reflects Willard's remarkable efforts to get Moquin to oppose motions before the judgment was entered, as does O'Mara's Notice of Withdrawal of Local Counsel wherein he stated he "begged" Moquin to file timely oppositions. (16 A.App. 3654:23-26.) This diligence **preceded** entry of the judgment. **After the judgment**, the record reflects Willard and his new counsel's extraordinary efforts

– in the face of Moquin's false promises, obstruction, and expletive-laden threats – to promptly file a Rule 60(b) Motion. (16 A.App. 3675-92.) None of the supposed findings that respondents rely on set forth express findings on the first *Yochum* factor, as they do not have anything to do with Willard's promptness in seeking relief from the judgment.

Indeed, the findings respondents rely on do not deal with *Yochum*; they are part of the Order's attempt to show that there was no attorney abandonment under *Passarelli*. (*See* 18 A.App. 4081-86, ¶¶ 39-63.) As such, the court must deny respondents' petition.

3. The District Court Did Not Consider Whether There Was an Absence of Intent to Delay the Proceedings

The petition next argues that the panel misunderstood the Order's express consideration of the second *Yochum* factor: namely, that the movant must establish "the absence of an intent to delay the proceedings." (Pet. at 8.) Again, respondents' argument here cuts against them because they can cite to no portion in the Order that addresses "intent" to delay the proceedings – thus establishing that *Yochum* was never under consideration.

Respondents state that Willard was informed by O'Mara prior to the dismissal that Moquin was unresponsive. (Pet. at 8.) Yet, there are two problems here. First, this finding was made to dispute Willard's ability to rely upon Moquin's mental illness to establish excusable neglect. It has nothing to do with

an intent to delay proceedings. Second, during this time in December of 2017, the record reflects that: (1) both Willard and O'Mara relentlessly attempted to contact Moquin to ensure he filed oppositions to the dispositive motions by the requisite deadlines; and (2) that Moquin then **assured Willard and O'Mara that he would file the oppositions.** (17 A.App. 3959-65; 17 A.App. 3954:17-20; s*ee also In re Discipline of Brian Moquin, Esq.*, Docket No. 78946 (Conditional Guilty Plea in Exchange for a Stated Form of Discipline, Apr. 16, 2019, available at Moquin ROA 53)[4].) The problem, as demonstrated by the admissible evidence presented in the Rule 60(b) Motion and reply, as well as the disciplinary record, is that the psychologically-troubled Moquin misled both Willard and O'Mara into believing he was going to file timely oppositions. (17 A.App. 3963-3965; *see, e.g.*, Moquin ROA 53-57.) Thus, even if the Order addressed this second *Yochum* factor, which it did not, the evidence reflects that there **was no intent** to delay the proceedings. In fact, the evidence shows the opposite. Willard was doing everything in his power to <u>not</u> delay the proceedings.[5]

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[4] In its opinion, this court noted Moquin's disciplinary case. *See Willard v. Berry-Hinckley Indus.*, 136 Nev. Adv. Op. 53 at 3, 469 P.3d 176, 178 n.3 (2020).

[5] Larry Willard is nearly 80 years old. As an elderly plaintiff seeking millions of dollars in damages due to respondents' abandonment of the commercial lease on Willard's property, he had absolutely no reason or incentive to delay the case. It is absurd to suggest that he would have intentionally delayed filing his Rule 60(b) motion or anything else in this case, and the evidence certainly did not establish such an intent. Respondents' zealous arguments on this point are just not credible.

Respondents next argue that the Order's reference to extensions to oppose the various motions proves the Court made a finding that Willard intended to delay the proceedings. (Pet. at 8.) Yet, the request of an extension does not show an intention to delay – nor does the Order find that the extensions were requested with the intent to delay the proceedings for purposes of *Yochum*. The truth, again, quite clearly, was that Moquin had abandoned Willard due to Moquin's mental illness, was misleading Willard and O'Mara, and could not function as an attorney. His bipolar condition **necessitated requests for extensions**, and those desperate requests in no way evidence an intent to delay the proceedings; they evidence a troubled attorney who could not function normally. Accordingly, not only did the Order not address (or even try to address) the second *Yochum* factor, the petition's argument that the order did address it falls flat.

Accordingly, the panel did not overlook or misapprehend the Order, and the petition must be denied based on this second *Yochum* factor as well.

4. The District Court Did Not Consider Whether Willard Lacked Knowledge of Procedural Requirements

The respondents next contend that the Order made findings under *Yochum* that Willard, an elderly non-lawyer, had knowledge of the procedural requirements. (Pet. at 9-10.) A threshold problem with respondents' argument here, which is consistent with **all** of their attempts to import a *Yochum* factor analysis into the Order, is context.

Each of the findings in the Order that the respondents claim establish the third *Yochum* factor exist in that Order to try to establish that Willard could not rely on Moquin's bipolar disorder for purposes of Rule 60(b) – not to establish the third *Yochum* factor.

In addition, the findings are extensions of respondents' flawed argument that Willard could not establish abandonment or rely on *Passarelli*. (*See* 18 A. App. 4082-84.) Thus, respondents' argument that the Order addressed the third *Yochum* factor is specious.

In addition, respondents misguidedly focus their attention on the events that took place primarily in December 2017 and not the points in time prior where Moquin admitted in his guilty plea that Willard was unaware of the deadlines and other matters. (Moquin ROA 53.) As such, even if the Order was addressing the third *Yochum* factor, which it clearly was not, it would be deficient since Willard's purported knowledge of the procedural requirements and deadlines covers one month of the entire case.[6] Willard was certainly active in the case in December 2017 after he realized his life was about to be destroyed due to Moquin's failures.

Finally, respondents overzealously claim that 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

[6] Indeed, Moquin admitted that his communications to Willard in the years leading to December 2017 were deficient. (Moquin ROA 56.)

> oppositions, that I'm very seriously considering granting all of it . . .' 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. 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."

(Pet. at 11 (emphasis added).)

Yet, the actual transcript of the proceedings – which is cited in the Order – shows that the district court **did not admonish Willard**, it admonished **Moquin**. (19 A.App. 4320-22.) The district court did not even address Willard at the hearing. (*Id.* at 4305-4330.) Despite this fact, the respondents – knowing that the almost 80-year old Willard was verbally abused, threatened, and taken advantage of by Moquin (and frequently berated with profanities) – claim that **Willard**, not Moquin, was admonished by the court, ignored deadlines, and repeatedly and willfully violated the NRCP and the district court's orders. The contention is false, meritless, and should be rejected.

5. The Court Did Not Address Good Faith in the Context of *Yochum*

The respondents again claim that the district court "expressly" addressed the fourth *Yochum* factor despite never mentioning it. (Pet. at 12.) To scrape together support for this "express" *Yochum* analysis, the respondents rely on the Order, paragraphs 68, 69, and 80. Yet, a review of paragraphs 68 and 69 in the context of

the Order, and in particular, in sequence with paragraph 67, simply demonstrates the failings of the petition.

Paragraph 67 states that:

> The *Rule 60(b) Motion* cites authority for the proposition that even "where an attorney's mishandling of a movant's case stems from the attorney's mental illness," which might justify relief under Rule 60(b). [sic] However, "client diligence must still be shown." 18 A.App. 4087-88 (italics in original; internal citations omitted).

Paragraphs 68 and 69 then state that Willard was not diligent or responsive in replacing Moquin despite "ample knowledge of his unresponsiveness." (18 A.App. 4088.) Noticeably absent from the Order here is any discussion of the actual *Yochum* factor of "good faith." Instead, the Order and its context make clear that it was addressing whether Willard could rely on Moquin's severe mental illness to support a finding of excusable neglect under Rule 60(b). As such, the petition should be denied because it fails to establish that the panel overlooked or misapprehended a non-existent *Yochum* factor analysis. Indeed, the panel was right to rely on the last substantive paragraph of the Order, paragraph 81, which expressly disavowed *Yochum*.

Further, the admissible evidence and the disciplinary record now establish that the conclusions respondents rely upon in the Order – which have nothing to do with *Yochum* – are now objectively false. Willard was the victim. After Willard became aware that Moquin failed to oppose respondents' dispositive motions in

December 2017 – despite Moquin's repeated promises and assurances to both Willard and O'Mara that he would file the oppositions – Willard diligently sought new counsel and only kept Moquin involved to assist new counsel in their attempt to right the ship. (*E.g.*, 17 A.App. 3954, 3959-65, 3963-65, 3979-82, 3991-94.) Of course, Moquin ultimately failed to assist new counsel, and new counsel did not delay in filing the Rule 60(b) Motion. (17 A.App. 3999-4000; *see also* Moquin ROA 54-55, 63; *see also In re Discipline of Moquin*, Docket No. 78946 (Order Approving Conditional Guilty Plea Agreement and Enjoining Attorney from Practicing Law in Nevada, Oct. 21, 2019).) The record amply shows that Willard and his new counsel unequivocally acted diligently by putting together and filing the Rule 60(b) Motion despite the fact that Moquin made that process extraordinarily difficult and repeatedly failed to follow through with providing case files and other information that would have helped Willard and his new counsel, as described above.

In addition, the record reflects that Willard did not know of Moquin's bipolar condition until **after the Sanctions Order**, despite respondents' attempt to claim that Willard knew of Moquin's condition **before** Moquin failed to oppose the dispositive motions in December 2017. (*See* AOB at 39; *compare* Order at ¶65 *with* Appellants' Reply Brief ("ARB") at 6 (showing sanctions order was entered

on January 4, 2018 and Willard's discovery of Moquin's bipolar disorder occurred in late January 2018.)

Finally, the respondents – again having no way to show that the Order addressed the "good faith" *Yochum* factor – turn their attention to the unopposed sanctions order to double down on their now debunked claim that the nearly 80-year-old Willard engaged in "willful" misconduct, exhibited "bad faith motives," and "strategically ambush[ed]" the respondents. (Pet. at 12-13.) Of course, the sanctions order is not the Rule 60(b) Order and therefore cannot be utilized to prove a lack of "good faith" analysis under *Yochum*. Moreover, the respondents' doubling down on the unsupported findings, in light of the admissible evidence Willard presented (and Moquin's disciplinary record), show just how inequitable the result is that the respondents now seek. As explained in the AOB, respondents strategically breached a lease and personal guaranty and destroyed Willard's life. He suffered $15,000,000 in just breach of lease / guaranty damages alone – which were fully disclosed and directly derived from a simple review of the lease.

In short, the petition's arguments on this point are baseless and do not support rehearing.

B. The Petition's Other Authorities Are Inapplicable

Respondents repeatedly rely on *Rodriguez v. Fiesta Palms, LLC,* 134 Nev. 654, 656, 428 P.3d 255, 257 (2018), *holding modified by Willard v. Berry-Hinckley*

Indus., 136 Nev. Adv. Op. 53, 469 P.3d 176 (2020), to support their specious argument that the *Yochum* factors were not met. (Pet. at 6-9, 11-12.) Yet, a simple review of that case demonstrates that it actually undercuts respondents' petition.

First, in *Rodriguez*, the district court ***expressly considered*** the *Yochum* factors in denying the Rule 60(b) Motion. *Id.* In the present case, the district court expressly did not. Thus, *Rodriguez* has no relevance to the petition.

Second, the court in *Rodriguez* concluded that Rodriguez failed to meet the first *Yochum* factor of filing a prompt application for relief because he filed his simple motion at the "extreme limit of reasonableness" – i.e., a week before the 6-month deadline. *Id.*, 134 Nev. at 657, 428 P.3d at 257.

In the present case, Willard filed his Rule 60(b) Motion only slightly more than one month after the March 6, 2018 order on the motion for sanctions. (*See* ARB "Timeline" at pp. 5-8.) Thus, it was promptly filed.

Moreover, unlike in *Rodriguez*, Willard and his new counsel were faced with Moquin's obstructive refusal to turn over case files and assist with submitting declarations to support the Rule 60(b) Motion – despite his repeated promises to do so. (*Id; see also* Moquin RAB at 54-55.) Accordingly, even though the Order in the present case fails to address the *Yochum* factors *in toto*, *Rodriguez* shows Willard promptly filed his Rule 60(b) Motion.

Third, respondents rely on *Rodriguez* to claim that Willard intended to delay the proceedings. In *Rodriguez*, the court found that there was an inference of delay because the appellant exhibited a pattern of repeatedly requesting continuances and filed his Rule 60(b) motion just a week before the six-month deadline. (Pet. at 9.) Yet here, Willard's Rule 60(b) Motion was promptly filed, and the December 2017 continuances **Moquin** requested were a result of his bipolar disorder. Thus, *Rodriguez* does not apply.

Finally, the respondents rely on *Rodriguez* to argue that the district court's December 2017 warnings to Moquin about deadlines prevent Willard from establishing the third *Yochum* factor. Yet, *Rodriguez* is distinguishable from the present case because the district court in *Rodriguez* directly warned Rodriguez, who was representing himself. Here, the evidence in the record (and the disciplinary record) show that: (a) the district court warned Moquin (not Willard); and (b) Moquin actively deceived Willard into believing that the deadlines would be met. (17 A.App. 3963-3965; *see, e.g.,* Moquin ROA at 53-57.) As such, *Rodriguez* is clearly distinguishable from the present case because, unlike in *Rodriguez*, Willard's purported knowledge of the December 2017 deadlines had no nexus to Moquin's failure to meet those deadlines. Moreover, the evidence submitted in support of the Rule 60(b) Motion, and Moquin's disciplinary admissions, establish that Willard was unaware of nearly all the other deadlines in

the case. Thus, *Rodriguez* does not support the third *Yochum* factor (or the fourth *Yochum* factor – good faith).[7]

The petition cites *Bryant v. Gibbs*, 69 Nev. 167, 243 P.2d 1050 (1952) for the proposition that Willard's conduct "evidences an intent to delay the proceedings." (Pet. at 9.) *Bryant* is inapplicable because it had nothing to do with intent to delay. The court simply held that, in the specific facts of that case, there was no legitimate excuse for the defendant's conduct. The petition also cites *Garrison v. Van Bueller Ent.*, 2020 WL 1531412 (Nev. 2020; No. 77051; unpublished) for the proposition that Willard's conduct shows a lack of good faith. (Pet. at 13.) *Garrison* had unique facts, including evidence of four other cases in which those defendants/appellants had knowingly allowed lawsuits to proceed to default judgments for financial reasons, and where this court determined that "appellants affidavits are untrue" regarding their knowledge of proceedings. *Id.* at *3. *Garrison* is inapplicable here.

Thus, the cases on which the petition is based are inapposite here.

CONCLUSION

The panel's decision was correct, and the petition fails to establish that the panel overlooked or misapprehended any facts that would support rehearing.

[7] The respondents do not attempt to argue that *Rodriguez* supports their arguments relating to good faith.

Simply put, the district court plainly did not consider and expressly discuss the *Youchum* factors. The petition's attempt to perform reconstructive surgery on the Order should be seen for what it is – an improper and late attempt to fix a now-discredited, respondent-prepared Order **that expressly disavowed *Yochum***. Because the panel correctly concluded that Plaintiffs' Rule 60(b) Motion should be reconsidered on remand, the petition should be denied.

DATED: October 26, 2020

/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/ Jonathan Joel Tew
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 COMPLIANCE FOR ANSWER TO PETITION FOR REHEARING

I hereby certify that this answer to the petition for rehearing complies with the formatting requirements of NRAP 32(a)(4)-(6) and the size limitation in NRAP 40(b)(3), because this answer has been prepared in a proportionally spaced typeface using MS Word in 14 point Times New Roman type style, and the answer contains 4,527 words (not counting the cover page, the certificate of service, or the certificate of compliance.

/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/ Jonathan Joel Tew

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 October, 2020, I electronically filed the foregoing **APPELLANTS' ANSWER TO PETITION FOR REHEARING** 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 for Respondents

Robert L. Eisenberg, Esq.
Lemons, Grundy & Eisenberg
6005 Plumas Street
Third Floor
Reno NV 89519
775-786-6868
Attorneys for Appellants

/s/ Stefanie E. Smith
An Employee of Robertson, Johnson, Miller & Williamson