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 **RESPONDENTS' PETITION FOR EN BANC RECONSIDERATION**

APPEAL

From the Second Judicial District Court, Washoe County
The Honorable Lynne K. Simons, Department VI, District Judge
District Court Case No. CV17-01712

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RESPONDENTS' PETITION FOR EN BANC RECONSIDERATION

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DISCLOSURE STATEMENT

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 Justices of this Court may evaluate possible disqualification or recusal.

1. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation ("BHI") is 100% owned by JH, Inc., a Nevada corporation. BHI and JERRY HERBST,[1] an individual, (collectively referred to herein as "Defendants") are represented by Dickinson Wright, PLLC. The law firm of Dickinson Wright, PLLC, represented BHI and Jerry Herbst below.

DATED this 1st day of December, 2020.

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine
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[1]Mr. Herbst passed away on November 27, 2018.

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INTRODUCTION

This appeal stems from an NRCP 60(b) order in a case in which Appellants ("Willard") failed to comply with even the most basic discovery obligations or court orders, instead holding Respondents ("BHI") captive to the litigation for years. Indeed, more than six years have passed since Willard initiated this case (and one of the two defendants has since passed away), and Willard has never provided a compliant NRCP 16.1 damages calculation. 18 AA 4063. The District Court dismissed Willard's case with prejudice as a sanction, finding, *inter alia*, that Willard engaged in tactics which were "willful," in "bad faith," and an "ambush"; that "Willard's "repeated and willful delay in providing necessary information to Defendants has necessarily prejudiced Defendants"; and that Willard's "disregard for this Court's orders and docket, Nevada law, and Defendants' rights to prepare a defense necessitates dismissal." 16 AA 3630, 3633, 3638.

Willard subsequently retained new counsel and moved to set aside the Sanctions Order, arguing that his prior counsel ("Moquin") had a psychological disorder which resulted in his abandonment of Willard, which justified NRCP 60(b)(1) relief based on excusable neglect. The District Court concluded that "[t]he Rule 60(b) Motion is not supported by competent, admissible and substantial evidence." 18 JA 4072, 4081, 4091. It also found, among other things, that Willard had not attempted to rectify or notify the District Court of any issues until the filing

of his NRCP 60(b) Motion, even though Willard was aware of such issues at the time they occurred, that Willard knew of the pertinent procedural requirements, and that Willard's "knowledge and inaction vitiates excuse for neglect." *Id*. at 4087. However, the District Court declined to address the *Yochum* factors, concluding that *Yochum* only applied to relief from a judgment, not an order.

On appeal, the Panel reversed and remanded the District Court's 60(b) Order. The Panel concluded that because the District Court failed to address the *Yochum* factors in denying Willard's NRCP 60(b)(1) motion, the District Court abused its discretion. The Panel explained that "while our jurisprudence has already stated as much, we now explicitly hold that a district court must address the *Yochum* factors when determining if the NRCP 60(b)(1) movant established, by a preponderance of the evidence, that sufficient grounds exist to set aside 'a final judgment, order, or proceeding.'" The Panel also reiterated that its "ability to review a district court's NRCP 60(b)(1) determination for an abuse of discretion necessarily requires district courts to issue findings pursuant to the pertinent factors in the first instance." Thus, the Panel stated that "we now expressly hold, as we have in other contexts, that district courts must issue explicit and detailed findings, preferably in writing, with respect to the four *Yochum* factors to facilitate this court's appellate review of NRCP 60(b)(1) determinations for an abuse of discretion."

BHI respectfully submits that en banc reconsideration is warranted for the following, independent reasons:

- The Panel's decision is contrary to Nevada precedent holding that a movant must show excusable neglect by the preponderance of the evidence, *Kahn v. Orme*, 108 Nev. 510, 835 P.2d 790 (1992), *overruled on other grounds by Epstein v. Epstein*, 113 Nev. 1401, 950 P.2d 771 (1997), and that a district court's NRCP 60(b) decision cannot be sustained where there is no competent evidence to justify the court's action, *McClellan v. David*, 84 Nev. 283, 439 P.2d 673 (1968); *Stoecklein v. Johnson Electric, Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 307 (1993), *holding modified by Willard v. Berry-Hinckley Indus.*, 136 Nev. Adv. Op. 53, 469 P.3d 176 (2020).
- The Panel's decision is contrary to Nevada precedent establishing that a district court need not make express findings on all of the *Yochum* factors so long as the record demonstrates that the district court considered the *Yochum* factors. *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 428 P.3d 255 (2018), *holding modified by Willard*, 136 Nev. Adv. Op. 53, 469 P.3d 176; *Stoecklein*, 109 Nev. at 271, 849 P.2d at 307.
- The Panel's decision is contrary to Nevada precedent holding that a district court's findings may be implied where clearly supported by the record.

Schouweiler v. Yancey Co., 101 Nev. 827, 712 P.2d 786 (1985); *Sierra Glass & Mirror v. Viking Indus., Inc.*, 107 Nev. 119,, 808 P.2d 512 (1991).

- This appeal involves a substantial precedential issue.

ARGUMENT

1. Legal standard.

En banc reconsideration may be ordered when (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional, or public policy issue. NRAP 40A(a). A petition based on grounds that full court reconsideration is necessary to secure and maintain uniformity of the decisions of the Supreme Court or Court of Appeals shall demonstrate that the panel's decision is contrary to prior, published opinions of the Supreme Court or Court of Appeals and shall include specific citations to those cases. NRAP 40A(c). If the petition is based on grounds that the proceeding involves a substantial precedential, constitutional, or public policy issue, the petition shall concisely set forth the issue, shall specify the nature of the issue, and shall demonstrate the impact of the panel's decision beyond the litigants involved. *Id*. BHI respectfully submits that this petition satisfies both criteria.

2. Reconsideration by the full court is necessary to ensure the uniformity of this Court's decisions.

The Panel's decision is contrary to Nevada precedent in three respects, each of which warrants en banc consideration to maintain the uniformity of this Court's decisions.

a. The Panel's decision is contrary to Nevada precedent regarding a movant's burden of proof to show entitlement to NRCP 60(b) relief.

First, the Panel's decision is contrary to decades of Nevada precedent holding that a party who seeks to set aside an order pursuant to NRCP 60(b)(1) bears the burden of proof to show excusable neglect "by a preponderance of the evidence." *Kahn*, 108 Nev. at 513–14, 835 P.2d at 793; *Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 446, 448 P.2d 911, 915 (1971). Indeed, Nevada law is clear that "before a…judgment may be set aside under NRCP 60(b) (1), the party so moving **must show to the court** that his neglect was excusable." *McClellan*, 84 Nev. at 287, 439 P.2d at 676 (emphasis added).

In fact, a district court's NRCP 60(b) decision "cannot be sustained where there is no competent evidence to justify the court's action." *Stoecklein*, 109 Nev. at 271, 849 P.2d at 307; *cf. generally Otak Nev. LLC v. Eighth Judicial Dist. Ct.*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013) (a court abuses its discretion when its decision is not supported by substantial evidence). Thus, where "there was no credible evidence before the lower court to show that the neglect of the movant was

excusable under the circumstances," this Court has reversed a district court's order setting aside a judgment, and stated that "no excusable neglect was shown as a matter of law."[2] *McClellan*, 84 Nev. at 284, 289, 439 P.2d at 674, 677; *see also Lukey v. Thomas*, 75 Nev. 20, 22, 333 P.2d 979 (1959).

Here, as the Panel itself described, "Willard maintained that Moquin's alleged psychological disorder resulted in his abandonment of Willard, which justified NRCP 60(b)(1) relief based on excusable neglect." Yet, the District Court, upon quoting and applying the Nevada precedent discussed *supra*, expressly found that "no competent, reliable, and admissible evidence of Mr. Moquin's claimed mental disorder is before this Court." 18 AA 4072-73, 4083. The District Court further explained that:

> Plaintiffs attempt to excuse [their] conduct [of ignoring the Nevada Rules of Civil Procedure and the District Court's orders] in their Rule 60(b) Motion by claiming Mr. Moquin had suffered a complete mental breakdown and his personal life was "in shambles." In addition to the preclusion of evidence discussed *supra*, the evidence is vague at best

[2]As the District Court referenced below, other jurisdictions have reached similar conclusions. 18 AA 4075 (citing *New Image Indus. v. Rice*, 603 So.2d 895 (Ala. 1992) (affirming denial of 60(b) relief where the only evidence of excusable neglect was an affidavit containing inadmissible hearsay and speculation) and *Agnello v. Walker*, 306 S.W.3d 666, 673 (Mo. Ct. App. 2010), *as modified* (Apr. 27, 2010) (a motion to set aside a default judgment is not a "self-proving motion," and "[i]t is not sufficient to attach heresay testimonial documentation in support of a motion to set aside….")); *see also, e.g., Residential Funding Co. v. Thorne*, 973 N.E.2d 294, 305 (Ohio Ct. App. 2012) ("Thorne has failed to submit any evidentiary quality material to support his motion for relief from judgment. Consequently, the trial court did not abuse its discretion in denying his Civ.R. 60(B) motion based on the materials presented.").

> regarding these assertions and vague regarding if, and when, Mr. Moquin's alleged disorder impaired him and are vague in asserting when any of the alleged events took place…

Id. at 4084.

In fact, the District Court unequivocally found that "[t]he Rule 60(b) Motion is not supported by competent, admissible and substantial evidence." 18 AA 4072. The District Court meticulously analyzed all of Willard's evidence, and concluded that "competent and substantial evidence has not been presented to establish Rule 60(b) relief." *Id*. at 4073-4081. It therefore held that "Plaintiffs have failed to meet their burden of proving, by a preponderance of the evidence, excusable neglect so as to justify relief under NRCP 60(b)." *Id*. at 4091.

Respectfully, it is difficult to imagine how Willard could satisfy his burden to establish entitlement to NRCP 60(b)(1) relief when Willard failed to provide **any** competent evidence in support of his claimed basis for excusable neglect. Applying the foregoing precedent, the District Court would have abused its discretion by granting Willard's Motion without such evidence. By not addressing the effect of the District Court's threshold evidentiary decision, the Panel's decision is contrary to *Stocklein*, *McClellan*, and *Kahn*. Accordingly, BHI respectfully submits that full court consideration is warranted to maintain uniformity amongst the opinions addressed herein.

b. <u>The Panel's decision is contrary to Nevada precedent regarding the extent to which a district court must explicitly address the *Yochum* factors</u>.

Second, the Panel's decision clearly contradicts Nevada precedent establishing that a district court need not make express findings on all of the *Yochum* factors so long as the record demonstrates that the district court considered the *Yochum* factors.

The Panel itself recognized its departure from published Nevada precedent, noting that:

> We 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. *See, e.g.*, *Rodriguez*, 134 Nev. at 659, 428 P.3d at 259 (declining to review the fourth *Yochum* factor because the district court made no finding as to that factor, but affirming the district court's denial of the NRCP 60(b)(1) motion based on the first three *Yochum* factors); *Stoecklein…*, 109 Nev. [at] 271-75, 849 P.2d [at] 308-310… (concluding that appellant established excusable neglect under NRCP 60(b)(1) after effectively making our own determinations in consideration of the *Yochum* factors). However, we now clarify that we require district courts to issue explicit factual findings in the first instance on all four *Yochum* factors.

Indeed, in *Rodriguez*, this Court affirmed a district court's denial of 60(b) relief even though the district court failed to issue specific findings on two of the *Yochum* factors. In pertinent part, this Court stated that "the district court did not make a specific finding as to Rodriguez's intent [to delay the proceedings]." 134 Nev. at 658, 428 P.3d at 258. Nonetheless, this Court held that "**[t]he facts of this case support an inference to delay**," and recounted the supporting facts. *Id.*

(emphasis added). It therefore concluded that this factor weighed against setting aside the judgment, even though the district court had not issued specific findings on the factor. Further, this Court recognized that the District Court "made no finding as to [the good faith] *Yochum* factor," and therefore this Court declined to consider it further. However, this Court still affirmed the District Court's decision based upon the remaining *Yochum* factors. *Id*.

The irreconcilable inconsistency between the Panel's decision, on the one hand, and *Rodriguez* and *Stoecklein*, on the other, is strikingly demonstrated by *Garrison v. Van Bueller Enterprises, LLC*, 460 P.3d 25, Docket No. 77051 (Order of Affirmance, Mar. 27, 2020) (unpublished), an unpublished decision issued by the **same Panel** less than five months prior to the Panel's decision in this appeal. Both this appeal and *Garrison* were from Orders Denying NRCP 60(b)(1) Motions entered by Judge Simons. In fact, the respective appealed-from orders were entered a mere three months apart. *Compare* 18 AA 4061 (entered on November 30, 2018) *with* Notice of Appeal in Case No. 77051 (attaching the order entered on August 24, 2018). Indeed, the present appeal was fully briefed as of November 19, 2019, more than four months before the Panel issued its *Garrison* Order.

Yet, the Panel applied opposite rules of law to reach its conclusion in *Garrison* that "[t]he district court did not abuse its discretion by failing to analyze all four *Yochum* factors." *Id*. at *1. Specifically, relying on *Rodriguez* and *Kahn*, the Panel

in *Garrison* explained that in disposing of an NRCP 60(b) motion, "the district court must **consider** several factors." *Id*. (emphasis in original) (quotations omitted). However, the Panel concluded that "[t]he district court **need not issue findings on a factor to consider that factor**," and cited *Rodriguez* in support, explaining that in that case, the Court "explain[ed] that [t]he district court considered but made no finding regarding one of the factors, and affirm[ed] the district court's order denying an NRCP 60(b)(1) motion." *Id*. (emphasis added). The Panel then explained that "[i]n its order denying appellants' motion, the district court cited all four *Yochum* factors, respondents' arguments under the *Yochum* factors, and appellants' replies. Although it issued findings on only the good faith factor, the order shows that it considered all four. **Because it considered them, it did not abuse its discretion.**" *Id*. (emphasis added).

While *Garrison* is unpublished, *cf.* NRAP 40A(c), it readily demonstrates that the Panel's decision in this appeal directly contradicts the published Nevada law that preexisted it. Specifically, contrary to *Rodriguez* and *Stoecklein*, the Panel's decision suggests that a district court order not making express findings on all four *Yochum* factors must be reversed, regardless of whether or not the record demonstrates that the district court considered the *Yochum* factors.

This contradiction is especially poignant given the record in this case, because even though the District Court incorrectly held that *Yochum* is inapplicable, the

record incontrovertibly demonstrates that the District Court considered all of the *Yochum* factors:

(1) Lack of knowledge of procedural requirements:

The 60(b) Order repeatedly found that Willard knew of the applicable procedural requirements:

- "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." 18 AA 4087.
- "Mr. Willard knew of the actions that supported the Sanctions Order." *Id*.
- "Plaintiffs had knowledge of the initial filing deadline" to oppose BHI's Sanctions Motion. "They were aware no opposition papers were filed. Mr. Willard continued to communicate with both Mr. Moquin and Mr. O'Mara from December 11 until December 25, 2017 regarding the delinquent filings…well after this Court's final filing deadline of December 18, 2017." *Id*. at 4085, 4084.
- "Plaintiffs knew timely oppositions were not filed." *Id*.
- "Plaintiffs and their attorneys were given notice of the potential consequence of failing to file an opposition to the Sanctions Motion." *Id*. at 4086.

- "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*. at 4085.
- "Mr. Willard admits he was informed by Mr. O'Mara prior to the dismissal of Plaintiffs' claims that Mr. Moquin was not responsive." *Id*. at 4087.
- "Plaintiffs have not established by substantial evidence that they exercised diligence to rectify representation in their case despite ample knowledge of Mr. Moquin's non-responsiveness." *Id*. at 4088.

Indeed, the District Court found that "Plaintiffs' knowledge and inaction vitiates excuse for neglect." *Id*. at 4087. Further, Willard essentially conceded that he was unable to satisfy this factor; his counsel admitted that "Willard did, candidly, know that things needed to be filed, he knew that. He knew that trial was comping 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 wants to continue to be." 19 AA 4334-35. BHI respectfully submits that on this record, it is virtually impossible that the District Court could conclude on remand that Willard satisfied his burden of proof to demonstrate a lack of knowledge of procedural requirements, since it has already expressly concluded otherwise.

(2) Absence of an intent to delay the proceedings:

The District Court also plainly considered whether there was an absence of intent to delay the proceedings, even though improperly failing to characterize it as a *Yochum* analysis. Specifically, the District Court found that Willard knew of the pertinent deadlines to oppose BHI's Sanctions Motion, as discussed *supra*. Yet, "[d]espite knowing no oppositions had been filed, neither Mr. Willard (through Mr. O'Mara), Mr. Moquin, nor Mr. O'Mara contacted Defendants' counsel or this Court to address the status of this case…. Plaintiffs did nothing to apprise this Court of any issues until they filed the Rule 60(b) Motion." 18 AA 4085. Further, despite being "informed by Mr. O'Mara **prior to the dismissal of [his] claims**" that Moquin was not responsive, Willard "failed to replace Mr. Moquin or take other action due to perceived financial reasons." *Id*. at 4087; 4085 ("Plaintiffs voluntarily chose to stop seeking new counsel to assist and chose to continue to rely on Mr. Moquin solely for financial reasons."). And "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 in March." *Id*. The District Court also expressly found that Willard's "knowledge and inaction vitiates excuse for neglect," *id*., and that Willard had "not established by substantial evidence that [he] exercised diligence to rectify representation in [his] case despite ampl[e] knowledge of Mr. Moquin's non-responsiveness." *Id*. at 4088.

Further, the District Court recounted Willard's obstinate refusal to provide BHI with fundamentally-necessary information throughout the proceedings, *id*. at 4063-67, and reiterated that Willard's "non-compliance forced extension of trial and discovery deadlines on three separate occasions." *Id*. at 4071. Indeed, the District Court had already expressly found in its Sanctions Order that Willard's "repeated and **willful delay** in providing necessary information to Defendants has necessarily prejudiced Defendants." 16 AA 3633 (emphasis added).

Finally, it should be reiterated that Willard's NRCP 60(b) Motion argued 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," 16 AA 3686, yet the District Court expressly found that Willard failed to provide any admissible evidence whatsoever proving that Moquin had a mental illness, or that it impacted Willard's conduct in this case. 18 AA 4073-84. Thus, the District Court rejected Willard's sole argument propounded in support of this factor in his NRCP 60(b) Motion.

Thus, the record demonstrates ample consideration of this factor. In fact, it is difficult to imagine how the District Court could conclude on remand that Willard demonstrated, by a preponderance of the evidence, absence of intent to delay the proceedings, without making findings or conclusions opposite to those it has already made. *Cf. Rodriguez*, 134 Nev. at 658, 428 P.3d at 258 (holding that "[t]he facts of

this case support an inference to delay," where the movant's "conduct differed markedly from that of a litigant who wishes to swiftly move toward trial," and where the appellant "exhibited a pattern of repeatedly requesting continuances and filed his NRCP 60(b)(1) motion just before the six-month outer limit").

(3) A prompt application to remove the judgment:

The record also demonstrates that the Court considered the promptness of Willard's 60(b) Motion. As discussed *supra*, the District Court found that rather than taking action to rectify Moquin's failure to oppose BHI's Sanctions Motion, a fact of which Willard was contemporaneously aware, Willard essentially "went dark" until the filing of his Rule 60(b) Motion, more than three months after the District Court had initially granted BHI's Sanctions Motion. The record therefore demonstrates that the District Court considered the promptness of Willard's request for relief, but ostensibly concluded that such timing did not entitle Willard to NRCP 60(b) relief, where Willard could have attempted to rectify Moquin's failings much sooner. *Cf. Kahn*, 108 Nev. at 514, 835 P.2d at 793 ("Despite his knowledge of the default judgment, Kahn did not file to set it aside until nearly six months of its entry.").

(4) Good faith:

The District Court also considered whether Willard acted in good faith. In its 60(b) Order, the District Court found that "Willard's claim that he had no choice

but to continue working with Mr. Moquin due to financial issues **lacks credibility**....," 18 AA 4088 (emphasis added), and that in light of the circumstances of this case, dismissal of Willard's claims did not unfairly penalize Willard for Moquin's alleged conduct. *Id*. at 4090. And again, as discussed *supra*, the District Court expressly found that Willard failed to provide any admissible evidence proving that Moquin had a mental illness or that it impacted Willard's conduct in this case, *id*. at 4073-4083, even though that was Willard's asserted basis for claiming he acted in good faith 16 AA 3686.

Further, placing the 60(b) Order in context, the District Court had already discussed in detail in its Sanctions Order that Willard's multiple violations were "willful." 16 AA 3629-33. Indeed, the District Court expressly found that Willard's had engaged in conduct that was patently unfair to Defendants, 16 AA 3623, demonstrated "bad faith motives in waiting to ambush Defendants," and was "strategic." *Id*. at 3630; 3629 ("Plaintiffs have exhibited complete disregard for this Court's Orders, deadlines imposed by this Court, and the judicial process in general"); 3637-38.[3]

In sum, BHI is not advocating herein that the District Court's findings are correct (although BHI certainly submits they are). Rather, BHI submits that the

[3]The Sanctions Order also contained a discussion of why the policy favoring adjudication on the merits did not militate against dismissal. 16 AA 3636-37.

record is clear that the *Yochum* factors were considered by the District Court in rendering its decision, even if the District Court improperly failed to label them as such. Thus, in reversing and remanding to the District Court to expressly make findings on the *Yochum* factors without even addressing the fact that the record already demonstrates consideration of such factors, the Panel's decision is contrary to *Rodriguez* and *Stoecklein*, warranting reconsideration by the full court to maintain the uniformity of these decisions.[4]

c. <u>The Panel's decision is inconsistent with Nevada precedent holding that a district court's findings may be implied where clearly supported by the record</u>.

Relatedly, the Panel's decision not only runs contrary to Nevada precedent specifically discussing the *Yochum* factors, it is also inconsistent with decades of broader—but applicable—Nevada precedent holding that "[i]n the absence of express findings of fact and conclusions of law by the trial court, this court must rely upon an examination of the record to see if the trial court's decision constitutes an abuse of discretion."[5] *Schouweiler*, 101 Nev. at 831, 712 P.2d at 789 (affirming the

[4]If nothing else, BHI seeks clarification from this Court that Willard may not present new arguments or evidence on remand—rather, the remand must be solely for the District Court to modify its order to make express findings on each of the *Yochum* factors on the record before it.

[5]A seemingly related maxim is that this Court will affirm the district court's decision if the district court reaches the right result, even if for the wrong reasons. *See, e.g., Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010).

denial of excess expert witness fees pursuant to NRS 18.005); *Sierra Glass*, 107 Nev. at 125, 808 P.2d at 515 ("In its findings of fact and conclusions of law, the district court never discussed Viking's capacity to sue as it should have pursuant to NRCP 52(a). If the court makes no ruling, findings may be implied when clearly supported by the record."); *Griffin v. Westergard*, 96 Nev. 627, 632, 615 P.2d 235, 238 (1980) ("Where the record is clear as to the required specific findings, the court will examine the decision and record and imply the findings.").

Even quite recently, this Court has stated that while generally, case-concluding sanctions "must be supported by an express, careful, and preferably written explanation of the court's analysis of certain pertinent factors that guide the district court in determining appropriate sanctions," the "district court's failure to provide any findings of fact or legal analysis when denying a motion for case-concluding sanctions may nonetheless be reviewed for an abuse of discretion **by examining the record**." *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235, 242, 416 P.3d 249, 256–57 (2018) (emphasis added) (citing *Schouweiler*, 101 Nev. at 831, 712 P.2d at 789). Indeed, even where this Court has cautioned that a district court's failure to provide express written findings of enumerated factors makes it "difficult at best for this court to review claims of error," this Court has declined to remand where "the district court judge did consider the…factors in reaching his finding," and where "it would simply add to the costs of this protracted

litigation to remand for a more detailed justification of the award by the trial judge." *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1049–50, 881 P.2d 638, 642–43 (1994) (in the context of *Beattie* factors).

Here, as addressed in detail *supra*, the record contains ample support that the District Court considered the *Yochum* factors, even if improperly failing to make express findings on the same. Accordingly, the Panel's seeming departure from this line of case law also warrants full court consideration to maintain the uniformity of this Court's decisions.

3. <u>The proceeding involves a substantial precedential issue</u>.

As an independent basis for en banc reconsideration, BHI also respectfully submits that this appeal involves a substantial precedential issue. First, by virtue of issuing a published opinion, the Panel itself recognized the precedential nature of this appeal. *See* NRAP 36(c)(1) ("The Supreme Court…will decide a case by published opinion if it: (A) Presents an issue of first impression; (B) Alters, modifies, or significantly clarifies a rule of law previously announced by the Supreme Court or the Court of Appeals; or (C) Involves an issue of public importance that has application beyond the parties.").

Second, the Panel's decision has the potential to impact innumerable civil cases—it impacts the proceedings of every case in which a movant seeks to set aside a judgment or order based on excusable neglect. In fact, remittitur has not yet even

issued on this appeal, yet this decision is already being discussed in briefing before the Court of Appeals. *See* Appellants' Reply Brief in Case No. 79883 at pgs. 8-10 (arguing that "[a]s *Willard* requires an extensive discussion by the Court of all four of the *Yochum* factors, the Court's ruling should be reversed.").

CONCLUSION

Based on the foregoing, BHI respectfully requests that this Court grant en banc reconsideration.

Respectfully submitted this 1st day of December, 2020.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition 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 Petition 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 Petition 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 4,609 words.

3. Finally, I hereby certify that I have read this Petition, 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 1st day of December, 2020.

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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 EN BANC RECONSIDERATION** 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.

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DATED this 1st day of December, 2020

/s/ Mina Reel
An Employee of Dickinson Wright PLLC

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