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 EN BANC RECONSIDERATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES AND STATUTES

INTRODUCTION

The petition for en banc reconsideration argues that: (1) the panel cannot **clarify** precedent to require a district court to make express findings of the factors in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982); (2) the panel's decision is contrary to Nevada precedent holding that, as a "threshold issue," a movant must show excusable neglect by a preponderance of the evidence; (3) the panel's decision is contrary to Nevada precedent holding that a district court's findings may be implied from the record; and (4) the appeal involves a substantial precedential issue. Respondents misconstrue the panel's holding and fail to establish application of NRAP 40A(c).

First, the panel identified and addressed the precedential holdings of the court, **and** made clear that it was only **clarifying** precedent. Thus, Respondents' claim that the panel somehow subverted established precedent is misleading and erroneous.

Second, the panel's decision never held that a party moving for Rule 60(b) relief need not show excusable neglect. Instead, the panel found:

> 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 9, n.7 (emphasis supplied).) Thus, Respondents' argument fails to demonstrate that the panel's decision is contrary to Nevada precedent, since the panel never reached that issue.

Third, the panel's decision **clarifying** that district courts must expressly address each *Yochum* factor is not contrary to Nevada precedent that an appellate court may in some instances imply findings from the record. The cases Respondents rely upon involve appeals addressing different standards and factors. Even more problematic for Respondents, the record demonstrates that the district court **expressly disavowed** the *Yochum* factors and **did not consider them.** (18 A.App. 4211 ¶81) Thus, the panel's **clarification** does not undo Nevada precedent on implied findings.

Finally, the panel's decision does not involve "a substantial precedential issue." (Petition 4.) The panel simply clarified that district courts must provide specific findings on each *Yochum* factor. Respondents fail to explain how this precedential issue is "substantial." While Respondents claim the panel's decision will affect future cases, they fail to identify any harm. Requiring district courts to make express findings on factors that the court must **already consider** is hardly burdensome. The panel's clarification of precedent: (1) will not overburden district courts; and (2) will assist appellate courts in Rule 60(b) appeals by providing a record that does not require speculation.

Accordingly, Respondents' Petition lacks merit and does not justify en banc reconsideration.

THERE ARE REMAINING ARGUMENTS THAT NEED TO BE ADDRESSED IF THE PETITION IS GRANTED

Even if the en banc court concludes that the panel erred, Willard raised additional arguments that would still need to be decided before this appeal can be resolved. The panel's 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 9, n.7.)

Willard's arguments in the opening brief that would still need to be resolved on appeal include:

(1) Whether Willard's counsel, Moquin, abandoned Willard (see 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 this case (and which this court affirmed in the disciplinary appeal, No. 78946, with three

justices dissenting because the discipline recommended 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). (AOB 32-34.)

(5) Whether the district court erred by imposing case-terminating sanctions. (AOB 27-34.)

Because the panel found other reversible error, the panel did not determine these issues. Accordingly, granting the petition would not be dispositive, and these remaining contentions would still need to be resolved.

ARGUMENT

A. Respondents' Petition Does Not Meet the Limited Purpose of En Banc Reconsideration

Petitions for reconsideration are appropriate only 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 substantial precedential, constitutional or public policy issue." NRAP 40A(c). Respondents claim the panel overlooked precedential holdings of this court, and that the

decision would disrupt uniformity of those prior holdings. Yet, the panel was only **clarifying** precedent – not undoing it.

Panels have authority to clarify the court's precedent. A Westlaw search reveals that in 2020 alone, panels of this court have issued at least ten decisions clarifying legal principles, including clarification of the court's precedents. *E.g. Kaur v. Singh*, 136 Nev. Adv. Op. 77, __ P.3d __ (December 10, 2020) (panel clarified prior en banc opinion, and panel required district courts to consider five-factor test dealing with judicial estoppel). Thus, the panel did nothing wrong by clarifying precedent.

In fact, most of Respondents' petition simply rehashes their petition for rehearing – which the panel already rejected.

B. En Banc Reconsideration is Unwarranted

1. <u>The Panel's Clarification of *Yochum* is Not Contrary to Precedent</u>

In the district court's Rule 60(b) order, *Yochum* is mentioned in one short paragraph. (18 A.App. 4091.) The Order does not expressly analyze each *Yochum* factor or explain how Willard failed to satisfy *Yochum*.

The panel's opinion made clear that this is insufficient: "[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 7, n.6 (emphasis supplied).)

Respondents argue the panel's decision "clearly contradicts Nevada precedent establishing that a district court need not make express findings on all of the *Yochum* factors…" (Petition 8.) Yet Respondents concede that the panel addressed this very point: that prior court decisions **"implied** that the district court need only demonstrate that it considered the *Yochum* factors – as opposed to issuing factual findings for each factor." (Petition 8 (emphasis supplied).)

Thus, Respondents effectively concede their argument fails. In fact, Respondents – in relying on *Rodriguez* and *Stocklein* to claim that express findings on the *Yochum* factors are not required – fail to acknowledge that in neither case does the court hold that a district court **need not** make specific findings on *Yochum* factors. Moreover, the district court disavowed *Yochum* and did not consider the *Yochum* factors. Accordingly, the panel's clarification requiring express *Yochum* findings does not change any holdings of prior opinions.[1]

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[1] Respondents cite *Garrison v. Van Bueller Enterprises, LLC*, 640 P.3d 25, Docket No. 77051 (Order of Affirmance, Mar. 27, 2020) (unpublished), to argue that the panel's decision in this case is contrary to one made five months earlier. The fact that the same panel decided to **clarify** precedent only five months after *Garrison* demonstrates that district courts too frequently fail to articulate express findings on the *Yochum* factors, and the need for express findings reached a tipping point of necessity. Also, the district court in this case **disavowed** applicability of *Yochum*, unlike in *Garrison*.

Separately fatal to Respondents' Petition is the fact that they concede the district court **did not even consider** the *Yochum* factors as required by binding case law. (Petition 10 ("the District Court incorrectly held that *Yochum* is inapplicable . . . .")) In so conceding, Respondents conclusively demonstrate that en banc reconsideration is inappropriate and that their Petition should be denied.

As they did in their Rehearing Petition, Respondents rehash their argument that the district court – despite disavowing *Yochum* – somehow *still* considered the *Yochum* factors: a contradiction if ever there was one. Yet, their arguments, which the panel correctly rejected in denying the Rehearing Petition, must fail.

a. Respondents' Arguments Regarding Willard's Knowledge of Procedural Requirements

Respondents contend that the Order made findings under *Yochum* that Willard had knowledge of procedural requirements. (Pet. 11-12.) A threshold problem with Respondents' argument here is context.

Each of the findings in the Order that Respondents claim establish this 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.[2]

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[2] Willard addresses Respondents' *Yochum* factor arguments in the order they are presented in the petition.

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 already addressed the third *Yochum* factor is wrong.

Moreover, Respondents focus their attention on events primarily in December 2017 and not the time prior, when Moquin admitted in his guilty plea that Willard was unaware of the deadlines and other matters. (*In re Discipline of Brian Moquin, Esq.*, No. 78946 (Conditional Guilty Plea, Apr. 16, 2019, available at 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.

b. Absence of Intent to Delay the Proceedings

Respondents argue that the district court "plainly considered whether there was an absence of intent to delay the proceedings, **even though improperly failing to characterize it as a *Yochum* analysis.**" (Pet. 13 (emphasis supplied).)

Respondents cite no portion in the Order that addresses "intent" to delay the proceedings; thus, *Yochum* was never considered.

Accordingly, Respondents cannot graft a *Yochum* analysis into the Order. This is fatal to Respondents' Petition because their case law – *Rodriguez,*

Stocklein, etc. – at least involved consideration of the pertinent factors. **No such consideration was performed by the district court in this case**.

Finally, the truth is that Willard had no intent to delay proceedings. During December 2017: (1) Willard relentlessly attempted to contact Moquin to ensure he filed oppositions to dispositive motions by requisite deadlines; and (2) Moquin then **assured Willard that he would file the oppositions.** (17 A.App. 3959-65; 17 A.App. 3954:17-20; s*ee also* Moquin ROA 53)[3].) The problem was that Moquin misled Willard into believing he would 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, there **was no intent** to delay the proceedings. In fact, the evidence shows the opposite. Willard was doing everything in his power not to delay the proceedings.[4]

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. 8.) Yet, the requests for extensions, which were stipulated, 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*.

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

[4] Larry Willard is nearly 80 years old. As an elderly plaintiff seeking millions of dollars in damages, he had no reason to delay the case. It is absurd to suggest he would have intentionally delayed filing anything in this case.

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 requests in no way evidence an intent to delay proceedings. 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.

c. Prompt Application to Remove the Judgment

Again, despite the district court's disavowal of the applicability of *Yochum*, Respondents again argue that the "record . . . demonstrates that the Court considered the promptness of Willard's Rule 60(b) Motion." (Pet. 15.)

This issue was much more thoroughly briefed in the Rehearing Petition and Appellants' answer thereto. Not surprisingly, Respondents walked back their analysis considerably in the present Petition because their arguments are simply not credible.

As was explained in the answer to the Rehearing Petition, the facts show Willard's consistent diligence. Indeed, the record reflects Willard's remarkable efforts to get Moquin to oppose motions before the judgment was entered, as does attorney 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 bipolar disorder, false promises, obstruction, and expletive-laden threats – to promptly file a Rule 60(b) Motion. (16 A.App. 3675-92.)

Further, none of the supposed findings that Respondents relied on in the Rehearing Petition – which they have abandoned in this Petition – 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, Respondents present yet another baseless argument unworthy of consideration under NRAP 40A(c).

d. Good Faith

Respondents again claim that the district court "expressly" addressed the fourth *Yochum* factor **despite never mentioning it** (Pet. 15-17) and despite the district court's finding that *Yochum* was inapplicable in the underlying case.

To perform reconstructive surgery on the Order and graft an "express" *Yochum* analysis, Respondents rely on the portions of the Order where there is **no reference to the *Yochum* factor of good faith**.

Instead, the Order and its context make clear that the district court, rather than focusing on *Yochum*, 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 panel's order requiring remand for consideration and specific findings of the *Yochum* factors must stand, and Respondents' Petition must be denied.

Further, the evidence and the disciplinary record establish that the conclusions Respondents rely upon in the Order – which have nothing to do with *Yochum* – are objectively false. Willard was Moquin's victim. After Willard became aware that Moquin failed to oppose Respondents' dispositive motions in December 2017 – despite Moquin's repeated promises and assurances 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.) 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*, No. 78946 (Order Approving Conditional Guilty Plea, Oct. 21, 2019).) The record amply shows that Willard and his new counsel acted diligently by preparing 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.

Finally, 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 claim that Willard engaged in "willful" misconduct, exhibited "bad faith motives," and "strategically" sought to ambush Respondents (who were represented by competent and aggressive counsel in a large law firm). (Pet. 16.) 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, Respondents' doubling down on the unsupported findings, in light of the evidence Willard presented (and Moquin's disciplinary record), show just how inequitable the result is that Respondents now seek. 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. Why would Willard "ambush" Respondents by failing to oppose case-dispositive motions and fully brief and submit other motions?

Due to Moquin's bipolar disorder, 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 evidence Willard advanced in support of the Rule 60(b) Motion).

Indeed, Respondents are well aware that they secured favorable rulings against an 80-year-old victim of a bipolar attorney who misled his client and willfully abandoned his case. This is not an exaggeration. In footnote 5 of their Petition, Respondents request that: "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 based solely for the District Court to modify its order to make express findings on each of the Yochum factors before it." (Petition 17, n.4.) This is part of a continued pattern of Respondents making logically absurd claims of willful misconduct by Willard, and denying the obvious abandonment of Willard by his counsel Moquin, which resulted in Respondents securing an unopposed victory in a case where they intentionally and strategically breached a lease and personal guaranty.

What is particularly disturbing is that Respondents persuaded the district court to rely on the fact that at the time of the Rule 60(b) Motion – which Moquin actively thwarted – Moquin had not yet been disqualified from practicing law in California. (18 A.App. 4083, ¶ 44-46.) Now, as this Court has taken judicial notice, Moquin entered a conditional guilty plea admitting what was obvious even at the time of the proceedings below – that he had abandoned Willard, was

diagnosed as bipolar, and simply could not function. (Moquin ROA 119-32; 143-48.) By inserting this footnote, Respondents again want to avoid any responsibility for destroying Willard's life, ensure that justice will never see the light of day, and achieve a result that is antithetical to all norms of decency and fairness in order to avoid their client's willful breach and refusal to pay Willard what he owed him under the breach of the lease and personal guaranty.

Given the significance that the district court placed on Moquin's status with the California and Nevada State Bars to conclude that Moquin was capable of practicing law, there is simply no legal justification – nor do Respondents present any legal authority to support their request to this Court – for prohibiting the admission of evidence of Moquin's disciplinary record on remand.

In short, the petition's arguments on this point do not support en banc review.

This panel'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 5, 6.) Respondents' petition makes no effort to address this important point.

2. The Panel's Decision is Not Contrary to Nevada Precedent Holding that a Movant Must Show Excusable Neglect

Respondents allege that the Panel's decision is contrary to Nevada precedent because: (1) Respondents bore the burden of proof to show excusable neglect by a

preponderance of the evidence; and (2) Willard could not meet that burden through competent evidence. (Pet. 5-7.) However, Respondents miss the point of the panel's decision.

The panel held:

> 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 9, n.7 (emphasis supplied).) Thus, Respondents' argument is not only premature; it fails to demonstrate that the panel's decision is contrary to Nevada precedent **since the panel never resolved that issue**.

Respondents argue that under *McClellan*, a party seeking to set aside a judgment under NRCP 60(b)(1) must show his neglect was excusable. More than a decade later, this Court set forth the definitive excusable neglect factors that must be met (i.e., the *Yochum* factors). Unfortunately, while the Appellants argued the *Yochum* factors, the district court held that *Yochum* did not apply and simply ignored the factors in the proceedings below. Thus, Respondents cannot claim that the panel's decision, clarifying that district courts must make express statements of the *Yochum* factors, runs afoul of *McClellan*, 84 Nev. at 287, 439 P.2d at 676, because the district court flatly rejected that those factors even applied.

Respondents cite *Kahn v. Orme*, 108 Nev. 510, 513–14, 835 P.2d 790, 792–93 (1992), to claim that Appellants had to establish the *Yochum* factors by a preponderance of the evidence. Again, the problem here is that the district court disavowed the *Yochum* factors and never addressed them. The panel's limited holding only stated that the district court was required to make express findings of the *Yochum* factors – which the district court did not do because the district court felt they did not apply – and remanded the case on such grounds. Thus, the panel's decision does not conflict with prior Nevada decisions.

Next, Respondents claim that the panel's decision is contrary to past decisions of this court because a district court cannot grant Rule 60(b) relief "where there is no competent evidence to justify the court's action." *Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 307 (1993). Yet again, Respondents ignore the limited nature of the panel's holding, namely, that the district court is required to make express specific findings on each of the *Yochum* factors. Nothing in the panel's decision reverses or is contrary to *Stocklein*. As the panel stated, its decision did not reach the excusable neglect factors. For the same reason, Respondents' reliance on *Otak Nev. LLC v. Eighth Judicial Dist. Ct.*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013) misses the point of the panel's holding as well.

Finally, Respondents cite cases from outside of Nevada to suggest the Appellants first must show competent evidence of excusable neglect before an appellate court can reverse a district court's decision. (Pet. 6.) Yet, none of these cases apply, because the district court rejected *Yochum* and the excusable neglect factors' applicability. As such, there is no threshold evidentiary requirement that precluded the panel's decision.

In sum, Respondents' statement that "[b]y not addressing the effect of the District Court's threshold evidentiary decision, the Panel's decision is contrary to *Stocklein, McClellan,* and *Kahn*" (Petition 7), is wrong, because none of those cases stand for the proposition that there is a "threshold evidentiary decision" grafted into the *Yochum* factors that would preclude the panel from clarifying that the district court erred by not making express specific findings as to each *Yochum* factor. Indeed, the district court believed *Yochum* **did not even apply** to this case.

3. The Panel's Decision is Not Contrary to Nevada Precedent Holding that a District Court's Findings May Be Implied from the Record

Respondents cite cases to suggest that when a district court fails to provide a written explanation of the court's analysis of certain factors, this court may still look to the record to determine if there was an abuse of discretion. (Petition 17-19.) On this basis, Respondents aver that the panel's decision runs contrary to established Nevada precedent. Respondents are wrong.

First, none of the cases Respondents cite involve appellate review of Rule 60(b) decisions, and thus have no precedential authority that the panel ignored.

Second, Respondents continue with their incorrect position that the district court actually considered the *Yochum* factors. (Pet. 19.) Again, the district court **expressly disavowed** the *Yochum* factors and did not consider them at all. Thus, the panel's decision cannot run contrary to Nevada precedent that this court can consider the record when a district court considers certain factors, but does not make findings regarding those factors, **when in this case, the district court did neither.**

4. <u>The Appeal Does Not Involve a Substantial Precedential Issue</u>

Respondents argue that this appeal presents a "substantial precedential issue" and "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 . . . based upon excusable neglect." (Pet. 19; emphasis added.) Respondents fail to explain how the panel's clarification of *Yochum* would result in undesirable consequences. Requiring district courts to make specific findings of factors they are required by law to consider: (1) does not unduly burden district courts at all; and (2) will assist appellate courts in their review of appeals based on Rule 60(b) by providing a clearer record and eliminating speculation about the district court's decision. Indeed, appellate courts will no longer have to course through the record

on appeal to determine how a district court came to decide unaddressed *Yochum* factors. Thus, the clarification the panel made is a good one. In the present case, the district court expressly disavowed *Yochum* and did not even consider or discuss the *Yochum* factors in the first place. The panel's decision will prevent such situations from occurring in the future.

CONCLUSION

The panel's decision was correct, and the Petition fails to establish that the panel did anything more than simply clarify existing law. Further, despite Respondents' attempt to avoid the panel's decision by inserting "threshold" determinations to analysis of the *Yochum* factors (which their case law does not support), the simple truth is that the district court **did not consider,** and in fact **expressly disclaimed,** the *Yochum* factors. Because the panel correctly concluded that Plaintiffs' Rule 60(b) Motion should be reconsidered on remand, the Petition should be denied.

Finally, the court should consider an essential point raised by the panel – yet ignored by Respondents. Indeed, the panel 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.

What happened in the district court was a travesty of justice – the abandonment of an elderly plaintiff by a bipolar attorney who willfully obstructed his client's case in which liability and damages are clear. The panel's decision must stand.

DATED: January 15, 2021

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CERTIFICATE OF COMPLIANCE FOR ANSWER TO PETITION FOR EN BANC RECONSIDERATION

I hereby certify that this answer complies with the formatting requirements of NRAP 32(a)(4)-(6) and the size limitation in NRAP 40A(d), 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 4,505 words (not counting the cover page, the certificate of service, or the certificate of compliance).

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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 15th day of January, 2021, I electronically filed the foregoing **APPELLANTS' ANSWER TO RESPONDENTS' PETITION FOR EN BANC RECONSIDERATION** with the Clerk of the Court by using the electronic filing system, which served the following parties electronically:

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