No. 82218

IN THE SUPREME COURT OF NEVADA

MAX VARGAS,

Appellant,

v.

ORTIZ FAMILY LLC d/b/a EL SELLITO ROJO; J MORALES INC.; DOE BOUNCERS I-V; DOES VI-X; and ROE CORPORATIONS X-XV, inclusive,

Respondent.

On Appeal from the District Court
Of Clark County, Nevada
No. A-18-768988-C
Presiding Judge David Jones

APPELLANT'S OPENING BRIEF

Oscar Peralta, Esq.
Nevada Bar No. 13559
Peralta Law Group
101 Convention Center Dr., Ste 340
Las Vegas, NV 89109
Tel: (702) 758-8700
Fax: (702) 758-8704
oscar@peraltalawgroup.com
Attorney for Appellant

IN THE SUPREME COURT OF NEVADA

MAX VARGAS,
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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: *None.*

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case or are expected to appear in this court:

Peralta Law Group

3. If litigant is using a pseudonym, the litigant's true name: *None.*

DATED: May 27, 2021

Oscar Peralta (SBN 13559)
101 Convention Center Dr., Ste. 340
Las Vegas, NV 89109

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JURISDICTIONAL STATEMENT

The Supreme Court of Nevada has jurisdiction over this matter pursuant to NRAP 3A(b)(8). The District Court entered default judgment against Respondent on April 13, 2018. Then, upon motion by Respondent filed on October 27, 2020, well past the six-month timeframe in which the District Court had jurisdiction to entertain such motion under NRCP 60(c), the District Court set aside the default judgment by way of an order entered on November 24, 2020. Appellant timely filed his Notice of Appeal on December 11, 2020, establishing the timeliness of the appeal.

Additional briefing on jurisdiction/appealability as requested by this Court via its Order dated February 12, 2021

NRAP 3(A)(b)(8) unequivocally provides that an order to set aside a judgment under NRCP 60(b)(1) after 60 days is appealable as a special order. The exact language of the Rule states that "[a]n appeal may be taken from . . . [a] special order entered after final judgment, excluding an order granting a motion to set aside a default judgment under NRCP 60(b)(1) **when the motion was filed and served within 60 days after entry of the default judgment**." NRAP 3(A)(b)(8) (emphasis added).

Evidently the drafters of the Rule considered every order to set aside a **default judgment** under NRCP 60(b)**(1)** to be "a special order entered after final judgment" under the rule if it was filed **more than 60 days after entry of the default judgment**. No other interpretation of the explicit exception contained in the Rule is

possible. This exception for 60(b)(1) orders to set aside a default judgment upon a swiftly filed motion –which takes up most of the language of NRAP 3(A)(b)(8)– cannot be read any other way without rendering it meaningless. If an order to set aside a default judgment under NRCP 60(b)(1) upon motion filed more than 60 days after entry of judgment, as we have in the instant case, were not appealable under the Rule, it would have been entirely pointless to carve out the exception for orders granting a 60(b)(1) motion brought within 60 days of entry of judgment.

While the common law definition of "a special order entered after final judgment" fully applies here as well[1], NRAP 3(A)(b)(8) itself directly includes in this definition the specific type of order under appeal here (an order to (a) set aside a default judgment, (b) under NRCP 60(b)(1), (c) when the motion was filed more than 60 days after entry of judgment). In fact, this is the only type of order whose appeal is authorized by the plain language of NRAP 3(A)(b)(8). Post-judgment orders pursuant to NRCP 60(b)(3) or NRCP 59(e), for example, do not automatically fall within the provisions of NRAP 3(A)(b)(8), as explained below.

[1] A special order entered after final judgment under the Rule is a post-judgment order that affects the rights of a party to the action, growing out of the previously entered judgment. *Gumm v. Mainor*, 118 Nev. 912, 914, 59 P.3d 1220, 1221 (2002). Here, the default judgment constitutes a final judgment because six months after the judgment was entered, the District Court no longer had jurisdiction to disturb the judgment pursuant to an NRCP 60(b)(1) motion. *See* NRCP 60(c). The order being challenged affects Appellant's right to collect the judgment.

The precedent of this Court is perfectly consistent with the foregoing analysis of NRAP 3(A)(b)(8). In *Lindblom v. Prime Hospitality,* this Court stated that under NRAP 3A(b)(8) "an order setting aside a default judgment is appealable as a special order after judgment if the motion to set aside is made more than sixty days after entry of the judgment." 120 Nev. 372, 374 n. 1, 90 P.3d 1283, 1284 n.1 (2004). In *Lindblom*, the bases of the appealed order were NRCP 60(b)(1) and another provision under 60(b) which no longer exists. *See id.* 120 Nev. at 375, 90 P.3d at 1285. Thus, pursuant to *Lindblom*, the Supreme Court has jurisdiction over the instant case. *Lindblom* remains controlling law in Nevada.

In *Est. of Adams By & Through Adams v. Fallini*, this Court held that an order granting an "NRCP 60(b) motion **for fraud upon the court** was interlocutory and not appealable." 132 Nev. 814, 818, 386 P.3d 621, 624 (2016) (emphasis added). *Fallini* differs decisively from the instant case. The order in *Fallini* (made pursuant to NRCP 60(b)**(3)**) was not the one specific type of order explicitly recognized under NRAP 3A(b)(8) (i.e. an order to (a) set aside a default judgment, (b) under NRCP 60(b)(1), (c) when the motion was filed more than 60 days after entry of judgment) and so the order there was not necessarily appealable under NRAP 3(A)(b)(8).

In fact, the Court in *Fallini* did not address NRAP 3(A)(b)(8) or *Lindblom* at all, evidencing that the Court did not consider these authorities to be relevant there. Thus, *Fallini* cannot be considered to have silently overruled *Lindblom* without

providing its rationale or even making a single reference to *Lindblom*. Furthermore, while this Court has the power to amend or change the Rules of Appellate Procedure, there is a certain procedure to be followed under NRS 2.120, so *Fallini* also cannot be considered to have simply nullified a Rule such as NRAP 3(A)(b)(8).

The ruling in *Fallini* that an order granting an "NRCP 60(b) motion **for fraud upon the court** was interlocutory and not appealable" appears to have relied entirely on a secondary authority, 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2871 (3d ed. 2016), which states that

> [a]n order granting a motion under Rule 60(b) and ordering a new trial is purely interlocutory and not appealable . . . . There is now also substantial case law support for the proposition that an appeal will lie from the grant of the motion **if the contention is that the court lacked power to grant it and not merely that it erred in granting the motion**.

This authority cites decisions from the Third, Fifth, Tenth, and Eleventh Federal Circuit Courts which in substance hold that the appellate court lacks jurisdiction unless there was a final judgment or the order granting the Rule 60(b) motion was a final decision of the district court. *See id.* at n. 10 (and the cases cited therein). However, this authority also cites decisions from the Second, Third, Fifth, and Eighth Federal Circuit Courts which qualify said holding, stating that when the jurisdiction of the lower court to grant the Rule 60(b) relief is challenged, the judgment/order would be treated as final for purposes of appealability and "an appeal will lie to review the power or jurisdiction of the court to make such order." *Tsai v.*

Rosenthal, 297 F.2d 614, 616 (8th Cir. 1961); Wright & Miller §2871 at n. 12 (and the cases cited therein).

The U.S. Court of Appeals for the Third Circuit summed up this authority concisely in a decision cited by Wright & Miller, which itself cites Wright & Miller:

> When an order granting a Rule 60(b) motion merely vacates the judgment and leaves the case pending for further determination, the order is akin to an order granting a new trial and in most instances, is interlocutory and nonappealable. 6A Moore's Federal Practice § 60.30(3) (2d ed. 1983); 11 C. Wright and A. Miller, Federal Practice and Procedure § 2871 (1973). However, *Stradley v. Cortez*, 518 F.2d 488 (3d Cir.1975) and *Demeretz v. Daniels Motor Freight, Inc.*, 307 F.2d 469 (3d Cir.1962) describe a very limited exception to this rule. "When the trial court's power to grant a new trial is challenged, what would otherwise be an interlocutory order is treated as an appealable final order." *Stradley* 518 F.2d at 491; *see also Demeretz*, 307 F.2d at 471. These latter cases present the situation in which an order granting a new trial is treated as an appealable final order because the appellant challenges the power of the court to take that action irrespective of the merits of the order itself.

Nat'l Passenger R.R. Corp. v. Maylie, 910 F.2d 1181, 1183 (3d Cir. 1990).

Therefore, although Wright & Miller is not controlling authority, but only a survey of legal trends, even these trends, on which Respondent is expected to rely, plainly support appealability in the instant case. Appellant's contention at the district court and on appeal has been that the district court lacked power to grant Respondent's motion because it no longer had jurisdiction over the case 15 months after entry of final judgment. A.App. 210, 212, 215.

While the authors of Wright & Miller §2871 question the wisdom of the doctrine that grants appealability when the jurisdiction of the district court to enter the order is challenged (*see* Wright & Miller §2871), as the Third Circuit Court stated in *Maylie*, "[a]s a panel we are bound by the prior precedent in this circuit." *Id.* Likewise, this Court is bound by its precedent in *Lindblom* and not by the opinion of the authors of a secondary authority. Furthermore, the subject order is independently appealable under NRAP 3A(b)(8).

Finally, neighboring state courts do treat orders to set aside default judgment as appealable in general. *See e.g., Gutierrez v. G & M Oil Co.*, 184 Cal. App. 4th 551, 108 Cal. Rptr. 3d 864 (2010) (as an order after a final judgment, trial court's order setting aside default judgment was appealable); *Manson, Iver & York v. Black*, 176 Cal. App. 4th 36, 97 Cal. Rptr. 3d 522 (2009) (an order vacating a default judgment is appealable as an order after final judgment); *Sanders v. Cobble*, 154 Ariz. 474, 475, 744 P.2d 1, 2 (1987) (an order setting aside a default judgment is appealable as a special order made after judgment); *Mary Ebel Johnson, P.C. v. Elmore*, 221 Or. App. 166, 189 P.3d 35, (2008) (order setting aside default judgment was appealable).

In *TRP International, Inc. v. Proimtu MMI LLC*, this Court held that "[a]n order granting a motion to amend or reconsider and vacating a final judgment is not appealable as a special order after final judgment under NRAP 3A(b)(8)." 133 Nev.

84, 86, 391 P.3d 763, 765 (2017). Because the order in that case (made pursuant to NRCP 59) was not the one specific type of order explicitly recognized under NRAP 3A(b)(8) (again, an order to (a) set aside a default judgment, (b) under NRCP 60(b)(1), (c) when the motion was filed more than 60 days after entry of judgment), the order in *TRP International, Inc.* could only be appealable under NRAP 3A(b)(8) if it met the common law definition of a "special order after final judgment." This Court found that it did not meet the common law definition because "once a final judgment is vacated, there cannot be a special order after final judgment unless and until a new final judgment is entered." *Id.* Since the challenged order was not otherwise appealable, the Court concluded that it had no jurisdiction to entertain the appeal. *Id.*

The holding in *TRP International, Inc.* cannot be extended to the instant appeal because NRAP 3A(b)(8) explicitly authorizes the appeal of the subject order. It is not necessary here to analyze whether the subject order meets the common law definition of a "special order after final judgment" [2] as it was in *TRP International, Inc.* because there is a clear statutory basis of appeal here pursuant to the plain meaning of NRAP 3A(b)(8), which this Court expressly recognized in *Lindblom*. Additionally, based on the line of decisions cited in Wright & Miller, the instant case is distinguishable from *TRP International, Inc.* because in that case there was no

[2] Nevertheless, this analysis is provided in footnote 1 supra.

final judgment once the judgment was vacated whereas here, the fact that the very authority of the district court to set aside the judgment is being challenged leads to the judgment being treated as final for purposes of appeal.

Lastly, it is critical to note that since *Fallini* was decided, this Court has had the opportunity to directly address the exact question of appealability at issue here. *See Meisel v. Archstone Inv. Partners, LP*, 133 Nev. 1050, 404 P.3d 397 (2017) (unpublished). There, this Court held that it has jurisdiction to review an appeal of an order setting aside a judgment upon an NRCP 60(b)(1) motion filed more than six months after notice of entry of judgment, pursuant to NRAP 3A(b)(8) and *Lindblom*. *Id.*

ROUTING STATEMENT

The matter before the Court is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(7) as an appeal from a postjudgment order in a civil case. The present matter is an appeal from a special order entered after final judgment under NRAP 3A(b)(8). However, there is an apparent tension in the published decisions of the Supreme Court regarding the appealability of such an order, which may render this matter presumptively retained by the Supreme Court under NRAP 17(a)(12).

ISSUE(S) PRESENTED

1. Does a District Court have jurisdiction to set aside a default judgment pursuant to NRCP 60(b) on the grounds of mistake by a party upon motion filed more than six months after entry of judgment?

STATEMENT OF THE CASE

Appellant brought an action against Respondent alleging that Appellant was brutally attacked by the employees of a bar which premises were owned by Respondent. Respondent failed to answer Appellant's complaint or otherwise appear in the action despite receiving all required notices of the proceedings. Appellant properly obtained a default judgment against Respondent which was entered by the District Court on July 18, 2020.

On October 27, 2020, Respondent filed an untimely motion to set aside the default judgment pursuant to NRCP 60(b) premised on mistake, arguing that Respondent's principal corporate officer, Jose Morales, did not know that he had to defend the action because he relied on the advice of a non-attorney. Respondent offered no additional reasons for his failure to appear in the action.

Appellant argued that the court lacked jurisdiction to consider the motion as NRCP 60(c) explicitly states that a motion under NRCP 60(b) on the basis of mistake cannot be made more than six months after entry of judgment, and this Court has expressly held that when such a motion "is filed more than six months after final

judgment, the motion is untimely and ***must be denied***." *See, e.g.*, *Doan v. Wilkerson*, 130 Nev. 449, 454, 327 P.3d 498, 501 (2014) (emphasis added).

The District Court nevertheless granted Respondent's motion and entered an order setting aside the default judgment on November 24, 2020. Appellant filed a timely notice of appeal on December 11, 2020.

STATEMENT OF FACTS

On February 5, 2018, Appellant Max Vargas ("Appellant") filed a complaint against two parties, including Respondent J Morales Inc. ("Respondent") arising out of a brutal attack against Appellant by security guards on premises owned by Respondent. A.App. 2-4. The Complaint was served on Respondent's registered agent on record with the Nevada Secretary of State on February 16, 2018. A.App. 12.

By the admission of Respondent's principal corporate officer, Respondent was aware of Appellant's Complaint in the District Court at around the time Respondent was served with process. A.App. 35.

On April 13, 2018, Default was entered against Respondent, and on April 17, 2018, Respondent was served with a copy of the Notice of Entry of Default by mail pursuant to NRCP 5(b). A.App. 20-23.

On May 11, 2018, Appellant's Attorney was contacted by Attorney Christopher Connell on behalf of Respondent indicating that Respondent was aware of the entry of default. A.App. 89.

On June 18, 2019, a prove-up hearing was held in Department 32, and Default Judgment was entered against Respondent on July 25, 2019. A.App. 24-26. Respondent was served with a copy of the Notice of Entry of Order of Default Judgment by mail pursuant to NRCP 5(b) on August 6, 2019. A.App. 27-31.

On October 27, 2020, Respondent J MORALES INC. filed an untimely motion to set aside the judgment pursuant to NRCP 60(b)(1) almost 15 months after entry of final judgment. A.App. 32-85. The District Court, lacking jurisdiction, granted the motion by way of an order entered on November 24, 2020. A.App. 218-225.

On December 11, 2020, Appellant filed a notice of appeal of the District Court's order granting Respondent's NRCP 60(b)(1) motion to set aside the default judgment. A.App. 226-236.

SUMMARY OF THE ARGUMENT

This case involves the question of whether a district court has jurisdiction to set aside a default judgment pursuant to NRCP 60(b) on the grounds of mistake by a party upon motion filed more than six months after entry of judgment.

All case law from this jurisdiction and federal jurisdictions interpreting the federal counterparts to NRCP 60(b) and NRCP 60(c) holds, without exception, that where a motion under Rule 60(b)(1)-(3) is filed beyond the six-month time limit prescribed by Rule 60(c), the motion is untimely, and the district court lacks jurisdiction to grant it.

Here, Respondent filed a motion under NRCP 60(b) premised exclusively on the grounds that its principal corporate officer mistakenly relied on the advice of a non-attorney in order to set aside a default judgment obtained against it by Appellant.

Appellant argued that the district court did not have jurisdiction to grant the motion because 15 months had passed since the notice of entry of judgment, which is well beyond the allowable time frame under NRCP 60(c). The district court nevertheless granted Respondent's motion by considering the timeliness of the motion as only one factor of a four-part test applied when an NRCP 60(b) motion is timely made, and not as an absolute bar to relief as NRCP 60 and all relevant case law interpreting the Rule require when a motion is untimely.

Again, Respondent's sole grounds for relief under NRCP 60(b) is mistake. As such, Respondent cannot circumvent the time limitation of NRCP 60(c) by labeling its mistake as "any other reason that justifies relief" under NRCP 60(b)(6) when all relevant authorities are clear that the stringently interpreted "catchall" provision of Rule 60(b)(6) cannot be used for such improper purpose.

Therefore, this Court should reverse the district court's order to set aside the default judgment properly obtained by Appellant.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S ORDER TO SET ASIDE THE DEFAULT JUDGMENT BECAUSE THE COURT LACKED JURISDICTION TO ENTER SAID ORDER WHEN RESPONDENT'S MOTION FOR RELIEF UNDER NRCP 60(B) PREMISED EXCLUSIVELY ON MISTAKE WAS BROUGHT 15 MONTHS AFTER NOTICE OF ENTRY OF JUDGMENT.

Standard of Review

The Nevada Supreme Court reviews an order disposing of an NRCP 60(b)(1) motion for abuse of discretion. *Rodriguez v. Fiesta Palms*, LLC, 134 Nev. 654, 656, 428 P.3d 255, 257 (2018). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). Similarly, a district court abuses its discretion in ruling on an NRCP 60(b)(1) motion if it disregards established legal principles." *Willard v. Berry-Hinckley Indus*., 136 Nev. Adv. Op. 53, 469 P.3d 176, 179 (2020). The Nevada Supreme Court reviews "the district court's interpretation of caselaw and statutory language de novo." *LVMPD v. Blackjack Bonding*, 131 Nev. 80, 85, 343 P.3d 608, 612 (2015).

A. The District Court Did Not Have Jurisdiction to Set Aside the Default Judgment upon NRCP 60(b) Motion Filed 15 Months after Notice of Entry of Final Judgment on the basis of Mistake

A motion for relief from judgment due to mistake pursuant to NRCP 60(b)(1) must be filed not more than six months after notice of entry of final judgment. NRCP 60(c). The Nevada Supreme Court has expressly held that where a motion for relief under NRCP 60(b)(1) "is filed more than six months after final judgment, the motion is untimely and **must be denied**." *See, e.g.*, *Doan v. Wilkerson*, 130 Nev. 449, 454, 327 P.3d 498, 501 (2014) (emphasis added).

Because the instant motion by Defendant was filed after more than double the allowable time under NRCP 60(b)(1), the motion is untimely and must be denied. The Supreme Court was quite explicit in its holding, allowing no room for discretion to the district court on this point. While the Supreme Court "generally afford[s] the district court wide discretion in ruling on an NRCP 60(b)(1) motion, a district court nevertheless abuses that discretion when it disregards established legal principles." *Willard v. Berry-Hinckley Indus*., 136 Nev. Adv. Op. 53, 469 P.3d 176, 179 (2020). As set forth above, it is an established legal principle that the district court no longer has jurisdiction to consider an NRCP 60(b)(1) beyond the six-month period following notice of entry of judgment. *See e.g., Wilkerson*, 130 Nev. at 454, 327 P.3d at 501; *Union Petrochemical Corp. of Nev. v. Scott*, 96 Nev. 337, 339, 609 P.2d 323, 324 (1980); *Rodriguez v. Fiesta Palms*, LLC, 134 Nev. 654, 657, 428 P.3d 255, 257 (2018); *Lindblom v. Prime Hospitality Corporation*, 120 Nev. 372, 374 n.1, 90

P.3d 1283, 1284 n.1 (2004); *Meisel v. Archstone Inv. Partners, LP*, 133 Nev. 1050, 404 P.3d 397 (2017) (unpublished disposition).

The United States Court of Appeals for the Ninth Circuit has applied the federal counterpart to Rule 60(c) consistently in the same way as this Court. *Nevitt v. United States*, 886 F.2d 1187, 1188 (9th Cir. 1989) (district court lacked jurisdiction due to untimely Rule 60(b)(2) motion); *Scott v. Younger*, 739 F.2d 1464, 1466 (9th Cir. 1984) (district court was without jurisdiction to consider motions made almost two years after judgment was entered); *Burton v. Spokane Police Dep't*, 473 F. App'x 731 (9th Cir. 2012) (district court properly denied as untimely motion to vacate the judgment under Rule 60(b)(2) or (3)); *Levels v. ASI/SBC*, 310 F. App'x 189, 190 (9th Cir. 2009) (unpublished decision) (motion based on excusable neglect was untimely and the district court lacked jurisdiction to consider the merits of the motion); *United States v. McGrew*, 716 F. App'x 704 (9th Cir. 2018) (The district court did not abuse its discretion in denying motion for relief from judgment because the motion was filed more than one year after entry of judgment); *Schwiger v. Palmer*, No. 3:07-CV-00382-LRH, 2011 WL 534395, at *1 (D. Nev. Feb. 7, 2011) (an untimely motion under Rule 60(b) must be denied). Federal cases that interpret Federal Rules of Civil Procedure that mirror our own Nevada Rules of Civil Procedure are strong persuasive authority. *See e.g., Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990).

Secondary sources have addressed this issue as well. American Jurisprudence, second edition states that even when a Rule 60(b) motion is made within the time limit specified in Rule 60(c), the motion still must be filed within a reasonable time. After the time limit has expired, "the court loses power to entertain the motion, and the expiration of the [applicable] period becomes an absolute bar to relief." 47 Am. Jur. 2d Judgments § 644.

B. Respondent's Reliance on NRCP 60(b)(6) Is Invalid Because the Only Actual Grounds for Relief Alleged By Respondent Falls Exclusively Under the Category of Mistake of NRCP 60(b)(1)

The sole basis of Respondent's motion to set aside judgment is NRCP 60(b)(1)—mistake. However, Respondent is expected to argue that its motion for relief was also based on NRCP 60(b)(6) in order to escape the time limitation applicable to NRCP 60(b)(1). The plain meaning of the rule, the case law interpreting it, and the interests of sound public policy make such an argument untenable. Again, a motion for relief under Rule 60(b)(1) must be denied as untimely when made after the time limitations of the rule and the district court does not have power to enlarge the time limits under the rule. 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2866 (3d ed.).

Decisions dealing with Rule 60(b)(6)

> certainly seem[] to establish that clause (6) and the first five clauses [Rule 60(b)(1)-(5)] are mutually exclusive and that relief cannot be had under clause (6) if it would have been available under the earlier clauses. This reading seems required also by the language of the rule. .

> . . there is now much authority that the provisions are mutually exclusive.

Id. at § 2864.

Courts have found extraordinary circumstances justifying relief under Rule 60(b)(6) only in a limited number of cases such as where "there was inaction by the government and unusual delays by the courts, and when there is a strong public interest in the case and the conduct of the parties is egregious" and not "for the purpose of relieving a party from free, calculated, and deliberate choices the party has made." *Id.*

The basis for Respondent's failure to defend, as described by Respondent, was mistake. Thus, it falls under NRCP 60(b)(1). Allowing a mistake to also fall under NRCP 60(b)(6) voids NRCP 60(b)(1) of meaning and defeats the whole purpose of the categorization under NRCP 60(b). Even though Respondent is expected to argue that it also sought relief under NRCP 60(b)(6), this Court has made clear that it does not matter how a party labels its basis for a motion under NRCP 60(b); what matters is what this basis is concretely. *Doan v. Wilkerson*, 130 Nev. 449, 454, 327 P.3d 498, 501 (2014). Moreover, Respondent did not allege any reason for relief other than the mistaken reliance of its principal corporate officer on the advice of a non-attorney, much less the "extraordinary circumstances" required under NRCP 60(b)(6), and thus Respondent has no basis for relief under clause (6). *See Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir. 1981).

If any basis under NRCP 60(b) could just be thrown in the catchall category of 60(b)(6), there would be no point to have any of the other categories or the extensive and varying legal implications accompanying each of those categories. Rule 60(b)(6) cannot be used as a means by which the time limitations of 60(b)(1-3) may be circumvented. *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 702 (2d Cir. 1972). Again, Rule 60(b)(6) is available only in cases evidencing extraordinary circumstances, and only when the relief sought is based upon "any other reason" than a reason which would warrant relief under 60(b)(1)-(5). *See Ackermann v. United States*, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950); *Federal Deposit Insurance Corp. v. Alker*, 234 F.2d 113, 116-17 & n.5 (3d Cir. 1956); *Stradley v. Cortez*, 518 F.2d 488, 493 (3d Cir. 1975). *See also* 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2864 (3d ed.).

Respondent is attempting to present itself as the hapless victim of an unfair judgment, despite being a sophisticated corporate defendant which owns a variety of businesses/commercial establishments. However, Appellant only followed the legal process, and he did so correctly and fairly. Respondent does not dispute this. Respondent simply chose not to do anything about this process against it despite having been served with notice at every turn. Respondent consciously waived its right to defend itself on the merits, whatever they may have been. Respondent laid its bed and now it is loath to lay in it. It is disingenuous for Respondent to cry foul

and to sanctimoniously reference the merits as though it was robbed of the chance to argue the merits.

Respondent had every opportunity to argue the merits at any time upon being served with the complaint, upon being served with the default, upon being served with the default judgment in the amount of $1.7 million, and even for six months thereafter. That ship has now sailed. The courts recognize the need for finality. It is desirable for cases to be decided on the merits, but when a party chooses to completely dismiss the judicial process and eschews every opportunity to avail itself of the merits, the legislature and the courts recognize the need to provide a fair and balanced mechanism that rightly takes into account the rights of the other party seeking legal recourse. *See Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir. 1981) (the interest of finality must be given great weight when a Rule 60(b) motion based on judicial mistake is filed after expiration of the time).

Respondent would not be prejudiced by a decision in favor of Appellant because Respondent, through its conscious choices, welcomed the consequences of such choices. Appellant, however, would be extremely prejudiced by a decision from this Court in favor of Respondent as Appellant did everything by the book and if Respondent could now make the case in district court that it was not the correct party, as it alleges, it would be too late for Appellant to name a different party, which Appellant could have easily done if Respondent had timely appeared in this action.

Thus, Appellant would be deprived of any recourse to which he might otherwise be entitled directly as a result of Respondent's dismissive attitude toward the judicial process.

CONCLUSION

The district court lacked jurisdiction to set aside the default judgment pursuant to an untimely NRCP 60(b) motion premised on mistake brought by Respondent 15 months after notice of entry of judgment. A voluminous body of legal authorities from this and other jurisdictions invariably and unambiguously establishes that such an untimely motion premised exclusively on mistake cannot escape the time limitation of NRCP 60(c) simply by invoking 60(b)(6) and must be denied. Therefore, the district court's order to set aside the default judgment properly obtained by Appellant should be reversed.

Dated this 27th day of May, 2021.

Oscar Peralta, Esq.
Nevada Bar No. 13559
Peralta Law Group
101 Convention Center Dr., Ste 340
Las Vegas, NV 89109
Tel: (702) 758-8700
Fax: (702) 758-8704
oscar@peraltalawgroup.com
Attorney for Appellant Max Vargas

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 Version in Times New Roman 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C) it is proportionately spaced, has a typeface of 14 points or more, and contains 6,212 words.

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

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I understand that I may be subject to sanctions if the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 27th day of May, 2021.

/s/ Oscar Peralta
Oscar Peralta, Esq.
Nevada Bar No. 13559
Peralta Law Group
101 Convention Center Dr., Ste 340
Las Vegas, NV 89109
Tel: (702) 758-8700
oscar@peraltalawgroup.com
Attorney for Appellant Max Vargas

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of May, 2021, a true and accurate copy of the above and foregoing document was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Ogonna M. Brown, Esq.
Adrienne Brantley-Lomeli, Esq.
Lewis Roca Rothgerber Christie LLP
3993 Howard Hughes Pkwy., Ste. 600
Las Vegas, NV 89169
Attorneys for Respondent J Morales Inc.

/s/ Oscar Peralta
Oscar Peralta, Esq.
Nevada Bar No. 13559
Peralta Law Group
101 Convention Center Dr., Ste 340
Las Vegas, NV 89109
Tel: (702) 758-8700
oscar@peraltalawgroup.com
Attorney for Appellant Max Vargas