Case No. 82218

In the Supreme Court of Nevada

MAX VARGAS,

Appellant,

*vs.*

ORTIZ FAMILY LL D/B/A EL SELLITO ROJO; J MORALES INC., DOE BOUNCERS I-V; DOES VI-X AND ROE CORPORATIONS X-XV

Respondent.

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Elizabeth A. Brown
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**APPEAL**

from the Eight Judicial District Court, Clark County, Nevada
The Honorable ROB BARE District Judge
District Court Case NO. A-18-768988-C

# RESPONDENT'S ANSWERING BRIEF

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## NRAP 26.1 DISCLOSURE

The undersigned counsel of record certify that the following are persons as described in NRAP 26.1(a) and must be disclosed:

1. J. Morales Inc. "Respondent" or alternatively, "JMI") is a domestic corporation. No publicly traded company owns more than 10% of its stock.

2. Ogonna Brown and Adrienne Brantley-Lomeli of Lewis Roca LLP represents JMI in the district court and have appeared in this Court.

These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

Dated this 12 day of July, 2021.

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## JURISDICTION

Appellant Max Vargas appeals an order granting a motion to set aside a default judgment under Rule 60(b)(1) and (b)(6. App.218. The notice of appeal was filed on December 11, 2020. App.226.

## ROUTING STATEMENT

The Supreme Court should retain this appeal pursuant to NRAP 17(a)(12) because there is tension in the published decisions of the Supreme Court regarding the appealability of such an order.

## ISSUES PRESENTED

1. Whether this Court has jurisdiction to consider the appeal.

2. Whether the district court was within its discretion in setting aside the judgment.

## STATEMENT OF THE CASE

This appeal arises from an order granting a motion to set aside a default judgment under Rule 60(b)(1) and (b)(6) for "mistake, inadvertence, surprise, or excusable neglect" and "other reason that justifies relief." As a result of the lower court's ruling, the default judgment entered against Respondent J. Morales Inc. was vacated.

## STATEMENT OF THE FACTS

### A. The Incident

Max Vargas alleges that on March 22, 2017, he sustained injuries at El Sellito Rojo, the nightclub owned and operated by the Ortiz Family ("Property"), when a bouncer employed by the Ortiz Family allegedly punched Vargas. App.1.

### B. After the Incident, JMI Purchases the Land

Five months after the incident, JMI purchased the Property on August 28, 2017. App.52. On November 9, 2017, Mr. Jose Morales ("Mr. Morales"), JMI's manager of record, purchased a liability insurance policy to insure the Property. App.38

### C. Vargas Files a Complaint and Incorrectly Names JMI

On February 5, 2018, Vargas filed a complaint against the Ortiz

Family, the Bouncer and JMI, alleging only a negligence claim against JMI. App.1. Specifically, Vargas alleged that JMI had a duty to maintain the premises in a reasonably safe condition. App.4.

### D. JMI Contacts its Insurance Agent and is Told it was Incorrectly Named

After JMI was served with the Complaint, it contacted its insurance agent. App.38. The agent advised JMI that because of the date JMI purchased the Property, JMI would not be held liable for any of the damages claimed in the lawsuit. *Id.* Based upon the advice from JMI's insurance agent that JMI was not a responsible party JMI did not retain an attorney or participate in the case. *Id.*

A default judgment was entered against both JMI and the Ortiz Family on July 25, 2019. App.31.

### E. The District Court Sets Aside the Default Judgment

In September 2020, JMI learned about the judgment after JMI's bank account was garnished. App.34. JMI promptly filed a motion to set aside judgment and stay execution of judgment. *Id.*

In determining whether to set aside the judgment, the district court relied on *Yochum v. Davis*, 653 P.2d 1215, 98 Nev. 484 (1982). *Yochum*

provides four factors a district court should consider in setting aside a judgment: timeliness, intent to delay, lack of knowledge of procedural requirements, and good faith. App.220.

> The Yokum case, the Rodriguez case, the Willard case, those cases, and Yokum I think is the mainline case that you see cited over and over again, even in the cases that follow, spell out that there's a four-factor balancing test that needs to be employed here. Those factors are one, was there a prompt application to remove the default judgment? Two, absence of intent to delay. Three, lack of knowledge of procedural requirements. And four, good faith. The burden, I think, falls on the defense in this spot; they're the party seeking to satisfy the default judgment. That burden, I think, is a preponderance burden.

App.205.

After oral argument, the district court took the matter under advisement. The district court made specific findings under each factor. App.222.

The district court ultimately found grounds to set aside the judgment, including under the catchall "other reason that justifies relief" in NRCP 60(b)(6), a ground that can be raised at any reasonable time. The court found that JMI had a meritorious defense, in that it did not own the property at the time of the incident, and that can be considered un-

der a NRCP 60(b)(6) analysis in considering any other reason that justifies relief. App.222. The Court determined that if JMI can prove that it was not the owner of the nightclub and had no role in Plaintiff's injuries, setting aside the default judgment, which awarded Plaintiff in excess of $1.7 million, is justified. App.223. Furthermore, the court determined that although JMI relied on what appears to be legal advice by a non-attorney, such reliance also justifies relief under 60(b)(6). *Id.* The Court also found that the basic policy of deciding a case on the merits also undoubtedly favors JMI and setting aside the default judgment. *Id.*

The district court accordingly vacated the default judgment.

### F. Appellant Files an Interlocutory Appeal

With the default judgment vacated, on December 1, 2020, JMI moved to dismiss the complaint, arguing that Appellant sued the wrong party and that JMI was not a party in interest. The district court set the hearing on the motion to dismiss for January 19, 2021.

## SUMMARY OF THE ARGUMENT

As a threshold matter, Appellant's appeal is premature as orders granting relief under Nevada Rule of Civil Procedure 60(b) are interloc-

utory and not appealable. An appealable final judgment is one that "disposes of the issues presented in the case, determines the costs, and leaves nothing for the future consideration of the court. An order vacating a default judgment by its nature reopens the whole case "for the future consideration" of the district court.

Further, the district court did not abuse its discretion in setting aside the default judgment. The determination that principals of equity and justice warranted a trial on the merits was neither arbitrary or capricious but rather based on controlling law and supported in the record. As such, the order setting aside the judgment should be upheld.

## I.
## THE APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION

Vargas's notice of appeal from the district court's order granting JMI's "Emergency Motion to Set Aside Judgment and Stay Execution of Judgment" is improper, as orders granting relief under Nevada Rule of Civil Procedure 60(b)are interlocutory and not appealable. Accordingly, this appeal should be immediately dismissed.

### A. A Final Order is One that Leaves Nothing for Further Consideration

Ordinarily, only "a final judgment" is appealable. NRAP 3A(b)(1).

This court determines the finality of an order or judgment by looking to what the order or judgment actually *does,* not what it is called. *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994). An appealable final judgment is one that "disposes of the issues presented in the case, determines the costs, and leaves nothing for the future consideration of the court." *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (citation omitted). The general rule requiring finality before an appeal may be taken is not merely technical, but is a crucial part of an efficient justice system. *Reno Hilton Resort Corp. v. Verderber*, 121 Nev. 1, 5, 106 P.3d 134, 136–37 (2005).

### B. This Court Recently Clarified that an Order Vacating a Default Judgment is Interlocutory

An order vacating a default judgment by its nature reopens the whole case "for the future consideration" of the district court. This Court recently clarified that such an order is "interlocutory in nature and, thus, may not be appealed until there has been a final judgment." *See Estate of Adams ex rel. Adams v. Fallini*, 132 Nev. 814, 818, 386 P.3d 621, 624 (2016) (citing Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2871 (3d ed. 2016)). In *Adams*, the district court granted defendant's Rule 60(b) motion to set aside the judgement. *Id.* Thereafter,

the matter proceeded to final judgment. *Id.* On appeal from the final judgment, defendant argued that this Court did not have jurisdiction to hear the appeal because the district court's NRCP 60(b) order was an appealable order, and the Estate did not file a timely notice of appeal for that order. *Id.* This Court disagreed and held that the Rule 60(b)(3) motion for fraud upon the court was interlocutory and not appealable. *Id.* It further determined that the NRCP 60(b) order merged into the final judgment. *Id.*

Further, *Adams* reversed the Court's previous unpublished guidance in the same case, *Estate of Adams ex rel. Adams v. Fifth Judicial Dist. Court*, No. 66521, 131 Nev. 1276, 2015 WL 234358, at *1 (2015) (unpublished table disposition), which in turn had relied on a footnote in *Lindblom v. Prime Hosp. Corp.*, 120 Nev. 372, 374, 90 P.3d 1283, 1284 (2004). In light of *Adams*, *Lindblom*'s footnote appears to be bad law.

Furthermore, Appellant's narrow interpretation of *Estate of Adams By & Through Adams v. Fallini*, 132 Nev. 814, 386 P.3d 621 (2016), is extremely problematic. It would create confusion if this Court, after *Adams* held that orders granting 60(b) relief from a default are, in fact, appealable. Litigants will have been misled by that language in *Adams*, and

the consequence of the Court finding that *Adams* only applied to a very narrow set of 60(b)(3) orders" would be to leave those who didn't appeal in reliance on *Adams* out of luck.

Because Appellant is challenging just such an order, the appeal is void, and Appellant has no standing to seek relief under NRAP 8(c). *See* NRAP 3A(a) (appellate standing requires a "party who is aggrieved by an ***appealable*** **judgment or order**" (emphasis added)).

### C. Federal Courts Have Determined that an Order Granting a Motion Under Rule 60(b) is Interlocutory

Federal case law interpreting Rule 60(b) likewise have determined that an order granting a motion under Rule 60(b) and ordering a new trial is purely interlocutory and not appealable. *See e.g.*; *Stubblefield v. Windsor Capital Group*, 74 F.3d 990 (10th Cir. 1996) (finding that the court o did not have jurisdiction to review district court's decision granting motion seeking relief from judgment, voiding a settlement agreement, vacating the judgment and scheduling the case for a settlement conference and jury trial because there was no final decision resolving the litigation on the trial-court level and the district court's decision did not terminate all matters as to all parties and causes of action so it retained jurisdiction to modify or rescind the order); *Haney v. City of Cumming*,

69 F.3d 1098 (11th Cir. 1995); *National Passenger R.R. Corp. v. Maylie*, 910 F.2d 1181, 1183 (3d Cir. 1990), citing Wright & Miller); *Parks By and Through Parks v. Collins*, 761 F.2d 1101, 1104 (5th Cir. 1985) (citing Wright & Miller); *Oliver v. Home Indem. Co.*, 470 F.2d 329 (5th Cir. 1972).

Courts have found that on appeal from a judgment entered *after* the new trial, the appellate court will review whether it was error to have reopened the first judgment. *Edwin Raphael Co. v. Maharam Fabrics Corp.*, 283 F.2d 310 (7th Cir. 1960); *see also Chambers County Com'rs v. Walker*, 459 So. 2d 861, 864 (Ala. 1984), (citing Wright & Miller); *Morton v. Clark*, 403 So. 2d 234, 235 (Ala. Civ. App. 1981), writ denied, 403 So. 2d 235 (Ala. 1981), (citing Wright & Miller)

And while Wright & Miller noted that there is 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, it seems an unwise doctrine, since it multiplies interlocutory appeals and requires the appellate courts to pass on the claim of lack of power. Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2871 (3d ed. 2016)).

### D. Even If This Court Finds an Appeal May Lie if the District Court Lacked Jurisdiction, the Court here had Jurisdiction

Appellant fixates on the requirement that a motion to set aside judgment under Rule 60(b)(1) must be brought within six months. However a motion brought under Rule 60(b)(6) may be brought within a reasonable time. NRCP 60(b)(6) gives district courts power to vacate judgments whenever that action is appropriate to accomplish justice. *Malta Irr. Dist. v. F.E.R.C.*, 955 F.2d 59, 65 (D.C. Cir. 1992); *Williams v. St. Louis County*, 812 F.2d 1079, 1083 (8th Cir. 1987); *Klapprott v. United States*, 335 U.S. 601, 611, 69 S. Ct. 384, 389, 93 L. Ed. 266 (1949) (finding that the moving party "set up an extraordinary situation which cannot fairly or logically be classified as mere 'neglect' on his part). There is no time limit for a NRCP 60(b)(6) motion. NRCP 60(c)(1); *Payne v. Tri-State Careflight, LLC*, 322 F.R.D. 647, 671 (D.N.M. 2017).

Here, the district court found grounds to set aside the judgment, including under the catchall "other reason that justifies relief" in NRCP 60(b)(6), a ground that can be raised at any reasonable time. The district court found good cause to vacate the judgment, including under Rule 60(b)(6), and to have the case proceed on its merits.

Because there is no final judgment, the district court's order is interlocutory and not appealable. The appeal should be dismissed, and the district court should continue its jurisdiction over this matter and entertain JMI's pending Motion to Dismiss.

## II.
## THE DISTRICT COURT WAS WITHIN ITS DISCRETION IN SETTING ASIDE THE DEFAULT

Whether a judgment should be set aside is addressed to the sound discretion of the trial court. The district court's discretionary power is subject only to the test of reasonableness, which requires a determination of whether there is logic and justification for the result. *Imperial Credit v. Eighth Jud. Dist. Ct.*, 130 Nev. 558, 563, 331 P.3d 862, 866 (2014). A district court's discretion is improperly exercised only when the judicial action is arbitrary, fanciful, or unreasonable or where no reasonable [person] would take the view adopted by the trial court. *Id.*

Here, the district court was well within its discretion in determining that principals of equity and justice warranted a trial on the merits. Rule 60(b)(6) was intended to make available all the grounds that equity had long recognized as bases for relief from a judgment. *Watkins v. Lundell*, 169 F.3d 540, 543 (8th Cir. 1999). Indeed, federal courts have

generally applied clause (6) liberally whenever modification or vacation of a judgment appeared appropriate to accomplish justice. *Johnson v. Spencer*, 950 F.3d 680, 701 (10th Cir. 2020).

### A. The District Court Did Not Err in Vacating the Judgment to Accomplish Justice

NRCP 60(b) operates as a remedial rule that gives due consideration to our court system's preference to adjudicate cases on the merits. *Willard v. Berry-Hinckley Indus.*, 136 Nev. Adv. Op. 53, 469 P.3d 176, 179 (2020). This Court affords "wide discretion" to district court in determining Rule 60(b) motions. *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 659, 428 P.3d 255, 259 (2018), *holding modified by Willard v. Berry-Hinckley Indus.*, 136 Nev. Adv. Op. 53, 469 P.3d 176 (2020). The decision to grant or deny an NRCP 60(b) motion for relief requires a district court to balance the preference for resolving cases on the merits with the importance of enforcing procedural requirements. *Id.* When finding that balance, a district court must carefully consider all of the relevant facts, including the difficulties faced by pro se litigants. *Id.*

Further, NRCP 60(b)(6) gives the courts ample power to vacate judgments whenever that action is appropriate to accomplish justice. *Malta Irr. Dist. v. F.E.R.C.*, 955 F.2d 59, 65 (D.C. Cir. 1992); *Williams v.*

*St. Louis County*, 812 F.2d 1079, 1083 (8th Cir. 1987); *Klapprott v. United States*, 335 U.S. 601, 611, 69 S. Ct. 384, 389, 93 L. Ed. 266 (1949) (finding that the moving party "set up an extraordinary situation which cannot fairly or logically be classified as mere 'neglect' on his part).

In determining situations in which "extraordinary circumstances" have been found, courts have focused on whether the movant made a fair and deliberate choice at some earlier time not to move for relief. Further, where there is neglect by counsel and an absence of neglect by the party, courts have refused to impute the negligence to the party and have granted relief under Rule 60(b)(6), finding that the conduct involved presented extraordinary circumstances. *Norris v. Salazar*, 277 F.R.D. 22 (D.D.C. 2011) (Counsel's inexplicable failure to respond to defendant's motion to dismiss, and failure to make any effort to obtain an extension of time to file an opposition, constituted "extraordinary circumstances" warranting relief from a final judgment since counsel's failure to respond or seek leave to file a late opposition was not based on strategy or a deliberate choice); *Escobar v. Shearson Lehman Hutton, Inc.*, 762 F. Supp. 461 (D.P.R. 1991) (Petitioners were entitled to relief

from an order dismissing a petition for review of an arbitration award, which had been entered due to petitioners' failure to timely oppose the dismissal motion, when petitioners' counsel lacked experience in securities arbitration law and petitioners were entitled to relief on the merits); *Transport Pool Division of Container Leasing, Inc. v. Joe Jones Trucking Co.*, 319 F. Supp. 1308 (N.D. Ga. 1970) (Default judgment against an individual would be set aside, although the motion was not filed within the one year limit, when default and failure to file the motion were due to gross and inexcusable neglect of the individual's counsel, the individual was an uneducated layman suffering from anxiety and illness, and the obligation was that of the corporation rather than the individual); *Community Dental Services v. Tani*, 282 F.3d 1164 (9th Cir. 2002) (Trademark-infringement defendant demonstrated "extraordinary circumstances" that justified granting relief from a default judgment, when his attorney virtually abandoned him by failing to proceed with the defense despite court orders to do so).

Here, the district court's findings were well reasoned and supported by law and the record. In determining whether to set aside the judgment, the district court relied on *Yochum v. Davis*, 653 P.2d 1215,

98 Nev. 484 (1982). *Yochum* provides four factors a district court should consider in setting aside a judgment: timeliness, intent to delay, lack of knowledge of procedural requirements, and good faith. App.220.

The district court found grounds to set aside the judgment, including under the catchall "other reason that justifies relief" in NRCP 60(b)(6), a ground that can be raised at any reasonable time. The court found that JMI had a meritorious defense, in that it did not own the property at the time of the incident, and that can be considered under a NRCP 60(b)(6) analysis in considering any other reason that justifies relief. App.222. The court also determined that if JMI can prove that it was not the owner of the nightclub and had no role in Plaintiff's injuries, setting aside the default judgment, which awarded Plaintiff in excess of $1.7 million, is justified. App.223. Furthermore, the court determined that although JMI relied on what appears to be legal advice by a non-attorney, such reliance also justifies relief under 60(b)(6). *Id.* The court further found that the basic policy of deciding a case on the merits also undoubtedly favors JMI. *Id*.

This decisions is neither arbitrary or capricious. Rather it is well reasoned and in line with principals of justice and fairness.

### *1. The Circumstances Do Not Fall Within the Other Provisions of Rule 60(b)*

Appellant contends that the sole basis of Respondent's motion to set aside judgment is NRCP 60(b)(1) for an alleged mistake and excusable neglect. However, the circumstances in this matter fall outside the scope of the other 60(b) categories.

The need to interpret what constitutes excusable neglect in light of the time limits imposed in Rule 60(b)(1) and the ability to obtain relief under Rule 60(b)(6) outside of that time frame was emphasized in a *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*. 507 U.S. 380, 393, 113 S. Ct. 1489, 1497, 123 L. Ed. 2d 74 (1993) In that case, the Court noted in reference to Rule 60(b)(1) that a narrower approach had developed. *Id*. The Court determined that excusable neglect is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence. *Id.* Because of the language and structure of Rule 60(b), a party's failure to file on time for reasons beyond his or her control is not considered to constitute "neglect." *Id.* The Court further noted that subsection 6 requires extraordinary circumstances, which suggests the party is faultless in the delay. *Id*. The Court concluded that if a party is partly to blame for the delay, relief

must be sought under subsection (1). *Id*.

Here, JMI was not at fault for the delay. JMI did not own the subject property at the time of the incident and was informed by his insurance agent that he would not be liable for any damages. Accordingly, JMI's actions do not fall under 60(b)(1).

### *2. Equity Necessitates Upholding the District Court as JMI Was Never Liable Because it Did Not Own the Subject Property at the Time of the Incident*

If the judgment is not vacated JMI will be responsible for a multi-million dollar judgment when it never had any underlying liability. Relief from judgment under civil procedure rule's "catch-all" provision is available where party seeking relief demonstrates that extreme hardship will result absent such relief. *Jackson v. Danberg,* 656 F.3d 157, 166 (3d Cir. 2011). A default judgment should be vacated where there has been a prima facie showing of a meritorious defense, so that to deny defendant his day in court and right to assert that defense would, in effect, be penalizing him. *Kinnear Corp. v. Crawford Door Sales Co.*, 49 F.R.D. 3, 5 (D.S.C. 1970); see also *United States v. McDonald*, 86 F.R.D. 204, 206 (N.D. Ill. 1980) (finding that relief from foreclosure was warranted under Rule 60(b)(6) where homeowners were entitled as of right under state law to homestead exemption which they did not waive);

*United States v. 96 Cases, More or Less, of Fireworks*, 244 F. Supp. 272, 272 (N.D. Ohio 1965) (setting aside a default judgment where defendant mistakenly assumed that his rights were being protected by his trade association's parallel action and observing that seizure of defendant's property would be a rather harsh penalty for the error on his part).

In determining principals of equity, courts have considered the amount in controversy. *In re Ireco Indus., Inc.*, 2 B.R. 76 (Bankr. D. Or. 1979) (considering circumstances that included the substantial sum in controversy, diligence by defendant seeking relief and fact that plaintiff was aware that defendant had expressed intention to interpose a defense); *Erick Rios Bridoux v. E. Air Lines*, 214 F.2d 207, 210 (D.C. Cir. 1954) (reversing the District Court's denial of a motion under Rule 60(b)(6) finding that it was improvident not to grant any relief whatever from the very large money judgment entered in this case by default).

Here, appellant obtained a default judgment for $1,706,214.75. Requiring JMI to pay a million dollar judgment in light of the fact that JMI did not own the land at the time of the subject incident is a miscarriage of justice. As such, this Court should uphold the district court's order setting aside the judgment and allow the matter to proceed on the

merits.

## CONCLUSION

For the foregoing reasons, this court should affirm the district court's grant of JMI's Motion to Set Aside the Judgment.

Dated this 12th day of July, 2021.

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## CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 29(e) because it contains 3,783 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 12th day of July, 2021.

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## CERTIFICATE OF SERVICE

I certify that on July 12, 2021, I submitted the foregoing "Respondent J Morales Inc.'s Answering Brief" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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