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; JERRY HERBST, an individual; and TIMOTHY P. HERBST, as Special Administrator of the ESTATE OF JERRY HERBST, deceased,

Respondents.

No. 83640
District Court Case No. CV14-01712

APPEAL FROM ORDER AFTER REMAND DENYING PLAINTIFFS' NRCP 60(b)(1) MOTION FOR RELIEF IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE HONORABLE LYNNE K. SIMONS

APPELLANTS' OPENING BRIEF

ROBERT L. EISENBERG
Nevada Bar No. 0950
Lemons, Grundy & Eisenberg
6005 Plumas Street, Third Floor
Reno, Nevada 89519
775-786-6868
rle@lge.net

RICHARD D. WILLIAMSON
Nevada Bar No. 9932
JONATHAN JOEL TEW
Nevada Bar No. 11874
Robertson, Johnson,
Miller & Williamson
50 West Liberty Street, Suite 600
Reno, Nevada 89501
775-329-5600
Rich@nvlawyers.com
Jon@nvlawyers.com

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 judges of this court may evaluate possible disqualification or recusal.

There are no parent corporations or publicly-held companies that own 10% or more of any of the Appellants.

The law firm of Lemons, Grundy & Eisenberg has represented the Appellants since December 15, 2018.

The law firm of Robertson, Johnson, Miller & Williamson has been counsel of record in this case since March 26, 2018.

Prior to March 2018, Brian P. Moquin represented the Appellants as lead counsel and David C. O'Mara represented the Appellants as local counsel.

No Appellant is using a pseudonym.

DATED: February 28, 2022

/s/ Robert L. Eisenberg
ROBERT L. EISENBERG (Bar No. 0950)
Lemons, Grundy & Eisenberg

RICHARD D. WILLIAMSON (Bar No. 9932)
JONATHAN JOEL TEW (Bar No. 11874)
Robertson, Johnson, Miller & Williamson

ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION[1]

Plaintiff/Appellant Larry Willard – who is now 79 years old – lost a $15,000,000 cut-and-dry breach of lease case because his previous attorney, California attorney Brian Moquin, suffered from bipolar disorder and abandoned his clients by failing to oppose several dispositive motions. Even after Plaintiffs retained new counsel in an attempt to undo the devastation, Moquin repeatedly made promises that he would help fix the problems he had caused, provide his case files, and continue to see the doctor who diagnosed him as bipolar. Consistent with his illness, however, Moquin never followed through. Instead, he became increasingly vulgar, hurling expletives at both Willard and present counsel, and viciously blaming his wife for his woes. He was also arrested for domestic violence in January of 2018.

Defendants/Respondents claim to have been harmed by Moquin's inaction as well – both in terms of time and attorneys' fees. But what they lost pales in comparison to what Larry Willard has lost.

Due to Moquin's abandonment of the Plaintiffs, the district court entered case-terminating sanctions. After a first appeal, this court concluded that the district court erred in its order denying Rule 60(b)(1) relief. On remand, the district court summarily rubber-stamped a new proposed order from Defendants and again denied

[1] For ease of reading, this introduction does not have appendix citations, but citations for each fact in this introduction will be provided in the body of the brief.

Rule 60(b)(1) relief. Accordingly, Mr. Willard and the other Plaintiffs have been forced to again seek relief from this court. As this court will see, the district court erred for several, independently-reversible reasons. Therefore, the court should reverse the district court and grant Rule 60(b)(1) relief so that Mr. Willard can have a trial on the merits with competent and responsive attorneys.

First, the district court committed clear error in finding that Moquin did not abandon Plaintiffs. Abandonment alone constitutes excusable neglect, and the evidence in this case demonstrates clear abandonment. Moquin failed to oppose dispositive motions despite repeatedly assuring Plaintiffs that he would. After Plaintiffs retained new counsel, Moquin refused to provide any assistance to Mr. Willard or new counsel – including the fundamental, ethical obligation to provide his files.[2] Instead, he elected to profanely insult and disparage Mr. Willard and his new counsel. Simply because an attorney is capable of performing *some* tasks does not preclude a finding of constructive abandonment and excusable neglect, as the district court seems to have believed.

Second, the district court should have issued a sanction more proportionate to Moquin's discovery failures and inability to oppose motions. Defendants claimed prejudice because of Moquin's failure to produce discovery on certain categories of

[2] See Docket No. 78946, Order at 1-2; see also Matter of Moquin, No. 78946, 450 P.3d 389 (Table), 2019 WL 5390401 at *1 (Nev. Oct. 21, 2019, unpublished disposition).

damages. Yet, this is a simple case involving Defendants' unexcused strategic decision to breach a commercial lease and personal guaranty. A much more appropriate sanction would have been to prohibit Plaintiffs from utilizing an expert at trial, or perhaps to limit Plaintiffs to establishing basic lease damages without punitive or consequential damages. Moreover, Plaintiffs' basic damages were repeatedly disclosed to Defendants. In fact, they were calculated and disclosed in the original *Verified Complaint* and again in the *Verified First Amended Complaint*. Thus, Defendants suffered no material prejudice from Moquin's discovery failures.

Third, the district court erred in its application of the pertinent case-terminating sanctions factors, and failed to consider the most appropriate factor applicable to this case: whether sanctions unfairly operate to penalize a party for the misconduct of his attorney. Defendants' *Motion for Sanctions* conveniently ignored this extremely relevant factor, and the district court's sanctions order ignored it as well. In its order denying relief, which the Defendants essentially drafted, the district court simply stated that the court was not required to consider that factor. However, that factor should have been addressed by the district court, and the failure to do so constituted an error of law.

Fourth, the district court erred in excluding admissible evidence. While some of the proffered evidence was hearsay, each item of evidence met the requirements of various exceptions to the hearsay rule, and should have been considered.

Relatedly, the district court was able to directly observe Moquin, and the procedural history of this case on its own established that Moquin was suffering from mental illness. This is not the typical sanctions case where a party hides or destroys evidence; this is a case where *the attorney simply could not function*. This also justifies reversal.

Fifth, the district court disregarded this court's clear directives on remand. On August 6, 2020, this court filed a published opinion in this matter, which reversed the district court's previous order denying relief. Willard v. Berry-Hinckley Indus., 136 Nev. 467, 469 P.3d 176 (2020). Defendants sought rehearing of that opinion, which was denied on November 3, 2020. Defendants then sought en banc reconsideration. On February 23, 2021, this court entered an *Order Denying En Banc Reconsideration*. In that order, the court expressly stated that "**neither party may present any new arguments or evidence on remand**; the district court's consideration of the factors set forth in Yochum v. Davis, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), is limited to the record currently before the court." (Emphasis added).

Despite this plain limitation, Defendants provided the district court with a proposed order that included approximately 17 pages of entirely new arguments and analysis. As that proposed order constituted a direct attempt to evade this court's *Order Denying En Banc Reconsideration*, the district court should have disregarded

Defendants' proposed order. Instead, the district court used it to again deny Rule 60(b)(1) relief. This was clear error.

Plaintiffs themselves did nothing wrong. They only ask for their day in court. Accordingly, Plaintiffs seek a reversal of the district court's orders dismissing their case and refusing to provide Rule 60 relief. Plaintiffs have repeatedly stated their willingness to rectify any harm actually caused to the Defendants by Moquin. Reversal is appropriate so that the case can finally proceed to a trial on the merits.

JURISDICTIONAL STATEMENT

The district court entered an *Order After Remand Denying Plaintiffs' Rule 60(b) Motion for Relief* on September 13, 2021 (the "Order After Remand"). A written notice of entry of the Order After Remand was filed on September 14, 2021. Plaintiffs filed their notice of appeal on October 11, 2021.

An order denying Rule 60(b) relief is appealable as a special order after final judgment under NRAP 3A(b)(8). Milton v. Gesler, 107 Nev. 767, 769 n.2, 819 P.2d 245, 246 n.2 (1991). To the extent that this appeal challenges the district court's prior orders and final judgment, the appeal is also authorized by NRAP 3A(b)(1).

ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court under NRAP 17(a)(12) because the case presents issues of statewide public importance involving clarification of the law dealing with sanctions imposed on clients due solely to the derelictions of counsel with a mental health disorder. Clients rely on their attorneys to guide them through the legal system. When those attorneys utterly fail to do so despite their repeated and fervent assurances, innocent clients are harmed, guilty defendants are absolved of liability, and the public's trust in the judicial system weakens. In addition, district courts do struggle to reconcile the extent of the recognized exceptions to the attorney-agency rule. The Supreme Court already considered and resolved the first appeal, obviously determining that the issues justified the Supreme Court retaining the case. The present appeal is no different. Review by the Supreme Court can clarify the effect and extent of the abandonment exclusion to the attorney-agency rule, which would provide district courts with important guidance.

STATEMENT OF ISSUES

1. Did the district court err in failing to find that Plaintiffs' prior counsel abandoned them?

2. Did the district court err in choosing to enforce case-terminating sanctions rather than awarding a lesser sanction that would address the actual degree of prejudice that Defendants suffered?

3. Did the district court err in failing to assess all of the pertinent factors set forth in Young v. Johnny Ribeiro Bld., 106 Nev. 88, 92-93, 787 P.2d 777, 780 (1990), such as whether sanctions unfairly operate to penalize a party for the misconduct of his attorney?

4. Did the district court err in excluding admissible evidence supporting relief under NRCP 60(b)(1)?

5. Did the district court err in allowing Respondents to include new arguments in their proposed order, despite this court's clear order expressly precluding new arguments on remand?

6. Did the district court err in otherwise denying Appellants' motion for relief under NRCP 60(b)(1)?

STATEMENT OF THE CASE

All of the Plaintiffs jointly filed a *Verified Complaint* on August 8, 2014, and then a *Verified First Amended Complaint* on January 21, 2015. (1 A.App. 1-2; 2 A.App. 232.) Due to attorney Moquin's failures, the district court entered an order granting Defendants' motion for sanctions on January 4, 2018. (13 A.App. 2917.) The district court then entered findings of fact and conclusions of law on March 6, 2018, dismissing all of the plaintiffs' claims with prejudice. (14 A.App. 2944-2976.)

The Willard plaintiffs filed the *Willard Plaintiffs' Rule 60(b) Motion for Relief* (the "Rule 60(b)(1) Motion") on the basis of excusable neglect. (14 A.App. 3024.) The district court denied the motion on November 30, 2018. (16 A.App. 3410.) Plaintiffs appealed.

Throughout the briefing on Plaintiffs' Rule 60(b)(1) Motion, Respondents primarily ignored the factors announced in Yochum. The district court adopted this position in its original *Order Denying Plaintiffs' Rule 60(b) Motion for Relief*, filed on November 30, 2018.

On August 6, 2020, however, a panel of this court entered an opinion reversing the dismissal and remanding for further proceedings. The opinion held that district courts must issue express factual findings pursuant to each of the Yochum factors. Willard, 136 Nev. at 468, 469 P.3d at 178.

Respondents sought rehearing, which was denied. Respondents then sought en banc reconsideration of the opinion, requesting "clarification from [the Nevada Supreme] 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." (Docket No. 77780, Pet. En Banc Recon., filed Dec. 1, 2020, at 17 n.4 (emphasis added).) This court denied en banc reconsideration, but concluded that "***neither party*** may present any new arguments or evidence on remand; the district court's consideration of the [Yochum factors] is limited to the record currently before the court." (Docket No. 77780, *Order Denying En Banc Reconsideration* at 1 (emphasis added).)

Despite this plain limitation, after the remand, Defendants submitted a new proposed order that included approximately 17 pages of entirely new arguments and analysis. Plaintiffs objected and noted that Defendants' submission violated this court's *Order Denying En Banc Reconsideration*. The district court then violated this court's remand limitation and incorporated the multiple new arguments and analysis that Defendants proposed. Those new findings not only disregarded this court's express limitations on the scope of the remand, but they also contradict the actual evidence and history of proceedings in this case. Accordingly, this appeal now follows.

STATEMENT OF FACTS

Background Regarding the Lease and Defendants' Breach[3]

On November 18, 2005, Plaintiffs entered into an agreement to purchase a gas station, car wash, and convenience store located on South Virginia Street in Reno (the "Virginia Property") for a total purchase price of $17,750,000. (14 A.App. 3044.) Out of their own funds, Plaintiffs paid a total of $4,668,738.49 in earnest money for the Virginia Property. (Id.) Plaintiffs then borrowed $13,250,000 from South Valley National Bank to pay the balance of the purchase price. (Id.) The purchase agreement contained a lease-back provision under which the seller or its assignee would lease the Virginia Property from Plaintiffs for 20 years at a base annual rental rate of $1,464,375 with the annual rent increasing by two percent per year. (Id.)

The seller's affiliate, Defendant BHI, became interested in leasing the property from Willard, and on December 2, 2005, BHI, Overland, and Willard entered into a lease agreement containing the lease-back provision mentioned above. (Id.) On February 21, 2006, BHI, Overland, and Willard entered into a subordination agreement which informed BHI that Willard was purchasing the Virginia Property

[3] To receive Rule 60(b)(1) relief, the moving party is no longer required to demonstrate a meritorious claim or defense. Nonetheless, the merits of this case underscore the need for relief. Therefore, Plaintiffs will briefly describe the merits of the case and then provide facts surrounding their experience with prior counsel and the resulting excusable neglect.

with bank financing. (Id.) In the agreement, BHI: (1) agreed not to terminate the lease without obtaining the bank's consent; and (2) acknowledged that the bank would not make the loan without the subordination agreement in place. (Id.) Accordingly, Defendants knew that breaching the lease would have devastating consequences on Plaintiffs. (See also 3 A.App. 504-505.)

On March 16, 2006, Willard refinanced the bank loan with Telesis Community Credit Union for a total loan amount of $13,312,500. (14 A.App. 3045.) Under this loan, Plaintiffs were required to pay $87,077.52 per month. (Id.) On February 17, 2007, BHI sent an offer letter to Willard and other landlords indicating that Herbst intended to acquire BHI's convenience store assets, which included the Virginia Property. (Id.) In the offer letter, Herbst offered to personally guarantee BHI's payments and performance under the lease. (Id.) Herbst materially supported the offer letter through representations that his net worth exceeded $200,000,000. (Id.) In reliance upon the Defendants' representations and Herbst's personal guarantees, Willard accepted Herbst's offer. (Id.)

Defendants operated the Terrible Herbst automotive service business and stayed current on their rent obligations to Plaintiffs until 2013. (Id.) On March 1, 2013, without any prior notice whatsoever, and without giving any reason, BHI defaulted on the lease by not sending the monthly rental payment. (Id.) On March 10, 2013, BHI's finance department disclosed to Willard that it would no longer pay

any rent. (Id.) On April 12, 2013, Defendants' lawyers sent a letter to Plaintiffs indicating that BHI did not intend to cure its breach and instead planned to vacate the property on April 30, 2013. (Id.) Once again, they failed to give any reason for their business decision to abandon the lease, other than the contention that BHI was losing money (which was not a legitimate basis for refusing to pay rent under the lease). (Id.) In other words, this was an intentional strategic breach meant only to save the Defendants money.

Under the lease, the rent was accelerated upon BHI's breach. (Id.) The amount owed, to date, exceeds $15,000,000. (Id.) Herbst personally guaranteed BHI's entire obligation under the lease. (Id.) Thus, all Defendants are liable for an amount in excess of $15,000,000. (Id.)

Despite Defendants' clear liability, Plaintiffs recognized they would have to mitigate their damages immediately. The Plaintiffs knew that because of their obligation to pay $87,077.52 per month, they could lose the Virginia Property due to BHI's sudden decision to breach the Lease and no longer pay the approximately $140,000 in rent that the Plaintiffs had been using to make payments on the loan. (14 A.App. 3046.) Willard coordinated with BHI to remain on the property until he could find a replacement tenant. (Id.) Willard entered into an interim agreement with BHI effective May 1, 2013, under which BHI agreed to continue active operations of the property. (Id.) This agreement did not excuse BHI's rent

obligations, but provided incentive for BHI to reduce its liability for damages while they attempted to locate a replacement tenant. (Id.)

Unfortunately, in late May 2013, Willard discovered that the property was not fully operational and was in total disarray. (Id.) On June 1, 2013, BHI vacated the property having paid no rent whatsoever since its sudden breach on March 1, 2013. (Id.) In other words, Defendants simply walked away from the lease without any legitimate reason. BHI never explained why it abandoned its obligations to the Plaintiffs and their property.

On June 14, 2013, Willard received a Notice of Intent to Foreclose from the loan servicing agent. (Id.) Following the breach, despite Willard's diligent efforts, he was unable to find a replacement tenant. (Id.) On February 14, 2014, Plaintiffs were forced to agree to a short sale of the property, wiping out their investment. (Id.)

Due to the Defendants' breach, Willard lost his investment, the stream of rental income of approximately $140,000 a month, and the property. (14 A.App. 3047; see also 3 A.App. 603.)

Willard's History with Prior Counsel

When BHI breached the lease, Willard faced losing his substantial income and his personal retirement funds. (14 A.App. 3047.) Willard is a senior citizen and was very much dependent on the income derived from the commercial property. (Id.) Willard's income not only provided for him, but also for his ex-wife and his elderly,

blind father (who has now passed away). (Id.) Willard now has only a social security income of $1,630 per month. (Id.)

To try to avoid financial ruin, Willard pursued a lawsuit against BHI and its guarantor, Jerry Herbst. (Id.) Willard was living in California at the time and originally retained an attorney there named Steven Goldblatt. (Id.) Goldblatt filed the case in California, and then had to withdraw because of a serious car accident. (Id.) Willard was thus forced to find another attorney to take his case and file it in the correct jurisdiction. (Id.) Plaintiffs were directed to another California attorney, Brian Moquin. (Id.)

Upon reviewing Moquin's professional status and speaking to other people, Willard had every reason to believe that Moquin was qualified and would take this case very seriously. (Id.) Because of Willard's lack of income, Moquin agreed to take the case on a contingency fee. (14 A.App. 3048.)

On August 8, 2014, Willard and Overland, along with co-plaintiffs Edward and Judith Wooley, commenced the Nevada action against Herbst and BHI.[4] (1 A.App. 1.) At the onset, Moquin was busy cleaning up and assimilating the original lawsuit that the previous attorney had incorrectly filed in California, filing this current case in Reno, and subsequently amending the complaint in this case. (14 A.App. 3048.) Throughout 2015 and 2016, Willard believed Moquin was quite

[4] The Wooley plaintiffs never appealed the orders entered against them.

busy dealing with discovery demands, interrogatories, legal research, and other litigation efforts. (Id.)

After some time, Willard realized that Moquin was having financial difficulties. (Id.) However, Moquin continued moving forward with this case, until some point in mid-to-late 2017. (Id.) As it turned out, Moquin was dealing with more than just financial problems. (Id.) Willard discovered that as much as Moquin wanted to respond to deadlines in a timely fashion, Moquin was dealing with mental health issues beyond his control. (Id.) Willard also discovered that Moquin was struggling with a constant marital conflict that greatly interfered with his work. (Id.) In addition, Moquin was suffering from bipolar disorder. (14 A.App. 3049; see also 14 A.App. 3112.)

Moquin's disorder is both severe and debilitating. (14 A.App. 3049.) Symptoms of Moquin's disorder manifest as apathy, an inability to concentrate, difficulty making decisions, an inability to accomplish tasks, missed work, lack of energy, and depressed mood. (Id.)

Willard now realizes that while Moquin was assuring Willard that Moquin was working on the case, he was missing deadlines and failing to properly pursue the case.[5] (Id.)

[5] In fact, Moquin's inability to meet deadlines and to comply with litigation obligations had become well known to defense counsel and the district court as early as May 2015. This was established in defense counsel's motion seeking a contempt

Moquin was not always responsive, but after Willard's total income was dissipated from Defendants' breach, Willard felt that his only option was to rely on Moquin. (14 A.App. 3050.) In addition, Moquin repeatedly assured Willard that he would prevail and that the case was proceeding fine. (Id.; 15 A.App. 3302-3303.)

For his part, Willard made ongoing efforts on an almost daily basis to push the case forward, provide Moquin with what he needed, and to pursue the case. (14 A.App. 3050.) Willard was devastated to realize that Moquin had not been able to file timely oppositions and had failed to comply with various discovery rules. (Id.) Moquin would continually provide anticipated completion dates of various documents, but then change those anticipated dates. (Id.) Moquin would alternate between cycles of optimism (mania) and then days when he would not respond at all (depression). (Id.)

Moquin's court records reveal disastrous personal problems that clearly affected his ability to practice and his overall stability. In a Request for Domestic

---

finding and sanctions based upon attorney Moquin's litigation failures. (2 A.App. 308-382.) Defense counsel's motion asserted "Moquin's dilatory conduct" (2 A.App. 309) and Moquin's failure to provide documents by dates he had promised. (2 A.App. 311.) The motion asserted that one witness's failure to comply with a subpoena was "attributable to Mr. Moquin" (2 A.App. 312); that Moquin's false assurances regarding the litigation "have become a pattern" (id.); and that Moquin had made numerous somewhat far-fetched excuses for his failures to comply with discovery requirements. (2 A.App. 312-313.) Defense counsel's 2015 contempt motion placed the blame entirely on Moquin, without even a whisper that Larry Willard knew of or was somehow responsible for Moquin's litigation failures.

Violence Restraining Order, which is signed under penalty of perjury, Moquin's wife, Natasha Moquin, confirms that Moquin "was recently diagnosed with Bipolar disorder, has been paranoid and violent," and that Mrs. Moquin is concerned about triggering a psychotic reaction. (14 A.App. 3110.)

Prior to filing for divorce, Natasha Moquin had already received an Emergency Protective Order against Moquin. (14 A.App. 3100; see also 14 A.App. 3112.) Moquin was even arrested pursuant to that Emergency Protective Order on January 23, 2018. (14 A.App. 3103; see also 15 A.App. 3305.)

Plaintiffs did not discover Moquin's mental illness until January 2018, when it was too late. (14 A.App. 3050; see also 15 A.App. 3305.) Upon discovering these facts, it became clear that the history of Moquin's failures began much earlier than the Plaintiffs initially realized. (14 A.App. 3050.)

Moquin's Failures and the Sanctions Orders

On December 2, 2016, Plaintiffs had disclosed Daniel Gluhaich as an un-retained expert witness pursuant to NRCP 16.1(a)(2). (9 A.App. 1911.) On February 9, 2017, the parties signed and submitted a proposed *Stipulation and Order to Continue Trial (Third Request)*, which included an agreement that Plaintiffs would serve Defendants with an updated initial expert disclosure for Mr. Gluhaich. (7 A.App. 1480-1485.) On February 9, 2017, the district court approved and filed that stipulation and order to continue trial. (7 A.App. 1486-1487.)

On May 30, 2017, the district court entered an *Order Granting Partial Summary Judgment in Favor of Defendants*, which denied Plaintiffs' claims for certain damages and further ordered Plaintiffs to serve an updated NRCP 16.1 damage disclosure. (7 A.App. 1489.)

On October 18, 2017, the Plaintiffs filed a *Motion for Summary Judgment of Plaintiffs Larry J. Willard and Overland Development Corporation*, which contained a detailed description of the damages they were seeking. (7 A.App. 1595-1600; see also 7 A.App. 1568-1570.) These damages included previously-disclosed rent damages and also damages for diminution in value and other categories of damages. (Id.) Some of these claimed damages were based upon the opinions of Gluhaich. (7 A.App. 1598-1599.)

On November 13, 2017, Defendants filed *Defendants'/Counterclaimants' Opposition to Larry Willard and Overland Development Corporation's Motion for Summary Judgment*. (8 A.App. 1616.) The next day, on November 14, 2017, Defendants filed a *Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich*, and a separate motion seeking permission for that motion to exceed the district court's page limits. (10 A.App. 2113; see also 13 A.App. 2923; 15 A.App. 3254.) Obviously sensing Moquin's inadequacies, the following day, on November 15, 2017, Defendants inundated Moquin by filing three more motions: *Defendants' Motion for Partial Summary Judgment*; *Defendants/*

Counterclaimants' Motion to Exceed Page Limit on Defendants/Counterclaimants' Motion for Sanctions; and *Defendants/Counterclaimants' Motion for Sanctions*. (See 10 A.App. 2212; 11 A.App. 2353; see also 13 A.App. 2918; 15 A.App. 3255.)

On December 6, Plaintiffs filed a *Request for a Brief Extension of Time to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for Submission of Dispositive Motions*. (13 A.App. 2900.)

On December 12, 2017, the attorneys appeared for a pre-trial conference. In that conference, they discussed the pending motions and Moquin's failure to file oppositions. (18 A.App. 3943-3969.) Moquin represented to the district court that on the day the oppositions were due he had computer problems and lost all of his work. (18 A.App. 3956-3957.) Moquin requested additional time to respond in light of these circumstances. (18 A.App. 3957.) Ultimately, the district court granted Moquin a few more days, until December 18, 2017, in which to file oppositions to the Defendants' pending motions. (18 A.App. 3961.) Each party was represented by counsel, but Larry Willard and the other parties were not actually present at this conference. (18 A.App. 3944-3945.)

Moquin never filed the oppositions in the time allowed. In fact, Moquin never filed another document in this case.

During that month of December, Willard attempted to communicate with Moquin on a daily basis, yet Moquin was highly unresponsive, and when he did

respond, he would falsely assure Willard that everything was going fine. (15 A.App. 3303.) On January 4, 2018, the district court entered three orders. One of those orders granted *Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* pursuant to DCR 13(3). (13 A.App. 2922-2926.) A separate order granted *Defendants'/ Counterclaimants' Motion for Sanctions* pursuant to DCR 13(3). (13 A.App. 2917-2921.) A third order noted Plaintiffs' failure to respond, but found that *Defendants'/Counterclaimants' Motion for Summary Judgment* is moot. (14 A.App. 2927.)

Defendants prepared and proposed Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions. (14 A.App. 2944, 2976.) Moquin did not object to those proposed findings. On March 6, 2018, pursuant to WDCR 9 and DCR 13(3), the district court entered the proposed *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions*. (Id.)

On March 15, 2018, Reno local attorney David O'Mara filed a *Notice of Withdrawal of Local Counsel*, in which he explained:

> Counsel has had no contact with lead counsel Mr. Moquin for many months with a total failure just prior to the Court's first decisions being filed in this case. Mr. Moquin was unresponsive during the time in which this Court was deciding the pending motions, even after counsel begged him for a response to be filed with the Court and was told he would provide such response.

(14 A.App. 2999.)

Moquin's Refusal to Cooperate with Willard and New Counsel

In January 2018, Moquin was arrested related to charges of domestic violence. (14 A.App. 3103; see also 15 A.App. 3305.) Plaintiffs began looking for a new lawyer. (15 A.App. 3305.)

Around that same time, Moquin explained to Willard that he had bipolar disorder and that he needed money to pay Dr. Douglas Mar for treatment. (Id.) After obtaining a loan from a friend, Willard arranged to pay Dr. Mar for his services. (Id.)

On March 13, 2018, Willard paid Dr. Mar's office $470 for Moquin's treatment so that Moquin could get well and help new counsel fix the case. (Id.; see also 15 A.App. 3326.)

Moquin was, in part, supposed to obtain a letter from Dr. Mar evidencing his diagnosis and treatment. (15 A.App. 3305.) Despite paying for Moquin's treatment, and despite numerous requests from Willard and the new attorneys, Moquin repeatedly failed to provide Plaintiffs with the promised letter from Dr. Mar. (Id.)

In fact, new counsel repeatedly requested Moquin to comply with ethical obligations by providing his files and other important information. (Id.; see also 15 A.App. 3328-3331.)

Willard and his new lawyers repeatedly asked Moquin to provide a summary of the case, documents regarding his mental illness, and his case files. (15 A.App. 3305.) From January through March, 2018, Moquin repeatedly assured Willard that

he would provide him with all of the information that his new attorneys needed to reinstate the case. (Id.)

On March 30, 2018, Moquin specifically promised Willard that Moquin will "get everything out the door before I leave today." (Id.) In response, Willard asked if he had obtained the requested documentation from Dr. Mar, and Moquin told Willard that he was playing phone tag with a person in Dr. Mar's office. (Id.) Willard then sent text messages on March 31, April 1, and April 2 desperately urging Moquin to provide the new attorneys with everything they needed to reinstate this case. (15 A.App. 3306.)

Moquin then responded with an alarming rant, which included the following: "I'm not sure what part of '[expletive] off' you don't understand, but it is in your best interest to stop communicating with me at this point until I contact you." (Id.; see also 15 A.App. 3334-3338.)

Moquin's abusive and threatening language is *just one* example of the abusive treatment Willard received from Moquin. (15 A.App. 3306.)

In early April 2018, Plaintiffs' new lawyers repeatedly asked Moquin for the various documents that he had still not provided. (Id.; see also 15 A.App. 3340-3343.)

Finally, exasperated with Moquin and his failure to cooperate and to provide the documents that he promised he would provide to fix the problems that he created,

Willard and new counsel finally felt that they had no choice but to move forward without the documents that Moquin had promised. (15 A.App. 3306.) Therefore, on April 18, 2018, Willard filed the Rule 60(b)(1) Motion. (14 A.App. 3024.)

Moquin never gave new counsel his complete files. (15 A.App. 3306.) In addition to the numerous emails requesting the files, on May 14, 2018, new attorney Williamson sent Moquin a formal demand for the Plaintiffs' client files. (Id.; see also 15 A.App. 3345-3346.)

On Wednesday, May 23, 2018, Willard again wrote to Moquin, begging him to provide: (1) a diagnosis letter from Dr. Mar; (2) evidence Moquin claimed to possess to prove that he timely disclosed the damage calculations; and (3) an affidavit from Moquin explaining his personal situation and how it impacted his performance in this case. (15 A.App. 3306.) Moquin responded by claiming that he intended to provide all of the information Plaintiffs needed, but that he could not get to it until that weekend because he had a hearing in his criminal case on Thursday, May 24, 2018. (Id.) Moquin assured Willard that he should be able to provide an affidavit and supporting exhibits that weekend. (Id.)

When Willard tried to follow-up later that week, however, Moquin threatened Willard by stating that if Willard tried to communicate again before Moquin had provided the documents, that *Willard would never receive them*. (15 A.App. 3307.) By the afternoon of Monday, May 28, 2018, however, Moquin still had not provided

the documents. (Id.; 15 A.App. 3348.) Therefore, Willard wrote to him again asking for the required documents. (15 A.App. 3348.) Moquin quoted his previous threat and responded as follows: "'Communicate in ANY WAY with me again before I have sent you the declaration and supporting exhibits and you will receive neither.' ***So be it***." (Id. (emphasis added).)

Moquin never provided the promised affidavit, the letter from Dr. Mar, other supporting exhibits, and damages disclosure information. Moquin never even provided the Plaintiffs' client files. (15 A.App. 3307.)

On May 29, 2018, new counsel filed the Rule 60(b)(1) reply brief. (15 A.App. 3291.) On November 30, 2018, the district court entered an *Order Denying Plaintiffs' Rule 60(b) Motion*. (16 A.App. 3410.)

First Appeal and Remand

Plaintiffs timely appealed that first order denying Rule 60(b)(1) relief. On August 6, 2020, this court entered its opinion reversing the district court's order denying relief. Willard, 136 Nev. at 468, 469 P.3d at 178. Defendants sought rehearing, which was denied. Defendants then sought en banc reconsideration. On February 23, 2021, this court entered an *Order Denying En Banc Reconsideration*. In that order, this court ruled that "neither party may present any new arguments or evidence on remand; the district court's consideration of the [Yochum factors] is limited to the record currently before the court."

Importantly, the Plaintiffs had been the only ones to substantively analyze the Yochum factors prior to the remand. Therefore, on remand, Plaintiffs referred the district court to the parties' prior briefing on the issue. (17 A.App. 3643.)

Moreover, at a status conference on April 21, 2021, Plaintiffs again explained that the district court was limited to the previous argument and analysis regarding the Yochum factors (as mandated by this court's order denying en banc reconsideration) and only the Plaintiffs had provided any substantive analysis on those factors. (18 A.App. 3992, 3997-3998.) In response, the district court required the parties to "provide a proposed order supporting your position with citations to the record." (18 A.App. 4003.) After Defendants requested additional time to prepare their proposed order, the district court granted that request and explained, "I'm happy to give you whatever time you need. . . . I want it done well. I'm less concerned with it being done in a short time as I'm more concerned with it being done well." (18 A.App. 4005.)

Ultimately, Defendants submitted a proposed order that violated this court's February 23, 2021 order and included approximately 17 pages of entirely new arguments and analysis. (17 A.App. 3689-3706.) Plaintiffs objected and informed the district court that Defendants' proposed order violated this court's order. (17 A.App. 3715-3722.) Amazingly, the district court overruled Plaintiffs' objection and proceeded to enter its Order After Remand, which violated this court's

February 23, 2021 order and incorporated the new arguments and analysis that Respondents proposed. (17 A.App. 3743-3748; 17 A.App. 3750, 3769-3786.) This appeal followed.

REQUEST FOR JUDICIAL NOTICE

In this court's previous opinion in this case, the court noted the fact that Moquin's conduct had resulted in disciplinary action against him, including an injunction against practicing law in Nevada, and the court cited its own disciplinary docket, No. 78946. Willard, 136 Nev. at 468 n.3, 469 P.3d at 178 n.3. Plaintiffs hereby request the court to again take judicial notice of its own docket No. 78946, which consists of the disciplinary proceedings against Moquin arising out of his representation of Plaintiffs in this case. Under NRS 47.130 and NRS 47.150, this court may take judicial notice of facts that are capable of verification from a reliable source, or where the facts are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

This court will invoke judicial notice to take cognizance of the record in another case, particularly where there is a close relationship between the two cases. See Mack v. Estate of Mack, 125 Nev. 80, 91-92, 206 P.3d 98, 106 (2009) (finding close relationship between murder case and deceased victim's estate case, and therefore taking judicial notice of outcome of murder trial). In Cannon v. Taylor, 88 Nev. 89, 92, 493 P.2d 1313, 1314 (1972), this court took judicial notice of a related

matter that involved "an incontrovertible fact, verifiable from records in the building where we sit." In the present case, Plaintiffs are requesting judicial notice of Moquin's disciplinary docket with this very court.

A court may take judicial notice of an attorney discipline case that is related to the pending case. For example, in the recent case of Kinder v. Legrand, No. 3:16-CV-0449-MMD-CBC, 2019 WL 2450922 (D. Nev. June 12, 2019), a criminal defendant's appeal was decided by the Nevada Supreme Court, but his attorney never advised him of the decision. In a subsequent federal habeas corpus petition, the federal court held that the statute of limitations was equitably tolled because of the attorney's abandonment of the defendant. Id. In so holding, the federal court took judicial notice of public records of the State Bar of Nevada, showing that the attorney had been disbarred. Id. The court noted that disciplinary records are accessible to the public, and that a court may take judicial notice of the State Bar's records of disciplinary action. Id.

This court's docket No. 78946 shows that on April 16, 2019, Moquin entered a conditional guilty plea arising out of his representation of Willard in the present case. Moquin pleaded guilty to violations involving diligence, communications, and obligations involving terminating representation. The guilty plea recites that for more than two years Moquin failed to comply with discovery requirements and court

orders; he evaded local counsel's efforts to obtain compliance; and Willard did not understand the consequences of Moquin's derelictions.

The guilty plea in the disciplinary docket also shows that Moquin stated that he had been diagnosed with bipolar disorder, and he had been arrested in California on charges of domestic violence. He also admitted that he falsely told Willard's new counsel, multiple times, that he would cooperate and provide necessary information for new counsel's effort to obtain relief under NRCP 60, but he never provided the information. The guilty plea establishes that Willard and the other Plaintiffs were injured by Moquin's violations of ethical requirements, because "the lawsuit dragged on for over four years and the client's claims were ultimately dismissed with prejudice based upon a sanction motion that [Moquin] failed to oppose."

The disciplinary docket also contains the State Bar's findings and conclusions, which recite clear and convincing evidence of Moquin's multiple and repeated violations of ethical requirements that lead to dismissal of Willard's case. Among other sanctions, the State Bar recommended a two-year injunction against Moquin practicing law in Nevada.

On October 21, 2019, this court entered an *Order Approving Conditional Guilty Plea Agreement and Enjoining Attorney from Practicing Law in Nevada*. In that order, the court confirmed:

> Moquin failed to adequately communicate with the client about the status of the case and after the client retained new counsel to pursue a

> motion for relief from the judgment, Moquin failed to provide new counsel with the client file and other documents that he had agreed to provide, which may have supported setting aside the judgment.

In fact, Justices Hardesty, Parraguirre and Silver issued a lengthy dissenting opinion, arguing that a two-year suspension was grossly insufficient in light of the severe harm Moquin caused the Willard Plaintiffs.[6]

Attorney Moquin's disciplinary file is closely and entirely related to this appeal. Accordingly, this court should take judicial notice of the contents of docket No. 78946, including the court's own decision.

SUMMARY OF ARGUMENTS

There are several compelling reasons for reversal of the district court's refusal to grant Rule 60(b)(1) relief. First, the district court erred by failing to recognize that Moquin abandoned the Plaintiffs. Second, the district court applied a sanction against the Willard Plaintiffs that was not proportional to Moquin's failures due to his mental illness and abandonment of the clients. Third, the district court, in assessing case-terminating sanctions, did not consider the factor most relevant and applicable to this case: whether sanctions unfairly operate to penalize a party for the misconduct of his attorney. Fourth, the district court erred by excluding admissible

[6] The dissent excoriated Moquin, finding (among other things) that "he failed to meaningfully respond to the client's numerous requests for his file and other documents that Moquin had agreed to provide to assist the client in salvaging the case." Matter of Moquin, Case No. 78946, Order at 5 (Oct. 21, 2019).

evidence demonstrating Moquin's undeniable mental illness and personal problems. Finally, the district court erred by accepting the Respondents' new-found arguments and analysis on the Yochum factors, despite that those arguments are contrary to the record and were offered in violation of this court's clear limitations on remand.

STANDARD OF REVIEW

This appeal involves the district court's denial of Plaintiffs' Rule 60(b)(1) Motion. As such, it is usually subject to review for abuse of discretion. Bonnell v. Lawrence, 128 Nev. 394, 400, 282 P.3d 712, 716 (2012). However, when the sanction imposed is dismissal with prejudice, *a heightened standard of review applies*. Young, 106 Nev. at 92, 787 P.2d at 779. The discretion available under Rule 60(b) "is a legal discretion and cannot be sustained where there is no competent evidence to justify the court's action." Cook v. Cook, 112 Nev. 179, 182, 912 P.2d 264, 265 (1996).

Additionally, this court reviews *de novo* a district court's legal conclusions, including the interpretation of court rules. Casey v. Wells Fargo Bank, N.A., 128 Nev. 713, 715, 290 P.3d 265, 267 (2012). *De novo* review is appropriate for issues involving interpretation of NRCP 60(b)(1). Ford v. Branch Banking & Tr. Co., 131 Nev. 526, 528, 353 P.3d 1200, 1202 (2015).

The court generally reviews evidentiary rulings for an abuse of discretion, but a district court abuses its discretion occurs if its "decision is arbitrary or capricious

or if it exceeds the bounds of law or reason." Pundyk v. State, 136 Nev. 373, 375, 467 P.3d 605, 607 (2020) (quoting Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)). Legal errors and findings so conclusory that they may mask legal errors are also not entitled to any deference. Davis v. Ewalefo, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015). "A district court by definition abuses its discretion when it makes an error of law." Koon v. United States, 518 U.S. 81, 100 (1996); accord Willard, 136 Nev. at 469, 469 P.3d at 179 (a district court abuses discretion "when it disregards established legal principles").

This appeal also involves application of the mandate rule, which requires a district court to effectuate a higher court's ruling on remand. Estate of Adams v. Fallini, 132 Nev. 814, 819, 386 P.3d 621, 624 (2016). This issue is reviewed de novo. Id.

ARGUMENT[7]

A. The District Court Erred in Failing to Recognize that Moquin Abandoned the Plaintiffs

Moquin's mental illness and abandonment demonstrate clear excusable neglect. Under Nevada law, where an attorney's mental illness causes procedural

[7] Many of the following contentions were raised in Plaintiffs' opening brief in the prior appeal, docket No. 77780. This court reversed and remanded due to the district court's failure to address the Yochum factors. Accordingly, this court declined to consider Plaintiffs' additional contentions at that time. Willard, 136 Nev. at 471 n.7,

harm to his client, NRCP 60(b)(1) justifies granting relief to the client. See Passarelli v. J. Mar Dev., 102 Nev. 283, 286, 720 P.2d 1221, 1224 (1986) (noting that it would be unfair to impute the attorney's conduct to the client and deprive the client of a "full trial on the merits."). Other courts agree. See, e.g., United States v. Cirami, 563 F.2d 26, 34 (2d Cir. 1977) (where a psychological disorder led a party's attorney to neglect his clients' business while at the same time assuring them that he was attending to it, Rule 60(b) relief is appropriate); Boehner v. Heise, No. 03 Civ. 05453 (THK), 2009 WL 1360975, at *9 (S.D.N.Y. May 14, 2009) (counsel's psychological disorder justified relief under Rule 60(b)); Cobos v. Adelphi Univ., 179 F.R.D. 381, 388 (E.D.N.Y. 1998) (where an attorney's mishandling of a movant's case stems from the attorney's mental illness, extraordinary circumstances may justify relief).

As the facts and evidence demonstrate, Moquin was suffering from a psychological disorder that caused him to abandon the case. Accordingly, the court should find excusable neglect and grant the Plaintiffs relief from the district court's orders disposing of their claims.

The district court's Order After Remand claims that the facts of the case do not demonstrate "excusable neglect" because under Huckabay Props. v. NC Auto Parts, 130 Nev. 196, 322 P.3d 429 (2014), the only exceptions that matter are a

469 P.3d at 180, n.7. Because the district court denied relief on remand, Plaintiffs' additional contentions are again ripe for this court's consideration in this appeal.

lawyer's addictive disorder, abandonment of his legal practice, or criminal conduct victimizing the client. (17 A.App. 3787.) The district court concluded that these factors did not apply to this case. (Id.) This was error for several reasons. First, it is beyond argument that an "addictive disorder" constitutes a form of mental illness. Accordingly, it is inequitable and illogical to allow one form of mental illness to serve as an exception, while refusing to grant relief for Moquin's bipolar disorder. In fact, the Passarelli court made no distinction. Rather, it held:

> Counsel's failure to meet his professional obligations constitutes excusable neglect. The disintegration of this attorney and his law practice was the result of a recognized psychiatric disorder. **Passarelli was effectually and unknowingly deprived of legal representation. It would be unfair to impute such conduct to Passarelli and thereby deprive him of a full trial on the merits**.

Passarelli, 102 Nev. at 286, 720 P.2d at 1224 (emphasis added; citation omitted).

Second, the record demonstrates that Moquin *unequivocally* abandoned the Plaintiffs. Facts establishing Moquin's abandonment of his clients are recited in detail in this court's disciplinary order in No. 78946, including the dissent's recitation of facts and the observation that "the injury to Moquin's client [Willard] was serious." Docket No. 78946, Order at 6. Quite remarkably, the district court took an extremely narrow view of abandonment, concluding that there is "no evidence of missed meetings or absences from the office" or that he closed his law practice. (17 A.App. 3787-3788.) Yet, the evidence demonstrates that Moquin could not function and oppose dispositive motions, which is significantly worse than

missing meetings or being absent from the office. (E.g., 13 A.App. 2918-2919; 13 A.App. 2923-2924; 14 A.App. 2928-2929; 14 A.App. 2999; 15 A.App. 3303-3304.) The record also reflects that Moquin was often unresponsive to his clients' calls, texts, and emails, and when Moquin did respond, he simply made assurances that he would get work done that he never did. (14 A.App. 2999; 15 A.App. 3303-3307; 15 A.App. 3309-3311; 15 A.App. 3313-3314; 15 A.App. 3316-3324; 15 A.App. 3333.) In addition, Moquin's behavior from January through April 2018 shows that the abandonment continued when he *refused* to help Willard or new counsel by providing any affidavit, health report, or even the Plaintiffs' client files – again despite promising to do so. (15 A.App. 3305-3307; 15 A.App. 3328-3331; 15 A.App. 3333-3338; 15 A.App. 3340-3343; 15 A.App. 3345-3346; 15 A.App. 3348-3349.) Ultimately, Moquin told Willard he would get nothing from him. (15 A.App. 3348; see also 15 A.App. 3307.)

Certainly, abandonment is not limited to closing one's law practice. It also includes abandoning a specific case or client. Moquin constructively closed his law practice to the Plaintiffs by taking these actions. A distinction should not be made between formally closing the doors of one's office and effectively closing one's practice with respect to a particular client. As this court has already recognized, it occurs whenever a client is "effectually and unknowingly deprived of legal representation." Passarelli, 102 Nev. at 286, 720 P.2d at 1224.

As the evidence demonstrates, Moquin was recalcitrant. He destroyed Willard's life and has shown no sympathy about it whatsoever. Willard should not be punished again simply because Moquin had not voluntarily gone on disability inactive status or formally closed his law practice. Had Moquin actually done so, the Plaintiffs would not have been blind-sided by his eventual abandonment.

In fact, Moquin's refusal to cooperate after admitting he is bipolar, not trying to mitigate his harm, not placing himself on disability status, and not properly closing his practice shows that the facts of this case are egregiously worse than what happened in Passarelli.

The district court claimed there was no abandonment because the Plaintiffs: knew there were filing deadlines, communicated with Moquin about those deadlines, continued to rely on Moquin, and were supposedly given notice of the seriousness of the situation. (17 A.App. 3775.)

The district court's analysis here misses the point. Plaintiffs' knowledge of filing deadlines and communication about those deadlines simply shows the Plaintiffs' diligence in trying to prosecute the case. If anything, it demonstrates Moquin's abandonment since he failed to file oppositions after assuring the Plaintiffs that he would.

With respect to the Plaintiffs continuing to rely on Moquin for a few weeks after he failed to oppose the motions, this is a hollow point. Even through Christmas,

Willard was desperately trying to get Moquin to file oppositions – and Moquin was the only attorney with deep knowledge of the case who could do so. Again, Moquin failed to follow through, which also shows clear abandonment. Finally, the claim that the Plaintiffs were given notice of how serious the situation was is mistaken. The Plaintiffs were not at the December 12, 2017 hearing where the district court issued that warning.

Next, the district court states that Moquin did not abandon the Plaintiffs because he appeared at status hearings, participated in depositions, filed motions and other papers, participated in oral arguments, and filed summary judgment motions. (17 A.App. 3789.)

The district court's findings, however, are contrary to this court's disciplinary order and do not preclude a finding of abandonment. Abandonment can happen at any time. Simply because Moquin attended depositions and filed motions before December 2017 is not relevant to what happened in December 2017 and afterwards. Indeed, Moquin did not even file replies to his summary judgment motions and never submitted them for decision, which is consistent with his failure to oppose the dispositive motions. As those facts collectively show, Moquin was performing and then suddenly stopped without notice. This is abandonment. See, e.g., Maples v. Thomas, 565 U.S. 266, 282 (2012) ("Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating

as his agent in any meaningful sense of that word." (internal citations omitted)); see also Boehner, 2009 WL 1360975, at *3-6 (attorney's ability to take a separate case to trial did not preclude relief and a finding that attorney constructively abandoned his client in another case).

The district court also made the inaccurate finding that the Plaintiffs knew of Moquin's psychiatric problems before the district court's January 4, 2018 orders and yet still allowed Moquin to represent them. (17 A.App. 3790.) This finding is unsupported by any evidence and is contradicted by the record. (See, e.g., 15 A.App. 3305.)

Plaintiffs did not learn of Moquin's diagnosis until January 2018. (15 A.App. 3305.) Prior to that, they justifiably relied on Moquin's assurances. (15 A.App. 3302.) The record shows that Willard texted and emailed daily on the progress of the oppositions, and through Christmas 2017, was still assured by Moquin that he would file the oppositions. (15 A.App. 3303-3304; 15 A.App. 3309-3311; 15 A.App. 3316-3324.) Further, when the Plaintiffs did discover Moquin's failures, they located and retained substitute counsel *just a few weeks later*. (15 A.App. 3304-3305.) As such, the Plaintiffs were extremely diligent in attempting to address Moquin's abandonment as soon as they discovered it.

Consistent with this court's holding in Passarelli, Moquin abandoned the Plaintiffs when he and his practice disintegrated, and the Plaintiffs were "effectually

and unknowingly deprived of legal representation." Passarelli, 102 Nev. at 286, 720 P.2d at 1224. Therefore, the district court erred in failing to recognize that Moquin's conduct constituted constructive abandonment and justifies Rule 60(b)(1) relief.

B. Plaintiffs Are Entitled to Relief Because the District Court Erred in Choosing to Impose Case-Terminating Sanctions Rather than Awarding a Lesser Sanction More Proportional to Any Actual Harm to Defendants

On March 6, 2018, the district court entered its sanctions order, the substance of which Plaintiffs challenged in their motion for Rule 60(b)(1) relief. The sanctions order dismissed Plaintiffs' claims with prejudice, and it was therefore a case-terminating sanction. "'Because dismissal with prejudice is the most severe sanction that a court may apply . . . its use must be tempered by a *careful* exercise of judicial discretion.'" Hunter v. Gang, 123 Nev. 249, 260, 377 P.3d 448, 455-56 (Nev. Ct. App. 2016) (internal citations omitted) (emphasis in original). Further, a heightened standard of review applies to case-terminating sanctions. Young, 106 Nev. at 92-93, 787 P.2d at 780.

The district court entered a case-terminating sanction because of attorney Moquin's failure to comply with discovery rules and the district court's orders. (14 A.App. 2945.) Moquin's failure to respond deprived Plaintiffs of any opportunity to explain their position. Moreover, at the time, neither the parties nor the district court knew that these failures were caused by Moquin's psychological

condition. When these facts are applied to the sanctions analysis required under Young, it becomes clear that Plaintiffs should receive relief from the sanctions orders.

In Young, this court identified some of the factors a district court should consider when considering dismissal with prejudice:

> The factors a court may properly consider include, but are not limited to, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, the policy favoring adjudication on the merits, **whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney**, and the need to deter both the parties and future litigants from similar abuses.

Young, 106 Nev. at 92-93, 787 P.2d at 780 (emphasis added).

i. Moquin's Inability to Comply with the Discovery Rules and District Court Orders Was Not Willful – and Plaintiffs Certainly Did Not Act Willfully in Any Way

"Sanctions may only be imposed where there has been willful noncompliance with a court order . . . ." GNLV Corp. v. Serv. Control Corp., 111 Nev. 866, 869, 900 P.2d 323 (1995). Defendants assumed Plaintiffs were engaged in willful misconduct, and even argued that Plaintiffs engaged in a bad faith attempt to sabotage them. (See 11 A.App. 2374, 2378.)

As this court can see, these allegations turned out to be untrue. Plaintiffs did not engage in any willful misconduct. Instead, Plaintiffs' failures are solely the result of Moquin's mental illness and other serious personal problems. Any other conclusion is belied by the factual evidence submitted in support of the Rule 60(b)(1) Motion and by plain reason. In light of what happened in this case, it strains credulity to conclude that Moquin was acting to strategically ambush the Defendants when he could not even oppose motions or timely file a request for submission of his own motions. There was no evidence to establish that Moquin or the Plaintiffs acted willfully or strategically.

Because there were no willful violations of orders or rules in this case, the district court should have granted Plaintiffs relief under Rule 60(b)(1).

ii. Defendants' Prejudice, if Any, Was Much More Limited Than They Claimed

Moquin's failures caused some delay and minor prejudice. However, delay alone is not generally considered substantial prejudice. Lemoge v. United States, 587 F.3d 1188, 1196 (9th Cir. 2009) ("[p]rejudice requires greater harm than simply that relief would delay resolution of the case."). Discovery was closed at the time that the district court entered case-terminating sanctions. The case could have – and should have – proceeded to trial. Plaintiffs had already produced all of their relevant documents. (3 A.App. 507.) Defendants had already prevailed on one motion for

partial summary judgment, and, more importantly, acknowledged that they had been able to prepare defenses to Plaintiffs' rent damages, which exceed $15,000,000. (Compare 11 A.App. 2369 with 11 A.App. 2371; see also 3 A.App. 603.) Thus, if the district court had granted the Rule 60(b)(1) Motion, trial could have been scheduled quickly and merely excluded the new damage claims.

Indeed, the crux of Defendants' purported prejudice relates to Moquin's claim for "diminution in value" damages and reliance upon an inadequately-disclosed expert. Thus, a more proportional sanction due to Moquin's mental illness should focus on the "diminution of value" claim. See, e.g., Young, 106 Nev. at 92, 787 P.2d at 779-80 ("fundamental notions of due process require that the discovery sanctions for discovery abuses be just and that the sanctions relate to the claims which were at issue in the discovery order which is violated.").

iii. Dismissal Was Too Severe of a Sanction

Dismissal of Plaintiffs' case with prejudice was too severe of a sanction. As the record demonstrates, the Defendants' deliberate breach of their commercial lease financially destroyed Willard. This case presents the only chance he has at his age to recover any financial compensation and live out his remaining years with some financial stability. If the Defendants face no responsibility for their intentional and unexcused breaches, and are absolved from liability due to Moquin's conduct, they will ultimately receive a windfall in excess of $15,000,000, all resulting from an

attorney's personal and mental problems. Conversely, Willard – through no fault of his own – will be left in financial ruin.

As noted above, Plaintiffs' failures were not willful. Indeed, under Nevada law, they constituted excusable neglect. Thus, the dismissal sanction was clearly too severe.

Finally, there is no question that sanctions serve no deterrent purpose when the cause of a litigant's failures was the mental illness of his attorney.

C. The District Court Erred by Not Considering Whether Sanctions Unfairly Operated to Penalize Plaintiffs for Their Attorney's Misconduct

Without relief, Plaintiffs are unfairly penalized by Moquin's illness-induced conduct. Moquin repeatedly assured Willard that the case was proceeding fine. It was only in late 2017 / early 2018 that it became clear to Willard that something was terribly wrong, and that Moquin was suffering from mental illness.

Under Young, a district court must consider "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." 106 Nev. at 93, 787 P.2d at 780. In its Order After Remand, the district court contended that the consideration of the Young factors are discretionary and simply concluded that "the Court addressed the factors it deemed appropriate." (17 A.App. 3793.) Respectfully, the district court erred by ignoring this critical factor. This court clearly included a

list of the pertinent factors that it felt were appropriate to be considered when evaluating case-terminating sanctions.

Here, no factor could be more important, relevant, and applicable in the instant case regarding whether to assess case-terminating sanctions than Moquin's extreme behavior and abandonment of the Plaintiffs. For this simple reason, the district court committed legal error in disregarding the critical Young factor. Plaintiffs are entitled to relief under Rule 60(b)(1).

D. The District Court Erred in Excluding Admissible Evidence Supporting Relief under NRCP 60(b)(1)

The district court entirely ignored the most glaring evidence of Moquin's abandonment: his repeated refusal to cooperate with Plaintiffs in their attempts to reinstate the case. In addition, in its Order After Remand, the district court incorrectly refused to consider the evidence submitted in support of Plaintiffs' Rule 60(b)(1) Motion and the corresponding reply.

i. Dr. Mar's Diagnosis

The district court ruled that Moquin's statement that he was diagnosed with bipolar disorder is hearsay with no exception under NRS 51.105(1) because the statement does not qualify as a "declaration of 'then existing state of mind, emotion, sensation, or other physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health.'" (17 A.App. 3764.) Yet, Moquin's admissions that

he has bipolar disorder are statements about his present condition, and are admissible. NRS 51.105(1).

The district court found that the statements were not "spontaneous." (17 A.App. 3764-3765.) Yet, the treatise the district court relied upon merely states that the spontaneous quality of the declarations provides special reliability. Spontaneity is not an absolute requirement to admissibility under the state of mind exception, but is a factor to assess in weighing admissibility. Sec. Alarm Fin. Enterprises, LP v. Alarm Prot. Tech., LLC, 743 F. App'x 786, 788 (9th Cir. 2018). Moreover, Moquin's statement to Willard is evidence of Moquin's state of mind at the time of the conversation. Wagner v. Cty. of Maricopa, 747 F.3d 1048, 1053 (9th Cir. 2013). When Moquin admitted to Willard that he was bipolar, that is a spontaneous statement about his present condition at the very time he made the statement to Willard. It is also a statement against Moquin's interest as it could have subjected him to possible civil liability or bar discipline. The statement was therefore admissible under NRS 51.345.

Finally, the special circumstances under which this statement was made offer assurances of accuracy that would not likely to have been enhanced by calling Moquin as a witness (and Moquin was unavailable to be called as a witness). Therefore, the district court should have concluded that this statement fell within the general exceptions of NRS 51.075(1) and NRS 51.315(1).

As such, the district court erred in its exclusion of this evidence.[8]

ii. Willard Can Testify as to Moquin's Mental Condition

The district court concluded that Willard cannot testify as a lay witness regarding Moquin's mental condition. (17 A.App. 3765.) The district court is simply wrong here. As one court carefully explained:

> Lay witnesses may testify upon observed symptoms of mental disease, because mental illness is characterized by departures from normal conduct. Normal conduct and abnormal conduct are matters of common knowledge, and so lay persons may conclude from observation that certain observed conduct is abnormal. Such witnesses may testify only upon the basis of facts known to them. They may testify as to their own observations and may then express an opinion based upon those observations. *Of course the testimony of a lay witness with training in this or related fields may have more value than the testimony of a witness with no such training*.

Carter v. U.S., 252 F.2d 608, 618 (D.C. Cir. 1957) (emphasis supplied).

Thus, lay witness testimony is actually very admissible, and indeed helpful, when it concerns mental illness. Further, Willard has a degree in psychology, which provides even more value – as the Carter court concluded. (15 A.App. 3275.)

---

[8] The district court also made the generalized statement that the Willard Declaration and Willard Reply Declaration contain hearsay within hearsay. (17 A.App. 3765.) However, it is unclear to which specific statements the court is referring. Moreover, hearsay within hearsay is admissible if each part of the combined statements fits within an exception to the hearsay rule. NRS 51.067. The district court conducted no analysis to support this finding, which is an abuse of discretion. See Willard, 136 Nev. at 469, 469 P.3d at 179 (disregarding "established legal principles" constitutes an abuse of discretion).

iii. The District Court's Rulings on Motion Exhibits 6, 7 and 8 Were Erroneous

The district court next ruled that Exhibits 6, 7, and 8 to the Rule 60(b)(1) Motion are not authentic and constitute inadmissible hearsay. This was error.

Exhibit 6 is an Emergency Protective Order entered against Moquin. (14 A.App. 3100.) Exhibit 7 is a Pre Booking Information Sheet regarding Moquin and his arrest. (14 A.App. 3103.) Exhibit 8 is a Request for Domestic Violence Restraining Order that Moquin's wife filed against him. (14 A.App. 3106.)

All three exhibits are authentic. That is apparent from Willard's declaration, the documents' appearance, and their surrounding characteristics. See, e.g., NRS 52.015(1); NRS 52.025; NRS 52.055. Moreover, if the Defendants truly doubted the documents' authenticity, then the Defendants should have provided some rebuttal "evidence or other showing sufficient to support a contrary finding" in their opposition. NRS 52.015(3). They did not do so.

Further, Defendants did not challenge that critical fact in their opposition, other than to provide their own uncertified document stating that Moquin's bar license was still active at that time. (15 A.App. 3282.) But that information is outdated, and Moquin's bar license is not the issue. Moreover, the best evidence of Moquin's failure to properly prosecute this case is capable of judicial notice: Moquin failed to file critical documents with the court.

Notably, the district court refused to take judicial notice of these exhibits. (17 A.App. 3767-3768.) Yet, the district court was willing to take judicial notice of Moquin's California Bar status from the California Bar website, which showed that Moquin was still a licensed lawyer in California at that time. (17 A.App. 3788.) It is unclear why genuinely-uncontested court documents are inauthentic and not susceptible of judicial notice while an attorney's supposed bar status from a website is. This inconsistency was inappropriate, and the district court erred in refusing to admit Exhibits 6, 7, and 8.

The exhibits also do not constitute hearsay. Exhibits 6 and 7 were not offered for the truth of the facts stated in them, but rather as examples of the personal turmoil that Moquin was facing. Therefore, Exhibits 6 and 7 do not fall within the hearsay rule.

Exhibit 8 to the Rule 60(b)(1) Motion presents a more difficult question. However, even if Mrs. Moquin's statements about Moquin's mental health would constitute hearsay, the general fact that she filed a request for a restraining order, and any inferences as to the effect that may have had on Moquin, do not constitute hearsay. Therefore, the district court should have admitted Exhibit 8 – either in full or for limited non-hearsay purposes, such as showing that there was turmoil in Moquin's home life.

As the factually-uncontested evidence shows, Moquin was suffering from a psychological disorder that caused him to abandon his clients. Accordingly, the district court should have found excusable neglect.

iv. The Texts and Emails Authored by Moquin and O'Mara are Admissible and Relevant

The district court also concluded that Exhibits 5, 6, 7, 8, 9, and 10 to the Rule 60(b)(1) reply brief were not relevant because they occurred after the district court issued its *Order Granting Motion to Strike*, *Order Granting Sanctions*, and *Sanctions Order*. (17 A.App. 3772.) This was clear error.

Exhibit 5 is a copy of the receipt for Willard's payment of Moquin's mental health treatment with Dr. Mar. (15 A.App. 3326.) Exhibit 6 is email correspondence that occurred from February 5 through March 21, 2018, between Moquin and Willard's new attorneys. (15 A.App. 3328-3331.) Exhibit 7 contains text messages between Willard and Moquin dated from March 30 through April 2, 2018. (15 A.App. 3333-3338.) Exhibit 8 is email correspondence dated April 2 through April 13, 2018, between Willard's new attorneys and Moquin. (15 A.App. 3340-3343.) Exhibit 9 is a letter from one of Willard's new attorneys to Moquin demanding the clients' files. (15 A.App. 3345-3346.) Exhibit 10 is email correspondence dated May 23 through May 28, 2018, between Moquin and Willard. (15 A.App. 3348-3349.)

The events that took place from January 2018 afterwards support the facts that Moquin abandoned the Plaintiffs and that he was suffering from mental illness. The communications demonstrate that Moquin was acting abnormally. Among other repulsive behavior, he began to spew vulgarities at his clients and new counsel, and failed to provide files, supportive declarations, and a mental health letter. These documents are indisputably relevant to the issue of abandonment and excusable neglect.

Finally, the district court concluded that any emails or text messages from O'Mara or Moquin contained in reply Exhibits 3, 4, 7, 8, and 10 are inadmissible hearsay. (17 A.App. 3768.) Yet, these exhibits do not constitute hearsay. For instance, statements that Moquin was "close" to completing opposition briefs and that they "will be filed" on December 11, 2017, are plainly not offered for their truth, but to show the Plaintiffs' diligence and the effect of Moquin's statements on O'Mara and the Plaintiffs. Similarly, Moquin's abusive and combative statements toward Willard are also not offered for the truth of the insults, but as evidence of Moquin's abnormal conduct and poor mental health. Therefore, they do not constitute hearsay under NRS 51.035.

Ideally, the Plaintiffs would have provided a formal diagnosis from a psychiatrist or an affidavit from Moquin confirming that he suffers from bipolar disorder. Yet this was impossible, because the Plaintiffs had no means to compel

medical discovery from Moquin in the context of this case. Moreover, as other courts have recognized, an affidavit from a client can be used to confirm that mental health problems justify a motion for relief based upon excusable neglect. See, e.g., Schumacher v. Schroeder, 414 N.W.2d 319 (Wis. Ct. App. 1987) (awarding relief from a judgment based in part upon an affidavit confirming that although the plaintiff and his spouse were aware of the attorney's "mental health problems, they had no idea that his health problems were seriously interfering with his ability to handle this case").

Willard's declarations alone, which are based on his personal knowledge and his own experiences with Moquin, substantiate the Plaintiffs' inadvertence, surprise, and excusable neglect:

> 67. I have learned that Mr. Moquin was apparently struggling with a constant marital conflict that greatly interfered with his work.
> 68. This culminated in Mr. Moquin suffering what I can only describe as a total mental breakdown.
> . . .
> 76. I now see that Mr. Moquin was suffering from many of these symptoms throughout his work on my case.
> 77. There have also been periods when Mr. Moquin was unavailable.
> 78. I have learned that Mr. Moquin has been going through a bitter divorce with his wife and that at one point he was even arrested in conjunction with those proceedings.
> . . .
> 80. Only now do I realize that while Mr. Moquin was assuring me that he was working on this case, he was missing deadlines and failing to properly pursue the case. At the time that they were occurring, I did not realize the extent of these circumstances, and they were completely out of our control.
> . . .

83. For my part, I was making ongoing efforts on an almost daily basis to push the case forward, provide Mr. Moquin with what he needed, and to pursue our case against the Defendants for breach of lease agreements that were backed up with a personal guarantee.

. . .

87. Having now received Mr. Moquin's diagnosis and learning more about his personal problems, I can now see how Moquin's issues affected our case.

(14 A.App. 3048-3050.)

14. I now know that he was struggling with mental health and dealing with other personal crises in his life.

15. I have learned that Mr. Moquin and his wife, Natasha, were in a state of nearly constant marital conflict that greatly interfered with his work.

16. This culminated in Mr. Moquin suffering what I can only describe as a total mental breakdown in December 2017.

. . .

34. After having worked with him for years, and having met his wife and his family, I had terrible sympathy for all of them and wanted to help if I could. At the same time, it was becoming clear to me that Mr. Moquin's personal problems had interfered with his duties to me and the other plaintiffs.

35. After Mr. Moquin suffered this mental breakdown, I recommended that he visit Dr. Douglas Mar, who is well-respected psychiatrist in Campbell, California.

36. At this time, I also started looking for other attorneys who might be able to help.

37. In January 2018, Mr. Moquin was also arrested related to charges of domestic violence.

38. Around that same time, Mr. Moquin explained to me that Dr. Mar had diagnosed him with bipolar disorder and that he needed money to pay Dr. Mar for treatment.

39. After obtaining a loan from a friend, I arranged to pay Dr. Mar for his services, but I do not know if Mr. Moquin has continued with any course of treatment.

40. On March 13, 2018, I paid Dr. Mar's office $470 to pay for Mr. Moquin's treatment so that Mr. Moquin could get well and help us fix the case.

. . .

42. Mr. Moquin was also supposed to obtain a letter from Dr. Mar evidencing his diagnosis and treatment.

43. Despite paying for Mr. Moquin's treatment, and despite numerous requests from me and my new attorneys, Mr. Moquin still failed to provide us with that letter from Dr. Mar.

. . .

46. Mr. Williamson and I both repeatedly asked Mr. Moquin to provide a summary of the case, documents regarding his mental illness, and his case files.

47. From January through March, 2018, Mr. Moquin repeatedly assured me that he would provide me with all of the information that my new attorneys needed to reinstate the case.

48. On March 30, Mr. Moquin assured me that he will "get everything out the door before I leave today." In response, I asked if he had obtained the requested documentation from Dr. Mar, and Mr. Moquin told me that he was playing phone tag with a person in Dr. Mar's office. I then followed up to ask if he had advised Mr. Williamson of the status, and he assured me that he would.

49. I then sent text messages on March 31, April 1, and April 2 urging Mr. Moquin to provide Mr. Williamson with everything he needed to try and reinstate this case.

50. Mr. Moquin then responded with an alarming rant, which included the following: "I'm not sure what part of '[expletive] off' you don't understand, but it is in your best interest to stop communicating with me at this point until I contact you."

. . .

52. Mr. Moquin's abusive and threatening language in his text dated April 2, 2018, is just one example of the abusive treatment I received from Mr. Moquin.

. . .

66. Throughout my experience with him, Mr. Moquin was always so positive about our case and confident that everything would work out. Over the last six months, however, Mr. Moquin's emotional swings have become terrifying and impossible to predict.

(15 A.App. 3303-3307.)

As one court explained in an analogous context:

> It does not require medical expertise to know that when a competent veteran attorney suddenly fails to perform, and covers up his non-performance by lying to his clients and his colleagues, something is obviously wrong with him. ***There is no reason to demand medical proof when the facts speak for themselves***.

In re Benhil Shirt Shops, Inc., 87 B.R. 275, 278 (S.D.N.Y. 1988) (emphasis added); see also Boehner, 2009 WL 1360975, at *5 ("when an 'able attorney, which [f]ormer [c]ounsel appears to have been, suddenly ignores [c]ourt orders and is unable to be reached despite diligent attempts, it does not require medical expertise to know that something is obviously wrong with counsel.'" (internal citations omitted)).

From a review of the case law, it is clear that the mental illness exception is not focused on the former attorney's specific diagnosis. Rather, the question is whether the client "was effectually and unknowingly deprived of legal representation." Passarelli, 102 Nev. at 286, 720 P.2d at 1224. In this case, the Plaintiffs were effectively deprived of legal representation.

E. O'Mara's Role as Local Counsel Does Not Prohibit a Finding of Excusable Neglect

The district court concluded that because local counsel David O'Mara was required to actively participate in the case, Willard cannot demonstrate excusable neglect. (17 A.App. 3792.) Yet, there is no statute or case that suggests that local counsel's reliance on lead counsel's promises to handle critical oppositions prohibits

a finding of excusable neglect. See Maples, 565 U.S. at 287 (litigant could not be held constructively liable for misconduct of lead attorney, despite presence of local counsel, where local counsel had no substantive involvement in the case). Accordingly, the district court erred in denying Plaintiffs' Rule 60(b)(1) Motion for this reason.

Indeed, the record here shows that O'Mara was similarly misled by Moquin. (14 A.App. 2999; 15 A.App. 3313-3314.) That fact presents a sharp contrast to the facts in Huckabay Props. v. NC Auto Parts, 130 Nev. 196, 322 P.3d 429 (2014), on which the Defendants relied. O'Mara's notice of withdrawal corroborates how Moquin's situation affected the case. (14 A.App. 2999 (O'Mara "begged" Moquin to oppose the dispositive motions and Moquin assured him he would).)

Further, Plaintiffs were still effectually and unknowingly deprived of legal representation. First, Willard's declarations show that he diligently attempted to ensure that Moquin would oppose the critical motions that ultimately ended the Plaintiffs' case. And second, while O'Mara owed various duties of advocacy under the Supreme Court Rules, the record reflects that he too was led to believe that Moquin would respond to the Defendants' motions and was effectively unaware that Moquin's had abandoned the case.

Again, Moquin expressly promised that "all three oppositions will be filed today." (15 A.App. 3313.) O'Mara and Willard justifiably relied on that promise.

Moquin's false promise and failure to file those very oppositions is what led to the dismissal that is the subject of this appeal. See, e.g., Coburn Optical Indus., Inc. v. Cilco, Inc., 610 F. Supp. 656, 660 (M.D.N.C. 1985) (recognizing "that local counsel must be able to rely to some extent on the representations of reputable out of state attorneys, especially when local counsel has no independent knowledge concerning the representations."); see also Scott v. Dalkon Shield Claimants' Tr., No. Civ. A. 85-1718, 1994 WL 321212, at *2 (E.D. La. June 23, 1994) (entering sanctions only against out-of-state counsel who mislead plaintiffs and their local counsel).

F. The District Court Improperly Allowed Defendants to Present New Arguments on Remand

The district court disregarded this court's prohibition on offering "any new arguments or evidence on remand" in support of the Yochum factors. That alone was reversible error. State Eng'r v. Eureka Cty., 133 Nev. 557, 559, 402 P.3d 1249, 1251 (2017) (a "district court commits error if its subsequent order contradicts the appellate court's directions"). The mandate rule requires a lower court to effectuate a higher court's ruling on remand. Estate of Adams, 132 Nev. at 819, 386 P.3d at 624; see also Tulelake Horseradish, Inc. v. Third Jud. Dist. Ct., No. 71805, 2017 WL 1251101 (Nev. April 3, 2017, unpublished disposition) (writ of prohibition issued to compel district court to comply with Nevada Supreme Court's order in prior appeal). A lower court must act on the mandate of an appellate court "without variance or

examination, only execution." Tulelake at *1 (quoting United States v. Garcia-Beltran, 443 F.3d 1126, 1130 (9th Cir. 2006)).

The same holds true with the law of the case doctrine. Under the "law of the case" doctrine, "if a judgment is reversed on appeal, the court to which the cause is remanded can only take such proceedings as conform to the appellate court's judgment." Geissel v. Galbraith, 105 Nev. 101, 103-04, 769 P.2d 1294, 1296 (1989). Accordingly, the district court committed clear error by failing to proceed in accordance with this court's ruling on remand by allowing 17 pages of new argument on the Yochum factors.

"It is well established that a party cannot for the first time in a reply memorandum (***or in a post-hearing proposed order***) assert new factual arguments to support a summary judgment motion." Procaps S.A. v. Patheon Inc., 141 F. Supp. 3d 1246, 1293 (S.D. Fla. 2015), aff'd, 845 F.3d 1072 (11th Cir. 2016) (emphasis added). When a party violates this principle, "the argument will not be considered." Foley v. Wells Fargo Bank, N.A., 849 F. Supp. 2d 1345, 1349 (S.D. Fla. 2012) (citing Herring v. Sec. Dep't of Corr., 397 F.3d 1338, 1342 (11th Cir. 2005)).

Plaintiffs' original Rule 60(b)(1) Motion established all four Yochum factors. Defendants' opposition did not even analyze the Yochum factors or dispute the Plaintiffs' meritorious claims. (15 A.App. 3154-3155.) Therefore, prior to remand, Plaintiffs' analysis of the Yochum factors was undisputed. As a result, the district

court should have complied with this court's mandate in the February 23, 2021 order; the district court should have ignored Defendants' new arguments; and the district court should have granted the Rule 60(b)(1) Motion.

G. The District Court Misapplied the Yochum Factors

As noted above, it was error to allow the Defendants to add 17 pages of new arguments under the guise of a "proposed order." More importantly, in relying on Defendants' new-found arguments, the district court then incorrectly applied the Yochum factors. As explained below, the findings that the Defendants proposed are not supported by the record.

i. Plaintiffs Filed a Prompt Motion for Relief

In determining whether to grant Rule 60(b)(1) relief for excusable neglect, district courts must apply the four Yochum factors: (1) a prompt motion for relief, (2) the absence of an intent to delay the proceedings; (3) a lack of knowledge of procedural requirements, and (4) good faith. Willard, 136 Nev. at 470, 469 P.3d at 179 (citing Yochum, 98 Nev. at 486, 653 P.2d at 1216).

The Order After Remand acknowledges that Plaintiffs met this factor by filing their Rule 60(b)(1) Motion in April 2018. (17 A.App. 3771-3772.) Therefore, this undisputed factor clearly weighs in favor of granting Rule 60(b)(1) relief.

ii. Plaintiffs Demonstrated a Lack of Any Intent to Delay

Plaintiffs adequately demonstrated a lack of any intent to delay. As shown below, in their fervor to avoid liability, Defendants' proposed order far overreached on this point. According to the Order After Remand, "Plaintiffs provided no admissible evidence" in support of this factor or (apparently) any other aspect of any their Rule 60(b)(1) Motion. But this statement is simply belied by the record.

a. The Court Admitted Evidence that Supports this Factor

First, the Order After Remand's claim that "Plaintiffs provided no admissible evidence" is contradicted by the record. (17 A.App. 3773.) As Willard's declaration in support of the Rule 60(b)(1) Motion explained:

> 59. Periodically I did get concerned with the slow pace of the litigation and the lack of a resolution, but Mr. Moquin always had an explanation or "legal reasons" for any issues and delays. He also frequently explained that the defendants' attorneys were the cause of the delay.
>
> . . .
>
> 80. Only now do I realize that while Mr. Moquin was assuring me that he was working on this case, he was missing deadlines and failing to properly pursue the case. At the time that they were occurring, I did not realize the extent of these circumstances, and they were completely out of our control.
>
> . . .
>
> 82. In addition, Mr. Moquin repeatedly assured me that we would prevail and that the case was proceeding fine.
>
> 83. For my part, I was making ongoing efforts on an almost daily basis to push the case forward, provide Mr. Moquin with what he needed, and to pursue our case against the Defendants for breach of lease agreements that were backed up with a personal guarantee.

(14 A.App. 3048-3050.) Those statements are admissible and undisputed. Willard's communications with Moquin likewise show that he and O'Mara were trying to push the case forward and that they had absolutely no intent to delay. (14 A.App. 2999; 15 A.App. 3309-3311; 15 A.App. 3313-3314; 15 A.App. 3316-3324; 15 A.App. 3333-3338.)

b. The District Court Wrongfully Excluded Evidence that Supports this Factor

The district court wrongly stated that "[a]ll the texts and emails offered by Plaintiffs and authored by Mr. Moquin or Mr. O'Mara constitute inadmissible hearsay under NRS 51.035 and NRS 51.065." (17 A.App. 3768.) The problem with that blanket conclusion is that it entirely ignores what the hearsay rule provides.

As noted above, the texts and emails were not offered to establish the truth of the matters asserted. See NRS 51.035 ("'Hearsay' means a statement offered in evidence to prove the truth of the matter asserted"). The district court ruled that that reply exhibits 2, 3, 4, 7, 8 and 10 were inadmissible hearsay. (17 A.App. 3768.) Yet, those communications, as set forth above, are not hearsay because they are not offered for the truth of the matter asserted. NRS 51.035. Further, Exhibit 2 is no different. Exhibit 2 demonstrates Willard pleading with Moquin for updates on his progress and for him to respond to Mr. Willard's messages. (15 A.App. 3309-3311.) Statements regarding whether Moquin was ready, or if he was at the law library, are

plainly not offered for their truth, but again to show the Willard Plaintiffs' diligence and the effect of Moquin's statements on them.

The fact that Willard was attempting to communicate with his counsel and move the case forward is not hearsay and directly supports this factor. Thus, the district court clearly erred in making a blanket conclusion that all emails and texts were hearsay.

c. The District Court's Reliance on the Unilateral Findings in the Unopposed Order that Is the Subject of the Rule 60(b)(1) Motion Is Inappropriate

The district court repeatedly relied upon its now-reversed original order denying Rule 60(b)(1) relief and the unopposed sanctions orders to support its new findings on the Yochum factors. (17 A.App. 3770-3771, 3774-3777, 3779-3785.) Notably, this court already reversed the original order denying Rule 60(b)(1) relief, so it is error to rely on that reversed order to justify another order. Moreover, the *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions* is the central subject of the Rule 60(b)(1) Motion. Accordingly, the district court's unilateral reliance on findings contained in that unopposed order (which Defendants prepared and was essentially entered by default) to support its refusal to revisit that same order is circular logic that fails to independently analyze the evidence in the record.

iii. Plaintiffs Lacked Knowledge of Procedural Requirements

Notably, "[a] lack of procedural knowledge on the part of the moving party is not always necessary to show excusable neglect under NRCP 60(b)(1)." Stoecklein v. Johnson Elec., 109 Nev. 268, 273, 849 P.2d 305, 309 (1993). "Each case depends upon its own facts," and a lack of procedural knowledge is just one persuasive factor. Id. However, Rule 60(b)(1) is also guided by "the state's sound basic policy of resolving cases on their merits whenever possible." Stoecklein, 109 Nev. at 274, 849 P.2d at 309.

Yet, Plaintiffs have also satisfied this third factor. As the record reflects, they are non-lawyers who justifiably relied upon Moquin's promises that he was meeting all procedural requirements. (14 A.App. 3048; 15 A.App. 3302-3303; 15 A.App. 3313-3314; 15 A.App. 3316-3324.) Thus, Plaintiffs were unaware of any procedural rules that were not being satisfied. Finally, in light of Moquin's failures, this factor should not be utilized to punish an elderly Plaintiff.

iv. Plaintiffs Are Proceeding in Good Faith

It is likewise clear from the record that Plaintiffs proceeded in good faith. As the plaintiffs in this case, they had every motivation to see their case move forward, and no motivation whatsoever to delay the case or to proceed in bad faith – particularly when their financial future depended on the outcome. (14 A.App. 3047-3050; 15 A.App. 3302-3303; 15 A.App. 3317-3319.) Likewise, there is no dispute

that Moquin alone caused the delays – not the Plaintiffs. Plaintiffs repeatedly pleaded with Moquin to move the case forward. (14 A.App. 3048-3050; 15 A.App. 3302-3304; 15 A.App. 3309-3311; 15 A.App. 3313-3314; 15 A.App. 3316-3324.)

It is illogical to conclude that a plaintiff would fail to oppose a defendant's motions, or file its own motions, to delay the case or act in bad faith. Sabotaging one's own case cannot constitute bad faith.

Finally, once the district court entered the sanctions orders, the Plaintiffs proposed various ways to minimize any prejudice to the Defendants. (See, e.g., 13 A.App. 3026, 3038; 15 A.App. 3296; 17 A.App. 3663.) Thus, the Plaintiffs have repeatedly and diligently tried to address the actual harm that Moquin caused in a reasonable and fair way. Unfortunately, the Defendants pushed to simply dismiss the entire case rather than reciprocate the Plaintiffs' efforts. Therefore, it is evident from the record that the Willard Plaintiffs have acted in good faith.

v. When Properly Weighed, All Yochum Factors Favor Relief

The Willard Plaintiffs have satisfied all four Yochum factors. Yet, it is also important to remember that the Yochum factors are not a four-pronged test. Rather, they must be weighed against one another. See, e.g., Stoecklein, 109 Nev. at 273-74, 849 P.2d at 308-09. Thus, even if the Plaintiffs somehow failed to satisfy one or more of the factors, a fair weighing of all four demands relief.

vi. The District Court Erred in Refusing to Allow the Case to Proceed to Trial

In addition to the Yochum factors, "[t]he district court must also consider this state's bedrock policy to decide cases on their merits whenever feasible when evaluating an NRCP 60(b)(1) motion." Willard, 136 Nev. at 470, 469 P.3d at 179 (citing Yochum, 98 Nev. at 487, 653 P.2d at 1217).

"NRCP 60(b)(1) operates as a remedial rule that gives due consideration to our court system's preference to adjudicate cases on the merits, without compromising the dignity of the court process." Willard, 136 Nev. at 469, 469 P.3d at 179. Importantly, district courts are required to liberally construe Rule 60(b). La-Tex Pshp. v. Deters, 111 Nev. 471, 475-76, 893 P.2d 361, 365 (1995). "The term 'discretion' contemplates a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record, and yields a conclusion based on logic and founded on proper legal standards." January v. Barnes, 621 So. 2d 915, 927 (Miss. 1992) (quoting Shuput v. Lauer, 325 N.W.2d 321, 328 (Wis. 1982)); Kelly v. State, 694 P.2d 126, 133 (Wyo. 1985).

Because of the clear excusable neglect, and Defendants' acknowledgment of being prepared to assert defenses to Plaintiff's rent-based damages, the district court should have followed Nevada's policy and allowed the case to proceed to trial. Critically, this court's precedent makes clear that it would be improper to impute

Moquin's conduct to the Plaintiffs. Passarelli, 102 Nev. at 286, 720 P.2d at 1224 (noting that it would be unfair to impute the attorney's conduct to the client and deprive the client of a "full trial on the merits.").

Based on the evidence and the other materials in the record, it is clear that the Plaintiffs promptly moved for relief, had no intent to delay these proceedings, lacked full knowledge of the procedural requirements at issue, and have been trying to proceed in good faith. Thus, the district court should have reinstated the case. To deny the Plaintiffs any trial on the merits due to Moquin's failures was clear error.

CONCLUSION

This is not a typical case-terminating sanctions case. The record reflects that the Plaintiffs were not at all culpable. Indeed, the record plainly demonstrates that Moquin's mental health was the sole source of the problems that occurred in this case, and that he fully abandoned the Plaintiffs at the eleventh hour. Then, after the unspeakable damage was done, he continued his abandonment by refusing to do anything to help the Plaintiffs salvage what was left of their case. This case cries out for reversal of the Order After Remand denying Rule 60(b)(1) relief.

DATED: February 28, 2022

/s/ Robert L. Eisenberg
Robert L. Eisenberg (0950)

/s/ Richard D. Williamson
Richard D. Williamson (9932)
Jonathan Joel Tew (11874)

ATTORNEY'S 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 2010 in 14-point, Times New Roman type style.

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, and contains 13,670 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 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: February 28, 2022

/s/ Robert L. Eisenberg

ROBERT L. EISENBERG (Bar No. 0950)
Lemons, Grundy & Eisenberg
6005 Plumas Street, Third Floor
Reno, Nevada 89519
775-786-6868
rle@lge.net

/s/ Richard D. Williamson

RICHARD D. WILLIAMSON (Bar No. 9932)
JONATHAN JOEL TEW (Bar No. 11874)
Robertson, Johnson, Miller & Williamson
50 West Liberty Street, Suite 600
Reno, Nevada 89501
775-329-5600
Rich@nvlawyers.com
Jon@nvlawyers.com

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Robertson, Johnson, Miller & Williamson, over the age of 18, and not a party within this action.

I further certify that on the 28th day of February, 2022, I electronically filed the foregoing **APPELLANTS' OPENING BRIEF** with the Clerk of the Court by using the electronic filing system, which served the following parties electronically:

John P. Desmond, Esq.
Brian R. Irvine, Esq.
Anjali D. Webster, Esq.
Dickinson Wright
100 West Liberty Street, Suite 940
Reno, NV 89501
Attorneys for Respondents

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