IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; and OVERLAND DEVELOPMENT CORPORATION, a California corporation, Appellants, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual; and TIMOTHY P. HERBST, as Special Administrator of the ESTATE OF JERRY HERBST, deceased. Respondents.	**SUPREME COURT NO. 83640** District Court Case No. CV14-01712 **RESPONDENTS' ANSWERING BRIEF**

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

******

RESPONDENTS' ANSWERING BRIEF

******

DICKINSON WRIGHT, PLLC
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 12515
100 W. Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (844) 670-6009

Attorneys for Respondents Berry-Hinckley Industries and Jerry Herbst

DISCLOSURE STATEMENT

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

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

DICKINSON WRIGHT, PLLC

/s/ Anjali D. Webster
JOHN P. DESMOND
BRIAN R. IRVINE
ANJALI D. WEBSTER

[1] Mr. Herbst passed away on November 27, 2018. 1 Respondents' Appendix ("RA") 94-96.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

RESPONSE TO ROUTING STATEMENT

The Court of Appeals presumptively decides appeals from post-judgment orders. NRAP 17(b)(7). Further, Defendants disagree with the Appellants statement that this case presents issues of statewide public importance: rather, this is a simple issue of whether the District Court acted within its discretion in denying Willard's NRCP 60(b)(1) Motion. However, Defendants have no objection to either Court deciding this appeal.

STATEMENT OF ISSUES

Whether the District Court acted within its discretion in denying Willard's NRCP 60(b) Motion, where Willard presented no admissible evidence in support of his Motion, the District Court entered detailed findings on the *Yochum* factors which are supported by substantial evidence and which support denial of Willard's Motion, and Willard's Motion did not establish any factual or legal grounds to set aside the order from which Willard sought relief.

INTRODUCTION

This is an appeal from an NRCP 60(b) order in a case in which Willard,[2] the plaintiff below who was represented by two attorneys throughout the case, sought millions of dollars against Defendants and then completely failed to comply with even basic discovery obligations, instead holding Defendants captive for **years** without letting them prepare their defenses, forcing three continuances of the trial date and violating numerous court orders along the way. Then, when only four weeks remained in discovery, Willard filed a motion for summary judgment requesting "brand-new, never-disclosed types, categories, and amounts of damages," which were nearly $40 million more than previously disclosed. Moreover, the additional damages were based upon documents, bases, categories, and calculations not previously disclosed. These "new" damages, which Willard averred that he personally "collaborated" with his attorneys to calculate, were not only premised upon documentation that Willard had never disclosed, but denied having had such documentation in his possession throughout the case. The District Court found that this eleventh-hour "ambush" was in "bad faith" and a "strategic decision" to prejudice Defendants.

[2]"Willard" refers to Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and Overland Development Corporation.

In December 2017, Defendants filed a motion seeking dismissal of Willard's case as a sanction for his conduct throughout the case, and Willard did not oppose Defendants' sanctions motion. The District Court dismissed Willard's case, citing to Willard's failure to oppose Defendants' sanctions motion as a basis, but "separate from" that failure, found that good cause existed to dismiss Willard's case based upon his egregious conduct throughout the case that had precipitated the sanctions motion in the first instance.

Despite knowing the deadline to oppose Defendants' sanctions motion, and knowing that no opposition had been filed, neither Willard nor his second attorney did anything to timely apprise the District Court of any alleged issues, instead waiting until four months after the opposition deadline to do so. Specifically, Willard filed a motion for 60(b)(1) relief claiming that he had been abandoned by one of his attorneys who allegedly had a mental breakdown in December 2017, and that this purported mental breakdown in the last couple of weeks of the case should somehow provide a basis to set aside the Sanctions Order which sanctioned Willard for his egregious conduct throughout the entire case. The District Court denied Willard's 60(b) motion, finding that it was not substantiated by any admissible evidence whatsoever, and that regardless, the arguments therein were belied by both the record and the law. Willard appealed from that order.

This Court reversed and remanded to the District Court to enter findings on each factor set forth in *Yochum v. Davis*, 94 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), *overruled in part on other grounds by Epstein v. Epstein*, 113 Nev. 1401, 950 P.2d 771 (1997), later clarifying that neither party could present new arguments or evidence on remand and that the District Court must make its findings based upon the record already before it. On remand, the District Court precisely followed this directive and issued detailed findings on each *Yochum* factor, finding that the *Yochum* factors strongly supported the denial of Willard's NRCP 60(b) Motion. This appeal ensued.

On appeal, Willard attempts to construct multiple challenges to the 60(b) Order entered on remand, augmenting these challenges with baseless and hypocritical accusations against Defendants and the District Court, as well as irrelevant attempts to garner sympathy. However, Willard's arguments are resoundingly contradicted by the law and the record, and Willard fails to demonstrate that the District Court abused its broad discretion in denying Willard's 60(b) Motion on remand. Rather, as the District Court found, (1) Willard's claimed bases for 60(b) relief were not substantiated with any admissible evidence; (2) the *Yochum* factors strongly supported denial; (3) the record demonstrated that Willard was not abandoned by his two attorneys, including during the time of the conduct which justified the dismissal; (4) Willard's challenges to the Sanctions Order were

baseless; and (5) Willard's representation by two attorneys throughout the case prohibited a finding of excusable neglect. Thus, multiple, independent bases supported the District Court's denial of Willard's 60(b) motion.

Indeed, this is not a case in which Willard was an unknowing defendant with a default judgment entered against him. Rather, Willard acted with impunity toward the NRCP and the District Court's orders for multiple years, to the prejudice of Defendants, necessitating the Sanctions Order in the first instance. The District Court's denial of Willard's 60(b) Motion to set aside the Sanctions Order was well reasoned and amply supported by the evidence, and Willard's untenable attempts to claim that the District Court abused its discretion should be denied. Defendants respectfully request that this Court affirm the District Court.

STATEMENT OF THE CASE

This is an appeal from a denial of NRCP 60(b)(1) relief. The District Court dismissed Willard's case as a sanction for his conduct, and Willard moved to set aside the dismissal under NRCP 60(b)(1). The District Court denied Willard's 60(b) Motion because it was not supported by admissible evidence, and also failed to establish any grounds that would entitle Willard to NRCP 60(b) relief. Willard appealed from that order, and this Court reversed and remanded to the District Court to set forth detailed findings for each *Yochum* factor. On remand, the District Court set forth detailed findings for each *Yochum* factor, and concluded that the *Yochum*

factors strongly supported denial of Willard's 60(b) Motion. Willard appealed from the 60(b) Order entered on remand.

STATEMENT OF FACTS[3]

1. Willard's egregious conduct throughout the case led to dismissal.

In August 2014, Willard[4] filed a complaint against Defendants claiming that Defendants had allegedly breached a lease agreement for a commercial property. 1 AA 1-187; 2 AA 232-249. Willard had two attorneys throughout the case: Brian Moquin, a California attorney admitted *pro hac vice*, and David O'Mara, a Reno attorney. 1 AA 202-219. Willard sought substantial damages, including $7 million in damages that were subsequently withdrawn and/or dismissed by the District Court on the basis that Willard never actually incurred the damages or that they were unrecoverable as a matter of law. 7 AA 1495-1507.

[3]Willard sets forth "background facts" regarding the purported merits of his Complaint, citing primarily to his own self-serving declaration. AOB 3-6. However, these allegations were never adjudicated or ruled upon and are completely irrelevant to the germane issue: whether NRCP 60(b) grounds existed to set aside the Sanctions Order. The District Court found that these allegations were "not relevant to the Court's determination of the Rule 60(b) Motion and [were] not considered" by the Court. 17 AA 3757 n.4. Even Willard recognizes that "[t]o receive Rule 60(b) relief, the moving party is no longer required to demonstrate a meritorious claim or defense." AOB 3 n.3. Thus, Willard's self-serving "facts" should be disregarded.

[4]Willard filed this complaint with other plaintiffs who stipulated to dismissal of their case and are not party to this appeal.

Throughout the case, Willard committed multiple infractions, culminating in the District Court dismissing his case. Specifically:

- Willard never provided NRCP 16.1(a)(1)(C) damages calculations. 14 AA 2944-77. Defendants demanded compliance through numerous communications and discovery requests, but to no avail. *Id*. In January 2017, at a hearing Willard personally attended, Willard's counsel admitted to this failure in open court, and the District Court ordered Willard to provide compliant damages calculations. *Id*. 2952-53. But Willard "blatantly disregarded" this order, which the District Court found was willful. *Id*. 2966-67, 2960.

- Willard's expert disclosure was facially inadequate. *Id*. 2949-50, 2966. The District Court ordered Willard to provide a compliant disclosure, but Willard never did so. *Id*. 2954-56. The District Court found this was willful, *id*. 2967-68, and personally attributable to Willard. *Id*. 2968-69.

- Willard "completely ignored multiple Orders from [the District] Court, deadlines imposed by [the District] Court, and [his] obligations pursuant to the Nevada Rules of Civil Procedure." *Id*. 2974.

- Because of Willard's continued infractions, Defendants were forced to extend discovery and delay trial multiple times to give Willard additional time to comply with basic discovery obligations. *Id*. 2948-49, 2954-57, 2972.

- Then, "[a]fter three years of obstinate refusal to provide Defendants with an NRCP 16.1 damages calculation or to supplement any damages calculations" or fulfill his other obligations, when only four weeks remained in discovery, Willard filed a motion for summary judgment in which he requested "brand-new, never-disclosed types, categories, and amounts of damages." *Id*. 2957. Indeed, Willard, who averred he "collaborated" with his attorney in preparing his new damages, sought $40 million more in damages that he sought in the complaint and ostensibly throughout the case.[5] *Id*. 2958; 7 AA 1568-70. His damages were also based on "brand new, different bas[e]s" that had never before been disclosed, and were based on "information that was in [Willard's] possession throughout the case" but also never disclosed. 14 AA 2957-58.

- The District Court found that this conduct was "willful," in "bad faith," a "strategic decision," and an attempt to "ambush" Defendants, which severely prejudiced them. *Id*. 2967.

Due to this conduct, Defendants filed a motion seeking sanctions, including dismissal, and a motion to strike the opinions of Willard's expert, Dan Gluhaich.

[5]In light of these facts, and the open-court admission that he had not presented compliant damages calculations, it is unclear why Willard inaccurately claims that his "basic damages were repeatedly disclosed to Defendants," and "were calculated and disclosed in the original Verified Complaint and again in the Verified First Amended Complaint." AOB xi.

Willard never opposed these motions, despite multiple extensions from Defendants and the Court. 14 AA 2960-61, 2965.

The District Court dismissed Willard's case with prejudice (the "Sanctions Order," which constitutes both the January and March 2018 Orders granting Defendants' Sanctions Motion). *Id*. 2944-77. It cited Willard's failure to oppose Defendants' sanctions motion, but also found that "separate from this consideration, good cause exists to dismiss this case," *id*. 2965; 13 AA 2919, and detailed Willard's continuous failure to comply with discovery requirements throughout the entire litigation until his eleventh-hour ambush. 14 AA 2944-77; 13 AA 2919.

2. <u>The District Court denied Willard's NRCP 60(b) Motion</u>.

Despite knowing the deadline to oppose Defendants' sanctions motion, and knowing no opposition had been filed, "neither Mr. Willard (through Mr. O'Mara), Mr. Moquin, nor Mr. O'Mara contacted Defendants' counsel or this Court to address the status of this case." 17 AA 3690. Instead, Willard waited until four months after the opposition deadline to file an NRCP 60(b)(1) Motion (the "60(b) Motion") with new counsel. *Id*. at 3776-77; 14 AA 2999, 3024-41.

Willard's claimed basis for 60(b)(1) relief was that Moquin "failed to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles." *Id*. 3025. Willard also argued that he satisfied the *Yochum* factors because of Moquin's alleged mental illness. *Id*. 3035. Finally, Willard argued

that the Sanctions Order was insufficient under *Young v. Johnny Ribeiro*. *Id*. 3036-3039.

The District Court denied Willard's 60(b) Motion (the "First 60(b) Order"). In a detailed order, it found that Willard failed to support the 60(b) Motion with any admissible evidence, and that he failed to meet his burden under NRCP 60(b) because he did not demonstrate any excusable neglect, abandonment, or lack of knowledge. 16 AA 3410-41. It also found that Willard's representation by two attorneys, when he only claimed (without support) excusable neglect as to one, precluded an excusable neglect finding. *Id*. Finally, the District Court reiterated the sufficiency of the Sanctions Order. *Id*.

3. This Court remanded the case to the District Court to issue findings on the *Yochum* factors.

Willard appealed from the First 60(b) Order, and this Court reversed and remanded the case with instructions. *Willard v. Berry-Hinckley Indus.*, 136 Nev. 467, 469 P.3d 176 (2020). Specifically, this Court concluded that the District Court abused its discretion by failing to address the *Yochum* factors when deciding the NRCP 60(b)(1) Motion, and clarified that district courts must issue detailed findings on each *Yochum* factor. *Id*. at 470-71, 469 P.3d at 180. This Court also held that "[w]ith the benefit of such findings, we will affirm a district court's NRCP 60(b)(1) determination where substantial evidence in the record supports the same," and that

"where the record contains conflicting evidence, we will affirm the district court's factual findings as long as sufficient evidence supports those findings." *Id*.

Additionally, this Court noted that "[b]ecause the district court's failure to address the *Yochum* factors requires remand for further proceedings, we decline to consider Willard's additional arguments challenging the merits of the district court's excusable neglect determination." *Id*. at 471 n.7, 469 P.3d at 180 n.7. This Court also expressly "[d]eclined to address Willard's arguments concerning the propriety of the underlying sanctions order, as Willard voluntarily dismissed his appeal of the same." *Id*. This Court later also clarified 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*…is limited to the record currently before the Court."[6] 17 AA 3636-3637.

4. <u>The District Court issued findings on the *Yochum* factors on remand</u>.

[6]Due to Willard's improper attempts to introduce evidence and arguments about a disciplinary hearing that had occurred outside the NRCP 60(c) timeframe and therefore could not be considered, Defendants had requested clarification that Willard could not present new arguments or evidence on remand, and instead, that the District Court analyze the *Yochum* factors solely on the existing record. (Docket 77780, Petition for En Banc Reconsideration, Dec. 1, 2020, at 17 n.4). Indeed, less than two weeks after this Court issued its Opinion, Willard had already improperly filed a copy of the disciplinary proceedings in the District Court. 16 AA 3598-3623.

On remand, the District Court again denied Willard's 60(b) Motion (the "60(b) Order").[7] 17 AA 3750-94. Therein, the Court made detailed findings on each *Yochum* factor. *Id*. 3768-86. Based upon these detailed findings, the District Court concluded that Willard "failed to establish excusable neglect under the *Yochum v. Davis* factors." *Id*. Further, it reiterated that Willard failed to support his motion with admissible evidence; that he failed to demonstrate excusable neglect, abandonment, or lack of knowledge; that O'Mara's role precluded a finding of excusable neglect; and that the Sanctions Order sufficiently addressed *Young*. *Id*. 3750-94. Willard appealed. *Id*. 3799.

SUMMARY OF ARGUMENT

Despite Willard's attempts to create as many purported appellate issues as possible, this is a simple appeal. The sole issue is whether the District Court acted within its discretion in denying Willard's 60(b) Motion. As will be discussed herein,

[7]The District Court asked each party to submit a proposed order. 18 AA 4004. After the parties did so, but before the District Court entered its 60(b) Order, Willard filed and submitted a motion seeking relief under NRCP 60(b)(6) based upon Moquin's alleged abandonment of Willard (the same basis he alleges for 60(b)(1) relief). The 60(b)(6) Motion was centered on Moquin's disciplinary proceedings, and Willard offered no explanation on why he waited until the time during which the District Court was supposed to consider the *Yochum* factors based solely on "the record currently before it" to submit extensive evidence of a disciplinary hearing that had occurred more than two years prior. This Court can take judicial notice of these filings, which are part of the District Court's docket: https://www.washoecourts.com/Query/CaseInformation/CV14-01712.

it plainly acted within its discretion, and Willard's arguments on appeal resoundingly fail to demonstrate otherwise.

First, Willard claims that the District Court erred in rejecting Willard's argument that he was allegedly abandoned by one of his attorneys in December 2017. However, the District Court found that dismissal was warranted "separate from" the alleged conduct in December 2017 or later. Thus, even taking Willard's spurious arguments as true, they are irrelevant. Further, Nevada's agency principles, and Willard's own knowledge and inaction, independently preclude an abandonment finding.

Next, Willard challenges the propriety of the Sanctions Order, claiming that the District Court allegedly failed to consider every dismissal factor. Yet, this Court already determined that Willard, who voluntarily dismissed his untimely appeal from the Sanctions Order, may not challenge the propriety of the Sanctions Order in this appeal. Regardless, even if this Court considers Willard's arguments, they are flatly contradicted by the record.

Willard next challenges the District Court's evidentiary findings. But these challenges are belied by the record and Nevada law, and certainly do not establish that the District Court abused its broad discretion in making its evidentiary determinations.

Next, Willard challenges the District Court's *Yochum* findings. This, too, is unavailing. The District Court entered detailed findings on each *Yochum* factor with citations to substantial evidence in the record in support. It found that Willard failed to establish an absence of intent to delay the proceedings, a lack of knowledge of procedural requirements, or good faith, and that therefore, the *Yochum* factors strongly supported denial of 60(b)(1) relief. Willard's overgeneralized arguments on appeal largely ignore the District Court's findings and the record. They do not establish that the District Court abused its discretion.

Finally, Willard virtually ignores that he was represented by **two** attorneys throughout the case, but only claims excusable neglect as to one. Nevada law requires that local counsel is responsible for, and must actively participate in the representation of, the client. Here, where local counsel O'Mara received contemporaneous notification about every discovery violation, attended every hearing, and was the sole signatory on Willard's deficient damages disclosures, his role cannot simply be ignored. Rather, as the District Court found, Willard's representation by two attorneys precluded excusable neglect.

Thus, for multiple reasons, the District Court should be affirmed.

ARGUMENT

1. Willard misstates the standard of review.

Willard argues that "a heightened standard of review applies" when the sanction imposed is dismissal with prejudice. AOB 23. However, Willard is not appealing from the Sanctions Order; thus, this heightened standard is inapplicable. Rather, Willard is appealing from the 60(b) Order, and this Court reviews a district court's NRCP 60(b)(1) determination for an abuse of discretion. *Willard*, 136 Nev. at 468, 469 P.3d at 178; *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 428 P.3d 255 (2018) ("The district court has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b)."). The District Court's evidentiary determinations are reviewed for abuse of discretion, and this Court will not interfere absent a showing of "palpable abuse." *Frei ex rel. Litem v. Goodsell*, 129 Nev. 403, 408, 305 P.3d 70, 73 (2013).

2. The District Court correctly determined that Willard was not abandoned by his two attorneys.

Willard's lead argument is that the District Court allegedly abused its discretion in concluding that Willard was not abandoned by his attorneys. AOB 24-30. Specifically, Willard argues that "where an attorney's mental illness causes procedural harm to his or her client, NRCP 60(b)(1) justifies granting relief to the

client,"[8] and that because "Moquin was suffering a psychological disorder that caused him to abandon the case,…the court should find excusable neglect." AOB 24-25. As will be discussed in detail *infra*, Willard fails to support his 60(b) Motion with any admissible evidence and therefore never establishes that the claimed cause of "abandonment," Moquin's "psychological disorder," existed or actually caused any abandonment.[9] But even beyond this fatal evidentiary shortcoming, Willard's arguments *still* lack merit, and fail to demonstrate that the District Court abused its discretion in denying 60(b) relief.

a. <u>Willard does not claim that Moquin abandoned him until after the conduct which caused the entry of the Sanctions Order had already occurred</u>.

First, even taking Willard's spurious arguments as true, Willard does not claim that Moquin abandoned him until, at the earliest, December of 2017. *See, e.g.*, AOB 29 (arguing that "[s]imply because Moquin attended depositions and filed motions before December 2017 is not relevant to what happened in December 2017

[8]The cases Willard cites for this proposition are readily distinguishable because they include competent evidence supporting a mental illness finding—sworn statements from the attorney describing his own mental illness, and in most, testimony from the attorneys' physician. AOB 25.

[9]Although Willard's complete failure to support his 60(b) Motion with admissible evidence is a threshold consideration which eliminates most of Willard's remaining arguments, this brief mirrors the argument sequence in Willard's Opening Brief for ease of reading.

and afterwards," and that "Moquin **was performing** and then suddenly stopped without notice"); 18 AA 3974 (Willard's counsel stating that "I think [Moquin's] track record up until late 2017 was that he did do his job, then something terrible did happen") *id*. 3976. In other words, then, Willard claims that Moquin allegedly abandoned him by failing to oppose Defendants' Sanctions Motions in December 2017 (and by allegedly failing to assist Willard with his 60(b) Motion thereafter)—but **not** during any of the conduct that occurred throughout the case prior to December 2017. *See* AOB 24-30.

The record certainly corroborates that "Moquin did not abandon Plaintiffs. He appeared at status hearings, participated in depositions, filed motions and other papers, including a lengthy opposition to Defendants' motion for partial summary judgment. Moquin participated in oral arguments and filed two summary judgment motions with substantial supporting exhibits and detailed declarations." 17 AA 3789. Indeed, Moquin answered Defendants' counterclaim, 2 AA 299-307; defended Willard's deposition, 3 AA 500-01; opposed Defendants' Motion for Partial Summary Judgment with a 22-page opposition accompanied by three affidavits and 51 exhibits, 4 AA 795-6 AA 1361; filed lengthy objections to Defendants' proposed order, 7 AA 1425-43; and filed a Motion for Summary Judgment in October 2017 which Willard claims "contained a detailed description of the damages Plaintiffs were seeking," AOB 11, and was accompanied by three detailed affidavits and more

than 50 exhibits. 7 AA 1542-1615. Moquin also participated in every hearing prior to Willard obtaining new counsel, including in December 2017. 18 AA 3856-3970. Thus, Willard cannot—and does not—argue that he was "abandoned" prior to December 2017. Instead, "the Nevada Rules of Civil Procedure, th[e] Court's express orders, and Defendants' requests for damages computations and expert disclosures were ignored." 17 AA 3788; *cf. Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 204 n.4, 322 P.3d 429, 434 n.4 (2014) (declining to find abandonment in an appeal where the attorney ignored court rules and orders).

Even assuming purely *arguendo* that an "abandonment" occurred in December 2017, it does not entitle Willard to 60(b) relief from the Sanctions Order, because the Sanctions Order would have been entered regardless of this alleged abandonment. By December 2017, Willard had already committed sanctionable behavior for more than three years. Plainly, Defendants' Sanctions Motion was not based upon Willard's failure to oppose the Sanctions Motion. Further, even at the December 2017 hearing in which the time to oppose Defendants' Sanctions Motion had not yet run, the District Court informed counsel (including O'Mara) that "you need to know going into these that I'm **very seriously considering granting all of it**," and that "I haven't decided it, but I need to see **compelling** reason not to grant

it."[10] 18 AA 3961, 3968. In its January 2018 Sanctions Order, the District Court held that "**[i]n addition**" to Willard's failure to respond to the Sanctions Motion, "the Court finds Defendants' Motion **has merit due to** Plaintiffs' egregious discovery violations **throughout the pendency of this litigation** and repeated failure to comply with this Court's orders," and that "Plaintiffs' conduct warrants dismissal of this action under NRCP 16.1(e)(3), NRCP 37(b)(2), NRCP 41(b), and…*Blanco v. Blanco*…." 13 AA 2919 (emphases added).

In its March 2018 Sanctions Order, the District Court reiterated that "**separate from** [the failure to oppose], good cause exists to dismiss this case." 14 AA 2965 (emphasis added). The District court then detailed how Willard's conduct **throughout the case** warranted dismissal, including: (1) Willard's failure to provide a damages disclosure (which was "so central to this litigation, and to Defendants' rights and ability to defend this case, that dismissal of the entire case [was] necessary"); (2) Willard's failure to properly disclose the opinions of Gluhaich, even though Willard untimely sought new damages that would require expert opinion and improperly attempted to rely on Gluhaich in support; (3) Willard's "complete disregard for this Court's Orders, deadlines imposed by this Court, and the judicial

[10]Willard's claim that he did not understand the seriousness of the situation simply because he chose to not attend the hearing is baseless and belied by his own allegations and purported evidence, including O'Mara's attendance.

process in general"; and (4) after three years of refusing to comply, Willard's eleventh-hour "ambush" of Defendants by completely changing the amounts and bases for his damages, relying on key documents that were in his possession throughout the case but never disclosed. 14 AA 2966-2975.

Willard's abandonment argument is essentially limited to the failure to oppose the Sanctions Motion. While failure to oppose the Sanctions Motion certainly did not help Willard's cause, it is clear from the record, and the District Court's findings, that dismissal was warranted independently from Willard's failure to oppose the Sanctions Motion. As the District Court reiterated in its 60(b) Order, "Plaintiffs' multiple instances of non-compliance, including the Plaintiffs' failure to provide a compliant damages disclosure in this action, is reflected in the court file for this proceeding, occurring well before Mr. Moquin's purported breakdown in December, 2017 or January, 2018 asserted as preventing him from opposing the motions." 17 AA 3774.

Accordingly, even assuming *arguendo* that Moquin abandoned Willard in December 2017 as Willard claims, dismissal would have occurred even without this alleged abandonment. Therefore, his abandonment argument cannot be a basis to set aside the Sanctions Order.

b. Nevada agency principles preclude an abandonment finding.

As an independent basis for rejecting Willard's argument, Nevada agency principles preclude an abandonment finding. "[C]lients must be held accountable for the acts and omissions of their attorneys," because the client "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts of omissions of this freely selected agent." *Huckabay,* 130 Nev. at 204, 322 P.3d at 433; *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962).

In *Huckabay*, this Court dismissed an appeal where appellants' lead counsel (appellant had two attorneys) failed to timely file an opening brief following multiple extensions. 130 Nev. at 198, 322 P.3d at 430. This Court opined that "[a]ppellants' dissatisfaction with their attorney's performance…does not entitle them to the reinstatement of their appeals, and their argument to the contrary is not consistent with general agency principles, under which a civil litigant is bound by the acts or omissions of its voluntarily chosen attorney." *Id*. at 198, 204-205, 322 P.3d at 430, 434-35.

On appeal, Willard argues that this case falls within a possible exception of "exceptional circumstances" to the general agency rule, where "the lawyer's addictive disorder and abandonment of his legal practice" may justify relief for the victimized client. *Id*. at 204 n.4, 322 P.3d at 434 n.4 (citing *Passarelli v. J-Mar Development, Inc.*, 102 Nev. 283, 286 (1986)). Willard argues that "Moquin

unequivocally abandoned the Plaintiffs," as he "could not function and oppose dispositive motions," "was often unresponsive," and "refused to help Willard or new counsel" with the 60(b) Motion from January-May 2018. AOB 26. However, *Pasarelli* is readily distinguishable. Indeed, *Passarelli* contained **evidence in the record** that the attorney suffered from substance abuse that led to him not coming to the office, missing most appointments and becoming unable to function. 102 Nev. at 285. Further, the client in *Pasarelli* did not know that trial had ever been set, whereas Willard plainly knew that there were deadlines set for him to oppose the Sanctions Motion. 17 AA 3779. And, the client in *Passarelli* had only one attorney. *Id*. None of these facts are present here. Rather, *Huckabay* compels the conclusion that the District Court correctly denied the 60(b) Motion.

c. <u>Willard's knowledge and involvement precludes an abandonment finding</u>.

Finally, Willard's knowledge and failure to exercise diligence independently precludes an abandonment finding. Willard claims he knew that Moquin was having financial difficulties, and that he borrowed money to fund Moquin's personal expenses. 14 AA 3048; 17 AA 3789-90. Willard also claims that he became aware that Moquin had suffered a mental breakdown, that he recommended a psychiatrist to Moquin, and he borrowed money to pay for Moquin's treatment. *Id*. 3049. Therefore, Willard knew of Moquin's alleged problems, yet continued to let Moquin represent him. This is another significant difference from the cases upon which

Willard relies, AOB 25, where the parties were unaware of the attorneys' problems. *Cf. Passarelli*, 102 Nev. at 286 ("Passarelli was effectually and **unknowingly** deprived of legal representation"); *United States v. Cirami*, 563 F.2d 26, 29-31 (2d Cir. 1977); *Boehner v. Heise*, 2009 WL 1360975 *2 (S.D.N.Y. 2009). Indeed, Willard claims that he was informed by O'Mara prior to dismissal that Moquin was not responsive, but did nothing about it due to financial reasons.[11] 14 AA 3050 ¶81; AOB 9 (claiming that "Moquin was not always responsive, but…Willard felt that his only option was to rely on Moquin"); 17 AA 3790. Thus, there was no abandonment: even "where an attorney's mishandling of a movant's case stems from the attorney's mental illness," which might justify relief under Rule 60(b), "client diligence must still be shown." *Cobos v. Adelphi University*, 179 F.R.D. 381, 388 (E.D.N.Y. 1998).

3. The District Court properly declined to set aside the judgment based on the *Young* factors.

Next, Willard challenges the propriety of the Sanctions Order, claiming that the District Court erred in its analysis of *Young v. Johnny Ribeiro*, 106 Nev. 88, 787

[11]Willard claims that the District Court "inaccurate[ly]" found "that Plaintiffs knew of Moquin's psychiatric problems before the…January 4, 2018….Sanctions Order." AOB 30. However, Willard has argued that "[i]t was only in **late 2017** that it became clear to Mr. Willard that something was terribly wrong and that **Mr. Moquin was suffering from mental illness**." 14 AA 3039 (emphases added); AOB 35.

P.2d 777 (1990), and should have issued a different sanction. AOB 31-36. Willard's arguments are unavailing.

a. Willard's arguments are not properly part of this appeal.

First, this Court need not consider Willard's arguments because they are not properly part of this appeal. Indeed, in making these arguments, Willard is ignoring this Court's prior rulings.

In the prior appeal, Willard's appeal from the Sanctions Order was untimely, and this Court issued an Order to Show Cause as to why the appeal from the Sanctions Order should not be dismissed. (August 8, 2019, Order, Docket 77780). In response, Willard agreed to the dismissal of his appeal from the Sanctions Order. (August 14, 2019, Response, Docket 77780). Despite this dismissal, Willard still challenged the propriety of the Sanctions Order in his opening brief. (August 26, 2019, Opening Brief pgs. 27-34, Docket 77780).

In its Opinion, this Court made clear that those arguments were not properly part of the appeal: rather, this Court "decline[d] to address Willard's arguments concerning the propriety of the underlying sanctions order, as Willard voluntarily dismissed his appeal of the same." *Willard*, 136 Nev. at 471 n.7, 469 P.3d at 180 n.7. In blatant disregard of this ruling, Willard continues to challenge the propriety of the Sanctions Order. AOB 31-36. His continued efforts to make these improper arguments are patently frivolous.

Indeed, 60(b) motions are not proper substitutes for arguments which should have been raised in a direct appeal from the underlying judgment. *See, e.g.*, *Mathews v. Carreira*, 770 N.E.2d 560 (Ma. App. 2002) ("Rule 60(b) cannot be used as a substitute for the regular appeal procedure."); *Carrabine v. Brown*, 1993 WL 318809 (Ohio Ct. App. 1993). Further, here, Willard intentionally chose not to appeal the Sanctions Order until after resolution of his 60(b) Motion. 14 3007-3008. Thus, Willard's inappropriate challenges to the Sanctions Order should not be considered.

b. Willard's arguments regarding the propriety of the Sanctions Order are meritless.

Even if this Court considers Willard's challenges to the Sanctions Order, they are meritless.

i. There was no undue penalty to Willard.

Willard argues that "the District Court erred by allegedly not considering whether the sanctions unfairly operated to penalize [Willard] for [his] attorney's misconduct" under *Young*. AOB 35-36. Willard is incorrect.

First, as the District Court found, consideration of the *Young* factors is discretionary. 17 AA 3792. *Young* identifies "[t]he factors a court **may** properly consider…." 106 Nev. at 93, 787 P.2d at 780. "[T]his court does not require district courts to consider every *Young* factor, so long as the district court's analysis is thoughtfully performed." *N. Am. Properties v. McCarran Int'l Airport*, No. 61997, 2016 WL 699864, at *5 (Nev. 2016) (unpublished).

Second, the District Court *did* consider all the *Young* factors. In the Sanctions Order, the District Court quoted *Huckabay* and *Link* in explaining that "a party cannot seek to avoid a dismissal based on arguments that his or her attorney's acts or omissions led to the dismissal." 14 AA 2972-73. It also attributed sanctionable conduct to Willard personally, including (1) Willard's failure to comply with NRCP 16.1 or the District Court's order to provide a damages disclosure, despite his personal knowledge; and (2) Willard's failure to disclose appraisals upon which his new damages were based until the virtual end of discovery, even though these appraisals were in his possession throughout the case. *Id*. 2952, 2966-67. And Willard, who averred that he personally "collaborated with" Moquin on his new untimely damages in his summary judgment motion, knew that the new damages were significantly different (and nearly $40 million more) than those ostensibly sought in his complaint, or in his interrogatory responses which he personally verified. *Id*. 2958; 7 AA 1568-70; 11 2418-29. Further, in addressing Willard's improper challenges to the Sanctions Order in his 60(b) Motion, the District Court reiterated that "dismissal of Plaintiff's claims did not unfairly penalize Plaintiffs based on the factors analyzed in the Sanctions Order," 17 AA 3793, and that Willard "knew of the actions that supported the Sanctions Order." *Id*. 3790. Thus, Willard wholly fails to demonstrate an abuse of discretion.

ii. The noncompliance was willful.

Next, Willard argues that "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." AOB 32-33. Willard also claims that "[t]here was no evidence to establish that Moquin or the Plaintiffs acted willfully or strategically." *Id*.

Even disregarding that Willard provided no admissible evidence of mental illness, *see infra*, Willard's arguments contradict the record. As discussed, the District Court highlighted multiple acts that supported its express finding of willfulness, including conduct attributable to Willard or conduct of which Willard was indisputably aware. 14 AA 2944-77. These willful failures, including Willard's failure to ensure compliance with a Court order that he personally heard, or to provide critical documents until the virtual close of discovery, cannot possibly be excused by Moquin's alleged "mental breakdown," which occurred long after Willard's willful misconduct.

iii. Defendants suffered substantial prejudice.

Next, Willard argues that there was only "some delay and minor prejudice" to Defendants, and Defendants could have prepared defenses to Plaintiffs' damages. AOB 30.

Willard's argument (which has no relevance to Willard's claimed 60(b)(1) grounds) is unavailing. As the District Court found, Willard's "repeated and willful delay in providing to Defendants has necessarily prejudiced Defendants," and the timing of Willard's eleventh-hour drastic changes "would require Defendants to engage in additional fact discovery, retain…experts, take depositions, re-open the briefing schedule, and again delay the trial for tasks that could, and should, have been accomplished during a discovery period that was already extended three times to account for Plaintiffs' continued noncompliance." 14 2970-71. Indeed, "prejudice from unreasonable delay is presumed" and failure to comply with court orders mandating discovery is sufficient prejudice. *In re Phenylpropanolamine (PPA) Products*, 460 F.3d 1217, 1236 (9th Cir. 2006).

Further, the sole individual defendant, Jerry Herbst, passed away in 2018. 16 AA 3563. Herbst was also the President and owner of BHI, the only other Defendant. Yet, Defendants will never have the benefit of Herbst's testimony, because even though Willard had **years** to depose Herbst or propound discovery requests upon him before his passing, he never attempted to do so. Thus, Defendants are significantly more prejudiced now than even when prejudice was found in the Sanctions Order. 14 AA 2970-71.

iv. The District Court correctly determined that dismissal was warranted.

Finally, Willard argues that "[d]ismissal was too severe of a sanction," purporting to rely upon Willard's age,[12] the purported financial effect on Willard of Defendants' claimed "breach," and a reiteration of Willard's unavailing willfulness argument. AOB 34-35. Assuming *arguendo* this has any relevance to 60(b)(1) relief, these conclusory arguments (which also fail to cite to any record or legal authority) lack merit.

Rather, the Sanctions Order held that "dismissal is not too severe for Plaintiffs' repeated and willful noncompliance with Court orders and with Nevada law," 14 AA 2971, and Willard offers no cogent reason as to why he would be entitled to set aside that ruling. *Cf. Huckabay*, 130 Nev. at 205, 311 P.3d at 434 ("[A] party cannot seek to avoid a dismissal based on arguments that his or her attorneys' acts or omissions led to the dismissal.").

[12]Willard's brief is replete with attempts to invoke sympathy based upon his age and claimed finances. AOB 1, 6-7, 12, 34. As they are completely irrelevant to whether the 60(b) Motion was correctly decided, this Court need not consider these attempts.

4. <u>The District Court correctly found that Willard's 60(b) Motion was not supported by admissible evidence</u>.

Next, Willard challenges the District Court's evidentiary determinations. AOB 36-46. His challenges fail to establish any abuse of discretion by the District Court.

A movant must establish grounds for NRCP 60(b) relief by a preponderance of the evidence. *Willard*, 136 Nev. at 470, 469 P.3d at 180. Further, while a "district court has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b),…this discretion is a legal discretion and cannot be sustained where there is **no competent evidence** to justify the court's action." *Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 307 (1993) (emphasis added).

Here, Willard sought 60(b)(1) relief based his unsubstantiated allegation that "Moquin failed to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles," 14 AA 3025, and that "Moquin's psychological disorder constitutes excusable neglect." *Id*. at 3034; AOB 25 ("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….").

However, Willard did not support his 60(b) Motion with any competent evidence.[13] 17 AA 3761-68; *see Agnello v. Walker*, 306 S.W.3d 666, 675 (Mo. App. 2010) (hearsay testimony or documentation cannot serve as the evidence necessary to meet movant's burden of persuasion to set aside judgment under Rule 60); *New Image Industries v. Rice*, 603 So.2d 895, 897 (Ala. 1992) (affirming trial court's refusal to grant Rule 60 relief where only evidence of excusable neglect was an affidavit containing inadmissible hearsay and speculation). And on appeal, Willard fails to demonstrate that the District Court abused its considerable discretion in making its evidentiary determinations.

a. <u>The Court properly excluded Dr. Mar's purported diagnosis</u>.

First, Willard challenges the exclusion of his declaration that "Moquin later explained to me that Dr. Mar had diagnosed him with bipolar disorder and that he needed money to pay Dr. Mar for treatment." 14 AA 3049.

The District Court found that this statement was "inadmissible hearsay with no exception under NRS 51.105(1) because Mr. Willard's declaration does not

[13]Willard not only failed to establish that Moquin had bipolar disorder, but also that Moquin's alleged disorder was the specific cause of any conduct of which he complains. *In re FM Forrest, Inc.*, 587 B.R. 891, 922 (Bankr. S.D. Tex. 2018) (under Rule 60(b)(6), "if a movant wants to establish that he is entitled to relief due to his attorney's mental illness, then he must introduce evidence from a medical doctor that such illness existed, when it existed, and that it in fact impaired the attorney's ability to represent the movant.").

constitute Mr. Moquin's declaration of 'then existing state of mind….'" 17 AA 3764. Rather, "Dr. Mar purportedly diagnosed Mr. Moquin; Mr. Moquin told Mr. Willard of Dr. Mar's purported diagnosis; and Mr. Willard makes the statement of Mr. Moquin's diagnosis." [14] *Id*. Further, the statements "were not spontaneous and instead were a basis for Mr. Moquin to request monetary assistance," and were "not admissible as contemporaneous statements Mr. Moquin made about his own present physical symptoms or feelings." *Id*. 3764-65.

On appeal, Willard attempts to equate the statements, which are, at most, *Willard* recounting *Moquin's* narrative recounting an alleged *prior conversation with his doctor*, with a "spontaneous statement about [Moquin's] present condition at the very time he made the statement to Willard," to prove that Moquin had bipolar disorder. AOB 37. This attempt falls flat on its face.

First, Nevada law categorically prohibits use of this testimony for Willard's intended purpose. NRS 51.105. Even taking Willard's declaration at face value, Willard claims that "Mr. Moquin **later** explained to me that Dr. Mar **had diagnosed him** with bipolar disorder and that he needed money to pay Dr. Mar for treatment." 14 AA 3049 (emphases added). That cannot be used to establish that Moquin had bipolar disorder, or even that Dr. Mar had diagnosed him with bipolar disorder,

[14]This is the "hearsay within hearsay" about which Willard purports to be confused. AOB 38 n.8.

because "[a] statement of memory or belief **to prove the fact remembered or believed is inadmissible** under the hearsay rule unless it relates to the execution, revocation, identification or terms of declarant's will." NRS 51.105(2) (emphasis added).

Moreover, this was not "a spontaneous statement about his present condition at the very time he made the statement to Willard," or an "admi[ssion] that he was bipolar," as Willard argues. AOB 37. A narrative of a former conversation is not a contemporaneous statement of present physical symptoms or feelings. For example, a court upheld the exclusion of a similar statement: "Mr. Henry's statement to Ms. Merrick explaining that he informed Dr. Smoot that he was having bad gas pains and that Dr. Smoot suggested walking and/or an enema to relieve the pressure." *Henry v. Nanticoke Surgical Assocs., P.A.*, 931 A.2d 460, 464 (Del. Super. Ct. 2007). The Court explained that this was not admissible under the state-of-mind exception: Mr. Henry's statement "did not assert a state of mind while making the statement to Mrs. Merrick (for example, 'I am in pain')." *Id*. Rather, "[t]he statement merely explained a past incident where Mr. Henry allegedly spoke to Dr. Smoot." *Id*.

Similarly, here, Willard does not allege that Moquin made a contemporaneous statement of his state of mind (for example, "I am in pain"). The statement merely explained a past incident where Dr. Mar allegedly made a statement to Moquin, which is not admissible under the state-of-mind exception. *See State v. Bell*, 950

S.W.2d 482, 484 (Mo. 1997) (victim's hearsay testimony concerning past abuse "was not a declaration of her state of mind[, but instead] was pure narration of past acts by another."). Indeed, if anything, Willard is trying to admit **Dr. Mar's** purported statement to Moquin (the alleged diagnosis), which is clearly not within the state-of-mind exception. *See Serrano v. Rotman*, 943 N.E.2d 1179, 1192 (Ill. Ct. App. 2011) ("The state of mind exception applies only to the state of mind of the declarant and not the state of mind of someone other than the declarant.").

Finally, Willard's argument that spontaneity is not a requirement to admissibility,[15] AOB 37, runs afoul of NRS 51.105, which applies to a statement of the declarant's "then existing state of mind…." *See* 2 McCormick On Evid. § 273 (7th ed.) (stating that "not only does the [analogous federal] rule mandate that the statement must be spontaneous by its requirement that the statement describe a 'then existing' physical condition, but the Advisory Committee Note indicates that the rule is a specialized application of the broader rule recognizing a hearsay exception for statements describing a present sense impression, the cornerstone of which is spontaneity. If circumstances demonstrate a lack of spontaneity, exclusion should

[15]Willard cites *Alarm Fin Enterprises, LP v. Alarm Prot. Tech, LLC*, 743 F. App'x 786, 788 (9th Cir. 2018). AOB 37. However, at best, *Alarm* only demonstrates that the Ninth Circuit has stated that "[e]vidence that the statement was not contemporaneous weighs against admission," which would not compel, or even justify, a different conclusion here. *Id*.

follow."). And regardless, Willard did not allege that Moquin made statements about his then-existing feelings or symptoms. Thus, either way, the state-of-mind exception does not apply.[16]

b. <u>The Court properly excluded Willard's lay witness testimony regarding Moquin's alleged mental condition</u>.

Next, Willard challenges the District Court's determination that Willard was not qualified to opine on Moquin's mental condition, mental disorder, or symptoms of any disorder or condition that manifested. AOB 38; 17 AA 3765. Willard's argument lacks merit.

Willard cites one case—*Carter v. US*, 252 F.2d 608, 618 (D.C. Cir. 1957)—to argue that "lay witness testimony is actually very admissible, and indeed helpful, when it concerns mental illness."[17] AOB 38. However, *Carter* merely contained a generalized discussion of lay witness testimony in a criminal case. A more recent

[16]Willard's gratuitous assertions that this was "a statement against Moquin's interest as it could have subjected him to possible civil liability or bar discipline," or that "the special circumstances under which this statement was made offer assurances of accuracy" can be summarily disregarded. AOB 37. Willard did not make this argument in his 60(b) briefing below, and regardless, it is offensive to claim, without support, that simply having bipolar disorder subjects one to liability or discipline. Nor does hearsay-within-hearsay in a manner prohibited by NRS 51.105(2) offer inherent assurances of accuracy.

[17]Willard also argues that his psychology degree from 1965 "provides even more value." AOB 38. Willard is a retired developer, and there is no indication that he contains the expertise necessary to opine on Moquin's alleged mental condition.

case from the same circuit held that a district court did not err by excluding evidence of bipolar disorder from a lay witness, explaining that "[e]ven if the evidence would have been probative, [the witness] cannot credibly contend that she was qualified to testify about a medical diagnosis." *Lane v. D.C.*, 887 F.3d 480, 485–86 (D.C. Cir. 2018). And, as the District Court found, other courts are in accord. 17 AA 3767 (quoting *In re Petition for Involuntary Commitment of Joseph R. Barbour*, 733 A.2d 1286 (Pa. 1999)); 3765 ((quoting *White v. Corn*, 616 S.E.2d 49, 54 (Va. App. 2005)). Thus, the District Court clearly did not commit "palpable abuse" in excluding this testimony.[18]

c. **The Court correctly excluded exhibits 6-8 to the 60(b) Motion**.

Next, Willard challenges the exclusion of exhibits 6-8 to his 60(b) Motion, which purport to detail Moquin's alleged domestic abuse, and contain statements about Moquin's alleged bipolar condition. AOB 39-41. Willard's challenge lacks merit.

First, as the District Court found, Willard could not authenticate the exhibits or identify them pursuant to NRS 52.015(1) or NRS 52.025 because he is not the author of those documents and lacks personal knowledge of their authenticity. 17 AA 3767-3768. Further, the exhibits did not satisfy the requirements for presumed

[18]Willard does not appear to challenge the District Court's exclusion of his proffered internet article listing alleged symptoms. 17 AA 3764; AOB.

authenticity under NRS 52.125 because they were not certified copies of public records. *Id*. On appeal, Willard provides no basis to challenge these findings other than simply declaring that the exhibits are authentic based on Willard's declaration, the documents' appearance, and their surrounding characteristics, and cursorily citing the statutes upon which the District Court relied.[19] AOB 39. This scant argument does not establish that the District Court committed "palpable abuse" in excluding this evidence.

Moreover, Willard's cursory claim that it was somehow unfair of the District Court to not take judicial notice of Willard's exhibits when it took judicial notice of Moquin's bar status is meritless. AOB 40. Indeed, "no party requested th[e District] Court to take judicial notice of the California court records…." 17 AA 3767-68; *cf. Madeja v. Olympic Packers, LLC.*, 310 F.3d 628, 639 (9th Cir. 2002) (district court did not abuse its discretion in refusing to take judicial notice of other proceedings where the documents submitted were not authenticated).

[19]Willard also argues that "if 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." AOB 39 (quoting NRS 52.015(3)). However, Defendants raised Willard's lack of personal knowledge and the lack of certification. There was no reason to provide evidence rebutting Willard's inadmissible evidence, especially where it was Willard's burden to prove excusable neglect.

Finally, even if the exhibits could be authenticated, the statements therein regarding Moquin's alleged disorder were inadmissible lay opinion and inadmissible hearsay, as they were apparently authored by Moquin's wife, and Willard was offering them to prove that Moquin suffers from bipolar disorder and his life was in "shambles." 17 AA 3768.

Willard claims that these exhibits were not offered to prove the truth of the statements made therein, but to show that Moquin was facing personal turmoil. AOB 40. This argument makes little sense, because if these exhibits were not offered for the truth of the facts stated in them, they would have no relevance. Willard's argument is also disingenuous, as Willard clearly attempts to utilize those exhibits for their contents, arguing that Moquin's wife "confirms that Mr. Moquin 'was recently diagnosed with Bipolar disorder, has been paranoid and violent,' and that Mrs. Moquin is concerned about triggering a psychotic reaction," and that Moquin's wife "further reveals that for years she has been concerned that Moquin was failing to meet filing responsibilities in this case." 14 AA 3032; AOB 10.

d. <u>The Court correctly excluded the exhibits to the 60(b) Reply</u>.

Finally, Willard argues that the District Court abused its discretion in excluding exhibits to the 60(b) Reply. According to Willard, Exhibits 5-10, reflecting alleged events occurring in 2018, "support the facts that Moquin abandoned the Plaintiffs and that he was suffering from mental illness," AOB 41-

42; and the communications in Exhibits 3, 4, 7, 8, and 10 were purportedly not hearsay. *Id*. at 42. Willard concludes by claiming that his affidavit "can be used to confirm that mental health problems justify a motion for relief based upon excusable neglect," and interpolates three pages of his declaration into his brief. [20] *Id*. at 43-46.

Willard's arguments are unavailing. These exhibits do not demonstrate that excusable neglect caused the entry of the Sanctions Order. As discussed *supra*, Moquin's claimed abandonment allegedly commencing in December 2017 (and certainly in 2018) was not the cause of the Sanctions Order that Willard seeks to set aside. Thus, this purported evidence would not establish that the Sanctions Order was entered as a result of Willard's alleged excusable neglect. Rather, as the District Court found, "[l]ogically, relevant events asserted to support Plaintiffs' argument of excusable neglect must have necessarily occurred prior to the entry of the orders Plaintiffs seek to set aside." 17 AA 3772 n.8; *Gersing v. Real Vision, Inc.*, 817 S.E.2d 500 (N.C. Ct. App. 2018) ("Excusable neglect is something which must have occurred at or before entry of the judgment, and which caused it to be entered. Therefore, excusable neglect on the part of the attorney occurs only when the

[20]It is unclear what these unsubstantiated declarations have to do with Willard's Reply Exhibits. But regardless, the District Court found that Willard's observations were not based on his own perceptions or observations, that Willard lacked personal knowledge to testify to Moquin's mental disorder, and that his statements were speculative, citing numerous examples of Willard's declaration in support. 17 AA 3763, 3765.

attorney's actions were the cause of the entry of judgment."); *Henry v. Goins*, 104 S.W.3d 475, 480 (Tenn. 2003).

e. <u>There is no basis for this Court to take judicial notice of Moquin's disciplinary action</u>.

Finally, Willard requests that this Court take judicial notice of Moquin's disciplinary proceedings. AOB 19-22. This Court should decline Willard's request. Most importantly, this Court prohibited Willard from introducing new evidence on remand, instead directing the District Court make findings based upon the existing record. 17 AA 3636-37. Thus, Willard is seeking to introduce new evidence and arguments on appeal that the District Court could not and did not consider.

Indeed, these proceedings could not have been considered as part of Willard's underlying 60(b) Motion. A party moving for NRCP 60(b)(1) relief,[21] as Willard did here, must move "no more than 6 months after the date of the proceeding or the date of service of written notice of entry of the judgment or order, whichever date is later," and "[t]he time for filing the motion cannot be extended under Rule 6(b)." NRCP 60(c)(1). Here, the guilty plea upon which Willard seeks to rely was not entered until April 2019, more than one year after the District Court entered its Sanctions Orders, and therefore could not be a basis for seeking 60(b) relief. AOB 25.

[21]Newly-discovered evidence is also subject to the 6-month time limit.

Regardless, even if this Court takes judicial notice, the proceedings do not substantiate Willard's unsupported arguments. In testifying, Moquin appeared to suggest that his bipolar diagnosis was contrived to best situate Willard to seek NRCP 60(b) relief. (Docket 78946 Record on Appeal Vol. 1, pg. 103). Moquin also testified that he "spent hundreds of hours" responding to discovery requests, and defended much of his conduct throughout the litigation. *Id*. 96-98. He testified that "I kept Mr. Willard informed…." *Id*. 99-100. Thus, for multiple reasons, this Court should decline Willard's request to take judicial notice. *Cf. also Forrest*, 587 B.R. at 922 (an attorney, who is not a medical doctor, is not competent to testify that she was mentally incapacitated to the extent it impaired her ability to practice law (collecting cases)).

5. <u>The District Court correctly considered and applied the *Yochum* factors</u>.

Not only did Willard fail to substantiate his arguments with any admissible evidence, the District Court also found on remand that the *Yochum* factors strongly supported denial of 60(b)(1) relief.. The District Court's detailed findings on each *Yochum* factor are supported by substantial evidence, and are well within the District Court's wide discretion. *See also Kahn v. Orme*, 108 Nev. 510, 513-14, 835 P.2d 790, 793 (1992) (movant must show excusable neglect by a preponderance of the evidence). Willard's attempts on appeal to claim otherwise are wholly unavailing.

a. **Prompt application to remove the judgment**.

The District Court found that "[w]hile Plaintiffs should and could have acted in a more prompt manner, Plaintiffs filed their *Rule 60(b) Motion* within a reasonable amount of time after the *Initial Sanctions Order* and the *Sanctions Order*." 17 AA 3772. Nonetheless, it found that "the remaining three *Yochum* factors weigh strongly against NRCP 60(b) relief." *Id*.; *cf. Rodriguez*, 134 Nev. at 659, 428 P.3d at 259 ("Even assuming Rodriguez acted in good faith, we affirm the district court's decision based on the first three *Yochum* factors, all of which favor denial of Rodriguez's NRCP 60(b)(1) motion."); AOB 55 (Willard arguing that *Yochum* factors must be weighed against each other).

b. Willard failed to demonstrate an absence of intent to delay the proceedings.

The next *Yochum* factor is whether the movant has demonstrated the absence of intent to delay the proceedings. "[A]n intent to delay the proceedings may be inferred from the parties' prior actions." *ABD Holdings, Inc. v. JMR Inv. Properties, LLC*, 441 P.3d 548 (Nev. 2019) (unpublished) (citing *Rodriguez*, 134 Nev. at 657, 428 P.3d at 258). For example, intent to delay existed where the movant "[e]xhibited a pattern of repeatedly requesting continuances [of the trial date] and filed his NRCP 60(b)(1) motion just before the six-month outer limit," exhibited conduct which "differed markedly from that of a litigant who wishes to swiftly move toward trial," and exhibited conduct which "indicate[d] that he intended to delay trial until he

secured new counsel, rather than proceeding without representation." *Rodriguez*, 134 Nev. at 658, 428 P.3d at 258.

This Court also inferred intent to delay where, *inter alia*, "[t]he record demonstrate[d] a pattern of delay from the case's inception: [the defendants] asked for extensions of the time to file their answer, hired an attorney the day the answer was due and then subsequently filed an untimely demand for securities of costs instead of answering the complaint—and thereafter still failed to answer the complaint." *ABD*, 441 P.3d 548. Intent to delay also existed where, in part, the movant "failed to file a single motion" opposing the respondent's motions. *Kahn*, 108 Nev. at 514, 835 P.2d at 793.

i. **The District Court's findings**.

The District Court found that Willard had not demonstrated an absence of intent to delay the proceedings for multiple, independent reasons. 17 AA 3773. First, Willard's only asserted basis for satisfying this *Yochum* factor—"Moquin's mental illness"—was not supported by admissible evidence. 14 AA 3035; 17 AA 3773, 3777. Second, rather than Willard demonstrating an absence of intent to delay, the *opposite* was true: the record was replete with affirmative evidence of intent to delay the proceedings. 17 AA 3774. The District Court entered detailed findings on Willard's continual delay from the inception of the case, and also reiterated that

Willard's noncompliance necessitated three extensions of trial and discovery deadlines. *Id*.

Further, the District Court found that this continual delay was personally attributable to Willard. *Id*. 3774-75. Not only were the acts of his freely-selected attorneys attributable to Willard, *see supra*, but Willard also personally knew of and/or participated in the conduct which caused delay and ultimately dismissal, such as not disclosing compliant NRCP 16.1 damages despite the Court's order, and not disclosing appraisals upon which his last-minute dramatically-different damages were based. *Id*. The District Court also found that this three-year[22] delay in producing fundamental information until revealing dramatic changes to his damages at the virtual end of discovery, when Defendants could not meaningfully respond or engage in discovery, was willful and strategic. *Id*. at 3774-75, 3782.

Additionally, Willard failed to demonstrate an absence of intent to delay with respect to the Sanctions Order, since despite knowing the deadline to oppose the Sanctions Motion, and knowing that no opposition had been filed, neither Willard nor O'Mara apprised the Court of any issues or provided any status update, instead

[22]*Cf.* NRCP 41(e)(2)(A) ("The court may dismiss an action for want of prosecution if a plaintiff fails to bring the action to trial within 2 years after the action was filed.").

waiting until four months after the opposition deadline to do so with new counsel.[23] *Id*. 3775-76. Finally, Willard claimed that he knew, prior to dismissal, that Moquin was allegedly unresponsive, but failed to replace Moquin or take other action due to perceived financial reasons (which the District Court found lacked credibility), which also failed to demonstrate absence of intent to delay. *Id*. 3776, 3777; 14 AA 3050.

Thus, the District Court found that "as in *Rodriguez*, Plaintiffs' conduct—both pre- and post- Sanctions Order—has 'differed markedly from that of a litigant who wishes to swiftly move toward trial,'" and that Willard failed to establish the absence of intent to delay the proceedings. *Id*. 3777 (quoting *Rodriguez*, 134 Nev. at 658, 428 P.3d at 258).

ii. **Willard's arguments on appeal**.

On appeal, Willard makes three arguments claiming that the District Court abused its discretion. Each lacks merit.

First, Willard argues that statements in his declaration discussing his "ongoing efforts on an almost daily basis to push the case forward" were not expressly excluded, and were therefore admitted. AOB 51-52. However, even assuming

[23]On January 4, 2018, the District Court entered an Order granting the Sanctions Motion, and ordered Defendants to submit a proposed order within 20 days. 13 AA 2920-21. O'Mara was copied on this Order, *id*., but failed to apprise the Court of any alleged issues at any point during that timeframe. 17 AA 3776.

arguendo that these self-serving statements (which did not provide any specificity or timeframe) were admissible, they do not overcome the myriad evidence upon which the District Court relied, discussed *supra*. And, even "where the record contains conflicting evidence, [this Court] will affirm the district court's factual findings as long as sufficient evidence supports those findings." *Willard*, 136 Nev. at 470-71, 469 P.3d at 180. Thus, here, where substantial evidence supported the District Court's findings, Willard's dubious "evidence" does not support reversal.

Second, Willard argues that the District Court "wrongfully excluded evidence that supports this factor," claiming that the exhibits to his 60(b) Reply were not hearsay because they showed Willard's "diligence and the effect of Moquin's statements on [him]." AOB 52-53. These exhibits, even if somehow admissible, would not satisfy Willard's burden to show an absence of intent to delay—or to show that the District Court abused its discretion.

As a threshold matter, the alleged communications in these exhibits did not begin until December 2017—**after** Willard had already undertaken "numerous egregious and intentional delays from the inception of the case." *Id*.; 15 AA 3309; 17 AA 3774. Indeed, as the District Court found, "multiple instances of non-compliance…occurred well before Mr. Moquin's purported breakdown in December 2017, or January 2018…," which had necessitated **three** continuances of trial and discovery deadlines. 17 AA 3774; *cf. Union Petrochemical Corp. of*

Nevada v. Scott, 96 Nev. 337, 609 P.2d 323 ("To condone the actions of a party who has sat on its rights only to make a last-minute rush to set aside a judgment would be to turn NRCP 60(b) into a device for delay rather than the means for relief from an oppressive judgment that it was intended to be."). Thus, these exhibits, even if somehow admissible, plainly do not support reversal.

And regardless, the District Court found that these communications did not demonstrate absence of intent to delay. Rather, citing exhibits 3-4 to Willard's 60(b) Reply, the District Court found that Willard *knew* of the opposition deadline and that no oppositions were filed, 17 AA 3775, but nonetheless failed to apprise the Court of any issues, instead waiting more than **four months** after the opposition deadline to do so with new counsel. *Id*. 3775-76. It also found that despite knowing that Moquin was unresponsive prior to the dismissal of his case, Willard failed to replace Moquin or take any other action. *Id*. 3776. Thus, again, these exhibits plainly do not support reversal.

Third, Willard argues that the District Court erred in repeating findings from its prior 60(b) Order, which he claims was "reversed," or Sanctions Order, which he claims was "essentially entered by default." AOB 53. This argument is frivolous. The very purpose of the remand was to require the District Court to make explicit and detailed findings on each *Yochum* factor, and this Court *expressly declined* to consider Willard's arguments challenging the merits of the District Court's

excusable neglect determination. *Willard*, 136 Nev. at 471 n.7, 469 P.3d at 180 n.7. The District Court was not obligated to reconsider its findings which were not part of the scope of the remand, based on its review of the same record. Nor does Willard have any basis to claim that the District Court may not rely upon its Sanctions Orders, which are not even properly part of this appeal. And any insinuation that the District Court was somehow just "unilaterally relying" on Defendants without making any findings itself is an affront to the role of a district court.

In sum, this factor strongly favors affirmance.

c. Willard failed to demonstrate a lack of knowledge of procedural requirements.

The next *Yochum* factor is whether the movant has demonstrated a lack of knowledge of the procedural requirements. "[A] party is generally deemed to have knowledge of the procedural requirements where the facts establish either knowledge or legal notice, where under the facts the party should have inferred the consequences of failing to act, or where the party's attorney acquired legal notice or knowledge." *ABD*, 441 P.3d 548 (unpublished) (citing *Rodriguez*, 428 P.3d at 258 and *Stoecklein*, 109 Nev. at 273, 849 P.2d at 308).

A movant has failed to satisfy this factor where, for example, he "personally witnessed the court grant [the defendant's] motion in limine because he did not file a written opposition." *Rodriguez*, 134 Nev. at 658, 428 P.3d at 258. Under such circumstances, the movant "should have inferred the consequences of not opposing

the motion to dismiss, especially in light of the court's express warning to take action." *Id*. This factor also disfavored 60(b)(1) relief where the movants "knew the answer was due, knew it was not timely filed, knew [the plaintiff] was seeking a default and money damages, and should have inferred that failing to file their answer and losing on the subsequent motions would result in a default judgment." *ABD*, 441 P.3d 548 (unpublished).

Willard cursorily alleges that he was "unaware of any procedural rules that were not being satisfied." AOB 54. This is a flagrant misrepresentation. Rather, as the District Court found, the record showed that Willard unequivocally failed to demonstrate this factor. 17 AA 3778. Indeed, Willard admitted as much below, conceding that "this is, candidly, a little bit of a difficult one." *Id*. 3778-79; 18 AA 3973.

Further, the record incontrovertibly established Willard's personal knowledge of key procedural requirements, including his knowledge that Defendants had repeatedly requested compliant damages disclosures but he had not produced them, and that the District Court had ordered him to produce them by a time certain. 17 AA 3779. Willard's failure to comply with this requirement was a "critical basis for the Sanctions Order." *Id*. Willard was also incontrovertibly aware of his last-minute dramatic changes to his damages, *see infra*. And Willard's own purported

"evidence" demonstrates that Willard knew of the requirement to oppose the Sanctions Motion. *Id*. 3775-77, 3790.

Moreover, Willard was represented by *two* attorneys throughout, and the District Court found that neither attorney abandoned Willard. *Id*. 3780. Indeed, even beyond the general procedural knowledge expected of practicing attorneys, Defendants wrote numerous letters detailing the pertinent procedural requirements; the parties entered into three stipulations reflecting their knowledge of the deadlines and procedural requirements; and the District Court entered multiple orders directly informing Plaintiffs of the pertinent procedural requirements and deadlines. *Id*.

Thus, to say the very least, Willard's cursory argument, which does not even reference the District Court's findings, does not demonstrate an abuse of discretion. Rather, this factor strongly favors affirmance.

d. **Willard failed to demonstrate good faith**.

The fourth *Yochum* factor is whether the movant has satisfied its burden to demonstrate good faith. "Good faith is an intangible and abstract quality with no technical meaning or definition and encompasses, among other things, an honest belief, the absence of malice, and absence of design to defraud." *Rodriguez*, 134 Nev. at 659, 428 P.3d at 259 (quotations omitted). And "[t]he facts evidencing an intent to delay the proceedings [can] likewise support the district court's findings that [the movants] did not act in good faith…." *ABD*, 441 P.3d 458 (unpublished).

Here, not only did Willard fail to demonstrate that he acted in good faith, the record demonstrated that Willard had affirmatively acted in *bad* faith, which necessitated dismissal of his case in the first instance. 17 AA 3784.

On appeal, Willard ignores the District Court's detailed findings regarding this factor. AOB 54-55. Rather, Willard's cursorily argues that: (1) Willard would have "no motivation whatsoever to delay the case or proceed in bad faith," particularly given his alleged finances; (2) Moquin caused the delays and Willard "repeatedly pleaded with Moquin to move the case forward"; (3) logically, plaintiffs cannot act in bad faith; and (4) after dismissal, Willard proposed various ways to avoid dismissal, which Defendants rejected. *Id*.

Willard's superficial arguments fall far short of demonstrating abuse of discretion by the District Court. Willard's generalized attempts to blame Moquin do not overcome the District Court's detailed and evidence-based findings to the contrary. Nor do Willard's speculations that generally, a plaintiff would not act in bad faith to delay a case.

Rather, the District Court found that Willard's sole basis for claiming good faith—Moquin's alleged mental disorder—was not supported by evidence. *Id*. 3781. The District Court also cited numerous instances where Willard had acted in bad faith. It reiterated that after three years of refusing to comply with threshold discovery obligations, Willard filed a motion at the virtual close of discovery seeking

judgment on "brand new, never-disclosed types, categories, and amounts of damages." *Id*. 3782. Further, Willard relied upon appraisals which he had never disclosed, despite them being in his possession throughout the entire case. *Id*. 3782-3783. The District Court found that this intentional withholding of key information and documentation throughout the case, only to provide it at the eleventh hour to seek nearly $40 million more in damages, was "intentional, strategic, and in bad faith." *Id*. 3783.

Further, this bad-faith conduct was personally attributable to Willard. *Id*. Certainly, Willard, who authored a 15-page affidavit in support of his summary judgment motion, averred that "[m]y counsel and I collaborated to create" the damages spreadsheet in support of the motion, and described his new damages in detail, knew the damages sought in this eleventh-hour motion were materially different than those he ostensibly sought in the verified complaint, or in his personally-verified interrogatory responses. *Id*.; 11 AA 2427 Similarly, Willard's failure to disclose his NRCP 16.1 damages in "blatant[] disregard[]" of the District Court's order was in bad faith and personally attributable to Willard. *Id*. 3784. Finally, the Court reiterated that Willard had "completely ignored multiple Orders from this Court, deadlines imposed by this Court, and their obligations pursuant to the Nevada Rules of Procedure," and had "received multiple opportunities and

extensions to rectify [his] noncompliance, but ha[d] not even attempted to do so." *Id*.

Willard's generalized and cursory allegations to the contrary do nothing to overcome these findings. AOB 54-55. Further, Willard's accusation that Defendants should have agreed to set aside the judgment against Willard is both bizarre and irrelevant. AOB 55.

This factor strongly favors affirmance.

Thus, as discussed herein, the District Court's detailed findings on *Yochum* factor were well within the District Court's wide discretion and its denial of Willard's 60(b) Motion should be affirmed.

e. <u>The policy of considering cases on the merits does not support Willard's position</u>.

The District Court considered Nevada's bedrock policy that cases be considered on the merits whenever possible, but concluded, based upon the record, that this policy did not warrant the relief sought by Willard. 17 AA 3784-86. Indeed, Willard had every opportunity to have his case heard on the merits, but repeatedly "frustrated this policy by refusing to provide Defendants with [his] damages calculations or proper expert disclosures." *Id*. 3785.

To let Willard benefit from this policy when he eschewed it for *years*, despite Defendants' repeated efforts, would make a mockery of the policy. *Id*. Rather, the policy "is not boundless and must be weighed against any other policy

considerations, including…the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing party; and administration concerns, such as the court's need to manage its large and growing docket." *Huckabay*, 130 Nev. at 203, 322 P.3d at 432; *Kahn*, 108 Nev. at 516, 835 P.2d at 794 (noting that "[l]itigants and their counsel may not properly be allowed to disregard process or procedural rules with impunity").

Accordingly, the District Court did not abuse its discretion with respect to this consideration. *See Rodriguez*, 428 P.3d at 256 (district court has "broad discretion" to balance the importance of deciding cases on the merits and the need to swiftly administer justice); *PPA*, 460 F.3d at 1228 ("this factor lends little support to a party whose responsibility it is to move a case toward disposition on the merits but whose conduct impedes progress in that direction.").

f. <u>Willard's claim that BHI presented "new arguments" on remand is frivolous</u>.

Finally, Willard's lead *Yochum* argument is patently frivolous. Willard claims that the District Court "disregarded this court's prohibition on offering 'any new arguments or evidence on remand' in support of the *Yochum* factors" (AOB 48-50) by considering a proposed order submitted by Defendants that Willard claims "included approximately 17 pages of entirely new arguments and analysis." AOB 18. Willard posits that because only Willard, and allegedly not Defendants, made

Yochum arguments below, the District Court apparently should not have allowed Defendants to even cite *Yochum* in their proposed order. *Id*. 49-50.

Willard's argument is baseless. This Court remanded the matter specifically to "issue explicit and detailed findings, preferable in writing, with respect to the four *Yochum* factors…." Both parties submitted a proposed order at the District Court's request, and both addressed the *Yochum* factors. AOB 48-50. Tellingly, Willard does not identify what "new" arguments or evidence the District Court considered, because he cannot.[24] *Id*. The District Court stated that "[a]s directed by the Supreme Court, the Court's consideration of the factors set forth in *Yochum*…is limited to the record currently before the court and this Court will issue its order appropriately." 17 AA 3748. That is what the District Court did, and the Order speaks for itself. Indeed, ironically, Willard complains elsewhere in his brief that 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." AOB 53.

[24]And certainly, Defendants had previously argued to the District Court that Willard intentionally delayed the proceedings, knew of procedural requirements, and failed to act in good faith, and that the policy favoring adjudication on the merits did not warrant relief. *See, e.g.*, 11 AA 2381-83, 2372, 2378-79, 2363; 15 AA 3149-53, 3161-63.

Moreover, if, as Willard claims, this Court had intended only to require the District Court to rubber-stamp Willard's *Yochum* arguments as findings, and grant Willard's Motion on that basis, AOB 49-50, it stands to reason that no remand would have been required.

Thus, Willard's arguments on this point can be summarily disregarded.

6. <u>Willard incorrectly ignores O'Mara's critical role in the analysis</u>.

Finally, a critical fact provides an independent basis to reject every argument in Willard's appeal: Willard had **two** lawyers throughout the entire case. Because Willard also had O'Mara as counsel, Willard's claims regarding Moquin, even if somehow sufficient, do not entitle Willard to 60(b) relief.

Even where one attorney's incapacitation may constitute excusable neglect, a plaintiff is not entitled to post-judgment relief where the plaintiff also had another capable attorney. In *Walls v. Brewster*, following dismissal, a plaintiff moved to vacate/amend the order, claiming that the plaintiff's failures resulted from excusable neglect; namely, the illness of plaintiff's attorney. 112 Nev. 175, 177-78, 912 P.2d 261, 262 (1996). The district court held that while illness of one of the attorneys may have constituted excusable neglect, the plaintiff had two attorneys, and there was no valid claim of excusable neglect as to the second attorney, who was not ill and could have rectified the plaintiff's failures. *Id*. This Court affirmed, echoing the district court's reasoning. *Id*. at 179, 912 P.2d at 263. Applying *Walls* here, even if Willard

somehow demonstrated excusable neglect by Moquin, this does not excuse O'Mara's failures. Thus, Willard's basis for 60(b) relief is patently insufficient because it fails to recognize that Willard had another attorney, O'Mara, for whom Willard offers no claim of excusable neglect.

The fact that O'Mara was purportedly local counsel makes no difference. Nevada law clearly defines the responsibilities of local counsel, and requires that the local counsel be "responsible for and actively participate in the representation of the client," "be present at all motions, pretrials, or any matters in open court," be responsible "for compliance with all state and local rules of practice," and "ensure that the proceeding is managed in accordance with all Nevada procedural and ethical rules." SCR 42(14). O'Mara expressly "consent[ed] as Nevada Counsel of Record to the designation of Petitioner to associate in this cause pursuant to SCR 42." 1 AA 203; 17 AA 3791.

Thus, O'Mara was "responsible for" and required to "actively participate in" the representation of Willard, SCR 42(14)(a), O'Mara was responsible to the court for the administration this action, *id*. at 14(c), 42(1)(a)(1), and it was O'Mara's responsibility "to ensure that the proceeding is tried and managed in accordance with all applicable Nevada procedural and ethical rules." *Id*. at 14(c); *see also* WDCR 23(1) ("Counsel who has appeared for any party shall represent that party in the case and shall be recognized by the court and by all parties as having control of the

client's case, until counsel withdraws, another attorney is substituted, or until counsel is discharged by the client in writing…."). Accordingly, even if Willard's deficient theories about Moquin had any evidentiary support, Willard offers no explanation as to why O'Mara did not fulfill his clearly-delineated duties. Willard's argument ignores, and runs afoul of, SCR 42. *Cf. generally Duke Univ. v. Universal Prod. Inc.*, 2014 WL 3670019, at *2 (M.D.N.C. July 24, 2014).

Further, O'Mara had far more than a perfunctory role in the case. O'Mara signed the Verified Complaint, claiming "[u]nder penalty of perjury" that "he is the attorney for [Willard] in the foregoing Complaint and knows the contents thereof, that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes them to be true." 1 AA 18. O'Mara attended every hearing and court conference. 17 AA 3792. And "O'Mara was the sole signatory on [the] deficient initial disclosures, the uncured deficiencies of which were a basis for the sanction of dismissal." 17 AA 3792; 11 AA 2392-98.

O'Mara's active role continued after Defendants filed their Sanctions Motion—O'Mara personally signed and brought a motion seeking an extension to file an opposition and representing that "Counsel has been diligently working for weeks to respond to Defendants serial motions, which include seeking dismissal of Plaintiffs' case. With the full intention of submitting said responses, Counsel for

Plaintiffs encountered unforeseen computer issues…Counsel for Plaintiffs is confident that with a one-day extension they will be able to recreate and submit the oppositions to Defendants' three motions." 13 AA 2900-03. O'Mara also participated in the hearing regarding the allegedly forthcoming oppositions. 15 AA 3244-71. Thus, as the District Court concluded, "O'Mara's involvement precludes a conclusion of excusable neglect here." 17 AA 3792.

Willard's arguments do not demonstrate any abuse of discretion. Willard claims O'Mara "was led to believe that Moquin would respond to the Defendants' motions and was effectively unaware that Moquin had abandoned the case," and that O'Mara "justifiably relied on [Moquin's] promise" that "all three oppositions would be filed today." [25] AOB 47-48.

This argument is meritless. First, it is untenable to argue that O'Mara was "effectively unaware" that Moquin failed to file any oppositions or "abandoned the case"—as a counsel of record for Willard, O'Mara received electronic notification of every filing, and Defendants filed a notice of non-opposition for their Sanctions Motion less than two hours after Willard failed to oppose it. Further, Willard himself

[25]Even disregarding the hearsay issue, this "promise" was allegedly made on December 11, 2017, one day **prior** to the hearing, attended by O'Mara, discussing Willard's failure to file. *Id*. Willard cannot credibly contend that O'Mara relied upon this alleged promise.

claims that O'Mara knew of Moquin's alleged unresponsiveness before the case was dismissed. 14 AA 3050.

Second, even if O'Mara was somehow unaware that Moquin had purportedly "abandoned the case" in December 2017, this does not excuse O'Mara's undisputed knowledge of—and contributions to—Willard's misconduct throughout the case that led to dismissal. O'Mara received stipulations detailing Willard's failures to provide discovery, and how those failures necessitated repeated continuances. 2 AA 389-95; 7 AA 1480-88. And, O'Mara was copied on every communication—and there were at least ten—by Defendants detailing Willard's continued lack of compliance. *See* 11 AA 2399-2401, 2410-14, 2416-17, 2442-45; 12 AA2455, 2543, 2639, 2651, 2653, 2677-81; 13 AA 2775-2802.

Thus, any argument that O'Mara was somehow misled is flatly contradicted by the record.[26] And indeed, if O'Mara's involvement is to be disregarded in a case

[26]Nor do the cases cited by Willard support the granting relief here. In *Scott v. Dalkon Shield Claimants' Tr.*, 1994 WL 321212 (E.D. La. June 23, 1994), the Court sanctioned an attorney under 28 U.S.C. 1927 where that attorney (who never "formally enrolled" to practice in the case as an unlicensed attorney in Louisiana) led his co-counsel and the plaintiff to believe that he would be responsible for representing plaintiff as lead counsel at a deposition and for procuring expert witnesses, but then abandoned plaintiff three months before trial right before the expert disclosure deadline. The Court had previously granted plaintiff's motion to continue trial and the expert disclosure deadline based upon the attorney's abandonment. *Id*. *Scott* is distinguishable not only because it is not a Rule 60(b) case, but also because the plaintiff, through counsel of record in Louisiana, moved to

which was dismissed for repeated lack of compliance with **Nevada** procedure, that would render meaningless SCR 42 and the purpose for requiring local counsel.

---

extend the deadlines upon learning of the abandonment, which Willard failed to do here.

In *Maples v. Thomas*, 565 U.S. 266 (2012), the petitioner's attorneys switched law firms and left Alabama without informing their client or seeking leave to withdraw, and failed to timely appeal. The Court held that the attorneys' conduct (and the fact that local counsel made clear "that he would undertake no substantive involvement in the case") left petitioner "without any functioning attorney of record" which excused petitioner's procedural default. *Maples i*s readily distinguishable from this case, where Willard indisputably had a functioning attorney (O'Mara) who did far more than simply prepare *pro hac vice* applications. Moreover, this Court has already held that for *Maples* to allow relief based upon attorney misconduct, the attorney must "actually abandon[] the client without notice, thus severing the principal-agent relationship." *Huckabay*, 130 Nev. at 204 n.4, 322 P.3d at 434 n.4. Here, the *Maples* exception does not allow relief for Willard, who had O'Mara as his attorney throughout the case and had notice of Moquin's alleged abandonment prior to the entry of the Sanctions Order but chose to keep him as his attorney for financial reasons. Instead, Willard is subject to the general rule in Nevada of "holding a litigant responsible for its attorney's procedural errors." *Id*.

Willard's reliance upon *Coburn Optical Indus., Inc. v. Cilco, Inc.*, 610 F.Supp. 656, 660 (M.N.D.C. 1985) for the proposition "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" is also misplaced. AOB 48. Rather, the Court found that local counsel must share liability, noting that "by local counsel propounding representations and argument in the motion to dismiss, even after shown to be false by the plaintiff's investigation, local counsel's responsibility and liability became akin to its out of state associate." *Coburn*, 610 F.Supp. at 660.

CONCLUSION

Based on the foregoing, Defendants respectfully request that this Court affirm the District Court's denial of 60(b)(1) relief.

DATED this 13th day of April, 2021.

By: */s/ Anjali D. Webster*
DICKINSON WRIGHT, PLLC
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 12515
100 W. Liberty Street, Suite 940
Reno, NV 89501

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Answering 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:

[x] This Answering Brief has been prepared in a proportionally spaced typeface using Microsoft Word version 14.0.6129.5000 (2010) in 14 point Times New Roman font;

2. I further certify that this Answering 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), it is:

[x] Proportionately spaced, has a typeface of 14 points or more and contains 13,932 words.

3. Finally, I hereby certify that I have read this Answering 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 this 13th day of April, 2021.

By: */s/ Anjali D. Webster*
DICKINSON WRIGHT, PLLC
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 12515
100 W. Liberty Street, Suite 940
Reno, NV 89501

CERTIFICATE OF SERVICE

I certify that I am an employee of DICKINSON WRIGHT, PLLC, and that on this date, pursuant to NRAP 25(d), I am serving the attached **RESPONDENTS' ANSWERING BRIEF** on the party(s) set forth below by:

☒ By electronic service by filing the foregoing with the Clerk of Court using the ECF Electronic Filing System, which will electronically mail the filing to the following individuals.

Robert L. Eisenberg
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street 3rd Floor
Reno, NV 89519
Telephone: (775) 786-6868
Fax: (775) 786-9716

Richard D. Williamson, Esq.,
Jonathan Joel Tew, Esq.
ROBERTSON, JOHNSON, MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
Reno, Nevada 89501
Telephone: (775) 329-5600
Fax: (775) 348-8300

DATED this 13th day of April, 2022

/s/ *Angela M. Shoults*
An Employee of Dickinson Wright PLLC

4877-9393-0267 v1 [65540-1]