IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; And OVERLAND DEVELOPMENT CORPORATION, a California corporation,

Appellants,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; JERRY HERBST, an individual; and TIMOTHY P. HERBST, as Special Administrator of the ESTATE OF JERRY HERBST, deceased,

Respondents.

No. 83640
District Court Case No. CV14-01712

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MOTION FOR PERMISSION TO FILE BRIEF IN EXCESS OF TYPE-VOLUME LIMITATION (INCLUDING DECLARATION OF COUNSEL AND CERTIFICATE OF COMPLIANCE)

Pursuant to NRAP 32(a)(7)(D), appellants move for permission to file a reply brief in excess of the 7,000 word-count limitation in NRAP 32(a)(7)(A)(ii). The proposed brief is 7,201 words.

Procedural requirements are satisfied

As required by NRAP 32(a)(7)(D)(ii) and (iii), this motion is accompanied by: (1) a declaration of counsel stating the reasons for the motion and the number of additional words requested; (2) a certificate as required by NRAP 32(a)(9)(C) as to

Docket 83640 Document 2022-18323

the word count; and (3) a single copy of the brief that appellants propose to file (e-filed separately).

Argument

Extraordinary cases can justify long briefs. The additional words requested for the reply brief in the present case are warranted when this case is compared to other cases in which courts have permitted appellate briefs in excess of size limitations. For example, in *Evans v. State*, 117 Nev. 609, 642, 28 P.3d 498, 520 (2001), there were numerous appellate issues, including issues dealing with statutory applications and constitutional law. This court allowed the appellant to file an opening brief of 120 pages and a reply brief of 54 pages, which at that time were "far in excess of the normal 30-page limit for briefs." *Id.; see also McConnell v. Federal Election Com'n*, 539 U.S. 938 (2003) (complex election case; Solicitor General allowed to file 140-page brief); *Penry v. Texas*, 515 U.S. 1304 (1995) (noting that appellant's brief in state appellate court was 375 pages long, and state's brief was 248 pages long); *Fusari v. Steinberg*, 419 U.S. 379, 390 (1974) (Burger, C.J., concurring; noting that appellee's brief was 122 pages long).

The accompanying declaration of counsel describes the record in the present case, the issues in the appeal, and significant efforts to reduce the size of the proposed brief. For the reasons set forth in this motion and the accompanying

declaration of counsel, appellants request permission to file the reply brief consisting of 7,201 words.

Dated: June 8, 2022 /s/ Richard D. Williamson
Richard D. Williamson

DECLARATION OF RICHARD D. WILLIAMSON [NRAP 32(a)(7)(D)(ii)]

Pursuant to NRAP 32(a)(7)(D)(ii), Richard D. Williamson, counsel for appellants, hereby submits the following declaration stating the reasons for the motion and the number of additional words requested.

Appellants respectfully contend that this case is sufficiently extraordinary and compelling to justify the proposed brief that is 7,201 words in length. This is only 201 words more than the limit, which is less than three percent over the usual limit.

This is an appeal from an order granting relief under NRCP 60 in commercial litigation involving breach of a lease. Appellants are seeking approximately $15 million in damages. This is the second appeal. The first appeal resulted in a reversal and remand for further proceedings. *Willard v. Berry-Hinckley Indus.*, 136 Nev. 467, 469 P.3d 176 (2020) (Docket No. 77780). The district court held further proceedings on the remand, resulting in another order denying Rule 60 relief. The present docket is an appeal from the second denial of Rule 60 relief.

Appellants' opening brief consists of 57 pages, with 13,670 words. The answering brief consists of 61 pages, with 13,932 words. The answering brief

contains nearly 30 arguments and sub-arguments, almost all of which need to be addressed in the reply brief. The issues in the briefs are very unusual, dealing with rather complex analyses of Rule 60 factors in the somewhat unique situation presented by the appeal. This situation includes the abandonment of appellants by their former counsel, who suffered mental problems that impacted his representation of appellants. Former counsel was disciplined for this abandonment. *In re Discipline of Moquin*, Docket No. 78946 (cited in footnote 3 of the *Willard* opinion). This appeal also presents unusual contentions regarding district court's failure to comply with this court's remand instructions.

Appellants' attorneys have repeatedly attempted to edit and cut the brief to the extent possible, including elimination of some issues and contentions, and cutting factual discussions and legal arguments. To date, appellants have removed more than 5,000 words from their initial drafts. We respectfully submit that further cutting will affect the brief's quality and the analyses in the brief, thereby impacting the court's ability to evaluate arguments and to reach the correct decisions on the issues presented.

The court should note that the brief contains a part dealing with judicial notice of attorney Moquin's discipline records. This part consists of 242 words. If the court were to count only the Argument portion of the brief, the word count would be less than the normal word count for a reply brief.

Accordingly, the undersigned counsel submits that these reasons justify permission for filing the reply brief consisting of 7,201 words. The proposed brief is being submitted with this motion.

Dated: June 8, 2022

/s/ Richard D. Williamson
Richard D. Williamson

CERTIFICATE OF COMPLIANCE [NRAP 32(a)(7)(D)(ii)]

This certificate of compliance accompanies appellants' motion requesting enlargement of the word-count limit for the reply, as required by NRAP 32(a)(7)(D)(ii). The certificate is also attached to the proposed brief being submitted with the motion.

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

2. **I have filed a motion for permission to exceed the word-count limit for this brief.** I certify that this brief contains 7,201 words. Therefore, if the motion is granted, the brief will comply with Rule 32.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any

improper purpose. I further certify that this brief complies with all applicable Nevada Rules of appellate procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to 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: June 8, 2022

/s/ Richard D. Williamson
Richard D. Williamson
ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

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

I further certify that on the 8th day of June, 2022, I electronically filed the foregoing **MOTION FOR PERMISSION TO FILE BRIEF IN EXCESS OF TYPE-VOLUME LIMITATION (INCLUDING DECLARATION OF COUNSEL AND CERTIFICATE OF COMPLIANCE)** with the Clerk of the Court by using the electronic filing system, which served the following parties electronically:

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

/s/ Teresa W. Stovak

An Employee of
Robertson, Johnson, Miller & Williamson

EXHIBIT

TO

MOTION FOR PERMISSION TO FILE BRIEF IN EXCESS OF TYPE-VOLUME LIMITATION (INCLUDING DECLARATION OF COUNSEL AND CERTIFICATE OF COMPLIANCE)

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,

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BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; JERRY HERBST, an individual; and TIMOTHY P. HERBST, as Special Administrator of the ESTATE OF JERRY HERBST, deceased,

Respondents.

No. 83640
District Court Case No. CV14-01712

Appeal from Order After Remand Denying
Plaintiffs' NRCP 60(b)(1) Motion for Relief in the
Second Judicial District Court of the State of Nevada
in and for the County of Washoe
Honorable Lynne K. Simons

APPELLANTS' REPLY BRIEF

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

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

NRAP 26.1 DISCLOSURE

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

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

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

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

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

No Appellant is using a pseudonym.

DATED: June 8, 2022

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

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

ATTORNEYS FOR APPELLANTS

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INTRODUCTION

Respondents' Answering Brief (RAB) over-relies on the Sanctions Orders that are the very subject of this appeal and fails to point to any meaningful *evidence* to justify those orders.

RESPONSE REGARDING JUDICIAL NOTICE

Defendants argue there is no basis for judicial notice of Moquin's disciplinary records. (RAB p.39.) In the previous opinion in this case, the court noted the fact that Moquin's conduct had resulted in disciplinary action against him, and cited its own docket, No. 78946. Willard v. Berry-Hinckley Indus., 136 Nev. 467, 468, 469 P.3d 176, 178 n.3 (2020). The facts of that disciplinary action are the same circumstances presented to the district court in *Willard Plaintiffs' Rule 60(b) Motion for Relief* (the "60(b)(1) Motion"). Judicial notice is also appropriate under NRS 47.130, NRS 47.150, and Mack v. Estate of Mack, 125 Nev. 80, 91-92, 206 P.3d 98, 106 (2009).

Interestingly, Defendants seek judicial notice of a motion that contains Moquin's disciplinary records. The RAB discusses Willard's NRCP 60(b)(6) motion, which "was centered on Moquin's disciplinary proceedings." (RAB p.11, n.7.) Defendants argue: "This Court can take judicial notice of these filings, which are part of the District Court's docket." (Id.) The RAB even provides a web link to the documents. (Id.) In other words, Defendants have requested this court to take

judicial notice of the same disciplinary documents for which Willard also sought judicial notice. Plaintiffs agree the court can take judicial notice of those documents. Therefore, in a supplemental appendix, the Willard Plaintiffs provide the briefing in support of and in opposition to their NRCP 60(b)(6) motion (for which Defendants have sought judicial notice). (19 A.App.4011 – 20 A.App.4356.)

ARGUMENT

A. Moquin's Abandonment

i. Critical Failure to Oppose Motions

Defendants' first argument is that the damage was already done by late 2017, so Moquin's abandonment is irrelevant. That claim is both rank speculation and contrary to what happened.

While Defendants *moved* for sanctions in November 2017, the Sanctions Orders were only entered in January 2018 – after Moquin abandoned Plaintiffs and failed to oppose dispositive motions.

The district court cited DCR 13(3) and found Plaintiffs' failure to file an opposition "constitutes both an admission that the Motion is meritorious and Plaintiffs' consent to granting" it. (13 A.App.2919.)

Although the order also stated dismissal was warranted for discovery violations, its understanding of those issues was limited to Defendants' unopposed arguments. Plaintiffs' discovery violations were nowhere near as "egregious" as

Defendants claim. They boil down to two issues: the failure to provide additional damage calculations, and three continuances.

First, regarding the damage calculations, Defendants had everything they were entitled to receive. In the *Verified Complaint* Willard sought unpaid rent of $19,443,836.94, with a net present value of "$15,741.360.75 as of March 1, 2013." (1 A.App.4). In the *Verified First Amended Complaint* Willard again sought unpaid rent of $19,443,836.94 and calculated the net present value "using a discount rate of 4% as specified in the Willard Lease was $15,741.360.75 as of March 1, 2013." (2 A.App.235.) This satisfies the requirement to provide a damages calculation. Willard also provided calculations for his other damages. (2 A.App.235, 244-245.)

In July 2015, Willard provided Defendants with interrogatory responses, which contained a year-by-year calculation of the rent owed and the same present-value calculation he provided in both complaints. (3 A.App.603.) In August 2016, Defendants admitted they knew of "more than $20 million cumulatively sought by Plaintiffs as rent-based damages." (2 A.App.398.) Moreover, in November 2016, Defendants' expert acknowledged receipt of Plaintiffs' damage disclosures and prepared her own calculation that varied by less than 1.5%. (7 A.App.1416.)

Defendants even admitted in January 2017 that Willard was seeking "$15 million plus" in rent damages. (18 A.App.3884.) So, Willard disclosed all rent

damages. While Defendants submitted an uncontested order contradicting these facts, that does not change the reality that Plaintiffs provided damage calculations.

Second, Defendants *stipulated* to every continuance. (2 A.App.383-395; 7 A.App.1480-1488.)

There is no indication the district court could have granted the Sanctions Orders if Moquin had opposed them. His abandonment led to this procedural mess.

Had Moquin opposed the motion for sanctions, Plaintiffs would have been able to establish that Defendants were not prejudiced. Defendants knew Plaintiffs' damage calculations and agreed to the continuances. Yet, Defendants took advantage of the unopposed motions to obtain sanctions orders that were inconsistent with the record.

ii. Agency Principles Do Not Preclude Abandonment

Defendants next argue that agency principles present an absolute bar to relief. (RAB p.20.) As discussed below, Nevada law contradicts this claim. And if the agency doctrine were an absolute bar, this court would have simply affirmed the district court on the first appeal without bothering to remand.

Defendants rely on Huckabay Props. v. NC Auto Parts, 130 Nev. 196, 322 P.3d 429 (2014), which emphasized that "Appellants' dissatisfaction with their attorney's performance" did not entitle them to reinstate an appeal. (RAB p.20.)

Yet, this case presents much more than "dissatisfaction" with Moquin's performance. In addition, this court more recently held that when a district court considers discovery sanctions, "it should consider 'whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney.'" Valley Health Sys., LLC v. Estate of Doe, 134 Nev. 634, 641, 427 P.3d 1021, 1028 (2018).

Defendants next try to avoid Passarelli v. J. Mar Dev., 102 Nev. 283, 720 P.2d 1221 (1986). (RAB 20-21.)[1] Yet, each of the purportedly "distinguishable" facts are superficial and do not preclude the Passarelli exception. Indeed, several of those facts are present in this case too (such as Moquin missing appointments and becoming unable to function). Moquin's practice is closed and he was disciplined for abandoning Willard. Moquin was barred from practicing law in Nevada for two years, and the dissenting opinion asserted that was not enough. Finally, there was no viable agency relationship after Moquin abandoned Plaintiffs in 2017.

iii. Willard Acted Reasonably

Defendants next argue that because non-attorney Willard knew of some deadlines and attended some hearings, that somehow precludes an abandonment finding. (RAB p.21.) Defendants even claim he should have personally apprised the

[1] Defendants complain Willard did not provide sworn statements from Moquin or his physician. (RAB p.15 n.8.) How can a party do that when the attorney has completely abandoned him? Willard holds no subpoena power over Moquin. While there is plenty of evidence Willard wanted to gather, the evidence before the district court proved that Moquin abandoned Willard.

district court of Moquin's issues. (RAB p.2.) Yet, Defendants fail to explain what Willard could have done. The district court's own rules forbid contact by a represented litigant. WDCR 23.

In addition, both Willard and local counsel did what they could. O'Mara informed the district court that Moquin had promised to file a response, but then became unresponsive. (14 A.App.2999.) For his part, Willard acted reasonably and promptly retained new counsel. (14 A.App.3002, 3024.)

Defendants distort the record by arguing "Willard knew of Moquin's alleged problems, yet continued to let Moquin represent him." (RAB p.21.) This is false. Moquin abandoned Willard in late 2017. (15 A.App.3303-3304.) Willard did not learn of Moquin's diagnosis until 2018, and did not start paying for Moquin's treatment until March 2018. (15 A.App.3305.) Willard's efforts to resurrect the case and help Moquin in 2018 do not change the fact that Moquin abandoned Plaintiffs in 2017.

Until the unopposed Sanctions Orders, Defendants blamed Moquin for any failures, rather than Willard or O'Mara. (2 A.App.309-314, 319, 372, 380; 18 A.App.3934.)

In fact, Willard's attempts to assist Moquin and obtain documentation of his condition are more reasons why the district court should have granted relief. Defendants' own brief argues that "client diligence must still be shown." (RAB 22

(citing Cobos v. Adelphi Univ., 179 F.R.D. 381, 388 (E.D.N.Y. 1998)).) Cobos relied on another case in which the movants "offered proof of seven separate attempts to contact the attorney by fax or mail." Cobos, at 388. Then, two months after those movants learned the case was dismissed, "the clients moved to vacate the dismissal." Id.

Here, Willard personally contacted Moquin more than two dozen times in December 2017 alone. (15 A.App.3309-3324.) Willard's new attorneys spoke with Moquin in January, called several other times, and emailed Moquin many more times between February and April 2018. (15 A.App.3328-3343.)

Willard spoke to Moquin several times between January and March, and contacted Moquin at least another 11 times between late March and early April 2018. (15 A.App.3305, 3333-3338.)

Willard filed the 60(b)(1) Motion less than two months after the district court entered its findings. (14 A.App.2944, 3024.) Thus, Willard showed far more diligence than the movants in Defendants' cases. The district court should have granted relief.

iv. Moquin Abandoned Willard

Defendants argue Willard was not abandoned because Moquin performed tasks before December 2017. (RAB p.16.) If Defendants' position were adopted, under no circumstances could an attorney ever abandon his client if, up to the point

of abandonment, that attorney had participated in the case. That would be a ridiculous rule. Logically, abandonment can only come after performance. Here, Moquin prepared a summary judgment motion in October 2017, and then disappeared from the case. That is abandonment.

B. Failure to Apply the Young Factors

i. This Court Should Review Improper Application of Young

District courts should consider "whether sanctions unfairly operate to penalize a party" for attorney misconduct. Young v. Johnny Ribeiro Bld., 106 Nev. 88, 93, 787 P.2d 777, 780 (1990). The district court erred by not properly considering whether its Sanctions Orders unfairly penalized Willard for Moquin's misconduct.

The district court also erred in refusing to enter less severe sanctions given the evidence presented in the 60(b)(1) Motion. As this court has explained, "fundamental notions of due process require that the discovery sanctions for discovery abuses be just and that the sanctions relate to the claims which were at issue in the discovery order which is violated." Young, 106 Nev. at 92, 787 P.2d at 779-80. Moreover, the district court should consider "the severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, the feasibility and fairness of alternative, less severe sanctions," and the policy favoring adjudication on the merits. Id., at 93, 780. Yet,

at the first chance, the district court jumped to case-terminating sanctions and refused to temper that decision despite all the evidence in the 60(b)(1) Motion.

Defendants attempt to avoid reversal by claiming the dismissal is not part of this appeal. Rule 60, however, is an appropriate method for obtaining "correction of judicial error," such as this. Smith v. Epperson, 72 Nev. 66, 68, 294 P.2d 362, 363 (1956); accord Kramer v. Kramer, 96 Nev. 759, 761, 616 P.2d 395, 397 (1980). Therefore, the district court should have granted relief.

ii. The District Court Penalized Willard for Moquin's Breakdown

Defendants next argue the Young factors are discretionary and partially addressed. (RAB pp.24-25.) They miss the point.

First, the Young factors are not entirely discretionary. The "district court *should* consider 'whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney.'" Valley Health, 134 Nev. at 641, 427 P.3d at 1028 (emphasis added) (quoting Young, 106 Nev. at 93, 787 P.2d at 780).

Second, the district court failed to consider Moquin's mental breakdown and the evidence demonstrating that sanctions unfairly penalized Willard.

Defendants attempt to rely on the findings, which they prepared. (RAB p.25 (citing 14 A.App.2944-2976).) Defendants also cite to the Order After Remand, which substantially mirrors their proposed order. (RAB p.25 (citing 17 A.App.3790-3793).) Not only was the adoption of Defendants' proposed orders improper, but

the district court was also misled because Defendants' conclusions are unsupported by the record.

The district court did note a party cannot generally avoid dismissal based on his attorney's conduct. (14 A.App.2972-2973.) But that was before anyone had informed the district court of Moquin's mental illness. That is precisely why the district court should have revisited this issue after Willard filed the 60(b)(1) Motion.

iii. Willard Is Not Personally Responsible

Next, Defendants claim the district court attributed sanctionable conduct to Willard personally. (RAB p.25.) Although Defendants drafted the very order they cite, this claim is still false. The district court did not attribute sanctionable conduct to Willard. Regarding the 16.1 disclosures, the findings merely note that Willard "personally attended" the hearing. (14 A.App.2952.) The district court then recounted that "*Plaintiffs' counsel* admitted … 'with respect to Willard, they do not' have an up-to-date, clear picture of Plaintiffs' damages claims." (Id. (emphasis added).) The district court interrupted Moquin, but it *appears* he said Willard's damage claims were "[n]ot 100 percent" up to date. (18 A.App.3915-3916.)

Critically, that hearing addressed additional, consequential damages. Defendants admitted: "plaintiffs, if they prevail in this case, get what they contracted for and nothing else," and complained Plaintiffs were also seeking additional damages beyond just lost rent. (18 A.App.3877.) Thus, Defendants knew what basic

rent damages Plaintiffs were seeking. Rather, that hearing was on Defendants' motion for partial summary judgment to dismiss *additional* damages.

Specifically, the question was whether Plaintiffs had disclosed their claims for consequential damages. (18 A.App.3913-3915.) The discussion that generated the "Not 100 percent" response came from the district court's question about Plaintiffs' previously-produced calculation: "did it include the amounts that you are advising the Court today that are withdrawn?" (18 A.App.3915.)

At no time was there any proof that Willard had not produced basic damage disclosures. Rather, the subject was whether Moquin had amended those damage disclosures to *remove* claims they were withdrawing. Therefore, the district court never held Willard personally responsible for any failure to provide damage disclosures. Moreover, any failure was harmless because the district court later dismissed the additional damage claims. (7 A.App.1489-1507.)

Defendants next blame Willard regarding two appraisals attached to the summary judgment motion. (7 A.App.1610-1612.) As Moquin never filed a reply, we have no idea what he would say about whether those appraisals were previously produced. The only thing clear is that Willard is not personally responsible.

Willard properly provided the appraisals to Moquin. If Moquin did not disclose them until October 2017, any blame rests with Moquin. Accordingly, the district court failed to consider whether any failure is attributable Moquin. Young,

106 Nev. at 93, 787 P.2d at 780. Moreover, sanctions should be proportionate and relevant to the claimed failure. The appropriate course would have been to consider whether to exclude those appraisals. Under no circumstances should the October 2017 disclosure of two appraisals be used to dismiss Willard's entire case.

Defendants' last attempt to blame Willard is that he "collaborated with" Moquin on the damage calculations. (RAB p.40.) This is a strange accusation, since the law requires just that. Moreover, it shows that Willard was trying to comply with his discovery obligations.

Defendants complain there were "nearly $40 million" in additional damages. (RAB p.25.) Yet, nearly $12 million was interest. (7 A.App.1599.) The other $28 million was for diminution in value. (Id.) While Defendants may argue that diminution in value is not an appropriate damage for a lease breach, that category was nothing new. (4 A.App.806; 18 A.App.3914.) Thus, Willard disclosed his damage calculations.

Defendants' final argument is that the Order After Remand stated Willard "knew of the actions that supported the Sanctions Order" and willfully engaged in the above conduct. (RAB p.25-26.)

Again, Defendants drafted that language. (Compare 17 A.App.3710 ¶217 and 3713 ¶234 with 17 A.App.3790 ¶217 and 3793 ¶234; see also 14 A.App.2944, 2976.)

Moreover, the findings in the Order After Remand were completely unsupported by evidence. (See 17 A.App.3790 ¶217; see also 17 A.App.3793 ¶234.)

As for the findings supporting dismissal, Defendants cite the entire document. (RAB p.26.) This is insufficient. NRAP 28(e)(1). In addition, those findings are likewise inadequately supported. (14 A.App.2966-2970.) They primarily rely on the January 2017 transcript, two stipulations, and the disclosure of expert Dan Gluhaich. (Id.) As discussed above, however, the January 2017 hearing only discussed whether Moquin had amended the disclosures to *remove* damage categories. (18 A.App.3913-3916.) In fact, in front of Willard, Moquin represented that he provided the required disclosures:

> Mr. Irvine made a statement claiming that we had never submitted a statement of damages --
> COURT: Under 16.1.
> MOQUIN: -- per 16.1, that is -- **I dispute that**. Now, we will be supplementing, but --
> COURT: Do you have evidence of that? Have you -- do you have a copy of the 16.1 information that you provided, or are you saying you are going to amend it?
> MOQUIN: No, **I'm saying that we provided**, *and* in discovery responses, went to great lengths to explain the basis.

(18 A.App.3915 (emphasis added).) Given Moquin's adamant representation, the court cannot find that Willard willfully withheld anything. Rather, Moquin assured Plaintiffs they had complied with discovery.

While Willard may have attended a hearing where Moquin discussed damage disclosures, it hardly follows that he willfully committed misconduct by relying on

his attorney. Indeed, Moquin later admitted that Willard did not understand the consequences of Moquin's derelictions. (19 A.App.4032.)

As for the stipulations, there is no evidence to support the idea that Willard ever saw these documents. Rather, "Moquin always had an explanation or 'legal reasons' for any issues and delays" and asserted that "defendants' attorneys were the cause of the delay." (14 A.App.3048.) Thus, the stipulations cannot be used as evidence that Willard willfully refused to comply with any orders.

In fact, the May 2016 stipulation focused on six categories of outstanding discovery. (2 A.App.390.) Apparently, Plaintiffs satisfied most of those requests, because the February 2017 stipulation noted just two categories of discovery Defendants needed: the updated 16.1 damage disclosures noted in the January 2017 hearing, and supplemental information for Plaintiffs' expert witness disclosure. (7 A.App.1482-1483.)

Again, the additional damage disclosures related to consequential damages that the district court later dismissed. (7 A.App.1489-1507.) As for the expert witness disclosure, Defendants filed a separate motion to strike that witness. (10 A.App.2113.) That motion was directed at the alleged failure to comply with the February 2017 stipulation. (10 A.App.2113.) This is one of the motions Moquin failed to oppose. Thus, while Willard should have the opportunity to oppose that

motion, any sanction should be limited to Gluhaich's expert testimony. It should not become the basis to dismiss Willard's entire case.

Lastly, the findings cited to another transcript in support of Willard's supposed willfulness. (14 A.App.2970.) The problem with that claim is that *Willard was not present at that hearing*. (18 A.App.3944.) Certainly, stipulations Willard never saw and hearings he never attended cannot be used as evidence that he willfully refused to do anything.

In short, the supposed evidence against Willard does not show he had any personal knowledge of, or willful participation in, any of Moquin's alleged failures. These distinguishing points are precisely the sort of analysis that Young requires and the district court failed to provide.

Findings should be set aside when they are clearly erroneous or not based on substantial evidence. Gibellini v. Klindt, 110 Nev. 1201, 1204, 885 P.2d 540, 542 (1994). Even when findings are supported by the record (which these are not), this court can still find as a matter of law that the findings do not support the sanctions. Campbell v. Maestro, 116 Nev. 380, 383, 996 P.2d 412, 414 (2000). As they are unsupported by the record and contrary to the law, the court should reverse the Sanctions Orders.

iv. Defendants' Claimed "Prejudice" Is a Windfall

Defendants claim prejudice because "drastic changes" to Plaintiffs' damage calculations would require Defendants to engage in additional discovery. (RAB p.27.) The problem, as demonstrated above, is that there were no "drastic changes" to Willard's damage calculations. His damages have essentially remained the same since the original complaint.

The only change was to the diminution of value damages Moquin itemized in Willard's summary judgment motion, based on the appraisal reports and Dan Gluhaich's report. Moquin asserted those damages were "part of the original amended complaint claim." (18 A.App.3914.) Moreover, any prejudice could have been addressed through a lesser sanction; namely, striking any new damages or only allowing rent damages. The district court erred in not entering a lesser sanction.

Defendants also claim prejudice because Jerry Herbst died and Plaintiffs never deposed him. (RAB p.27.) The failure to depose Herbst prejudices Willard and is more evidence of Moquin's failures. The idea that a defendant is prejudiced when a plaintiff fails to take his deposition is absurd. There is no obligation for one party to depose another. Moreover, if Defendants wanted to preserve Herbst's testimony, they could have taken his deposition themselves.

Further, Willard attempted to bring this case to trial before Herbst died. Willard asked the district court to allow "trial on the merits." (14 A.App.3009.) In

the 60(b)(1) Motion, Willard again asked to proceed to trial. (14 A.App.3026, 3034, 3037, 3039.) Thus, any prejudice associated with Herbst's passing is because Defendants refuse to allow this case to proceed.

Defendants strategically breached a commercial lease and guarantee and, because of Moquin's mental illness, avoided over $15,000,000 in clear liability to an elderly plaintiff. Defendants have not been severely prejudiced. In fact, Moquin gave them an unjust windfall.

"Dismissals for misconduct attributable to lawyers and in no wise to their clients invariably penalize the innocent and may let the guilty off scot-free. That curious treatment strikes us as both anomalous and self-defeating." Staschel v. Weaver Bros., 98 Nev. 559, 561, 655 P.2d 518, 519-20 (1982) (citations omitted). Consistent with Staschel, the extreme injustice of the district court's dismissal justifies reversal.

C. The District Court Excluded Admissible Evidence

The district court could have granted relief simply based upon Moquin's observed conduct. Moreover, Willard's declaration was sufficient support for the 60(b)(1) Motion. In addition, Willard offered ample, admissible evidence – which the district court erroneously disregarded.

i. Moquin's Statements of His Diagnosis Are Admissible

Defendants offer two arguments to justify excluding evidence of Moquin's condition. First, they claim Moquin's acknowledgement of bipolar disorder must be "spontaneous." (RAB pp.31-33.) Second, they claim Moquin's explanation of his diagnosis is a "statement of memory or belief" under NRS 51.105(2) rather than a statement of "existing state of mind, emotion," "physical condition, mental feeling [or] bodily health" under NRS 51.105(1). (RAB p.32.) Both arguments are wrong.

First, NRS 51.105(1) includes no spontaneity requirement. Contemporaneous statements are not a requirement. They simply go to the weight of the evidence. Sec. Alarm Fin. Enterprises, LP v. Alarm Prot. Tech., LLC, 743 F. App'x 786, 788 (9th Cir. 2018).

Defendants rely upon Henry v. Nanticoke Surgical Assocs., 931 A.2d 460 (Del. Super. Ct. 2007). But the statements in Henry were not offered to prove the declarant's state of mind; they were offered to prove the decedent's doctor gave negligent medical advice. Henry, 931 A.2d at 463. Here, Willard is not claiming anyone gave negligent medical advice. The issue is Moquin's state of mind. Therefore, Henry does not apply.

State v. Bell, 950 S.W.2d 482 (Mo. 1997) does not apply either. In that case, "Ms. Allen said that Mr. Bell had beaten her on numerous occasions," which the trial court confirmed was not a "statement of fear, emotion, or any other mental

condition." Bell, 950 S.W.2d at 484. But Moquin's statements that he has bipolar disorder *are* statements of a "mental condition."

Moquin's admissions to Willard about having bipolar disorder are statements about his then-existing state of mind, emotion, physical condition, mental feeling, and bodily health. Thus, Defendants' third case, Serrano v. Rotman, 943 N.E.2d 1179 (Ill. Ct. App. 2011), also supports admission.

Moreover, the diagnosis itself is not the only evidence. Moquin admitted he was suffering "utterly crushing emotional and situational turmoil." (15 A.App.3336.) None of the evidence involve "memory or belief." Rather, they are statements of Moquin's state of mind, emotion, mental feeling, and bodily health under NRS 51.105(1). Therefore, all of these statements are admissible.[2]

ii. Willard's Admissible Lay Testimony

Willard also provides his own observation that Moquin suffered "a total mental breakdown." (14 A.App.3049; 15 A.App.3303.) Willard even personally paid $470 so that Moquin could get treatment and help fix the case. (15 A.App.3305.) Willard also explained that, in December 2017, Moquin's "emotional swings" became "terrifying and impossible to predict." (15 A.App.3307.)

[2] Defendants falsely claim Willard never argued that Moquin's statements offer assurances of accuracy. (RAB p.34.) Yet, Willard expressly argued "a statement should not be excluded by the hearsay rule 'if its nature and the special circumstances under which it was made offer assurances of accuracy'" under NRS 51.075(1). (16 A.App.3397.)

Defendants argue a lay witness cannot testify about a medical diagnosis. (RAB p.35 (citing Lane v. D.C., 887 F.3d 480 (D.C. Cir. 2018)).) That court held lay witnesses cannot testify on "scientific or other specialized knowledge." 887 F.3d at 485. Willard's statements do no such thing. They repeat Moquin's admission that he had bipolar disorder. Moreover, Willard's observations describe Moquin's "total mental breakdown." (14 A.App.3049; 15 A.App.3303.) Those statements do not constitute "scientific or other specialized knowledge." Rather, they are based on Willard's perception, and helpful to determine the facts. Thus, Willard's statements are admissible under NRS 50.265.

iii. Exhibits 6-8 Are Admissible

The district court abused its discretion by excluding Exhibits 6 through 8. While they were not certified, all three are authentic. (14 A.App.3100-3106.) That is apparent from Willard's declaration, their appearance, and their surrounding characteristics. NRS 52.015(1); NRS 52.025; NRS 52.055. Police reports are deemed authentic when they contain "indicia of reliability" such as a signature, date stamps, and identification numbers. Francis v. Caribbean Transp. Ltd., 882 F. Supp. 2d 275, 281-82 (D.P.R. 2012). In the absence of a genuine dispute over authenticity, it was an abuse of discretion to refuse these exhibits.

The exhibits also are not hearsay. The fact that the Moquins were the subject of domestic court disputes is not hearsay. Knor v. Parking Co. of Am., 596 N.E.2d

1059, 1063 (Ohio Ct. App. 1991) (admitting police reports to show there had been reports of criminal acts).

Moquin's arrest is not hearsay. The general fact that Mrs. Moquin sought a restraining order is not hearsay. The documents show the turmoil in which Moquin was mired. Therefore, while the district court could have disregarded individual statements, it erred by treating the entirety of Exhibits 6-8 as hearsay. They are not.

iv. Moquin's Texts and Emails Are Admissible

The district court incorrectly applied the hearsay rule. If a statement is not offered to prove "the truth of the matter asserted," it does not fall within the rule. NRS 51.035. Thus, the refusal of all texts and emails was error.

a. The District Court Misapplied the Hearsay Rule

Nowhere in Moquin's texts and emails does he state: "my mental instability caused me to abandon this case." Thus, most statements were not offered for their truth. They were offered for other purposes, such as to show mental instability and the effect on Willard. Additionally, the few statements offered for their truth fall within hearsay exceptions.

In Reply Exhibit 3, Moquin assured Plaintiffs and co-counsel that "all three oppositions will be filed today." (15 A.App.3313.) That statement was not offered for its truth. It was clearly false. Thus, it was not hearsay.

The next day, O'Mara asked "Do we have a plan?" (15 A.App.3313.) Moquin responded, "You mean a clue?" (Id.) Again, those statements were not offered for the truth of whether Moquin had a plan or a clue. Therefore, they are not hearsay.

Moquin's statements in Exhibit 4 were also not offered for their truth:

- "i should be able to pull it all together." (15 A.App.3316.)
- "i am still on it." (15 A.App.3320.)

Moquin did not "pull it all together" and was clearly not "on it." Thus, these statements were not offered for their truth. They were offered for their effect on Willard and to show Willard was being diligent. Accordingly, they are not hearsay.

Exhibit 7 contains many non-hearsay statements that Moquin made to Willard. For instance, Moquin's assurance that "I'll get everything out before I leave today" was not offered for the truth. (15 A.App.3333.) Again, that statement shows the effect on Willard, who did everything reasonable to ensure documents were filed.

Moquin's rant continues with, "I'm not sure what part of 'fuck off' you don't understand." (15 A.App.3337.) This statement was not offered for the truth of any matter asserted. Rather, it shows Moquin had unraveled and abandoned his clients.

The statements in Reply Exhibit 10 are also not hearsay. They show Moquin's erratic character. (15 A.App.3348.) State v. Losson, 865 P.2d 255, 259 (Mont. 1993) (statements that show the speaker's state of mind are not hearsay).

The district court disregarded all of Moquin's statements as hearsay, despite the many limitations of the hearsay rule. This fundamental misapplication of the hearsay rules is reversible error.

b. Evidence Does Not Expire

Defendants also claim evidence after December 2017 is irrelevant. (RAB p.38.) Under this theory, confessing to a crime is always inadmissible, because the confession comes after the crime.

While the main issues are Moquin's abandonment in late 2017 and Willard's excusable neglect in relying on him until early 2018, evidence obtained after the fact is still relevant to show what happened.[3]

Evidence of subsequent acts to prove prior events is appropriate. U.S. v. Mares, 441 F.3d 1152, 1157 (10th Cir. 2006); Sonnenschein v. Bartels, 60 N.W. 10, 11 (Neb. 1894) ("evidence of collateral facts, including subsequent events, will be received, provided they shed light upon the transaction involved, and tend to explain the motives of the parties").

[3] Defendants' reliance on Gersing v. Real Vision, Inc., 817 S.E.2d 500 (N.C. Ct. App. 2018) is misplaced. That court entered judgment following a foreclosure. The defendant argued excusable neglect nine months later because his attorney failed to assert an anti-deficiency statute. The court refused to find excusable neglect because the attorney had withdrawn and the defendant failed to retain new counsel. Id. Gersing did not involve abandonment, mental illness, or the failure to oppose dispositive motions. Gersing does not apply.

Moquin's refusal to assist Willard by providing an affidavit, a physician's statement, or even his files is further proof of abandonment.

Defendants misled the district court when they persuaded it to impose an absolute bar to all subsequent statements, admissions, and events. The district court committed a reversible abuse of discretion by ignoring Reply Exhibits 5-10.

D. The District Court Misapplied Yochum

i. Plaintiffs Satisfied the First Factor

The district court and Defendants admit Willard filed a prompt motion for relief. (RAB p.41; 17 A.App.3772.) This satisfies the first Yochum factor.

ii. Willard Proved Lack of Intent to Delay

Defendants claim an intent to delay can be inferred from the fact there were three continuances, extensions to respond to briefs, knowledge there was a deadline to oppose the motion for sanctions, and that Willard did not immediately retain new counsel. (RAB pp.41-47.) The problem with these arguments (which the district court adopted) is that they are contrary to the actual evidence. Much of the delay was attributable to Defendants, not Plaintiffs, and certainly not Willard.

First, all three continuances were stipulations to allow Defendants to conduct additional discovery. Thus, these continuances to benefit Defendants cannot be used to show that Willard had any intent to delay.

Second, all parties received and obtained extensions. Defendants did not file their reply in support of partial summary judgment until 17 days after Plaintiffs' opposition. (4 A.App.807; 6 A.App.1361.) Defendants also did not file their opposition to Willard's summary judgment motion for 26 days. (7 A.App.1575; 8 A.App.1616.) Thus, Defendants either disregarded the WDCR 12 briefing schedule or (more likely) obtained extensions to file their briefs. In either case, it is hypocritical for Defendants to claim that Moquin's request for additional time to oppose three dispositive motions is evidence that *Willard* had any intent to delay.

Third, Defendants argue that Willard knew there was a deadline to oppose the sanctions motions. The salient question is, did Willard do anything to try to meet deadlines? He did:

- December 2: "How is it looking Brian?"
- December 4: "I hope you are up finishing it."
- December 5: "How is it going?"
- December 6: "PLEASE TELL ME … you have already FILED!"

(15 A.App.3309-3311.)

- December 19: "Close to finish?"
- December 20: "Really hope this gets filed soon (today)."
- December 22: "you assured me of filing this TODAY!?"

- December 25: "I'm anticipating getting the best gift ever: CONFIRMATION OF FILINGS ON HERBST."

(15A.App.3316-3324.)

These messages show Willard had no intent to delay. Rather, he consistently urged Moquin to meet deadlines.

Fourth, Defendants assert Willard did not replace counsel fast enough. Again, the record does not support this claim. Throughout December 2017, Moquin was assuring Willard that everything would be filed. (15 A.App.3303-3320.) Moquin assured him that "everything was fine" and that his responses "were not due yet or could be filed at a later date." (15 A.App.3303.) On December 11, Moquin assured Willard and O'Mara that "all three oppositions will be filed today." (Id.) Moquin then received more time. (15 A.App.3304.) Even as of December 21, Moquin claimed, "i am still on it." (15 A.App.3320.)

The initial Sanctions Orders were entered in January 2018. (13 A.App.2917, 2922; 14 A.App.2927.) Within days, Willard contacted new attorneys, who unsuccessfully tried to gather files and evidence. (18 A.App.3977; 15 A.App.3305, 3328-3331, 3340-3343.) Ultimately, they filed the 60(b)(1) Motion even though they did not have Moquin's discovery files, correspondence, or other critical information. (14 A.App.3002, 3024; 15 A.App.3328-3349; 19 A.App.4034.)

Accordingly, despite Moquin's total abandonment, Willard did everything possible to move this case forward.

Fifth, Defendants' legal authority does not support their argument. Defendants rely on ABD Holdings, Inc. v. JMR Inv. Properties, LLC, 441 P.3d 548 (Nev. 2019) (unpublished) for the proposition that intent to delay may be inferred from the parties' prior actions. (RAB p.41.) Yet, ABD Holdings is inapposite. None of those attorneys suffered from mental illness or other debilitating issues.

Indeed, the case confirmed Nevada courts "grant NRCP 60(b) relief from a default judgment where the attorney affirmatively misrepresents the status of the case to the client or abandons the client, and the particular facts of the case warrant relief." Id. at *3. Moquin unequivocally misrepresented the status of the case and abandoned Plaintiffs. Therefore, ABD Holdings supports granting relief.

Finally, Willard had been deprived of all income except social security. (14 A.App.3047.) He was never going to recover anything unless the case went to trial. It is nonsensical to conclude he had any intent to delay. The record shows that Willard satisfied the second Yochum factor.

iii. Willard Lacked Knowledge of Procedural Facts

Regarding the third Yochum factor, Defendants rely on Rodriguez v. Fiesta Palms, LLC, 134 Nev. 654, 428 P.3d 255 (2018), but that case involved markedly different facts.

Here, Willard vaguely knew documents should be filed, but Moquin assured him they would be filed on time. (15 A.App.3303-3304, 3313, 3316, 3320.) By contrast, the Rodriguez court directly gave Rodriguez an "express warning to take action." 134 Nev. at 658, 428 P.3d at 258. The last hearing Willard personally attended before dismissal – in January 2017 – was when Moquin assured everyone that he provided damages disclosures and simply needed to amend them to *remove* certain items. (18 A.App.3915.)

Defendants imply Willard admitted having procedural knowledge. (RAB p.48 ("Willard admitted as much below, conceding that 'this is, candidly, a little bit of a difficult one.'").) It is troubling that Defendants provide such a misleading excerpt. NRAP 28.2(a)(3). The full exchange is telling:

> The third factor is lack of a procedural requirements, and this is, candidly, a little bit of a difficult one. There isn't a situation where someone was served, got a default judgment entered against them because they thought they had 30 days to respond instead of 20 days. It's a situation where the defendants filed motions with the court, filed dispositive motions, motions for sanctions, there was a straight deadline, and Mr. Moquin, the plaintiffs' former counsel, failed to meet that deadline.
>
> COURT: Does it make a difference, really, against Mr. Irvine's vehement opposition, that I gave him additional time, I gave him my deadline?
>
> WILLIAMSON: … it certainly demonstrated extensive generosity on behalf of the court. ***It doesn't change Mr. Willard's lack of procedural knowledge***. I think there is no doubt Mr. Moquin knew better and should have acted better. Again, we'll get to it in a minute why he didn't act better, but ***the plaintiffs did have a lack of procedural knowledge*** ....

(18 A.App.3973-3974 (emphasis added).)

Despite Defendants' zealous advocacy, the record confirms Willard had no notice of specific deadlines to oppose the sanctions motions and did everything he could to help meet the deadlines Moquin claimed existed.

Additionally, lack of procedural knowledge is not always necessary to show excusable neglect. Stoecklein v. Johnson Elec., 109 Nev. 268, 273, 849 P.2d 305, 309 (1993). "Each case depends upon its own facts," and lack of procedural knowledge is just one factor. Id. Rule 60(b)(1) is also guided by "the state's sound basic policy of resolving cases on their merits whenever possible." Stoecklein, 109 Nev. at 274, 849 P.2d at 309. Therefore, although the third factor is not an absolute requirement, Willard satisfied it.

iv. The Fourth Yochum Factor

Good faith has no technical definition, but encompasses "an honest belief, the absence of malice, and the absence of design to defraud." Stoecklein, 109 Nev. at 273, 849 P.2d at 309. Willard demonstrated good faith.

Willard had an honest belief that plaintiffs were proceeding correctly. Moquin claimed he satisfied the requirements of NRCP 16.1. (18 A.App.3915.) He assured Willard that Defendants were causing delays. (14 A.App.3048.) Moquin even assured Willard he was meeting deadlines. (15 A.App.3303-3320.) Whether

Moquin misunderstood the facts or was lying to Willard is irrelevant. The result is that Willard had an honest belief.

Willard also exhibited no malice and no design to defraud. He repeatedly pleaded with Moquin to ensure everything was filed. (15 A.App.3303-3324.) Willard made "ongoing efforts on an almost daily basis" to pursue the case. (14 A.App.3050.) The record is devoid of any contrary evidence. Defendants' position relies on the agency rule to impute knowledge through Moquin to Willard. Yet, Moquin abandoned Willard and was not communicating. Therefore, the undisputed evidence establishes that Willard has always proceeded in good faith. Despite Defendants' *arguments*, the *evidence* demonstrates that Willard satisfied the Yochum factors.

E. The District Court Improperly Allowed New Arguments

This court forbid "any new arguments or evidence" on remand. (*Order Denying En Banc Reconsideration* at 1.) The district court disregarded that order.

Defendants offer two responses. First, they sarcastically argue "the District Court apparently should not have allowed Defendants to even cite *Yochum* in their proposed order." (RAB p.54.) Second, Defendants claim "Willard does not identify what 'new' arguments or evidence the District Court considered, because he cannot." (Id.) Both arguments fail.

Despite this court's clear limitation, Defendants offered several new case citations and 17 pages of new arguments they presented for the first time in their proposed order on remand. (17 A.App.3689-3706.)

In addition to one new rule citation, Defendants added the following cases that were never included in the Rule 60(b)(1) briefing: Kahn v. Orme, McClellan v. David, Rodriguez, ABD Holdings, Mathews v. Carreira, Carrabine v. Brown, Morgan v. Estate of Morgan, and Union Petrochemical v. Scott. (17 A.App.3682 ¶¶60-61, 3689 ¶95, 3692 ¶119, 3696 n.8, 3698 ¶152.) In adopting Defendants' proposed order, the district court included all of these new cases. (17 A.App.3762 ¶¶60-61, 3769 ¶95, 3772 ¶119, 3776 n.9, 3778 ¶152.)

Further, Defendants proposed more than 100 paragraphs of entirely new arguments. (17 A.App.3689 ¶92 – 3706 ¶201.) Over Willard's objection, the district court adopted those new arguments – paragraph by paragraph. (17 A.App.3769 ¶92 – 3786 ¶201.)

As for the claim that Willard did not identify what new arguments Defendants raised, that is also false. The opening brief cited to the 17 pages of new arguments Defendants offered and the 17 pages where the district court adopted those arguments. (AOB at 18 (citing 17 A.App.3689-3706); AOB at 19 (citing 17 A.App.3769-3786).) Defendants also had Willard's objections. (17 A.App.3720-3741.)

Overall, contrary to this court's clear limitation, Defendants took the district court's request for a proposed order as an opportunity to present new arguments to manufacture a helpful record that did not exist prior to remand. In light of that violation, the district court should have rejected Defendants' proposed order. Instead, the district court rubber-stamped it and violated the mandate rule. Estate of Adams v. Fallini, 132 Nev. 814, 819, 386 P.3d 621, 624 (2016). Thus, the district court committed reversible error. State Eng'r v. Eureka Cty., 133 Nev. 557, 559, 402 P.3d 1249, 1251 (2017).

F. Local Counsel Does Not Preclude Abandonment

Defendants claim abandonment is impossible because there was local counsel. Yet, there is no such *per se* rule. Indeed, common sense dictates that a party can be abandoned, despite the presence of local counsel, when local counsel is also misled.

Defendants rely on Walls v. Brewster, 112 Nev. 175, 912 P.2d 261 (1996). Yet, Walls did not deal with local counsel. The attorneys in that case were partners. 112 Nev. at 176, 912 P.2d at 262. In addition, there were no allegations of mental illness, misconduct, or abandonment. Thus, Walls has no bearing.

O'Mara was also misled. Moquin repeatedly assured him everything was fine. (14 A.App.2999; 15 A.App.3303-3314.) Willard and O'Mara relied upon Moquin, who induced that reliance. As such, Willard is entitled to relief.

G. The District Court Ignored the Merits

The district court also disregarded the state's bedrock principle of deciding cases on the merits whenever possible. Stoecklein, 109 Nev. at 274, 849 P.2d at 309.

Defendants claim this is justified because of the confusion over damage calculations and expert disclosures. (RAB p.52.) Again, however, the district court fell into the trap of Defendants' circular proposed orders. Defendants cite the Order After Remand, which cites paragraph 155 of the findings supporting sanctions. (17 A.App.3785.) Not only were those findings unopposed, but paragraph 155 contains no evidentiary support. (14 A.App.2973.) This is another example of the district court accepting Defendants' arguments, who then use their own orders as support. A critical point of this appeal is that the orders Defendants prepared are unsupported by the record.

The evidence in the record is that Defendants had Willard's damage calculations. Moreover, to the extent Moquin failed to previously produce appraisal reports or expert disclosures on diminution of value, then any sanction should be limited to those damages. Young, 106 Nev. at 93, 787 P.2d at 780. The district court erred in blindly accepting Defendants' claims and refusing to revisit them under Rule 60(b)(1).

Willard always offered to mitigate any prejudice, but "the punishment should fit the crime." (14 A.App.3025; 15 A.App.3296; 18 A.App.3978.) A full dismissal

does not "fit the crime." The district court should have allowed this clear breach of lease case to proceed on the merits.

CONCLUSION

Plaintiffs are not at fault for the catastrophe Defendants cultivated from Moquin's collapse. The district court erred in failing to acknowledge that Moquin abandoned Plaintiffs. Abandonment alone constitutes excusable neglect, and the evidence in this case demonstrates clear abandonment. The district court erred by failing to grant relief under NRCP 60(b)(1). The Sanctions Orders should be reversed and this case should proceed to trial.

DATED: June 8, 2022

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

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

ATTORNEY'S CERTIFICATE OF COMPLIANCE

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

2. **I have filed a motion for permission to exceed the word-count limit for this brief.** I certify that this brief contains 7,201 words. Therefore, if the motion is granted, the brief will comply with Rule 32.

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

DATED: June 8, 2022

/s/ Richard D. Williamson
Richard D. Williamson (Bar No. 9932)
ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

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

I further certify that on the 8th day of June, 2022, I electronically filed the foregoing **APPELLANTS' REPLY BRIEF** with the Clerk of the Court by using the electronic filing system, which served the following parties electronically:

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

/s/ Teresa W. Stovak

An Employee of
Robertson, Johnson, Miller & Williamson