

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.

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.

No. 83640

District Court Case No. CV14-01112

Electronically Filed
Aug 26 2022 05:57 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

No. 84848

District Court Case No. CV14-01712

APPENDIX TO APPELLANTS' SUPPLEMENTAL OPENING BRIEF

VOLUME 21 OF 21

Submitted for all appellants by:

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FILED
Electronically
CV14-01712
2021-11-10 12:00:56 PM
Alicia L. Lerud
Clerk of the Court
Transaction # 8743649

1 CODE NO. 3370

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4
5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF WASHOE
7

8 LARRY J. WILLARD, individually and as
9 trustee of the Larry James Willard Trust Fund;
10 OVERLAND DEVELOPMENT
11 CORPORATION, a California corporation;
12 EDWARD C. WOOLEY AND JUDITH A
13 WOOLEY, individually and as trustees of the
14 Edward C. Wooley and Judith A. Wooley
15 Intervivos Revocable Trust 2000,

16 Plaintiffs,

17 vs.

18 BERRY-HINCKLEY INDUSTRIES, a Nevada
19 Corporation; and JERRY HERBST, an
20 individual,

21 Defendants.
22 _____/

23 BERRY-HINCKLEY INDUSTRIES, a
24 Nevada corporation; and JERRY HERBST,
25 an individual;

26 Counterclaimants,

27 vs

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

Counter-defendants.
_____/

Case No. CV14-01712

Dept. No. 6

**ORDER HOLDING ENTRY
OF ORDER RULING ON
WILLARD PLAINTIFFS'
MOTION FOR RELIEF UNDER
NRCP 60(b)(5) & (6) IN ABEYANCE**

1 **ORDER HOLDING ENTRY OF ORDER RULING ON WILLARD**
2 **PLAINTIFFS' MOTION FOR RELIEF UNDER NRCP 60(b)(5) & (6) IN ABEYANCE**

3 Before this Court is the *Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5) & (6)*
4 (*"Motion"*) filed by Plaintiffs LARRY J. WILLARD, individually and as Trustee of the Larry
5 James Willard Trust Fund and OVERLAND DEVELOPMENT CORPORATION (collectively,
6 "Plaintiffs" unless named individually), by and through its counsel of record, Robertson,
7 Johnson, Miller & Williamson, and Lemons, Grundy & Eisenberg.

8 Defendants BERRY-HINCKLEY INDUSTRIES, a Nevada corporation, and JERRY
9 HERBST (collectively, "Defendants" unless named individually) filed *Defendants' Opposition*
10 *to the Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5) & (6)*, by and through their
11 counsel of record, Dickinson Wright, PLLC.

12 Plaintiffs filed their *Reply in Support of Willard Plaintiffs' Motion for Relief Under*
13 *NRCP 60(b)(5) & (6)* and the matter was thereafter submitted for the Court's consideration.

14 On October 11, 2021, Plaintiffs filed their *Notice of Appeal*. Plaintiffs appealed to the
15 Nevada Supreme Court this Court's *Order After Remand Denying Plaintiffs' Rule 60(b)*
16 *Motion for Relief*.

17 Pursuant to Nevada law, "a timely notice of appeal divests the district court of
18 jurisdiction to act and vests jurisdiction" in the Nevada Supreme Court. Rust v. Clark
19 County Sch. Dist., 103 Nev. 686, 688-89, 747 P.2d 1380, 1381-82 (1987). However, the
20 Nevada Supreme Court carved out a narrow exception to this rule, allowing a district court
21 to "retain jurisdiction to enter orders on matters that are collateral to and independent from
22 the appealed order, i.e., matters that in no way affect the appeal's merits." Mack-Manley v.
23 Manley, 122 Nev. 849, 855, 138 P.3d 525, 530 (2006).
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1 In their instant *Motion*, Plaintiffs seek the following relief:

2 (1) *Order Granting Defendants'/Counterclaimants' Motion to Strike and/or Motion*
3 *in Limine to Exclude the Expert Testimony of Daniel Gluhaich* (entered Jan. 4, 2018);

4 (2) *Order Granting Defendants'/Counterclaimants' Motion for Sanctions* (entered
5 Jan. 4, 2018); and

6 (3) *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for*
7 *Sanctions* (entered Mar. 6, 2018) pursuant to NRCP 60(b)(5) & (6).

8 Because the appellate court's ruling may render the present *Motion* moot, the Court
9 exercises its discretion to hold the *Motion* in abeyance.

10 *Motion, generally.*

11 Accordingly, and good cause appearing therefor,

12 **IT IS HEREBY ORDERED** ruling on *Willard Plaintiffs' Motion for Relief Under NRCP*
13 *60(b)(5) & (6)* is held in abeyance pending remittitur after appeal disposition.

14 DATED this 10th day of November, 2021.

15 
16 DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 10th day of November, 2021, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

ROBERT EISENBERG, ESQ.
BRIAN IRVINE, ESQ.
ANJALI WEBSTER, ESQ.
RICHARD WILLIAMSON, ESQ.
JONATHAN TEW, ESQ.
JOHN DESMOND, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

Holly Longe

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5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF WASHOE
7

8 LARRY J. WILLARD, individually and as
9 trustee of the Larry James Willard Trust Fund;
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13 WOOLEY, individually and as trustees of the
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15 Intervivos Revocable Trust 2000,

16 Plaintiffs,

17 vs.

18 BERRY-HINCKLEY INDUSTRIES, a Nevada
19 Corporation; and JERRY HERBST, an
20 individual,

21 Defendants.
22 _____/

23 BERRY-HINCKLEY INDUSTRIES, a
24 Nevada corporation; and JERRY HERBST,
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26 Counterclaimants,

27 vs

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

Counter-defendants.
_____/

Case No. CV14-01712

Dept. No. 6

**ORDER GRANTING MOTION FOR
LEAVE TO FILE MOTION FOR
RECONSIDERATION; ORDER
GRANTING MOTION FOR
RECONSIDERATION OF ORDER
HOLDING PLAINTIFFS' MOTION
FOR RELIEF UNDER
NRCP 60(B)(5) & (6) IN ABEYANCE**

1 **ORDER GRANTING MOTION FOR LEAVE TO FILE FOR RECONSIDERATION;**
 2 **ORDER GRANTING MOTION FOR RECONSIDERATION OF ORDER HOLDING**
 3 **PLAINTIFFS' MOTION FOR RELIEF UNDER NRCP 60(B)(5) & (6) IN ABEYANCE**

4 Before this Court is the *Motion for Leave to File Motion for Reconsideration and*
 5 *Motion for Reconsideration of Order Holding Plaintiffs' Motion for Relief Under NRCP*
 6 *60(b)(5)&(6) in Abeyance* ("Motion") filed by Plaintiffs LARRY J. WILLARD, individually and
 7 as Trustee of the Larry James Willard Trust Fund, and OVERLAND DEVELOPMENT
 8 CORPORATION (collectively "Plaintiffs" unless individually referenced), by and through their
 9 counsel of record, Robertson, Johnson, Miller & Williamson, and Lemons, Grundy &
 10 Eisenberg.

11 Defendants BERRY-HINCKLEY INDUSTRIES, a Nevada corporation, and JERRY
 12 HERBST (collectively, "Defendants" unless named individually) filed a *Response to Motion*
 13 *for Reconsideration of Order Holding Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6)*
 14 *in Abeyance* ("Response"), by and through their counsel of record, Dickinson Wright, PLLC.

15 Plaintiffs filed their *Reply in Support of Motion for Leave to File Motion for*
 16 *Reconsideration and Motion for Reconsideration of Order Holding Plaintiffs' Motion for*
 17 *Relief Under NRCP 60(b)(5)&(6) in Abeyance* ("Reply") and the matter was thereafter
 18 submitted for the Court's consideration.

19 **I. RELEVANT FACTUAL AND PROCEDURAL HISTORY.**

20 On November 10, 2021, the Court entered its *Order Holding Entry of Order Ruling on*
 21 *Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5) & (6) in Abeyance* ("Order").

22 In their *Motion*, Plaintiffs contend under Foster v. Dingwall, 126 Nev. 49, 228 P.3d
 23 453 (2010), the Court has jurisdiction to certify its intent whether to grant or deny Plaintiffs'
 24 request for relief under NRCP 60(b)(5) & (6). *Motion*, pp. 1-2. Furthermore, Plaintiffs

1 contend because of Larry Willard's age, seventy-nine (79), permitting him to wait until an
2 issue is decided from the appellate court would be a manifest of injustice. *Motion*, p. 3.

3 In their *Response*, Defendants agree the Court has jurisdiction to consider Plaintiffs'
4 request for relief under NRCP 60(b)(5) & (6) pursuant to Foster, 126 Nev. 49, 228 P.3d 453
5 (2010). *Response*, p. 1.¹ In response, Plaintiffs' object to Defendants presenting
6 arguments unrelated to the issue of reconsideration and note Defendants agree to Plaintiffs'
7 request for relief under NRCP 60(b)(5) & (6) should be decided now, rather than being held
8 in abeyance. *Reply*, pp. 1-3.

11 **II. APPLICABLE LAW AND ANALYSIS.**

12 Pursuant to Washoe District Court Rule 12(8), a party seeking reconsideration must
13 seek such relief within fourteen (14) days after service of written notice of entry of the order
14 for which reconsideration is sought. WDCR 12(8). Rule 12(8) also requires the rehearing of
15 motions follow the requirements of District Court Rule 13(7) which permits the renewing or
16 rehearing of a motion only upon leave of court. DCR 13(7). Thus, it is a two-step process.
17 First, leave must be obtained to file a motion for reconsideration. If leave is granted, then,
18 second, the Court decides whether to grant reconsideration and change its order. Nothing
19 in either rule precludes the Court from granting leave and considering the *Motion* in the
20 same order. Accordingly, the Court grants Plaintiffs' leave to file their *Motion* and moves to
21 a determination of whether the *Order Holding Entry of Order Ruling on Willard Plaintiffs'*
22 *Motion for Relief Under NRCP 60(B)(5) & (6) in Abeyance* should be altered via
23 reconsideration.

26 //

28 ¹ Defendants focus the remainder of their *Response* arguing the legal merits of Plaintiffs' request for relief under NRCP 60(b)(5)&(6), to which Plaintiffs' object to in their *Reply*.

1 The Supreme Court of Nevada has held a district court has jurisdiction to decide on
2 requests "for relief regarding matters that are not collateral to or independent from the
3 appealed order while the appeal remains pending." Foster v. Dingwall, 126 Nev. 49, 53,
4 228 P.3d 453, 455 (2010). Consistent with Foster, the Court concludes it has jurisdiction to
5 rule on Plaintiffs' request for relief under NRCP 60(b)(5) & (6) and finds there are sufficient
6 grounds to grant Plaintiffs' *Motion*. The Court reconsiders and rescinds its order holding in
7 any abeyance any decision on the *Plaintiff's Motion for Relief Under NRCP 60(5) & (6)*.
8

9 **III. ORDER.**

10 Accordingly, and good cause appearing therefor,

11 **IT IS HEREBY ORDERED** the *Motion for Leave to File Motion for Reconsideration*
12 *and Motion for Reconsideration of Order Holding Plaintiffs' Motion for Relief Under NRCP*
13 *60(b)(5) & (6) in Abeyance* is GRANTED. The Court rescinds its order holding in any
14 abeyance any decision on the *Plaintiff's Motion for Relief Under NRCP 60(5) & (6)*. The
15 Court deems the matter resubmitted and will enter its decision by separate order.
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17

18 DATED this 10th day of February, 2022.

19 
20 DISTRICT JUDGE
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CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;
that on the 10th day of February, 2022, I electronically filed the foregoing with the
Clerk of the Court system which will send a notice of electronic filing to the following:

JOHN DESMOND, ESQ.
ROBERT EISENBERG, ESQ.
ANJALI WEBSTER, ESQ.
RICHARD WILLIAMSON, ESQ.
BRIAN IRVINE, ESQ.
JONATHAN TEW, ESQ.

And, I deposited in the County mailing system for postage and mailing with the
United States Postal Service in Reno, Nevada, a true and correct copy of the attached
document addressed as follows:

Holly Longe

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 15 Intervivos Revocable Trust 2000,

Case No. CV14-01712

Dept. No. 6

**ORDER DENYING WILLARD
 PLAINTIFFS' MOTION FOR
RELIEF UNDER NRCP 60(B)(5)&(6)**

13 Plaintiffs,

14 vs.

15
 16 BERRY-HINCKLEY INDUSTRIES, a Nevada
 17 Corporation; and JERRY HERBST, an
 18 individual,

19 Defendants.
 20 _____/

21 BERRY-HINCKLEY INDUSTRIES, a
 22 Nevada corporation; and JERRY HERBST,
 23 an individual;

24 Counterclaimants,

25 vs

26 LARRY J. WILLARD, individually and as
 27 trustee of the Larry James Willard Trust Fund;
 28 OVERLAND DEVELOPMENT
 CORPORATION, a California corporation;

Counter-defendants.
 _____/

**ORDER DENYING WILLARD PLAINTIFFS'
MOTION FOR RELIEF UNDER NRCP 60(B)(5)&(6)**

Before this Court is *Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6)* ("*Motion*") filed by Plaintiffs LARRY J. WILLARD, individually, and as Trustee of the Larry James Willard Trust Fund, and OVERLAND DEVELOPMENT CORPORATION (collectively, "Plaintiffs" unless named individually), by and through its counsel of record, Robertson, Johnson, Miller & Williamson, and Lemons, Grundy & Eisenberg.

Defendants BERRY-HINCKLEY INDUSTRIES, a Nevada corporation, and JERRY HERBST (collectively, "Defendants" unless named individually) filed *Defendants' Opposition to the Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6)* ("*Opposition*"), by and through their counsel of record, Dickinson Wright, PLLC.

Plaintiffs filed their *Reply in Support of Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6)* ("*Reply*") and the matter was thereafter submitted for the Court's consideration.

I. RELEVANT FACTUAL AND PROCEDURAL HISTORY.

On April 18, 2018, Plaintiffs filed *Willard Plaintiffs' Rule 60(b) Motion for Relief* ("*NRCP 60(b) Motion*") on the grounds Brian Moquin's ("Mr. Moquin") mental illness constituted excusable neglect.

On December 11, 2018, the Court entered *Judgment* in favor of Defendants and dismissed Plaintiffs' claims with prejudice.

On September 13, 2021, the Court entered its *Order After Remand Denying Plaintiffs' Rule 60(b) Motion for Relief*, which Plaintiffs appealed on October 11, 2021, and is presently pending appeal.

1 In their *Motion*, Plaintiffs argue there are exceptional circumstances to warrant NRCP
2 60(b)(6) relief because the Court has been presented with newly available evidence of Mr.
3 Moquin's disciplinary records, which were previously unavailable to Plaintiffs because Mr.
4 Moquin purportedly deceived Plaintiffs by failing to provide such evidence and Mr. Moquin
5 was disciplined after Plaintiffs filed their request for relief under NRCP 60(b)(1). See
6 generally *Motion*, pp. 7, 11-12. Furthermore, Plaintiffs identify fifteen (15) purported
7 significant changes in the factual conditions of this case to warrant relief under NRCP
8 60(b)(5). *Motion*, pp. 13-14.

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11 In their *Opposition*, Defendants assert each of the six (6) categories of relief under
12 Rule 60 of the Rules of Civil Procedure are mutually exclusive. *Opposition*, pp. 8-9 (citing
13 various persuasive federal authority). Defendants argue Plaintiffs' arguments demonstrate
14 their *Motion* is an attempt to improperly and untimely bolster their NRCP 60(b)(1)
15 arguments. *Opposition*, pp. 9-11. Defendants contend Plaintiffs' *Motion* is untimely
16 because Plaintiffs fail to explain why the *Motion* comes two (2) years after Mr. Moquin's
17 conditional guilty plea entered in April 2019. *Opposition*, pp. 13-14. Likewise, Defendants
18 contend Plaintiffs request for relief under NRCP 60(b)(5) is untimely and NRCP 60(b)(5)
19 relief does not apply prospectively to final judgments. *Opposition*, pp. 21-22.

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22 In their *Reply*, Plaintiffs assert they did not state the *Motion* is a supplement to their
23 previously filed NRCP 60(b) motion. *Reply*, p. 2. Plaintiffs contend they filed their *Motion*
24 within a reasonable time because disciplinary and conviction records were not publicly filed.
25 Furthermore, Plaintiffs cite authority they urge is persuasive for the premise NRCP 60(b)(6)
26 relief is available when personal problems of counsel cause counsel to grossly neglect a
27 client's case and mislead the client. *Reply*, p. 3. Additionally, Plaintiffs argue their *Motion*
28

1 was filed within a reasonable time and Mr. Moquin's abandonment of Plaintiffs constitutes
2 extraordinary circumstances to award relief under NRCP 60(b)(6). *Reply*, pp. 3-4.

3 **II. APPLICABLE LAW AND ANALYSIS.**

4 **A. NRCP 60(b)(5)**

5
6 Section 60(b)(5) of the Nevada Rules of Civil Procedure provides, in pertinent part, a
7 court may relieve a party from a final judgment, order, or proceeding for the following
8 reasons, including "the judgment has been satisfied, released, or discharged; it is based on
9 an earlier judgment that has been reversed or vacated; or applying it prospectively is no
10 longer equitable." NRCP 60(b)(5).

11
12 A motion for relief under NRCP 60(b)(5) requires the district court find "a significant
13 change either in factual conditions or in law." S.E.C. v. Coldicutt, 258 F.3d 939, 942 (9th
14 Cir. 2001) (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384, 112 S. Ct. 748,
15 760 (1992)). A two-step process is required for relief under NRCP 60(b)(5): (1) the moving
16 party must satisfy their burden of showing significant change either in factual conditions or in
17 the law; and (2) "whether the proposed modification is suitably tailored to resolve the
18 problems created by the changed factual or legal conditions." U.S. v. Asarco Inc., 430 F.3d
19 972, 979 (9th Cir. 2005) (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384,
20 391, 112 S. Ct. 748 (1992)).
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23 The Court finds the newly published disciplinary actions of Mr. Moquin do not
24 constitute significant changes in factual conditions. The Court's prior finding that Plaintiffs
25 were represented by Mr. Moquin and Mr. O'Mara has not changed. *Order*, pp. 42-43.
26 Further, the newly published disciplinary actions are still based on the information the Court
27 had before it previously. Therefore, the proposed modification is not suitably tailored to
28

1 resolve the problems created by claimed changed factual conditions argued to support
 2 Plaintiffs' position Moquin's mental illness constituted excusable neglect. The Court finds
 3 NRCP 60(b)(5) does not provide a basis for relief from the Court's prior ruling.

4
 5 **B. NRCP 60(b)(6)**

6 ADKT 0522 amended Rule 60(b) of the Nevada Rules of Civil Procedure adding
 7 subsection six (6) to Rule 60(b) to conform with Rule 60(b)(6) of the Federal Rules of Civil
 8 Procedure. See ADKT 0522 and Advisory Committee Note-2019 Amendment ("[t]he
 9 amendments generally conform to Rule 60 to FRCP 60, including incorporating FRCP
 10 60(b)(6) as Rule 60(b)(6)."). NRCP 60(b)(6) provides, in pertinent part, a court may relieve
 11 a party from a final judgment, order, or proceeding for the following reasons, including "any
 12 other reason that justified relief." NRCP 60(b)(6) (emphasis supplied). NRCP 60(b)(6) was
 13 specifically amended to conform with FRCP 60(b)(6). As such, it has long been held federal
 14 decisions interpreting the "Federal Rules of Civil Procedure are strong persuasive authority,
 15 because the Nevada Rules of Civil Procedure are based in large part upon their federal
 16 counterparts." Exec. Mgmt., Ltd. v. Tigor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872, 876
 17 (2002) (internal quotations omitted) (citing Las Vegas Novelty v. Fernandez, 106 Nev. 113,
 18 119, 787 P.2d 772, 776 (1990)); see also Nelson v. Heer, 121 Nev. 832, 834, 122 P.3d
 19 1252, 1253 (2005).

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 23 "The district court has broad discretion to grant or deny a motion to set aside a
 24 judgment under NRCP 60(b), and [i]ts determination will not be disturbed on appeal absent
 25 an abuse of discretion." Byrd v. Byrd, No. 80548-COA, 2021 WL 4494633, at *3, 137 Nev.
 26 Adv. Op. 60, (Nev. Ct. App. Sept. 30, 2021) (internal quotations omitted); see also Cook v.
 27 Cook, 112 Nev. 179, 181-82, 919 P.2d 264, 265 (1996). An abuse of discretion occurs if
 28

1 the district court's discretion is arbitrary, capricious, or exceeds the bounds of law or reason.

2 Byrd, 2021 WL 4494633, at *3.

3 Recently, the Nevada Court of Appeals held "NRCP 60(b)(6) provides an
4 independent basis for relief that is mutually exclusive of clauses (1)-(5)." Byrd, 2021 WL
5 4494633, at *4. Federal courts have also concluded the same.¹ A party seeking relief
6 under NRCP 60(b)(6) must satisfy three (3) elements: (1) the motion "cannot be premised
7 on another ground delineated in" NRCP 60; (2) the motion was filed within a reasonable
8 time; and (3) there are extraordinary circumstances justifying reopening the judgment.
9
10 Bynoe v. Baca, 966 F.3d 972, 979 (9th Cir. 2020).

11 In this case, the Court concludes Plaintiffs' NRCP 60(b)(6) relief is precluded
12 because the *Motion* is premised on another ground delineated in NRCP 60. Both the *NRCP*
13 *60(b) Motion* and the instant *Motion* request relief based on NRCP 60(b)(5) and specifically
14 on the facts of Mr. Moquin's mental illness and the effect on his representation of Plaintiffs.
15 In the instant *Motion*, Plaintiffs argue newly published disciplinary records of Mr. Moquin are
16 additional evidence the Court can now, and should, consider which in effect supplements
17 their previously filed *NRCP 60(b) Motion*.²

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22 ¹ See Gonzalez v. Crosby, 545 U.S. 524, 528-29, 125 S. Ct. 2641, 2646 (2005) ("Rule 60(b)(6) . . .
23 permits reopening [of a judgment] when the movant shows any . . . reason justifying relief from the
24 operation of the judgment other than the more specific circumstances set out in Rules 60(b)(1)-(5).")
25 (internal quotations omitted); Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863, 108
S. Ct. 2194, 2204 (1988) (to prevail under Rule 60(b)(6) the motion must be "made within a
reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1)
through (b)(5).").

26 ² *Motion*, p. 2 ("Now, additional evidence exists to support the Willard Plaintiffs' claims surrounding
27 Moquin's mental illness. This evidence was not previously available."); p. 3 (Plaintiffs state the Court
28 should now consider Mr. Moquin's 2019 disciplinary action and documents filed therein as additional
evidence.); pp. 12-13 ("Now, however, there is additional and compelling evidence proving that
substantial justice requires this Court set aside its prior orders and allow this matter to be decide on
its merits.").

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED the *Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6)* is DENIED.

DATED this 9th day of May, 2022.

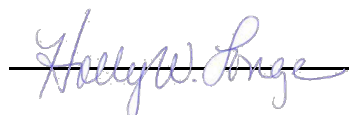

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;
that on the 10th day of May, 2022, I electronically filed the foregoing with the Clerk
of the Court system which will send a notice of electronic filing to the following:

JOHN DESMOND, ESQ.
ANJALI WEBSTER, ESQ.
ROBERT EISENBERG, ESQ.
RICHARD WILLIAMSON, ESQ.
BRIAN IRVINE, ESQ.
JONATHAN TEW, ESQ.

And, I deposited in the County mailing system for postage and mailing with the
United States Postal Service in Reno, Nevada, a true and correct copy of the attached
document addressed as follows:

A handwritten signature in blue ink, reading "Holly W. Lange", is positioned above a solid horizontal line.

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Alicia L. Lerud
Clerk of the Court
Transaction # 9047927

2540

DICKINSON WRIGHT PLLC
JOHN P. DESMOND
Nevada Bar No. 5618
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Attorney for Berry Hinckley Industries and Jerry Herbst

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as
trustee of the Larry James Willard Trust Fund;
OVERLAND DEVELOPMENT
CORPORATION, a California corporation;
EDWARD E. WOOLEY AND JUDITH A.
WOOLEY, individually and as trustees of the
Edward C. Wooley and Judith A. Wooley
Intervivos Revocable Trust 2000,

Plaintiffs,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada
corporation; and JERRY HERBST, an
Individual;

Defendants.

CASE NO. CV14-01712

DEPT. 6

BERRY-HINCKLEY INDUSTRIES, a
Nevada corporation; and JERRY HERBST,
an individual;

Counterclaimants,

vs

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

Counter-defendants.

/

PLEASE TAKE NOTICE that on the 10th day of May, 2022, an Order was entered in the above-captioned matter denying Willard Plaintiffs' Motion for Relief Under NRCP 60(B)(5)&(6). A true and correct copy of the order is attached hereto as **Exhibit 1**.

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 13th day of May, 2022.

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
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Email: Birvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

CERTIFICATE OF SERVICE

I certify that I am an employee of DICKINSON WRIGHT PLLC, and that on this date, pursuant to NRCP 5(b); I am serving a true and correct copy of the attached **NOTICE OF ENTRY OF ORDER** on the parties through the Second Judicial District Court's E-Flex filing system to the following:

Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.
ROBERTSON, JOHNSON, MILLER &
WILLIAMSON
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rle@lge.net

Attorneys for Plaintiffs/Counterdefendants

Attorneys for Plaintiffs/Counterdefendants

DATED this 13th day of May, 2022.

/s/ Angela M. Shoults
An employee of DICKINSON WRIGHT PLLC

EXHIBIT TABLE

Exhibit	Description	Pages¹
1	ORDER DENYING WILLARD PLAINTIFFS' MOTION FOR RELIEF UNDER NRCP 60(b)(5) & (6)	8

¹ Exhibit Page counts are exclusive of exhibit slip sheets.

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Clerk of the Court
Transaction # 9047927

EXHIBIT 1

EXHIBIT 1

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Clerk of the Court
Transaction # 9040806

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5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF WASHOE
7

8 LARRY J. WILLARD, individually and as
9 trustee of the Larry James Willard Trust Fund;
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11 CORPORATION, a California corporation;
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Case No. CV14-01712

Dept. No. 6

**ORDER DENYING WILLARD
PLAINTIFFS' MOTION FOR
RELIEF UNDER NRCP 60(B)(5)&(6)**

13 Plaintiffs,

14 vs.

15
16 BERRY-HINCKLEY INDUSTRIES, a Nevada
17 Corporation; and JERRY HERBST, an
18 individual,

19 Defendants.
20 _____/

21 BERRY-HINCKLEY INDUSTRIES, a
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CORPORATION, a California corporation;

Counter-defendants.
_____/

**ORDER DENYING WILLARD PLAINTIFFS'
MOTION FOR RELIEF UNDER NRCP 60(B)(5)&(6)**

Before this Court is *Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6)* ("*Motion*") filed by Plaintiffs LARRY J. WILLARD, individually, and as Trustee of the Larry James Willard Trust Fund, and OVERLAND DEVELOPMENT CORPORATION (collectively, "Plaintiffs" unless named individually), by and through its counsel of record, Robertson, Johnson, Miller & Williamson, and Lemons, Grundy & Eisenberg.

Defendants BERRY-HINCKLEY INDUSTRIES, a Nevada corporation, and JERRY HERBST (collectively, "Defendants" unless named individually) filed *Defendants' Opposition to the Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6)* ("*Opposition*"), by and through their counsel of record, Dickinson Wright, PLLC.

Plaintiffs filed their *Reply in Support of Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6)* ("*Reply*") and the matter was thereafter submitted for the Court's consideration.

I. RELEVANT FACTUAL AND PROCEDURAL HISTORY.

On April 18, 2018, Plaintiffs filed *Willard Plaintiffs' Rule 60(b) Motion for Relief* ("*NRCP 60(b) Motion*") on the grounds Brian Moquin's ("Mr. Moquin") mental illness constituted excusable neglect.

On December 11, 2018, the Court entered *Judgment* in favor of Defendants and dismissed Plaintiffs' claims with prejudice.

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1 In their *Motion*, Plaintiffs argue there are exceptional circumstances to warrant NRCP
2 60(b)(6) relief because the Court has been presented with newly available evidence of Mr.
3 Moquin's disciplinary records, which were previously unavailable to Plaintiffs because Mr.
4 Moquin purportedly deceived Plaintiffs by failing to provide such evidence and Mr. Moquin
5 was disciplined after Plaintiffs filed their request for relief under NRCP 60(b)(1). See
6 generally *Motion*, pp. 7, 11-12. Furthermore, Plaintiffs identify fifteen (15) purported
7 significant changes in the factual conditions of this case to warrant relief under NRCP
8 60(b)(5). *Motion*, pp. 13-14.

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10 In their *Opposition*, Defendants assert each of the six (6) categories of relief under
11 Rule 60 of the Rules of Civil Procedure are mutually exclusive. *Opposition*, pp. 8-9 (citing
12 various persuasive federal authority). Defendants argue Plaintiffs' arguments demonstrate
13 their *Motion* is an attempt to improperly and untimely bolster their NRCP 60(b)(1)
14 arguments. *Opposition*, pp. 9-11. Defendants contend Plaintiffs' *Motion* is untimely
15 because Plaintiffs fail to explain why the *Motion* comes two (2) years after Mr. Moquin's
16 conditional guilty plea entered in April 2019. *Opposition*, pp. 13-14. Likewise, Defendants
17 contend Plaintiffs request for relief under NRCP 60(b)(5) is untimely and NRCP 60(b)(5)
18 relief does not apply prospectively to final judgments. *Opposition*, pp. 21-22.

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20 In their *Reply*, Plaintiffs assert they did not state the *Motion* is a supplement to their
21 previously filed NRCP 60(b) motion. *Reply*, p. 2. Plaintiffs contend they filed their *Motion*
22 within a reasonable time because disciplinary and conviction records were not publicly filed.
23 Furthermore, Plaintiffs cite authority they urge is persuasive for the premise NRCP 60(b)(6)
24 relief is available when personal problems of counsel cause counsel to grossly neglect a
25 client's case and mislead the client. *Reply*, p. 3. Additionally, Plaintiffs argue their *Motion*
26
27
28

1 was filed within a reasonable time and Mr. Moquin's abandonment of Plaintiffs constitutes
2 extraordinary circumstances to award relief under NRCP 60(b)(6). *Reply*, pp. 3-4.

3 **II. APPLICABLE LAW AND ANALYSIS.**

4 **A. NRCP 60(b)(5)**

5
6 Section 60(b)(5) of the Nevada Rules of Civil Procedure provides, in pertinent part, a
7 court may relieve a party from a final judgment, order, or proceeding for the following
8 reasons, including "the judgment has been satisfied, released, or discharged; it is based on
9 an earlier judgment that has been reversed or vacated; or applying it prospectively is no
10 longer equitable." NRCP 60(b)(5).

11
12 A motion for relief under NRCP 60(b)(5) requires the district court find "a significant
13 change either in factual conditions or in law." S.E.C. v. Coldicutt, 258 F.3d 939, 942 (9th
14 Cir. 2001) (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384, 112 S. Ct. 748,
15 760 (1992)). A two-step process is required for relief under NRCP 60(b)(5): (1) the moving
16 party must satisfy their burden of showing significant change either in factual conditions or in
17 the law; and (2) "whether the proposed modification is suitably tailored to resolve the
18 problems created by the changed factual or legal conditions." U.S. v. Asarco Inc., 430 F.3d
19 972, 979 (9th Cir. 2005) (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384,
20 391, 112 S. Ct. 748 (1992)).

21
22
23 The Court finds the newly published disciplinary actions of Mr. Moquin do not
24 constitute significant changes in factual conditions. The Court's prior finding that Plaintiffs
25 were represented by Mr. Moquin and Mr. O'Mara has not changed. *Order*, pp. 42-43.
26 Further, the newly published disciplinary actions are still based on the information the Court
27 had before it previously. Therefore, the proposed modification is not suitably tailored to
28

1 resolve the problems created by claimed changed factual conditions argued to support
 2 Plaintiffs' position Moquin's mental illness constituted excusable neglect. The Court finds
 3 NRCP 60(b)(5) does not provide a basis for relief from the Court's prior ruling.

4
 5 **B. NRCP 60(b)(6)**

6 ADKT 0522 amended Rule 60(b) of the Nevada Rules of Civil Procedure adding
 7 subsection six (6) to Rule 60(b) to conform with Rule 60(b)(6) of the Federal Rules of Civil
 8 Procedure. See ADKT 0522 and Advisory Committee Note-2019 Amendment ("[t]he
 9 amendments generally conform to Rule 60 to FRCP 60, including incorporating FRCP
 10 60(b)(6) as Rule 60(b)(6)."). NRCP 60(b)(6) provides, in pertinent part, a court may relieve
 11 a party from a final judgment, order, or proceeding for the following reasons, including "any
 12 other reason that justified relief." NRCP 60(b)(6) (emphasis supplied). NRCP 60(b)(6) was
 13 specifically amended to conform with FRCP 60(b)(6). As such, it has long been held federal
 14 decisions interpreting the "Federal Rules of Civil Procedure are strong persuasive authority,
 15 because the Nevada Rules of Civil Procedure are based in large part upon their federal
 16 counterparts." Exec. Mgmt., Ltd. v. Tigor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872, 876
 17 (2002) (internal quotations omitted) (citing Las Vegas Novelty v. Fernandez, 106 Nev. 113,
 18 119, 787 P.2d 772, 776 (1990)); see also Nelson v. Heer, 121 Nev. 832, 834, 122 P.3d
 19 1252, 1253 (2005).

20
 21
 22
 23 "The district court has broad discretion to grant or deny a motion to set aside a
 24 judgment under NRCP 60(b), and [i]ts determination will not be disturbed on appeal absent
 25 an abuse of discretion." Byrd v. Byrd, No. 80548-COA, 2021 WL 4494633, at *3, 137 Nev.
 26 Adv. Op. 60, (Nev. Ct. App. Sept. 30, 2021) (internal quotations omitted); see also Cook v.
 27 Cook, 112 Nev. 179, 181-82, 919 P.2d 264, 265 (1996). An abuse of discretion occurs if
 28

1 the district court's discretion is arbitrary, capricious, or exceeds the bounds of law or reason.

2 Byrd, 2021 WL 4494633, at *3.

3 Recently, the Nevada Court of Appeals held "NRCP 60(b)(6) provides an
4 independent basis for relief that is mutually exclusive of clauses (1)-(5)." Byrd, 2021 WL
5 4494633, at *4. Federal courts have also concluded the same.¹ A party seeking relief
6 under NRCP 60(b)(6) must satisfy three (3) elements: (1) the motion "cannot be premised
7 on another ground delineated in" NRCP 60; (2) the motion was filed within a reasonable
8 time; and (3) there are extraordinary circumstances justifying reopening the judgment.
9
10 Bynoe v. Baca, 966 F.3d 972, 979 (9th Cir. 2020).

11 In this case, the Court concludes Plaintiffs' NRCP 60(b)(6) relief is precluded
12 because the *Motion* is premised on another ground delineated in NRCP 60. Both the *NRCP*
13 *60(b) Motion* and the instant *Motion* request relief based on NRCP 60(b)(5) and specifically
14 on the facts of Mr. Moquin's mental illness and the effect on his representation of Plaintiffs.
15 In the instant *Motion*, Plaintiffs argue newly published disciplinary records of Mr. Moquin are
16 additional evidence the Court can now, and should, consider which in effect supplements
17 their previously filed *NRCP 60(b) Motion*.²

18 //

19
20
21
22 ¹ See Gonzalez v. Crosby, 545 U.S. 524, 528-29, 125 S. Ct. 2641, 2646 (2005) ("Rule 60(b)(6) . . .
23 permits reopening [of a judgment] when the movant shows any . . . reason justifying relief from the
24 operation of the judgment other than the more specific circumstances set out in Rules 60(b)(1)-(5).")
25 (internal quotations omitted); Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863, 108
S. Ct. 2194, 2204 (1988) (to prevail under Rule 60(b)(6) the motion must be "made within a
reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1)
through (b)(5).").

26 ² *Motion*, p. 2 ("Now, additional evidence exists to support the Willard Plaintiffs' claims surrounding
27 Moquin's mental illness. This evidence was not previously available."); p. 3 (Plaintiffs state the Court
28 should now consider Mr. Moquin's 2019 disciplinary action and documents filed therein as additional
evidence.); pp. 12-13 ("Now, however, there is additional and compelling evidence proving that
substantial justice requires this Court set aside its prior orders and allow this matter to be decide on
its merits.").

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED the *Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6)* is DENIED.

DATED this 9th day of May, 2022.

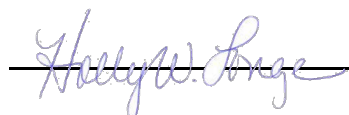

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;
that on the 10th day of May, 2022, I electronically filed the foregoing with the Clerk
of the Court system which will send a notice of electronic filing to the following:

JOHN DESMOND, ESQ.
ANJALI WEBSTER, ESQ.
ROBERT EISENBERG, ESQ.
RICHARD WILLIAMSON, ESQ.
BRIAN IRVINE, ESQ.
JONATHAN TEW, ESQ.

And, I deposited in the County mailing system for postage and mailing with the
United States Postal Service in Reno, Nevada, a true and correct copy of the attached
document addressed as follows:

A handwritten signature in blue ink, reading "Holly W. Lange", is positioned above a solid horizontal line.

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Alicia L. Lerud
Clerk of the Court
Transaction # 9085063

CODE: 2610
Richard D. Williamson, Esq., SBN 9932
Jonathan Joel Tew, Esq., SBN 11874
ROBERTSON, JOHNSON, MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
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Robert L. Eisenberg, Esq., SBN 0950
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rle@lge.net

Attorneys for Plaintiffs/Counterdefendants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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

Counterdefendants.

Case No. CV14-01712

Dept. No. 6

Robertson, Johnson,
Miller & Williamson
50 West Liberty Street,
Suite 600
Reno, Nevada 89501

NOTICE OF FILING COST BOND

PAGE 1

NOTICE OF FILING COST BOND

Please take notice that Plaintiff Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and Plaintiff Overland Development Corporation, have posted cash in the amount of \$500 for the costs on appeal, pursuant to NRAP 7.

Affirmation

Pursuant to NRS § 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 6th day of June, 2022.

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON

By: /s/ Richard D. Williamson
Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.

and

LEMONS, GRUNDY & EISENBERG

By: /s/ Robert L. Eisenberg
Robert L. Eisenberg, Esq.

Attorneys for Plaintiffs/Counterdefendants

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson, Johnson, Miller & Williamson, 50 West Liberty Street, Suite 600, Reno, Nevada 89501, over the age of 18, and not a party within this action. I further certify that on the 6th day of June, 2022, I electronically filed the foregoing **NOTICE OF FILING COST BOND** with the Clerk of the Court by using the ECF system which served the following parties electronically:

John P. Desmond, Esq.	Robert L. Eisenberg, Esq.
Brian R. Irvine, Esq.	Lemons, Grundy & Eisenberg
Anjali D. Webster, Esq.	6005 Plumas Street, Third Floor
Dickinson Wright	Reno NV 89519
100 West Liberty Street, Suite 940	775-786-6868
Reno, NV 89501	<i>Attorneys for Plaintiffs/</i>
<i>Attorneys for Defendants/Counterclaimants</i>	<i>Counterdefendants</i>

/s/ Stefanie E. Smith

An Employee of Robertson, Johnson, Miller & Williamson

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Transaction # 9085058 : yviloria

CODE: \$2515
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Jonathan Joel Tew, Esq., SBN 11874
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Attorneys for Plaintiffs/Counterdefendants

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Counterdefendants.

Robertson, Johnson,
Miller & Williamson
50 West Liberty Street,
Suite 600
Reno, Nevada 89501

NOTICE OF APPEAL
PAGE 1

NOTICE OF APPEAL

Notice is hereby given that Plaintiff Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and Plaintiff Overland Development Corporation, hereby appeal to the Nevada Supreme Court from the *Order Denying Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6)*, entered on May 10, 2022 (attached as Exhibit 1). These Plaintiffs also appeal from all other rulings and orders made final and appealable by the foregoing.

Affirmation

Pursuant to NRS § 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 6th day of June, 2022.

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON

By: /s/ Richard D. Williamson
Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.

and

LEMONS, GRUNDY & EISENBERG

By: /s/ Robert L. Eisenberg
Robert L. Eisenberg, Esq.

Attorneys for Plaintiffs/Counterdefendants

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson, Johnson, Miller & Williamson, 50 West Liberty Street, Suite 600, Reno, Nevada 89501, over the age of 18, and not a party within this action. I further certify that on the 6th day of June, 2022, I electronically filed the foregoing **NOTICE OF APPEAL** with the Clerk of the Court by using the ECF system which served the following parties electronically:

John P. Desmond, Esq.	Robert L. Eisenberg, Esq.
Brian R. Irvine, Esq.	Lemons, Grundy & Eisenberg
Anjali D. Webster, Esq.	6005 Plumas Street, Third Floor
Dickinson Wright	Reno NV 89519
100 West Liberty Street, Suite 940	775-786-6868
Reno, NV 89501	<i>Attorneys for Plaintiffs/</i>
<i>Attorneys for Defendants/Counterclaimants</i>	<i>Counterdefendants</i>

/s/ Stefanie E. Smith

An Employee of Robertson, Johnson, Miller & Williamson

Index of Exhibits

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**ORDER DENYING WILLARD PLAINTIFFS'
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Before this Court is *Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6)* ("*Motion*") filed by Plaintiffs LARRY J. WILLARD, individually, and as Trustee of the Larry James Willard Trust Fund, and OVERLAND DEVELOPMENT CORPORATION (collectively, "Plaintiffs" unless named individually), by and through its counsel of record, Robertson, Johnson, Miller & Williamson, and Lemons, Grundy & Eisenberg.

Defendants BERRY-HINCKLEY INDUSTRIES, a Nevada corporation, and JERRY HERBST (collectively, "Defendants" unless named individually) filed *Defendants' Opposition to the Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6)* ("*Opposition*"), by and through their counsel of record, Dickinson Wright, PLLC.

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I. RELEVANT FACTUAL AND PROCEDURAL HISTORY.

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25 Furthermore, Plaintiffs cite authority they urge is persuasive for the premise NRCP 60(b)(6)
26 relief is available when personal problems of counsel cause counsel to grossly neglect a
27 client's case and mislead the client. *Reply*, p. 3. Additionally, Plaintiffs argue their *Motion*
28

1 was filed within a reasonable time and Mr. Moquin's abandonment of Plaintiffs constitutes
2 extraordinary circumstances to award relief under NRCP 60(b)(6). *Reply*, pp. 3-4.

3 **II. APPLICABLE LAW AND ANALYSIS.**

4 **A. NRCP 60(b)(5)**

5
6 Section 60(b)(5) of the Nevada Rules of Civil Procedure provides, in pertinent part, a
7 court may relieve a party from a final judgment, order, or proceeding for the following
8 reasons, including "the judgment has been satisfied, released, or discharged; it is based on
9 an earlier judgment that has been reversed or vacated; or applying it prospectively is no
10 longer equitable." NRCP 60(b)(5).

11
12 A motion for relief under NRCP 60(b)(5) requires the district court find "a significant
13 change either in factual conditions or in law." S.E.C. v. Coldicutt, 258 F.3d 939, 942 (9th
14 Cir. 2001) (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384, 112 S. Ct. 748,
15 760 (1992)). A two-step process is required for relief under NRCP 60(b)(5): (1) the moving
16 party must satisfy their burden of showing significant change either in factual conditions or in
17 the law; and (2) "whether the proposed modification is suitably tailored to resolve the
18 problems created by the changed factual or legal conditions." U.S. v. Asarco Inc., 430 F.3d
19 972, 979 (9th Cir. 2005) (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384,
20 391, 112 S. Ct. 748 (1992)).

21
22
23 The Court finds the newly published disciplinary actions of Mr. Moquin do not
24 constitute significant changes in factual conditions. The Court's prior finding that Plaintiffs
25 were represented by Mr. Moquin and Mr. O'Mara has not changed. *Order*, pp. 42-43.
26 Further, the newly published disciplinary actions are still based on the information the Court
27 had before it previously. Therefore, the proposed modification is not suitably tailored to
28

1 resolve the problems created by claimed changed factual conditions argued to support
 2 Plaintiffs' position Moquin's mental illness constituted excusable neglect. The Court finds
 3 NRCP 60(b)(5) does not provide a basis for relief from the Court's prior ruling.

4
 5 **B. NRCP 60(b)(6)**

6 ADKT 0522 amended Rule 60(b) of the Nevada Rules of Civil Procedure adding
 7 subsection six (6) to Rule 60(b) to conform with Rule 60(b)(6) of the Federal Rules of Civil
 8 Procedure. See ADKT 0522 and Advisory Committee Note-2019 Amendment ("[t]he
 9 amendments generally conform to Rule 60 to FRCP 60, including incorporating FRCP
 10 60(b)(6) as Rule 60(b)(6)."). NRCP 60(b)(6) provides, in pertinent part, a court may relieve
 11 a party from a final judgment, order, or proceeding for the following reasons, including "any
 12 other reason that justified relief." NRCP 60(b)(6) (emphasis supplied). NRCP 60(b)(6) was
 13 specifically amended to conform with FRCP 60(b)(6). As such, it has long been held federal
 14 decisions interpreting the "Federal Rules of Civil Procedure are strong persuasive authority,
 15 because the Nevada Rules of Civil Procedure are based in large part upon their federal
 16 counterparts." Exec. Mgmt., Ltd. v. Tigor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872, 876
 17 (2002) (internal quotations omitted) (citing Las Vegas Novelty v. Fernandez, 106 Nev. 113,
 18 119, 787 P.2d 772, 776 (1990)); see also Nelson v. Heer, 121 Nev. 832, 834, 122 P.3d
 19 1252, 1253 (2005).

20
 21
 22
 23 "The district court has broad discretion to grant or deny a motion to set aside a
 24 judgment under NRCP 60(b), and [i]ts determination will not be disturbed on appeal absent
 25 an abuse of discretion." Byrd v. Byrd, No. 80548-COA, 2021 WL 4494633, at *3, 137 Nev.
 26 Adv. Op. 60, (Nev. Ct. App. Sept. 30, 2021) (internal quotations omitted); see also Cook v.
 27 Cook, 112 Nev. 179, 181-82, 919 P.2d 264, 265 (1996). An abuse of discretion occurs if
 28

1 the district court's discretion is arbitrary, capricious, or exceeds the bounds of law or reason.

2 Byrd, 2021 WL 4494633, at *3.

3 Recently, the Nevada Court of Appeals held "NRCP 60(b)(6) provides an
4 independent basis for relief that is mutually exclusive of clauses (1)-(5)." Byrd, 2021 WL
5 4494633, at *4. Federal courts have also concluded the same.¹ A party seeking relief
6 under NRCP 60(b)(6) must satisfy three (3) elements: (1) the motion "cannot be premised
7 on another ground delineated in" NRCP 60; (2) the motion was filed within a reasonable
8 time; and (3) there are extraordinary circumstances justifying reopening the judgment.
9
10 Bynoe v. Baca, 966 F.3d 972, 979 (9th Cir. 2020).

11 In this case, the Court concludes Plaintiffs' NRCP 60(b)(6) relief is precluded
12 because the *Motion* is premised on another ground delineated in NRCP 60. Both the *NRCP*
13 *60(b) Motion* and the instant *Motion* request relief based on NRCP 60(b)(5) and specifically
14 on the facts of Mr. Moquin's mental illness and the effect on his representation of Plaintiffs.
15 In the instant *Motion*, Plaintiffs argue newly published disciplinary records of Mr. Moquin are
16 additional evidence the Court can now, and should, consider which in effect supplements
17 their previously filed *NRCP 60(b) Motion*.²

18
19
20 //

21
22 ¹ See Gonzalez v. Crosby, 545 U.S. 524, 528-29, 125 S. Ct. 2641, 2646 (2005) ("Rule 60(b)(6) . . .
23 permits reopening [of a judgment] when the movant shows any . . . reason justifying relief from the
24 operation of the judgment other than the more specific circumstances set out in Rules 60(b)(1)-(5).")
25 (internal quotations omitted); Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863, 108
S. Ct. 2194, 2204 (1988) (to prevail under Rule 60(b)(6) the motion must be "made within a
reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1)
through (b)(5).").

26 ² *Motion*, p. 2 ("Now, additional evidence exists to support the Willard Plaintiffs' claims surrounding
27 Moquin's mental illness. This evidence was not previously available."); p. 3 (Plaintiffs state the Court
28 should now consider Mr. Moquin's 2019 disciplinary action and documents filed therein as additional
evidence.); pp. 12-13 ("Now, however, there is additional and compelling evidence proving that
substantial justice requires this Court set aside its prior orders and allow this matter to be decide on
its merits.").

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED the *Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6)* is DENIED.

DATED this 9th day of May, 2022.

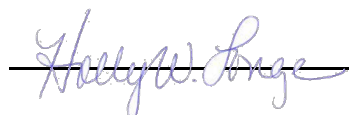

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;
that on the 10th day of May, 2022, I electronically filed the foregoing with the Clerk
of the Court system which will send a notice of electronic filing to the following:

JOHN DESMOND, ESQ.
ANJALI WEBSTER, ESQ.
ROBERT EISENBERG, ESQ.
RICHARD WILLIAMSON, ESQ.
BRIAN IRVINE, ESQ.
JONATHAN TEW, ESQ.

And, I deposited in the County mailing system for postage and mailing with the
United States Postal Service in Reno, Nevada, a true and correct copy of the attached
document addressed as follows:

A handwritten signature in blue ink, reading "Holly W. Lange", is written over a horizontal line.

FILED
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CV14-01712
2022-06-06 03:52:01 PM
Alicia L. Lerud
Clerk of the Court
Transaction # 9085063

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Attorneys for Plaintiffs/Counterdefendants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as
Trustee of the Larry James Willard Trust Fund;
OVERLAND DEVELOPMENT
CORPORATION, a California corporation;
EDWARD E. WOOLEY AND JUDITH A.
WOOLEY, individually and as trustees of the
Edward C. Wooley and Judith A. Wooley
Intervivos Revocable Trust 2000,

Plaintiffs,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada
corporation; and JERRY HERBST,

Defendants.

BERRY-HINCKLEY INDUSTRIES a Nevada
corporation; and JERRY HERBST,

Counterclaimants,

vs.

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

Counterdefendants.

Case No. CV14-01712

Dept. No. 6

Robertson, Johnson,
Miller & Williamson
50 West Liberty Street,
Suite 600
Reno, Nevada 89501

CASE APPEAL STATEMENT

Pursuant to NRAP 3(f), Plaintiff Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and Plaintiff Overland Development Corporation (collectively, the “Willard Plaintiffs”) hereby submit the following case appeal statement:

A. District court case number and caption, showing names of all parties to the proceedings (without using *et al.*):

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund;
OVERLAND DEVELOPMENT CORPORATION, a California corporation;
EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiffs,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual,

Defendants.

Case No. CV14-01712

Dept. No. 6

BERRY-HINCKLEY INDUSTRIES a Nevada corporation; and JERRY HERBST, an individual,

Counterclaimants,

vs.

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

Counterdefendants.

On February 22, 2019, Defendant Berry-Hinckley Industries and Timothy P. Herbst, Special Administrator of the Estate of Jerry Herbst, filed a Suggestion of Death explaining that Defendant Jerry Herbst passed away on November 27, 2018. That same day, Defendant Berry-Hinckley Industries filed a Motion to Substitute Proper Party to substitute Timothy P. Herbst, as Special Administrator of the Estate of Jerry Herbst, deceased, for Defendant Jerry Herbst. That

1 motion included a proposed order. On February 26, 2019, Defendant Berry-Hinckley Industries
 2 filed an Addendum to Motion to Substitute Proper Party, which attached a revised proposed
 3 order. On March 29, 2019, Willard Plaintiffs filed a Notice of Non-Opposition to Substitution
 4 confirming that they did not oppose either the Motion to Substitute Proper Party or the
 5 Addendum to Motion to Substitute Proper Party. To date however, the Court has not ruled on
 6 that motion. Therefore, the caption has not yet officially changed.

7 B. Name of judge who entered order or judgment being appealed:

8 Hon. Lynne K. Simons

9 C. Name of each appellant, and name and address of counsel for each appellant:

10 Appellants are Plaintiff Larry J. Willard, individually and as trustee of the Larry James
 11 Willard Trust Fund, and Plaintiff Overland Development Corporation

12 Counsel for Appellants are:

13 Robert L. Eisenberg (SBN 950)
 14 Lemons, Grundy & Eisenberg
 6005 Plumas Street, Third Floor
 Reno NV 89519

15 Richard D. Williamson (SBN 9932)
 16 Jonathan Joel Tew (SBN 11874)
 Robertson, Johnson, Miller, & Williamson
 17 50 W. Liberty St. Suite 600
 Reno, NV 89501

18 D. Name of each respondent, and name and address of each respondent's appellate
 19 counsel, if known:

20 Respondents are Defendant Berry-Hinckley Industries and Defendant Jerry Herbst
 21 (and/or Timothy P. Herbst, as Special Administrator of the Estate of Jerry Herbst, deceased, for
 22 Defendant Jerry Herbst).

23 Counsel for Respondents are:

24 John P. Desmond, Esq.
 25 Brian R. Irvine, Esq.
 Anjali D. Webster, Esq.
 26 Dickinson Wright
 100 West Liberty Street, Suite 940
 27 Reno, NV 89501

1 E. Whether attorneys identified in subparagraph D are not licensed to practice law in
 2 Nevada; and if so, whether the district court granted permission to appear under SCR 42 (include
 3 copy of district court order granting permission):

4 All of the attorneys that are currently representing the parties are licensed to practice law
 5 in Nevada.

6 F. Whether appellant was represented by appointed counsel in the district court or on
 7 appeal: No appointed counsel; retained counsel only.

8 G. Whether any appellant was granted leave to proceed *in forma pauperis*: No.

9 H. Date proceedings were commenced in district court: August 8, 2014.

10 I. Brief description of nature of the action and result in district court, including type
 11 of judgment or order being appealed and relief granted by district court:

12 This litigation involves the lease, strategic breach, and ultimate abandonment of
 13 commercial property in Reno. After plaintiffs' former counsel failed to oppose several pending
 14 motions, the district court issued a sanction consisting of dismissal of plaintiffs' claims. The
 15 district court also denied a motion for relief under NRCP 60(b)(1) and entered judgment.

16 After a first appeal, the Nevada Supreme Court entered an opinion, which stated in part
 17 that "district courts must issue express factual findings, preferably in writing, pursuant to each
 18 *Yochum* factor to facilitate our appellate review. Accordingly, we reverse the district court's
 19 order denying the NRCP 60(b)(1) motion and remand to the district court for further
 20 consideration." *Willard v. Berry-Hinckley Indus.*, 136 Nev. 467, 468, 469 P.3d 176, 178 (2020).

21 Defendants sought rehearing of that opinion, which was denied. Defendants then sought
 22 en banc reconsideration of that opinion. On February 23, 2021, the Nevada Supreme Court
 23 entered an Order Denying En Banc Reconsideration, in which it ordered that "neither party may
 24 present any new arguments or evidence on remand; the district court's consideration of the
 25 factors set forth in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), is limited to
 26 the record currently before the court."

27 While that appeal was still pending, the Nevada Supreme Court enacted a new subsection
 28 to NRCP 60, effective March 1, 2019. This new subsection provides that courts are not limited

to only excusable neglect, but can now grant relief from an order for “any other reason that justifies relief.” NRCP 60(b)(6).

Therefore, after additional evidence became available in 2021, and after the Rule 60(b)(1) motion was resubmitted to the district court, the Willard Plaintiffs promptly filed a motion for relief under NRCP 60(b)(5)&(6) on July 13, 2021. The district court denied the motion, and the Willard Plaintiffs have appealed from the denial.

J. Whether case was previously subject of appeal or writ proceeding in Nevada Supreme Court or Court of Appeals, and if so, caption and docket number of prior proceeding:

Yes, this case has been the subject on one prior appeal and is the subject of another currently-pending appeal. The caption and docket number for the first appeal are set forth below:

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

Docket No. 77780

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada
corporation; and JERRY HERBST, an individual,
Respondents.

The caption and docket number for the currently-pending appeal are:

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

Docket No. 83640

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.

K. Whether appeal involves child custody or visitation: No.

L. Whether appeal involves possibility of settlement: Yes.

Affirmation

Pursuant to NRS § 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

1 DATED this 6th day of June, 2022.

2 ROBERTSON, JOHNSON,
3 MILLER & WILLIAMSON

4 By: /s/ Richard D. Williamson
Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.

5 and

6 LEMONS, GRUNDY & EISENBERG

7 By: /s/ Robert L. Eisenberg
8 Robert L. Eisenberg, Esq.

9 *Attorneys for Plaintiffs/Counterdefendants/*
10 *Appellants*

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson, Johnson, Miller & Williamson, 50 West Liberty Street, Suite 600, Reno, Nevada 89501, over the age of 18, and not a party within this action. I further certify that on the 6th day of June, 2022, I electronically filed the foregoing **CASE APPEAL STATEMENT** with the Clerk of the Court by using the ECF system which served the following parties electronically:

John P. Desmond, Esq.	Robert L. Eisenberg, Esq.
Brian R. Irvine, Esq.	Lemons, Grundy & Eisenberg
Anjali D. Webster, Esq.	6005 Plumas Street, Third Floor
Dickinson Wright	Reno NV 89519
100 West Liberty Street, Suite 940	775-786-6868
Reno, NV 89501	<i>Attorneys for Plaintiffs/</i>
<i>Attorneys for Defendants/Counterclaimants</i>	<i>Counterdefendants</i>

/s/ Stefanie E. Smith

An Employee of Robertson, Johnson, Miller & Williamson