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.

No. 83640
District Court Case No. CV14-01712

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. 84848
District Court Case No. CV14-01712

APPEAL FROM ORDER DENYING WILLARD PLAINTIFFS' MOTION FOR RELIEF UNDER NRCP 60(b)(5)&(6) IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE HONORABLE LYNNE K. SIMONS

APPELLANTS' SUPPLEMENTAL REPLY BRIEF

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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: November 18, 2022

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

RICHARD D. WILLIAMSON (Bar No. 9932)
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ATTORNEYS FOR APPELLANTS

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INTRODUCTION

Plaintiffs/Appellants Larry J. Willard, individually and as Trustee of the Larry James Willard Trust Fund ("Mr. Willard"), and Overland Development Corporation (collectively, the "Willard Plaintiffs") simply want a trial on the merits, instead of being foreclosed from trying their meritorious claims because of prior counsel's egregious misconduct and abandonment. That is all they have ever wanted and all they ask of this court. The extraordinary circumstances presented in this case demand that opportunity.

Defendants/Respondents complain that they are being held "captive" and "hostage" in this case. (Respondents' Supplemental Answering Brief ("RSAB") at 2, 5.) Setting aside the rhetoric, it is important to acknowledge the factual history of what has actually transpired in this case.

On or about December 2005, Defendant/Respondent Berry-Hinckley Industries ("BHI") entered into a long-term lease with the Willard Plaintiffs for an automotive service center and market. (14 A.App. 3044; 14 A.App. 3053-3087.) Jerry Herbst personally guaranteed BHI's entire obligation under the lease. (14 A.App. 3045.)

On March 1, 2013, however, BHI strategically defaulted on the lease—without adequate notice and without any legitimate reason. (14 A.App. 3045.)

As a result of this breach, and Mr. Willard's resulting inability to pay, Mr. Willard's bank, which held a mortgage on the property, started foreclosure. (14 A.App. 3046.) On February 14, 2014, the Willard Plaintiffs were forced to agree to a short sale of the property, wiping out their investment. (14 A.App. 3046-3047.)

Due to the Defendants' breach, Mr. Willard lost his financial investment in the property, he lost the property itself, and he lost the rental income of approximately $140,000 a month that the Defendants still owe him to this day. (14 A.App. 3047; see also 3 A.App. 603-604 (calculating the Willard Plaintiffs' damages as of July 9, 2015).)

To try to avoid financial ruin, and to obtain compensation for damages caused by Defendants' breach, the Willard Plaintiffs pursued this lawsuit. (14 A.App. 3047.) In both the *Verified Complaint* and the *Verified First Amended Complaint*, the Willard Plaintiffs 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; 2 A.App. 235.) The Willard Plaintiffs also provided calculations for their other damages. (2 A.App. 235, 244-245.)

The Willard Plaintiffs actively participated in the case and provided Defendants with extensive discovery on their damages. (3 A.App. 603-604; 6 A.App. 1207; 6 A.App. 1227-1230; 7 A.App. 1416; 7 A.App. 1543-1547; 14 A.App. 3050.)

In July 2015, Mr. 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' own expert acknowledged receipt of Plaintiffs' damage disclosures and prepared her own calculation that varied by less than 1.5%. (7 A.App. 1416.)

Unfortunately, Mr. Willard's attorney at the time, Brian Moquin, had a personal and professional meltdown. (14 A.App. 3049; 14 A.App. 3100; 14 A.App. 3103; 14 A.App. 3110; 14 A.App. 3112; 15 A.App. 3305; 18 A.App. 3956-3957.) Thus, even though the Willard Plaintiffs had actually participated in discovery and provided the Defendants with their damage calculations, BHI was able to convince the district court to dismiss the case.

As a result of Defendant's deluge of motions and Moquin's inaction, the district court began entering orders and findings without having received any opposition or input from the Willard Plaintiffs. (13 A.App. 2917-2921, 2922-2926; 14 A.App. 2927, 2944-2976.)

As soon as he was able to secure new counsel, Mr. Willard asked the district court to "allow the parties to finally proceed to a trial on the merits." (14 A.App.

3009.) That is all he has asked since. (See, e.g., 14 A.App. 3034, 3039; 15 A.App. 3296; 18 A.App. 3974, 3976; 19 A.App. 4026, 1465.) Yet, for approximately five years now, BHI and the other Defendants have aggressively sought to deny him that chance. Instead, knowing that the only way they will escape liability in this clear-cut case is through case-terminating sanctions, the Defendants have aggressively fought to achieve and then hold onto the sanctions orders they obtained while Moquin was falling apart. The Defendants apparently hope to deny the elderly Mr. Willard any chance to present his case on the merits.

Thus, it is not the Defendants who are being held hostage. It is Mr. Willard. He deserved a trial on the merits in January 2018 and he still deserves one today. Therefore, the Court should grant relief and finally allow him to proceed to trial.

ARGUMENT

A. This Case Justifies Relief Under Rule 60(b)(1) and 60(b)(6)

The primary problem presented by Defendants' RSAB is that Defendants misunderstand and misapply the holding in Vargas v. J Morales Inc., 138 Nev. Adv. Op. 38, 510 P.3d 777 (2022).

It is true "that the 'any other reason that justifies relief' provision under NRCP 60(b)(6) is mutually exclusive of the relief provided in NRCP 60(b)(1)-(5) and may not be used to circumvent the 6-month time constraints imposed under that rule." Vargas, 138 Nev. Adv. Op. 38, 510 P.3d at 778. Thus, the defendant in

Vargas was not allowed to file a motion based upon "mistake or excusable neglect" more than 14 months after notice of entry of default judgment was served, and use NRCP 60(b)(6) as a means to avoid the normal 6-month time limit. Vargas, 138 Nev. Adv. Op. 38, 510 P.3d at 781.[1]

Yet, that does not mean that the Court cannot consider the facts of this case under multiple subsections of NRCP 60(b). See Matter of Emergency Beacon Corp., 666 F.2d 754, 759-61 (2d Cir. 1981) (the court considered appellants' arguments that the requested relief from judgment was untimely under FRCP 60(b)(1), (2), and (3), but ultimately concluded that awarding relief under Rule 60(b)(6) was an "appropriate exercise of discretion to accomplish justice.") Here, if the Court does not believe Moquin's conduct falls under the scope of

[1] Defendants also cite, but misconstrue, a critical holding in Vargas: "relief may not be sought under NRCP 60(b)(6) ***when it would have been available*** under NRCP 60(b)(1)-(5)." (RSAB at 19 (quoting Vargas, 510 P.3d at 781 (emphasis added)).) The next sentence explains that the defendant – who did not seek relief from a default judgment for 14 months – was seeking relief that "would have fallen under NRCP 60(b)(1) *had it been timely sought*." Vargas, 510 P.3d at 781 (emphasis added). Unlike the defendant in Vargas, the Willard Plaintiffs **did** file a timely motion under Rule 60(b)(1). That is the subject of the current appeal in Docket No. 83640 (and the prior successful appeal in Docket No. 77780). Thus, if relief "would have been available" under NRCP 60(b)(1), then this Court should rule in favor of the Willard Plaintiffs in Docket No. 83640. Alternatively, if the Defendants contend that Moquin's conduct does not fall under the scope of NRCP 60(b)(1), then this Court should grant relief in this supplemental appeal under NRCP 60(b)(6).

NRCP 60(b)(1) or NRCP 60(b)(5), then this Court should grant relief under NRCP 60(b)(6).

Just as it is possible for both NRCP 60(b)(3) (fraud) and NRCP 60(b)(4) (void judgment) to apply to the same case, it is likewise appropriate for this case to warrant relief under both NRCP 60(b)(1) (excusable neglect and abandonment) and NRCP 60(b)(6) (extraordinary circumstances stemming from attorney misconduct).

As the Vargas opinion explains, the requested relief in that case "was based on allegations constituting ***only*** mistake or excusable neglect, which fall under NRCP 60(b)(1)," and so NRCP 60(b)(6) was not available. Vargas, 138 Nev. Adv. Op. 38, 510 P.3d at 778 (emphasis added); see also id. at 780 n.2 ("the underlying motion ***only*** supported a request for relief pursuant to NRCP 60(b)(1)" (emphasis added).) The primary concern in Vargas was to prohibit the filing of late claims that have a strict 6 month time limitation. The facts of this case are not as limited as those presented in Vargas.

In this case, relief would be appropriate under NRCP 60(b)(1), (5), and (6). Those subsections provide three independent bases for relief. The underlying factual background obviously significantly overlaps, but the grounds for relief under each subsection is separate and discrete.

The defendant in Vargas moved for relief under NRCP 60(b)(1) **and** 60(b)(6); and the district court granted relief under **both** subparts of Rule 60(b). Vargas, 510 P.3d at 779. The Vargas court reversed, adopting federal cases which hold that relief under Rule 60(b)(6) is mutually exclusive of relief under Rule 60(b)(1)-(5). Id. at 778, 781. The mutually exclusive nature of the rule merely prohibits a district court from **granting** relief under Rule 60(b)(6) and other subparts, as the district court attempted to do in Vargas. But nothing in Vargas prohibits a party from requesting relief, *in the alternative*, under Rule 60(b)(6) and other subparts.

Federal cases recognize that a party may request relief, in the alternative, under the different subparts of Rule 60(b). For example, in the case of In re Batcheler, 607 B.R. 745 (Bankr. S.D. Fla. 2019), the moving party sought relief pursuant to FRCP 60(b)(5) "or, in the alternative," pursuant to FRCP 60(b)(6). Id. at 748-49. The court first analyzed subsection 60(b)(5), concluding that the moving party was entitled to relief under that subsection. Id. at 749-50. The court then turned its attention to the alternative 60(b)(6) contention, holding that, because the court had already determined that Rule 60(b)(5) applied, the court did not need to consider subsection 60(b)(6). Id. at 750-51. Nevertheless, the court evaluated subsection 60(b)(6) anyway. The court held that, even in the absence of application of 60(b)(5), the moving party had demonstrated a compelling basis for

relief under 60(b)(6). Id. at 751. "Under the unique mixture of facts and circumstances, the Court concludes that, absent application of Rule 60(b)(5), Rule 60(b)(6) provides an equally viable alternative basis for relief." Id.

Similarly, in International Marine, LLC v. FDT, LLC, No. 10-0044, 2015 WL 3965928 (E.D. La. June 30, 2015; unpublished), the moving party requested relief under Rule 60(b)(4) (void orders), or "in the alternative," under Rule 60(b)(6) (manifest injustice). Id. at *5. The court considered the alternative contentions separately and independently. Id. at *5-6; see also Tobia v. Bally Total Fitness Holding Corp., No. 12-1198, 2013 WL 638290 at *3-6 (E.D. Pa. Feb. 21, 2013; unpublished) (moving party sought relief under Rule 60(b)(1), or in the alternative, under Rule 60(b)(6), and the court considered both contentions separately and independently).

In the present case, relief is appropriate under NRCP 60(b)(1), (5), and (6). The "mutually exclusive" holding in Vargas does not prohibit the Willard Plaintiffs from seeking relief in the alternative, and Vargas does not prohibit this court from considering the rule's subsections independently and in the alternative.

B. The Rule 60(b)(5)&(6) Motion Was Timely and Appropriate

Defendants contend that the Willard Plaintiffs should have filed the *Willard Plaintiffs' Motion for Relief Under NRCP 60(b)(5)&(6)* (the "Rule 60(b)(5)&(6) Motion") sooner than they did. This contention, however, has several practical

problems. First, the motion was based largely on facts relating to Moquin's state bar discipline, but under SCR 121, all disciplinary proceedings "shall be kept confidential" until the State Bar of Nevada files a formal complaint. That did not even happen until December 21, 2018. (See 19 A.App. 4030.) Second, as a practical matter, the Willard Plaintiffs did not receive automatic notice that the bar complaint against Moquin was filed. They participated in the Bar's investigation, but were not formal parties to it and did not receive notice of filings. (See, e.g., 19 A.App. 4094.) Third, a simple complaint does not provide proof that Moquin committed malpractice or violated his professional duties. See, e.g., Hotel Riviera, Inc. v. Short, 80 Nev. 505, 519, 396 P.2d 855, 863 (1964) (recognizing that allegations in a complaint are "merely claims and not evidence"). Fourth, even the disciplinary panel's May 2019 findings were only a recommendation that required approval by the Nevada Supreme Court. SCR 113(1). Fifth, the Nevada Supreme Court did not approve the conditional guilty plea until October 21, 2019 – which was after parties were already briefing the Rule 60(b)(1) appeal. (19 A.App. 4052.) Sixth, as discussed below, once the Nevada Supreme Court entered its opinion in the Rule 60(b)(1) appeal, it appeared that any additional briefing was unnecessary. Seventh, even if the Willard Plaintiffs wanted to file another motion for relief sooner, once this Court entered its *Order Denying En Banc Reconsideration* in Docket No. 77780, the Willard Plaintiffs were prohibited by the

Order from adding the new evidence attached to the Rule 60(b)(5)&(6) Motion until after the proceedings on remand were submitted. (20 A.App. 4347.) Thus, given the practical realities associated with the disciplinary proceedings and the parties' prior appeal, it was not feasible to file the Rule 60(b)(5)&(6) Motion any sooner than the Willard Plaintiffs did, and it would certainly be unreasonable to impose a clear deadline any time before they did. Accordingly, the Rule 60(b)(5)&(6) Motion was timely.

Moreover, Rule 60(b)(6) did not even exist in Nevada until March 2019. One of the primary reasons why relief under that rule should apply in this case is this Court's order enjoining Moquin from practice, which it did not enter until October 2019. (19 A.App. 4052.) The Willard Plaintiffs did not even obtain certified copies of the State Bar of Nevada's disciplinary files until 2020. (19 A.App. 4094-4095.) The State Bar of California did not even complete its investigation until March 2021. (19 A.App. 4061, 4095.) Other materials justifying Rule 60(b)(6) relief were not publicly available until June 2021. (19 A.App. 4066, 4095-4096.) Accordingly, as it was filed only weeks later, on July 13, 2021, the Rule 60(b)(5)&(6) Motion was timely.

A motion under Rule 60(b)(5) or (6) "must be made within a reasonable time." NRCP 60(c)(1). The question of reasonableness is made on a case-by-case basis. Sudeikis v. Chicago Transit Auth., 774 F.2d 766, 769 (7th Cir. 1985)

("There is no hard and fast rule as to how much time is reasonable for the filing of a Rule 60(b)(6) motion; courts have found periods of as little as a few months unreasonable, and have found periods of as long as three years reasonable.").

Based on the dates on which facts became available, the Rule 60(b)(5)&(6) Motion was absolutely timely. Yet, given the particular procedural history of this case, there is another reason why Mr. Willard's Rule 60(b)(5)&(6) Motion was filed "within a reasonable time."

Mr. Willard only needs one form of Rule 60(b) relief. Based on the law as it existed in 2018, the Willard Plaintiffs timely and appropriately sought relief under NRCP 60(b)(1). That relief is still appropriate today.

Starting in 2019, however, the law changed and new facts came to light. By the time the amendments to Rule 60(b)(5) and the existence of Rule 60(b)(6) became effective, the 2018 Rule 60(b)(1) appeal had already been pending for several months. Moreover, as noted above, the relevant evidence did not even exist yet. Then, by August 2020, this Court had already ruled in the Willard Plaintiffs' favor and reversed the district court's order denying Rule 60(b)(1) relief. Willard v. Berry-Hinckley Indus., 136 Nev. 467, 471, 469 P.3d 176, 180 (2020). Thus, assuming that the district court would allow the Willard Plaintiffs to finally proceed to trial, there was no need to seek another form of Rule 60(b) relief once this Court published its opinion in the first appeal. It was only after the district

court improperly allowed the Defendants to submit new arguments and analysis into the record that it became apparent that the Willard Plaintiffs might need to seek further relief. In short, it was "reasonable" for the Willard Plaintiffs to wait until after the remand and after the Defendants' improper proposed order was submitted before filing the Rule 60(b)(5)&(6) Motion.

Accordingly, the Rule 60(b)(5)&(6) Motion was both timely and appropriate given the circumstances of this case.

C. The Court Could Choose to Provide Relief Under Rule 60(b)(5)

Defendants also argue that the Sanctions Orders are not the type of orders that warrant relief under Rule 60(b)(5). Yet, the plain language of the rule simply asks whether applying a judgment "prospectively is no longer equitable." NRCP 60(b)(5). Equity is inherently flexible, allowing a court to properly address the unique circumstances in the case before it. E.g., Smith v. Davis, 953 F.3d 582, 590 (9th Cir.), cert. denied, 208 L. Ed. 2d 440, 141 S. Ct. 878 (2020). It is true that Rule 60(b)(5) was traditionally focused on forward-looking judgments, such as injunctions. Yet, the 2019 amendment removed that limitation. Moreover, the district court here never reached a judgment on the merits. The Sanctions Orders operated to take away the opportunity for a trial on the merits. Thus, now that the full circumstances have come to light, it is no longer equitable to dispose of this

case based upon Moquin's misconduct. Rather, the just and equitable thing is to allow the case to proceed to a trial on the merits.

D. Admissible Evidence Supports Granting Relief

In the RSAB, Defendants offer a new argument that the Willard Plaintiffs should have obtained a declaration from former local counsel David O'Mara. (RSAB at 22 n.4.) This is a new argument that Defendants did not raise in their opposition to Rule 60(b)(6) relief below, and so it should be disregarded. Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983–84 (1981).

Yet, even if the Willard Plaintiffs could have obtained a declaration from Mr. O'Mara, such a declaration was unnecessary. He is an officer of the Court and had already offered his statements on what happened with Moquin:

> David C. O'Mara, Esq., of The O'Mara Law Firm, P.C. hereby withdraws as local counsel for all Plaintiffs. **Counsel has had no contact with lead counsel Mr. Moquin for many months with a total failure just prior to the Court's first decisions being filed in this case**. **Mr. Moquin was unresponsive during the time in which this Court was deciding the pending motions, even after counsel begged him for a response to be filed with the Court and was told he would provide such response**.

(14 A.App. 2999-3000 (emphasis added).)

Mr. O'Mara's statement in his court filing is entirely consistent with the conversations, emails and text messages submitted in this case. (14 A.App. 3048-3050; 15 A.App. 3302-3307; 15 A.App. 3309-3311; 15 A.App. 3313-3314; 15 A.App. 3316-3324; 15 A.App. 3328-3331; 15 A.App. 3333-3338; 15 A.App.

3340-3343; 15 A.App. 3348-3349.) All of this evidence is admissible and sufficient to support relief under Rule 60(b).

Moreover, Moquin's own conditional guilty plea admits that he "evaded local counsel's attempts to ensure that responses were filed." (19 A.App. 4033.) Therefore, a declaration from Mr. O'Mara would have been redundant and unnecessary.

In fact, the best evidence for relief comes from Moquin's conditional guilty plea. Moquin admits that he represented to Mr. Willard's current attorney, Richard Williamson, that Moquin "would provide any documentation necessary" to support the Rule 60(b)(1) Motion. (19 A.App. 4034.) Moquin also admitted that he promised to "organize and provide his entire client file to Williamson." (Id.) "Williamson asked for the promised documents and file multiple times between January, 2018 and April, 2018." (Id.) Unfortunately, Moquin "never provided Williamson with the promised documents that would support the NRCP 60(b) Motion." (Id.) Moquin "never provided Williamson with any of his file for the representation." (Id.) When Mr. Willard contacted Moquin in late March, 2018 seeking help with the Rule 60(b)(1) Motion, Moquin "responded by text with a

rant and threatened Willard that he would not provide the promised documents." (Id.)[2]

Moquin went on to admit that he "knowingly violated RPC 1.3 (Diligence) when he (i) failed [to] comply with the requirements of NRCP, (ii) failed to timely comply with discovery deadlines, (iii) failed to submit the Motion for Summary Judgment prepared for Plaintiffs, and (iv) failed to oppose multiple, potentially case-ending, motions." (19 A.App. 4036.) Moquin also admits that the Willard Plaintiffs were injured by his "violations of RPC 1.3 (Diligence) because the lawsuit dragged on for over four years and the clients' claims were ultimately dismissed with prejudice based on a sanction motion that [Moquin] failed to oppose." (Id.)

In signing the Conditional Guilty Plea, Moquin also expressly certified and acknowledged that he "admits the facts that support all elements of the offenses." (19 A.App. 4038.) This Court's order approving Moquin's guilty plea expressly

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[2] The Defendants argue that Moquin's admission that he had been diagnosed with bipolar disorder does not establish that he actually suffers from bipolar disorder." (RSAB at 33.) This is a curious argument. As an initial matter, Moquin's statement actually is admissible evidence under NRS 51.105(1) and NRS 51.345(1). More importantly, however, that statement is important even if it is untrue. If Moquin was lying about having a mental illness, then his statement is just further evidence of misconduct under RPC 3.1, 3.3(a)(3), 3.4(b), 4.1(a), and 7.1. Thus, if true, Moquin's statement of mental illness is further support for relief under NRCP 60(b)(1). If false, it is further support for relief under NRCP 60(b)(6). In either case, the Willard Plaintiffs are entitled to relief based upon Moquin's gross misconduct and unstable condition.

adopted and relied upon Moquin's admissions regarding his numerous ethical failures in representing the Willard Plaintiffs. (19 A.App. 4052-54.) This Court also adopted and accepted Moquin's admissions regarding the prejudice his misconduct caused to the Willard Plaintiffs. (Id.) This Court's majority imposed a two-year injunction against Moquin practicing law in Nevada. But three justices dissented on the ground that this discipline was not enough, in light of Moquin's outrageous misconduct. (19 A.App. 4054.) The dissenters argued for more severe discipline, noting "Moquin's admitted lack of diligence and communication, the gravity of the client's loss, and Moquin's knowing mental state." (Id.) The dissenters also correctly observed that Moquin's failure to provide files and documents had the result that "the client was thus never able to test his complaint [against Defendants] on the merits." (Id. at 4056.) And finally, the dissenters adopted Bar counsel's arguments that "the injury to Moquin's client was serious," and that the client "should have had the benefit of diligent representation that would have allowed his claims to be heard." (Id. at 4057.)

Based on this mountain of evidence, relief under Rule 60(b) is not just appropriate, but required. The district court erred and abused its discretion in disregarding admissible evidence and, instead, just relying on the unopposed orders that the Defendants created during Moquin's meltdown.

E. The District Court Abused Its Discretion in Failing to Recognize that Attorney Misconduct Falls Under NRCP 60(b)(6)

As discussed above, the Willard Plaintiffs are entitled to relief under Rule 60(b)(1). Their reliance on Moquin while he had – without their knowledge – essentially abandoned their case constitutes excusable neglect justifying relief under Rule 60(b)(1).

Separate and apart from that conclusion, the evidence now also shows that Moquin not only abandoned the Willard Plaintiffs, but actively engaged in affirmative misconduct against his own clients. That realization demands relief under Rule 60(b)(6). See United States v. Cirami, 563 F.2d 26, 34 (2d Cir. 1977) (where a psychological disorder led a party's attorney to neglect his clients' business while at the same time assuring them that he was attending to it, Rule 60(b)(6) relief is appropriate); Boehner v. Heise, No. 03 Civ. 05453 (THK), 2009 WL 1360975, at *9 (S.D.N.Y. May 14, 2009) (counsel's psychological disorder justified relief under Rule 60(b)(6)); Cobos v. Adelphi Univ., 179 F.R.D. 381, 388 (E.D.N.Y. 1998) (where an attorney's mishandling of a movant's case stems from the attorney's mental illness, extraordinary circumstances may justify relief).

The Defendants are incorrect in attempting to claim that the new evidence of malpractice and affirmative misconduct is just a supplement to the Rule 60(b)(1) Motion. The realization of the extent of Moquin's willful misconduct warrants

relief under NRCP 60(b)(6), which is an independent avenue for Rule 60(b) relief that was not available at the time Plaintiffs moved for relief under Rule 60(b)(1). See, e.g., Lal v. California, 610 F.3d 518, 524 (9th Cir. 2010); L. P. Steuart, Inc. v. Matthews, 329 F.2d 234, 235 (D.C. Cir. 1964); Rivera v. Walmart, Inc., No. CV 19-12616, 2022 WL 457826, at *3 (E.D. La. Feb. 15, 2022) ("potential malpractice represents the type of "extraordinary circumstances" that warrant relief under Rule 60(b)(6)"). To permit Moquin's misconduct to destroy an otherwise straight-forward breach of lease case is impermissible. Boughner v. Sec'y of Health, Ed. & Welfare, U. S., 572 F.2d 976, 978-79 (3d Cir. 1978).

Compounding the injustice, after withholding judgment for almost nine months, the district court then entered a short order summarily concluding that "based on all of the circumstances that were before it then, and those that are argued now, do not warrant the relief requested." (21 A.App. 4372.) That dismissive review was insufficient. The district court should have performed a full analysis of the actual grounds for relief available under NRCP 60(b)(6). Blue Diamond Coal Co. v. Trustees of UMWA Combined Ben. Fund, 249 F.3d 519, 529 (6th Cir. 2001) (holding that FRCP 60(b)(6) "requires the trial court to intensively balance numerous factors, including the competing policies of the finality of judgments and the 'incessant command of the court's conscience that justice be done in light of all the facts.'" (quoting Griffin v. Swim–Tech Corp., 722 F.2d 677,

680 (11th Cir. 1984))). The district court abused its discretion by failing to perform a proper fact-intensive inquiry of the extraordinary circumstances in this case.

Public policy also supports relief because "confidence in the administration of justice is weakened when a party is prevented from presenting his case because of the gross negligence of his lawyer who is, after all, an officer of the court." Carter v. Albert Einstein Med. Ctr., 804 F.2d 805, 808 (3d Cir. 1986).

Therefore, for all of these reasons, the district court abused its discretion by denying relief under Rule 60(b)(6).

CONCLUSION

Just as a plaintiff can be entitled to recovery under more than one cause of action, and just as a defendant can assert more than one affirmative defense, so too are the Willard Plaintiffs entitled to request relief under more than one subsection of Rule 60(b).

The Willard Plaintiffs are absolutely entitled to relief under Rule 60(b)(1) and this Court's holding in Passarelli v. J. Mar Dev., 102 Nev. 283, 286, 720 P.2d 1221, 1224 (1986). As explained in the briefing for Docket No. 83640, the district court abused its discretion in failing to award relief under that rule. If this Court agrees, then this supplemental appeal under Rule 60(b)(6) is moot.

If this Court does not agree, however, then the fact remains that relief would also be appropriate under Rule 60(b)(6), which was not an available remedy at the time the Rule 60(b)(1) motion was initially filed.

Moquin lied to his own clients, he lied to his local counsel, and he lied to replacement counsel – all while engaging in other misconduct and apparently violating several criminal laws along the way. If Moquin's egregious misconduct does not constitute a "reason that justifies relief" under NRCP 60(b)(6), then nothing does. Surely this Court did not promulgate a nullity. Therefore, the Court should grant relief under NRCP 60(b) and finally allow the elderly Mr. Willard to proceed to trial on his clear breach of contract case with damages that the Defendants' own expert recognizes and easily calculated six years ago.

DATED this 18th day of November, 2022.

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON
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and

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14-point, Times New Roman type style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 4274 words.

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

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 18th day of November, 2022.

LEMONS, GRUNDY & EISENBERG

and

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON

By: */s/ Richard D. Williamson*
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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 18th day of November, 2022, I electronically filed the foregoing **APPELLANTS' SUPPLEMENTAL REPLY BRIEF** with the Clerk of the Court by using the electronic filing system, which served the following parties electronically:

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