

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. CV14-01712

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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 OPENING 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: August 26, 2022

/s/ Robert L. Eisenberg

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INTRODUCTION

In accordance with the court’s *Order Consolidating Appeals, Regarding Briefing, and Granting Motion to File Reply Brief in Excess of Word Limit*, filed on June 28, 2022, 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”) hereby file this Supplemental Opening Brief.

Consistent with the consolidation order, the Willard Plaintiffs generally rely upon the appendices that were already filed in case number 83640. Yet, as allowed by the consolidation order, and to comply with NRAP 30(b)(2), they do attach one supplemental volume (volume 21) to the existing appendix. In addition, while this Supplemental Opening Brief independently complies with the requirements of NRAP 28(a), Mr. Willard has provided succinct statements of the case and the facts with the understanding that this brief is supplemental to (and will be read in conjunction with) the briefs previously-filed in case number 83640, including Appellants’ Opening Brief, filed February 28, 2022, and Appellants’ Reply Brief, filed June 9, 2022.

As explained in this Supplemental Opening Brief, the district court erred in denying relief to Mr. Willard and the Willard Plaintiffs given the extraordinary circumstances presented in this case.

JURISDICTIONAL STATEMENT

The district court entered an *Order Denying Willard Plaintiffs’ Motion for Relief Under Rule 60(b)(5)&(6)* on May 10, 2022 (the “Rule 60(b)(6) Order”). Defendants filed a written notice of entry of that order on May 13, 2022. Plaintiffs filed their timely notice of appeal from that order on June 6, 2022.

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

ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court under NRAP 17(a)(12) because the case presents issues of statewide public importance involving clarification of the law dealing with the scope of relief available under NRCP 60(b)(6) (which is a relatively new provision) and the limitations on sanctions imposed on clients due solely to the derelictions of their counsel. Review by the Supreme Court on these issues would serve to clarify the existing law and provide district courts with important guidance.

STATEMENT OF ISSUES

In addition to the issues presented in Appellants' Opening Brief, filed February 28, 2022, this Supplemental Opening Brief also raises the following additional issues:

1. Did the district court err in failing to grant relief under NRCP 60(b)(5) by maintaining its Sanctions Orders even when continuing to apply them is no longer equitable?
2. Did the district court err in failing to grant relief under NRCP 60(b)(6) when it summarily denied relief even though the exceptional circumstances of this case justify relief?
3. Did the district court err in otherwise denying *Willard Plaintiffs'* *Motion for Relief Under NRCP 60(b)(5)&(6)* (the "Rule 60(b)(5)&(6) Motion")?

STATEMENT OF THE CASE

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

The Willard Plaintiffs filed the *Willard Plaintiffs' Rule 60(b) Motion for Relief* (the "Rule 60(b)(1) Motion") on the basis of excusable neglect. (14 A.App. 3024.) The district court denied that motion and the Plaintiffs successfully appealed. On August 6, 2020, this court entered an opinion reversing the dismissal and remanding for further proceedings. Willard v. Berry-Hinckley Indus., 136 Nev. 467, 469 P.3d 176 (2020).

Respondents unsuccessfully sought rehearing. Respondents then sought en banc reconsideration. This court denied en banc reconsideration, but concluded that "neither party may present any new arguments or evidence on remand; the district court's consideration of the factors set forth in Yochum v. Davis, 98 Nev.

484, 486, 653 P.2d 1215, 1216 (1982), is limited to the record currently before the court.” (Docket No. 77780, *Order Denying En Banc Reconsideration* at 1.)

While that first appeal was already pending, new law and new evidence came to light, all of which provide additional grounds to grant the Willard Plaintiffs relief.

First, effective March 1, 2019, this court enacted a new subsection to Rule 60. That new subsection provides that courts are not limited to just excusable neglect, but can now grant relief from an order for “any other reason that justifies relief.” NRCp 60(b)(6).

Second, on October 21, 2019, this court entered an *Order Approving Conditional Guilty Plea Agreement and Enjoining Attorney from Practicing Law in Nevada* against attorney Moquin. (19 A.App. 4052.)

Third, additional court and disciplinary records from California were made available in 2021.

Of course, Mr. Willard could not avail himself of the new rule until he had gathered evidence. In addition, once the court entered its *Order Denying En Banc Reconsideration* in case 77780, Mr. Willard could not present new evidence to the district court on remand until the district court concluded its remand proceedings on the Yochum factors.

Now, however, Mr. Willard and this court have additional tools to ensure that justice is done. This court can finally set aside Defendants' delay tactics and direct the district court to decide the merits of the case.

STATEMENT OF FACTS

Defendants knowingly and strategically breached their lease agreement with the Willard Plaintiffs. As a result, under the terms of the lease agreement, Defendant/Respondent Berry-Hinckley Industries ("BHI") became liable for more than \$15,000,000 in rent-based damages. (14 A.App. 3045.) Defendant Jerry Herbst personally guaranteed BHI's entire obligation under the lease. (Id.) Thus, all Defendants owe the Willard Plaintiffs more than \$15,000,000. (Id.)

When BHI breached the lease, Mr. Willard faced losing his substantial income and his personal retirement funds. (14 A.App. 3047.) Willard is a senior citizen and was very much dependent on the income derived from the commercial property. (Id.) Willard's income not only provided for him, but also for his ex-wife and his elderly, blind father (who has now passed away). (Id.) Willard now has only a social security income of \$1,630 per month. (Id.)

In an effort to avoid financial ruin, all of the plaintiffs joined in pursuing a lawsuit against the Defendants. (14 A.App. 3047.) Plaintiffs were located in California at the time, and were ultimately directed to California attorney Brian

Moquin to represent them. (Id.) Because of their lack of income, Moquin agreed to take the case on a contingency fee. (14 A.App. 3048.)

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

After some time, Willard realized that Moquin was having financial difficulties. (Id.) However, Moquin continued moving forward with this case, until some point in mid-to-late 2017. (Id.) As it turned out, Moquin was dealing with more than just financial problems. (Id.) Moquin was dealing with mental health issues. (Id.) Willard also discovered that Moquin was struggling with a constant marital conflict that greatly interfered with his work. (Id.) In addition, Moquin was suffering from bipolar disorder. (14 A.App. 3049; see also 19 A.App. 4034.)

Mr. Willard felt that his only option was to rely on Moquin. (14 A.App. 3050.) In addition, Moquin repeatedly assured Willard that he would prevail and that the case was proceeding fine. (Id.; 15 A.App. 3302-3303.)

For his part, Willard made ongoing efforts on an almost daily basis to push the case forward, provide Moquin with what he needed, and to pursue the case. (14 A.App. 3050.) Although Willard did not know it at the time, Moquin was failing to comply with court orders and deadlines. (See, e.g., 19 A.App. 4031-4032.) As Moquin’s disciplinary records would later establish, “Willard did not understand that [Moquin’s] failure to comply with discovery requirements was delaying the trial in the matter.” (19 A.App. 4032.) Moquin even “evaded local counsel's attempts to ensure that responses were filed.” (Id.)

Moquin’s court records also reveal disastrous personal problems that clearly affected his ability to practice and his overall stability. In a Request for Domestic Violence Restraining Order, signed under penalty of perjury, Moquin’s wife, Natasha Moquin, confirms that Moquin “was recently diagnosed with Bipolar disorder, has been paranoid and violent,” and that Mrs. Moquin is concerned about triggering a psychotic reaction. (14 A.App. 3110.)

Prior to filing for divorce, Natasha Moquin had already received an Emergency Protective Order against Moquin. (14 A.App. 3100; see also 14 A.App. 3112.) Moquin was even arrested on January 23, 2018. (14 A.App. 3103; accord 15 A.App. 3305; see also 19 A.App. 4069.)

Plaintiffs did not discover Moquin's mental illness until January 2018. (14 A.App. 3050; see also 15 A.App. 3305.) After they did realize what was happening, they began looking for a new lawyer. (15 A.App. 3305.)

In preparing the Rule 60(b)(1) Motion, Mr. Willard and his new attorneys repeatedly contacted Moquin to obtain (a) a declaration explaining the circumstances of his mental illness, his missteps in this case, his ultimate abandonment, and his official medical diagnosis; (b) an authenticated diagnosis from his doctor; and (c) Moquin's case file for this lawsuit. (15 A.App. 3305; 19 A.App. 4034.) Moquin made a series of promises that he would provide all of the requested information, only to then threaten Mr. Willard and subsequently refuse to provide any of the promised information. (15 A.App. 3305-3307; 15 A.App. 3328-3331; 15 A.App. 3333-3338; 15 A.App. 3340-3343; 15 A.App. 3345-3346; 15 A.App. 3348-3349; see also 19 A.App. 4034.)

Moquin never even gave Willard's new counsel his complete files. (15 A.App. 3306-3307.) In addition to the numerous emails requesting the files, on May 14, 2018, new attorney Williamson sent Moquin a formal demand for the Plaintiffs' client files. (Id.; see also 15 A.App. 3345-3346.)

Moquin violated numerous ethical duties he owed to the Willard Plaintiffs, including the obligations to protect their interests and provide their client files. (19 A.App. 4036-4037.)

On November 30, 2018, the district court entered an order denying the Rule 60(b)(1) Motion. (16 A.App. 3410.)

On April 16, 2019, Moquin entered a *Conditional Guilty Plea* with the State Bar of Nevada. (19 A.App. 4030-4039.) In that *Conditional Guilty Plea*, he stipulated to facts surrounding his wholly deficient and clearly unethical representation. (See generally id.) Therein, Moquin agreed to plead guilty to many of the ethical charges against him and admitted in pertinent part that:

20. Between December 12, 2017 and December 18, 2017, [Moquin] evaded local counsel's attempts to ensure that responses were filed.

21. [Moquin] failed to file any response to any of the defendants' motions by the extended deadline.

...

24. After the January 4, 2018 Order was issued, Willard retained new counsel to attempt to undo the harm created by Respondent's failures in the representation.

25. That new counsel, Richard Williamson, Esq., contacted Respondent to gather information and documentation necessary to try to set aside the dismissal.

26. [Moquin] told Williamson that [Moquin] had been diagnosed with bipolar disorder and had recently been arrested in California on charges of domestic violence.

27. [Moquin] represented to Williamson that he would provide any documentation necessary to support the NRCP 60(b)[(1)] Motion for Relief, including but not limited to, an affidavit in support of the Motion, medical records/documents explaining the mental, emotional and psychological health issues that affected the representation, and documents related to the arrest.

28. [Moquin] represented to Williamson that he would organize and provide his entire client file to Williamson.

29. Williamson asked for the promised documents and file multiple times between January, 2018 and April, 2018.

30. During this time, Willard paid for [Moquin's] psychiatric bills in an effort to help [Moquin] be able to support Williamson's preparation of the NRCP 60(b)(1) Motion.

31. [Moquin] never provided Williamson with the promised documents that would support the NRCP 60(b)(1) Motion.

32. [Moquin] never provided Williamson with any of his file for the representation.

33. When Willard contacted [Moquin] in late March, 2018 to try to facilitate [Moquin] assisting in the NRCP 60(b)(1) Motion for Relief, [Moquin] responded by text with a rant and threatened Willard that he would not provide the promised documents.

...

36. On May 14, 2018, Williamson sent [Moquin] a formal demand for the Plaintiffs' files.

37. [Moquin] did not respond to Williamson's May 14, 2018 request.

38. In late May, 2018, Willard directly requested the necessary documents to support the NRCP 60(b)(1) motion from [Moquin].

39. [Moquin] promised to provide the documentation on Memorial Day weekend.

40. In the afternoon on May 28, 2018 (Memorial Day), Willard again asked [Moquin] for the documents.

41. [Moquin] replied to Willard, referencing a prior statement [Moquin] had made that if Willard 'communicate[d] in ANY WAY with [him] again before [he has] sent [Willard] the declaration and supporting exhibits [Willard] will receive neither' and declaring 'So be it.' (Quote alterations in original.)

42. [Moquin] did not provide any documentation to Willard or Williamson after May 28, 2018.

(19 A.App. 4033-4035.) Based on those admissions, Moquin and the State Bar of Nevada agreed that Moquin knowingly violated RPC 1.3 (Diligence), RPC 1.4 (Communication), and RPC 1.16 (Declining or Terminating Representation). (19 A.App. 4036-4037; see also 19 A.App. 4044.)

On October 21, 2019, this court entered its *Order Approving Conditional Guilty Plea Agreement and Enjoining Attorney from Practicing Law in Nevada*. (19 A.App. 4052-4059.) That order found that Moquin admitted to violating RPC 1.13, 1.4, and RPC 1.16. (Id. at 4052.) This court’s order also concluded:

“Moquin failed to adequately communicate with the client about the status of the case and after the client retained new counsel to pursue a motion for relief from the judgment, Moquin failed to provide new counsel with the client file and other documents that he had agreed to provide, which may have supported setting aside the judgment.”

(Id. at 4052-53.)

Three justices actually dissented from the order, maintaining that the two-year injunction was too lenient “considering Moquin's admitted lack of diligence and communication, the gravity of the client's loss, and Moquin's knowing mental state.” (19 A.App. 4054.) The three dissenting justices noted that Moquin failed to adequately communicate with Mr. Willard; Moquin failed to respond to requests for his file, thereby creating a situation where “the client was thus never able to test his complaint on the merits”; “the injury to Moquin’s client was serious”; and “bar

counsel stated that *this was a legally clear breach of contract matter*, and although there is no guarantee that the client would have recovered, he should have had the benefit of diligent representation that would have allowed his claims to be heard.” (Id. at 4055-57 (emphasis added).)

On August 6, 2020, this court entered an opinion reversing the Rule 60(b)(1) order. Willard, 136 Nev. 467, 469 P.3d 176 (2020).

On August 19, 2020, the Willard Plaintiffs filed a Notice of Related Action in the district court, attaching Moquin’s *Conditional Guilty Plea in Exchange for a Stated Form of Discipline*, the disciplinary panel’s *Findings of Fact, Conclusions of Law, and Recommendation After Formal Hearing*, and this court’s *Order Approving Conditional Guilty Plea Agreement and Enjoining Attorney from Practicing Law in Nevada*. (16 A.App. 3598-3632.)

On February 23, 2021, however, this court entered an order stating that “neither party may present any new arguments or evidence on remand; the district court’s consideration of the factors set forth in Yochum v. Davis, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), is limited to the record currently before the court.” (Docket No. 77780, *Order Denying En Banc Reconsideration* at 1.)

On March 25, 2021, the Office of Chief Trial Counsel for the State Bar of California indicated that it was moving forward with further action on the bar complaint against Mr. Moquin. (19 A.App. 4061.)

Separately, the State Bar of California also suspended Moquin’s license to practice law. (19 A.App. 4063.)

Moreover, on June 16, 2021, the State Bar of California filed a Transmittal of Records of Conviction of Attorney. (19 A.App. 4066-4068.) This transmittal contained certified copies of Moquin’s various criminal court records surrounding misdemeanor charges of battery, false imprisonment, and contempt of court while he was supposed to be representing the Willard Plaintiffs. (19 A.App. 4069-4077.)

The parties completed their briefing on the Yochum factors for the Rule 60(b)(1) remand on June 29, 2021. (17 A.App. 3736.)

Just two weeks later, the Willard Plaintiffs filed their Rule 60(b)(5)&(6) Motion on July 13, 2021. (19 A.App. 4011.) Defendants obtained an extension and filed their opposition to the Rule 60(b)(5)&(6) Motion on August 10, 2021. (Id. at 4097.) The Willard Plaintiffs promptly filed their reply on August 17, 2021. (Id. at 4349.)

On November 10, 2021, the district court stated that it would hold its ruling on the Rule 60(b)(5)&(6) Motion “in abeyance pending remittitur after appeal disposition.” (21 A.App. 4359.) Fearing further delay in the ultimate resolution of this case, the Willard Plaintiffs filed a motion for reconsideration, in which they requested a ruling on the Rule 60(b)(5)&(6) Motion. (See 21 A.App. 4362-63.) Ultimately, the district court denied Rule 60(b)(5)&(6) Motion. (21 A.App. 4372.)

The district court found that both the Rule 60(b)(1) Motion and the Rule 60(b)(5)&(6) Motion sought “relief based on NRCP 60(b)(5) and specifically on the facts of Mr. Moquin’s mental illness and the effect on his representation of Plaintiffs.”¹ (21 A.App. 4371.) The district court found that the Rule 60(b)(5)&(6) Motion “in effect supplements” the Rule 60(b)(1) Motion. (Id.) The district court then summarily concluded that “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.) It did not provide any additional analysis on the actual grounds for relief available under NRCP 60(b)(6). (See id.)

This appeal followed.

SUMMARY OF ARGUMENTS

The best and most appropriate resolution for this case is to grant relief under Rule 60(b)(1) due to the Willard Plaintiffs’ excusable neglect in failing to recognize Moquin’s failures and replace him with competent counsel sooner than they ultimately did.

In addition, however, Moquin’s disciplinary proceedings, his documented crimes, his admitted misconduct, and the advent of Rule 60(b)(6) all provide supplemental bases for relief.

¹ It is unclear whether the district court intended to reference NRCP 60(b)(5) or actually meant to reference NRCP 60(b)(1), as the Rule 60(b)(1) Motion never mentioned NRCP 60(b)(5).

STANDARD OF REVIEW

This appeal involves the district court's denial of a Rule 60(b) motion. As such, it is usually reviewed for abuse of discretion. Bonnell v. Lawrence, 128 Nev. 394, 400, 282 P.3d 712, 716 (2012). But the discretion standard in a Rule 60(b) motion "is a legal discretion and cannot be sustained where there is no competent evidence to justify the court's action." Cook v. Cook, 112 Nev. 179, 182, 912 P.2d 264, 265 (1996). Likewise, "[a] district court by definition abuses its discretion when it makes an error of law." Koon v. United States, 518 U.S. 81, 100 (1996)

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

ARGUMENT

A. The District Court Erred in Denying Relief Under Rule 60(b)(6)

Nevada courts may now relieve a party from a final judgment, order, or proceeding for "any other reason that justifies relief." NRCP 60(b)(6). As the United States Supreme Court has explained, this rule "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." Klapprott v. United States, 335 U.S. 601, 614-15 (1949).

This court recently confirmed that relief under NRCP 60(b)(6) must be for grounds different than those already enumerated under NRCP 60(b) subsections (1) through (5). Vargas v. J Morales Inc., 138 Nev. Adv. Op. 38, 510 P.3d 777, 781 (2022). The rule “was enacted to go beyond the grounds for relief previously provided where justice so requires.” Id.

As noted above, the court is already empowered to – *and should* – grant relief to the Willard Plaintiffs under NRCP 60(b)(1). Yet, based on the disciplinary findings and the other evidence in the record, the court can also grant relief under NRCP 60(b)(6).

Although this court has now applied NRCP 60(b)(6), federal cases still provide persuasive guidance. Nelson v. Heer, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005). Rule 60(b)(6) is a broad catchall provision that permits relief from the operation of a judgment for any reason justifying such relief. Kile v. United States, 915 F.3d 682, 687 (10th Cir. 2019).

The rule acts as a “grand reservoir of equitable power to do justice in a particular case.” Id.

In denying the Rule 60(b)(5)&(6) Motion, the district court stressed that both it and the Rule 60(b)(1) Motion sought relief based “on the facts of Mr.

Moquin’s mental illness and the effect on his representation of Plaintiffs.”² (21 A.App. 4371.) Based on this construction, the district court concluded that the Rule 60(b)(5)&(6) Motion merely “supplements” the Rule 60(b)(1) Motion. (Id.) That is not accurate. As the attorney who allowed his clients’ case to be dismissed, Moquin is certainly a central character in both motions. Yet, they are based on different laws and even different facts.

At issue in the Rule 60(b)(1) appeal was the question of whether the Willard Plaintiffs were entitled to relief due to their “excusable neglect.” Moquin’s mental illness and ultimate abandonment obviously inform whether the failure to file documents and more quickly replace Moquin constituted “excusable neglect” under Rule 60(b)(1). The Willard Plaintiffs are entitled to relief under the Rule 60(b)(1) excusable neglect standard. Yet, the Rule 60(b)(5)&(6) Motion has nothing to do with excusable neglect. The two motions are based on different standards, which the district court failed to appreciate.

As the disciplinary records now show, Moquin not only engaged in ethical violations, but he also “evaded local counsel’s attempts to ensure that responses were filed.” (19 A.App. 4033.) Moquin then “never provided Williamson with the

² The district court also found that both the Rule 60(b)(1) Motion and the Rule 60(b)(5)&(6) Motion sought “relief based on NRCP 60(b)(5),” which is plainly incorrect. (21 A.App. 4371.) The Rule 60(b)(1) Motion never even mentioned NRCP 60(b)(5). (14 A.App. 3024-3041; see also 15 A.App. 3291-3299)

promised documents that would support the NRC 60(b)(1) Motion.” (Id. at 4034.) Based on those and other admissions, Moquin knowingly violated RPC 1.3, RPC 1.4, and RPC 1.16. (19 A.App. 4036-4037; see also 19 A.App. 4044.)

This court found that “Moquin failed to adequately communicate with the client about the status of the case and after the client retained new counsel to pursue a motion for relief from the judgment, Moquin failed to provide new counsel with the client file and other documents that he had agreed to provide, which may have supported setting aside the judgment.” (19 A.App. 4052-53.)

An attorney’s active misconduct and deceptive behavior are just the type of exceptional circumstances that Rule 60(b)(6) encompasses. As one court explained, Rule 60(b)(6) “is broad enough to permit relief when as in this case personal problems of counsel cause him grossly to neglect a diligent client's case and mislead the client.” L. P. Steuart, Inc. v. Matthews, 329 F.2d 234, 235 (D.C. Cir. 1964); see also Lal v. California, 610 F.3d 518, 524 (9th Cir. 2010) (“an attorney's gross negligence resulting in dismissal with prejudice for failure to prosecute constitutes an ‘extraordinary circumstance’ under Rule 60(b)(6) warranting relief from judgment”). Thus, the district court’s summary conclusion to the contrary was error. (21 A.App. 4371-72.)

Moquin deceived the Willard Plaintiffs throughout this matter. (See, e.g., 15 A.App. 3302-03, 3311, 3313.) It is true that Moquin admitted he suffers from a

mental illness. (19 A.App. 4034.) Regardless, however, Moquin violated his ethical duties to the Willard Plaintiffs. (*Id.* at 4036, 4044-46, 4052-53.) Moquin then actively refused to help the Willard Plaintiffs seek relief from the problems he caused. (19 A.App. 4034, 4053.) All of this conduct constitutes exceptional circumstances that justify relief under NRCP 60(b)(6).

Accordingly, this court should grant the Willard Plaintiffs relief and reverse the district court's decisions with instructions to allow the Willard Plaintiffs to proceed to a trial on the merits.

B. Alternatively, NRCP 60(b)(5) Provides Relief Because There Has Been a Significant Change in the Legal and Factual Conditions

Rule 60(b)(5) also provides an additional basis for relief. That rule now allows a court to “relieve a party or its legal representative from a final judgment, order, or proceeding” where “applying it prospectively is no longer equitable” NRCP 60(b)(5). Before March 1, 2019, Rule 60(b)(5) only allowed relief from an injunction if applying the injunction prospectively was no longer equitable. The March 2019 rule change significantly broadened the scope of this rule, removing the limitation to only injunctions.

This case presents a significant change in both legal and factual conditions – namely, that Moquin has admitted to (1) failing to adequately respond to requests to produce information related to damages; (2) causing delays; (3) failing to serve

updated disclosures; (4) failing to submit a motion for summary judgment before the deadline to submit such motions passed; (5) evading local counsel's and the Willard Plaintiffs' attempts to ensure that responses were filed; (6) failing to file any opposition to the Motion for Sanctions or other pending matters; (7) failing to provide the case file and other critical documentation to the Willard Plaintiffs' current counsel; (8) threatening the Willard Plaintiffs; (9) knowingly violating numerous Nevada Rules of Professional Conduct; and (10) causing the Willard Plaintiffs severe harm. (19 A.App. 4033-37.)

These facts show that it is neither just nor equitable to continue to maintain the Sanctions Orders and the order after remand denying the Rule 60(b)(1) Motion against the Willard Plaintiffs. Moquin has now expressly admitted to his mental illness, a heap of wrongdoings, and his abandonment of the Willard Plaintiffs. (Id.) This is undeniably an incredible change in the circumstances and facts surrounding the district court's prior orders, including its order after remand denying the Willard Plaintiffs' Rule 60(b)(1) Motion.

Now that Moquin has admitted to his wrongdoing and the harm he has caused the Willard Plaintiffs, it would be unjust for the district court to continue enforcing case-terminating sanctions against the Willard Plaintiffs. Accordingly, the district court's Sanctions Orders can also be set aside based on Rule 60(b)(5).

CONCLUSION

The circumstances here cry out for the Sanctions Orders to be set aside. The Willard Plaintiffs were at Moquin's mercy. Whether through mental illness or intentional misconduct, Moquin deceived and harmed the very people he was supposed to advocate and protect.

Attorneys often make mistakes, but they do not usually threaten, deceive, bully, and undermine their clients. This case presents extraordinary circumstances that demand extraordinary relief. The court should grant relief to the Willard Plaintiffs so that the parties can finally proceed to a trial on the merits with competent counsel.

DATED this 26th day of August, 2022.

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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 4,552 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 26th day of August, 2022.

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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 26th day of August, 2022, I electronically filed the foregoing **APPELLANTS' SUPPLEMENTAL OPENING BRIEF** with the Clerk of the Court by using the electronic filing system, which served the following parties electronically:

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