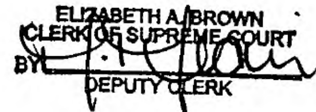
IN THE SUPREME COURT OF THE STATE OF NEVADA

H. BRUCE COX; AND SUE ANN COX, HUSBAND AND WIFE,
Appellants,
vs.
GILCREASE WELL CORPORATION, A NEVADA NON-PROFIT COOPERATIVE CORPORATION,
Respondent.

No. 84394



ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying postjudgment motions seeking NRCP 60(b) and NRCP 59(e) relief. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Appellants H. Bruce Cox and Sue Ann Cox (collectively, Cox) sued Respondent Gilcrease Well Corporation (GWC) alleging that GWC committed "fraud on the court" in a previous lawsuit between the parties. In the new case, Cox sought to set aside the judgment from the previous suit. Cox, a lawyer, hired co-counsel to work on the case. Although Cox apparently never withdrew as counsel from the case, Cox heavily relied on co-counsel to act as lead counsel while recovering from various health issues. During litigation, neither Cox nor Cox's co-counsel appeared at a Rule 16 conference in February 2021. Cox's co-counsel did not appear and also failed to conduct discovery because of a mental health issue and a COVID-19 diagnosis in January 2021.

GWC moved for summary judgment in June 2021. Cox's co-counsel stipulated with GWC for an extension to file an opposition to summary judgment. Instead of filing the opposition, Cox's co-counsel unsuccessfully moved to reopen discovery. At a hearing on the discovery motion, the district court granted Cox's co-counsel an extension to file the

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opposition to summary judgment. After the second extension, Cox's co-counsel filed a late opposition. After a September 2021 hearing, the district court found that the opposition was deficient because it was late, did not contain a memorandum of points and authorities, and failed to cite to legal authority among other reasons. The district court also found that claim and issue preclusion applied, the lawsuit was an impermissible collateral attack on the previous lawsuit between the parties, and Cox's allegations against GWC did not constitute a viable "fraud on the court" claim.

After the district court granted GWC's motion for summary judgment, Cox - now apparently acting without co-counsel - moved for relief from the orders denying the motion to reopen discovery and granting summary judgment. Cox's motion relied on NRCP 60 and NRCP 59. The district court denied the motion. Cox now appeals the order denying NRCP 60 and NRCP 59 relief.

Cox argues that the district court erred in denying NRCP 59(e) and NRCP 60(b) relief because co-counsel constructively abandoned Cox and provided "deficient representation" due to co-counsel's mental health issues. Having considered Cox's arguments and the record, we conclude that the district court did not abuse its discretion in denying NRCP 60(b) relief as to either order or in denying NRCP 59(e) relief as to the order granting summary judgment.[1] *AA Primo Builders, LLC v. Washington*, 126

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[1]Cox appears to only argue that NRCP 59(e) applies to the order granting summary judgment, not the order denying the motion to reopen discovery as Cox only makes arguments regarding that order. If Cox intended to make such an argument, it fails because the order denying the motion to reopen discovery is not appealable. *See* NRAP 3A(b) (listing appealable determinations); *Lytle v. Rosemere Estates Prop. Owners*, 129 Nev. 923, 926, 314 P.3d 946, 948 (2013) (holding that NRCP 59(e) may be used to alter or amend any appealable order not just a final judgment).

Nev. 578, 589, 245 P.3d 1190, 1197 (2010) (reviewing an NRCP 59(e) motion for an abuse of discretion); *Cook v. Cook*, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996) (providing that we review the denial of a motion to set aside a judgment for an abuse of discretion).

NRCP 60(b)(1) provides that a district court "may relieve a party . . . from a final judgment, order, or proceeding" for excusable neglect. Further, NRCP 60(b)(6) provides that a court may set aside a judgment for "any other reason that justifies relief." NRCP 60(b)(6) relief, however, is "available only under extraordinary circumstances." *See Vargas v. J Morales Inc.*, 138 Nev., Adv. Op. 38, 510 P.3d 777, 781 (2022) (internal quotation marks omitted). NRCP 60(b)(6) "was enacted to go *beyond* the grounds for relief previously provided where justice so requires." *Id.* Accordingly, "NRCP 60(b)(6) is mutually exclusive of the relief provided in NRCP 60(b)(1)-(5)." *Id.*, 510 P.3d at 782. A NRCP 59(e) motion to alter or amend a judgment is available to "prevent manifest injustice." *AA Primo Builders*, 126 Nev. at 582, 245 P.3d at 1193 (quoting 11 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2810.1, at 119 (2d ed.1995)).

First, we consider the order denying the motion to reopen discovery. NRCP 60(b) applies only to a "*final* judgment, order, or proceeding." NRCP 60(b) (emphasis added). A final judgment "disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000). Here, the order denying Cox's motion to reopen discovery was not a final order because it did not resolve all the issues in the case. *Cf. Barry v. Linder*, 119 Nev. 661, 669, 81 P.3d 537, 542 (2003) (holding that NRCP 60(b) was inappropriate as to an interlocutory, non-final order)

superseded by rule on other grounds as stated in LaBarbera v. Wynn Las Vegas, LLC, 134 Nev. 393, 395, 422 P.3d 138, 140 (2018). Accordingly, NRCP 60(b) relief was not warranted as to the order denying the motion to reopen discovery, and the district court did not abuse its discretion as to that order.

Second, we consider the order granting summary judgment. Cox claims NRCP 60(b) relief is appropriate because co-counsel's mental health issues led co-counsel to constructively abandon Cox and led to deficient representation. We address the NRCP 60(b)(1) claim first. Cox primarily relies on *Passarelli v. J-Mar Development, Inc.* 102 Nev. 283, 720 P.2d 1221 (1986). There, Passarelli hired counsel, but counsel did not appear at trial because of substance abuse issues. *Id.* at 285, 720 P.2d at 1223. This court found that NRCP 60(b)(1) applied because Passarelli's counsel failed to meet professional obligations because of a psychiatric disorder and so Passarelli "was effectually and unknowingly deprived of legal representation." *Id.* at 286, 720 P.2d at 1224. Similarly, in *Dagher v. Dagher*, this court found excusable neglect when counsel misled Dagher by representing that work was being done in the case when in reality counsel failed to appear at a hearing. 103 Nev. 26, 28, 731 P.2d 1329, 1329-30 (1987).

Those circumstances are not present here. Cox knew of co-counsel's mental health issues when co-counsel moved to reopen discovery, which was before co-counsel filed the opposition. Unlike *Passarelli* and *Dagher*, Cox's co-counsel was active in the case, co-counsel obtained extensions, appeared to argue the summary judgment motion, and filed the opposition. Cox also helped co-counsel prepare the opposition by faxing a declaration. Further, Cox has not shown that co-counsel's faulty opposition

was due to mental health issues. By the time of the hearing, Cox's co-counsel had sought out treatment and also "associate[ed] with another attorney to assist . . . with work." At the hearing on the motion for summary judgment, co-counsel did not argue that mental health led to the late opposition (although co-counsel acknowledged the past failings). Cox's co-counsel explained that "[s]omething happened whereby the ball was dropped" and that "I just want to represent what I've been going through at that time . . . [y]ou know, had a baby . . . ." Co-counsel only noticed that the opposition was not filed while preparing for the hearing the day before.

So while mental health issues caused co-counsel to miss the Rule 16 conference, the record does not correlate co-counsel's mental health to the failure to file a timely opposition or include a memorandum of points and authorities. *See Engleson v. Burlington N. R.R. Co.*, 972 F.2d 1038, 1043 (9th Cir. 1992) (carelessness is not a ground for NRCP 60(b) relief); *see also Smith v. Stone*, 308 F.2d 15, 18 (9th Cir. 1962) (holding that counsel's failure to follow court procedure and rules was not excusable inadvertence or neglect, stating "[c]ounsel for litigants . . . cannot decide . . . when they will file those papers required in a lawsuit. Chaos would result. . . . There must be some obedience to the rules of the court . . . ."). Thus, the district court did not clearly abuse its discretion in denying NRCP 60(b)(1) relief because Cox fails to tie the alleged excusable neglect—co-counsel's mental health—to the specific order in issue, the order granting summary judgment.[2]

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[2]In hearing a motion to set aside a judgment under NRCP 60(b)(1), the court must consider whether there has been "a prompt application to remove the judgment" among other considerations. *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), *overruled on other grounds by*

We turn to Cox's NRCP 60(b)(6) claim. Cox argues that the same circumstances justifying NRCP 60(b)(1) relief also justify NRCP 60(b)(6) relief. Cox argues that co-counsel's opposition to summary judgment constituted "gross negligence" and thus is an "extraordinary circumstance." Because NRCP 60(b)(6) was modeled after its federal analog, we turn to federal cases for guidance. *Vargas*, 510 P.3d at 781. "To justify relief under subsection (6), a party must show 'extraordinary circumstances' suggesting that the party is faultless in the delay." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993). Here, Cox's co-counsel is to blame for the untimely filing and offers no "faultless" excuse, which suggests that NRCP 60(b)(6) relief is inappropriate.

Some federal circuits have recognized "gross negligence" by counsel as actionable under FRCP 60(b)(6), whereas mere neglect by

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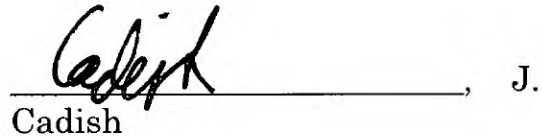
Epstein v. Epstein, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997). Cox notes that the district court did not make any findings regarding this element, but does not contend that this omission warrants reversal. *Cf. Senjab v. Alhulaibi*, 137 Nev. 632, 633, 497 P.3d 618, 619 (2021) ("We will not supply an argument on a party's behalf but review only the issues the parties present."). Rather, Cox frames the omission as a concession that this factor favors relief. To the extent there are any errors in the analysis of the remaining factors, we decline to reverse given the above analysis. *See* NRCP 61 ("At every stage of the proceeding the court must disregard all errors and defects that do not affect any party's substantial rights."); *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (relying on NRCP 61 in holding that "[a]n error is harmless when it does not affect a party's substantial rights" and "[w]hen an error is harmless reversal is not warranted"). We further decline to reverse to the extent the district court improperly imposed a meritorious defense requirement given the above analysis.

counsel is a 60(b)(1) claim. *See, e.g.*, *Cmty. Dental Servs. v. Tani*, 393 F.3d 1164, 1170 n.11 (9th Cir. 2002) (holding that "gross negligence" by counsel may constitute "extraordinary circumstances" which could support a viable FRCP 60(b)(6) claim). In *Tani*, after examining Tani's counsel's conduct throughout the entire case, the court found that counsel "virtually abandoned" Tani by representing that the case was going well despite numerous failures such as failing to communicate with opposing counsel for settlement negotiations in the face of a court order to do so, failing to attend "various" hearings, and failing to oppose a motion. *Id.* at 1170-71. The court held that "conduct on the part of a client's alleged representative that results in the client's receiving practically no representation at all clearly constitutes gross negligence." *Id.* at 1171. And that such behavior "vitiat[es] the agency relationship that underlies our general policy of attributing to the client the acts of his attorney." *Id.* The Ninth Circuit standard for Rule 60(b) claims has not been universally adopted. *See, e.g.*, *Solaroll Shade & Shutter Corp. v. Bio–Energy Sys., Inc.*, 803 F.2d 1130, 1133 (11 Cir. 1986) (holding that 60(b) claims of attorney error are categorized under the more specific Rule 60(b)(1) not Rule 60(b)(6)); *Nemaizer v. Baker*, 793 F.2d 58, 63 (2d. Cir. 1986) ("To grant relief under this subsection would be to accept the proposition that when counsel's conduct shows gross negligence relief to a client may be afforded under Rule 60(b)(6) . . . we have consistently indicated a reluctance to do so."); *Ben Sager Chems. Intern., Inc. v. E. Targosz & Co.*, 560 F.2d 805, 810 (7th Cir. 1977) ("There is contrary authority, however, which holds that gross negligence of a freely chosen counsel is the neglect of the client and therefore cognizable only under Rule 60(b)(1).").

We do not adopt or reject that standard here, given that Cox has not shown that co-counsel was grossly negligent. On one hand, Cox's co-counsel did not attend the Rule 16 conference, did not conduct discovery before GWC moved for summary judgment, and did not always promptly return Cox's calls or notify Cox of the Rule 16 conference and various minute orders. On the other hand, Cox's co-counsel opposed GWC's earlier motion to dismiss, represented Cox in an earlier writ petition to this court, appeared at a hearing to request a continuance while preparing the writ petition, filed status reports, moved to reopen discovery, appeared at that hearing, communicated with opposing counsel for an extension, filed an opposition to GWC's motion for summary judgment, and appeared at that hearing. Cox's co-counsel did not affirmatively misrepresent to Cox how the case was progressing. Rather, co-counsel disclosed the mental health issues to Cox and the pair subsequently worked together to move to reopen discovery on the basis of co-counsel's mental health issues. Although somewhat of a close case, we cannot say the district court abused its discretion in finding that Cox failed to establish "extraordinary circumstances." *See Tani*, 393 F.3d at 1170 n.11.

Lastly, Cox argues that the same circumstances justifying NRCP 60(b) relief also justify NRCP 59(e) relief because the order granting summary judgment is the product of a "manifest injustice." Given that Cox appears to argue that the order should be set aside under NRCP 59(e) rather than offer a substantive alteration or amendment, we likewise conclude that the district court did not abuse its discretion in denying NRCP 59(e)

relief.[3] *See AA Primo Builders*, 126 Nev. at 582, 245 P.3d at 1193 ("the only real limitation on the type of motion permitted being that it must request a substantive alteration of the judgment . . . ." (internal quotation marks omitted)). Accordingly, we ORDER the judgment of the district court AFFIRMED.



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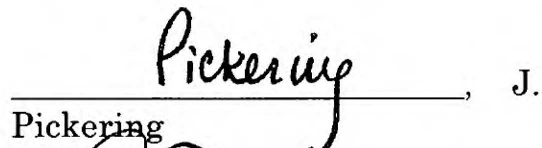

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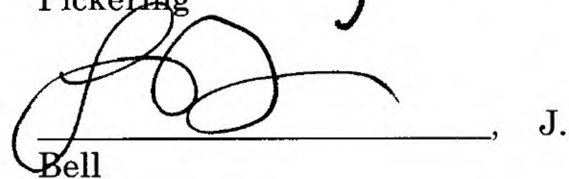

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Bell

cc: Hon. Joanna Kishner, District Judge
Persi J. Mishel, Settlement Judge
Sgro & Roger
H. Bruce Cox
Brownstein Hyatt Farber Schreck, LLP/Las Vegas
Eighth District Court Clerk

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[3]On appeal, Cox devotes one sentence to address the merits of the summary judgment motion. Cox states that claim preclusion did not apply because the claims in the previous lawsuit are not the same as the claims in the current lawsuit. To the extent Cox attempts to argue that the district court committed a manifest error of law under NRCP 59(e), we decline to consider it because it is not cogently argued. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).