IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TRINH PHUONG NGUYEN, D.D.S., A/K/A TRINA NGUYEN, D.D.S., AN INDIVIDUAL; AND TRINH PHUONG NGUYEN, D.D.S., PROF. CORP.; A NEVADA PROFESSIONAL CORPORATION, D/B/A DESERT PALMS DENTAL, Appellants, vs. NEW CHINA CUISINE, LLC, A NEVADA LIMITED LIABILITY COMPANY, D/B/A NEW CHINA CUISINE; XING QUAN XUE, A/K/A RAYMOND XUE, AN INDIVIDUAL; DONAHUE SCHRIBER ASSET MANAGEMENT CORPORATION; DS ELDORADO PLAZA, LLC; DONAHUE SCHRIBER REALTY GROUP, LP; AND DONAHUE SCHRIBER REALTY GROUP, INC., Respondents.	No. 72631

FILED

APR 25 2018

ORDER OF REVERSAL AND REMAND

Trina Nguyen, D.D.S., and Desert Palms Dental appeal from district court orders dismissing their complaint and denying their motion for relief from judgment in a tort action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.[1]

[1]Melvin J. Goldberg, Esq., served as the short trial judge and presided over the motion to dismiss and Judge Johnson presided solely over the motion for relief from judgment.

COURT OF APPEALS
OF
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After an unsuccessful arbitration, appellants requested and were granted a trial de novo, and the case was assigned to the short trial program.[2] The parties fully litigated a number of motions in this case over the course of a little more than one year. Trial was set for December 2, 2016, with a pretrial conference scheduled for November 22, 2016. However, neither appellants nor their counsel, James W. Kwon, Esq., appeared in-person at the pretrial conference. Prior to the conference, Kwon's law clerk informed the short trial judge and opposing counsel that Kwon was out of the country and would be appearing telephonically, but Kwon did not call in. After attempting to reach Kwon for about 45 minutes, counsel for the landlord respondents orally moved to dismiss appellants' complaint. Counsel for respondent New China Cuisine joined this motion. No notice of the joint motion to dismiss was provided to appellants.

On November 29, 2016, after receiving no response from Kwon or appellants regarding their failure to attend the pretrial conference, the short trial judge prepared an order granting the joint motion to dismiss with prejudice. On that same day, upon receiving notice of this order, Kwon contacted the short trial judge and opposing counsel for all parties. All parties agreed to schedule a conference call for December 1, 2016, to discuss Kwon's absence and the status of the case. During this phone conference, Kwon explained the circumstances surrounding his absence and requested the short trial go on as scheduled. This request was apparently denied[3] by

[2]We do not recount the facts except as necessary to our disposition.

[3]The record on appeal does not include a transcript of the December 1, 2016, conference call.

the short trial judge as the district court entered the short trial judge's order dismissing appellants' complaint with prejudice on December 5, 2016.

On December 22, 2016, appellants moved for, inter alia, relief from judgment concerning the order dismissing their complaint. They argued Kwon's absence at the pretrial conference amounted to excusable neglect because his cell phone failed to connect due to technical issues he was experiencing while out of the country. The district court entered an order summarily denying appellants' motion for relief from judgment.

Appellants argue the district court erred by entering the short trial judge's order granting respondents' joint motion to dismiss their complaint with prejudice because a lesser sanction would be more appropriate for their counsel's absence at the pretrial conference.[4] Appellants further argue the district court abused its discretion by denying their motion for relief from judgment. We agree under these facts that the district court abused its discretion by denying appellants' motion for relief from judgment pursuant to NRCP 60(b).

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[4]We will not consider appellants' direct complaints about the district court's order granting respondents' joint motion to dismiss. Respondents made their motion orally at the pretrial conference, which neither appellants nor their counsel attended. As a result, appellants did not oppose this motion below in writing, or provide any transcripts of the proceedings, and we will not consider arguments against this motion for the first time on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). Still, we are troubled by the short trial judge's and district court's decisions to consider and grant this *oral* motion to *dismiss* after it was revealed appellants' counsel was out of the country and attempted to appear.

Under NRCP 60(b)(1), the district court may relieve a party from a final judgment on grounds of "mistake, inadvertence, surprise, or excusable neglect." Though "the district court has wide discretion in determining what neglect is excusable and what neglect is inexcusable," *Durango Fire Protection, Inc. v. Troncoso*, 120 Nev. 658, 662, 98 P.3d 691, 693 (2004), the propriety of its determination that some neglect is inexcusable does not end our inquiry.[5]

"While each case depends upon its own facts, we have established several criteria for evaluating a district court's exercise of discretion in granting or denying a motion [under NRCP 60(b)(1)]." *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). "We have held that the presence of the following factors indicates that 60(b)(1) has been satisfied: (1) a prompt application to remove the judgment; (2) the absence of an intent to delay the proceedings; (3) a lack of knowledge of procedural requirements; and (4) good faith." *Id.* A showing that the moving party may have a meritorious claim or defense is also required. *See Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 307 (1993).[6] "Finally, the district court must consider

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[5]While not framed as a case-ending sanction in the briefing in this appeal, the short trial judge's and the district court's decisions to grant respondents' joint motion to dismiss and the district court's decision to deny appellants relief from this judgment amounted to such a sanction here. We remind the parties and the district court that we review decisions to impose case-ending sanctions with "a somewhat heightened standard of review." *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990).

[6]*Stoecklein* only describes this factor as a showing of a "meritorious defense." *See Stoecklein*, 109 Nev. at 271, 849 P.2d at 307. We observe that this line of cases applies equally to a motion for relief from judgment brought by plaintiffs making legal claims as well as defendants defending against them.

the state's underlying basic policy of deciding a case on the merits whenever possible." *Id.*

First, appellants moved for relief from the judgment on respondents' joint motion to dismiss 17 days after that judgment was entered. Therefore, we conclude appellants' application to remove the judgment was sufficiently prompt to satisfy the first factor of NRCP 60(b)(1). *See id.* at 271-72, 849 P.2d at 308 (concluding that moving for relief from judgment within 35 days is sufficiently prompt).

Second, respondents seem to suggest that appellants delayed the underlying proceedings because the case was continued twice. However, respondents were the cause of both continuances. The first continuance was requested by New China Cuisine because its owner was going to be out of the country on the original trial date. The second continuance was requested by appellants because the landlord respondents had not filed an answer to their amended complaint after several claims survived the landlord respondents' motion to dismiss. Rather than an intent to delay proceedings, we conclude appellants' motion for relief from judgment evinces an intent to complete these proceedings on the merits.

Third, we observe that "[a] lack of procedural knowledge on the part of the moving party is *not always necessary* to show excusable neglect under NRCP 60(b)(1)." *Id.* at 273, 849 P.2d at 308 (emphasis added). Here, appellants' counsel, Kwon, knew about the relevant procedural requirements and attempted to satisfy them. Therefore, this factor supports the district court's decision to deny appellants' motion for relief from judgment. Nonetheless, this factor "is not a determinative linchpin here." *Id.*

Fourth, "[g]ood faith is an intangible and abstract quality with no technical meaning or definition and encompasses, among other things, an

honest belief, the absence of malice, and the absence of design to defraud." *Id.* at 273, 849 P.2d at 309. "In common usage the term is used to describe a state of mind denoting honesty of purpose and freedom from intent to defraud." *Id.*

Here, there is no evidence that appellants intended to deceive or defraud respondents at any point in the underlying proceedings. Due to personal circumstances beyond his control that involved a life-threatening family health concern, Kwon's mind was "elsewhere" during the weeks leading up to the pretrial conference and he neglected to inform the short trial judge and opposing counsel that he would be out of the country on the date of that conference. Still, he worked with opposing counsel to prepare jury instructions, serve trial subpoenas, file a joint pretrial memorandum, and hand-deliver hard copies of the exhibit books, jury instructions, and verdict forms to the short trial judge. But for unforeseen and unpredictable technical difficulties Kwon experienced in attempting to call in to the pretrial conference, he would have appeared at that conference by telephone and this case would likely have gone to trial on the merits. Therefore, we conclude that appellants have satisfied the "good faith" factor of NRCP 60(b)(1).

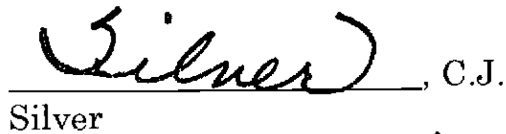
Fifth, appellants filed a complaint, "which, if true, would establish" a viable claim for relief. *Id.* at 274, 849 P.2d at 309. Therefore, we conclude that appellants have satisfied the "meritorious claim" factor of NRCP 60(b)(1).

Finally, Nevada has a general "policy of resolving cases on their merits whenever possible." *Id.* Here, this case was ready to go to trial and appellants had been diligent during pretrial activities. Had Kwon's cell phone connected on the day of the pretrial conference, this case could have gone to trial and been decided on the merits. We acknowledge that Kwon

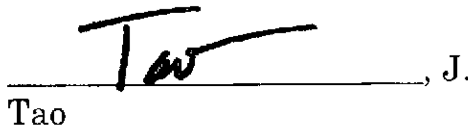
negligently failed to timely inform the short trial judge and opposing counsel that he would be out of the country on the date of the pretrial conference and would attempt to appear by telephone or other electronic means. Still, we conclude Kwon's negligent oversight was not so egregious, given the totality of the proceedings that transpired below,[7] that appellants must be denied their day in court.

For all of these reasons, we conclude the district court abused its discretion by denying appellants' motion for relief from judgment. Accordingly, we

ORDER the district court order denying appellants' motion for relief from judgment REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



_______________, C.J.
Silver



_______________, J.
Tao

_______________, J.
Gibbons

cc: Hon. Susan Johnson, District Judge
Melvin J. Goldberg, Short Trial Judge
Janet Trost, Settlement Judge
James W. Kwon
Law Offices of Karl H. Smith/Las Vegas
Law Offices of Elizabeth R. Mikesell
Eighth District Court Clerk

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[7]No party alleged that Kwon's absence at the pretrial conference caused any prejudice other than the time and money spent attending the conference without him.