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**IN THE UNITED STATES DISTRICT COURT**

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**FOR THE EASTERN DISTRICT OF CALIFORNIA**

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KATHRYN HOGAN, *et al.*,

CASE NO. CV-F-03-6408 LJO WMW

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Plaintiffs,

**ORDER ON PLAINTIFFS' FED. R. CIV. P. 60(B)(6)  
MOTION** (Doc. 346)

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vs.

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FRESNO COUNTY SHERIFF'S  
DEPUTY MICHAEL ROBINSON,  
et al.,

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Defendants.

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**INTRODUCTION**

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By notice on March 19, 2009, plaintiffs Kathryn Hogan (“Kathryn”) and Charlotte-Marie Hogan (“Charlotte-Marie”) (collectively referred to as “Plaintiffs”) moved for relief from this Court’s judgment pursuant to Fed. R. Civ. P. 60(b)(6).<sup>1</sup> Plaintiffs based their motion on a declaration filed by their former counsel, Kevin G. Little (“Mr. Little”), on March 16, 2009 (“Little Declaration”). Defendants Michael Robinson and the County of Fresno (“County defendants”) opposed this motion on April 9, 2009. Defendant Patricia Towne (“Ms. Towne”) opposed the motion on April 10, 2009. Plaintiffs failed to reply. For the following reasons, this Court DENIES Plaintiffs’ motion for relief from judgment, as Plaintiffs’ motion is untimely and fails to demonstrate extraordinary circumstances to warrant relief.

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**BACKGROUND**

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This Court has detailed the background of this lengthy and complex case in past orders. For the sake of brevity, the Court recounts only the information relevant and necessary to the instant motion.

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**General Background**

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<sup>1</sup>For purposes of clarity, and without intending any disrespect, the Court refers to the plaintiffs by their first names. County defendants and Ms. Towne are referred to collectively as “defendants.”

1 Plaintiffs initiated this action on October 9, 2003. Plaintiffs proceeded on the third amended  
2 complaint, which was filed on May 2, 2005. Plaintiffs alleged that the County defendants and Ms.  
3 Towne conspired in an effort to diminish the estate of Plaintiffs' parents. Plaintiffs alleged that  
4 defendants falsely accused Thomas and Frances Hogan's daughter, Kathryn, of committing elder abuse  
5 against her parents. Additionally, Plaintiffs alleged that defendants improperly installed a  
6 Conservatorship and committed other acts which caused damage to the Hogan family and the value of  
7 the Hogan citrus ranch. Over the life of the case, Plaintiffs identified over 100 witnesses and produced  
8 tens of thousands of documents.

### 9 **Procedural History Relevant to Instant Motion**

10 A jury trial in this action was set to begin on July 23, 2007. On April 17, 2007, this Court denied  
11 Plaintiffs' request to extend the discovery cut-offs dates, motion filing dates, and pretrial dates and to  
12 continue the July 23, 2007 jury trial. In response, Plaintiffs' counsel, Mr. Little, filed a "Motion for  
13 Leave to Withdraw Due to Impossibility of Complying With Court's Order Dated April 17, 2007." On  
14 the same day, defendants moved to exclude expert witness testimony by Plaintiffs. In addition, Ms.  
15 Towne filed a motion to strike Plaintiffs' expert witness disclosures for failure to comply with Fed. R.  
16 Civ. P. 26(a). A United States Magistrate Judge heard the motions on April 26, 2007, and by minute  
17 order, granted County defendants' motion to preclude expert witness testimony, granted Ms. Towne's  
18 motion to strike Plaintiffs' expert witness disclosures, denied Mr. Little's motion to withdraw and denied  
19 Plaintiffs' motion to certify for appeal the April 17, 2007 order.

20 On May 10, 2007, Mr. Little and Plaintiffs moved to reconsider the Magistrate Judge's April 26,  
21 2007 order to deny Mr. Little's motion to withdraw and Plaintiffs' motion to certify appealability. This  
22 Court heard the motion on May 17, 2007. In a written decision filed later that day, this Court found:

23 Based on: (1) a finding made during the sealed portion of the hearing, (2) the evidence  
24 that the declaration from the treating physician of Plaintiffs' counsel dated 5/15/2007 was  
25 not generated at the time of the motion to withdraw and was not made available to the  
26 Magistrate Judge, and (3) the evidence that Plaintiffs had been adequately noticed and  
27 had not objected to Plaintiffs' counsel's motion to withdraw, the Court found that the  
28 new facts were of a strong and convincing nature and thus GRANTED the motion for  
reconsideration IN PART, as that motion pertained to Plaintiffs' counsel's motion to  
withdraw. Plaintiffs' counsel no longer represents plaintiffs, effective immediately.

The Court then issued an order on May 21, 2007, to substitute out Mr. Little, and allow the Plaintiffs to

1 represent themselves in propria persona. The Court served Plaintiffs with both the May 17 and May 21  
2 orders by mail.

3 On May 24, 2007, in accordance with this Court’s scheduling order, defendants filed motions  
4 for summary judgment. The hearing date for the summary judgment motions was set for June 29, 2007.

5 Also on May 24, 2007, County defendants filed a motion to compel the deposition of Kathryn  
6 Hogan. On May 25, 2007, this Court ordered Kathryn to attend her deposition based on this Court’s  
7 previous orders. The Court scheduled the deposition for May 29, 2007 and explained, “Plaintiffs are  
8 represented. As pro se litigants, Plaintiffs now represent themselves.” On the same day as this Court’s  
9 order to compel the deposition testimony, Plaintiffs filed a Notice of Appeal of the May 17, 2009 order.  
10 Kathryn Hogan failed to appear at the May 29, 2007 deposition, in violation of this Court’s order. As  
11 a result, on May 30, 2007, defendants filed motions to dismiss Kathryn.

12 The Court stayed the proceedings pending the outcome of Plaintiffs’ appeal on June 1, 2007.  
13 On July 27, 2007, the United States Court of Appeal for the Ninth Circuit dismissed Plaintiffs’ appeal  
14 for lack of jurisdiction. Accordingly, this Court lifted the stay of proceedings on August 1, 2007.

15 The parties proceeded to brief the motions to dismiss Kathryn Hogan. On August 29, 2007, this  
16 Court dismissed Kathryn Hogan for failing to appear at her deposition and for repeated violations of this  
17 Court’s orders. In the Order on Defendants’ Motions to Dismiss, this Court found:

18 Ms. Hogan’s deliberate refusal to appear for the Court-ordered deposition over the eight-  
19 month period has caused numerous motions, filings, hearings, ex parte applications, ex  
20 parte hearings, and orders from this Court. It has further caused Ms. Hogan to file an  
21 interlocutory appeal, which was dismissed. Ms. Hogan filed a motion to reconsider the  
22 appeal’s dismissal. Ms. Hogan’s failure to comply with the May 25, 2007 order to  
23 compel her additional deposition is one episode in a long history of unreasonable  
behavior—indeed six hours of deposition testimony has been ordered no less than four  
times in the last eight months. Furthermore, since defendants filed the motion to compel  
in May, Ms. Hogan has continued to ignore other Court orders. Ms. Hogan is intent to  
deliberately contribute to the congestion of an already overburdened court.

24 In addressing Kathryn’s argument that she was at a disadvantage without representation, the Court  
25 pointed out that “plaintiffs have had three months to find counsel.” Moreover, Kathryn argued that her  
26 failure to appear was Mr. Little’s fault, because Mr. Little advised her not to appear at the deposition.  
27 The Court rejected Kathryn’s argument, reasoning that a “client is unable to reasonably rely on advice  
28 of counsel who admits to being incapable of representation. At the time the advice as given, Ms. Hogan

1 knew that [Mr. Little] was no longer representing her. Therefore, her current claim that she acted on  
2 advice of counsel is disingenuous.” The clerk of court entered judgement against Kathryn Hogan on  
3 August 29, 2007.

4 In light of Kathryn’s dismissal, the Court ordered defendants to re-file the summary judgment  
5 motions as to Charlotte-Marie’s remaining claims no later than September 11, 2007. Defendants timely  
6 re-filed the summary judgment motions. Charlotte-Marie opposed the motions on September 25, 2007.  
7 On October 9, 2007, this Court granted defendants’ motions for summary judgment. In its Order, the  
8 Court noted that “Ms. Hogan has had over four months to seek legal advice in this matter, but does not  
9 explain why she has been unable to obtain counsel. Furthermore, pro se litigants must follow the same  
10 rules of procedure that govern other litigants.” The Court granted summary judgment against Charlotte-  
11 Marie on multiple grounds, including that the claims were time-barred and failed as a matter of law.  
12 Judgement was entered against Charlotte-Marie Hogan, and this case was closed, on October 9, 2007.

13 On January 11, 2008, this Court awarded Attorneys’ Fees to Defendants. On March 5, 2008, the  
14 Court awarded costs against Plaintiffs.

#### 15 **Little Declaration**

16 On March 16, 2009, Mr. Little filed a declaration concerning his representation of Plaintiffs in  
17 this action. In the declaration, Mr. Little wrote: “I believe that the facts detailed herein could support  
18 a contention that I was grossly negligent in my representation of the plaintiffs between December 200  
19 and May 2007 and that my failures prejudiced plaintiffs severely, thus warranting relief under FRCP  
20 60(b)(6).” Mr. Little explains that he was under tremendous stress during that time period and suffered  
21 from a mental condition. Mr. Little declares that plaintiffs were unaware of his condition, and “as a  
22 result of his failure to disclose his inability to function at an adequate level,” plaintiffs “suffered greatly.”

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#### 25 **DISCUSSION & ANALYSIS**

##### 26 **Fed. R. Civ. P. 60(b)(6) Standard and Applicable Law**

27 Federal Rule of Civil Procedure 60(b)(6) provides: “On motion and just terms, the court may  
28 relieve a party or its legal representative from a final judgement, order, or proceeding for...any other

1 reason that justifies relief.” A motion under Fed. R. Civ. P. 60(b)(6) must be brought “within a  
2 reasonable time.” Fed. R. Civ. P. 60(c)(1). Moreover, the motion requires a showing of “‘extraordinary  
3 circumstances’ justifying the reopening of a final judgment.” *Gonzalez v. Crosby*, 545 U.S. 524 (2005)  
4 (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). A party moving for relief under Fed.  
5 R. Civ. P. 60(b)(6) “must demonstrate both injury and circumstances beyond his control that prevented  
6 him from proceeding with the action in a proper fashion.” *Harvest v. Castro*, 531 F.3d 737, 749 (9th Cir.  
7 2008). (quoting *Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d 1097, 1103 (9th Cir. 2006)). Fed.  
8 R. Civ. P. 60(b)(6) shall be “used sparingly as an equitable remedy to prevent manifest prejudice and  
9 is to be utilized only where extraordinary circumstances prevented a party from taking timely action to  
10 prevent or correct an erroneous judgment.” *Latshaw*, 452 F.3d at 1103.

### 11 **Motion is Untimely**

12 Plaintiffs must raise a Fed. R. Civ. P. 60(b)(6) motion “within a reasonable time.” Fed. R. Civ.  
13 P. 60(c)(1). “What constitutes a ‘reasonable time’ depends upon the facts of each case, taking into  
14 consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn  
15 earlier of the grounds relied upon, and the prejudice to the opposing parties.” *Ashford v. Steuart*, 657  
16 F.2d 1053, 1055 (9th Cir. 1981). A party who filed a Fed. R. Civ. P. 60(b) motion after the time for  
17 appeal has expired must establish “the existence of extraordinary circumstances which prevented or  
18 rendered him unable to prosecute an appeal.” *Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th  
19 Cir. 1982).

20 Plaintiffs’ motion is filed over 18 months after judgment was entered, and over two years after  
21 Plaintiffs were put on notice of the facts and circumstances upon which they rely. Mr. Little alerted  
22 Plaintiffs that he was unable to continue to represent them in April 2007. This Court relied on a  
23 declaration by Mr. Little’s doctor to allow Mr. Little to withdraw as counsel of record in May 2007. In  
24 its August 2007 order to dismiss Kathryn, the Court noted Plaintiffs were aware of Mr. Little’s issues  
25 and ruled that a “client is unable to reasonably rely on advice of counsel who admits to being incapable  
26 of representation.” Judgement was entered against Kathryn on August 29, 2007, based on terminating  
27 sanctions that she blamed on the erroneous advice of Mr. Little. Judgement was entered against  
28 Charlotte-Marie on October 10, 2007. Plaintiffs demonstrated their ability to appeal this Court’s



1 them from proceeding with the action in a proper fashion.

2 Based on the circumstances of this case, the cases cited in Mr. Little's declaration, and relied  
3 upon by Plaintiffs, are distinguishable. For example, Plaintiffs rely on *Community Dental Servs. v. Tani*,  
4 282 F.3d 1164 (9th Cir. 2002), to argue that "relief is warranted where evidence shows that the attorney  
5 essentially abandoned the client." In *Tani*, the attorney ignored court orders, neglected motions, missed  
6 hearings and other court appearances, failed to file pleadings or serve them to opposing counsel, and  
7 otherwise "virtually abandoned his client by failing to proceed with his client's defense despite  
8 [repeated] court orders to do so." 282 F.3d at 1170-71. The court found that the attorneys' actions  
9 amounted to the "client's receiving practically no representation at all" which resulted in a default  
10 judgment against the plaintiff. *Id.* Here, Mr. Little withdrew with permission of the Court and judgment  
11 was entered after the withdrawal, based on the action of the parties and the merits of the case. Moreover,  
12 the Ninth Circuit has declined to expand the holding of *Tani* beyond the default judgment context. *See*  
13 *Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d 1097 (9th Cir. 2006). Accordingly, the case law  
14 relied upon by Plaintiffs in support of this motion is unavailing.<sup>2</sup>

15 **CONCLUSION**

16 For the foregoing reasons, this Court DENIES Plaintiffs' Fed. R. Civ. P. 60(b)(6) motion and  
17 VACATES the April 27, 2009 hearing on this motion.

18 IT IS SO ORDERED.

19 **Dated: April 21, 2009**

/s/ Lawrence J. O'Neill  
UNITED STATES DISTRICT JUDGE

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26 <sup>2</sup>Because this Court finds this untimely motion to be without extraordinary circumstances, this Court need not  
27 address Ms. Towne's additional arguments related to the mutual release and judicial estoppel. In addition, this Court declines  
28 Ms. Towne's invitation to use its inherent powers to impose sanctions on Plaintiffs. It would be a mistake, however, for  
Plaintiffs to conclude that further litigation at the trial level on issues now fully determined would have the same result on  
requested sanctions.