

IN THE SUPREME COURT OF THE STATE OF NEVADA

FIRST STREET FOR BOOMERS &
BEYOND, INC.; AITHR DEALER,
INC.;

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT
COURT, IN AND FOR THE COUNTY
OF CLARK, STATE OF NEVADA,
AND THE HONORABLE CRYSTAL
ELLER, DISTRICT JUDGE,

Respondents,

And

ROBERT ANSARA, as Special
Administrator of the Estate of SHERRY
LYNN CUNNISON, Deceased;
ROBERT ANSARA, as Special
Administrator of the Estate of
MICHAEL SMITH, Deceased heir
to the Estate of SHERRY LYNN
CUNNISON, Deceased; and DEBORAH
TAMANTINI individually, and heir to
the Estate of SHERRY LYNN
CUNNISON, Deceased; HALE
BENTON, Individually; HOMECCLICK,
LLC; JACUZZI INC., doing business as
JACUZZI LUXURY BATH;
BESTWAY BUILDING &
REMODELING, INC.; WILLIAM
BUDD, Individually and as BUDDS
PLUMBING; DOES 1 through 20; ROE
CORPORATIONS 1 through 20; DOE
EMPLOYEES 1 through 20; DOE

CASE NO.

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MANUFACTURERS 1 through 20;
DOE 20 INSTALLERS 1 through 20;
DOE CONTRACTORS 1 through 20;
and DOE 21 SUBCONTRACTORS 1
through 20, inclusive,

Real Parties in Interest.

**From the Eighth Judicial District Court
The Honorable Crystal Eller District Judge**

PETITION FOR WRIT OF MANDAMUS

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Dealer, Inc.;*

1 **NRAP 26.1 DISCLOSURE STATEMENT**

2 The undersigned counsel of record certifies that the following are persons
3 and entities described in NRAP 26.1(a), and must be disclosed. These
4 representations are made in order that the judges of this Court may evaluate
5 possible disqualification or recusal.
6

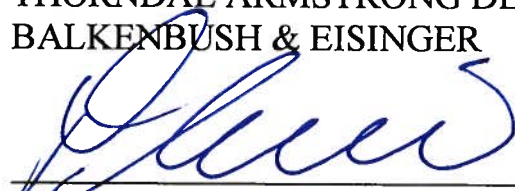
7
8 firstSTREET for Boomers & Beyond, Inc. is a private company with no
9 parent corporation.
10

11 AITHR Dealer, Inc. is a wholly owned subsidiary of firstSTREET for
12 Boomers & Beyond, Inc.

13 Defendant-Petitioner is represented by THORNDAL ARMSTRONG
14 DELK BALKENBUSH & EISINGER. Defendant-Petitioner has not been
15 represented by any other attorneys.
16

17 DATED this 16th day of August, 2021.
18

19 THORNDAL ARMSTRONG DELK
20 BALKENBUSH & EISINGER

21 
22 _____
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ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding because this matter raises as a principal issue questions of first impression involving Nevada common law as well as questions of statewide importance. NRAP 17(a)(10)-(11).

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. STATEMENT OF THE ISSUES.....	7
III. RELIEF SOUGHT	7
IV. STATEMENT OF THE FACTS	7
V. ARGUMENT.....	10
A. A Writ Of Mandamus Is The Proper Extraordinary Relief To Prevent Extreme And Irreparable Prejudice To The Petitioner.....	10
B. The District Court's Improper Interpretation and Application of NRCP 16.1(e)(3) Are Improper Conclusions of Law Prompting De Novo Review.....	11
C. The District Court's Interpretation of NRCP 16.1(e)(3) Conflicts with the Plain Language of the Rule.....	12
D. The District Court's Imposition of Sanctions Against Petitioners Is Not Supported by Other Legal Authority.....	14
E. The District Court Abused Its Discretion By Striking Petitioners' Answer Without Conducting an Evidentiary Hearing.....	15
VI. CONCLUSION.....	19
CERTIFICATE OF COMPLIANCE	22

TABLE OF AUTHORITIES

	Page
Cases	
<i>Marshall v. District Court</i> , 108 Nev. 459, 836 P.2d 47 (1992)	10
<i>Halcrow, Inc. v. Eighth Judicial Dist. Court</i> , 129 Nev.Adv.Op. 42, 302 P.3d 1148 (2013)	10
<i>Trustees of the Plumbers Union Local 525 Health and Welfare Plan v. Developers Surety and Indemnity Co.</i> , 120 Nev. 56, 59, 84 P.3d 59 (2004)	11
<i>State of Nevada v. Granite Construction Co.</i> , 118 Nev. 83, 86, 40 P.3d 423 (2002)	11
<i>County of Clark v. Sun State Properties, Ltd.</i> , 119 Nev. 329, 334, 72 P.3d 954 (2003)	11
<i>Bopp v. Lino</i> , 110 Nev. 1246, 1249, 885 P.2d 559 (1994)	11
<i>Department of Taxation v. Eighth Judicial District Court in and for County of Clark</i> , 136 Nev. 366, 466 P.3d 1281, 1283 (2020)	11
<i>Toll v. Wilson</i> , 135 Nev. 430, 433, 453 P.3d 1215, 1218 (2019)	11
<i>New Horizon Kids Quest III, Inc. v. Eighth Judicial Dist. Court</i> , 133 Nev. 86, 89, 392 P.3d 166, 168 (2017)	11
<i>County of Clark v. Sun State Properties, Ltd.</i> , 119 Nev. 329, 72 P.3d 954 (2003)	11
<i>Young v. Johnny Ribeiro Bldg., Inc.</i> , 106 Nev. 88, 787 P.2d 777 (1990)	12, 14
<i>Nevada Power Co. v. Flour Illinois</i> , 108 Nev. 638, 837 P.2d 1354 (1992) .	14, 15
<i>Foster v. Dingwall</i> , 126 Nev. 56, 227 P.3d 1042 (2010)	14
<i>Bahena v. Goodyear Tire & Rubber Co.</i> , 126 Nev. 243, 235 P.3d 592(2010)	14, 15

Bahena v. Goodyear Tire & Rubber Co., 126 Nev. 606, 245 P.3d 1182 (2010)16

Rules

NRCP 16.1..... 1, 4, 5, 6, 9, 10, 11, 12, 13, 14, 15

NRCP 37 12, 13, 14, 15, 17

E.D.C.R. 2.34 4

Statutes

NRS 34.160 10

POINTS AND AUTHORITIES

I. INTRODUCTION

Petitioners, firstSTREET for Boomers & Beyond, Inc. (“firstSTREET”), and AITHR Dealer, Inc. (“AITHR”, collectively referred to as “Petitioners”), seek relief from the District Court’s Order Striking Petitioners’ Answer to Plaintiffs’ Fourth Amended Complaint, for liability defenses only. Since Petitioners never violated any Discovery Order, the District Court’s sole reasoning was that Petitioners’ violated NRCP 16.1 by *failing to timely voluntarily disclose certain documents*. This writ proceeding arises out of a tragic accident that occurred on or around February 21, 2014. According to Plaintiffs’ Fourth Amended Complaint, in October of 2013, Sherry Cunnison (“Ms. Cunnison”) entered into a contract to purchase a Jacuzzi® model no. 5229 Walk-In Tub (the “tub”). The tub was marketed by Defendant/Petitioner firstSTREET for Boomers & Beyond, Inc. (“firstSTREET”), and sold by Defendant/Petitioner AITHR Dealer, Inc. (“AITHR”).

The tub was installed in Ms. Cunnison’s home on January 27, 2014. From the date of installation to the date of the incident, Ms. Cunnison used the tub several times. On February 21, 2014, a well-being check was performed and Ms. Cunnison was found in the tub by emergency personnel. While emergency personnel extracted her from the tub, Ms. Cunnison’s left humerus was broken

1 and she was transported to Sunrise Hospital. On February 25, 2014, while under
2 the treatment of her doctors, Ms. Cunnison underwent an open reduction internal
3 fixation of left distal humeral shaft. Ms. Cunnison developed sepsis following the
4 surgery and died at the hospital on February 27, 2014.

6 The tub was designed and manufactured by Defendant Jacuzzi. Defendant
7 firstSTREET developed marketing and advertising for the tub pursuant to a
8 contract with Jacuzzi. Defendant AITHR is a wholly owned subsidiary of
9 firstSTREET, and sold the tub to Ms. Cunnison. AITHR then hired the
10 subcontractors that installed the tub.

13 Plaintiffs' original Complaint was filed on February 3, 2016, alleging
14 Negligence, and Strict Product Liability Defective Design, Manufacture and/or
15 Failure to Warn. *Petitioners' Appendix*, Tab 1. The original Complaint was based
16 on a theory of a defective drainage system and alleged that the incident occurred
17 when Ms. Cunnison "attempted [sic] exit the Jacuzzi walk-in tub by pulling the
18 plug to let the water drain, allowing her to open the Jacuzzi walk in tub's door and
19 exit. The drain would not release trapping SHERRY in the tub for 48 hours."
20 *Petitioners' Appendix*, Tab 1 (PA0007).

24 These allegations remained substantially the same throughout several
25 amended Complaints until the Plaintiffs filed their Fourth Amended Complaint on
26 June 21, 2017. *Petitioners' Appendix*, Tab 2. The Fourth Amended Complaint
27
28

1 added several breach of warranty causes of action and a “cause of action” for
2 punitive damages. The Fourth Amended Complaint presented an entirely new
3 theory that the tub was dangerous, not because of the drainage system, but
4 because of “the inability to get back up or exit the tub if Plaintiff fell.” *Petitioners’*
5 *Appendix*, Tab 2 (PA0020).
6

7
8 A significant amount of discovery has been done since the inception of the
9 case. Significantly, throughout the discovery process Plaintiffs engaged in several
10 discovery disputes with Defendant Jacuzzi regarding the production of documents
11 relating to similar prior instances, customer complaints, and preventative
12 measures developed and utilized to address the alleged issue of the tub floor and
13 seat being slippery when wet. Several of these discovery disputes were addressed
14 with the Discovery Commissioner in due course and various discovery orders
15 against Jacuzzi were recommended to and adopted by the District Court. Those
16 orders were entered against Jacuzzi only. After filing two (2) separate Motions to
17 Strike Jacuzzi’s Answer, and after conducting a four (4) day evidentiary hearing,
18 on November 18, 2020, the District Court (Judge Richard Scotti) signed an Order
19 Granting Plaintiffs’ Motion and struck Jacuzzi’s Answer as to liability only.¹
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25 *Petitioners’ Appendix*, Tab 3.
26

27
28 ¹ This Order was entered *after* Jacuzzi waived its right to a phase 2 evidentiary
hearing that would have addressed a potential “advice of counsel” defense, which

1 Though counsel for Plaintiffs and Petitioners engaged in a few E.D.C.R.
2 2.34 conferences regarding discovery issues, *Plaintiffs never once filed a motion*
3 *to compel against Petitioners*. Consequently, the Discovery Commissioner never
4 had any opportunity to decide a single discovery dispute against Petitioners, much
5 less recommend an order for the District Court to enter. As an obvious result, no
6 discovery order has ever been entered against Petitioners in this case and
7
8 Petitioners have not violated any discovery orders.
9

10 On October 9, 2020, Plaintiffs filed a Renewed Motion to Strike Defendant
11 firstSTREET for Boomers & Beyond, Inc.'s & AITHR Dealer, Inc.'s Answer to
12 Plaintiffs' Fourth Amended Complaint². *Petitioners' Appendix*, Tab 4. Plaintiffs
13 argued that Petitioners had violated NRCP 16.1's disclosure requirements by
14 failing to voluntarily disclose relevant documents related to similar prior and
15 subsequent incidents; documents related to a separate, unrelated product - a 911
16 Alert bracelet; documents related to potential remedial measures to address the
17 alleged slipperiness of the floor; recordings of customer phone calls to Petitioners;
18 *Lead Perfection* documents; and customer survey documents regarding the tub.
19
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26 is a prong of the factors delineated in *Young v. Johnny Ribeiro Bldg., Inc.*, 106
27 Nev. 88, 787 P.2d 777 (1990).

28 ² The District Court denied an earlier motion to strike Petitioners' Answer.
Petitioners' Appendix, Tab 5.

1 Plaintiffs further argued that the alleged failure to voluntarily produce these
2 documents without a Discovery Order was willful and that Plaintiffs were
3 prejudiced. Plaintiffs then sought an order striking Petitioners' Answer to the
4 Fourth Amended Complaint from the District Court. However, Plaintiffs never
5 filed any motions to compel these documents prior to filing the Renewed Motion
6 to Strike.
7
8

9 In its Opposition to the Renewed Motion to Strike, Petitioners argued that
10 they have produced all relevant documents in their possession, pursuant to NRCP
11 16.1, and have responded to all of Plaintiffs' discovery requests. *Petitioners'*
12 *Appendix*, Tab 6 (PA0397 to PA0399) and Tab 8 – 34 to 39 (PA0951 to PA0956).
13 Petitioners explained that they do not have access to several of the documents that
14 Plaintiffs sought, nor did they have the capacity to search through *Lead Perfection*
15 documents, which were stored by a third-party. *Petitioners' Appendix*, Tab 6
16 (PA0422 to PA0433). Furthermore, several documents, such as those relating to
17 an unrelated product, the 911 Alert Pendant, which was, in certain regions of the
18 country, included with a tub sale as a gift (as were restaurant gift cards and other
19 gifts), were not produced because they are wholly irrelevant. *Petitioners'*
20 *Appendix*, Tab 6 (PA407 and PA0424). Again, Plaintiffs never filed any motion to
21 compel the production of any of these documents, or any others that they argued
22 should have been disclosed voluntarily pursuant to NRCP 16.1.
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1 The oral argument related to Plaintiffs' Motion was held on November 19,
2 2020. *Petitioners' Appendix*, Tab 8. During the hearing, through evidence,
3 deposition testimony and affidavits, it was made abundantly clear to the Court that
4 Petitioners were not in possession of the documents and information that Plaintiffs
5 claimed were required to be voluntarily disclosed. *Id.* (PA0961 to PA0966). This
6 was NOT an evidentiary hearing.
7

8
9 On December 28, 2020, the Honorable Richard F. Scotti granted Plaintiffs'
10 Renewed Motion to Strike Petitioners' Answer to the Fourth Amended Complaint,
11 finding that Petitioners willfully concealed relevant evidence with the intent to
12 harm and severely prejudice the Plaintiffs' ability to pursue its claims, "in
13 violation of its discovery obligations under NRCP 16.1." *Petitioners' Appendix*,
14 Tab 9. In doing so, the District Court ignored the overwhelming case law holding
15 that case terminating discovery sanctions like striking a Defendant's Answer may
16 only be imposed upon a violation of a court order, and that when such sanctions
17 are as severe as striking a party's pleading, the party should be allowed an
18 evidentiary hearing in accordance with principles of Due Process.
19

20
21 In short, the District Court clearly abused its discretion by striking
22 Petitioners' Answer where Plaintiff had not once filed a motion to compel against
23 Petitioners, the Discovery Commissioner had not once recommended any
24 discovery order against Petitioners, and the District Court had not once entered
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1 any discovery order against Petitioners. The District Court further abused its
2 discretion by granting such severe sanctions against Petitioners without affording
3 Petitioners an evidentiary hearing. Petitioners have no adequate remedy on appeal,
4 which warrants the issuance of an extraordinary writ of mandamus.
5

6 **II. STATEMENT OF THE ISSUES**

7
8 1. Whether the District Court abused its discretion by striking
9 Petitioners' Answer for alleged discovery abuses, in the absence of any prior
10 motion to compel or resultant discovery order.
11

12 2. Whether the District Court abused its discretion by striking
13 Petitioners' Answer for alleged discovery abuses without conducting an
14 evidentiary hearing.
15

16 **III. RELIEF SOUGHT**

17
18 Petitioners request a Writ of Mandamus ordering the Eighth Judicial Court
19 to Vacate its December 28, 2020, Order Striking Petitioners' Answer to the Fourth
20 Amended Complaint. In the alternative, Petitioners request a Writ of Mandamus
21 ordering the Eighth Judicial District Court to conduct an evidentiary hearing.
22

23 **IV. STATEMENT OF THE FACTS**

24
25 1. Plaintiffs' original Complaint alleged Negligence, and Strict Product
26 Liability Defective Design, Manufacture and/or Failure to Warn, and was based
27 on a theory of a defective drainage system. *Petitioners' Appendix*, Tab 1.
28

1 2. Plaintiffs' Fourth Amended Complaint alleges multiple claims
2 against Petitioners based on theories of negligence and strict products liability.
3 *Petitioners' Appendix*, Tab 2.
4

5 3. The tub was designed, manufactured, and produced exclusively by
6 Jacuzzi. *Petitioners' Appendix*, Tab 6 (PA0395).
7

8 4. firstSTREET created advertising and marketing materials for the
9 tub. *Petitioners' Appendix*, Tab 6 (PA0395).
10

11 5. AITHR is a wholly owned subsidiary of firstSTREET, and sold the
12 tub to Ms. Cunnison. AITHR then hired the subcontractors that installed Ms.
13 Cunnison's tub. *Petitioners' Appendix*, Tab 6 (PA0395).
14

15 6. Plaintiffs original Motion to Strike Defendant firstSTREET for
16 Boomers & Beyond, Inc.'s & AITHR Dealers, Inc.'s Answer to Plaintiffs' Fourth
17 Amended Complaint, filed on January 16, 2019, was denied by the District Court
18 on March 12, 2019. *Petitioners' Appendix*, Tab 5.
19

20 7. Plaintiffs filed the Renewed Motion to Strike Defendant
21 firstSTREET for Boomers & Beyond, Inc.'s & AITHR Dealers, Inc.'s Answer to
22 Plaintiffs' Fourth Amended Complaint on October 9, 2020. *Petitioners' Appendix*,
23 Tab 4.
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26 8. Petitioners filed Defendants firstSTREET and AITHR's Opposition
27 to Plaintiffs' Renewed Motion to Strike Defendants firstSTREET and AITHR's
28

1 Answer to Plaintiffs' Fourth Amended Complaint on November 6, 2020.
2 *Petitioners' Appendix*, Tab 6.

3 9. The District Court conducted a hearing on Plaintiffs' Motion on
4 November 19, 2020 and took the matter under submission. *Petitioners' Appendix*,
5 Tab 8.
6

7 10. On December 28, 2020, the District Court issued a Minute Order
8 Granting Plaintiffs' Renewed Motion to Strike Defendants firstSTREET and
9 AITHR's Answers to Plaintiffs' Fourth Amended Complaint, finding that
10 firstSTREET and AITHR "willfully and repeatedly concealed very relevant
11 evidence with the intent to harm and severely prejudice the Plaintiffs' ability to
12 pursue its claims, in violation of its discovery obligations under NRCP 16.1."
13 *Petitioners' Appendix*, Tab 9.
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17 11. The District Court based its ruling solely on its interpretation of
18 NRCP 16.1, and did not find that Petitioners had violated any discovery order.
19 The District Court additionally did not hold an evidentiary hearing on the issues
20 presented. The District Court signed the submitted Order Granting Plaintiffs'
21 Renewed Motion to Strike Defendants firstSTREET and AITHR's Answer to
22 Plaintiffs Fourth Amended Complaint on December 31, 2020, and this
23 extraordinary writ proceeding followed. *Petitioners' Appendix*, Tab 10.
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1 **V. ARGUMENT**

2 **A. A Writ Of Mandamus Is The Proper Extraordinary Relief To**
3 **Prevent Extreme And Irreparable Prejudice To The Petitioner.**

4 A writ of mandamus is available to compel the performance of an act that
5 the law requires as a duty resulting from an office, trust or station.” NRS 34.160.
6
7 The Supreme Court of Nevada has the authority to issue writs of mandamus to
8 control arbitrary or capricious abuses of discretion or clear errors of law by district
9 courts. *Marshall v. District Court*, 108 Nev. 459, 466, 836 P.2d 47, 52 (1992);
10 *Halcrow, Inc. v. Eighth Judicial Dist. Court*, 129 Nev.Adv.Op. 42, 302 P.3d 1148,
11 1151 (2013) (“Mandamus relief may also be proper to control an arbitrary or
12 capricious exercise of discretion.”). “Writ relief will not be available when an
13 adequate and speedy legal remedy exists.” *Id.* “Whether a future appeal is
14 sufficiently adequate and speedy necessarily turns on the underlying proceedings’
15 status, the types of issues raised in the writ petition, and whether a future appeal
16 will permit this court to meaningfully review the issues presented.” *Id.* The above
17 ruling of the Respondent Court improperly interpreted NRCP 16.1 to strike
18 Petitioners’ Answer, without any violation of a discovery or other court order, and
19 without being afforded an evidentiary hearing. There is no adequate or speedy
20 legal remedy for this terminating sanction.
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27 A Writ of Mandamus is therefore necessary to correct the District Court’s
28 clear error of law. Intervention by this Court will ensure that the continued

1 prejudicial treatment of Petitioners will be arrested, allowing Petitioners to litigate
2 the several questions of fact as to liability before a jury.

3 **B. The District Court's Improper Interpretation and Application of**
4 **NRCP 16.1(e)(3) Are Improper Conclusions of Law Prompting De**
5 **Novo Review.**

6 Under Nevada law, a District Court's rulings on questions and conclusions
7 of law are subject to de novo review by the appellate court. *Trustees of the*
8 *Plumbers Union Local 525 Health and Welfare Plan v. Developers Surety and*
9 *Indemnity Co.*, 120 Nev. 56, 59, 84 P.3d 59 (2004); *State of Nevada v. Granite*
10 *Construction Co.*, 118 Nev. 83, 86, 40 P.3d 423 (2002); *County of Clark v. Sun*
11 *State Properties, Ltd.*, 119 Nev. 329, 334, 72 P.3d 954 (2003); *Bopp v. Lino*, 110
12 Nev. 1246, 1249, 885 P.2d 559 (1994).

16 The District Court's interpretation and application of NRCP 16.1(e)(3) is a
17 question and conclusion of law, thereby triggering de novo review. *Department of*
18 *Taxation v. Eighth Judicial District Court in and for County of Clark*, 136 Nev.
19 366, 466 P.3d 1281, 1283 (2020) (citing *Toll v. Wilson*, 135 Nev. 430, 433, 453
20 P.3d 1215, 1218 (2019); *New Horizon Kids Quest III, Inc. v. Eighth Judicial Dist.*
21 *Court*, 133 Nev. 86, 89, 392 P.3d 166, 168 (2017)).

24 ///

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1 **C. The District Court’s Interpretation of NRCP 16.1(e)(3) Conflicts**
2 **with the Plain Language of the Rule.**

3 The District Court’s interpretation of NRCP 16.1(e)(3) to allow the severe
4 sanctions imposed on Petitioners, namely striking Petitioners’ Answer, conflicts
5 with the plain language of the Rule.
6

7 NRCP 16.1(e)(3) states, in its entirety:

8 (1) *Other Grounds for Sanctions.* If an ***attorney*** fails to
9 reasonably comply with any provision of this rule, or if an ***attorney or***
10 ***a party*** fails to comply with an order entered under Rule 16.3, the
11 court, on motion or on its own, should impose upon a party or a
12 party’s attorney, or both, appropriate sanctions in regard to the
failure(s) as are just, including the following:

13 (A) any of the sanctions available under Rules 37(b) or 37(f);
14 or

15 (B) an order prohibiting the use of any witness, document, or
16 tangible thing that should have been disclosed, produced,
17 exhibited, or exchanged under Rule 16.1(a).

18 NRCP 16.1(e)(3) (emphasis added).
19

20 Thus, if the conduct complained of is done by an attorney, rather than a
21 party, then the District Court’s sanction may not necessarily be preceded by
22 violation of a court order. However, when it is the ***party’s*** conduct that is
23 sanctioned by the District Court³, the sanctions available under Rules 37(b) or
24

25
26
27 ³ In the case of striking a party’s Answer, it is the ***party’s*** conduct that is being
28 sanctioned, not the attorney’s. *See Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev.
88, 787 P.2d 777 (1990).

1 37(f) are only available if the “party fails to comply with an order entered under
2 Rule 16.3.” As this Court is no doubt aware, NRCP 16.3 governs the authority of
3 the Discovery Commissioner and the procedure of obtaining a court order based
4 on a report and recommendation of the Discovery Commissioner. Thus, a *party*
5 must violate a court order, originating with the Discovery Commissioner, in order
6 to warrant the discovery sanctions.
7
8

9 Throughout the entire course of discovery, Plaintiffs failed to file a single
10 motion to compel against Petitioners, and consequently there is no discovery order
11 that Petitioners could have violated. Moreover, the District Court expressly found,
12 as a matter of law, that:
13
14

15 [t]he sanction of striking the answer of [Petitioners] will not unfairly
16 operate to penalize [Petitioners] for the conduct of its counsel. In its
17 opposition to the instant motion [Petitioners] did not attempt to excuse
18 its discovery abuses based on advice of counsel. Nor did [Petitioners]
19 identify any discovery conduct that was done at the direction of its
20 counsel.

21 *Petitioners’ Appendix*, Tab 10 (PA1020). Thus, the District Court’s sanctions
22 were expressly based on conduct of Petitioners, who are a *party*, and the District
23 Court expressly found that the sanctions were not a result of attorney conduct.
24 Yet, the basis for the District Court’s ruling – the violation of NRCP 16.1’s
25 disclosure requirements – is based entirely and solely on the conduct of counsel,
26 *not the party*. For it is counsel that selects what documents are disclosed as part of
27 the NRCP 16.1 disclosure requirements, not the party that counsel represents.
28

1 This is a very significant distinction, as without a court order in place, the
2 *party* cannot be sanctioned under Rules 37(b) or 37(f). *See Young v. Johnny*
3 *Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990). Again, NRCP 16.1(e)(3)
4 envisions a clear distinction between an attorney's conduct (not complying with
5 NRCP 16.1) and an attorney's or party's conduct (not complying with a court
6 order).

7
8
9 Because there have been no discovery orders issued against Petitioners, and
10 pursuant to the plain language of NRCP 16.1(e)(3), the District Court abused its
11 discretion when it imposed the sanction of striking Petitioners' Answer for
12 conduct attributed solely to Petitioners.

13
14
15 **D. The District Court's Imposition of Sanctions Against Petitioners**
16 **Is Not Supported by Other Legal Authority.**

17 Nevada case law requires violation of a court order before a district court
18 may strike a pleading. *See Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787
19 P.2d 777 (1990) (imposing sanctions where a party ignored the "court's express
20 oral admonition to ... rectify any inaccuracies in his deposition testimony");
21 *Nevada Power Co. v. Flour Illinois*, 108 Nev. 638, 837 P.2d 1354 (1992)
22 (imposing sanctions against a party for destroying evidence in violation of a court
23 order to preserve the evidence); *Bahena v. Goodyear Tire & Rubber Co.*, 126
24 Nev. 243, 235 P.3d 592 (2010) (imposing sanctions where a corporate party failed
25 to produce a witness for deposition, in violation of a court order); *Foster v.*
26
27
28

1 *Dingwall*, 126 Nev. 56, 227 P.3d 1042 (2010) (imposing sanctions on several
2 parties in the suit for failing to attend their depositions and failing to supplement
3 their responses to interrogatories, in violation of a court order). In each of the
4 foregoing seminal cases issued by this Court, the sanctioned party had violated a
5 court order.
6

7
8 Here, Plaintiffs never sought a discovery order from the Discovery
9 Commissioner or the District Court against Petitioners. Petitioners could not, and
10 did not violate any discovery order that would warrant discovery sanctions, much
11 less that would warrant the District Court striking Petitioners' Answer.
12

13 **E. The District Court Abused Its Discretion By Striking Petitioners'**
14 **Answer Without Conducting an Evidentiary Hearing.**

15 This District Court struck Petitioners' Answer pursuant to NRCP 37(b),
16 based on its erroneous interpretation of NRCP 16.1(e)(3). In *Nevada Power Co. v.*
17 *Flour Illinois*, 108 Nev. 638, 644, 837 P.2d 1354, 1359 (1992), this Court has
18 held:
19
20

21 Under NRCP 37(b)(2), a party's suit may be dismissed if the party
22 "fails to obey an order to provide or permit discovery." Determining
23 whether a party "fail[ed] to obey an order" may, as it does here,
24 involve factual questions as to the meaning of the order allegedly
25 disobeyed and questions as to whether the disobedient party did, in
26 fact, violate the court's discovery order. The only way that these
27 questions of fact can be properly decided is by holding an evidentiary
28 hearing.

Id., 108 Nev. at 644, 837 P.2d at 1359 (1992). Moreover,

1 when the court does not impose ultimate discovery sanctions of
2 dismissal of a complaint with prejudice or striking an answer as to
3 liability *and* damages, the court should, at its discretion, hold such
4 hearing as it reasonably deems necessary to consider matters that are
5 pertinent to the imposition of appropriate sanctions. The length and
6 nature of the hearing for non-case concluding sanctions shall be left to
7 the sound discretion of the district court.

8 *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 256, 235 P.3d 592, 600-
9 01 (2010) (emphasis in the original). Thus, where there are significant questions
10 of fact regarding the allegations of discovery abuse, as there are here, the District
11 Court should have conducted an evidentiary hearing, and had discretion as to the
12 length and nature of that hearing. In fact, Plaintiffs' counsel recognized that a
13 hearing on this precise issue should be heard, and could be held in less than one
14 day. *Petitioners' Appendix*, Tab 8 (PA0988).

15
16 The need for an evidentiary hearing on Plaintiffs' motion is perhaps best
17 evidenced by Plaintiffs' and the Court's apparent reliance on an Affidavit
18 submitted by Nick Fawkes. *Petitioners' Appendix*, Tab 4 (PA0077 to PA0080)
19 and Tab 8 (PA0967 to PA0969). Mr. Fawkes was never subjected to a deposition
20 or cross-examination to question his recollection of events. Moreover, Mr.
21 Fawkes' affidavit is not supported by proper foundation which is essential for a
22 Court to make a ruling on the validity of his testimony, let alone whether to strike
23 a party's Answer. Finally, Plaintiffs' counsel submitted, and the Court considered,
24 counsel's own affidavit in support of Mr. Fawkes when faced with the affidavit of
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1 David Modena, Petitioners' NRCP 30(b)(6) witness who had been deposed twice.
2 *Petitioners' Appendix*, Tab 7 (PA0914 to PA0916).

3 While this Court in *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606,
4 245 P.3d 1182 (2010) (*Bahena II*), clarified that while an evidentiary hearing is
5 not mandated in every case where the imposed sanctions are less than dismissal or
6 default with prejudice, "the district courts should be encouraged to exercise their
7 discretion to hold evidentiary hearings regarding non-case concluding sanctions
8 when requested and when there are disputed issues of material fact regarding the
9 discover dispute identified by the parties." *Bahena II*, 126 Nev. at 611, 245 P.3d at
10 1185. Here, however, the District Court's Order Striking Petitioners' Answers is
11 in fact a case concluding sanctions insomuch as Petitioners are now precluded
12 from presenting any liability arguments to the jury. The only issue remaining is
13 that of Plaintiffs' alleged damages.
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15 Moreover, the purpose of an evidentiary hearing is to determine whether a
16 party violated a court order. This Court has held:
17

18
19 Determining whether a party "fail[ed] to obey an order" may, as it
20 does here, involve factual questions as to the meaning of the order
21 allegedly disobeyed and questions as to whether the disobedient party
22 did, in fact, violate the court's discovery order. ***The only way that***
23 ***these questions of fact can be properly decided is by holding an***
24 ***evidentiary hearing.***
25

26
27 *Nevada Power, supra*, at 644, 837 P.2d at 1359 (emphasis added).
28

1 Prior to striking Petitioners' Answer, the District Court heard a separate
2 motion to strike co-defendant Jacuzzi's Answer for alleged discovery abuses
3 arising out of Jacuzzi's alleged violation of several discovery orders entered by
4 the District Court. Prior to deciding that motion, the District Court conducted a
5 four (4) day evidentiary hearing, wherein witnesses appeared from across the
6 country to testify under oath and undergo cross-examination. Moreover, the
7 District Court ordered a "second phase" of evidentiary hearing and testimony to
8 determine if Jacuzzi (the party) was directly responsible for its own discovery
9 misconduct. *Petitioners' Appendix*, Tab 3. This extensive hearing related to
10 Jacuzzi further demonstrates the complexity of this case and the discovery
11 disputes that have arisen are such that an evidentiary hearing is necessary prior to
12 imposing sanctions against Petitioners.
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18 However, in the case of Petitioners, the District Court did not allow *any*
19 evidentiary hearing prior to imposing what amounts to case terminating sanctions
20 against Petitioners. It is curious to note that in the case of co-defendant Jacuzzi,
21 the District Court had issued multiple discovery orders against Jacuzzi, and then,
22 after conducting four (4) days of evidentiary hearings, determined that Jacuzzi had
23 violated those orders prior to striking Jacuzzi's Answer. In the case of Jacuzzi,
24 there were actual court orders to interpret to determine whether they had been
25 violated and whether and to what extent sanctions were warranted.
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1 In stark contrast, in the case of Petitioners, it is understandable, though not
2 justifiable, why the District Court may have wanted to avoid an evidentiary
3 hearing without any discovery orders to interpret.⁴ The complexity of the issues in
4 this case required an evidentiary hearing in the case of co-Defendant Jacuzzi, and
5 the District Court obviously felt compelled to conduct the four (4) day, two (2)
6 phase, evidentiary hearing in that case. The discovery issues involving Petitioners
7 are no less complex, and the District Court's failure to allow an evidentiary
8 hearing constitutes an abuse of discretion and further illustrates the necessity for a
9 violation of a court order to occur prior to the imposition of sanctions against a
10 party.
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15 **VI. CONCLUSION**

16 For the foregoing reasons, Petitioners firstSTREET For Boomers &
17 Beyond, Inc. and AITHR Dealer, Inc. urge this Court for issuance of a Writ of
18 Mandamus, commanding Respondents, the Eighth Judicial District Court and the
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22 ⁴ Petitioners' Answer was stricken just days before a new judge would be
23 assigned to this case, due to Judge Scotti failing to retain the bench following the
24 November 2020 election. Moreover, the speed at which Petitioners' Answer was
25 stricken, compared to that of co-Defendant Jacuzzi, is staggering. Plaintiffs filed a
26 Motion for Reconsideration on May 15, 2019; a hearing was held on July 1, 2019;
27 the evidentiary hearing took place on September 16, 17, 18 and October 1, 2020;
28 and the Order striking co-Defendant Jacuzzi's Answer was signed on November
18, 2020. Whereas Plaintiffs' motion against Petitioners was filed on October 9,
2020; a hearing was held on November 19, 2020; and the Order was signed by the
District Court on December 31, 2020 – the day before Judge Scotti left the bench.

1 Honorable Crystal Eller⁵ to vacate its December 28, 2020 Order granting
2 Plaintiffs' Renewed Motion to Strike Defendants FirstSTREET For Boomers &
3 Beyond, Inc. and AITHR Dealer, Inc.'s Answers to Plaintiffs' Fourth Amended
4 Complaint.
5

6 DATED this 16th day of August, 2021.
7

8 THORNDAL ARMSTRONG DELK
9 BALKENBUSH & EISINGER
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11 
12

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27 ⁵ The original ruling was made by the Honorable Richard F. Scotti. However,
28 Judge Scotti lost the November 2020 election and Judge Eller is the current
presiding judge over this case.

VERIFICATION

**STATE OF NEVADA }
COUNTY OF CLARK } SS:**

Pursuant to NRAP 21(a)(5), I, PHILIP GOODHART, ESQ., being first duly sworn on oath, deposes and states under penalty of perjury that the following is true and correct, and of my own personal knowledge:

1. I am an attorney licensed to practice in the State of Nevada, and am Partner at the law firm of Thorndal, Armstrong, Delk, Balkenbush & Eisinger, attorneys for Petitioners first STREET For Boomers & Beyond, Inc. and AITHR Dealer, Inc.'s.

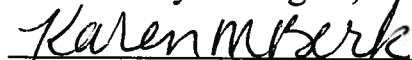
2. I certify that I have read this Petition, and to the best of my knowledge, information and belief, this Petition complies with the form requirements of Rule 21(d) and is not frivolous or interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

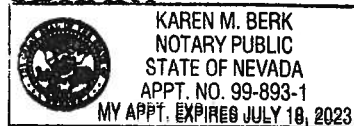
FURTHER, YOUR AFFIANT SAYETH NAUGHT.

Executed on August 16th, 2021.


PHILIP GOODHART

SUBSCRIBED and SWORN to before me
this 16th day of August, 2021, by PHILIP GOODHART





NOTARY PUBLIC in and for the County of Clark, State of Nevada

CERTIFICATE OF COMPLIANCE

1
2 1. I hereby certify that this brief complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and
4 the type style requirements of NRAP 32(a)(6) because this brief has been prepared
5 in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times
6 New Roman Font.
7
8

9 2. I further certify that this brief complies with the page and type volume
10 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted
11 from NRAP 32(a)(7)(C), it is proportionately spaced, has a type face of 14 points
12 or more and contains 4,630 words.
13
14

15 3. Finally, I hereby certify that I have read this brief, and to the best of
16 my knowledge, information, and belief, it is not frivolous or interposed for any
17 improper purpose. I further certify that this brief complies with all applicable
18 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which
19 requires every assertion in the brief regarding matters in the record to be
20 supported by a reference to the page and volume number, if any, of the transcript
21
22

23 ///

24 ///

25 ///


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27 ///

1 or appendix where the matter relied on is to be found. I understand that I may be
2 subject to sanctions in the event that the accompanying brief is not in conformity
3 with the requirements of the Nevada Rules of Appellate Procedure.
4

5 DATED this 16th day of August, 2021.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On August 16, 2021, I caused to be served a true and correct copy of the foregoing TO PETITION FOR WRIT OF MANDAMUS upon the following by the method indicated:

- × **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below:

Honorable Crystal Eller
Eighth Judicial District Court, Dept. XIX
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155

- × **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

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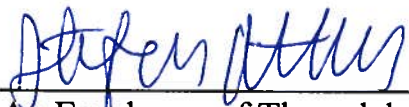
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NOTE – DEFENDANTS HOMECCLICK, LLC; BESTWAY BUILDING & REMODELING, INC.; WILLIAM BUDD, Individually and as BUDDS PLUMBING have previously been dismissed from this lawsuit, but the caption has not been amended/revised to reflect this. Therefore there has been no service on these parties.



An Employee of Thorndal Armstrong Delk
Balkenbush & Eisinger