Case No. 83379

IN THE SUPREME COURT OF NEVADA

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

Petitioner,

vs.

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; HOMECLICK, 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 MANUFACTURERS 1 THROUGH 20; DOE 20

INSTALLERS 1 through 20; DOE CONTRACTORS 1 through 20; and DOE SUBCONTRACTORS 1 through 20, inclusive, Real Parties in Interest.

21

REAL PARTY IN INTEREST'S OPPOSITION TO MOTION FOR STAY

District Court Case No. A-16-731244-C

Benjamin P. Cloward (SBN 11087)
Ian C. Estrada (SBN 12575)
Landon D. Littlefield (SBN 15268)
RICHARD HARRIS LAW FIRM, LLP
801 South Fourth Street
Las Vegas, Nevada 89101

Attorneys for Real Parties in Interest, 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

I. INTRODUCTION

This is a product liability case. In February 2014, Sherry Cunnison slid off the seat of her Jacuzzi Walk-In Tub becoming wedged in the footwell, unable to escape. After three days, firefighters found her trapped and tried unsuccessfully to remove her, ultimately resorting to cutting the door off the tub. Sherry was rushed to the hospital where she later died of rhabdomyolysis and dehydration. Plaintiffs filed suit in February 2016. 1 RA 1-13.

Only after years of blatant and willful discovery abuse by firstSTREET/AITHR ("First Street") and Jacuzzi (collectively, "Petitioners") did Sherry learn that other people had also been stuck in this Walk-in Tub before her incident. Due to the severe and pervasive misconduct, Petitioners had their Answers stricken in January 2021 and November 2020, respectively (the "Sanction Orders").[1] 1 RA 52-70; 1 RA 14-51.

---

[1] *See* 1 RA 57 ("First Street willfully and repeatedly concealed very relevant evidence with the intent to harm and severely prejudice the Plaintiffs' ability to pursue [their] claims, in violation of their discovery obligations under NRCP 16.1."); *see also* 1 RA 39 ("Jacuzzi willfully and repeatedly violated clear and unambiguous court orders even though Jacuzzi fully understood the scope of the orders and its obligations under those orders.").

In August and October 2021, right before trial, and 7-11 months after entry of the Sanction Orders, Petitioners filed separate Writs challenging the Sanction Orders. 1 RA 71-103; 1 RA 104-147. Then, in an emergency of their own making, Petitioners filed a Motion to Stay Trial in the district court. 1 RA 148-165. That Motion was denied. 1 RA 166-174. Now, First Street filed this Emergency Motion for Stay of Trial Court Proceedings under NRAP 8 with this Court, and Jacuzzi joined.

II. ARGUMENT

Petitioners' Emergency Motion for Stay of Trial should be denied, as the NRAP 8(c) factors weigh heavily against a stay.

a. The NRAP 8(c) factors do not favor staying trial. [2]

i. Factor one: whether the object of the petition will be defeated absent a stay.

If stay is granted, the object of the appeal will only be defeated in part. Because trial has been trifurcated, Petitioners will only be precluded from presenting certain evidence in the liability phase but will

---

[2] Because Jacuzzi joined in First Street's Motion for Stay of Trial, Plaintiffs address both Jacuzzi and First Street where appropriate, and separately where different argument are presented.

be allowed to mount a full defense in the remaining phases. Thus, when weighed against other NRAP 8(c) factors, stay is not supported.

ii. Factor two: Petitioners will not suffer irreparable harm if the stay is denied.

The second factor weighs heavily against Petitioners, who argue substantial money and time will be expended if a retrial occurs. This Court has addressed **and rejected** this very argument. Specifically, this Court has stated that "litigation expenses, while potentially substantial, are neither irreparable nor serious." *Hansen v. Eighth Jud. Dist. Ct. ex rel. Cty. Of Clark,* 116 Nev. 650, 658, 6 P.3d 982, 986 (2000). Further, "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay **are not enough** to show irreparable harm.") *Id.* (cleaned up)(emphasis added). This factor heavily favors Plaintiffs. Petitioners' plea of costly litigation should be rejected.

iii. Factor three: Plaintiffs/Real Parties in Interest will be irreparably harmed if the stay is granted.

For years, Plaintiffs have been wrongfully denied relevant evidence. Neither Jacuzzi nor First Street have acted in good faith in the

discovery process and blatantly withheld relevant information.[3] *See* 1 RA 14-51; 1 RA 52-70. Because of Petitioners' discovery abuses, which led to both Answers being stricken, "Plaintiffs have lost their fundamental right to have their case heard expeditiously." 1 RA 44. Further, the district court also aptly noted "that given the target demographic of the Jacuzzi Walk-in Bathtub, some of the people involved in other incidents have since passed away, thereby forever depriving Plaintiffs of the testimony and evidence related to those incidents." 1 RA 44. This is true. Plaintiffs have been deprived testimony and evidence, and the requested Stay would only cause further deprivation. This irreparable harm is real—not just illusory.[4] Important evidence was forever lost to Plaintiffs

[3] For example, "over a year after Commissioner Bulla's July 20, 2018, Order … Jacuzzi served its Eighteenth [and Nineteenth Supplements] Supplemental NRCP 16.1 Disclosure[s]," which contained approximately 81 prior and subsequent incidents. 1 RA 34. The discovery abuses are not limited to Jacuzzi, First Street also chose to withhold at least 63 relevant incidents which has contributed to Plaintiffs' inability to gather relevant evidence. 1 RA 61. To date, on the cusp of trial, Plaintiffs/Real Parties in Interest are still obtaining information relating to other similar incidents and information that was wrongfully withheld.

[4] For example, Donald Raidt was a purchaser of the Jacuzzi Walk-In Tub who complained about slipperiness and also slipped and fell himself. 1 RA 169. His incident was known to both Jacuzzi and First Street. 1 RA 169. Yet, this incident was not turned over to Plaintiffs until July 26, 2019. 1 RA 169. Donald Raidt passed away on February 9, 2019. 1 RA

for use in their remaining punitive damages claim against Petitioners. And because of the uncertainty of how long a stay would last, any further delay will likely lead to additional evidence being lost, causing further harm and prejudice. Denial should follow.[5]

iv. *Factor four: Petitioners have no likelihood* of success on appeal

Petitioners' Writs and this Emergency Motion for Stay are Petitioners' final attempt at prolonging litigation that commenced in 2016. There is no reason to further delay this trial on grounds that Petitioners are likely succeed on appeal: they simply will not.

1. First Street's Writ has no likelihood of success

169. His relative Karen Raidt Lee also died in June 2019. 1 RA 169. And his brother, Richard Raidt died in May 2019. 1 RA 169. Donald Raidt's son also had no knowledge of Donald's injuries or the circumstances surrounding his fall. 1 RA 169. Real Parties in Interest did not learn about this until May 2021, when they attempted to depose Donald Raidt. This is not the only example where evidence and testimony were forever lost due to Petitioners' discovery abuses. 1 RA 169.

[5] First Street also argues that it produced "99%" of the documents by August 21, 2019. *See* First Street Mot. to Stay at 9:18-25. But this does not detract from the fact that between 2016 and August of 2019, First Street wrongfully withheld relevant and discoverable information that prejudiced Plaintiffs' ability to pursue its claims against First Street.

First Street primarily argues in its Writ that because no court Order was violated, Judge Scotti's rulings granting Plaintiffs' Motion to Strike the Answer was erroneous. First Street's argument fails.

NRCP 16.1(e)(3) specifically allows for two separate and distinct avenues for which a court may impose sanctions:

> If an **attorney** fails to reasonably comply with any provision of this rule, **or** if an **attorney or a party** fails to comply with an order entered under Rule 16.3, the court [should impose] appropriate sanctions in regard to the failure(s) as are just, including the following:
>
> > (A) **any of the sanctions available under Rules 37(b)** and 37(f)

(Emphasis added).

Language directly from the rule allows a judge to impose sanctions in one of two ways, both being plainly set forth: first, "If an **attorney** fails to reasonably comply with any provision of this rule; **or**," second, "if an attorney or a party fails to comply with an order pursuant to subsection (d) of this rule … ." So, when either the attorney fails to comply with the rule, or an attorney or party fails to comply with an order, "any of the sanctions available under Rules 37(b) and 37(f)" can be triggered.

Turning to Rule 37, NRCP 37(b)(2)(C) provides that one of the sanctions available is "[a]n order striking out pleadings or parts thereof,

or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default the disobedient party … ." Further, NRCP 37(c) provides that "[i]f a party fails to provide information or identify a witness as required by Rule 16.1(a)(1), 16.2(d) or (e), 16.205(d) or (e), or 26(e), the party is not allowed to use that information or witness …[and] in addition to or instead of this sanction, the court … (C) may impose other appropriate sanctions **including any** of the orders listed in Rule 37(b)(1). And in turn, Rule 37(b)(1) sets out various sanctions, including "striking pleadings in whole or part," "dismissing the action or proceeding in whole or in part," and "rendering a default judgment against the disobedient party." Thus, the Order striking First Street's Answer was well grounded in plain language of available sanctions offered by Rules 37(b), 16.1(a)(1), 16.1(e)(3) and 26. This was not error.

Further, the Order was supported by a thorough analysis and substantial evidence as required by this Court.[6] *See* 1 RA 63-64 ("An

[6] To be sure, Judge Scotti based the Sanction Order on the following wrongfully concealed evidence: (1) Sherry Cunnison's phone calls to First Street where she complained about getting stuck before she died; (2) the "Guild Surveys" containing complaints about slipping and falling while using the tub; (3) documents about and the existence of the Alert 911

analysis of the aforementioned *Young* factors, which the Court has carefully, thoughtfully, and fully considered, reveals that striking the First Street Defendants' Answer is appropriate."); *see also Young*. *See Young* v. *Johnny Ribiero Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990) (explaining the standard for administering appropriate sanctions).

2. Jacuzzi

Jacuzzi argues in its Writ that when the district court issued the Sanction Order, after the multi-day evidentiary hearing, it erred by applying a "preponderance of the evidence standard and not a "clear and convincing standard." This argument is flawed for multiple reasons.

Jacuzzi's argument that the district court's decision was error because it did not apply the standard it desires (clear and convincing) presumes that the standard advanced by Jacuzzi will ultimately be adopted by this Court. But that argument is not persuasive and highly speculative at best. This Court has had multiple opportunities to clarify what standard should be applied but has not done so.

---

system; (4) evidence of an anti-slip bathmat; (5) information about incidents of customers who slipped and/or were stuck in the tub; and (6) the "Lead Perfection" notes documenting repeated customer complaints about the slipperiness of the tub. 1 RA 58.

For instance, in the case cited in Jacuzzi's Writ, *Valley Health System, LLC v. Estate of Doe*, even though this court mentioned that Judge Scotti had justified the sanctions ordered by "clear and convincing" evidence," the court did not state that such a standard was correct or required. 134 Nev. 634, 427 P.3d 1021 (2018).

This Court's review of Judge Scotti's order in *Valley* is instructive here. There, this Court set forth the following:

> When a district court imposes case-**ending** sanctions, we apply a somewhat heightened standard of review. However, **sanctions are not considered case ending when as here, the district court strikes a party's answer thereby establishing liability, but allows the party to defend on the amount of damages.**

Id. at 638-39, 427 P.3d 1027 (cleaned up)(emphasis added).

Thus, in *Valley*, this Court distinguished between case-ending and **non** case-ending sanctions, clarifying that when case-ending sanctions were at issue the Court would apply a "heightened standard" of review, whereas for **non** case-ending sanctions, a court's sanctions "will be upheld if the district court's sanctions order is supported by substantial evidence." *Id.* This is the exact scenario we have here. Because the

Sanction Order against Jacuzzi was "non case-ending," a "heightened standard" of review (i.e., clear and convincing) is not required.

Applying that standard here, that a non case-ending sanction order must only be supported by substantial evidence, it is apparent that the district court did not error. Judge Scotti's Sanction Order was 30 pages long and it showed that the court only imposed the sanction "after thoughtful consideration of all the factors involved" and was "supported by an express, careful … and written explanation of the court's analysis" of the *Young* factors. *See Young*, 106 Nev. 88, 787 P.2d 777.

III. CONCLUSION

For the foregoing reasons, this Court should deny First Street's Motion to Stay the trial.

Dated this 17th day of November, 2021.

/s/ Benjamin P. Cloward
Benjamin P. Cloward (SBN 11087)
Ian C. Estrada (SBN 12575)
Landon D. Littlefield (SBN 15268)
RICHARD HARRIS LAW FIRM
801 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Real Parties in Interest

CERTIFICATE OF SERVICE

I certify that on November 17, 2021, I submitted the foregoing REAL PARTY IN INTEREST'S OPPOSITION TO MOTION FOR STAY for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following.

Philip Goodhart, Esq.
Meghan M. Goodwin, Esq.
Thorndal Armstrong Delk Balkenbush & Eisinger
1100 East Bridger Ave., Las Vegas, NV 89101-5315
Mail To: P.O. Box 2070, Las Vegas, NV 89125-2070
Attorneys for Petitioners, firstSTREET For Boomers & Beyond, Inc.; AITHR Dealer, Inc. and Real Party in Interest, Hale Benton

D. Lee Roberts, Jr., Esq.
Brittany M. Llewellyn, Esq.
Johnathan T. Krawcheck, Esq.
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
6385 S. Rainbow Blvd., Suite 400, Las Vegas, NV 89118
Attorneys for Real Party in Interest, Jacuzzi, Inc. dba Jacuzzi Luxury Bath

Daniel F. Polsenberg, Esq.
Joel D. Henriod, Esq.
Lewis Roca Rothgerber Christie, LLP
3993 Howard Hughes Pkwy., Suite 600, Las Vegas, NV 89169-5996
Attorneys for Real Party in Interest, Jacuzzi, Inc. dba Jacuzzi Luxury Bath

Charles Allen, Esq.
Graham Scofield, Esq.
Charles Allen Law Firm
3575 Piedmont Road, NE, Building 15, Suite L-130
Atlanta, GA 30305
Attorneys for Real Party in Interest, Robert Ansara

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

The Honorable Crystal Eller
DISTRICT COURT JUDGE – DEPT. 19
200 Lewis Avenue, Las Vegas, Nevada 89155
Respondent

NOTE - DEFENDANTS HOMECLICK, 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.

/s/ Catherine Barnhill
An Employee of Richard Harris Law Firm