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2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3 **FIRST STREET FOR BOOMERS &**
4 **BEYOND, INC.; AITHR DEALER,**
5 **INC.;**

6 **Petitioner,**

7 **v.**
8

9 **THE EIGHTH JUDICIAL DISTRICT**
10 **COURT, IN AND FOR THE COUNTY**
11 **OF CLARK, STATE OF NEVADA,**
12 **AND THE HONORABLE CRYSTAL**
13 **ELLER, DISTRICT JUDGE,**

14 **Respondents,**

15 **And**

16 **ROBERT ANSARA, as Special**
17 **Administrator of the Estate of SHERRY**
18 **LYNN CUNNISON, Deceased;**
19 **ROBERT ANSARA, as Special**
20 **Administrator of the Estate of**
21 **MICHAEL SMITH, Deceased heir**
22 **to the Estate of SHERRY LYNN**
23 **CUNNISON, Deceased; and**
24 **DEBORAH**
25 **TAMANTINI individually, and heir to**
26 **the Estate of SHERRY LYNN**
27 **CUNNISON, Deceased; HALE**
28 **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

CASE NO. 83379
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Elizabeth A. Brown
Clerk of Supreme Court
District Court No.
A-16-731244-C
Dept. No. XIX

REPLY IN SUPPORT OF MOTION FOR STAY OF TRIAL COURT PROCEEDINGS UNDER

NRAP 8

DISTRICT COURT CASE NO. A-16-731244-C

Page 1

Docket 83379 Document 2021-33378



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 21 SUBCONTRACTORS 1
through 20, inclusive,

Real Parties in Interest.

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

**REPLY IN SUPPORT OF MOTION FOR STAY OF TRIAL COURT
PROCEEDINGS UNDER NRAP 8**

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Dealer, Inc.;*



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2 **REPLY IN SUPPORT OF MOTION FOR STAY OF TRIAL COURT**
3 **PROCEEDINGS UNDER NRAP 8**

4 **RELIEF REQUESTED ON OR BEFORE NOVEMBER 24, 2021.**

5 Petitioners FIRST STREET FOR BOOMERS & BEYOND and AITHR
6 DEALER, INC., respectfully submit this Reply in Support of their Motion for
7 Stay pursuant to NRAP 8(a)(2)(A)(ii), pending consideration and resolution of
8 their Petition for Writ of Mandamus that was filed with this Court on August 17,
9 2021. Preliminarily, contrary to the arguments made in the Opposition, Petitioners
10 *did not* file an “Emergency” Motion for Stay. Pursuant to NRAP 27(e) an
11 emergency motion should only be filed if the movant requires a ruling in less than
12 14 days. Here, Petitioners filed their motion on November 10, 2021 and requested
13 relief on, or before, November 24, 2021.

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18 **I. The Factors Set Forth in NRAP 8(c) Warrant a Stay of Proceedings**
19 **Pending Resolution of the Petition.**

20 Real Party in Interest’s Opposition does not support any argument that the
21 factors set forth in NRAP 8(c) fail to support a stay of the District Court
22 proceedings. For example, and as noted, this trial has been trifurcated and the
23 District Court will allow Petitioners to mount a full defense in the punitive phases
24 of the trial. However, Petitioners are currently *prohibited* from mounting a full
25 defense as to liability and compensatory damages. Essentially, Plaintiffs argue that
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1 even though a jury could award Plaintiffs millions of dollars in damages in the
2 first phase, the object of the writ is not defeated. That is purely nonsensical.
3

4 If a stay is denied, then the trial will proceed on November 29, 2021 and
5 could very well conclude before Petitioners' writ has been decided. If Petitioners
6 are forced to proceed to trial with the current District Court order in place, then
7 Petitioners will be deprived of not only their liability defenses, but also defenses
8 that will likely reduce Plaintiffs' claimed compensatory damages. Therefore, even
9 though the District Court will allow a defense in the punitive phases of the trial,
10 the purpose of the pending writ will be completely defeated absent a stay.
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14 Focusing on the fourth factor, the likelihood of success, NRCP 16.1(e)(3)
15 does allow for the imposition of sanctions under Rules 37(b) and 37(f). However,
16 what is most important in this particular matter is that when a court looks to strike
17 a pleading it must focus on, and analyze all the factors enunciated in *Young v.*
18 *Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990). One of the most
19 important factors is whether the objectionable conduct was performed by counsel,
20 or by the party¹. This is significant inasmuch as when an Answer is stricken it is
21 the *party's conduct* that is being sanctioned, not the attorney's. *Id.* Since a party is
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27 ¹ This factor is so significant that for Plaintiffs' Motion to Strike Jacuzzi's
28 Answer, the District Court ordered a *separate evidentiary hearing* to determine if
Jacuzzi's violation of the court orders was the conduct of counsel, or of Jacuzzi.



1 not in control of the NRCP 16.1 disclosures, in order for the Answer to be
2 stricken, the party must violate a Court Order.
3

4 Without a court order in place, the *party* cannot be sanctioned under Rules
5 37(b) or 37(f). *See Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d
6 777 (1990). Again, NRCP 16.1(e)(3) envisions a clear distinction between an
7 attorney's conduct (not complying with NRCP 16.1) and a party's conduct (not
8 complying with a court order). With no discovery order, Petitioners cannot be
9 found to have violated an order of the court, and, therefore, their Answer cannot
10 be stricken.
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14 Finally, with respect to the harm that Real Party in Interest claims they will
15 suffer, their Opposition does not dispute the fact that after the district court
16 granted Real Party in Interest's Motion to Re-Open discovery for all purposes
17 (*Petitioners' Appendix*, Tab 4), no depositions of persons claiming other similar
18 incidents with the walk-in-tub (i.e., the witnesses that have "died") were
19 scheduled between December 31, 2020 and May 28, 2021 (the last day that
20 depositions could be scheduled and completed within the discovery deadline).
21
22 *Petitioners' Appendix*, Tab 5.
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24

25 Moreover, as noted in the Petitioners motion, 6,865 pages of the 6,867
26 pages Petitioners produced in this litigation (99.97%) were disclosed to Plaintiffs
27 on, or before, August 21, 2019 – over one (1) year before Plaintiffs filed their
28

1 Renewed Motion to Strike Petitioners' Answers. *Petitioners' Appendix*, Tab 6.
2
3 During that time period Real Party in Interest focused their efforts on Jacuzzi, not
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5 Petitioners. Therefore, any justice delayed rests equally in the hands of
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7 Plaintiffs/Real Party In Interest.

8 **II. Conclusion**

9 The District Court failed to properly interpret and apply NRCP 16.1 when
10 striking Petitioners Answer. The District Court further failed to properly analyze
11 all of the *Young* factors. Petitioners writ will be defeated, and Petitioners will
12 suffer irreparable harm if this stay is denied and this case proceeds to trial. Since
13 trial is currently scheduled for November 29, 2012, Petitioners request that this
14 Court issues its decision prior to November 24, 2012.
15

16 DATED this 19th day of November, 2021.
17

18 THORNDAL ARMSTRONG DELK
19 BALKENBUSH & EISINGER

20 */s/ Philip Goodhart*
21

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2. I further certify that this brief complies with the page and type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted from NRAP 32(a)(7)(C), it is proportionately spaced, has a type face of 14 points or more and contains 1,731 words.

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

///

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 19th day of November, 2021.
6

7 THORNDAL ARMSTRONG DELK
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9 */s/ Philip Goodhart*

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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 November 19, 2021, I caused to be served a true and correct copy of the foregoing
REPLY IN SUPPORT OF MOTION FOR STAY OF TRIAL COURT PROCEEDINGS UNDER NRAP 8 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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10 **NOTE** – DEFENDANTS HOMECCLICK, LLC; BESTWAY BUILDING &
11 REMODELING, INC.; WILLIAM BUDD, Individually and as BUDDS
12 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.

13 */s/ Stefanie Mitchell*

14 _____
15 An Employee of Thorndal Armstrong Delk
16 Balkenbush & Eisinger