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; 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

CASE NO. 83379

District Court No. A-16-731244-C
Dept. No. XIX

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

PETITIONERS' ANSWERING BRIEF TO PETITION FOR REHEARING

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NRAP 26.1 DISCLOSURE STATEMENT

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

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

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

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

DATED this 29th day of April, 2022.

THORNDAL ARMSTRONG DELK
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/s/ Philip Goodhart

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page

Rules

POINTS AND AUTHORITIES

I. INTRODUCTION

This case 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", collectively "Petitioners"). The tub was installed in Ms. Cunnison's home on January 27, 2014. From the date of installation to the date of the incident, Sherry 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 and she was transported to Sunrise Hospital. On February 25, 2014, while under the treatment of her doctors, Ms. Cunnison underwent an open reduction internal fixation of left distal humeral shaft. Ms. Cunnison developed sepsis following the surgery and died at the hospital on February 27, 2014.

The tub was designed and manufactured by Jacuzzi. firstSTREET developed marketing and advertising for the tub, which required Jacuzzi approval pursuant to

a contract between firstSTREET and Jacuzzi. AITHER sold the tub to Ms. Cunnison.

Plaintiffs filed the original complaint on February 3, 2016, alleging Negligence, and Strict Product Liability Defective Design, Manufacture and/or Failure to Warn. The Complaint was based on a theory of a defective drainage system and alleged that the incident occurred when Ms. Cunnison "attempted [sic] exit the Jacuzzi walk-in tub by pulling the plug to let the water drain, allowing her to open the Jacuzzi walk in tub's door and exit. The drain would not release trapping SHERRY in the tub for 48 hours." [Complaint, ¶24]. These allegations remained substantially the same throughout several amended complaints until the Plaintiffs filed their Fourth Amended Complaint on June 21, 2017. The Fourth Amended Complaint added several breach of warranty causes of action and a cause of action for punitive damages, and was based on an entirely new theory that the tub was dangerous, not because of the drainage system, but because of "the inability to get back up or exit the tub if Plaintiff fell." [Fourth Amended Complaint, ¶40]. Thus, though substantial discovery had already been conducted prior to Plaintiffs' Fourth Amended Complaint, Plaintiffs moved the goal posts and documents that were relevant prior to the Fourth Amended Complaint may not have been relevant afterwards, and vice versa.

Though counsel for Plaintiff and Petitioners engaged in a couple EDCR 2.34 conferences regarding discovery issues, ***Plaintiffs never once filed a motion to compel against Petitioners before either the Discovery Commissioner or the District Court***. Consequently, the Discovery Commissioner never had any opportunity to decide a single discovery dispute against Petitioners, much less recommend an order for the District Court to enter. Neither did the District Court ever enter any discovery order against Petitioners. As an obvious result, ***no discovery order*** has ever been entered against Petitioners in this case and Petitioners have not violated any discovery orders.

Notwithstanding the foregoing, on October 9, 2020, Plaintiffs filed a Renewed Motion to Strike Defendant First Street for Boomers & Beyond, Inc.'s & AITHR Dealer, Inc.'s Answer to Plaintiffs' Fourth Amended Complaint[1]. Plaintiffs argued that Petitioners had failed to disclose relevant documents related to similar prior and subsequent incidents, documents related to a separate, unrelated product, a 911 Alert bracelet, potential remedial measures to address the alleged slipperiness of the floor, recordings of customer phone calls to Petitioners, Lead Perfection documents, and documents related to a customer complaint regarding the tub. Plaintiffs argued that the alleged failure to produce these documents was willful and

[1] An earlier motion to strike Petitioners' Answer was denied.

that Plaintiffs were prejudiced thereby. Plaintiffs therefore sought an order striking Petitioners' Answer to the Fourth Amended Complaint from the District Court, however, Plaintiffs never filed any motions to compel these documents prior to filing the Renewed Motion to Strike.

In its Opposition to the Renewed Motion to Strike, Petitioners argued that they have produced all relevant documents in their possession, pursuant to NRCP 16.1, and have responded to all Plaintiffs' discovery requests. Petitioners explained that they do not have access to several of the documents that Plaintiff sought, nor did they have the capacity to search through Lead Perfection documents, which were stored by a third-party. Furthermore, several documents, such as those relating to an unrelated product, the 911 Alert Pendant, which was, in certain regions of the country, included with a tub sale as a gift (as were restaurant gift cards and other gifts), were not produced because they are wholly irrelevant. Again, Plaintiffs never filed any motion to compel the production of any of these documents, or any others that they argued should have been disclosed pursuant to NRCP 16.1.

On December 28, 2020, the Honorable Richard F. Scotti granted Plaintiffs' Renewed Motion to Strike Petitioners' Answer to the Fourth Amended Complaint, finding that Petitioners willfully concealed relevant evidence with the intent to harm and severely prejudice the Plaintiffs' ability to pursue its claims, "in violation of its discovery obligations under NRCP 16.1." Specifically, the District Court stated

that, "pursuant to NRCP 16.1(e)(3), the Court strikes First Street's Answer as to liability…". The Minute Order does not cite any other basis for the sanction and does not even mention NRCP 37. On December 31, 2020, Plaintiffs prepared an Order, presumably to reflect the Court's ruling as laid out in its over four-page Minute Order, which was submitted to the Court, and which became the Sanctions Order. In that order, Plaintiffs embellished the Court's ruling, adding reference to EDCR 7.60 and *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88 (1990) where the Court never mentioned EDCR 7.60 in it Minute Order and only noted that it had "considered each of the factors set forth in *Young v. Johnny Ribeiro*…", not that the sanctions were premised on the court's inherent authority as discussed in that case. Neither the Minute Order nor the Sanctions Order cite to any specific discovery order that Petitioners violated. The District Court ignored the overwhelming case law holding that discovery sanctions may only be imposed upon a violation of a court order and that when such sanctions are as severe as striking a party's pleading, the party should be allowed an evidentiary hearing in accordance with principles of Due Process.

Following the Sanctions Order, Respondent petitioned this Court for a writ of mandamus on the basis that the sanctions were inappropriate as Petitioners had not violated any discovery order.

On December 7, 2021, Real Parties In Interest ("Cunnison") filed an Answering Brief in which they argued in detail (1) the minute order issued by the District Court constituted a discovery order, the violation of which warranted sanctions [ANSWERING BRIEF, PP. 10-12]; and (2) the "District Court also imposed sanctions under NRCP 16, NRCP 26, NRCP 37, and its inherent equitable powers to control abusive litigation practices." *Id*., p. 27. Cunnison then used over five pages to argue that the District Court relied on grounds other than NRCP 16.1(e)(3) to sanction Petitioners. *See id*., pp. 27-33.

This Court agreed with Petitioners and rejected Cunnison's arguments. On March 15, 2022, this Court granted Petitioner's petition and directed the Court Clerk to "ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its order striking petitioners' answer as to liability."

On April 4, 2022, Cunnison filed a Petition for Rehearing, arguing again that (1) the minute order of the District Court constituted a discovery order [PETITION FOR REHEARING pp. 17-2]; and (2) the District Court did not base its sanction order solely on NRCP 16.1(e)(3) as this Court's Order granting the Petition for Writ of Mandamus indicated, but that the District Court's sanction order was also premised on NRCP 37(c), EDCR 7.60, and the court's inherent powers to sanction as described in *Young v. Johnny Ribeiro Bldg., Inc*., 106 Nev. 88 (1990). [PETITION FOR REHEARING, pp. 5-17]. Both of these arguments have already

been made and briefed extensively before this Court by Cunnison in their Answering Brief to Petitioner's Petition for Writ of Mandamus.

Cunnison's primary argument is that this Court failed to read or understand the Sanctions Order as a whole, an on that basis should rehear the arguments already made in the Writ proceedings. Essentially, Cunnison disagrees with this Court's Writ of Mandamus and is asking this Court to reconsider arguments it has already heard. Rehearing is not appropriate, and Cunnison's arguments lack the same merit they lacked before. Cunnison's Petition for Rehearing should be denied.

II. STATEMENT OF THE ISSUES

1. Whether the issues raised in the Petition for Rehearing meet the standard for rehearing under NRAP 40(c)(2);

2. Whether the District Court relied on any basis, other than NRCP 16.1(e)(3) to strike Petitioner's Answer.

3. Whether the District Court abused its discretion by striking Petitioners' Answer for alleged discovery abuses in the absence of a discovery order.

III. ARGUMENT

A. The Nevada Supreme Court Did Not Misapprehend Any Material Fact Or Question Of Law Which Would Warrant Rehearing.

NRAP 40(c)(2) governs rehearing petitions and only allows rehearing "[w]hen it appears that the court has overlooked or misapprehended a material matter in the record or otherwise" or "[i]n such other circumstances as will promote

substantial justice." *Dow Chemical Co. v. Mahlum*, 115 Nev. 13, 16, 973 P.2d 842, 843 (1999). Furthermore, "[m]atters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing." NRAP 40(c)(1).

In this case, this Court has already entertained all the arguments made in the Petition for Rehearing as part of the briefing—indeed almost all of Cunnison's briefing—as part of the writ proceedings. Cunnison's suggestion that the "express terms of the sanction order were unclear" to the Court, that "the Court should have read the Sanction Order as a whole" is just another way of saying Cunnison disagrees with the conclusions drawn by the Court. Disagreement with this Court's rulings is not grounds for rehearing. On this basis alone the Court should deny the Petition for Rehearing.

B. The District Court Relied Solely On NRCP 16.1(e)(3) To Strike Petitioners' Answer.

In their Answering Brief to Petitioner's Petition for Writ of Mandamus, Cunnison's primary argument was "The District Court Did Not Abuse Its Discretion Because There Was A Prior Discovery Order And The Sanctions Were Not Limited To Just NRCP 16.1(e)(3)." [ANSWERING BRIEF, p. 26]. Cunnison then argued, for over in over eight pages that "[i]n addition to NRCP 16.1(e)(3), the District Court also imposed sanctions under NRCP 16, NRCP 26, NRCP 37, and its inherent equitable powers to control abusive litigation practices." *Id.*, p. 27. Thus,

this Court considered these arguments then, disagreed with them, and issued a Writ of Mandamus.

Nonetheless, the Petition for Rehearing again argues that the District Court relied on bases other than NRCP 16.1(e)(3), including (1) NRCP 37(c); (2) EDCR 7.60; and (3) the court's inherent powers as described in *Young v. Johnny Ribeiro Bldg., Inc*., 106 Nev. 88 (1990). [PETITION FOR REHEARING, p. 11]. Thus, this argument has already been raised and cannot be reargued on rehearing and is not grounds under NRAP 40(c)(2) for reconsideration of the Court's prior ruling. Specifically, Cunnison argues:

> If The Express Terms of the Sanction Order Were Unclear, This Court Should Have Read And Interpreted The Sanction Order As A Whole.

Id., p. 11. Cunnison suggests, without any basis, this Court did not read the Sanctions Order as a whole and therefore misinterpreted it, not that there is any material fact or question of law that was ignored (though Cunnison uses this language to imply they have met the standard for rehearing under NRAP 40(c)(2)). *See* [PETITION FOR REHEARING, pp. 11-12]. To the extent this argument depends on whether this Court read the Sanction Order "as a whole" the first time these arguments were raised, this argument is without merit.

To the extent Cunnison raises any new argument in the Petition for Rehearing, "no point may be raised for the first time on rehearing." NRAP 40(c)(1). Cunnison does not raise any actual material fact or question of law that the court overlooked

or misapprehended because the Court entertained all these arguments during the Writ proceedings. There is therefore no basis for rehearing and Cunnison's Petition should be denied. In any event, Cunnison's argument that the District Court issued any sanctions against Petitioners on any basis other than NRCP 16.1(e)(3) are without merit and even if the Court is inclined to rehear Cunnison's arguments from the Writ proceedings, the Petition for Rehearing should still be denied.

1. Neither The Minute Order Nor The Sanctions Order Cite NRCP 37(c).

The Petition for Rehearing quotes the Sanctions Order as clearly stating:

> The First Street Defendants are in violation of NRCP 16.1 and NRCP 26 because they have not produced significant portions of the above-mentioned evidence. Accordingly, sanctions under NRCP 16.1(e)(3) and NRCP 37 are appropriate.

Petition for Rehearing, p. 7. What the Petition for Rehearing ignores is that the rest of the argument in that section of the Order cited NRCP 16.1(e)(3) and incorrectly assumed sanctions could be imposed even without violation of a discovery order, which conclusion this Court specifically rejected when it granted Petitioner's Petition for Writ of Mandamus. Nowhere in the Sanctions Order does the District Court even cite to NRCP 37(c) or suggest that it is a separate basis relied upon to issue sanctions.

NRCP 16.1(e)(3) specifically provides for sanctions only after a ***party*** violates a ***discovery order***, and then, confines the available sanctions to those

outlined in NRCP 37(b)(2) and NRCP 37(f). NRCP 16(e)(3)(A). The Rule does not reference NRCP 37(c), and nowhere in the Sanctions Order or the Minute Order is NRCP 37(c) cited. It is disingenuous to suggest to this Court that a Rule that was not even cited by the District Court was a basis for the sanctions imposed.

2. EDCR 7.60 Is Not Applicable.

The Petition for Rehearing argues that EDCR 7.60 is an additional basis the District Court relied upon to impose sanctions. However, "no point may be raised for the first time on rehearing." NRAP 40(c)(1). Cunnison failed to raise this argument in their briefing in the Writ proceedings and may not raise it now. Regardless, the Minute Order is entirely silent as to EDCR 7.60, and EDCR 7.60 is not a sufficient basis to impose the sanction of striking a pleading.

EDCR 7.60(a) provides sanctions where an attorney

> without just cause or because of failure to give reasonable attention to the matter, no appearance is made on behalf of a party on the call of a calendar, at the time set for the hearing of any matter, at a pre-trial conference, or on the date of trial…

EDCR 7.60(a). Thus, EDCR allows for sanctions where a party or its attorney fails to make appearances at calendar call, the pre-trial conference or trial itself. These are not discovery sanctions. EDCR 7.60(b) states:

> The court may, after notice and an ***opportunity to be heard***, impose upon an attorney or a party any and all sanctions which may, under the facts of the case, be reasonable, including the imposition of fines, costs or attorney's fees when an attorney or a party without just cause:

> (1) Presents to the court a motion or an opposition to a motion which is obviously frivolous, unnecessary or unwarranted.
>
> (2) Fails to prepare for a presentation.
>
> (3) So multiplies the proceedings in a case as to increase costs unreasonably and vexatiously.
>
> (4) Fails or refuses to comply with ***these rules***.
>
> (5) Fails or refuses to comply with an order of a judge of the court.

EDCR 7.60(b) (emphasis added). EDCR does not provide discovery sanctions, but sanctions for failure to comply with "these rules". Furthermore, EDCR 7.60 only allows sanctions under the rule after an "opportunity to be heard", i.e., an evidentiary hearing and lists appropriate sanctions as fines, costs, and attorney's fees. Nowhere in EDCR 7.60 does the Rule suggest it is for discovery sanctions or that it is a sufficient basis to strike a pleading. EDCR 7.60 is not applicable in this case and any reliance the District Court or the Petition for Rehearing had on the rule is misplaced.

3. The District Court Cites Young As Authority For Factors To Consider When Determining Appropriate Sanctions, Not As Authority To Issue Sanctions.

The Petition for Rehearing argues that the District Court relied on the court's inherent powers to issue sanctions, as discussed in *Young v. Johnny Ribeiro Bldg., Inc*., 106 Nev. 88 (1990) to strike Respondents' Answer. This is inaccurate. The Minute Order and Sanctions Order merely reference *Young* with reference to the

factors the court should consider when issuing sanctions, not as an independent basis for issuing sanctions.

The Minute Order states:

> This Court has considered each of the factors set forth in *Young v. Johnny Ribeiro Bldg., Inc*., 106 Nev. 88 (1990) before reaching its conclusion.

[MINUTE ORDER]. There is no other reference to or discussion of *Young* in the Minute Order.

The Sanctions Order mentions Young in a similar context, while adding that the court has "inherent equitable powers" to issue sanctions. However, this is mentioned in passing and nowhere in the Sanctions Order does the Court state that it is striking Petitioners' answer ***based on*** 'inherent equitable powers'. *See* [SANCTION ORDER, p. 8:6-9:1]. There is absolutely nothing in the Sanctions Order that expressly states that the sanctions imposed on Petitioners was based on the court's inherent equitable powers. This argument, in addition to being rehashed from the Writ proceedings, is without merit.

C. Petitioners Did Not Violate Any Discovery Order Which Would Warrant Sanctions.

"Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing." NRAP 40(c)(1).

The Petition for Rehearing further argues that Petitioners violated a discovery order which warrants sanctions, pointing to a minute order that was allegedly violated. This is the same argument Cunnison made in the Writ proceedings. *See* [ANSWERING BRIEF, p. 12]. Cunnison argued then that the minute order "was a discovery order since ***the District Court had assumed all discovery*** at that point and served as a basis upon which the Sanction Order was granted." *Id*. (emphasis added). Thus, this Court entertained this very argument before issuing the requested Writ of Mandamus. This Court expressly stated:

> The Cunnison real parties in interest identify a minute order wherein the district court directed petitioners to make certain additional disclosures, arguing petitioners' purported violation of that minute order supports the sanctions under NRCP 16.1. We disagree, as a minute order is not effective for any purpose, *Rust v. Clark Cty. Sch. Dist*., 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) (concluding that "the clerk's minute order, and even an unfiled written order are ineffective for any purpose"), which would include for the purpose of imposing sanctions under NRCP 16.1(e)(3). Furthermore, the minute order was not issued pursuant to NRCP 16.3 as required by NRCP 16.1(e)(3) and the district court did not find that it was a facially clear discovery order that petitioners disobeyed.

[ORDER GRANTING PETITION FOR A WRIT OF MANDAMUS, p. 4] (emphasis added).

Notwithstanding the prior argument that the minute order was a discovery order because the District Court had assumed all discovery, and this Court's rejection of that argument, Cunnison parrots the very same argument in the Petition for Rehearing, arguing "The Court Overlooked That The Minute Order Was In Fact

A Discovery Order Because The District Court Had Assumed All Discovery Matters At That Point." [PETITION FOR REHEARING, p. 17]. Cunnison fails to present any issue of fact or law that this Court 'misapprehended', but merely tries to distinguish the *Rust* case cited by the Court by arguing that a minute order is binding because a Discovery Commissioner's oral ruling has been held to be binding in some cases. Cunnison does not cite any authority for that proposition, and, as this Court explained in granting Petitioners' Writ of Mandamus, not only was the minute order "not effective for any purpose", but the District Court did not rely on any alleged violation of a minute order, nor was the minute order issued pursuant to NRCP 16.3 as is required by NRCP 16.1(e)(3). Cunnison does not address these points in their Petition for Rehearing and there is no basis for rehearing of this Court's conclusion that the minute order is not a discovery order for purposes of NRCP 16.1(e)(3) sanctions.

…

…

…

…

IV. CONCLUSION

For the foregoing reasons, Petitioners firstSTREET For Boomers & Beyond, Inc. and AITHR Dealer, Inc. urge this Court to DENY Cunnison Real Parties In Interest's Petition for Rehearing.

DATED this 29th day of April, 2022.

THORNDAL ARMSTRONG DELK
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/s/ Philip Goodhart

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CERTIFICATE OF COMPLIANCE

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

2. I certify that this brief complies with the type-volume limitations of NRAP 40(b)(3) because it contains 4154 words.

3. Finally, I hereby certify that I have read this Answering 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

…

…

…

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

DATED this 29th day of April, 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 April 29, 2022, I caused to be served a true and correct copy of the foregoing PETITIONERS' ANSWERING BRIEF TO PETITION FOR REHEARING 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
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× **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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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/ Stefanie Mitchell

_____

An Employee of Thorndal Armstrong Delk Balkenbush & Eisinger