

IN THE SUPREME COURT OF NEVADA

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

Petitioners,

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

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

Real Party in Interest.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable RICHARD SCOTTI, District Judge
District Court Case No. A-16-731244-C

EN BANC PETITION FOR RECONSIDERATION

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as 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 disqualifications or recusal.

Robert Ansara is an individual and is Special Administrator to the Estate of Sherry Lynn Cunnison. Robert Ansara is also Special Administrator to the Estate of Michael Smith.

Deborah Tamantini is an individual.

Benjamin P. Cloward, Esq. and Ian C. Estrada, Esq. at Richard Harris Law Firm represent the above mentioned before this Court.

Dated: June 20, 2022.

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TABLE OF CONTENTS

<i>NRAP 26.1 DISCLOSURE</i>	<i>I</i>
<i>TABLE OF CONTENTS</i>	<i>III</i>
<i>TABLE OF AUTHORITIES</i>	<i>IV</i>
<i>INTRODUCTION</i>	<i>1</i>
<i>BACKGROUND</i>	<i>3</i>
<i>LEGAL STANDARD</i>	<i>6</i>
<i>ISSUES ON RECONSIDERATION</i>	<i>6</i>
<i>ARGUMENT</i>	<i>7</i>
I. THE PANEL’S ORDER IS INCONSISTENT WITH THIS COURT’S DECISION IN <i>BAHENA I</i>	<i>7</i>
II. THE PANEL’S MISAPPREHENSION OF LAW AND FACT INVOLVES A PUBLIC POLICY MATTER THAT WARRANTS THIS COURT’S RECONSIDERATION.	<i>13</i>
A. Express Language in the Sanction Order Shows that the District Court Relied on More than NRCP 16.1(e)(3) to sanction firstSTREET.....	<i>19</i>
B. Even if the Express Terms of the Sanction Order are Unclear, the Panel Should Have Read and Interpreted the Sanction Order as a Whole to Carry Out the District Court’s Intent	<i>21</i>
<i>CONCLUSION</i>	<i>23</i>
<i>CERTIFICATE OF COMPLIANCE</i>	<i>V</i>
<i>CERTIFICATE OF SERVICE</i>	<i>VI</i>

TABLE OF AUTHORITIES

CASES

<i>Allstate Ins. Co. v. Thorpe</i> , 123 Nev. 565, 570, 170 P.3d 989, 992–93 (2007).....	21
<i>Arnold v. Kip</i> , 123 Nev. 410, 418, 168 P.3d 1050, 1055 (2007)	15
<i>Bahena v. Goodyear Tire & Rubber Co.</i> , 126 Nev. 243, 250–51, 235 P.3d 592, 597 (2010).....	1, 8, 9
<i>Bass-Davis v. Davis</i> , 122 Nev. 442, 444–45, 134 P.3d 103 (2006).....	6
<i>Oxbow Constr. v. Eighth Jud. Dist. Ct.</i> , 130 Nev. 867, 875, 335 P.3d 1234, 1240 (2014).....	21
<i>Rust v. Clark Cty. Sch. Dist.</i> , 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987).....	12
<i>Vegas United Inv. Series 105, Inc. v. Celtic Bank Corp.</i> , 135 Nev. 456, 459, 453 P.3d 1229, 1231-32 (2019).....	22
<i>State v. Eighth Jud. Dist. Ct.</i> , 131 Nev. 411, 416, 351 P.3d 736, 740 (2015).....	23
<i>Young v. Johnny Ribeiro Bldg., Inc.</i> , 106 Nev. 88, 787 P.2d 777 (1990)	20

RULES

NRCP 16.1	passim
NRCP 16.1(e)(3).....	passim
NRCP 37	passim
NRCP 37(b)(1)	18
NRCP 37(c)(1).....	22
NRAP 40(a).....	6

OTHER

23 Am. Jur. 2d, <u>Depositions and Discovery</u> § 1.	13
Craig R. Delk, <i>Nevada Civil Practice Manual</i> , §16.02[1] (Jeffrey W. Stempel et al. eds., 5 th ed. 2012).....	14, 15
Diego A. Zambrano, <i>Discovery as Regulation</i> , 119 MICH. L. REV. 71, 72 (2020).....	13
Nora Freeman Engstrom, <i>The Lessons of Lone Pine</i> , 129 YALE L.J. 2, 67 (2019).....	13
Robin Page West, <i>Letters for Litigators</i> , 31 LITIGATION, Spring 2005, at 21, 25.....	13

INTRODUCTION

The Real Parties in Interest (“Cunnison”) petition for en banc reconsideration of the panel’s March 15, 2022, Order Granting Petition for a Writ of Mandamus (the “Order”). Cunnison filed a petition for rehearing on April 4, 2022. The Court issued an Order Directing Answer, but a panel of this Court (the “panel”) denied rehearing on May 5, 2022.

Under the panel’s Order; if during trial a judge makes an oral ruling, neither party has to obey the ruling unless it’s reduced to a formal written order because as the 3-panel court found, even an order that was reduced to a minute order, is “ineffective for any purpose . . .” Further, under the panel’s Order, a party has no reason to affirmatively produce any evidence in litigation because only after violation of a written order will any consequence attach. While the foregoing two sentences were not the express conclusion of this panel, they are, in fact, the result if reconsideration is not granted.

Reconsideration is necessary for two independent reasons. First, to maintain uniformity of this Court’s decisions, as the panel’s holding is inconsistent with *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 250–51, 235 P.3d 592, 597 (2010) (“*Bahena I*”). In *Bahena I*, this Court

held that a discovery commissioner's ruling, whether oral or written, "is effective and must be complied with ... once it is made," i.e., immediately. *Id.* at 250–251, 235 P.3d 597. But the panel's Order stated the district court's minute order, which dealt with discovery, had no effect whatsoever. Thus, the result is that a discovery commissioner's oral ruling must be complied with immediately, yet a district court's written minute order can be ignored without repercussion unless that ruling is reduced to a formal written order. Respectfully, that cannot be a desired result of this Court's decisions.

Second, this proceeding involves a substantial public policy issue that is the backbone of our civil litigation system: full and fair discovery. The district court's Order Striking firstSTREET's Answer as to Liability Only (the "Sanction Order")¹ found that firstSTREET "repeatedly violated" its duties under NRCP 16.1 and NRCP 26. In denying rehearing, the panel has ratified firstSTREET's conduct. This is against public policy in favor of prompt, full, and voluntary disclosures. In reaching its conclusion, the panel overlooked or misapprehended that the district court's Sanction Order relied on more bases than just NRCP

¹ PA1010-1024. ("Sanction Order")

16.1(e)(3). The Sanction should have been upheld under those additional bases. Instead, the panel ignored those bases and ratified firstSTREET's egregious discovery violations. The panel's Order is in direct contravention of public policy.

BACKGROUND

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 in the tub. The firefighters were unable to pull her from the tub and were forced to cut the door off the tub to get her out. Sherry was rushed to the hospital where she later died of dehydration and rhabdomyolysis. Plaintiffs filed suit in February 2016. 1 RA 1–13.

Only after years of blatant and willful discovery abuse by firstSTREET did Cunnison learn that a significant number of people had also slipped and been stuck in this Walk-in Tub before her incident.²

² As set forth in the Sanction Order, the following is a list of the most critical evidence that firstSTREET intentionally concealed from Plaintiffs: (1) Sherry Cunnison's recordings of phone calls to Defendant firstSTREET wherein on at least one occasion she complained about getting stuck once before she died; (2) surveys containing numerous complaints about customers slipping and/or falling while using the

Because of this severe and pervasive misconduct, the district court struck firstSTREET's Answer in in January 2021.³ Co-Defendant Jacuzzi also had its answer stricken in this case for similar misconduct.⁴

In August 2021, shortly before trial, firstSTREET filed a writ challenging the Sanction Order. firstSTREET's writ only challenged the district court's Sanction Order as it related to NRCP 16.1(e)(3). Namely, firstSTREET argued that the district court could not sanction firstSTREET absent a prior discovery order. That is, firstSTREET did

Jacuzzi walk-in tubs; (3) documents about and the existence of a 911 Alert System, which was a safety system for the walk-in tub; (4) the anti-slip bathmat installed and provided to customers in response to complaints of slipperiness; (5) documents and information about dozens of incidents of customers who had slipped and/or got stuck in the relevant Jacuzzi tub, and were either injured or had been at risk of being injured due to the slipperiness or being stuck; and (6) notes prepared by firstSTREET documenting repeated customer complaints about the slipperiness of the Jacuzzi tubs. *See* PA 1012:18–28.

³ *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.”).

⁴ *See* 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.”).

not address the district court's sanctions under NRCP 37 and under the court's inherent equitable powers.

In response, Cunnison contended, generally, (1) that the court's minute order functioned as a prior discovery order because the district court had assumed all discovery at that point; and (2) the district court sanctioned firstSTREET under multiple bases in addition to NRCP 16.1(e)(3), all of which independently support the sanction here. *See* Cunnison Answer Brief ("CAB") at 12; 26–32. Neither firstSTREET nor the panel have addressed the latter.

The panel issued its Order Granting firstSTREET's Petition for a Writ of Mandamus on March 15, 2022. Therein, the panel concluded that NRCP 16.1(e)(3) was the district court's sole basis for carrying out sanctions against firstSTREET:

We decline to consider the parties arguments relative to other rules justifying the district court's action, **as NRCP 16.1(e)(3) is the only rule the district court relied on** as a basis for imposition of sanctions in its order.⁶

That conclusion is error and is belied by the express language of the Sanction Order as discussed below. The panel also concluded that the

⁶ Order at 4, fn. 2 (emphasis added).

district court's minute order directing firstSTREET to comply with discovery did not support the sanction under NRCP 16.1(e)(3) because a minute order has no actual effect such that a party must comply with it or be subject to sanctions under NRCP 16.1(e)(3). As discussed below, this conclusion leads to an undesirable result and is inconsistent with Nevada authority.

Then, Cunnison filed a petition for rehearing on April 4, 2022. The Court issued an Order Directing Answer, but a panel of this Court denied rehearing on May 5, 2022. Now, Cunnison petitions reconsideration of the en banc Court.

LEGAL STANDARD

A petition for en banc reconsideration should be granted when necessary to secure and maintain uniformity of Nevada's [appellate court] decisions" or if the panel's order "involves a substantial precedential, constitutional or public policy issue." NRAP 40(a); *Bass-Davis v. Davis*, 122 Nev. 442, 444–45, 134 P.3d 103 (2006).

ISSUES ON RECONSIDERATION

1. Under *Bahena I*, a discovery commissioner's ruling, whether oral or written, must be given immediate effect. Here, under the panel's Order, a district court's ruling is given **no** effect; unless reduced to a

written formalized order. This means even decisions mid-trial are ineffective until reduced to writing. Also, it effectively gives the discovery commissioner more immediate authority than the district court. Is the panel's decision inconsistent or irreconcilable with *Bahena I*?

2. In the Sanction Order, the district court expressly relied on multiple bases to carry out its sanction of striking firstSTREET's Answer. But the panel overlooked those other bases and instead incorrectly found that, "NRCp 16.1(e)(3) is the only rule the district court relied on as a basis for imposition of sanctions in its order." (Emphasis added). Did the panel err, in contravention of Nevada's well-established public policy in favor of full and voluntary disclosure, by failing to consider those other bases?

ARGUMENT

I. THE PANEL'S ORDER IS INCONSISTENT WITH THIS COURT'S DECISION IN *BAHENA I*.

Reconsideration of the panel's Order is necessary to maintain uniformity of this Court's decisions. Namely, the panel's Order holding that the district court's minute order was "ineffective for any purpose," and therefore could not uphold the sanctions imposed against firstSTREET, is irreconcilable with this Court's holding in *Bahena I*.

There, this Court held that a discovery ruling, whether oral or written, must be given immediate effect. *Bahena v. Goodyear Tire & Rubber Co.*, 235 P.3d 592, 597, 126 Nev. 243, 250–51 (Nev. 2010).

In its Order, the panel stated that the minute order issued by the district court was not effective for any purpose, including as a discovery order that would support sanctions against firstSTREET:

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 is 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.⁷

That holding is irreconcilable with *Bahena I* and seemingly overextends the intended reach of *Rust*.

⁷ Order at 4.

In *Bahena I*, this Court held that a Discovery Commissioner's rulings are effective and must be complied with once made, regardless of whether the ruling is **oral or written**:⁸

A ruling by the discovery commissioner is effective and must be complied with for discovery purposes once it is made, orally or written, unless the party seeks a stay of the ruling pending review by the district court. *Id.*; EDCR 2.34(e). Goodyear failed to seek a stay of the ruling or an expedited review by the district court prior to the time to comply with the ruling, and was therefore required to comply with the discovery commissioner's directive. The failure to do so was tantamount to a violation of a discovery order as it relates to NRCP 37(b)(2). *Young*, 106 Nev. at 92, 787 P.2d at 779 (holding that a court's oral ruling was sufficient to “constitute an order to provide or permit discovery under NRCP 37(b)(2)”).

Bahena v. Goodyear Tire & Rubber Co., 235 P.3d 592, 597, 126 Nev. 243, 250–51 (Nev. 2010). Thus, this Court has expressly stated that a discovery-related ruling should be given immediate effect. That includes

⁸ Here, the district court had assumed all discovery-related matters in the case. See *CAB 12*. Thus, under *Bahena I*, the district court's minute order, which dealt with discovery, was effective the moment it was issued. And in the Sanction Order, the district court stated that it relied on the minute order to sanction firstSTREET: “on March 4, 2019, this court ordered the defendants (which included First Street and AITHR) to produce all documents relating to any slip incident in a Jacuzzi tub whether or not there was any injury.” See PA 1012:15–17.

oral rulings. Said another way, this Court made clear that there should be repercussions for failing to adhere to a discovery-related ruling. In direct contrast, the panel's Order would implicate no repercussions for failing to adhere to a court's ruling unless, and until, that ruling is put into a formal written order. Indeed, this Court's comment that "a minute order is not effective for any purpose," would seem to suggest that a district court's minute order can be ignored, whereas under *Bahena I*, discovery related ruling must be complied with immediately.⁹ The resulting effect of the panel's Order should give this Court pause.

An illustration is helpful here to showcase the effect of the panel's holding. For example, presume the parties are in a discovery dispute over the disclosure of documents. The district court rules that the defendant in that case should produce the sought-after documents immediately or face sanctions under NRCP 16.1, NRCP 37, or the court's inherent equitable powers. The defendant there, aware of the panel's Order in this case, chooses to ignore the court and does not produce the documents. At this juncture, the district court cannot issue sanctions. But the discovery commissioner under the same circumstances would have the authority to

⁹ Order at 4.

do so. The next week, the court issues a minute order directing the party to disclose the documents or face sanctions. Again, the party opts not to disclose, still aware that there's no order. At this point, under the panel's decision, the court remains without authority to issue sanctions. The plaintiffs then circulate a written order for defendant's approval as to form and content. It is only after the order is finally submitted to the court, and the court signs the order, that the defendant can be sanctioned for failure to disclose the documents. This result—where a party can avoid its statutorily mandated and court-ordered obligations without consequences—must be considered undesirable considering the importance of discovery in our system. Yet that it is the effect of the panel's Order.

Another example is if during the middle of trial, the Court orders that a party refrain from doing something, the party is not required to obey, unless and until the Court stops trial, excuses the jury, types out a formal order, signs the order, and files the order. This is not an exaggeration – this is the literal effect of the Panel's decision because

unless formalized, “the clerk's minute order, and even an unfiled written order **is ineffective for any purpose.** . . .”¹¹

Further, the Panel’s use of *Rust* extends its intended reach. The panel cited to *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) to supports its conclusion that the minute order is not effective to support sanctions. That case is distinguishable. There, the Court considered whether Rust had filed a premature notice of appeal. The district court orally pronounced judgment against Rust and Rust filed the notice of appeal without waiting for or requesting the written judgment. The Court concluded that the oral order had no effect and could not be appealed. *Id.*

Thus, *Rust* dealt with the appealability of orders, not whether a district court had authority to sanction a party for its failure to comply with a written minute order. The circumstances that were at play there are simply not considerations that should drive a decision here. And they are certainly not considerations that should ratify firstSTREET’s egregious discovery violations while simultaneously depriving every

¹¹ Order at 4 (emphasis added).

single district court in the entire State of the enforcement of any order unless and until it is reduced to writing.

II. THE PANEL'S MISAPPREHENSION OF LAW AND FACT INVOLVES A PUBLIC POLICY MATTER THAT WARRANTS THIS COURT'S RECONSIDERATION.

The discovery process is known as the “heart,” “backbone,” and “foundation” of civil litigation.¹² If a party is not required to participate in the process fully and fairly without repercussion, the very backbone of our system is rendered meaningless.

The purpose of discovery is to remove surprise from trial preparation. The discovery rules accomplish this objective by advancing the time at which disclosure can be compelled from the trial to the period preceding it, thereby reducing the possibility of surprise and obviating the need to conduct a trial blindly.¹³ Discovery should expedite the disposition of the litigation, by educating the parties in advance of trial of the real value of their claims and defenses, which may encourage

¹² Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71, 72 (2020); Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2, 67 (2019); Robin Page West, *Letters for Litigators*, 31 LITIGATION, Spring 2005, at 21, 25.

¹³ 23 Am. Jur. 2d, Depositions and Discovery § 1.

settlements. *Id.* Here, because of firstSTREET’s discovery violations, Cunnison’s ability to prepare for trial and present its case has been greatly prejudiced.¹⁴ In fact, the district court felt that Cunnison’s case was so prejudiced by these violations that it concluded the only justice available to Cunnison for these sins was to strike firstSTREET’s Answer.

NRCP 16.1 and NRCP 26 are intended to accomplish the full-disclosure purpose of the discovery rules. They do so by requiring parties to make initial disclosures **voluntarily** without awaiting request. Thus, NRCP 16.1 creates an obligation on parties to fully disclose discoverable evidence at the outset of litigation. NRCP 16.1 is intended to promote and facilitate prompt investigation, preparation, prosecution, **and full disclosure**, so that cases can be resolved quickly—by settlement or otherwise—thereby minimizing litigation delay and needless expenses to all parties and the judicial system as a whole.¹⁵

¹⁴ PA 1019 (“Plaintiffs have been substantially prejudiced by the First Street Defendants’ concealment of the evidence.”); PA 1012 (“First Street willfully and repeatedly concealed very relevant evidence with the intent to harm and severely prejudice the Plaintiffs’ ability to pursue its claims, in violation of their discovery obligations under NRCP 16.1.”).

¹⁵ Craig R. Delk, *Nevada Civil Practice Manual*, §16.02[1] (Jeffrey W. Stempel et al. eds., 5th ed. 2012).

Additionally, not only must the parties make initial disclosures under NRCP 16.1, but they must also supplement their disclosures under NRCP 26(e). The purpose of voluntary disclosure and supplementation rules is to promote the timely prosecution of litigation.¹⁶ These rules are intended to provide the parties an informed basis upon which to meaningfully approach the litigation rather than only providing such a basis after a substantial expenditure of time and resources in discovery and pretrial preparation.¹⁷ They are also intended to compel cooperation among the parties to accomplish the full disclosure objectives of the discovery rules with a minimum of time and expense consumed in procedural requirements, thereby resulting in the most efficient use of professional and judicial time. *Id.* Accomplishing these goals requires the cooperation of the parties along with firm and consistent judicial action to encourage those refusing to cooperate or honor their NRCP 16.1 obligations to do so by the imposition of meaningful sanctions. *Id.*

¹⁶ *Arnold v. Kip*, 123 Nev. 410, 418, 168 P.3d 1050, 1055 (2007).

¹⁷ Craig R. Delk, *Nevada Civil Practice Manual*, §16.02[1] (Jeffrey W. Stempel et al. eds., 5th ed. 2012).

Here, in a calculated and deliberate gambit, firstSTREET and its attorneys chose to repeatedly violate its duties and obligations to fully and fairly comply with its discovery obligations under the Rules.¹⁸ firstSTREET withheld numerous documents, witnesses, and incidents that were germane to Cunnison’s case. These discovery violations are unquestionably in violation of NRCP 16.1 and 26. Yet the panel’s Order encourages a “cat and mouse” game that, as this case illustrates, can go on for years.

By granting the writ and denying rehearing, the panel’s Order encourages other litigants to withhold relevant evidence. For instance, like here, other litigants may withhold prior incidents of slip and falls, key witness information, and incident reports and recordings, knowing that true punishment will never occur unless a *filed* order is violated. *See supra* fn. 2. Indeed, the panel’s Order enables this type of conduct that goes against the point of civil litigation; to uncover the truth.

¹⁸ *See* PA 1014 (“The First Street Defendants repeatedly violated these duties.”).

Now, with a potentially lasting negative impact on future litigants, Cunnison respectfully urges the en banc court to reconsider the panel's Order.

Here, the district court struck firstSTREET's Answer because of repeated, egregious, willful violations of NRCP 16.1.¹⁹ Where a party violates NRCP 16.1, district courts have several rules by which it can impose sanctions, not just NRCP 16.1(e)(3). First, there is no question that firstSTREET violated NRCP 16.1, as even firstSTREET agrees that the basis of the sanction was the district court's finding of NRCP 16.1 violations.²⁰ Once the district court found firstSTREET violated NRCP

¹⁹ PA 1011:18-19 ("in violation of their discovery obligations under NRCP 16.1"); PA 1013:5-7 ("But the First Street Defendants substantially ignore and overlook their obligations under NRCP 16.1 and NRCP 26"); PA 1014:21-22 ("Even so, that does not excuse First Street's failure to produce the evidence earlier in accordance with NRCP 16.1"); PA 1015:14-15 ("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."); PA 1017:3 (stating that striking a pleading is appropriate where there is "a willful failure to produce documents as required under NRCP 16.1")

²⁰ Even firstSTREET acknowledges that NRCP 16.1 was the reason the district court sought fit to strike firstSTREET's answer. *See* firstSTREET's Writ at 1:8-12; 13:24-27 ("Yet, the basis for the District Court's ruling—the violations of NRCP 16.1's disclosure requirements ...").

16.1, it expressly set forth several sources of authority that it relied on to impose the sanction against firstSTREET. But the panel ignored those bases, and erroneously concluded that NRCP 16.1(e)(3) was the district court's **sole** basis for carrying out sanctions against firstSTREET:

We decline to consider the parties arguments relative to other rules justifying the district court's action, **as NRCP 16.1(e)(3) is the only rule the district court relied on** as a basis for imposition of sanctions in its order.²¹

The panel's reliance on this conclusion shows that the panel overlooked the Sanction Order's express language stating that the sanctions were being imposed pursuant to **multiple** bases in **addition to** NRCP 16.1(e)(3). *See* Pet. for Rehearing at 5–10. These other bases are independently sufficient to uphold the sanction against firstSTREET. Namely, the district court expressly set forth two separate and independent bases to sanction firstSTREET: (1) NRCP 37 and (2) its inherent equitable powers to control abusive litigation practices.²² Neither firstSTREET nor the panel have explained why these

²¹ Order at 4, fn. 2 (emphasis added).

²² PA 1015-1017; Cunnison Answering Brief (“CAB”) 14, fn. 9.

alternative, independent bases are insufficient to support the sanction against firstSTREET here.

A. Express Language in the Sanction Order Shows that the District Court Relied on More than NRCP 16.1(e)(3) to sanction firstSTREET.

First, NRCP 37 is a basis independent of NRCP 16.1(e)(3) that the district court expressly relied on to sanction firstSTREET.²³ See CAB 26–30; Pet. for Rehearing at 6–8. In the very first paragraph of the “APPLICABLE STANDARDS” section of the Sanctions Order, the district court explained:

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.²⁴

Under a plain reading of this language, it is apparent that the district court sanctioned firstSTREET under *both* NRCP 16.1(e)(3) *and* NRCP

²³ Under NRCP 37(c)(1), there is no prerequisite for a prior order before enforcing sanctions. NRCP 37(c)(1) sets forth that where “a party fails to provide information ... as required by Rule 16.1(a)(1)” the court may impose sanctions, “including any of the orders listed in Rule 37(b)(1).” And in turn, one of the listed items in NRCP 37(b)(1) is striking a party’s pleading. Neither the panel nor firstSTREET have explained why this basis is insufficient to support the sanction here.

²⁴ PA 1015:14-16 (emphasis added).

37. This express language is contrary to this Court’s finding that “NRCP 16.1(e)(3) is the **only** rule the district court relied on as a basis for imposition of sanctions in its order.”

Second, the district court also expressly sanctioned firstSTREET pursuant to the court’s inherent equitable powers. *See* CAB at 31–32; Pet. for Rehearing at 8–10. In the “Applicable Standards” section of the Sanctions Order, the district court specifically cited to its inherent equitable powers as an **additional** basis for entering sanctions:

Additionally, in *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990), the Supreme Court of Nevada held that courts have “inherent equitable powers to dismiss actions or enter default judgments for ... abusive litigation practices. Litigants and attorneys alike should be aware that these powers may permit sanctions for discovery and other litigation abuses not specifically proscribed by statute.”²⁵ (Emphasis added).

Thus, the Sanctions Order’s discussion of the court’s inherent equitable powers is an express basis for sanctions that was separate and independent of NRCP 16.1(e)(3). In this light, it is simply incorrect that “NRCP 16.1(e)(3) is the only rule the district court relied on.” Again,

²⁵ PA1017:6-10 (emphasis added).

neither firstSTREET nor the panel explained why this was an insufficient basis to uphold the sanction.²⁶

B. Even if the Express Terms of the Sanction Order are Unclear, the Panel Should Have Read and Interpreted the Sanction Order as a Whole to Carry Out the District Court's Intent

The fact that the district court expressly listed multiple sources of authority, at minimum, makes the Sanction Order unclear as to whether NRCP 16.1(e)(3) was the only basis for the imposition of sanctions. Accordingly, this Court should have interpreted the Sanction Order to carry out the district court's intent: to sanction first street for its discovery abuses. *See* Pet. for Rehearing at 11–17.

When a district court's order is unclear, its interpretation is a question of law that this Court reviews de novo. *Oxbow Constr. v. Eighth Jud. Dist. Ct.*, 130 Nev. 867, 875, 335 P.3d 1234, 1240 (2014), *citing Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 570, 170 P.3d 989, 992–93 (2007). In *Allstate Ins. Co. v. Thorpe*, this Court held:

When reviewing a district court's judgment, we apply the rules of construction that pertain to interpreting other written instruments. We have previously explained that when unclear, a judgment's interpretation is a question of law for this

²⁶ CAB 28.

court. Additionally, we have stated that a judgment's legal effect must be determined by construing the judgment **as a whole, and that, in the case of ambiguity, the interpretation that renders the judgment more reasonable and conclusive and brings the judgment into harmony with the facts and law of the case will be employed.**

Allstate, 123 Nev. at 570, 170 P.3d at 992–93.

Here, the “Applicable Standards” section discusses NRCP 37 and expressly sets out the court’s inherent equitable powers.²⁷ And in the conclusion section of the Sanction Order, the district court ultimately concludes that “[i]n *sum* [...] the only fair remedy is to strike the First Street Defendants’ Answer[.]”²⁸ By reading the Sanctions Order to be solely based on NRCP 16.1(e)(3), this Court rendered these other provisions meaningless. *See Vegas United Inv. Series 105, Inc. v. Celtic Bank Corp.*, 135 Nev. 456, 459, 453 P.3d 1229, 1231-32 (2019) (“[t]he court should harmonize [its] provisions and seek to ensure that no provision is rendered meaningless”).

When read holistically, the district court’s intent was to sanction firstSTREET for its violations of NRCP 16.1. The bases used to carry out

²⁷ PA 1015:16, 7:8-8:20.

²⁸ PA 1021:1-2.

that intent included NRCP 37 and the court’s inherent equitable powers—not just NRCP 16.1(e)(3). The panel should have interpreted the Sanction Order to carry out the district court’s purpose: striking firstSTREET’s Answer. *See State v. Eighth Jud. Dist. Ct.*, 131 Nev. 411, 416, 351 P.3d 736, 740 (2015) (“Although the district court's order was somewhat opaque about its granting summary judgment in favor of Ad America on the takings issue, our review of the hearing transcripts confirms that this was the district court's intended disposition.”).

CONCLUSION

Cunnison respectfully requests reconsideration and contends that reconsideration is warranted under NRAP 40 because (1) the panel’s decision is inconsistent with this Court’s authority, and (2) the consequences of the panel’s Order are widespread and implicate important public policy issues. En banc reconsideration is therefore warranted.

Dated: June 20, 2022.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief compiles with the formatting, typeface requirements, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point font, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 40(b)(3) because it contains 4,648 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated: June 20, 2022.

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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:

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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.

/s/ Catherine Barnhill
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