

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

Electronically Filed  
Jun 30 2022 10:27 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Case No. 83379

20; ROE CORPORATIONS 1 through 20;  
DOE EMPLOYEES 1 through 20; DOE  
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

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### NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF EN BANC PETITION FOR RECONSIDERATION

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CUNNISON, Deceased; and DEBORAH TAMANTINI individually, and  
heir to the Estate of SHERRY LYNN CUNNISON, Deceased*

## SUPPLEMENTAL AUTHORITY

The Cunnison Real Parties in Interest give notice of supplemental authority pursuant to NRAP 31(e). The supplemental authority is *Hung v. Genting Berhard*, 138 Nev. Adv. Op. 50 (2022), a Nevada Court of Appeals Opinion that issued on June 30, 2022.

In *Hung*, the Court considered “how this court will treat an appeal when the appellant only properly challenges a district court’s order on a singular issue, even though the outcome of that order rests on multiple alternative grounds.” *Id.* at 2. The Court concluded that it was forced to affirm the district court because the district court provided alternative bases to support its ruling, and Hung “fail[ed] to challenge the validity of each alternative basis on appeal[.]” *Id.*

The Court of Appeal’s reasoning is relevant to this Court’s decision, and provides as follows:

A natural result of these fundamental waiver principles is that, when a district court provides independent alternative grounds in support of a decision later challenged on appeal, the appellant generally successfully challenge all of those grounds in its appellate briefing to obtain a reversal. ... And when appellants fail to challenge the alternative grounds in their opening brief, even if they later do so in the reply brief, the

failure to raise those issues in the opening brief results in waiver.

In this case, the district court's order of dismissal rested on four independent alternative grounds: NRCP 12(b)(2), NRCP 12(b)(5), NRCP 12(b)(6), and the doctrine of *forum non conveniens*. But the Hungs' opening brief challenged only the district court's determination regarding personal jurisdiction. Under these circumstances, the failure to properly challenge each of the district court's independent alternative grounds leaves them unchallenged and therefore intact, which results in a waiver of any assignment of error as to any of the independent alternative grounds. And the Hungs have not demonstrated otherwise. This logically forecloses their appeal as it concerns the district court's dismissal of the amended complaint.

Indeed, from a practical point of view, for us to reverse the district court's dismissal ruling, we would have to, first, raise challenges on the Hungs' behalf regarding NRCP 12(b)(5), NRCP 12(b)(6), and *forum non conveniens*; second, conceive of reasons to find fault with the district court's resolution of the issues; and then, third, use those reasons to reverse the district court's order. As another Court persuasively reasoned in an analogous situation, "[s]uffice to say, such an exercise of sua sponte judicial power would impermissibly place us in the role of advocate—far outside the boundaries of our traditional adjudicative duties." *Johnson v. Commonwealth*, 609 S.E.2d 58, 59–60 (Va. Ct. App. 2005)[.] ... So applying this principle, because the Hungs did not challenge each and every one of the district court's independent alternative grounds for dismissal of

the complaint, we summarily affirm based on the unchallenged grounds.

*Id.* at 5–7.

*Hung* supports the following legal propositions in the Cunnison Real Parties in Interest Petition:

1. “In reaching its conclusion, the panel overlooked or misapprehended that the district court’s Sanction Order relied on more bases than just NRCP 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.”

(Cunnison Pet. at 2–3).

2. “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 not address the district court’s sanctions under NRCP 37 and under the court’s inherent equitable powers.”

(Cunnison Pet. at 4–5).

3. “In response [to firstSTREET’s Writ], 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.”

(Cunnison Pet. at 5).

4. “Once the district court found firstSTREET violated NRCP 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.<sup>21</sup>

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.<sup>22</sup> Neither firstSTREET nor the panel have explained why these alternative, independent bases are insufficient to support the sanction against firstSTREET here.”

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<sup>21</sup> Order at 4, fn. 2 (emphasis added).

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

(Cunnison Pet. at 17–19).

5. *See generally*, Cunnison Pet. at 19–21 (subsection of Petition entitled “Express Language in the Sanction Order Shows that the

District Court Relied on More than NRCP 16.1(e)(3) to sanction firstSTREET.”).

6. “First, NRCP 37 is a basis independent of NRCP 16.1(e)(3) that the district court expressly relied on to sanction firstSTREET.<sup>23</sup> See CAB 26–30; Pet. for Rehearing at 6–8.”

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<sup>23</sup> 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.

(Cunnison Pet. at 19).

7. “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. ... 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, neither firstSTREET nor the panel explained why this was an insufficient basis to uphold the sanction.”

(Cunnison Pet. at 20–21).

DATED: June 30, 2022.

/s/ Benjamin P. Cloward  
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### **Certificate of Compliance**

I certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or imposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record be supported by reference to the page or transcript or appendix where the matter relied upon is found. In addition, I certify that this brief satisfies NRAP 32 with a word count of 1,130 words, proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook 14-point type. I understand that I may be subject to sanctions if the accompanying brief is not in conformity with the requirement of the Nevada Rules of Appellate Procedure.

Dated: June 30, 2022.

*/s/ Benjamin P. Cloward*  
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### Certificate of Service

I certify that on June 30, 2022, I submitted the foregoing “NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF EN BANC PETITION FOR RECONSIDERATION” for filing via the Court’s eFlex electronic filing system. Electronic notification will be sent to the following:

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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:

The Honorable Crystal Eller  
District court judge – Dept. 19  
200 Lewis Avenue, Las Vegas, Nevada 89155  
*Respondent*

**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  
An Employee of Richard Harris Law Firm