

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

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

5                   **Petitioners,**

6                   **v.**

7  
8   **THE EIGHTH JUDICIAL DISTRICT**  
9   **COURT, IN AND FOR THE COUNTY**  
10   **OF CLARK, STATE OF NEVADA,**  
11   **AND THE HONORABLE CRYSTAL**  
12   **ELLER, DISTRICT JUDGE,**

13                   **Respondents,**

14                   **And**

15   **ROBERT ANSARA, as Special**  
16   **Administrator of the Estate of SHERRY**  
17   **LYNN CUNNISON, Deceased;**  
18   **ROBERT ANSARA, as Special**  
19   **Administrator of the Estate of**  
20   **MICHAEL SMITH, Deceased heir**  
21   **to the Estate of SHERRY LYNN**  
22   **CUNNISON, Deceased; and DEBORAH**  
23   **TAMANTINI individually, and heir to**  
24   **the Estate of SHERRY LYNN**  
25   **CUNNISON, Deceased; HALE**  
26   **BENTON, Individually; HOMECLICK,**  
27   **LLC; JACUZZI INC., doing business as**  
28   **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**

Electronically Filed  
Aug 03 2022 03:31 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

1 MANUFACTURERS 1 through 20;  
2 DOE 20 INSTALLERS 1 through 20;  
3 DOE CONTRACTORS 1 through 20;  
4 and DOE 21 SUBCONTRACTORS 1  
5 through 20, inclusive,

6 Real Parties in Interest.

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

9  
10 **PETITIONERS' ANSWERING BRIEF TO EN BANC PETITION FOR**  
11 **RECONSIDERATION**  
12

13 Philip Goodhart  
14 Nevada Bar No. 5332  
15 Meghan M. Goodwin  
16 Nevada Bar No. 11974  
17 THORNDAL ARMSTRONG DELK  
18 BALKENBUSH & EISINGER  
19 1100 East Bridger Avenue  
20 Las Vegas, NV 89101-5315  
21 Tel.: (702) 366-0622  
22 [png@thorndal.com](mailto:png@thorndal.com)  
23 [mmg@thorndal.com](mailto:mmg@thorndal.com)

24 *Attorneys for Petitioners, firstSTREET For Boomers & Beyond, Inc.; AITHR*  
25 *Dealer, Inc.;*  
26  
27  
28

1                                   **NRAP 26.1 DISCLOSURE STATEMENT**

2           The undersigned counsel of record certifies that the following are persons  
3 and entities described in NRAP 26.1(a), and must be disclosed. These  
4 representations are made in order that the judges of this Court may evaluate  
5 possible disqualification or recusal.  
6

7  
8           firstSTREET for Boomers & Beyond, Inc. is a private company with no  
9 parent corporation.  
10

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

13           Defendant-Petitioner is represented by THORNDAL ARMSTRONG  
14 DELK BALKENBUSH & EISINGER. Defendant-Petitioner has not been  
15 represented by any other attorneys.  
16

17           DATED this 3<sup>rd</sup> day of August, 2022.  
18

19                                   THORNDAL ARMSTRONG DELK  
20                                   BALKENBUSH & EISINGER

21                                     
22                                   \_\_\_\_\_  
23                                   PHILIP GOODHART, ESQ.

24                                   Nevada Bar No. 5332

25                                   MEGHAN M. GOODWIN, ESQ.

26                                   Nevada Bar No. 11974

27                                   1100 East Bridger Avenue

28                                   Las Vegas, Nevada 89101

                                  Attorneys for Petitioners firstSTREET For  
                                  Boomers & Beyond, Inc. and AITHR Dealer, Inc.

## TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. STATEMENT OF ISSUES.....	4
III. ARGUMENT	
A. En Banc Reconsideration Is Not Warranted Under NRAP 40A(a) Or NRAP 40(c)(1) .....	7
1. The Panel Order Granting Petition for a Writ of Mandamus Is Not Contrary to <i>Bahena I</i> .....	7
2. The Panel's Order Does Not Involve a Substantial Public Policy Issue.....	10
3. Cunnison's Supplement Adds Nothing to their Arguments.....	15
IV. CONCLUSION.....	18
CERTIFICATE OF COMPLIANCE .....	20
CERTIFICATE OF SERVICE.....	23

## TABLE OF AUTHORITIES

### **Cases**

**Page**

<i>Young v. Johnny Ribeiro Bldg., Inc.</i> , 106 Nev. 88, 787 P.2d 777 (1990).....	
.....	2, 3, 13
<i>Bahena v. Goodyear Tire &amp; Rubber Co.</i> , 126 Nev. 243, 235 P.3d (2010).....	
.....	4, 6, 7, 8
<i>Rust v. Clark Cty. Sch. Dist.</i> , 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987).....	9
<i>Morrow v. Eighth Judicial Dist. Court</i> , 129 Nev. 110, 113, 294 P.3d 411, 414	
(2013).....	14
<i>Hung v. Genting Berhard</i> , 138 Nev. Adv. Op. 50 (2022).....	15
<i>Dow Chemical Co. v. Mahlum</i> , 115 Nev. 13, 16, 973 P.2d 842, 843 (1999) ...-.....	8

### **Rules**

EDCR 2.34.....	1, 7
EDCR 7.60.....	2, 3
NRCP 16.....	3, 12
NRCP 16.1.....	3, 5, 6, 9, 10, 16
NRCP 16.3.....	3, 8, 9, 15
NRCP 16.1(e)(3).....	1, 3, 4, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18
NRCP 16(e)(3)(A).....	13

1	NRCP 26.....	3, 10, 12, 14
2	NRCP 37.....	1, 3
3	NRCP 37(b)(2).....	13
4	NRCP 37(c).....	3, 13
5	NRCP 37(c)(1).....	12
6	NRCP 37(f).....	13
7	NRAP 21(a)(5).....	21
8	NRAP 28(e)(1).....	21
9	NRAP 31(e).....	16
10	NRAP 32(a)(4).....	21
11	NRAP 32(a)(5).....	21
12	NRAP 32(a)(6).....	21
13	NRAP 32(a)(7).....	21
14	NRAP 32(a)(7)(C).....	21
15	NRAP 40A(a).....	4, 5, 18
16	NRAP 40(b)(3).....	15
17	NRAP 40(c).....	18
18	NRAP 40(c)(1).....	4, 5, 11
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

## POINTS AND AUTHORITIES

### **I. INTRODUCTION**

Preliminarily, Petitioners adopt, and reference this Court to the facts outlined in Petitioners' Petition for Writ of Mandamus (*see* "Petition" at 1:3 to 5:7) and Petitioners' Answering Brief to Cunnison's Petition for Rehearing (*see* "Answering Brief" at 1:3 to 2:26). As noted in the Petition and Answering Brief, early during discovery, counsel for Plaintiffs and Petitioners engaged in several EDCR 2.34 conferences regarding discovery issues. However, *Plaintiffs never once filed a motion to compel against Petitioners before either the Discovery Commissioner or the district court.* 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, Plaintiffs filed a Renewed Motion to Strike Petitioners' Answer to Plaintiffs' Fourth Amended Complaint<sup>1</sup>, which was granted by the Honorable Richard F. Scotti. Specifically, the district court stated that, "pursuant to NRCP 16.1(e)(3), the Court strikes First Street's Answer as to liability...". (PA1005-1009). *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

---

<sup>1</sup> A discussion of the arguments contained within the Motion and Opposition are discussed in the Petition at 4:10 to 6:8 and in the Answering Brief at 3:13 to 4:20.

1 its over four-page Minute Order, which was submitted to the district court, and  
2 which became the Sanctions Order. *See* Petitioners' Appendix, Tab 10 (PA1010-  
3 1024).  
4

5 In that Order, Plaintiffs embellished the district court's ruling, adding  
6 reference to EDCR 7.60 and *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88  
7 (1990) where the Court never mentioned EDCR 7.60 in its Minute Order and only  
8 noted that it had "considered each of the factors set forth in *Young v. Johnny*  
9 *Ribeiro...*", not that the sanctions were premised on the district court's inherent  
10 authority as discussed in that case. *See* PA1005. Significantly, neither the Minute  
11 Order nor the Sanctions Order cite to any specific discovery order that Petitioners  
12 violated. The district court ignored the overwhelming case law holding that  
13 discovery sanctions may only be imposed upon a violation of a court order and that  
14 when such sanctions are as severe as striking a party's pleading, the party should be  
15 allowed an evidentiary hearing in accordance with principles of Due Process.  
16  
17  
18

19 Following the Sanctions Order, Petitioners petitioned this Court for a Writ of  
20 Mandamus on the basis that the sanctions were inappropriate as Petitioners had not  
21 violated any discovery order. Real Parties In Interest ("Cunnison") filed an  
22 Answering Brief in which they argued in detail (1) a minute order issued by the  
23 district court constituted a discovery order, the violation of which warranted  
24 sanctions (*see* Cunnison's Answering Brief, pp. 10-12); and (2) the "district court  
25  
26  
27  
28



1 also imposed sanctions under NRCP 16, NRCP 26, NRCP 37, and its inherent  
2 equitable powers to control abusive litigation practices.” *Id.*, p. 27.

3 This Court’s Panel agreed with Petitioners that “[u]nder NRCP 16.1’s plain  
4 language, for the district court to sanction a *party’s* conduct, the party must have  
5 disobeyed an order entered under NRCP 16.3...” *See* Order Granting Petition for  
6 Writ of Mandamus, p.3. The Panel explained that “the district court ignored the  
7 plain language of NRCP 16.1(e)(3) when it imposed sanctions on petitioners  
8 without first entering, and petitioners violating, an NRCP 16.3 order compelling  
9 discovery.” *Id.*, pp. 3-4.

10 Cunnison subsequently filed a Petition for Rehearing, ***arguing again*** that (1)  
11 the minute order of the district court constituted a discovery order (*see* Petition for  
12 Rehearing, pp. 17-21); and (2) the district court did not base its sanction order solely  
13 on NRCP 16.1(e)(3), but that the district court’s sanction order was also premised  
14 on NRCP 37(c), EDCR 7.60, and the court’s inherent powers to sanction as  
15 described in *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88 (1990). *See* Petition  
16 for Rehearing, pp. 5-17.

17 Petitioners filed an Answering Brief to the Petition for Rehearing, ***noting that***  
18 ***Cunnison’s arguments had already been made and briefed extensively*** before this  
19 Court by Cunnison in their Answering Brief to Petitioner’s Petition for Writ of  
20 Mandamus. Cunnison merely rehashed arguments from below and did not present  
21  
22  
23  
24  
25  
26  
27  
28

1 an appropriate basis for rehearing. *See generally* Petitioners’ Answering Brief to  
2 Petition for Rehearing.

3       After denying Cunnison’s request, Cunnison filed an En Banc Petition for  
4 Reconsideration. Cunnison’s primary arguments are (1) this Court’s Order Granting  
5 Petition for a Writ of Mandamus of March 15, 2022 conflicts with *Bahena v.*  
6 *Goodyear Tire & Rubber Co.*, 126 Nev. 243, 250-51, 235 P.3d 592, 597 (2010)  
7 (“*Bahena I*”); and (2) this Court’s Order Granting Petition for a Writ of Mandamus  
8 overlooked aspects of the district court’s sanctioning order and “incorrectly found  
9 that, NRCP 16.1(e)(3) is the only rule the district court relied on as a basis for  
10 imposition of sanctions in its order.”

11       Essentially, Cunnison disagrees with the Panel’s Writ of Mandamus and is  
12 asking this Court to reconsider arguments it has already heard from Cunnison in  
13 their Answering Brief to the Petition for Writ of Mandamus and again in their  
14 original Petition for Rehearing. En Banc Reconsideration is not appropriate, and  
15 Cunnison’s arguments lack the same merit they lacked before. Cunnison’s En Banc  
16 Petition for Rehearing should be denied.

## 17 **II. STATEMENT OF THE ISSUES**

18       1. Whether the issues raised in the En Banc Petition for Reconsideration  
19 meet the standard for rehearing under NRAP 40A(a) and NRAP 40(c)(1).  
20  
21

22 ///

23 ///

1 **III. ARGUMENT**

2 **A. En Banc Reconsideration Is Not Warranted Under NRAP 40A(a)**  
3 **Or NRAP 40(c)(1).**

4 En banc reconsideration of a decision of a panel of the Supreme Court  
5 is not favored and ordinarily will not be ordered except when (1)  
6 reconsideration by the full court is necessary to secure or maintain  
7 uniformity of decisions of the Supreme Court or Court of Appeals, or  
8 (2) the proceeding involves a substantial precedential, constitutional or  
public policy issue.

9 NRAP 40A(a).

10 **1. The Panel Order Granting Petition for a Writ of Mandamus**  
11 **Is Not Contrary to *Bahena I*.**

12 Cunnison argues that as a result of the Panel Order, “if during trial a judge  
13 makes an oral ruling, neither party has to obey the ruling unless it’s reduced to a  
14 formal written order...”. *See* En Banc Petition for Reconsideration, p. 1. Cunnison  
15 further argues that “under the Panel’s Order, a party has no reason to affirmatively  
16 produce any evidence in litigation because only after violation of a written order  
17 will any consequences attach.” *Id.*

18 These two arguments, while rather hyperbolic, completely lack merit. The  
19 issue for this Court involves an alleged violation of a ***discovery order*** that was never  
20 issued, not an oral order during trial. Moreover, there is a formal procedure, outlined  
21 in NRCP 16.1, that a party may follow to compel production of documents and seek  
22 sanctions of an opposing party for alleged failure to voluntarily produce documents  
23 during discovery. That procedure requires a party to file a motion to compel where  
24  
25  
26  
27  
28

1 the propriety of the party's claims can be fleshed out and an order can then be  
2 issued. NRCP 16.1(e)(3) provides that if a party violates such a discovery order,  
3 then sanctions may be warranted. This is a well established procedure that  
4 specifically addresses the calamities Cunnison forecasts will result from the Panel  
5 Order.  
6

7 In this case, and the impetus behind the Panel Order, Cunnison never filed a  
8 single motion to compel against Petitioners. Cunnison filed several motions to  
9 compel against defendant Jacuzzi, and is obviously familiar with the process, but  
10 never once filed a motion against Petitioners. As a necessary consequence,  
11 Petitioners never violated any discovery order, which fact the Panel acknowledged  
12 when it held "Indeed, the district court failed to identify any order petitioners  
13 violated that would justify sanctions under NRCP 16.1." *See* Panel Order, p. 4.  
14

15 Cunnison argues that reconsideration is necessary here because the Panel  
16 Order is inconsistent with *Bahena I*. Cunnison entirely misrepresents the holding in  
17 *Bahena I* and there is absolutely no inconsistency between that case and the Panel  
18 Order.  
19

20 *Bahena I* involved a rollover accident that was allegedly the result of a  
21 Goodyear tire separating from the vehicle. *Bahena I*, 126 Nev. at 246, 235 P.3d at  
22 594. Three weeks before the close of discovery, "***Bahena filed a second motion to***  
23 ***compel for sanctions*** seeking better responses to interrogatories and to require an  
24 index matching the discovery documents." *Id* (emphasis added). The discovery  
25  
26  
27  
28

1 commissioner issued a written order for Goodyear to create the requested index,  
2 and the district court approved the discovery commissioner's findings and  
3 recommendations. *Id.*

4  
5 A second dispute arose when Bahena noticed the deposition of a Goodyear  
6 representative. *Id.* Goodyear moved for a protective order, and at the hearing, the  
7 discovery commissioner "***recommended in writing***" that the deposition go forward.  
8 *Id.* (emphasis added). Goodyear did not request the discovery commissioner stay  
9 that ruling pursuant to EDCR 2.34(e) and failed to produce a witness for the noticed  
10 deposition. *Id.* at 250, 235 P.3d at 597. Thereafter, the district court "entered its  
11 order approving the discovery commissioner's recommendations retroactive to the  
12 December 14, 2006, hearing date." *Id.* at 247, 235 P.3d at 595.

15 Bahena then filed a motion for sanctions "based on Goodyear's unverified  
16 interrogatory responses and boilerplate or proprietary and trade-secret objections."  
17 *Id.* At the hearing of that motion, the court also addressed Goodyear's objections to  
18 the report and recommendation of the discovery commissioner regarding the  
19 deposition of a Goodyear representative, and sustained its prior order approving the  
20 recommendations. *Id.* The district court struck Goodyear's answer "for sanctions  
21 based upon discovery abuses." *Id.*

24  
25 The Court in *Bahena I* only supported the district court's sanction order after  
26 violation of ***multiple written discovery orders*** by the discovery commissioner,  
27 which were a ratified by the district court. Despite this, Cunnison argues the Court's  
28

1 statements that “[a] ruling by the discovery commissioner is effective and must be  
2 complied with for discovery purposes once it is made, orally or written, unless the  
3 party seeks a stay of the ruling pending review by the district court”, render *Bahena*  
4 *I* is inconsistent with the Panel Order. En Banc Petition, p. 9 (citing 126 Nev. at  
5 250-51, 235 P.3d at 597.)  
6

7         Cunnison latches on to this language and relies on it alone to suggest that the  
8 instant case is inconsistent with *Bahena I* even though the district court only struck  
9 the defendant’s answer in *Bahena I* after it found that Goodyear had violated  
10 multiple written discovery orders recommended by the discovery commissioner and  
11 approved by the district court. Those discovery orders were issued pursuant to  
12 NRCp 16.3, and only then because the moving party had filed a motion to compel  
13 against the defendant.  
14  
15

16         *Bahena I* is clearly distinguishable from the current case as Cunnison never  
17 filed a single motion to compel against Petitioners. Not one. And no discovery order  
18 was ever entered against Petitioners, as was held by the Panel of this Court. The  
19 district court never cited to any violation of any discovery order prior to issuing  
20 sanctions here, whereas in *Bahena I*, there were multiple discovery orders issued by  
21 the discovery commissioner, ratified by the district court, and then violated by the  
22 defendant. The circumstances of the two cases are entirely dissimilar and  
23 distinguishable.  
24  
25  
26  
27  
28

1           Nonetheless, this is Cunnison's primary argument for reconsideration.  
2 Cunnison identified a minute order of the court, suggesting that it could be  
3 considered a 'discovery order' for purposes of NRCP 16.1. However, as the Panel  
4 correctly held, such a minute order "is ineffective for any purpose" (citing *Rust v.*  
5 *Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987)), particularly  
6 for purposes of imposing sanctions under NRCP 16.1(e)(3). *See* Panel Order, p. 4.  
7 Moreover, the Panel held that such an order was not issued pursuant to NRCP 16.3  
8 as required by NRCP 16.1(e)(3) and significantly, "the district court did not find  
9 that it was a facially clear discovery order that petitioners disobeyed." *Id.*

10           Thus, not only is the order relied upon by Cunnison not 'effective for any  
11 purpose', it was not issued pursuant to NRCP 16.3; the district court did not even  
12 mention such an order in its sanctioning order; and clearly did not rely on any  
13 alleged violation of that order to issue the sanctions. Cunnison's reliance on that  
14 minute order, and its argument regarding inconsistency with *Bahena I*, are entirely  
15 misplaced and meritless. The plain language of NRCP 16.1(e)(3) only permits  
16 sanctions where a party violates an order issued pursuant to NRCP 16.3. No such  
17 order was ever issued, much less violated, and there is no acceptable basis for en  
18 banc reconsideration of Cunnison's En Banc Petition. This Honorable Court should  
19 DENY Cunnison's En Banc Petition.

20  
21  
22  
23  
24  
25  
26 ///

27  
28 ///

1                               **2. The Panel's Order Does Not Involve a Substantial Public**  
2                               **Policy Issue.**

3               There is no issue of public policy presented here, much less a 'substantial'  
4 issue which would warrant reconsideration. Cunnison argues the Panel Order  
5 "encourages other litigants to withhold relevant evidence" and "encourages a "cat  
6 and mouse" game that, as this case illustrates, can go on for years." *See* En Banc  
7 Petition for Reconsideration, p. 16. Cunnison ignores the fact that the Panel Order  
8 interpreted the plain language of the district court's Order and applied the clear and  
9 unambiguous Nevada Rules of Civil Procedure, and relevant case law.  
10

11  
12               Even Cunnison admits, "[h]ere, the district court struck firstSTREET's  
13 Answer because of repeated, egregious, willful violations of NRCP 16.1." *See* En  
14 Banc Petition for Reconsideration, p. 17. This comports with the district court's  
15 Minute Order re Sanctions:  
16

17                       Accordingly, pursuant to *NRCP 16.1(e)(3)*, the Court strikes First  
18 Street's Answer as to liability...

19  
20 *See* December 28, 2020 Minute Order, p.1 (PA1005)(emphasis added). It also  
21 comports with the Sanctioning Order, where the court clearly stated:

22                       Accordingly, pursuant to *NRCP 16.1(e)(3) and NRCP 26*, the Court  
23 strikes First Street and AITHR's Answer as to liability...

24  
25 *See* Sanctioning Order, p. 2:20-22 (PA1011)(emphasis added). Despite the clear  
26 language of the Minute Order, and Sanctioning Order *drafted by Cunnison's own*  
27 *counsel*, Cunnison then argues the district court relied on several other bases for  
28



1 imposing sanctions. *The Panel of the Court rejected that argument* given the  
2 above-cited language of the Orders, and noted that “NRCP 16.1(e)(3) is the only  
3 rule the district court relied on as a basis for imposition of sanctions in its order.”  
4

5 *See* Panel Order, p. 4, n. 2.

6         Nonetheless, Cunnison then argues the “panel overlooked the Sanction  
7 Order’s express language stating that the sanctions were being imposed pursuant to  
8 multiple bases in addition to NRCP 16.1(e)(3).” *See* En Banc Petition for  
9 Reconsideration, p. 18. This argument is baseless, and is the exact same argument  
10 made in Cunnison’s Answering Brief to Petition for a Writ of Mandamus (*see*  
11 Cunnison’s Answering Brief, pp. 26-29), and Petition for Rehearing. *See* Petition  
12 for Rehearing, pp. 5-11. Moreover, Cunnison also argues in their En Banc Petition  
13 for Reconsideration that “even if the express terms of the sanction order are unclear,  
14 the Panel should have read and interpreted the Sanction Order as a whole to carry  
15 out the district court’s intent.” En Banc Petition for Reconsideration, pp. 21-23. This  
16 is merely a repetition of the same argument made in Cunnison’s Petition for  
17 Rehearing (Petition for Rehearing, pp. 11-17), which argument was only raised for  
18 the first time on rehearing.<sup>2</sup>  
19  
20  
21  
22  
23  
24  
25  
26

---

27 <sup>2</sup> “Matters presented in the briefs and oral arguments may not be reargued in the  
28 petition for rehearing, and no point may be raised for the first time on rehearing.”  
NRAP 40(c)(1).

1 The district court's own Minute Order identifies only NRCP 16.1(e)(3) as the  
2 sole basis for sanctions and instructs Cunnison to draft an order for the court's  
3 signature. Cunnison's counsel then drafted the Sanctioning Order and added "and  
4 NRCP 26" to "NRCP 16.1(e)(3)", presumably for the duty to supplement discovery.  
5 It is surprising that Cunnison now refutes the statement in the En Banc Petition for  
6 Reconsideration and the language their own counsel drafted as part of the  
7 Sanctioning Order to now argue the district court's justification for awarding  
8 sanctions was broader than the express language of both orders. The Panel of this  
9 Court interpreted the orders according to their plain language and drew its  
10 conclusions accordingly.  
11

12  
13  
14 Cunnison further argues the "express language in the sanction order shows  
15 that the district court relied on more than NRCP 16.1(e)(3) to sanction  
16 firstSTREET." En Banc Petition for Reconsideration, p. 19-21. Cunnison argues  
17 the district court also imposed sanctions under NRCP 16, NRCP 26, NRCP  
18 37(c)(1), and its inherent equitable powers to control abusive litigation practices.  
19 *Id.* Cunnison, after citing the Sanctions Order, then cites NRCP 37(c)(1) in a  
20 footnote, suggesting, incorrectly, the district court relied on that rule for sanctions.  
21 *Id.*, p. 19 fn. 25.  
22  
23  
24

25 What the En Banc Petition for Reconsideration ignores is that the rest of the  
26 argument in that section of the Sanctioning Order cited to NRCP 16.1(e)(3), and  
27 incorrectly assumed that sanctions could be imposed even without violation of a  
28

1 discovery order, which conclusion this Court's Panel specifically rejected when it  
2 granted Petitioner's Petition for Writ of Mandamus. *Nowhere in the Sanctions*  
3 *Order does the district court even cite to NRCP 37(c)* or suggest that it is a separate  
4 basis relied upon to issue sanctions.  
5

6 NRCP 16.1(e)(3) specifically provides for sanctions only after a *party*  
7 violates a *discovery order*, and then, confines the available sanctions to those  
8 outlined in NRCP 37(b)(2) and NRCP 37(f). NRCP 16(e)(3)(A). The Rule does not  
9 reference NRCP 37(c), and nowhere in the Sanctions Order or the Minute Order is  
10 NRCP 37(c) cited. It is disingenuous to suggest to this Court that a Rule that was  
11 not even cited by the district court was a basis for the sanctions imposed.  
12  
13

14 The En Banc Petition for Reconsideration also argues that the district court  
15 relied on the court's inherent powers to issue sanctions, as discussed in *Young v.*  
16 *Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88 (1990), to strike Respondents' Answer. En  
17 Banc Petition for Reconsideration, p. 20. This is inaccurate. The Minute Order and  
18 Sanctions Order merely reference *Young* with reference to the factors the district  
19 court should consider when issuing sanctions, not as an independent basis for  
20 issuing sanctions. *See* PA1005. Moreover, nowhere in the Sanctions Order does the  
21 Court state that it is striking Petitioners' answer *based on* 'inherent equitable  
22 powers'. *See* PA1017, p. 8:6-9:1. There is absolutely nothing in the Sanctions Order  
23 that expressly states that the sanctions imposed on Petitioners was based on the  
24 court's inherent equitable powers.  
25  
26  
27  
28

1 Cunnison finally suggests, without any basis, the Panel did not read the  
2 Sanctions Order as a whole and therefore misinterpreted it. Cunnison does not argue  
3 that this point has any effect on considerations of uniformity among this Court's  
4 decisions, or is in any way relevant to public policy considerations and is therefore  
5 beyond the scope of issues permitted to be addressed on en banc reconsideration.  
6

7 Cunnison asks this Court to look to the intent of the district court, to surmise  
8 some hidden meaning in the Minute Order and Sanctioning Order, implying that the  
9 Orders are somehow not clear because this Court has twice rejected Cunnison's  
10 arguments. But the rule regarding statutory interpretation is even more relevant in  
11 this context. "When a rule is clear on its face, [the Court] will not look beyond the  
12 rule's plain language." *Morrow v. Eighth Judicial Dist. Court*, 129 Nev. 110, 113,  
13 294 P.3d 411, 414 (2013).  
14  
15  
16

17 Here, the district court's Minute Order and Sanctioning Order are clear on  
18 their face. Both clearly and unequivocally state that "pursuant to NRCP 16.1(e)(3),  
19 the Court strikes First Street's Answer..." (Minute Order, p. 1) (PA1005), and  
20 "pursuant to NRCP 16.1(e)(3) and NRCP 26, the Court strikes First Street and  
21 AITHR's Answer...". Sanctioning Order, p. 2:14-22 (PA1011). There is nothing  
22 ambiguous about those statements and any argument that the district court relied on  
23 any other basis other than NRCP 16.1(e)(3) to impose sanctions is misinterpreting  
24 the plain language of the district court's Orders.  
25  
26  
27  
28

1 As illustrated above, the Panel's Order does not run contrary to any existing  
2 precedent, indeed it strictly adheres to precedent. The district court's Minute Order  
3 and Sanctioning Order are facially clear and unambiguous that the sanctions were  
4 levied pursuant to alleged violations of NRCP 16.1(e)(3). However, as the Panel  
5 recognized, the plain language of NRCP 16.1(e)(3) does not permit sanctions  
6 against a party absent violation of an order issued pursuant to NRCP 16.3. The Panel  
7 found that no discovery order had been issued against Petitioners, the minute order  
8 Cunnison points to was not issued pursuant to NRCP 16.3, and the district court did  
9 not identify any discovery order that was violated in either the Minute Order or the  
10 Sanctioning Order.  
11  
12

13  
14 Cunnison has failed to demonstrate how strict adherence to the plain  
15 language of the Nevada Rules of Civil Procedure "involves a substantial ... public  
16 policy issue" that would warrant En Banc reconsideration. Cunnison's En Banc  
17 Petition should be denied.  
18

### 19 **3. Cunnison's Supplement Adds Nothing to their Arguments<sup>3</sup>**

20  
21 Cunnison filed a Notice of Supplemental Authority in Support of En Banc  
22 Petition for Reconsideration to apprise this Court of a ruling from the Nevada Court  
23 of Appeals styled *Hung v. Genting Berhard*, 138 Nev. Adv. Op. 50 (2022) wherein  
24  
25

---

26  
27 <sup>3</sup> The Supplement adds another 1,130 words to their argument, resulting in a total  
28 of 5,778 words of argument in this En Banc Petition for Reconsideration, in  
violation of NRAP 40(b)(3).

1 the Court of Appeals essentially held that an appellant abandons arguments or  
2 alternative bases of appeal by not addressing them in their opening brief. Cunnison  
3 is improperly using NRAP 31(e) to supplement their Petition for En Banc  
4 Reconsideration because the case cited as additional authority carries no  
5 precedential authority for this Court as it issues from the Court of Appeals.  
6 Moreover, it is neither “pertinent” nor “significant” as required by NRAP 31(e).  
7 Finally, the case is entirely inapposite to the issues before this Court as it does not  
8 stand for the proposition Cunnison suggests it does, and is readily distinguishable  
9 from the instant case. Cunnison’s Supplement should be disregarded to avoid  
10 distraction from the actual issues before the Court.  
11  
12  
13

14 Here, Petitioners filed their Petition for Writ of Mandamus arguing the only  
15 basis for the district court’s sanctions was NRCP 16.1(e)(3) as the Minute Order  
16 and Sanctioning Order both make abundantly clear. Cunnison filed an Answering  
17 Brief arguing there were alternative bases for the sanctions other than NRCP 16.1,  
18 albeit without any evidentiary support for the argument.  
19  
20

21 A Panel of this Court agreed with Petitioners and declined “to consider the  
22 parties’ arguments relative to other rules justifying the district court’s action as  
23 NRCP 16.1(e)(3) is the only rule the district court relied on as a basis for imposition  
24 of sanctions in its order.” Order Granting Petition for Writ of Mandamus, p. 4 n. 2.  
25 Said another way, this Court concluded the only basis for the sanctions, according  
26 to the plain language of the district court’s order was NRCP 16.1(e)(3), and therefore  
27  
28

1 the **COURT** declined to address the other parties' arguments regarding other  
2 supposed bases that did not exist. That is, this Court made the determination that  
3 the district court used a single basis for imposing sanctions as clearly stated in the  
4 Minute Order and Sanctioning Order, and therefore the **Court** declined to entertain  
5 alternative arguments. This is a clearly different situation than addressed in *Hung*,  
6 where a **party** failed to address alternative bases for a district court's order in their  
7 brief. *Hung* is easily and necessarily distinguishable from the instant case.  
8  
9

10 Here, again, the district court's sanctions were based solely on NRCP  
11 16.1(e)(3) as is clearly stated in both the Minute Order and Sanctioning Order. A  
12 Panel of this Court agreed. The Panel then proceeded to apply the plain language of  
13 the Rule and agreed with Petitioners that absent violation of a discovery order, the  
14 district court could not sanction a party pursuant to the only rule the district court  
15 relied upon in sanctioning Petitioners. Because there was never any discovery order  
16 entered against Petitioners, Petitioners could not have violated any discovery order  
17 and therefore the district court abused its discretion in sanctioning Petitioners  
18 pursuant to NRCP 16.1(e)(3).  
19  
20  
21

22 The district court in this case did not bases its order on any alternative bases  
23 as the district court in *Hung* did, and therefore any failure to raise arguments  
24 regarding nonexistent alternative bases is inconsequential and entirely inapposite to  
25 the issues before this Court.  
26

27 ///  
28

1        Additionally, Cunnison argues, inappropriately as the argument was already  
2 made and dismissed in the original Writ proceedings, that the Panel “overlooked  
3 the Sanction Order’s express language stating that the sanctions were being imposed  
4 pursuant to multiple bases in addition to NRCP 16.1(e)(3).” Notice of Supplemental  
5 Authority in Support of En Banc Petition for Reconsideration, p. 4. Cunnison is  
6 expressly arguing that *Hung* supports an argument that was made and determined  
7 by the Panel in the Writ proceedings, which is entirely inappropriate on rehearing  
8 pursuant to NRAP 40(c), which prohibits matters presented in the writ briefs from  
9 being reargued (NRAP 40(c)), and NRAP 40A(a) which limits matters for En Banc  
10 reconsideration to issues of congruity between other Nevada Supreme Court  
11 Decisions and matters “involving substantial precedential, constitutional or public  
12 policy issues.” NRAP 40A(a).  
13  
14  
15  
16

17        Cunnison does not argue that *Hung* supports any argument appropriately  
18 made in their En Banc Petition for Reconsideration but merely rehashes arguments  
19 already made in prior briefs and already determined, appropriately, by a Panel of  
20 this Court.  
21

#### 22    **IV.    CONCLUSION**

23        Venturing beyond the bounds permitted by NRAP 40A(a) to justify their En  
24 Banc Petition for Reconsideration, Cunnison repeats, for the *third time* before this  
25 Court the very same arguments made in their Answering Brief to the Petition for a  
26 Writ of Mandamus and again in their Petition for Rehearing. Cunnison also  
27  
28

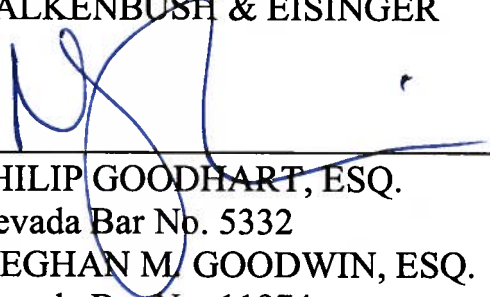


1 reiterates arguments that were only made for the first time in the Petition for  
2 Rehearing. Both times the Panel of this Court heard and rejected Cunnison's  
3 arguments. They are not any more persuasive now than they were the first two  
4 times, nor are they appropriate for purposes of the En Banc Petition for  
5 Reconsideration.  
6

7 For the foregoing reasons, Petitioners firstSTREET For Boomers & Beyond,  
8 Inc. and AITHR Dealer, Inc. urge this Court to DENY Cunnison Real Parties In  
9 Interest's En Banc Petition for Reconsideration.  
10

11 DATED this 3<sup>rd</sup> day of August, 2022.  
12

13 THORNDAL ARMSTRONG DELK  
14 BALKENBUSH & EISINGER

15   
16 \_\_\_\_\_  
17 PHILIP GOODHART, ESQ.  
18 Nevada Bar No. 5332  
19 MEGHAN M. GOODWIN, ESQ.  
20 Nevada Bar No. 11974  
21 1100 East Bridger Avenue  
22 Las Vegas, Nevada 89101  
23 Attorneys for Petitioners  
24  
25  
26  
27  
28

**VERIFICATION**

**STATE OF NEVADA }  
COUNTY OF CLARK } SS:**

Pursuant to NRAP 21(a)(5), I, MEGHAN M. GOODWIN, ESQ., being first duly sworn on oath, deposes and states under penalty of perjury that the following is true and correct, and of my own personal knowledge:

1. I am an attorney licensed to practice in the State of Nevada, and am Partner at the law firm of Thorndal, Armstrong, Delk, Balkenbush & Eisinger, attorneys for Petitioners, firstSTREET For Boomers & Beyond, Inc. and AITHR Dealer, Inc.

2. I certify that I have read this Answering Brief, and to the best of my knowledge, information and belief, this Answering Brief complies with the form requirements of Rule 21(d) and is not frivolous or interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

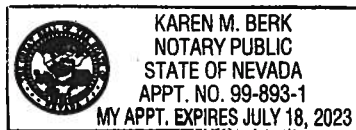
FURTHER, YOUR AFFIANT SAYETH NAUGHT.

Executed on August 3, 2022.

MEGHAN M. GOODWIN

SUBSCRIBED and SWORN to before me  
by Meghan M. Goodwin this  
this 3rd day of August, 2022.

Karen M. Berk  
NOTARY PUBLIC, Clark County, Nevada



## CERTIFICATE OF COMPLIANCE

1  
2 1. I hereby certify that this brief complies with the formatting  
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and  
4 the type style requirements of NRAP 32(a)(6) because this brief has been prepared  
5 in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times  
6 New Roman Font.  
7

8  
9 2. I further certify that this brief complies with the page and type volume  
10 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted  
11 from NRAP 32(a)(7)(C), it is proportionately spaced, has a type face of 14 points  
12 or more, and contains 4,406 words.  
13  
14

15 3. Finally, I hereby certify that I have read this Answering Brief, and to  
16 the best of my knowledge, information, and belief, it is not frivolous or interposed  
17 for any improper purpose. I further certify that this brief complies with all  
18 applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1),  
19 which requires every assertion in the brief regarding matters in the record to be  
20 supported by a reference to the page and volume number, if any, of the transcript or  
21

22 ///

23 ///

24 ///

25 ///

1 reiterates arguments that were only made for the first time in the Petition for  
2 Rehearing. Both times the Panel of this Court heard and rejected Cunnison's  
3 arguments. They are not any more persuasive now than they were the first two  
4 times, nor are they appropriate for purposes of the En Banc Petition for  
5 Reconsideration.  
6

7 For the foregoing reasons, Petitioners first STREET For Boomers & Beyond,  
8 Inc. and AITHR Dealer, Inc. urge this Court to DENY Cunnison Real Parties In  
9 Interest's En Banc Petition for Reconsideration.  
10

11 DATED this 3<sup>rd</sup> day of August, 2022.  
12

13 THORNDAL ARMSTRONG DELK  
14 BALKENBUSH & EISINGER

15   
16

17 PHILIP GOODHART, ESQ.  
18 Nevada Bar No. 5332  
19 MEGHAN M. GOODWIN, ESQ.  
20 Nevada Bar No. 11974  
21 1100 East Bridger Avenue  
22 Las Vegas, Nevada 89101  
23 Attorneys for Petitioners  
24  
25  
26  
27  
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

\* **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:

x **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.

23

1 Graham Reese Scofield, Esq., *Admitted Pro Hac Vice*  
2 CHARLES ALLEN LAW FIRM  
3 3575 Piedmont Road NE  
4 Building 15, Suite L-130  
5 Atlanta, GA 30305  
6 (404) 419-6674  
7 [graham@charlesallenlawfirm.com](mailto:graham@charlesallenlawfirm.com)  
8 *Attorneys for Plaintiff Robert Ansara*

9 D. Lee Roberts, Jr., NV Bar No. 8877  
10 Brittany M. Llewellyn, NV Bar No 13527  
11 Johnathan T. Krawcheck, *Admitted Pro Hac Vice*  
12 WEINBERG, WHEELER, HUDGINS,  
13 GUNN & DIAL, LLC  
14 6385 South Rainbow Blvd., Suite 400  
15 Las Vegas, Nevada 89118  
16 (702) 938-3838  
17 [lroberts@wwhgd.com](mailto:lroberts@wwhgd.com)  
18 [bllewellyn@wwhgd.com](mailto:bllewellyn@wwhgd.com)  
19 [jkrawcheck@wwhgd.com](mailto:jkrawcheck@wwhgd.com)  
20 *Attorneys for Defendant Jacuzzi Inc. dba*  
21 *Jacuzzi Luxury Bath*

22 Daniel F. Polsenberg, Esq.  
23 Joel D. Henriod, Esq.  
24 Abraham G. Smith, Esq.  
25 LEWIS ROCA ROTHGERBER CHRISTIE LLP  
26 3993 Howard Hughes Pkwy, Suite 600  
27 Las Vegas, NV  
28 (702) 949-8200  
[DPolsenberg@LRRC.com](mailto:DPolsenberg@LRRC.com)  
[JHenriod@LRRC.com](mailto:JHenriod@LRRC.com)  
[ASmith@LRRC.com](mailto:ASmith@LRRC.com)  
*Attorneys for Defendant Jacuzzi Inc. dba*  
*Jacuzzi Luxury Bath*

1 Philip Goodhart, Esq.  
2 Meghan M. Goodwin, Esq.  
3 THORNDAL ARMSTRONG DELK BALKENBUSH & ESIGINER  
4 1100 East Bridger Avenue  
5 Las Vegas, NV 89101-5315  
6 (702)366-0622  
7 png@thorndal.com  
8 mng@thorndal.com  
9 *Attorneys for Hale Benton*

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**  
13 **caption has not been amended/revised to reflect this. Therefore there has**  
14 **been no service on these parties.**

15 

16 An Employee of Thorndal Armstrong Delk  
17 Balkenbush & Eisinger  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28