IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 19-0521

JUNKERMIER, CLARK, CAMPANELLA, STEVENS, P.C., a Montana Professional Corporation,

Plaintiff/Appellee,

vs.

TERRY ALBORN, PAUL UITHOVEN, CHRISTINA RIEKENBERG, JOE BATESON and SHERM VELTKAMP,

Defendants/Appellees.

APPELLEE'S, JUNKERMIER, CLARK, CAMPANELLA, STEVENS, P.C., OPPOSITION TO APPELLANTS' PETITION FOR REHEARING

On Appeal From the Montana Eighteenth Judicial District, Gallatin County

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APPEARANCES:

Kirk D. Evenson
Thomas A. Marra
Marra, Evenson & Levine, P.C.
2 Railroad Square, Suite C
P.O. Box 1525
Great Falls, MT 59403-1525
(406) 268-1000
kevenson@marralawfirm.com
tmarra@marralawfirm.com

(Attorneys for Appellee)

Michael J. Lilly
Bridget W. leFeber
Berg Lilly, P.C.
1 West Main Street
Bozeman, MT 59715
(406) 587-3181
mikelilly@berglawfirm.com
bridgetl@berglawfirm.com

(Attorneys for Appellants)

T. Thomas Singer
Amanda G. Hunter
Axilon Law Group, PLLC
P.O. Box 987
Billings, MT 59103-0987
(406) 294-9466
tsinger@axilonlaw.com
ahunter@axilonlaw.com

(Attorneys for Amicus Curiae)

Carey E. Matovich
Matovich, Keller & Huso, P.C.
P.O. Box 1098
Billings, MT 59103-1098
(460) 252-5500
cmatovich@mkhattorneys.com

(Attorneys for Appellants)

I. INTRODUCTION

Appellee, Junkermier, Clark, Campanella, Stevens, P.C. ("JCCS"), opposes the *Appellants Alborn, Uithoven, Riekenberg, Bateson, and Veltkamps' Petition for Rehearing* ("Appellants") as it fails to establish that this Court overlooked some fact material to the decision and that the decision conflicted with a statute or controlling decision. M.R.App.P. 20(1)(a). Appellants' arguments in their *Petition* again raise issues that this Court decided previously and "run counter to the law of this case." *Junkermier, Clark, Campanella, Stevens, P.C. v. Alborn*, 2020 MT 179, ¶22, ____ Mont. _____, ____P.3d____, 2020 WL 3969891. Former Shareholders' *Petition for Rehearing* should therefore be denied.

II. ARGUMENT

A. A *Petition for Rehearing* is not a forum in which to rehash the arguments already made in the briefs and considered by the Court.

As this Court ruled in denying the last *Petition for Rehearing* filed in this matter: "For starters, '[a] petition for rehearing is not a forum in which to rehash arguments made in the briefs and considered by the Court.' *State ex rel. Bullock v. Philip Morris, Inc.*, 217 P.3d 475, 485 (2009)(citing M.R.App.R. 20(1)(a))." *Junkermier, Clark, Campanella, Stevens, P.C. v.*

Alborn, 2016 MT 218, 384 Mont. 464, 308 P.3d 747, *Order on Petition for Rehearing*, dated October 6, 2016. Here, the issue regarding joint and several liability was thoroughly argued in briefs and considered by the Court. Appellants ignore the comprehensively briefed issue that joint obligations can arise in contractual situations as well as torts. Mont. Code Ann. §28-1-302, upon which the Court relied, arises in Title 28, which sets forth Montana's statutes for "Contracts and Other Obligations." Appellants' citation to *Sloane v. Fauque*, 239 Mont. 383, 784 P.2d 895 (1989) is inapposite. *Sloane* dealt with the tortious actions of two or more persons acting "in concert." That does not mean "acting in concert" cannot be found in a contractual situation. See, *Williston on Contracts*, §36:1 (4th ed.) and *Restatement (Second) of Contracts* §289 (1981), as briefed by JCCS.

B. The factual premise provided by Appellants to reverse and remand for the purposes of determining each Former Shareholder's contribution with respect to the *Judgment* is not supported by the record or the law.

Appellants' *Petition for Rehearing* does not provide a substantive basis in the facts or the law to alter this Court's determination that the Appellants were jointly and severally liable for JCCS' damages. Several important facts in the record reveal that Appellants' arguments are

misinformed. Appellants' parsing from one sentence in the Opinion, does not do justice as to why this Court concluded Appellants acted in concert. Appellants ignore the totality of the basis upon which this Court concluded Appellants, acting in concert, thereby created their joint and several liability. *Id.* at ¶¶17-18. Appellants then compound their failure by mistakenly advising this Court that the entity through which Appellants performed services for JCCS' former clients, Amatics, was not a party to this action. Appellants' counterclaims against JCCS asserted on April 7, 2014, in their *Amended Answer and Counterclaims of Defendants ("Answer and Counterclaims")* reveals otherwise. Docket ("Dkt") 65.[1] In the *Answer and Counterclaims*, Amatics sued JCCS for "Tortious Interference with Contract" and "Tortious Interference With Prospective Economic Advantage." The "Prayer for Relief" in Appellants' *Answer and Counterclaims* includes: "For judgment in favor of Defendant Amatics pursuant to the 13th and 14th claims for relief in its counterclaims."

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[1] Defendants Veltkamp and Bateson were originally represented by separate counsel and filed their own Counterclaims. Dkt. 67. Later, Veltkamp and Bateson joined in a common defense and counterclaims with the other Former Shareholders. At trial, all five Former Shareholders were represented by one law firm. *Notice of Substitution of Counsel.* Dkt. 166.

The fact that Appellants, on behalf of the entity Amatics, subsequently failed or refused to pursue such claims or an appeal based upon such claims, does not change the fact the claims were made. The first *Pretrial Order* under "Defendants' Contentions" failed to mention the "Tortious Interference" claims. Nor does it mention any contribution claim between the Defendants. Dkt. 167.

The failure to even mention the "Tortious Interference" claims or contribution in the *Pretrial Order* is fatal to Appellants' *Petition for Rehearing*:

> The pretrial order supersedes the pleadings, states the issues to be tried, and controls the subsequent course of the action. *Craig v. Schell*, 1999 MT 40, ¶ 44, 293 Mont. 323, 975 P.2d 820. The purpose of the pretrial order is to prevent surprise, simplify the issues, and permit the parties to prepare for trial. *Nentwig v. United Indus.*, 256 Mont. 134, 138-39, 845 P.2d 99, 102 (1992). Failure to raise an issue in the pretrial order may result in a waiver. *Nentwig*, 256 Mont. at 138, 845 P.2d at 102 (quoting *Bache v. Gilden*, 252 Mont. 178, 181-82, 827 P.2d 817, 819 (1992)). Although we have held a pretrial order should be liberally construed to permit any issues at trial that are "embraced within its language," the theory or issue must be at least implicitly included in the pretrial order. *Nentwig*, 256 Mont. at 138-39, 845 P.2d at 102.

Ganoung v. Stiles, 2017 MT 176, ¶ 28, 388 Mont. 152, 398 P.3d 282.

Further, the previous seven years of litigation renders the claims barred under the doctrine of res judicata. As this Court held in *Balyeat Law, P.C. v. Hatch*, 284 Mont. 1, 942 P.2d 716 (1997):

> The doctrine of res judicata bars issues and claims litigated in a former action as well as issues and claims which might have been litigated in the former action. *Mills v. Lincoln County* (1993), 262 Mont. 283, 864 P.2d 1265. This Court has established that the doctrine of res judicata bars a party from relitigating a matter that the party has already had the opportunity to litigate. " 'Once there has been a full opportunity to present an issue for judicial decision in a given proceeding ... the determination of the court in that proceeding must be accorded finality as to all issues raised or which fairly could have been raised....' " *Mills*, 864 P.2d at 1267 (citing *First Bank v. District Court* (1987), 226 Mont. 515, 519–20, 737 P.2d 1132, 1134–35).

Id. at 3-4, 942 P.2d at 717.

The action by Appellants and Amatics to **jointly** pursue counterclaims against JCCS further supports this Court's determination they "acted in concert." As further indicia that Appellants "acted in concert" is their own *Proposed Findings of Fact, Conclusions of Law and Order* (Dkt. 316) at Finding of Fact 115, which states:

> Former Shareholders hired attorney Mike Cok to represent the former Bozeman JCCS Office employees named as defendants. JCCS insisted that those employees would not be dismissed from the lawsuit unless Former Shareholders indemnified them for all payments required by their Confidentiality and Post Employment

> Agreements. Former Shareholders agreed to indemnify the employees and they were dismissed from this case by stipulation on November 7, 2014.

Clearly the Appellants (Former Shareholders) agreed to jointly and severally indemnify the former employees of JCCS.

Another problem with Appellants' *Petition* is Appellant's assertion, after over seven years of litigation, that it is now incumbent upon this Court to remand to the District Court to determine the appropriate contribution as and between Appellants. The proper method for effectuating contribution as and between the Appellants, was for those Appellants to have filed cross-claims against each other seven years ago. In order to have properly preserved any action for claims like contribution or indemnity with respect to the individual Appellants, there was the need to have timely raised issues and claims "which might have been litigated in the former action." *Balyeat Law, P.C. v. Hatch*, supra, at 3-4, 942 P.2d at 717. That such issues and claims were never raised in this action, until now, means that res judicata, or for that matter collateral estoppel, precludes such claims and issues at this time. Again, the fact that Appellants never cross-claimed for contribution substantiates, rather than diminishes, this Court's basis for concluding they were "acting in concert" in every respect.

A *Petition for Rehearing* is not the appropriate procedural or substantive vehicle to address contribution issues for the first time given there has been finality as to all issues raised or which fairly could have been raised. *Id.* The failure of Appellants to have established cross-claims for contribution in their pleadings goes even beyond this Court's rule precluding consideration of an issue raised for the first time on appeal. *Ammondson v. Northwestern Corp.*, 2009 MT 331, ¶68, 353 Mont. 28, 220 P.3d 1. A *Petition for Rehearing* should not be used to address contribution claims that were never before the District Court, nor the equities of such claims.

III. CONCLUSION

For all of the foregoing reasons, Appellants' *Petition for Rehearing* should be denied.

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DATED this 7th day of August, 2020.

MARRA, EVENSON & LEVINE, P.C.
2 Railroad Square, Suite C
P.O. Box 1525
Great Falls, MT 59403-1525

By /s/ Kirk D. Evenson
Kirk D. Evenson
Attorneys for Appellee

By /s/ Thomas A. Marra
Thomas A. Marra
Attorneys for Appellee

CERTIFICATE OF COMPLIANCE

I, Kirk D. Evenson, one of the attorneys for Appellant, hereby certify that:

(1) Said APPELLEE'S, JUNKERMIER, CLARK, CAMPANELLA, STEVENS, P.C., OPPOSITION TO APPELLANTS' PETITION FOR REHEARING, filed herewith has a line spacing of 2.0, except for footnotes and quoted, indented material, which have a line spacing of 1.0;

(2) Said APPELLEE'S, JUNKERMIER, CLARK, CAMPANELLA, STEVENS, P.C., OPPOSITION TO APPELLANTS' PETITION FOR REHEARING, is proportionately spaced and uses a 14 point Times New Roman typeface; and

(3) Said APPELLEE'S, JUNKERMIER, CLARK, CAMPANELLA, STEVENS, P.C., OPPOSITION TO APPELLANTS' PETITION FOR REHEARING, has a word count of 1,466 as counted by

WordPerfect X9 for Windows, not including the Table of Contents, Table of Authorities and Certificate of Compliance.

DATED this 7th day of August, 2020.

MARRA, EVENSON & LEVINE, P.C.
2 Railroad Square, Suite C
P.O. Box 1525
Great Falls, Montana 59403-1525

By /s/ Kirk D. Evenson
Kirk D. Evenson
Attorneys for Appellee

CERTIFICATE OF SERVICE

I, Kirk D. Evenson, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Objection to Petition for Rehearing to the following on 08-07-2020:

Bridget W. leFeber (Attorney)
One West Main
Bozeman MT 59715
Representing: Terry Alborn, Joe Bateson, Christina Riekenberg, Paul Uithoven, Sherm Veltkamp
Service Method: eService

Michael J. Lilly (Attorney)
One West Main St.
Bozeman MT 59715
Representing: Terry Alborn, Joe Bateson, Christina Riekenberg, Paul Uithoven, Sherm Veltkamp
Service Method: eService

Carey E. Matovich (Attorney)
2812 1st Ave N., Suite 225
P.O. Box 1098
Billings MT 59101
Representing: Terry Alborn, Joe Bateson, Christina Riekenberg, Paul Uithoven, Sherm Veltkamp
Service Method: eService

T. Thomas Singer (Attorney)
Axilon Law Group, PLLC
PO Box 987
Billings MT 59103-0987
Representing: Applicants Opposed to Enforcing Employee Non-Competes
Service Method: eService

Amanda G. Hunter (Attorney)
115 N. Broadway, Ste 310
P.O. Box 987
Billings MT 59103-0987
Representing: Applicants Opposed to Enforcing Employee Non-Competes
Service Method: eService

Electronically Signed By: Kirk D. Evenson
Dated: 08-07-2020