IN THE SUPREME COURT OF THE STATE OF MONTANA
No. _____

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES, and THOMPSON FALLS CONGREGATION OF JEHOVAH'S WITNESSES,

Petitioners,

v.

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, SANDERS COUNTY, and THE HONORABLE ELIZABETH A. BEST, PRESIDING JUDGE,

Respondents.

PETITION FOR WRIT OF SUPERVISORY CONTROL AND MOTION FOR STAY OF PROCEEDINGS

On Petition from the Twentieth Judicial District Court,
Sanders County, Montana
Cause No. DV-16-84
The Honorable Elizabeth A. Best, Presiding

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I. INTRODUCTION

Earlier this year, this Court unanimously overturned a final judgment of the District Court and directed entry of summary judgment for these same Defendants, against this same Plaintiff, in this same action. But on remand, the District Court declined to enter final judgment for Defendants. Instead, the court ruled that Plaintiff could still litigate abandoned and precluded claims arising from these same facts. On the contrary, this Court's decision entirely disposed of this case. This Petition seeks an order directing the District Court to enter final judgment for Defendants and terminate this matter forthwith.

Alexis Nunez ("Nunez") and Holly McGowan ("McGowan") sued Defendants for negligence, negligence per se, and breach of fiduciary duty. Just before trial, they dismissed their common law negligence and breach of fiduciary duty claims and proceeded to trial only on negligence per se. The jury found against McGowan and awarded damages to Nunez. The District Court entered final judgment and Defendants appealed.

Because Nunez abandoned her other claims, the only issue on appeal was negligence per se. This Court reversed and ordered summary judgment for Defendants. *Nunez v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 2020 MT 3, ¶ 34, 398 Mont. 261, 455 P.3d 829. Each Plaintiff presented a single

negligence per se claim to the jury and, ultimately, neither prevailed. The case was over—or should have been.

On remand, Nunez filed a motion seeking another trial on the abandoned common law negligence claim, and the District Court granted her motion. But a plaintiff cannot "split" claims to get two bites at the apple. Plaintiffs must pursue all claims arising out of the transaction at the same time. *Res judicata* bars claims "that could have been litigated…." *Reisbeck v. Farmers Ins. Exch.*, 2020 MT 171, ¶ 15, 400 Mont. 345 (internal quotation marks and citation omitted).

Further, when this Court directs entry of judgment, "the questions which did actually arise on the hearing in the district court *and those which could have been there presented,*" are fully and finally "determined and adjudged." *Central Mont. Stockyards v. Fraser*, 133 Mont. 168, 186, 320 P.2d 981, 991 (1957) (emphasis added).

Pursuant to MRAP 14, Petitioners ask this Court to exercise supervisory control and direct the entry of final judgment in Petitioners' favor on all claims.

II. JURISDICTION

Nunez and McGowan filed suit against Watchtower Bible & Tract Society of New York, the Thompson Falls Congregation, Christian Congregation of Jehovah's Witnesses, and Watchtower Bible & Tract Society

of Pennsylvania ("Watchtower PA"), alleging negligence, negligence per se, and breach of fiduciary duty. Ex. A: Compl., Sept. 26, 2016; Ex. B: 1st Am. Compl., Nov. 14, 2016.

In an order denying Defendants' motion, the District Court *sua sponte* granted partial summary judgment to Nunez on negligence per se. Ex. C: Order Denying Defs.' Mot. Partial Summ. J. Claims, Aug. 30, 2018. Notwithstanding the shaky foundation for this ruling, on the eve of trial, Nunez (and McGowan) chose to dismiss their other claims and proceed only on negligence per se: "We don't have a desire to submit any other negligence theories…. We do not need to go forward with our breach of fiduciary duty…. [W]e are fine limiting our negligence claim to the negligence per se claim[,]" their attorney explained to the District Court. Ex. D: Trial Tr. 141:8-21, Sept. 24, 2018.

The District Court sought clarification: "[W]hat I understand you're saying is you're dismissing the breach of fiduciary duty cause of action…and the common law negligence cause of action…. You're just resting on the negligence per se cause of action." Plaintiffs' counsel confirmed: "That's correct, your Honor." Ex. D 141:25–142:9. Defendants' counsel also confirmed: "regardless of how it's characterized, they're dismissing negligence,

dismissing breach of fiduciary duty and proceeding on a per se with both plaintiffs." Ex. D. 143:12-15.

The jury found against McGowan. Ex. E: Verdict Form, Sept. 26, 2018. The jury was instructed that Defendants were liable as a matter of law to Nunez for negligence per se and told to determine her damages. Ex. F: Punitive Damage Form, Sept. 26, 2018. Final judgment was entered. Ex. G: Notice Entry J., Jan. 15, 2019. Defendants appealed on the sole issue of negligence per se. This Court explained: "The plaintiffs dismissed their common law negligence claims and proceeded to a jury trial on this single claim." *Nunez*, ¶ 8. This Court unanimously reversed and remanded "for entry of summary judgment in [Defendants'] favor[.]" *Nunez*, ¶ 34.

Upon remand, Nunez filed two motions: a "Motion for Leave to Proceed with Claim for Common Law Negligence," and a "Motion for Leave to File Second Amended Complaint and to Add Watchtower [PA]." Ex. H: Mot. Leave Proceed Claim Negligence & Br. Support, Jan. 23, 2020; Ex. I: Pl.'s Mot. Leave File 2d Am. Compl. & Add Watchtower PA, Feb. 6, 2020. Defendants argued that Rule 15(a)(2) does not allow a post-trial (much less post-judgment) motion to add a claim or party, that *res judicata* barred Nunez's common law negligence claim, and that this Court's mandate was to enter

"summary judgment" in Defendants' favor. Ex. J: Defs.' Resp. Pl.'s Mot. Leave File 2d Am. Compl. & Add Watchtower PA, May 4, 2020.

Nunez then withdrew the motion to add Watchtower PA. Ex. K: Pl.'s Notice Withdrawal Mot. Add Watchtower PA, May 29, 2020. The District Court promptly *granted* Nunez's motion to proceed with her common law negligence claim. The court erroneously found Defendants stipulated Nunez could reassert her common law negligence claim. Ex. L: Order Granting Leave Proceed Negligence Claim & File 2d Am. Compl., June 1, 2020.

This error saturated the court's ruling. Ex. L 3 (The claim was "dismissed without prejudice, with an agreement that it could be reasserted"); Ex. L 3 (It was "clear from that agreement, and the record, that the parties understood that the common law negligence claim may be reasserted…."); Ex. L 3-4 ("The parties...took care to dismiss the claim without prejudice, leaving the door open for Nunez to reassert it if necessary…. The parties explicitly agreed to leave the door open for pursuit of the common law negligence claim."); Ex. L 4 ("The parties expressly agreed that the common law claim of negligence could be reasserted"); Ex. L 5 ("Allowing Nuñez to now proceed with the common law claim is therefore consistent with the parties' agreement.").

This was completely wrong. Even Nunez knew it. Thus, she filed a motion to alter or amend, explaining the order "conflate[s] the parties' stipulation to dismiss Defendant Watchtower [PA] with Plaintiff's in-court, pre-trial withdrawal" of her common law negligence claims." Ex. M: Pl.'s Mot. Alter Amend Order & Br. Support 2, June 9, 2020. Nunez conceded "there was no express agreement" to allow Nunez "to reassert her common law negligence claims[.]" Ex. M 2-3. (There was no *implied* agreement, either.) Nunez acknowledged she simply made a strategic decision to dismiss that claim. Ex. M 3.

Defendants filed a response and cross motion to alter or amend arguing that the error undermined the court's reasoning and that "nothing in Montana law allows a plaintiff a second trial" for an abandoned claim. Ex. N: Resp. Pl.'s Mot. Alter Amend Order & Cross Mot. Alter Amend & Br. Support 8, June 15, 2020.

Without considering Defendants' response, the District Court amended its order but still granted Nunez's motion. The court's Amended Order begins, "Plaintiffs Alex [sic] Nuñez and Holly McGowan (Nuñez)[1] have moved to

[1] As Defendants repeatedly pointed out, McGowan was not a party to the motion. The District Court's original Order made this same mistake.

alter or amend the Court's Order granting leave to amend the Complaint because the Court relied in part on a factual error." Ex. O: Order Amending Order Granting Leave Proceed Negligence Claim & File 2d Am. Compl. 2, June 10, 2020. The court acknowledged its error, but again granted Nunez's motion stating Nunez "[detrimentally] reli[ed] on the correctness of the District Court order" granting her partial summary judgment on her negligence per se claim, "but [Nunez] carefully dismissed her common law claim without prejudice, so that she could reassert it." Ex. O 2, 4. This was still wrong. Nunez did not "carefully dismiss[] her common law negligence claim without prejudice" or raise any possibility of reasserting it. She orally informed the court on the eve of trial that she was abandoning the claim, and would not present it to the jury. Her post-appeal motion is a request for relief from the binding effects of her trial strategy.

III. ARGUMENT

A. This case is appropriate for supervisory control.

The Montana Constitution gives this Court control over trial courts. Mont. Const. art. VII, § 2.2. MRAP 14 codifies this power: "The supreme court has supervisory control over all other courts and may...supervise another court by way of a writ of supervisory control." MRAP 14(3). This "extraordinary remedy" is appropriate when the "normal appeal process [is] inadequate[]" or

"the case involves purely legal questions[]" and the District Court "is proceeding under a mistake of law and is causing a gross injustice[]…." MRAP 14(3). This situation exists "when a cause in the District Court is mired in procedural entanglements and an appeal is not an adequate remedy[.]" *State ex rel. Deere & Co. v. 5th Jud. Dist.*, 224 Mont. 384, 399, 730 P.2d 396, 406 (1986).

This case should be over. After trial and appeal, this Court directed judgment in Defendants' favor. If this continues and the jury rejects Nunez's common law negligence claim, can she then resurrect her breach of fiduciary duty claim? And if that fails, what about another theory?

An ordinary appeal is not an adequate remedy because the very purpose of *res judicata* is to bring a "definite end" to litigation and prevent "piecemeal, collateral attacks against judgments." *Brilz v. Metro. Gen. Ins. Co.*, 2012 MT 184, ¶ 18, 366 Mont. 78, 285 P.3d 494 (citation omitted). Further, this petition presents a "purely legal question[]"[2] and the District Court is "proceeding under a mistake of law and is causing a gross injustice[]." MRAP 14(3).

[2] The "application of claim preclusion presents an issue of law[.]" *Asarco LLC v. Atl. Richfield Co.*, 2016 MT 90, ¶ 10, 383 Mont. 174, 369 P.3d 1019.

B. *Res judicata* bars Nunez's common law negligence claim.

Res judicata "prevents a party from relitigating a matter that the party has already had an opportunity to litigate." *Bragg v. McLaughlin*, 1999 MT 320, ¶ 15, 297 Mont. 282, 993 P.2d 662, *overruled in part on other grounds*. There are two branches: issue preclusion and claim preclusion. Claim preclusion does not apply to a particular issue; it blocks "'all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.'" *Brilz*, ¶ 23 (quoting Restatement (Second) of Judgments § 24). "The law of res judicata now reflects the expectation that parties who are given the capacity to present their 'entire controversies' shall in fact do so." *Brilz*, ¶ 24 (internal quotation marks and citation omitted).

The elements of claim preclusion are:

(1) The parties or their privies are the same;

(2) The subject matter of the present and past actions is the same;

(3) The issues are the same and relate to the same subject matter;

(4) The capacities of the parties are the same to the subject matter and issues between them; and

(5) A final judgment on the merits has been entered.

Reisbeck, ¶ 15 (citation omitted).

All five elements exist here. The parties, subject matter, issues, and capacities of the parties are the same. After trial, the District Court entered *final judgment*. "A final judgment conclusively determines the rights of the parties and settles all claims in controversy in an action or proceeding[]" and commences the right to appeal. MRAP 4(1)(a).

Does an appeal change this? No. "[A] judgment otherwise final remains so despite the taking of an appeal…." Restatement (Second) of Judgments § 13 cmt. f; *United States v. 5 Unlabeled Boxes*, 572 F.3d 169, 175 (3d Cir. 2009) ("[T]he pendency of an appeal does not affect the potential for res judicata flowing from an otherwise-valid judgment."). An appeal can *undo* a final judgment, but only if claims that were actually presented are reserved for further consideration. If this Court had *affirmed* the judgment in Nunez's favor, there is no question *res judicata* would bar her common law negligence claim. Reversal with an order to enter judgment for Defendants has the same effect.

If Nunez had filed a separate post-appeal lawsuit asserting her common law negligence claim, all claim preclusion elements would clearly be present. Her post-judgment attempt to continue this action instead of filing a new lawsuit does not change anything. If it did, final judgment would never really be final—a plaintiff could sue a defendant for negligence and if the plaintiff

won at trial but lost on appeal, try a different theory. Under Nunez's theory, even if the plaintiff won at trial *and* on appeal she could keep suing on other theories. That is exactly the kind of "piecemeal" litigation *res judicata* prohibits. *Brilz*, ¶ 18. Yet that is exactly what happened here.

1. This Court's precedent uniformly supports Petitioners' position.

In *Fisher v. State Farm General Insurance Co.*, 1999 MT 308, 297 Mont. 201, 991 P.2d 452, the plaintiff sued State Farm on a coverage claim. The plaintiff then filed a second action against State Farm alleging bad faith. After judgment in the first action, State Farm moved for summary judgment in the second based on *res judicata*. The court granted the motion and this Court affirmed because *res judicata* "bar[s] an action for a claim which a party had an opportunity to litigate in a prior action." *Fisher*, ¶ 10.

This case is indistinguishable from *Fisher*. Nunez had a chance to present her claim to the jury and does not get a second chance. "A judgment is binding…as to all matters…which could have been properly raised irrespective of whether the particular matter was in fact litigated." *Hall v. Heckerman*, 2000 MT 300, ¶ 16, 302 Mont. 345, 15 P.3d 869 (internal quotation marks and citation omitted).

In *Orlando v. Prewett*, 236 Mont. 478, 771 P.2d 111 (1989), the Prewetts prevailed in a quiet title action. On appeal, this Court reversed and directed judgment for Orlando. Having won at trial but lost on appeal, the Prewetts filed a mechanic's lien and a new lawsuit seeking its foreclosure. The district court "concluded that res judicata barred the enforcement of the mechanic's lien[]" because it should have been brought as a counterclaim in the first action. *Id.* at 113. The Prewetts objected that "the mechanic's lien cannot possibly be barred by *res judicata* because the lien itself was never considered" at trial or reviewed by the Supreme Court in the first appeal. *Id.* This Court rejected that argument. It was "precisely the type of counterclaim" the Prewetts were required to raise in the first case and by "failing to pursue" it they "forever lost the opportunity to litigate its merits…." *Id.*

Like the Prewetts, Nunez won, only to have that victory reversed. Just as the Prewetts could not pursue their mechanic's lien separately from the quiet title claim, Nunez is barred from splitting her common law negligence and negligence per se claims. Claim preclusion "operates as a kind of common-law compulsory joinder requirement, promoting judicial economy through the consolidation of related claims." *Brilz*, ¶ 23 (citation omitted). A lawsuit is a speak-now-or-forever-hold-your-peace event for parties. Bring all claims and

defenses arising out of the transaction at once, or "forever" lose them. *Orlando*, 771 P.2d at 113.

Similarly, this Court in *Kimpton v. Jubilee Placer Mining Co.*, 22 Mont. 107, 108, 55 P. 918, 919 (1899), held as follows, regarding its order to the lower court:

> The District Court was commanded to *enter* judgment in favor of plaintiff. This involved the performance of a mere ministerial act and duty … and, when our mandate was obeyed by the court below, the decree it caused to be entered was the judgment of this Court; *and by "that judgment the questions which did actually arise on the trial, and those which could have been presented, as well as the rights of the parties in the subject-matter of the suit, were finally determined.* They became *res judicata*, and all that remained for the District Court to do [] was to enter the judgment rendered by the Supreme Court.

If the District Court entered judgment in Defendants' favor, as directed, and Nunez appealed, pursuing her common law negligence claim, this Court could simply have quoted *Kimpton* while substituting "defendant" for "plaintiff."

2. Nunez's argument that she did not dismiss her common law negligence claim with prejudice, or there was no corresponding order entered is irrelevant.

Whether dismissed without prejudice, abandoned, or never pleaded, Nunez's claim arose out of the same transaction and could have been presented to the jury. Nunez contends "there was no reason to pursue the common law

negligence theory at trial" because "negligence *per se* is simply a form of negligence" and the District Court had determined that Defendants were negligent per se. Ex. H 8. Nunez can't have it both ways. If "negligence *per se* is simply a form of negligence," then Nunez presented her "negligence" theory to the jury and this Court has directed judgment in Defendants' favor on that "negligence" theory. Nunez cannot contend the two claims are both just negligence, and also that they are in fact two different claims.

Nunez's strategic decision to forego common law negligence and rely on negligence *per se* does not change the *res judicata* impact of the final judgment. Nunez could have presented both theories to the jury. There were good reasons to do so. First, her common law negligence claim arose out of the same transaction. This was her only opportunity to pursue it. Second, these theories presented different grounds for liability and potentially different damages. For example, the jury could have decided to award punitive damages on ordinary negligence but not on negligence *per se*. Third, Nunez should have anticipated the possibility that this Court would reverse the District Court's *sua sponte* partial summary judgment on her negligence *per se* claim.

Nunez's calculated decision to abandon common law negligence was strategic, no different than deciding what claims to plead in the first place.

Nothing *prevented* Nunez from presenting common law negligence to the jury.[3] Again, a primary purpose of *res judicata* is to prevent plaintiffs "from splitting a single cause of action into more than one lawsuit." *Touris v. Flathead Cty.*, 2011 MT 165, ¶ 12, 361 Mont. 172, 258 P.3d 1. Nunez's position "would encourage the duplicative, piecemeal and potentially endless filings that res judicata seeks to prevent." *Id.*

3. *Res judicata* is so robust because the rules of civil procedure allow plaintiffs to present all claims at once, including alternative claims and theories.

> The rationale … underlying this approach is that modern procedural systems afford parties ample means for fully developing the entire transaction in one action—e.g., by permitting the presentation of all material relevant to the transaction without artificial confinement to any single substantive theory or kind of relief and without regard to historical forms of action or distinctions between law and equity; by allowing allegations to be made in general form and reading them indulgently; by allowing allegations to be mutually inconsistent subject to the pleader's duty to be truthful; by permitting considerable freedom of amendment and tolerating changes of direction in the course of litigation; and by enabling parties to resort to compulsory processes besides

[3] Nunez's assertion that she relied on the District Court's partial summary judgment when she dismissed her other claims is undermined by the fact that McGowan also dismissed her other claims, even though the District Court did not grant partial summary judgment on her negligence *per se* claim. Nunez's tactical decision to dismiss her negligence claim just before trial was purposeful, it precluded Defendants from presenting any exculpatory evidence regarding causation. Gamesmanship gone awry does not permit a do-over.

> private investigations to ascertain the facts surrounding the transaction.

Brilz, ¶ 24. Because of this, "res judicata now reflects the expectation that parties who are given the capacity to present their 'entire controversies' shall in fact do so." *Id.* (internal quotation marks and citation omitted). Nunez could have presented common law negligence to the jury. *Res judicata* now bars it.

4. Even supposing the District Court's final judgment does not bar Nunez's common law negligence claim, the judgment ordered by this Court does.

Res judicata "is applicable to a judgment for defendant based on a direct verdict, on a jury verdict, on a judgment notwithstanding the verdict, or on any other determination during or after trial." Restatement (Second) of Judgments § 19 cmt. h. Thus, an appellate court order directing entry of judgment has the same *res judicata* impact as any other judgment.

Nunez and the District Court believe this Court's remand left the case open for further proceedings—that there is a difference between a remand directing entry of "judgment" and one directing the entry of "summary judgment." There is no difference. This Court has instructed that "summary judgment is, indeed, a final judgment on the merits and that the *res judicata* bar is, therefore, applicable." *Mills v. Lincoln Cty.*, 262 Mont. 283, 285, 864 P.2d 1265, 1267 (1993).

This Court's order left no leeway. This Court "may affirm, reverse, or modify any judgment or order appealed from and may direct the proper judgment…to be entered or direct a new trial or further proceedings to be had." MCA § 3-2-204(1). The Court did not order a "new trial" or remand "for further proceedings." It "remand[ed] for entry of summary judgment in favor of Jehovah's Witnesses." *Nunez*, ¶ 34. *Cf. Zavarelli v. Might*, 239 Mont. 120, 125-126, 779 P.2d 489, 493 (1989) (when a case is remanded "for further proceedings" the trial court "may consider or decide any matters left open by the appellate court[]"). The District Court has no discretion "to do other than carry out that mandate as written." *State ex rel. Kitchens v. 13th Jud. Dist.*, 130 Mont. 57, 60, 294 P.2d 907, 909 (1956).

When this Court directs entry of judgment, "the questions which did actually arise on the hearing in the district court *and those which could have been there presented*, as well as the rights of the parties litigant," are fully and finally "determined and adjudged" and cannot be raised again. *Central Mont. Stockyards*, 320 P.2d at 991 (emphasis added); *Meiners v. Aetna Cas. & Sur. Co.*, 663 A.2d 6, 8 (Me. 1995) (where appeal presented "sole contested issue remaining between the parties" and the appellate court remanded with

instructions to enter judgment in favor of defendant, the trial court did not err in refusing to allow plaintiff to present issues she previously failed to present).

Nunez cannot amend her complaint to replead common law negligence because Rule 15 does not allow such a post-trial (or post-judgment) amendment, and "there are no active pleadings to amend." *Thrune v. Shetler*, No. 89-35144, 1989 U.S. App. LEXIS 23555, at *1 (9th Cir. Dec. 21, 1989) (unpublished). The case is over.

IV. CONCLUSION

The rationale behind *res judicata* is to require parties to pursue all claims arising out of the same transaction in one action "and avoid[] the expense and vexation of multiple lawsuits." *Brilz*, ¶ 21. Nunez had that chance. *Res judicata* bars her request for a second lawsuit on the same facts. This Court should exercise supervisory control and direct the entry of final judgment in Petitioners' favor on all claims and the immediate termination of this case, save only the award of appropriate fees and costs.

Proceedings should be stayed pending a resolution of the issues raised.

DATED this 21st day of August, 2020.

/s/ Bradley J. Luck
Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Petition is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2016 is 3977 words, excluding Certificate of Service and Certificate of Compliance.

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CERTIFICATE OF SERVICE

I, Bradley J. Luck, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 08-21-2020:

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