

**IN THE SUPREME COURT OF THE STATE OF MONTANA  
CASE NO. DA 20-0238**

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ALPS PROPERTY & CASUALTY INSURANCE COMPANY,  
d/b/a Attorneys Liability Protection Society, A Risk Retention Group,  
Plaintiff/Appellee

v.

KELLER, REYNOLDS, DRAKE, JOHNSON & GILLESPIE, P.C., RICHARD  
GILLESPIE, BRYAN SANDROCK, GG&ME, LLC, a Montana Limited Liability  
Company, and DRAES, INC., a Montana Close Corporation, CHARLES JOSEPH  
SEIFERT and THOMAS Q. JOHNSON

Defendants / Appellants

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On Appeal from the Montana First Judicial District  
Lewis & Clark County Cause No. ADV-2016,  
Honorable District Court Judge Mike Menahan

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**ALPS PROPERTY & CASUALTY INSURANCE COMPANY'S  
OBJECTIONS TO PETITION FOR REHEARING**

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ALPS Property & Casualty Insurance Company (“ALPS”), by and through its attorneys of record, hereby objects to the Petition for Rehearing submitted by Appellants Bryan Sandrock, GG&ME, LLC and Draes, Inc. (collectively “Sandrock”).

### **STANDARD**

Rule 20(1), M.R.App.P., provides that a petition for rehearing will be considered only when the Court overlooked some fact material to the decision or some question presented by counsel that would have proven decisive to the case, or when its decision conflicts with a statute or controlling decision not addressed by the supreme court. *LeMond v. Yellowstone Development, LLC*, 2014 MT 181, ¶ 1, 334 P.3d 366 (2014) (Mem.).

### **ARGUMENT**

In his Petition, which is nearly devoid of citations to the record, Sandrock has failed to identify a fact or issue previously raised but overlooked by this Court. No basis exists under Rule 20 to allow rehearing.

#### **I. THIS COURT DID NOT OVERLOOK FACTS MATERIAL TO THE DECISION.**

Sandrock cites only one basis for his request for rehearing; he asserts that this Court “overlooked some fact material to the decision.” (Petition, p. 1). Yet the “facts” set forth by Sandrock fall into two categories: matters already

considered by the Court; and new “facts” not included in the record. Neither category allows for rehearing by this Court. Rule 20(1), M.R.App.P.

**A. This Court Did Not Overlook the Individual Attorneys’ Lack of Knowledge.**

Sandrock claims that this Court did not distinguish the “critical facts” that individual attorneys Johnson and Seifert did not know of the default or the sanctions until April 2016. (Petition, pp. 1-3). However, as noted in the Petition itself, this Court did, in fact, consider the issue. *Opinion* at ¶ 7. Indeed, this Court repeatedly and directly addressed that no one at the Firm, including Johnson and Seifert, were aware of the entry of default or the sanctions order at the inception of the Policy. *Opinion* at ¶ ¶ 7; 12; 17, 18, 19, 23, 24.

Sandrock identifies no facts material to the Court’s analysis which were overlooked. The Opinion establishes that this Court considered the issue of Johnson’s and Seifert’s lack of knowledge directly, *and* with respect to each Policy provision and legal theory. Rule 20 does not allow rehearing of this thoroughly analyzed – and correctly decided – issue.

**B. In Seeking Consideration of a Hypothetical, Sandrock Impermissibly Relies on Facts Not in the Record on Appeal.**

Sandrock asks this Court to consider a lengthy hypothetical based on the alleged practices of the state’s larger law firms. (Petition, pp. 4-6). Sandrock does not cite to the record, but instead asks this Court to review websites to establish

the basis for the hypothetical. Sandrock then asks the Court “suppose” that the hypothetical law firm negligently causes a \$10 million loss; “suppose” that an associate erred; and infer that COVID-19 played a role in the negligence.

(Petition, p. 4-5). These facts are neither in the record nor at issue.

It is “well established” that this Court must confine its review to the record on appeal. *Plains Grains Ltd. P’ship v. Board of County Com’rs of Cascade County*, 2010 MT 155, ¶ 49, 357 Mont. 61, 238 P.3d 332. Neither the hypothetical posed, nor the facts “supporting” it, are part of the record on appeal, and cannot be considered on rehearing. In addition, in order for this Court to have “overlooked some fact material to the decision,” that fact must have previously been brought to the Court’s attention. *See, e.g., State v. Curtiss*, 114 Mont. 232, 245, 135 P.2d 361, 364 (1943) (denying petition for rehearing when argument was raised for the first time).

In arguing this hypothetical situation, Sandrock fails to establish a basis for rehearing the correctly decided issues on appeal. The Petition should be denied.

**C. This Court Did Not Overlook Gillespie’s Beliefs Re: Default.**

Sandrock devotes much of his petition to re-arguing the import of attorney Gillespie’s beliefs concerning the effects of the entry of default. (Petition, pp. 6-8). In its Opinion, this Court squarely confronts this exact issue, raised by Sandrock in the original appeal:

Sandrock disputes the application of the prior knowledge provisions to Gillespie and asserts that because Gillespie believed the District Court's comment that "it does not take much to set aside a default," in the DeTienne Lawsuit, Gillespie did not have prior knowledge requiring him to submit the claim to the prior insurer, or to advise ALPS of the potential claims in the Firm's application.

*Opinion*, ¶ 28. Having identified the issue, the Court considered, analyzed, and resolved it. *Opinion*, ¶¶ 29-31.

This Court did not overlook this argument, or the facts supporting it. Sandrock has not established a basis for rehearing his legal theory, previously considered and correctly decided by this Court.

**D. This Court Did Not Overlook Sandrock's "Failure to Supervise" Claim.**

Sandrock asks this Court to reconsider the effect of his "failure to supervise" claim against Johnson and Seifert. (Petition, pp. 8-10). He claims that "this Court ignores the fact that Gillespie had months to retain and prepare for an April 16, 2016 damages hearing but failed to properly prepare *after* ALPS policy was issued (constituting further negligence and malpractice and failure to supervise claims)." (Petition, p. 8). Yet Sandrock identifies not a single fact *in the record* which this Court failed to consider.

The Opinion establishes that this Court considered, repeatedly, the effect of the supervision claim on coverage. This Court held:

Appellants also argue that the claim against Gillespie (failure to timely file an answer and acts relating to the entry of a sanctions order) is not the same as the claims against Johnson and Seifert (negligent supervision of Gillespie's work) and, thus, covered under the Policy. Appellants argue the claims are distinct and based on different acts or omissions. Even so, the claims against Johnson and Seifert still fall outside the coverage of the Policy. Johnson and Seifert's alleged failure to supervise also would have occurred prior to the Policy's effective date, resulting in no coverage.

*Opinion* at fn 2. Moreover, the Court directly addressed the nature of claims-made policies, like the ALPS policy at issue here. *Opinion*, ¶ 15.

Sandrock fails to establish any fact or legal argument “overlooked” by this Court with respect to Sandrock’s supervision claims. Rehearing should be denied.

## **II. NEW LEGAL ISSUES, NOT PREVIOUSLY RAISED, CANNOT BE REVIEWED VIA PETITION FOR REHEARING.**

In addition to repackaging previous theories without identifying any material overlooked facts, Sandrock seeks review of a new issue. In Sandrock’s original appeal, Sandrock identified four issues for review:

1. Did the lower court err in allowing ALPS to invalidate coverage based on exclusionary policy provisions?
2. Did the lower court err by applying exclusionary policy provisions when they were not applicable?
3. Did the lower court err as to wholly innocent insureds and wholly innocent victims due to either the failure of Gillespie to make an accurate disclosure on his policy application or incorrectly make certain disclosures on his policy application?

4. Did the lower court err by failing to even consider Gillespie's explanation for his policy application disclosures?

(Sandrock Opening Brief, p. 1).

In the Petition for Rehearing, Sandrock identifies a completely new and discrete "issue for rehearing":

Is a reportable legal malpractice claim confined to a singular insurance policy at a definable point in time or ongoing and capable of triggering multiple insurance policies over multiple years?

(Petition, p. 1). As shown above, Sandrock has not identified a basis for rehearing this new issue pursuant to Rule 20. In addition, this Court "will not, on an application for rehearing, consider grounds for reversal not presented upon the original hearing." *Kills on Top v. Guyer*, 2019 WL 5057500, (OP 18-0656 2019), *citing Mares v. Mares*, 60 Mont. 36, 55, 199 P. 267, 272 (1921) (*other citations omitted*). Sandrock's new "issue for rehearing" was not presented in the original briefing, and cannot be reviewed under the guise of a petition for rehearing.

### **CONCLUSION**

This Court has specific criteria for considering a petition for rehearing, and will do so only upon the grounds set forth in Rule 20, M.R.App.P. *Evans v. State of Montana*, 2020 WL674011 (OP 20-0537, November 17, 2020). Sandrock fails to support the Petition for Rehearing with the identification of any basis for rehearing this matter.

ALPS respectfully requests that the Petition for Rehearing be summarily denied.

DATED this 17<sup>th</sup> day of March, 2021.

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### **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Wordperfect 9 is 1,381 words, not averaging more than 280 words per page, excluding the captions, tables, signatures, and certificates.

BY /s/Martha Sheehy  
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## CERTIFICATE OF SERVICE

I, Martha Sheehy, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Objection to Petition for Rehearing to the following on 03-17-2021:

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