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IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 20-0313

LEO G. and JEANNE R. BARSANTI,
Petitioners and Appellant,

v.

MONTANA PUBLIC SERVICE COMMISSION,
and NORTHWESTERN ENERGY
Respondents and Appellees,

Appellee Joint Response Opposing Petition for Rehearing

In a non-citable memorandum opinion, this Court concluded that Leo and Jeanne Barsanti (“Barsantis”) failed to exhaust all available administrative remedies prior to seeking judicial review. 2021 MT 54N, ¶ 10 (Mar. 2, 2021). This Court further concluded that Barsantis had not satisfied either of the exceptions to the statutory requirement for parties to exhaust administrative remedies (i.e., futility or involving

solely questions of law). *Id.* ¶ 12. Although determining that the District Court incorrectly concluded that the failure to exhaust remedies was jurisdictional, as opposed to an issue of justiciability, the Court nonetheless upheld the District Court’s decision because Barsantis’ Petition for Judicial review “was procedurally non-justiciable, *i.e.* unripe.” *Id.* ¶ 13 (original italics).

On March 17, 2021, Barsantis filed a timely Petition for Rehearing of this Court’s decision (“Petition”). The Montana Public Service Commission (“Commission”) and NorthWestern Energy (“NorthWestern”) (collectively, “Appellees”), respectfully oppose Barsantis’ Petition.

Standard of Decision

This Court will grant rehearing when “it overlooked some fact material to the decision . . . some question presented by counsel that would have proven decisive to the case or . . . its decision conflicts with a statute or controlling decision not addressed by the supreme court.” Mont. R. App. P. 20(1)(a)(i)–(iii). A rehearing petition “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.*, DA 07-0299, Order Denying Rehearing at 2 (Sept. 10, 2009).

Argument

This Court neither overlooked material facts or arguments from counsel that would have proven decisive to the appeal, nor does the decision conflict with any statute or controlling decision. Barsantis merely seek to rehash arguments previously raised before both the District Court and on appeal. Rehearing is not appropriate.

I. This Court did not overlook controlling law.

Barsantis argue the Court overlooked Mont. Code Ann. § 2-4-506(3), and therefore misapplied § 2-4-702(1)(a), in affirming the District Court’s dismissal of their Petition for Judicial Review. Pet. at 3–5. Barsantis argue that the statutory right to request a declaratory ruling on agency rules excused their requirement to exhaust administrative remedies. *Id.*

This Court already considered arguments about Mont. Code Ann. § 2-4-506(3). Barsanti Op. Br. at 21–22; Joint Appellees Resp. Br. at 12–13 (arguing that statute is not applicable in this case as Barsantis did not seek a declaratory ruling pursuant to that statute). Barsantis’

Petition recites their arguments from earlier briefing as grounds for rehearing this matter. Pet. at 4. Furthermore, Barsantis' argument about the Court's alleged misapplication of Mont. Code Ann. § 2-4-702(1)(a) is not relevant as it is contingent upon Barsantis seeking a declaratory action pursuant to Mont. Code Ann. § 2-4-506(3), which they did not do.

This Court did not overlook controlling law. It correctly ignored irrelevant legal argument. Barsantis failed to provide sufficient grounds for rehearing.

II. This Court did not overlook material facts.

Although construed as an error of fact, Barsantis argue that the Court misapplied relevant case law regarding exhaustion of administrative remedies. *See* Pet. at 5 (“The Court overlooked facts in decisions it relied on that are material to the exhaustion question presented. That makes those cases inapplicable here.”). Barsantis appear to argue that this Court failed to correctly apply, to the extent the Court relied on, *Bitterroot River Protection Ass’n v. Bitterroot Conservation District*, 2002 MT 66, 309 Mont. 207, 45 P.3d 24; *Art v. Mont. Dept. of Labor and Industry*, 2002 MT 327, 60 P.3d 958, 313

Mont. 197; and *Flowers v. Bd. of Personnel Appeals*, 2020 MT 150, 400 Mont. 238, 465 P.3d 210. *Id.* at 5–9. Barsantis support their arguments exclusively with cites to their prior briefs. *Id.* (citing to Opening Brief for support of misapplication of *Bitterroot*, to District Court brief for support of misapplication of *Art*, and to their Opening and Reply briefs for misapplication of *Flowers*). Barsantis fail to present any new argument in their Petition. Instead, they are simply rehashing arguments already presented to the Court. These are insufficient grounds for rehearing.

III. This Court’s opinion does not conflict with controlling precedent.

Barsantis argue that *Flowers* and *State v. Ankeny*, 2010 MT 224, 243 P.3d 391, 358 Mont. 32, govern the outcome of this appeal. Pet. at 9–12. Barsantis argue that they are excused from seeking reconsideration of Final Order 7604u, because they satisfy either the bona fide constitutional claim exception or futility exception to the requirement to exhaust administrative remedies. *Id.* at 11 (“So, it makes sense to seek reconsideration prior to the *fait accompli* of the final order . . . The preferred course is to raise reconsideration early in a proceeding as appellants did multiple times.”); *Id.* at 12 (“However,

neither court distinguished *Ankeny* nor gave a reason why multiple requests to reconsider are not sufficient to preserve issues for appeal.”).

This Court has already considered and rejected whether any exceptions to the statutory requirement to exhaustion apply to this proceeding. 2021 MT 54N, ¶¶ 11–12. Further, this Court has also already been briefed regarding *Ankeny*’s relevance, if any. *Compare* Opening Br. at 38 (Relying on *Ankeny*, Barsantis reconsideration requests “ought to have been sufficient to make a record to preserve those issues for appeal.”), *with* Appellee Br. at 11 (Discussing *Ankeny*, “Barsantis wrongly conflate preservation of their interlocutory issues for appeal, with exhaustion of administrative remedies under Mont. Code Ann. § 2-4-702. . . . Similarly, properly preserving an evidentiary objection in an agency proceeding does not relieve that party of its obligation to follow proper agency procedures prior to appeal.”).

This Court’s opinion does not conflict with controlling precedent. Barsantis have not provided sufficient grounds for rehearing.

Conclusion

The Commission and NorthWestern respectfully request the Court deny Barsantis’ Petition.

RESPECTFULLY SUBMITTED this 31st day of March, 2021.

/s/ Zachary Rogala

Counsel for Montana Public Service Commission

/s/ Sarah Norcott

Counsel for NorthWestern Energy

CERTIFICATE OF SERVICE

I, Zachary Rogala, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Objection to Petition for Rehearing to the following on 03-31-2021:

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Dated: 03-31-2021