DA 13-0439

IN THE SUPREME COURT OF THE STATE OF MONTANA

DANIEL K. O'CONNELL & VALERY A. O'CONNELL,
Plaintiffs/Appellants,

v.

GLASTONBURY LANDOWNERS ASSOCIATION, INC.,
BOARD OF DIRECTORS,
Defendants/Appellees.

DEFENDANTS/APPELLEES' OBJECTIONS TO PLAINTIFFS/APPELLANTS' PETITION FOR REHEARING

On Appeal from the Montana Sixth Judicial District Court,
Park County
Honorable Brenda R. Gilbert

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COMES NOW the Defendants/Appellees Glastonbury Landowners Association, Inc. Board of Directors (GLA) and objects to Plaintiffs/Appellants Daniel and Valery O'Connells' Petition for Rehearing (O'Connells). The O'Connells have failed to present sufficient grounds for a rehearing pursuant to Mont. R. App. P. 20(1)(a), and their Petition should be denied.

STANDARD FOR GRANTING REHEARING

Mont. R. App. P. 20(1)(a) states:

> The supreme court will consider a petition for rehearing presented only upon the following grounds:
>
> (i) That it overlooked some fact material to the decision;
>
> (ii) That it overlooked some question presented by counsel that would have proven decisive to the case; or
>
> (iii) That its decision conflicts with a statute or controlling decision not addressed by the supreme court.

Questions or points not raised in the original hearing will not be considered on the rehearing. *Mares v. Mares*, 60 Mont. 36, 199 P. 267, 272 (1921). Further:

> [A] petition for a rehearing should be presented only in those cases where reasonably food grounds therefore exist, and this should made to appear upon the face of the petition. If this court has committed error, or overlooked some matter of importance in deciding a case, as shown by the record and

opinion itself, the petition should be confined to the presentation of these matters. *Collins v. Metropolitan Life Ins. Co.*, 32 Mont. 329, 80 P. 1092, 1093 (1905).

ARGUMENT

I. SUMMARY

The O'Connells arguments offer no grounds which would justify a rehearing. Rather, the O'Connells simply reargue points previously raised or try to insert new arguments not raised at the District Court level or in their original appellate briefing.

II. THE SUPREME COURT DID NOT OVERLOOK WHETHER OR NOT THE O'CONNELS WERE GRANTED DISCOVERY AND A HEARING.

First, the O'Connells argue the Supreme Court overlooked the question of whether they were denied discovery and hearing. This is simply not true. The O'Connells already briefed this issue extensively in Section I of their opening appellate brief. Now they try to re-plow that ground by arguing they didn't have enough time at the summary judgment hearing. Questions or points not raised in the original hearing will not be considered on the rehearing. *Mares v. Mares*, 60 Mont. 36, 199 P. 267, 272 (1921).

The issue as to whether the O'Connells had the opportunity to conduct discovery was argued in the opening brief as well. The GLA responded then that the O'Connells had nearly nine months from when they filed their complaint to

when summary judgment was granted to conduct discovery—which they neglected to do. Further, the O'Connells were first to file their Motion for Summary Judgment—apparently satisfied there were no material facts at issue and deciding there was no need for discovery.

Finally, the O'Connells simply claim they need to conduct discovery without actually presenting facts essential to justify their opposition. In other words, they lost their Motion for Summary Judgment, and now they want to conduct discovery in hopes of finding something that would support their position. The O'Connells had nine months to conduct discovery and should not be granted the opportunity to go on a post-decision fishing expedition.

III. THE SUPREME COURT DID NOT OVERLOOK THE O'CONNELLS' AFFIDAVIT OR FAIL TO REVIEW THE DISTRICT COURT'S CONCLUSIONS *DE NOVO*.

Without providing any basis, the O'Connells allege this Court overlooked their affidavits which were part of the record and failed to properly review the District Court's findings *de novo*. The O'Connells argue that they presented evidence of contested fact which should have precluded summary judgment against them. These are not new arguments but simply restatements of arguments at the District Court and on appeal. The O'Connells' affidavit is part of the record, and the O'Connells have not shown that it was overlooked.

The District Court stated in its June 19, 2013 Order that it "considered the

Motions, the Briefs and Affidavits filed with respect to such Motions, the oral argument presented, and all of the records and files herein, whether specifically mentioned or not...." (See Exhibit A to GLA's previously filed Appendix). The party opposing summary judgment cannot rely on mere allegations in the pleadings, but must present its evidence raising genuine issues of material fact in the form of affidavits or other sworn testimony. ... mere denial, speculation, or conclusory statements" are insufficient to raise a genuine issue of material fact. *Schumacker v. Meridian Oil Co.*, 1998 MT 79, ¶¶ 14-15, 288 Mont. 217, ¶¶14- 15, 956 P.2d 1370, ¶¶ 14-15. Clearly, the District Court rejected the O'Connells' "contested facts" as material to granting the GLA summary judgment.

On appeal, this Court found "The District Court fully considered and rejected the O'Connells' contentions on each issue and granted summary judgment in favor of the association." *O'Connell v. Glastonbury Landowners Assn., Inc.*, 2013 MT 395N, ¶ 4. The O'Connells fail to explain why this Court did not review the District Court's decision *de novo* or how facts were overlooked. Facts were not overlooked—they were considered at all levels and rejected as material to summary judgment. The O'Connells have failed to provide grounds for a rehearing.

IV. THE SUPREME COURT DID NOT OVERLOOK A BYLAW PROVISION JUSTIFYING A REHEARING.

The O'Connells next point to GLA'S Bylaws which state that in the event of a conflict between its Covenants and its Bylaws, the Covenants shall control. They argue this somehow supports their argument that each membership interest is entitled to vote for only one board member per election regardless of how many vacancies are on the board. The District Court concluded the GLA acted properly by implementing election procedures which allowed each membership to vote for one candidate for each board vacancy noting the GLA's power to interpret the Bylaws and that the ballots used allowed one vote per issue or vacancy.

This Court affirmed the District Court noting:

> The District Court determined that the Association has the authority under its By-Laws to administer elections, and that the current method of allocating votes to members has been in place since 1997 without objection from the O'Connells. *O'Connell v. Glastonbury Landowners Assn., Inc.*, 2013 Mt 395N, ¶ 5.

The O'Connells failed to raise this argument in the District Court or on appeal, and it should be disregarded. *Mares*, 199 P. at 272. In any case, the O'Connells fail to explain how this provision would affect the outcome of the case.

In fact, it would not because the District Court found there was no conflict between the GLA's governing documents (including the Covenants and Bylaws) and how the GLA implemented its elections since its creation. The O'Connells offer nothing new that would justify a rehearing.

V. THE SUPREME COURT DID NOT OVERLOOK SUPPOSED AMBIGUITY IN THE GLA'S GOVERNING DOCUMENTS.

The O'Connells finally argue that this Court overlooked all the ambiguities that were construed against them rather than against the drafter, the GLA. Again, the O'Connells raise new arguments in their Petition for Rehearing which are not grounds for granting a rehearing.

First the O'Connells state there are uncertainties in the GLA governing documents which should be construed against the GLA. However, this directly contradicts statements in the appellate brief. The O'Connells argued the GLA's interpretation and implementation of its Bylaws was wrong because they were ambiguous. P.'s App. Br. at 26 (Aug. 26, 2013).

Second, the O'Connells make the nonsensical argument that only the courts have the power to interpret contract provisions, and that the District Court was mistaken in agreeing with the GLA's interpretation. This ignores the GLA Bylaws which state: "The Board shall have the power to interpret all the provisions of these Bylaws and such interpretation shall be binding on all persons." Article XII.A. (See Exhibit H at 16 to GLA's previously filed Appendix). Further, Article VI.B.16 of the Bylaws also empowers the Board to "Adopt Rules from time to time for the conduct of any meeting, election or vote in a manner that is not inconsistent with any provision of the Covenants, Articles of Incorporation or these

Bylaws." (Exhibit H at 6). Clearly, the GLA has the power to interpret its own Bylaws.

The O'Connells also fail to explain why this overlooked ambiguities and conflicts with contract law. Rather they simply state that it does so. The O'Connells point out no material facts, no question raised, nor any conflicting statute or decisions the Court overlooked. Mont. R. App. P. 20(1)(a). There are no grounds for a rehearing.

CONCLUSION

The O'Connells have failed to provide grounds for a rehearing under Mont. R. App. P. 20(1)(a). There is no basis for claiming that this Court overlooked facts, questions, or statutory or common law which would change the outcome of the appea. The GLA respectfully requests that this Court deny the O'Connells' Petition for the Rehearing.

DATED this 27th day of December, 2013.

BROWN LAW FIRM, P.C.

BY _____

Michael P. Heringer/Seth M. Cunningham
Attorney for Glastonbury Landowners Association Board of Directors

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 20 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 of the text of these objections is 1,449 words as calculated by Microsoft Word.

DATED this 27th day of December, 2013.

BROWN LAW FIRM, P.C.

BY _____

Michael P. Heringer
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Attorney for Glastonbury Landowners Association Board of Directors

CERTIFICATE OF SERVICE

This does certify that a true and correct copy of the foregoing was duly served on counsel of record by U.S. mail, postage prepaid, and addressed as follows, this 27th day of December, 2013:

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