**IN THE SUPREME COURT OF THE STATE OF MONTANA**
**CASE NO. DA 20-0279**

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DANA ROLAN,
on her own behalf and on behalf of the class she represents,

Plaintiffs, Counter-Defendants and Appellees

v.

NEW WEST HEALTH SERVICES,
Defendant and Appellee

DARWIN SELECT INSURANCE COMPANY and ALLIED WORLD ASSURANCE COMPANY and DARWIN NATIONAL ASSURANCE COMPANY
Defendant, Counterclaimant, and Appellant

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On Appeal from the Montana First Judicial District
Lewis & Clark County Cause No. CDV-2010-91
Honorable Kathy Seeley

# APPELLANT ALLIED WORLD ASSURANCE COMPANY'S OBJECTIONS TO ROLAN'S PETITION FOR REHEARING

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## INTRODUCTION

Appellant Allied World Assurance Company ("Allied") objects to Appellee Dana Rolan's ("Rolan") Petition for Rehearing. "Rule 20(1) provides that a petition for rehearing will be considered only when the Court 'overlooked some fact material to the decision,' when 'it overlooked 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, ¶ 2, 334 P.3d 366 (Mem). Rolan does not assert that this Court overlooked a material fact or a question presented by counsel. Rather, Rolan requests rehearing on a single basis: "the Opinion conflicts with Montana law." (Petition for Rehearing ("PFR"), p. 1).

Rolan has failed to establish a basis for rehearing pursuant to Rule 20(1), M.R.Civ.P. The Petition should be denied.

### A. Misrepresentation

Rolan asserts that the Court should reconsider limiting a "misrepresentation" to "affirmative communications." Rolan misstates this Court's holding. Far from limiting a misrepresentation to specific communications, the Court held that estoppel can be established with "clear and convincing evidence that Allied's 'conduct, acts, language, *or silence*' amounted to 'a representation or concealment

of material facts.'" (Opinion, ¶ 28, *emphasis added, quoting Liberty Nw. Ins. Co. v. Selley*, 2000 MT 76, ¶ 10, 299 Mont. 127, 998 P.2d 156. Although this Court found that New West "failed to identify *any* affirmative communication in which Allied represented that the $3,000,000 limit applied to this litigation," (¶ 26), the holding was not limited to that finding. This Court also recognized the elements of estoppel by acquiescence, reciting the longstanding rule that "[m]ere silence cannot work as estoppel. To be effective for this purpose, the person to be estopped must have had an intent to mislead or a willingness that another should be deceived; and the other must have been misled by the silence." *Id, quoting City of Billings v. Pierce Packing Co.*, 117 Mont. 255, 267, 161 P.2d 636, 641 (1945). The Court correctly determined that New West did not present clear and convincing evidence that Allied "acquiesced" to an understanding that the $3 million limit applied.

Rolan has failed to establish that the holding conflicts with a controlling decision not addressed by the Court, and therefore rehearing is not warranted under the standards enunciated in Rule 20(1)(a).

**B. *Ellinghouse***

Rolan asserts that this Court misapplied *Safeco Ins. Co. v. Ellinghouse*, 223 Mont. 239, 725 P.2d 217 (1986). Rolan's request for rehearing on this basis fails on its face because rehearing is only allowed when a decision conflicts with a

decision not addressed in the opinion. The parties raised – and this Court addressed – *Ellinghouse.* (Opinion, fn 1 and 2). Absent citation to authority which this Court failed to consider, rehearing is not allowed.

It must also be noted that while Rolan repeatedly states that the "undisputed facts" establish that Allied assumed control of the defense to invoke the *Ellinghouse* reasoning, Rolan does not cite to the record to establish such facts. (See PFR, p. 3, 4, 9). The record is devoid of any evidence that Allied controlled New West's defense, as established by Allied in the original briefing on appeal. (See Allied's Reply Brief, pp. 9-11, and record citations contained therein).

**C. New West's Insurer Status**

Rolan argues that New West's status as an insurer is "not relevant" to the estoppel analysis. (PFR, p. 5). This Court referenced the insurer's status with respect to the reasonable expectations doctrine, not the elements of estoppel. (Opinion, ¶ 27). Rolan claims that insurance status should not be considered when analyzing violations of the Unfair Trade Practices Act, citing *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 30, 345 Mont. 12, 192 P.3d 186. But Rolan fails to establish that this Court's holding conflicts with *Lorang* or that *Lorang* is a controlling decision. *Lorang* is not controlling, given that the Court in *Lorang* did not address equitable estoppel, the issue in this case. Rehearing is not warranted on this basis.

### D. Single Claimant

Rolan quibbles with this Court's reference to the undisputed fact that only one claimant had been identified at the time Allied reserved its rights in 2010. (PFR, p. 5). Rolan does not assert that the factual reference is erroneous and does not cite to any conflict between this reference and a controlling case or statute. Rolan contends that "by 2013, there were identifiable class claimants," again without any citation to the record. Having failed to identify an erroneous factual finding or conflict with controlling authority, rehearing is not warranted.

### E. Rolan's Assertion that the District Court should be Affirmed.

Rolan devotes several pages of the Petition to a blatant re-arguing of the merits of the appeal, with no attempt to identify a basis for rehearing. (PFR, pp. 8-10). This Court holds that "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*., 2009 Mont LEXIS 443, at *2, 217 P.3d 475, 486 (*citing* M.R. App. P. 20(1)(a)). Rolan's disagreement with the ruling does not justify rehearing pursuant to Rule 20(1).

### F. The Constitution

Rolan argues that this Court should re-consider Allied's alleged conduct which deprived Rolan of a fundamental Constitutional right to a 'speedy remedy'"

pursuant to Article II, § 16, Montana Constitution. (PFR, p. 10). The record does not establish Rolan's uncited and unsupported premise that Allied caused delay in this matter. More importantly, neither Rolan nor New West asserted a constitutional claim below. Had such a claim been asserted, Allied would have moved for dismissal given that Allied is not a state actor responsible for ensuring constitutional guarantees.[1] Rolan's novel theory that this Court must now consider an unasserted constitutional claim does not warrant rehearing.

## CONCLUSION

Rolan has utterly failed to identify any basis for rehearing pursuant to Rule 20, M.R.App.P. Allied respectfully requests that the petition for rehearing be denied.

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[1]Interpreting the Equal Protection Clause, the United States Supreme Court has held that a state statute authorizing private conduct by insurers—even in an area subject to state regulation—did not turn that private conduct into "state action." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51-54, 119 S.Ct. 977, 986-87 (1999).

DATED this 21st day of January, 2022.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27, M.R.App.P., I hereby certify that this brief is printed with proportionally spaced New York Times typeface of 14 points; is double-spaced except footnotes and block quotes; and the word count of 1,118 words, exclusive of tables and certificates, is less than the word limit of 2,500 words provided by Rule 20(3), M.R.Civ.P.

___/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 01-21-2022:

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