IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 81764

JOHN BORGER and SHERRI BORGER,
Appellants

v.

POLARIS INDUSTRIES, INC.
Respondent

On Appeal from the Eighth Judicial District Court
Clark County, Nevada, Dept. No. XXV
Case No. A-17-751896-C

RESPONSE TO PETITION FOR REHEARING

Debra L. Spinelli, Esq., Bar No. 9695
Jordan T. Smith, Esq., Bar No. 12097
Dustun H. Holmes, Esq., Bar No. 12776
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
Telephone: 702.214.2100

Attorneys for Respondent

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I. INTRODUCTION

Nevada Rule of Appellate Procedure ("NRAP") 40(c)(2) sets forth the two conditions in which the Court may grant a rehearing of one of its orders: (1) when the Court overlooked or misapprehended a material fact or question of law; or (2) when the Court overlooked, misapplied, or failed to consider a statute, procedural rule, regulation, or directly controlling decision. John and Sherri Borger's ("Borgers") Petition for Rehearing ("Petition") plainly fails to meet either of these conditions.

First, the Borgers' Petition is procedurally improper because it attempts to simply reargue the same issues that the Borgers previously presented to this Court in their appellate briefs. While citing extensively to the dissent, the Petition rehashes the arguments that the Borgers previously made to this Court and does not cite to any new controlling legal authority or identify any instances in which the Court mistakenly overlooked a material fact. For this reason alone, the Petition should be denied.[1] Moreover, the Petition raises a new argument regarding the application of

[1] *See, e.g.*, *City of N. Las Vegas v. 5th & Centennial,* 130 Nev. 619, 624, 331 P.3d 896, 899 (2014) (declining to grant the City's petition for rehearing on the prejudgment interest issue where court did not overlook any controlling legal authority); *SFR Invs. Pool 1, LLC v. U.S. Bank N.A.,* 138 Nev. Adv. Op. 22, 507 P.3d 194, 198 (2022) (denying petition for rehearing where court did not overlook or misapprehend any material facts in the record).

the private interest factor for the first time during its request for a Rehearing, which is expressly prohibited by NRAP 40(c)(1).

Second, the Borgers' Petition fails to demonstrate that the Court misapplied or failed to consider a "statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." NRAP 40(c)(2)(B). Specifically, the Petition argues that, when ruling on its appeal, the Court ignored *Mountain View*'s evidentiary requirement, misapplied *Placer Dome*'s exceptional circumstances standard, and did not afford sufficient deference to the forum choice of an out-of-state litigant. Regarding the Borgers' first two arguments, the Court properly applied Nevada's controlling precedents to the evidence before it and appropriately found that the district court did not abuse its discretion when granting Polaris's motion to dismiss. Regarding the amount of deference provided to the Borgers' choice of forum, the Borgers appear to have simply misread the Court's Order.

The NRAP do not allow for rehearing merely because a litigant disagrees with an order of this Court. Instead, the Rules require the moving party to identify specific evidence or authority that the Court disregarded when ruling or the party must demonstrate that the Court's order misapplied controlling precedent. The Petition does neither. Because this Court properly applied Nevada law when upholding the district court's dismissal of the Borgers' action on forum non conveniens grounds, the Borgers' Petition should be denied.

II. ARGUMENT

A. Standard for Rehearing.

A panel of this Court will only consider a petition for rehearing in two narrow circumstances: (1) when the Court has overlooked or misapprehended a material fact or material question of law, or (2) "when the Court has overlooked, misapplied, or failed to consider a statute, procedural rule, regulation or decisions directly controlling a dispositive issue in the case." NRAP 40(c)(2)(A)-(B).

Under this Court's "long established practice, rehearings are not granted to review matters that are of no practical consequence. Rather, a petition for rehearing will be entertained only when the court has overlooked or misapprehended some material matter, or when otherwise necessary to promote substantial justice." *Gordon v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 114 Nev. 744, 745, 961 P.2d 142, 143 (1998); *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 608, 245 P.3d 1182, 1184 (2010). Furthermore, "in petitions for rehearing, parties may not reargue matters they presented in their appellate briefs and during oral arguments, and no point may be raised for the first time." NRAP 40(c)(1); *City of N. Las Vegas*, 130 Nev. at 622, 331 P.3d at 898 ; *Whitehead v. Nevada Comm'n on Jud. Discipline*, 110 Nev. 380, 390, 873 P.2d 946, 953 (1994).

Here, the Borgers have not contended that the Court overlooked or misapprehended a material fact or question of law. Nor do they claim that the Court

overlooked or failed to consider a controlling ruling. Instead, their request for a rehearing is based solely on the Borgers' contention that the Court misapplied Nevada law regarding dismissal via the doctrine of forum non conveniens.

B. The Borgers' Petition is Procedurally Improper and Should Be Denied.

The Borgers raise only three arguments in support of their petition for rehearing, all of which are identical to the arguments that the Borgers already presented in their appellate briefs and, thus, are not properly before the Court on rehearing. NRAP 40(c)(1).

First, the Borgers claim that the Court ignored the affidavit requirement set forth in *Mountain View Recreation, Inc. v. Imperial Commercial Cooking Equipment Co*., 129 Nev. 413, 305 P.3d 881 (2013). (*See* Ex. A, Petition, at 6–7). The Borgers previously raised this same argument in their appellate briefs, where they argued that the district court erred in dismissing the case because Polaris did not meet the *Mountain View* affidavit requirement. (*See* Ex. B, Appellants' Opening Appellate Brief, at 21–24).

Second, the Borgers claim that the Court improperly upheld the district court's decision to dismiss the action because there is insufficient evidence in the record to establish the "exceptional circumstances" needed to support a motion for forum non conveniens. (Ex. A at 8–10). The Borgers already made this argument in their

appellate brief where, like here, they argued that Polaris failed to meet its evidentiary burden to show the existence of exceptional circumstances. (*See* Ex. B at 21–24).

Finally, the Borgers argue that their choice of forum, to which none of the parties nor the Borgers' claims against Polaris have any connection, was entitled to the same deference as Nevada residents. (Ex. A at 10–12). The Borgers advanced this same argument in their appellate briefs, where they argued that the district court erred by affording the Borgers' choice of forum less deference because they are not residents of Nevada. (*See* Ex. B at 18–21).

These attempts to use the Petition as a vehicle to re-litigate or re-weigh the exact same arguments and evidence that they already advanced on appeal, without citing to any new controlling authority, is procedurally improper and should be rejected. *Whitehead*, 110 Nev. at 390, 873 P.2d at 952 (denying petition for rehearing where "all of the points sought to be raised in the Petition/Motion are either immaterial, constitute attempts to reargue matters already considered and decided, or constitute efforts to raise new arguments for the first time"). The only difference between the Borgers' appellate briefs and their Petition is that the Petition now attempts to assign to this Court the same errors that they previously attributed to the district court. But NRAP 40(c)(1) clearly prohibits the Borgers from rearguing matters presented in their appellate briefs. As such, the Borgers' Petition should be denied. *See, e.g.*, *Bahena*, 126 Nev. at 609, 245 P.3d at 1184 (holding that the court

"did not overlook or misapprehend any material matters, nor did we overlook, misapply, or fail to consider controlling legal authority" where the court "followed clear Nevada precedent").

The Borgers' Petition should also be denied to the extent that it introduces new arguments not previously presented to this Court. The Borgers now argue, for the first time, that "the private interest factor is neutral when 'neither Plaintiffs nor Defendants identify specific unwilling witnesses by name.'" (Ex. A at 8). The Borgers do not cite any Nevada case law that supports this proposition. Moreover, the Borgers never made this argument before the district court or on appeal. NRAP 40(c)(1) prohibits movants from raising any points in a petition for rehearing for the first time. The Borgers' attempt to do so here is thus procedurally improper and should be rejected.

C. The Petition Does Not Meet Either NRAP 40(c)(2) Condition for Granting Rehearing.

The Borgers do not argue that the Court overlooked any material facts, questions of law, or controlling legal authorities. Indeed, the Petition does not cite to **any** controlling Nevada case law that was not previously cited in its appellate briefs or in the Court's Order. Instead, the Borgers appear to be moving for rehearing solely on the grounds that the Court misapplied Nevada precedent in three different ways. As demonstrated below, each of these arguments should be rejected because the Court's Order properly applied Nevada law to the circumstances of this case and

appropriately determined that the district court did not abuse its discretion when granting Polaris's motion to dismiss the Borgers' claims.

i. The Court Properly Applied *Mountain View* to the Borgers' Claims.

The Borgers argue that this Court ignored the standards in *Mountain View* by allegedly dismissing the "evidentiary requirement" that a motion to dismiss for forum non conveniens must be supported by affidavits demonstrating the specific hardships to or inconvenience of witnesses. The Borgers' argument misunderstands both *Mountain View* and the evidence that was before the district court when it ruled on Polaris's motion to dismiss.

First, as demonstrated above, the Borgers' Petition merely re-states the same argument that it submitted to this Court in its appellate briefing—and that the Court appropriately rejected.

Second, the Borgers' argument that the Court "dismissed [*Mountain View*'s] evidentiary requirement" misreads the Court's ruling that the district court had a sufficient evidentiary basis under *Mountain View*—in the form of an affidavit, sworn deposition testimony, and other admissible evidence—such that it did not abuse its discretion in granting Polaris's motion to dismiss. (*See* Ex. C, Order, at 3 n.2). In *Mountain View*, the defendants filed a motion for change of venue from Nye County to Clark County, arguing, in part, that Clark County would be more convenient for witnesses because the majority of the witnesses lived in or around Las Vegas or had

to "pass through" Las Vegas to get to Nye County. On appeal, the Count found that the record did not support a change of venue on forum non conveniens grounds because the defendant had relied on mere allegations of inconvenience and nothing more. The court held that "[g]eneral allegations regarding inconvenience or hardship are insufficient because **'[a] specific factual showing** must be made.'" *Mountain View*, 129 Nev. at 419, 305 P.3d at 885 (citations omitted and emphasis added). Because the record at the district court was "devoid of affidavits from either percipient or expert witnesses **or other evidence** to demonstrate how the witnesses would be inconvenienced," the Court held that the defendant did not make a sufficient factual showing to support its motion. *Id.* at 420, 305 P.3d at 885 (emphasis added).

The Court's Order properly applied *Mountain View*'s evidentiary requirement, which requires a specific factual showing based on affidavits or "other evidence" that constitutes more than mere allegations made by an attorney. In fact, the Borgers' Petition ignores the numerous pieces of "other evidence" that Polaris submitted in support of its motion to dismiss, including an affidavit, sworn deposition transcripts, and other admissible evidence showing that all of the events that form the basis of the Borgers' action occurred out-of-state and that nearly all of the material fact witnesses also reside out-of-state, including: a) law enforcement personnel who investigated the subject incident; b) first responders and initial

medical teams who spoke with and treated the Borgers immediately after the subject incident; and c) key employees of the off-road vehicle rental agency, Sandbar, from whom the Borgers rented the subject vehicle, who interacted with the Borgers before and after the subject incident and provided safety instructions to them regarding the proper operation of the subject vehicle. Dismissing the Borgers' action based on this admissible evidence does not constitute a "speculative dismissal." Instead, it is a decision that recognizes that, at the time that the district court granted Polaris's motion to dismiss, the parties had undertaken more than a year's worth of discovery, which allowed the district court to base its order on sworn testimony and other evidence, in addition to the affidavit submitted by Polaris. Importantly, the Borgers have not argued that Nevada law prevents this Court or the district court from considering that additional evidence.

Instead, the Court properly applied *Mountain View*'s evidentiary requirements to the circumstances of this lawsuit. Here, unlike in *Mountain View*, there are multiple, material witnesses who have no relation to Polaris or the Borgers, who reside out-of-state, and are, therefore, beyond the subpoena power of the Nevada courts. *See Quinn v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 123 Nev. 25, 29, 410 P.3d 984, 987 (2018) ("NRAP 45(b)(2) restricts the service of a subpoena on a nonparty to 'any place within the state.'"). As a result, Polaris cannot compel these

witnesses to attend trial in Nevada.[2] *Mountain View* did not encounter this issue. There, the defendant's witnesses did not reside out-of-state and, thus, were subject to the compulsory subpoena powers of Nevada courts. Moreover, the Borgers have not identified any authority demonstrating that Nevada courts have interpreted *Mountain View*'s evidentiary requirement so narrowly. *See, e.g., Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 131 Nev. 296, 304-05, 350 P.3d 392, 398 (2015) (finding that the district court did not abuse its discretion by concluding that the ease of bringing out-of-state witnesses and evidence to trial favored dismissal for forum non conveniens).

The Court did not distort or misapply the *Mountain View* evidentiary standard. *Mountain View* requires a motion to dismiss for forum non conveniens to be supported by affidavits "or other evidence" sufficient to create a specific factual showing that dismissal is appropriate. Polaris's motion to dismiss met that standard and the Court properly found that the district court did not abuse its discretion after considering the relevant, admissible evidence.

[2] The Borgers settled with Sandbar on January 16, 2019, and Sandbar was dismissed from this case shortly thereafter. The Borgers suggest that the Court cannot conclude "in the absence of any evidence, that a Nevada corporation [like Sandbar] will find it inconvenient to produce witnesses for a Nevada trial." (*See* Ex. A at 10). This argument misses the point: Now that Sandbar is no longer a defendant in this case, it has *no obligation* to produce witnesses for trial at all, and its Arizona-based employees cannot otherwise be compelled to come to Nevada by the remaining parties in this case.

ii. The Court Properly Applied the *Placer Dome* "Exceptional Circumstances" Standard.

Next, the Borgers contend that the Court misapplied the standard for "exceptional circumstances" under *Placer Dome* and argue that there is insufficient evidence in the record to support a motion to dismiss for forum non conveniens. (Ex. A at 8). Tellingly, the Petition does not analyze *Placer Dome* or the "exceptional circumstances" standard, nor explain why Polaris purportedly was unable to meet this standard for any reason other than that Polaris did not obtain affidavits from the out-of-state, non-party Sandbar employees or the first responders attesting to their unwillingness to travel for trial. Further, while the Borgers do quote extensively to the dissent, they do not raise any arguments or identify any controlling authority that the Court did not already appropriately consider when issuing its Order.[3]

Contrary to the Borgers' cursory and largely unsupported contentions, the Court properly applied the "exceptional circumstances" standard when it held that the district court did not abuse its discretion in granting Polaris's motion to dismiss. Under Nevada law, when considering a motion to dismiss for forum non conveniens, if the court finds that an adequate alternative forum exists, then "the court must then

[3] Instead, the Petition attempts to improperly rely on a never-before-raised argument that the "private interest factor is neutral when 'neither Plaintiffs nor Defendants identify specific unwilling witnesses by name.'" The Borgers do not cite any Nevada authority that supports this proposition and are prohibited by NRAP 40(c)(1) from raising it here.

weigh public and private interest factors to determine whether dismissal is warranted." *Placer Dome,* 131 Nev. at 301, 350 P.3d at 396. Dismissal for forum non conveniens is then appropriate "in exceptional circumstances when the factors weigh strongly in favor of another forum." *Id.* In *Placer Dome,* the Court held that the public and private factors weighed strongly in favor of another forum where the case lacked any genuine connection to Nevada, another jurisdiction's laws would apply, there was limited local interest in the case, no parties or witnesses resided in Nevada, material documents were located outside of Nevada, and compulsory process would be available in the alternative forum. *Id.* at 302–05, 350 P.3d at 396-99. Here, the Court found that these same public and private factors—plus some others, including that the subject vehicle was sold, rented, and driven in Arizona—existed. (*See* Ex. C at 4). Accordingly, the Court's determination that the public and private factors weigh heavily in favor of dismissal is a proper application of the *Placer Dome* exceptional circumstances test.

iii. Contrary to the Borgers' Petition, the Court Did Not Afford the Borgers' Choice of Forum Lesser Deference

The Borgers' final argument in support of their Petition is that their choice of forum was entitled to the same deference as Nevada residents and that the Court misapplied Nevada law by affording them "less favorable consideration" on the basis that the Borgers do not reside in Nevada. (Ex. A at 10–12). The Borgers do not cite any controlling, Nevada authority that holds that an out-of-state plaintiff's

choice of forum is entitled to the same deference as a Nevada resident. More importantly, however, the Borgers' argument that the Court misapplied this supposed standard is a simple misreading of the Court's Order. Nowhere in the Court's Order does the Court hold that the Borgers' choice of forum is entitled to lesser deference because it is not their forum of residence. In fact, the Court *explicitly states the opposite,* noting, "we have never held that a plaintiff's Nevada forum choice is entitled to less deference when the plaintiffs are not Nevada residents, and we do not resolve that point here." (Ex. C at 4 n.3). The Borgers' attempt to create an issue for rehearing by misconstruing the Court's Order is baseless and should be rejected.

III. CONCLUSION

The Borgers' Petition is both procedurally improper and substantively deficient for the reasons stated above. In affirming the district court's dismissal of the Borgers' case on the grounds of forum non conveniens, this Court did not overlook or misapply a material question of law or fact, nor any statute, procedural

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rule, regulation, or decision directly controlling a dispositive issue in this case. As such, the Borgers' Petition for Rehearing should be denied.

DATED this 10th day of May 2022.

PISANELLI BICE PLLC

By: /s/ Jordan T. Smith
Debra L. Spinelli, Esq., Bar No. 9695
Jordan T. Smith, Esq., Bar No. 12097
Dustun H. Holmes, Esq., Bar No. 12776
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) as this brief has been prepared in a proportionally spaced typeface using Office Word 2007 in size 14 font in Times New Roman.

I further certify that I have read this brief and it complies with the page- or type-volume limitations of NRAP 40(a)(3) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains approximately 3,135 words.

Finally, I hereby certify that to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 10th day of May 2022.

PISANELLI BICE PLLC

By: /s/ Jordan T. Smith
Debra L. Spinelli, Esq., Bar No. 9695
Jordan T. Smith, Esq., Bar No. 12097
Dustun H. Holmes, Esq., Bar No. 12776
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of PISANELLI BICE PLLC and that, on the 10th day of May 2022, I caused to be served via the Court's e-filing/e-service system a true and correct copy of the above and foregoing **Response to Petition for Rehearing** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Courts E-Filing system (Eflex) to the following:

Chad A. Bowers, Esq.
CHAD A. BOWERS, LTD.
3202 West Charleston Blvd.
Las Vegas, NV 89102

Kyle Wayne Farrar, Esq.
KASTER, LYNCH, FARRAR & BALL, LLP
1117 Herkimer Strett
Houston, TX 77008

Attorneys for Appellants

/s/ Cinda Towne
An employee of PISANELLI BICE PLLC