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## **Precap: *Junkermier, Clark, Campanella, Stevens, P.C. v. Alborn, Uithoven, Riekenberg, P.C.***

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**PRECAP; *Junkermier, Clark, Campanella, Stevens, P.C. v. Alborn, Uithoven, Riekenberg, P.C.***

**Victoria Dettman**

**I. QUESTIONS PRESENTED**

Did the district court err in finding the shareholder agreements, containing partially restrictive covenants not to compete, unenforceable because they lacked an essential term, were “agreements to agree,” and were unconscionable contracts of adhesion? If the district court did err—and the shareholder agreements are enforceable—are the partially restrictive covenants not to compete reasonable under *Dobbins, DeGuire & Tucher, P.C. v. Rutherford, MacDonald and Olson*,<sup>1</sup> and can the employer show a legitimate business interest in enforcing the covenants under *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*?<sup>2</sup>

This case is noteworthy because Montana law is unsettled on the issue of whether an employer has a legitimate business interest in enforcing a restrictive covenant when the employee chooses to end the employment relationship. If the Court reaches that issue, this case could guide attorneys in drafting enforceable partially restrictive covenants not to compete.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

The Montana accounting firm Junkermier, Clark, Campanella, Stevens, P.C. (“JCCS”) brought this action alleging Terry Alborn, Paul Uithoven, Christina Riekenberg, Joe Bateson, and Sherm Veltkamp (“Shareholders”) breached their *Shareholder’s Employment Agreements* (“Agreements”) and fiduciary duties to JCCS.<sup>3</sup>

JCCS was established in 1946 in Great Falls and has expanded throughout Montana by merging with and acquiring various accounting firms.<sup>4</sup> JCCS wished to expand to Bozeman and in the year 2000 began merger discussions with Bozeman firm Veltkamp, Stannebein & Bateson, P.C. (“VSB”).<sup>5</sup> The two entities eventually merged on January 1, 2002; JCCS paid for VSB’s assets with JCCS shares and VSB dissolved.<sup>6</sup> VSB

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<sup>1</sup> 708 P.2d 557 (Mont. 1985).

<sup>2</sup> 265 P.3d 646 (Mont. 2011).

<sup>3</sup> Appellant’s Opening Brief at 1–2, *Junkermier, Clark, Campanella, Stevens, P.C. v. Alborn, Uithoven, Riekenberg, P.C., Terry Alborn, Paul Uithoven, Christina Riekenberg, Joe Bateson, and Sherm Veltkamp*, <https://supremecourtdocket.mt.gov/view/DA%2015-0605%20Appellant's%20Opening%20-%20Brief?id=%7BF05C4752-0000-CE17-BD41-BE04DF468C34%7D> (Mont. Jan. 14, 2016) (No. DA 15-0605).

<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.* at 4.

<sup>6</sup> *Id.*

had four shareholders at the time of the merger: Uithoven, Bateson, Veltkamp, and Stannebien, All four became JCCS shareholders.<sup>7</sup> Alborn became a JCCS shareholder in 1980 and moved to the Bozeman JCCS branch after the merger with VSB.<sup>8</sup>

The Shareholders signed identical Agreements following the merger.<sup>9</sup> The Agreements were for a term of one year, but a vote of 75% of the directors could terminate them without cause.<sup>10</sup> The Agreements provided for compensation a “mutually agreeable amount.”<sup>11</sup> Additionally, the Agreements contained a partially restrictive covenant not to compete, confined to the instant and any contiguous county.<sup>12</sup> Partially restrictive covenants not to compete infringe upon, but do not unequivocally prohibit, one’s right to perform his or her trade. The covenant stated, in pertinent part:

If this Agreement is terminated for any reason and the Shareholder provides professional services in . . . competition with JCCS, the Shareholder agrees . . . to pay JCCS an amount equal to one hundred (100%) percent of the gross fees billed by JCCS to a particular client over the twelve month period immediately preceding such termination . . .<sup>13</sup>

All JCCS shareholders signed new Agreements on July 1, 2011.<sup>14</sup> Subsequently, the Agreements were extended by one year on July 1, 2012.<sup>15</sup> Therefore, the Agreements were set to expire on June 30, 2013.<sup>16</sup>

In 2013, the Shareholders voluntarily left JCCS after meeting with an independent consultant and having discussed their decision to leave with JCCS.<sup>17</sup> Shareholder Alborn directed a JCCS employee to download JCCS’s electronic client list in June 2013.<sup>18</sup> The Shareholders formed a new accounting firm, Amatics CPA Group, which opened on July 1, 2013.<sup>19</sup> Amatics advertised and sent solicitation letters to JCCS’s Bozeman clients.<sup>20</sup> Over the next year, 2,100 of JCCS’s 2,400 Bozeman clients moved their business to Amatics.<sup>21</sup>

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<sup>7</sup> Appellee’s Brief at 3, *Junkermier, Clark, Campanella, Stevens, P.C. v. Alborn, Uithoven, Riekenberg, P.C., Terry Alborn, Paul Uithoven, Christina Riekenberg, Joe Bateson, and Sherm Veltkamp*, <https://supremecourtdocket.mt.gov/view/DA%2015-0605%20Appellee%20Response%20-%20Brief?id=%7B601BF652-0000-CD10-B8D0-56BEE9239902%7D> (Mont. Feb. 12, 2016) (No. DA 15-0605).

<sup>8</sup> Appellant’s Opening Brief, *supra* note 3, at 4.

<sup>9</sup> *Id.* at 5; Appellee’s Brief, *supra* note 7, at 3.

<sup>10</sup> Appellee’s Brief, *supra* note 7, at 3.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Appellant’s Opening Brief, *supra* note 3, at 5–6.

<sup>14</sup> Appellee’s Brief, *supra* note 7, at 4.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 5.

<sup>19</sup> Appellant’s Opening Brief, *supra* note 3, at 10.

<sup>20</sup> *Id.* at 12.

<sup>21</sup> *Id.*

The Bozeman JCCS office eventually closed.<sup>22</sup> JCCS then commenced this action, seeking declaratory judgment enforcing the Agreements' covenants not to compete and alleging numerous causes of action, including breach of contract.<sup>23</sup> Both parties moved for summary judgment on JCCS's action for declaratory judgment and breach of contract claim. The district court granted the Shareholder's motion (thereby denying JCCS's motion), finding the Agreements unenforceable because they lacked an essential term (compensation), were "agreements to agree," and were unconscionable contracts of adhesion.<sup>24</sup> Because the district court found the Agreements unenforceable, it held they could not serve as basis for JCCS's breach of contract claim.<sup>25</sup> Therefore, the district court never reached the issue of whether the partially restrictive covenants in the Agreements were reasonable.<sup>26</sup> JCCS now appeals the district court's ruling. There are multiple issues on appeal, including fiduciary duty owed, breach of fiduciary duty, proof of damages, and attorneys' fees. However, the pivotal issue discussed below is that of the Agreements' partially restrictive covenants not to compete.

### III. SUMMARY OF ARGUMENTS

#### A. *Appellant Junkermier, Clark, Campanella, Stevens, P.C.*

##### 1. *The District Court Erred in Granting Summary Judgment to the Shareholders on the Basis That the Agreements Are Unenforceable.*

JCCS argues the district court erred when it found the Agreements unenforceable because they lacked an essential term, were "agreements to agree," and were unconscionable contracts of adhesion.

JCCS asserts the Agreements had all essential terms. JCCS contends the district court improperly relied on distinguishable case law to conclude compensation was not adequately contemplated in the Agreements.<sup>27</sup> JCCS asserts the Shareholders were compensated for their work pursuant to the Agreements.<sup>28</sup> Additionally, JCCS argues the amount of the Shareholders' salary is irrelevant to the issue of whether the partially restrictive covenant is enforceable, thus asserting that the covenant is not made unenforceable by the mere omission of a dollar figure.<sup>29</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*; Appellee's Brief, supra note 7, at 1–2.

<sup>24</sup> Appellee's Brief, supra note 7, at 10.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Appellant's Opening Brief, supra note 3, at 30.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

JCCS asserts the Agreements are not “agreements to agree.”<sup>30</sup> JCCS argues that the amount of the employee’s salary does not need to be included in the Agreement because the amount of the employee’s salary is not consideration for the covenant not to compete.<sup>31</sup> Instead, the employment itself is the consideration.<sup>32</sup> Therefore, JCCS concludes the Agreement contemplates the parties’ full agreement.<sup>33</sup>

Supported by eight peer accounting firms as amici curiae, JCCS also argues that the Agreements are not unconscionable contracts of adhesion.<sup>34</sup> JCCS argues the Agreements are not contracts of adhesion because the Shareholders were not in an inferior bargaining position as officers, shareholders, and in the case of one shareholder, a director.<sup>35</sup> JCCS asserts the Shareholders were on equal footing with JCCS to speak up about changes they wished to make to the covenants.<sup>36</sup> JCCS contends the Agreements were effectively agreements the Shareholders entered into with themselves and not unconscionable contracts of adhesion.<sup>37</sup>

## 2. *The District Court Erred in Not Granting Summary Judgment to JCCS under Dobbins and Its Progeny.*

The district court found the Agreements unenforceable and therefore did not reach the issue of whether the partially restrictive covenants are reasonable.<sup>38</sup> JCCS contends this is reversible error and that the district court should have considered whether the covenant satisfies *Dobbins*’ reasonableness test.<sup>39</sup> JCCS argues that public policy favors its position because an employer must be able to “protect its client base from depletion by a former employee.”<sup>40</sup> JCCS states, “Montana businesses rely on the enforceability of covenants like the one here every day.”<sup>41</sup> JCCS further contends that failing to uphold the covenant in the Agreement would “preclude Montana businesses from competing in the modern world.”<sup>42</sup>

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<sup>30</sup> *Id.* at 30–31.

<sup>31</sup> *Id.* at 31.

<sup>32</sup> *Id.*

<sup>33</sup> Appellant’s Opening Brief, *supra* note 3, at 31.

<sup>34</sup> *Id.* at 33–34.

<sup>35</sup> *Id.* at 36.

<sup>36</sup> Appellant’s Reply Brief at 13, *Junkermier, Clark, Campanella, Stevens, P.C. v. Alborn, Uithoven, Riekenberg, P.C., Terry Alborn, Paul Uithoven, Christina Riekenberg, Joe Bateson, and Sherm Veltkamp*, <https://supremecourtdocket.mt.gov/view/DA%2015-0605%20Appellant%20Reply%20-%20Brief?id=%7B40DE6753-0000-CF16-9242-C5D987664393%7D> (Mont. March 11, 2016) (No. DA 15-0605).

<sup>37</sup> Appellant’s Opening Brief, *supra* note 3, at 36.

<sup>38</sup> *Id.* at 33.

<sup>39</sup> *Id.* at 36.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

JCCS argues its partially restrictive covenant is enforceable because it is consistent with the Court's holding in *Dobbins* and its progeny.<sup>43</sup> The threshold question in determining enforceability is whether the covenant is a reasonable restraint on trade.<sup>44</sup> JCCS argues that its covenant is a reasonable restraint on trade because: (1) it is limited in operation to time and place; (2) is based on good consideration in the Shareholder's salary and employment; and (3) affords reasonable protection for and does not impose an unreasonable burden on the employer, employee, or the public.<sup>45</sup>

JCCS also argues it has a legitimate business reason to enforce the covenants, pursuant to *Wrigg*.<sup>46</sup> A legitimate business reason exists when the restriction is necessary to protect the employer's goodwill, customer relationships, or trade information.<sup>47</sup> JCCS acknowledges that precedent shows covenants are only appropriate when a less restrictive measure will not suffice and argues there are no less restrictive means to protect JCCS's business in this instance.<sup>48</sup> JCCS argues the Shareholders gained an unfair advantage when they solicited JCCS's customers after voluntarily leaving their employment with JCCS.<sup>49</sup> JCCS contends it intentionally did not discharge the Shareholders or lock its client lists and confidential information because it knew doing so would have violated *Wrigg* and resulted in no recovery under the covenants.<sup>50</sup> JCCS emphasizes that the Shareholders chose to leave their employment and argues a partial restriction on trade should be held reasonable when an employee initiates their termination.<sup>51</sup>

*B. Appellee Alborn, Uithoven, Riekenberg, P.C., Terry Alborn, Paul Uithoven, Christina Riekenberg, Joe Bateson, and Sherm Veltkamp*

*1. The District Court Did Not Err in Granting the Shareholders' Motion for Summary Judgment Because the Agreements Are Unenforceable.*

The Shareholders contend the district court properly granted summary judgment because the Agreements did not contain all essential terms, were "agreements to agree," and are unconscionable contracts of

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<sup>43</sup> Appellant's Opening Brief, supra note 3, at 22.

<sup>44</sup> Appellant's Opening Brief, supra note 3, at 23, citing *Mungas v. Great Falls Clinic, LLP*, 221 P.3d 1230 (Mont. 2009).

<sup>45</sup> Appellant's Opening Brief, supra note 3, at 24–25.

<sup>46</sup> *Id.* at 25; *Wrigg*, 265 P.3d at 651.

<sup>47</sup> Appellant's Opening Brief, supra note 3, at 26.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 27.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 26–27.

adhesion. The Shareholders remind the Court that agreements restraining a profession are disfavored in Montana.<sup>52</sup>

The Shareholders argue the Agreements are unenforceable because they do not contain an essential term to the contract: compensation.<sup>53</sup> The Shareholders contend the compensation term in the Agreements is incomplete because it fails to “include the Shareholder’s compensation or a mode or means to calculate it.”<sup>54</sup> Additionally, the Shareholders assert they were not fully compensated because their 2013 bonuses went unpaid after JCCS discovered the Shareholder’s plan to leave.<sup>55</sup> Likewise, the Shareholders argue the district court properly considered the Agreements as “agreements to agree” because they do not specify compensation or a means to determine it.<sup>56</sup>

The Shareholders also contend the Agreements are unconscionable contracts of adhesion and support their contention with three main arguments.<sup>57</sup> First, the Shareholders argue they had no meaningful choice but to sign the Agreements because they were employees in a weaker bargaining position and were forced to sign a standard form that all shareholders signed without any negotiation.<sup>58</sup> Second, the Shareholders argue the terms are more favorable to JCCS for various reasons, the most prevalent being that the damage payment to JCCS of 100% of gross fees billed by JCCS to a particular client in the previous year does not reflect JCCS’s actual damages.<sup>59</sup> Third, the Shareholders argue the covenant not to compete is outside of the Shareholder’s reasonable expectations because they reasonably believed it would only apply if the Agreements were terminated—not if the Agreements expired.<sup>60</sup>

Finally, the Shareholders argue the covenant not to compete does not apply to them because it only applies upon termination, not term expiration, and they were not terminated. Instead, the Agreements had expired on June 30, 2013.<sup>61</sup>

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<sup>52</sup> Appellee’s Brief, *supra* note 7, at 12.

<sup>53</sup> *Id.* at 12–13.

<sup>54</sup> *Id.* at 13.

<sup>55</sup> *Id.* at 14.

<sup>56</sup> *Id.* at 14–15.

<sup>57</sup> *Id.* at 15.

<sup>58</sup> Appellee’s Brief, *supra* note 7, at 17; Appellees’ Brief in Response to Brief of Amici Curiae at 2, *Junkermier, Clark, Campanella, Stevens, P.C. v. Alborn, Uithoven, Riekenberg, P.C., Terry Alborn, Paul Uithoven, Christina Riekenberg, Joe Bateson, and Sherm Veltkamp*, <https://supremecourtdocket.mt.gov/view/DA%2015-0605%20Supplemental%20-%20Brief?id=%7B10B62D53-0000-CE13-924C-7F4D95F87002%7D> (Mont. Feb. 29, 2016) (No. DA 15-0605).

<sup>59</sup> Appellee’s Brief, *supra* note 7, at 17.

<sup>60</sup> *Id.* at 19; Appellees’ Brief in Response to Brief of Amici Curiae, *supra* note 58, at 4.

<sup>61</sup> Appellee’s Brief, *supra* note 7, at 19.

2. *Even If the Agreements Are Enforceable, the District Court Did Not Err in Denying JCCS's Motion for Summary Judgment Because There Are Genuine Issues of Material Fact.*

The Shareholders argue that even if the Court determines the district court erred in finding the Agreements unenforceable, JCCS's motion for summary judgment should still be denied because there are genuine issues of material fact as to the adequacy of consideration, the reasonableness of the partially restrictive covenant, and the legitimacy of JCCS's business interest.<sup>62</sup>

The Shareholders contend that if the contract is considered enforceable, questions of fact exist regarding whether the covenant not to compete is reasonable.<sup>63</sup> The Shareholders argue, pursuant to *Dobbins*, *Mungas*, and *Wrigg*, the reasonableness of a partially restrictive covenant is a question of fact and therefore should not be decided on a motion for summary judgment.<sup>64</sup> Additionally, the Shareholders argue that the liquidated damage clause requires the Shareholders to pay an unreasonably large amount to JCCS for breach of the covenant.<sup>65</sup>

The Shareholders also disagree with JCCS's reported legitimate business interest in the covenant not to compete.<sup>66</sup> The Shareholders argue JCCS had an opportunity to prepare its Bozeman clients for the Shareholders' departure and that JCCS expected the Shareholders to download their firm's client list.<sup>67</sup> Additionally, the Shareholders argue JCCS does not have a legitimate business interest to restrict the Shareholders' trade because clients have the right to choose their accountants; therefore, as a matter of public policy, an accountant cannot be bound by a covenant not to compete that effectively prevents an accountant from providing services to the client.<sup>68</sup> The Shareholders assert the fact they voluntarily left JCCS is not relevant to JCCS's legitimate business reason because the Shareholders worked through the end of their Agreements, a distinguishing fact from *Wrigg*.<sup>69</sup> Finally, the Shareholders argue JCCS does not have a legitimate business interest in client relationships that were gained before the Shareholders joined JCCS, and many of the clients employed VSB before its merger with JCCS.<sup>70</sup>

C. *Amici Curiae Accounting Firms in Support of Appellant*

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<sup>62</sup> *Id.* at 24–26, 29.

<sup>63</sup> *Id.* at 27.

<sup>64</sup> *Id.* at 25.

<sup>65</sup> *Id.* at 28.

<sup>66</sup> *Id.* at 29.

<sup>67</sup> Appellee's Brief, *supra* note 7, at 30.

<sup>68</sup> *Id.* at 31; Appellees' Brief in Response to Brief of Amici Curiae, *supra* note 58, at 7.

<sup>69</sup> Appellee's Brief, *supra* note 7, at 31.

<sup>70</sup> *Id.* at 32.



Eight Montana accounting firms (“Accounting Firms”) filed an Amicus Brief supporting JCCS.<sup>71</sup> The Accounting Firms had regularly used restrictive covenants and assert the Court’s holding in this case could impact the restrictive covenants normally utilized in the accounting profession.<sup>72</sup> The Accounting Firms argue the Agreements are not per se unconscionable contracts of adhesion.<sup>73</sup> They support their position by arguing: (1) the bargaining positions of the parties were not vastly unequal;<sup>74</sup> (2) this type of restrictive covenant is within the reasonable expectations of Montana accountants;<sup>75</sup> (3) this type of restrictive covenant is not contrary to public policy as a matter of law;<sup>76</sup> and (4) the restrictive covenant does not violate the ethical rules applicable to accountants.<sup>77</sup> The Accounting Firms emphasize this restrictive covenant is consistent with *Dobbins* and its progeny because it does not prohibit the Shareholders from practicing their profession; it just requires them to compensate JCCS when they take JCCS’s clients to another firm.<sup>78</sup>

The Accounting Firms also assert the amount of liquidated damages is reasonable and not unconscionable when comparing the terms in the present case to those in *Dobbins*—which were considered reasonable.<sup>79</sup> The Accounting Firms argue that liquidated damages for a breach of a restrictive covenant are frequently aligned with the cost to purchase an accounting practice because that is what, in essence, is occurring.<sup>80</sup> The Accounting Firms argue the reasonableness is further reinforced by the fact the Shareholders can make payments over a three-year period.<sup>81</sup> For these reasons, the Accounting Firms request the Court reverse the district court’s order to the extent it concludes that the restrictive covenant is an unconscionable contract of adhesion.<sup>82</sup>

#### IV. ANALYSIS

The Court is reviewing this issue de novo and therefore will likely inquire as to both the enforceability of the Agreements and the reasonableness of the covenants. The Court will first consider whether the

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<sup>71</sup> Brief of Amici Curiae Accounting Firms Supporting Appellant at 2, *Junkermier, Clark, Campanella, Stevens, P.C. v. Alborn, Uithoven, Riekenberg, P.C., Terry Alborn, Paul Uithoven, Christina Riekenberg, Joe Bateson, and Sherm Veltkamp*, <https://supremecourtdocket.mt.gov/view/DA%2015-0605%20Amicus%20-%20Brief?id=%7BC080B352-0000-CC17-85F2-BB75E2E16085%7D> (Mont. Feb. 5, 2016) (No. DA 15-0605).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 4.

<sup>74</sup> *Id.* at 5.

<sup>75</sup> *Id.* at 6.

<sup>76</sup> *Id.* at 9.

<sup>77</sup> Brief of Amici Curiae Accounting Firms, supra note 71, at 13.

<sup>78</sup> *Id.* at 12.

<sup>79</sup> *Id.* at 14, 16.

<sup>80</sup> *Id.* at 17.

<sup>81</sup> *Id.* at 18.

<sup>82</sup> *Id.*

Agreements are enforceable. If it decides the Agreements are enforceable it will then consider the legitimacy of the partially restrictive covenants not to compete.

As to the enforceability, expect questions from the Court clarifying the compensation term due to its importance for both the essential term and “agreement to agree” issues. To aid it in determining whether the contract is an unconscionable contract of adhesion, the Court may inquire about the Agreement’s one-year term, the procedure for renewing the term, and the reasonableness of the liquidated damages provision. JCCS likely has a stronger argument on appeal even though the district court granted the Shareholders’ motion for summary judgment. JCCS’s contention that the contract is not an unconscionable contract of adhesion is well supported in its briefs and further accredited by the Accounting Firms.

Montana, generally, disfavors restraint on trade. Covenants not to compete are statutorily barred, subject to only a few exceptions.<sup>83</sup> Even when the statutory exceptions do not apply, the Montana Supreme Court has permitted indirect covenants not to compete in only a few narrow instances. In *Dobbins v. Rutherford*, the Court held a covenant not to compete enforceable if it is an indirect, reasonable restraint on trade.<sup>84</sup> A reasonable restraint is one that: (1) is restricted in operation as to time or place; (2) is based on good consideration; and (3) reasonably protects the employer but does not unreasonably burden the employee or public.<sup>85</sup>

*Dobbins* was further narrowed in *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*, where the Court held a reasonable covenant not to compete shall only be upheld where the employer can show a legitimate business interest in enforcing the covenant.<sup>86</sup> The Court noted that an employer “normally lacks a legitimate business interest in a covenant when it chooses to end the employment relationship.”<sup>87</sup> Neither *Wrigg* nor any decision since has addressed the issue of whether an employer has a legitimate business interest in enforcing a covenant when an employee initiates and voluntarily leaves his or her employment, leaving a gap in Montana law. That issue is precisely what the Court has the opportunity to address in this case. The Shareholders left JCCS at their own volition, and this case is an opportunity for the Court to clarify what legitimate business interest an employer has when enforcing a covenant not to compete when the employee leaves the employment relationship. JCCS makes a convincing argument that, based on Montana case law, this is the type of legitimate business interest that would support enforcing a covenant not to compete.

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<sup>83</sup> See MONT. CODE. ANN. §§ 28–2–703 to 28–2–705 (2015).

<sup>84</sup> *Dobbins*, 708 P.2d at 580.

<sup>85</sup> *Id.*

<sup>86</sup> *Wrigg*, 265 P.3d at 653.

<sup>87</sup> *Id.* at 653.

If the Court chooses to address this issue, its clarification will aid attorneys in interpreting Montana's fact-intensive restrictive covenant case law. Clarification is important so attorneys may competently draft covenants not to compete that will be enforced by Montana courts.