IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 19-0521

JUNKERMIER, CLARK, CAMPANELLA, STEVENS, P.C.,

Plaintiff and Appellee,

vs.

TERRY ALBORN, PAUL UITHOVEN,
CHRISTINA RIEKENBERG, JOE BATESON,
AND SHERM VELTKAMP,

Defendants and Appellants.

On Appeal from the Montana Eighteenth Judicial District Court
Gallatin County Cause No. DV-13-736C
Before the Honorable Amy Eddy

APPELLANTS ALBORN, UITHOVEN, RIEKENBERG, BATESON, AND VELTKAMPS' PETITION FOR REHEARING

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PETITION

Appellants Alborn, Uithoven, Riekenberg, Bateson, and Veltkamp ("Former Shareholders") petition the Court for a rehearing on the grounds that this Court's decision "overlooked some fact material to its decision" and "conflicts with a controlling statute or decision." Rule 20(1)(a)(i)&(iii) M. R. App. P.

ARGUMENT

A. Introduction.

This Court concluded that a "reasonable reading" of the Covenant required a payment for "gross fees billed" to JCCS clients served by Former Shareholders in the amount required by just one Covenant ($2,353,463.27). This Court further concluded that Former Shareholders were jointly and severally liable for that payment because they "acted in concert." *Junkermier, Clark, Campanella, Stevens, P.C. v. Alborn*, 2020 MT 179, ¶ 16-17, 2020 Mont. LEXIS 2072. (*Junkermier II)*

This Court's Opinion overlooked material facts and a controlling statute and decision. Given the facts and controlling law overlooked, and given the interpretation placed upon the Covenant, this Court should conclude that the Covenant imposes a several liability upon each Former Shareholder. This Court then should remand the case with instructions requiring the District Court to

determine each Former Shareholder's share of the total payment and enter judgment accordingly.

B. This Court overlooked the fact that each Former Shareholder (1) played a very different role, both before and after their departure from JCCS, (2) generated "gross fees billed" to JCCS clients in dramatically different amounts, and (3) benefitted from competing with JCCS in very different ways.

This Court's decision to impose joint liability upon all Former Shareholders was premised on its conclusion that they "worked in concert." The Court stated:

> Indeed, from the initial announcement of their departure from JCCS, Appellants worked in concert, including as alleged and defended in this litigation.

Junkermier II, ¶ 17. This conclusion overlooked the critical fact that Former Shareholders were in very different positions and played very different roles, both before and after their departure from JCCS.

Veltkamp decided to cut back on his workload in 2009. By the time of the departure in 2013, he had transitioned all of his clients to other JCCS employees. (Finding of Fact ("FOF") No. 29, Dkt. 332) Bateson decided to cut back on his workload in 2011. By the time of the departure, he had transferred all but one of his clients to other JCCS employees. JCCS had redeemed all but 100 shares of Veltkamp's stock and was in the process of redeeming Bateson's shares. *Id.*

Veltkamp was not a part of the discussions and preparations that led to the other Former Shareholders' departure from JCCS. He learned of their decision to

leave after it was made and the departure was complete. JCCS did not even offer him a new employment contract. (Trans. 602:1-25; 603:1-25) In contrast, the other Former Shareholders played major roles in planning the departure from JCCS. (FOF Nos. 38-60)

The roles Former Shareholders played after their departure from JCCS were also very different. Veltkamp did not become an Amatics shareholder or take part in its management. He was simply a part-time, seasonal, Amatics employee. (Trans. 602:13-25; 603:1-25) Likewise, Bateson was never an Amatics shareholder and took no part in its management. (FOF Nos. 38 & 39) Alborn, Uithoven and Riekenberg formed Amatics, and managed its affairs. *Id.*

The "gross fees billed" by each Former Shareholder to JCCS clients were dramatically different. At one extreme, Bateson was "billing manager" for former JCCS clients with "gross fees billed" by Amatics of $18,852.25. But on the other extreme, Alborn was "billing manager" for former JCCS clients with "gross fees billed" by Amatics of $418,815.84. (Exh. 154, Trans. 736)

Finally, this Court's conclusion overlooked the fact that the benefits each Former Shareholder received by competing with JCCS were very different. Veltkamp received an average annual salary from Amatics over the three years following his departure of $17,441. Bateson received an average annual salary from Amatics over the three years following his departure of $37,503. In

comparison, Alborn received an average annual salary from Amatics over the three years following his departure of $150,132. (Exh. 182, Trans. 745)

C. The imposition of joint liability imposes an unreasonable burden upon one or more Former Shareholders.

This Court was required to review the Covenant to determine if it imposed an unreasonable burden upon Former Shareholders. This Court concluded that the Covenant did not impose an unreasonable burden upon Former Shareholders because **Amatics** could afford to pay the amount required. *Junkermier II*, ¶¶ 27-29. Amatics was not a party to the Covenants and not a party to this action. In finding the Covenant imposed a reasonable burden upon Former Shareholders because Amatics could afford it, this Court overlooked the fact that Amatics was not owned or managed by Veltkamp or Bateson.

Moreover, this Court did not review the Covenant to determine if it imposed an unreasonable burden upon each individual Former Shareholder as required by *Junkermier I*. This Court imposed joint liability upon each Former Shareholder without regard for the very different role each played in preparing for the departure from JCCS, without regard for the fact that neither Veltkamp nor Bateson owned any interest in Amatics, without regard for the dramatically different "gross fees billed" by each and without regard for the significantly different benefits received by each from competing with JCCS.

This Court's imposition of joint liability without regard for these facts imposes a grossly unreasonable burden on one or more Former Shareholders. Given this Court's imposition of joint liability, Veltkamp could end up paying $2,353,463.27 despite having played no role in planning the departure from JCCS, despite having served as a part-time, seasonal, Amatics employee, and despite having earned an average annual salary of $17,441. Likewise, Bateson could end up paying $2,353,463.27 despite having no ownership in or management responsibilities for Amatics, despite serving as "billing manager" for JCCS clients for whom "gross fees billed" were only $18,852.25, and despite having earned an average annual salary of $37,503.

Admittedly, Veltkamp or Bateson would have a right of contribution from the other Former Shareholders. However, if they are required to pay JCCS the full amount, they would be required to pursue the other Former Shareholders for contribution. There is no guaranty that any Former Shareholder saddled with payment of the full amount would be successful in securing contribution from the other Former Shareholders. The other Former Shareholders may not have the financial means to pay their share or may be forced into bankruptcy.

If a Former Shareholder is unsuccessful in securing contributions from all the other Former Shareholders, the burden on that Former Shareholder would be grossly unreasonable. It would be an unreasonable burden upon Veltkamp to pay

the entire $2,353,463.27 given his status as a part-time, seasonal, Amatics employee earning an average annual salary of just $17,441. It would be an unreasonable burden upon Bateson to pay the entire $2,353,463.27 given his "gross fees billed" as billing manager of only $18,852.25, and given his average annual salary of $37,503.

D. A strict interpretation of the Covenant requires that each Former Shareholder is severally liable for his/her share of "gross fees billed".

This Court acknowledged that covenants not to compete are strongly disfavored. *Junkermier II,* ¶ 21. Such covenants are to be strictly construed in favor of employees. *Junkermier I,* ¶ 39. As a result, this Court was required to strictly construe the Covenant in favor of Former Shareholders.

The Court correctly concluded that a strict construction of the Covenant resulted in the conclusion that … **the Covenant did not originate as a joint obligation**…" *Junkermier* II, ¶ 17 (emphasis added). The plain language of the Covenant did not create a joint obligation. However, facts overlooked by this Court do not support its conclusion that, "by acting in concert," Former Shareholders converted the several obligation created by their separate Covenants into a joint obligation. Moreover, that conclusion conflicts with a controlling statute and decision.

The facts this Court overlooked demonstrate Veltkamp did not "act in concert" with the other Former Shareholders in preparing to leave JCCS or in

forming and managing Amatics. He did not even know of their plans to leave until after the fact. Then, he became a part-time, seasonal, Amatics employee earning $17,441 per year with no ownership interest or management responsibilities. Although Bateson played a role in planning the departure, he played no role in forming Amatics, had no management responsibilities for its affairs, and did not become a shareholder. He was responsible for "gross fees billed" to JCCS clients in the amount of $18,850 and was only earning $37,503 per year.

This Court overlooked the fact that Veltkamp and Bateson's roles were far more limited than those of the other Former Shareholders. Nonetheless, this Court treated all Former Shareholders as if they were equal owners of Amatics, their conduct was the same, their "gross fees billed" were the same, and the benefit they received from competing with JCCS was the same.

This Court did not cite any legal authority for its conclusion that Former Shareholders' conduct ("by acting in concert") could convert the several obligation created by the Covenant to a joint obligation. There is none.

The terms of the Covenant, not Former Shareholders' conduct, created the nature of their obligation. The rule is stated in Williston on Contracts (4th Ed. 2012) Section 36.3:

> Whether contract rights or duties are joint, several, or joint and several depends upon the meaning of the contract as ascertained by its proper interpretation or construction.

This Court found that a "proper interpretation" of the Covenant was that it **did not** create a joint obligation. *Junkermier II,* ¶ 17 (emphasis added).

This Court employed what it called a "reasonable reading" of the Covenant to conclude it required a single payment of $2,353,463.27. It did so to avoid an "absurd result." *Junkermier II,* ¶ 16. In reaching this conclusion, the Court reasoned:

> If Appellants had divided up the JCCS accounts and went their separate ways, acted individually to serve their respective accounts, and were separately ordered to pay a penalty for clients they served, the total liquidated damages for their combined individual liabilities for all JCCS accounts would likewise have been $2,353,463.27.

Id. The same reasoning should be applied when determining whether the Covenant imposed joint and several liability. Former Shareholders' liability should be determined as if they "went their separate ways, acted individually to serve their respective accounts, and were separately ordered to pay a penalty for clients they served…" *Id.*

By employing a "reasonable reading" of the Covenant, this Court concluded that it required a single payment of $2,353,463.27 consisting of the "combined individual liabilities" owed by each Former Shareholder. A strict interpretation of the Covenant compels the conclusion that it requires each Former Shareholder to pay his/her "individual liabilit(y)" for his/her share of $2,353,463.27. That is the

amount of each Former Shareholder's "individual liability" had he/she "went their separate way."

This Court's reading of the Covenant must be consistent. If a "reasonable reading" of the Covenant requires a reduction of the total amount owed to $2,343,463.27 to avoid an "absurdity," it also requires a reduction of the amount for which each Former Shareholder is liable as to his/her pro rata share of that reduced amount. That "reasonable reading" is necessary to avoid an "absurdity."

After all, this Court is required to strictly construe the Covenant in favor of Former Shareholders. Surely, a strict interpretation of the Covenant in favor of Former Shareholders does not result in a payment of $2,353,463.27 by a shareholder like Veltkamp who only earned an average annual salary of $17, 441 or a payment of $2,353,463.27 by a shareholder like Bateson who was responsible for "gross fees billed" of only $18,852.25. Such a result would be "absurd."

The Court's reliance upon Mont. Code Ann. § 28-1-302 to support the conclusion Former Shareholders were jointly liable was misplaced. That section reads:

> … all **joint** obligations and covenants shall be taken and held to be **joint and several** obligations and covenants… (emphasis added)

This Court's application of this rule to the Covenant reverses the order of the terms **joint** and **several.**

This Court's decision overlooked Mont. Code Ann. § 28-1-102 which provides:

> An obligation arises either from:
>
> (1) the contract of the parties; or
> (2) the operation of law.

Former Shareholders' obligation to JCCS arose "by contract of the parties."

This Court concluded that the Covenant, as drafted, did not create a joint obligation. This Court said:

> While the Covenant **did not originate as a joint obligation**, nonetheless, by acting in concert, Appellants' contractual obligations to pay a singular liquidated damage penalty for each JCCS client they took with them to Amatics became their joint obligation to JCCS. (emphasis added)

Junkermier II, ¶ 17. The Covenant, as this Court interpreted it, created a several obligation, not a joint obligation.

To avoid the consequences of that interpretation, this Court imposed joint liability based upon Former Shareholders' "acting in concert." This Court's decision overlooked *Sloane v. Fauque,* 239 Mont. 383, 385-386, 784 P.2d 895, 896-897 (1989) (adopting Section 876 of the Restatement of Torts (Second) Torts (1979). That decision held that joint liability for "acting in concert" arises from tortious conduct. The Court previously held that Alborn was the only Former Shareholder who acted tortiously. *Junkermier I,* ¶ 60 Consequently, Former

Shareholders could not be held jointly liable for "acting in concert " to commit a tortious act.

E. Relief requested.

Former Shareholders ask this Court to amend its Opinion to hold that they are severally liable for their pro rata shares of $2,353,463.27 and remand the case to the District Court with instructions to determine those pro rata shares. This request is consistent with the Court's "reasonable reading" of the Covenant requiring payment pursuant to one Covenant and its duty to strictly construe the Covenant in favor of Former Shareholders as required by *Junkermier I,* ¶ 39 in a way that does not impose an unreasonable burden upon any one of them as individuals.

DATED this 29th day of July, 2020.

BERG LILLY, PC

By /s/ Michael J. Lilly
Michael J. Lilly

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By /s/ Carey E. Matovich
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) Montana Rules of Appellate Procedure, I certify that this Petition for Rehearing is printed with a proportionately spaced Times New Roman text typeface of 14 points; is doubled spaced; and the word count

calculated by Microsoft Word 2010 is 2,316 words, excluding the table of contents, table of citations, certificate of service, and certificate of compliance.

/s/ Michael J. Lilly
Michael J. Lilly

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2020, I served a true and accurate copy of the foregoing PETITION FOR REHEARING on the following:

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/s/ Michael J. Lilly
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I, Michael J. Lilly, hereby certify that I have served true and accurate copies of the foregoing Petition - Rehearing to the following on 07-29-2020:

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