

NO. A05-1285

State of Minnesota
In Court of Appeals

Paul McClure individually and
d/b/a McClure Associates,

Appellants,

vs.

Davis Engineering, L.L.C. and Douglas Machine, Inc.,

Respondents.

APPELLANTS' REPLY BRIEF

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<u>TABLE OF AUTHORITIES</u>	1
<u>ARGUMENT</u>	2
A. INTRODUCTION	2
B. RESPONDENTS’ ARGUMENTS SHOW THERE IS NO “CLEAR” INTENT IN MINN. STAT. § 181.145 TO EXCLUDE INDIVIDUALS FUNCTIONING IN A CORPORATE FORM...	2
1. Respondents’ Arguments Ignore Proper Statutory Analysis	2
C. RESPONDENTS ATTEMPT TO OVERTURN MINNESOTA STATUTES AND DECADES OF MINNESOTA PRECEDENT THAT HOLD THAT BREACHES OF CONTRACT ARE GOVERNED BY A SIX-YEAR STATUTE OF LIMITATION...	6
1. Respondents Ask This Court To Overrule The Legislature And Overturn Decades Of Precedent Relating To Minn. Stat. § 541.05	6
D. RESPONDENTS REQUEST THIS COURT TO REWRITE MINN. STAT. § 181.145 TO REDEFINE WHEN COMMISSIONED SALESPERSONS’ POSITIONS “TERMINATE.”	9
<u>CONCLUSION</u>	11
<u>CERTIFICATE OF COMPLIANCE</u>	11

TABLE OF AUTHORITIES

Statutes

Minn. Stat. § 181.145.....	3, 5, 6, 10, 11
Minn. Stat. § 541.05.....	7, 8
Minn. Stat. § 541.07.....	7, 8
Minn. Stat. § 654.44.....	4

Cases

<i>AAA Electric & Neon Service, Inc. v. R-Design Co.</i> , 364 N.W.2d 869 (Minn. App. 1985).....	9
<i>Cherne Contracting Corp. v. Wausau Ins. Cos.</i> , 572 N.W.2d 339 (Minn. App. 1997).....	9
<i>Estate of Beecham</i> , 378 N.W.2d 800 (Minn. 1985).....	9
<i>Fusion v. Nebraska Aluminum Castings, Inc.</i> , 934 F. Supp. 1270 (D. Kan. 1996).....	3, 4, 6
<i>Krueger v. State Department of Highways</i> , 287 Minn. 539 (1970).....	9
<i>Roaderrick v. Lull Eng'g Co.</i> , 208 N.W.2d 761 (1973).....	8
<i>Wagner Homes, inc. v. Lehtinen</i> , 1996 WL 422540 (Minn. App.).....	9

ARGUMENT

A. INTRODUCTION

Respondents' Response Memorandum is replete with distortions of Appellants' arguments and basic misapprehensions of statutory analysis and construction. The Court should see it for what it is - an attempt to circumvent the basic norms of statutory interpretation and subvert black letter statutory law. Should Respondents' arguments be accepted, bushels of cases dealing with the use of the term "person" to include corporations would have to be revisited. Further, cases that have for decades held that contracts for services have a six-year statute of limitations would be reversed. The Court cannot allow Respondents' destructive and destabilizing arguments to prevail.

B. RESPONDENTS' ARGUMENTS SHOW THERE IS NO "CLEAR" INTENT IN MINN. STAT. § 181.145 TO EXCLUDE INDIVIDUALS FUNCTIONING IN A CORPORATE FORM.

1. Respondents' Arguments Ignore Proper Statutory Analysis.

Respondents, like the trial court, supported their position that Minn. Stat. § 181.145 cannot apply to statutory "persons" simply by accepting the flawed statutory analysis of Minnesota law by a Kansas court. *Fusion, Inc. v. Nebraska Aluminum Castings, Inc.*, 934 F.Supp. 1270 (D. Kan. 1996). That case, and Respondents' identical position, cannot be accepted by this

Court. The analysis of Minnesota statutes in that case is not only minimal, it is almost non-existent, and it completely ignores the primary tenet of construction relating to the use of the term “person” contained in Minn. Stat. § 654.44, subd. 1 which *requires* that the terms defined therein “*shall*” have the meanings given therein when used in Minnesota Statutes “unless another intention *clearly* appears.” [emphasis added]; see Minn. Stat. § 654.44, subd. 16 (stating the term “shall” is mandatory.”). Neither the Kansas court nor the Respondents have shown any “CLEAR” intent that normal statutory interpretation should not apply.

Both *Fusion* and the Respondents utterly fail to address that “commissioned salesperson” is not limited by any definitional list of terms. Both utterly fail to explain why a list of terms applying to “employers” should specifically limit the definition of “commissioned salespersons” in a completely different and *previous* subdivision. In short, both *Fusion* and the Respondents’ arguments lack analysis and contain only assertions and conclusions.

The Respondents’ arguments also lay bare the hollowness of their position relating to the statutory language and construction of Chapter 181 as a whole. Respondents argue that what they call the “jumbled and confusing statutory history of the definition of ‘employer’ in Chapter 181” should be

used as a basis to show a *clear* intent to limit the term “person.” If the statutory history relating to the term “employer” is admittedly unclear - jumbled and confusing - how can that term be used to show any clear intent to limit a completely separate term in a completely separate and previous subdivision? This does not make sense.¹

Respondents also wish to have the matter both ways with respect to the interpretation of the terms defining “employer.” They argue that the list of terms defining “employer” in Subdivision 2 of Minn. Stat. § 181.145 is specific and limiting when the Court is interpreting the term “commissioned salesperson” in Subdivision 1. Appellants pointed out the absurd results of such limitation – many potential business entities would not be covered by the statute. Recognizing the absurdity of the position, Respondents argue the terms in Subdivision 2 are only limiting when applied to Subdivision 1’s definition of “commissioned salesperson,” and are not limiting when applied in their own context to the term “employer” in Subdivision 2. Where the list

¹ Respondents also again claim that there is some sort of connection between the interpretation of Minn. Stat. § 181.145 and the taxation benefits of operating in a corporate form. As pointed out in Appellants’ original Memorandum, natural persons who incorporate are in the exact same work and payment situation as natural persons who do not, and Respondents can show no correlation between incorporation and the loss of the right to prompt payment under a commission contract. There is absolutely no nexus between operating an individual in a corporate form and the interpretation of Minn. Stat. § 181.145.

of terms are actually used, Respondents argue, they should not be limiting but should be broadly and liberally interpreted to cover any conceivable type of business entity, unless it would be “unlikely” that such an entity would contract with a commissioned salesperson. This, of course, is completely contrary to its previous position, and is unsupportable as an argument of statutory construction.

Finally, the Respondents, like *Fusion*, simply fail to address why the legislature did not specifically limit the term “commissioned salesperson” to natural persons if that were its clear intent. As shown in Appellants’ original Memorandum, the legislature has shown it knows precisely how to specify a “natural person” when that is what it clearly intended, and it has done so at least **168 times**. (App. p. 54-74) The legislature’s intent **not** to limit salespersons to individuals or natural persons by **clearly** stating just that is enough for this Court to apply its own precedent rather than follow *Fusion’s* fallacious lead.

Respondents’ arguments are an attempt to use a Kansas case with scanty analysis of Minnesota law to subvert the norms of statutory interpretation in Minnesota, and justify its refusal to pay its commissioned salesperson what they owe. Appellant is a “commissioned salesperson” under Minn. Stat. § 181.145. This Court must apply Minnesota law and

statutory analysis, and should reverse the trial court's grant of summary judgment and remand to the trial court for further proceedings consistent with that reversal.

C. RESPONDENTS ATTEMPT TO OVERTURN MINNESOTA STATUTES AND DECADES OF MINNESOTA PRECEDENT THAT HOLD THAT BREACHES OF CONTRACT ARE GOVERNED BY A SIX-YEAR STATUTE OF LIMITATION.

1. Respondents Ask This Court To Overrule The Legislature And Overturn Decades Of Precedent Relating To Minn. Stat. § 541.05.

Respondents argue that Appellants' breach of contract claim is somehow not a breach of contract, but is instead either a wage claim or a claim based on a specific statute. Again, Appellants feel compelled to point out that the breach of contract claim is just that – a breach of contract.

Minn. Stat. § 541.05, subd. 1(1) states in pertinent part: “ ... the following actions shall be commenced within six years: (1) upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed.” This cannot be more clear.

Nevertheless, Respondents argue that Minn. Stat. § 541.07(5) should apply because Appellants' relationship with Respondents was akin to employment:²

² This is another example of Respondents attempting to have issues both ways. When arguing Minn. Stat. § 181.145 should *not* apply to Appellants,

... the following actions shall be commenced within two years ... (5) for the recovery of wages or overtime or damages, fees or penalties accruing under any federal or state law respecting the payment of wages or overtime or damages, fees or penalties ... (The term 'wages' means all remuneration for services or employment, including commissions ... where the relationship of master and servant exists .. and the term 'damages' means single, double, or treble damages, accorded by any statutory cause of action whatsoever and whether or not the relationship of master and servant exists).

Respondents claim that Appellants are requesting "damages" under this statute. That term obviously cannot apply, however. The term "damages" only applies where the claim is "accorded by any *statutory* cause of action." Appellants' claim is not statutory – it is based on the contract for commissions and contracts are subject to the standard six-year limitations.

Respondents apparently claim that Minn. Stat. § 541.05 is simply too broad in its current form, and that contracts for anything relating to the provision of services should be carved out as an exception to Minn. Stat. § 541.05. The only authority Respondents cite are cases such as *Roaderrick v. Lull Eng'g Co.*, 208 N.W.2d 761 (1973), holding that *wage claims of employees* are governed by Minn. Stat. § 541.07. Appellants are not even arguing this point.

Respondents argue that statute deals only with situations that are akin to employment. Now, Respondents fall over themselves arguing that the statute of limitations dealing with employees *should* apply to Appellants.

Thus, Respondents are asking this Court for nothing less than overruling the legislature and overturning decades of its own and the Supreme Court's precedent in this area. As pointed out in Appellants' original Memorandum, besides the unambiguous application of Minn. Stat. § 541.07 to this case, there are direct and specific cases from this Court and the Minnesota Supreme Court holding that a six-year statute applies to services rendered by independent contractors. *See Wagner Homes, inc. v. Lehtinen*, 1996 WL 422540 (Minn. App.) (plaintiff had a contract for a 10% commission on a sale; this Court applied the six-year statute of limitations under Minn. Stat. § 541.05, subd. 1(1)); *see also Cherne Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d 339 (Minn. App. 1997) (applying six-year statute of limitations to services rendered by independent contractor); *Estate of Beecham*, 378 N.W.2d 800 (Minn. 1985); *Krueger v. State Department of Highways*, 287 Minn. 539 (1970); *AAA Electric & Neon Service, Inc. v. R-Design Co.*, 364 N.W.2d 869 (Minn. App. 1985).

Respondents arguments are not only hollow, they are destructive and destabilizing. The ruling of the trial court must be reversed and remanded for further proceedings consistent with that reversal.

**D. RESPONDENTS REQUEST THIS COURT TO REWRITE
MINN. STAT. § 181.145 TO REDEFINE WHEN
COMMISSIONED SALESPERSONS' POSITIONS
"TERMINATE."**

In Appellants' original Memorandum, it was shown that Appellants had provided sufficient record evidence at the trial court to show the Appellants' relationship with Respondents terminated in late 2002, and thus Appellants' claims with respect to the Lloyd's Barbecue transaction did not accrue until that time. Pursuant to Minn. Stat. § 181.145, "[w]hen any person ... *terminates* the salesperson, or when the salesperson resigns that position, the employer shall promptly pay the salesperson" Minn. Stat. § 181.145, subd. 2 [emphasis added].

Respondents argue only two points in opposition. First, they state Appellants and Respondents never had a "relationship" that could be terminated. This was not a point that was argued or ruled on at the trial court level, and cannot be raised now. In any event, there is considerable record evidence that such a relationship did exist. Respondents seriously distort the state of the record when they claim that McClure in his deposition testified only to the commission on the Novartis claim. This is completely inaccurate. The deposition clearly shows that the question to which McClure was responding was an open-ended, overarching question, and did

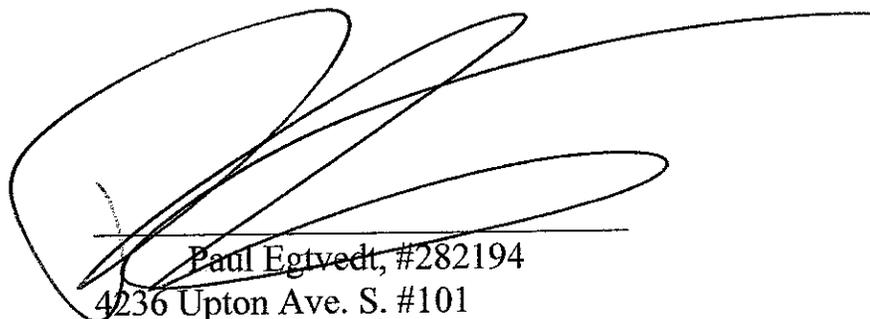
not relate specifically to only the Novartis claim. Second, Respondents claim they “terminated” McClure in 2000. Again, this cannot be supported by the record, as there is no dispute that McClure continued to work for Respondents into late 2002. (App. p. 4)

Respondents ask this Court to rewrite Minn. Stat. § 181.145 to create a shield for its wrongful denial of payment to McClure. This the Court cannot allow. The trial court’s decision relating to McClure’s claims for penalties and attorney’s fees on the Lloyd’s Barbecue transaction must be reversed and remanded to the trial court for proceedings consistent with that reversal.

CONCLUSION

Based on the foregoing, McClure respectfully requests that the trial court's grant of summary judgment to Davis on the issues identified herein be reversed, and that this Court remand the matter to the trial court for proceedings consistent with that reversal.

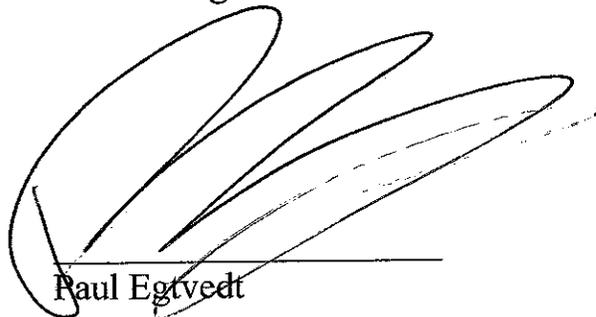
Dated: October 10, 2005



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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface and word count limitations of Rule 132.01, subd. 3. I performed a word count using Microsoft Word 2000, and this brief contains 1769 words.



Paul Egtvedt