

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' BRIEF

Paul Egtvedt (#282194)
EGTVEDT & SKEES, LLP
4236 Upton Avenue South, #101
Minneapolis, Minnesota 55405
(612) 501-3076

Attorneys for Appellants

Jesse R. Orman
BRIGGS & MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 977-8400

Attorneys for Respondents

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STATEMENT OF LEGAL ISSUES

1. **WHETHER THE TRIAL COURT ERRED IN RULING THAT “COMMISSIONED SALESPERSONS” UNDER MINN. STAT. § 181.145 CANNOT INCLUDE INDIVIDUALS OPERATING WITH A CORPORATE FORM.**

Trial Court’s Ruling:

The trial court ruled that Appellants were not “commissioned salespersons” under Minn. Stat. § 181.145 because an individual operating with a corporate form is not within the statutory definition of “commissioned salesperson.”

Authorities:

Minn. Stat. § 181.145

Minn. Stat. § 181.171

Minn. Stat. § 654.44, subd. 7

Minn. Stat. § 654.44, subd. 7

Fusion v. Nebraska Aluminum Castings, Inc., 934 F. Supp. 1270 (D.

Kan. 1996)

Dayton Hudson Corp. v. Johnson, 528 N.W.2d 260 (Minn. App.

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2. **WHETHER THE TRIAL COURT ERRED IN RULING THAT THE SIX-YEAR STATUTE OF LIMITATIONS FOR BREACHES OF CONTRACT FOUND IN MINN. STAT. § 541.05, SUBD. 1, DOES NOT APPLY TO APPELLANTS' BREACH OF CONTRACT CLAIMS.**

Trial Court's Ruling:

The trial court ruled that Minnesota's statute of limitations for breaches of contract, Minn. Stat. § 541.05, subd. 1, does not apply to Appellants' breach of contract claims because the more applicable statute of limitations is the two-year provision found Minn. Stat. § 541.07(5).

Authorities:

Minn. Stat. § 541.05, subd. 1(1)

Minn. Stat. § 541.07(5)

Castner v. Christgau, 24 N.W.2d 228, 231 (Minn. 1946)

Roderick v. Lull Eng'g Co., 208 N.W.2d 761 (1973)

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3. **WHETHER THE TRIAL COURT ERRED IN RULING THAT APPELLANTS' CLAIM RELATING TO THE LLOYD'S BARBECUE SALE ACCRUED IN MAY 2000 WHERE RESPONDENTS FAILED TO SHOW THAT THERE WAS NO GENUINE DISPUTE OF MATERIAL FACT THAT MCCLURE DID NOT CONTINUE TO OPERATE AS A MANUFACTURER'S REPRESENTATIVE UNTIL AT LEAST DECEMBER 2002.**

Trial Court's Ruling:

The trial court ruled that Appellants' claim relating to the Lloyd's Barbecue sale accrued in May 2000 where the Respondents failed to make a showing that there was no genuine dispute as to any material fact that McClure's representation of Davis terminated in December 2002.

Authorities:

Minn. Stat. § 181.145, subd. 2

Ind. Sch. Dist. No. 197 v. Accident & Casualty Ins. Of Winterhur, 525 N.W.2d 600 (Minn. App. 1995)

STATEMENT OF THE CASE

This is an appeal from the District of Minnesota, Tenth Judicial District, County of Sherburne. It is an appeal from an Order Granting Partial Summary Judgment (“Order”) to Respondents of The Honorable Karla F. Hancock, Judge of District Court. The case is a claim for alleged unpaid commissions and statutory penalties and fees. The Order granted summary judgment to Respondents on two of Appellants’ three commissions claims and on Appellants’ claims for penalties and attorney’s fees. Subsequent to the Order, the parties settled the remaining claim of Appellants, leaving open only those issues identified in the Statement of Legal Issues for this appeal.

STATEMENT OF FACTS

A. MCCLURE’S CLAIMS

Appellants Paul McClure individually and d/b/a McClure Associates, Inc. (hereinafter collectively “McClure”) brought this suit as a claim for commissions due pursuant to an agreement under which McClure alleged he was to provide independent contractor manufacturer’s representative services to Respondents Davis Engineering, L.L.C. and Douglas Machine, Inc. (hereinafter collectively “Davis”) in exchange for a 10% commission. (Appendix p. 2-4) McClure is an individual operating as an S corporation.

(App. p. 1) McClure sued for commissions on three separate pieces of business he alleged he brought to Davis: Novartis, Lloyd's Barbecue and Edward's Label. (App. p. 2-4)

The two claims at issue in this appeal are Novartis and Lloyd's Barbecue. McClure alleged he brought a potential sale to Davis from Novartis, which Davis ultimately closed for \$435,265.00, entitling him to a commission payment of \$43,526.50. (App. p. 7) Davis paid him nothing. (App. p. 8) McClure further alleged that he brought a potential sale to Davis from Lloyd's Barbecue that Davis ultimately closed, and for which they received full payment from Lloyd's in the amount of \$935,150.00 in May 2000, entitling McClure to a commission of \$93,315.00. (App. p. 3) Davis paid him only \$56,409.05, leaving a balance due of \$38,905.95. (App. p. 16-17) McClure received the \$56,409.05 in progress payments, the last being on May 10, 2000. (App. p. 17) McClure complained that he was owed additional compensation on the project, but Davis paid him nothing further. (App. 17)

McClure alleged that he continued to work as a representative with Davis until December 2002. (App. p. 4)

B. PROCEDURAL HISTORY

McClure originally brought this action in August 2002, and amended his Complaint in May 2004. In his Amended Complaint, McClure made claims relating to the Novartis and Lloyd's transactions for: breach of contract, unjust enrichment and quantum meruit, with the related penalties and attorney's fees provisions of Minnesota Statutes pursuant to Minn. Stat. § 325E.37 and Minn. Stat. § 181.145 and 181.171. (App. p. 1-7)

After the close of discovery, Davis brought a motion for summary judgment. Davis argued in pertinent part that:

1. McClure's claims under Minn. Stat. § 181.145 should be dismissed because McClure is not a "commissioned salesperson" under that statute;
2. McClure's claims for breach of contract, penalties and attorney's fees relating to his Lloyd's Barbecue claim should be dismissed because McClure's breach of contract claim should be governed by the provisions of Minn. Stat. § 541.07.¹

The trial court ruled that McClure's claims under Minn. Stat. § 181.145 be dismissed because McClure was not a "commissioned salesperson" because he operated with a corporate form. (App. p. 115-116)

¹ Davis did not raise any statute of limitations argument with respect to the Novartis claim.

It also ruled that McClure's claims for breach of contract relating to the Lloyd's claim be dismissed because Minnesota's statute of limitations for breach of contract should not apply to McClure's breach of contract claim. (App. p. 117-118) Rather, the trial court applied the two/three-year statute of limitations in Minn. Stat. § 541.07(5). (App. p. 117-118) Finally, the trial court ruled that McClure's claim on the Lloyd's transaction accrued in May 2000. (App. p. 117) Therefore, the trial court dismissed all of McClure's claims relating to the Lloyd's transaction because McClure did not amend his Complaint until May 2004. (App. p. 118)

Subsequent to the Order, the parties settled the underlying commissions claim relating to Novartis, specifically leaving open the opportunity for McClure to appeal the issues he raises here. McClure therefore brings this Appeal.

ARGUMENT

A. STANDARD OF REVIEW

McClure's issues on appeal relate solely to statutory interpretation and the application of undisputed facts to law. Therefore, the Court must review the issues raised herein *de novo*. *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (questions of statutory interpretation are reviewed *de novo*).

B. MCCLURE IS A “COMMISSIONED SALESPERSON.”

1. The Trial Court Erred in Ruling that the Statutory Term “Person” Does Not Include Corporations.

a. The trial court relied entirely on a Nebraska interpretation of Minnesota law.

The trial court granted summary judgment to Davis for statutory penalties and attorney’s fees on all his claims because it ruled that a “person” under Minn. Stat. § 181.145 cannot include a corporation.² This is error.

Minn. Stat. § 181.145, subd. 1, states in pertinent part:

For the purposes of this section, "commission salesperson" means a person who is paid on the basis of commissions for sales and who is not covered by sections 181.13 and 181.14 because the person is an independent contractor.

Therefore, in order to be covered under Minn. Stat. § 181.145, a plaintiff must satisfy three requirements: (1) he must be an independent contractor; (2) he must be paid by commission; and (3) he must be a “person.” Davis did not dispute at the trial court level that McClure was an independent contractor paid by commission. The only issue was whether McClure was a “person.”

² McClure also brought his action under Minn. Stat. § 181.171, as an enforcement mechanism of Minn. Stat. § 181.145.

In support of its ruling, the trial court cited only to, and relied entirely on, *Fusion v. Nebraska Aluminum Castings, Inc.*, 934 F. Supp. 1270 (D. Kan. 1996). That is an unappealed District of Nebraska case not binding on any Minnesota court. It has zero precedential value and it is wrong.

Fusion held that the definition of a commissioned salesperson as a “person” in Minn. Stat. 181.145, subd. 1 does not include corporations. It supported its conclusion simply by citing to a different definition of a different term in a later subdivision. It stated that the legislature defined “employer” in subdivision 2 to include “any person, firm, company, association, or corporation” From that definition, it extrapolated that the legislature meant to limit the definition of commissioned salespersons in subdivision 1 to exclude corporations as a person. That is it. No further analysis, no further discussion, nothing. This Court simply cannot allow a Nebraska court to determine Minnesota statutory interpretation based on such thin and fallacious reasoning. A review of statutory construction and interpretation of Minnesota law shows that this foreign conclusion is erroneous.

b. The trial court erred in concluding that the term “person” does not include corporations for the purpose of enforcing statutory rights.

Minn. Stat. § 181.145 does not contain an independent definition of the term “person.” “Person” is, however, defined in Minn. Stat. § 654.44, subd. 7. That statute defines a “person” as including “bodies politic and corporate, partnerships and other unincorporated associations.” Further, Minn. Stat. § 654.44, subd. 1 *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.”). Therefore, the statutes themselves leave no discretion for the Court. It must apply the definition of § 645.44, and rule that McClure is a “person” under § 181.145.

c. The trial court erred in concluding that a legislative intent to exclude corporations “clearly” appears.

Other cases from this Court construing the term “person” show the Court has no discretion not to include a corporation within the definition of “person” in this case, even where it appears the statutes were enacted primarily to protect natural persons. For example, in *Dayton Hudson Corp. v. Johnson*, 528 N.W.2d 260 (Minn. App. 1995), this Court held that a corporation was a “person” under Minn. Stat. § 609.748, subd. 2 (1994),

which authorized a restraining order upon the petition of a “person who is the victim of harassment.” The statute defined harassment as “repeated, intrusive, or unwanted acts, words, or gestures that are intended to adversely affect the safety, security, or privacy of another. *Id.* at subd. 1(a)(1). The victim in that case was a corporation. This Court held it was *required* to include a corporation within the term “person” because no contrary intention “clearly” appeared:

Neither Minn. Stat. § 609.748 nor chapter 609 in its entirety defines person. The legislature, however, generally defines person to include “bodies politic and corporate.” Minn. Stat. § 645.44, subd. 7 (1994); see also *State v. Christy Pontiac-GMC*, 354 N.W.2d 17, 19 (Minn. 1984) (finding corporation person under criminal code); *Magnusson v. American Allied Ins. Co.*, 189 N.W.2d 28, 34 (1971) (citing Minn. Stat. § 645.44, subd. 7 in finding corporation person under civil statute). *But cf. CAN Fin. Corp. v. Local 743 of Int’l Bhd. Of Teamsters, Chauffeurs, Warehousemen and Helpers of Am.*, 515 F. Supp. 942, 946 (N.D. Ill. 1981) (in common law action for invasion of privacy, personal right to privacy not extended to corporation).³ The legislature mandates application of this definition to all Minnesota statutes or legislative acts, unless another intention clearly applies.

Statutory interpretation presents a question of law which we review de novo. *State v. Zacher*, 504 N.W.2d 468, 470 (Minn. 1993). In ascertaining legislative intent, we presume that the legislature did not intend an absurd result. Minn. Stat. § 645.17(1) (1994). We also presume that the legislature understood the effect of its words. *In re Phillips’ Trust*, 90 N.W.2d 522, 527 (1958). Because the legislature did not expressly define the term person in Minn. Stat. § 609.748, we use the legislature’s general definition to determine that a corporation is a person under this statute. Because Dayton’s is a corporation

³ It is instructive to note this Court here cited to a foreign case and declined to adopt its reasoning.

under the Minnesota Business Corporation Act, see Minn. Stat. § 302A.011, subd. 8 (1992), we conclude that it is a person entitled to seek a restraining order under the anti-harassment statute.

To the same effect, Hilligan v. Schulte, 1999 WL 672766 (Minn. App. 1999); *see also Swarthout v. Mutual Service Life Ins. Co.*, 632 N.W.2d 741 (Minn. App. 2001).

The exact same situation presents itself here as was presented to this Court in the *Dayton's* case. The term “person” is not defined in Minn. Stat. § 181.145, or more generally in all of Chapter 181. Therefore, the legislature has mandated that the definition of Minn. Stat. § 645.44 applies.

The Nebraska court in *Fusion* flouted this legislative mandate. It justified its actions by stating that the definition of an employer was meant to limit the definition of a commissioned salesperson. It claimed that because the description of an employer contained both the terms person and corporation, the use of the term person in relation to a commissioned salesperson a previous subdivision should also be limited. *Fusion* fails to address that “commissioned salesperson” is not limited by any list of terms, but merely says “person.” It fails to explain why a list of terms applying to employers should also apply to commissioned salespersons. It fails to address the issue that the list of terms it uses to limit the term “commissioned salesperson” occurs in a *subsequent* subdivision. In short,

Fusion lacks any statutory construction analysis relating to “clear” intent as required by Minn. Stat. § 645.44 and as interpreted in the *Dayton’s* case.

Fusion also ignores the statutory language of Chapter 181 as a whole. That Chapter’s definition of “employer” has been consistently inconsistent. Prior to 1987, Chapter 181 defined “employer” in various sections and subdivisions as: “any person, firm, company, association or corporation”, Minn. Stat. § 181.13; “any person, firm or corporation”, Minn. Stat. § 181.03; “person, firm, corporation, or association”, Minn. Stat. § 181.03, etc. In 1997, many of these descriptions of “employer” were deleted in favor of Minn. Stat. § 181.171, subd. 4, which defines an employer as “any person.” Nevertheless, some other descriptions of “employer” were inexplicably retained, such as those in Minn. Stat. § 181.03 and 181.145. Nevertheless, Minn. Stat. § 181.171 is an enforcement mechanism of Minn. Stat. § 181.145, and its definition covers “this section” inclusive of Minn. Stat. § 181.145. Therefore, the description of “employer” in Minn. Stat. § 181.145 is not itself clear, and this is the term that *Fusion* uses to explicitly limit the definition of a completely different term in a completely different, and prior, subdivision. This renders untenable any conclusion that the legislature “clearly” intended to limit the definition of “commissioned salesperson” by its description of the term “employer” in a later subdivision.

d. The trial court erred in applying *Fusion* because such application produces absurd, unreasonable results.

Another tenet of statutory interpretation mentioned in the *Dayton's* case is that the legislature did not intend absurd results. Indeed, the very first presumption required by Minn. Stat. § 645.17 is that “the legislature does not intend a result that is absurd, impossible of execution, or unreasonable.” *Fusion* ignores this required presumption.

Application of *Fusion's* crabbed holding would require that at least the following employers would not have to comply with Minn. Stat. § 181.145: partnerships, cooperatives, trusts, estates and political bodies. It is absurd that these entities should not comply with Minn. Stat. § 181.145 when other employers are.

Further, under *Fusion* natural persons functioning through corporate organizational forms for tax purposes, just like McClure, are excluded. The trial court stated that because McClure chose to incorporate and receive benefits from that form, he should be deprived of the benefit of prompt payment for his work. There is simply no reason why this should be the case. Natural persons who incorporate are in the exact same payment situation as natural persons who do not. They do the same leg-work, attend the same meetings, write the same letters, send the same faxes, and close the same transactions. There is simply no reason why one and not the other

should be deprived of the protection of prompt payment of commissions. Obtaining the benefits of the federal S corporation taxation laws has no correlation whatsoever with being deprived of the ability to seek prompt payment of commissions under Minnesota state law. To deny such persons the ability to seek prompt payment of commissions is absurd and unreasonable.

- e. **“Salesperson” in other statutes includes corporations, and when the legislature wants to explicitly limit the definition of “person” it does so.**

Fusion’s absurdity is further illustrated by other statutes. When the legislature specifically defines a salesperson beyond merely stating it is a “person,” it includes corporations as salespersons. For example, in the Manufactured Home Sales Act and the Lawful Gambling and Gambling Devices Act, a “salesperson” includes a corporation. Minn. Stat. § 327B.01, subds. 17, 19; Minn. Stat. § 349.12, subds. 11A, 30.

Similarly, when the legislature wants to specifically limit the definition of salesperson to a natural person, it specifically defines a salesperson as an “individual.” See e.g., Minn. Stat. §§ 60A.02, subd. 7; 60K.31, subd. 13; 82A.02, subd. 19. Indeed, 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.

McClure made claims for penalties and fees under Minn. Stat. § 181.145, and as enforced through Minn. Stat. § 181.171. McClure is a "salesperson" under Minn. Stat. § 181.145. This Court must apply its own precedent rather than an unappealed case from Nebraska. This Court should reverse the trial court's grant of summary judgment and remand to the trial court for further proceedings consistent with that reversal.

C. MCCLURE'S BREACH OF CONTRACT CLAIMS ARE SUBJECT TO MINNESOTA'S STATUTE OF LIMITATIONS FOR BREACH OF CONTRACT.

1. The Trial Court Erred in Concluding that McClure's Breach of Contract Claims Were Statutory Claims Subject to a Two or Three-Year Statute of Limitations.

The trial court granted summary judgment to Davis on McClure's breach of contract claim relating to the Lloyd's Barbecue transaction because it determined that McClure's claims relating to the Lloyd's Barbecue transaction were statutory rather than for breach of contract. This is erroneous and must be reversed.

McClure's breach of contract claim is just that – a breach of contract. McClure had a contract with Davis to pay him a 10% commission. Davis

did not. Therefore, McClure's breach of contract claim is subject to the six-year statute of limitations found in Minn. Stat. § 541.05, subd. 1(1), which 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 is quite clear.

Nevertheless, the trial court determined it would apply Minn. Stat. § 541.07(5), quoting the statute:

... 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).

As an initial matter, this statute clearly applies to statutory claims by employees, and not work by independent contractors. McClure's breach of contract claim is not based on a "federal or state law respecting the payment of wages or overtime or damages." It accrued as a breach of an underlying agreement between the parties.

Further, nothing in that statutory provision - wages, overtime or damages - applies to McClure's breach of contract claim. He is not claiming overtime. His claim is not for "wages" because wages only includes

commissions “*where the relationship of master and servant exists[.]*”

McClure was an independent contractor, and independent contractors are not “servants.” *See Castner v. Christgau*, 24 N.W.2d 228, 231 (Minn. 1946) (citing Restatement of Agency, § 220, discussing the differences between “servants” and “independent contractors”).

That leaves only “damages.” That term cannot apply, however. The term “damages” only applies where the claim is “accorded by any *statutory* cause of action.” McClure’s claim is not statutory – it is based on his contract with Davis. Therefore, McClure’s contract is subject to the standard six-year limitations period for breach of contract.

The sole authority cited by the trial court is *Roderick v. Lull Eng’g Co.*, 208 N.W.2d 761 (1973), holding that *wage claims of employees* are governed by Minn. Stat. § 541.07. This is not a wage claim by an employee.⁴ McClure was an independent contractor, and there are no cases holding that the statute of limitations for the breach of a contract with an independent contractor is two years. There are, however, 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*

⁴ McClure made related claims for penalties and attorney’s fees under Chapter 181 as well, but those statutes do not create McClure’s right to payment. The contract does. Minn. Stat. § 181.145 only addresses whether McClure may be entitled to penalties and attorney’s fees in addition.

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).

McClure's breach of contract claim is not based on any federal or state law for the payment of wages, and is not based on any statutory cause of action. It is a claim by an independent contractor for breach of contract. Even under the trial court's analysis (discussed below) that McClure's claim on the Lloyd's Barbecue transaction accrued in May 2000, McClure brought his Amended Complaint in May 2004, well within the six-year period. The trial court's ruling that Minnesota's six-year breach of contracts limitations period does not apply to McClure's breach of contract claim on the Lloyd's Barbecue transaction must be reversed and remanded to the trial court for further proceedings consistent with that reversal.

D. MCCLURE BROUGHT HIS ACTION WITHIN TWO YEARS OF THE TERMINATION OF THE AGREEMENT.

1. The Trial Court Erred In Determining that McClure's Claims Accrued in May 2000.

The trial court ruled that the “triggering event” for payment of McClure’s commissions on the Lloyd’s Barbecue transaction was full payment to Davis. (App. p. 117) This occurred in May 2000, and therefore the trial court ruled that McClure’s breach of contract, penalties and attorney’s fees claims on that transaction accrued in May 2000. (Id.) For the purposes of McClure’s breach of contract claim, this makes no difference because, as was shown above, McClure brought his breach of contract claim well within the six-year statute of limitations. Nevertheless, the trial court’s ruling precluded an action for penalties and fees. This ruling was made without any analysis of the statute giving rise to McClure’s penalties and attorney’s fees claim.

Pursuant to Minn. Stat. § 181.145, the statute of limitations for a violation of that provision does not begin to run until the relationship is terminated: “When 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]. There

can be no violation until the relationship is terminated. *See also Kohout v. Shakopee Foundry Co.*, 162 N.W.2d 237 (Minn. 1968) (holding that penalty provisions under Minn. Stat. § 181.13 did not accrue until after the employee made a demand at the time of his discharge). McClure alleged that the relationship terminated in December 2002. (App. p. 4)

In Davis's summary judgment papers, it entirely failed to address the issue of when the relationship terminated. The burden of responding to a summary judgment motion does not arise until the moving party makes a showing of the absence of genuine issues of material fact:

The moving party bears the burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). All factual inferences and ambiguities are drawn against the moving party. *Rathbun v. W.T. Grant Co.*, 219 N.W.2d 641, 646 (Minn. 1974).

Ind. Sch. Dist. No. 197 v. Accident & Casualty Ins. Of Winterhur, 525 N.W.2d 600 (Minn. App. 1995); *see also Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955) (stating that the movant must "clearly" sustain its burden of showing there is no genuine issue as to any material fact). Davis clearly did not sustain its burden of showing that there was no dispute as to when the relationship terminated where it did not even address when the relationship terminated.

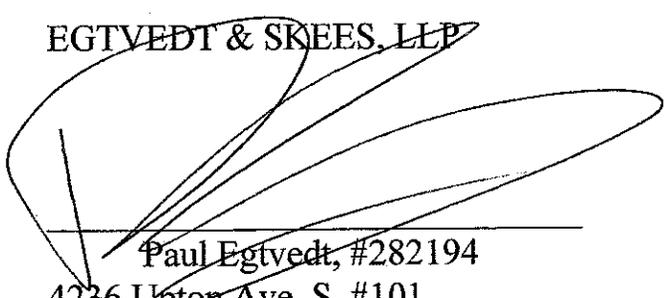
McClure raised this issue in his Response Memorandum to the trial court, but the trial court did not address the issue either. Therefore, it failed to properly interpret, or even address, the statutory language of Minn. Stat. § 181.145 requiring that the relationship terminate before a claim under that statute accrues. Therefore, the trial court's grant of summary judgment to Davis relating to McClure's claims for penalties and attorney's fees relating to 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: August 22, 2005

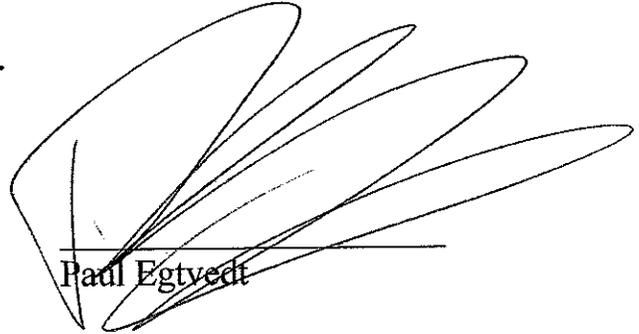
EGTVEDT & SKEES, LLP



Paul Egtvedt, #282194
4236 Upton Ave. S. #101
Minneapolis, MN 55410
(612) 501-3076

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 4712 words.



Paul Egtvedt

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).