

CASE NO. A06-0710

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*State of Minnesota*  
*In Court Of Appeals*

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Svenn Borgersen,  
Appellant,

vs.

Cardiovascular Systems, Inc.  
Respondent.

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**APPELLANT'S REPLY BRIEF**

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## I.

### LEGAL ARGUMENT

#### A. RESPONDENT'S ARGUMENTS ON THE BREACH OF CONTRACT CLAIM

##### 1. This is a Case of a Single, Bilateral Employment Contract

Respondent CSI claims the cover letter and the Agreement are to be read together as one contract.<sup>1</sup> This claim is erroneous for several reasons.

##### *Documents in Conflict are not Read Together*

CSI's citation to *Anchor Cas. Co.* as suggesting that contemporaneous documents are read together, rather than helping its cause, reinforces Borgersen's argument that they cannot fairly be read together. (Resp. Br. at 15). CSI forgot to supply the full context of *Anchor Cas. Co.* "[I]t is urged that the applications, exhibits G, H, and I, and the bond, exhibit A, should be read together as constituting the transaction as a whole. However, the parties to these instruments are not the same, *and the plain provisions of the applications and the bond are incompatible.*" *Anchor Cas. Co. v. Bird Island Produce, Inc.*, 249 Minn. 137, 146, 82 N.W. 2d 48 (Minn. 1957)(emphasis added). Here, the statement in the cover letter discussing at-will employment is irreconcilable with the terms of the Agreement.

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<sup>1</sup>The term "Agreement" refers to the written "Employment Agreement" found at App. 36. The term "cover letter" refers to the document that enclosed the Agreement and is found at App. 34.

CSI argues that the “at-will” statement in the cover letter and the “cause” provision in the Agreement can be read together. The cases cited by CSI are easily distinguished. *Banbury*, for example, was a case involving a distributorship agreement that incorporated by reference an internal company rule that purported to require cause for termination of the distributorship. The Court found that the rule “does not state that [the distributor] may fire . . . only for cause, but rather states that material violations may lead to termination. [The rule] contains no language manifesting an intent that it constitute the exclusive basis for termination.” *Banbury v. Omnitrition, Int'l, Inc.*, 533 N.W.2d 876, 880 (Minn. App. 1995). Here, however, we have the exclusivity language that was found lacking in *Banbury*. (See App. Br. at 22).

The “at-will” provision in *Banbury* is also substantially different than the “at-will” provision claimed in the cover letter here. Termination at will in *Banbury* was allowed on thirty days notice, while termination for cause was immediate. The Court then easily reconciled the two provisions on the basis of the amount of notice required for each. “Construing the contract as a whole, we hold that the distributorship contract allows for termination either at the will of a party upon 30 days written notice or for cause effective immediately, but with a right to appeal.” *Id.*

The same result prevailed in *Polk v. Mutual Serv. Life Ins. Co.*, 344 N.W.2d 427 (Minn. App. 1984), also relied upon by CSI, which upheld a termination of an agency contract where the contract allowed for either immediate termination “for cause” as defined

or termination “at will” on thirty days notice. *Polk*, 344 N.W. 2d at 429. In Borgersen, there is no similar time notice requirement that allows the terms to be construed together.

CSI makes a feeble attempt to reconcile the “at-will” and “for cause” language this way: “[t]he employment agreement provides that CSI *has the right* [to terminate for cause]. In the absence of cause, therefore, Borgersen may be terminated for no reason or any reason, with or without prior notice.” (Resp. Br. at 20). This is classic sophistry. In truth it makes utterly no sense to explicitly define cause in the Agreement if CSI did not need to have cause to fire Borgersen. The whole “with cause” provision in this Agreement was a waste of ink if the Court adopts CSI’s strained interpretation.

This case is unlike *Martin v. Equitable Life Assurance Soc.*, 553 F.2d 573 (8th Cir. 1977), cited by CSI in which both an “at-will” clause and a “for cause” provision were contained in the same document itself.<sup>2</sup> Here we have only a “for cause” provision in the written agreement and various clauses that indicate the written agreement provides the exclusive means of termination. (See App. Br. at 22)

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<sup>2</sup>CSI erroneously claims that *Martin* “appl[ies] Minnesota law”. (Resp. Br. at 21). It actually applies South Dakota law. This is significant because South Dakota, unlike Minnesota, makes the at-will employment rule a matter of substantive law that imposes limits on the freedom to contract. In South Dakota, the rule is not simply a rule of contract construction as it is in Minnesota. *Cf. Martin*, 553 F.2d at 574, fn 2 (“Section 60-4-4 of the South Dakota Compiled Laws is in accord. The statute provides: ‘An employment having no specified term may be terminated at the will of either party on notice to the other, unless otherwise provided by statute’”) and *Pine River*, 333 N.W.2d at 628 (“The argument misconstrues the at-will rule, which is only a rule of contract construction, as a rule imposing substantive limits to the formation of a contract.”)

*The Collateral Agreement Argument Was Ignored*

CSI never answers the argument in Appellant's brief concerning the criteria for enforcement of collateral agreements. (See Appellant's brief at 23-24). The cover letter does not meet the standards set forth in *Apple Valley Red-E-Mix v. Mills-Winfield*, 436 N.W. 2d 121, 124 (Minn. App. 1989). The terms of the cover letter are unenforceable for this reason as well.

*The Lack of Signature By Borgersen on the Cover Letter is Fatal*

CSI cites no precedent that holds that a written contract that purports to be fully integrated and which contains mutual promises must as a matter of law be read together with a cover letter. The cases relied upon by CSI are all distinguishable. (Resp. Br. at 15-16)

First, they involve multiple documents that were *executed* at the same time. *Anderson v. Kammeier*, 262 N.W.2d 366, 369-70 (Minn. 1977); *Marso v. Mankato Clinic, Ltd.*, 153 N.W.2d 281, 288-89 (Minn. 1967); *Koch v. Han-Shire Investments, Inc.*, 273 Minn. 155, 165, 140 N.W.2d 55 (Minn. 1966). The cover letter was never signed by Borgersen. The Agreement is the only signed document.

CSI cites *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983), for the novel proposition that Borgersen's signing of the Agreement and coming to work was enough to prove his agreement with the terms of the cover letter. (Resp. Br. at 18.) CSI's contention stretches the holding of *Pine River* beyond recognition. *Pine River* concerned whether a progressive discipline policy in an employment handbook could be considered a

unilateral contract. There was no signed, integrated employment agreement in *Pine River* that conflicted with the terms of the employee handbook. Continued employment in *Pine River* was only referenced by the Court as supplying the necessary *consideration* for the agreement; it was *not proof of the terms* of the contract itself. *Pine River*, 333 N.W.2d at 629.

To suggest that an unsigned cover letter defeats the terms of a fully executed and integrated employment agreement is a unique and dangerous new twist in contract law. An employee would never be able to rely upon the promises of job security made in the contract he or she signed. The employee would always need to look over a shoulder, wondering what representations were made by an employer that could come back to defeat the contract itself. Siding with CSI's position would open the door to all kinds of writings defeating an express, written contract, such as personnel handbooks with at-will statements in them, employment applications that have boilerplate at-will statements above the signature line, signed acknowledgments given employees at the commencement of employment, etc. The door will be opened for litigated conflict when the goal of a signed agreement was certainty and litigation avoidance. "The very object of the parties in reducing the contract to writing is that it shall no longer be subject to dispute." *Thiem v. Eckert*, 165 Minn. 379, 383 (1925).

*The Agreement is a Bilateral Contract -- Borgersen Made Significant Promises*

CSI's arguments about the lofty virtues of at-will employment ring hollow under the facts of this case where Dr. Borgersen made significant promises of his own in the written

employment agreement.<sup>3</sup> In paragraph 6 of the Agreement, entitled “Undertakings of Employee”, Borgersen “agree[d] to spend [his] full working time and effort in performance of [his] duties with the Corporation so long as employed by the Corporation; and will not, during the course of employment by the Corporation, without prior written approval of the Board of Directors of the Corporation, become an employee, director, officer, agent, partner of or consultant to or a stockholder of . . . any company or other business entity which is a significant competitor, supplier, or customer of the Corporation.” (App. 37).

In paragraph 8, Borgersen agreed to keep information obtained while working for the company confidential. (App. 38).

In paragraph 9, Borgersen, a licensed professional engineer, gave up all rights to “any invention, work of authorship, discovery or idea (whether patentable or not and including those which may be subject to copyright protection) generated, conceived, or reduced to practice by the Employee alone or in conjunction with others, during or after working hours, while an Employee of the Corporation (‘Inventions’)[.]”<sup>4</sup> Further, the loss of his rights to these “shall continue beyond the termination of employment with respect to Inventions

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<sup>3</sup>*Pine River* makes clear that “[t]here is no reason why the at-will presumption needs to be construed as a limit on the parties’ freedom to contract. If the parties choose to provide in their employment contract of an indefinite duration for provisions of job security, they should be able to do so.” *Id.*, 333 N.W. 2d at 628.

<sup>4</sup>The Agreement exempts certain inventions protected by Minn. Stat. § 181.78. (App. 39)

conceived or made by [him] during the period of [his] employment and shall be binding upon assigns, executors, administrators and other legal representatives.” (App. 38-39).

In paragraph 10 he agreed not to do any work for a competitor of CSI for a period of one year following his termination of employment with the Corporation. (App. 39). Borgersen had his own consulting firm at this time. Normally an employee would be free to work for whomever he wanted after his employment for a company ended.

“A bilateral contract is one in which there are mutual promises between two parties to the contract; each party being both a promisor and a promisee.” Restatement, Contracts, § 12.” *Slyvestre v. State*, 298 Minn. 142, 151-52, 214 N.W. 2d 658 (1973). This was clearly not meant to be the typical employment relationship that the at-will rule was designed for. Borgersen made commitments of his own in exchange for the commitment from CSI not to arbitrarily fire him.

## **2. Consideration of the Cover Letter Violates the Parol Evidence Rule**

CSI has misapplied the holdings of *Farrell v. Johnson* and *Alpha Real Estate* on the parol evidence rule. CSI argues that “the offer letter is undisputedly a contemporaneous written agreement[.]” (Resp. Br. at 16). Borgersen does not agree that the cover letter is anything but a past, erroneous attempt by one party to provide a synopsis of the Agreement. It preceded the Agreement itself and cannot contradict the plain meaning of an integrated contract. *Alpha Real Estate* in any event barred the use of parol evidence to prove “prior or contemporaneous oral agreements”. *Alpha Real Estate v. Delta Dental Plan*, 664 N.W. 2d

303, 312 (Minn. 2003)(emphasis added). It makes no difference that the cover letter is written; the same rationale should apply.

In *Anchor Cas. Co.*, the Court said, “[w]here, *as here*, the effect of the proffered evidence would be to contradict the plain meaning of the language of the exhibit, or to engraft upon it a provision entirely outside of it, parol evidence for that purpose is not admissible.” *Anchor Cas. Co. v. Bird Island Produce, Inc.*, 249 Minn. 137, 144, 82 N.W. 2d 48 (Minn. 1957)(emphasis added). Here the cover letter is offered to contradict the plain terms of the Agreement and to add to it a term not contained in it.

## **B. RESPONDENT’S ARGUMENTS ON THE WHISTLEBLOWER CLAIM**

### **1. CSI Admits that Timing is Immaterial**

CSI concedes the argument from Borgerson and *amicus* that it does not matter whether a report under the whistleblower law relates to a past or future violation of law. Instead, CSI contends that the trial court’s decision was based on “*whether* the conduct was illegal at all.” (Resp. Br. at 9). CSI, however, then fails to challenge any of Borgerson’s arguments that the failure to report the test results to the FDA violated federal regulations, thus rendering it illegal. (See App. Br. at 34-36).

### **2. CSI is Overly Aggressive in its Contention of What Minnesota Law Requires for a Report Under the Whistleblower Act**

CSI has presented a distorted reading of Minnesota precedent on who is a whistleblower under the law. It suggests five alleged “general requirements” of when a

report constitutes whistleblowing. (Resp. Br. at 9-10) These suggestions go far beyond the holdings of the cases referenced.

There is no requirement that “[t]he report must be news to the employer.” *Id.* Making this an element of whistleblowing would limit the application of the whistleblower law to only situations involving negligent, unknowing violations of law by an employer. If the employer is committing an intentional violation of law, the employer obviously knows of it at the time of the report. The alleged requirement makes no logical sense in most instances. The purpose of the statute is to protect the whistleblower, not the employer.

According to the statute, if the employer is being told in good faith of suspected illegal conduct, it is illegal to fire the employee for reporting it. Nowhere in the statute did the legislature shift the focus to what the employer knew or did not know about its own conduct. Here, it would defeat the purpose of the whistleblower law if CSI could fire Borgersen for his effort to get it to report the failed test results to the FDA as required by FDA regulations.

The suggestion by CSI that “Borgersen was not telling CSI something it did not already know” is either ill-focused or ill-conceived. (Resp. Br. at 10). CSI seems to be focusing on its knowledge that the FDA wanted stent interaction testing, which is not what Borgersen was reporting. Borgersen was telling CSI it had to report to the FDA *specific test results* that showed catastrophic failure of the device. CSI only told the FDA the results of successful stent interaction testing (which used a less rigorous testing protocol); it was not

reporting the failed test results (which used a more realistic testing protocol). Borgersen was trying to get it to report the failed results.

The argument in any event is ill-conceived. To make the argument, CSI must first admit that it already knew that it was violating federal regulations by not reporting the failed test results. CSI has yet to make this admission. CSI then must explain why it did not make the report if it knew it was against the law not to make the report. CSI's admitted refusal to report these results to the FDA would have to be deemed an intentional violation of the law if it claims it already knew of the violation at the time of the report. Should it then be able to lawfully fire Borgersen for trying to correct or prevent an intentional violation of law? The argument from CSI is deeply flawed.

CSI relies upon *Obst v. Microtron, Inc.*, 614 N.W.2d 196 (Minn. 2000), in support of its alleged requirement that the report "must be news to the employer". *Obst*, however, was a unique situation that the Court expressly limited to its facts on that issue. *Id.* 614 N.W. 2d at 203.

The suggestion that a report cannot be made in the course of business as part of the plaintiff's job duties (Resp. Br. at 9-10) is also stretching the case law, but really has no application here anyway.<sup>5</sup> It is undisputed that it was not Borgersen's job duty to determine

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<sup>5</sup>The *Michaelson* case cited by CSI involved a unique situation with an in-house lawyer for 3M telling the company that certain internal plans might violate Title VII or other equal employment opportunity laws. *Michaelson v. Minnesota Mining & Mfg. Co.*, 474 N.W.2d 174, 180 (Minn. App. 1991) *aff'd* 479 N.W.2d 58 (Minn. 1992). The *Cokely* case cited by CSI does not stand for the proposition cited at all, but was decided on other

what got reported to the FDA. The trial court so found. (App.19, Finding of Fact 23(“The parties agree that it was not Borgersen’s responsibility to actually send materials to the FDA or to determine what went into an FDA submission.”). CSI has grossly exaggerated Borgersen’s job duties.

CSI is correct in its assertion that one purpose of the report can be to expose illegality. (Resp. Br. at 9). As noted in Appellant’s brief, the purpose can also be to prevent illegality. (App. Br. at 31-34). Borgersen was doing both. (App. 54). (“And we covered these kinds of things while we were at CSI, what the FDA expected to get . . . They provided a risk analysis, but the risk analysis did not include this kind of an event and did not properly describe it or did not properly cover it . . . I was telling CSI that this kind of information needed to go to the FDA and should be part of our reporting procedure specifically if we were going to intend to clean out stents.”)

CSI is wrong when it suggests that “[t]he plaintiff must state that the conduct violates a law or regulation”. (Resp. Br. at 9). There is simply no case law that so holds. In fact, as noted in Appellant’s initial brief, the Supreme Court has said that it is *not necessary* for the employee to recite the specific law or rule that is believed to be violated, so long as the employee “alleges facts that, if proven, would constitute a violation of law or rule adopted pursuant to law.” *Abraham v. Cty. of Hennepin*, 639 N.W. 2d 342, 354-55 (Minn.

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grounds. *Cokely v. City of Ostego*, 623 N.W.2d 625, 631 (Minn. App. 2001), review denied (Minn. May 15, 2001).

2002)(App. Br. at 28). See also, *Hedglin v. City of Willmar*, 582 N.W. 2d 897, 902 (Minn. 1998); and *Obst*, 614 N.W. 2d at 204. All that is required is for there to be a law implicated by the report that is suspected to be violated.

The statement by CSI that plaintiff must “report[] the conduct to [an] agency during employment and the employer [must] know about it” is also an erroneous statement of the law. The whistleblower statute does not require a report to an agency to be actionable. A report to an employer by itself is sufficient. Minn. Stat. § 181.932, subd. 1(a).

CSI challenges Borgersen’s good faith in making a report to CSI. It claims that his signature on a test result *that CSI chose to submit* to the FDA meant that he somehow engaged in the activity he alleged was unlawful. (Resp. Br. at 13). CSI conveniently ignores the undisputed fact that Borgersen had no input on what would be submitted to the FDA. CSI also sidesteps the disputed factual issues Borgersen has raised concerning his signature. The protocols were developed after his signature. The test results were altered after his signature. (App. Br. at 10). This case is replete with disputed issues of material fact as to plaintiff’s good faith reports to his employer.

Overall, CSI’s arguments lack substance and support and should be rejected.

**II.**

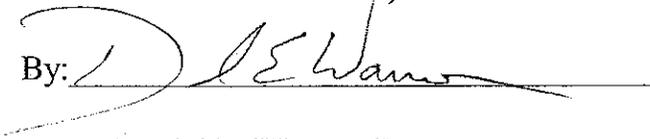
**CONCLUSION**

Based upon the foregoing, Appellant respectfully asks the Court of Appeals to reverse the grant of summary judgment and remand the case for trial.

Dated: July 6, 2006.

*Respectfully submitted,*

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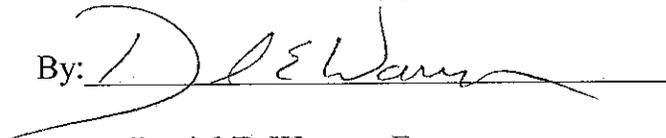
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**CERTIFICATION**

I certify that this brief conforms to Rule 132.01 of the Minnesota Rules of Appellate Procedure for a brief using proportional font of 13 point or larger. The length of this brief is 3,791 words. This brief was prepared using WordPerfect 12.0.

Dated: July 6, 2006.

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