

No. A07-0360

State of Minnesota
In Court of Appeals

Michelle Kunza,

Plaintiff/Appellant,

vs.

St. Mary's Regional Health Center,
and Dr. Wade Wernecke, individually
and as an employee of St. Mary's
Regional Health Center,

Defendants/Respondents.

Respondent St. Mary's Regional Health Center's Brief and Appendix

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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).

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Legal Issue

Did Ms. Kunza identify any genuine issues of material fact regarding the covenant not to sue; and, if not, did the district court err in its application of the law to the undisputed facts?

The district court held: There were no genuine issues of material fact regarding the covenant not to sue; and, applying the law to the undisputed facts, respondents were entitled to judgment as a matter of law.

Most apposite cases (not to exceed four) and most apposite constitutional and statutory provisions:

William Lindeke Land Co. v. Kalman, 252 N.W. 650 (Minn. 1934)

Brookfield Trade Ctr., Inc. v. County of Ramsey, 584 N.W.2d 390 (Minn. 1998)

Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn., 664 N.W.2d 303 (Minn. 2003)

G. B. Kent & Sons, Ltd. v. Helena Rubinstein, Inc., 393 N.E.2d 460 (N.Y. 1979)

Statement of the Case

This is a case of employment litigation. Appellant Michelle Kunza alleged sexual harassment and other mistreatment at work by her former employer, respondent St. Mary's Regional Health Center, and by a coworker, respondent Dr. Wade Wernecke. The original complaint, the first amended complaint, and the second amended complaint pled 15 statutory and common law causes of action spread across nine counts.

The parties conducted extensive discovery, including 19 depositions. Respondents then moved the district court for summary judgment and dismissal, making a number of

alternative arguments in support of their motions. By means of a footnote in her motion response memorandum, Kunza Appdx. 18, Ms. Kunza voluntarily dismissed many of her causes of action. These remained:

- Count One – alleged sexual discrimination, alleged sexual harassment, and alleged aiding and abetting in violation of the Minnesota Human Rights Act, Minn. Stat. ch. 363A, (“MHRA”)
 - as against St. Mary’s only

- Count Two – alleged reprisals and alleged aiding and abetting in violation of the MHRA
 - as against St. Mary’s only

- Count Four – alleged negligent hiring, supervision, and retention of Dr. Wernecke
 - as against St. Mary’s only

- Count Seven – alleged battery
 - as against both respondents

- Count Nine – alleged generic vicarious liability and respondeat superior
 - as against St. Mary’s only

By order dated August 10, 2006, the district court granted both respondents’ summary judgment motions. Kunza Appdx. 3. As to the causes of action voluntarily dismissed by Ms. Kunza, the order dismissed with prejudice. Id. As to the remaining causes of action listed immediately above, the order dismissed without prejudice based on one of the arguments made by respondents – that Ms. Kunza had prematurely sued in violation of a covenant not to sue. Id. This ruling mooted the need for the district court to rule on the other arguments made by respondents, and the district court did not do so. The district court administrator then entered judgment in favor of respondents based on the district court’s order. Id.

Not long after judgment was entered, and pursuant to Gen. R. Prac. for Dist. Cts. 115.11, Ms. Kunza wrote the district court a letter requesting leave to file a motion for reconsideration of the summary judgment order. Kunza Appdx. 65. Respondents responded by separate letters. St. Mary's Appdx. 1, 4. By order dated September 5, 2006, the district court denied the request, finding no compelling circumstances for revisiting the summary judgment order. St. Mary's Appdx. 7.

After that, Ms. Kunza filed a "Motion to Clarify" with the district court. St. Mary's Appdx. 9. Two days before the date set for oral argument on the motion, Ms. Kunza filed her first appeal in this case challenging the August 10, 2006, summary judgment. Appellate Court Case No. A06-1900. The pendency of the first appeal caused the district court to decline to rule on the "Motion to Clarify."

In the meantime, both respondents had applied to the district court for taxation of costs and disbursements and Dr. Wernecke had applied to the district court for attorney's fees. But the pendency of the first appeal caused the district court to defer consideration of respondents' applications for costs, disbursements, and attorney's fees, pending the outcome of the first appeal.

By order filed on October 25, 2006, this court questioned whether the first appeal had been properly taken and directed the parties to file informal briefs on that issue. The parties did so. By order filed on November 21, 2006, this court dismissed the first appeal without prejudice and remanded the case to the district court for resolution of the costs, disbursements, and attorney's fees issues. Kunza Appdx. 67. The order preserved for Ms.

Kunza the right to re-file an appeal after the district court had resolved those three issues. Id. The remand of the case to the district court mooted Ms. Kunza's unresolved "Motion to Clarify."

In mid-January of 2007, the parties orally argued the costs, disbursements, and attorney's fees issues to the district court. By order and memorandum filed on January 18, 2007, the district court granted in substantial part both respondents' applications for costs and disbursements, but denied Dr. Wernecke's application for attorney's fees. Kunza Appdx. 70. That same day, the district court administrator entered judgment on the costs, disbursements, and fees order. Id. This second appeal followed. Kunza Appdx. 1. In response, Dr. Wernecke filed a notice of review on the attorney's fee issue.

In due course, Ms. Kunza filed her opening appeal brief in this second appeal. Because the brief contained five arguments not made in the district court that were being raised for the first time on appeal, respondents jointly moved this court to strike those portions of Ms. Kunza's opening brief. Respondents filed a joint brief in support of their motion, Ms. Kunza filed a response brief, and respondents filed a joint reply brief. By order filed on April 2, 2007, this court referred the motion to strike to the panel assigned to consider this second appeal on the merits.

Statement of Facts

In this second appeal, the focus will be on the covenant not to sue Ms. Kunza gave to respondents. This second appeal does not involve the merits of Ms. Kunza's employment law causes of action or respondents' substantive defenses to those causes of action. Even so,

a brief explanation of the facts related to the causes of action and defenses is necessary to understand the environment in which the parties found themselves at the time Ms. Kunza covenanted not to sue or file a charge against respondents. The situation at that time shows why her covenant made so much sense and why it now must be enforced as she agreed.

1. The Parties.

St. Mary's is a hospital located in Detroit Lakes. Through its various medical departments, including its Emergency Department, ("ED"), St. Mary's provides a full range of services to the region. The ED is staffed with a variety of employees, including a department manager, emergency medicine physicians, registered nurses, licensed practical nurses, and ward clerks.

Dr. Wernecke was and is one of the ED physicians. Wernecke 8-9, 66. Dr. Wernecke had and has a true employer-employee relationship with St. Mary's, as opposed to the more typical hospital-physician relationship in which the physician is employed elsewhere (usually a clinic) but has privileges to practice medicine in the hospital. Id. at 18, 88-90; Wernecke Ex. 11.

Ms. Kunza was a ward clerk in St. Mary's ED, Id. at 34, and thus a co-worker of Dr. Wernecke's. Ms. Kunza's duties as a ward clerk consisted of a variety of tasks, including the answering of phones, dealing with the public and with family and friends of patients, ordering supplies, sundry other clerical tasks, and the transcribing of physician orders for patient tests, treatments, and medications. Id. at 34, 394-95, 467; Alinder Ex. 21.

Other involved persons whose names are mentioned in this brief are Mr. Thomas Thompson, St. Mary's President/CEO, Thompson 8, Ms. Jean Evans, St. Mary's Administrative Director of Human Resources and Support Services, Evans 7, and Mr. Thomas Alinder, the ED manager, Alinder 7.

2. The Alleged Harassment and the Investigation Thereof.

On June 28, 2004, Ms. Kunza reported for the first time that Dr. Wernecke allegedly had been sexually harassing her and otherwise mistreating her at work for more than two years. Kunza 371, 408, 413-15. Ms. Kunza's report set in motion a swift and thorough investigation by St. Mary's, including multiple conversations with Ms. Kunza, *Id.* at 311-13, 438-39, 444, 446-47, 449-54, 459-60, 462; multiple conversations with Dr. Wernecke, Thompson 39-40, 50, Evans 48-49, 55, Wernecke 28-35, Alinder 22-23; and, interviews of five other ED employees, Evans 39-40, 43-45. Given that Dr. Wernecke was supervised by Mr. Thompson, Thompson 11, Ms. Evans involved him in the matter as well. Evans 48.

As a result of the investigation, St. Mary's concluded that Dr. Wernecke had engaged in some inappropriate behavior, but not sexual harassment. *Id.* at 19, 22. For that reason, Mr. Thompson gave Dr. Wernecke a written warning, which, among other things, ordered Dr. Wernecke to cease and desist from the inappropriate behavior, not to take any reprisals against Ms. Kunza or anyone else, and to attend workplace behavior training. Thompson 49, 52; Wernecke 14-15, 49-50, 59-60, 63-64; Goodman Ex. 9. Dr. Wernecke did in fact attend the mandated training. Wernecke 59-63. The written warning also put Dr. Wernecke on

notice that further inappropriate behavior would lead to further discipline, up to and including discharge. Goodman Ex. 9.

3. Ms. Kunza's Resignation.

Throughout the investigation, Ms. Kunza demanded that St. Mary's either transfer her to another department or find a way that she could work in the ED without ever having any contact with Dr. Wernecke. See e.g. Kunza 424-25, 485, 487, 496-97. Ms. Evans repeatedly explained to Ms. Kunza the difficulties with her demand: St. Mary's is a small facility; it employs ward clerks in only two departments; the ward clerk in the other department (Med/Surg) had more than 30 years' experience in the position, making it unfair to displace her; Ms. Kunza refused to change jobs or work different shifts; and, there were no available positions at the time (although there had been earlier). Evans 60; Evans Ex. 35. See also Thompson 56-58; Alinder 47-48.

Ms. Evans and Mr. Alinder repeatedly assured Ms. Kunza that the situation had been thoroughly investigated, that Dr. Wernecke had been spoken to, that he had been warned not to retaliate, and that St. Mary's was confident that any inappropriate behavior on his part would not recur. Kunza 460, 462, 480. Ms. Kunza was unmoved. She persisted in demanding that the ward clerks' schedules and the ED physicians' schedules be customized to guarantee that she would never have contact with Dr. Wernecke. Id. at 497, 510-11.

It got to the point where Ms. Kunza refused to come to work if she thought Dr. Wernecke would be on duty. Id. at 332, 463, 487-88, 509. One of the absences prompted a meeting on August 6, 2004, at which Mr. Alinder told Ms. Kunza that she had been absent

without permission, that she is a valuable member of the team, and that she must report to work as scheduled. Id. at 490-91. She was reminded that she could always trade shifts with other ED ward clerks, something she had done in the past. Id. at 491. She was reminded that St. Mary's had spoken with Dr. Wernecke about his misbehavior and that St. Mary's was confident that it would not recur. Id. at 491-92. Ms. Kunza had not worked with Dr. Wernecke, and had had no contact with him whatsoever, since she had first come forward with the harassment allegations in late June. Id. at 492.

By this point, Ms. Kunza had retained a lawyer who was communicating about the situation with St. Mary's lawyer. See e.g. Kunza Ex. 15.

On August 10, 2004, Ms. Kunza tendered her resignation to Ms. Evans, claiming that from her perspective the situation was beyond repair. Kunza 498-99. Ms. Evans refused to accept the resignation. Id. at 501; Evans 66; Alinder Ex. 28. She told Ms. Kunza to postpone such an important decision for a few days and take the rest of the week off because Ms. Kunza ought to speak with her lawyer about it and the lawyer was on vacation at the time. Kunza 501-03. Ms. Kunza agreed. Id. at 503.

On August 17, 2004, Ms. Kunza again missed work without permission. Id. at 505. See also Evans 68-69; Alinder 26, 43-45, 56-57. This unexcused absence and other recent events prompted Ms. Evans to write a letter to Ms. Kunza. Kunza 504; Kunza Ex. 15. The letter confirmed a statement by Ms. Kunza's lawyer that Ms. Kunza flatly refused to come to work on any day on which Dr. Wernecke would be working. Kunza Ex. 15. The letter insisted that Ms. Kunza come to work as scheduled. Id.

After apparently having spoken with her lawyer, Ms. Kunza re-tendered her resignation on August 19, 2004, which St. Mary's reluctantly accepted. Kunza 408, 517-18; Alinder Ex. 29; Evans Ex. 34.

4. The Covenant Not to Sue.

The situation in mid-August of 2004 was not good. Ms. Kunza claimed to have been mistreated by respondents, both through the alleged harassment and through the alleged failure to satisfy her scheduling demands. For its part, St. Mary's was at a loss on how to assuage Ms. Kunza and keep her employed. Both Ms. Kunza and St. Mary's had retained lawyers, and Dr. Wernecke was about to do so. Litigation was imminent. This is the environment in which the parties found themselves when Ms. Kunza made the covenant not to sue that is the subject of this second appeal.

The parties decide to attempt settlement prior to litigation. Roby Aff. ¶ 3. To facilitate those efforts, at the request of Ms. Kunza's then-counsel, in mid-August of 2004 the parties entered into an "Agreement to Toll Statute of Limitations," (the "Tolling Agreement"). *Id.* at ¶ 4; Kunza Appdx. 12. All three parties were represented by counsel at the time. As Ms. Kunza accurately states, "The Tolling Agreement was negotiated by sophisticated attorneys." Kunza Brief 11. In fact, counsel signed the Tolling Agreement on behalf of their respective clients. Roby Aff. ¶ 4; Kunza Appdx. 13. Ms. Kunza's appendix contains a faxed copy of the Tolling Agreement with fax copies of the signatures. The parties agreed to be bound thereby: "This Tolling Agreement may be executed in counterparts and by facsimile signatures." Kunza Appdx. 12.

As described in the Tolling Agreement, Ms. Kunza was threatening to file a suit or charge against both respondents alleging the same causes of action she later alleged in this litigation. Kunza Appdx. 12. Respondents denied any liability. *Id.* The three parties “agreed to enter into pre-suit negotiations” and to work “in good faith to attempt to resolve the claims without any civil Complaint or Charge being filed.” *Id.*

In furtherance of this goal, in the Tolling Agreement respondents gave Ms. Kunza “a suspension of the running of all and any applicable statutes of limitations for the period beginning July 28, 2004.” Kunza Appdx. 12. While the limitations period was suspended, Ms. Kunza could negotiate for a settlement without fear of losing any claims to a time bar, should settlement efforts fail. Remember, Ms. Kunza was alleging unlawful conduct stretching back more than two years, and the parties had no idea how many more weeks or months might pass while they tried to settle the dispute and avoid litigation. Ms. Kunza reasonably feared that some of her potential claims might expire during the pendency of settlement discussions. See e.g. Minn. Stat. § 363A.28, subd. 3 (one year statute of limitations for MHRA claims); Minn. Stat. § 541.07(1) (two year statute of limitations for intentional tort claims). Hence, Ms. Kunza reasonably sought temporarily to suspend the statute of limitations.

In exchange for this protection, in the Tolling Agreement Ms. Kunza gave Respondents a covenant not to sue: “Ms. Kunza promises not to sue and file a Charge during the term of this Tolling Agreement.” Kunza Appdx. 12, (the “Covenant”). The Covenant allowed Respondents to work on settling the matter without having to devote time and

resources to responding to an agency charge or to answering a complaint. Remember, Ms. Kunza already had a lawyer and litigation was imminent; and, again, the parties had no idea how many weeks or months might pass while they tried to settle the dispute and avoid litigation. Respondents reasonably sought to avoid having to gear up for formal proceedings while they tried to settle the dispute.

None of the parties wished to leave the Tolling Agreement in effect forever if settlement discussions broke down. Ms. Kunza would want the Covenant to be lifted so she could sue or file a charge. Respondents would want the statutes of limitation to resume running on Ms. Kunza's claims. For those reasons, the Tolling Agreement states, "That either party may cancel the Tolling Agreement upon short notice, i.e., ten days." Kunza Appdx. 12. The abbreviation "i.e." is Latin for *id est*, which means "that is." Black's Law Dictionary (8th ed. 2004). Thus, the Tolling Agreement's cancellation clause must be read as, ". . . upon short notice, *that is*, ten days." [italics added] For final emphasis, the Tolling Agreement stated, "This Tolling Agreement is binding on all parties . . ." Kunza Appdx. 12.

5. The Cancellation of the Covenant Not to Sue.

The pre-suit settlement efforts obviously were not successful, as evidenced by this litigation. Because it eventually became clear that settlement efforts were running out of steam, Respondents gave notice of cancellation of the Tolling Agreement.

By letter dated Wednesday, September 22, 2004, from St. Mary's counsel to Ms. Kunza's counsel, St. Mary's gave notice of cancellation of the Tolling Agreement, "effective

ten days from Friday, September 24th.” Kunza Appdx. 15. Thus, as to St. Mary’s, the Tolling Agreement remained in effect up to and including Monday, October 4, 2004, computed as follows: The first day, Friday, September 24th, is excluded, but the last day, Monday, October 4th, is included. Minn. Stat. § 645.15; Olson v. McGraw, 247 N.W. 8, 8 (Minn. 1933) (common law of contracts excludes first day and includes last day unless it is a Saturday, Sunday, or holiday); Nebola v. Minn. Iron Co., 112 N.W. 880, 881 (Minn. 1907) (applying the statutory rule to a contract’s time frame and calling it the “common-law rule on the same subject” that applies “to actions in tort, as well as upon contract”).

By fax dated September 22, 2004, from Dr. Wernecke’s counsel to Ms. Kunza’s counsel, Dr. Wernecke also gave notice of cancellation of the Tolling Agreement. Kunza Appdx. 14. Thus, as to Dr. Wernecke, the Tolling Agreement also remained in effect up to and including Monday, October 4, 2004, computed as follows: The first day, Wednesday, September 22nd, is excluded, but the last day, Saturday, October 2nd, is included. But because October 2nd was a Saturday, the next regular business day, Monday October 4th, becomes the 10th day of the 10-day cancellation time frame. Minn. Stat. § 645.15; Olson, 247 N.W. at 8; Nebola, 112 N.W. at 881.

6. The Breach of the Covenant Not to Sue.

The cancellation notices had the effect of establishing an expiration date for the Covenant. Ms. Kunza was barred from suing or filing a charge up to and including Monday, October 4, 2004. She was free to sue or file a charge on and after Tuesday, October 5, 2004. Ms. Kunza, however, jumped the gun. She prematurely commenced this suit by serving Dr.

Wernecke with the summons and complaint on Thursday September 30, 2004. Kunza Appdx. 17. “A civil action is commenced against each defendant: (a) when the summons is served upon that defendant” Minn. R. Civ. P. 3.01. The next day, Friday, October 1, 2004, she served St. Mary’s with the summons and complaint. Kunza Appdx. 16; Minn. R. Civ. P. 3.01. The suit was commenced by the same lawyers (not Ms. Kunza’s present lawyers) who had negotiated and signed the Tolling Agreement.

7. The Early and Multiple Notices to Ms. Kunza of the Breach.

Respondents noticed the Covenant argument early in the case. They recognized that the argument could very well dispose of most if not all of this non-meritorious suit without the time and expense of a trial. To preserve the argument and to be fully forthcoming as required by the procedural and discovery rules, respondents pled the argument multiple times from the outset of case and also divulged its details to Ms. Kunza in their interrogatory answers early in the case.

Respondents did not need to answer Ms. Kunza’s original complaint because it was quickly replaced by a first amended complaint for technical reasons. St. Mary’s answered the first amended complaint on November 1, 2004. Among other things, St. Mary’s pled this defense: “All counts are barred by a contractual promise not to sue.” St. Mary’s Appdx. 12. Dr. Wernecke answered the first amended complaint the same day. Among other things, he pled this defense: “Plaintiff’s claims are barred by contract.” St. Mary’s Appdx. 14.

Not long thereafter, Respondents answered interrogatories served by Ms. Kunza. One of the interrogatories asked about respondents' defenses. St. Mary's interrogatory answers, served January 6, 2005, included this:

Plaintiff, through her attorney, entered into a tolling agreement with Defendants. The tolling agreement provided that Plaintiff would not commence suit while the tolling agreement was in effect. Plaintiff breached this condition.

St. Mary's Appdx. 16. Dr. Wernecke's interrogatory answers, served January 7, 2005, included this:

Plaintiff, through her attorney, entered a tolling agreement with St. Mary's and Dr. Wernecke, through their attorneys, agreeing that she would not commence suit until at least ten days after the agreement was terminated. Plaintiff's complaint was served upon Dr. Wernecke's attorney less than ten days after the tolling agreement was terminated.

St. Mary's Appdx. 20.

Some months later, Ms. Kunza changed lawyers. To reflect the new representation, Ms. Kunza served a second amended complaint in late October of 2005. St. Mary's answered the second amended complaint on October 28, 2005, and again pled this defense: "All counts are barred by a contractual promise not to sue." St. Mary's Appdx. 23. Dr. Wernecke answered the second amended complaint on October 31, 2005, and again pled this defense: "Plaintiff's claims are barred by contract." St. Mary's Appdx. 25.

Amazingly, despite the early and multiple notices of her breach of the Covenant, Ms. Kunza discounted the argument, failed to appreciate it, or ignored it. She took no action to protect her claims by, for example, moving to strike the argument, by re-serving the summons and complaint, or by making a phone call to defense counsel to discuss the

argument. Cf. Thorson v. Zollinger Dental, P.A., 728 N.W.2d 261, 267 (Minn. Ct. App. 2007) (insufficient service of process could have been cured by re-serving the summons and complaint properly).

Instead, the parties proceeded with discovery, including 18 depositions noticed by Ms. Kunza and one noticed by respondents. After the discovery record was fully developed, respondents brought their multiple dispositive motions, one of which asserted the protections of the Covenant. The district court ruled in favor of respondents based on the Covenant and did not reach the other arguments made by respondents.

Standard of Review

The familiar summary judgment standard of review applies to this second appeal. The appellate court determines *de novo* whether the record contains any genuine issues of material fact warranting a trial. If none, the appellate court then determines *de novo* whether the district court erred in its application of the law to the undisputed facts. Minn. R. Civ. P. 56.03; Schermer v. State Farm Fire & Cas. Co., 721 N.W.2d 307, 311 (Minn. 2006); A. J. Chromy Constr. Co. v. Commercial Mech. Servs., Inc., 260 N.W.2d 579, 582 (Minn. 1977).

Where, as here, a district court grants summary judgment based on undisputed facts, this court reviews the district court's legal conclusion *de novo*. Lefto v. Hoggsbreath Enters., Inc., 581 N.W.2d 855, 856 (1998).

In many cases, including this one, the moving party in the district court seeks summary judgment or dismissal based on multiple arguments in support of the motions, any one of which, if successful, would terminate part or all of the case. In those situations, a

district court can make a ruling based on one of the arguments without having to rule upon the other arguments. The district court in this case did just that – it granted summary judgment to respondents based on the Covenant and did not rule on the other arguments made by respondents.

In this second appeal, this court obviously will have to examine the district court's ruling on the Covenant. But what of the other arguments made by St. Mary's in the district court? The district court did not rule on them. They were:

Count One – Sexual Discrimination, Sexual Harassment, and Aiding and Abetting of Same in Violation of the MHRA:

Ms. Kunza concealed the alleged harassment; Ms. Kunza failed to cooperate with remedial efforts after she finally came forward; Ms. Kunza cannot prove that St. Mary's failed to take timely and appropriate remedial action after it knew or should have known of Dr. Wernecke's alleged wrongdoing; Ms. Kunza cannot prove that St. Mary's deliberately tried to make her work environment so intolerable that she had to quit; the aiding and abetting claim suffers from fatal legal defects – no underlying actionable harassment occurred and an employer cannot aid and abet itself

Count Two- Reprisals and Aiding and Abetting of Same in Violation of the MHRA:

The events of reprisal cited by Ms. Kunza do not, as a matter of law, amount to the kind of adverse employment action contemplated by the reprisal statute; Ms. Kunza cannot prove that St. Mary's deliberately tried to make her work environment so intolerable that she had to quit

Count Four – Negligent Hiring, Negligent Supervision, and Negligent Retention of Dr. Wernecke:

Ms. Kunza cannot prove that Dr. Wernecke had a propensity to injure others or, if he did, that St. Mary's knew or should have known about it; Ms. Kunza cannot prove that Dr. Wernecke's alleged mistreatment of her threatened her with or caused her physical injury; the claims for negligent supervision and retention are preempted by the MHRA's exclusive procedure provision

Count Seven – Battery:

Principles of vicarious liability do not apply to the alleged battery

Count Nine – Generic Vicarious Liability and Respondeat Superior:

This Count fails to state a claim upon which relief can be granted because vicarious liability and respondeat superior are not recognized stand-alone causes of action

This brief calls these other arguments “Reserved, Alternative Theories,” the term used by the supreme court in Mattson v. Underwriters at Lloyds of London, 414 N.W.2d 717, 721 (Minn. 1987). How can St. Mary’s preserve its Reserved, Alternative Theories and reassert them later in the district court in the unfortunate event that this court reverses the summary judgment? A notice of review would not work because the district court did not issue any judgment or order adverse to St. Mary’s on the Reserved, Alternative Theories. Minn. R. Civ. App. P. 106 (notices of review applicable only to adverse judgments and orders); Hoyt Inv. Co. v. Bloomington Commerce and Trade Ctr. Assocs., 418 N.W.2d 173, 175 (Minn. 1988); Mattson, 414 N.W.2d at 722, n. 8. Ms. Kuzna agrees. Kunza Brief 5, n. 4.

The supreme court addressed this dilemma in the Mattson case, where it laid out several methods by which a litigant can preserve arguments made to, but not decided by, the district court. Based on the Mattson guidelines, St. Mary’s hereby preserves its Reserved, Alternative Theories for possible later consideration by the district court if circumstances warrant. Paraphrasing one of Mattson’s suggested methods for doing so, St. Mary’s hereby asks, if this court reverses the district court’s summary judgment on the Covenant argument, that this court expressly remand the case to the district court for a decision on St. Mary’s Reserved, Alternative Theories. Mattson, 414 N.W.2d at 721.

Argument

This court must affirm if the record does not contain any genuine issues of material fact warranting a trial on the Covenant; and if the district court did not err in its application of the law to the undisputed facts. Ms. Kunza never claimed, much less demonstrated, the existence of any material fact issues regarding the Covenant; and the district court correctly applied the law to the undisputed facts. Therefore, this court must affirm the district court's summary judgment.

1. Covenants Not to Sue Generally.

A covenant not to sue is “. . . an agreement not to enforce an existing cause of action against the party to the agreement.” Gronquist v. Olson, 64 N.W.2d 159, 164 (Minn. 1954). See also Karnes v. Quality Pork Processors, 532 N.W.2d 560, 562 (Minn. 1995) (same); Musolf v. Duluth Edison Elec. Co., 122 N.W. 499, 502 (Minn. 1909) (a “bar” to the action).

According to the Restatement:

(1) A contract not to sue is a contract under which the obligee of a duty promises never to sue the obligor or a third person to enforce the duty *or not to do so for a limited time*. (2) . . . [A] contract not to sue for a limited time bars an action to enforce the duty *during that time*. [italics added]

Restatement (Second) of Contracts, § 285 (1981).

“A breach occurs if the party initiates any sort of cause of action.” Midwest Fed. Sav. and Loan Ass'n of Minneapolis v. Green Tree Acceptance, Inc., 1989 WL 411604, at *13 (D. Minn. Aug. 17, 1989). Like a release, a covenant not to sue “. . . may be pleaded as a defense to a cause of action.” Green Tree; 1989 WL 411604, at *13; see also Bellefonte Re Ins. Co. v. Argonaut Ins. Co., 586 F. Supp. 1286, 1287 (S.D.N.Y. 1984) aff'd 757 F.2d 523 (2nd Cir. 1985).

Pre-suit covenants not to sue further an important public policy – the settlement of litigation. “Settlement of disputes without litigation is highly favored.” Johnson v. St. Paul Ins. Co., 305 N.W.2d 571, 573 (Minn. 1981).

Covenants not to sue are an accepted method of relieving a party from the hazards, and the courts from the burdens, involved in common-law litigation.

Anderson v. Wachter, 167 N.W.2d 719, 722 (Minn. 1969). Public policy encourages parties to make an effort to settle disputes before suing. If a pre-suit covenant not to sue will facilitate that effort, it must be encouraged and supported by the courts.

2. This Court’s Narrow Scope of Review.

In the district court, Ms. Kunza made a surprisingly superficial response to respondents’ Covenant argument. Her 44½-page motion response memorandum devoted only two paragraphs to the argument. Kunza Appdx. 41-42. There, Ms. Kunza made three brief contentions:

- That Dr. Werneck’s letter cancelling the Tolling Agreement took effect the moment it was sent, not 10 days later as required by the Tolling Agreement. Id.
- That the Covenant barred Ms. Kunza only from suing in court *and* filing an agency charge; she was not barred from suing in court *or* filing an agency charge; Id.; and,
- That the Covenant barred only the *filing* (as opposed to *commencing*) of suit within the proscribed time frame and that Ms. Kunza had *filed* this case outside of the proscribed time frame; Id.

At the hearing on the summary judgment motions, Ms. Kunza verbally added as an afterthought a fourth argument, without citation to any authority and comprising only two sentences in the transcript:

- That respondents ought to be estopped from arguing the Covenant because respondents failed to bring their motions sooner. 7/12/06 Trans. 46.

Ms. Kunza's tepid response in the district court on the Covenant issue drastically constrains this court's scope of review. An appellate court can consider only arguments presented to the district court. Toth v. Arason, 722 N.W.2d 437, 443 (Minn. 2006); Rubey v. Vannett, 714 N.W.2d 417, 424 (Minn. 2006). "Issues raised for the first time on appeal are not to be considered." Sletten v. Ramsey County, 675 N.W.2d 291, 302 (Minn. 2004). See also Fahrendorff v. North Homes, Inc., 597 N.W.2d 905, 909 (Minn. 1999); Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988).

For these reason, this court's scope of review is, at most, limited to the four arguments listed above. But the scope of review narrows even further because Ms. Kunza waived two of the four arguments listed above by failing to brief them to this court:

- That the Covenant barred only the *filing* (as opposed to *commencing*) of suit within the proscribed time frame and that Ms. Kunza had *filed* this case outside of the proscribed time frame;
- That respondents ought to be estopped from arguing the Covenant because respondents failed to bring their motions sooner.

"It is well-established that failure to address an issue in brief constitutes waiver of that issue." Peterson v. BASF Corp., 711 N.W.2d 470, 482 (Minn. 2006), cert. denied, 127 S.Ct. 579 (2006). See also Melina v. Chaplin, 327 N.W.2d 19, 20 (Minn. 1982).

In sum, only these two arguments by Ms. Kunza may be reviewed on appeal:

- That Dr. Werneck's letter cancelling the Tolling Agreement took effect the moment it was sent, not 10 days later as required by the Tolling Agreement.

- That the Covenant barred Ms. Kunza only from suing in court *and* filing an agency charge; she was not barred from suing in court *or* filing an agency charge.

Ms. Kunza's brief, however, contains five additional arguments not presented to the district court and raised for the first time in this second appeal. Ms. Kunza conceded that at least one of the five new arguments is being raised for the first time on appeal. Kunza Brief 16-17. As mentioned above, respondents jointly moved this court to strike those portions of Ms. Kunza's opening brief pertaining to the five new arguments. The legal support for the motion to strike is more fully set forth in respondents' joint opening and reply briefs previously filed in support of their motion to strike.

In this brief, St. Mary's will first address the only two arguments Ms. Kunza properly preserved for appellate review. After that, St. Mary's will address the five new arguments Ms. Kunza did not properly preserve for appellate review, but only because this court has yet to rule on the motion to strike.

3. The Absence of Disputed Material Facts.

In her cursory district court argument, Ms. Kunza never claimed, much less demonstrated, the existence of any material fact issues regarding the Covenant. The two arguments she preserved for appellate review present legal questions for resolution by the court. Alpha, 664 N.W.2d at 311 ("This issue involves the interpretation of a written contract, which is a question of law."); Brookfield, 584 N.W.2d at 394 (same). In the district court Ms. Kunza did question the applicability of the Covenant's language to the events that

unfolded when respondents cancelled the Covenant. But the cancellation events themselves were not in dispute. Ms. Kunza challenged only the legal import of those undisputed events.

As the district court stated, “There are no material issues of fact in regards to the Tolling Agreement.” Kunza Appdx. 8. This second appeal comes down to whether the district court correctly applied the law to the undisputed facts. As the district court put it:

Whether service of the Summons and Complaint on the 1st day of October, 2004, constitutes a breach of the contract is solely a legal question to be answered by the court.

Id. As St. Mary’s shows next, the district court did indeed correctly apply the law to the undisputed facts.

4. The Application of the Law to the Undisputed Facts.

Neither of the two arguments that Ms. Kunza properly preserved for appellate review diminish the viability of the Covenant or mandate reversal of the district court’s summary judgment.

(i) 10-Days’ Cancellation Notice.

This was a curious argument for Ms. Kunza to make. She alleges that Dr. Wernecke cancelled the Tolling Agreement prematurely and now he ought to be held to the consequences of doing so. Suppose this thinking is correct. Also suppose that Dr. Wernecke subsequently alleged that on the day after he gave his cancellation notice a statute of limitations expired on one of Ms. Kunza’s claims. After all, if the Tolling Agreement was truly cancelled, then the statutes of limitations would have to resume running.

Would not Ms. Kunza protest that the statute of limitations did not expire at that point and that she was entitled to nine more days of tolling? Would she not insist that Dr. Wernecke's cancellation notice was effective no sooner than 10 days after he sent it? Of course she would, and for good reason. All parties were entitled to a full 10-day cancellation period.

Be that as it may, the plain fact is that Dr. Wernecke's notice did not prematurely cancel the Tolling Agreement, nor could it. The Tolling Agreement unambiguously required 10 days' cancellation notice, as the district court observed. Kunza Appdx. 6, 12. The Tolling Agreement did not require any "magic words" to invoke the 10-day time frame and did not even require the cancelling party to make reference to the 10-day time frame. All it required was a "notice." *Id.* Most importantly, the Tolling Agreement did not permit any party to cancel prematurely for any reason. To the contrary, it barred instantaneous cancellation.

Dr. Wernecke's cancellation notice, Kunza Appdx. 14, complied with the Tolling Agreement. It said, "[W]e hereby cancel and terminate the Agreement to Toll Statute of Limitations which was executed in connection with this matter." The notice did not expressly or impliedly even hint at an attempted early cancellation. The notice did no more and no less than invoke the 10-day cancellation provision of the Tolling Agreement.

Consider the implications of Ms. Kunza's argument. Contracts of all kinds – for the sale of goods, manufacturing, labor, employment, professional services, consulting, you name it – often contain language requiring a cancellation notice of a specified number of days, weeks, or months. According to Ms. Kunza, any notice cancelling such contracts that

does not explicitly reference the specified notice time period automatically breaches the contract by coercing a premature cancellation! This is going to come as a big surprise to many. Reasonable people reasonably assume that a cancellation notice commences the running of the contractually-specified notice period, not truncates it.

Even if Dr. Wernecke's notice can somehow be read as an attempt to shorten or dispense with the 10-day cancellation notice period, the "erroneous date rule" would trump the attempt as a matter of law. According to G. B. Kent, Inc., 393 N.E.2d at 461:

The erroneous date rule [holds] that a termination notice which erroneously identifies the termination date is nonetheless sufficient to effect a termination as of the first proper termination date . . .

Our federal appellate court put it this way:

And it is the general rule that where a contract, whether it be one for employment or for insurance or of a different kind, requires written notice of cancellation upon a stated time, a notice failing to meet the time requirement, but otherwise appropriate, is nonetheless effective upon the lapse of the time required by the contract.

Shain v. Wash. Nat'l Ins. Co., 308 F.2d 611, 614 (8th Cir. 1962). The Alabama Supreme court said:

The rule is well settled in this and other jurisdictions, that, when the notice declares that the cancellation is presently operative, or fixes a time shorter than that prescribed, where the policy requires a certain number of days' notice, it becomes effective at the expiration of the prescribed period.

Black v. Travelers Ins. Co., 165 So. 221, 222 (Ala. 1936).

The "erroneous date rule" appears to have originated with Lyon v. Pollard, 87 U.S. 403, 404 (1874). There, an employment contract required 30 days' cancellation notice. Notice was given on September 19, but the employee was dismissed prematurely on October

4. The court did not hold that the cancellation notice was defective or somehow in breach of the contract, as Ms. Kunza calls for. Instead, the court held that the notice effectively cancelled the contract as of October 19. Id. See also Hagstrom v. Am. Circuit Breaker Corp., 518 N.W.2d 46, 49 (Minn. Ct. App. 1994) (30 days' notice of cancellation required; only 29 days' notice given; held, applying North Carolina law, contract cancelled 30 days after notice received), rev. denied, (Minn. Aug. 24, 1994); Richards v. Allianz Life Ins. Co. of N. Am., 62 P.3d 320, 325 (N.M. Ct. App. 2002) (two contracts; one required 15 days' notice of cancellation, the other 30; notice given on December 21 to be effective on December 28; held, notice not defective because of attempted premature cancellation; instead, notice would be considered effective as of January 5 and January 20 for the respective contracts), cert. denied, 59 P.3d 1262 (N.M. 2002); Paradise v. Augustana Hosp. and Health Care Ctr., 584 N.E.2d 326, 329 (Ill. App. Ct. 1991) (30 days' notice of cancellation required; only one day's notice given; held, contract cancelled 30 days after notice given); G. B. Kent, 393 N.E.2d at 462 (one year's notice of cancellation required; only three and one-half months's notice given; held, although the notice was not effective to cancel the contract as of the end of the year in which the notice was given, it was effective to cancel the contract as of the end of the next year); Shain, 308 F.2d at 617 (30 days' notice of cancellation required; only 29 days' notice given; held, contract cancelled 30 days after notice given); Seaboard Mut. Cas. Co. v. Profit, 108 F.2d 597, 599-600 (4th Cir. 1940) (five days' notice of cancellation required; only four days' notice given; held contract cancelled five days after notice given).

Under the “erroneous date rule,” a cancellation notice will serve to cancel the contract at the time set forth in the contract, even if the notice purports to cancel the contract earlier. The notice is not voided. Nor is the notice voidable or considered a breach of the contract, as Ms. Kunza contends. Instead, the notice still carries legal effect, but the erroneous cancellation date set forth in the notice is ignored and cancellation occurs at the time set forth in the contract.

Even if Dr. Wernecke’s cancellation notice can somehow be read as an attempt to shorten or dispense with the 10-day cancellation period, the “erroneous date rule” would, as a matter of law, preserve the 10-day period set forth in the Tolling Agreement. Because of the rule, Ms. Kunza (and St. Mary’s as well for that matter) were entitled to a full 10-day interval between the giving of the notice and the end of the Tolling Agreement. That being the case, it is clear that Ms. Kunza sued too soon.

(ii) Suing *and* Charging vs. Suing *or* Charging.

Ms. Kunza argues that the Tolling Agreement barred her only from both suing *and* filing a charge against respondents but not from suing *or* filing a charge. Resolution of this argument is guided by these familiar rules of contract interpretation:

In interpreting a contract, the language is to be given its plain and ordinary meaning. [citation omitted] We read contract terms in the context of the entire contract and will not construe the terms so as to lead to a harsh and absurd result. [citation omitted] Additionally, we are to interpret a contract in such a way as to give meaning to all of its provisions.

Brookfield Trade Ctr., 584 N.W.2d at 394. We therefore turn to the language of the Tolling Agreement.

The preamble to the Tolling Agreement states:

Kunza has indicated that she will be filing a Charge *or* civil Complaint against the Hospital and Wernecke the undersigned parties have agreed to enter into pre suit negotiations and are working in good faith to attempt to resolve the claims without *any* civil Complaint *or* Charge being filed. [italics added]

Kunza Appdx. 12. Section 4 of the Tolling Agreement states:

Ms. Kunza promises not to sue *and* file a Charge during the term of this Tolling Agreement. [italics added]

Kunza Appdx. 12.

As these passages unambiguously show, the parties intended to postpone any kind of adversary proceeding, whether in court or in an agency. Indeed, the postponement of such proceedings was a key component of the consideration received by respondents under the Tolling Agreement. The postponement was the flip side of the covenant given by respondents to Ms. Kunza to toll the statutes of limitation.

Now, Ms. Kunza would have the court believe that she was free to sue in court or file an agency charge without being in violation of the Tolling Agreement, as long as she did not do both concurrently. This tortured reading of the Tolling Agreement is wrong for several reasons.

First, the Tolling Agreement's plain language gives no such choice to Ms. Kunza. Reading Section 4 "in the context of the entire contract" so as to "give meaning to all of its provisions," Brookfield Trade Ctr., 584 N.W.2d at 394, the Tolling Agreement was designed to, and did, protect Respondents from any kind of suit or agency proceeding.

Second, Ms. Kunza's spin on Section 4 reduces the section to an absurdity, contrary to the rule that a court "will not construe the terms so as to lead to a harsh and absurd result." Id. According to Ms. Kunza, Respondents would have been fine with having to defend against either a suit or an agency charge while the Tolling Agreement was in effect and sought to be protected only from having to defend against both concurrently. This cannot be a rational reading of the Tolling Agreement, and the district court so held. Kunza Appdx. 8.

Third, the touchstone of contract interpretation is the intent of the parties at the time they made the contract. William Lindeke Land Co., 252 N.W. at 652. The plain language of the Tolling Agreement demonstrates that respondents, and more importantly Ms. Kunza, intended, as the district court said, "to allow the parties to engage in settlement discussions without *any* formal legal action." [italics original] Kunza Appdx. 10. Any other reading of the Tolling Agreement would render the parties' intent meaningless. The district court correctly concluded:

The court does not believe it was the intent of the parties to allow the Plaintiff to either sue or file a Charge, but not both. . . . [T]he court finds that it was clearly the intent of the parties . . . that she promised not to sue and promised not to file a charge within ten days of notice of cancellation.

Kunza Appdx. 9-10.

Fourth, Ms. Kunza's view of the Covenant is based on a legal impossibility. She says that the Covenant would be violated only if she both sued and filed an agency charge concurrently. But that is a scenario permitted under neither federal law nor state law.

Under federal law, an aggrieved party must first file a charge with the Equal Employment Opportunity Commission (“EEOC”) and give the EEOC a specified period of time to process the charge before any federal suit can be filed. 42 U.S.C. § 2000e-5(e)(1), (f)(1). After the specified period of time passes, and if the claim remains unresolved, the EEOC file can be closed and the aggrieved party can sue. *Id.* Under the federal system, it is not legally possible to sue in court and file a charge concurrently. The two steps must be taken serially.

Unlike the federal law, the MHRA gives an aggrieved party the choice between initially suing or filing a charge; the party need not file a charge first. Minn. Stat. § 363A.28, subd. 1. But, like the federal law, under the MHRA the aggrieved party cannot do both concurrently. The MHRA says that the aggrieved party “may bring a civil action . . . *or* may file a verified charge.” *Id.* [italics added] If the aggrieved party chooses to bring a civil action, he or she and the Minnesota Department of Human Rights are required immediately to terminate any then-pending agency proceedings. Minn. Stat. § 363A.33, subd. 3. And, once the civil action is underway, the agency proceeding cannot be reactivated, nor can a new charge be filed. *Id.* If the aggrieved party chooses to file an agency charge instead of suing, the agency “procedure herein provided shall, while pending, be exclusive.” Minn. Stat. § 363A.04. So, again, concurrent agency and court proceedings are barred.

As our supreme court has held:

Whenever possible, a contract must receive a construction that will make it lawful, and where there is a choice between a construction of illegality and one of legality, an intended contractual course of legality is to be presumed in the absence of proof of a purpose to the contrary.

Indianhead Truck Line, Inc. v. Hvidsten Transp., Inc., 128 N.W.2d 334, 341 (Minn. 1964).

The Covenant easily can be, and must be, interpreted consistent with the parties' intent to avoid the illegal construction urged by Ms. Kunza, and the district court did so. Kunza Appdx. 8. The Covenant barred Ms. Kunza from either suing or filing a charge for 10 days after respondents' notices of cancellation.

(iii) Result.

Having disposed of the only two arguments properly presented to this court by Ms. Kunza, it naturally follows that the district court correctly applied the law to the undisputed facts. The Covenant was valid and enforceable. Respondents gave notices of cancellation of the Tolling Agreement that contained the Covenant. Prior to expiration of the notice period, Ms. Kunza sued, meaning that, according to the district court:

[T]he Plaintiff was in breach of the Tolling Agreement when she served her Summons and Complaint less than ten days after notice of cancellation.

Kunza Appdx. 10. Consequently, this suit was barred. The summary judgment must be affirmed.

5. A Final Comment.

In ruling in favor of respondents on the Covenant, the district court paused for a just a moment, commenting on whether the case was being decided on a "technicality." Kunza Appdx. 11. The district court quickly and correctly dismissed any such notion because the law of contracts bars courts from delving into the adequacy of consideration for a contractual promise. Id.

In Estrada v. Hanson, 10 N.W.2d 223, 225-26 (Minn. 1943), the supreme court held:

It is an elementary principle of contract law that courts will not inquire into the adequacy of consideration. “It is unnecessary that a consideration should be adequate. It is sufficient if it is something which the law regards as of value.” 2 Dunnell, Dig. § 1756.

In the same vein, the consideration passing between contracting parties need not be (and seldom is) precisely symmetrical. Powell v. MVE Holdings, Inc., 626 N.W.2d 451, 463 (Minn. Ct. App. 2001), rev. denied, (Minn. July 24, 2001).

As the district court correctly observed:

Here, each party received something of value. The Plaintiff had the statute of limitations tolled and the Defendants were relieved of formal legal proceedings. This is sufficient consideration to support the contract, and the court will not look beyond that.

Kunza Appdx. 11. Just as it was important and valuable to Ms. Kunza to have the statutes of limitations tolled for a period of weeks, if not months, during the pre-suit settlement discussions, it was just as important and valuable to respondents to be free from formal proceedings for that same period of weeks or months. Ms. Kunza conceded the point on page 15 of her brief:

Ms. Kunza does not contest that her foregoing of her right to sue and Respondents’ tolling of the statute of limitations furnished adequate consideration to support the Tolling Agreement.

Although not legally relevant, consideration was not only adequate, but symmetrical as well. Surely Ms. Kunza would have loudly and justifiably protested if respondents had tried to invoke a statute of limitations that had expired during the 10-day notice period. She would have rightly insisted on the benefit of the bargain she made in the Tolling Agreement – suspension of the running of all statutes of limitations during of the cancellation notice

period. So too respondents. They were entitled to insist on the benefit of the bargain they made in the Tolling Agreement – freedom from legal proceedings for the duration of the cancellation notice period.

It is no more “technical” to enforce the Covenant made by Ms. Kunza than it is to enforce a statute of limitations. More than a few suits have been dismissed over the years because they narrowly missed the statute of limitations. See e.g. J.J. v. Luckow, 578 N.W.2d 17, 21 (Minn. Ct. App. 1998) (four days) rev. denied, (Minn. July 16, 1998); McShane v. Comm’r of Pub. Safety, 377 N.W.2d 479, 480 (Minn. Ct. App. 1985) (six days), rev. denied, (Minn. Jan. 23, 1986).

If there is any remaining doubt about the “technical” nature of the summary judgment, it immediately evaporates in the light of the important public policy in play: Parties are strongly encouraged to attempt to settle disputes, rather than to litigate them. Johnson. A temporary suspension of the statutes of limitations and a temporary covenant not to sue can be very useful tools in support of the public policy. They relieve the parties of the distraction and expense of adversary proceedings so that the parties can focus on trying to settle the dispute. Although a pre-suit settlement unfortunately was not achieved in this case, the parties cannot be faulted for the effort, and their Tolling Agreement must be enforced as supportive of their effort and as responsive to the strong public policy.

6. The Arguments Not Properly Before this Court.

If this court grants respondents’ joint motion to strike certain portions of Ms. Kunza’s opening brief, then there is no need for this court to consider this section 6. However, if the

court denies the motion and elects to consider the Ms. Kunza's five newly-raised arguments, then St. Mary's offers the following analysis, keeping in mind that this court and the parties do not have the benefit of any analysis or ruling on these arguments from the district court. Additionally, by making the following comments St. Mary's does not waive its contention that these five arguments are not properly before this court.

(i) Respondents Supposedly Benefitted from Their Alleged Breaches.

This newly-raised argument is wrong for a variety of reasons.

First, the premise of this newly-raised argument is false, as shown above. Dr. Wernecke gave a proper cancellation notice that did not breach the Tolling Agreement. And, as shown above, even if his cancellation notice was flawed as to its effective date, the "erroneous date rule" protects the notice from being considered a breach of the Tolling Agreement and serves instead to make the notice effective at the end of the contractual 10-day time frame.

Second, it is hard to see, and Ms. Kunza neglects to explain, how extending the professional courtesy of admitting service of process, as both respondents did, amounts to a breach of the Tolling Agreement.

Third, once respondents had agreed to admit service of process, the timing of *when* they were served with copies of the summons and complaint was wholly under Ms. Kunza's control. She easily could have waited a few days before sending out the papers, and, if she had, the Covenant issue would have never arisen. Now, she faults respondents for signing the admission forms at the time she insisted they do so! In that regard, Ms. Kunza contends

that she had no obligation to engage in “altruistic behavior” by “asserting Respondents’ contract rights on their behalf” by timely curing her own breach of the Tolling Agreement. Kunza Brief 20. Respondents, on the other hand, must be bound to “altruistic behavior” by delaying their admissions of service, according to Ms. Kunza’s inconsistent position.

In any event, Ms. Kunza confuses the dates the admission of service forms were *signed* with the dates service of process *actually occurred*. They are not the same. The admission of service forms had two dates on each. First, each had a blank to be filled in by the signer with the date of signing. Kunza Appdx. 16, 17. Second, and more importantly, the main body of each admission form contained a fixed, typed-in date specifying when service of process was deemed to have occurred, *regardless of when the form was signed*. Kunza Appdx. 16, 17. St. Mary’s admission form, signed on October 1, 2004, states in the main body that the summons and complaint “was received and served on Friday, October 1, 2004.” Kunza Appdx. 16. Dr. Wernecke’s admission form, signed on October 4, 2004, states in the main body that the summons and complaint “was received and served on Thursday, September 30, 2004.” Kunza Appdx. 17. Both admission forms were drafted by Ms. Kunza’s then-counsel.

Thus, it was Ms. Kunza, not respondents, who selected the dates service of process occurred. The dates she picked were fixed and independent from the dates respondents actually signed the admission forms. It was Ms. Kunza, not respondents, who picked service of process dates lying within the 10-day Tolling Agreement cancellation time frame. Even if, as now demanded by Ms. Kunza, respondents had waited several days before signing the

admission forms *it would have made no difference*. Service of process would still have occurred on October 1 and September 30, 2004, the service dates picked by Ms. Kunza, not respondents.

(ii) Specific Performance Supposedly a Disfavored Remedy.

This newly-raised argument asks the question, What is the proper remedy for breach of a covenant not to sue? Ms. Kunza contends, for the first time on appeal, that the remedy is money damages, not enforcement of the Covenant. She is incorrect. The court in Bellefonte Re Ins. Co. explained how long ago courts moved away from damages as a remedy for breach of a covenant not to sue and now focus on whether the suit should go forward:

At early common law, a covenant not to sue, unlike a release, was no defense to a suit brought in breach of the covenant. The covenantee's only remedy was a suit for damages in which he could recover any amount that had been recovered against him in the breaching action. The obvious inefficiency of this two step process led the courts of equity to enjoin suits prohibited by a covenant not to sue, and the law courts eventually came to allow the covenant to be pleaded as a bar. *See 4 Corbin on Contracts* § 932 at 744 (1951). Thereafter, suits seeking damages for the breach of a covenant not to sue became rare . . .

Bellefonte Re Ins. Co., 586 F. Supp. at 1287.

The modern view is that a covenant not to sue is treated, for procedural purposes, like a release to avoid the circuitry of the two-step process described in Bellefonte Re Ins. Co. See e.g. Ex Parte HealthSouth Corp., 2007 WL 495247, at *6 (Ala. Feb. 16, 2007); Karcher v. Burbank, 21 N.E.2d 542, 546 (Mass. 1939); Sunset Scavenger Corp. v. Oddou, 53 P.2d 188, 190 (Cal. Dist. Ct. App. 1936). The defense of release, if successful, results in dismissal of

the suit, not money damages. Barilla v. Clapshaw, 237 N.W.2d 830, 832 (Minn. 1976) (summary judgment granted to the defendant based on a release signed by the plaintiff). So too with a successful covenant-not-to-sue argument.

This view is consistent with the purposes of a covenant not to sue: “relieving a party from the hazards, and the courts from the burdens, involved in common-law litigation.” Anderson, 167 N.W.2d at 722. The covenant is a “bar” to the action. Musolf, 122 N.W. at 502. The covenant is “protection against suit.” Monroe v. Bd. of Regents of Univ. Sys. of Ga., 602 S.E.2d 219, 226 (Ga. Ct. App. 2004), cert. denied, (Ga. Oct. 12, 2004). It is the suit itself that is to be avoided – the time, the bother, the stress, the risk, and the costs of the suit. Covenants not to sue serve that purpose, not, as Ms. Kunza would have it, the purpose of providing a basis upon which to sue for damages. See e.g. Butler v. Butler Bros., 242 N.W. 701, 704 (Minn. 1932) (stockholder dispute; claims dismissed due to a covenant not to sue); Polar Int’l Brokerage Corp. v. Richman, 820 N.Y.S.2d 584, 587 (N.Y. App. Div. 2006) (indemnity dispute; action barred by covenant not to sue); Windstar Club, Inc. v. WS Realty, Inc., 886 So.2d 986, 987 (Fla. Dist. Ct. App. 2004) (construction dispute; claim dismissed due to covenant not to sue); Murphy v. McDonald’s Corp., 1986 WL 10064, at *3 (N.D. Ill. Sept. 11, 1986) (employment complaint dismissed because upon discharge the employee had executed a covenant not to sue); Hutton v. Davis, 547 P.2d 486, 487 (Ariz. Ct. App. 1976) (wrongful death action; summary judgment affirmed based on a covenant not to sue); A.P. Freund Sons v. Vaupell, 174 N.E.2d 882 (Ill. App. Ct. 1961) (mechanic’s lien action; dismissal granted; covenant not to sue barred the action).

St. Mary's could not find any precedent where the victim of a breach of a covenant not to sue recovered money damages, and Ms. Kunza has cited none. Nor did she cite any cases applying her newly-raised specific performance argument to a covenant not to sue. This is not surprising because for decades the recognized remedy has been enforcement of the covenant, *i.e.*, providing the aggrieved party that for which it contracted – freedom from the suit itself. That is what the district court properly did in this case.

(iii) Ms. Kunza Supposedly Substantially Performed the Tolling Agreement.

This newly-raised argument, must be rejected for several reasons.

First, as Ms. Kunza concedes, the doctrine of substantial performance “generally applies to construction contracts.” Kunza Brief 17. As the supreme court has said:

The courts are not in accord as to when the rule of substantial performance applies or does not apply. It is quite generally applied in cases involving building and construction contracts. It is given a much more limited application in cases involving other contracts depending upon the fact situation in each case.

Carlson v. Doran, 90 N.W.2d 323, 327 (Minn. 1958). Accord State Bank of Monticello v. Lauterbach, 268 N.W. 918, 923 (Minn. 1936). See also Restatement (Second) of Contracts, § 237, cmt. d (1981).

The vast majority of reported substantial performance cases involve construction contracts. This is so because under construction contracts the work is performed in increments and the obligation to pay for the work can be measured in corresponding increments. The on-going incremental work eventually passes a point at which substantial performance can be declared, thus imposing a duty on the owner to pay the contractor. For

this reason, the doctrine of substantial performance works well when applied to construction contracts. And even in those few cases where the doctrine has been applied to other kinds of contracts, the contracts similarly involved the exchange of money or property, as was true in the two non-construction cases cited by Ms. Kunza. McKenzie v. Dunsmoor, 131 N.W. 632 (Minn. 1911); Old Mill Printers v. Kruse, 392 N.W.2d 621 (Minn. Ct. App. 1986).

Here, on the other hand, the Tolling Agreement involved not an exchange of money or property but instead involved an exchange of promises to forebear from asserting legal rights (the right to assert the defense of statutes of limitations; the right to sue or file a charge). This kind of exchange makes the doctrine of substantial performance an ill fit for the Tolling Agreement. There is no way to parse the promised forbearances. A statute of limitations cannot be 50% or 80% tolled. It is either tolled or not. A lawsuit or charge cannot be partially or substantially commenced. It is either commenced or not. “[A] contract not to sue for a limited time bars an action to enforce the duty during that time,” not for part of the time. Restatement (Second) of Contracts, § 285 (1981).

Second, the doctrine of substantial performance actually supports respondents’ position in this appeal, not Ms. Kunza’s position. As Ms. Kunza noted:

Substantial performance allows a party who performs all the *essential* requirements of a contract to enjoy the benefit of the bargain even though the performance entailed some trivial defects that are easily remedied. [italics added]

Kunza Brief 17, citing Ylijarvi v. Brockphaler, 7 N.W.2d 314, 318 (Minn. 1942).

Ms. Kunza, of course, did not perform “all” of her essential requirements under the Tolling Agreement. In fact, she breached the most essential of her requirements – refraining

from suing during the life of the Tolling Agreement. According to the case cited by Ms. Kunza, “Deviations or lack of performance, which are . . . so material that the owner does not get substantially that for which he bargained” do not qualify for the doctrine of substantial performance. Ylijarvi, 7 N.W.2d at 318.

Third, and even if Ms. Kunza’s breach of the Covenant can be considered “trivial,” the doctrine of substantial performance would serve only *to protect her expectations* under the Tolling Agreement and would not serve *to defeat respondents’ expectations*. In the construction world, where the doctrine of substantial performance primarily applies, the doctrine works this way: A contractor claims to have completed its obligations under the construction contract. The owner disagrees, citing construction defects or incomplete tasks. If the defects and tasks are “trivial,” the doctrine of substantial performance serves to protect the contractor’s expectation of payment from the owner. But the “trivial” defects and tasks do not serve to defeat the owner’s expectations – the owner does not lose the improved real property. See e.g. Voight v. Jones, 404 N.W.2d 830, 834 (Minn. Ct. App. 1987) (remodeling contract; contractor substantially performed; therefore entitled to be paid).

Now substitute Ms. Kunza for the contractor and respondents for the owner. Ms. Kunza claimed to have completed her obligations under the Tolling Agreement. Respondents disagreed, citing the premature suit. If the premature lawsuit was a “trivial” defect, the doctrine of substantial performance would serve to protect Ms. Kunza’s expectation of “payment” from respondents, with the “payment” taking the form of a full 10 days’ tolling of the statutes of limitation during the cancellation period. But the “trivial”

defect would not serve to defeat respondent's expectations – protection from suit during the same 10-day period.

Fourth, the result in this case is no different than the result in a case where a plaintiff commences an action after the statute of limitations has expired. In that situation, the plaintiff cannot be heard to proclaim that he or she substantially performed the statute of limitations, and that, after all, the suit is only a day or two late, so the defendant cannot possibly be prejudiced. Either the suit is timely or not. It makes no sense to talk in terms of substantial performance. See e.g. Luckow, 578 N.W.2d at 21 (four days late); McShane, 377 N.W.2d at 480 (six days late). So too here. Either Ms. Kunza's suit either was premature or it was not. The doctrine of substantial performance just doesn't fit.

(iv) Respondents Supposedly Waived Their Rights Under the Tolling Agreement.

This newly-raised argument derives from both a false factual premise and from a false legal premise. On the facts, Ms. Kunza asserts that respondents failed actively to assert the Covenant argument until they brought their summary judgment motions and therefore waived the argument. Kunza Brief 22. As shown above, however, respondents actively asserted the argument early and often, hardly the acts of parties wishing to waive the argument. Keeping in mind that the suit began in late September/early October of 2004, the argument was asserted in:

- St. Mary's answer to the first amended complaint on November 1, 2004;
- Dr. Wernecke's answer to the first amended complaint the same day;
- St. Mary's interrogatory answers, served January 6, 2005: "Plaintiff, through her attorney, entered into a tolling agreement with Defendants. The tolling

agreement provided that Plaintiff would not commence suit while the tolling agreement was in effect. Plaintiff breached this condition.” St. Mary’s Appdx. 16.

- Dr. Wernecke’s interrogatory answers, served January 7, 2005: “Plaintiff, through her attorney, entered a tolling agreement with St. Mary’s and Dr. Wernecke, through their attorneys, agreeing that she would not commence suit until at least ten days after the agreement was terminated. Plaintiff’s complaint was served upon Dr. Wernecke’s attorney less than ten days after the tolling agreement was terminated.” St. Mary’s Appdx. 20.
- St. Mary’s answer to the second amended complaint on October 28, 2005; and,
- Dr. Wernecke’s answer to the second amended complaint on October 31, 2005.

Contrast respondents’ early and full disclosures with how the defendant played “hide the ball” in Thorson. There, the defendant was asked point blank in letters and in an interrogatory why it had pled the defense of insufficiency of process. The defendant gave evasive and incomplete answers, leaving the plaintiff in the dark as to why service was no good. Only after the statute of limitations had run out did the defendant inform the plaintiff that she had served the wrong person. Here, of course, respondents answered Ms. Kunza’s interrogatories fully and laid out why the Covenant barred this suit.

Ms. Kunza’s newly-raised waiver argument also derives from a false legal premise. Ms. Kunza asserts that respondents had the legal duty to act sooner on their Covenant argument so that she could have been alerted to the statute of limitations problems caused by her own breach of the Covenant. Kunza Brief 22. When respondents did not act sooner, they waived the Covenant argument, Ms. Kunza now argues for the first time on appeal. Id.

The falsity of the legal premise for this argument lies in the alleged legal duty. The presence or absence of a legal duty is a question of law for the court, not a question of fact for the jury. Clark v. Whittemore, 552 N.W.2d 705, 707 (Minn. 1996). Both the United States and Minnesota Supreme Courts have held that the law does not recognize the kind of legal duty for which Ms. Kunza now advocates for the first time on appeal – a legal duty on the part of a defendant to alert a plaintiff that her claims are on the verge of expiring.

In Heidbreder v. Carton, 645 N.W.2d 355 (Minn. 2002), a putative father missed the statutory deadline for paternal registration. He alleged that the mother had concealed her location from him, thus frustrating his registration efforts. For this reason, he urged the court to relax the registration deadline. The court refused:

Even if we were to treat the registration deadline as a statute of limitations that could be tolled by fraudulent concealment, [the putative father] would not be entitled to relief because [the mother] had no duty to inform [the putative father] of her location or otherwise assist him in protecting his rights. *See Lehr [v. Robertson]*, 463 U.S. [248] at 265 n. 23, 103 S.Ct. 2985 [2995] [77 L.Ed.2d 614 (1983)] (noting that “[i]t is a generally accepted feature of our adversary system that a potential defendant who knows that the statute of limitations is about to run has no duty to give the plaintiff advice”).

Id. at 370-71. See also Port Auth. of N.Y. and N.J. v. Allied Corp., 914 F. Supp. 960, 963 (S.D.N.Y. 1995) (“no affirmative duty to disclose” claims before statute of limitations runs out).

This situation is not unlike the situation in which a defendant finds itself insufficiently served with the summons and complaint. Such a defendant has no legal duty immediately to highlight the problem for the plaintiff by bringing a dispositive motion. The defendant may postpone the motion and may instead plead the defense of insufficiency of service of

process in its answer. Minn. R. Civ. P. 12.02. After that, the defendant may proceed to defend the case for a considerable period of time before the defendant must bring the process problem to the attention of the plaintiff. In the meantime, the defendant can remain silent and no waiver of the process defense occurs:

Simple participation in the litigation . . . does not, standing alone, amount to waiver of a jurisdictional defense. . . . [P]articipating in litigation through discovery and responding to an opposing party's motions are not sufficient to waive the defense

Patterson v. Wu Family Corp., 608 N.W.2d 863, 868-69 (Minn. 2000). (Of course, where, as here, the plaintiff asks about the problem in an interrogatory, an honest answer must be given by the defendant, as respondents did here. Thorson.)

The legal duty Ms. Kunza asserts as the basis for her waiver argument – the duty to make the Covenant argument as soon as possible so that she could appreciate the statute of limitations problems – simply does not exist. To the contrary, having pled and disclosed the Covenant argument, respondents had the right to bring their Covenant motions whenever they saw fit, according to the federal and state supreme courts. By doing so, respondents hardly can be accused of voluntarily relinquishing a known right.

Again we see the inconsistency of Ms. Kunza's contention that she had no obligation to engage in "altruistic behavior" by "asserting Respondents' contract rights on their behalf" by timely curing her own breach of the Tolling Agreement. Kunza Brief 20. While disclaiming any obligation to look out for respondents' contract rights, Ms. Kunza inconsistently demands that respondents should have looked out for her contract rights by acting sooner so as to save her claims from the statutes of limitations.

Respondents make no apologies for waiting to bring their Covenant and other motions until discovery had been completed, including the 18 depositions noted by Ms. Kunza. Respondents most definitely hoped that the statute of limitations would run out on Ms. Kunza's claims in the meantime. The Covenant provided a clean method of disposing of most of this non-meritorious suit without the time and expense of a trial. If the district court had disagreed, respondents had concurrently filed several additional dispositive motions for the district court's consideration. In the meantime, respondents had no legal duty to give Ms. Kunza advice or take other action (such as filing an earlier motion) so that Ms. Kunza could avoid problems with the statutes of limitation. The alleged failure of respondents to give such advice or take other action was not a waiver of their Covenant argument. (Of course, respondents *did* advise Ms. Kunza of the argument, in detail, early in the case, as shown above.)

It is ironic and more than a little unfair for Ms. Kunza to chastise respondents for "allow[ing] the litigation to progress for almost two years." Kunza Brief 22. Ms. Kunza allowed Dr. Wernecke allegedly to harass her for more than two years before she reported it to management. Had she spoken up earlier, this protracted and expensive case would have never existed. Also, the district court file will show that Ms. Kunza was delinquent for a year in answering discovery, resulting in a successful motion to compel by St. Mary's and an award of approximately \$2,500 in favor of St. Mary's for its motion fees and expenses. Further delay occurred in the scheduling of Ms. Kunza's deposition. After a date certain had

been agreed to well in advance, Ms. Kunza called off the deposition with only a day or two of notice due to illness. This pushed back the deposition many weeks.

Because a defendant has no legal duty to disclose statute of limitations problems to a plaintiff, Ms. Kunza was unable to cite any case law supporting her assertion that respondents waived the Covenant argument by not bringing an earlier motion. Ms. Kunza's analogy to arbitration proceedings does not hold up here. Once a party engages in litigation, it is impractical to start over with an arbitration case; and *vice versa*. The two forms of dispute resolution are mutually exclusive. Here, on the other hand, there is nothing inconsistent about conducting discovery before bringing multiple dispositive motions as a group. See e.g. Patterson. Remember, respondents' Covenant motion was only one of several motions made at the same time. This timing was consistent with general litigation practice, and, more importantly, more respectful of the district court. The district court should not be peppered with multiple, separately timed dispositive motions. By following general litigation practice, respondents did not waive the Covenant argument.

(v) Respondents Supposedly Abandoned Their Rights under the Tolling Agreement.

This newly-raised argument parallels Ms. Kunza's waiver argument. Both are based on the timing of when respondents "actively assert[ed] their rights under the Tolling Agreement." Kunza Brief 24. The analysis set forth above regarding the waiver argument applies to the abandonment argument as well.

Additionally, a party alleging abandonment of a contract must present "...clear and convincing evidence of an intention by the other party to abandon its rights." Republic Nat'l

Life Ins. Co. v. Marquette Bank & Trust Co. of Rochester, 295 N.W.2d 89, 93 (Minn. 1980).

Because the abandonment argument was never presented to the district court and instead is raised for the first time on appeal, there is no way for this court to determine whether the district court did or did not conclude that Ms. Kunza met the “clear and convincing” burden of proof. The short argument in Ms. Kunza’s brief hardly satisfies her burden.

More importantly, the district court record on this argument, such as it is, does not evince any intent by respondents to abandon (or waive) their Covenant argument. To the contrary, the district court record – the pleading of the argument four times, the two sets of interrogatory answers, and the dispositive motions themselves – evince respondents’ clear intent to preserve and assert the argument.

Conclusion

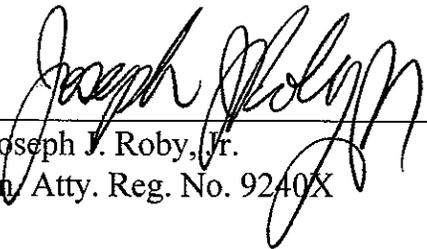
Ms. Kunza breached a valid and enforceable covenant not to sue and, consequently, this lawsuit was barred. There are no genuine issue of material fact to the contrary. The district court correctly applied the law to the undisputed facts. This court must affirm the district court’s summary judgment.

In the unfortunate event that this court reverses the district court’s summary judgment, then this court must remand the case to the district court for a decision on St. Mary’s Reserved, Alternative Theories. Mattson.

Respectfully submitted,

Dated: May 11, 2007

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