

STATE OF MINNESOTA
IN COURT OF APPEALS

Susan L. Nordin, the Personal)
Representative of the Estate of)
Lester L. Nordin)
)
Respondent,)
)
vs.)
)
Roland Retzlaff)
)
Appellant.)

APPELLANT'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).

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF THE LEGAL ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

ARGUMENT 5

I. DID THE TRIAL COURT ERR IN FINDING THAT THE STATUTE OF LIMITATIONS UNDER MINN. STAT. §336.3-118 SUBD. (B) HAD NOT RUN AND THAT THEREFORE RESPONDENT’S DEMAND FOR PAYMENT ON THE DECEMBER 31, 1997 PROMISSORY NOTE WAS NOT TIME BARRED?

A. Yes, the Trial Court was in error. A payment by a third party unbeknownst to and never subsequently ratified by the debtor does not constitute a payment under the common law sufficient to reinitiate the ten year limitation period for making a demand for payment on a demand note 6

B. The adoption of the Uniform Commercial Code in Minnesota did not displace the common law principles regarding payments by third-parties and the effect of those payments on the running of the statute of limitations 12

C. The Uniform Commercial Code provisions regarding what constitutes a payment, when read according to their plain meaning, do not supplant the common law principles regarding payments by third-parties and the effect of those payments on the running of the statute of limitations; rather, those provisions adopt the common law 14

II. DID THE TRIAL COURT ERR IN DENYING THE RESPONDENT REASONABLE ATTORNEYS’ FEES AND COSTS INCURRED IN THIS MATTER?

A. No, the trial court did not err. Collection on the note was time barred. Further, Respondent failed to present evidence of costs and fees incurred..... 18

CONCLUSION 19

APPENDIX..... 20

TABLE OF AUTHORITIES

<u>STATUTES:</u>	<u>PAGES</u>
Minn. Stat. § 336.1-103	1, 12-14
Minn. Stat. § 336.3-108(a)	7
Minn. Stat. § 336.3-118(b)	1, 2, 7-8, 9, 10, 11, 13-14
Minn. Stat. § 336.3-602(a)	1, 14-18
Minn. Stat. § 645.08	16
Minn. Stat. § 645.17	10
 <u>CASES:</u>	
<i>Bernloehr v. Fredrickson</i> , 213 Minn. 505, 7 N.W.2d 328 (Minn. 1942)	1, 7
<i>Elkins Manor Associates v. Eleanor Concrete Works, Inc.</i> , 396 S.E.2d 463 (W.Va. 1990)	13
<i>Entzion v. Illinois Farmers Ins. Co.</i> , 675 N.W.2d 925, 928 (Minn.App. 2004)	10
<i>Estate of Hart v. Hart</i> , Not Reported in N.E.2d, 2007 WL 4444236 (Ohio App. 10 Dist.), 4 UCC Rep.Serv.2d 885 (Ohio App. 2007)	1, 8-9, 15, 18
<i>Norwest Bank Minnesota N.A. v. Verex Assurance, Inc.</i> , Not reported in N.W.2d, 1996 WL 363371 (Minn. App. 1996)	16-17
<i>Pfenninger v. Kokesch</i> , 68 Minn. 81, 70 N.W. 867 (Minn. 1897)	1, 7
<i>Radloff v. First American Nat'l Bank</i> , 470 N.W.2d 154, 156 (Minn.App.1991), review denied (Minn. July 24, 1991).....	1, 6, 18-19

STAR Centers, Inc. v. Faegre & Benson, L.L.P.,
644 N.W.2d 72 (Minn. 2002) 6

White v. Transit Cas. Co.,
402 S.W.2d 212 (Tex.Civ.App 1966) 17-18

Woodcock v. Putnam,
101 Minn. 1, 111 N.W. 639 (Minn. 1907) 1, 7

SECONDARY AUTHORITIES:

51 Am. Jur. 2d Limitation of Actions § 360 13

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69 (1st ed. 1965) 17

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William and Mary Morris, *Harper Dictionary of Contemporary Usage*,
70 (2nd ed. 1985) 17

STATEMENT OF THE LEGAL ISSUES

- I. DID THE TRIAL COURT ERR IN FINDING THAT THE STATUTE OF LIMITATIONS UNDER MINN. STAT. §336.3-118 SUBD. (B) HAD NOT RUN AND THAT THEREFORE RESPONDENT'S DEMAND FOR PAYMENT ON THE DECEMBER 31, 1997 PROMISSORY NOTE WAS NOT TIME BARRED?

Trial Court Held: That a payment by Edna Nordin to her husband, Lester Nordin, was sufficient to restart the statute of limitations on a demand note given to Lester Nordin by Appellant on December 31, 1997.

Most apposite cases:

Pfenninger v. Kokesch, 68 Minn. 81, 70 N.W. 867 (Minn. 1897);
Woodcock v. Putnam, 101 Minn. 1, 111 N.W. 639 (Minn. 1907);
Bernloehr v. Fredrickson, 213 Minn. 505, 7 N.W.2d 328 (Minn. 1942);
Estate of Hart v. Hart, Not Reported in N.E.2d, 2007 WL 4444236
(Ohio App. 10 Dist.), 64 UCC Rep.Serv.2d 885 (Ohio App. 2007)

Most apposite statutes:

Minn. Stat. § 336.1-103(b);
Minn. Stat. § 336.3-118(b);
Minn. Stat. § 336.3-602(a)

- II. DID THE TRIAL COURT ERR IN DENYING THE RESPONDENT REASONABLE ATTORNEYS' FEES AND COSTS INCURRED IN THIS MATTER?

Trial Court Held: That because Respondent had not presented any evidence of costs and fees incurred, the request for costs and fees should be denied.

Most apposite cases:

Radloff v. First American Nat'l Bank, 470 N.W.2d 154, 156 (Minn.App. 1991), review denied (Minn. July 24, 1991)

STATEMENT OF THE CASE

On August 19, 2008, Lester Nordin passed away. As part of the probate proceedings for his estate, demand was made on Roland Retzlaff to pay \$28,775 that was claimed to be due under a December 31, 1997 demand note. The demand was made on December 23, 2008, more than ten years after the note had been executed. Mr. Retzlaff denied liability because the claim was time-barred by Minn. Stat. § 336.3-118, the applicable statute of limitations in Minnesota for demand notes.

Due to circumstances surrounding and subsequent to his entering into the note, Mr. Retzlaff did not believe the debt was one that had ever been intended to be enforced. No demand for payment on the Promissory Note had ever been made by Mr. Nordin. The only demand came more than ten years after the note had been signed and then the demand was by Mr. Retzlaff's ex-wife, acting as personal representative of her father, Lester Nordin's, estate.

The estate argued that because the decedent's wife had made a payment on the note in 2003, the ten year limitation period had recommenced with her payment to her husband. It was uncontested that Mr. Retzlaff was unaware of the payment by Mrs. Nordin at the time it was made and had never taken any action to ratify, adopt, or otherwise endorse the payment or acknowledge the amount due on the note.

On May 22, 2009, Respondent commenced suit for payment on the note in Grant County District Court, the Honorable Judge Peter A. Hoff presiding. Neither party disputing any of the material facts, the parties submitted the matter to the court on cross-motions for summary judgment. The District Court heard the motion on August 10, 2009

and issued its order granting summary judgment in favor of the Estate of Lester L. Nordin on August 12, 2009.

In its order, the District Court ordered judgment be entered in favor of the Estate in the amount of \$28,775, the amount claimed due and payable on the note, but denied the Estate its request for costs and attorneys fees. The District Court found that because Lester Nordin's wife had made a payment on the note, the claim was not time barred. The court additionally found that the provisions of the UCC overrode long-standing common law regarding payment by third-party payees and their effect on limitation periods.

From the August 12, 2009 order granting summary judgment, Roland Retzlaff appeals.

STATEMENT OF THE FACTS

Appellant Roland Retzlaff and Susan L. Nordin, the Personal Representative of the Estate of Lester L. Nordin, were married on September 24, 1975. Exhibit D, paragraph 3 to *Affidavit of Susan L. Nordin* (at A24). The marriage ended in divorce on February 23, 1998. Exhibit D, page 13 to *Affidavit of Susan L. Nordin* (at A36).

During the course of the marriage, the couple received money from Lester and Eleanor Nordin, Susan Nordin's parents. Paragraph 2 of *Affidavit of Roland Retzlaff* (at A49). It was unclear when this money was received whether there was any expectation of repayment. Paragraph 3 of *Affidavit of Roland Retzlaff* (at A49). No request for repayment was ever made. Paragraph 4 of *Affidavit of Roland Retzlaff* (at A49).

During Roland Retzlaff's divorce from Lester Nordin's daughter, Mr. Nordin requested and Roland Retzlaff did sign a Promissory Note payable to the order of Lester or Eleanor Nordin. This Promissory Note was signed on December 31, 1997 and had a principal balance of \$38,775. Exhibit A to *Affidavit of Susan L. Nordin* (at A20). No additional consideration was provided to Roland Retzlaff in exchange for signing the note, but Mr. Retzlaff does not deny that he did sign the note. Paragraph 6 of *Affidavit of Roland Retzlaff* (at A49). At no time afterwards did Lester or Eleanor Nordin ever make any demand on Roland Retzlaff to pay on the note. Paragraph 7 of *Affidavit of Roland Retzlaff* (at A49). Indeed, the first request for payment on the note came on December 23, 2008, after Lester Nordin's death and then only at the demand of Roland Retzlaff's ex-wife, Susan, the personal representative of the estate. Exhibit C to *Affidavit of Susan L. Nordin* (at A23).

In 1999, following the divorce of his daughter from Roland Retzlaff and following the death of his wife, Eleanor Nordin, Lester Nordin married Edna (Retzlaff) Nordin, Roland Retzlaff's mother. Paragraph 3 of *Affidavit of Susan L. Nordin* (at A18). For reasons unbeknownst to the parties, on or about June 10, 2003, Edna Nordin provided a check to Lester Nordin in the amount of \$10,000. Exhibit B to *Affidavit of Susan L. Nordin* (at A22). Apparently concurrently, the following was written on the back of the December 31, 1997 Promissory Note: "Received June 10, 2002 payment on note 10,000. No interest to be paid – just balance of note. LLM." Exhibit A to *Affidavit of Susan L. Nordin* (at A21). The parties here agree that the June 10, 2003 payment and the notation on the back of the December 31, 1997 Promissory Note, though dated 2002, likely

occurred concurrently and that the notation was likely made by Lester Nordin. Page 3 of *Response to Plaintiff's Memorandum of Law* (at A42); Page 3 *Memorandum of Law in Support of Summary Judgment* (at A13).

Despite whatever was intended by Mr. and Mrs. Nordin on June 10, 2003, undisputed is the fact that Roland Retzlaff knew nothing about it. Paragraphs 8-11 of *Affidavit of Roland Retzlaff* (at A50). It was not until at least two months—and possibly as many as two years—after the fact that Roland Retzlaff learned that Mrs. Nordin had given her husband some money. Paragraph 8 of *Affidavit of Roland Retzlaff* (at A50). Roland Retzlaff knew nothing of the amount paid or of the supposedly concurrent notation until after the December 23, 2008 demand was made. Paragraphs 8-11 of *Affidavit of Roland Retzlaff* (at A50). Roland Retzlaff did not ask Mrs. Nordin to make the payment to her husband and did not ever communicate any approval of said payment. Paragraph 11 of *Affidavit of Roland Retzlaff* (at A50). Respondent has neither alleged nor proven any fact which would constitute an endorsement, ratification, or adoption of Mrs. Nordin's payment to her own husband on a debt allegedly owed by Roland Retzlaff.

ARGUMENT

The issue before the court is rather simple and straightforward: Does Minnesota law allow a creditor to restart the limitation period for a demand note through a payment by a third party of a portion of the amount due when that third party's payment is unbeknownst to and never subsequently ratified by the debtor? Appellant's position is that allowing creditors to toll and restart a limitation period through a unilateral payment by a third party of a portion of the debt is contrary to the established law in Minnesota

and would eviscerate the protections the legislature intended to give to debtors by the adoption of a limitation period. Further, a creditor's obligation to timely pursue the collection of a debt owed would be vitiated and Minnesota courts would be faced with the prospect of adjudicating the claims of creditors who, through artifice and for a pittance, could further delay and make more untimely the collection of stale accounts due.

Standard of review

On appeal from summary judgment, the Court of Appeals reviews de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *E.g. STAR Centers, Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72 (Minn. 2002). The standard of review for costs and attorney fees is whether the district court abused its discretion. *E.g. Radloff v. First American Nat'l Bank*, 470 N.W.2d 154, 156 (Minn.App. 1991), *review denied* (Minn. July 24, 1991).

I. DID THE TRIAL COURT ERR IN FINDING THAT THE STATUTE OF LIMITATIONS UNDER MINN. STAT. §336.3-118 SUBD. (B) HAD NOT RUN AND THAT THEREFORE RESPONDENT'S DEMAND FOR PAYMENT ON THE DECEMBER 31, 1997 PROMISSORY NOTE WAS NOT TIME BARRED?

A. Yes, the Trial Court was in error. A payment by a third party unbeknownst to and never subsequently ratified by the debtor does not constitute a payment under the common law sufficient to reinitiate the ten year limitation period for making a demand for payment on a demand note.

Prior to the adoption of the Uniform Commercial Code, the common law required that, for a payment to be sufficient to affect the running of the statute of limitations, the

payment had to have been made by the debtor himself or by another acting under the authority of the debtor. *E.g. Pfenninger v. Kokesch*, 68 Minn. 81, 70 N.W. 867 (Minn. 1897); *Woodcock v. Putnam*, 101 Minn. 1, 111 N.W. 639 (Minn. 1907). This requirement could only be overcome if the person seeking to enforce the debt could show that the debtor subsequently ratified a payment that was made in the debtor's name but without his authority. *Id.* The rule was adopted by the common law on the basis that an acknowledgment of a debt otherwise time barred must be shown to be voluntary on the part of the debtor in order to restart the limitation period.

Part payment before the statute of limitations has run tolls the running of the statute, upon the theory that it amounts to a voluntary acknowledgment of the existence of the debt from which a promise to pay the balance is implied. A part payment, to be the basis for such a promise, must be made by the debtor himself, or by his authority, or, if not made by him personally or by his authority, it must be ratified by him.

Bernloehr v. Fredrickson, 213 Minn. 505, 7 N.W.2d 328 (Minn. 1942). Respondent's position is that the limitation period can be tolled by the unilateral payment of a portion of the debt by a third party. This position runs contrary to the common law principal and eliminates the requirement that a voluntary acknowledgment of the debt must be made to render tolerable the enforcement of an otherwise time-barred debt.

In this case, the statute of limitations was ten years. The note at issue is a demand note since it does not state a time for payment. *See* Minn. Stat. § 336.3-108(a); *see also* August 12, 2009 Order at paragraph 3 (at A56). The statute of limitations for a demand note is provided by Minn. Stat. § 336.3-118(b), which states in relevant part:

[I]f demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced

within six years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of ten years.

Implicit within the Minn. Stat. § 336.3-118(b) provision is the common law rule that the payment must be made by the maker himself, at his direction, or that the payment later be ratified by the maker. See *Estate of Hart v. Hart*, Not Reported in N.E.2d, 2007 WL 4444236 (Ohio App. 10 Dist.), 64 UCC Rep.Serv.2d 885 (Ohio App. 2007) (at A73).

Estate of Hart provides a situation most similar to that presented here. In that case, Charles and Mary Hart signed a promissory note agreeing to repay Charles' mother, Lorna Hart \$278,818.36 plus interest. The note was payable on demand and was made on October 5, 1990. Neither Charles nor Mary ever made any payments on the note and Lorna never made any demand for repayment. Over the years, Lorna did, however, file personal gift tax returns showing she had discharged approximately \$110,000 of the interest due on the note. Following her death, Lorna's executor, in September of 2006, presented Charles and Mary with a demand for repayment. Following suit, the trial court granted summary judgment in favor of Charles and Mary on the basis of the expiration of the statute of limitations. On appeal, the Estate of Lorna Hart argued that the forgiveness of interest constituted payment on the debt and therefore the limitation period had not run. In affirming the trial court's grant of summary judgment, the Ohio Court of Appeals stated:

The principle on which part payment takes a case out of the statute is that the party paying intended by it to acknowledge and admit the greater debt to be due. *A unilateral act by a party other than the debtor, or one authorized to act on his behalf, does not constitute a payment sufficient to take a debt out of the statute*

of limitation. In this case, the decedent's act of forgiving part of a debt did not involve delivery to herself and receipt from herself, and we fail to see how appellees can be said to have acknowledged the debt through the decedent's unilateral act.

64 UCC Rep.Serv.2d 885 (emphasis added, citations omitted) (at A76). Thus, in *Estate of Hart*, the common law principles informed the UCC provisions regarding the statute of limitation on demand notes.

Here, the note was entered into on December 31, 1997. It is undisputed that no demand for payment on the note was made until December 23, 2008, more than ten years after the note was entered into by Roland Retzlaff. Therefore, for the limitation period under Minn. Stat. §336.3-118(b) to have *not* run, there had to have been a payment made on the note within ten years of December 31, 1997. The only transaction which could be argued to have been a payment was Mrs. Nordin's June 10, 2003, payment to her husband. However, under longstanding common law principles, this payment was not sufficient to toll or restart the limitation period as to a debtor who never asked for the payment to be made, and never subsequently ratified the payment.

To hold to the contrary would essentially render Minn. Stat. § 336.3-118(b) meaningless. A creditor need only find a third person willing to make a nominal payment on a debt and, without ever notifying the debtor of the payment, extend the limitation period indefinitely. In fact, taken to its extreme, the forgiveness by the creditor himself of a small portion of the debt or interest owed could well be sufficient to restart the limitation period—as was the position argued for by the unsuccessful appellant in *Estate of Hart*. This could not have been the legislative intent in adopting the statute of

limitation since adopting such a statute would lead to the absurd result of creating an essentially meaningless limitation period. See Minn. Stat. § 645.17 (1) (stating “the legislature does not intend a result that is absurd, impossible of execution, or unreasonable”).

Statutes of limitation can appear, at first blush, to be inequitable since they bar what would otherwise be a valid claim. However, limitations periods are, in fact, creatures of legislatively promulgated equity and are designed to provide fairness to both debtor and creditor:

The purpose of a statute of limitations is to prescribe a period within which a right may be enforced and after which a remedy is unavailable for reasons of private justice and public policy. A statute of limitations discourages fraud and endless litigation. It prevents a party from delaying an action until papers are lost, facts are forgotten, or witnesses are dead. A statute of limitations is based on the proposition that it is inequitable for a plaintiff to assert a claim after a reasonable lapse of time during which the defendant believes no claim exists.

Entzion v. Illinois Farmers Ins. Co., 675 N.W.2d 925, 928 (Minn.App. 2004). In this case, Appellant did not believe the claim existed. He had never received any demand for payment from Lester Nordin. Further, facts are now lost due to the delay in making any demand. Mr. Nordin’s intentions are no longer ascertainable since he has passed away. Mrs. Nordin’s intentions are also lost due to her advanced Alzheimer’s. Paragraph 10 of *Affidavit of Roland Retzlaff* (at A50).

The estate is attempting to enforce a note that was nearly eleven years old at the time of the demand and which had never been so much as mentioned to Mr. Retzlaff by Mr. Nordin. The request to sign the note came after money had been lent to the then divorcing couple over a period of two decades with seemingly no expectation by Mr.

Nordin of repayment. This case is precisely the type of stale claim which, as a matter of private justice and public policy, the legislature intended to bar when enacting Minn. Stat. § 336.3-118(b).

The drafters' comments indicate Minn. Stat. § 336.3-118(b) was written as it is in order to deal with situations such as those presented in this case:

Some demand notes are not enforced because the payee has forgiven the debt. This is particularly true in family and other noncommercial transactions. A demand note found after the death of the payee may be presented for payment many years after it was issued. The maker may be a relative and it may be difficult to determine whether the note represents a real or a forgiven debt. Subsection (b) is designed to bar notes that no longer represent a claim to payment and to require reasonably prompt action to enforce notes on which there is default. If a demand for payment is made to the maker, a six-year limitations period starts to run when demand is made. The second sentence of subsection (b) bars an action to enforce a demand note if no demand has been made on the note and no payment of interest or principal has been made for a continuous period of 10 years. This covers the case of a note that does not bear interest or a case in which interest due on the note has not been paid. This kind of case is likely to be a family transaction in which a failure to demand payment may indicate that the holder did not intend to enforce the obligation but neglected to destroy the note. A limitations period that bars stale claims in this kind of case is appropriate if the period is relatively long.

Minn. Stat. § 336.3-118, comment 2. The drafters of the demand note limitation period clearly intended, as a matter of private justice and public policy, to bar claims under circumstances where the lengthy passage of time indicated that one family member did not intend to enforce a note given by another family member. In this case, Mr. Nordin never demanded repayment of the money he had lent to his daughter and his son-in-law. Only in the midst of Roland and Susan Retzlaff's divorce did he ask for a note regarding the debt. Afterwards, Lester Nordin never mentioned the debt to Roland Retzlaff again.

Because no demand for payment of the note was made within ten years, the estate's claim was time barred by Minn. Stat. § 336.3-118(b). The payment by Mrs. Nordin to her husband did not restart the ten year limitation period as the payment was not by Roland Retzlaff, not made by his authority, and was not subsequently ratified by Mr. Retzlaff.

B. The adoption of the Uniform Commercial Code in Minnesota did not displace the common law principles regarding payments by third-parties and the effect of those payments on the running of the statute of limitations.

Because the common law principle regarding payment of debts by third parties and its effect on the limitation period is so clear, the Respondent argued to the Trial Court that, since the common law cases were pre-UCC cases, they were somehow inapplicable after the adoption of the UCC.

This argument, however, ignores the explicit statement in the UCC that the common law is not supplanted by the UCC's provisions:

Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

Minn. Stat. § 336.1-103(b). White and Summers further explain that the intent of the UCC drafters was never to displace the common law, but rather the UCC was to be largely informed by the common law.

As Professor Grant Gilmore once put it, the Code "derives from the common law [and] assumes the continuing existence of a large body of pre-Code and non-Code law on which it rests for support, [without which the Code] could not survive." Much of the pre-Code and non-Code law to which Professor Gilmore refers is

case law from such fields as contracts, agency, and property, which comes into play via 1-103.

Elkins Manor Associates v. Eleanor Concrete Works, Inc., 396 S.E.2d 463 (W.Va. 1990)

(quoting J. White & R. Summers, *Uniform Commercial Code* 6-7 (3d ed. 1988)).

Essentially, the common law rule for part-payment of a debt by a third-party is a question of agency law. It is the debtor himself who must make the payment either personally or acting through an agent whom the debtor either directs to make a payment or whose payment the debtor later ratifies.

Section 336.1-103 also states that the UCC should be interpreted to make uniform the law amongst jurisdictions. Minn. Stat. § 336.1-103(a)(3). The common law principal *is* the uniform law among jurisdictions:

Because a part payment, to remove the bar or renew the running of the statute of limitations, must have the effect of a new promise to pay the balance, such a payment, whether made before or after a debt is barred by the statute of limitations, stops the running of the statute or revives the debt only if it is made by the debtor, or someone having the authority to make a new promise on behalf of the debtor.

51 Am. Jur. 2d Limitation of Actions § 360 (citing cases from numerous jurisdictions).

Nothing in the Code indicates that the common law principle regarding third-party payees and their effect on the limitation period is meant to be displaced.

The section promulgating the limitation period under consideration does itself further emphasize that the common law is not displaced. The drafter's comments to Minn. Stat. § 336.3-118 state that a limitation period is all that is being promulgated by the provision and that common law principles relating to the treatment of limitation periods are to remain:

The only purpose of Section 3-118 is to define the time within which an action to enforce an obligation, duty, or right arising under Article 3 must be commenced. Section 3-118 does not attempt to state all rules with respect to a statute of limitations. *For example, the circumstances under which the running of a limitations period may be tolled is left to other law pursuant to Section 1-103.*

Minn. Stat. § 336.3-118, comment 1 (emphasis added). Thus, contrary to the trial court's findings that the UCC provisions trumped the common law, the Code's drafters make clear the limited scope of the limitation provision and state unequivocally that the provision was *not* intended to "trump" long-standing common law principles regarding whether a limitation period may be tolled or restarted by a third party's payment of a portion of an outstanding note obligation.

In this case, the payment by Mrs. Nordin to her husband was not a payment under the common law that was sufficient to restart the limitation period of Minn. Stat. § 336.3-118 and the Code itself states that such common law principles are not displaced by the adoption of the Code.

C. The Uniform Commercial Code provisions regarding what constitutes a payment, when read according to their plain meaning, do not supplant the common law principles regarding payments by third-parties and the effect of those payments on the running of the statute of limitations; rather, those provisions adopt the common law.

Finally, the trial court and Respondent attempted to rely on a provision of the UCC regarding the definition of payment in an attempt to circumvent the longstanding common law principle regarding payments of debt by third parties. The provision relied upon states: "[A]n instrument is paid to the extent payment is made by or on behalf of a

party obliged to pay the instrument, and to a person entitled to enforce the instrument.” Minn. Stat. § 336.3-602(a). Relying on Minn. Stat. § 336.3-602(a) the Respondent and the trial court reasoned that since a payment was made by Lester Nordin’s wife, the limitation period for enforcing the note was restarted and ran for another ten years from that date. However, reading Minn. Stat. § 336.3-602(a) in contravention of the common law, as Respondent and the trial court did, is in error.

In *Estate of Hart*, discussed above, the Ohio Court of Appeals interpreted that state’s version of § 336.3-602 (a) and said:

Each gift may have achieved the same effect as a payment would have—reduction in the amount ultimately owing; but this does not render each gift a payment. As noted earlier, the definition of a *'payment' encompasses more than just its effect. It also encompasses* delivery by one party and receipt by another and *an acknowledgement by the debtor (or his authorized representative) that the greater debt is owing.* Thus, we hold that a creditor's gift to the debtor in the form of forgiveness of part of a debt not yet due is not a 'payment' with respect to the note evidencing that debt, for purposes of [the statute of limitations].

To hold otherwise would frustrate the purpose of the statute of limitation. Creditors could circumvent the operation of the limitation period by forgiving a small portion of the amount not yet due under a demand note every ten years, thereby unilaterally reviving the debt at precisely the time when the statute would otherwise extinguish it. Moreover, debtors could take undue advantage of generous creditors who agree to forgive a portion of a debt, by arguing that the forgiveness is a payment that relieves the debtor of liability for a breach. The purpose of statutes of repose is to 'put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights. We cannot countenance an interpretation of 'payment' that would frustrate this purpose.

64 UCC Rep.Serv.2d 885 (emphasis added, citations omitted) (at A76). In Minnesota too, the common law states that “payment” must mean something more than the simple receipt by the creditor of an amount of money. To constitute a “payment” for purposes of tolling the statute of limitations, a transfer to the creditor must include an

acknowledgment by the debtor that the greater debt is owing. Here, there has never been an acknowledgment by Roland Retzlaff that the greater debt is owing. Therefore, there was never a “payment” pursuant to Minn. Stat. § 336.3-602(a).

Further, Minn. Stat. § 336.3-602(a) must be read to incorporate the common law rule if it is to be read in a manner that is grammatically correct. Under Minn. Stat. § 336.3-602(a), an instrument is “paid” under two circumstances: 1) when the payment is made *by* the party obligated to pay, or 2) when the payment is made *on behalf of* the party obligated to pay. It is unquestioned that the payment in this case was not made *by* Roland Retzlaff. The question is whether the payment by Mrs. Nordin to Mr. Nordin was *on behalf of* Roland Retzlaff.

Answering the question requires the meaning of “on behalf of” to be discerned. Under Minnesota’s canons of construction, “[w]ords and phrases are construed according to rules of grammar and according to their common and approved usage.” Minn. Stat. § 645.08. Appellant argues that the Respondent and the trial court incorrectly read the “*on* behalf of” language of Minn. Stat. § 336.3-602(a) as “*in* behalf of.”

In an unpublished opinion, the Minnesota Court of Appeals has addressed this distinction. See Norwest Bank Minnesota N.A. v. Verex Assurance, Inc., Not reported in N.W.2d, 1996 WL 363371 (Minn. App. 1996) (at A68). In Norwest, the Court of appeals said of the two terms: “*The terms are not synonymous. As noted above, ‘in behalf of’ means ‘in the interest or in defense of.’ ‘On behalf of’ means ‘as the agent of, as representative of.’*” Norwest Bank Minnesota N.A. v. Verex Assurance, Inc., Not reported in N.W.2d, 1996 WL 363371 (Minn. App. 1996) (emphasis added; *citing* Bryan

A. Garner, *A Dictionary of Modern Legal Usage* 102 (2d ed. 1995) (at A70). Mr. Garner—currently the editor of Black’s Law Dictionary—is not alone on his views on the distinction between “in behalf of” and “on behalf of” that were adopted by the Minnesota Court of Appeals. For example:

In behalf of means “for the benefit of”; *on behalf of* means “acting as the agent of.”

This fund-raiser is *in behalf of* [for the benefit of] the victims of last week’s flood.

On behalf of [acting as the agent of] the company, I want to thank you all for your help.

William A. Sabin, *The Gregg Reference Manual*, 329 (10th ed. 2005) (emphasis in original).

A person acting *on behalf of* another is acting in his place or as his representative or agent. “*On behalf of* the company, I wish to present you this gold watch in appreciation. One acting *in behalf of* another is acting for his benefit or his interest: “*In behalf of* my client I would ask that you consider his limited income.”

William and Mary Morris, *Harper Dictionary of Contemporary Usage*, 70 (2nd ed. 1985) (emphasis in original).

The distinction between *in behalf of* and *on behalf of* is one that a good writer recognizes instinctively, though he may never have seen it set forth formally. *In behalf of* means for the benefit of, or as a champion or friend: “The money was raised in behalf of the strikers in Georgia.” *On behalf of* means as the agent of or in place of: “The lawyer entered a not guilty plea on behalf of the defendant.”

Theodore M. Bernstein, *The Careful Writer: A Modern Guide to English Usage*, 69 (1st ed. 1965). The distinction is also made in case law from other jurisdictions. For example, “We think the term ‘on behalf of’ means someone has given notice who was authorized by the assured to act for him.” *White v. Transit Cas. Co.*, 402 S.W.2d 212

(Tex.Civ.App. 1966). The drafters of Minn. Stat. § 336.3-602(a) chose “on behalf of” not “in behalf of” and that distinction essentially adopts the common law rule that a payment, to constitute a “payment,” must be made at the direction of the debtor or ratified by him.

In this case, the facts arguably do not show Mrs. Nordin’s payment was even made *in behalf of* Mr. Retzlaff—we simply do not know the circumstances surrounding the payment from wife to husband. However, the facts certainly do not show that the payment was ever made *on behalf of* Mr. Retzlaff. There are no facts which show Mr. Retzlaff directed Lester Nordin’s wife to make the payment and there are no facts which show Mr. Retzlaff later ratified the payment by Mrs. Nordin. Thus, under Minn. Stat. § 336.3-602 (a), the payment by Mrs. Nordin to her husband did not constitute a payment under the UCC. See *Estate of Hart v. Hart*, Not Reported in N.E.2d, 2007 WL 4444236 (Ohio App. 10 Dist.), 64 UCC Rep.Serv.2d 885 (Ohio App. 2007) (at A73). The trial court’s finding that the payment by Mrs. Nordin was sufficient to restart the statute of limitations was in error.

III. DID THE TRIAL COURT ERR IN DENYING THE RESPONDENT REASONABLE ATTORNEYS’ FEES AND COSTS INCURRED IN THIS MATTER?

A. No, the trial court did not err. Collection on the note was time barred. Further, Respondent failed to present evidence of costs and fees incurred.

As stated above, the standard of review for costs and attorney fees is whether the district court abused its discretion. *E.g. Radloff v. First American Nat'l Bank*, 470 N.W.2d

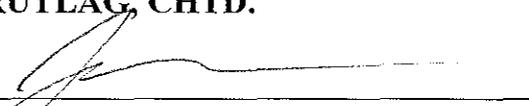
154, 156 (Minn.App. 1991), *review denied* (Minn. July 24, 1991). Here, the trial court found that Respondent had failed to present evidence of its costs and fees and therefore denied Respondent's request. This denial did not constitute an abuse of discretion where Respondent failed to provide the relevant evidence. Further, as argued above, the costs and fees incurred were in an attempt to enforce a demand note for which collection was time barred.

CONCLUSION

Because Roland Retzlaff never made any payment on the note, never acknowledged the amount due or ratified the payment of Edna Nordin, and did not receive a demand for payment until more than ten years after the making of the note, the trial court was in error in its finding that the Estate's efforts to collect on the note are not barred by the statute of limitations. The Trial Court's decision granting summary judgment in favor of Respondent should be reversed. The Trial Court's decision denying Respondent attorneys fees and costs should be affirmed.

Respectfully submitted this 16th day of December, 2009.

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