

NO. A10-658

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State of Minnesota  
**In Court of Appeals**

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Arlyn A. Hamann, M.D.,

*Appellant,*

v.

Park Nicollet Clinic,

*Respondent.*

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**APPELLANT'S REPLY BRIEF**

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## INTRODUCTION

The affirmative arguments supporting the request by Appellant Arlyn A. Hamann, M.D. (“Dr. Hamann”) that this Court reverse the decision of the District Court are set forth in detail in Dr. Hamann’s initial brief to this Court. Moreover, that initial brief effectively rebuts most of the arguments contained in the responsive brief that Respondent Park Nicollet Clinic (“Park Nicollet”) filed. Accordingly, this reply brief is limited to those few contentions and misstatements of law and fact in the brief of Park Nicollet that warrant a limited additional response.

## ARGUMENT

### **I. PARK NICOLLET HAS MISSTATED THE LAW IN MINNESOTA AS IT RELATES TO THE ACCRUAL OF A CAUSE OF ACTION BASED ON NONPAYMENT OF WAGES.**

On one hand Park Nicollet intensely argues that the applicable statute of limitations in this case is that which applies to the wage-based claims, Minn. Stat. § 541.07(5), while on the other hand Park Nicollet fails to recognize the date of accrual for wage-based claims as established by Minnesota case law. Resp. Brief 5-7. Park Nicollet cannot have it both ways. While Park Nicollet’s argument that a cause of action for breach of contract accrues on the breach of the terms of the contract -- even if the damages resulting from the breach do not occur until sometime afterwards -- is true as it relates to certain contracts, this concept has been specifically held to be inapplicable by this Court in the context of claims based on nonpayment of wages.<sup>1</sup> *Guercio v.*

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<sup>1</sup> Park Nicollet bases all of its arguments on the notion that a breach of contract for nonpayment of wages accrues when the employee “knew without any doubt or ambiguity” that the employer would not perform.

*Production Automation Corporation*, 664 N.W.2d 379, 387 (Minn. Ct. App. 2003) (“A breach of contractual cause of action accrues generally at the time of the breach, even if the damages do not manifest themselves until later. But under Minnesota law, a contractual cause of action for lost wages arises each time a payment is due but not paid”) (emphasis added).

Under established Minnesota law, where the underlying claim is based on the ongoing nonpayment of wages, the cause of action accrues separately each time a payment is due but not paid. *Levin v. C.O.M.B. Co.*, 441 N.W.2d 801 (Minn. 1989); *McGoldrick v. Datatrak Intern., Inc.*, 42 F.Supp.2d 893 (D. Minn. 1999). So, where, as here, an employee is on notice that its employer will not perform pursuant to an employment contract, the employee has the election to *either* (1) bring suit at that time; *or* (2) wait until employer fails to perform. *See Levin*, 441 N.W.2d at 804 (“the renunciation and repudiation of a contract by one of the parties does not set the statute of limitations in motion against the other party although it gives the latter an election to sue immediately”) (citation omitted). Accordingly, in April 2005, when Dr. Hamann was informed by the Department Chair that the Policy would not be honored, Dr. Hamann had the election to either (1) bring suit at that time, or (2) wait until Park Nicollet failed to perform. *See Levin*, 441 N.W.2d at 804. Dr. Hamann rightfully chose the latter.

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Resp. Brief. at p. 14. This is not the law in Minnesota. As such, virtually all of Park Nicollet’s arguments are contaminated by this faulty reasoning.

## II. PARK NICOLLET MISAPPLIED THE LAW ON ANTICIPATORY REPUDIATION.

Park Nicollet's framing of its anticipatory repudiation argument is off the mark as it relates to the facts and circumstances of this case, namely, where the claim is based on the nonpayment of wages. Park Nicollet is correct in its citation of the black-letter law of anticipatory repudiation. Resp. Brief 9 (citing *In re Haugen*, 278 N.W.2d 75 (Minn. 1979) for the proposition that "[i]t is well established that anticipatory repudiation occurs when one party communicates to the other his repudiation *before* the time fixed by the contract for his performance) (emphasis is original). However, Park Nicollet relies on the *general* law applicable to contracts -- that a cause of action accrues when the contract is breached, even if the damages resulting from the breach do not occur until sometime afterwards -- to set the framework for its argument. See Resp. Brief 9-10. As such, Park Nicollet incorrectly argues that in April 2005, when Park Nicollet notified Dr. Hamann that it refused to honor the terms of the Policy, it amounted to an absolute breach of contract, even though the damages occurred later. This is faulty reasoning. Because a cause of action for the nonpayment of wages accrues each time a payment is due but not paid, Minnesota Law provides that the April 2005 notification amounts to nothing more than a repudiation of Park Nicollet's prospective obligation to perform.

As discussed above, the law applicable to accrual for ordinary contracts is inapplicable to claims based on wages. Here, where the cause of action is based on wages, Dr. Hamann's cause of action accrues separately, each time a payment is due but not paid (each pay period). *Guercio*, 664 N.W.2d at 387; *Levin*, 441 N.W.2d at 803-04.

As such, in notifying Dr. Hamann that it would not honor the Policy in April 2005, Park Nicollet effectively repudiated the Policy such that Dr. Hamann had the *option* to either (1) bring suit at that time, or (2) wait until Park Nicollet failed to perform (by failing to pay him in accordance with the terms of the Policy), and each failed payment gave rise to a new, separate cause of action.

Accordingly, Park Nicollet misapplied the law of anticipatory repudiation in framing its argument, based on a theory that was held by this Court to be inapplicable to cases where the underlying claim is based on the non-payment of wages, as is the case here. Dr. Hamann had the *option* to wait, as he did, until Park Nicollet failed to perform (by failing to pay him in accordance with the terms of the Policy) and, consequently, Dr. Hamann has viable claims that separately accrued for each failed payment that occurred within the two-years, or three-years, preceding the commencement of this suit.<sup>2</sup> Moreover, Dr. Hamann's claims continue to accrue on an *ongoing* basis, in that Park Nicollet continues to refuse to pay Dr. Hamann in accordance with the terms of the Policy. The ruling of the trial court should be reversed on these grounds.

### **III. PARK NICOLLET'S ARGUMENT AGAINST DR. HAMANN'S SO-CALLED "ONGOING BREACH" THEORY IS A "RED HERRING" SO TOO ARE THE AUTHORITIES CITED IN SUPPORT OF THAT ARGUMENT.**

In its brief Park Nicollet presents a "red herring" argument that "Appellant's 'ongoing breach' theory is contrary to established law," and in support of that

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<sup>2</sup> Minn. Stat. § 541.07(5) provides a two year statute of limitations for claims based on wages, and a three year statute of limitations when the claim is based on conduct that is willful. Although it is Dr. Hamann's position that Park Nicollet's conduct was willful, that determination has not yet been made. Regardless of whether the applicable statute of limitations is two years or three years, Dr. Hamann has viable claims within both limitations periods.

proposition, Park Nicollet goes on to distinguish this “ongoing breach” theory as “not supported by Minnesota law” on the basis of the authorities cited in Dr. Hamann’s initial brief. *See* Resp. Brief pp. 10-15. However, Dr. Hamann never argued the existence of an “ongoing breach” theory under Minnesota law. In his initial brief Dr. Hamann simply argued that, as Minnesota law applies to wage-based claims, Park Nicollet has an ongoing obligation to perform pursuant to the terms of the Policy such that, in refusing to perform, Park Nicollet continues to breach the contract on an ongoing basis. *See* App. Brief pp. 9-11. Put another way, the act of notifying Dr. Hamann that it would not perform -- even if this notification is “dramatic” -- does not accelerate the accrual date for all of Dr. Hamann’s wage-based claims that accrued subsequent to that notification. That is clearly the law in Minnesota. *See Guercio*, 664 N.W.2d at 387 (“*a contractual cause of action for lost wages arises each time a payment is due but not paid*”) (emphasis added). Dr. Hamann’s position is not a complicated one: Park Nicollet has an ongoing obligation to perform and, in not performing, Park Nicollet is breaching the contract on an ongoing basis. Thus, Park Nicollet’s argument that “Appellant’s ‘ongoing breach’ theory is contrary to Minnesota law” is a “red herring” and has no impact on this case.

A. Park Nicollet’s Argument that *Levin*, *Guercio*, and *McGoldrick* are Distinguishable from the Facts of this Proceeding is Without Merit.

Against the backdrop of its unilateral creation of the “ongoing breach” theory, Park Nicollet argues that *Levin*, *Guercio*, and *McGoldrick* are not instructive to the facts of this case. *See* Resp. Brief pp. 11-13. Park Nicollet’s argument misses the mark. As set forth above, Dr. Hamann never argued the existence of an “ongoing breach” theory.

It follows then that Dr. Hamann did not cite the above cases in support of that theory. Dr. Hamann cited *Levin*, *Guercio*, and *McGoldrick* for the proposition that where there is a continuing (or ongoing) obligation on the part of the employer -- that is, an obligation on the part of the employer that follows its initial breach or repudiation of the contract, as is the case here -- the court in each of these cases allowed the claims to proceed for all unpaid wages that fell within the applicable statute of limitations period. *See* App. Brief at p. 13. Dr. Hamann stands by this argument, and Park Nicollet has failed to effectively rebut it.

Park Nicollet attempts to distinguish this case from *Levin* by arguing that “[t]he agreement in *Levin* was similar to an installment contract, and the plaintiff alleged a series of breaches arising from repeated failures to pay commission, each of which came due only at the close of a contract year -- a predetermined future date.” *See* Resp. Brief at p. 11. However, the facts of this case cannot be more analogous to the facts of *Levin*, even as summarized in Park Nicollet’s brief as set forth in the preceding sentence. The allegations in Dr. Hamann’s brief directly parallel the facts in this case as follows: (1) here, as in *Levin*, “the agreement is similar to that of an installment contract” (i.e, in exchange for Dr. Hamann’s continued performance of the terms of the Policy, Dr. Hamann is to be compensated each and every payday); and (2) here, as in *Levin*, “[Dr. Hamann] allege[s] a series of breaches arising from repeated failures to pay, each of which came due [on each payday] -- a predetermined date.” Accordingly, even taking Park Nicollet’s own synopsis of the pertinent facts of *Levin*, Dr. Hamann’s claims parallel that of *Levin* in all material respects.

Park Nicollet attempts to distinguish the facts of this case from those in *Guercio* by arguing that *Guercio* “addressed a repudiation of a future obligation.” See Resp. Brief at p. 11. Because Park Nicollet has misapplied the law of participatory repudiation, as set forth in Section II above, its application of *Guercio* to the facts of this case is equally flawed. Here, once the Policy had *vested*<sup>3</sup>, Park Nicollet had future obligations -- to pay Dr. Hamann according to the terms of the Policy at each pay period -- so long as Dr. Hamann continued to satisfy the terms of the Policy. So, as set forth above and in previous briefing, because wage-based claims accrue each time a payment is due and unpaid, Park Nicollet’s notification to Dr. Hamann in April 2005 -- that it would no longer honor the Policy -- amounted to nothing more than a repudiation of its future obligations. Accordingly, the analysis of *Guercio* is controlling on the issues here.

Lastly, Park Nicollet argues that Dr. Hamann’s “reliance on *McGoldrick v. Datatrak Intern., Inc.*, 42 F.Supp.2d 893 (D. Minn. 1999) to support his ‘ongoing breach’ theory is also misplaced.” See Resp. Brief at p. 12. Specifically, Park Nicollet attempts to dismiss *McGoldrick* as providing “no meaningful guidance for this case because the opinion does not adequately describe the facts at issue or legal reasoning.” *Id.* By this, what Park Nicollet means is that *McGoldrick* provides no meaningful guidance for *its* case. In *McGoldrick*, the employee brought suit for unpaid wages based on an

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<sup>3</sup> In its brief, Park Nicollet takes issue with Dr. Hamann using the term “vested” because, according to Park Nicollet, Dr. Hamann did not use that term in his Complaint. Park Nicollet is clearly pulling at straws. While the Complaint does not use the word “vested,” it can be easily inferred from Paragraph 2: “[a]lthough Dr. Hamann had fully performed his obligations under the Policy,” and Paragraph 16: “[t]he Department Chair confirmed to Dr. Hamann that he was entitled to the benefits of the Policy,” but asked that he “voluntarily defer exercising the Policy ... .” These allegations clearly satisfy the short and plain statement requirement of the Minnesota Rules of Civil Procedure. See Minn. R. Civ. P. 8.01.

employment contract. *McGoldrick*, 42 F.Supp.2d at 894. The employer defended on the grounds that the claim was barred by the statute of limitations. *Id.* at 895. The court found, unequivocally, that the employer had a continuing obligation to pay the employee and employee's claims "accrued individually, upon each failure of payment." *Id.* Thus, the opinion of *McGoldrick* need not be any more defined to establish the proposition that it was cited for by Dr. Hamann -- that at a minimum, the employee's claims that accrued within the applicable statute of limitations period were not time barred. *See* App. Brief 14.

Accordingly, Park Nicollet's argument that the cases cited by Dr. Hamann, namely *Levin*, *Guercio*, and *McGoldrick*, are distinguishable from the facts at issue here on the basis of its unilaterally-created "ongoing breach" theory has no merit. *Levin*, *Guercio*, and *McGoldrick* are all on-point to the issues of this case in that all of these cases were based on the nonpayment of wages, and in all of these cases there were failed payments by the employer that fell within the applicable statute of limitations period. So, under *Levin*, *Guercio*, and *McGoldrick*, Dr. Hamann's wage-based claims that accrued within the statute of limitations period should be permitted to proceed.

B. Park Nicollet's Reliance on *Shope* as its Basis for Dismissal Falls Short.

Park Nicollet argues that the facts of this case are most analogous to the facts in *Medtronic v. Shope*, 135 F.Supp.2d 988 (D. Minn. 2001). Specifically, Park Nicollet argues that "[l]ike the cancellation of the stock certificates in *Shope*, Appellant's allegation that in April 2005 'he was told for the first time that the Policy no longer existed and would no longer be honored' and 'his salary would be cut if he refused' to

take night call amounts to an allegation of a dramatic breach of a present obligation that very clearly began the running of the statute of limitations.” Resp. Brief 13-14. However, in *Shope* the employer only had one obligation to the employee -- to effectively hold the previously-issued stock certificates in trust until the employee’s rights in the certificates vested. There were no additional or ongoing obligations on the part of the employer (i.e., the employer did not promise the employee that it would continue to issue stock certificates each payday so long as the employee met certain conditions). *Shope*, 135 F.Supp. 2d at 989. So, when the employer in *Shope* cancelled the stock certificates, it breached its sole obligation to the employee -- to hold the certificates in trust -- so the statute of limitations began on that single date. *Id.* at 990.

Here, on the other hand, when Park Nicollet notified Dr. Hamann that it would not honor the Policy in April 2005, that did not excuse Park Nicollet from performing in accordance with the terms of the Policy. To the contrary, Park Nicollet was still required to pay Dr. Hamann on each subsequent payday as provided by the Policy. So, at that time, Dr. Hamann had the option to (1) bring suit based on the repudiation, or (2) wait until the claim accrued, as was the case in *Levin*, *Guercio*, and *McGoldrick*. And, in choosing to wait, Dr. Hamann did not forfeit his right to bring suit based on the causes of action that accrued at a later date. Thus, the facts in *Shope* are inapposite to this proceeding and Park Nicollet’s reliance on *Shope* is clearly misplaced.

**IV. IT IS DISINGENUOUS FOR PARK NICOLLET TO ARGUE THAT PUBLIC POLICY SHOULD ALLOW IT TO AVOID ALL OBLIGATIONS UNDER THE POLICY THAT IT UNLITERALLY DRAFTED AND IMPLEMENTED.**

Park Nicollet now attempts to hide behind public policy to avoid its obligations under a contract that it, itself, drafted and implemented. Park Nicollet argues that “the limitations period will never expire so long as [Dr. Hamann] continues to work for [Park Nicollet].” Resp. Brief 14. However, in its attempt to display for this Court the extent of the adverse impact that may result from enforcing the Policy pursuant to its terms, Park Nicollet overlooks a very important fact: that if Park Nicollet did not intend to obligate itself to perform under the terms of the Policy, Park Nicollet could have drafted the Policy to effectuate that intention. It did not. Instead, Park Nicollet created for itself an ongoing obligation to perform so long as Dr. Hamann continues to meet the requirements under the Policy. And, to the extent that the Policy is ambiguous in that respect, it should be construed against Park Nicollet as its drafter. *See Empire State Bank v. Devereaux*, 402 N.W.2d 584, 587 (Minn. Ct. App. 1987) (contract terms are to be construed against the drafter). Thus, Park Nicollet cannot now ask this Court to “bail it out” from a situation that it -- as the drafter of the Policy -- was in the best position to prevent.

Park Nicollet goes on to argue that Dr. Hamann “could sit on his hands and let damages accrue while evidence is lost, memories fade, and witnesses die off.” Resp. Brief 15. This hypothetical situation of what *might* happen should be given little weight. First, the argument that Dr. Hamann could sit on his hands while damages accrue is not entirely accurate. That is, while damages do continue to accrue with each failed payment

of wages, the extent of Dr. Hamann's damages will always be limited to the unpaid wages that fall within the applicable statute of limitations period preceding the commencement of the lawsuit. *See Levin*, 441 N.W.2d 803-04 (allowing the employee to bring only those claims that accrued within the relevant statute of limitations period); *Guercio*, 664 N.W.2d at 379 (same); *McGoldrick*, 42 F.Supp.2d at 893 (same). So, at most, Park Nicollet's exposure for back pay will be limited to the unpaid wages that accrued within three-years of the commencement of the suit, if Park Nicollet's refusal to pay is willful, or within two-years of the commencement of the suit, if Park Nicollet's refusal to pay is not willful. To that effect, it would be against Dr. Hamann's interest to bring suit more than three years after his first cause of action accrued because his damages for back pay would be capped at three years (at the most), while his potential damages for front pay could extend for as meets the requirements of the Policy.

The last argument Park Nicollet makes is that "under [Dr. Hamann's theory] the applicable statute of limitations will never run -- even if he chooses to continue to working for 20 years." This hypothetical situation is inapplicable to this proceeding. Here, Dr. Hamann did not wait 20 years, he brought suit within 5 years of Park Nicollet's initial refusal to honor the policy.<sup>4</sup> Furthermore, Park Nicollet still has the option to "stop the bleeding" and prevent the accrual of additional claims by engaging in one simple act: commencing performance and paying Dr. Hamann in accordance with the terms of the Policy. Accordingly, Park Nicollet, as the drafter of the Policy, was in the

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<sup>4</sup> Dr. Hamann was notified that Park Nicollet would no longer honor the Policy in April 2005, and Dr. Hamann commenced this litigation by service of the summons and complaint in October 2009.

best position to prevent any injustice it believes it may be subjected to, and Park Nicollet remains in a position to cut off any additional damages. So, outside of arguing in terms of what *might* happen, Park Nicollet has not presented any evidence whatsoever that it was at all prejudiced by Dr. Hamann's supposed delay in commencing this action. Dr. Hamann met all of his obligations under the Policy, and this Court should not allow Park Nicollet to avoid its obligations under the Policy that it itself drafted, solely by a self-serving resort to alleged public policy considerations.

**V. THE SUPPOSED "NEW CONTRACTUAL TERM" THAT PARK NICOLLET ARGUES WAS ACCEPTED BY DR. HAMANN THROUGH HIS CONTINUED EMPLOYMENT LACKS SUFFICIENT CONSIDERATION TO CREATE A BINDING CONTRACT.**

Park Nicollet argues that Dr. Hamann's "continued employment with [Park Nicollet] after it announced the Policy was not longer in effect signaled his acceptance of a new unilateral contract." *See* Resp. Brief 15. Notwithstanding that this argument was raised for the first time on this Appeal, and should not be given any consideration by this Court,<sup>5</sup> Park Nicollet failed to provide sufficient consideration in exchange for Dr. Hamann giving up his vested rights in the Policy.

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<sup>5</sup> *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that this court generally will not consider matters not argued to and considered by the district court). A reviewing court must generally consider "only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." *Thayer v. American Financial Advisers, Inc.*, 322 N.W.2d 599, 604 (Minn.1982).

A. Park Nicollet's Promise to Continue Paying Dr. Hamann His Same Compensation in Exchange for Dr. Hamann forfeiting his Vested Rights in the Policy is Insufficient Consideration to Create a Binding Contract.

It is black letter contract law that every contract must be supported by sufficient consideration. *See Cederstrand v. Lutheran Brotherhood*, 117 N.W.2d 213, 218 (Minn. 1962) (a binding contract requires an offer, acceptance and consideration). “Consideration thus insures that the promise enforced as a contract is not accidental, casual, or gratuitous, but has been uttered intentionally as the result of some deliberation, manifested by reciprocal bargaining or negotiation.” *Id.* at 220. “[T]he requirement of consideration is not mere technicality, historical anarchism, or arbitrary formality.” *Id.* In this case no consideration exists with respect to Park Nicollet’s alleged “new contractual term.”

Here, Park Nicollet did not give anything of value in exchange for Dr. Hamann’s alleged surrender of his vested rights in the Policy. Apparently, what Park Nicollet is arguing is that it *allowed* Dr. Hamann to continue working at the same salary that he had been previously paid, in exchange for Dr. Hamann’s surrender of his vested rights in the Policy. This argument defies logic as well as Minnesota law. It is well established that a promise to do something that one is already obligated to do is not sufficient consideration. *See Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 728 (Minn. 1985) (a promise to do something that one is already legally obligated to do does not constitute consideration). Accordingly, if considered by this Court, Park Nicollet’s newly-asserted

argument -- that Dr. Hamann gave up his rights to the Policy in exchange for continued employment -- must fail for want of consideration.

**VI. DR. HAMANN HAS SUFFICIENTLY STATED A CLAIM FOR UNJUSTENRICHMENT.**

A. Dr. Hamann Pled Full Performance of the Requirements of the Policy to the Extent He was Unimpeded.

Another argument Park Nicollet raises for the first time on this appeal is that Dr. Hamann has failed to assert a claim for unjust enrichment because he “did not plead full performance under the Policy.” Resp. Brief 17. This could not be further from the truth. What more does Dr. Hamann need to allege than an admission by the then department chair, confirming to Dr. Hamann that “he was entitled to the benefits of the Policy.” A.A. 5. And, to the extent Dr. Hamann did not obtain the approval of other physicians is because Dr. Hamann was asked to “voluntarily defer exercising the Policy until April 2005 because several of the physicians in the Department would themselves be out on maternity leave.” *Id.* By use of these “bait and switch” tactics, Park Nicollet never presented Dr. Hamann’s request to the other physicians for approval and, thus, unlawfully impeded Dr. Hamann’s ability to obtain approval prior to its revocation of the Policy. *See Zobel & Dahl Constr. v. Crotty*, 356 N.W.2d 42, 45 (Minn. 1984) (“Generally, contract performance is excused when it is hindered or rendered impossible by the other party”) (citation omitted). So, to the extent the alleged failure to obtain physician approval is not excused, and a binding contract is not otherwise found, this case is a presents perfect example of the essence of an unjust enrichment claim. *Stein v. O’Brian*, 565 N.W.2d 471, 474 (Minn. Ct. App. 1997) (finding that a claim for unjust

enrichment arises where one party unjustly gains a benefit, and there is no valid contract completely governing the rights of the parties).

B. Dr. Hamann is Not Required to Allege that He was Promised Additional Compensation for Continuing to Take Night Call.<sup>6</sup>

It is disingenuous for Park Nicollet to argue that because Dr. Hamann did not allege he was promised additional compensation for continuing to take night call when he was no longer required to do so, he has failed to state a claim for unjust enrichment. Resp. Brief 17. That is not the law. To sufficiently state a claim for unjust enrichment Dr. Hamann need only allege that Park Nicollet knowingly received something of value to which it was not entitled and that the circumstances are such that it would be unjust for Park Nicollet to retain the benefit. *See Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. Ct. App. 2001). Dr. Hamann has done so.

Dr. Hamann alleges that the Policy provides that, upon meeting the Policy requirements, he would be entitled to cease taking night call and be paid the same wage. A.A. 4. He further alleges that he met the requirements of the Policy and was refused his opportunity to exercise his rights as provided by the Policy -- to cease taking night call -- against the threat of having his salary reduced. A.A. 6. Lastly, he alleges that when he ceased taking night call, his salary was reduced. A.A. 6. Clearly, there was a benefit conferred upon Plaintiff for the services rendered by Dr. Hamann in continuing to work

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<sup>6</sup> In its brief, Park Nicollet only contests its enrichment as to the claims that fall between April 2005 and February 2008 -- the period of time Dr. Hamann continued to take night call against the threat of a salary reduction. Park Nicollet does not contest its enrichment from 2008 to the present -- the period where Dr. Hamann stopped taking night call pursuant to the terms of the Policy and had his salary reduced. Thus, Dr. Hamann need only rebut Park Nicollet's enrichment as it relates to the April 2005 to February 2008 timeframe. *See* App. Brief 21-22 for the corresponding arguments.

night calls that, but for Park Nicollet's refusal to honor the Policy, Dr. Hamann was not required to work. Indeed, Dr. Hamann is simply requesting compensation for the benefits unjustly received by Park Nicollet for the services he rendered. This certainly would not be the first case where a Minnesota court calculates and awards damages on the basis of services rendered. *See Schimmelpfennig v. Gaedke*, 27 N.W.2d 416, 421 (Minn. 1947) (finding that the measure of damages for services rendered is simply the value of the services provided). Minnesota courts permit the calculation of damages in various ways. *See Roberge v. Cambridge Coop. Creamery*, 79 N.W.2d 142, 150 (Minn. 1956) (affirming award that was based on plaintiff's testimony about the value of his services and on testimony of other witnesses engaged in similar business). Accordingly, Dr. Hamann has stated a cognizable claim for relief for unjust enrichment, and he should be afforded the opportunity to litigate that claim on its merits.

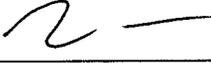
### CONCLUSION

As set forth in Dr. Hamann's initial brief, and as further supported by the foregoing, the District Court erred in holding that Dr. Hamann's claims for breach of contract, promissory estoppel and unjust enrichment are barred by the statute of limitations. The District Court also erred in holding that Dr. Hamann failed to state a claim upon which relief can be granted for unjust enrichment. Accordingly, this Court should reverse the ruling of the District Court and remand this case for further proceedings.

Respectfully submitted,

MOSS & BARNETT  
A Professional Association

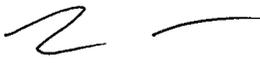
Dated: June 21, 2010.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief was prepared using Microsoft Word 2003, in Times New Roman font, 13 point, and according to the word processing system's word count, is no more than 4,376 words, exclusive of the cover page, table of contents, table of authorities, signature block and addendum, and complies with the typeface requirements of Minn. R. Civ. App. P. 132.01.

Dated: June 21, 2010.

  
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Michael E. Gerould