

NO. A10-658

State of Minnesota
In Court of Appeals

Arlyn A. Hamann, M.D.,

Appellant,

v.

Park Nicollet Clinic,

Respondent.

APPELLANT'S BRIEF AND ADDENDUM

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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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STATEMENT OF THE ISSUES

1. Under Minnesota law, where an employee has a vested earned right in an employment policy that provides an established compensation structure to the employee, as long as the employee meets certain conditions, does the employer's notice to the employee that it will no longer honor the policy accelerate the accrual of the statute of limitations applicable to each subsequent failure to make payment of the agreed upon compensation?

The District Court held in the affirmative.

Minn. Stat. § 541.07

Levin v. C.O.M.B. Co., 441 N.W.2d 801 (Minn. 1989)

Guercio v. Production Automation Corp., 664 N.W.2d 379 (Minn. Ct. App. 2003)

Medtronic, Inc. v. Shope, 135 F.Supp.2d 988 (D. Minn. 2001)

Botten v. Shorma, 440 F.3d 979 (8th Cir. 2006)

2. Does Minnesota law limit unjust enrichment claims to only those arising out of conduct that is "illegal" or "unlawful"?

The District Court held in the affirmative.

First Nat'l Bank of St. Paul v. Ramier, 311 N.W.2d 502, 504 (Minn. 1981)

Schumacher v. Schumacher, 627 N.W.2d 725, 729-30 (Minn. Ct. App. 2001)

Mon-Ray, Inc. v. Granite Re, Inc., 677 N.W.2d 434, 440 (Minn. App. 2004)

Klass v. Twin City Fed. Sav. & Loan Ass'n, 190 N.W.2d 493, 494-95 (Minn. 1971)

3. Under Minnesota law, has an employee alleged sufficient facts to establish that his employer was "enriched" for purposes of an unjust enrichment claim when the employee has a vested right in a policy that allows the employee to reduce his working hours *without* a reduction in compensation, and the employer fails to honor the policy and reduces the employee's compensation?

The District Court held in the negative.

STATEMENT OF THE CASE

This matter is an appeal from a judgment dismissing an action for failure to state a claim upon which relief may be granted, pursuant to an Order by the Honorable Denise D. Riley of the Hennepin County District Court.

Arlyn A. Hamann, M.D. (“Dr. Hamann”) commenced this action against his employer Defendant Park Nicollet Clinic (“Park Nicollet”) to remedy the wrong caused by Park Nicollet’s failure to honor its promises to Dr. Hamann under its Length of Service Recognition Policy, commonly known as the Senior Physician Call Policy (the “Policy”). A.A. 1.¹ Specifically, Park Nicollet promised Dr. Hamann that, if he met certain criteria, he would be exempt thereafter from late night obstetrics call (“OB night call”) and his salary would not be reduced for not taking OB night call. In reliance on these promises, Dr. Hamann thereafter spent nine years practicing medicine exclusively at Park Nicollet and bearing the burden of OB night call. He also forewent professional and employment opportunities elsewhere. After Dr. Hamann had fully performed his obligations under the Policy, Park Nicollet revoked the Policy, and Dr. Hamann was denied the benefits promised to him and on which he had relied. As a result, Dr. Hamann was compelled to continue to take OB night call against the threat that his salary would be reduced. When Dr. Hamann later stopped taking OB night call, his salary was substantially reduced. On or about November 2, 2009, Dr. Hamann commenced this

¹ References in this brief to Appellant’s Appendix will be in the form “A.A. ____.”
References to the Addendum will be in the form “A. ____.”

action, asserting claims for breach of contract, promissory estoppel and unjust enrichment, arising out of Park Nicollet's wrongful conduct.²

In lieu of answering Dr. Hamann's Complaint, Park Nicollet brought a Motion to Dismiss, pursuant to Rule 12.02 of the Minnesota Rules of Civil Procedure. A.A. 13. By an Order dated January 21, 2010, the District Court granted Park Nicollet's Motion to Dismiss, holding that (1) Dr. Hamann's claims for breach of contract, promissory estoppel and unjust enrichment were barred by the statute of limitations, and (2) Dr. Hamann had failed to state a claim for which relief can be granted as to his claim for unjust enrichment. A.1. Dr. Hamann was provided notice of filing of the Order on February 17, 2010, and Dr. Hamann filed a timely appeal. A. 10. and A.A. 15.

STATEMENT OF FACTS

Dr. Hamann is employed by Park Nicollet Clinic as a physician, practicing obstetrics and gynecology, primarily at its St. Louis Park clinic location. Dr. Hamann has been continuously employed by Park Nicollet in this capacity since 1974. A.A. 3.

In 1995, Park Nicollet adopted the Length and Service Recognition Policy and disseminated a written copy of the Policy to all physicians in its Obstetrics/Gynecology Department. A.A. 3 and A.A.12. The stated purpose of the Policy was "[t]o reward length of service at Park Nicollet Clinic." A.A. 3 and A.A.12. In other words, the Policy was adopted to encourage physicians in the Obstetrics/Gynecology Department to continue to practice with Park Nicollet over a long period of time so as to maintain

² A claim of misrepresentation was also asserted, but was voluntarily dismissed during the proceedings, and is not at issue herein.

help meet its physician staffing needs, including taking obstetrics call, which often occurred at night or before or after normal business hours. A.A. 3. In addition, the Policy also benefited Park Nicollet by reducing the dollar and human cost of physician turnover and ensuring that its patients' Ob/Gyn medical needs were properly met by qualified and experienced specialists. A.A. 3-4.

To be eligible to receive the benefits of the Policy, a physician had to meet four criteria: (1) be at least 60 years of age; (2) have at least 15 years of taking OB call; (3) be at least a two-thirds full-time employee; and (4) have the approval of physicians in the call rotation. A.A. 4 and A.A. 12. A physician who met those criteria "would be exempted from night call" and "would receive no salary reduction for not taking night call." A.A. 4. The Policy further provided that, after meeting the four criteria, eligible physicians would continue to practice obstetrics and take a proportionate number of weekday and weekend call days per month, a proportionate number of holiday day calls and nighttime backup call. A.A. 4.

At the time the Policy was adopted and in the ensuing nine years, Dr. Hamann was in his prime wage earning years, and was free to leave Park Nicollet and practice medicine elsewhere, if he chose. A.A. 4. However, the promise of being exempt from OB night call in the later years of his life, without suffering a salary reduction, was important to Dr. Hamann. A.A. 4. OB night call is difficult and demanding work, often requiring the physician to get up in the middle of the night and deal with serious emergency situations and complications involving obstetric patients. A.A. 4. OB night call is physically strenuous and exhausting work, psychologically difficult and draining,

highly stressful, professionally challenging and very disruptive of normal life activities.

A.A. 4. The rigors and demands of OB night call are particularly difficult for senior physicians. A.A. 4.

Dr. Hamann relied on Park Nicollet's promises under the Policy that he would be exempt from taking OB night call without salary reduction. A.A. 4. Although free to leave Park Nicollet and accept other professional and employment opportunities that existed elsewhere, Dr. Hamann remained employed and practiced continuously at Park Nicollet for over nine years after the Policy was adopted until he reached 60 years of age. A.A. 4-5. During that time, he worked hard, and took OB call and OB night call like the other physicians in the rotation. A.A. 5. He served Park Nicollet continuously since the Policy was adopted, foregoing the other professional and employment opportunities that were available to him. A.A. 5.

Dr. Hamann's continuing reliance on Park Nicollet's promises was reasonable. Indeed, the Policy that was first adopted in 1995 was reaffirmed in 2002 as the formal Policy applicable to all physicians in the Department. A.A. 5. As a result, Dr. Hamann continued to rely on Park Nicollet's promises under the Policy and remained employed with Park Nicollet. A.A. 5. During this time, Park Nicollet granted the benefits of the Policy to another physician who had fully performed thereunder. Several years after the Policy was adopted, Dr. Edward Maeder, another physician in the Department, turned 60 and elected to exercise the Policy. A.A. 5. Park Nicollet allowed him to do so, and he was exempt from OB night call and suffered no salary reduction as a consequence. A.A. 5.

Park Nicollet acknowledged that Dr. Hamann was eligible to exercise the Policy. In early 2004, several months before Dr. Haman was to reach 60 years of age (in July of 2004), he spoke with the then Department Chair regarding his desire to exercise the Policy and be exempt from OB night call once he turned 60. A.A.5. At that time, the Department Chair confirmed to Dr. Hamann that he was entitled to the benefits of the Policy, but asked Dr. Hamann to voluntarily defer exercising his right until April 2005 because several of the physicians in the Department would themselves be out on maternity leave and the Department otherwise would be short staffed. A.A. 5. However, the Department Chair assured Dr. Hamann that he would be allowed to exercise the Policy in April 2005. A.A. 5. Based on these representations, and out of loyalty to the Department and Park Nicollet, Dr. Hamann agreed to Park Nicollet's request and deferred exercising the Policy until April 2005. A.A. 5.

Park Nicollet revoked the Policy after Dr. Hamann had fully performed thereunder and was eligible for its benefits. In April 2005, when Dr. Hamann informed the Department Chair that he wished to exercise the Policy and stop taking night call, he was told for the first time that the Policy no longer existed and would no longer be honored. A.A. 6. He was told that he had to continue to take OB night call and that his salary would be cut if he refused. A.A. 6. Faced with the threat of a substantial salary reduction, Dr. Hamann chose to continue to take OB night call, which he did until February 2008. A.A. 6. During that time, Dr. Hamann, then in his early 60's, endured the difficult and demanding work of OB night call, which left him physically and emotionally exhausted and which adversely affected his health. A.A. 6.

Eventually, several years later in February 2008, Dr. Hamann was compelled to withdraw from OB night call for health reasons. Park Nicollet immediately cut his salary. A.A. 6. Dr. Hamann never received the benefits that Park Nicollet promised to him and that he earned by over nine years of loyal service to Park Nicollet in full performance of his obligations under the Policy. A.A. 6. Without any other avenue for recourse, Dr. Hamann filed this suit.

STANDARD OF REVIEW

Park Nicollet brought a Motion to Dismiss Dr. Hamann's lawsuit pursuant to Rule 12.02 of the Minnesota Rules of Civil Procedure. This Court must perform a *de novo* review on an appeal from a judgment following such a motion. *Larson v. Wasemiller*, 738 N.W.2d 300, 303 (Minn. Ct. App. 2007). At this stage of the proceedings, the court need only consider "whether the complaint sets forth a legally sufficient claim for relief; it is immaterial whether or not plaintiff can prove any of the facts alleged." *Terwilliger v. Hennepin County*, 542 N.W.2d 675, 676 (Minn. Ct. App. 1996), *affirmed* 561 N.W.2d 909 (Minn. 1997), *citing* *Diedrich v. State*, 393 N.W.2d 677, 680 (Minn. Ct. App. 1986). Pleadings should be dismissed under Rule 12.02 "only if it appears to a certainty that no facts, which could be introduced consistent with the pleadings, exist which would support granting the relief demanded." *Northern States Power Co. v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963). "A claim prevails against a motion to dismiss if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demand." *Northern States Power Co.*, 122 N.W.2d at 29. All fact

inferences are drawn in favor of the claimant in determining whether a claim will withstand attack under Rule 12.02(e). Herr & Haydock, Minnesota Practice, 2002, Vol. 1, § 12.9, *citing Hedlund v. Hedlund*, 371 N.W.2d 232 (Minn. Ct. App. 1985).

“On a motion to dismiss for failure to state a claim, the allegations contained in the pleading must be considered as true and viewed in the light most favorable to the pleader.” *Northern States Power Co. v. Minn. Metro. Council*, 667 N.W.2d 501, 506 (Minn. Ct. App. 2003), *rev’d* 684 N.W.2d 485 (Minn. 2004). “We must accept the allegations contained in the complaint as true. It is immaterial to our analysis whether the plaintiff can prove the alleged facts.” *Dakota Bank v. Eiesland*, 645 N.W.2d 177, 180 (Minn. Ct. App. 2002), *citing Elzie v. Comm’r of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980). Dr. Hamann has pled sufficient facts to support claims for breach of contract, promissory estoppel and unjust enrichment.

ARGUMENT

The District Court erred in dismissing Dr. Hamann’s lawsuit. For the reasons set forth below, this Court should reverse the District Court’s ruling in its entirety and remand the case to the District Court for further proceedings

I. THE POLICY IMPLEMENTED BY PARK NICOLLET WAS AN OFFER FOR A UNILATERAL CONTRACT AND, ONCE DR. HAMANN ACCEPTED BY COMPLETE PERFORMANCE, PARK NICOLLET HAD AN IMMEDIATE AND ONGOING OBLIGATION TO PERFORM IN ACCORDANCE WITH ITS TERMS.

A. Dr. Hamann Obtained a Vested Right in the Policy in 2004 and Park Nicollet is Bound to Perform in Accordance with its Terms.

It is well-settled law in Minnesota that an employment policy can form the basis of a unilateral contract. *See Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626 (Minn. 1983) (finding that when an employer makes a promise of employment on terms definite enough to form an offer, which the employee accepts through performance, a unilateral contract is formed, which obligates the employer to perform); *Brown v. Tonka Corp.*, 519 N.W.2d 474, 477 (Minn. Ct. App. 1997) (holding that an employer was obligated to pay vacation pay to an employee pursuant to the employee's contract, once the employer received the benefit of the employee's services); *Hartung v. Billmeier*, 66 N.W.2d 784 (Minn. 1954) (finding a unilateral contract was formed when the employee met the requirements for a bonus as set forth by the employer). Once an employee begins performance, the employer is bound by the terms of the policy, although the employer is not under an obligation to perform until full consideration is given. *Sylvester v. State*, 214 N.W.2d 658, 667 (Minn.1973) (*citing* Restatement, Contracts, § 45) (“If an offer for a unilateral contract is made, and part of the consideration in the offer is given or tendered by the offeree in response thereto, the offeror is bound by the contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer”).

Here, the Policy constituted a unilateral contract, which Dr. Hamann accepted by complete performance. As set forth in the Complaint, Park Nicollet established the Policy in 1994. To be eligible to receive the benefits of the Policy, a physician had to meet four criteria: (1) be at least 60 years of age; (2) have at least 15 years of taking OB call; (3) be at least a two-thirds full-time employee; and (4) have the approval of physicians in the call rotation. Dr. Hamann accepted the offer through his continued employment, he satisfied the requisite criteria and completed performance in 2004, when he reached 60 years of age. *Sylvester*, 214 N.W.2d at 667-68 (finding that once the judges “began their service as judges, the state was bound by a contract to pay [the judge’s retirement benefits in accordance with the terms of the contract], although of course the state’s duty of immediate performance did not arise until the judge’s completion of the requisite years of service”). Dr. Hamann obtained a vested right in the Policy in April 2004 when he met all the requirements of the Policy. At that time the Policy could not be rescinded or revoked, and Park Nicollet was bound to perform at that time.

B. Park Nicollet Continues to Breach the Terms of the Policy.

As set forth in the Complaint, the Policy provides that, once a physician meets the Policy requirements, he or she will: (1) “be exempted from [OB] night call,” and (2) “receive no salary reduction for not taking [OB] night call.” An eligible physician is entitled to receive the benefits of the Policy as long as he or she continues obstetric practice and takes a proportionate number of weekday and weekend call days per month, a proportionate number of holiday day calls and nighttime backup call. Accordingly, by

its terms, the Policy created in Park Nicollet a *continuing obligation* to perform as long as Dr. Hamann continued to meet these criteria. Thus, any action by Park Nicollet to either (1) deny Dr. Hamann the right to be exempt from OB night call, or (2) reduce Dr. Hamann's salary for not taking OB night call, constitutes a breach of the Policy. Park Nicollet is in breach of the Policy for both these reasons.

As noted, in early 2004, several months before Dr. Haman reached 60 years of age, Dr. Hamann spoke with the then Department Chair regarding his desire to exercise the Policy and be exempt from OB night call upon turning 60. At that time the Department Chair asked Dr. Hamann to voluntarily defer exercising the Policy until April 2005 because several of the physicians in the Department would themselves be out on maternity leave and the Department otherwise would be short staffed. In April 2005, when Dr. Hamann attempted for the second time to exercise the Policy, he was told by the Department Chair for the first time that the Policy was then revoked, despite the fact that Dr. Hamann's rights in the Policy had already vested. Park Nicollet denied Dr. Hamann his right to be exempt from taking OB night call, and Dr. Hamann was compelled to continue to take OB night call under the threat that his salary would be reduced if he stopped. Finally, in February 2008, when Dr. Hamann stopped taking OB night call for health reasons, Park Nicollet cut his pay dramatically. This salary reduction has continued to the present. Thus, Park Nicollet breached its contract with Dr. Hamann by (1) denying him his right to be exempt from OB night call from April 2005 until February 2008, and (2) reducing his salary for not taking OB night call from February 2008 to the present.

II. IN THE ALTERNATIVE, DR. HAMANN HAS A VIABLE CLAIM FOR PROMISSORY ESPOPPEL.

Dr. Hamann has pled promissory estoppel as an alternative theory of recovery. Promissory estoppel is an equitable doctrine that implies a contract in law where none exists in fact. *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 746 (Minn. 2000). To the extent this Court may find that a contract did not exist, Dr. Hamann stands on promissory estoppel as his basis for recovery.

III. BY REASON OF PARK NICOLLET'S CONTINUING OBLIGATION TO PERFORM, DR. HAMANN'S CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.

Minnesota law provides a two-year statute of limitations for employment-based claims. Minn. Stat. § 541.07. The statute of limitations is extended to three years when the conduct in question is willful. *Id.* Although Dr. Hamann stresses that Park Nicollet's actions are willful, thus invoking the three year statute, the District Court did not decide whether the two-year or three-year statute of limitations is applicable in this case. Regardless, as set forth below, Dr. Hamann's claims are ongoing and he has viable claims within both the two-year and three-year statute of limitation periods.

A. Minnesota Law Provides that a Contractual Cause of Action for Unpaid Wages Arises Each Time a Payment is Due but Not Paid. The District Court Erred in Holding Otherwise.

Under Minnesota law, where an employee has a vested right to some form of continuing compensation, pursuant to contract or otherwise, a separate cause of action arises each time a payment is due but not paid. *Guercio v. Production Automation Corporation*, 664 N.W.2d 379, 387 (Minn. Ct. App. 2003) ("Under Minnesota law, a

contractual cause of action for lost wages arises 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). Each of the cases just cited analyzed the statute of limitations issue in the context of a continuing obligation on the part of the employer to pay the employee some form of compensation over time. 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. The instant case is controlled by this case law.

In *Levin*, an employee brought a breach of contract claim against his employer for unpaid commissions. *Levin*, 441 N.W.2d at 802. The contract provided that certain commissions would be paid to the employee on an annual basis. *Id.* The employer ceased paying the annual commissions and failed to pay them for three consecutive years. The employee did not commence suit until over three-years after the employer first failed to pay the commissions. *Id.* The employer moved for summary judgment on alternative grounds, among them that the claim was barred because the cause of action accrued when the first annual commission was not paid and therefore the entire claim was barred by the statute of limitations. *Id.* at 803. The Minnesota Supreme Court disagreed, holding that the employee’s claim was based on a series of breaches and repeated failures to pay. *Id.* 803 Although the employee knew or should have known when the first commission went unpaid that he would receive no further commissions, such knowledge did not accelerate the accrual date for all subsequent unpaid commissions. *Id.* at 803-04. Accordingly, although the initial breach was barred by the statute of limitations, there were separate

and continuing breaches that occurred within the statute of limitations period that were not barred. *Id.*

Similarly, in *Guerco*, the employee brought suit for lost wages, among other claims, based on his employer's unilateral change in the employee's compensation structure. 664 N.W.2d 383. The employer argued that the employee's claim was barred by the two-year statute of limitations because the employee brought suit more than two-years after the employer changed the structure. *Id.* at 387. The Minnesota Court of Appeals disagreed, holding that "the suit was timely as to payments that [the employee] alleges should have been paid to him during the two years prior to the commencement of [the] suit." *Id.* at 388.

Also to this effect, in *McGoldrick*, the employee was a party to an employment contract, but was paid less than the annual compensation he was promised. 42 F.Supp.2d at 894. Some years after the employer's initial breach (i.e., after the employer first failed to pay the employee his agreed upon compensation), the employee brought suit for the unpaid wages, and the employer defended on the grounds that the claim was barred by the statute of limitations. *Id.* at 895. Notwithstanding the employer's arguments to the contrary, the court unequivocally found that the employer had a continuing obligation to pay the employee and, at a minimum, the employee's claims that fell within the applicable statute of limitations period were not time barred. *Id.* at 897.

In the instant case, just as in the aforementioned authorities, Park Nicollet has a continuing obligation to perform in accordance with the terms of the Policy. Park Nicollet has committed a number of separate, ongoing breaches as a result of its failure to

perform. These separate, ongoing breaches commenced in April of 2005 and continued through February of 2008, when Dr. Hamann was compelled to withdraw from night call. In addition, Park Nicollet has continued to breach the contract from February of 2008 to the present, by reducing Dr. Hamann's salary for each of the pay periods occurring during that time.

Accordingly, because Park Nicollet is under a continuing obligation to perform in accordance with Dr. Hamann's vested rights in the Policy, a separate cause of action arises each time Park Nicollet fails to perform under the Policy, at least as long as Dr. Hamann continues to meet the ongoing eligibility criteria thereunder.

B. The District Court Confused Dr. Hamann's *Right* to Bring a Claim With his *Obligation* to Bring a Claim.

As set forth above, Park Nicollet has a continuing obligation to perform in accordance with terms of the Policy. However, the District Court erroneously concluded that Dr. Hamann's claims of breach of contract, promissory estoppel and unjust enrichment accrued from a single, isolated event, which triggered the point of accrual for all Dr. Hamann's claims and losses. The District Court held that Park Nicollet affirmatively breached its claimed duty to Dr. Hamann in April 2005, when Park Nicollet informed Dr. Hamann that the Policy no longer existed. A. 8. This holding is contrary to Minnesota law.

The very principal upon which the District Court relies -- that "a cause of action for breach of contract accrues immediately on a breach, though actual damages resulting therefrom do not occur until afterwards" -- has been specifically held to be inapplicable

to claims based on wages. *See Guercio*, 664 N.W.2d at 387 (“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). Indeed, under established Minnesota law, where 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). Thus, in accordance with well-established Minnesota law, although Dr. Hamann had a *right* to bring his claim once Park Nicollet affirmatively repudiated the contract in April 2005, Dr. Hamann did not have an *obligation* to do so. The District Court misinterpreted this distinction.

C. The District Court Erroneously Relied on Cases that are Factually Inapposite.

The District Court supports its holding that Dr. Hamann’s claims are time-barred by relying on *Medtronic, Inc. v. Shope*, 135 F.Supp.2d 988 (D. Minn. 2001) and *Botten v. Shorma*, 440 F.3d 979 (8th Cir. 2006). The District Court erred in doing so. Contrary to the facts of this case, neither *Shope* nor *Botten* involve a continuing obligation of performance on the part of the employer. That is, contrary to the facts of this case, in

both *Shope* and *Botten* the employer had an existing obligation *only*, and, once breached, the respective employee's cause of action accrued.

In *Shope*, the employee sued his employer for canceling certain stock certificates the employer issued to the employee as an incentive to stay with the company. 135 F. Supp.2d 988. The stock was not given to the employee outright, but was issued in the employee's name. The employee was granted most of the normal rights associated with stock ownership, such as the right to vote the shares and the right to receive dividends. The only right the employee did not possess was the right to transfer the stock. *Id.* at 989. Before the stock was physically transferred to the employee, the employee resigned from employment and the employer canceled the stock certificates. *Id.* The employee then waited almost 5-years before requesting that the employer honor the certificates. At that time the employer brought a declaratory action, seeking a determination that the statute of limitations barred further rights under the certificates. *Id.* at 990. The employee argued that his claims were not barred, relying principally on *Levin*. *Id.* at 992. The federal district court distinguished the case from *Levin*, finding that "when [the employer] canceled the stock certificates, it did not merely declare an intention to decline to perform a future contractual duty; the cancellation was an affirmative breach of [the employer's] duty to hold the certificates in trust for [the employee]" *Id.* In addition, the court found that the employee's right to vote the shares and receive dividends were present rights that the employee absolutely lost when the employer cancelled the shares. *Id.*

In *Botten*, the employee was owed compensation by his employer at the time that the employer merged with another company. 440. F.3d 979. As a result, the new company executed an agreement to assume liability for the amount of compensation the employee was owed at the time of the merger. *Id.* Approximately five years after the merger, the employee made a written demand to the new company for payment, which was rejected. *Id.* The employee brought suit for the unpaid compensation. On appeal the Eight Circuit held that, “[w]hen a contract sets a date for payment, the statute of limitations begins to run on that date.” *Id.* 981 (citation omitted). Because the contract provided a set time for payment that was outside of the statute of limitations period, the employee’s claims were barred. *Id.*

There is clear distinction between the instant case and both the *Shope* and *Botten* cases. First, in both *Shope* and *Botten*, there was *only* a present contractual obligation: in *Shope*, the employer issued the employee stock certificates and agreed to hold them in trust until his rights in the certificates vested; in *Botten*, the plaintiff’s new employer contracted to pay the compensation owed to him by his previous employer. Here, on the other hand, there was a present *and* continuing obligation on the part of the employer. Park Nicollet was required to perform under the Policy the moment Dr. Hamann’s rights in the Policy vested, and Park Nicollet is required to continue to perform by continuing to allow Dr. Hamann to be exempt from OB night call without a reduction in pay, as long as he continues to satisfy the remaining criteria.

In addition, in both *Shope* and *Botten*, there was only one breach upon which the plaintiff’s cause of action accrued: in *Shope*, the cause of action accrued when the

employer cancelled the plaintiff's option; and, in *Botten*, the cause of action accrued when the employer failed to pay. In the instant case, however, there are multiple breaches upon which Dr. Hamann's causes of action accrued. Park Nicollet breached the contract each time that it either (1) denied Dr. Hamann his right to be exempt from night call, or (2) paid him less salary for not taking OB night call from April 2005 to the present. Accordingly, to the extent the District Court relied on *Shope* and *Botten* to establish the date of accrual for Dr. Hamann's causes of action, the District Court was in error.

IV. UNJUST ENRICHMENT.

A. **The District Court Erred in Holding that an Unjust Enrichment Claim can Only be Based on Conduct that is "Illegal" or "Unlawful."**

The District Court erred in holding that a claim for unjust enrichment can only rest on conduct that is "illegal" or "unlawful." It is well-established law in Minnesota that an action for unjust enrichment will lie where one party was illegally or wrongfully enriched, *or* in situations of fraud, misrepresentation, or mistake, *or* in situations where it would be morally wrong for the party to retain the benefit gained at another's expense. *First Nat'l Bank of St. Paul v. Ramier*, 311 N.W.2d 502, 504 (Minn. 1981) (stating that unjust enrichment can mean illegal or unlawful enrichment); *Anderson v. DeLisle*, 352 N.W.2d 794 (Minn. Ct. App. 1984) (recognizing that a claim of unjust enrichment may stem from situations of fraud or mistake); *Schumacher v. Schumacher*, 627 N.W.2d 725, 729-30 (Minn. Ct. App. 2001) (recognizing that unjust enrichment has been extended to morally wrong acts as well); *Mon-Ray, Inc. v. Granite Re, Inc.*, 677 N.W.2d 434, 440

(Minn. App. 2004) (a claim for unjust enrichment may be based on situations “where it would be morally wrong for one party to enrich himself at the expense of another”); *Klass v. Twin City Fed. Sav. & Loan Ass’n*, 190 N.W.2d 493, 494-95 (1971) (affirming trial court’s finding of unjust enrichment without a showing of fraud, mistake, or illegal or unlawful conduct).

Here, Dr. Hamann has pled sufficient facts to show that Park Nicollet has been enriched “unjustly” by engaging in conduct that is, at a minimum, “morally wrong.” Specifically, when Park Nicollet adopted the Policy in 1995, it did so to encourage physicians in the Obstetrics/Gynecology Department to continue to practice with Park Nicollet over a long period of time both to maintain continuity and to help meet its physician staffing needs. In 2004, after Dr. Hamann had fully performed under the Policy and while the Policy was still in effect, Dr. Hamann attempted to exercise the Policy, but Park Nicollet requested that Dr. Hamann wait until April of 2005. Dr. Hamann obliged. However, in April 2005, when Dr. Hamann attempted to exercise the Policy, Park Nicollet told Dr. Hamann for the first time that the Policy had been revoked. At that point, Park Nicollet had received the full benefit of Dr. Hamann’s performance under the Policy and Dr. Hamann was left without any option. Although his rights in the Policy had vested, he was forced to continue to take night call. If he objected or refused, his salary would be reduced (which eventually occurred in February of 2008). At a minimum, the bait and switch tactics employed by Park Nicollet constitute misrepresentations or conduct that is “morally wrong.” The District Court erred on this issue.

In any event, there can be little doubt that Park Nicollet's actions were also illegal or unlawful. The law of the State of Minnesota is found not only in its statutes, but also in its common law as established over time by the considered jurisprudence of its courts. Park Nicollet's actions in breach of its common law duties of contract, and in breach of its common law obligations under Dr. Hamann's theories of promissory estoppel and unjust enrichment, were clearly illegal or unlawful.

B. The District Court Erred in Holding that Park Nicollet was Not Enriched by Forcing Dr. Hamann to Take OB Night Call After his Rights in the Policy had Vested and By Reducing Dr. Hamann's Salary After he Stopped Taking Night Call.

The District Court held that Dr. Hamann "cannot show that [Park Nicollet] improperly retained any benefit: he was fully compensated for taking night call after the termination of the Policy and, once he stopped taking night call his salary was reduced with a commensurate reduction of his duties." This is clear error.

As set forth in the Complaint, Park Nicollet implemented the Policy for its own benefit *and* for the benefit of its respective physicians. Specifically, the stated purpose of the Policy was to "[t]o reward length of service at Park Nicollet Clinic." After the respective physicians met all of the requirements of the Policy, they were to receive the following benefits: (1) they are no longer required to take OB night call, and (2) they are to be paid the same salary. Here, Park Nicollet clearly benefited from Dr. Hamann's longevity of service from the date the Policy was implemented through the time he performed thereunder nine years later. After Plaintiff satisfied the Policy requirements and provided notice to Park Nicollet of his intention to exercise the Policy, Park Nicollet

revoked the Policy and forced Dr. Hamann to continue to take OB night call under threat of a salary reduction. Park Nicollet billed its patients and was compensated for each OB night call Dr. Hamann took after attempting to exercise the Policy. Park Nicollet was enriched because it profited from Dr. Hamann's services in taking OB night call when he was no longer required to do so, and it failed to pay him anything above his original compensation. In addition, in February of 2008, when Dr. Hamann stopped taking OB night call, Park Nicollet reduced Dr. Hamann's salary, and was thereby enriched by the money it saved each pay period by not paying Dr. Hamann his full rightful salary. Accordingly, Park Nicollet was unjustly enriched by its actions in denying Dr. Hamann his rights under the Policy, and such enrichment is ongoing.

CONCLUSION

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

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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 6,719 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: 5/12, 2010.



Michael E. Gerould