

NO. A10-658

State of Minnesota
In Supreme Court

Park Nicollet Clinic,

Appellant,

vs.

Arlyn A. Hamann, M.D.,

Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF THE ISSUE

Did the Court of Appeals correctly hold that, because a new cause of action for the recovery of wages accrues each time a payment of wages is due but not paid, the claims of Respondent Dr. Arlyn Hamann for lost wages are not time-barred under Minn. Stat. § 541.07(5)?

The District Court's Ruling: The District Court held that Dr. Hamann's claims were time-barred.

The Court of Appeals' Ruling: The Court of Appeals reversed and remanded, relying on established Minnesota case law, and correctly held that Dr. Hamann's wage claims were not time-barred because a new cause of action for the recovery of wages accrues each time a payment is due but not paid.

Most Apposite Authority:

Minn. Stat. § 541.07(5)

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)

STATEMENT OF THE CASE

Respondent, Arlyn A. Hamann, M.D. (“Dr. Hamann”) commenced this action against his now former employer, Park Nicollet Clinic (“Park Nicollet”), to remedy the wrong caused by Park Nicollet’s failure to honor its promises to him under its Length of Service Recognition Policy, commonly known as the Senior Physician Call Policy (the “Policy”). (ADD-31.)¹ Pursuant to the Policy, Park Nicollet promised Dr. Hamann that, if he met certain requirements, he would be exempt thereafter from taking late night obstetrics call (“OB night call”) without a corresponding reduction in his salary. In reliance on these promises, Dr. Hamann spent the next nine years practicing medicine exclusively at Park Nicollet, during which time he endured the physically and mentally taxing burden of OB night call. Dr. Hamann also forewent various professional and employment opportunities elsewhere in reliance on Park Nicollet’s promises.

Although Dr. Hamann fully performed his obligations under the Policy and loyally served Park Nicollet for over 35 years in total, Park Nicollet unilaterally revoked the Policy and denied Dr. Hamann the benefits it had promised him and on which he had relied for over nine years. As a result, Dr. Hamann was forced to continue to take OB night call, despite his mature age, under threat of a substantial reduction of his salary. Dr. Hamann was eventually compelled to stop taking OB night call for health reasons, and thereafter, Park Nicollet substantially reduced his salary. On or about November 2, 2009,

¹ References in this brief to Respondent’s Appendix will be in the form “R.APP. _.”
References to Appellant’s Addendum will be in the form “ADD- _.”
References to Appellant’s Appendix will be in the form “APP- _.”

Dr. Hamann commenced this 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. (R.APP. 1.) By 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 upon which relief can be granted as to his claim for unjust enrichment. (ADD-20-29.) Dr. Hamann timely filed an appeal of the District Court's Order. (R.APP 3; 4.) The Court of Appeals reversed the District Court's determination that Dr. Hamann's claims were time-barred and affirmed the District Court's dismissal of Dr. Hamann's unjust enrichment claim. (ADD-19.) Park Nicollet has now appealed from the Court of Appeals' decision reversing the District Court's dismissal of this action for failure to state a claim upon which relief may be granted.

STATEMENT OF FACTS

Until recently, Dr. Hamann was employed by Park Nicollet Clinic as a physician, practicing obstetrics and gynecology, primarily at its St. Louis Park clinic location. Dr. Hamann had been continuously employed by Park Nicollet in this capacity since 1974. (ADD-22.)

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

In 1995, Park Nicollet adopted a Length and Service Recognition Policy and disseminated a written copy of the Policy to all physicians in its Obstetrics/Gynecology Department. (ADD-22; 31.) The stated purpose of the Policy was “[t]o reward length of service at Park Nicollet Clinic.” (ADD-22; 31.) Thus, 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 continuity and help meet its physician staffing needs. Park Nicollet’s staffing needs include taking obstetrics call (“OB call”), which often occurred at night or before or after normal business hours. (ADD-22.) 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. (ADD-22-23.)

To be eligible to receive the benefits of the Policy, a physician had to meet four requirements: (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. (ADD-23; 31.) A physician who met those criteria “would be exempted from night call” and “would receive no salary reduction for not taking night call.” (ADD-23.) The Policy further provided that, after meeting the requirements, 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. (ADD-23.)

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. (ADD-23.) 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 and he relied on this promise. (ADD-23.) 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. (ADD-23.) OB night call is physically strenuous and exhausting work, psychologically difficult and draining, highly stressful, professionally challenging and very disruptive of normal life activities. (ADD-23.) The rigors and demands of OB night call are particularly difficult for senior physicians. (ADD-23.)

Dr. Hamann heavily relied on Park Nicollet's promises under the Policy that he would be exempt from taking OB night call without salary reduction. (ADD-23.) Although free to leave Park Nicollet and accept other professional and employment opportunities elsewhere, Dr. Hamann remained loyal to Park Nicollet and practiced continuously with Park Nicollet for over nine years after the Policy was adopted until he reached 60 years of age. (ADD-23-24.) During that time, he worked hard, and took OB call like the other physicians in the rotation. (ADD-24.) He endured the highly strenuous physical and mental demands of the job for years, all in reliance on Park Nicollet's promises under the policy. (ADD-23-24.)

Dr. Hamann's continuing reliance on Park Nicollet's promises was reasonable. Indeed, the Policy was first adopted in 1995 and was reaffirmed in 2002 as the formal Policy applicable to all physicians in the Department. (ADD-24.) During this significant period of reliance, Park Nicollet granted the benefits of the Policy to another physician

who had also met the requirements thereunder. Several years after the Policy was adopted, another physician in the Department, Dr. Edward Maeder, turned 60 and elected to exercise the Policy. (ADD-24.) Park Nicollet fulfilled its obligations to Dr. Maeder under the policy and exempted him from OB night call without reducing his salary. (ADD-24.)

Park Nicollet acknowledged that Dr. Hamann met all of the requirements of the Policy. In early 2004, several months before Dr. Haman turned 60, 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. (ADD-24.) At that time, the Department Chair told Dr. Hamann that he was entitled to the benefits of the Policy, but asked him to defer exercising his rights until April 2005 because several physicians in the Department were out on maternity leave and the Department would otherwise be short staffed. (ADD-24.) At this time, the Department Chair assured Dr. Hamann that he would be allowed to exercise the Policy in April 2005. (ADD-24.) In reliance 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. (ADD-24.)

Park Nicollet unilaterally revoked the policy after Dr. Hamann had fully performed all of its requirements and was fully eligible to receive its benefits. (ADD-25.) 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. (ADD-25.) Dr. Hamann was threatened with a substantial reduction in salary if he chose not to continue to take OB

night call. (ADD-25.) Faced with that threat, Dr. Hamann chose to continue taking OB night call, which he did until February 2008. (ADD-25.) 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. (ADD-25.)

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. (ADD-25.) Dr. Hamann never received the benefits that Park Nicollet promised to him and that he earned by over nine years of dedicated service to Park Nicollet under the Policy. (ADD-25.) Without any other avenue for recourse, Dr. Hamann filed this suit.

The District Court dismissed Dr. Hamann's claims as time-barred under the applicable statute of limitations. (ADD-1-9.) Relying on established Minnesota case law, the Court of Appeals reversed the District Court's dismissal and held that Dr. Hamann's claims were not time-barred because a contractual cause of action for unpaid wages arises each and every time a wage payment is due but not paid. (ADD-10-19.) Dr. Hamann's claims for breach of contract and promissory estoppels are the subject of this appeal.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

Upon review of a motion to dismiss pursuant to Minn. R. Civ. P. 12.02(e), the Court considers whether the complaint sets forth a legally sufficient claim for relief. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). It is immaterial whether or not the plaintiff can prove the facts alleged. *Id.* (citing *Royal Realty Co. v. Levin*, 69 N.W.2d 667, 670 (Minn. 1955)). Pleadings should be dismissed 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. *Id.* (citing *Northern States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963)). This Court reviews the District Court's decision *de novo*. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) citing *Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984) (“[A]n appellate court need not give deference to a trial court’s decision on a legal issue”). The Court must consider only the facts alleged in the Complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party. *Bodah*, 663 N.W.2d at 553, citing *Marquette Nat’l Bank v. Norris*, 270 N.W.2d 290, 292 (Minn. 1978).

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT DR. HAMANN’S CLAIMS FOR NONPAYMENT OF WAGES WERE NOT BARRED BY THE STATUTE OF LIMITATIONS.

The Court of Appeals correctly concluded that Dr. Hamann’s claims for breach of contract and promissory estoppel based on the nonpayment of wages were not barred by

the applicable statute of limitations. Both of Dr. Hamann's claims are subject to a three-year statute of limitations under Minn. Stat. § 541.07(5). Because Park Nicollet's actions constitute a series of discrete breaches of the Policy, Dr. Hamann may recover for any breach occurring within the three years preceding the commencement of this action and any breaches occurring thereafter.

A. The Applicable Statute of Limitations.

It is undisputed that the statute of limitations set forth in Minn. Stat. § 541.07(5) applies to the claims at issue. Minnesota law provides a two-year statute of limitations for recovery of wages but extends the limitations period to three years when the conduct in question is willful. *Id.* Although Dr. Hamann contends that Park Nicollet's actions were willful, thus invoking the three year statute, the District Court did not decide which limitations period applies to this case. Regardless, Dr. Hamann's claims fall within both the two and three-year statute of limitations periods because Park Nicollet's actions amount to a series of discrete breaches of the Policy, each of which gives rise to a new cause of action.

B. The Court of Appeals Correctly Determined Under Established Minnesota Law that a Contractual Cause of Action for Unpaid Wages Arises Each Time a Payment is Due but Not Paid.

Park Nicollet asserts that Dr. Hamann's claims for nonpayment of wages accrued only once, in 2005, when Park Nicollet told Dr. Hamann that the Policy was no longer in effect. This conclusion misstates Minnesota law regarding the accrual of claims for the recovery of wages. Park Nicollet bases its argument on the general law applicable to the accrual of claims for breach of contract, namely, that a cause of action for breach of

contract accrues on the breach of terms of the contract, even if damages resulting from the breach do not occur until sometime afterwards. *See Guercio v. Production Automation Corp.*, 664 N.W.2d 379, 387 (Minn. Ct. App. 2003). However, Minnesota courts have expressly distinguished the accrual of claims for nonpayment of wages from the accrual of other types of contract claims. *Id.* (“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); *McGoldrick v. Datatrak Intern., Inc.*, 42 F.Supp.2d 893 (D. Minn. 1999) (when the underlying claim is based on an ongoing nonpayment of wages, the cause of action accrues separately each time a payment is due but not paid). Thus, pursuant to established Minnesota law, a contractual cause of action for unpaid wages arises each and every time a wage payment is due but not paid. *Levin v. C.O.M.B.*, 441 N.W.2d 801, 803 (Minn. 1989); *Guercio*, 664 N.W.2d at 387; *McGoldrick*, 42 F.Supp.2d at 898.

Accordingly, under Minnesota law, when an employee is put on notice that his 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 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. Dr. Hamann rightfully chose the latter.

C. Park Nicollet Mischaracterizes its Actions as a Single Breach of Contract When, in Reality, They Constitute a Series of Discrete Breaches Under the Policy.

As previously established, a contractual cause of action for lost wages arises each time a payment is due but not paid. *See Levin v. C.O.M.B. Co.*, 441 N.W.2d 801, 803 (Minn. 1989). The problem with Appellant's argument is that it treats its wrongful conduct as a single or absolute breach of contract, rather than what it really is: a series of discrete breaches of the Policy occurring each and every time Park Nicollet failed to provide Dr. Hamann the compensation he was promised under the Policy. Park Nicollet's obligations were ongoing in nature as long as Dr. Hamann was employed. They were breached each pay period during which Dr. Hamann met all the requirements, but did not receive the compensation promised.

For example, suppose Dr. Hamann did not meet the Policy's requirements during a given pay period. (In addition to meeting the four basic criteria, Dr. Hamann was expected to continue obstetric practice and take a proportionate number of weekday and weekend call days per month, a proportionate number of holiday day calls and night time back-up call. (ADD-31.) In that case, Park Nicollet would have no obligation to compensate him for that period and likewise Dr. Hamann would not be entitled to the compensation under the Policy for that period. If during the next pay period, however, Dr. Hamann met all the continuing expectations, Park Nicollet would be obligated to provide the benefits. Thus, it simply defies common sense to characterize Park Nicollet's

wrongful actions as a single or absolute breach of contract. Clearly, Park Nicollet's failure to provide to Dr. Hamann the benefits he earned constitutes a series of discrete breaches of the Policy and should be treated as such.

1. Park Nicollet has Mischaracterized Dr. Hamann's Argument.

In an effort to further its argument that the Court of Appeals' decision was not supported by Minnesota law, Appellant mischaracterizes the argument Dr. Hamann made to both the District Court and the Court of Appeals as a "continuing breach theory."³ To be clear, Dr. Hamann never argued the existence of either an "ongoing breach" or "continuing breach" theory under Minnesota law. In his initial brief to the Court of Appeals, Dr. Hamann simply argued that, under Minnesota law applicable to wage-based claims, Park Nicollet has an ongoing obligation to perform pursuant to the terms of the Policy. In refusing to perform, Park Nicollet has repeatedly breached the contract on an ongoing basis. (APP. 14-16.) This argument was reiterated in Dr. Hamann's Reply Brief. (Hamann Appellate Reply Brief p. 5.) Stated Otherwise, Park Nicollet has committed a series of discrete breaches of the Policy, which occurred during each pay period in which Dr. Hamann met the Policy's requirements but was not compensated in accordance with the Policy. 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.

³ Although Appellant offered this same argument to the Court of Appeals, it referred to this argument as a "ongoing breach" theory instead of a "continuing breach theory." (R.APP. 17-19.)

2. Park Nicollet has Misapplied the Law of Anticipatory Repudiation.

Park Nicollet correctly cites the black-letter law of anticipatory repudiation, 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.) (R.APP. 17.) However, as it did before the Court of Appeals, Park Nicollet again mistakenly 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 of its argument. As such, Park Nicollet simply repeats its erroneous argument that in April 2005, when Park Nicollet notified Dr. Hamann that it refused to honor the terms of the Policy, its actions constituted an absolute breach of contract, even though the damages occurred later. This is faulty reasoning. Under Minnesota law a cause of action for the nonpayment of wages accrues each time a payment is due but not paid. Therefore, the April 2005 notification constitutes a repudiation of Park Nicollet’s prospective obligation to perform. *See Levin*, 441 N.W.2d at 804.

3. Relying on Established Minnesota Law, the Court of Appeals Properly Determined that Park Nicollet’s Actions in April 2005 Constituted a Repudiation of the Policy Rather Than a One-Time Breach of the Policy.

Contrary to Appellant’s assertion, the Court of Appeal’s decision is clearly supported by established Minnesota law governing claims for the nonpayment of wages. Relying on the principles of law set forth in *Levin*, the Court of Appeals found that Park

Nicollet's action in informing Dr. Hamann in April 2005 that the Policy would not be honored, even after Dr. Hamann had met all of its requirements, constituted a repudiation of the Policy. (ADD-15.) In so finding, the Court of Appeals properly rejected Appellant's argument that the only breach of the Policy was Park Nicollet's breach in 2005 of a then-existing duty. (ADD- 15.) After carefully examining the cases cited by both parties, particularly *Levin* and *Medtronic*, the Court of Appeals properly found that this case was governed by the legal principles established in *Levin*, as opposed to those applied in *Medtronic*. This Court should find likewise.

4. The Legal Principles Established in *Levin*, *Guerico* and *McGoldrick* Govern this Case.

In *Levin*, an employee sued his employer for breach of contract relating to unpaid commissions. 441 N.W.2d at 802. Under the contract, the employee was to receive an annual salary plus monthly commissions. *Id.* Two years later, the employer amended the compensation plan and ceased paying the annual commissions in subsequent years. *Id.* When the employee first inquired about the cessation of commission payments three years after the change in the compensation plan, the employer advised him that he would no longer receive commission payments. *Id.* 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, arguing in part that the claim was barred by the statute of limitations because the cause of action accrued when the first annual commission was not paid. *Id.* at 803. This Court disagreed, holding that the employee's claim was based on a series of breaches and repeated failures to pay and

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. This Court also held that, although the employer's renunciation and repudiation of the contract gave the employee the right to sue immediately, the employee could elect to sue based on any of the annual commission-payment due dates that fell within the two-year limitations period. *Id.*

As in *Levin*, the Court of Appeals found that Dr. Hamann's claims were not limited to compensation for a single pay period following Park Nicollet's repudiation of its policy. (ADD-15.) The Court of Appeals correctly found that, while Park Nicollet repudiated the Policy in April 2005, each ensuing pay period during which Park Nicollet failed to satisfy its obligations under the Policy constitutes a separate breach, like the employer's failure to make commission payments in *Levin*. (ADD-15.) The facts of this case are no different analytically than of *Levin*. Thus, Park Nicollet's argument that the Court of Appeals' decision was not supported by Minnesota law is without merit.

The facts of this case are also similar to those of in *Guerico* and *McGoldrick*. In *Guerico*, 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.

To the same 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. The facts of this case are similar to those in *Levin*, *Guerico*, and *McGoldrick*, and thus, ample Minnesota law exists that supports the Court of Appeals’ decision.

5. *Medtronic* and *Botten* are Distinguishable.

Park Nicollet’s reliance on *Medtronic, Inc. v. Shope*, 135 F.Supp.2d 988 (D. Minn. 2001) and *Botten v. Shorma*, 440 F.3d 979 (8th Cir. 2006) is misplaced, just as the Court of Appeals opined. Contrary to the present case, neither *Medtronic* nor *Botten* involve a continuing obligation of performance on the part of the employer nor a series of discrete breaches by the employer. In both *Medtronic* and *Botten* the employer had an existing obligation only, and, once breached, the respective employee’s cause of action accrued.

In *Medtronic*, the employee sued his employer for canceling stock certificates issued in the employee’s name as an incentive to stay with the company. 135 F.Supp.2d

988. The certificates granted normal stock ownership rights but restricted the right to transfer the stock for five years. *Id.* at 989. Before the stock was transferred to the employee, the employee resigned and the employer canceled the stock certificates. *Id.* The employee waited roughly five years before requesting the employer to honor the certificates. The employer brought a declaratory action seeking a determination that the statute of limitations barred further rights under the certificates. *Id.* at 990. Relying on *Levin*, the employee argued that his claims were not barred. *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.* The Court also found that the employee’s right to vote the shares and receive dividends were present rights that were lost when the shares were cancelled. *Id.* The single, absolute breach in *Medtronic* is clearly distinguishably from the series of discrete breaches that occurred in both *Levin* and the present case.

In *Botten*, the employee was owed compensation by his employer at the time the employer merged with another company. 440 F.3d 979. The new company executed an agreement to assume liability for the compensation owed to the employee 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 *Medtronic* and *Botten*. First, in both *Medtronic* and *Botten*, there was only a present contractual obligation as opposed to an ongoing or renewing obligation. In *Medtronic*, the employer issued stock certificates and agreed to hold them in trust until the employee's rights in the certificates vested. In *Botten*, the plaintiff's new employer contracted to pay the compensation owed to him by his previous employer. In the present case however, Park Nicollet had a present *and* continuing obligation to Dr. Hamann. Park Nicollet was required to perform under the Policy during each and every pay period in which Dr. Hamann worked for Park Nicollet and met all the Policy's requirements.

Second, in both *Medtronic* and *Botten*, there was only one breach upon which the cause of action accrued. In *Medtronic*, the cause of action accrued when the employer cancelled the plaintiff's option. In *Botten*, the cause of action accrued when the employer failed to pay. In the present case, however, multiple breaches exist upon which Dr. Hamann's causes of action accrued. Park Nicollet breached the Policy each and every pay period that it failed to compensate Dr. Hamann in accordance with the Policy after Dr. Hamann had met all of the requirements. Accordingly, *Medtronic* and *Botten* are inapposite, and Park Nicollet's reliance on them is misplaced.

D. It is Disingenuous for Park Nicollet to Argue that Public Policy Should Allow it to Avoid all Obligations Under a Policy it Unilaterally Drafted and Implemented.

Park Nicollet attempts to hide behind a distorted view of public policy to avoid its obligations under a contract that it drafted and implemented. Park Nicollet argues that the limitations period will never expire so long as Dr. Hamann continues to work for Park Nicollet. 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: if Park Nicollet did not intend to obligate itself to perform under the terms of the Policy, it could have written the Policy otherwise. 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. 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.

Further, Park Nicollet misstates the law applicable to the running of the statute of limitations when it argues that “the limitations period for wage-related claims based on a change to an employer’s policy will never expire so long as the plaintiff continues to work for the same employer.” (Appellant’s Brief p. 8, 13.) While it is true that damages 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). At most, Park Nicollet's exposure for back pay will be limited to the unpaid wages that accrued within the two or three-years of preceding the commencement of the suit, depending on whether Park Nicollet's refusal to pay was willful or not.

Park Nicollet also incorrectly argues 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." (Appellant's Brief, p. 14.) This hypothetical situation is inapplicable to this proceeding. Dr. Hamann did not wait 20 years, he brought suit within five years of Park Nicollet's initial refusal to honor the policy.⁴ Further, Dr. Hamann's employment with Park Nicollet was terminated during the pendency of this litigation.

Finally, Park Nicollet's effort to analogize this case to the termination of a five year employment contract, in support of its argument that Dr. Hamann's position leads to absurd results, misses the mark. (See Appellant's Brief p. 13.) First, breach of contract for wrongful termination of employment is not the same as breach of contract in the context of an existing employment relationship. Second, the termination of an employment relationship is a single event, not a series of discrete breaches as occurred in this case. Once the employment relationship is terminated, the employee is no longer capable of earning benefits under the contract by continuing to work. For these reasons, Park Nicollet's argument that public policy mandates reversal of the Court of Appeal's decision is without merit.

⁴ 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 on October 30, 2009. (ADD 20-29.)

E. The Cases Cited by Appellant from Foreign Jurisdictions are Inapposite and not Persuasive; it was Proper for the Court of Appeals to Compare the Present Wage Case with Wage Cases Arising Under the FLSA and Similar State Statutes.

In a further effort to support its public policy argument, Park Nicollet criticizes the Court of Appeals for referring to cases dealing with claims under the Fair Labor Standards Act (“FLSA”) and similar state wage and hour statutes. (Appellant’s Brief p. 16.) This argument is misguided. For instance, according to Park Nicollet’s own argument, the FLSA applies to wage claims in which “an employee ... has in fact performed work for which he was improperly compensated.” (Appellant’s Brief p. 16-17), (citation omitted). That is exactly what occurred in the present case. For over 20 years, Dr. Hamann worked as a dedicated physician for Park Nicollet, the last nine years under an established Policy that entitled him to valuable compensation. By reason of Park Nicollet’s breaches of the Policy, Dr. Hamann has not received the compensation and benefits he was promised. Effectively, his burden is to show, as in FLSA cases, that he performed work and met various requirements for which he was improperly compensated under the Policy. Therefore, it was proper for the Court of Appeals to compare the present wage recovery case to wage recovery cases under the FLSA.

Park Nicollet also cites a short and peculiar list of cases from foreign jurisdictions to support its argument, none of which are binding on this Court or persuasive, given the distinct facts of this case. (Appellant’s Brief p. 15-16.) The only pertinent information to take away from them is that the determination of whether an employer’s breach of contract constitutes a single breach or a series of discrete breaches is a very fact-specific

inquiry, one which the Minnesota Court of Appeals has already thoughtfully and correctly made in this case.

Moreover, Park Nicollet's reliance on *Snortland v. State*, 615 N.W.2d 574 (N.D. 2000) is misplaced for another reason. A careful review of the cases cited by Park Nicollet further reveals that other North Dakota courts have declined to follow the reasoning applied in *Snortland*, on facts that are more akin to the present case than those in *Snortland*. For instance, in *Rdo Foods Co. v. United Brands Intern., Inc.*, 194 F.Supp.2d 962, 970-71 (D.N.D. 2002), an employee brought suit against his employer for breach of a management agreement under which the employee was to receive an annual management fee. The *Rdo* court concluded that the employer's reliance on *Snortland* was misplaced because the breach in *Snortland*, was a single, one-time event. *Id.* at 970 citing *Snortland*, 615 N.W.2d at 577. Utilizing reasoning akin to that used by the Court of Appeals in this case, the federal District Court found that each year the employee was not paid according to the terms of the management agreement, a new cause of action for breach of contract arose, each with its own statute of limitations period. *Id.* at 971.

Likewise, the Court in *Tull v. City of Albuquerque*, also performed a fact-specific analysis and determined that the specific facts and claims asserted by the plaintiffs in that case were more analogous to the single-wrong cases than to the continuing-wrong cases. 120 N.M. 829 (N.M. Ct. App. 1995). Significantly however, the *Tull* Court recognized that "[t]he Plaintiffs' continuing wrong theory has been applied in a number of cases involving contracts that require periodic payments, including some cases arising in the employment context." *Id.* at 1011 (citations omitted). Thus, Park Nicollet grossly

overstates its case when it claims that “other jurisdictions have recognized the pernicious consequences of endorsing Dr. Hamann’s continuing breach theory” (Appellant’s Brief p. 15.)

Most significantly, courts from many other jurisdictions, including those from which Park Nicollet cited cases, have overwhelmingly adopted reasoning similar to that applied by Court of Appeals in this case. *See e.g., Cook v. U.S.*, 855 F.2d 848, 851 (Fed. Cir. 1988) (noting the usual rule that a claim for unpaid overtime under the FLSA accrues at the end of each pay period when it is not paid); *Beebe v. United States*, 640 F.2d 1283, 1292 (Fed. Cl. 1981) (to the same effect); *Hodgson v. Behrens Drug Company*, 475 F.2d 1041, 1050 (5th. Cir. 1973) (to the same effect); *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 993 n.44 (9th Cir. 2007) (discussing similar standard under California statute of limitations); *Hosking v. New World Mortg., Inc.*, 602 F. Supp.2d 441, 446 (E.D.N.Y. 2009) (to the same effect); *Rdo*, 194 F.Supp.2d at 970-71 (D.N.D. 2002) (declining to follow *Snortland* and applying reasoning similar to Minnesota Court of Appeals to a breach of a management agreement); *Hageland Aviation Servs., Inc. v. Harms*, 210 P.3d 444, 449 (Alaska 2009) (discussing similar standard under Alaska wage and hour Act and noting that “a cause of action for unpaid overtime accrues at the end of each pay period in which overtime is due”); *Garner v. State, Dept. of Educ.*, 122 Haw. 150 (Haw. Ct. App. 2009) (holding that the statute of limitations applicable to periodic pay breach of contract claims begins to run on each paycheck as it becomes due); *City of Carlsbad City of Carlsbad v. Grace*, 966 P.2d 1178, 1182 (N.M. Ct. App. 1998) (holding that each monthly overpayment of royalties constitutes a separate act and the statute should be

calculated as expiring three years from the date of each payment; distinguishing *Tull v. City of Albuquerque*, 120 N.M. 829); *Hart v. International Tel. & Tel. Corp.*, 546 S.W.2d 660 (Tex. App. 1977) (finding that plaintiff had a separate cause of action for each quarter of the year in which commissions were earned but not paid under verbal employment contract).

The list of jurisdictions applying reasoning similar to that applied by the Minnesota Court of Appeals in this case could go on indefinitely. However, it is not necessary for this Court to venture outside Minnesota to decide the issue. This Court has already clearly established Minnesota's position with regard to the accrual of wage claims in *Levin*, *Guercio* and *McGoldrick*. Pursuant to established Minnesota law, a contractual cause of action for lost wages arises each time a payment is due but not paid. *Id.* This is all the persuasive case law that this Court needs to decide this case.

CONCLUSION

The Court of Appeals correctly held that Dr. Hamann's claims for breach of contract and promissory estoppel were not time-barred by the statute of limitations because a new cause of action for the recovery of wages accrues each time a payment of wages is due but not paid. Accordingly, this Court should affirm the ruling of the Court of Appeals and remand this case for further proceedings.

Respectfully submitted,

MOSS & BARNETT
A Professional Association

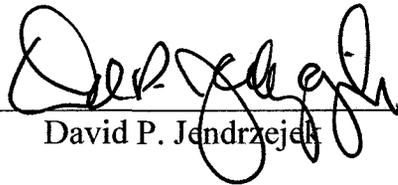
Dated: May 16, 2011.

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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 6,582 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.

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