

NO. A07-360

State of Minnesota
In Court of Appeals

Michelle Kunza,

Plaintiff/ Appellant,

vs.

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

Defendants/ Respondents.

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE ISSUES¹

- I. Did the district court err when it found that Appellant Michele Kunza breached the Agreement to Toll Statute of Limitations by commencing this lawsuit?**

The district court granted Respondents' motion for summary judgment.

Apposite Cases:

Brothers Jurewicz, Inc. v. Atari, Inc., 296 N.W.2d 422 (Minn.1980)

Employers Mut. Liab. Ins. Co. of Wis. v. Eagles Lodge of Hallock, Minn., 282 Minn. 477, 165 N.W.2d 554 (1969)

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Apple Valley Red-E-Mix, Inc. v. Mills-Winfield Engineering Sales, Inc., 436 N.W.2d 121 (Minn. Ct. App. 1989)

¹ Respondent St. Mary's Regional Health Center suggests in its statement of the case that an issue exists as to whether Ms. Kunza has appealed from a non-appealable order. (Statement of the Case of Respondent St. Mary's Regional Health Center ¶ 5(A).) Had St. Mary's Regional Health Center bothered to read this Court's Order dated November 21, 2006, St. Mary's Regional Health Center would have known that this Court granted Ms. Kunza the right to appeal the August 10th judgment "after entry of a judgment ruling on the requests for attorney fees and costs and disbursements." (Order dated Nov. 21, 2006 at 3.) (Appellant's Appendix at 000069.) The district court entered judgment on the requests for fees, costs, and disbursements on January 18, 2007. (Order dated Jan. 18, 2007.) Although Ms. Kunza inadvertently neglected to include a copy of this judgment with her notice of appeal, this oversight has been corrected. Regardless, it is perfectly clear that Ms. Kunza's appeal is properly before this Court.

STATEMENT OF THE CASE

The Parties to this action entered into an Agreement to Toll Statute of Limitations (“Tolling Agreement”) in mid-August 2004 in order to facilitate settlement talks between the parties without involving an administrative agency or the court. In the Tolling Agreement, Appellant Michelle Kunza promised “not to sue and file a Charge” during the term of the Tolling Agreement. The Tolling Agreement did not limit the rights of the parties after the agreement was cancelled.

Respondent Wade Wernecke (“Wernecke”) cancelled the Tolling Agreement on September 22, 2004. Ms. Kunza served a Summons and Complaint on Respondents on October 1, 2004, asserting claims under Minn. Stat. § 363A.01 *et. seq.*, the Minnesota Human Rights Act (“MHRA”), for Sexual Discrimination, Sexual Harassment, Aiding and Abetting, Retaliation/Reprisal and Aiding and Abetting Retaliation/Reprisal. Ms. Kunza also brought claims under Minnesota common law for Breach of Contract, Negligent Hiring/Negligent Supervision and Negligent Retention, Negligent Infliction of Emotional Distress, Intentional Infliction of Emotional Distress, Assault and Battery, Defamation, and Vicarious Liability/Respondent Superior.

Over the course of litigation, Ms. Kunza voluntarily dismissed the following claims with prejudice: Aiding and Abetting, Breach of Contract, Defamation, Assault, and Intentional and Negligent Infliction of Emotional Distress. The claims of Sexual Discrimination and Sexual Harassment, Retaliation/Reprisal, Negligent Hiring, Negligent Supervision and Negligent Retention, Battery, and Respondent Superior remained. In moving for summary judgment on Ms. Kunza’s claims, both Respondents—St. Mary’s

Regional Health Center (“SMRHC”) and Wernecke—alleged that Ms. Kunza breached the Tolling Agreement. The District Court for the Seventh Judicial District, Hon. John E. Pearson presiding, found that Ms. Kunza breached the Tolling Agreement and granted Respondents’ motion for summary judgment. Therefore, Ms. Kunza’s remaining claims were dismissed without prejudice on August 10, 2006.² Final judgment was entered on January 18, 2007.

STATEMENT OF THE FACTS

Appellant Michelle Kunza was a ward clerk in the emergency department of Respondent SMRHC and worked with Respondent Wernecke, an emergency-room physician at SMRHC.³ (Appellant’s Appendix (hereinafter “A”) at 000019.) During her employment with SMRHC, Ms. Kunza was subjected to a barrage of sexually offensive behavior. Between April 2002 and June 2004, Wernecke made numerous sexually suggestive comments to Ms. Kunza, touched Ms. Kunza in inappropriate ways, suggested Ms. Kunza should have sex with him, and asked Ms. Kunza about her dating habits and

² Continuing to raise inane issues, Respondent SMRHC intimates that although Kunza may appeal the district court’s August 10th judgment, the August 10th order directing entry of that judgment is not reviewable. (Statement of the Case of SMRHC ¶ 5(B).) While this sort of linguistic distinction may score points on a law school exam, it lacks credence here. If this Court upholds the district court’s judgment, then this “issue” is moot. On the other hand, if this Court reverses the district court’s judgment, then one must wonder how the district court’s order could remain in effect. Obviously, there can be no valid order entering an invalid judgment. Thus, the district court’s August 10th judgment and order are inextricably intertwined for purposes of this Court’s review.

³ Because the district court did not discuss the underlying claims brought by Ms. Kunza, the circumstances giving rise to this lawsuit are not at issue. Should the Court wish to familiarize itself with the facts surrounding Ms. Kunza’s employment with SMRHC, those facts can be found in Ms. Kunza’s memorandum opposing summary judgment which is found at A. 0018.

sex life. (A. 21-26.) On August 19, 2004, Ms. Kunza's employment with SMRHC ended due to SMRHC's failure to provide Kunza an alternative to working with Wernecke. (A. 000039.)

In August 2004, Ms. Kunza, SMRHC, and Wernecke entered into the Tolling Agreement which tolled the statute of limitations on Kunza's claims while the parties engaged in settlement negotiations. (A. 000012). The Tolling Agreement provided in pertinent part that:

4. Ms. Kunza promises not to sue and file a Charge during the term of this Tolling Agreement;
5. That either party may cancel the Tolling Agreement upon short notice, i.e., ten days; . . .

(Id. ¶¶ 4-5.) On September 22, 2004, Wernecke cancelled the Tolling Agreement, via a faxed letter from his counsel. (A. 000014.) This letter consisted of a single sentence. "On behalf of Dr. Wernecke, we hereby *cancel and terminate* the Agreement to Toll Statute of Limitations which was executed in connection with this matter."

(Id.)(emphasis added). That same day, SMRHC's counsel mailed a notice of cancellation to Kunza. SMRHC's letter stated:

Pursuant to Section 5 of the Agreement to Toll Statute of Limitations, St. Mary's Regional Health Center hereby gives notice of cancellation of the Agreement, effective ten days from Friday, September 24th.

To confirm our telephone conversation earlier this afternoon: It is Ms. Kunza's intent to commence a lawsuit by serving, but not filing, a summons and complaint. I have agreed to accept service on behalf of the hospital.

(A. 000015.)

Ms. Kunza thereafter served a summons and complaint on SMRHC and Wernecke. SMRHC's counsel signed an admission of service on October 1, 2004. (A. 000016.) Dr. Wernecke's counsel signed an admission of service on October 4, 2004. (A. 000017.) On June 13, 2006, Respondents moved for summary judgment. On August 10, 2006, the district court granted summary judgment on the theory that Wernecke's September 22, 2004, letter of cancellation was actually a notice of cancellation and that Kunza therefore breached the Tolling Agreement by commencing this action less than ten days after receiving Wernecke's letter. (A. 000010.)

ARGUMENT⁴

I. STANDARD OF REVIEW

On appeal, a grant of summary judgment is reviewed *de novo* and affirmed only where there is no genuine dispute of material fact and the district court did not err in its application of the law. Zip Sort, Inc. v. Commissioner of Revenue, 567 N.W.2d 34, 37

⁴ The proper application of the Tolling Agreement to Ms. Kunza's lawsuit is the only issue properly before this Court on appeal. Respondents may only seek review of the district court's judgment dismissing Kunza's claims without prejudice if that judgment may adversely affect Respondents. Minn. R. Civ. App. P. 106. However, the district court's granting Respondents' summary judgment motions did not adversely affect Respondents because the district court never determined, or even addressed, whether Kunza raised any genuine issues of material fact with respect to her claims against Respondents. See Otterson v. Schultz, 1989 WL 7603, * 2 (Minn. Ct. App., Feb. 7, 1989) (concluding that denial of a motion for summary judgment did not adversely affect the respondent because the district court did not actually decide any factual issues). Absent the requisite adverse effect, Respondents may not seek review by this Court. As such, it is not the role of this Court to make the initial determination as to whether genuine issues of material fact exist on Ms. Kunza's underlying claims. In the event of a reversal of the district court's order granting summary judgment, this Court should remand this action for further consideration of Ms. Kunza's claims. A copy of Otterson is attached to Appellant's Appendix at page 63.

(Minn. 1997). If there are no genuine issues of material fact, the review is limited to determining whether the district court erred in its application of the law. Prior Lake Am. v. Mader, 642 N.W.2d 729, 735 (Minn. 2002). No deference is given to the district court's application of the law. Id.; Gramling v. Memorial Blood Ctrs., 601 N.W.2d 457, 459 (Minn. Ct. App. 1999). The evidence must be viewed in the light most favorable to the party against whom summary judgment was granted, i.e., Ms. Kunza. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993).

The Tolling Agreement is a contract between Ms. Kunza and Respondents. Interpretation of a written contract is a question of law reviewed *de novo*. Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn., 664 N.W.2d 303, 311 (Minn. 2003); Turner v. Alpha Phi Sorority House, 276 N.W.2d 63, 66 (Minn. 1979). The fundamental approach to construing contracts is to allow the intent of the parties to prevail. Midway Center Assoc. v. Midway Center, Inc., 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975); Koch v. Han-Shire Investments, Inc., 273 Minn. 155, 165, 140 N.W.2d 55, 62 (1966). The language found in a contract should normally be given its plain and ordinary meaning. Turner, 276 N.W.2d at 67. However, when a contract bears more than one reasonable interpretation, the ambiguity should be resolved against the party who drew the contract. Empire State Bank v. Devereaux, 402 N.W.2d 584, 587 (Minn. App. 1987); Telex Corp. v. Balch, 382 F.2d 211, 217 (8 Cir. 1967) (applying Minnesota law). Importantly, the terms of a contract should not be construed so strictly that they lead to a harsh or absurd result. Employers Mut. Liab. Ins. Co. of Wis. v. Eagles Lodge of Hallock, Minn., 282 Minn. 477, 479-80, 165 N.W.2d 554, 556 (1969).

II. THE DISTRICT COURT COMMITTED REVERSIBLE ERRORS OF LAW IN INTERPRETING THE PARTIES' TOLLING AGREEMENT

- A. **The Tolling Agreement cannot bar Ms. Kunza's lawsuit because the lawsuit was commenced after the Tolling Agreement was cancelled on September 22, 2004.**

The Tolling Agreement was terminable at will by either party. (A. 000012, ¶ 5.)

The only requirement was that the terminating party provide short notice, i.e., ten days.

Id. As the district court noted, "Dr. Wernecke cancelled the agreement, via letter from his counsel, on the 22nd of September, 2004." (A. 000008.) From the record before the district court, it appears that Wernecke failed to previously provide the requisite ten-day notice of cancellation. However, the fact that Wernecke's cancellation was in breach of the Tolling Agreement's notice requirement does not change the fact that the Tolling Agreement was cancelled effective September 22, 2004.⁵ Therefore, Ms. Kunza's commencement of this action subsequent to her receipt of Wernecke's cancellation letter did not, and could not, breach the Tolling Agreement.

The district court, without explanation or justification, treated Wernecke's letter as a notice of cancellation, instead of a cancellation. This construction is simply wrong. As an initial matter, the district court's interpretation of Wernecke's letter can hardly be said to be viewing the letter in the light most favorable to Ms. Kunza. The full text of Wernecke's letter states, "On behalf of Dr. Wernecke, we *hereby cancel and terminate*

⁵ Kunza could, of course, pursue a claim for breach of the Tolling Agreement's notice requirement. However, Kunza was not required to bring this claim. See Minn. R. Civ. P. 18.01 (stating that a party *may* bring as many claims as the party has against the opposing party). Kunza's choice not to bring this claim does not change the fact that Wernecke breached the notice requirement when he cancelled the Tolling Agreement prior to Ms. Kunza's commencing this lawsuit.

the Agreement to Toll Statute of Limitations which was executed in connection with this matter.” (A. 000014) (emphasis added). The plain language of Wernecke’s letter states that the agreement is cancelled, not that it will be canceled. A reasonable fact finder could easily reach this conclusion. As such, summary judgment was inappropriate. This conclusion is reinforced when one considers the lanaguge used by SMRHC. SMRHC’s notice of cancellation states, “[SMRHC] *hereby gives notice of cancellation* of the Agreement, effective ten days from Friday, September 24th.” (A. 000015) (emphasis added). Clearly, the phrase “hereby cancel and terminate” expresses an immediacy that the phrase “hereby gives notice of cancellation” does not.

The district court provided absolutely no reason for construing Wernecke’s September 22nd letter as a notice of cancellation. The plain meaning of the phrase “hereby cancel and terminate” is the exact opposite of the meaning applied to that phrase by the district court. The September 22nd letter unambiguously provides that the Tolling Agreement ceases to have any binding force. The district court apparently acknowledged as much when it wrote that Wernecke’s letter cancelled the Tolling Agreement on September 22, 2004. (A. 000008.) Two pages later however, the court simply asserts that Kunza commenced this lawsuit less than ten days after notice of cancellation. (A. 000010.) The district court failed to explain how or why it reached a conclusion that flies in the face of the plain meaning of Wernecke’s letter—a meaning that was recognized by the district court’s own opinion. The purpose of appellate review is to determine, based on the evidence before the district court, whether the district court committed an error, not to try the case *de novo*. Loth v. Loth, 227 Minn. 387, 392, 35 N.W.2d 542, 546

(1949). The district court offered no evidence or reasoning to support its decision to override the plain meaning of Wernecke's letter. Cf. Turner, 276 N.W.2d at 67 (contract language should be given its plain and ordinary meaning). This error requires reversal of the district court's grant of summary judgment.⁶

Wernecke's cancellation letter was effective with respect to Kunza and SMRHC. The plain language of the Tolling Agreement gives the right of cancellation to "either party." (A. 000012 ¶ 5). The Tolling Agreement defines the parties as Michelle Kunza ("Kunza") and St. Mary's Regional Health Center and Dr. Wade Wernecke ("Hospital and Wernecke"). (A. 000012.) Because Wernecke is one of the parties, he had the power to cancel the Tolling Agreement, which he did on September 22, 2004. (A. 000014.)

An unambiguous contract may not be supplemented with additional terms. Apple Valley Red-E-Mix, Inc. v. Mills-Winfield Engineering Sales, Inc., 436 N.W.2d 121, 123 (Minn. Ct. App. 1989). Here, the district court explicitly found that the Tolling Agreement was not ambiguous (A. 000008) and, by implication, not susceptible to supplementation. Nevertheless, the court granted summary judgment based on the determination that Ms. Kunza did not wait ten days after receiving notice of cancellation before commencing this lawsuit. (A. 000011.) Ms. Kunza, however, was not required to wait ten days (or any days for that matter) because, as noted above, Wernecke had

⁶ Ironically, the district court laments having to dismiss "a complaint on what could be labeled a minor 'technicality.'" (A. 000011.) This statement follows on the heels of the district court's rejection of Ms. Kunza's somewhat technical argument against summary judgment. (A.000008-000009.) Given that the standard of review on summary judgment favors the non-moving party, it is intellectually inconsistent for the district court to rely upon the technicality that favors Respondents, instead of the technicality that favors Ms. Kunza.

already cancelled and terminated the Tolling Agreement. The district court essentially extended the duration of the Tolling Agreement for ten days *after* the date of cancellation. The Tolling Agreement's termination clause in no way supports this result: The requirement of ten-day notice prior to cancellation clearly does not create a ten-day grace period after cancellation. Importantly, the Tolling Agreement does not grant either party any rights after the Tolling Agreement has been cancelled, nor does it place any post-cancellation restrictions on Kunza's right to bring this lawsuit. (A. 000012)

In clear and unambiguous language, Wernecke cancelled the Tolling Agreement on September 22, 2004. The Tolling Agreement just as clearly and unambiguously did not bar Ms. Kunza's post-cancellation commencement of this lawsuit. The district court erred by supplementing the unambiguous terms of the Tolling Agreement to include a provision that extended Ms. Kunza's obligation not to sue for ten full days past the date the Tolling Agreement was cancelled. The district court erred in granting summary judgment. The decision below must be reversed.

B. Ms. Kunza did not breach the Tolling Agreement because she did not sue and file a charge.

In the Tolling Agreement Ms. Kunza agreed "not to sue *and* file a charge during the term of this tolling agreement." (A. 12 ¶ 4) (emphasis added). The word "and" is conjunctive. Chisholm v. Davis, 207 Minn. 614, 617-18, 292 N.W. 268, 270 (1940); Third New International Dictionary 80 (2d ed. 2002). Thus, in order to violate the terms of the Tolling Agreement, Ms. Kunza would need to both sue and file a charge during the term of the Tolling Agreement. Ms. Kunza has never filed a charge with the Equal

Employment Opportunity Commission or the Minnesota Department of Human Rights. (A. 000041.) Indeed, not only has Ms. Kunza never filed a charge, she did not file a complaint with the district court until October 2005, over a year past the time encompassed by the Tolling Agreement.

The district court ignored the plain language of the Tolling Agreement and read the word “and” as the disjunctive “or.” The district court justified disregarding the plain language by saying that “[t]he court does not believe it was the intent of the parties to allow [Ms. Kunza] to either sue or file a charge, but not both.” (A. 000009.) The district court did not explain how this belief is consistent with viewing the Tolling Agreement, as the district court was required, in a light most favorable to Ms. Kunza. Indeed, the district court’s belief is misplaced. The Tolling Agreement was negotiated by sophisticated attorneys for both parties. This fact weighs against implying terms into the Tolling Agreement. See Plaza Associates v. Unified Development, Inc., 524 N.W.2d 725, 729 (Minn. Ct. App. 1994) (“The active and extensive negotiation of a lease by sophisticated parties also weighs against finding an implied covenant in a lease since the parties were free to include whatever provisions they wished.”) (citation and quotations omitted). The district court chose to rest its conclusion on the preamble of the Tolling Agreement. However, as the district court noted, the preamble is not a term of the Tolling Agreement. (A. 000009.) At most the language in the preamble creates an ambiguity as to the meaning of the terms of the Tolling Agreement. If the Tolling Agreement is ambiguous, Respondents are not entitled to summary judgment. Donnay v. Boulware, 275 Minn. 37, 45, 144 N.W.2d 711, 716 (1966) (holding summary judgment is

inappropriate when the terms of a contract are ambiguous or reasonably susceptible to more than one interpretation). Therefore, the preamble does not provide a good reason to alter the plain meaning of the actual terms negotiated by sophisticated counsel.

C. Even if Ms. Kunza did breach the Tolling Agreement, dismissal of her lawsuit is not the appropriate remedy.

1. A party cannot benefit from its own breach.

“A party who first breaches a contract is precluded from successfully claiming against the other party.” Carlson Real Estate Co. v. Soltan, 549 N.W.2d 376, 379 (Minn. Ct. App. 1996); see also Space Ctr., Inc. v. 451 Corp., 298 N.W.2d 443, 451 (Minn. 1980) (first party to breach an option contract and purchase agreement could not use other party’s subsequent breach to avoid liability). For this rule to apply, there must be an initial breach, and the subsequent breach must result directly from the initial breach. MTS Co. v. Taiga Corp., 365 N.W.2d 321, 327 (Minn. Ct. App. 1985). Such a situation applies here.

Wernecke breached the Tolling Agreement by canceling it without providing the required ten-day notice. Then, SMRHC’s attorney spoke with Ms. Kunza’s attorney and agreed to accept service on behalf of SMRHC. (A. 000015.) Even if Ms. Kunza somehow breached the Tolling Agreement, which she did not, by subsequently filing suit, her breach directly resulted from Respondents’ initial breach. In other words, Ms. Kunza would not have filed suit if Wernecke had not cancelled the agreement and if SMRHC’s attorney had not agreed to accept service. Respondents cannot now hold Ms. Kunza accountable for her reasonable response to their initial breach.

2. Specific performance is a disfavored remedy.

Minnesota Courts, as with courts from other jurisdictions, follow the general rule of disfavoring specific performance. See, e.g., Metropolitan Sports Facilities Com'n v. Minn. Twins Partnership, 638 N.W.2d 214, 229 (Minn. Ct. App. 2002) (specific performance of leases is disfavored); Gibson v. McCraw, 332 S.E.2d 269, 274 (W. Va. 1985) (no specific performance of contracts to make a will); Victor Temporary Servs. v. Slattery, 482 N.Y.S.2d 623, 624 (N.Y.A.D. 1984) (non-compete agreement may only be specifically enforced if it is reasonable in scope and necessary to protect the employer's interests); accord Bennett v. Storz Broadcasting Co., 270 Minn. 525, 534-35, 134 N.W.2d 892, 899 (1965) (non-compete agreement must be reasonable and protect the interests of the employer). "With the passage of time, specific performance becomes disfavored." Bander v. Grossman, 611 N.Y.S.2d 985, 990 (N.Y. Sup. 1994). The presence of an adequate remedy at law weighs against specific performance. Barndt v. County of Los Angeles, 211 Cal.App.3d 397, 404 (Cal. App. 1989) (discussing specific performance of contracts for personal services).

The district court erred when it held that the remedy for Ms. Kunza's alleged breach of the Tolling Agreement was specific performance—i.e. that Ms. Kunza's lawsuit must be dismissed as barred by the Tolling Agreement. The Tolling Agreement itself does not specify a remedy for breach. (A. 000012.) The district court chose a

remedy that leads to the harsh result of dismissal.⁷ However, contract terms should not be construed so strictly that they lead to a harsh or absurd result. See Employers Mut. Liab. Ins. Co. of Wis., 282 Minn. at 479-80, 165 N.W.2d at 556. Granted, this is the remedy Respondents sought. However, this remedy is especially harsh and unjust when there are other remedies available, such as monetary damages for Respondents' litigation costs that would not have been incurred if Ms. Kunza had served her summons and complaint on October 5th instead of October 1st.

The district court's grant of summary judgment also contravened the law's primary objective of disposing of cases on their merits. See Dennie v. Metropolitan Med. Ctr., 387 N.W.2d 401, 404 (Minn. 1986). Ms. Kunza's chance to litigate the merits of her claims rests on this appeal. Granted, the district court's order allows Ms. Kunza to re-file her claims. However, with new litigation, Respondents can and will raise the previously unavailable defense of the statute of limitations as to Ms. Kunza's claims of sexual harassment and sexual discrimination under the MHRA. By the time a second final judgment is obtained, the time for appealing the district court's first judgment, i.e. this order, will have expired. See Minn. R. Civ. App. P. 104.01. Therefore, as a practical matter, the district court's judgment disposes of Ms. Kunza's claims without allowing for any chance of a hearing on the merits.

⁷ Ms. Kunza's chance to litigate the merits of her claims rests on this appeal. While the district court's order allows Ms. Kunza to re-file her claims, Respondents can and will raise the previously unavailable defense that Ms. Kunza's re-filed claims are barred by the statute of limitations.

Respondents naturally do not want any remedy other than specific performance. Presumably they cannot show any actual damages from Ms. Kunza's alleged breach. Respondents stand to lose handily if Ms. Kunza is permitted to proceed with her claims arising from Respondents' reprehensible behavior while Ms. Kunza was employed by SMRHC. Respondents have previously claimed that acceptance of this argument constitutes impermissible examination of the adequacy of the consideration supporting the Tolling Agreement. However, it is simply illogical to equate Respondents' lack of damages with the adequacy of consideration. Ms. Kunza does not contest that her foregoing of her right to sue and Respondents' tolling of the statute of limitations furnished adequate consideration to support the Tolling Agreement. Instead, Ms. Kunza believes that her filing a lawsuit a few days early did not impose any damages on Respondents and that absent damages; Respondents cannot obtain a remedy for breach of contract. See generally Despatch Oven Co. v. Rauenhorst, 229 Minn. 436, 447, 40 N.W.2d 73, 80 (1949) (affirming judgment against party who could demonstrate only nominal damages arising from an alleged breach of contract); Sloggy v. Crescent Creamery Co., 72 Minn. 316, 317-18, 75 N.W. 225, 226 (1898) (affirming dismissal of breach-of-contract claim where party could not demonstrate that damages arose from contract). It is well established that damages that are speculative, remote, or conjectural are not recoverable. Hornblower & Weeks-Hemphill Noyes v. Lazere, 301 Minn. 462, 467, 222 N.W.2d 799, 803 (1974).

Consider the example of a contract for the manufacturing of goods where the purchaser agrees to pay the manufacturer a fixed sum for each batch of goods produced.

If the manufacturer fails to produce the final batch, the purchaser will not be able to recover damages in a breach of contract claim unless the purchaser can show actual damages. The mere fact that the purchaser did not receive the final batch of product, which was part of the consideration for the contract, will not suffice to show damages because the purchaser was also relieved of the corresponding obligation to pay for the final batch of product. Thus, the purchaser must show some harm apart from the loss of part of the bargained-for consideration in order to sustain a damage claim for breach of contract.

Similarly here, Respondents cannot claim that the loss of a few days of immunity from Ms. Kunza's lawsuit constitutes damages *per se* because Respondents were simultaneously relieved of the corresponding obligation to toll the statute of limitations. Absent a showing of some other harm, Respondents cannot seek dismissal of this lawsuit as damages for the alleged breach of the Agreement. To date, Respondents have failed to provide any evidence of damages caused by their having to respond to Ms. Kunza's lawsuit a few days earlier than they believe the Agreement allowed.

3. Ms. Kunza substantially performed her obligation under the Tolling Agreement

The doctrine of substantial performance recommends denying Respondents' breach of contract defense. Granted, no party discussed the doctrine of substantial performance prior to the Court's granting summary judgment.⁸ See Johnson v. Jensen,

⁸ Ms. Kunza did discuss the doctrine of substantial performance with the district court in a letter requesting permission to file a motion to reconsider the summary judgment order. (A. 000065-66.)

446 N.W.2d 664, 665 (Minn. 1989) (litigants are generally required on appeal to argue the theory or theories presented to the court at trial). However, this fact does not bar the Court from considering the doctrine on appeal. It is well established that an appellate court has discretion to allow a party to proceed on a theory not raised before the lower court. Cohen v. Cowles Media Co., 479 N.W.2d 387, 390 (Minn. 1992) (citing Minn. R. Civ. App. P. 103.04 (appellate courts “may review any other matter as the interest of justice may require”)). Thus, on appeal in Cohen, the Minnesota Supreme Court allowed the plaintiff to argue a previously unmentioned promissory estoppel theory because 1) the theory was a variation of the contract theory presented in the lower courts and 2) the theory relied on the same evidence as the contract theory. Id. Ms. Kunza’s substantial performance argument meets these factors.

Substantial performance allows a party who performs all the essential requirements of a contract to enjoy the benefit of the bargain even though the performance entailed some trivial defects that are easily remedied. As the Minnesota Supreme Court explained:

[S]ubstantial performance means performance of all the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed, except for some slight and unintentional defects which can be readily remedied or for which an allowance covering the cost of remedying the same can be made from the contract price. Deviations or lack of performance which are either intentional or so material that the owner does not get substantially that for which he bargained are not permissible.

Ylijarvi v. Brockphaler, 213 Minn. 385, 390, 7 N.W.2d 314, 318 (1942). The doctrine generally applies to construction contracts, see, e.g., Material Movers, Inc. v. Hill, 316

N.W.2d 13, 18 (Minn. 1982), but the doctrine may be extended to non-construction contracts as well. Carlson v. Doran, 252 Minn. 449, 455, 90 N.W.2d 323, 327 (1958). The application of the doctrine depends upon the fact situation of each case, and the nature and extent of the nonperformance are important facts to consider. Paving Plus, Inc. v. Professional Investments, 382 N.W.2d 912, 915 (Minn. Ct. App. 1986). The issue of whether a contract has been substantially performed is a question for the finder of fact, unless the evidence is conclusive. Ylijarvi, 213 Minn. at 392, 7 N.W.2d at 319.

McKenzie v. Dunsmoor involved the performance of an agreement to provide elder care in exchange for real property. 114 Minn. 477, 131 N.W. 632 (1911). Mr. and Mrs. Dunsmoor executed to one Stephen Budd a warranty deed for their residence in exchange for Budd's promise to provide care and support and to pay medical and funeral expenses. 114 Minn. at 479, 131 N.W. at 632. After Budd's death, his widow (the plaintiff) continued to care for the Dunsmoors. However, after Mr. Dunsmoor also died, the plaintiff arranged for a new caretaker for Mrs. Dunsmoor. Id. Mrs. Dunsmoor, apparently displeased with the new arrangement, moved out. The plaintiff refused to continue caring for Mrs. Dunsmoor and also failed to pay for certain medical and funeral expenses incurred by Mrs. Dunsmoor. Id. The Court, however, found that the plaintiff was nevertheless entitled to the warranty deed under the doctrine of substantial performance. 114 Minn. at 479-80, 131 N.W. at 632-33. Specifically, the Court found that cancellation of the deed would be too drastic of a remedy considering the long-time performance by plaintiff and her husband. Id.

In the present case, the nature and extent of Ms. Kunza's alleged nonperformance is minimal. Ms. Kunza refrained from commencing her lawsuit throughout the entire period of settlement negotiations and for an additional nine days after Wernecke cancelled the Tolling Agreement. For all intents and purposes, Respondents enjoyed the full benefit of their bargain. Indeed, as previously noted, Respondents have yet to present any evidence to show they were damaged by Ms. Kunza's alleged breach. To the contrary, Respondents were willing participants in the commencement of this lawsuit. Wernecke cancelled the Tolling Agreement on September 22, 2004. (A. 000014.) SMRHC then sent Ms. Kunza's counsel a letter agreeing to accept service of the summons and complaint. (A. 000015.) Both Respondents signed admissions of service, which they were not required to do. (A. 000016-17.) If Respondents thought they had been denied the full benefit of their bargain, they should have objected or not signed admissions of service. They did neither. Therefore, Respondents must honor their obligation under the Tolling Agreement by allowing Ms. Kunza to proceed with her lawsuit. See, e.g., Old Mill Printers v. Kruse, 392 N.W.2d 621, 623-24 (Minn. Ct. App. 1986) (applying doctrine of substantial performance to require defendant to pay plaintiff for printing services rendered, despite the fact that the finished product was the wrong color, because defendant knew of the problem but failed to promptly rescind his contract with plaintiff).

Furthermore, upholding the district court's grant of summary judgment will lead to a drastic result because Respondents will now be able to assert a statute of limitations defense if Ms. Kunza re-files her claims. There is no reason to cut off Ms. Kunza's right

to prepare and present her case. See Krahn v. J. L. Owens Co., 138 Minn. 374, 375, 165 N.W. 129, 130 (1917) (“It is the purpose of our judicial system to give every man his day in court, to afford him a full and fair opportunity to prepare and present his case, and to the end that mistakes may be corrected, ample opportunity is afforded for a review”). The Tolling Agreement was only intended to bring a temporary halt to litigation. The Tolling Agreement was not designed to permanently bar a lawsuit, nor did Ms. Kunza release any of her claims by signing it. Allowing a temporary suspension of litigation to effectively serve as a permanent barrier to Ms. Kunza’s claims would confer upon Respondents a benefit for which they never bargained.

Respondents will likely argue that the injustice could have been resolved by Ms. Kunza voluntarily dismissing her lawsuit and re-filing it so as to avoid being barred by the Tolling Agreement. The fact that Ms. Kunza’s claims are perhaps now barred by the statute of limitations is, in their view, just an unfortunate result of Ms. Kunza’s failure to cure her breach. Assuming for the sake of argument, this view is correct, why should Ms. Kunza bear the burden of asserting Respondents’ contract rights on their behalf? Contract law has never required a breaching party to engage in such altruistic behavior. Here, Ms. Kunza believed her lawsuit was timely filed because Wernecke had cancelled the Tolling Agreement. If Respondents disagreed, they should not have allowed the allegedly improper litigation to proceed for a year and a half before they actively

expressed their disagreement.⁹ Summary judgment was not appropriate. The district court should be reversed.

III. RESPONDENTS SHOULD NOT BE PERMITTED TO SEEK DISMISSAL OF MS. KUNZA'S CLAIMS UNDER THE TOLLING AGREEMENT

There are two equitable doctrines that operate to divest Respondents of any remaining right to assert the Tolling Agreement as a bar to Ms. Kunza's prosecution of this lawsuit. Each doctrine is premised on the idea that Respondents' conduct throughout this litigation prevents them from now invoking the Tolling Agreement as their defense.

A. Respondents have waived their right under the Tolling Agreement.

Waiver is the voluntary relinquishment of a known right. Beck v. Spindler, 256 Minn. 543, 564, 99 N.W.2d 670, 684 (1959). A breach of contract claim will be waived when the aggrieved party fails to timely raise it and instead, acquiesces to, and participates in, the conduct alleged to be a breach. For example, in Brothers Jurewicz, Inc. v. Atari, Inc., the Minnesota Supreme Court held that a right to arbitrate under an arbitration agreement may be waived "if judicial proceedings based on that contract have been initiated and have not been expeditiously challenged on the grounds that disputes under the contract are to be arbitrated." 296 N.W.2d 422, 428 (Minn.1980). The Court reasoned that "[t]he plaintiffs . . . repudiated (the arbitration provision) by commencing this lawsuit and the defendants joined in the repudiation by answering to the merits

⁹ Indeed, Respondents have arguably abandoned their rights under the Tolling Agreement. See Section III(B).

without a demand for arbitration or a motion to stay the suit until arbitration could be had.” Id.

Here, the district court found Ms. Kunza breached the Tolling Agreement on October 1, 2004. (A. 000008.) Respondents had notice of the lawsuit and could have immediately filed a motion to dismiss based on their breach of contract defense. See Minn. R. Civ. P. 12.03. Instead, Respondents allowed the litigation to progress for almost two years—expending considerable resources on discovery—before actively asserting the defense at summary judgment. Respondents’ actions can hardly be considered timely or expeditious.

Of course, Respondents had good reason to keep silent about their breach of contract defense. Had they obtained a dismissal in 2004, Ms. Kunza would have been free to re-file her complaint. By prolonging this action, Respondents sought to ensure that the statute of limitations would run on Ms. Kunza’s sexual harassment claims, thereby allowing them to escape liability on a technicality rather than the merits of their defense. However, it is exactly this type of prejudicial conduct that contract law explicitly prohibits. See Community Partners Designs, Inc. v. City of Lonsdale, 697 N.W.2d 629, 634 (Minn. Ct. App. 2005) (“Action by the party seeking arbitration which is inconsistent with the right to arbitration is not enough to support a finding of waiver unless such action is accompanied by prejudice to the objecting party.”). Like the defendants in Atari, Respondents willingly participated in this lawsuit by, *inter alia*, signing acknowledgments of service (A. 000016-000017.), filing responsive pleadings,

and conducting discovery. In so doing, Respondents waived any claim that the filing of the lawsuit constituted a breach of the Tolling Agreement.

B. Respondents abandoned any rights under the Tolling Agreement.

“[A] contract will be treated as abandoned where the acts of one party inconsistent with its existence are acquiesced in by the other.” Country Club Oil Co. v. Lee, 239 Minn. 148, 154, 58 N.W.2d 247, 251 (Minn. 1953). “A finding of abandonment depends upon the intentions of the parties and is not predicated on any single factor” In re Application of Berman, 310 Minn. 446, 452, 247 N.W.2d 405, 408 (1976). The intention to abandon a contract may be found “from the facts and circumstances surrounding the transactions and may be implied from the acts of the parties.” Republic Nat'l Life Ins. Co. v. Marquette Bank & Trust Co. of Rochester, 295 N.W.2d 89, 93 (Minn. 1980).

The main difference between waiver and abandonment is that waiver requires some affirmative action on the part of the non-breaching party, whereas abandonment does not. In other words, waiver applies where a non-breaching party participates in a course of conduct that is inconsistent with his rights. However, abandonment applies where a breaching party takes action that is inconsistent with the non-breaching party's rights and the non-breaching party fails to actively assert his rights in response. So, for example, the Court in Berman found that defendant purchasers' failure to actively assert their interest in certain property adequately justified the conclusion that the purchasers abandoned their interest under a contract for deed of said property. 310 Minn. at 453, 247 N.W.2d at 409.

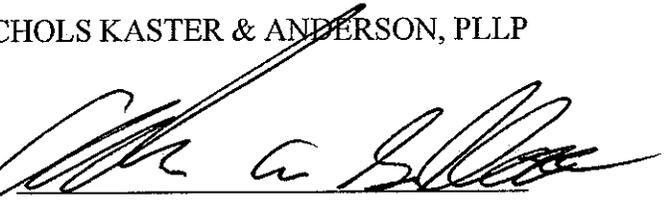
Here, Respondents passed up several opportunities to actively assert their rights under the Tolling Agreement. Respondents were completely free to decline to sign the acknowledgments of service if they believed that commencing a lawsuit would be a breach of the Tolling Agreement, but they did not. Respondents could have filed a motion to dismiss, but they did not. Therefore, Respondents have abandoned any breach of contract defense that might arise from the Tolling Agreement.

CONCLUSION

The grounds for reversal are clear. The district court committed numerous errors of law, and Respondents have engaged in prejudicial conduct by failing to actively assert their alleged rights under the Tolling Agreement. For these reasons as well as those set forth above, Appellant respectfully requests this Court to reverse the district court's order granting summary judgment.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for Appellant Michelle Kunza certifies that this brief complies with the following requirements:

1. This brief was drafted using Microsoft Word 2000 word processing software;
2. The brief was drafted using Times New Roman, 13-point font, compliant with the typeface requirements; and
3. There are 6,345 words in this brief.

Dated: March 15, 2007

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