

NO. A10-658

State of Minnesota
In Supreme Court

Park Nicollet Clinic,

Appellant,

vs.

Arlyn A. Hamann, M.D.,

Respondent.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Respondent Arlyn Hamann has failed to demonstrate that his claims for breach of contract and promissory estoppel are timely. Hamann ignores the allegations in his own Complaint in his haste to escape the consequences of the statute of limitations that applies to his claims. Hamann urges, for instance, that he brings claims for “nonpayment of wages,” when in reality, and as reflected in his Complaint, his claims are obviously contractual and quasi-contractual in nature. The fact that Hamann prays for damages in the form of wages, among other things, does not change the nature of his claims.

Although Hamann attempts to avoid this inescapable result, a number of his arguments – and the authorities cited in his brief – acknowledge the well-settled rule that a contractual cause of action for breach of an existing obligation accrues at the time of the breach, not when the plaintiff suffers monetary harm. Neither Hamann’s opposition brief, nor the Court of Appeals’ decision in this matter, provide any persuasive basis for adopting an exception to this rule for claims where the alleged contractual damages happen to be wages. Under Hamann’s ongoing breach theory, his claim accrues over and over simply because he alleges wage-based damages, even though he had all the information he needed to bring his action at the time of the alleged breach. This theory is not supported by logic, Minnesota law, or sound policy.

Because the District Court properly found that Hamann’s breach of contract and promissory estoppel claims are time-barred, the Court of Appeals’ ruling should be reversed.

LEGAL ARGUMENT

I. IN AN ATTEMPT TO SAVE HIS TIME-BARRED CLAIMS, HAMANN IGNORES HIS OWN ALLEGATIONS AND MISCHARACTERIZES HIS LEGAL THEORY.

Hamann's argument, like the Court of Appeals' ruling, rests almost entirely on this Court's holding in *Levin v. C.O.M.B. Co.*, 441 N.W.2d 801, 805 (Minn. 1989). In trying to fit the facts of this case into the *Levin* Court's holding, Hamann distorts the allegations he made in his Complaint and employs confusing and inconsistent arguments.

On appeal, Hamann refers repeatedly to his breach of contract and promissory estoppel claims as claims "for the recovery of wages" or "for nonpayment of wages." (Respondent's Brief ("Resp. Br."), pp. 1, 8, 10, 13.) It is clear from the face of his Complaint, however, that the only thing Hamann alleges he was ever entitled to is the right to stop taking night call without a reduced salary. Count I of the Complaint describes the alleged breach as follows: "Park Nicollet breached the agreement *by failing to honor the agreement and refusing to allow Dr. Hamann to be exempt from night call without salary reduction.*" (ADD-25-26.) Strikingly, neither Count I (Breach of Contract) nor Count II (Promissory Estoppel) contains any allegation relating to the reduction of Hamann's salary when he stopped taking night call in February 2008. (ADD-25-27.) Thus, from the bare allegations in his Complaint, Hamann does not even assert that damages occurred after he stopped taking night call. His allegations have no relation to pay periods.

Hamann further confuses the issues with an "example," in which he suggests that the Policy had requirements beyond the four criteria it identifies for eligibility to receive

its benefits. (Resp. Br., p. 11.) This, too, is inconsistent with Hamann's Complaint and the arguments elsewhere in his brief. Hamann alleges in his Complaint that he "had fully performed his obligations under the Policy" by April of 2005. (ADD-21.) Likewise, Hamann argues that he "had fully performed all of [the Policy's] requirements and was fully eligible to receive its benefits" and that Park Nicollet revoked the Policy "even after Dr. Hamann had met all of its requirements" (Resp. Br., pp. 6, 14.) In addition, Hamann's Complaint contains no reference to his meeting the "continuing expectations" he now claims were also required for eligibility under the Policy. (See ADD-20-31.) On appeal, Hamann's claims have become something different than what he asserted in his Complaint.

Hamann now contorts his ongoing breach theory, explaining that the essence of his argument is that "[i]n refusing to perform, Park Nicollet has repeatedly breached the contract on an ongoing basis." (Resp. Br. pp. 12.) Hamann does not explain how this is different from an ongoing breach. (See *id.*) Moreover, despite his attempt to distance himself from the continuing breach argument, he describes his position in that manner throughout his brief. (Resp. Br., pp. 11, 16, 18, 19.)

However, even a theory of repeated, discrete breaches is inconsistent with Hamann's Complaint allegations. If his breach of contract claim is for "a series of discrete breaches of the Policy occurring each and every time Park Nicollet failed to provide [him] the compensation he was promised under the Policy," as he now urges, then he would have no claim for the time period when he continued to take night call and received his full salary. (Resp. Br., p. 11.) That is not what he has pled. Hamann seeks

damages starting in April 2005, alleging that between April of 2005 and February of 2008, he sustained damages related to “physically and psychologically difficult and demanding work of OB night call, which left him exhausted and physically worn out and which adversely affected his health.” (ADD-25.) Hamann’s attempt to hide from his Complaint allegations should not save his time-barred claims.

II. HAMANN’S POSITION, AND THE COURT OF APPEALS’ DECISION, IS NOT SUPPORTED BY MINNESOTA LAW.

Regardless of whether it is an “ongoing,” “continuous,” “repeated,” or “separate and distinct” breach theory, Hamann’s argument, and the Court of Appeals’ ruling, rests entirely on his proposition that the alleged breach in April 2005 was an anticipatory repudiation of a future obligation. This proposition, however, is unfounded, and is not supported by any reasoned analysis or Minnesota law.

A. According to the Complaint, Park Nicollet’s Declaration in April 2005 Constituted a Breach of a Present Obligation and Not an Anticipatory Repudiation.

It is well-settled that an anticipatory repudiation occurs when one party communicates to the other his repudiation of the contract *before the time fixed by the contract for his performance*. (Resp. Br., p. 11, 13); *In re Haugen*, 278 N.W.2d 75 (Minn. 1979) (emphasis added). According to Hamann, “Park Nicollet unilaterally revoked the policy *after Dr. Hamann had fully performed all of its requirements and was fully eligible to receive its benefits.*” (Resp. Br., p. 6.) Hamann does not, and cannot, explain how this allegation, if true, constitutes an anticipatory repudiation rather than an absolute breach of a present obligation. Hamann asserts that Park Nicollet’s

position “is faulty reasoning,” but does not identify any flaw in Park Nicollet’s argument. There is none. According to Hamann’s allegations, Park Nicollet’s breach of the Policy was *after* the time fixed by the Policy for its performance. In Hamann’s own words, the breach occurred “after [he] had fully performed all of [the] requirements and was fully eligible to receive [the Policy’s] benefits.” (Resp. Br., p. 6.) It was, therefore, an affirmative breach, not an anticipatory repudiation. Hamann’s argument and the Court of Appeals’ conclusion to the contrary completely ignores well-settled law and the facts alleged in Hamann’s Complaint.

B. Hamann Relies On Inapplicable Case Law.

Hamann refers repeatedly to this Court’s pronouncement in *Levin* that “[u]nder Minnesota law a cause of action for the nonpayment of wages accrues each time a payment is due but not paid,” a holding repeated by the Minnesota Court of Appeals in *Guercio*. (Resp. Br., pp. 10, 11, 13, 24); *see also Levin*, 441 N.W.2d at 805; *Guercio v. Prod. Automation Corp.*, 664 N.W.2d 379, 387 (Minn. App. 2003). *Levin* and its progeny are inapplicable to this case for two principle reasons: (1) Hamann’s is not a cause of action for nonpayment of wages; and (2) Hamann does not allege anticipatory repudiation of a future payment obligation.

Hamann ignores the critical fact that *Levin* involved the anticipatory repudiation of a commission plan. Here, he alleges that Park Nicollet refused to honor the Policy after Hamann had “fully performed.” (Resp. Br., pp. 6, 14-15.) The *Levin* Court’s holding was based on Levin’s allegation of “nonpayment of commissions based on sales made during the year ending August 31, 1984, the year ending August 31, 1985, and the period

beginning September 1, 1985 and ending June 4, 1986, and from June 4, 1986 forward.” 441 N.W.2d at 803. Because Levin sought recovery of wages in the form of commissions based on sales made during the prior year, “Levin’s cause of action with respect to each contract period could not have accrued prior to the close of the period.” *Id.* In contrast, Hamann had “fully performed” by April of 2005. (Resp. Br., p. 6.) Thus, Hamann alleges just one breach, and his argument that there were somehow “separate and distinct breaches” is nonsensical.

Hamann’s attempt to rely on the holding in *Guercio* similarly fails. As in *Levin*, *Guercio* addressed a repudiation of a future payment obligation. In that case, the court observed in dicta that a change in the plaintiff’s commission plan from 50% to 40% on certain product lines did not start the running of the limitations period.¹ *Guercio*, 664 N.W.2d at 387-88. Importantly, the plaintiff in *Guercio* could not claim entitlement to anything when the alleged breach occurred, i.e., the change in the commission plan. Going forward, the plaintiff would not receive a reduced commission unless and until he made a sale in the future.

Hamann’s reliance on *McGoldrick v. Datatrak Intern., Inc.*, 42 F.Supp.2d 893 (D. Minn. 1999) to support his “ongoing breach” theory is also misplaced. (Resp. Br., p. 14.) First, that decision provides no meaningful guidance for this case because the opinion does not adequately describe the facts at issue or legal reasoning. More importantly, based on what little facts are shared, the employee in *McGoldrick* was hired at a salary of

¹ The discussion in *Guercio* relied upon by Hamann is dicta because the Court had already decided that the contract claim failed on the merits for other reasons. *Guercio*, 664 N.W.2d at 383-84.

\$50,000 per year. *McGoldrick*, 42 F.Supp.2d at 894. After nearly a year, the employee had only received \$6,115.75 of his promised salary, and he resigned. *Id.* He initiated an action seeking back pay just before the two-year limitations period expired. *Id.* Relying on *Levin*, the district court rejected the employer's argument that the wage claim accrued when he was hired. *Id.* at 898. In *McGoldrick* there was no dramatic, affirmative breach from which the claim was born because the employee never received any notice that he would not be receiving the pay he was promised.

C. Hamann Cannot Distinguish the Holdings in *Medtronic* and *Botten*, which Compel the Conclusion that His Claims Are Time-Barred.

Hamann fails to distinguish the apposite authority *Park Nicollet* cites to demonstrate that his claims are time-barred. Hamann states that *Medtronic* and *Botten* are inapplicable but does nothing more than recite his unsupported contention that “*Park Nicollet* had a present and continuing obligation to Dr. Hamann.” (Resp. Br., pp. 16-18); *see Medtronic, Inc. v. Shope*, 135 F.Supp.2d 988, 992 (D. Minn. 2001); *Botten v. Shorma*, 440 F.3d 979, 981 (8th Cir. 2006).

In the end, Hamann cannot refute that his allegation that in April 2005 “he was told for the first time that the Policy no longer existed and would no longer be honored” and “his salary would be cut if he refused” to take night call amounts to an assertion of a dramatic breach of a present obligation that very clearly began the running of the statute of limitations, pursuant to the well-established principles of contract law recognized in *Shope* and *Botten*. (ADD-25); *Shope*, 135 F.Supp.2d at 992; *Botten*, 440 F.3d at 981. Based on the facts alleged in the Complaint, Hamann could not have received more

definite notice that the Policy was no longer in effect than he did in April 2005. Thus, by his own allegations, if any breach occurred or any promise was broken, it happened more than three years before Hamann brought suit. He knew without any doubt or ambiguity in April 2005 that the policy in question no longer existed and that he would not receive its purported benefits. That started the statute of limitations period running, and because Hamann did not initiate this action within the applicable period, his claims are time-barred.

III. HAMANN DOES NOT IDENTIFY ANY POLICY REASONS THAT SUPPORT ADOPTION OF HIS ONGOING BREACH THEORY.

Hamann does not refute the compelling policy reasons Park Nicollet identifies for rejecting his ongoing breach theory, implicitly conceding that they are, in fact, sound policy considerations. (*See Resp. Br.*, pp. 19-20.) Instead, Hamann argues that Park Nicollet is asking the Court to “bail it out” from its “ongoing obligation to perform so long as Dr. Hamann continues to meet the requirements of the Policy.” (*Id.* at p. 19.) What Hamann asks the Court to do, however, is to bail *him* out for sleeping on his rights for more than four years. Hamann offers no justification for his failure, nor any reason why other plaintiffs should be allowed to be similarly lethargic after they know they have legal claims.

Hamann complains that Park Nicollet proposes a hypothetical situation when it points out that under his theory, the statute of limitations might never run. (*See Resp. Br.*, p. 20.) However, this Court routinely and rightly considers the potential consequences of “hypothetical situations” to ensure its rulings comport with sound

policy. *See, e.g., Larson v. Wasemiller*, 738 N.W.2d 300 (2007). Here, a ruling in Hamann's favor would not comport with sound policy. Hamann has offered no reason that a plaintiff should be allowed to sit on his rights indefinitely once he knows, without a doubt, that those rights have been violated. Hamann argues that, if his theory is adopted, damages are limited to those that fall within the applicable limitations period. (Resp. Br., p. 19.) This misses the point. The policy considerations elaborated by this Court and others address the protection of defendants against stale claims, not the extent of a plaintiff's damages. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-464 (1975); *Bachertz v. Hayes-Lucas Lumber Co.*, 201 Minn. 171, 176 (Minn. 1937).

Hamann also fails to distinguish Park Nicollet's example of an employee who has a five-year employment contract and is terminated on his first day of employment. Under Hamann's theory and the Court of Appeals' ruling, the employee's claim accrues when the employee is terminated, and repeatedly thereafter every pay period for the next five years. Thus, the employee would be allowed to bring a claim at any time in the seven or eight years after his termination, even though he knew, without a doubt, that he could maintain a breach of contract claim and what the resulting harm would be when he was discharged.

Hamann provides no support for his contention that this analogy "misses the mark." (*See* Resp. Br., p. 20.) Instead, he merely points out that "breach of contract for wrongful termination of employment is not the same as breach of contract in the context of an existing employment relationship," without explaining how these two contexts differ, or why those differences bear upon Park Nicollet's analogy. (*Id.*) More to the

point, in Park Nicollet's example there is an existing employment relationship because of the parties' contractual obligations. Hamann's second point, that the termination of an employment relationship is a single event, actually supports Park Nicollet's argument. (*See id.*) The termination of an employment relationship is just like Hamann's allegation that Park Nicollet refused to honor its Policy because it, too, is a single event – a dramatic breach that gives clear notice of a claim. Hamann offers no policy rationale to support this Court's adoption of his ongoing breach theory, and for this additional reason, it should be rejected.

IV. HAMANN HAS NOT IDENTIFIED ANY CASES FROM OTHER JURISDICTIONS THAT SUPPORT THE COURT OF APPEALS' REASONING.

Hamann has not rebutted the authority Park Nicollet cites in support of its position. In addition, the cases he refers to in support of his continuing breach theory are almost exclusively wage and hour cases, and thus inapplicable to breach of contract and promissory estoppel claims like Hamann's. The weight of the apposite authority from other jurisdictions clearly rests with Park Nicollet.

A. Hamann Cannot Effectively Distinguish Park Nicollet's Cases.

Hamann is unable to distinguish the cases from other jurisdictions that Park Nicollet has cited, simply calling Park Nicollet's cases "fact-specific" and performing no meaningful analysis of their holdings. In addressing the North Dakota Supreme Court's decision in *Snortland*, for instance, Hamann relies on a federal district court decision that declined to follow *Snortland* where the plaintiff claimed breach of an installment contract which provided for payment at a fixed date, at the end of each fiscal year. *See RDO*

Foods Co. v. United Brands Int'l, Inc., 194 F.Supp.2d 962 (D.N.D. 2002); *Snortland v. State*, 615 N.W.2d 574, 577-78 (N.D. 2000). The *RDO* court distinguished *Snortland* on the grounds that under the contract in *RDO*, “each payment is separate and distinct from the others, each requiring a separate calculation.” *RDO Foods Co.*, 194 F.Supp.2d at 971. The facts and reasoning of the *RDO* case are akin to *Levin*, and both cases are factually distinct from the allegations recited by Hamann, as more fully articulated above.

Hamann makes no attempt to distinguish the other cases Park Nicollet cites. For instance, Hamann simply states that the *Tull v. City of Albuquerque* court “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.” *Tull v. City of Albuquerque*, 120 N.M. 829, 831 (N.M. App. 1995). What Hamann does not say is that the “specific facts” in *Tull* were strikingly similar to his own allegations, and the court’s holding – that “the continuing effects [of the employer’s initial refusal to increase the employees’ salaries] do not extend the life of Plaintiffs’ breach of contract cause of action, which is based solely on that initial refusal” – demonstrates that Hamann’s claims, which are based solely on Park Nicollet’s initial refusal to honor the Policy, are also time-barred. *Id.* at 832. Likewise, Hamann does not distinguish the other cases that suggest his claims are time-barred. *See McCord-Baugh v. Birmingham City Bd. of Educ.*, 2001 Ala. Civ. App. LEXIS 556, * 2-5 (Ala. Civ. App. 2001); *Goldman Copeland Assocs., P.C. v. Goodstein Bros. & Co.*, 268 A.D.2d 370, 702 N.Y.S.2d 269 (2000) (holding that breach of lease claim accrued on date the landlord had sent the first yearly statement containing the porter wage escalation and was barred by

statute of limitations); *Maher v. Tietex Corp.*, 331 S.C. 371, 500 S.E.2d 204 (S.C. Ct. App. 1998) (holding that the statute of limitations barred the employee's breach of contract claim because the claim had accrued at the point when the employee should have known that his employer had reduced his bonus amount even though the employee had accepted the reduced amount for several years before filing a lawsuit). The foreign cases cited by Park Nicollet are on point and persuasive.

B. The Wage and Hour Cases Hamann Cites Are Inapposite.

Hamann's proclamation that "[t]he list of jurisdictions applying reasoning similar to that applied by the Minnesota Court of Appeals in this case could go on indefinitely" appears to be based solely on the FLSA and state wage and hour cases he cites. (*See* Resp. Br., pp. 22-24.)² Hamann's reliance on these cases is misplaced, however, since an entirely different rationale applies in the FLSA context, as explained in Park Nicollet's initial brief. Unlike a wage claim under the FLSA, the underpayment Hamann alleges beginning in 2008 was not the violation itself. It was simply a by-product of Park Nicollet's alleged refusal to follow the Policy in 2005.

By way of example, an FLSA plaintiff does not know, at the beginning of each pay period, whether he will be paid in accordance with the law for the time he works during that period. He may work more than forty hours one week, and not be paid

² Hamann cites just two cases that do not address the statute of limitations under the FLSA or similar state wage and hour statutes. These cases, too, are inapposite. In *City of Carlsbad v. Grace*, the court held that statute of limitations issue was not preserved on appeal. 126 N.M. 95, 100 (N.M. Ct. App. 1998.) The *Hart v. Int'l Tel. & Telegraph Co.* court addressed a contract for commissions, similar to the facts of *Levin*, which, for the reasons stated herein, are distinctly different from those alleged by Hamann. 546 S.W.2d 660, 661-62 (Tex. Ct. App. 1977).

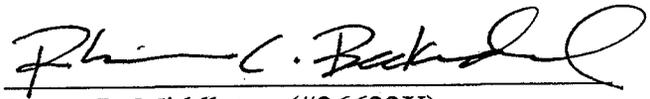
overtime wages – in violation of the FLSA. The next week, the plaintiff may work less than forty hours. Because he is not entitled to overtime wages for his first forty hours of work, there is no FLSA violation for the second week. Thus, in order to calculate his damages, each pay period must be considered separately.

In contrast, beginning in April of 2005, Hamann knew that “the Policy no longer existed and would no longer be honored.” That was the alleged breach. From that time on, Hamann was not allowed the benefits of the Policy. That was the alleged harm, which Hamann claims he suffered immediately in the form of exhaustion and negative health effects. There was nothing different that occurred, or might occur, from one pay period to the next. Hamann’s decision to stop taking night call in February 2008 cannot constitute a new breach by Park Nicollet. By April of 2005, Hamann knew everything he needed to know in order to file his lawsuit. He failed to do so within the statutory limitations period, and consequently, his claims are time-barred.

CONCLUSION

Hamann attempts to salvage his claims by advancing a legal theory on appeal that is inconsistent with the allegations in this Complaint. Regardless, Hamann’s ongoing breach theory is not the law in Minnesota. Nor should it be. Hamann’s claims are time-barred. Park Nicollet respectfully requests that the Court of Appeals’ decision be reversed, and the District Court’s Order dismissing Hamann’s Complaint be affirmed in its entirety.

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