ORIGINAL

20000025

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Howard Snortland,

Plaintiff/Appellant,

vs.

State of North Dakota acting through its agencies, the North Dakota Department of Public Instruction and North Dakota Teachers Fund for Retirement,

Defendants/Appellees.

Supreme Court No. 20000025

District Court No. 98-C-2062

APPEAL FROM THE DISTRICT COURT
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE BENNY A. GRAFF PRESIDING

BRIEF OF APPELLEES

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STATEMENT OF THE ISSUE

Whether in granting the defendants' motion for summary judgment, the district court properly decided that the plaintiff's causes of action in contract were barred by the statute of limitations.

STATEMENT OF THE CASE

A. Statement of the Proceedings

This is an appeal from a summary judgment of dismissal of the plaintiff's contract action arising out of an alleged deprivation of retirement benefits. The district court found that the six-year statute of limitations for contract actions commenced to run when the plaintiff received his first retirement check in 1981, and the plaintiff's action that was not commenced until 1998 was barred by the statute of limitations.

Plaintiff Howard Snortland ("Snortland") commenced an action for breach of contract based upon an alleged deprivation of retirement benefits by serving a Summons and Complaint on defendants North Dakota Department of Public Instruction ("DPI") and North Dakota Teachers Fund for Retirement ("TFFR") on August 5, 1998. (App. at 3-8). The plaintiff alleged that, in addition to the benefits he received since his retirement based upon the payments to him that had been designated by the North Dakota Legislature as "annual salary," he also should have been entitled to receive retirement benefits based upon payments to him that had been designated by the Legislature as "unvouchered expense payments." (App. at 6, Complaint at ¶¶ IV-VI). The plaintiff alleged that the DPI breached his employment contract by failing "to properly and accurately report [his] compensation to the appropriate state agency," and that the TFFR breached his employment contract by failing to pay "his proper retirement benefits." (App. at 6-7, Complaint at ¶¶ VII-IX).

Defendants DPI and TFFR served an Answer in response to the plaintiff's Complaint, and upon Order of the district court granting leave to

amend the Answer, served an Amended Answer on the plaintiff. (Supp. App. at 44-50). The defendants raised the affirmative defense that the plaintiff's causes of action were barred by the three-year statute of limitations pursuant to N.D.C.C. § 28-01-22.1, or in the alternative, the six-year statute of limitations pursuant to N.D.C.C. § 28-01-16. (Supp. App. at 47-48, Amended Answer at Affirmative Defense 3). The defendants also asserted that the plaintiff's Complaint should be dismissed due to his failure to state a claim in contract upon which relief could be granted. (Supp. App. at 46-47, Amended Answer at Affirmative Defense 1 & 2).

The defendants served a Motion for Summary Judgment on the plaintiff on November 16, 1999. (App. at 22-23). In addition to the evidence that the plaintiff included in the Appellant's Appendix at 35-107, in support of their motion, the defendants submitted the Transcript of the Deposition of Howard Snortland and the Plaintiff's Answers to Defendants' First Set of Interrogatories and Requests for Production of Documents. (Supp. App. at 3-145).

On December 29, 1999, the district court, the Honorable Benny A. Graff presiding, heard oral arguments on the defendants' motion. (Supp. App. at 3, Hearing Transcript). The district court rejected the plaintiff's argument that the running of the statute of limitations was tolled by statements allegedly made to him by a representative of the TFFR. (Supp. App. at 30-31, Hearing Transcript at 27-28). The district court ruled that the plaintiff's causes of

action were barred by the six-year statute of limitations under N.D.C.C. § 28-01-16 (Supp. App. at 31, Hearing Transcript at 28).[1]

The Order Granting Motion for Summary Judgment was executed by the district court on January 7, 2000, and Judgment was entered on January 10. (App. at 108-109). The plaintiff served his notice of appeal to the North Dakota Supreme Court on January 27, 2000. (App. at 110).

B. Statement of the Facts

Plaintiff Howard Snortland ("Snortland") served as superintendent of defendant North Dakota Department of Public Instruction ("DPI") from January 1, 1977, until December 31, 1980. (Supp. App. at 13, Snortland Dep. at p. 10, ll. 18-24). As the DPI's superintendent, the plaintiff was required to serve as a member of the Board of Trustees of defendant North Dakota Teachers' Fund for Retirement ("TFFR"), and was responsible for participating in the management of the retirement fund. N.D.C.C. § 15-39.1-05 (1971 N.D. Sess. Laws ch. 184, § 1); (Supp. App. at 14, Snortland Dep. at p. 11, ll. 21-25).

During his term as superintendent of the DPI, the plaintiff received payments designated by the North Dakota Legislature as "annual salary" in the amount of $22,500 per year as established by N.D.C.C. § 15-21-02 (1973 N.D. Sess. Laws ch. 417, § 2). As an elected state official, the plaintiff also was entitled to receive payments designated by the Legislature as "state officer's expense payments" in amounts established by consecutive

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[1] The district court made no ruling with respect to the defendants' argument that the plaintiff's Complaint failed to state a claim upon which relief could be granted.

appropriation measures. 1977 N.D. Sess. Laws ch. 1, § 1, subdivision 19; 1979 N.D. Sess. Laws ch. 42, § 1, subdivision 17; (App. at 74-87).

The plaintiff qualified by virtue of his employment as superintendent of the DPI as a "teacher" for purposes of participation in the TFFR. N.D.C.C. § 15-39.1-04 (1975 N.D. Sess. Laws ch. 150, § 1). The plaintiff was eligible to receive retirement benefits from the TFFR using a formula based upon his "monthly salary" which was defined to mean "one-twelfth of the annual salary paid the teacher." N.D.C.C. § 15-39.1-10 (1979 N.D. Sess. Laws ch. 234, § 2). Assessments representing the plaintiff's contributions to the TFFR were to be deducted from the plaintiff's salary each month during his term as superintendent, and were to be certified and paid quarterly by the DPI to the state treasurer along with the DPI's required contribution. N.D.C.C. § 15-39.1-09 (1975 N.D. Sess. Laws ch. 151, § 1; 1977 N.D. Sess. Laws ch. 168, § 1; 1979 N.D. Sess. Laws ch. 234, § 1).

The general statutory provisions relating to the TFFR's retirement benefits were included in the 1979 North Dakota Teachers' Fund for Retirement Public School Teacher Handbook. (App. at 40-62, Handbook). The Handbook advised participants in the TFFR to "verify the information included [in their annual statements from the TFFR]," and informed participants that the reported "salary earned are important and should be checked to insure the teacher's employer has accurately reported his participation for the previous year." (App. at 49, Handbook at p. 8). The Handbook identified the plaintiff as a member of the TFFR Board of Trustees and informed participants that the Board members were "responsible for the general administration of the Fund. It is charged with formulating

appropriate administrative policies and procedures to assure the proper administration of statutory provisions governing the Fund." (App. at 45, Handbook at p. 4).

During the period of time in which the plaintiff served as the DPI's superintendent, the DPI reported the plaintiff's salary to the TFFR as being those amounts that had been designated by the Legislature as "annual salary" under N.D.C.C. § 15-21-02. (App. at 63-67). The plaintiff's Wage and Tax Statements (W-2 Forms) for the tax years 1977, 1978, 1979, and 1980 indicate that only those payments designated as "annual salary" were reported to the Internal Revenue Service for income tax purposes. (Supp. App. at 54, Plaintiff's Answer No. 8 and attached income tax returns).

The plaintiff's earnings statements indicate that deductions for retirement were withheld from the plaintiff's monthly salary during his term as superintendent of the DPI. (Supp. App. at 54, Plaintiff's Answer No. 8 and attached earnings statements). The plaintiff stated that he was not able to recall any TFFR "assessments being paid or made against such unvouchered expense payments." (Supp. App. at 55-56, Plaintiff's Answer No. 11). The TFFR's records confirm that assessments -- representing the plaintiff's contributions based upon his monthly salary -- along with the DPI's contributions were made to the TFFR, but that no additional assessments or contributions were made to the TFFR based upon the plaintiff's unvouchered expense payments. (App. at 63-67).

The plaintiff testified during his deposition that as superintendent of the DPI he would have been responsible for the actions of his employees if they failed to conduct business in accordance with the law, including those laws

concerning reports to pension plan programs. (Supp. App. at 13-14, Snortland Dep. at p. 10, ll. 25 to p. 11, ll. 20). The plaintiff also testified that, with respect to the DPI's records, "if there was any discrepancy or any problems with the state records or state financial information, [he] would have known about it." (Supp. App. at 20, Snortland Dep. at p. 17, ll. 5-25).

The minutes of the TFFR Board of Trustees' meeting held on September 9, 1980, indicate that the Board was presented the issue of whether unvouchered expense payments received by a school superintendent in addition to his salary that was reported for income tax purposes "could be included in salary for purposes of [the TFFR]." (App. at 91). The minutes state that "[a]fter some discussion, the Board Members and Executive Secretary generally agreed that only salary reported for Internal Revenue purposes should be used as earned income for Fund purposes," and "[t]hat the matter [would] be looked into in more detail before any final action [was] taken." (App. at 91). The minutes indicate that the plaintiff was in attendance at the September 9 Board meeting. (App. at 88).

The minutes of the TFFR Board's meeting held on December 5, 1980, indicate that the Executive Secretary of the Board "presented a copy of the letter sent to the attorney, Chapman & Chapman, regarding the issue of unvouchered expenses for Fund purposes." (App. at 97). The minutes state that "[t]he attorney plan[ned] to have responses ready for the next board meeting." (App. at 97). The minutes indicate that the plaintiff was not in attendance at the December 5 Board meeting. (App. at 94).

The December 4, 1980, letter from the TFFR's Executive Secretary to the Board's attorney requested an opinion regarding the questions as to

whether "salary, as used in Section 15-39.1-09," would "also include unvouchered expenses paid to a participating member," and whether "a teacher's unvouchered expenses [would] be included in the base upon which assessments [were] levied and retirement benefits [were] eventually calculated." (App. at 68). In a December 23, 1980, letter, the Board's attorney expressed his opinion, based upon the North Dakota Supreme Court's decision in Walker v. Omdahl, 242 N.W.2d 649 (N.D. 1976), concerning "unvouchered expenses, received by the Superintendent of Public Instruction and other officials in addition to salary," that "the unvouchered expenses would not be subject to assessment for the purposes of the Teachers' Fund for Retirement." (App. at 69-70).

The minutes of the TFFR Board's meeting held on December 30, 1980, indicate that Board and its Executive Secretary reviewed the December 23 letter from its attorney responding to the question of "the definition of salary pertaining to unvouchered expenses," and that the Board voted to adopt the recommendation of the attorney. (App. at 101). The minutes indicate that the plaintiff was not in attendance at the December 30 Board meeting. (App. at 99).

The plaintiff admitted during his deposition that as a member of the TFFR Board of Trustees, he was responsible for attending the Board's meetings. (Supp. App. at 14-15, Snortland Dep. at p. 11, ll. 21 to p. 12, ll. 3). The plaintiff testified that he did not attend the December 30 meeting for the probable reason that he considered himself a "lame duck" and felt it was not necessary for him to be in attendance. (Supp. App. at 26, Snortland Dep. at p. 23, ll. 9-15).

The plaintiff retired on December 31, 1980, and submitted his application for retirement benefits to the TFFR on or about January 25, 1981. (Supp. App. at 146). The TFFR's calculation of the plaintiff's retirement benefits was based upon the plaintiff's "annual salary" that had been reported to it by the DPI during the time the plaintiff served as superintendent of that agency. (App. at 72). The TFFR sent the plaintiff his first retirement check on February 25, 1981, with correspondence that advised him of the assessments and contributions that had been credited to his retirement account. (App. at 73).

The plaintiff admitted he was informed by a DPI employee by the name of Doris Tillotson ("Tillotson") prior to his retirement on December 31, 1980, that his retirement benefits "would be based on [his] statutory salary and would not include any amounts paid as unvouchered expenses." (Supp. App. at 52-53, Plaintiff's Answer No. 4; Supp. App. at 21-22, Snortland Dep. at p. 18, ll. 19 to p. 19, ll. 5). The plaintiff testified that sometime in 1981 following his retirement, he questioned the TFFR's Executive Secretary, Scott Engmann ("Engmann"), about the basis for the calculation of his retirement benefits and that Engmann also informed him that his "retirement benefits would be based on [his] statutory salary only." (Supp. App. at 52-53, Plaintiff's Answer No. 4; Supp. App. at 27-28, Snortland Dep. at p. 24, ll. 5 to p. 25, ll. 22).

The minutes of the Board's December 5, 1980, meeting indicate that Engmann was in attendance and recently had been selected to be the new TFFR Executive Secretary. (App. at 94, 97). The minutes of the Board's December 30 meeting indicate that Engmann also was present when the Board reviewed and voted to adopt the opinion of its attorney regarding unvouchered

expenses. (App. at 99). There is no evidence in the record, however, that Engmann participated in the Board's decision.

The plaintiff admitted during his deposition that it had been his opinion, even prior to taking office as superintendent of the DPI, that unvouchered expense payments made to state elected officials constituted salary. (Supp. App. at 16-19, Snortland Dep. at p. 13, ll. 25 to p. 16, ll. 3). The plaintiff also admitted that it remained his opinion, ever since he discussed the matter with Tillotson and Engmann, that he was not "treated fairly" by not being paid retirement benefits based upon his unvouchered expense payments. (Supp. App. at 29-30, Snortland Dep. at p. 26, ll. 5 to p. 27, ll. 7). The plaintiff acknowledged that he continued to express his feeling of unfair treatment and "griped about it" to other persons during the 1980's. (Supp. App. at 29-30, Snortland Dep. at p. 26, ll. 5 to p. 27, ll. 7).

The plaintiff testified that as the result of his continued feelings of unfair treatment he discussed the matter in January 1998 with an individual he considered to be "an expert," and that discussion prompted him to finally pursue a cause of action against the defendants. (Supp. App. at 33-34, Snortland Dep. at p. 30, ll. 4 to p. 31, ll. 7).

Engmann testified by affidavit that he could not recall what conversations he had with the plaintiff in 1981 regarding the plaintiff's retirement benefits due to the passage of time. (App. at 35). Engmann testified that any representations he would have made to the plaintiff regarding the "unvouchered expense payments" for retirement benefit purposes would have been based upon the December 23, 1980, letter opinion of the

TFFR's attorney and the Board's decision to adopt the attorney's recommendation. (App. at 35-36).

LAW AND ARGUMENT

A. Standard of review for granting a motion for summary judgment.

The North Dakota Supreme Court stated in Schanilec v. Grand Forks Clinic, Ltd., 1999 ND 165, ¶¶ 8-9, 599 N.W.2d 253:

> Summary judgment is a procedure for the prompt and expeditious disposition of a controversy without trial if either litigant is entitled to judgment as a matter of law, if no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts, or if resolving factual disputes would not alter the results. . . On appeal, this Court reviews the evidence in a light most favorable to the party opposing the summary judgment motion.
>
> In considering a motion for summary judgment, a court may examine the pleadings, depositions, admissions, affidavits, interrogatories, and inferences to be drawn from the evidence to determine whether summary judgment is appropriate. . . Although the party seeking summary judgment has the burden to clearly demonstrate there is no genuine issue of material fact, the court must also consider the substantive standard of proof at trial when ruling on a summary judgment motion. . . The party resisting the motion may not simply rely upon the pleadings or upon unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means, raising an issue of material fact, and must, if appropriate, draw the court's attention to relevant evidence in the record raising an issue of material fact. . . Summary judgment is proper against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial.

"Disputes of fact become questions of law if reasonable persons could draw only one conclusion from the evidence." Hanson v. Cincinnati Life

Insurance Co., 1997 ND 230, ¶ 11, 571 N.W.2d 363. See Schanilec, 1999 ND 165, ¶ 20, 599 N.W.2d 253 (a factual issue with respect to plaintiff's knowledge regarding discovery of an injury and the commencement of the running of a statute of limitations "becomes one of law if the evidence is such that reasonable minds could draw but one conclusion").

The plaintiff requests that this Court review the district court's summary judgment dismissal of his claim for additional retirement benefits on the basis that the court should have determined that a genuine issue of material fact existed regarding the tolling of the statute of limitations as the result of statements allegedly made to him by Engmann. However, upon review of the undisputed material facts presented by the defendants and the inferences to be drawn from those facts, reasonable minds could draw but one conclusion – i.e., the plaintiff's causes of action against the defendants are barred by the statute of limitations.

B. The district court, in granting the defendants' motion for summary judgment, properly decided that the plaintiff's causes of action in contract were barred by the statute of limitations.

1. The statute of limitations applicable to the plaintiff's claims commenced to run when the plaintiff received his first retirement check in 1981.

N.D.C.C. § 28-01-16 provides that an action based upon contract must be commenced within six years after the claim for relief has accrued. The North Dakota Supreme Court has adopted a "discovery rule" in its application of N.D.C.C. § 28-01-16. In Hebron Public School Dist. No. 13 of Morton County v. U.S. Gypsum Co., 475 N.W.2d 120, 126 (N.D. 1991), the state supreme court concluded that "for purposes of Sec. 28-01-16(1),

N.D.C.C., (Cum. Supp. 1989), a cause of action, or claim for relief does not accrue until the aggrieved party discovers the facts which constitute the basis for its cause of action or claim for relief. . ." With respect to the "discovery rule," "knowledge is an objective standard which focuses upon whether the plaintiff has been apprised of facts which would place a reasonable person on notice that a potential claim exists." Zettel v. Licht, 518 N.W.2d 214, 215 (N.D. 1994).

The plaintiff admitted that it had been his opinion even prior to taking office as superintendent of the DPI on January 1, 1977, that the unvouchered expense payments made to state elected officials constituted salary. With the receipt of each annual Wage and Tax Statement (W-2 Form) beginning in 1978 from his employment as superintendent, the plaintiff knew or should have known that only those payments designated by the Legislature as "annual salary" under N.D.C.C. § 15-21-02 had been reported to the Internal Revenue Service as wages, tips, and other compensation for income tax purposes.

The plaintiff's earnings statements indicate that deductions for retirement were withheld from the plaintiff's monthly salary during his term as superintendent of the DPI. The plaintiff stated that he was not able to recall any TFFR "assessments being paid or made against such unvouchered expense payments." The plaintiff knew or should have known beginning in 1977, with the receipt of each payment, that assessments for payment to the TFFR were being deducted from his salary payments, but not from his unvouchered expense payments.

Furthermore, if the plaintiff had verified the information contained in each annual statement he received from the TFFR, he would have known that

the DPI had reported the plaintiff's salary to the TFFR as being only those amounts that had been designated by the Legislature as "annual salary" under N.D.C.C. § 15-21-02, and not his unvouchered expense payments. In addition, the plaintiff admitted that another DPI employee, prior to his retirement on December 31, 1980, and a representative of the TFFR, shortly after his retirement in 1981, both advised him that his retirement benefits would be based on his statutory salary and would not include any amounts paid as unvouchered expenses. The correspondence that the TFFR sent the plaintiff with his first retirement check on February 25, 1981, advised him of the assessments and contributions that had been credited to his retirement account

The plaintiff admitted that as superintendent of the DPI he would have been responsible for the actions of his employees if they failed to conduct business in accordance with the law, including those laws concerning reports to pension plan programs. The plaintiff also admitted that if there was any discrepancy or any problems with the DPI's financial records, he would have known about it. As superintendent of the DPI and the individual within that agency ultimately responsible for properly reporting his own salary and making the proper contributions to the TFFR, the plaintiff knew or should have known beginning in 1977 whether the DPI was accurately reporting his salary and making proper assessments from his salary to the TFFR.

As a member of the TFFR Board of Trustees, the plaintiff was charged with the duty of formulating appropriate administrative policies and procedures to assure the proper administration of statutory provisions

governing the TFFR. The plaintiff knew or should have known when he attended the Board's September 9, 1980, meeting that 1) the Board had been presented the issue of whether unvouchered expense payments received by a school superintendent in addition to his salary that was reported for income tax purposes "could be included in salary for purposes of [the TFFR]," 2) the Board Members and Executive Secretary generally agreed that only salary reported for Internal Revenue purposes should be used as earned income for Fund purposes, and 3) the matter would be looked into in more detail before any final action was taken.

The plaintiff admitted that as a member of the TFFR Board of Trustees, he was responsible for attending the Board's meetings. If the plaintiff had fulfilled his responsibilities to attend the Board's December 5 and December 30 meetings, he would or should have known the Board had voted to adopt the recommendation of its attorney that "the unvouchered expenses would not be subject to assessment for the purposes of the Teachers' Fund for Retirement," and that the attorney's opinion was based upon the North Dakota Supreme Court's decision in Walker v. Omdahl.

The evidence presented by the defendants to the district court in support of their motion for summary judgment was such that reasonable minds could draw but one conclusion. Any factual dispute regarding the plaintiff's discovery of his claim and the commencement of the running of the statute of limitations became one of law. In his capacities as a participant in the TFFR pension plan, as superintendent of the DPI, and as a member of the TFFR Board of Trustees, the plaintiff knew or should have known the facts that constituted the basis for his claim and that would have placed a

reasonable person on notice that a potential claim for additional retirement benefits existed no later than the date the plaintiff received his first retirement check in 1981. The plaintiff's causes of action against the defendants are barred by the six-year statute of limitations and summary judgment of dismissal of the plaintiff's action was appropriate.

2. The running of the statute of limitations was not tolled.

a. The plaintiff failed to meet his burden of proof of equitable estoppel.

The plaintiff contends that the district court erred in its summary judgment dismissal of his claim on the basis that the court should have determined that a genuine issue of material fact existed regarding the tolling of the statute of limitations as the result of statements allegedly made to him by Engmann. The plaintiff's argument ignores the undisputed material facts presented by the defendants, and the inferences drawn from those facts, as those facts relate to the restrictions imposed on the application of the tolling of the statute of limitations.

The North Dakota Supreme Court has stated "the public policy behind statutes of limitation is to prevent the litigation of stale claims when, through the lapse of time, evidence regarding the claim has become difficult to procure or even lost entirely." Narum v. Faxx Foods, Inc., 1999 ND 45, ¶ 21, 590 N.W.2d 454. The state supreme court in Narum recognized that, in limited instances, "[t]he doctrine of equitable estoppel may operate to preclude application of a statute of limitations . . ." Id. at ¶ 24. The state supreme court summarized the restriction on the availability of estoppel as a

method of circumventing the public policy against the litigation of stale claims as follows:

> To successfully implement the doctrine of equitable estoppel under N.D.C.C. § 31-11-06, the plaintiff must carry the burden of proving three elements:
>
> > First, the plaintiff must prove that the defendant made statements and "from the nature of defendant's statements and all of the surrounding facts and circumstances that the statements were made with the idea that plaintiff would rely thereon."... Second, the "plaintiff must show that she relied on the representations or acts of defendant and, as a result of that reliance, she failed to commence the action within the prescribed period."... Lastly, "the plaintiff must show that the acts of defendant giving rise to the assertion of estoppel must have occurred before the expiration of the limitation period."
>
> Burr v. Trinity Medical Center, 492 N.W.2d 904, 908 (N.D.1992) (internal citations and footnote omitted). A plaintiff's reliance on the defendant's conduct must be reasonable, and there must be some form of affirmative deception on the part of the defendant. Matter of Helling, 510 N.W.2d 595, 597 (N.D.1994).

Id. (emphasis added). A plaintiff must show that the defendant's affirmative conduct "was intended to cause [the plaintiff] to fail to timely commence its action." American Ins. Co. v. Midwest Motor Express, Inc., 554 N.W.2d 182, 188 (N.D. 1996) (emphasis added).

In this case, the plaintiff's testimony casts substantial doubt in the first instance on his ability to claim that Engmann's alleged statements in fact ever acted to deter him from commencing his action within the prescribed time period. The plaintiff admitted it remained his opinion ever since he discussed the matter with Engmann that he was not "treated fairly" by not being paid

retirement benefits based upon his unvouchered expense payments. The plaintiff acknowledged he continued to express his feeling of unfair treatment and "griped about it" to other persons during the 1980's. The plaintiff testified that as the result of his continued feelings of unfair treatment he discussed the matter in January 1998 with an individual he considered to be "an expert," and that discussion prompted him to finally pursue a cause of action against the defendants.

The plaintiff's admitted response to Engmann's alleged statements does not support a finding of reliance by the plaintiff that would justify his failure to commence his action within the prescribed time period. Instead, the plaintiff's response was one of continued voiced discontent and questioning of Engmann's alleged statements in the form of "griping" to other individuals, until seventeen years later when the plaintiff expressed his discontent to an individual who happened to lend support to the plaintiff's own long-standing opinion.

b. The plaintiff was not in a position of inequality with respect to Engmann and did not lack the means of acquiring independent knowledge of the matters asserted.

A party relying upon a confidence arising from an alleged fiduciary relationship "must be in a position of inequality, dependence, weakness, or lack of knowledge." Union State Bank v. Woell, 434 N.W.2d 712, 721 (N.D. 1989) (emphasis added). The North Dakota Supreme Court has held that "a party seeking to rely on estoppel must not only lack actual knowledge regarding the true state of title, but must also be destitute of the means of acquiring such knowledge. A public record is such a means." Wehner v. Schroeder, 354 N.W.2d 674, 677 (N.D. 1984) (emphasis added). See also O'Connell v. Entertainment Enterprises, Inc., 317 N.W.2d 385, 390 (N.D.

1982) (to support claim of estoppel, plaintiff must "show that he lacked knowledge and the means of obtaining knowledge as to the truth of the facts in question); City of Williston v. Ludowese, 208 N.W. 82, 92 (N.D. 1926) (there can be no equitable estoppel "where they both have equal means of knowledge").

The Eighth Circuit Court of Appeals in Bell v. Fowler, 99 F.3d 262, 268 (8th Cir. 1996) (citing First Church of Christ Scientist v. Revell, 2 N.W.2d 674, 678 (S.D. 1942)), held that "[t]he South Dakota courts have historically held that equitable estoppel is to be applied only in cases where the party asserting the estoppel was without knowledge of the facts at issue and was also without a means of obtaining knowledge of those facts." (Emphasis added). See also Wolfe v. Bennett PS & E, Inc., 974 P.2d 355, 360 (Wash. Ct. App. 1999) ("information that is easily obtained by the party asserting estoppel does not satisfy the requirements of equitable estoppel"); Matter of Adventist Living Centers, Inc., 52 F.3d 159, 162 (7th Cir. 1995) ("misled party must establish that . . . it had 'no knowledge or convenient means of ascertaining the true facts which would have prompted it to react otherwise'").

The plaintiff's attempt to justify his failure to timely commence his cause of action based upon statements allegedly made to him by Engmann requires that the Court absolve the plaintiff of his own duties and experiences with respect to the TFFR. In the Brief of Appellant at 14-16, the plaintiff recites elements of the fiduciary duty that Engmann is alleged to have breached. Each of these elements ironically relates to a duty the plaintiff himself owed as a member of the TFFR Board of Trustees at the time the

Board voted to adopt the opinion of its attorney regarding unvouchered expenses.

There is no evidence that the statements allegedly made by Engmann to the plaintiff were anything but a statement of the Board's December 30 actions, which the plaintiff, if he had fulfilled his responsibility to attend the meeting, would not only have had personal knowledge of, but would have had the opportunity to express his views on the matter. Furthermore, despite his lack of attendance, the minutes of the TFFR Board's December 5, 1980, and December 30, 1980, meetings were public records and were as readily accessible to the plaintiff in 1981 as they were to the defendants when they prepared their motion for summary judgment eighteen years later in 1999.[2]

Considering the plaintiff's four-year tenure as a member of the TFFR Board of Trustees and his fiduciary duty with respect to the TFFR -- including the matters pertaining to the Board's consideration of unvouchered expense payments -- the plaintiff's argument that he was in a position of inequality, dependence, or weakness with respect to Engmann, or that he lacked the means of obtaining independent knowledge of the matters of which Engmann allegedly informed him is implausible. See, e.g., Katsaros v. Cody, 744 F.2d 270, 279 (2nd Cir. 1984), cert. denied, Cody v. Donovan, 469 U.S. 1072 (1984) ("under an objective standard trustees [of pension fund] are to be judged 'according to the standards of others 'acting in a like capacity and familiar with such matters.'").

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[2] The plaintiff in fact signed recognitions of service that became attachments to the December 30, 1980, TFFR Board meeting minutes.

The plaintiff's lack of inequality, dependence, or weakness with respect to Engmann and his readily available means of independently obtaining knowledge with respect to the statements allegedly made to him by Engmann preclude the plaintiff from claiming a breach of fiduciary duty to toll the running of the statute of limitations.

c. **The plaintiff is estopped from claiming that the statements allegedly made to him by Engmann tolled the running of the statute of limitations.**

The doctrine of equitable estoppel is further limited by the doctrine of "counterestoppel," or "estoppel against estoppel." As characterized by the Pennsylvania Superior Court in Zitelli v. Dermatology Education and Research Foundation, 597 A.2d 1173, 1185-87 (Pa. Super. Ct. 1991):

> The effects of such doctrine are that two estoppels may destroy or neutralize each other, or, as otherwise expressed, one estoppel may set another at large, and that one party cannot rely on an estoppel when he and he alone is responsible for facts which constitute the estoppel.
>
> . . .
>
> Where the actions by the party asserting estoppel were such to promote the condition which now is asserted as an estoppel and the party to be bound by the estoppel did nothing to create the condition, estoppel cannot be alleged. Where there is no concealment, misrepresentation or other inequitable conduct by the other party, a party may not properly claim that an estoppel arises in his favor from his omission or mistake.

"One party to a transaction may be denied the right to estoppel against the other party by reason of certain facts which create an estoppel against himself; the doctrine applied in this situation is characterized as one of counterestoppel, or estoppel against estoppel. The effect of such doctrine is

that two estoppels may destroy each other." Blackmer v. Travelers Indemnity Co., 442 N.Y.S.2d 923, 927 (N.Y. Sup. Ct. 1981).

The plaintiff's actions in his official capacities as the superintendent of the DPI and as a member of the TFFR Board of Trustees were such to promote and contribute to the alleged breaches of contract by the state agencies and the condition that the plaintiff now asserts as a means to toll the running of the statute of limitations.

The plaintiff admitted that as superintendent of the DPI he would have been responsible for the actions of his employees if they failed to conduct business in accordance with the law, including those laws concerning reports to pension plan programs. The plaintiff also admitted that if there was any discrepancy or any problems with the DPI's financial records, he would have known about it.

There is no evidence in the record that Engmann participated in the DPI's reporting of the plaintiff's compensation to the TFFR Instead, the evidence substantiates the fact that the plaintiff as superintendent promoted and contributed to the circumstance that the plaintiff now alleges represents a breach of contract by the DPI. As superintendent of the DPI and the individual within that agency ultimately responsible for properly reporting his own salary and making the proper contributions to the TFFR, the plaintiff is estopped from claiming that the DPI breached his employment contract and from claiming that any statements allegedly made to him by Engmann served to toll the running of the statute of limitations to bring his cause of action against the DPI.

The plaintiff alleged that the TFFR breached his employment contract by failing to pay "his proper retirement benefits." As a member of the TFFR Board of Trustees, the plaintiff was under a duty to participate in the formulation of appropriate administrative policies and procedures to assure the proper administration of statutory provisions governing the TFFR. If the plaintiff had fulfilled his responsibilities to attend the Board's December 5 and December 30 meetings, he would have had the opportunity to participate in the Board's decision as to whether or not unvouchered expenses would be subject to assessment for the purposes of the TFFR.

There is no evidence in the record that Engmann participated in the Board's decision regarding unvouchered expenses. Instead, the evidence substantiates the fact that the plaintiff as a member of the Board, through his actions in failing to attend the Board meetings, promoted and contributed to the circumstance that he now alleges represents a breach of contract by the TFFR. As a member of the TFFR Board of Trustees under a duty to participate in the formulation of appropriate administrative policies and procedures to assure the proper administration of statutory provisions governing the TFFR, the plaintiff is estopped from claiming that the TFFR breached his employment contract and from claiming that any statements allegedly made to him by Engmann served to toll the running of the statute of limitations to bring his cause of action against the TFFR.

d. Public policy weighs against the plaintiff's reliance on equitable estoppel against the defendants.

As a general public policy consideration, "[e]stoppel against an administrative agency is not freely applied." Singha v. North Dakota State

Bd. of Medical Examiners, 1998 ND 42, ¶ 34, 574 N.W.2d 838. When equitable estoppel is asserted against the government, application of the doctrine requires "a careful weighing of the inequities that would result if the doctrine is not applied versus the public interest at stake and the resulting harm to that interest if the doctrine is applied." Blocker Drilling Canada, Ltd. v. Conrad, 354 N.W.2d 912, 920 (N.D. 1984). As stated by the California Court of Appeals in County of Orange v. Carl D., 90 Cal.Rptr.2d 440, 447 (Cal. Ct. App. 1999):

> There is a higher standard for estoppel against a public entity. In addition to all the elements for estoppel against a private party, "in the considered view of the court of equity, the injustice which would result from a failure to uphold an estoppel [must be] of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 496-497, 91 Cal.Rptr. 23, 476 P.2d 423). Plainly stated, in the equitable estoppel balancing process, justice and right to the individual must outweigh the negative impact upon the public. Estoppel will not stand against a government agency " 'if the result will be the frustration of a strong public policy.' "

See also Wolfe, 974 P.2d at 360 ("[e]quitable estoppel is not a favored doctrine when applied to allow municipal liability"); Lehman v. U.S., 154 F.3d 1010, 1017 (9th Cir. 1998), cert. denied, 119 S.Ct. 1336 (1999) ("an omission to give advice is insufficient conduct to support equitable estoppel against the government").

The public interest at stake and the resulting harm to the defendants if the doctrine of estoppel is applied to toll the running of the statute of limitations far outweigh any inequity to the private interests of the plaintiff who seeks to financially benefit from his seventeen-year period of silence.

Any recovery by the plaintiff would negatively impact and adversely deplete the assets available to the TFFR for payment to other benefit recipients, and the assets available to the DPI for furthering public education purposes. These substantial public interests, especially in light of the plaintiff's own actions, outweigh the self-serving interests of the plaintiff in this matter. Application of the doctrine of estoppel against either the DPI or the TFFR to toll the running of the statute of limitations would result in a frustration of strong public policy.

Based upon the undisputed facts in this case, the district court properly concluded that the running of the statute of limitations was not tolled by the statements allegedly made by Engmann to the plaintiff.

C. Summary judgment could have been properly granted on alternative grounds.

The defendants presented the defense that the plaintiff's Complaint failed to present a claim upon which relief could be granted. The district court concluded that the statute of limitations barred the plaintiff's causes of action. If this Court concludes the district court erred in finding that the causes of action were barred by the statute of limitations, the district court's order should still be confirmed on the defendants' alternative defense. See Olson v. University of North Dakota, 488 N.W.2d 386, 388 (N.D. 1992); Livingood v. Meece, 477 N.W.2d 183, 188 (N.D. 1991) ("an appellee is entitled on appeal to attempt to save the judgment by urging any ground asserted in the trial court."; Tkach v. American Sportsman, Inc., 316 N.W.2d 785, 787 n.1 (N.D. 1982).

The plaintiff's Complaint for a determination as to whether he is entitled to receive retirement benefits based on "state officer's expense payments," asks that the Court now substitute its judgment for that of the 1977 and 1979 Legislatures in matters that at the time called for legislative discretion. The Court need not visit that issue due to the fact that prior to the plaintiff's term as superintendent of the DPI, the North Dakota Supreme Court set the guideline for evaluating under what circumstances "state officer's expense payments" might be considered "salary." Based upon the state supreme court precedent that became part of the plaintiff's employment contract with respect to his unvouchered expense payments, the plaintiff's Complaint fails to state a claim upon which relief can be granted.

In Walker v. Omdahl, 242 N.W.2d 649 (N.D. 1976), the North Dakota Supreme Court was presented with the issue of whether an increase in the amount of payments designated by the 1975 North Dakota Legislature as "state officer's expense payments" over the amount of such expense payments provided for by previous legislative sessions violated the North Dakota Constitution.

As summarized by the state supreme court, the petitioner had asserted at trial that the "payments for unvouchered expenses [under 1975 N.D. Sess. Laws ch. 25, § 1, subdivision 17] constitute salary and, accordingly, that to the extent that the unvouchered expense allowances were increased during the term for which the State officials were elected, the increases constitute a violation of Section 84" of the North Dakota Constitution. Walker, 242 N.W.2d at 652.

On appeal, the North Dakota Supreme Court followed the reasoning of the trial court and, quoting from the appellee's brief, stated as follows:

> Beginning in 1951 the legislature realized that it would be necessary to make an allowance for expenses for the proper administration of government by capable people and therefore beginning with Chapter 57, S.L. 1951 . . . the legislature provided for an unvouchered payment of a lump sum expense allowance to the secretary of state, state auditor, state treasurer, commissioner of insurance, public service commissioners and commissioner of agriculture and labor. In 1957 the legislature, for the same purpose, provided for a lump sum expense payment to the elected public officers of North Dakota, pursuant to Chapter 2, S.L. 1957 . . . Each biennial session of the legislature since that time has enacted a similar measure. . . .

Walker, 242 N.W.2d at 656.

The state supreme court further stated that:

> . . . we must consider that in this case the court is being asked to substitute its judgment for that of the Legislature in a matter which calls for legislative discretion. In such matters we are normally reluctant to intervene unless the legislative act clearly contravenes the Constitution and its objectives. Stability, continuity, and the ability to perform are essential to the survival of any government.
>
> The Legislature, being the political arm of our government, is the body given the power within constitutional limits to preserve such elements for the life of the State. The Legislature enacts the laws by which we live, but under our Constitution the administration of the laws is left to the executive branch of government. It is apparent that laws can only be as effective as they are administered. Hence it follows that the Legislature has a vital interest in making the State offices attractive to the most qualified and dedicated people. In the last quarter of a century the Legislature has used the unvouchered expense account as an incentive to attract such people to public office.

Walker, 242 N.W.2d at 656-657.

Recognizing the Legislature's need to "provide for cost of living increases through unvouchered expense allowances," the North Dakota Supreme Court limited its intervention into this matter calling for legislative discretion to a determination of "the reasonableness of the legislative action." Walker, 242 N.W.2d at 657-58. The state supreme court ruled with prospective application that "expenses beyond the allowances for expenses in the previous session of the Legislature [i.e., 1975] which exceed amounts reasonably necessary to cover increases in the cost of living are salary." Id. at 658.

In this case, the plaintiff's request for a determination by the Court as to whether he is entitled to receive retirement benefits based on "state officer's expense payments" asks that the Court now substitute its judgment for that of the 1977 and 1979 Legislatures in matters that at the time called for legislative discretion. The Court, however, need not visit these issues due to the fact that the matter is resolved by application of the North Dakota Supreme Court's decision in Walker that was decided prior to the plaintiff's term as superintendent of the DPI and that became part of the plaintiff's employment contract with respect to his unvouchered expense payments. See Storbeck v. Oriska School Dist. #13, 277 N.W.2d 130, 134 (N.D. 1979) (existing law at the time of the formation of contract becomes part of the contract).

In order to determine what amount, if any, of the unvouchered expense payments received by the plaintiff might be considered salary, the Court, in accordance with Walker, need only determine what expense payments appropriated by the 1977 and 1979 Legislatures beyond the expense payments appropriated by the 1975 Legislature exceeded the amounts reasonably

necessary to have covered increases in the cost of living. In 1975, the Legislature appropriated the sum of $16,000 per year as the expense payment for the superintendent of the DPI. 1975 N.D. Sess. Laws ch. 25, § 1, subdivision 17; Walker, 242 N.W.2d at 657-58. In 1977, the Legislature, however, decreased the sum appropriated as the expense payment for the superintendent of the DPI to $7,000 per year for 1977 and 1978. 1977 N.D. Sess. Laws ch. 1, § 1, subdivision 19. In 1979, the Legislature set the sum appropriated as the expense payment for the superintendent of the DPI at $8,900 for 1979 and $10,950 for 1980 – both amounts again falling well below the 1975 benchmark appropriation of $16,000.

In this case, any issues concerning the plaintiff's subjective opinion as to the purpose of the unvouchered expense payments, or the manner in which the plaintiff expended the unvouchered expense payments are irrelevant. The amount of unvouchered expense payments appropriated for payment to the superintendent of the DPI during the plaintiff's term in office fell well below the amount at issue in Walker so as to eliminate any issue concerning what amount might be considered salary.

Based upon state supreme court precedent that became part of the plaintiff's employment contract with respect to his unvouchered expense payments, the plaintiff's Complaint fails to state a claim upon which relief can be granted.

CONCLUSION

Based upon the foregoing law and argument, defendants North Dakota Department of Public Instruction and North Dakota Teachers' Fund for

Retirement request this Court affirm the district court's summary judgment of dismissal of the plaintiff's contract action.

Dated this 1st day of May, 2000.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Howard Snortland, Plaintiff/Appellant vs. State of North Dakota acting through its agencies, the North Dakota Department of Public Instruction and North Dakota Teachers Fund for Retirement, Defendants/Appellees.	)	**AFFIDAVIT OF SERVICE** **Supreme Court No. 2000025** **District Court No. 98-C-2062**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Donna J. Connor states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 1st day of May, 2000, I personally served the following **BRIEF OF APPELLEES and SUPPLEMENTAL APPENDIX TO BRIEF OF APPELLEES** by delivering true and correct copies thereof to Howard Snortland by and through his attorney James J. Coles at the address below, with a clerk or other individual in charge thereof:

James J. Coles
Attorney at Law
Norwest Bank Building, Suite 301
400 East Broadway Avenue
P.O. Box 2162,
Bismarck, ND 58502-2162

Donna J. Connor

Subscribed and sworn to before me
this 1st day of May, 2000.

Notary Public

JENNEY J. SCHATZ
Notary Public, State of North Dakota
My Commission Expires APRIL 8, 2003
STATE OF NORTH DAKOTA
NOTARY PUBLIC SEAL

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