IN THE COURT OF APPEALS OF IOWA

No. 2-896 / 12-0061
Filed January 24, 2013

BETTY GUNDERSON,
Plaintiff-Appellant,

vs.

DIANNA K. ENGELBRECHT,
Trustee of the NELLIE A. LARSEN
and SHIRLEY B. MARTS TRUST,
Defendants-Appellees.

DIANNA K. ENGELBRECHT,
Trustee of the NELLIE A. LARSEN
and SHIRLEY B. MARTS TRUST,
Counter Claimant,

vs.

BETTY GUNDERSON,
Counterclaim-Defendant.

Appeal from the Iowa District Court for Franklin County, Colleen D. Weiland, Judge.

Betty Gunderson appeals a district court's order granting partial summary judgment. **REVERSED AND REMANDED.**

Michael J. Cross of Cross Law Firm, Hampton, for appellant.

G.A. Cady III, of Hobson, Cady & Cady, Hampton, for appellee.

Considered by Potterfield, P.J., and Danilson and Tabor, JJ.

TABOR, J.

Betty Gunderson appeals an order granting partial summary judgment on her June 16, 2010 petition seeking compensation for care-taking services she performed for Shirley Marts. The district court found the two-year statute of limitations at Iowa Code section 614.1(8) (2009) barred Gunderson's claim for unpaid wages for the period from January 2005 through June 2006. Gunderson argues that because she agreed to be paid when Marts sold stock, her claim did not accrue until the stock sale occurred.

Because the district court erred as a matter of law in finding Gunderson's claim accrued when the agreement was modified in July 2006, we reverse and remand for further proceedings.

I. Background Facts and Proceedings

Gunderson began providing in-home care for Marts in spring 2001. In their initial oral contract, Gunderson agreed to provide daily in-home services for up to eight hours a day at a rate of $10.00 per hour. Between 2001 and 2005, Marts and Gunderson periodically modified the hours and payment terms of their oral agreement based on fluctuations in Marts's health. Gunderson also hired a second caregiver, Brenda Thompson, to be on-call when Gunderson was unavailable. Marts paid Gunderson out of a trust she shared with her sister.

In January 2005, Marts requested Gunderson increase her in-home care to twenty-four hours a day, seven days a week, at ten dollars per hour. Concerned these expenses would deplete her trust, Marts offered to pay Gunderson when she sold some Verizon stock, which Marts held in her own

name separate from the trust assets. After Marts presented proof of ownership, Gunderson acquiesced to the alternative compensation scheme. She provided overnight care under these terms for 547 nights until July 2006, expecting to be compensated when Marts sold the stock.[1]

In July 2006, Marts's niece, Dianna Engelbrecht, objected to Gunderson's pay rate. Consequently Marts and Gunderson modified the in-home care agreement to seven dollars per hour to be paid weekly. In May 2008, Marts nominated Gunderson to be her attorney-in-fact. Their seven dollars per hour agreement remained in effect until Engelbrecht became Marts's guardian and conservator on July 29, 2009, at which time Engelbrecht terminated Gunderson's services and revoked her authority as attorney-in-fact. Seven months later, Marts passed away.

As trustee, Engelbrecht published a notice of revocable trust and Gunderson timely filed a claim in Franklin County in June 2010 for her 547 nights of uncompensated services in addition to other various expenses. Engelbrecht filed an answer denying Gunderson's claim and alleging Gunderson violated her fiduciary duty as Marts's attorney-in-fact. Engelbrecht's answer also included an affirmative defense that Gunderson brought her compensation claim outside the two-year statute of limitations. In January 2011, Engelbrecht filed a motion for partial summary judgment on the basis that Gunderson's claim was time-barred.

On March 31, 2001, the district court granted Engelbrecht's motion, finding Gunderson's claim for compensation from January 2005 through June 2006 was

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[1] Gunderson calculated the amount owed between January 2005 and June 2006 totaled $54,700.

a claim for wages that accrued in July 2006, "when she and Marts agreed upon the terms of payment of Gunderson's 'liquidated' and already-earned wages." The court concluded that because Iowa Code section 614.1(8) requires a claim for wages to be filed within two years, her June 2010 claim is barred by the statute of limitations.

After the court denied Gunderson's subsequent application for permission to appeal in advance of the final judgment, the parties settled the action's remaining issues and reserved Gunderson's right to appeal the final judgment regarding her compensation. On January 3, 2012, the court reaffirmed its summary judgment and dismissed the case, recognizing Gunderson's right to appeal the court's grant of partial summary judgment.

II. Scope and Standard of Review

We review summary judgment rulings for corrections of legal error. *Robinson v. Allied Property & Cas. Ins. Co.*, 816 N.W.2d 398, 401 (Iowa 2012). Summary judgment is proper only if no genuine issue of material fact appears on record and the movant is entitled to judgment as a matter of law. *Employers Mut. Cas. Co. v. Van Haaften*, 815 N.W.2d 17, 22 (Iowa 2012). If reasonable minds can resolve an issue differently, it is genuine, and if a fact may affect the outcome of a case, it is material. *Seneca Waste Solutions, Inc. v. Sheaffer Mfg. Co.*, 791 N.W.2d 407, 411 (Iowa 2010). We view the record in the light most favorable to the resisting party and consider on behalf of that party every legitimate inference we may reasonably deduce from the record. *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 692 (Iowa 2009). If a claim is barred

by the applicable statute of limitations, summary judgment is appropriate. *Steinke v. Kurzak*, 803 N.W.2d 662, 666 (Iowa Ct. App. 2011).

III. Analysis

Gunderson first contends because she acted as an independent contractor rather than an employee, the payment owed does not fit within the definition of "wages." She next argues, if we conclude she was earning a wage, she and Marts agreed her payment would be due when Marts sold the Verizon stock. Gunderson concludes because there is no evidence to suggest the stock was sold before she filed her petition, her cause of action had not yet accrued. She also asserts her claim for payment should be considered an open account, subject to a five-year statute of limitations that began when her services were terminated on July 29, 2009.

Engelbrecht points to Gunderson's identification of herself as a "caretaker" and contends section 235B.2(1)'s definition of that term proves the compensation owed to her must be considered wages**.**[2] Engelbrecht further contends because the two-year window to file suit begins when payment is due rather than when the promisor has the ability to pay, Gunderson missed the deadline to demand payment two years after each month's wages became due. Engelbrecht also

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[2] The code chapter entitled "Dependent Adult Abuse Services – Information Registry" defines "caretaker" as "a related or nonrelated person who has the responsibility for the protection, care, or custody of a dependent adult as a result of assuming the responsibility voluntarily, by contract, through employment, or by order of the court." Iowa Code § 235B.2(1). This case does not involve chapter 235B. Accordingly, we do not find the definition from that chapter to be controlling of the question whether Gunderson was an employee or independent contractor.

denies Gunderson's services were uninterrupted and therefore subject to a five-year limitation period.

"The purpose of the Iowa Wage Payment Collection Law is to facilitate the collection of wages owed to employees." *Phipps v. IASD Health Servs. Corp.*, 558 N.W.2d 198, 201 (Iowa 1997). The act includes within its definition of "wages" compensation owed by an employer for "[l]abor or services rendered by an employee, whether determined on a time, task, piece, commission, or other basis of calculation." Iowa Code § 91A.2(a). An employer must pay "all wages due its employees . . . at least in monthly, semimonthly, or biweekly installments on regular paydays which are at consistent intervals from each other and which are designated in advance by the employer." *Id.* § 91A.3(1).

For purposes of chapter 91A, Gunderson fits the definition of employee rather than independent contractor. *See Runyon v. Kubota Tractor Corp*, 653 N.W.2d 582, 585 (Iowa 2002) (applying dictionary definition of "employ" in context of section 91A.2(3) definition of "employee"); *see also Jeanes v. Allied Life Ins. Co.*, 300 F.3d 938 (8th Cir. 2002) (concluding common law test to distinguish independent contractors from employees is not controlling in chapter 91A); *Miller v. Component Homes*, 356 N.W.2d 213, 217 (Iowa 1984) ("[T]he primary consideration [in chapter 91A] is the right of control, not the intention of the parties"). Therefore, we agree with the district court that the amount owed to Gunderson constitutes wages and accordingly Iowa's wage payment collection act applies.

Chapters 91A and 614 frame the issue of when Gunderson's claim for unpaid wages accrued. We look first to chapter 614, which governs limitations of actions, and find two possible time periods for filing Gunderson's claim. Section 614.1(8) prohibits actions "founded on claims for wages or for a liability or penalty for failure to pay wages, within two years," though it does not define the point at which such a claim accrues. Alternatively, sections 614.1(4) and 614.5 provide a five-year statute of limitations when an action involves a continuous, open, current account, which will "be deemed to have accrued on the date of the last item therein."

Before turning to the instant facts, we review three decisions which address the accrual dates for wage compensation claims.

More than forty years ago, our supreme court addressed circumstances similar to those at issue in this case. In *Patterson v. Patterson*, 189 N.W.2d 601, 603 (Iowa 1971), a claimant trained as a nurse cared for her ailing father-in-law for three years until he was transferred to a nursing home six months before his death. Our supreme court found the two-year statute of limitations in section 614.1(8) applied to the daughter-in-law's suit seeking compensation because it was "clearly a claim for wages." *Patterson*, 189 N.W.2d at 605. But because there was no break in the services, the amount owed was a "continuous account" and the statute commenced upon termination of her services. *Id.* Gunderson cites *Patterson* to support her argument that a five-year statute should begin to run as of July 29, 2009.

Twenty-five years later, our supreme court synthesized the *Patterson* holding with section 91A.3. In *Audus v. Sabre Commns. Corp.*, 554 N.W.2d 868, 869–70 (Iowa 1996), an employer orally agreed to pay an employee a salary plus three percent commission on sales of communication towers. Although the employee received his salaried compensation in weekly payments, his commission payments were erratic over the period of his employment. *See Audus*, 554 N.W.2d at 870. When the employee quit his job and demanded back payment for his commissions, his employer refused, asserting the claim was time-barred under section 614.1(8). *See id.* at 870–71.

First focusing on our wage payment collection law, the court held the purpose of section 91A.3(1) is to place a burden upon employers to pay wages at regular intervals rather than restrict an employee's ability to collect unpaid wages. *Id.* at 873. The court concluded: "[S]ection 91A.3(1) was not intended to serve as a statute of limitations." *Id.*

In deciding whether the two-year wage limitation in section 614.1(8) or the five-year open account limitation in section 614.5 applied to the employee's claim, the *Audus* court adopted the *Patterson* reasoning and held because the commissions accrued continuously over his employment and were based on their overall accumulation rather than allocated to each sale, the amount owed constituted a continuous account. *See id.* at 873–74. The court concluded that regardless of whether the action accrued when he made his last sale or when he demanded payment upon his departure, all of his claims fell within the two-year limitation. *See id.* at 874.

In *Gabelmann v. NFO, Inc.*, 571 N.W.2d 476, 477–79 (Iowa 1997), an employee sued his former employer under chapter 91A for failing to pay his monthly housing allowances and cost of moving. On appeal, parties disputed whether section 614.1(8) or 614.5 governed the statute of limitations period on his claim. *See Gabelmann*, 571 N.W.2d at 481–82. Our supreme court found section 614.1(8) applied and commenced after each payment became due; therefore the housing allowance came due at the end of each month. *See id.* at 482. In response to the employee's reliance on *Patterson* and other precedent, the court explained:

> Those cases stand for the proposition that when services are rendered for a long, continuous period of time, under an implied agreement for compensation, but *wholly indefinite as to the period of employment*, the statute of limitations does not begin to run until there is a break in, or an end to, the services. There is one common thread running through these cases: Unlike the present case, there was no agreement to pay a fixed amount per hour, day, week, or month. Thus, there was no basis to say that the payment for services accrued at any time before there was a break in, or an end to, the services. Once there was a break in the services or the services ended . . . payment accrued thereby triggering the statute of limitations.

Id. at 482–83 (emphasis in original) (internal citations omitted).

Engelbrecht relies on *Gabelmann* to argue not only that a two-year statute of limitations is appropriate, but that it actually began to run each month Gunderson was not paid.

The employment relationship between Gunderson and Marts is similar to that in the *Patterson* case: a provider extended care without compensation and later sought payment in full. But unlike *Patterson*, in this case, the

uncompensated employment period was both preceded and followed by times when Marts paid Gunderson at an agreed-upon hourly rate.

Gunderson's situation also differs from the employee in *Audus* who received periodic wage payments but was owed additional compensation for commissions at the end of his employment. Except for the period of time when she agreed to defer her compensation until the stock sale, Gunderson received regular periodic payments at a set hourly rate. In this aspect, Gunderson's pay arrangement was more akin to that in *Gabelmann*, where the employee's housing allowance was to be paid on a fixed monthly basis. *See Gabelmann*, 571 N.W.2d at 482–83 (rejecting open account argument where there was agreement to pay fixed amount at regular interval).

Under the *Gabelmann* rationale, because Gunderson and Marts agreed to a periodic rate of payment throughout the course of Gunderson's employment, we are unable to apply the open-accounts statute to Gunderson's claim for compensation for the period from January 2005 through June 2006. Accordingly, we agree with the district court that the two-year statute of limitations for wages set out in section 614.1(8) applies under these circumstances.

But our application of that two-year statute to the instant facts results in a different outcome from that in *Gabelmann*. There the court found the employer's failure to make the monthly payments for the employee's housing allowance did not change the agreed-upon periodic payment. "Rather such failure constituted a breach of the employment agreement as to each payment coming due. A cause

of action therefore accrued for each payment as it became due, and the two-year statute of limitations began to run for that payment." *Id.* at 482.

No such breach occurred in the agreement between Gunderson and Marts. According to the summary judgment record, both parties agreed Gunderson would be paid when Marts sold her Verizon stock. Spurred by Engelbrecht's objection, Marts and Gunderson modified their agreement in July 2006 and returned to a rate of seven dollars per hour to be paid weekly. But the record does not show that the employer and employee intended to alter the deferred compensation agreement covering January 2005 through July 2006. Under their agreement, Gunderson's claim did not accrue until Marts sold her stock.

Engelbrecht characterizes the stock sale as Marts's ability to pay and relies on *Gabelmann*'s holding that the statute of limitations starts when payment is due rather than when an employer has an ability to pay:

> [W]e are aware that some jurisdictions read an "ability to pay" rule into their statute of limitations statute. *See In re Clover's Estate*, 171 Kan. 697, 237 P.2d 391, 392 (1951) (holding the statute of limitations on a promise to pay begins to run when the promisor's ability to pay actually becomes a fact). We reject any notion that our statute of limitations provisions should similarly encompass an "ability to pay" rule as the district court implied and as NFO argues here. We decline the invitation to read into the statute anything more than it already says.

Id. In the *Clover* case, the claimant conveyed to her brother an undivided one-fifth interest in real estate for "$1 and other valuable consideration, upon his promise and agreement to pay her a satisfactory amount for her interest in the land when he got on his feet." 237 P.2d at 393. The Kansas Supreme Court

found the statute of limitations on her claim against her brother's estate began to run "as soon as that ability to pay becomes a fact." *Id.* at 395.

We do not believe Marts's proposal to remit payment upon the sale of her stock improperly superimposes an "ability to pay" rule on the statute of limitations. Unlike the uncertain prospects of the promisor in *Clover*, Marts owned the Verizon stock and at all times had an ability to pay Gunderson. Employee Gunderson dickered for a higher hourly wage in return for employer Marts's promise to pay her when she liquidated an already-held asset. This arrangement differs from an indefinite condition that wages would be paid when the employer could afford to do so.

Under their agreement, Gunderson's wage claim did not accrue until Marts sold her Verizon stock. Although section 91A.3 considers wages "due" in traditional intervals, this section is meant to protect employees from an employer's refusal to pay rather than provide an employer with a defense to an employee's claim. *See Audus*, 554 N.W.2d at 873 ("Section 91A.3(1) places no burden on the employee, and it should not compel a loss by the employee of the employee's wage claim when the employer fails to satisfy the statute's requirements."). We find in this case that the wage claim statute did not trigger the running of the statute of limitations when the employer and employee agreed to their own date at which payment would become due.

We disagree with the district court's conclusion that Gunderson's claim accrued in July 2006. We reverse the district court's order granting partial

summary judgment and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.