STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0139

Chester Vernon Jones,
Appellant,

vs.

Drew Evans, Superintendent,
Minnesota Bureau of Criminal Apprehension in his official capacity,
Respondent.

Filed August 6, 2018
Affirmed
Bratvold, Judge

Ramsey County District Court
File No. 62-CV-16-6425

Bradford Colbert, Legal Assistance to Minnesota Prisoners, Lora Fike (certified student attorney), St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, Angela Helseth Kiese, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Bratvold, Judge; and Kalitowski, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

BRATVOLD, Judge

Appellant challenges the district court's dismissal of his civil claims against respondent Drew Evans, in his official capacity as superintendent of the Minnesota Bureau of Criminal Apprehension (BCA). In 2016, appellant filed a lawsuit under 42 U.S.C. § 1983 (2012) seeking declaratory and injunctive relief for substantive and procedural due process violations, as well as for promissory estoppel. Appellant's claims arise from his 2005 plea agreement, in which the state allegedly promised he would not have to register as a predatory offender. Because the district court correctly determined that the six-year limitations period expired before appellant commenced his legal action, we affirm.

FACTS

In August 2005, the state charged appellant Chester Vernon Jones with third-degree criminal sexual conduct. In September 2005, Jones entered into a plea agreement with the state and pleaded guilty to, and was adjudicated delinquent of, fifth-degree criminal sexual conduct. Sometime before February 24, 2006, Jones was assigned a new probation officer who noticed that Jones had not registered as a predatory offender. After the BCA confirmed that Jones was required to register, Jones's probation officer told him to register, which Jones did in March 2006. In 2007 and 2016, Jones was convicted of failure to comply with various aspects of the predatory-offender registration statute; specifically, Jones twice failed to notify law enforcement of a new address.

In November 2016, Jones sued Evans, alleging that the BCA had wrongfully required him to register because, as a part of his 2005 plea agreement, the state had agreed that he "would not have to register as a predatory offender."

Jones moved for summary judgment. The BCA filed a motion to dismiss and a cross motion for summary judgment, refuting Jones's claims on the merits and arguing that his claims should be dismissed under the statute of limitations. In November 2017, the district court dismissed Jones's complaint after determining that his claims were commenced after the limitations period had expired. Jones appeals.

D E C I S I O N

Before analyzing the district court's decision that Jones's claims were commenced untimely, we must address the applicable standard of review. The district court granted the BCA's motion to dismiss Jones's complaint under Minn. R. Civ. P. 12.02(e), and both parties contend that the standard is that for a rule 12.02(e) motion.[1] But under Minn. R. Civ. P. 12.02, "[i]f, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." *See Antone v. Mirviss*, 720 N.W.2d 331, 334 n.4 (Minn. 2006). Because the parties submitted

[1] The practical difference between the rule 12.02(e) standard and the summary judgment standard is minimal in this case. First, our standard of review is de novo for both types of motions. *In re Individual 35W Bridge Litig.*, 806 N.W.2d 811, 815 (Minn. 2011) (stating that appellate courts review dismissals under rule 12.02(e) de novo). Second, while we review properly-supported facts under rule 56 and we consider alleged facts in a complaint under rule 12.02, the material facts are not in dispute in this case. *See generally id.* (stating for suits dismissed under Minn. R. Civ. P. 12.02(e), the appellate court may consider "only those facts alleged in the complaint").

evidence that addressed matters outside of Jones's complaint, and the district court considered this evidence in reaching its decision, we conclude that the BCA's motion became one for summary judgment under Minn. R. Civ. P. 56.01 and we apply that standard of review. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (stating that "it is the responsibility of appellate courts to decide cases in accordance with law," despite whether a party makes a particular argument).

This court reviews summary judgment decisions de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). In its review, "[this court] determine[s] whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Id.* The evidence is viewed in the light most favorable to the party against whom summary judgment was granted. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). Further, "the construction and applicability of a statute of limitation or repose is a question of law subject to de novo review." *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 883 (Minn. 2006).

Minnesota law requires registration for certain offenders who are charged with criminal sexual conduct even if convicted of another offense "arising out of the same set of circumstances." Minn. Stat. § 243.166, subd. 1b(a)(1)(iii) (2016) (registration statute).[2]

[2] We apply the 2016 version of the applicable statute, but note that it has not changed in ways material to this case since 2005, when Jones was adjudicated delinquent of fifth-degree criminal sexual conduct. *See* Minn. Stat. § 243.166, subds. 1, 1b, 3, 4, 5, 6 (Supp. 2005); Minn. Stat. § 299C.093 (Supp. 2005).

With some exceptions, those subject to the registration statute must "continue to register" for ten years after their initial registration.[3] Minn. Stat. § 243.166, subd. 6(a) (2016). More specifically, the registration statute imposes requirements in addition to initial registration, such as periodic verification, *see* Minn. Stat. § 243.166, subd. 4(e) (2016), and notice to local authorities upon change of address, *see* Minn. Stat. § 243.166, subd. 3(b) (2016).

Failure to comply with the registration statute is a felony. Minn. Stat. § 243.166, subd. 5(a) (2016). Also, failure to comply with the registration statute will lead to an additional five-year period, during which the individual must continue to register. *See* Minn. Stat. § 243.166, subd. 6(b) (stating that a required registrant must "continue to register for an additional period of five years" if he violates certain provisions of the registration statute). Further, if an individual required to register is "incarcerated due to a conviction for a new offense or following a revocation of probation, supervised release, or conditional release for any offense," then that individual must continue to "register until ten years have elapsed since the person was last released from incarceration or until the person's probation, supervised release, or conditional release period expires, whichever occurs later." Minn. Stat. § 243.166, subd. 6(c) (2016).

As a result of Jones's delinquency adjudication in 2005, he was required to register as a predatory offender. *See* Minn. Stat. § 243.166, subd. 1b(a)(1)(iii) (2016) (requiring

[3] While the predatory-offender registration statute contemplates an offender registering as a predatory offender at the outset of the ten-year period, it also states an offender must "continue to register," which appears to be shorthand for requiring an offender to comply with the ongoing provisions of the statute. *See* Minn. Stat. § 243.166, subds. 3(a), 6(b) (2016).

registration for person charged with felony criminal sexual conduct and adjudicated delinquent for the offense of another arising out of that circumstance). Because Jones was later convicted in 2016 of failing to comply with the registration statute, as well as convicted of other new offenses, the record indicates that Jones is required register until 2032.

I. Jones commenced his legal action after the applicable limitations period had expired and the district court correctly dismissed his claims as untimely.

In his complaint, Jones asked for judgment declaring that he is not subject to the registration statute and for an injunction preventing the BCA from requiring him to register. His complaint asserted a civil claim for deprivation of his constitutional rights under 42 U.S.C. § 1983, claiming (1) the BCA violated his substantive-due-process rights because it required him to register despite the state's promise that he did not have to register as part of the 2005 plea agreement; and (2) the BCA violated of his procedural-due-process rights because it did not provide sufficient process before it required him to register. Additionally, Jones asserted a promissory estoppel claim based on the state's alleged representations during Jones's plea agreement.

The statute of limitations for each of Jones's three claims is six years. *See* Minn. Stat. § 541.05, subd. 1(5) (2016) (providing six-year statute of limitations for any injury "to the person or rights of another, not arising on contract"); *see also Jacobson v. Bd. of Trs. of Teachers Ret. Ass'n*, 627 N.W.2d 106, 110 (Minn. App. 2001) (holding limitations period for promissory estoppel is six years), *review denied* (Minn. Aug. 15, 2001); *Berg v.*

Groshen, 437 N.W.2d 75, 77 (Minn. App. 1989) (holding six-year limitations period applies to section 1983 claims).

Generally, the statute of limitations begins to run when a cause of action accrues. *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 832 (Minn. 2011). "Accrual refers to the point in time when a plaintiff can allege sufficient facts to survive a motion to dismiss for failure to state a claim upon which relief can be granted." *Sec. Bank & Tr. Co. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, __ N.W.2d __, __, 2018 WL 3131140, at *3 (Minn. June 27, 2018) (quotations omitted). To accrue, "a cause of action requires the existence of operative facts supporting each element of the claim." *Id.*

Here, Jones's causes of action accrued in 2006 when he was initially required to register as a predatory offender because the operative facts existed to support each element of his three claims at that time. Thus, Jones's claims expired in 2012.[4] Jones's complaint was served in 2016, meaning, he commenced his suit four years after the limitation period expired.

Nonetheless, Jones contends that the district court incorrectly dismissed his suit for two reasons: (A) the BCA's wrongful acts were continuing violations that toll the statute

[4] The district court, citing Minn. Stat. § 541.15(a)(1) (2016), determined that the statute of limitations was tolled until Jones turned 18 on June 23, 2006, meaning that the statute of limitations expired six years after Jones's 18th birthday, on June 23, 2012. We note that the district court misconstrued section 541.15. In *D.M.S. v. Barber*, the supreme court stated that, under section 541.15(a)(1) when an action "accrues during a plaintiff's infancy, the plaintiff must commence the action either within one year of reaching the age of majority or within the six-year period of limitation, whichever is later." 645 N.W.2d 383, 387 (Minn. 2002). Accordingly, Jones's 18th birthday would have been relevant only if the six-year statute of limitations had expired before he reached majority. Regardless, the limitation period expired in 2012.

of limitations; and (B) the BCA's wrongful acts include ongoing requirements for Jones, and each ongoing requirement gives rise to a new cause of action, for which the limitations period has not yet expired. We address each argument in turn.

A. The continuing-violation theory is not applicable to Jones's claims.

Some causes of action do not expire under the statute of limitations if the allegedly wrongful act by the defendant was "a continuing violation." *Sigurdson v. Isanti County*, 448 N.W.2d 62, 66 (Minn. 1989). For example, in the context of employment, the supreme court held that gender discrimination may be a continuing violation that extends the statute of limitations. *Id.* at 68. The supreme court explained that, "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Id.* at 67. *Sigurdson* emphasized that the correct analysis is "whether any present violation exists." *Id.* (citation omitted) (quoting *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S. Ct. 1885, 1889 (1977)). In performing this analysis, a court must distinguish between discriminatory acts and discriminatory effects: "[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Sigurdson*, 448 N.W.2d at 67 (alteration in original) (quoting *Lorance v. AT & T Techs., Inc.*, 490 U.S. 900, 907, 109 S. Ct. 2261, 2266 (1989), *superseded by statute*, 42 U.S.C. § 2000e-5(e)(2) (2012)).

We conclude that the statute of limitations for Jones's claims is not tolled for two reasons. First, Minnesota courts have applied the continuing-violation theory in employment-discrimination cases, in part, because these claims "involve[e] wrongful acts that manifest over a period of time, rather than in a series of discrete acts." *Davies v. West*

Publ'g Co., 622 N.W.2d 836, 841 (Minn. App. 2001), *review denied* (Minn. May 29, 2001). While Minnesota courts have applied the theory in other contexts, *see id.*, we have done so very rarely. No Minnesota appellate court has held that the continuing-violation theory applies to due-process or estoppel claims. Given the unique nature of the continuing-violation theory, and its particular applicability to employment-discrimination claims, we decline to apply it to the claims asserted in this case.

Second, even if we were to assume that the continuing-violation theory applies to Jones's claims, it would not have tolled the statute of limitations under the facts he alleged. Jones argues that he is challenging the BCA's continuous requirement that he register as a predatory offender. The BCA responds that Jones's claims challenge the initial determination that Jones must register, and that the continuous requirements are merely effects of that initial determination. The district court agreed with the BCA and determined that the allegedly wrongful acts were discrete and "occurred one time."

We agree with the district court's conclusion. *Sigurdson* is instructive in determining whether the BCA's alleged wrongful acts are continuing or discrete. In *Sigurdson*, the supreme court determined that an employer's failure to promote an employee, based on a discriminatory union contract, over the course of several years, was a continuing act of employment discrimination, thereby tolling the statute of limitations. *Sigurdson*, 448 N.W.2d at 68. The supreme court distinguished the employer's multiple decisions not to promote an employee from an employer's single decision to adopt a policy. *Id.* In doing so, *Sigurdson* relied on United States Supreme Court precedent to conclude that an employer's facially neutral policy is not a continuing violation even though, in

practice, the policy discouraged women from seeking traditionally male jobs. *Id.* at 67 (discussing *Lorance*, 490 U.S. at 905, 109 S. Ct. at 2265).

Sigurdson supports our conclusion that Jones's complaint does not allege continuing violations. First, Jones's substantive-due-process claim rests on a single, wrongful act by the BCA. To prevail, Jones must prove that the BCA has violated his right to be protected "from 'certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them.'" *In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999) (quoting *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 983 (1990)). Based on our review of the statutory requirements, we conclude that the alleged "wrongful" or "arbitrary" act underlying Jones's substantive-due-process claim occurred in 2006 when the BCA determined Jones was required to register as a predatory offender.

It is true that the registration law imposes ongoing requirements that apply to Jones. *See* Minn. Stat. § 243.166, subd. 4(e) (periodic verification); Minn. Stat. § 243.166, subd. 3(b) (notice to local authorities upon change of address). But these ongoing requirements pertain to Jones because the BCA determined in 2006 that he was an offender subject to registration under subdivision 1b. *See* Minn. Stat. § 243.166, subd. 1b. The BCA's determination was a single, discrete act; in contrast, the ongoing registration requirements that apply to Jones are the effects of that initial determination.[5] *See* Minn. Stat. § 243.166,

[5] Jones argues that "[h]ad the initial requirement to register been a singular event, and the subsequent requirements merely consequences of that action, then the statute would treat those who initially failed to register differently from those who fail to comply with the subsequent requirements." This argument fails because Jones draws an irrelevant distinction between registering and being required to register. Whether Jones actually registered is not material to his claims. Jones's claims turn on the fact that the BCA

subds. 3, 4. Just as *Sigurdson* stated that ongoing employment did not give rise to a continuing violation, we conclude that ongoing registration requirements did not give rise to a continuing violation.

Second, Jones's procedural-due-process claim also rests on a single wrongful act by the BCA. This claim requires Jones to show that the BCA has deprived him of a protected life, liberty, or property interest and followed procedures that were constitutionally deficient. *Mertins v. Comm'r of Nat. Res.*, 755 N.W.2d 329, 336 (Minn. App. 2008). Jones alleges the BCA did not provide sufficient notice and process before determining that he must register as a predatory offender. Because the BCA made this determination once, in 2006, we conclude that Jones's second cause of action does not allege a continuing violation.

Third, Jones's estoppel claim fails for similar reasons. The elements of promissory estoppel are (1) there was a clear and definite promise, (2) the promisor intended to induce reliance, and such reliance occurred, and (3) the promise must be enforced to prevent injustice.[6] *Hous. & Redev. Auth. of Chisholm v. Norman*, 696 N.W.2d 329, 336 (Minn.

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determined he was a predatory offender required to register. *See* Minn. Stat. § 243.166, subd. 1(b). Also, Jones mistakenly relies on our decision in *Longoria v. State*, in which we described a conviction for failing to adhere to the requirements of the predatory offender statute as a "continuing offense." 749 N.W.2d 104, 106-07 (Minn. App. 2008), *review denied* (Minn. Aug. 5, 2008). But *Longoria* did not consider the statute of limitations for a claim arising from the BCA's initial determination that an individual is required to register as a predatory offender. *Id.*

[6] Jones's summary-judgment memorandum described his claim as equitable estoppel, but in his appellate brief and at oral arguments to this court, he asserted promissory estoppel. Based on our analysis of the elements of each cause of action, we determine there are no relevant differences between promissory and equitable estoppel that would have led to a

2005). Here, Jones alleges that the BCA wrongly determined that Jones must register after the state's purported promise during the 2005 plea negotiations that he would not have to register. As discussed above, and without deciding whether the BCA may be estopped based on the prosecutor's promises, we conclude that the BCA's 2006 determination that Jones must register was a single event and not a continuous violation.

In sum, even if we were to apply the continuing-violation theory to the claims asserted in Jones's complaint, he failed to allege continuing violations and we conclude that the statute of limitations was not tolled for any of Jones's claims.[7]

B. The ongoing requirements of the predatory-offender registration statute do not give rise to new causes of action.

Jones argues that the "enforcement of the ongoing requirements found in [the predatory-offender registration statute] create a new cause of action within the statute of limitations." This argument is substantively similar to Jones's continuing-violation argument. Because Jones cites cases that do not rely on the continuing-violation theory, we address his cited authorities separately.

Jones relies on the United States Supreme Court's decision in *Bazemore v. Friday*, in which an employer enacted a racially discriminatory policy that resulted in paying some employees less than others. 478 U.S. 385, 394-95, 106 S. Ct. 3000, 3006-07 (1986). The

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different result in this case had Jones argued equitable estoppel on appeal. *See Transamerica Ins. Grp. v. Paul*, 267 N.W.2d 180, 183 (Minn. 1978) (listing elements of equitable estoppel).

[7] The parties also discuss unpublished decisions, which are not precedential. *See* Minn. Stat. § 480A.08, subd. 3(c) (2016); *Vlahos v. R&I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004).

policy did not become illegal until Congress passed Title VII of the Civil Rights Act of 1964. *Id.* The United States Supreme Court held that, after the passage of the Civil Rights Act, each paycheck reflecting a salary discrepancy pursuant to the racially discriminatory policy was a separate cause of action. *Id.*

Jones argues that the same analysis applies to his case, contending that "[t]he fact that Jones was initially required to register outside the statute of limitations does not change that [the BCA] is still acting unlawfully and unconstitutionally." We disagree. While the plaintiffs in *Bazemore* challenged repeated acts of racial discrimination, Jones contests the BCA's determination requiring him to register as a predatory offender. The BCA's determination occurred at one time in 2006 and was not repeated.[8] Jones also does not allege that his liability for failing to maintain his predatory offender registration, or the subsequent extensions of his registration period, involved an additional, discrete act by the BCA.[9]

We agree with the BCA's position that Jones's claims are governed by the supreme court's decision in *Hamann*, 808 N.W.2d at 830. There, a medical clinic adopted a policy providing that physicians who met certain criteria would be exempted from taking night

[8] Jones also attempts to support his argument by asking the court to look to the "continual trespass doctrine." *See Herbert v. City of Fifty Lakes*, 744 N.W.2d 226, 234 (Minn. 2008). Because Jones cites no case law applying this doctrine outside of trespass, we reject it.

[9] Although not raised by Jones, we note that under the registration statute, the BCA is tasked with multiple responsibilities, including mailing and receiving the verification forms, as well as maintaining a data system of offenders required to register. Minn. Stat. § 243.166, subd. 4(e); Minn. Stat. § 299C.093 (2016). Because Jones's complaint does not assert that his claims arise from any of the BCA's ongoing responsibilities, we do not further consider these statutory provisions.

call without facing a decrease in salary. *Id.* In early 2004, Hamann, a physician at the clinic who met the policy criteria, informed the clinic department chair that he would like to exercise his rights and be exempted from night call with no salary reduction. *Id.* The department chair asked Hamann to postpone his rights under the policy for a year to prevent short staffing. *Id.* Hamann agreed, but when he again sought to exercise his rights in April 2005, the department chair told Hamann the policy no longer existed and would not be honored. *Id.* at 830-31. As a result, Hamann continued taking night call until 2008 when he needed to stop for health reasons, at which point the clinic reduced his salary. *Id.* at 831.

Hamann sued the clinic, alleging breach of contract and promissory estoppel. *Id.* The district court dismissed Hamann's claim, determining that the two-year statute of limitations began to run in April 2005 when the clinic informed Hamann it would not honor its obligations under the policy. *Id.* This court reversed, concluding that while the clinic repudiated the policy in April 2005, each pay period during which the clinic did not satisfy its obligations under the policy "gave rise to a new cause of action." *Id.* The supreme court reversed the court of appeals, holding that Hamann's causes of action accrued in 2005 and that each new pay period was not a new breach because Hamann challenged a single instance of conduct: the one-time "decision to require that physicians over age 60 take night call." *Id.* at 828, 834-36.

Hamann's reasoning is instructive here. Jones's complaint challenges the BCA's one-time decision. Thus, Jones's causes of action accrued no later than 2006 when the BCA determined he must register as a predatory offender.

Jones makes three arguments in an attempt to distinguish *Hamann*. First, he argues that *Hamann* is inapplicable because he is seeking declaratory relief, while *Hamann* sought monetary damages. *See id.* at 831. But *Hamann* did not suggest that its ruling might have been different if the plaintiff sought different relief. Accrual of a cause of action turns on the existence of operative facts related to the elements and not the relief sought. Second, Jones argues that, unlike in *Hamann*, Jones must comply with the predatory-offender registration requirements or risk criminal penalties, while Hamann could have quit his job or refused to take the night call. He argues that "[t]he use of such compulsion dictates a different result when it comes to a continuing violation." But nothing in *Hamann*, or related caselaw, suggests that compulsion, or the absence thereof, has any effect on the statute of limitations.[10] Third, Jones points out that *Hamann* addressed an estoppel claim and not constitutional claims. Jones also alleges an estoppel claim and we discern no principled basis to depart from *Hamann*'s reasoning for Jones's constitutional claims.

As a final matter, Jones argues that if this court determines that Jones "cannot challenge the validity of being required to register as a predatory offender after six years of being informed that he has to register," then it is possible that a person could face a "lifetime of unjustified government intrusion." We are not persuaded. Statutes of

[10] Jones also argues that this court should analogize his case to a criminal sentence and points out that a court "may at any time correct a sentence not authorized by law." *See* Minn. R. Crim. P. 27.03, subd. 9; *Vazquez v. State*, 822 N.W.2d 313, 318 (Minn. App. 2012). We disagree. Rule 27.03, subd. 9, applies only to criminal sentences. Also, the predatory-offender registration requirement is not a "punitive consequence" but rather a "regulatory" requirement. *Kaiser v. State*, 641 N.W.2d 900, 907 (Minn. 2002). Accordingly, we conclude rule 27.03 has no bearing on the limitations period for Jones's civil claims.

limitations, by definition, include the possibility that an injustice will go unresolved. "If the result now seems harsh, it is a criticism that may be levelled against many statutes of limitation." *Anderson v. Comm'r of Pub. Safety*, 878 N.W.2d 926, 930 (Minn. App. 2016). The decision to establish statutes of limitations is for the legislature; this court "is limited in its function to correcting errors [and] it cannot create public policy." *LaChapelle v. Mitten*, 607 N.W.2d 151, 159 (Minn. App. 2000), *review denied* (Minn. May 16, 2000).

Affirmed.