

CASE NO. A07-1820

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State of Minnesota  
In Court of Appeals

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JONATHAN GOODMAN,

*Appellant,*

vs.

BEST BUY, INC.,

*Respondent.*

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APPELLANT'S BRIEF AND APPENDIX

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

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## STATEMENT OF THE LEGAL ISSUES

- I. 28 U.S.C. §1367(d) provides: “*the period of limitations for any claim [over which a federal court has supplementary jurisdiction] shall be tolled while the claim is pending and for a period of 30 days after it is dismissed.*” Is the time to sue in state court limited to 30-days following dismissal by a federal court, or is the time left unexpired in the period of limitations available to be added to the 30-day period?

**District court held:** The court acknowledged a split in other courts’ interpretations of this statute but held that 28 U.S.C. §1367(d) requires a plaintiff to bring suit in state court within 30-days of a federal court dismissal.

**Apposite authorities:**

- (1) 28 U.S.C. §1367(d);
- (2) *Bonifield v. County of Nevada*, 94 Cal. App. 4<sup>th</sup> 298, 114 Cal Rptr. 2d 207 (2001);
- (3) *Berke v. Buckley Broadcasting Corp.*

- II. Minnesota common law excludes from the limitations period time that elapses while a claimant is prevented from pursuing a legal remedy by a paramount authority. [Is time that passes while Defendant is pursuing federal removal of Plaintiff’s timely-commenced state court action counted towards exhaustion of the limitations period?]

**District court did not address.**

**Apposite Authorities:**

- (1) *St. Paul M. & M Ry. Co. v. Olson*, 87 Minn. 117, 91 N.W. 294 (1902).
- (2) Dunnell Minn. Dig. LIMITATION OF ACTIONS §2.07 (4th ed.)

- III. Where Minnesota law provides for equitable tolling, should this Court toll the deadline for bringing this action in state court where: (1) Plaintiff timely commenced his original action in state court and that action was only interrupted due to Defendant’s removal to federal court; (2) the federal dismissal order did not give notice of any 30-day deadline to re-commence suit in state court; (3) the federal tolling statute arguably allows for tacking of unexpired time plus 30-days; (4) Plaintiff acted diligently under the circumstances?

**District court did not address.**

**Apposite Authorities:**

- (1) *Raygor v. University of Minnesota*, 604 N.W.2d 128 (Minn. Ct. App. 2000), *rev'd on other grounds*, 620 N.W.2d 680 (Minn. 2001), 534 U.S. 533 (2002).
- (2) *State by Khalifa v. Dieter Enters, Inc.*, 418 N.W.2d 202 (Minn. Ct. App. 1988).
- (3) *Ochs v. Streater, Inc.*, 568 N.W.2d 858 (Minn. Ct. App. 1997)

## INTRODUCTION

An employee is terminated after being absent because of a medical condition. Five months later, safely within the one-year limitations period, he sues in state court alleging violations of the Minnesota Human Rights Act (“MHRA”) and the federal Family and Medical Leave Act (“FMLA”). The employer removes to federal court based on the FMLA claim. The federal court later grants summary judgment on the FMLA claim but declines to decide the MHRA claim, dismissing it without prejudice. The employee, by then *pro se*, commences a new state court action within three months. The state court dismisses his case as untimely.

The federal tolling statute tolls state law periods of limitation during federal court proceedings. By its plain language the statute affords the employee the time remaining on the original period of limitations plus 30-days after his case is dismissed to bring his state court action. There are no decisions from a Minnesota court interpreting this statute. The employee should not have been time-barred under this statute.

Alternatively, Minnesota allows for the tolling of limitation periods when a claimant is prevented from pursuing his legal rights because of a paramount authority or where tolling is necessary based on equitable principles as applied to the facts. The employee was prevented from pursuing his state court action by the federal court removal. He acted diligently and there was no prejudice to the defendant. This Court should reverse the dismissal.

## STATEMENT OF THE CASE

Appellant Jonathan Goodman was born in Bonthe, Sierra Leone in 1956. (Affidavit of Jonathan Goodman attached as exhibit A to affidavit of Mark Miller dated 5/25/07)(hereafter “Goodman affidavit of 8/10/06”). He entered the United States in 1986 and later became a U.S. citizen. (*Id.*).

Goodman was hired by Respondent Best Buy, Inc.<sup>1</sup> as a customer service representative in September of 2002. (Goodman affidavit of 8/10/06). He worked for Best Buy until he was fired on February 21, 2005. (Goodman affidavit of 8/10/06; exhibit N to Ballard affidavit of 5/4/07). Best Buy claimed that the termination was due to excessive absenteeism. (Exhibit N to Ballard affidavit of 5/4/07). Goodman claimed that he had a longstanding medical condition from high blood pressure and that his termination resulted from Best Buy’s improper failure to accommodate him or allow him to take intermittent medical leave. (*See* Goodman affidavit of 8/10/06).

On July 12, 2005, Goodman commenced an action in Minnesota state court with a summons and complaint prepared by his then-attorney, Amadu Edward Swaray. (Appendix at 1 ff.). The complaint alleged that Best Buy had terminated Goodman in violation of the federal Family and Medical Leave Act (“FMLA”) and in violation of the Minnesota Human Rights Act (“MHRA’s”) prohibition on disability discrimination. (*Id.*).

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<sup>1</sup> Best Buy asserts that its proper name is Best Buy Stores, L.P. (*See* first affidavit of Shalanda D. Ballard dated 5/4/07)(hereafter “Ballard affidavit of 5/4/07”). In this brief, Respondent will be referred to as Best Buy.

Best Buy removed the case to federal court on August 4, 2005, presumably on the basis of federal jurisdiction over the FMLA claim. (App. 11). On August 11, 2005, Best Buy answered the complaint. (App. 8).

On December 4, 2006, the federal district court, the Honorable David S. Doty, issued an Order granting Best Buy's motion for summary judgment on the FMLA claim. (App. 13). The Order also expressly declined to exercise its supplemental jurisdiction to decide Goodman's state law MHRA claim. (*Id.*). Accordingly, the district court dismissed the MHRA claim without prejudice. (*Id.*). Nowhere did the district court's dismissal order advise that there were only 30-days in which to re-commence the state court action. (*Id.*).

Accompanying the federal court's dismissal order was notice of entry of judgment and a civil notice describing the time periods in which to appeal. (App. 19, 20). The civil notice indicated only that the parties could appeal the judgment to the Eighth Circuit within 30-days. (App. 20).

By that point, Goodman was proceeding *pro se*. (App. 22). He attempted to file an appeal on the 30<sup>th</sup> day after the dismissal order by filing an appeal in this Court, rather than the Eighth Circuit. (*Id.*). Still acting *pro se*, Goodman revised his original complaint to delete the FMLA claim and make other substantive changes and then commenced a second state court action based solely on the MHRA claim. (App. 23). The second action was filed in state court on March 9, 2007. (*Id.*).

Best Buy did not interpose an answer. (App. 28). Rather, it brought a motion to dismiss or in the alternative for summary judgment. (App. 30). The Hennepin County District Court granted Best Buy's motion to dismiss purely on the basis of the statute of limitations, holding that, as a matter of 28 U.S.C. §1367(d) Goodman had only thirty days after the federal court dismissed his claim to re-file a state court action. (*Id.*). It did not address the merits of Goodman's claim. *Id.* Goodman timely appealed to this Court on September 20, 2007. (App. 36).

## ARGUMENT

### Scope and Standard of Review

The construction and applicability of statutes of limitation are questions of law that reviewing courts analyze *de novo*. *Benigni v. County of St. Louis*, 585 N.W.2d 51, 54 (Minn. 1998). Issues of equitable tolling are subject to abuse of discretion review. *Mercer v. Anderson*, 715 N.W.2d 114, 120 (Minn. Ct. App. 2006). However, here the state trial court did not rule on equitable tolling and is owed no discretion.

- I. UNDER THE FEDERAL TOLLING STATUTE, GOODMAN HAD ALL TIME UNEXPIRED ON THE ONE-YEAR LIMITATIONS PERIOD PLUS THIRTY DAYS IN WHICH TO RE-COMMENCE HIS MHRA ACTION IN STATE COURT.

The state court relied upon the federal tolling statute, 28 U.S.C. §1367(d), in dismissing Goodman's second state case as untimely. This statute tolls "*the period of limitations . . . while the claim is pending [in federal court] and for a*

*period of 30 days after it is dismissed.*” 28 U.S.C. §1367(d). The crux of this appeal is the meaning of the tolling language in this statute.

A. Background and History of the Federal Tolling Statute.

Before addressing the statutory language, it is helpful to review the background and context of the federal tolling statute. Section 1367(d) is a part of a larger piece of federal legislation called the Judicial Improvements Act of 1990 (“the Act”). Patrick D. Murphy, *A Federal Practitioner’s Guide to Supplemental Jurisdiction under 28 U.S.C. § 1367*, 78 Marq. L. Rev. 973, 973 (1995) (hereafter “*Federal Practitioner’s Guide*”). Title III of the Act, entitled “Federal Courts Study Committee Implementation Act of 1990,” related to supplemental jurisdiction and was codified at section 1367. See Note, “*Pushing the Limits of the Judicial Power: Tolling State Statutes of Limitations under 28 U.S.C. § 1367(d)*,” 77 Tex. L. Rev. 1049, 1056 (1999)(hereafter “*Pushing the Limits*”).

Section 1367 was considered a centerpiece of the overall Act and sought to codify the federal case law doctrines of pendent, ancillary and pendent-party jurisdiction by combining all three under the more generic label of “supplemental jurisdiction.” *Federal Practitioner’s Guide* at 973; *Pushing the Limits* at 1050. Subsection (a) of §1367 contained the broad grant of federal power over state law claims supplemental to any civil action within the original jurisdiction of the federal courts. *Federal Practitioner’s Guide* at 995-1005.

Subsection (b) of §1367 tailored the scope of supplemental jurisdiction in cases where the federal court’s jurisdiction was based on diversity of citizenship.

*Federal Practitioner's Guide* at 1006. Subsection (c) codified the grounds upon which a federal court could choose to exercise its discretionary authority to hear claims under its supplemental jurisdiction power. *Id.* at 1021-1031. Subsection (d) of §1367 contained a tolling provision for claims asserted under federal supplemental jurisdiction which are later dismissed by the federal court. *Id.* at 1031-1036.<sup>2</sup>

Subsection (d) is noteworthy for its lack of legislative history. *See Federal Practitioner's Guide* at 1031 n. 306 (observing that subsection (d) appears to have been the original idea of the drafters of the supplemental jurisdiction statute—rather than the Federal Courts Study Committee). Commentators believe that subsection (d) was modeled on a 1969 proposal made by the American Law Institute in response to then-Chief Justice Warren's request for improvements in the court system which advocated for adoption of a tolling provision for all actions timely filed in federal court and later dismissed for lack of jurisdiction. *Id.* at 1031, n. 306; *see also Pushing the Limits* at 1057-1058.

The United States Supreme Court has observed that subsection (d) was adopted to improve the administration of justice by providing a better alternative for federal courts contemplating retaining jurisdiction over supplemental state law claims. *Jinks v. Richland Co.*, 538 U.S. 456, 462 (2003). Prior to the adoption of §1367(d), federal courts were faced with several, generally unsatisfactory, options

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<sup>2</sup> Subsection (e) merely defines the word "State" to include the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States. 28 U.S.C. § 1367(e).

for preserving a state law claim when the period of limitations had expired during the federal proceedings. *Id.*

One option was for the federal court to dismiss the state law claims on condition that the defendant would waive any statute of limitations defense in state court; but many defendants would not do so. *Id.* Another option was for the federal court to retain jurisdiction of the state law claim—even if the claim more properly belonged in state court. *Id.* A third option was for the federal court to dismiss the action subject to reopening if the state court later dismissed the action as untimely. *Id.* Finally, in cases where the federal action was originally commenced in state court but removed to federal court, the federal court could remand the case to the state court. *See generally Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988).

Section 1367(d) provided a simple federal tolling provision for cases dismissed by the federal court. *Jinks*, 538 U.S. at 463-464. The statute has been found to be a constitutional exercise of Congress's power over the administration of justice. *Jinks*, 538 U.S. at 463-465.

B. The Plain Meaning of the Federal Tolling Statute.

The federal tolling statute is quite brief. In its entirety it provides:

The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

28 U.S.C. § 1367(d) (emphasis added).

A plain language reading of the statute requires that the plaintiff be given the benefit of the unexpired time on the period of limitations plus 30 days.<sup>3</sup> The statute provides that “*the period of limitations . . . shall be tolled.*” It does not say that the “*statute of limitations . . . shall be tolled.*” *Id.* This choice of words is significant. It suggests an interruption of the period of time allowed, rather than simply avoid the running of the statute of limitations while the federal suit was pending. If the drafters merely wanted to avoid the expiration of a statute of limitations during the federal proceeding, they would have said the statute of limitations shall be tolled. But the drafters chose, instead, to toll the “period of limitations.” The word “period” in this context means time period. The drafters wanted to stop the clock on the time period allowed for suit and then restart it after dismissal of the federal action.

Under this plain meaning interpretation, a plaintiff is entitled to the unexpired time remaining in the period of limitations plus 30-days to bring his or her state court action. Such an interpretation would give full effect to the phrase “*the period of limitations . . . shall be tolled.*”. This Court should give the statute its plain meaning here.

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<sup>3</sup> In this case, the state court did not make an attempt to interpret the plain meaning of the statute. Rather, that court simply went to case law interpretation of the statute from other jurisdictions, skipping over the plain language.

C. Case Law Interpretation of the Federal Tolling Statute.

The United States Supreme Court has not explicitly interpreted the meaning of §1367(d) on either occasion when the statute was before the Court.<sup>4</sup> However, the Court gave a strong indication of its interpretation of the statute in a comment in the *Raygor* decision. In that case, the Court remarked that §1367(d) was intended to: “*toll the state statute of limitations for 30 days in addition to however long the claim had been pending in federal court*” *Raygor v. Regents of the University of Minnesota*, 534 U.S. at 542 (emphasis added). This statement indicates that the Court understands the statute to provide for tolling that includes unexpired time on the limitations period, plus 30-days.

First, the Court’s use of the words “*in addition to*” in the *Raygor* opinion suggests that there must be something more than a 30-day grace period onto which it is added. The reference to “in addition to” suggests the aggregation of time periods. This is consistent with Goodman’s interpretation that the statute provides for unexpired time, plus 30-days. There would be no need for “addition” if the statute only provided for a 30-day grace period.

Secondly, this interpretation of the *Raygor* comment is consistent with the Court’s earlier exegesis on the meaning of the word “tolling” under federal law in *Chardon v. Fumero Soto*, 462 U.S. 650, 652 n.1 (1983). In *Chardon*, the Court

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<sup>4</sup> Section 1367(d) has come before the United States Supreme Court only twice and on neither occasion was the Court called upon to decipher the meaning of this language. See *Jinks*, 538 U.S. 456; *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002).

explained that “tolling” means that the period of limitations ceases running. *Id.* How tolling will play out in any situation is the “tolling effect.” *Id.* There are three different ways tolling effect can be expressed.

“Tolling effect” refers to the method of calculating the amount of time available to file suit after tolling has ended. The statute of limitations might merely be suspended; if so, the plaintiff must file within the amount of time left in the limitations period. If the limitations period is renewed, then the plaintiff has the benefit of a new period as long as the original. It is also possible to establish a fixed period such as six months or one year during which the plaintiff may file suit, without regard to the length of the original limitations period or the amount of time left when tolling began.

*Chardon*, 462 at 652 n.1. In other words, *Chardon* identified three types of tolling effect: (1) simple clock-stopping; (2) renewal of a limitations period as long as the original; and (3) a fixed grace period.

Later when it decided *Raygor*, the Court expressed the view that §1367(d) provides for a tolling period of 30-days in addition to the unexpired time. This would be consistent with a hybrid of the first and third types of tolling effect recognized in *Chardon*. The *Raygor* Court language recognizes that §1367(d) combines both the clock-stopping and the grace period tolling effects.

In summary, Supreme Court precedent suggests strongly that §1367(d) is intended to afford someone in Goodman’s position the benefit of both the time remaining unexpired on the period of limitations plus 30-days in which to sue.

No Minnesota court has ever interpreted the language of §1367(d). In the one case to come before this Court in which the statute was applied, there was apparently no issue as to the meaning of §1367(d) because the plaintiff had sued

within 30-days of the federal court dismissal. *Rothmeier v. Investment Advisers, Inc.*, 556 N.W.2d 590, 592-593 (Minn. Ct. App. 1996).

In the absence of any controlling decisions expressly interpreting the statute, the state court in this case looked to other jurisdictions for guidance. The court identified and compared two decisions: *Bonifield v. County of Nevada*, 94 Cal. App. 4th 298, 114 Cal. Rptr. 2d 207 (2001), *rev. denied* (2002), and *Berke v. Buckley Broadcasting Corp.*, 359 N.J. Super. 587, 595, 821 A.2d 118, 123 (2003). The decisions represents express divergent views on the proper interpretation of §1367(d).

In the *Bonifield* decision, the California Court of Appeals held that §1367(d) affords a plaintiff the unexpired time on the period of limitations plus 30-days to bring his or her state court action. *Bonifield* at 303-304, 114 Cal. Rptr. at 210-211. The *Bonifield* Court rejected an interpretation of §1367(d) that would limit the time period to 30-days following the dismissal with the following comment:

This interpretation ignores, and is inconsistent with, the plain meaning of the statutory language. Section 1367(d) specifies that the statute of limitations for a state claim over which the federal court has supplemental jurisdiction 'shall be tolled while the claim is pending [in federal court] and for a period of 30 days after it is dismissed unless State law provides for a longer period.'

To toll the statute of limitations period means to suspend the period, such that the days remaining begin to be counted after the tolling ceases. \* \* \* [S]ection 1367(d) operates at a minimum as follows: The days left in the statute of limitations period at the time the federal claim was filed begin to run after the tolling ceases, i.e. on the 31st day after the federal claim is dismissed.

*Bonifield* at 304, 94 Cal. App. 4th at 211. The *Bonifield* Court noted that in this context “tolling” is like a clock that is stopped and then restarted. When restarted whatever time remained when the clock was stopped remains available to the plaintiff. *Id.* at 303-304, 94 Cal. App. 4th at 211 (citing *Woods v Young*, 53 Cal. 3d 315, 326, 807 P.2d 455, 461, 279 Cal. Rptr. 613, 619 n.3 (1991)).

The *Bonifield* Court then went on to explain its understanding that the 30-day language was intended to address the problem that would arise where a plaintiff initially brought suit at or near the end of the period of limitations. Under such a circumstance, the plaintiff would be hard-pressed or entirely prevented from re-commencing suit unless there was some grace period added. *Id.* In short, the *Bonifield* Court gave meaning to all of the language in §1367(d).

In contrast, the *Berke* Court resolved the statutory interpretation question by ignoring the tolling language, commenting that it was ambiguous. That Court observed:

We agree with the grace-period reasoning. The evident purpose of the statute is only to preserve a plaintiff’s right of access to the state court for a minimum thirty-day period in order for it to assert those state causes over which the federal court has declined to exercise jurisdiction and as to which the statute of limitations has run before that declination. Despite its ambiguous use of the word “tolling,” we do not believe that the federal statute intends a result that would permit a gross protraction of the limitations period in clear contravention of the underlying policy of statutory limitations on the time for bringing suit. \* \* \* Hence the import of the statute is simply to toll the running of the state statute of limitations from its customary expiration date until the expiration of a thirty-day period following conclusion of the federal action, that is, to provide a thirty-day grace period.

*Berke* at 595, 821 A.2d at 123-124 (emphasis added). Three other courts have adopted the 30-day grace period interpretation.<sup>5</sup>

After examining both the *Bonifield* and *Berke* Court approaches, the state court in this case chose the approach from *Berke* observing only that this interpretation had been followed by other courts. This analysis was flawed for two reasons: (1) it relied improperly on the number of courts acting rather than on the validity of those courts' analyses; and (2) it disregarded the language of the statute without justification.

First, where only three courts have adopted the *Berke* interpretation versus one court adopting the *Bonifield* interpretation, there can hardly be said to be a consensus - let alone a majority view - on the issue. Moreover, mere numerosity of decisions cannot be sufficient to justify adopting one rule of law over another. If that were true, then courts would merely "count heads" rather than decide issues. This would give issues of first impression greater weight - even when the first cases decided may not have had the benefit of development and analysis that comes with time. A decision accepting one court's analysis over another should be supported by something more meaningful than that two other courts have taken the same approach.

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<sup>5</sup> See *Juan v. The Government of the Commonwealth of the Northern Mariana Islands*, 6 N.M.I. 322, 2001 M.P. 18 (2001); *Huang v. Ziko*, 132 N.C. App. 358, 511 S.E.2d 305 (1999); *Kolani v. Gluska*, 64 Cal. App. 4th 402, 75 Cal. Rptr. 2d 257 (1998).

Additionally, the lower court's adoption of the *Berke* interpretation is in error because it ignores language in the statute. The *Berke* Court acknowledged that the tolling language in the statute was "ambiguous" and then simply ignored that language. But courts are required to give effect to the entire language of the statute. See Minn. Stat. §645.15 (2); *Lynch v. Hetman*, 559 N.W.2d 124, 127 (Minn. Ct. App. 1996); see also *O'Kane v. Apfel*, 224 F.3d 686, 689 (7th Cir. 2000)("courts should interpret statutes so as to 'give effect, if possible, to every clause and word'").

Rather than give effect to the tolling language in §1367(d), the *Berke* Court (and by extension the lower court here) simply disregarded this language. In contrast, the *Bonifield* Court's approach took into account **both** the tolling language and the 30-day provision. The lower court's analysis here is flawed because it fails to account for the entire statute.

In this case, the statute on its face and as interpreted provides for tolling equal to the unexpired time, plus 30-days. This Court should interpret the statute in this manner and reverse the lower court's dismissal.

II. GOODMAN'S CLAIM WAS TIMELY BECAUSE THE LIMITATIONS PERIOD WAS TOLLED BY WELL-ESTABLISHED MINNESOTA TOLLING RULES AND BY THE OPERATION OF 28 U.S.C. §1367(d) THAT DEFERS TO STATE TOLLING RULES.

A. Goodman's Claim Should Have Been Tolloed by the Doctrine of Paramount Authority.

"Whenever a person is prevented from exercising his legal remedy by some paramount authority, the time during which he is thus prevented is not to be

counted against him in determining whether the statute of limitation has barred his right, even though the statute makes no specific exception in his favor in such cases.” *St. Paul M &M. Ry.Co. v Olson*, 87 Minn. 117, 91 N.W. 294, 296 (1902); Dunnell Minn. Dig. LIMITATION OF ACTIONS §2.07 (4th ed.). This view of tolling a statute of limitations is deeply imbedded in Minnesota jurisprudence. In 1888 the Supreme Court of Minnesota explained:

[i]t would be unreasonable and inconsistent for the law to present to a party, in one hand, a command to do an act within a certain time under the penalty of losing his rights, and, with the other hand, restrain him from doing the act. For this reason, the time during which the plaintiff was thus prevented by the law from issuing execution was at common law excluded from the year allowed for that purpose. . . Analogous in principle are those cases in which the court has frequently made exceptions to the operation of statutes of limitation, though exception for such causes were not provided for in the statutes; as, for example, the period during which an administrator or executor is exempted from suit; when the right to sue and administrator has been suspended by reason of an appeal from the order appointing him; the time during which the courts have been shut by war; of the period during which the plaintiff has, by the defendant, been prevented by injunction from bringing suit.

*Wakefield v. Brown*, 38 Minn. 361, 363-364, 27 N.W. 788, 790 (1888). Thus, it has always been the rule in Minnesota that where a litigant suffered some legal impediment to filing a timely suit, the limitations period would be suspended during the time in which the impediment existed.

In the seminal case on paramount authority the defendant occupied some land in Minnesota that he believed to be public. *St. Paul, M.&M. Ry. Co. v. Olson*, 87 Minn. 117, 119; 91 N.W. 294, 295 (1902). He applied to the United States land office to enter the land under the homestead act. *Id.* His application was rejected

by the federal office, he appealed, was rejected again, and appealed again. *Id.* This litigation took eleven years. *Id.* at 121; 91 N.W. at 296. When the railroad sued Olson in state court claiming that it owned the land, Olson argued that he adversely possessed the land and that the railroad's suit was brought too late. *Id.* The Supreme Court of Minnesota, applying the tolling doctrine of paramount authority held:

[Olson] asserted by his homestead application that the land was public land, and within the jurisdiction of the land department, which he invoked; and by successive appeals he thereby compelled the plaintiff to litigate in the land department, with him his claim, for eleven years. We therefore hold that the time during which the question of the title to the land was pending and undetermined in the land department cannot be counted against the [railroad] in determining whether the statute of limitation has barred its right to recover its land.

*Olson* at 122, 91 N.W. at 297.

This Court applied the paramount authority doctrine more recently to toll the statute of limitations where an ex-wife sought to enforce a child-support order and the ex-husband claimed the suit was barred by the statute of limitations. *Froats v. Froats*, 415 N.W.2d 445, 446-47 (Minn. Ct. App. 1987). In that case, the court that adjudicated a child-support dispute allowed the ex-husband five years to satisfy child-support arrearages in its judgment and decree. *Id.* at 446. However, there was a five-year statute of limitations period for the ex-wife to enforce the judgment and decree, and the ex-husband argued that this had expired when the ex-wife sued after ten years. *Id.* Applying the doctrine of paramount authority this Court held that the court's judgment and decree effectively kept the

statute of limitations from running against the ex-wife because her right to sue could not accrue until the husband failed to pay after five years.<sup>6</sup> *Id.*

Goodman's case fits squarely within the tolling doctrine of paramount authority and is practically on all fours with *Olson*.<sup>7</sup> Goodman timely filed his suit in state court. Only five months of his one-year limitations period had elapsed at that time. Best Buy then removed the case to federal court and compelled Goodman to litigate there although it was not his choice and the state court would have had jurisdiction to hear both of his claims.<sup>8</sup> The federal court granted Best Buy's motion for summary judgment on his federal claims but dismissed his state law claims without prejudice.

Approximately sixteen months elapsed while the federal proceedings took place. There was nothing Goodman could have done to prevent the running of this time because the power of the federal court to adjudicate his case was paramount. The federal removal statute is clear that the effect of removal is that "the State court shall proceed no further unless and until the case is remanded." 28 U.S.C.

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<sup>6</sup> In *Froats* this Court restarted the statute of limitations when the five years had expired based on the notion that the ex-wife's right to sue had not even accrued until five years were up. *Id.* at 346. However, normally a court would apply the doctrine of paramount authority to suspend the statute of limitations because the time "is not to be counted against him." *Olson* at 296, 91 N.W. at 120.

<sup>7</sup> Goodman's case is arguably more compelling since the rights asserted in Goodman are civil rights whereas the rights at issue in *Olson* were the property rights of a railroad.

<sup>8</sup> FMLA claims may be brought in either state or federal court. 29 U.S.C. §2617(a)(2).

§1446(d); *Kansas Public Employees Retirement System v. Reimer & Koger Assoc Inc.*, 77 F.3d 1063, 1069 (8th Cir. 1996); *Frith v. Blazon-Flexible Flyer, Inc.*, 512 F.2d 899, 901 (5th Cir. 1975). The federal court's power under this provision is so strong that that the federal court could actually enjoin a state court case filed after removal. *Kansas Public Employees*, 77 F.3d 1063.

For Goodman to have emerged from the federal court proceedings having lost his right to bring a new state court action and vindicate his right under the MHRA is absurd and unfair where Goodman had lost all ability to mitigate the effect of Best Buy's removal and stop the running of the limitations period. The doctrine of paramount authority recognizes this and provides a remedy for those in Goodman's situation. The doctrine should be applied here with the result that Goodman's state law claims can go forward on remand.

B. Goodman's Claim Should have Been Tolled Under the Doctrine of Equitable Tolling.

Another Minnesota doctrine that rescues Goodman from his predicament is equitable tolling. The doctrine is applied by courts where the facts of a particular case justify it. *State by Khalifa v. Dieter Enters, Inc.*, 418 N.W.2d 202, 204 (Minn. Ct. App. 1988). The courts look to whether there were circumstances beyond the plaintiff's control that prevented him or her from commencing suit within the required period. *Ochs v. Streater, Inc.*, 568 N.W.2d 858, 860 (Minn. Ct. App. 1997). Two important considerations are the conduct of the plaintiff and the prejudice to the defendant that would result if the statute were tolled. *Id.* This

Court has also explained that a lack of prejudice to the defendant plus a “lack of clarity and clear precedent on the issues involved justifies equitable tolling.” *Raygor v. University of Minnesota*, 604 N.W.2d 128, 133-34 (Minn. Ct. App. 2000), *rev’d on other grounds*, 620 N.W.2d 680, 687 (Minn. 2001), 534 U.S. 533 (2002).

For instance the *Raygor* panel of this Court applied the doctrine to plaintiff’s MHRA claim where the claim was dismissed by the federal court on the basis of Eleventh Amendment immunity of the university. *Id.* at 132-33. Because 28 U.S.C. §1367(d) potentially allowed tolling of the statute of limitations for filing in state court and the law was not clear whether the statute applied to claims barred by the Eleventh Amendment, this Court gave the plaintiff the benefit of the unclarity. *Id.* at 133-34. This unclarity plus the lack of prejudice to the defendant university provided the necessary basis for equitable tolling. *Id.* (citing *Capital Tracing, Inc.*, 63 F.3d 859, 863 (9th Cir. 1995).<sup>9</sup> See also *Vance v. Whirlpool Corp.*, 707 F.2d 483, 489-90 (4th Cir. 1983)(lack of clear precedent and no demonstration of prejudice to defendant warrants application of the equitable tolling doctrine). The *Raygor* panel also considered that the defendant university

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<sup>9</sup> On appeal the Minnesota Supreme Court reversed this Court. *Regents of the University of Minnesota v. Raygor*, 620 N.W.2d 680, 687 (Minn. 2001). However, the Minnesota Supreme Court did not take issue with this Court’s reasoning or its explanation of the doctrine. Rather, it reversed because this Court did not appear to apply the correct standard of review to the district court’s denial of the equitable tolling remedy to plaintiff. *Id.* The standard of review problem is not implicated here, since the state court in this case did not rule on the application of the equitable tolling doctrine to Goodman’s case although it was briefed.

played a part in the delay by waiting nine months before it asserted its Eleventh Amendment defense. *Id.* at 133.

Concerning the conduct of the plaintiff in this case, Goodman was diligent about his state law claim. He originally timely filed his claims in state court.

Moreover, Goodman was not on notice of any further limitations thereafter. The federal district court in this case did not advise Goodman of the limitations period. Moreover, the federal clerk's office actually may have confused him further by advising him in the clerk's notice of his time lines to appeal the decision. Goodman is from West Africa and arrived from there in 1986. Not surprisingly, Goodman, *pro se*, attempted to appeal the decision, but erroneously filed his appeal with this Court instead of in the Eighth Circuit. Shortly thereafter, he re-worked his complaint and filed it in state court ninety-seven days after the decision dismissing his claim without prejudice. At no point did Goodman abandon his claim or sleep on his rights.

Furthermore, any reliance Goodman may have placed on the existing precedent for the correct time limits could not have produced a clear answer. As noted above 28 U.S.C. §1367(d) has never been interpreted by a Minnesota Court. The limited decisional guidance on it is from other states and that guidance is in conflict. The state court here suggested that the attorney representing Goodman in federal court should have apprised him of the time limits. But an attorney who consulted the statute and the case law could have reasonably concluded that Goodman had his remaining time plus thirty days. There is an absence of

controlling authority and lack of unanimity in other courts as to the interpretation to be given this statute.

Goodman's situation is different from the plaintiff in *Ochs* who had no legal support for his own private interpretation of the Minnesota Rules of Civil Procedure which he believed excused him altogether from filing properly commencing suit. *Ochs*, 568 N.W.2d 858. Goodman had reason for believing he had ample time to re-commence suit.

Additionally, Best Buy cannot demonstrate that any prejudice would result from equitable tolling in favor of Goodman. Goodman did not assert any surprising new claims in his second state court complaint and Best Buy will have the use of the discovery that was already conducted in the federal proceeding. *See Raygor*, 604 N.W.2d 128, 133. Thus, any concerns about the staleness of Goodman's claims are entirely absent. And just like in *Raygor*, Best Buy, even if not culpable, is responsible for the delay here because it removed the action to federal court. At any rate, the "policy of repose, designed to protect defendant, is frequently outweighed . . . where the interests of justice require vindication of the plaintiff's rights." *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 428 (1965).

Under the Minnesota tolling rules, Goodman's case is the perfect instance for the application of equitable tolling.

C. Application of State Tolling Doctrines Comports With the Express Language of 28 U.S.C. §1367(d).

The federal tolling statute specifically contemplates that state tolling rules should be applied where they would provide the plaintiff with more time than the federal statute to file suit and seek vindication of state rights. The statute states that “[t]he period of limitations . . . shall be tolled while the claim is pending and of a period of 30 days after it is dismissed unless State law provides for a longer tolling period.” 28 U.S.C. §1367(d)(emphasis added).

Tolling rules are integral to a state statute of limitations and the choice of its length. The United States Supreme Court has held that “no federal policy – deterrence, compensation, uniformity, or federalism – was offended by the application of state tolling rules. *Chardon v. Fumero*, 462 U.S. 650, 657 (1983)(citing *Robertson v. Wegman*, 436 U.S. 584, 594 n.11 (1978)). The Supreme Court aptly described the relationship between statutes of limitations and other related doctrines:

Any period of Limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitable reflects a value judgment concerning the point at which the interest in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and question of application.

*Chardon* at 657, n.8 (quoting *Johnson v Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975)). In other words, a state’s equitable doctrines regarding the

statute of limitations are part and parcel of the statutory period selected by the state legislature regarding a particular cause of action.

Even assuming that the federal tolling statute is interpreted in the way that is least favorable to Goodman, *i.e.* that he only had thirty days after the federal court dismissed his suit in which to re-file his MHRA claim in state court, Minnesota law would not allow his claim to be time-barred.

Both the paramount authority doctrine and the equitable tolling doctrine could act to extend Goodman's time as his facts fit squarely within the Minnesota requirements. And where applicable, such tolling doctrines should be applied because the federal statute instructs that the state courts may use whatever other tolling rules may be at their disposal.

III. THE ONLY ISSUE FOR THIS COURT TO REVIEW IS WHETHER GOODMAN'S CLAIM IS TIME-BARRED.

In this appeal Goodman asks this Court to reverse the lower court's holding on whether his claim is time-barred. The lower court did not reach the merits of Goodman's MHRA claim, and it would be inappropriate for this Court to consider issues that were not considered by the trial court in reaching its decision. *Thayer v. American Financial Advisers, Inc.*, 322 N.W.2d 599, 604 (Minn. 1982); *Acton Constr. Co. v. State*, 363 N.W.2d 130, 135 (Minn. Ct. App. 1985).

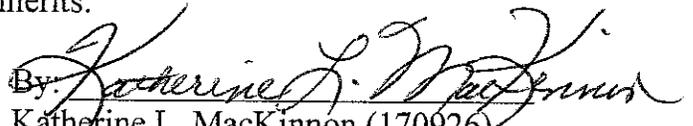
The lower court in its memorandum of law only analyzed and considered the question of whether the MHRA's one-year statute of limitations had run and it granted Best Buy's motion to dismiss on that basis. The lower court stated,

“[b]ecause Plaintiff’s sole claim in his complaint was filed after the statutory limit had passed, his complaint is dismissed. As such, this Court does not reach Defendant’s arguments regarding the sufficiency of Plaintiff’s discrimination claim.” Accordingly, there is no reason for this Court to address those issues at this time.

**CONCLUSION**

This Court should reverse the statute of limitations issue and remand to the state court for further proceedings on the merits.

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