

NO. A08-312

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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GENNA L. CHRISTIAN  
f/k/a GENNA L. PICARD,

*Appellant,*

vs.

JUDITH M. BIRCH,

*Respondent.*

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APPELLANT'S REPLY BRIEF

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## ARGUMENT

### **I. A State's Exercise of Jurisdiction Over a Criminal Act, Does not as a Matter of Law Confer Exclusive Civil Jurisdiction Over the Same Act.**

Respondent makes much of the fact that Wisconsin ultimately decided to criminally prosecute her, implying somehow that the exercise of criminal jurisdiction comes at the absolute expense of a subsequent civil action in another state. Respondent cites, Sanders v. St. Louis & N.O. Anchor Line, 3 L.R.A 390, 10 S.W. 595 (Mo. 1889); Smoot v. Fischer, 248 S.W.2d 38; State v. Nelson, 92 Wis.2d 855, 285, N.W.2d 924 (Wis. App. 1979) and Orthermann v. Apple River Campground, Inc. 765 F.2d 119, 121 (8<sup>th</sup> Cir. 1985) for that argument. The Respondent completely ignores, however, that these cases discussed jurisdiction in either a civil *or* criminal context and at no time held that the exercise of criminal jurisdiction has the effect of freezing out subsequent civil actions in other states.

Contrary to the assertions of the Respondent, the Appellant has not “split any hairs or linguistics” when it asserts that the District Court was the first court to acquire jurisdiction over Plaintiff’s claim. Plaintiff’s claim involves the Plaintiff suing the Defendant for Defendant’s negligent operation of a motor vehicle. The Plaintiff has not brought a similar suit in Wisconsin nor anywhere else. The very case cited in Respondent’s brief, Orthmann, illustrates what is meant by the ‘first to file rule’: “generally, the doctrine of federal comity permits a court to decline jurisdiction

over an action when a complaint *involving the same parties and issues* has already been filed in another district.” Orthmann v. Apple River Campground, Inc., 765 F.2d 119, 121 (8<sup>th</sup> Cir. 1985) (emphasis added).

Respondent’s position appears to be that because the Defendant was charged, prosecuted, and convicted in Wisconsin in criminal court for her driving, that Wisconsin courts have acquired or retained jurisdiction over any subsequent civil action which is brought by Plaintiff. The cases cited for this proposition do not lend any support to Respondent’s position, in that they speak merely of concurrent jurisdiction either in the civil setting or the criminal setting. Respondent has not cited a case involving a prior criminal suit being filed, which implicates the ‘first to file rule’ with regards to a subsequent civil suit.

Civil and Criminal jurisdiction have different criteria. In Minnesota a person may be criminally prosecuted if he/she:

- (1) Commits an offense in whole or in part within [Minnesota];
- (2) Being without the state, causes, aids or abets another to commit a crime within in the state; and
- (3) Being without the state, intentionally, causes a result within the state prohibited by the criminal laws of this state. Minn. Stat. §609.02.

In the civil realm a person can be sued: If they commit an act on waters bordering Minnesota (Minn. Const. Art. 2, §2); and satisfy Minnesota’s long arm statute (Minn.

Stat. §543.19 Subd. 1) and the test under International Shoe.<sup>1</sup>

Although both civil and criminal jurisdiction are undergirded by notions of due process, the exercise of criminal jurisdiction is less broad, leading one to wonder what would happen if a civil suit were properly filed in Minnesota but could not be criminally filed in Minnesota for “jurisdictional reasons” under the mix and match rule proposed by Respondent? Would that mean that another state would be prevented from bringing a criminal prosecution when it otherwise had the authority to do so?

In the alternative, imagine for a moment the absurdity of a rule that barred another state from asserting civil jurisdiction over an occurrence solely because there had been a criminal prosecution in another state. Take the recent criminal prosecutions for mortgage fraud as an example. Does a prosecution of a mortgage company by various U.S. Attorneys and States Attorney Generals prevent an individual Minnesotan from bringing a civil action in Minnesota on the same facts? Clearly this is not the intent of the first to file rule.

## **II. In the Case at Bar Minnesota’s Statute of Limitations is Procedural.**

The Respondent manages to cobble together three pages worth of discordant

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See pages 6-11 and 24-26 of Appellant’s brief for an in-depth discussion of civil-subject and personal jurisdiction.

and out of context sound bites from various Minnesota cases and the Restatements in support of its argument that Minnesota's statute of limitations is substantive. However, the Respondent makes no mention and does not attempt to dispute the Appellant's substantive/procedural analysis found on pages 12-16 of its brief. As recently as 2007, the Court of Appeals, in an unpublished decision, engaged in essentially the same analysis as this brief's author. Commandeur v. Howard Hartry, Inc., A05-2014 (Minn. App. 12/21/2007) (Attached hereto pursuant to Minn. Stat. §480A.08; See: Appellant's Supplemental Appendix - 1). Commandeur dealt with California and Minnesota's competing statutes of limitations in a negligence and conversion suit filed in Minnesota. (*Id.*). The respondent in that case filed a motion for summary judgment on the basis that California's more restrictive statute of limitations should apply, and if applied, respondent's case was time-barred and should be dismissed. (*Id.* at 2).

The Commandeur Court discussed exhaustively whether statutes of limitations are procedural or substantive for the purposes of a choice-of-law analysis. (*Id.* 2-7). The Court's analysis and holding is abundantly clear and does not need to be restated or supplemented to any great degree here because it is attached and speaks for itself. Suffice it to say, however, the Commandeur Court held that when a complaint seeks common-law relief the statute of limitations is procedural. (*Id.* 3).

### **III. The Respondent Purposefully Availed Herself of Minnesota's Jurisdiction by Her Acts.**

Contrary to the assertions in her brief the Respondent had a great many contacts with Minnesota such that Minnesota would be able to exercise personal jurisdiction over her. Those contacts were discussed at length in Appellant's initial brief and not repeated here.

Throughout the course of this litigation one of the primary contentions of the Appellant has been that the St. Louis River<sup>2</sup> is, for lack of a better word, an emanation of what is physically understood to be Minnesota. An accident over waters where Minnesota clearly has the right to exercise jurisdiction is no different for personal jurisdiction purposes than if the identical accident had happened in the heart St. Paul. "Concurrent jurisdiction" has never been defined as a "lesser form" of exclusive jurisdiction and it simply means that Minnesota (or Wisconsin for that matter) can assert its authority and laws over the St. Louis River as if an the accident took place on the Minnesota side of a line that is not readily visible or proven in this case.

### **IV. "Forum Shopping" is not relevant to the case at bar nor is present where the location of the accident creates a recognized right for Appellant to bring suit in either Minnesota or Wisconsin Courts**

Respondent has consistently raised the specter of "forum shopping" in

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The Respondent's brief incorrectly refers to the body of water under the accident site as the "St. Lawrence River" when in fact it is the "St. Louis River" and should be referred to as such in the Court of Appeal's decision.

response to Respondent filing suit in the Minnesota District Court. In her brief to the District Court, Respondent cited “forum shopping” as relevant to the “interstate order” and “advancement of state’s interests” of the Milkovich factors. A-52; A-54. In Respondent’s Brief before this Court, forum shopping is cited to support the application of factor one (predictability or result) and factor two (interstate order). See Respondent’s Brief, pp. 11-14. The District Court referenced forum shopping in his analysis of the ‘interstate order’ in his memorandum. A-9.

Respondent’s Brief takes numerous quotations from Medtronic, Inc. v. Advanced Bionics Corp. 630 N.W.2d 438 (Minn. Ct. App. 2001) and attempts to argue that those principles apply to the unique facts of this case. See Respondent’s Brief at 11-12. However, this Court, in its *de novo* review of the interstate order factor (if such analysis is necessary), should follow the approach adopted in Danielson which is much more analogous to the case at bar. Danielson dealt with competing statutes of limitations and affirmatively held that applying either statutes of limitations would indicate disrespect for the other, and, at the very least, that factor is neutral. See Danielson v. National Supply Co., 670 N.W.2d 1, 7-8 (Minn. Ct. App. 2003), *rev. den’d* (Oct. 16, 2003).

Respondent has also cited Fee v. Great Bear Lodge of Wisconsin Dells, LLC. (See Respondent’s Brief at 12, citing Fee v. Great Bear Lodge of Wisconsin Dells,

LLC, Not Reported in D. Supp.2d 2004 WL 898916 (D. Minn. 2004)).<sup>3</sup> Fee is of questionable value to this Court in light of Danielson, because it is an unreported decision of a federal district court, and is factually distinguishable because in Fee the harmful contact occurred in Wisconsin Dells, Wisconsin, and in the present case, the claim involved an accident which occurred in an area where Minnesota Courts exercise concurrent jurisdiction over the physical location, to wit: the Blatnik bridge above the St. Louis River.

In its *de novo* review of the fourth factor, this Court should follow the reasoning in Danielson when dealing with competing statutes of limitations, and hold that the policy of compensating tort victims and compensation of Minnesota medical providers outweighs Wisconsin's interest in preventing stale claims and problems of proof. See Danielson, 670 N.W.2d at 8-9.

Concurrent jurisdiction gives Minnesota and Wisconsin courts jurisdiction over a civil harm. Respondent does not dispute that the Minnesota courts have concurrent jurisdiction over the civil harm based on the accident location on the bridge. "If persons while upon the St. Croix River, and navigating its waters, are within the jurisdiction of the state, they should be deemed entitled to the protection of its laws; and the question of the right of action should not be made to depend upon the accident that at a particular point of time a boat happened to be in whole or part

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<sup>3</sup> The Respondent appears to have mistakenly attributed this case to the 8<sup>th</sup> Circuit Court of Appeals. See Respondent's Brief at 12.

on one or the other side of the center of the stream.” Opsahl v. Judd, 30 Minn. 126, 14 N.W. 575 (1883). Instead of distinguishing clear precedent directly on point, Respondent has attempted to cloud the issues by way of a tortured choice-influencing analysis regarding the location of the accident, the fact that Wisconsin statute of limitations has passed, and the fact that Respondent was prosecuted in Wisconsin to create the perception that Appellant is forum shopping.

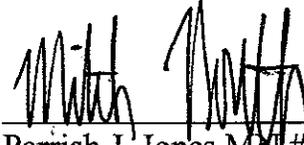
If this accident took place somewhere outside of Minnesota’s jurisdiction, this argument might have some merit, but it is not forum shopping when someone brings a lawsuit in a Court where they have a recognized right to do so. Based on Opsahl, even if this Court were to engage in the choice-influencing consideration approach, it should do so without considering forum shopping, recognizing that this action took place within an area where Minnesota exercises concurrent jurisdiction.

### CONCLUSION

Based on the foregoing and for the reasons stated in Appellant’s initial brief, the Appellant asks this Court to remand the decision of the District Court with instruction that Minnesota’s statute of limitations applies; and with instructions that personal jurisdiction over the Respondent is proper.

Dated this 3 day of July 2008.

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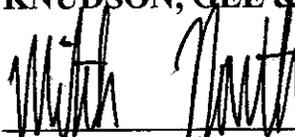
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**FORM AND LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01 subds. 1 and 3 for a brief produced with proportional font. The length of the brief is 1929 words. This brief was prepared using Correl Version 12.

Dated this 3 day of July 2008.

**KNUDSON, GEE & TORVINEN, S.C.**



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