

NO. A11-290

State of Minnesota  
**In Court of Appeals**

Beverly Butts, by and through her Power of Attorney, Kathy Iverson;  
Kenneth Hojberg, by and through his Power of Attorney,  
LeeAnn Hojberg; Clare Knutson, by and through his Power of  
Attorney, Paul Knutson; and Sylvia Wulff, by and through her Power  
of Attorney, Morris Blom,

*Respondents,*

vs.

The Evangelical Lutheran Good Samaritan Society, individually and  
d/b/a Good Samaritan Society – Albert Lea,

*Appellants,*

vs.

Brianna Broitzman, Ashton Larson, Alicia Heilmann  
and Kaylee Nash,

*Defendants.*

**BRIEF, ADDENDUM AND APPENDIX OF APPELLANTS**

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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 LEGAL ISSUES

1. **Did the district court err by denying Good Samaritan's motions for summary judgment because Minn. Stat. § 573.01 required abatement of plaintiffs' claims after they died from causes unrelated to their claim for injury to the person?**

*Good Samaritan raised this issue in its three motions for summary judgment. (A.A.107, 115, 121). The district court denied Good Samaritan's motion for summary judgment with respect to Plaintiff Beverly Butts on August 24, 2010 and entered final judgment on February 7, 2011. (ADD.15). The district court denied Good Samaritan's motion for summary judgment with respect to Plaintiff Sylvia Wulff on October 5, 2010 and entered final judgment on February 7, 2011. (ADD.8). The district court denied Good Samaritan's motion for summary judgment with respect to Plaintiff Kenneth Hojberg on December 14, 2010 and entered final judgment on January 19, 2011. (ADD.1). Good Samaritan preserved this issue in its Notice of Appeal. (A.A.145).*

Apposite authority:

Minn. Stat. § 573.01 (2010)

*Lampert Lumber Co. v. Joyce*, 405 N.W.2d 423 (Minn. 1987)

*Burma v. Stransky*, 357 N.W.2d 82 (Minn. 1984)

2. **Did the district court abuse its discretion by granting the various plaintiffs' motions for voluntary dismissal without prejudice under Minn. R. Civ. P. 41.01(b) because the plaintiffs' representatives sought dismissal for an improper purpose and because Good Samaritan established legal prejudice?**

*Good Samaritan responded to this issue that plaintiffs' representatives raised in their motions for voluntary dismissal. (A.A.109, 113, 118). The district court granted the motion for voluntary dismissal without prejudice with respect to Plaintiff Beverly Butts on August 24, 2010 and entered judgment on February 7, 2011. (ADD.15). The district court granted the motion for voluntary dismissal without prejudice with respect to Plaintiff Sylvia Wulff on October 5, 2010 and entered judgment on February 7, 2011. (ADD.8). The district court granted the motion for voluntary dismissal without prejudice with respect to Plaintiff Kenneth Hojberg on December 14, 2010 and entered judgment on January 19, 2011. (ADD.1). Good Samaritan preserved this issue in its Notice of Appeal. (A.A.145).*

Apposite authority:

Minn. R. Civ. P. 41.01(b)

*Altimus v. Hyundai Motor Co.*, 578 N.W.2d 409 (Minn. App. 1998)

*Home Owners Loan Corp. v. Huffman*, 134 F.2d 314 (8th Cir. 1943)

*Metropolitan Federal Bank of Iowa v. W.R. Grace & Co.*, 999 F.2d 1257 (8th Cir. 1993)

## STATEMENT OF THE CASE

In January 2010, Plaintiffs Beverly Butts, Kenneth Hojberg, Clare Knutson, and Sylvia Wulff — all nursing-home residents in their 80s — brought this action through their powers of attorney against Defendant The Evangelical Lutheran Good Samaritan Society and four individual nursing assistants, two of whom were 18-year-old adults and two of whom are juveniles. Plaintiffs base their claims on the nursing assistants' alleged abusive actions, which occurred in the Good Samaritan nursing-home facility in Albert Lea. Each individual claim was based upon injury to each separate plaintiff's person, including pain and suffering. After these allegations came to light in May 2008, the Minnesota Department of Health investigated and determined that the nursing assistants alone were responsible for the abuse. The Department of Health found no fault with Good Samaritan, concluding that Good Samaritan had acted properly before and during the investigation. The two 18-year-old nursing assistants were criminally charged, pleaded guilty, and were incarcerated.

After suit was commenced, Plaintiffs Butts, Wulff and Hojberg passed away from causes unrelated to the alleged abuse. Minnesota law has long mandated under Minn. Stat. § 573.01 that claims arising from injury to the person abate with the plaintiff's death from an unrelated cause. Therefore, when Butts passed away from unrelated causes on May 15, 2010, the defendants moved for partial summary judgment as to her claim. Butts's representative responded with a motion for voluntary dismissal without prejudice under Minn. R. Civ. P. 41.01(b). She gave no reason for the motion. On August 24, 2010, the Freeborn County District Court, Hon. Steven R. Schwab presiding, granted the

motion for voluntary dismissal without prejudice and denied Good Samaritan's motion for summary judgment.<sup>1</sup> In the meantime, Butts's special administrator had filed a second lawsuit in South Dakota federal district court alleging almost identical claims. Unlike Minnesota, South Dakota has a so-called "survival statute" that allows a plaintiff's estate to recover pain-and-suffering damages that occurred before the injured person's death. In other words, Butts's estate sought and obtained the right to forum shop after the law in their original chosen forum turned out to be unfavorable.

This scenario occurred two more times. After Plaintiffs Wulff and Hojberg passed away from unrelated causes, defendants moved for summary judgment as to those claims, and they, in turn, moved for voluntary dismissal without prejudice. As with the Butts motion, these plaintiffs likewise gave no reason for the motion. Wulff's and Hojberg's special administrators then filed second lawsuits in South Dakota federal district court. On October 5, 2010, the district court granted the Wulff motion for voluntary dismissal without prejudice and denied Good Samaritan's motion for partial summary judgment. On December 14, 2010, the district court granted the Hojberg motion for voluntary dismissal without prejudice and denied Good Samaritan's motion for summary judgment.

As to the four original plaintiffs, therefore, only Knutson's claim remains in Minnesota. On January 19, 2011, the district court amended the Hojberg order to add the language required by Minn. R. Civ. P. 54.02 to make the resulting judgment final. The

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<sup>1</sup> At the same time, the district court granted Good Samaritan's motion to compel arbitration as to then-surviving Plaintiffs Wulff and Knutson. The court so ordered based upon a provision in the resident contract. Arbitration is not an issue on appeal. Wulff has since passed away.

court administrator entered judgment on January 19, 2011. The court amended the Wulff and Butts orders to add Rule 54.02 language on February 7, 2011. The court administrator entered judgment on those orders on February 7, 2011. Good Samaritan appeals from all three judgments.

### STATEMENT OF THE FACTS

In 2008, Beverly Butts, Sylvia Wulff, Kenneth Hojberg, and Clare Knutson, all vulnerable adults in their 80s, resided in the nursing home Good Samaritan Society – Albert Lea. (A.A.6). Defendant The Evangelical Lutheran Good Samaritan Society operates the home. (*Id.*). Good Samaritan employed Brianna Broitzman, Ashton Larson, Alicia Heilmann, and Kaylee Nash as nursing assistants. (*Id.*). Plaintiffs alleged that from January 1, 2008 to May 1, 2008, these four nursing assistants engaged in ongoing abusive and neglectful conduct toward each of these nursing-home residents. (*Id.*).

These allegations first came to Good Samaritan's attention during an exit interview on May 1, 2008 when a terminated aide first reported the behavior of one of the four nursing assistants. (A.A.34). Good Samaritan immediately contacted law-enforcement authorities. (A.A.35). After more allegations surfaced involving the three other nursing assistants (two of whom were juveniles), Good Samaritan put all four on administrative leave. (*Id.*). Ultimately, each was fired.

Both the police and the Minnesota Department of Health — the regulatory body that oversees all Minnesota nursing homes — conducted full investigations. (A.A.34, 47). Good Samaritan also conducted an internal investigation and brought in a team of nurses to examine each of the residents. (A.A.35). The Department of Health

investigation revealed that all of the offenders received appropriate orientation and training with respect to residents' rights, behavior management, problem solving for dealing with challenging behaviors, abuse and neglect, and the Vulnerable Adults Act. (A.A.43).

The Department of Health's August 2008 report concluded that the nursing assistants were responsible for the verbal, sexual, and emotional abuse of 15 nursing-home residents. (A.A.43). The Department found no fault with Good Samaritan, stating in its report that Good Samaritan "has policies and procedures in place in regard to abuse prevention. The procedures were followed and implemented after the incidents were made known." (A.A.47). Thus, "no federal deficiencies or state licensing orders are issued." (*Id.*). The two adult nursing assistants were criminally charged and pleaded guilty via an Alford Plea to gross misdemeanor counts of disorderly conduct. (A.A.103-105). Brianna Broitzman and Ashton Larson were each sentenced to 180 days in jail. (*Id.*).

In January 2010 — a year and a half after the Department of Health released its report — the four named plaintiffs, through their powers of attorney, commenced this suit against Good Samaritan and the four individual nursing assistants. (A.A.3). Plaintiffs alleged that Good Samaritan failed to exercise proper supervision and control over the conduct of its four nursing assistants, resulting in abuse based on their actions. (A.A.6). Plaintiffs' complaint alleged six counts against Good Samaritan, all arising from alleged injuries to their persons:

- Count Four: Direct liability for negligent management based on their “injuries to mind and body causing them each to experience pain and suffering . . .” (A.A.10-12).
- Count Five: Direct liability for negligent supervision based on “injuries to mind and body causing them to experience pain and suffering . . .” (A.A.13).
- Count Six: Direct liability for negligent retention based on “injuries to mind and body causing them to experience pain and suffering. . .” (A.A.13-14).
- Count Seven: Vicarious liability based on “injuries to mind and body, causing them to experience pain and suffering . . .” (A.A.14-15).
- Count Eight: Strict liability under the Minnesota Vulnerable Adult Act, Minn. Stat. § 626.557 based on “injuries to mind and body causing them each to experience pain and suffering . . .” (A.A.15).
- Count Nine: Indemnification based on “injuries to mind and body, causing them to experience pain and suffering . . .” (A.A.15-16).

Plaintiffs’ complaint made no request for special damages.

In April 2010, special administrators for four other nursing-home residents filed a separate lawsuit (“the *Jacobs* action”), based on identical facts, against Good Samaritan in the United States District Court, District of South Dakota, Southern Division. (A.A.51).<sup>2</sup> These four were never plaintiffs in a Minnesota action. All passed away before commencing suit anywhere. (A.A.59). These plaintiffs assert federal diversity

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<sup>2</sup> The case is styled *Jacobs et al v. The Evangelical Good Samaritan*, Case # 10-4035 U.S. District Court, District of South Dakota, Southern Division.

jurisdiction based on the fact that Good Samaritan is a North Dakota corporation with its principal place of business in Sioux Falls, South Dakota. (A.A.52). Although the four special administrators are Minnesota residents, the residents were also Minnesota residents, and all of the alleged incidents occurred in Minnesota, these plaintiffs commenced the *Jacobs* action in South Dakota solely because South Dakota has a survival statute — allowing a special administrator to recover for personal injury to the deceased. (A.A.59); S.D. Codified Laws § 15-4-1. The same group of attorneys represents all plaintiffs in this case and in *Jacobs*. One must conclude, therefore, that the plaintiffs in this action chose to commence suit in Minnesota with full knowledge of the differences in the law between the states. The plaintiffs in this case, however, have never argued that South Dakota law applies here. In fact, their complaint bases the right of recovery on Minnesota law. (A.A.5-16).

Beverly Butts passed away on May 15, 2010 of causes unrelated to the alleged abuse. (A.A.22). Good Samaritan and the individual defendants moved for summary judgment to dismiss the claims against them with prejudice, as mandated by Minn. Stat. § 573.01. (A.A.107). Without offering an explanation of need, the decedent's representative defended the motion by moving for voluntary dismissal without prejudice under Minn. R. Civ. P. 41.01(b). (A.A.109) It is undisputed, and plaintiff concedes, that Butts's representative no longer has any valid claim under Minnesota law. (A.A.125). In the meantime, on June 3, 2010, Michael Butts, as the Special Administrator for the Estate of Beverly Butts, commenced a new lawsuit in South Dakota federal district court alleging almost identical personal-injury claims as in the Minnesota lawsuit. (A.A.25).

Plaintiff claimed federal diversity jurisdiction based on the sole connection to South Dakota — the location of Good Samaritan’s corporate office. (A.A.25-26).

Sylvia Wulff passed away on August 16, 2010 of unrelated causes. (A.A.63). Kenneth Hojberg passed away on October 10, 2010, also of unrelated causes. (A.A.67). After each plaintiff passed away, Good Samaritan made a motion for summary judgment and plaintiffs’ representatives — without offering an explanation of need — made motions for voluntary dismissal without prejudice. (A.A.113, 115, 118, 121). On September 29, 2010, Wulff’s special administrator also filed a new lawsuit in South Dakota alleging almost identical personal-injury claims. (A.A.68). Hojberg’s special administrator did the same on November 8, 2010. (A.A.77).<sup>3</sup>

As to each of the deceased plaintiffs, the district court denied Good Samaritan’s motion for summary judgment and granted the representatives’ motion for voluntary dismissal without prejudice. (ADD.1, 8, 15). Although the district court agrees that these plaintiffs no longer have viable claims under Minnesota law, it concluded that Good Samaritan would suffer “minimal prejudice” through each representatives’ recommencement of the identical lawsuit in South Dakota, because the parties had only engaged in limited discovery. (ADD.23-24, 7, 14).

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<sup>3</sup> At this point, therefore, four separate suits are pending in South Dakota — the *Jacobs* action and the separate actions of the three Minnesota plaintiffs (Butts, Wulff and Hojberg).

## ARGUMENT

### I. Standard of review

On appeal from summary judgment, the appellate court asks two questions: (1) whether there are any genuine issues of material fact; and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Here, the district court erred in its application of the law when, after acknowledging that plaintiffs no longer had a viable claim for personal injury in Minnesota, it refused to order summary judgment on the merits.

A reviewing court will not reverse a district court's decision on a Rule 41 motion unless the district court abuses its discretion. *Altimus v. Hyundai Motor Co.*, 578 N.W.2d 409, 411 (Minn. App. 1998). The district court abused its discretion when it dismissed the three lawsuits without prejudice under Minn. R. Civ. P. 41.01(b) because it failed to require plaintiffs to provide adequate justification, and because its order both created legal prejudice to Good Samaritan and condoned plaintiffs' representatives' forum shopping in South Dakota.

### II. The district court erred as a matter of law when it denied Good Samaritan's motions for summary judgment.

The Minnesota Supreme Court has explained that the definition of "dismissal on the merits" and "with prejudice" means that "the claimant, having failed to prove her claim under the law and the evidence adduced, is not entitled to recover on her claim from the other party." *Lampert Lumber Co. v. Joyce*, 405 N.W.2d 423, 427 (Minn. 1987). In other words, "[f]ailure to plead or prove a case goes to the substantive

legitimacy of the case itself . . .” *Id.* at 426. In short, “[s]ummary judgment is a determination on the merits.” *Burma v. Stransky*, 357 N.W.2d 82, 89 (Minn. 1984). Moreover, a district court lacks authority to deny a summary-judgment motion just because its ruling would be adverse to a plaintiff. “A defendant is *entitled to summary judgment as a matter of law* when the record reflects a complete lack of proof on an essential element of the plaintiff’s claim.” *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) (emphasis added). Among others, one missing essential element here is damages. Because the plaintiffs are deceased, the personal representatives are not entitled to, and can never establish, damages under Minnesota law. If a defendant is entitled to summary judgment, dismissal must be on the merits of the case with prejudice. *See Pond Hollow Homeowners Ass’n v. The Ryland Grp., Inc.*, 779 N.W.2d 920, 923 (Minn. App. 2010) (holding that district court’s grant of summary judgment requires entry of judgment to be on merits with prejudice). The district court erred as a matter of law when it refused to order summary judgment on the merits.

The basis for Good Samaritan’s motions<sup>4</sup> was Minn. Stat. § 573.01, which states:

“A cause of action *arising out of an injury to the person* dies with the person of the party

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<sup>4</sup> Good Samaritan brought three separate motions for summary judgment under Minn. R. Civ. P. 56. (A.A.107, 115, 121). In support of its motions, Good Samaritan submitted extrinsic evidence attached to counsel’s affidavit that countered one of the main assumptions in the complaint — that the plaintiffs were alive and could recover damages for injury to their person, including their alleged pain and suffering. (A.A.1, 61, 65). Thus, the motions were for summary judgment — not motions to dismiss, as plaintiffs argued below — because the court considered extrinsic evidence not found in the complaint. *See Northern States Power Co. v. Minn. Metropolitan Council*, 684 N.W.2d 485, 490 (Minn. 2004) (explaining that motions for summary judgment involve consideration of materials outside pleadings).

in whose favor it exists, except as provided in section 573.02 [concerning an action for wrongful death.]” Minn. Stat. § 573.01 (2010) (emphasis added). Section 573.01 upholds longstanding Minnesota law providing that “[a] cause of action for a personal tort is strictly personal. It is not in the nature of property, in the sense that any one but the injured party can have any right in it. It is not assignable, and does not pass to the party’s representatives . . .” *Boogren v. St. Paul City Ry. Co.*, 97 Minn. 51, 54, 106 N.W. 104, 106 (1906). This rule applies to foreclose an action for personal injury after the injured person’s death.

The roots of the rule are as old as the common law of England: “[T]he death of either party is at once an abatement of the suit. . . . For . . . the executors of the plaintiff have received [no] manner of wrong or injury.” 3 Wm. Blackstone, *Commentaries on the Laws of England*, 302-303 (1768). In the injury context, neither a decedent’s estate nor its representative can sustain any personal injury or suffer pain. Therefore, the common law held that an action to recover such damages abated at death.

But the common law of abatement foreclosed not only an action for *injury* to the deceased person, but an action for his or her *death* as well. In Minnesota, this common-law rule resulted in the two statutory provisions cited above. First, carried forward in 1858 from the territorial laws, and modeled after Lord Campbell’s Act, Minnesota’s wrongful death statute, Minn. Stat. § 573.02 (2010), changed the common law and recognized a statutory cause of action in favor of heirs and next of kin, but only when a death is caused by tortious conduct. *See generally, Fussner v. Andert*, 261 Minn. 347, 351, 113 N.W.2d 355, 358 (1961) (explaining history of wrongful-death statute); *see*,

e.g., *Beck v. Groe*, 245 Minn. 28, 33-35, 70 N.W.2d 886, 891-93 (1955) (noting that wrongful death action was unknown at common law). Recoverable damages are limited to “pecuniary loss.” *Id.* But damages in wrongful death are not recoverable “for the pain and suffering of the deceased.” *Id.*; see also, *Hutchins v. Saint Paul, M. & M. Ry. Co.*, 44 Minn. 5, 9, 46 N.W. 79, 80 (1890) (“No compensation can be given . . . for the pain and suffering of the deceased.”).

Minnesota’s original state statutes also carried forward a territorial survival provision that coordinated the common law rule of abatement with the newly created wrongful-death exception. See generally, *Lavalle v. Kaupp*, 240 Minn. 360, 362 and n.2, 61 N.W.2d 228, 229 and n.2 (1953). Thus, when death itself is not caused by tortious conduct, as here, the Minnesota survival statute follows the original common law of abatement — a cause of action seeking damages for pain and suffering or other “injury to the person” abates at the injured person’s death.<sup>5</sup>

Minnesota’s wrongful-death and survival statutes serve the primary policy of compensation while protecting its tort and insurance systems from the burdens of liabilities that serve no compensatory purpose. The personal representatives in this case

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<sup>5</sup> The Minnesota Legislature amended the survival-of-actions provisions in 1967 to provide that a cause of action for *special* damages survives when the injured person dies of an unrelated cause. Minn. Stat. § 573.02, subd. 2. As discussed in the ensuing text, this change comports with the underlying policy rationale supporting abatement when death occurs from an unrelated cause. The purely personal damages — like pain and suffering — are unique to the individual who suffered them. Thus, awarding those damages after the injured party’s death serves no compensatory purpose. But the economic damages — like medical expenses — survive to burden the estate, thus making it sensible that a cause of action to recover special damages likewise survives. Plaintiffs have not alleged special damages here. (A.A.10-16).

did not themselves suffer the damages they sued to recover — that is, pain, suffering, and other injuries unique to the now-deceased injured persons. Instead, they sued in a representative capacity. When the individual residents passed away, suit for those damages became barred under Minnesota law because the injured person could no longer gain a compensatory benefit from a recovery. Thus, the focus on compensation provided a sound policy basis for the legislature to prohibit such recovery. See *Thompson v. Petroff's Estate*, 319 N.W.2d 400, 405 (Minn. 1982) (stating that “[u]nder modern tort theory, the primary reason for the existence of a cause of action is to provide a means of compensation for the injured victim”); see also, *Prosser & Keeton on Torts*, “Survival and Wrongful Death,” (5th ed. 1984) (stating “[t]he pain and suffering recovery on behalf of the estate [in a survival action], however, is clearly a windfall to the heirs, and a respectable number of states explicitly exclude such damages in the survival action”); 1 Am.Jur.2d, *Abatement, Survival & Revival*, § 51 at p. 87 (stating that “underlying the distinction is the thought that the reason for addressing purely personal wrongs ceases to exist when the person injured cannot be benefited by a recovery”).<sup>6</sup> The legislative policy underlying Section 573.01 is well-reasoned and has long been the law in Minnesota.

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<sup>6</sup> Other Minnesota law reinforces this underlying policy. See, e.g., *Travelers Indem. Co. v. Vaccari*, 310 Minn. 97, 100-101, 245 N.W.2d 844, 846 (1976) (prohibiting assignment of cause of action for personal injuries); 4A *Minnesota Practice*, CIVJIG 91.25, 91.85 (providing instructions that function to prevent an award of damages for personal injury made during the injured person’s lifetime from providing his or her estate with an inheritable remainder).

Under Minnesota law, “[t]he test for survivability is in the substance, not the form, of the cause of action.” *Beaudry v. State Farm Mut. Auto. Ins. Co.*, 518 N.W.2d 11, 13 (Minn. 1994), *overruled in part on other grounds by Oanes v. Allstate Ins. Co.*, 617 N.W. 2d 401 (Minn. 2000) (changing accrual date of underinsured motorist claims for statute-of-limitations purposes). When “injury to the person is the ‘primary and moving cause of the damages sought,’” the cause of action abates. *Beaudry*, 518 N.W.2d at 13 (quoting *Webber v. St. Paul City Ry. Co.*, 97 F. 140, 145 (8th Cir. 1899)). Put another way, “the nature of the damages sued for rather than the form of the remedy is the test.” *Fowlie v. First Mpls. Trust Co.*, 184 Minn. 82, 85, 237 N.W. 846, 847 (1931). When a cause of action abates, “general damages, such as pain and suffering, dies with the person.” *Beaudry*, 518 N.W.2d at 12.

As detailed above, each of plaintiffs’ separate counts seeks damages arising from injuries to the person. Indeed, the complaint six times specifies pain-and-suffering as the nature of the damages plaintiffs seek. (A.A.10-16). As a matter of Minnesota law, therefore, Good Samaritan is entitled to summary judgment.

Summary judgment on a legal issue is proper where it can be resolved merely by applying statutory provisions to undisputed material facts. *Tyler Lumber Co. v. Logan*, 293 Minn. 1, 7, 195 N.W.2d 818, 822 (1972). Because Butts, Wulff, and Hojberg are now deceased from causes unrelated to the abuse alleged in their complaints, neither they nor their representatives have a viable claim for personal injury against Good Samaritan. The district court recognized this indisputable conclusion, but it nevertheless refused to order summary judgment on the merits. (ADD.23) (“Plaintiff Butts no longer has a

viable claim for personal injury in Minnesota.”). The district court erred as a matter of law when it refused to apply Section 573.01 to the undisputed facts and order summary judgment on the claims related to Butts, Wulff, and Hojberg. This court should reverse the district court and remand for entry of a judgment of dismissal with prejudice in favor of Good Samaritan with respect to the Butts, Wulff, and Hojberg claims.

**III. The district court abused its discretion when it granted voluntary dismissal without prejudice under Minn. R. Civ. P. 41.01(b).**

Instead of granting summary judgment on the merits with prejudice, the district court allowed the plaintiffs — without offering any explanation of need — to defend the summary-judgment motion through their motions for voluntary dismissal without prejudice under Minn. R. Civ. P. 41.01(b). Rule 41.01 allows a plaintiff to request that the court order voluntary dismissal without prejudice:

Except as provided in clause (a) of this rule, an action shall not be dismissed at the plaintiff’s insistence except upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff’s motion to dismiss, the action shall not be dismissed against the defendant’s objection unless the counterclaim may remain pending for independent adjudication of the court. Unless otherwise specified in the order, a dismissal herein is without prejudice.

Minn. R. Civ. P. 41.01(b).

Although they offered no explanation of need, the obvious purpose for the plaintiffs’ various motions for dismissal without prejudice was to avoid Section 573.01’s mandate. The assumption necessarily underlying their corresponding commencement of three new actions in South Dakota is their belief that changing jurisdictions might provide a basis for extinguishing that mandate. Otherwise, changing jurisdictions would

only delay the inevitable.<sup>7</sup> But commencing suit in Minnesota was *plaintiffs'* choice. And that choice was plainly one of legal strategy, because the same attorneys who represent residents who had passed away before any suit was ever brought — i.e., the *Jacobs* plaintiffs — commenced suit in South Dakota to begin with.<sup>8</sup> Moreover, plaintiffs' Minnesota complaint invokes Minnesota law as the basis of alleged liability.<sup>9</sup> And plaintiffs at no time defended Good Samaritan's motion for summary judgment on the ground that South Dakota law somehow applies, thus negating applicability of Section 573.01. Instead, plaintiffs moved for dismissal without prejudice for the irrefutable purpose of depriving Good Samaritan of a substantive defense applicable

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<sup>7</sup> Indeed, plaintiffs have successfully induced the federal district court in *Jacobs* to rule — at the motion-to-dismiss stage — that Good Samaritan is not entitled to have Minnesota law apply. (A.A.86) The court in *Jacobs* reasoned that “the rationale behind Minnesota’s survival statutes has been discredited by the Minnesota Supreme Court” and “Minnesota’s collateral interests and policies do not support the application of Minnesota’s survival statutes.” (A.A.96, 98). The court reached those conclusions, however, based upon cases discussing survival of actions when the *defendant* dies after committing an *intentional* tort, situations that are no longer even governed by Section 573.01. (*Id.*). If necessary, Good Samaritan will appeal the South Dakota ruling.

More importantly, the plaintiffs have never argued that South Dakota law applies in *this* case, but it goes without saying that they intend to so argue in South Dakota. *See, e.g., Kennedy v. State Farm Mut. Auto. Ins. Co.*, 46 F.R.D. 12, 15-16 (E.D.Ark. 1969) (ruling that it would “amount to legal prejudice to subject the defendant to the risk that plaintiff may succeed in inducing the Georgia courts to refuse to apply Arkansas law. . . . This type of forum shopping has no sanction.”) (Citation omitted).

<sup>8</sup> Indeed, in the *Jacobs* action, the plaintiffs' choice-of-law argument conceded their strategy, stating that “if [the *Jacobs*] injury claims had been brought in a Minnesota court their claims would have been invalid and subject to dismissal.” (A.A.134).

<sup>9</sup> Count Four of the Minnesota complaint alleges negligence per se based upon Minnesota rules and statutes, while Count Eight alleges strict liability on the same basis. (A.A.10-15).

under the law of *their* chosen forum, so they could forum shop for a different outcome in South Dakota. The court should reject such an outcome, reverse the district court's order allowing dismissal without prejudice, and remand with directions that a judgment of dismissal with prejudice be entered in Good Samaritan's favor.

Courts consider several factors in determining whether to grant a plaintiff's motion for voluntary dismissal under Rule 41.01(b): (1) the defendant's effort and the expense of trial preparation; (2) the plaintiff's excessive delay and lack of diligence; (3) insufficient explanation of plaintiff's need for dismissal; and (4) whether defendant moved for summary judgment. *Altimus v. Hyundai Motor Co.*, 578 N.W.2d 409, 411 (Minn. App. 1998). Although the latter consideration is not automatically dispositive, "a voluntary dismissal that *strips a defendant of a defense that would otherwise be available* may be sufficiently prejudicial to justify denial." *Id.* (emphasis added). In *Altimus* — as here — the plaintiff "had no cause of action under current law." *Id.* at 412. This court rejected the plaintiff's argument that dismissal without prejudice was justified merely because the legislature might pass a future bill that would allow her claim. *Id.* at 411. The court rejected this argument because "dismissing this case without prejudice would deprive [defendants] of their existing defenses." *Id.* Thus, under *Altimus*, dismissal without prejudice is improper (1) when the plaintiff offers an inadequate or improper basis for seeking such relief; and (2) when the effect of a dismissal without prejudice would subject a defendant to legal prejudice by depriving it of an existing defense. Both factors apply here to foreclose a voluntary dismissal.

A court abuses its discretion when it “omits consideration of a factor entitled to substantial weight.” *Whitaker v. 3M Co.*, 764 N.W.2d 631, 636 (Minn. App. 2009) (citation omitted). In this case, the district court failed to consider the fact that plaintiffs did not just offer an inadequate explanation of need for voluntary dismissal, they offered no explanation at all. *See Altimus*, 578 N.W.2d at 411 (specifying “insufficient explanation of plaintiff’s need for dismissal” as an important consideration in the analysis). Nowhere did plaintiffs explain why they needed to abandon the forum they alone chose for their suit. The privilege of choosing a forum is not also a license to manipulate it for the perceived benefits and abandon it if detriment arises. Instead of examining this factor, the district court terminated its analysis of *Altimus* by considering only the expense and delay factors. In failing to require an explanation of proper need, the district court abused its discretion, requiring reversal.

The district court also abused its discretion by failing to examine the legal prejudice that follows when voluntary dismissal can serve no purpose other than to deprive the defendant of an existing defense. *See Altimus*, 578 N.W.2d at 411 (specifying deprivation of a defendant’s existing defenses as an important consideration in the analysis). Legal prejudice has been defined as “prejudice to some legal interest, some legal claim, [or] some legal argument.” *Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir. 1996). Legal prejudice exists, for example, where dismissal without prejudice would cause a defendant to lose a statutory defense such as the statute of limitations. *See e.g., Phillips v. Illinois Central Gulf Railroad*, 874 F.2d 984, 987-99 (5th Cir. 1989) (affirming district court’s order denying motion for voluntary dismissal and

granting summary judgment where defendant would have been stripped of statute-of-limitations defense); *Wojtas v. Capital Guardian Trust Co.*, 477 F.3d 924, 927 (7th Cir. 2007) (denying motion for voluntary dismissal where defendant would suffer legal prejudice based on loss of statute-of-limitations defense); *Quintero v. Klaveness Ship Lines*, 914 F.2d 717 (5th Cir. 1990) (affirming denial of voluntary dismissal because “loss of the federal *forum non conveniens* defense, all of which would result from a voluntary dismissal, constitutes plain legal prejudice. . .” ); *Rodriguez v. Marks Bros. Pickle Co., Inc.*, 102 F.R.D. 104, 108 (E.D. Wis. 1984) (vacating order for voluntary dismissal where grave prejudice resulted in plaintiff re-filing identical claims in different state’s forum resulting in loss of legal defense). Here, the district court’s dismissal without prejudice of the claims related to Butts, Wulff, and Hojberg could serve no purpose other than to extinguish Good Samaritan’s statutory defense under Section 573.01. Plaintiffs offered no basis for their motions to dismiss, but the obvious purpose was to deprive Good Samaritan of its legal defense by attempting to induce the South Dakota court to apply South Dakota law. *See, e.g., Kennedy v. State Farm Mut. Auto. Ins. Co.*, 46 F.R.D. 12, 15-16 (E.D.Ark. 1969) (ruling that it would “amount to legal prejudice to subject the defendant to the risk that plaintiff may succeed in inducing the Georgia courts to refuse to apply Arkansas law. . . . This type of forum shopping has no sanction.”) (Citation omitted). In the face of established legal prejudice, and the absence of any viable explanation for plaintiffs’ motion for voluntary dismissal, the district court abused its discretion by ordering dismissal without prejudice.

Courts have also concluded that legal prejudice exists where dismissal would promote forum shopping. Forum shopping is “[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard.” *Blacks Law Dictionary* 681 (8th ed. 2004). It has been long discouraged in Minnesota in the choice-of-law context as being disrespectful to Minnesota law. *See, e.g., Schumacher v. Schumacher*, 676 N.W.2d 685, 691 (Minn. App. 2004) (noting that forum shopping frustrates the maintenance of interstate order). And forum shopping is particularly odious when it is used to manipulate the legal system after a plaintiff’s initial choice of forum becomes disadvantageous to that plaintiff. *See Southern Maryland Agricultural Ass’n of Prince George’s County v. United States, D.C. Md.*, 16 F.R.D. 100, 102 (D. Md. 1954) (“Plaintiff chose the forum which it believed to be most advantageous to it. There is no equity in its present effort to revoke that choice”). “Once a plaintiff has commenced its action . . . its opportunity to search for a more conducive forum ordinarily is concluded.” *Spar, Inc. v. Information Resources, Inc.*, 956 F.2d 392, 395 (2nd Cir. 1992) (affirming defendant’s motion to dismiss based on statute of limitations and rejecting plaintiff’s request for change of venue to forum where statute of limitations did not apply). Forum shopping is an improper purpose for seeking voluntary dismissal, and the district court abused its discretion in sanctioning such blatant forum shopping as is at work here.

The district court should have denied plaintiffs’ motions for voluntary dismissal in the face of this clear legal prejudice. “[I]t is axiomatic that ‘[a] motion for voluntary dismissal should generally be denied when the purpose is to avoid an adverse determination on the merits of the action.’” *Zhengzhou Harmoni Spice Co., Ltd. v.*

*United States*, 675 F.Supp.2d 1320, 1334 (U.S. Ct. Int. Trade 2010) (citing 8 *Moore's Federal Practice* 3d § 41.40(7)(b)(v) and authorities). Moreover, “a party is not permitted to dismiss merely to escape an adverse decision . . . to seek a more favorable forum.” *Hamm v. Rhone-Poulenc Rorer Pharmaceuticals, Inc.*, 187 F.3d 941, 950 (8th Cir. 1999); *see also Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354, 358 (10th Cir. 1996) (“[A] party should not be permitted to avoid an adverse decision on a dispositive motion by dismissing a claim without prejudice.”); *Radiant Tech. Corp. v. Electrovert USA Corp.*, 122 F.R.D. 201, 204 (N.D.Tex. 1988) (“[o]utright dismissal should be refused . . . when a plaintiff seeks to circumvent an expected adverse result.”). Legal prejudice exists because the obvious purposes for plaintiffs’ motion were to deprive Good Samaritan of its statutory defense under Section 573.01 and to permit plaintiffs to forum shop by moving their lawsuits to South Dakota in hopes of inducing a court in that state to apply South Dakota law. The district court abused its discretion by allowing plaintiffs to voluntarily dismiss their claims without prejudice.

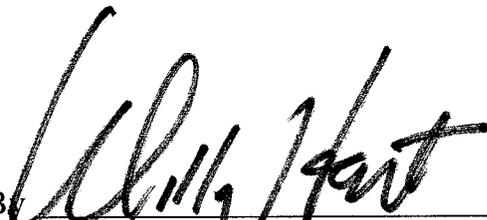
### CONCLUSION

Although a district court’s discretion generally governs its consideration of a motion for voluntary dismissal, such discretion “does not extend to a refusal to apply well-settled principles of law to a conceded or undisputable state of facts.” *Home Owners’ Loan Corp. v. Huffman*, 134 F.2d 314, 316 (8th Cir. 1943). In addition, an abuse of discretion occurs when a district court exhibits “arbitrary action by failure to apply the appropriate equitable and legal principles to the established or conceded facts and circumstances.” *Id.* at 317. It is an abuse of discretion “for a district court to find no

legal prejudice, and thus to grant voluntary dismissal, where the nonmoving party has demonstrated a valid defense to the claims sought to be dismissed.” *Metropolitan Fed. Bank of Iowa v. W.R. Grace & Co.*, 999 F.2d 1257, 1263 (8th Cir. 1993). Here, because the court failed to apply established law as well as important factors, it was able to focus on the minor issue of discovery, concluding that because the motion for voluntary dismissal came early in the proceedings and there had been limited discovery, there “is minimal prejudice to defendants.” (ADD.24). But in doing so, the district court ignored well-settled principles of law under Section 573.01, it failed to apply applicable criteria, it allowed legal prejudice to Good Samaritan, and it condoned forum shopping intended to extinguish Good Samaritan’s statutory defense. As such, the district court abused its discretion by ordering dismissal without prejudice. Its order and judgment should therefore be reversed and the case remanded with instructions to enter a judgment of dismissal with prejudice as to the Butts, Wulff, and Hojberg claims.

Respectfully submitted,

Dated: February 25, 2011

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## FORM AND LENGTH CERTIFICATION

This brief was drafted using Word 2002. The font is Times New Roman, proportional 13-point font, which includes serifs. The word count of this brief is 6,272.

Dated: February 25, 2011

A handwritten signature in black ink, appearing to read "William M. Hart", written in a cursive style. The signature is positioned above a horizontal line.

William M. Hart