

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,

Co-Appellants.

INFORMAL BRIEF AND APPENDIX OF CO-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).

INTRODUCTION

Appellant Evangelical Lutheran Good Samaritan Society's Brief ("Good Samaritan") demonstrates the district court erred by denying Defendants' motions for summary judgment and granting dismissal without prejudice. Good Samaritan's arguments apply with even greater force to Co-Appellants Brianna Broitzman, Ashton Larson, Alicia Heilmann, and Kaylee Nash (collectively "Individual Defendants"), who are not parties to any South Dakota action. Accordingly, for reasons stated in Good Samaritan's Brief and the Individual Defendants' Informal Brief,¹ the Individual Defendants request that the Court reverse the district court and order that judgment be entered in the Individual Defendants' favors.

STATEMENT OF LEGAL ISSUES

- 1. Did the district court err by denying summary judgment in favor of Individual Defendants Brianna Broitzman, Ashton Larson, Alicia Heilmann, and Kaylee Nash where Plaintiffs died of causes unrelated to the alleged tortious acts?**

Yes. The Individual Defendants raised this issue in their three motions for summary judgment. (Co-Appellant's Appx. ("CAA __") 1, 3, 5.) The district court concluded Plaintiffs had no viable claims for personal injury in Minnesota but denied the motions. The Individual Defendants preserved this issue in their Notice of Related Appeal. (*Id.* 7.)

Apposite authority:

Minn. Stat. § 573.01.

Wild v. Rarig, 302 Minn. 419, 234 N.W.2d 775 (1975).

Lipka v. Minn. Sch. Employees Ass'n, Local 1980, 537 N.W.2d 624 (Minn. Ct. App. 1995).

¹ By Order dated March 3, 2011, the Court granted the Individual Defendants' Motion to Accept Informal Brief.

2. Did the district court err by granting plaintiffs’ motions for voluntary dismissal without prejudice pursuant to Minn. R. Civ. P. 41.01(b)?

Yes. The Individual Defendants responded to this issue that Plaintiffs’ representatives raised in their motions for voluntary dismissal. (Appellant’s Appx. (“AA __”) 109, 113, 118.) The Individual Defendants also sought dismissal “with prejudice” in their motions for summary judgment (CAA 2, 4, 6.) The district court granted voluntary dismissal without prejudice even though its stated basis—existence of South Dakota actions—is inapplicable to the Individual Defendants who are not parties to any South Dakota action. The Individual Defendants preserved this issue in their Notice of Related Appeal. (CAA 7.)

Apposite authority:

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

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

STATEMENT OF THE CASE AND OF THE FACTS

The Individual Defendants request that the Court incorporate by reference Good Samaritan’s Statements of the Case and of Facts. (*See* Appellant’s Br. 2-8.) Additionally, the Court should note that the only claims against the Individual Defendants are for civil assault and battery (Count One), intentional infliction of emotional distress (Count Two), and failure to report the maltreatment of vulnerable adults (Count Three). (AA 8-10.) The Individual Defendants are not parties to any South Dakota action. (AA 48, 68, 77, 126.)

ARGUMENT

I. STANDARD OF REVIEW

The Individual Defendants request that the Court incorporate by reference Good Samaritan’s argument regarding the applicable standard of review.

II. THE DISTRICT COURT ERRED WHEN IT DENIED THE INDIVIDUAL DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

As Good Samaritan explained, the district court erred by denying the Defendants' motions for summary judgment even though the court correctly concluded Plaintiffs have no "viable claim[s] for personal injury in Minnesota."² (Appellant's Br. 14-15 (citing Add. 23).) There is no dispute of material fact as to the non-viability of the claims, and Defendants were entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03.

The claims are not viable because "[a] cause of action arising out of an injury to the person dies with the person of the party in whose favor it exists, except as provided in section 573.02."³ Minn. Stat. § 573.01. Non-viable claims include Count One for civil assault and battery and Count Two for intentional infliction of emotional distress. *See Wild v. Rarig*, 302 Minn. 419, 446, 234 N.W.2d 775, 792-93 (1975) (describing assault and battery as intentional torts that do not "survive the death of either party"); *Lipka v. Minn. Sch. Employees Ass'n, Local 1980*, 537 N.W.2d 624, 629-30 (Minn. Ct. App. 1995) (holding that "assault claim and emotional distress claims are considered 'injury to the person' claims" barred by Minn. Stat. § 573.01).

² The district court's conclusion appeared in its August 24, 2010 order denying summary judgment regarding Beverly Butts' claims. (Add. 23.) The district court took judicial notice of this order when denying summary judgment regarding the Kenneth Hojberg and Sylvia Wulff claims. (Add. 5, 12.)

³ Pursuant to Minn. Stat § 573.02, subd. 2, a claim for "special damages" survives. However, as Good Samaritan explained (Appellant's Br. 12 n.5), Plaintiffs did not claim special damages, *e.g.* "damages to which an exact dollar amount can be assigned, such as medical expenses or lost wages to date of death." *Deal v. Northwood Children's Home Soc'y*, 608 N.W.2d 922, 925 n.1 (Minn. Ct. App. 2000).

Regarding Count Three for alleged “failure to report the maltreatment of vulnerable adults,” this Court looks *de novo* to “the substance, not the form, of the cause of action” to determine whether the cause of action survives. *Lipka*, 537 N.W.2d at 629 (internal quotation omitted). Here, Plaintiffs alleged the Individual Defendants “had a duty to immediately report” information, breached a duty, and “[a]s a direct and proximate result of the failure ... Plaintiffs experienced injuries to mind and body causing them to experience pain and suffering.” (AA 10 ¶¶ 31, 31, 34.) The substance of the allegations seeks compensation for physical and emotional harm. Accordingly, Count Three arises out of an injury to the person and therefore dies with persons in whose favor it exists. Minn. Stat. § 573.01.

For these reasons as well as those stated in Good Samaritan’s Brief, the Individual Defendants request that the Court reverse the district court and remand with instructions to enter judgment in favor of the Individual Defendants.

III. THE DISTRICT COURT ERRED BY GRANTING VOLUNTARY DISMISSAL WITHOUT PREJUDICE UNDER MINN. R. CIV. P. 41.01(B)

As the district court explained, “[t]he reason for Plaintiffs’ request for voluntary dismissal is obvious and practical.” (Add. 23.) The reason was to pursue an action in South Dakota, where Good Samaritan does business. (*Id.*) By ordering dismissal *without* prejudice, the district court erroneously permitted Plaintiffs to forum shop regarding claims against Good Samaritan. (App. Br. at 15-21.) But the Individual Defendants are not subject to claims in South Dakota. (AA 48, 68, 77, 126.) Accordingly, the district court’s lone rationale for granting dismissal without prejudice—that “little discovery has

been conducted” in the Minnesota actions (Add. 23)—is inapplicable to the Individual Defendants who have no discovery obligations in South Dakota.

Minnesota law provided the Individual Defendants with an existing defense that the claims against them “die[d] with the person of the party in whose favor it exists.” Minn. Stat. § 573.01. *See* § II, *supra*. The dismissals without prejudice have improperly deprived the Individual Defendants “of their existing defenses” because Plaintiffs “have no cause of action under Minnesota law.” *Altimus v. Hyundai Motor Co.*, 578 N.W.2d 409, 412 (Minn. Ct. App. 1998). This was an abuse of discretion because the dismissals without prejudice were not supported by the record and constituted a misapplication of Minn. Stat. § 573.01. *See Minneapolis Grand, LLC v. Galt Funding LLC*, 791 N.W.2d 549, 556 (Minn. Ct. App. 2010) (“A district court abuses its discretion when its findings are not supported by the record or it misapplies the law.”). Accordingly, the Court should reverse the dismissal without prejudice, hold that dismissal should have been with prejudice, and remand for entry of judgment in the Individual Defendants’ favor. *See id.* at 556 (ordering “reverse and remand for entry of judgment in [Appellant’s] favor” where there had been abuse of discretion).

CONCLUSION

The district court correctly concluded that Plaintiffs have no “viable claim personal injury in Minnesota,” but it erred by denying summary judgment and ordering dismissal without prejudice even though there can be no viable claim. Accordingly, for the reasons stated above as well as in Good Samaritan’s Appellant’s Brief, the Individual Defendants respectfully request that the district court reverse the district court, order

dismissal with prejudice, and direct that judgment be entered in the Individual Defendants' favors.

BASSFORD REMELE
A Professional Association

Dated: March 9, 2011

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