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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,

v.

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

Appellants,

and

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

Co-Appellants.

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ARGUMENT

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

The concessions appearing in plaintiffs' brief are all the court needs for a ruling that reverses the district court's order and remands for entry of a judgment of dismissal with prejudice as to the Butts, Wulff, and Hojberg matters:

- "Minnesota law applied to the Minnesota action." (Resp. Br. at 18).
- "There is no dispute that under Minn. Stat. § 573.01 Respondents claims in Minnesota abated." (Resp. Br. at 6). "The law is clear that the claims abated." (Resp. Br. at 23).
- "[T]here was no genuine issue of material fact regarding the death of the plaintiffs and the abatement of Respondents' case in Minnesota." (Resp. Br. at 24).
- "The district court found that the claims abated when the plaintiffs died." (Resp. Br. at 6).
- "The district court dismissed the case *because* the plaintiffs' *cause of action abated."* (Resp. Br. at 11) (emphasis added).

The foremost concession is that "plaintiffs' cause of action abated." (*Id.*). Under Minnesota law, "[a] *cause of action* arising out of injury to the person dies with the person of the party in whose favor it exists . . . ." Minn. Stat. § 573.01 (2010) (emphasis added). A "cause of action" is defined as "a group of operative facts giving rise to one or more bases for suing." *Martin ex rel. Hoff v. City of Rochester,* 642 N.W.2d 1, 9 (Minn. 2002); *see also, Black's Law Dictionary*, 235 (8th ed. 2004)(same and defining cause of

action also as "a state of facts" that entitles a party to maintain an action); *Anderson v. Werner Cont'l, Inc.,* 363 N.W.2d 332, 335 (Minn. App. 1985) (holding that claims are the same cause of action "if the same operative nucleus of facts is alleged in support of the claims"), *review denied* (Minn. Jun. 24, 1985); *SMA Services, Inc. v. Weaver*, 632 N.W.2d 770, 774 (Minn. App. 2001) (stating that "[t]wo causes of action are the same when they involve the same set of factual circumstances or when the same evidence will sustain both actions"). In fact, this court just recently ruled that the term "cause of action" in a statutory provision means "'a group of operative facts giving rise to one or more bases for suing.'" *Juetten v. LCA-Vision, Inc.*, 777 N.W.2d 772, 776 (Minn. App. 2010) (construing the term "cause of action" as it appears in the medical-malpractice expert-review statute, Minn. Stat. § 145.682) (quoting *Martin ex rel. Hoff*, 642 N.W.2d at 9), *review denied* (Minn. Apr. 28, 2010). In other words, as it is used in Minn. Stat. § 573.01, a "cause of action" is neither a theory of liability – like negligence, strict liability, or the like – nor a particular suit pending in a particular court.[1] It is, instead, the *right to sue* under the facts comprising the underlying occurrence. Thus, when a person passes away, the *right to sue* for personal injuries under such facts is extinguished.

Plaintiffs' entire legal argument proceeds from premises that contradict not only what the statute says – *i.e.*, that the *cause of action* (right to sue) abates – but also the law that informs its operative terms. The following is the most succinct example:

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[1] Minnesota law defines an individual lawsuit as an "action." Minn. Stat. § 645.45 (2010) (defining "action" as "any proceeding in any court of this state"); *see also, Juetten,* 777 N.W.2d at 776 (stating that "suit" and "action" are synonymous). The *cause of action*, however, is the "group of operative facts" giving rise to a right to allege Good Samaritan's liability. *Martin*, 642 N.W.2d at 9; *Juetten*, 777 N.W.2d at 776.

"Minnesota law applied to the Minnesota actions but did not preclude subsequent actions." (Resp. Br. at 20) (*see also*, Resp. Br. at 14 (arguing that "Minn. Stat. § 573.01 does not extinguish subsequent actions")). Indeed, however, the opposite is true. The statute *expressly* precludes subsequent actions because it extinguishes the right to sue. In other words, conceding that "plaintiffs' cause of action abated" (Resp. Br. at 23) is the same as conceding that no current *or future* right to sue exists.

This result under Minnesota statutes is entirely consistent with the result mandated under other Minnesota case law. *See, e.g.*, *Boogren v. St. Paul City Ry. Co.*, 97 Minn. 51, 54, 106 N.W. 104, 106 (1906) (holding 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* . . .") (emphasis added). In other words, an injured person may not assign the right to recover for personal injury during his or her lifetime, nor may surviving representatives assert that cause of action as the basis for commencing suit. Directly contradicting that law, plaintiffs argue that through the expedience of a dismissal without prejudice the deceased individuals' surviving representatives nevertheless became free to assert the cause of action as grounds for recovery. But under Minnesota law, when a plaintiff passes away from an unrelated cause, no current *or future* right to sue exists. The district court lacked authority to override established supreme court precedent and legislative mandate through a mechanism of dismissal.

This result necessarily follows from plaintiffs' further concession that Minnesota law applies to this case. (Resp. Br. at 18). Minnesota law applies here not because suit is

venued in this state, but because Minnesota law controls *the cause of action* (*i.e.*, the right to sue that follows from the nucleus of operative facts). *Milkovich v. Saari*, 295 Minn. 155, 162, 203 N.W.2d 408, 412 (1973) (stating that "[o]n April 1, 1966, our court handed down two decisions which indicated our determination to replace lex loci with a more rational choice-of-law methodology") (citations omitted); *Nodak Mut. Ins. Co. v. Am. Fam. Mut. Ins. Co.*, 604 N.W.2d 91, 96 (Minn. 2000) (stating that "both this court and the North Dakota Supreme Court have rejected *lex loci* in favor of the significant contacts approach to choice-of-law cases"). Indeed, no state still applies a *lex loci* approach to choice of law. Therefore, conceding that Minnesota law applies in this case is the same as conceding that Minnesota law applies wherever suit on the cause of action might be commenced. It is also the same as conceding that this action is subject to a ruling that no current or future right to sue exists.

Plaintiffs can be expected to argue that they may deprive Good Samaritan of this outcome – even though they have conceded that the law mandating that outcome controls – by commencing suit in South Dakota and urging application of a different rule there. This, of course, conclusively establishes the prejudice element discussed below. *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).[2] In the context of this

[2] This ruling should be doubly applicable here, since the plaintiffs have *conceded* that Minnesota law applies. Despite this concession, plaintiffs nevertheless have successfully

discussion, however, such an argument establishes contempt for the constitutional mandate of full faith and credit. *See, e.g., Durfee v. Duke*, 375 U.S. 106, 111, 84 S.Ct. 242, 245 (1963) (stating that under U.S. Const. art IV, § 1, a state court judgment in one state is entitled to full faith and credit in other states when it is determined that questions have been fully and fairly decided in the original court). Plaintiffs have conceded that Good Samaritan is entitled to a ruling that the deceased plaintiffs' causes of action are extinguished. But by end-running a resulting judgment to that effect, the plaintiffs have attempted to avoid in South Dakota what the constitution mandates. *Durfee*, 375 U.S. at 109. 84 S.Ct. at 244 (stating that "[f]ull faith and credit thus generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it"); *McBroom v. Al-Chroma, Inc.*, 386 N.W.2d 369, 372 (Minn. App. 1986) (quoting same language from *Durfee*). In short, because Minnesota law applies, plaintiffs are precluded from seeking a result at odds with what they concede is the mandated outcome. ("There is no dispute that under Minn. Stat. § 573.01 Respondents claims in Minnesota abated." (Resp. Br. at 6); "The law is clear that the claims abated." (Resp. Br. at 23)). Under Minnesota law, Good Samaritan is entitled to summary judgment – *i.e.,* a judgment of dismissal with prejudice – the legal effect of which is that no current or future right to sue on the deceased plaintiffs' causes of action

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argued in an identical companion case that South Dakota law applies. They undoubtedly anticipate the same legal strategy in the three South Dakota cases that the estates of the deceased Minnesota plaintiffs have commenced. This is the very forum-shopping outcome the *Kennedy* court rejected.

exists. The district court's refusal to order summary judgment must therefore be reversed.

Further support for reversal springs from plaintiffs' concession that the "[t]he district court found that the claims abated *when* the plaintiffs died." (Resp. Br. at 6) (emphasis added). Under Minnesota law, by definition this is the same as conceding that immediately upon their deaths, no current or future right to sue on the deceased plaintiffs' causes of action remained.

Finally, plaintiffs have conceded that "[t]he district court dismissed the case *because* the plaintiffs' cause of action abated." (Resp. Br. at 11) (emphasis added). This is exactly the reason the district court dismissed the case, but that reason in turn precludes a dismissal without prejudice. *See Burma v. Stransky*, 357 N.W.2d 82, 89 (Minn. 1984) (holding that whenever a district court makes "determinations on the merits [it cannot] thereafter dismiss without prejudice the claims with respect to which those determinations were made"). Plaintiffs argue that a dismissal because of abatement need not be on the merits. (Resp. Br. at 16 (stating that "[t]he district did not make a determination on the merits because the plaintiffs passed away before they could fully litigate their cases"); Resp. Br. at 23) (arguing that "adequate discovery had not been conducted to adjudicate the claims against Appellants on the merits")). This argument depends on an utter misapprehension of what constitutes "the merits" under the law.

Summary judgment is always on the merits. *Burma*, 357 N.W.2d at 89 (stating that "[s]ummary judgment is a determination on the merits"). Summary judgment must be ordered whenever there is no genuine issue of material fact and either party is entitled

to judgment as a matter of law. Minn. R. Civ. P. 56.03. When a party fails to establish a fact essential to the claim, all other facts are immaterial. *Carlisle v. City of Mpls.*, 437 N.W.2d 712, 715 (Minn. App. 1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986)). Under Minnesota law – which undisputedly applies – for every cause of action "arising out of injury to the person," a fact essential to the claim is that the plaintiff has not passed away from a cause unrelated to the claim. Minn. Stat. § 573.01. The defendants met their summary judgment burden by offering admissible evidence (the obituaries) showing that this essential fact – one that is otherwise virtually never in controversy – is absent. (A.A.22, A.A.63, A.A.67).[3] Because the existence of a living plaintiff is a missing essential fact, all other facts are immaterial, and Good Samaritan was therefore entitled to summary judgment. Under such circumstances, it is legally irrelevant that the plaintiffs had yet to "fully litigate their cases." (Resp. Br. at 16). That is the very definition of summary judgment — to *foreclose* "full litigation" when the outcome can never produce a result other than a judgment in favor of the defendant. To reiterate, "[s]ummary judgment is a determination on the merits." *Burma*, 357 N.W.2d at 89. Plaintiffs' argument that a dismissal because of abatement need not be on the merits contradicts the most basic of law controlling summary judgments.

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[3] It is possible to envision a case where the cause of death is genuinely in dispute, thus foreclosing summary judgment. But resolution of that fact in *plaintiff's* favor would never result in a dismissal without prejudice. It would result in a conversion of the case to one for wrongful death under Minn. Stat. § 573.02. In any event, plaintiffs concede that the cause of the plaintiffs' deaths is not in dispute here. (Resp. Br. at 23).

Plaintiffs continue their point by arguing that before a court may entertain a motion for summary judgment, it "must be able to make a determination on the merits." (Resp. Br. at 21). Again, however, their argument as to what constitutes "the merits" badly misconstrues the law. According to plaintiffs, dismissal on the ground of abatement is not "on the merits" because the undisputed facts used to establish abatement – *i.e.*, fact showing plaintiffs' deaths from causes unrelated to the actionable conduct – "do not prove the merits of each plaintiff's claims of ongoing abuse and neglect at the hands of [the nursing assistants]." (Resp. Br. at 23). Plaintiffs cite no authority for this contention, and it is not difficult to understand why. If that were the law, summary judgment could never be entered unless the legal basis for it also resolved the merits of the underlying facts, even though those facts became legally immaterial due to the failure of proof on some essential element of the claim. This not only contradicts the most basic summary judgment standards – as outlined above – it contradicts the manner in which summary judgment has applied in countless decisions. For example, the occurrence underlying the decision in *Burma* arose out of an automobile accident. 357 N.W.2d at 84. This accident spawned two lawsuits on behalf of the same plaintiff. Suit A resulted in a judgment entered upon a settlement. The defendants then sought summary judgment in Suit B (which a guardian had commenced), on the ground that the judgment in Suit A barred Suit B. The district court ordered summary judgment without prejudice in Suit B, but the supreme court reversed, ruling that the necessary determination on the merits foreclosed a dismissal without prejudice. *Id.* at 89. But this was so even though the district court in that case no more reached the "merits" of the car accident and resulting

injuries than the court in this case reached the "merits" of the abuse and neglect allegations here. Summary judgment was on the merits because the law of judgments mandated dismissal of Suit B. A summary judgment is on the merits because, by definition, some missing element renders all other facts immaterial.

This returns the discussion full circle to the plaintiffs' concession that "[t]he district court dismissed the case *because* the plaintiffs' cause of action abated." (Resp. Br. at 11). This is so.[4] It is further so, as just demonstrated, that such a ruling is a determination on the merits. Plaintiffs argument that the district court properly dismissed the case without prejudice because the cause of action abated is the same as arguing that a district court may dismiss a case without prejudice because the plaintiff failed to raise a genuine issue of material fact on causation or damages.[5] But the supreme court has expressly held that once a district court makes "determinations on the merits [it may] not thereafter dismiss without prejudice the claims with regard to which those determinations were made." *Burma*, 357 N.W.2d at 89; *see also, Pond Hollow Homeowners' Ass'n v.*

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[4] Plaintiffs' confusion about the legal implications of their many concessions is well-demonstrated by this non-sequitur: "The court did not err in denying Appellants' and Co-Appellants motions for summary judgment. The issue before the court was whether the claim abated under Minn. Stat. § 573.01. The law is clear that the claims abated. Therefore there was no error as a matter of law." (Resp. Br. at 23).

[5] Indeed, for more than two centuries the law has recognized that a cause of action seeking damages for injury to the person – *i.e.*, pain and suffering and the like – abates because no living person has suffered compensable damage. *See, e.g.,* 3 Wm. Blackstone, *Commentaries on the Laws of England,* 302-303 (1768) (stating that reasons underlying abatement include fact that "the executors of the plaintiff have received [no] manner of wrong or injury"). Thus, finding (or conceding) that a cause of action has abated is the same as finding (or conceding) that the proof has failed on an essential element of the claim (damages). By definition, such a state of undisputed facts requires summary judgment.

The Ryland Gp., 779 N.W.2d 920, 924 (Minn. App. 2010) (ruling that where district court determined that plaintiff failed to raise a genuine issue of material fact on the applicable standard of care, it could not then enter a judgment of dismissal without prejudice). The district court's ruling to the contrary here must be reversed and the case remanded with instructions to enter a judgment of dismissal with prejudice as to the Butts, Wulff, and Hojberg claims.

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

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 considered only the expense and delay factors, while omitting consideration of whether: (1) dismissal for the purpose of avoiding an established and undisputed adverse outcome is an improper reason under Rule 41.01; and (2) legal prejudice exists when the nonmoving party has demonstrated – indeed, the moving party concedes – a valid defense to the claims sought to be dismissed. As such, the district court abused its discretion. And because an examination of those factors forecloses a dismissal without prejudice, this court should reverse and remand with instructions to enter a judgment of dismissal with prejudice as to the Butts, Wulff, and Hojberg claims.

A. Despite their denials, the irrefutable purpose for the plaintiffs' motion for dismissal without prejudice was forum shopping.

Plaintiffs effusively deny that the re-filing of their cases in South Dakota constitutes forum shopping. But their own admissions, together with the legal effect of

abatement, utterly belie the denials. The following succinctly sums up plaintiffs' purpose in seeking a dismissal without prejudice in order to file suit in South Dakota: "Respondents do not wish to relitigate the issue that was before the district court – the abatement issue. Instead, Respondents seek a decision on the merits of the claims of abuse and neglect." (Resp. Br. at 16). This is exactly the point. Abatement *forecloses* the right to sue, so in order to avoid that result, plaintiffs sought dismissal without prejudice and a forum where they might induce the court not to apply Minnesota's law of abatement (law they have conceded is applicable). Denying forum shopping in such circumstances is hollow. *Kennedy*, 46 F.R.D. at 15-16 (E.D. Ark. 1969) (stating that attempted strategy of "inducing the Georgia courts to refuse to apply Arkansas law. . . . [is] forum shopping [that] has no sanction"). Conceding that Minnesota law applies, while shopping for a forum for the purpose of avoiding Minnesota law, is forum shopping. The district court abused its discretion in not addressing plaintiffs' blatant forum shopping and in failing to refuse a dismissal without prejudice in the face of such blatant forum shopping.

Plaintiffs claim that no forum shopping occurred here because they chose Minnesota only for convenience and could not have foreseen that an abatement issue might arise. (Resp. Br. at 19). The record sustains neither claim. First, plaintiffs unquestionably chose Minnesota for the perceived advantage that a forum with jurisdiction over the perpetrators might provide, like the possibility of recovering against Good Samaritan without establishing Good Samaritan's fault. The South Dakota courts lack personal jurisdiction over the perpetrators, so they are not parties to the actions filed

there. This strategy was plainly purposeful, since the four residents of the Albert Lea facility who passed away before any suit was filed chose South Dakota as their forum, and they did not – could not – name the perpetrators as defendants there, while the four residents who remained living chose Minnesota as their forum. The latter sued the perpetrators. All eight are represented by the same attorneys. Thus, the plaintiffs deliberately pursued a forum strategy from the outset, choosing Minnesota for its favorable law in light of its jurisdiction over the perpetrators, and South Dakota by necessity. Moreover, plaintiffs chose this strategy even though all eight were nursing-home residents in their 80s – *i.e.*, had surpassed their life expectancy – and each suffered from advanced dementia. Four had already passed away in the short period before suit was commenced. To suggest that commencing suit in Minnesota did not portend a potential abatement issue is to contradict everything the plaintiffs knew and everything they did as legal strategy.

Plaintiffs try to distinguish the cases cited in Good Samaritan's opening brief "because in this case there was no choice-of-law analysis, no change of law during the litigation, and no 'bargain hunt' for the best forum." (Resp. Br. at 20). But each of the cited factors strongly supports reversal here. First, no choice of law analysis was necessary in this case *because plaintiffs concede that Minnesota law applies.* Conceding the applicable law while seeking to shop for a forum that will refuse to apply it is the *most* egregious kind of forum shopping. Second, it's true that Minnesota abatement law did not change during this litigation, but plaintiffs deliberately chose Minnesota as their forum with full knowledge of the high potential that the law of abatement would

eventually apply to one or more of the four nursing-home residents. Now that this has come to pass, the *plaintiffs* want to change the applicable law by changing forums during the litigation. Finally, deliberately choosing the first forum at the outset – while other plaintiffs chose the second forum – and then switching to the second forum when unfavorable circumstances developed is not just a forum bargain hunt, it is a before-and-after bargain hunt. Forum shopping was the irrefutable purpose behind the plaintiffs' legal strategy, and the district court abused its discretion in both failing to even address that important factor and in allowing such a blatant manipulation of the legal system as occurred here. *See, e.g., 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"); *Spar, Inc. v. Information Resources, Inc.*, 956 F.2d 392, 395 (2nd Cir. 1992) ("Once a plaintiff has commenced its action . . . its opportunity to search for a more conducive forum ordinarily is concluded"). Forum shopping is an improper purpose for seeking a dismissal without prejudice. The order and judgment below 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.

B. Good Samaritan established legal prejudice because dismissal without prejudice could serve no purpose other than to deprive it of an existing defense.

Legal prejudice is "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); *see also, Altimus v. Hyundai Motor Co.*, 578 N.W.2d 409, 411 (Minn. App. 1998)

(specifying deprivation of a defendant's existing defenses as an important consideration in the analysis). As the Eighth Circuit has put it, "[w]e would consider it 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 statute of limitations 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).

In response, plaintiffs make the impossibly contradictory argument that "Appellants did not 'lose' the abatement defense." (Resp. Br. at 11). This is so, argue plaintiffs, because "nothing precludes Appellants from bringing the abatement defense . . . in South Dakota Federal Court." (Id.). If that is a concession that Minnesota law applies in the South Dakota action, then the district court abused its discretion by requiring the parties to litigate in South Dakota for the sole purpose of obtaining the undisputed relief to which Good Samaritan is entitled under Minnesota law, even though a motion asking for such relief was then pending before the Minnesota court.

Assuming plaintiffs did not intend to concede application of Minnesota law in the South Dakota actions,[6] the above-quoted statement lacks all sense and substance. If Minnesota law is held not to apply, of course Good Samaritan will lose its abatement defense! This nonsensical circuity only confirms what should be undeniable (yet plaintiffs somehow continue to deny it) – the purpose of the South Dakota action is to

[6] And one must assume the plaintiffs intended no such concession, since they emphasize in their briefs that "there is precedent that holds that Minnesota's abatement law does not apply in South Dakota Federal District Court to the Appellants in this case." (Resp. Br. at 18) (citing the companion South Dakota case commenced by the estates of the deceased Albert Lea residents who passed away before any suit was commenced).

avoid the abatement defense. Having conceded that Minnesota law applies *here*, the *sole* purpose of the South Dakota action is to urge the South Dakota court to *reject* the abatement defense in favor of South Dakota's survival statute. When a plaintiffs' cause of action is subject to the law of a first forum – and this should be especially true if the law is applicable by concession – such a scenario establishes the legal prejudice necessary to foreclose a dismissal without prejudice. *See, e.g., Kennedy*, 46 F.R.D. 12 at 15-16 (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). This case is not about convenience; it is not about some procedural advantage; it is not about the vexation of having to defend a second lawsuit. It is about the fact that plaintiffs have conceded the *substantive* deficiency of their cause of action, yet they have sought and received the right to avoid the required outcome – *i.e.*, a judgment of dismissal with prejudice – through a dismissal without prejudice. The district court abused its discretion by failing to address the legal-prejudice factor and by failing to apply it as a basis to deny a dismissal without prejudice.

Many of the cases supporting this result – cited above and in Good Samaritan's opening brief – have as their underlying facts legal prejudice from the loss of a statute-of-limitations defense. The *Bank of Iowa* case, quoted above, is a good example. Plaintiffs point out that statutes of limitations are unlike some other defenses because their expiration merely extinguishes the remedy but not the underlying right. (Resp. Br. at 13-14). This is true. *See, e.g., Contos v. Herbst*, 278 N.W.2d 732, 745 (Minn. 1979) (stating

that "[s]tatutes of limitations generally affect the remedy and not the right"). A few courts have found this point important for dismissals without prejudice, while most have found that it doesn't affect the legal-prejudice analysis. *See, e.g., Bank of Iowa*, 999 F.2d at 1263; *Wojtas v. Capital Guardian Trust Co.*, 477 F.3d 924, 927 (7th Cir. 2007). In the context of this case, however, the distinction only reinforces the argument for reversal. It is difficult to imagine a rule of law that more clearly extinguishes the *right* to sue – *i.e.*, not merely the remedy – than the abatement statute at issue here: "A *cause of action* arising out of injury to the person *dies* with the person of the party in whose favor it exists . . . ." Minn. Stat. § 573.01 (2010) (emphasis added). The cause of action dies; it is extinguished. In fact, in explaining the distinction for statutes of limitations, the Seventh Circuit explained why the Wisconsin statute of limitations nevertheless is not amenable to a right-versus-remedy analysis: "'The expiration of the limitations period [in Wisconsin] *extinguishes the cause of action* of the potential plaintiff . . . .'" *Wojtas*, 477 F.3d at 927 (emphasis added). Like the Wisconsin statute of limitations, statutory abatement under Section 573.01 extinguishes the cause of action. The statute says so expressly. Even by plaintiffs' own analysis, therefore, the holding in *Wojtas* applies with equal force here: "Capital, having acquired a right to assert the statute of limitations bar by operation of Wisconsin law, would suffer plain legal prejudice if the [plaintiffs'] motion for voluntary dismissal were granted." 477 N.W.2d at 927-28. The district court abused its discretion by failing to address the legal-prejudice factor and by failing to apply it as a basis to deny a dismissal without prejudice.

Finally, plaintiffs point out that the court in *Bank of Iowa* ultimately affirmed a dismissal without prejudice, but they neglected to mention why. The court so ruled because the defendant had failed to establish that the dismissed claims were governed by the Minnesota statutes of limitations under which the defendant sought a dismissal with prejudice. 999 F.2d at 1263. Here, notably, the plaintiffs *concede* that point – Minnesota law (Section 573.01) does govern. The plaintiffs having so conceded, it was an abuse of discretion for the district court to permit a dismissal without prejudice. The order and judgment below 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.

CONCLUSION

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,

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FORM AND LENGTH CERTIFICATION

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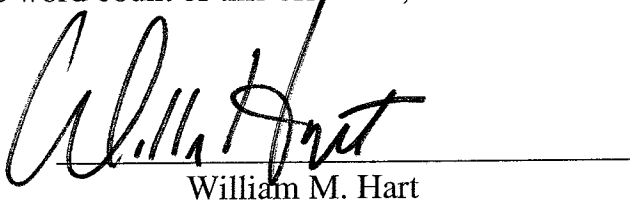

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