

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.*

---

**RESPONDENTS' BRIEF AND APPENDIX**

---

James P. Carey (#180555)  
Marcia K. Miller (#032162X)  
SIEBEN, GROSE, VON HOLTUM  
& CAREY, LTD.  
900 Midwest Plaza East  
800 Marquette Avenue  
Minneapolis, MN 55402  
(612) 333-4500

Mark R. Kosieradzki (#57745)  
Joel E. Smith (#213184)  
KOSIERADZKI SMITH LAW FIRM, LLC  
3675 Plymouth Boulevard, Suite 105  
Plymouth, MN 55446  
(763) 746-7800

*Attorneys for Respondents*

William M. Hart (#150526)  
Barbara A. Zurek (#213974)  
Melissa Dosick Riethof (#282716)  
MEAGHER & GEER, P.L.L.P.  
33 South Sixth Street, Suite 4400  
Minneapolis, MN 55402  
(612) 338-0661

*Attorneys for Appellants*

Stephen O. Plunkett (#203932)  
Shanda K. Pearson (#0340923)  
BASSFORD REMELE  
33 South Sixth Street, Suite 3800  
Minneapolis, MN 55402  
(612) 333-8829

*Attorneys for Co-Appellants*

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).

## TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES .....	ii
STATEMENT OF ISSUES .....	1
STATEMENT OF THE CASE AND FACTS .....	3
ANALYSIS.....	6
I.    STANDARD OF REVIEW .....	6
II.   THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING RESPONDENTS' MOTION TO DISMISS WITHOUT PREJUDICE.....	7
A.   The record shows that the district court considered all the <i>Altimus</i> factors. ....	9
B.   The district court did not abuse its discretion in finding that Appellants would suffer minimal prejudice. ....	10
1.   Appellants fail to establish substantial prejudice based on loss of a statutory defense.....	11
2.   Filing the action in South Dakota Federal Court did not constitute forum shopping.....	19
III.  THE DISTRICT COURT DID NOT ERR IN ANALYZING THE PARTIES' MOTIONS AS A MOTION FOR DISMISSAL AND DENYING APPELLANTS' AND CO- APPELLANTS' SUMMARY JUDGMENT MOTIONS.....	21
CONCLUSION.....	24

## TABLE OF AUTHORITIES

### CASES

<i>Altimus v. Hyundai Motor Co.</i> , 578 N.W.2d 409 (Minn. Ct. App. 1998).....	1, 6, 7, 8, 9, 10
<i>Bolten v. Gen. Motors Co.</i> , 180 F.2d 379 (7th Cir. 1950).....	8, 9, 13, 14
<i>Burma v. Stransky</i> , 357 N.W.2d 82 (Minn. 1984).....	21, 22
<i>Electric Fetus Co., Inc. v. City of Duluth</i> , 547 N.W.2d 448 (Minn. Ct. App. 1996).....	7
<i>Grzelak v. Calumett Pub. Co.</i> , 543 F.2d 579 (7th Cir. 1975).....	2, 22
<i>Grivas v. Parmelee Transp. Co.</i> , 207 F.2d 334 (7th Cir. 1953).....	9
<i>In re Bayshore Ford Trucks Sales, Inc.</i> , 471 F.3d 1233 (11th Cir. 2006).....	8
<i>Jacobs v. The Evangelical Lutheran Good Samaritan Society</i> , No. CIV. 10-4035-KES (S.D. Dist. Ct. December 28, 2010).....	3, 4, 18
<i>McCants v. Ford Motor Co.</i> , 781 F.2d 855 (11th Cir. 1986).....	12
<i>McCarney v. Ford Motor Co.</i> , 657 F.2d 230 (8th Cir. 1981).....	11
<i>Metro. Fed. Bank of Iowa, F.S.B. v. W.R. Grace &amp; Co.</i> , 999 F.2d 1257 (8th Cir. 1993).....	1, 12, 13
<i>Millsap v. Jane Lamb Mem'l Hosp.</i> , 111 F.R.D. 481 (S.D. Iowa 1986).....	8

<i>Mumm v. Mornson</i> , 708 N.W.2d 475 (Minn. 2006).....	6, 7
<i>N. States Power Co. v. Minn. Metro. Council</i> , 684 N.W.2d 485 (Minn. 2004).....	22
<i>Paulucci v. City of Duluth</i> , 826 F.2d 780 (8th Cir. 1987).....	7
<i>Peters v. Waters Instruments, Inc.</i> , 312 Minn. 152, 251 N.W.2d 114 (Minn. 1977).....	7
<i>Phillips USA, Inc. v. Allflex USA, Inc.</i> , 77 F.3d 354 (10th Cir. 1996).....	6
<i>Quinterro v. Klaveness Ship Lines</i> , 914 F.2d 717 (5th Cir. 1990).....	14, 15, 16
<i>Rodriguez v. Marks Bros. Pickle Co., Inc.</i> , 102 F.R.D. 104 (E.D. Wis. 1984).....	16, 17, 18
<i>Schumacher v. Schumacher</i> , 676 N.W.2d 685 (Minn. Ct. App. 2004).....	20
<i>Southern Md. Agr. Ass'n of Prince George's County v. U.S.</i> , 16 F.R.D. 100 (1954).....	20
<i>Spar, Inc. v. Info. Resources, Inc.</i> , 956 F.2d 392 (2nd Cir. 1992).....	20, 21
<i>Tyler Lumber Co. v. Logan</i> , 293 Minn. 1, 195 N.W.2d 818 (1972).....	23
<i>Wojtas v. Capital Guardian Trust Co.</i> , 477 F. 3d 924 (2007).....	9, 13, 14
<i>Zhengzhou Harmoni Spice Co., Ltd. v. U.S.</i> , 675 F. Supp. 2d 1320 (Ct. Int'l Trade 2010).....	12, 21

**STATUTES**

Minn. Stat. § 573.01..... *passim*

**RULES**

Federal Rules of Civil Procedure 12.....22

Federal Rules of Civil Procedure 56.....22

Minnesota Rules of Civil Procedure 12.02.....2, 22

Minnesota Rules of Civil Procedure 41.01.....2, 22

**SECONDARY SOURCES**

Black’s Law Dictionary 544 (8th ed. 2004).....19

C. Wright, A. Miller & M. Kane,  
10 *Federal Practice & Procedure* § 2713 (2010).....22

## STATEMENT OF ISSUES

1. A motion to dismiss without prejudice is properly granted when the court weighs Defendant's effort and expense, Plaintiff's purpose in bringing the motion, and whether the Defendant will suffer prejudice aside from the prospect of a second lawsuit. Here, discovery was barely underway; Respondents brought a motion for voluntary dismissal after each plaintiff passed away and their claims abated; and Appellants did not suffer prejudice beyond having to defend the suit in South Dakota Federal Court. Did the district court abuse its discretion in granting Respondents' motion to dismiss without prejudice?

This issue was preserved in the supporting memoranda of Respondents' three motions for voluntary dismissal without prejudice (R.A. 1, 5, 17, 21, 36, 41), Appellants summary judgment motions, and Respondents' memoranda in opposition to those motions. (A.A. 107, 115, 121; R.A. 11, 28, 47.) The district court granted Respondents' motions for voluntary dismissal without prejudice and denied Appellants' motions for summary judgment. (ADD. 1, 8, 15.)

### **Apposite Authorities:**

*Metro. Fed. Bank of Iowa, F.S.B. v. W.R. Grace and Co.*,  
999 F.2d 1257 (8th Cir. 1993)

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

Minn. Stat. § 573.01

2. A motion is properly before the court as a motion to dismiss when the court cannot make a determination on the merits and the motion is based primarily on the pleadings alone. Here, the only extrinsic evidence was the plaintiffs' obituaries, which were offered in support of Appellants' abatement defense but did not go to the merits of Respondents' claims against Appellants. Did the district court err in analyzing the motions as a motion to dismiss and denying Appellants' motions for summary judgment?

This issue was preserved in the supporting memoranda of Respondents' three motions for voluntary dismissal without prejudice (R.A. 1, 5, 17, 21, 36, 41), Appellants summary judgment motions, and Respondents' memoranda in opposition to those motions. (A.A. 107, 115, 121; R.A. 11, 28, 47.) The district court granted Respondents' motions for voluntary dismissal without prejudice and denied Appellants' motions for summary judgment. (ADD. 1, 8, 15.)

**Apposite Authorities:**

Minn. R. Civ. P. 12.02

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

*Grzelak v. Calumet Pub. Co.*,  
543 F.2d 579 (7th Cir. 1975)

## STATEMENT OF THE CASE AND FACTS

For approximately six months, during the winter and spring of 2008, Co-Appellants Brianna Broitzman, Ashton Larson, Alicia Heilmann, and Kaylee Nash sexually, emotionally, and physically abused and neglected residents at Appellants' nursing home Good Samaritan Society—Albert Lea. (A.A. 6.) Co-Appellants were Appellants' employees and had unmonitored access to the vulnerable, elderly residents. (A.A. 6.) The abuse occurred during the course and scope of Co-Appellants' employment at Good Samaritan Society—Albert Lea. (A.A. 6.)

Some of the victims of the abuse and neglect passed away before a suit was brought in Minnesota. The special administrators for those victims filed suit in South Dakota Federal District Court. (A.A. 2, 48-60.) That court has jurisdiction because Appellant, the Evangelical Lutheran Good Samaritan Society, has its principal place of business, its corporate office, and its main administrative offices in South Dakota. (A.A. 2, 48-60.) Co-Appellants were not named in the South Dakota federal action.

Appellants brought a motion to dismiss that case, which the South Dakota Federal District Court denied. *Jacobs v. The Evangelical Lutheran Good Samaritan Society*, No. CIV. 10-4035-KES (S.D. Dist. Ct. December 28, 2010) (A.A. 86-102.) The issue before the *Jacobs* court was “whether South Dakota’s or Minnesota’s law applies to the potential rights of the residents and the potential

liabilities of Good Samaritan.” (A.A. 91.) The *Jacobs* court held, among other things, that Minnesota’s interest in protecting vulnerable adults, as expressed in the Minnesota Vulnerable Adult Act, did not support the application of Minnesota’s survival statute in that case. (A.A. 98) (“And allowing Good Samaritan to escape potential liability under this act simply because its residents died from unrelated causes would serve only to undermine the legitimate goal of protecting those who are often unable to protect themselves.”)

The four victims who survived to file suit in Minnesota filed a civil suit against Appellants and Co-Appellants in January of 2010. (AA. 3.) Unfortunately, three of those plaintiffs passed away before their claims could be heard.<sup>1</sup> Beverly Butts passed away on May 15, 2010, Sylvia Wulff passed away on August 16, 2010, and Kenneth Hojberg passed away on October 10, 2010. (A.A. 22, 63, 67.) Consequently, Respondents brought motions for voluntary dismissal without prejudice in all three matters. (A.A. 109, 113, 118.) Appellants and Co-Appellants brought motions for partial summary judgment. (A.A. 107, 115, 121; CAA 1, 3, 5.) In all three matters the district court granted Respondents’ motion for voluntary dismissal without prejudice and denied Appellants’ and Co-Appellants motions for partial summary judgment. (ADD. 1, 8, 15.)

---

<sup>1</sup> Clare Knutson’s case is currently in Arbitration. Representatives of each of the deceased plaintiffs have brought claims in South Dakota Federal Court. (A.A. 25, 68, 77.)

In the Butts Order the district court specifically held that “there is minimal prejudice to the Defendants because of the early stage in the proceedings, the limited cost, discovery and other trial preparation that has occurred, the lack of delay in bringing the motion, and the sufficient explanation by Plaintiffs of the need for dismissal.” (ADD. 23-24.) Likewise, the district court determined the following in the Wulff matter:

The only difference between the current cross motions before the Court and the previous cross motions for voluntary dismissal and summary judgment is the fact that we are dealing with the death of a different named Plaintiff and three additional months have passed. No additional discovery was completed. There is no new or additional prejudice that will result in harm to Defendants by the Court granting Plaintiffs’ motion.

(ADD. 13-14.) The court adopted those findings in the Hojberg matter as well.

(ADD. 4-5.)

Appellants and Co-Appellants now appeal from all three district court orders. Co-Appellants essentially adopt Appellants arguments as they did in the motions below. (CAA 1, 3, 5.) Therefore, the following is a response to Co-Appellants informal brief to the extent that it applies.

It is not clear from Co-Appellants’ brief, however, why they raise an argument regarding “forum shopping” when Co-Appellants are not named in the claims in South Dakota Federal Court. Also, Respondents do not argue that plaintiffs’ claims survive in Minnesota. Thus, Co-Appellants were not deprived of

any defenses because there is nothing further for Co-Appellants to defend against Respondents.

Further, Co-Appellants argue that the district court abused its discretion because its findings were not supported by the record and it misapplied the law. (Co-App. Br. at 5.) The record shows that Ms. Butts, Ms. Wulff, and Mr. Hojberg passed away before the court could make a determination on the merits of their claims. (A.A. 22, 63, 67.) There is no dispute that under Minn. Stat. § 573.01 Respondents claims in Minnesota abated. The district court found that the claims abated when the plaintiffs died. Thus, the district court properly applied Minn. Stat. § 573.01 and the court's findings were properly supported by the record.

## ANALYSIS

### I. STANDARD OF REVIEW

“A reviewing court will not reverse a district court’s decision on a Rule 41 motion to dismiss unless the district court abuses its discretion.” *Altimus v. Hyundai Motor Co.*, 578 N.W.2d 409, 411 (Minn. Ct. App. 1998).” A court abuses its discretion if it renders a decision that is “arbitrary, capricious, whimsical, or manifestly unreasonable.” *Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354, 357 (10th Cir. 1996). On appeal from the denial of summary judgment this Court reviews the record to determine whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Mumm v.*

*Mornson*, 708 N.W.2d 475, 481 (Minn. 2006). The facts asserted by the nonmoving party must be taken as true. *Elec. Fetus Co., Inc. v. City of Duluth*, 547 N.W.2d 448, 451 (Minn. Ct. App. 1996).

## **II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING RESPONDENTS' MOTION TO DISMISS WITHOUT PREJUDICE.**

When determining whether to grant a plaintiff's motion for voluntary dismissal, courts consider several factors and weigh whether the defendant will suffer clear legal prejudice. *Altimus*, 578 N.W.2d at 411. "Courts generally will grant dismissals where the only prejudice the defendant will suffer is that resulting from a subsequent lawsuit." *Paulucci v. City of Duluth*, 826 F.2d 780, 782 (8th Cir. 1987). In addition, voluntary dismissal is generally granted without prejudice. *See Peters v. Waters Instruments, Inc.*, 312 Minn. 152, 156, 251 N.W.2d 114, 116 (Minn. 1977) (stating dismissal with prejudice is a drastic form of relief). The Minnesota Supreme Court has stated that dismissal *with* prejudice should be granted only in exceptional circumstances where there are "considerations of willfulness and contempt for the authority of the court or the litigation process, in addition to prejudice to the parties involved." *Id.*

The factors the district court is to consider on a motion for voluntary dismissal are: (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*, 578 N.W.2d at 411. Although courts may consider the existence of a pending summary judgment motion, that factor "is not by itself dispositive." *Id.*

Generally, courts find clear legal prejudice when significant time has passed since litigation started and extensive discovery had been produced. *See e.g., In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1259 (11th Cir. 2006) (holding district court's denial of Rule 41(a)(2) motion was not an abuse of discretion where parties' extensive discovery had concluded and case was ready for trial); *Millsap v. Jane Lamb Mem'l Hosp.*, 111 F.R.D. 481, 483-84 (S.D. Iowa 1986) (holding defendant demonstrated adequate prejudice to support dismissal with prejudice when suit was pending for three years and plaintiffs could not find credible expert opinion evidence). For example, in *Altimus*, clear legal prejudice was shown where the request for dismissal was based on a possible future change in the law, and was made two years after the lawsuit was initiated. 578 N.W.2d at 412.

Regarding prejudice to the defendant, the *Altimus* court stated, "the mere prospect of a second lawsuit is not sufficiently prejudicial to justify denial of a Rule 41(a)(2) motion to dismiss. . . . But a voluntary dismissal that strips a defendant of a defense that would otherwise be available *may* be sufficiently prejudicial to justify denial." *Id.* (citations omitted). *But see Bolten v. Gen.*

*Motors Co.*, 180 F.2d 379, 382 (7th Cir. 1950) (reversing denial of motion to dismiss without prejudice where statute of limitations had run and counsel conceded that the motion was sought to pursue the case in another jurisdiction), *abrogation on other grounds recognized by Wojtas v. Capital Guardian Trust Co.*, 477 F. 3d 924, 926 (7th Cir. 2007).<sup>2</sup>

**A. The record shows that the district court considered all the *Altimus* factors.**

There is no dispute that the parties' motions were brought prior to meaningful discovery. The district court correctly found that "[trial expenses] must be relatively small at this point in the proceedings." (ADD. 23). Therefore, there is no dispute regarding the first *Altimus* factor. Likewise there is no dispute regarding step two of the *Altimus* analysis—there were no allegations regarding Plaintiffs' delay or lack of diligence.

Regarding step three—insufficient explanation of a plaintiff's need for dismissal—Plaintiffs' Powers of Attorney below agreed with Appellants and Co-Appellants that under Minn. Stat. § 573.01 they could no longer seek remedies in Minnesota on behalf of the deceased plaintiffs. (RA. 5, 21, 41.) In each of the motions for voluntary dismissal, Respondents explained that a plaintiff died before

---

<sup>2</sup> The *Wojtas* court clarified that allowance of a motion to dismiss under Rule 41(a)(2) is discretionary with the court and not a matter of absolute right. *See also Grivas v. Parmelee Transp. Co.*, 207 F.2d 334, 336 (7th Cir. 1953) (holding same).

he or she could fully pursue the claims and therefore voluntary dismissal was warranted. (R.A. 1, 5, 17, 21, 36, 41.) Based on this, the district court found that “[t]he reason for Plaintiffs’ request for voluntary dismissal is obvious and practical . . . The sole basis for the motion is the death of [the Plaintiffs].”<sup>3</sup> (ADD. 23.) There is no abuse of discretion in this finding. Thus, Appellants’ claims that the plaintiffs’ representatives offered no explanation of a need for the voluntary dismissal, and that the district court did not weigh this factor are meritless. (App. Br. at 2, 7, 8, 9, 15, 18, 19.)

Step four of the *Altimus* analysis, whether defendant moved for summary judgment, is not by itself dispositive; and denial of Appellants’ summary judgment motion is discussed *infra* at section III.

**B. The district court did not abuse its discretion in finding that Appellants would suffer minimal prejudice.**

Appellants’ claims of prejudice are groundless because 1) Appellants were not deprived of a statutory defense; and 2) even if they were, deprivation of a statutory defense alone is not sufficient to deny a voluntary motion to dismiss without prejudice, and 3) the action in South Dakota Federal Court does not constitute forum shopping.

---

<sup>3</sup> Co-Appellants quote the district court out of context implying that that “obvious and practical” reason for the dismissal was to pursue the South Dakota action. (Co-App. Br. at 4.) In fact, the rest of the paragraph in the district court opinion shows that the court understood that Respondents brought the motion for voluntary dismissal because the plaintiffs had passed away.

**1. Appellants fail to establish substantial prejudice based on loss of a statutory defense.**

Appellants liken deprivation of an abatement defense under Minn. Stat. § 573.01 to deprivation of statute of limitations defenses and other statutory defenses. (App. Br. at 17-20.) This analogy fails for four reasons. First, unlike a statute of limitations, which is looming on the horizon in every case, abatement under Minn. Stat. § 573.01 does not come into play unless a plaintiff passes away. Thus, unlike a statute of limitations defense, with abatement there is no way of knowing when or whether the claim will no longer be viable.

Second, Appellants did not “lose” the abatement defense. In fact, there was no dispute that the plaintiffs’ claims abated. The district court dismissed the case because the plaintiffs’ cause of action abated. (ADD. 1, 8, 15.) Under the district court order, the plaintiffs’ powers of attorney are precluded from bringing an action on behalf of the deceased plaintiffs in Minnesota court. However, there is nothing in the district court order that precluded plaintiffs’ representatives from bringing the action in South Dakota Federal Court and nothing that precludes Appellants from bringing the abatement defense and all the other defenses in South Dakota Federal Court.<sup>4</sup>

---

<sup>4</sup> See *McCarney v. Ford Motor Co.*, 657 F.2d 230, 234 (8th Cir. 1981) (“[i]f the first suit was . . . disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit.”)

Further, Appellant-Corporation is not inconvenienced by having to defend an action in South Dakota Federal Court because its principal place of business is in South Dakota. Also, Co-Appellants are not inconvenienced because they are not named in the South Dakota action. But even if Appellants and Co-Appellants claim to be inconvenienced by defending the suit in South Dakota Federal Court, that inconvenience is not sufficiently prejudicial, under *Altimus*, to preclude the motion to dismiss and they have not lost any defenses they choose to raise in South Dakota Federal Court.

Third, even if this Court holds that Appellants somehow lost a statutory defense, that loss did not categorically result in denial of the plaintiffs' motions for dismissal without prejudice.<sup>5</sup> See e.g., *McCants v. Ford Motor Co.*, 781 F.2d 855, 859 (11th Cir. 1986) ("the loss of a valid statute of limitations defense [does not] constitute a bar to a dismissal without prejudice"); *Metro. Fed. Bank of Iowa, F.S.B. v. W.R. Grace & Co.*, 999 F.2d 1257, 1263 (8th Cir. 1993) (disagreeing with *McCants* but affirming voluntary dismissal without prejudice where Defendant failed to show prejudice, Plaintiff sought dismissal of its claims to avoid res judicata, no choice-of-law analysis occurred at the motion-to-dismiss level, and the court held that Plaintiff did not blatantly forum shop by filing actions

---

<sup>5</sup> See generally *Zhengzhou Harmoni Spice Co., Ltd. v. U.S.*, 675 F. Supp. 2d 1320, 1330, n.11 (Ct. Int'l Trade 2010) (noting that a loss of a statute of limitations defense does not categorically constitute plain legal prejudice).

simultaneously in multiple jurisdictions). Therefore, even if this Court holds that Appellants were deprived of the abatement defense, that alone, without a showing of additional prejudice, does not constitute an abuse of the district court's discretion in granting the voluntary dismissal.

Fourth, the cases Appellants cite are distinguishable from this case because in those cases there was a specific statutory mandate or judicial holding that precluded subsequent actions. For example, in *Wojtas* the court analyzed a Wisconsin statute of limitations that the court held specifically precluded all subsequent actions once the statute of limitations ran. *Wojtas*, 477 F. 3d at 926. “The court noted that under Wisconsin law, expiration of the applicable statute of limitations operates to extinguish a plaintiff’s cause of action in its entirety, rather than merely barring the remedy in Wisconsin such that re-filing the same claim in another jurisdiction would be permitted.” *Id.* The *Wojtas* court distinguished *Bolten* because the statutory specification under Wisconsin law, which completely extinguished the right in *Wojtas*, was not present in the statute in *Bolten*. *Id.* at 927. “Wisconsin law conferred on [Defendant] a vested right—not present in *Bolten*—that would have been rendered useless if voluntary dismissal without prejudice was granted.” *Id.* The *Wojtas* court explained the *Bolten* decision as follows:

In *Bolten*, the plaintiff sought voluntary dismissal under Rule 41(a)(2) after the defendant filed a motion for summary judgment based on the

expiration of the applicable Illinois statute of limitations. The plaintiff admitted that he planned to refile the lawsuit in Missouri, which had a longer limitations period. This court held that the discretion of the district court under Rule 41(a)(2) was limited to the “terms and conditions” of dismissal, not the right of the plaintiff to voluntarily dismiss his suit. The *Bolten* opinion noted that ‘the adjudication on [the limitations] issue *had nothing to do with the merits of the case and meant nothing more than that the action could not proceed in the Illinois jurisdiction,*’ The court concluded that ‘while the defendant by the allowance of the plaintiff’s motion may be subjected to the annoyance and expense of a suit on the merits, it will not suffer any legal prejudice.’

*Wojtas*, 477 F.3d at 927 (citations and quotations omitted).

Here, unlike the statute of limitations in *Wojtas*, Minn. Stat. § 573.01 does not extinguish subsequent actions. While it is clear that once the elderly victims passed away, Respondents could no longer seek remedies in Minnesota, nothing in Minn. Stat. § 573.01 precluded Respondents from pursuing remedies in South Dakota Federal Court. Instead, Minn. Stat. § 573.01 is more like the statute in *Bolten* that did not preclude the subsequent action in Missouri where the statute of limitations had not yet run.

Likewise in *Quinterro*, which Appellants cite on page 11 of their brief, there was a specific United States Supreme Court holding, not present here, that precluded the plaintiff from relitigating a choice-of-law issue in state court once it was dismissed in federal court. *See Quinterro v. Klaveness Ship Lines*, 914 F.2d 717, 719 (5th Cir. 1990). *Quinterro* involved relitigation of a federal choice-of-law determination made pursuant to a *forum non conveniens* dismissal. *Id.* Mr.

Quintero, a Filipino sailor, who was injured while unloading a ship docked in the Port of New Orleans, filed suits in both state and federal courts of Louisiana. *Id.* at 719. Following a remand, Mr. Quintero filed a motion to dismiss his federal suit. *Id.* at 720. The federal district court denied the motion, granted Defendants' motion for *forum non conveniens* dismissal, and determined that Philippine law applied. *Id.* The district court also granted Defendants' request for an injunction preventing Mr. Quintero from relitigating the choice-of-law issue in his pending Louisiana state court proceeding. *Id.*

On appeal, the *Quintero* court held that the district court did not abuse its discretion by enjoining Mr. Quintero from relitigating the choice-of-law issue based on a very specific holding of the United States Supreme Court that "the relitigation exception of the Anti-Injunction Act allows a federal court to enjoin state court relitigation of a federal choice-of-law determination made pursuant to a *forum non conveniens* dismissal." *Id.* The *Quintero* court also held that the choice-of-law determination was a decision reaching the merits. *Id.* at 725-26. Therefore Defendants' *forum non conveniens* defense was a defense to the merits of the choice-of-law analysis and the court held Mr. Quintero could not relitigate that issue. *Id.* Despite the limitations on relitigating the choice-of-law issue in state court, however, the *Quintero* court held that Mr. Quintero could "reinstate and litigate his claim in the Philippines without undue inconvenience." *Id.* at 721-

22. Thus, while Mr. Quinterro was not able to relitigate the choice-of-law issue, he was able to litigate the merits of the underlying case in the forum of the applicable law. *Id.*

This case is distinguishable from *Quinterro* in several respects. First, there is no United State Supreme Court precedent under which Appellants may enjoin the South Dakota litigation in this case. Second, in *Quinterro* the court conducted a choice-of-law analysis, which was considered a decision on the merits, and which Mr. Quinterro sought to relitigate. Here there was no choice-of-law analysis. The district court did not make a determination on the merits because the plaintiffs passed away before they could fully litigate their cases. 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. Appellants were not precluded from doing so in South Dakota Federal Court. Thus, this case is somewhat similar to *Quinterro* in that just like Mr. Quinterro, who was still able to litigate the merits of his claim in the Philippines, Respondents are able to litigate the merits of their claims in South Dakota Federal Court.

Finally, in *Rodriguez*, which Appellants cite at page 19 of their brief, there had been a previous judicial holding within the case that guaranteed application of Wisconsin Workers' Compensation laws. *Rodriguez v. Marks Bros. Pickle Co.*,

*Inc.*, 102 F.R.D. 104, 108 (E.D. Wis. 1984). In *Rodriguez*, Plaintiffs originally filed suit in Texas state court, the case was then removed to federal district court in Texas. *Id.* at 105. Then, upon a motion for change of venue, the case was transferred to federal district court in Wisconsin “for the convenience of the parties and witnesses and the interests of justice.” *Id.* Plaintiffs moved to dismiss the action in Wisconsin federal district court, which the court granted. *Id.* Defendants moved to vacate that order after Plaintiffs filed a nearly identical action back in the same original Texas state court. *Id.* at 106. The *Rodriguez* court set out the standard for “substantial legal prejudice” as follows:

Where a dismissal without prejudice would subject the defendant to substantial legal prejudice, as contrasted to mere inconvenience or vexation incident to defending a subsequent suit, permission to so dismiss should be denied. However, *ordinarily the motive of the plaintiff in seeking to dismiss is not material*, and the fact that a nonsuit may give the plaintiff some tactical procedural advantage in the same or in some other forum is not grounds for refusing to allow the dismissal....

*Id.* at 107.

The *Rodriguez* court held that Defendants would be substantially prejudiced in that case because of the court’s previous decision to transfer venue to the Eastern District of Wisconsin which guaranteed application of Wisconsin’s Workers’ Compensation Act. *Id.* at 108. (“Indeed, this defendant’s right to present its case in this Court, obliged to apply Wisconsin law, was guaranteed by Judge Hinojosa’s decision of September 30, 1983.”) Further, the plaintiffs in

*Rodriguez* sought to re-file an essentially identical complaint in the exact same court from which their previous action had been removed. *Id.*

Respondents here, unlike the plaintiffs in *Rodriguez*, do not wish to bring an identical complaint back in Minnesota district court. Instead, here the plaintiffs passed away and the parties agreed that under Minn. Stat. § 573.01, the original cause of action in Minnesota abated. Minnesota law applied to the Minnesota action.

Further, in this case, 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. *See Jacobs v. The Evangelical Lutheran Good Samaritan Society*, No. CIV. 10-4035-KES (S.D. Dist. Ct. December 28, 2010) (A.A. 86-102.). Thus, not only are the cases Appellants cite distinguishable because there is no statutory or judicial mandate that precludes subsequent actions in a different jurisdiction, here there is actually caselaw that holds that South Dakota law—not Minnesota law—applies in the action against Appellants in South Dakota Federal Court. Thus, because Appellants are in no way precluded from bringing any of their defenses to the subsequent action in South Dakota Federal Court, just as they unsuccessfully attempted to do in *Jacobs*, they have failed to show substantial prejudice.

**2. Filing the action in South Dakota Federal Court did not constitute forum shopping.**

Forum shopping is “the practice of choosing the most favorable jurisdiction or court in which a claim might be heard.” Black’s Law Dictionary 544 (8th ed. 2004) (“A plaintiff might engage in forum-shopping, for example, by filing suit in a jurisdiction with a reputation for high jury awards or by filing several similar suits and keeping the one with the preferred judge.”) Thus, by definition, “forum shopping” implies some choice between forums. Here, once the elderly plaintiffs passed away, their claims did not survive in Minnesota, and the representatives of their estates no longer had a choice of viable forums. The representatives did not have the luxury of choosing the most advantageous forum. South Dakota provides the only viable forum to seek redress for the abuse the elderly plaintiffs suffered. Consequently, the act of filing suit in South Dakota, the only available forum, does not constitute forum shopping.

Also, the elderly plaintiffs passed away and therefore did not bring a second identical lawsuit in South Dakota. The plaintiffs, through their powers of attorney, chose to bring the lawsuit in Minnesota while the plaintiffs were alive because that was the most convenient forum. Unfortunately, they passed away while that suit was pending. The representatives of the plaintiffs’ estates now have a viable survivorship claim in South Dakota.

The cases Appellants cite at page 20 of their brief are readily distinguishable from this case 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. *See e.g., Schumacher v. Schumacher*, 676 N.W.2d 685, 691 (Minn. Ct. App. 2004) (conducting a choice-of-law analysis and concluding that application of Minnesota law would promote forum shopping and would contravene public policy reason for Iowa statute that granted immunity to owner’s of domestic animals); *Southern Md. Agr. Ass’n of Prince George’s County v. U.S.*, 16 F.R.D. 100 (1954) (denying motion to dismiss where Plaintiff wished to change federal forums based on a change of law); *Spar, Inc. v. Info. Resources, Inc.*, 956 F.2d 392, 395 (2nd Cir. 1992) (“[P]laintiff’s failure to shop diligently before the action’s inception is no reason to allow it now to ‘bargain hunt.’”).

Unlike in *Schumacher*, here the district court did not weigh economic and public policy interests and did not determine which state’s laws applied. As stated above, Minnesota law applied to the Minnesota actions but did not preclude subsequent actions; and there was no determination of which law would apply to subsequent actions.

Also, unlike in *Southern Md.*, here the plaintiffs below did not wish to change forums because a law had changed. And unlike the plaintiffs in *Spar*, who

filed a case in a jurisdiction in which the statute of limitations had run, here the plaintiffs had a viable claim in Minnesota when they filed it.

Further, the plaintiffs clearly did not expect to pass away before a determination on the merits of their claims. Thus, Appellants also fail in their argument that the district court abused its discretion because a party is not permitted to dismiss an action merely to circumvent an *expected* adverse determination on the merits. (App. Br. at 21.) *See Zhengzhou*, 675 F. Supp. 2d at 1334 (“However, to render dismissal inappropriate, that adverse result must be ‘expected.’”) Here neither of the two components of Appellants’ argument are present. 1) There was no expectation that the Plaintiffs would pass away prior to resolution of the case. In other words, the “adverse” result for Appellants was not expected because Minn. Stat. § 573.01 was not at issue when Respondents filed their claim. 2) There was no adjudication on the merits because the district court did not reach the merits of Respondents’ claim.

### **III. THE DISTRICT COURT DID NOT ERR IN ANALYZING THE PARTIES’ MOTIONS AS A MOTION FOR DISMISSAL AND DENYING APPELLANTS’ AND CO-APPELLANTS’ SUMMARY JUDGMENT MOTIONS.**

For a motion to be properly before the court as a motion for summary judgment, the court must be able to make a determination on the merits. *See generally Burma v. Stransky*, 357 N.W.2d 82, 84-86 (Minn. 1984) (distinguishing a motion to dismiss from a motion for summary judgment and holding that where a

court is able to make a determination on the pleadings, the motion is properly before the court as a motion for summary judgment). When a motion for summary judgment is based on the pleadings and not on factual material, it is appropriate for the court to treat it as a motion to dismiss. *Grzelak v. Calumet Pub. Co.*, 543 F.2d 579, 583 (7th Cir. 1975) (applying Federal Rules of Civil Procedure 12 and 56 which are essentially identical to the Minnesota counterparts) (as cited in C. Wright, A. Miller & M. Kane, 10 *Federal Practice & Procedure* § 2713 (2010)); *see also* Minn. R. Civ. P. 12.02; *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 491 (Minn. 2004) (holding that when parties present matters outside the pleadings, the motion is treated as one for summary judgment).

Here, Respondents brought three separate motions for voluntary dismissal under Minn. R. 41.01. (R.A. 1, 17, 36.) Appellants and Co-Appellants brought three separate motions for summary judgment. (A.A. 107, 115, 121.) The district court treated the motions as a motion for dismissal noting that limited discovery had occurred:

At this point in the litigation little discovery has been conducted, as the parties have competing motions to expedite and stay discovery and the proceedings. Two of the Individual Defendants will soon face criminal trials related to the allegations in this case. Although the parties likely are and will be incurring substantial expense in the cost of preparation for trial, that expense must be relatively small at this point in the proceedings. . . . the time period between the filing of both motions and [the Plaintiffs' death] is extremely brief.

(ADD. 23.)

The record shows that the district court did not err in making this finding. Appellants claim that the district court reviewed documents outside the pleadings because Good Samaritan submitted extrinsic evidence. (App. Br. at 10) (citing AA. 1, 61, 65.) That extrinsic evidence was the obituaries of the plaintiffs who passed away. (*Id.*) Apparently, the obituaries were before the district court to prove that each plaintiff's action abated under Minn. Stat. § 573.01. This fact was not in dispute. More importantly, the obituaries do not prove the merits of each plaintiff's claims of ongoing abuse and neglect at the hands of Co-Appellants.

Further, Appellants' reliance on *Tyler Lumber Co. v. Logan*, 293 Minn. 1, 7, 195 N.W.2d 818, 822 (1972) is misplaced because in *Tyler* the court was not analyzing whether the motion was properly before the court as a motion to dismiss or a motion for summary judgment but rather whether the case was a legal issue, which therefore could be properly disposed of on summary judgment. Thus, the parties' motions were properly before the district court as a motion for voluntary dismissal because adequate discovery had not been conducted to adjudicate the claims against Appellants on the merits.

The court did not err in denying Appellants' and Co-Appellants motions for summary judgment. The issue before the district 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. The court did not weigh the

substantial evidence of abuse and neglect; and there was no genuine issue of material fact regarding the death of the plaintiffs and the abatement of Respondents' case in Minnesota.

### **CONCLUSION**

The district court did not abuse its discretion in granting Respondents' motion to dismiss without prejudice. Respondents brought the motions for voluntary dismissal after the plaintiffs passed away and the claims abated prior to meaningful discovery. Also, Co-Appellants and Appellants have failed to show that they suffered prejudice that would preclude a motion to dismiss. Co-Appellants have nothing further to defend against Respondents; and Appellants are not prohibited from raising their defenses in the action in South Dakota Federal Court.

The district court also did not err in its application of Minn. Stat. § 573.01 and there are no genuine issues of material fact regarding abatement of Respondents' claims in Minnesota state court. Therefore, Respondents respectfully request that this Court affirm the district court's Orders.

Respectfully submitted,

Date: \_\_\_\_\_

4-6-2011



James P. Carey, #180555

Marcia K. Miller, # 032162X

Attorneys for Respondents

**Sieben, Grose,**

**Von Holtum & Carey, LTD**

900 Midwest Plaza East

800 Marquette Ave

Minneapolis, Minnesota 55402

(612) 333-4500

-and-

Mark. R. Kosieradzki, #57745

Joel E. Smith, #213184

Attorneys for Respondents

**Kosieradzki Smith Law Firm, LLC**

3675 Plymouth Blvd.

Suite 105

Plymouth, MN 55446

(763) 746-7800

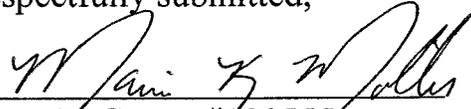
## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced using the following font:  
Proportional serif font, 13-point or larger. The length of this brief is 5,812 words.  
This brief was prepared using Microsoft Word 2007.

Date: \_\_\_\_\_

4-6-2011

Respectfully submitted,



James P. Carey, #180555

Marcia K. Miller, # 032162X

Attorneys for Respondents

**Sieben, Grose,**

**Von Holtum & Carey, LTD**

900 Midwest Plaza East

800 Marquette Ave

Minneapolis, Minnesota 55402

(612) 333-4500

-and-

Mark. R. Kosieradzki, #57745

Joel E. Smith, #213184

Attorneys for Respondents

**Kosieradzki Smith Law Firm, LLC**

3675 Plymouth Blvd.

Suite 105

Plymouth, MN 55446

(763) 746-7800