

2010 WL 7588995 (Minn. Dist. Ct.) (Trial Motion, Memorandum and Affidavit)
District Court of Minnesota.
Third Judicial District
Freeborn County

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, Plaintiffs,

v.

THE EVANGELICAL LUTHERAN GOOD SAMARITAN SOCIETY, Individually and d/b/a Good Samaritan Society-Albert Lea, Brianna Broitzman, Ashton Larson, Alicia Heilmann, and Kaylee Nash, Defendants.

No. 24CV10129.
November 1, 2010.

Personal Injury

Memorandum in Opposition to Defendants' Motions for Partial Summary Judgment

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Judge: The Hon. [Steven Schwab](#).

INTRODUCTION

This case arises out of the abuse, mistreatment, and **neglect** of Plaintiffs while they were residents of Defendant nursing home, Good Samaritan Society—Albert Lea. Sadly, three of the above-named plaintiffs have passed away before they were able to seek redress for the abuse they suffered. In the two preceding matters, this Court ruled in favor of Plaintiffs. Nothing has changed since then. Defendants' memoranda in support of their motions for partial summary judgment essentially mirror their previous submissions to this Court. No additional discovery has been completed and Defendants will suffer no additional prejudice. Therefore, just as in the previous matters this Court should grant Plaintiffs' Motion for Voluntary Dismissal without Prejudice and deny Defendants' Motion for Partial Summary Judgment.

FACTUAL BACKGROUND

In January of 2010, the above-named plaintiffs filed a civil suit against Defendants based on Defendants' ongoing, abusive, and **neglectful** conduct against Plaintiffs. (Comp. ¶¶ 14-15.) Defendants are Good Samaritan Society and their employees at their Albert Lea nursing home. Good Samaritan Society has its base of operations, its corporate office, and its main administrative offices in South Dakota.

On October 10, 2010, one of the above-named plaintiffs, Kenneth Hojberg passed away. Prior to Mr. Hojberg's passing, two of his co-plaintiffs also passed away. Beverly Butts passed away on May 15, 2010 and Sylvia Wulff, passed away on August 16, 2010. Defendants brought motions for partial summary judgment in both the Butts and Wulff matters. In both matters, this

Court granted Plaintiffs' motion for voluntary dismissal without prejudice and denied Defendants' motions for partial summary judgment. (Aug. 24, 2010 Order "Butts Ord." at 2, 7-8; Oct. 5, 2010 Order "Wulff Ord." at 1.)

In the Butts Order this 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." (Butts Ord. at 7-8.)

Likewise, this 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.

(Wulff Ord. at 4-5.) The same is true here. Plaintiffs have had very limited opportunities to conduct discovery. No additional discovery has been completed since this Court's Orders in the Butts and Wulff matters and no new or additional prejudice has arisen that will result in harm to Defendants.

ANALYSIS

I. DISMISSAL OF KENNETH HOJBERG'S CLAIMS IS PROPERLY BEFORE THIS COURT ON A MOTION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE—NOT ON DEFENDANTS' PARTIAL SUMMARY JUDGMENT MOTIONS.

Summary judgment motions are governed by Minn. R. Civ. P. 56 and motions to dismiss are governed by Minn. R. Civ. P. 12 and [Minn. R. Civ. P. 41.01](#). On a motion to dismiss, the district court generally considers only the complaint and the documents referenced in the complaint. [Martens v. Minn. Mining & Mfg. Co.](#), 616 N.W.2d 732, 739 n.7 (Minn. 2000). When the parties present matters outside the pleadings, the motion is treated as one for summary judgment. [Minn. R. Civ. P. 12.02](#); see [N. States Power Co. v. Minn. Metro. Council](#), 684 N.W.2d 485, 491 (Minn. 2004). Conversely, when a motion for summary judgment is based solely on the pleadings and not on factual material, it is appropriate for the court to treat a motion for summary judgment 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)).

The Minnesota Supreme Court distinguished a motion to dismiss from a summary judgment motion in [Burma v. Stransky](#), 357 N.W.2d 82, 84-86 (Minn. 1984). *Burma* involved appointment of a guardian where family members alleged they had not been given notice of the guardian's appointment and questioned the validity of a settlement the guardian made. *Id.* at 84-86. The settlement resulted in dismissal of a personal injury action; but the plaintiffs brought another suit because they argued that the settlement was void because of the invalid guardian appointment. *Id.* at 86. The district court granted Defendants' motion for summary judgment and dismissed Plaintiffs' claims in the second suit without prejudice. *Id.*

On appeal, Plaintiffs argued that the portion of the district court's order granting summary judgment was meant to be an order of dismissal without prejudice. *Id.* at 89. The Minnesota Supreme Court held that since the district court was able to make a determination on the merits of the claims, the order was for summary judgment rather than dismissal without prejudice. *Id.*

This case is exactly the opposite of *Burma*. Unlike in *Burma*, here there is no basis for this Court to adjudicate the matter on the merits. Defendants' motions and supporting briefs lack factual material and rely solely on the pleadings. Therefore, this Court should treat Defendants' motions as motions to dismiss without prejudice—not as motions for partial summary judgment.

This Court treated Defendants' previous motions for partial summary judgment, regarding co-plaintiffs Butts and Wulff, as motions for voluntary dismissal:

When considering whether to grant a plaintiff's request for dismissal, the court must consider: '(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.' A pending summary judgment motion is not by itself a dispositive factor, and 'the mere prospect of a second lawsuit is not sufficiently prejudicial to justify denial' of a motion to dismiss.

(Butts Ord. at 7; Wulff Ord. at 4) (quoting *Altimus v. Hyundai Motor Co.*, 578 N.W.2d 409, 410-11 (Minn. Ct. App. 1998)). In the Butts matter, this Court then noted that very little discovery had been conducted and that "Plaintiff's request for voluntary dismissal is obvious and practical... The sole basis for the motion is the death of Plaintiff Butts." (Butts Ord. at 7.) In the Wulff matter this Court relied on the same reasoning to hold that "dismissal without prejudice is appropriate at this time and that summary judgment is inappropriate." (Wulff Ord. at 5.)

There has been no additional discovery since Plaintiffs and Defendants brought their motions in the Butts and Wulff matters; and Plaintiffs' need for voluntary dismissal is the same—another co-plaintiff has passed away. In short, nothing has changed except that one more vulnerable, **elderly**, plaintiff has passed away. Therefore, just as with the previous motions, here this Court should grant Plaintiffs' Motion for Voluntary Dismissal and should deny Defendants' Motions for Partial Summary Judgment.

II. KENNETH HOJBERG'S CAUSE OF ACTION SHOULD BE DISMISSED WITHOUT PREJUDICE.

Like a summary judgment motion, a dismissal with prejudice "operates as an adjudication on the merits." See *Firoved v. Gen. Motors Corp.*, 277 Minn. 278, 283-84, 152 N.W.2d 364, 368 (1976). It is a punitive measure and "should therefore be granted only under exceptional circumstances." *Beal v. Reinertson*, 298 Minn. 542, 543-44, 215 N.W.2d 57, 58 (1974). "The primary factor to be considered in determining whether to grant a dismissal with or without prejudice is the prejudicial effect of the order upon the parties to the action." *Id.*

First, because discovery has been very limited, Defendants rely solely on the pleadings in its motions for partial summary judgment. As stated above, this Court has no means for adjudicating this action on the merits. Thus, this Court should dismiss Mr. Hojberg's claim without prejudice.

Second, Defendants will likely argue that an order disposing of Mr. Hojberg's claim with prejudice would preclude Mr. Hojberg's personal representative or successors in Interest from pursuing other appropriate claims. There is no justification for this Court to adversely affect the Hojberg family from bringing further actions including actions in another forum. Good Samaritan Society has its base of operations, its corporate office, and its main administrative offices in South Dakota, and there is an expectation that the parties are under the protection of South Dakota's survivorship laws. Therefore, Mr. Hojberg's personal representatives have a viable claim under South Dakota's survivorship statute; and significant prejudice would occur if Mr. Hojberg's personal representatives were precluded from bringing that claim and other subsequent actions. See [S.D. Codified Laws § 15-4-1](#).

CONCLUSION

Partial summary judgment is not proper where, as here, a motion comes to the court on the pleadings alone. Under those circumstances, the proper motion is a motion to dismiss. Further, here the motion to dismiss should be granted without prejudice. Mr. Hojberg's personal representatives would be greatly prejudiced if disposal of Mr. Hojberg's claims precluded them from bringing further actions. Thus, Plaintiff respectfully requests that this Court deny Defendants' motion for Summary Judgment and grant Plaintiffs' motion to voluntarily dismiss without prejudice.

Date: 11-1-10

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