No. A23-1337

FILED
September 25, 2023
OFFICE OF
APPELLATE COURTS

State of Minnesota
In Court of Appeals

Steve Quest,

Respondent,

v.

Nicholas Robert Rekieta, et al.,

Appellants.

RESPONDENT'S INFORMAL MEMORANDUM REGARDING APPELLATE JURISDICTION

Christopher W. Bowman (#0389933)
MADIGAN, DAHL & HARLAN, P.A.
33 South Sixth Street, Suite 3675
Minneapolis MN 55402
T: (612) 604-2000

and

David W. Schneider (#0254733)
SCHNEIDER & MADSEN, P.C.
706 South First Street
Willmar MN 56201
T: (320) 235-1902

Attorneys for Respondent Steve Quest

Matt Kezzhaya (#0402193)
KEZHAYA LAW PLC
150 S. Fifth Street, Suite 1850
Minneapolis MN 55402
T: (479) 431-6112

and

Marc J. Randazza (Admitted *pro hac vice*)
RANDAZZA LAW GROUP
4974 S. Rainbow Boulevard, Suite 100
Las Vegas NV 89118
T: (702) 420-2001

Attorneys for Appellants Nicholas Robert Rekieta and Rekieta Law, LLC

INTRODUCTION & PROCEDURAL HISTORY

The underlying litigation in this appeal concerns claims of defamation (including defamation *per se*), intentional infliction of emotional distress, and negligent infliction of emotional distress, each of which stems from statements made by Defendant-Respondent Nicholas Robert Rekeita (along with Rekieta Law, LLC, jointly referred to herein as "Rekieta" or "Appellants").

Appellants moved to dismiss the claims pursuant to Colorado's Anti-SLAPP statute, codified at Colo. Rev. Stat. § 13-20-1101 (2022), recognizing at the district court that the motion should be treated as one for summary judgment. (Dkt. #29). Under that statute, "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States constitution or the state constitution in connection with a public issue" is subject to a "special motion to dismiss unless the court determines that the plaintiff has established that there is a reasonable likelihood that the plaintiff will prevail on the claim." Colo. Rev. Stat. § 13-20-1101(3)(a).

The district court – in a July 10, 2023 order – found that Colorado law did not apply under a choice-of-law analysis. Having found that the Colorado law does not apply, the district court reviewed the motion as a motion for summary judgment, and denied the motion as premature. (Dkt. #43).

Judgment was entered the following day, and Appellants filed this appeal on September 7, 2023. (Dkt. #44, 49).

Appellants acknowledge in their Statement of the Case that the order "does not dispose of all claims by and against all parties, nor did the district court enter a final partial judgment for immediate appeal." Appellants contend, however, that the appeal "is taken pursuant to a statute which authorizes an immediate appeal from the denial of a special motion to dismiss and because this is an appeal of the denial of immunity from suit."

On September 13, 2023, this court entered an order directing the Parties to file informal memoranda addressing two questions:

(1) Are the district court's July 10, 2023 order and July 11, 2023 judgment denying Appellants' special motion to dismiss immediately appealable under the collateral-order doctrine; and

(2) If the order and judgment are not immediately appealable under the collateral-order doctrine, must this appeal be dismissed.

Quest now submits this informal brief pursuant to that order.

ARGUMENT & AUTHORITY

As a general rule, an order denying a motion for summary judgment is not immediately appealable unless the district court certifies that the question is important and doubtful. Minn. R. Civ. App. P. 103.03(i); *see also McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830, 832 (Minn. 1995). Certain

orders, however, are immediately appealable even absent an important-and-doubtful certification pursuant to Minn. R. Civ. App. P. 103.03(j), where the right to appeal is derived not from procedural rules, but from fundamental principles relating to the finality of judgments. *In re State & Regents Bldg. Asbestos Cases*, 435 N.W.2d 521, 522 (Minn. 1989). Following this logic, Minnesota appellate courts have permitted interlocutory appeals from orders denying motions to dismiss for lack of personal jurisdiction, lack of subject-matter jurisdiction, and governmental immunity. *See, e.g., Hunt v. Nevada State Bank*, 285 Minn. 77, 88-91, 172 N.W.2d 292, 299-301 (1969); *McGowan*, 527 N.W.2d at 832-33; *Anderson v. City of Hopkins*, 393 N.W.2d 363, 364 (Minn. 1986).

I. NEITHER THE ORDER NOR THE JUDGMENT ARE IMMEDIATELY APPEALABLE UNDER THE COLLATERAL-ORDER DOCTRINE.

In furtherance of permitting these interlocutory appeals in limited circumstances, the Minnesota Supreme Court has adopted the collateral-order doctrine, in order to provide a clear analytical framework to assess the immediate appealability of an order or judgment not specifically identified in the rules of civil appellate procedure. *Kastner v. Star Trails Ass'n*, 646 N.W.2d 235, 240 (Minn. 2002). This doctrine applies to a "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent

of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221 (1949). For the collateral-order doctrine to permit immediate appeal, three conditions must be satisfied: (1) the order must conclusively determine the disputed question; (2) the order must resolve an important issue that is completely separate and independent from the merits of the action; and (3) the order must be effectively unreviewable on appeal from a final judgment. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993); *Kastner*, 646 N.W.2d at 240 (formally adopting collateral-order doctrine).

As relevant here, Quest does not contest, for limited purposes of this threshold question on the collateral-order doctrine that the district court's July 10, 2023 order that Minnesota law (as opposed to Colorado law) applies satisfies the first and third prong of the collateral-order doctrine.[1] But the issue as framed by Appellants fails the second criterion.

The Tenth Circuit's decision in *Los Lobos Renewable Power LLC v. Americulture*, 885 F.3d 659 (10th Cir. 2018) is instructive. In *Los Lobos*, the

[1] At the risk of stating the obvious, Quest's concession that the Order meets the first and third prong of the collateral-order doctrine is not and should not be taken as an attack on the *merits* of the order. To be sure, Quest maintains that the district court's analysis was correct, and in the event that this appeal proceeds to a review of the merits that the proper disposition would be an affirmance.

district court denied a special motion to dismiss based on New Mexico's Anti-SLAPP statute after concluding that the statute was "a procedural provision that does not apply in the courts of the United States." 885 F.3d at 662. The *Los Lobos* plaintiffs disputed that the collateral-order doctrine permitted appellate review of the order,[2] claiming "the district court's application of the anti-SLAPP statute necessarily required considering and evaluating the merits of th[e] action." *Id.* at 665. A divided Tenth Circuit disagreed:

> It is one thing for a court to consider a New Mexico anti-SLAPP motion, apply the New Mexico anti-SLAPP statute and deny the motion under the statute. It is an entirely different matter for the court to refuse to apply the anti-SLAPP statute at all. In the first scenario, the court must determine whether the special motion to dismiss is frivolous or available on its own terms, as well as whether or not to grant it. These determinations necessarily turn on the merits of the lawsuit.
>
> But the latter scenario presents a more abstract question of federal law that has nothing to do with the particular facts in this case. Indeed, whether federal courts can apply the New Mexico anti-SLAPP statute depends on considerations entirely external to the dispute between [the parties].

Id. (citations omitted).

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[2] The district court in *Los Lobos* subsequently amended the order to certify the decision for immediate appeal, but the *Los Lobos* defendants did not timely petition the Tenth Circuit for permission to appeal as required by 28 U.S.C. § 1292(b). 885 F.3d at 662. That failure left the collateral-order doctrine as the sole potential source of appellate jurisdiction. *Id.* at 663-64.

Unlike in *Los Lobos*, the question of whether Colorado's Anti-SLAPP statute applies in the present case was not conducted a procedural versus substantive question that could be resolved by the *Erie* doctrine without stepping in to the merits of the underlying dispute; it concerned whether the Minnesota court (which unquestionably had both subject matter and personal jurisdiction over the case and was a proper venue for the litigation) should disregard Minnesota law (which has no Anti-SLAPP statute) and instead apply Colorado law. In rejecting this suggestion, the district court properly relied on *Jepson v. General Cas. Co. of Wisc.*, 513 N.W.2d 467 (Minn. 1994), which sets out the five-factor analysis that guides which jurisdiction's law is to be applied when there is a conflict.

The fourth *Jepson* factor – advancement of the forum's government interest – is the death knell for the district court's order and resulting judgment being reviewable under the collateral-order doctrine. This factor requires analysis of whether choice of law would affect a "significant interest of the forum state." 513 N.W.2d at 472. This factor becomes critical, as it ensures that the Minnesota judiciary is not required "to apply rules of law inconsistent with Minnesota's concept of fairness and equity." *Bd. of Regents of Univ. of Minn. v. Royal Ins. Co. of Am.*, 503 N.W.2d 486, 490-91 (Minn. App. 1993). Here, given that the Minnesota Supreme Court has found that

Minnesota's previous Anti-SLAPP Statute unconstitutionally infringed on the Seventh Amendment right to a jury – *See Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623 (Minn. 2017) – consideration of this fourth *Jepson* factor requires consideration of the merits of Quest's claims against Appellants. As such, the order cannot qualify as appealable under the collateral-order doctrine.[3]

In the alternative, if the court finds that the choice-of-law analysis does qualify under the collateral-order doctrine, it is crucial that the appeal be limited solely to the choice-of-law analysis. Appellants' Statement of the Case indicates that they intend for the scope of the appeal to be broader. In Section 5 of the Statement of the Case ("Statement of the Issues"), Appellants state as follows: "Whether the District Court erred as a matter of law by failing to find

[3] Appellants may try to suggest Colorado's Anti-SLAPP statute is immediately appealable as granting immunity. This assertion, however, is unavailing. Colorado's appellate courts have recognized that the Colorado statute is substantively similar to California's Anti-SLAPP law, and California caselaw interpreting the California statute is instructive. *See L.S.S. v. S.A.P.*, 523 P.3d 1280, 1285 (Colo. App. 2022). But as the California courts have recognized, "the anti-SLAPP statute *is not an immunity statute*; it merely provides a means by which defendants can protect themselves against certain meritless claims at an early stage of the litigation." *Schaffer v. City and County of San Francisco*, 168 Cal. App.4th 992, 1002 (Cal. App. First Dist. 2008) (emphasis added); *see also Physicians Committee For Responsible Medicine v. Tyson Foods, Inc.*, 119 Cal.App.4th 120, 129-30 (Cal. App. First Dist. 2004) (recognizing that Anti-SLAPP statute is a statutory remedy and not an immunity); *Jarrow Formulas, Inc. v. LaMarche*, 74 P.3d 737, 743-44 (Cal. 2003) (cautioning against "the fallacy that the anti-SLAPP statute allows a defendant to escape the consequences of wrongful conduct" and noting that the statute "neither constitutes—nor enables courts to effect—any kind of immunity" (quotations and citations omitted)).

that Colorado law applies *and by failing to dismiss the case therefor on account of the immunity from suit thereunder*." (Emphasis added.)

This second issue – assuming that Colorado law applies, does Colorado's Anti-SLAPP statute require dismissal of the action – unquestionably requires analysis of the merits of the dispute. *See Los Lobos*, 885 F.3d at 665. In answering that question, the court would be required to determine whether the complaint *in this matter* arises from "any act of [Appellants] in furtherance of [Appellant's] right of petition or free speech under the United States constitution or the state constitution in connection with a public issue" as well as whether Quest "has established that there is a reasonable likelihood that [he] will prevail on the claim." *See* Colo. Rev. Stat. § 13-20-1101(3)(a). The only way for the court to conduct that analysis is to consider the merits of the dispute between the parties.

Quest therefore submits that no portion of the order or judgment qualifies under the collateral order doctrine. But at most, review under the collateral-order doctrine must be limited to the choice-of-law analysis. *See Stone v. Innovation Homes, Inc.*, 986 N.W.2d 237, 246 (Minn. App. 2023) ("[W]hen an order is appealable in part and not appealable in part, then an immediate appeal 'brings up for review only that part which is appealable.'"

(Citing *Storey v. Weinberg*, 226 Minn. 48, 31 N.W.2d 912, 916 (1948))), *rev. granted on other grounds* (Minn. May 16, 2023).[4]

II. BECAUSE THE ORDER AND JUDGMENT ARE NOT IMMEDIATELY APPEALABLE UNDER THE COLLATERAL-ORDER DOCTRINE, THE APPEAL MUST BE DISMISSED AS PREMATURE.

To the extent that the district court's order and judgment do not qualify for immediate appealability under the collateral-order doctrine, the appeal must be dismissed. Rule 103.03 contains a "nearly exhaustive list of appealable orders and judgments." Minn. R. Civ. App. P. 103.03, 1998 Advisory Committee Comment. Because the order and judgment do not meet any of the categories listed in the Rule 103.03, dismissal of the appeal is warranted. *See In re Estate of Figliuzzi*, 979 N.W.2d 225, 231 (Minn. 2022) (providing that non-final orders are not appealable, and dismissal is warranted).

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[4] The petition for review in *Stone* raised a single issue that is irrelevant to the analysis in this case, either in the threshold jurisdictional question or, if and to the extent the district court's order is appealable, to the merits consideration; to wit, "Does Minnesota law already recognize—or should it recognize—the juridical-link doctrine in the context of class-action standing?" (*See Stone*, A22-0928, Petition for Review, March 8, 2023).

Respectfully submitted,

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MADIGAN, DAHL & HARLAN, P.A.

By: */s/ Christopher W. Bowman*
Christopher W. Bowman (#0389933)
33 South Sixth Street, Suite 3675
Minneapolis MN 55402
T: (612) 604-2000

and

David W. Schneider (#0254733)
SCHNEIDER & MADSEN, P.C.
706 South First Street
Willmar MN 56201
T: (320) 235-1902

Attorneys for Respondent Steve Quest