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No. A23-1337

State of Minnesota
In Court of Appeals

Steve Quest,

Respondent,

v.

Nicholas Robert Rekieta, et al.,

Appellants.

BRIEF ON BEHALF OF RESPONDENT STEVE QUEST

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STATEMENT OF THE LEGAL ISSUES

In 2017, the Minnesota Supreme Court struck down Minnesota's Anti-SLAPP statute—Minn. Stat. §§ 554.02 and .03—as applied to torts on the ground that it impermissibly infringed on a plaintiff's right to a jury trial. In light of that holding, did the district court err by finding that application of Colorado's own Anti-SLAPP statute to litigation of a defamation claim properly venued in Minnesota would contravene Minnesota's interests in fairness and equity and declining to apply Colorado law to the dispute?

Apposite Authority:

- *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623 (Minn. 2017)
- *Jepson v. General Cas. Co. of Wisc.*, 513 N.W.2d 467 (Minn. 1994)
- Colo. Rev. Stat. § 13-20-1101 (2022)

STATEMENT OF THE CASE

This action commenced on December 12, 2022, when Plaintiff-Respondent Steve Quest ("Quest" or "Respondent") served a summons and complaint. (*See* Dkt. #3). On January 13, 2023, no responsive pleading having been received, Quest moved for default judgment. (Dkt. #5). The same day, Defendant-Appellants Nicholas Robert Rekieta and Rekieta Law, LLC (jointly, "Rekieta" or "Appellants") filed a "Pro-Se Motion for Extension" seeking to

extend the deadline to serve a responsive pleading until January 31. (Dkt. #10). The district court granted the extension on January 17. (Dkt. #12).

On January 31, the parties entered into a stipulation to allow Quest to serve an amended complaint, after which Appellants would be given fourteen days to serve and file a responsive pleading. (Dkt. #20). Quest filed his amended complaint on February 7, asserting three counts: (1) defamation, including defamation *per se*; (2) intentional infliction of emotional distress; and (3) negligent infliction of emotional distress. (Dkt. #23).

On February 14, Appellants filed and served an answer (Dkt. #28) and a motion to dismiss the complaint pursuant to Colorado's Anti-SLAPP Statute, codified at Colo. Rev. Stat. § 13-20-1101 (2022). (Dkt. #29). The district court denied the motion on July 10, declining to analyze the Colorado Anti-SLAPP statute after finding that Minnesota law applied to the dispute and Appellants were not otherwise entitled to summary-judgment dismissal of the complaint (Dkt. #43). Judgment was entered under that order the following day. (Dkt. #44).

Appellants filed the instant appeal on September 7. (Dkt. #49). Six days later, this court directed the parties to file informal memoranda addressing: (1) whether the collateral-order doctrine permits an appeal of the order and resulting judgment; and (2) if the first issue is answered in the negative, must

the appeal be dismissed. On October 11, this court accepted appellate jurisdiction over the appeal, but limited the scope of the appeal to review of the district court's choice-of-law decision.

ARGUMENT & AUTHORITY

I. STANDARD OF REVIEW

The sole issue before the court is whether the district court erred by concluding that Minnesota law applies to the dispute between the parties, over which it is undisputed (at least for purposes of this appeal) that the Minnesota courts have jurisdiction and are a proper venue and forum for the litigation. Appellants allege that the district court erred by not applying Colorado law – specifically Colorado's Anti-SLAPP statute codified at Colo. Rev. Stat. § 13-20-1101 (2022) – to the dispute. This court reviews a district court's choice-of-law analysis under a de novo standard of review. *Schumacher v. Schumacher*, 676 N.W.2d 685,690 (Minn. App. 2004).

II. THE DISTRICT COURT DID NOT ERR BY CONCLUDING THAT MINNESOTA LAW APPLIES TO THE DISPUTE.

a. Framework of Minnesota's choice-of-law analysis

Minnesota's choice-of-law rules involve a multistep analysis. *Christian v. Birch*, 763 N.W.2d 50, 56 (Minn. App. 2009). The first step in the analysis is an examination of whether the laws of two (or more) jurisdictions are in conflict; put another way, the court must analyze whether "the choice of one

forum's laws over the other will determine the outcome of the case." *Nodak Mut. Ins. Co. v. Am. Family Mut. Ins. Co.*, 604 N.W.2d 91, 94 (Minn. 2000). All parties here agree that the district court correctly determined that a conflict existed: Colorado has an Anti-SLAPP statute, whereas Minnesota's statute has been struck down as unconstitutional as to claims with a right to a jury trial.

The second step of the choice-of-law analysis addresses whether the different jurisdictions' laws may be constitutionally applied to the case at hand. *Jepson v. General Cas. Co. of Wisc.*, 513 N.W.2d 467, 469 (Minn. 1994). "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13, 101 S. Ct. 633, 640 (1981). The district court does not explicitly address this analysis, but for purposes of this appeal it is not disputed that Colorado may have sufficient contacts such that application of Colorado law would not be unconstitutionally arbitrary.

The appeal, therefore, focuses on the third-step in the choice-of-law analysis, which requires courts to apply a multifactor test to the case at hand, weighing (1) predictability of results, (2) maintenance of interstate and international order, (3) simplification of the judicial task, (4) advancement of

the forum's governmental interests, and (5) application of the better rule of law. *Jepson*, 513 N.W.2d at 470; *see also* Robert A. Leflar, *Choice-Influencing Considerations in Conflicts of Law*, 41 N.Y.U. L. Rev. 267, 279 (1966) (proposing five-factor test). "These factors were not intended to spawn the evolution of set mechanical rules but instead to prompt courts to carefully and critically consider each new fact situation and explain in a straight-forward manner their choice of law." *Jepson*, 513 N.W.2d at 470.

b. The Minnesota Supreme Court's decision striking down Minnesota's own Anti-SLAPP statute compels a finding that Minnesota law applies in this dispute.

The fourth *Jepson* factor – directing courts consider whether application of a law of a particular jurisdiction would affect a "significant interest of the forum state" – is determinative here. *See Jepson*, 513 N.W.2d at 472. This factor is intended to ensure that the Minnesota courts are 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). As relevant here, application of Colorado's Anti-SLAPP statute would require the district court to deviate from the concept of fairness and equity set out in the Minnesota Constitution and the Minnesota Supreme Court's holding striking down Minnesota's own Anti-SLAPP statute on matters with a jury-trial right.

Colorado's Anti-SLAPP statute provides:

> 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) (emphasis added).[1] In conducting this analysis, the district court is instructed to "consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." Colo. Rev. Stat. § 13-20-1101(3)(b). Put another way, in considering a motion under Colorado's Anti-SLAPP statute, district courts are to determine (1) whether the action arises from an act of the defendant in furtherance of the right of petition or free speech in connection with a public issue and, if so, (2) whether the plaintiff has established a reasonable likelihood of success. If the first question is answered in the affirmative and the second in the negative, the Colorado Anti-SLAPP Statute requires the court to dismiss the lawsuit.

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[1] The question of whether this action arises "from any act of [Appellants] in furtherance of [Appellants'] right of petition or free speech under the United States constitution or the state constitution in connection with a public issue" was not determined by the district court and is not before this court on appeal.

Minnesota adopted its own Anti-SLAPP statute in 1994. *See* Minn. Laws 1994, Ch. 566, § 2. Under that statutory provision, defendants in Minnesota were afforded an opportunity to bring a motion to "dispose of a judicial claim on the grounds that the claim materially relates to an act of [defendant] that involves public participation." Minn. Stat. § 554.02, subd. 1. The responding party (*i.e.*, the plaintiff) held the burden of proof and of persuasion, and the district court was instructed to dismiss the claim "unless the court finds that the responding party has produced clear and concerning evidence that the acts of the moving party are not immunized from liability." Minn. Stat. § 554.02, subd. 2(2)-(3).

The Minnesota Constitution provides the "right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy." Minn. Const. Art. I, § 4. This language is "categorical," and permits no exceptions. *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 62 (Minn. 2012). Minnesota courts exhibit a "watchful jealousy" of any "impairment of the right of a free and inviolate jury trial"; and pursuant to this oversight authority, the courts will recognize as unconstitutional any law that renders the jury-trial right "so burdened with conditions that it is not a jury trial, such as the Constitution guarantees." *Flour City Fuel & Transfer Co. v. Young*, 150 Minn. 452, 454-58,

185 N.W. 934, 935-37 (1921). Against this constitutional framework, the Minnesota Supreme Court struck down the Anti-SLAPP Statute, noting that the statute "unconstitutionally instructs district courts to usurp the role of the jury by making pretrial factual findings that can, depending on the findings, result in the complete dismissal of the underlying action." *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 635 (Minn. 2017).

A comparison of Minnesota's constitutionally infirm Anti-SLAPP statute with Colorado's Anti-SLAPP statute reveals that while there are some differences in the text, they are (for purposes of a choice-of-law analysis) unconstitutionally similar. Under both statutes, a district court is to dismiss a lawsuit unless the plaintiff can establish a *likelihood* of success. The only difference between the two statutes is the standard of proof that the plaintiff is held in making this showing: Minnesota's statute required clear-and-convincing evidence while the Colorado statute requires the plaintiff to make the showing to a reasonable likelihood. *Compare* Minn. Stat. § 554.02, subd. 2(3) *with* Colo. Rev. Stat. § 13-20-1101(3)(a). But both statutes require the district court to weigh evidence, in contradiction to the right to a jury trial found in the Minnesota Constitution.

Appellants attempt to minimize this constitutional infirmary through a misconceived understanding of Minnesota's summary-judgment standard and

the Washington Anti-SLAPP Statute. *See* Appellant's Brief at 13-14. Neither argument is compelling.

i. Appellants misconstrue Minnesota's summary judgment standard.

The Minnesota Rules of Civil Procedure provide that a court must grant summary judgment when the moving party "shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. No genuine issue for trial exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (alteration in original) (quoting *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)).

For a claim to survive summary judgment, the non-moving party need only show that, when the evidence is viewed in the light most favorable to the non-moving party, reasonable persons might draw different conclusions from such evidence presented. *Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978). As this court has recognized, summary judgment is to be denied even when it is *unlikely* that the non-moving party will prevail at trial, so long as the issues are not shown to be "sham, frivolous, or so insubstantial that it would obviously be futile to try them." *Hamilton v.*

Indep. Sch. Dist. No. 114, 355 N.W.2d 182, 184 (Minn. App. 1984) (quoting *Whisler v. Findeisen*, 280 Minn. 454, 456, 160 N.W.2d 153, 155 (1968)).

Consider the following: A traffic accident occurs at an intersection, with the plaintiff claiming the defendant ran a red light with the defendant insisting that the light was green. The defendant brings a summary-judgment motion supported with declarations from twenty eyewitnesses to the accident, each of whom swears that the defendant had a green light. In response, the plaintiff submits a single witness declaration stating that the plaintiff had the green light. Has the plaintiff in that situation established a reasonable likelihood that they will be successful? No; the significant weight of the evidence is directly contrary to the plaintiff's theory. But nonetheless, the defendant is not entitled to summary judgment, as a genuine issue of material fact still exists. To suggest, therefore, that the Colorado Anti-SLAPP Statute's reasonable-likelihood-of-success standard is the functional equivalent of the Minnesota summary-judgment standard strains credulity.

Because application of the Colorado Anti-SLAPP Statute would impermissibly require the district court to weigh evidence at the summary judgment stage of the litigation, it suffers from the same constitutional infirmity as Minnesota's own statute that was struck down by the Minnesota Supreme Court. Application of the Colorado Anti-SLAPP Statute would

therefore contravene Minnesota's concept of fairness and equity, and the district court's choice-of-law decision should be affirmed.

ii. Appellants' statement to the contrary notwithstanding, there are material differences between the Washington and Colorado Anti-SLAPP Statutes.

The Minnesota Supreme Court noted that the Washington courts had struck down Washington's Anti-SLAPP Statute, then codified at Was. Rev. Code § 4.24.525 (2014), as impermissibly "invad[ing] the jury's essential role of deciding debatable questions of fact" and thereby violating Washinton's constitutional protection of a jury trial. *Davis v. Cox*, 351 P.3d 862, 874 (Wash. 2015).

The Washington Anti-SLAPP Statute reviewed in *Davis* "require[d] the trial judge to make a factual determination of whether the plaintiff has established by clear and convincing evidence a probability of prevailing on the claim." 351 P.3d at 873 (citing RCW § 4.24.525(4)(b)). The Washington Court distinguished this standard from the frivolous standard, noting that the Anti-SLAPP statute required a "higher threshold than a frivolous inquiry." *Id.* at 873-74.

After the *Davis* decision, the Washington Legislature amended its Anti-SLAPP Statute, with the current law providing that the district court is required to dismiss an action if: (1) the moving party establishes that the

Washington Anti-SLAPP Statute applies; (2) the non-moving party fails to establish that the statute does *not* apply; and (3) either (a) the non-moving party "fails to establish a prima facie case as to each essential element of the cause of action" or (b) the moving party establishes (i) the non-moving party has failed to state a cause of action upon which relief can be granted or (ii) there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. R.C.W. § 4.105.060(1).

Unlike the Colorado Anti-SLAPP Statute's "reasonable likelihood of success" language, the framework under the *current* Washington Anti-SLAPP Statute incorporates directly the long-approved considerations of motions where a court is asked to determine questions not based on fact, but on law. *See* Minn. R. Civ. P. 12.02(e); Minn. R. Civ. P. 56.03; *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 847-48 (Minn. 1995) (holding that a moving party is entitled to summary judgment when "there are no facts in the record giving rise to a genuine issue for trial as to the existence of an essential element of the nonmoving party's case") (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986)); *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) (holding that summary judgment is mandatory for the defendant when "the record reflects a complete lack of proof on an essential element of the plaintiff's claim").

Comparison between Washington and Colorado's Anti-SLAPP Statute therefore compels the opposite conclusion from that advocated by Appellants. Application of the Colorado Anti-SLAPP Statute would require the district court to usurp the jury's fact-finding function and the Constitutional right to a jury trial. The fourth *Jepson* factor therefore requires an affirmance of the district court's decision to apply Minnesota law in this case, as application of Colorado law would be inconsistent with Minnesota's view of fairness and equity.

iii. Minnesota's interest in compensating tort victims further supports application of Minnesota law.

The State of Minnesota has a significant interest in ensuring that tort victims are fully compensated. *See, e.g., Jepson*, 513 N.W.2d at 472. Appellants argue that the district court's analysis of this state interest was erroneous because, unlike the plaintiffs in *Jepson* and *Danielson v. Nat'l Supply Co.*, 670 N.W.2d 1 (Minn. App. 2003), Quest is not a Minnesota resident. But a full analysis of Minnesota jurisprudence reveals that Minnesota's interest in providing full compensation for tort victims is not limited to situations where the plaintiff is a Minnesota resident. *See, e.g., Bigelow v. Halloran*, 313 N.W.2d 10, 12-13 (Minn. 1981). This governmental interest further weighs in favor of application of Minnesota law to the dispute.

c. The remaining Jepson *factors do not render the district court's decision to apply Minnesota law to the present dispute erroneous.*

Quest respectfully submits that when the Colorado Anti-SLAPP Statute is viewed through the framework of the Minnesota Supreme Court's analysis in *Leiendecker*, the fourth *Jepson* factor is determinative that the district court did not err by applying Minnesota law to the dispute. But in the alternative, analysis of the remaining *Jepson* factors similarly warrant affirmance of the district court's decision.

i. Predictability of Results

The predictability-of-results factor "represents the ideal that litigation on the same facts, regardless of where the litigation occurs, should be decided the same to avoid forum shopping." *Nodak Mut. Ins. Co. v. Am. Fam. Mut. Ins. Co.*, 604 N.W.2d 91, 94 (Minn. 2000). This factor applies primarily to "consensual transactions where people should know in advance what law will govern their act." *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408, 412 (1973); *see also Myers v. Gov't Emp. Ins. Co.*, 302 Minn. 359, 365, 225 N.W.2d 238, 242 (1974). But the factor has "less relevance in cases such as accidents when the parties could not reasonably have such expectations." *Northwest Airlines, Inc. v. Astraea Aviation Servs.*, 111 F.3d 1386, 1394 (8th Cir. 1997).

The Eighth Circuit's holding in *Northwest Airlines* is instructive here. Rekieta's statements were made in Minnesota. While the statements were

made over the internet, there is nothing in the record to suggest that it is likely that Appellants expected Colorado law to apply to the statements. Just as in *Northwest Airlines*, therefore, "[t]his factor . . . points to applying Minnesota law." 111 F.3d at 1394.

ii. Maintenance of Interstate Order

The primary concern regarding the maintenance of interstate order is "whether the application of Minnesota law would manifest disrespect for [another state's] sovereignty or impede the interstate movement of people and goods." *Jespson*, 513 N.W.2d at 471. As such, this factor is of most concern when there is evidence of forum shopping such as when a plaintiff moves to Minnesota "for the purpose of bringing suit." *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1979), *aff'd*, 449 U.S. 302, 101 S. Ct. 633 (1981); *see also Lommen v. City of East Grand Forks*, 522 N.W.2d 148, 151 (Minn. App. 1994) ("One particular concern in choice-of-law methodology is to minimize forum shopping designed to influence choice of law."). Here, there is no dispute that Appellants' actions—while broadcast over the internet—were undertaken in Minnesota. Minnesota therefore has "sufficient contacts with and interest in the facts and issues being litigated" to mitigate any concerns about disruption of interstate order, and this factor is therefore neutral. *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 739 (8th Cir. 1995); *see also Hague*, 289 N.W.2d at 48-49;

Northwest Airlines, 111 F.3d at 1394 (finding that Minnesota has "several important contacts with the issues being litigated since one of its residents made the comments in the state" and applying Minnesota law therefore would not show disrespect to another state).

iii. Simplification of the Judicial Task

This factor is "not particularly relevant where the competing laws are straightforward and the law of either state could be applied without difficulty." *Schumacher v. Schumacher*, 676 N.W.2d 685, 691 (Minn. App. 2004). The laws of both Colorado and Minnesota—as implicated here in a choice-of-law analysis—may be applied without any difficulty. The factor is therefore neutral.[2]

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[2] Appellants' assign error to the district court's determination that this factor weighed in favor of applying Minnesota law, suggesting that the district court truncated its analysis of this court's opinion in *Gimmestad v. Gimmestad*, 451 N.W.2d 662 (Minn. App. 1990), without consideration of the Minnesota Supreme Court's finding in *Milkovich* that this factor "poses no problem since the courts are fully capable of administering the law of another forum if called upon to do so." 295 Minn. at 161, 203 N.W.2d at 412. But given that consideration of the predictability and government-interest factors support application of Minnesota law, any error of the district court in finding that neutral factors also supported Minnesota law is harmless error. *See Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (finding that to prevail on appeal appellant must show both error and resulting prejudice); *Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987) (holding that a reviewing court will not reverse a district court simply because the district court based its decision on incorrect reasons).

iv. Application of the Better Law

This final factor is addressed "only when the other four factors are not dispositive as to which state's law should be applied. *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 455-56 (Minn. App. 2001). As explained above, analysis of the other four factors resolve this matter in favor of application of Minnesota law, and consideration under this factor is therefore unnecessary.[3]

CONCLUSION

The sole question before this court on appeal is whether the district court erred by concluding that Minnesota law should govern this dispute, particularly in light of the fact that the Minnesota Supreme Court has struck down Minnesota's previous Anti-SLAPP law as running afoul of the constitutional right to a jury trial. While the specifics of the Colorado Anti-SLAPP statute differ from its unconstitutional counterpart in Minnesota, these differences are (for purposes of the choice-of-law analysis) distinctions without a difference. As recognized by the Minnesota Supreme Court,

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[3] In the event this court finds that analysis of this factor is necessary, the proper result would be to remand to the district court to analyze the fifth and final *Jepson* factor rather than this court conducting the analysis as an issue of first impression in the case. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that an appellate court will generally not consider matters that were not argued to *and considered by* the district court).

Minnesota has a governmental interest in preserving the right to a jury trial, a right which would be short-circuited by application of a foreign jurisdiction's Anti-SLAPP statute. The district court therefore did not err by concluding that Minnesota law applies to the dispute, and this court should **affirm** the decision.

Pursuant to Minn. R. Civ. App. P. 128.02, subd. 1(f), Respondent respectfully submits that because an affirmance on these grounds simply applies settled principles and controlling precedent – to wit, Minnesota's constitutional right to a jury trial weighed against the provisions of a foreign jurisdiction's Anti-SLAPP statute in the context of a choice-of-law analysis – to the facts of this case, it would be appropriate for the court to issue its affirmance in the form of a nonprecedential opinion. *See* Minn. R. Civ. App. P. 136.01, subd. 1(b).

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Respectfully submitted,

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms with the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with proportional font. The length of this brief is 4,003 words, as calculated by the word count of the word-processing software used to prepare the brief. The brief was prepared using Microsoft Word 365.

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