

NO. A06-1137

State of Minnesota
In Court of Appeals

John Grundtner,

Appellant,

vs.

University of Minnesota and Michael Perkins
in his personal and professional capacities,

Respondents.

RESPONDENTS' BRIEF

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Legal Issues

1. An employee only makes a report under Minnesota's whistleblower statute if he or she alleges facts that, if true, would amount to a violation of law. Here, Grundtner does not allege that he reported any such facts; rather he alleges that he objected to a contemplated, but not taken, act. Was the trial court correct in dismissing the claim on this ground?

The trial court concluded that Grundtner did not engage in any protected conduct because he did not report any allegations that, if true, would have amounted to a violation of law. The most apposite cases are *Abraham v. County of Hennepin*, 639 N.W.2d 342 (Minn. 2002); *Petroskey v. Lommen, Nelson, Cole & Stageberg, P.A.*, 847 F. Supp. 1437 (D. Minn. 1994); and *Michaelson v. Minnesota Mining & Manufacturing Co.*, 474 N.W.2d 174 (Minn. Ct. App. 1991). The most apposite statute is Minnesota Statute Section 181.932.

2. The whistleblower statute protects employees who refuse to follow orders to take illegal actions. The undisputed evidence shows that Grundtner was not ordered to do anything illegal by the University. Was the trial court correct in dismissing the claim?

The trial court concluded that Grundtner's own testimony made clear that he was not ordered to do anything illegal. The most apposite cases are *Harris v. Ostbye & Anderson, Inc.*, No. C1-98-1399, 1999 WL 43512 (Minn. Ct. App. Feb. 2, 1999); and *Gundacker v. Unisys Corp.*, 151 F.3d 842 (8th Cir. 1998). The most apposite statute is Minnesota Statute Section 181.932.

3. A plaintiff making a claim under the whistleblower statute must show causation. Here, the University decided to take the employment actions before it had any knowledge of the alleged reports. Does the whistleblower claim fail for this additional reason?

The trial court did not consider this issue because it found that Grundtner had failed to establish a prima facie case. The most apposite case is *Hubbard v. United Press International, Inc.*, 330 N.W.2d 428 (Minn.1983).

4. Tort claims that require examination of University employment decisions may only be brought by writ of certiorari to the Minnesota Court of Appeals. Grundtner's tort claims relate to and require inquiry into the reasons for the University's decision not to renew his contract. Did the trial court lack jurisdiction over these claims?

The trial court concluded that it lacked jurisdiction over Grundtner's tort claims. The most apposite cases are *Shaw v. Board of Regents of University of Minnesota*, 594 N.W.2d 187 (Minn. Ct. App. 1999); *Willis v. County of Sherburne*, 555 N.W.2d 277 (Minn. 1996); and *Kobluk v. Regents of University of Minnesota*, No. C8-97-2264, 1998 WL 297525 (Minn. Ct. App. June 9, 1998). The most apposite statute is Minnesota Statute Section 606.01.

5. Grundtner claims that his supervisor, Michael Perkins, is liable for interference with contract for causing the University not to renew Grundtner's contract. A supervisor is not liable for interference with contract unless he or she acts with actual malice. There is no evidence of malice. Does the claim fail?

The trial court concluded that Grundtner failed to make a showing of malice. The most apposite cases are *Nordling v. Northern States Power Company*, 478 N.W.2d 498 (Minn. 1991); and *Guercio v. Production Automation Corp.*, 664 N.W.2d 379 (Minn. Ct. App. 2003).

6. Grundtner claims he was defamed by a reference provided by a University vice president. Statements made in job references are entitled to a qualified privilege, requiring a showing of malice. Grundtner cannot present evidence of malice. Does the claim fail?

The trial court concluded that Grundtner failed to make a showing of malice. The most apposite cases are *Buchanan v. Minnesota State Department of Health*, 573 N.W.2d 733 (Minn. Ct. App. 1998); and *Hunt v. IBM Mid-American Employees Federal Credit Union*, 384 N.W.2d 853 (Minn. 1986).

7. Did the trial court properly exercise its discretion in ordering Grundtner to return privileged documents he had taken from the University without authorization?

The trial court ordered the return of certain privileged documents. The most apposite cases are *Urban ex rel Urban v. American Legion Post 184*, 695 N.W.2d 153 (Minn. Ct. App. 2005); and *Montgomery Ward & Co. v. County of Hennepin*, 450 N.W.2d 299 (Minn. 1990).

Statement of the Case

Appellant John Grundtner is a former University employee whose contract was not renewed. The University of Minnesota, to improve its management of capital improvement projects, is undergoing a major reorganization of the department responsible for this function. The reorganization effort has been led, in part, by Associate Vice President Michael Perkins and, thus far, has included combining units, eliminating several positions, and changing the responsibilities of certain positions. Plaintiff John Grundtner was one of several employees impacted. The group he led as University Architect was combined with the planning group. As a result, Grundtner's position and the Director of Planning position were eliminated and a new position was created, Director of Architecture and Planning. Grundtner alleges that the elimination of his position was not due to the reorganization, but actually because he had objected in a

meeting, along with others, to a proposed procurement method Grundtner believed to be illegal. The University heeded the comments by Grundtner and others and pursued a different procurement method.

Grundtner asserted claims against the University under the Minnesota whistleblower statute and for defamation and against defendant Perkins for interference with contract. He originally asserted additional claims as well, but voluntarily dismissed them.

The University moved for summary judgment. By order dated April 19, 2006, the District Court, per the Honorable Catherine L. Anderson, granted the motion for summary judgment in its entirety, dismissing all claims.

Statement of the Facts

GRUNDTNER'S EMPLOYMENT WITH THE UNIVERSITY

Plaintiff John Grundtner started at the University in May 2000 in the position of University Architect.¹ Grundtner entered into a one-year contract that was subject to renewal annually at the discretion of the University.²

Kathleen O'Brien joined the University as Vice President of University Services in September 2002.³ University Services is the operations side of the University.⁴ One

¹ Respondents' Appendix (R.A.) at 26 (Grundtner Vol. 2, 21).

² *Id.* at 19 (Grundtner Vol. 1, 118).

³ *Id.* at 49 (O'Brien Vol. 1, 18).

⁴ *Id.* at 49 (O'Brien Vol. 1, 18-19).

unit within University Services is Capital Planning and Project Management (CPPM).⁵ CPPM is responsible for the planning, design, and construction of capital improvement projects.⁶

Vice President O'Brien came to the University with a specific direction—make changes to restore trust and confidence in the University's construction functions.⁷ To help her do this, in November 2002, she hired an outside consultant, Michael Perkins, to review the organization and provide recommendations for change.⁸

Perkins reviewed the organization—interviewing about one hundred employees—and submitted a report recommending many changes.⁹ One recommendation was to increase the role of the University Architect to include project management and delivery responsibilities.¹⁰ Perkins had observed that the University Architect was being underutilized and thought Grundtner should have the opportunity to “step up and perform.”¹¹

⁵ *Id.* at 49 (O'Brien Vol. 1, 20).

⁶ R.A. at 50 (O'Brien Vol. 1, 21-22).

⁷ *Id.* at 50 (O'Brien Vol. 1, 23).

⁸ *Id.* at 51-52 (O'Brien Vol. 1, 48-49) and 35-36 (Perkins Vol. 1, 44-45).

⁹ *Id.* at 40 (Perkins Vol. 1, 103) and Slovut Aff., Ex. D.

¹⁰ *Id.* at 40 and 43 (Perkins Vol. 1, 103-104 & 250).

¹¹ *Id.* at 40 (Perkins Vol. 1, 103-104).

In February 2003, the University Architect's responsibilities were expanded to include management of project issues and operations.¹²

Perkins became the Associate Vice President in charge of CPPM in June 2003.¹³ His role, at least initially, was to "come in and take a look at the organization and begin making some changes in it to achieve more productivity than it had experienced in the past."¹⁴

Perkins observed that the architecture group (led by Grundtner) and the planning group (led by Director of Planning Harvey Turner) were not working effectively together.¹⁵ Because of this observation and the need to deal with an upcoming budget reduction, in about August 2003 Perkins asked Grundtner and Turner to work together to determine a solution as to how these two groups could work more effectively together and also how to deal with the budget reduction.¹⁶ One potential solution contemplated by

¹² R.A. at 26 (Grundtner Vol. 2, 21-22). There is nothing in the record to support Grundtner's claim in his brief that the change was a result of "consistently superior performance." Appellant's Brief (A.B.) at 3. Grundtner also asserts in his brief that he was "extremely qualified," and that he was "universally well-regarded." There is no support for these assertions in the record.

¹³ *Id.* at 34 (Perkins Vol. 1, 22).

¹⁴ *Id.* at 35-36 (Perkins Vol. 1, 44-45).

¹⁵ *Id.* at 58 (Perkins Aff., ¶ 2).

¹⁶ *Id.* at 28 (Grundtner Vol. 2, 29) and 58 (Perkins Aff., ¶ 3).

Perkins was to combine the two units.¹⁷ Perkins needed to determine a final solution by January 2004.¹⁸ Grundtner and Turner failed to make any progress on this task because, according to Grundtner, Turner was deliberately moving slowly because he did not want to combine the two departments.¹⁹

In the summer of 2003, Vice President O'Brien assigned Gary Summerville, a long time University employee, to work directly for Perkins to assist in moving CPPM in a more efficient and effective direction.²⁰ Summerville had thirty years of experience at the University, with extensive involvement in all aspects of capital projects.²¹ Perkins soon observed that Summerville was someone who "showed a willingness to dig in [and] help make policy and procedure change" and would "sit down with people on a regular basis and work through some of the day-to-day issues that we have on projects."²² In

¹⁷ *Id.* at 58 (Perkins Aff., ¶¶ 3 & 4).

¹⁸ *Id.*; *see also* R.A. at 27-28 (Grundtner Vol. 2, 28-32) and Slovut Aff., Exs. E and O.

¹⁹ R.A. at 28 (Grundtner Vol. 2, 30).

²⁰ *Id.* at 64 (Summerville Aff. ¶ 6).

²¹ *Id.* at 62-63 (Summerville Aff. ¶¶ 1-5). Grundtner writes that Perkins had no idea what Summerville's prior work experience was. A.B. at 8. This misstates the record. Perkins was not aware of Summerville's specific job titles. R.A. at 108 (Perkins Vol. 1, 73). Perkins was aware that Summerville had held several different positions within facilities management and worked on a significant basis on construction matters. *Id.* at 107-108 (Perkins Vol. 1, 72-73).

²² R.A. at 40 (Perkins Vol. 1, 101).

contrast, Perkins observed Grundtner as someone who failed to both pick up on “basic management responsibilities” and “pick up more of a role in moving our change forward.”²³

Beginning in late summer 2003, Perkins began discussing with Summerville how best to focus his efforts within CPPM.²⁴ Perkins decided that Summerville should take over project delivery and management responsibilities from Grundtner.²⁵ Perkins also discussed Summerville’s role with Vice President O’Brien, voicing the opinion that Summerville would be more effective than Grundtner in overseeing owners representatives and voicing concerns regarding Grundtner’s performance in that regard.²⁶

Perkins asked Summerville in early to mid-October 2003 if he would be willing to take over project management and delivery responsibilities, and Summerville agreed.²⁷ On November 6, 2003, Perkins announced this first change to the organization.²⁸

²³ *Id.*

²⁴ R.A. at 64 (Summerville Aff. ¶ 7).

²⁵ *Id.*

²⁶ *Id.* at 53 (O’Brien Vol. 1, 105).

²⁷ *Id.* at 62 (Summerville Aff. ¶ 3). Grundtner, in his brief, describes the transfer of responsibilities to Summerville as a “sudden change” (A.B. at 8) and tries to link it to a November 5, 2003, meeting. The undisputed facts show that this was not a sudden change—it was discussed with Vice President O’Brien and Summerville long before the November 5 meeting.

²⁸ Slovut Aff., Ex. E.

In about January 2004, Perkins reached a decision on the issue presented to Grundtner and Turner back in August of 2003—how to make the architecture and planning groups work more effectively together and how to deal with the budget reduction.²⁹ As had been contemplated back in August 2003, Perkins decided to combine the two departments, thus eliminating the two director positions (University Architect and Director of Planning) and creating a new position, Director of Architecture and Planning.³⁰ Perkins advised Human Resources of the upcoming changes so that necessary paperwork could be created and to ensure that University rules with respect to notice and timing were followed.³¹

On March 1, 2004, Perkins met with Grundtner to advise him that his contract would not be renewed.³² Grundtner was advised that his appointment would end on June 13, 2004.³³ Perkins also met on March 1, 2004, with three other employees whose positions were also being eliminated as part of the reorganization.³⁴

This first segment of the reorganization was announced in March 2004. The changes included the complete restructuring of planning and architecture, with four

²⁹ R.A. at 59 (Perkins Aff., ¶ 6).

³⁰ R.A. at 59 (Perkins Aff., ¶ 6) and 46 (Perkins Vol. 2, 309-10).

³¹ Slovut Aff., Ex. F (Berns 31-32, 50).

³² *Id.*, Ex. F (Berns 56-57).

³³ *Id.*, Ex. G (Revised notice letter).

³⁴ *Id.*, Ex. F (Berns 56-57).

positions eliminated, including the University Architect position and the Director of Planning position.³⁵

The University and Grundtner entered into a Telecommuter Agreement on March 17, 2004.³⁶ Under this Agreement, Grundtner was to complete three tasks by April 5, 2004. Grundtner was also to provide daily e-mail updates to Perkins and be in the office on April 5, 2004, and work from home from March 17 up to that date.³⁷

Grundtner was without University computer access beginning on Friday, March 26, 2004, and ending on Tuesday, March 30, 2004.³⁸ Perkins directed access to be terminated because he did not believe Grundtner had any further need for it—the Telecommuter Agreement tasks could be completed without it—and he believed that given the short time period Grundtner had left with the University, it would be wise to terminate access.³⁹ Grundtner complained to, among others, Vice President O'Brien, and

³⁵ R.A. at 60-61 (Perkins Aff., Ex. A). At footnote 13 of his brief, Grundtner writes of a “supposed reorganization.” There is no basis to dispute the ongoing reorganization. Grundtner admits that the planning department and architecture department were combined, with a new director hired to oversee the new department. Like Grundtner, the Director of Planning was given notice of his non-renewal. That the Director of Planning was later hired into a new position, acting as an assistant to Michael Denny for certain projects, is irrelevant. R.A. at 109 (Perkins Vol. 1, 135).

³⁶ Slovut Aff., Ex. H (Telecommuter Agreement) and R.A. at 17 (Grundtner Vol. 1, 77).

³⁷ Slovut Aff., Ex. H (Telecommuter Agreement).

³⁸ R.A. at 29 (Grundtner Vol. 2, 39-40).

³⁹ *Id.* at 41 (Perkins Vol. 1, 150-151).

his computer and e-mail access was restored on March 30.⁴⁰ During the two work days he lacked access, Grundtner had a working computer and a working personal e-mail address that he could use from his home.⁴¹

Grundtner did not complete the Telecommuter Agreement tasks by April 5, 2004, and did not provide any e-mail updates to Perkins.⁴² On May 10, 2004, Perkins submitted to Human Resources an evaluation of Grundtner's performance under the Telecommuter Agreement reflecting these facts.⁴³ Human Resources sent Grundtner a copy of the evaluation on June 4, 2004, to which Grundtner responded.⁴⁴

GRUNDTNER'S PURPORTED "REPORTS"

Grundtner alleges two incidents of "reporting" in response to which he claims to have suffered retaliation. The first involves a construction project on the Crookston campus, and the second involves discussions he had with the University's audit department.

⁴⁰ R.A. at 17 and 29 (Grundtner Vol. 1, 79 and Vol. 2, 39-40).

⁴¹ *Id.* at 17 (Grundtner Vol. 1, 77).

⁴² *Id.* at 42 (Perkins Vol. 1, 214) and Slovut Aff., Ex. I (Performance Evaluation).

⁴³ Slovut Aff., Ex. I (Performance Evaluation).

⁴⁴ *Id.*, Ex. F (Berns 90).

THE CROOKSTON PROJECT

In early 2003, the University sent out a solicitation for bids for the construction of a new student center on the Crookston campus. Only one bid was received. It was well over the budget for the project, and it was rejected.⁴⁵

The University set out to determine what went wrong and how it could get the project moving.⁴⁶ Grundtner's proposed solution to the problem was to fire the outside architect.⁴⁷ Perkins disagreed with this proposal because it would be too costly to start over on the architecture side and would cause a significant delay.⁴⁸ Instead, Perkins decided to work with the architect to get the project completed successfully.⁴⁹

Grundtner contends that on October 28 or 29, Michael Denny (then a consultant and formerly the interim Associate Vice President for CPPM) told him that he and Perkins had met with the architect and decided that the project should be sent out for bids again and that, if necessary, the University would negotiate with the low bidder.⁵⁰

⁴⁵ R.A. at 27 (Grundtner Vol. 2, 26-27) and Slovut Aff., Ex. J (bid rejection letter).

⁴⁶ *Id.* at 38 (Perkins Vol. 1, 75-76).

⁴⁷ *Id.* at 39 (Perkins Vol. 1, 85-86).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 14 (Grundtner Vol. 1, 65). Grundtner writes in his brief that "Defendant Perkins and Mr. Denny had decided at this meeting to negotiate with the low bidder to get the project within budget, so that it could be awarded" A.B. at 5. This statement is misleading because there was no low bidder at the time in question. The issue at the time was how to re-bid the project after the first unsuccessful request for bids.

Grundtner testified that he told Denny that it would be illegal for the University to take this course. Denny did not direct Grundtner to do anything.⁵¹ In fact, there was nothing for Grundtner to do because, although he says he would have had initial sign-off authority on a solicitation for bids, there were no bidding documents for him to sign.⁵² Also, Denny did not have authority to direct Grundtner to do anything, in any event.⁵³ And Grundtner had no binding authority with respect to procurement or bidding.⁵⁴

On November 5, 2003, a meeting was held to discuss the project, including the method of procurement that should be used.⁵⁵ One issue discussed was whether the University could bid the project out again and then negotiate with the low bidder, if necessary.⁵⁶ At the meeting, Grundtner said that this method would be impermissible.⁵⁷ According to Grundtner, individuals from the procurement department, as well as a representative from the Office of General Counsel, stated at the meeting that they agreed

⁵¹ R.A. at 13-14 (Grundtner Vol. 1, 64-65).

⁵² *Id.* at 14 (Grundtner Vol. 1, 67-68)

⁵³ *Id.* at 27 (Grundtner Vol. 2, 28).

⁵⁴ *Id.* at 6 (Grundtner Vol. 1, 11).

⁵⁵ *Id.* at 9 (Grundtner Vol. 1, 39).

⁵⁶ Slovut Aff., Ex. K (Buffington 11-12).

⁵⁷ R.A. at 9 (Grundtner Vol. 1, 39) and Slovut Aff., Ex. K (Buffington 11-12).

with Grundtner that the University could not take that route.⁵⁸ Accordingly, the University set out to determine a method that could be used.

The University determined that the best method of procurement would be a request for proposal “lump sum” method.⁵⁹ This method was used.⁶⁰ Grundtner has not alleged (nor could he) that this request for proposal was illegal and acknowledges that as far as he knows it was legal.⁶¹

FEBRUARY CONTACT WITH AUDIT DEPARTMENT

Grundtner testified that, on February 23, 2004, he spoke to University counsel Sandra Martell, who suggested he take his concerns to the University’s audit department. Grundtner testified that he spoke to University auditor Gail Klatt that same day and complained about, as described in his brief, “fiscal irregularities.”⁶² With respect to his complaint of “fiscal irregularities,” he did not know if they were violations of policy or violations of law.⁶³

⁵⁸ R.A. at 15-16 (Grundtner Vol. 1, 71-73).

⁵⁹ Slovut Aff., Ex. N (Larson 110).

⁶⁰ *Id.*

⁶¹ R.A. at 10-11 (Grundtner Vol. 1, 48-51).

⁶² A.B. at 29; R.A. at 13 (Grundtner Vol. 1, 62-64).

⁶³ R.A. at 13 (Grundtner Vol. 1, 62-64).

Perkins was not aware that Grundtner had contacted the audit department until the initiation of this litigation.⁶⁴ The individual originally contacted by Grundtner—the head of the audit department—did not tell anyone within CPPM or University Services that Grundtner had contacted audits and believes, to the best of her knowledge, that no one within audits disclosed the contact.⁶⁵ Grundtner acknowledges that he has no evidence showing that Perkins was aware he had complained.⁶⁶

VICE PRESIDENT O'BRIEN'S REFERENCE FOR GRUNTNER

Grundtner asked Vice President O'Brien to serve as a job reference for him.⁶⁷ Vice President O'Brien agreed, provided a reference to the University of Northern Florida, and summarized her contact with that university in a voice mail left for Grundtner:

Hi, Jack, this is Kathy O'Brien calling. Um, I'm just calling cause I wanted you to know that I had a call from Lance Taylor at the University of North Florida on Friday, ah, July 2, and I had a lengthy conversation with him, and I believe a couple other members of the search committee tried to give you a good grades and a sound recommendation for the position there. And also, I wanted you to know that when they asked why, ah, you left the University, I told them that there was a major change in the organization and that you and others had, um, a conflict with our new director and that that's why you moved on. And they asked if others had been unappointed or left at the same time you did, and I said, yes. So it sounded from the question and the way I answered it like I had responded to their concerns. And did just want you to know that I touched that base immediately when

⁶⁴ R.A. at 58 (Perkins Aff., ¶ 1).

⁶⁵ *Id.* at 65 (Klatt Aff., ¶ 4).

⁶⁶ *Id.* at 16 (Grundtner Vol. 1, 74-76).

⁶⁷ *Id.* at 7 (Grundtner Vol. 1, 17-18).

they called me on Friday. And so good luck in that search, and if you have other places you're applying and you expect me to get a call, please let Gayle know and I'll try to respond to them promptly. Hope you had a good Fourth of July and that your knees are doing good. Ah, bye now.⁶⁸

Grundtner's sole basis for contending that Vice President O'Brien made false and defamatory statements is this voice mail.⁶⁹

In her deposition, Vice President O'Brien expanded on the summary left on Grundtner's voice mail. With respect to the "conflict" issue, she had told the University of Northern Florida that there had been a difference of professional opinion with respect to the direction for CPPM.⁷⁰ Vice President O'Brien said it should not be a concern because there were "honest and professional differences."⁷¹ The University of Northern Florida asked whether Vice President O'Brien would hire Grundtner if she were in their position. Vice President O'Brien responded that she would.⁷²

The University of Northern Florida did not hire Grundtner. Grundtner does not know why he was not hired.⁷³

⁶⁸ Slovut Aff., Ex. L (transcription of voice mail message).

⁶⁹ R.A. at 7 (Grundtner Vol. 1, 19).

⁷⁰ *Id.* at 57 (O'Brien Vol. 2, 167-68).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 7-8 (Grundtner, Vol. 1, 20-22).

Vice President O'Brien did not speak to any other potential employers and Grundtner stopped providing her name as a reference after receiving the voice mail.⁷⁴

Argument

The trial court correctly granted the motion for summary judgment, dismissing all of Grundtner's claims—whistleblower and defamation against the University and interference with contract against Perkins. Summary judgment is proper where there are no issues of material fact in dispute and where determination of the applicable law will resolve the controversy.⁷⁵ Although the court must view the evidence presented in the light most favorable to the nonmoving party, summary judgment is proper when the nonmoving party fails to provide the court with specific facts indicating that there is a genuine issue of fact.⁷⁶

I. GRUNDTNER'S WHISTLEBLOWER CLAIM FAILS AS A MATTER OF LAW.

The trial court correctly dismissed Grundtner's whistleblower claim because the undisputed facts show, among other things, that Grundtner failed to engage in protected conduct. As the trial court recognized, Minnesota's whistleblower statute protects from retaliation an employee who, in good faith, "reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law."⁷⁷ Although an employee need

⁷⁴ R.A. at 56 (O'Brien Vol. 2, 165) and 20 (Grundtner Vol. 1, 151-152).

⁷⁵ See *Gaspord v. Washington County Planning Comm'n*, 252 N.W.2d 590 (Minn. 1977).

⁷⁶ See *Erickson v. Gen. United Life Ins. Co.*, 256 N.W.2d 255, 258-59 (Minn. 1977).

⁷⁷ Minn. Stat. § 181.932, subd. 1(a).

not be right that a violation has occurred—thus, the “suspected” component—the employee must, at a minimum, allege “facts that, if proven, would constitute a violation of law or rule adopted pursuant to law.”⁷⁸ Grundtner did not allege facts that, if true, would have been a violation of law.

Whistleblower claims are analyzed using the three-part *McDonnell Douglas* framework.⁷⁹ First, to establish the prima facie case, the employee must show (1) statutorily protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two.⁸⁰ Once a prima facie case is established, the employer has the burden of production to show a legitimate, nondiscriminatory reason for the discharge.⁸¹ Finally, the employee may still prevail by demonstrating that the articulated reasons were pretextual.⁸² Grundtner’s claim fails both because he cannot establish a prima facie case and because, even if he could, he cannot meet his burden to show that the University’s stated reasons were actually a pretext for illegal retaliation.

⁷⁸ *Abraham v. County of Hennepin*, 639 N.W.2d 342, 355 (Minn. 2002) (citing *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 204 (Minn. 2000)); Minn. Stat. § 181.932, subd. 1(a).

⁷⁹ See *Hubbard v. United Press Int’l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)); see also *Obst v. Microtron, Inc.*, 588 N.W.2d 550, 554 (Minn. Ct. App. 1999), *aff’d*, 614 N.W.2d 196 (Minn. 2000).

⁸⁰ *Hubbard*, 330 N.W.2d at 444; *Rothmeier v. Inv. Advisers, Inc.*, 556 N.W.2d 590, 592 (Minn. Ct. App. 1996) (applying standard to whistleblower case); *Cox v. Crown CoCo, Inc.*, 544 N.W.2d 490, 496 (Minn. Ct. App. 1996).

⁸¹ *Hubbard*, 330 N.W.2d at 445.

⁸² *Id.*

A. GRUNDTNER CANNOT ESTABLISH A PRIMA FACIE CASE.

Grundtner cannot establish a prima facie case. First, he cannot show that he engaged in any protected conduct. He did not report any illegal conduct and he did not refuse an order to engage in illegal conduct.⁸³ Second, Grundtner cannot show causation between any purported report and any adverse employment action.

1. GRUNDTNER DID NOT ENGAGE IN PROTECTED CONDUCT.

a. AS ALLEGED AND IN FACT, THE UNIVERSITY DID NOTHING ILLEGAL.

Minnesota's whistleblower statute protects an employee who reports a "violation or suspected violation of any federal or state law or rule adopted pursuant to law."⁸⁴ The Minnesota Supreme Court in *Abraham* held that an employee must allege "facts that, if proven, would constitute a violation of law or rule adopted pursuant to law."⁸⁵ This

⁸³ Although not argued to the trial court, Grundtner includes a single sentence in his brief alleging that he "participated in the auditor's investigation, triggering the protections of Section B of the Whistleblower Statute." A.B. at 30. Subdivision 1(b) of the whistleblower statute applies when "the employee is requested by a public body or office to participate in an investigation, hearing, [or] inquiry." It does not apply where the employee makes a report that results in an investigation. See *Bersch v. Rgnonti & Assoc. Inc.*, 584 N.W.2d 783, 787 (Minn. Ct. App. 1998) (Subdivision 1(b) "applies only when a third-party requests an employee's participation in an investigation and cannot apply to claims arising from an employee's unilateral actions.") There was no investigation at the time Grundtner went to attorney Martell and then to the audit department. It was only after Grundtner went to the audit department that his complaints were investigated—with no further participation by Grundtner. Here, there simply was no third-party request by a public body, and there was no ongoing investigation. Subdivision 1(b) does not apply to this case.

⁸⁴ Minn. Stat. § 181.932, subd. 1(a).

⁸⁵ *Abraham*, 639 N.W.2d at 355 (citing *Obst*, 614 N.W.2d at 204).

means, as applied by the Minnesota federal district court in *Petroskey*, that it is not enough for an employee to allege that illegal conduct was simply proposed or considered.⁸⁶ The federal district court analyzed the plain language of the statute and Minnesota case law and concluded that the whistleblower statute has no application where an employer decides not to follow an otherwise illegal path.⁸⁷

Every Minnesota case considering the whistleblower statute is consistent with the Minnesota Supreme Court's holding in *Abraham* as well as the federal district court's reasoning in *Petroskey*. In other words, there is only a finding of liability if the employee reported facts that, if true, would amount to a violation of law. Examples of these cases include the following:

- *Gee v. Minnesota State Colls. and Univs.*, 700 N.W.2d 548, 556 (Minn. Ct. App. 2005): Claim failed in part because plaintiff failed to meet her burden to show evidence meeting elements of embezzlement or theft.
- *Burt v. Yanisch*, No. A03-1843, 2004 WL 1827866, at *4 (Minn. Ct. App. Aug. 17, 2004) (R.A. at 71-75): Claim failed because allegations of personal phone use by state employees, even if true, would not have amounted to a violation of the law.

⁸⁶ See *Petroskey v. Lommen, Nelson, Cole & Stageberg, P.A.*, 847 F. Supp. 1437, 1447-48 (D. Minn. 1994). Grundtner argues that *Petroskey* was "heavily dependent" on *Vonch v. Carlson Cos., Inc.*, 439 N.W.2d 406 (Minn. Ct. App. 1989) and that *Vonch* was overruled by *Abraham*. *Petroskey* does not rely upon or even cite *Vonch* for the proposition relevant to this case. See 847 F. Supp. at 1447-48.

⁸⁷ *Id.* at 1448 ("Notably, the statutory language speaks to conduct which has already transpired, and the fact that an avenue of action has been contemplated by the employer and rejected insulates that conduct from the whistleblower proscriptions.") (citing *Michaelson v. Minnesota Mining & Mfg. Co.*, 474 N.W.2d 174 (Minn. Ct. App. 1991)).

- *Salgy-Knapp v. Cirrus Design Corp.*, No. A03-654, 2004 WL 193140, at *2-3 (Minn. Ct. App. Feb. 3, 2004) (R.A. at 99-100): Claim failed because allegations, even if true, would not have amounted to a violation of federal regulations.
- *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 204 (Minn. 2000): Plaintiff's claim failed because his allegations, even if true, amounted to a violation of a control plan, but not the law.
- *Michaelson v. Minnesota Mining & Mfg. Co.*, 474 N.W.2d 174, 180 (Minn. Ct. App. 1991): Claim failed, in part, because employee did not report conduct, but rather provided legal analysis of proposed business decisions.

Grundtner, in his brief, alleges that he made two reports of “illegal activity” by the University. These reports, according to Grundtner, regarded (1) the consideration of a procurement method, and (2) “fiscal irregularities.”

Considered Procurement Method

With respect to the “report” regarding the considered procurement method, the relevant facts alleged are as follows:

- Grundtner was told that the University was going to re-bid a project and then, if necessary, negotiate with the low bidder.
- He (and others) stated that this would be illegal.
- The University did not re-bid the project and negotiate with the low bidder, but rather engaged in an alternative, permissible procurement method.

There can be no dispute that these allegations, if proven, would not amount to a violation of any law. It is not a violation of any law to consider action that might be illegal. And, as admitted by Grundtner, his objections were heeded and a proper procurement method was used. As the case law discussed above makes clear, the mere consideration of an act that might be a violation of the law does not trigger the protections of the whistleblower

statute. Thus, Grundtner's whistleblower claim as it relates to his objection to the proposed procurement practice fails.⁸⁸

Grundtner offers no case law supporting a contrary conclusion. He cites *Mahazu*, a 2002 unpublished opinion of this Court, where the issue was whether protection exists when an employee rather than the employer commits the illegal act.⁸⁹ This issue has no relevance to Grundtner's case—the employee in *Mahazu* did, in fact, allege illegal conduct. Grundtner also cites *Hedglin v. City of Wilmar* where the issue was whether the employee has to be correct that the conduct occurred.⁹⁰ The Court held that he did not, based on the word “suspected” in the statute. The holding is fully consistent with *Abraham*—the issue is whether the employee alleged facts that, if true, would have amounted to a violation of law.

The plain language of the statute and all of the cases applying the statute compel the conclusion that Grundtner did not engage in protected conduct when he objected to the contemplated procurement method.

⁸⁸ Although the University is not disputing, for purposes of summary judgment, that it would be precluded from negotiating with a low bidder, the University notes that this is not based on the state procurement statute. State statutes regarding competitive bidding generally do not apply to the University. See *Integrated Dev. Mfg. Co. v. Univ. of Minnesota*, 363 N.W.2d 845, 847 (Minn. Ct. App. 1985). The issue of whether or not negotiating with the low bidder would be acceptable is a matter of common law, arising from the Minnesota Supreme Court's decision in *Griswold v. Ramsey County*, 65 N.W.2d 647 (Minn. 1954). Given that the University did not follow this procurement method, it is immaterial whether the common law would preclude it.

⁸⁹ *Mahazu v. Becklund Home Health Care, Inc.*, No. C8-02-28, 2002 WL 1751280, *3 (Minn. Ct. App. July 30, 2002) (R.A. at 85-91).

⁹⁰ *Hedglin v. City of Wilmar*, 582 N.W.2d 897, 902 (Minn. 1998).

Fiscal Irregularities

Grundtner writes that he “made a second report when he went to the University auditor to complain about what he believed to be fiscal irregularities.”⁹¹ These complaints were the suspected release of a password by Perkins to allow another individual to approve projects; the discontinuance of a small contracts program; the lack of a posting for the position filled by Summerville; Denny having sign-off authority as a consultant; and Denny not having a college degree.⁹² Grundtner admitted in his deposition that he had no idea at the time he spoke to the audit department whether his concerns only implicated University policy or whether they somehow implicated state or federal law.⁹³ As before the trial court, Grundtner has failed to provide any guidance on how his allegations—such as failing to post a job position and discontinuing a contracts program—implicate violations of state or federal law. As the cases cited above make clear—such as *Obst* (not a report because allegations were of violation of a control plan, not of a law) and *Gee* (not a report because personal cell phone not a violation of law)—it

⁹¹ A.B. at 29.

⁹² R.A. at 13 (Grundtner Vol. 1, 62-64).

⁹³ *Id.* at 12 (Grundtner Vol. 1, 59). Grundtner also spoke to the auditor about his belief that Perkins had retaliated against him for objecting to the considered procurement method. Grundtner testified that he believes that the retaliation violated the law. Grundtner did not argue to the trial court and has not argued to this Court that this complaint of retaliation was protected conduct under the whistleblower statute. The University, in its initial memorandum to the trial court, showed that it was not protected conduct because the facts as alleged by Grundtner, even if true, would not have amounted to a violation of law. Grundtner did not respond to this argument and, as noted, has not addressed this issue in his brief. Thus, the University has only focused on the “fiscal irregularities.”

is Grundtner's burden to show his complaints implicated state or federal law and he cannot meet that burden here. Grundtner's complaint about these internal University matters was not protected conduct.

b. GRUNDTNER DID NOT REFUSE AN ORDER TO ENGAGE IN ILLEGAL ACTIVITY.

Grundtner also attempts to state a claim under subdivision 1(c) of the whistleblower statute, which prohibits retaliation against an employee who refuses an order to perform an act the employee believes to be illegal.⁹⁴ The claim fails initially for the simple reason that there was no order.⁹⁵ Grundtner testified that he inferred that he was being ordered to do something when Denny told him they had decided to re-bid the project and then, if necessary, negotiate with the low bidder. Grundtner admits, though, that Denny had no authority to direct him to do anything. He further admits that there was nothing for Grundtner to do at that point because bidding documents had not been

⁹⁴ Minn. Stat. § 181.932(c) states, in pertinent part:

Subdivision 1. Prohibited action. An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:

(c) the employee refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or regulation adopted pursuant to law, and the employee informs the employer that the order is being refused for that reason.

⁹⁵ *Harris v. Ostbye & Anderson, Inc.*, No. C1-98-1399, 1999 WL 43512, at *2 (Minn. Ct. App. Feb. 2, 1999) (affirming the district court's grant of summary judgment when "appellant testified that respondent never specifically ordered him to perform an action that appellant believed would violate the law.") (R.A. at 78-80).

prepared. Indeed, no action resulted from Grundtner's conversation with Denny other than a follow-up meeting to discuss what procurement method to use. The trial court correctly recognized this, stating that "there is no evidence to support a finding that Denny or the University ever ordered Grundtner to *perform an action* that he believed to be unlawful."⁹⁶ The facts are clear—there was no order.

Notably, even in cases where there has been an order, claims fail where it is apparent that the employer did not actually want the employee to do anything illegal. For example, the Eighth Circuit, applying Minnesota law, rejected a claim by a plaintiff who said he was ordered to illegally begin working on a project without Navy approval.⁹⁷ Affirming the district court's grant of summary judgment, the court stated "evidence with respect to the work authorization issue shows plaintiff brought the problem to the attention of his superiors and the work authorization was changed to his satisfaction. Management's response to his complaint takes this incident outside the whistleblower statute."⁹⁸ In so holding, the Eighth Circuit reasoned that "no request to perform [an] illegal act [exists] where management acknowledged and corrected the error the employee brought to his attention."⁹⁹

Grundtner cites the 1987 *Phipps* decision for the proposition that a whistleblower

⁹⁶ Appellant's Appendix at 11 (emphasis in original).

⁹⁷ *Gundacker v. Unisys Corp.*, 151 F.3d 842, 844 (8th Cir. 1998).

⁹⁸ *Id.* at 847 (internal quotations omitted).

⁹⁹ *Id.* at 847 (citing *Morrow v. Air Methods, Inc.*, 897 F. Supp. 418, 421 (D. Minn. 1995)).

claim based on a refusal to follow an order is viable even if the illegal act does not occur.¹⁰⁰ *Phipps*, though, does not speak to this issue. *Phipps* involved a common law wrongful discharge claim, not a statutory claim. A manager ordered an employee to pump leaded gasoline into a vehicle designated to accept only unleaded fuel—an act that would have violated the law. The employee refused and was fired. The Minnesota Supreme Court held that the refusal of an order to do something illegal gave rise to a claim for wrongful discharge. Grundtner states in his brief that “[t]he illegal act did not occur.”¹⁰¹ The *Phipps* decision makes no mention of whether or not another employee proceeded to pump leaded gasoline into the vehicle after the plaintiff’s firing. *Phipps* does make clear, though, that an actual order is needed to give rise to a claim.

Here, there was no order. Even if there had been an order (which there was not), the University’s conduct makes clear it did not intend for Grundtner or anyone to violate the law. Learning that the proposed action might be illegal, the University made sure procurement experts and legal counsel were involved to help determine an appropriate course. As the trial court correctly concluded, Grundtner’s claim fails.

2. GRUNTNER CANNOT SHOW CAUSATION.

Grundtner also fails to establish a prima facie case because he cannot show a causal link between his purported reports and any adverse employment action. The issue is whether Grundtner can satisfy his burden to produce evidence showing that his objection to the procurement method or his February 23 contact with the audit

¹⁰⁰ *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569, 571 (Minn. 1987).

¹⁰¹ A.B. at 30.

department caused the University to take an adverse employment action against him. The trial court did not reach this issue because of its conclusion that Grundtner did not engage in any protected conduct.

First, Grundtner cannot show that his objection to the procurement method caused the University to retaliate against him. The decision to transfer project management responsibilities from Grundtner to Summerville was made before Grundtner objected to the proposed procurement method. Perkins asked Summerville if he would like to take over the role in early to mid-October 2003. Grundtner made his objection sometime between October 28 and November 5, 2003. These undisputed facts show Grundtner's objection could not have caused the transfer of the project management responsibilities.

Also, as to the non-renewal of Grundtner's contract, he admits that the combination of the two departments was contemplated well before he made his objection to the procurement method—in fact, he says that as early as August 2003 the Director of Planning avoided him because he did not want the two departments to be combined.¹⁰² Perkins simply decided in January 2004 to go forward with the joining of the two departments—logically this meant that the lead positions for those two departments would, therefore, be eliminated. Grundtner cannot show causation and, therefore, his claim based on his objection to the procurement method fails for this additional reason.

Second, his February 2004 contact with the audit department is irrelevant because the decision-maker, Perkins, did not know that Grundtner contacted the audit department

¹⁰² R.A. at 28 (Grundtner Vol. 2, 29-30); *see also id.* at 58 (Perkins Aff., ¶¶ 3 & 4).

until after this litigation was started. Also, the decision to combine the two departments was made in January 2004, before Grundtner even made contact with the audit department. Grundtner acknowledges in his brief that “Defendant Perkins had already decided to terminate his contract in the November 2003 through early January 2004, time-frame.”¹⁰³ Thus, a decision to not renew his contract was made before Grundtner’s February 2004 contact with the audit department. Grundtner cannot satisfy his prima facie burden, and his whistleblower claim falls for this additional reason.

B. THE UNIVERSITY HAD A LEGITIMATE, NON-DISCRIMINATORY REASON FOR ITS EMPLOYMENT ACTION AND GRUNDTNER CANNOT SHOW PRETEXT.

1. THE UNIVERSITY HAD A LEGITIMATE, NON-DISCRIMINATORY REASON.

Grundtner’s claim would fail even if he could establish a prima facie case because the University had a legitimate, non-discriminatory reason for the employment actions at issue. To satisfy its burden under the *McDonnell Douglas* framework, an employer need only “introduce evidence which, *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action.”¹⁰⁴ Moreover, in reviewing

¹⁰³ A.B. at 14.

¹⁰⁴ *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993) (emphasis in original).

the employer's reason, deference is accorded to the employer's business decisions as courts do not sit as "super personnel departments" second-guessing management decisions.¹⁰⁵

Here, the University has presented evidence of a legitimate non-discriminatory reason for each of its actions. Both the transfer of project management responsibilities and the non-renewal of Grundtner's contract were part of a larger effort by Perkins to reorganize CPPM to make it more efficient and effective. He transferred project management responsibilities to an employee with thirty years of experience at the University, believing he could do a better job than had been done by Grundtner. Perkins combined the architect group and the planning group, believing that this would improve how the two groups worked together. These reasons satisfy the University's burden.

2. PLAINTIFF CANNOT SHOW PRETEXT.

Once the University satisfies its burden, the burden shifts back under *McDonnell Douglas* to Grundtner to produce specific facts that would demonstrate that the reasons articulated by the University are pretexts and the real motivating factor was illegal retaliation.¹⁰⁶ A plaintiff may establish pretext "either directly by persuading the Court a discriminatory reason likely motivated the employer or indirectly by showing that the

¹⁰⁵ See *Edmund v. MidAmerican Energy Co.*, 299 F.3d 679, 686 (8th Cir. 2002); *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1317 (8th Cir. 1996).

¹⁰⁶ See *Christopher v. Adam's Mark Hotels*, 137 F.3d 1069, 1072 (8th Cir. 1998) (citations omitted).

employer's proffered explanation is unworthy of credence."¹⁰⁷ Courts require more than just the fact that an adverse employment action occurs a short time after protected activity. For example, in a 2005 decision of this Court, the employee argued that the short length of time between his protective conduct and the adverse action was "the most decisive proof of retaliation."¹⁰⁸ The Court found that this was not enough because the evidence could not be disputed that the decision to terminate was actually made prior to the purported protected conduct.¹⁰⁹

Here, Grundtner cannot present facts showing that Perkins was motivated by something other than the pursuit of a better CPPM. Perkins's direction from the start was to reorganize CPPM to make it better. Grundtner knew as early as August 2003 (well before he ever objected to the procurement method) that his group and the planning group might be combined. Ultimately, that is precisely what happened—with the two unit head positions being eliminated. Grundtner's burden is to point to specific facts showing pretext and he simply cannot do so. For this additional independent reason, the whistleblower claim fails.

¹⁰⁷ *Hamblin v. Alliant TechSystems, Inc.*, 636 N.W.2d 150, 153 (Minn. Ct. App. 2002) (citation omitted).

¹⁰⁸ *McVicker v. Minnetonka Indep. Sch. Dist. No. 276*, No. A05-271, 2005 WL 3111936, at *3 (Minn. Ct. App. Nov. 22, 2005) (R.A. at 92-95).

¹⁰⁹ *Id.*

II. GRUNDTNER'S TORT CLAIMS FAIL FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR ADDITIONAL INDEPENDENT REASONS.

A. THE TRIAL COURT LACKED JURISDICTION TO REVIEW THE UNIVERSITY'S EMPLOYMENT DECISIONS; PLAINTIFF'S TORT CLAIMS EACH IMPLICATE A UNIVERSITY EMPLOYMENT DECISION AND WERE PROPERLY DISMISSED.

A petition for writ of certiorari review to the Court of Appeals pursuant to Minnesota Statute Section 606.01 is the exclusive means by which employees may challenge employment decisions of the University.¹¹⁰ The rule applies to all non-state public employees,¹¹¹ and has been followed in a variety of settings, including termination of a county department director,¹¹² a nursing home administrator,¹¹³ a teacher,¹¹⁴ and police reserve unit members.¹¹⁵ “Because it mandates nonintrusive and expedient judicial review, certiorari is compatible with the maintenance of fundamental separation of power

¹¹⁰ See, e.g., *Shaw v. Bd. of Regents of Univ. of Minnesota*, 594 N.W.2d 187, 191 (Minn. Ct. App. 1999) (holding that as general rule certiorari is “the only method available for [judicial] review of a university decision”).

Grundtner argues at pages 37 and 38 of his brief that the trial court had jurisdiction over this whistleblower claim. The University has never argued otherwise. The trial court properly exercised jurisdiction over Grundtner's statutory claim and dismissed it on other grounds.

¹¹¹ See, e.g., *Dokmo v. Indep. Sch. Dist. No. 11, Anoka-Hennepin*, 459 N.W.2d 671, 673 (Minn. 1990); *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992); *Willis v. County of Sherburne*, 555 N.W.2d 277, 282 (Minn. 1996).

¹¹² *Willis*, 555 N.W.2d at 282.

¹¹³ *Dietz*, 487 N.W.2d at 239.

¹¹⁴ *Dokmo*, 459 N.W.2d at 673.

¹¹⁵ *Mowry v. Young*, 565 N.W.2d 717, 720 (Minn. Ct. App. 1997).

principles and thus is a particularly appropriate method of limiting and coordinating judicial review.”¹¹⁶

This certiorari rule applies not only to claims for breach of contract, but to any common law claim that requires review of an employment decision. “[R]egardless [of how] the claim is cloaked,” the claim is limited to certiorari review when it “involve[s] any inquiry into the [agency’s] discretionary decision to terminate.”¹¹⁷ Applying this rule, the Minnesota Court of Appeals has found the following claims to be only reviewable by certiorari where they required review of employment decisions: intentional infliction of emotional distress and intentional interference with contract;¹¹⁸ misrepresentation;¹¹⁹ wrongful termination;¹²⁰ and defamation.¹²¹ Two University cases illustrate the breadth of the doctrine—the Court of Appeals’ 1998 *Kobluk* decision and 2002 *Stephens* decision.

¹¹⁶ *Id.*

¹¹⁷ *Willis*, 555 N.W.2d at 282.

¹¹⁸ *Narum v. Burrs*, No. C8-97-563, 1997 WL 526304, at *2 (Minn. Ct. App. Aug. 26, 1997) (dismissing claims against county supervisors because certiorari review was only avenue for review of termination decision) (R.A. at 96-97).

¹¹⁹ *Hansen v. Indep. Sch. Dist. 820*, No. C4-96-2476, 1997 WL 423567, at *2 (Minn. Ct. App. July 29, 1997) (R.A. at 76-77).

¹²⁰ *Bechtold v. City of Rosemount*, No. C3-94-2366, 1995 WL 507583, at *2-4 (Minn. Ct. App. Aug. 29, 1995) (R.A. at 67-70).

¹²¹ *Springer v. City of Marshall*, No. CX-94-81, 1994 WL 396324, at *2 (Minn. Ct. App. Aug. 2, 1994) (R.A. at 101-102).

In *Kobluk v. Regents of the University of Minnesota*, the Court of Appeals recognized that the “manner in which a claim is characterized does not change the jurisdictional analysis.”¹²² If the inquiry requires examination of internal University management processes or its quasi-judicial decision-making, certiorari jurisdiction is the only proper jurisdiction.¹²³ In *Kobluk*, the plaintiff was a University faculty member who, after being denied tenure, commenced an action that included tortious interference and breach of contract claims.¹²⁴ In finding the district court lacked jurisdiction over Kobluk’s claims, the Court of Appeals reasoned that his claims all arose “out of incidents surrounding” the tenure review process:

Kobluk’s contract claims and fraud claims *arise out of incidents surrounding* the tenure review process. Similarly, his defamation claims on appeal are too difficult to extract from the University’s internal management process The internal management of the University has been constitutionally placed in the hands of the regents alone. Because these claims cannot be examined without examining the University’s internal management process, the only manner of review is by writ of certiorari to this court.

....
*The district court does not have jurisdiction over Kobluk’s claims of breach of contract, tortious interference with contract, fraud and defamation because they arise out of the University’s internal management processes.*¹²⁵

¹²² See *Kobluk v. Regents of Univ. of Minnesota*, No. C8-97-2264, 1998 WL 297525, at *2-3 (Minn. Ct. App. June 9, 1998) (R.A. at 81-84).

¹²³ *Id.* at *3-4; see also *Willis*, 555 N.W. 2d at 282.

¹²⁴ See *Kobluk*, 1998 WL 297525, at *1 (R.A. at 81-84).

¹²⁵ *Kobluk*, 1998 WL 297525, at *3-4 (emphasis added) (citations omitted) (R.A. at 81-84).

In *Stephens*, the Court of Appeals upheld dismissal of the plaintiff's contract, contract-related, and common-law tort claims, stating that these claims could only be reviewed by writ of certiorari as they all arose out of the University's decision-making process.¹²⁶ The Court reasoned:

Regardless of how these claims are "cloaked," they all implicate an alleged breach of the employment contract and demand scrutiny of how the University exercised its administrative discretion.¹²⁷

As discussed below, Grundtner's tort claims are related to the non-renewal of his contract and would require inquiry into the University's decision.

1. INTERFERENCE WITH CONTRACT

Grundtner asserts a claim against Perkins for interference with contract, alleging that as a result of Perkins's actions, the University's obligations "to Plaintiff were not honored and Plaintiff's economic relationship with [the University] was disrupted and severed."¹²⁸ In other words, Perkins caused the University to not renew Grundtner's contract. Because Perkins was the University's decision-maker with regard to Grundtner's non-renewal, the trial court correctly concluded that "[l]itigation of this claim necessarily entails an inquiry into the University's decision to terminate

¹²⁶ *Stephens v. Bd. of Regents of the Univ. of Minnesota*, No. C3-01-1772, 2002 WL 1315809 (Minn. Ct. App. June 18, 2002) (R.A. at 103-106).

¹²⁷ *Stephens*, 2002 WL 1315809 at *2 (citing *Willis*, 555 N.W.2d at 282) (R.A. at 104).

¹²⁸ Complaint, ¶¶ 33 & 61 (Appellant's Appendix at 5 and 9).

Grundtner.”¹²⁹ As a result, the trial court dismissed the claim based on a lack of jurisdiction.

This Court considered this precise situation in the 1997 unpublished *Narum* decision.¹³⁰ In *Narum*, the plaintiff brought an interference with contract claim against her supervisor claiming that the supervisor had caused the termination of her employment relationship.¹³¹ The Court of Appeals concluded that “inquiry into the facts surrounding respondent’s claim would involve an inquiry into the county board’s discretionary decision to terminate respondent.”¹³²

Under the Minnesota Supreme Court’s decision in *Willis* and this Court’s decisions in cases such as *Kobluk*, *Stephens*, and *Narum*, the trial court lacked jurisdiction to inquire into the reasons for Grundtner’s non-renewal. Grundtner’s only avenue to challenge the basis for the non-renewal was by certiorari review by this Court.

2. DEFAMATION

Grundtner’s defamation claim involves the reference provided by Vice President O’Brien to the University of Northern Florida. Grundtner contends that the reasons she provided for the non-renewal of his contract were false. As the trial court correctly reasoned, “[l]itigation of this claim necessarily entails inquiry into the University’s

¹²⁹ *Narum v. Burrs*, No. C8-97-563, 1997 WL 526304 (Minn. Ct. App., Aug. 26, 1997) (R.A. at 96-97).

¹³⁰ *Id.*

¹³¹ *Id.* at *1.

¹³² *Id.* at *2.

decision to terminate Grundtner because it would require an examination into the conflict between Grundtner and Perkins and whether such conflict was the reason for Grundtner's termination."¹³³

This Court considered a similar situation in the 1994 unpublished *Springer* decision.¹³⁴ In *Springer*, the plaintiff brought a defamation claim alleging she was terminated based on false allegations and that she was forced to self-publish the termination and its basis.¹³⁵ This Court affirmed the district court's conclusion that it lacked jurisdiction over the claim because "a court would have to examine the circumstances underlying the alleged defamatory statements, i.e., the circumstances of Springer's discharge."¹³⁶

Grundtner cites two cases in support of jurisdiction, *Clark* and *Willis*.¹³⁷ These cases, though, do not differ from *Stephens*, *Kobluk* or *Springer*—all stand for the proposition that the district court lacks jurisdiction over tort claims that relate to employment decisions.

¹³³ Appellant's Appendix at 111.

¹³⁴ *Springer v. City of Marshall*, No. CX-94-81, 1994 WL 396324, at *2 (Minn. Ct. App. Aug. 29, 1994) (R.A. at 101-102).

¹³⁵ *Id.* at *1.

¹³⁶ *Id.* at *2.

¹³⁷ Grundtner also says that the trial court "did not address *Zahavy v. University of Minnesota*, 544 N.W.2d 32 (Minn. App. 1996)." The trial court's failure to rely upon *Zahavy* was appropriate given *Zahavy* was effectively overruled by *Shaw v. Board of Regents of University of Minnesota*, 594 N.W.2d 187, 191 (Minn. Ct. App. 1999).

In *Willis*, the Minnesota Supreme Court stated that “regardless [of how a] claim is cloaked,” the claim is limited to certiorari review when it “involve[s] any inquiry into the [agency’s] discretionary decision to terminate.”¹³⁸ The defamation claim in *Willis* was found to “not involve inquiry into the board’s discretionary decision to terminate the employee.” Unlike with Grundtner’s claim, the defamatory statements in *Willis* were not about the reasons for the termination; rather, they were found in letters that were sent to the decision-making board. Notably, the Minnesota Supreme Court in *Willis* did not hold that a trial court always has jurisdiction over defamation claims, it merely held that jurisdiction will lie when a tort claim does not require inquiry into the termination decision.

In *Clark*, a teacher brought a defamation claim, asserting “that the school principal told his students that he was on medical leave, that his teaching standards were inferior, and that his classes would be taught differently.”¹³⁹ This claim did not relate to the termination decision and, therefore, the trial court had jurisdiction to hear the claim.¹⁴⁰ In contrast, Grundtner’s defamation claim is directly related to the non-renewal of his contract.

¹³⁸ *Willis*, 555 N.W.2d at 282.

¹³⁹ *Clark v. Indep. Sch. Dist. No. 834*, 553 N.W.2d 443, 446 (Minn. Ct. App. 1996).

¹⁴⁰ *Id.*

The alleged defamatory statements in this case are about the reasons for the non-renewal and, therefore, would require inquiry into that reasoning. The trial court lacked jurisdiction over the defamation claim.

B. EACH OF GRUNDTNER'S TORT CLAIMS FAIL FOR ADDITIONAL, INDEPENDENT REASONS.

1. INTERFERENCE WITH CONTRACT

In addition to dismissing the claims on jurisdiction grounds, the trial court concluded that dismissal of Grundtner's interference with contract claims was also appropriate because of a lack of evidence showing that Perkins's actions were predominantly motivated by malice and bad faith.¹⁴¹

To establish a claim for tortious interference with contract, Grundtner must show: 1) the existence of a contract; 2) the alleged wrongdoer's knowledge of the contract; 3) intentional interference with the contract; 4) no justification for the interference; and 5) damages.¹⁴² Grundtner has an additional burden because his claim is against an employee of the party with whom he contracted.¹⁴³

Supervisors are generally not liable for employment decisions and are entitled to a qualified privilege in making employment decisions.¹⁴⁴ The privilege afforded

¹⁴¹ Appellant's Appendix at 112-113.

¹⁴² *Schumacher v. Ihrke*, 469 N.W.2d 329, 332 (Minn. Ct. App. 1991).

¹⁴³ *See Nordling v. N. States Power Co.*, 478 N.W.2d 498, 506 (Minn. 1991).

¹⁴⁴ *Id.*

supervisors is an important one and was developed because “allow[ing] the officer or agent to be sued and to be personally liable would chill corporate personnel from performing their duties and would be contrary to the limited liability accorded incorporation.”¹⁴⁵

The qualified privilege of a supervisor is only lost if his actions are “predominantly motivated by malice and bad faith, that is, by personal ill-will, spite, hostility, or a deliberate intent to harm the plaintiff employee.”¹⁴⁶ “The burden of proving actual malice is on the plaintiff.”¹⁴⁷ Actual malice, as opposed to simply malice, means that not only must the supervisor have acted “with the knowledge that [the act] is wrongful, [the supervisor must also act with] the desire to injure another or . . . an affirmative disregard of the known harm accruing to others as a result of the intentional act.”¹⁴⁸

Grundtner primarily relies on *Carter*, a 1997 Minnesota Court of Appeals decision.¹⁴⁹ In *Carter*, the chair of a public board called an emergency meeting to discuss whether to remove the plaintiff from his position as executive director of the board. At

¹⁴⁵ *Guercio v. Prod. Automation Corp.*, 664 N.W.2d 379, 389 (Minn. Ct. App. 2003).

¹⁴⁶ *Nordling*, 478 N.W.2d at 507.

¹⁴⁷ *Id.*

¹⁴⁸ *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 154 (Minn. Ct. App. 2001).

¹⁴⁹ *Carter v. Peace Officers Standards and Training Bd.*, 558 N.W.2d 267 (Minn. Ct. App. 1997).

this meeting, the chair told the board that the plaintiff had been invited to the meeting and that the plaintiff had agreed to resign from his position. Both of these statements, according to the plaintiff, were false. The board then voted to remove the plaintiff from the position, with several board members believing the plaintiff's absence indicated that the plaintiff had either agreed to resign or that he had no defense to the chair's stated reasons for the termination. In other words, the plaintiff produced evidence of specific false statements made by the chair to the decision-making board for the purpose of influencing the decision to terminate. This evidence of false statements to the decision-making board was sufficient to overcome summary judgment as to whether the chair was acting in bad faith or motivated by "personal ill-will, spite, hostility, or a deliberate intent to harm."¹⁵⁰

Grundtner has produced no evidence similar to that in *Carter*. Rather than pointing to any specific evidence, Grundtner says there is "ample evidence that Mr. Perkins demoted and then terminated him to prevent him from becoming aware of and preventing or reporting unlawful behavior on Mr. Perkins' part."¹⁵¹ There is no such evidence. Here, Perkins was acting within the scope of his duties when he decided to eliminate several positions in the reorganization of CPPM. The facts show that he was not motivated by malice, but by a desire to make CPPM more effective. The elimination of Grundtner's position was part of a process to improve CPPM, which included

¹⁵⁰ *Id.* at 273.

¹⁵¹ A.B. at 42.

combining two groups that had not been working effectively together. Even Grundtner does not claim that Perkins eliminated the Director of Planning position—or the other positions eliminated in the reorganization—out of spite toward Grundtner.¹⁵² And Grundtner admits that the idea of combining the architecture group and the planning group was raised before his alleged reporting took place. There is simply no showing of actual malice.

2. DEFAMATION

Although it dismissed the defamation claim on jurisdictional grounds, the trial court also analyzed the claim on the merits, determining that it would also fail due to qualified privilege. The only statements identified by Grundtner to be allegedly defamatory are those found in the voice mail left by Vice President Kathleen O'Brien.¹⁵³ Just as before the trial court, Grundtner has failed to address the issue of qualified privilege and has failed to identify any facts showing the actual malice necessary to overcome qualified privilege. This is an understandable failure given, among other things, Vice President O'Brien recommended Grundtner's hire to the potential employer. He has also failed to explain how the statements could be actionable, in any event, given their imprecise nature.

¹⁵² R.A. at 18 (Grundtner Vol. 1, 113).

¹⁵³ A.B. at 41. During discovery, Grundtner also alleged that a performance evaluation was defamatory. He did not argue this to the trial court, though, and has not argued this in his initial brief to this Court. Therefore, the University will not address the issue here. The University did address this performance evaluation in its Memorandum of Law in Support of Summary Judgment, at pages 42-43 (Appellant's Appendix at 96-97).

a. NO EVIDENCE OF ACTUAL MALICE.

A plaintiff suing in defamation is required to plead and prove that the defendant published (1) a statement of fact, (2) that was false, (3) that concerns the plaintiff, and (4) that tends to harm the plaintiff's reputation and to lower him or her in the estimation of the community.¹⁵⁴ A plaintiff has an additional burden of proving actual malice when the statement made is entitled to a qualified privilege.¹⁵⁵ A qualified privilege exists if a statement is made upon a proper occasion, from a proper motive, and is based upon reasonable or probable cause.¹⁵⁶

In order to defeat qualified privilege, a plaintiff must prove actual malice.¹⁵⁷ To do so,

a plaintiff must show the statement was made from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff. Malice cannot be implied from the statement itself or from the fact that the statement was false. Malice may be proved by extrinsic evidence of personal ill feeling, or by intrinsic evidence such as the exaggerated language of the libel, the character of the language used, the mode and extent of publication, and other matters in excess of the privilege.¹⁵⁸

¹⁵⁴ *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 886 (Minn. 1986).

¹⁵⁵ *Buchanan v. Minnesota State Dep't of Health*, 573 N.W.2d 733, 737 (Minn. Ct. App. 1998).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 738.

¹⁵⁸ *Id.* (internal quotations and citations omitted).

Employers are entitled to a qualified privilege when giving a reference “because the public interest is best served by encouraging accurate assessments of an employee’s performance.”¹⁵⁹ Therefore, Grundtner’s burden is to show that Vice President O’Brien acted with actual malice when she provided the job reference for him. Here, though, there is no evidence—either extrinsic or intrinsic—that she acted based on ill will or for the purpose of harming Grundtner.

As he did below, Grundtner has failed to identify any extrinsic evidence showing that Vice President O’Brien acted out of ill will toward him. To the contrary, the evidence shows that she agreed to assist him, tried to do so, recommended that he be hired and, as a courtesy, left him a voice mail summarizing her contact with the University of Northern Florida. These facts cannot be disputed and show that Vice President O’Brien did not act out of spite.

Grundtner also cannot show any intrinsic evidence of malice. Vice President O’Brien’s summary of her contact with the University of Northern Florida does not indicate she used any exaggerated language. Rather, it indicates that she was trying to paint Grundtner in a positive light.

Because there is no evidence Vice President O’Brien acted out of ill will or with the purpose of harming Grundtner, Grundtner cannot meet his burden to overcome the University’s qualified privilege. The trial court’s dismissal of the defamation count should be affirmed.

¹⁵⁹ *Hunt v. Univ. of Minnesota*, 465 N.W.2d 88, 92 (Minn. Ct. App. 1991).

b. NO DEFAMATORY STATEMENT.

The alleged defamatory statement is reflected in this portion of the voice mail:

And also, I wanted you to know that when they asked why, ah, you left the University, I told them that there was a major change in the organization and that you and others had, um, a conflict with our new director and that that's why you moved on.

The aspect that Grundtner contends to be defamatory is that he had a conflict with the new director. This statement, as a matter of law, is not actionable, in part, because it is not sufficiently precise.

Courts looking at terms and phrases similar in meaning to "had a conflict with" have determined them to not be actionable. For example, the Minnesota Court of Appeals determined that a statement calling the plaintiff a "troublemaker" was not actionable because it was too imprecise to be proven true or false:

The term "troublemaker" lacks precision and specificity. This phrase also fails to suggest verifiable false facts about McGrath. Finally, the ambiguity of the term "troublemaker" prevents any underlying facts from being inferred from this phrase. Accordingly, the phrase "troublemaker" is not actionable because it is constitutionally protected.¹⁶⁰

Similarly, the United States District Court for the District of Minnesota rejected claims based on statements that the plaintiff was "rude" and "hard to work with" because they were too imprecise to be proven true or false.¹⁶¹ These terms are similar in meaning, and in ambiguity, to the statement that Grundtner had a conflict with management. Thus,

¹⁶⁰ *McGrath v. TCF Bank Sav., FSB*, 502 N.W.2d 801, 808 (Minn. Ct. App. 1993).

¹⁶¹ *Schibursky v. Int'l Bus. Machs. Corp.*, 820 F. Supp. 1169, 1181-82 (D. Minn. 1993).

dismissal would have been appropriate on the additional ground that Vice President O'Brien's statements were too imprecise to form the basis of a defamation action.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WITH RESPECT TO CERTAIN PRIVILEGED DOCUMENTS.

Grundtner, without authorization, took confidential documents with him when he left the University. These documents were protected by attorney-client privilege and the work-product doctrine. After Grundtner refused to return the documents, the University brought a motion for a protective order to compel Grundtner to return the documents. The trial court, ruling from the bench, found that the documents were protected by attorney-client privilege and the work product doctrine and ordered Grundtner to return them to the University. Grundtner challenges that decision.

Grundtner's burden is to show a clear abuse of discretion. "Absent a clear abuse of discretion, a district court's decision regarding discovery, including granting protective orders, will not be disturbed by a reviewing court."¹⁶² Grundtner has not satisfied his burden to show that the trial court abused its discretion.

A. ATTORNEY-CLIENT PRIVILEGED DOCUMENTS

The documents at issue did not present the trial court with a difficult decision. Three of the four privileged documents were memoranda from University counsel to

¹⁶² *Urban ex rel Urban v. Am. Legion Post 184*, 695 N.W.2d 153, 162 (Minn. Ct. App. 2005) (citation omitted). See also *Montgomery Ward & Co. v. County of Hennepin*, 450 N.W.2d 299, 305-06 (Minn. 1990) (stating that appellate court reviews district court discovery decisions under an abuse of discretion standard.); *Erickson v. MacArthur*, 414 N.W.2d 406, 407 (Minn. 1987) ("The trial court has considerable discretion in granting or denying discovery requests.")

CPPM administrators analyzing the application of the law to specific facts and providing legal advice. The fourth document was a draft claims document sent by a University attorney to CPPM administrators outlining legal claims for breach of contract to be asserted by the University against an architect, specifying the damages for each claim.

Grundtner cannot satisfy his burden to show that the trial court abused its discretion in determining that the documents in question were privileged. Grundtner's arguments in his brief—the same as presented to the trial court—show that he has no basis for arguing an abuse of discretion.

First, Grundtner states that the documents were not “created in, or in anticipation of litigation.”¹⁶³ This proposition is irrelevant. Attorney-client privilege does not depend on litigation or the anticipation of litigation.¹⁶⁴

Second, Grundtner argues that the documents are “educational in nature,” and, therefore, not privileged. There is no such exception to attorney-client privilege. Any advice from an attorney to a client could be described as having an educational component. An essential purpose of advice is to educate a client about the law and provide advice based on the law. Plaintiff's comparison of the subject memoranda to sexual harassment policies is not persuasive. The memoranda at issue analyze case law, statutes, and contract provisions and provide advice based on that analysis. This is the

¹⁶³ A.B. at 47.

¹⁶⁴ See, e.g., *Brown v. Saint Paul City Ry. Co.*, 62 N.W.2d 688, 700 (1954) (stating elements of attorney-client privilege—none of which reference ongoing or anticipated litigation).

essence of attorney-client privilege. A sexual harassment policy or employee handbook describes or details company policy to employees as a whole. There is no comparison.

Third, Grundtner argues that even if privilege might apply, it does not apply here because the privileged documents relate to his lawsuit: “[t]he rule Mr. Grundtner was personally told to follow is germane to this case and, even if attorney-client privileges otherwise might apply, it does not apply to his case which revolves around being fired for insisting the rules he was instructed on be followed.”¹⁶⁵ This argument—that a whistleblower claim negates attorney-client privilege—is without any basis in law and directly contradicts the plain the language of the whistleblower statute. The statute expressly preserves privilege:

This section does not permit disclosures that would violate federal or state law or diminish or impair the rights of any person to the continued protection of confidentiality of communications provided by common law.¹⁶⁶

Plaintiff cannot pierce attorney-client privilege by claiming that the communications are relevant to his claim.

The trial court did not abuse its discretion in rejecting Grundtner’s arguments and concluding that the documents in question were subject to attorney-client privilege.

B. WORK PRODUCT PROTECTED DOCUMENTS

The trial court correctly concluded that two documents at issue were protected by the work-product doctrine. Under Rule 26(c) of the Minnesota Rules of Civil Procedure,

¹⁶⁵ A.B. at 48.

¹⁶⁶ Minn. Stat. § 181.932, subd. 5 (2004).

documents “prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including the other party’s . . . consultant)” are protected work product. The documents here are from University counsel to an expert regarding potential liability of a third party.

Grundtner provides no basis to conclude that the trial court abused its discretion. The documents at issue on their face clearly indicate that they were created so the University could decide whether an architect/engineer was liable for changes. They were requested by attorneys for the University. In contrast, the documents in *McCoo v. Denny’s, Inc.*, a case relied upon by plaintiff, were handwritten witness statements taken by a corporate representative.¹⁶⁷ These did not have the same indicia as the documents at issue with respect to the fact that litigation was anticipated.

Plaintiff provides a block quote from *Lewis v. UNUM Corp. Severance Plan*, but leaves out key language.¹⁶⁸ The Kansas federal district court stated that “[t]he Court looks to the primary motivating purpose behind the creation of the document to determine whether it constitutes work product.”¹⁶⁹ The motivating purpose behind the subject documents is apparent—University counsel was determining whether an architect/engineer was liable for certain losses. In other words, University counsel was determining whether litigation would be appropriate.

¹⁶⁷ *McCoo v. Denny’s, Inc.*, 192 F.R.D. 675, 683 (D. Kan. 2000).

¹⁶⁸ *Lewis v. UNUM Corp. Severance Plan*, 203 F.R.D. 615 (D. Kan. 2001).

¹⁶⁹ *Id.* at 623.

The United States District Court for the District of Minnesota has articulated the test to determine whether documents are work product as follows:

The test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.¹⁷⁰

Looking at the nature of these documents—who they are to (University counsel), who they are from (an expert), and what they are about (who is responsible for certain costs)—the only conclusion is that they were obtained because of the prospect of litigation. The trial court was within its discretion in reaching this conclusion.

Finally, Grundtner has failed to provide any basis for how he was prejudiced by being ordered to return any of the documents. The two reports protected by the work product doctrine have absolutely no connection to this litigation, and Grundtner has not alleged otherwise. The documents protected by attorney-client privilege also would have no impact on summary judgment.

Conclusion

The undisputed facts show that Grundtner lost his job because the University Architect position was eliminated, along with several other positions, as part of a significant reorganization. There is no evidence to support Grundtner's claim that his position was eliminated in retaliation for any protected conduct or out of spite. Defendants University of Minnesota and Michael Perkins respectfully request the trial court be affirmed.

¹⁷⁰ *Beiter Co. v. Blomquist*, 156 F.R.D. 173, 180 (D. Minn. 1994).

Dated: September 5, 2006

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FORM 132. CERTIFICATION OF BRIEF LENGTH

STATE OF MINNESOTA
IN COURT OF APPEALS

JOHN GRUNDTNER,

Appellant,

CERTIFICATION OF BRIEF LENGTH

vs.

UNIVERSITY OF MINNESOTA
AND MICHAEL PERKINS,

APPELLATE COURT CASE NO. A06-1137

Respondents.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3. The length of this brief is 1345 lines and 12376 words. This brief was prepared using in Microsoft Word 2003 using a 13 point font.

DATED: September 1, 2006

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SIGNATURE

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) (with amendments effective July 1, 2007).