

NO. A07-1353

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State of Minnesota  
*In Supreme Court*

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LeRoy Bahr,

*Appellant,*

v.

Boise Cascade Corporation aka  
Boise Paper Cascade Corporation,  
Stacy Rasmussen and Eural Dobbs,

*Respondents.*

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**RESPONDENTS' BRIEF**

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## ISSUE PRESENTED

Whether the Minnesota Supreme Court should affirm the decision of the Minnesota Court of Appeals that the evidence Appellant construed as malice was insufficient to meet his burden of proof to establish a jury question as a matter of law.

**The Court of Appeals reversed the district court's denial of Respondents' motions for summary judgment and JMOL/JNOV.**

- Frankson v. Design Space Int'l, 394 N.W.2d 140 (Minn. 1986).
- Harvet v. Unity Medical Center, Inc., 428 N.W.2d 574 (Minn. Ct. App. 1998).
- Rudebeck v. Paulson, 612 N.W.2d 450 (Minn. Ct. App. 2000).
- El Deeb v. Univ. of Minn., 60 F.3d 423 (8th Cir.1995).

## STATEMENT OF THE CASE

On or about October 18, 2001, Respondent Stacey Rasmussen ("Rasmussen") contacted his supervisor Eural Dobbs<sup>1</sup> ("Dobbs") to report that Appellant LeRoy Bahr ("Appellant"), Rasmussen's coworker, had confronted him just moments before in a hostile and threatening manner. Appellant, Dobbs and Rasmussen all worked for Respondent Boise Cascade Corporation ("Boise"). Rasmussen reported that he felt harassed and could no longer continue in his job. Dobbs, who was also Appellant's supervisor, immediately telephoned Boise's Human Resources Department to request assistance. Dobbs was directed to take a statement from Rasmussen and report his findings. Dobbs did so and after reconvening with the Human Resources Department, a decision was made by Barb Johnson ("Johnson"), Boise's Human Resources coordinator, to diffuse what she believed was a potentially volatile situation and send Appellant, who

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<sup>1</sup> Dobbs is Rasmussen's uncle (by marriage) and was a Defendant in the underlying lawsuit. The jury found no liability as to Dobbs and he is therefore not a party to these appellate proceedings.

appeared to be the aggressor, home pending an investigation. Consistent with Johnson's decision and instruction, Dobbs escorted Appellant from the mill and Boise immediately launched an investigation.

Over the course of the next two weeks, Boise interviewed Rasmussen and Appellant several times. Boise also interviewed Rasmussen and Appellant's coworkers when the investigation revealed issues in addition to the confrontation. Following these interviews, Boise found that Appellant's conduct violated the company policy prohibiting workplace harassment (the "Harassment Policy") and it imposed discipline. Through the grievance process and following months of discussions with Appellant and his union representative, and further considering that Appellant and Rasmussen continued to work together without incident for more than a year, Boise dropped its formal discipline. Boise made Appellant aware that harassment would not be tolerated and he indicated he understood the Harassment Policy. Both Rasmussen and Appellant continue to work at Boise to this day.

On September 16, 2003, almost two years after these events, Appellant filed a lawsuit in Koochiching County District Court against Boise, Rasmussen, and Dobbs second guessing Boise's investigation and contending that something that occurred during the investigation constituted defamation per se. (R.App. 001-006). Following discovery, Respondents filed summary judgment motions on July 27, 2006, and oral argument was held on August 28. (Id. at 007-008; Tr. 2-33, R.App. 024-055). In their motions, Respondents argued *inter alia* that a qualified privilege attached to

communications in furtherance of Boise's investigation and that Appellant's offerings of malice were contrary to law, mere speculation and conjecture, and at best a mere alternative theory to explain the actions taken by Boise and Rasmussen. As such, Respondents alleged that Appellant's allegations were insufficient to defeat the privilege as a matter of law. On January 8, 2007, more than 130 days after taking the motion under advisement and a week before trial, the district court filed a one-page order denying the motions without a memorandum. (Id. at 009).<sup>2</sup>

The matter proceeded to trial before the Honorable Charles H. LeDuc II on January 16. After Appellant rested, Respondents brought a directed verdict motion reasserting the legal arguments previously addressed in their summary judgment motions. (Tr. 478-532, R.App. 134-188). As before, the district court summarily denied the motion without submitting a memorandum or setting forth its reasons on the record. (Id. at 531, R.App. 187). After resting their case, Respondents renewed their motion for a directed verdict. (Id. at 642-658, R.App. 215-231). Once again, however, the district court denied the motion. (Id.). Although the district court ruled that Respondents were entitled to a qualified privilege, it apparently determined that Appellant had submitted sufficient evidence of malice to allow the issue to go to the jury. (Id. at 653, R.App. 226).

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<sup>2</sup> The district court's order suggests the existence of an appended memorandum of law. However, no memorandum was attached. Respondents' counsel contacted the Koochiching County Court Administrator to request a copy of the memorandum but was informed that no memorandum was or has been subsequently provided to the Court Administrator for processing.

On January 22, 2007, the trial court entered an order for judgment consistent with the special verdict form the jury returned a few days earlier on which it found that Boise and Rasmussen made statements constituting defamation per se and that these statements were made with malice. (R.App. 010-016). The jury awarded Appellant damages of \$27,200 against Boise and \$1,000 against Rasmussen. (Id. at 012-013). However, the jury determined that Dobbs made no statements constituting defamation per se and subsequently awarded Appellant no damages against him. (Id. at 013-014).

On February 21, 2007, Rasmussen and Boise filed a motion for judgment notwithstanding the verdict, contending that the jury's decision was manifestly contrary to the evidence and the law. (Id. at 017-018). Oral argument was held on March 22, 2007. (Tr. 733-43, R.App. 232-242). On May 14, 2007, the district court issued an order denying the motion once again without a memorandum or written reasons and entered final judgment, along with interest, costs and disbursements of \$8,515.70. (R.App. 019-021).

Thereafter, Rasmussen and Boise filed a Notice of Appeal with the Court of Appeals. (Id. at 022-023). On August 5, 2008, The Court of Appeals issued an unpublished decision reversing the trial court. (App. 43-54).<sup>3</sup> The Court of Appeals held that the jury's finding of malice was contrary to the evidence and that Appellant's claim of defamation per se was barred by the qualified privilege. (Id. at 53-54). Accordingly,

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<sup>3</sup> All references to App. \_\_\_\_\_, refer to Appellant's Appendix submitted in conjunction with the brief he filed on November 20, 2008.

the Court of Appeals concluded that Boise and Rasmussen were entitled to JMOL. (Id. at 54).

Appellant then submitted a petition for review by the Minnesota Supreme Court. By its Order dated October 21, 2008, the Minnesota Supreme Court granted review.

### **STATEMENT OF THE FACTS**

#### **The Parties**

Appellant began his employment at the Boise mill in International Falls 40 years ago and he is currently employed as a stores keeper. (Tr. 95-96, 205, R.App. 056-057).<sup>4</sup> Dobbs began working at the Boise mill in 1970. (Id. at 414, R.App. 111). Dobbs took the position of stores keeper in 1973 and stayed in that position until 1998 when he became the superintendent of stores. (Id.). Rasmussen has worked at the mill for 10 years and is still employed at Boise. (Id. at 615, R.App. 205). While superintendent of stores, Dobbs was Appellant and Rasmussen's supervisor. (Id. at 96, R.App. 056). Dobbs ceased working for Boise in December 2004. (Id. at 413, R.App. 110).

#### **Boise Cascade Corp.'s Harassment Policy**

On January 1, 1996, Boise distributed a corporate policy it adopted prohibiting workplace harassment. (R.App. 243-244, Ex. 51). The Harassment Policy provides:

Boise Cascade is committed to providing a professional work environment for its employees that is free from physical, psychological, or verbal

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<sup>4</sup> Although a juxtaposition of the facts set forth by Respondents and those offered by Appellant may on their surface appear to create factual disputes, and Respondents anticipate Appellant will go to great lengths to highlight any differences as such, this is truly a red herring as such disputes are superficial and there are no factual disputes concerning the evidence Appellant construes as malice.

harassment. In keeping this commitment, harassment of any employee by any supervisor, co-worker, vendor, client, or customer of Boise Cascade will not be tolerated. Harassment consists of unwelcome conduct that interferes unreasonably with an individual's work performance or that creates an intimidating, hostile, or offensive work environment.

...

The purpose of this policy is to ensure that harassing conduct, regardless of whether it rises to the level of harassment prohibited by law, will not be tolerated and that all Boise Cascade employees will be able to work in any environment free from harassment.

...

All Boise Cascade employees are responsible for helping to ensure that we avoid harassment. Any employee who believes that he or she is the object of harassment or who has knowledge of any harassment of any other employee should immediately report it to a supervisor, to the employee's location or division/staff organization's employee relations/human resources representative, or to corporate Equal Employment.

...

A prompt investigation will be conducted, and appropriate disciplinary action, up to and including termination, will be taken against any employee who is found to have been responsible for harassment or for knowingly permitting a hostile work environment to exist. Appropriate corrective action, including transfer or change in assignment, will also be taken. To the fullest extent practicable, the company will keep complaints and the terms of their resolution confidential.

(Id.).

Appellant is familiar with the Harassment Policy and has reviewed it from time to time. (Tr. 132-33, R.App. 059-060). Appellant admits he understands the purpose of the Harassment Policy and he absolutely agrees with it. (Id. at 197-98, R.App. 073-074).

Events of September 27, 2001

In the early morning of September 27, 2001, three of Rasmussen's coworkers, Elaine Asket, Judy Clark, Julie Kucera, informed him that Appellant was spreading a rumor that Rasmussen was having an extra-marital affair with another stores keeper identified as Robin Begg. (Id. at 442-45, R.App. 119-122). At his morning break, Rasmussen went to Begg's office to discuss the rumor. (Id. at 318, 447-48, R.App. 093, 123-124).

Upon learning of the rumor, Begg became visibly upset, picked up the telephone and made a call. (Id. at 448, R.App. 124). At the time, Rasmussen did not know who she was calling. (Id.). Begg asked the individual answering the call who started the rumor and then engaged in a brief discussion. (Id.). Rasmussen could not hear both sides of the conversation and shortly thereafter he left Begg's office and went back to work. (Id. at 448-49, R.App. 124-125). Begg did not share the answer to her telephone inquiry with Rasmussen. (Id. at 449, R.App. 125).

Later that day, Appellant, flanked by stores keepers Bobbi Bernath and Jared Pearson, confronted Rasmussen in the mill. (Id. at 450, 626-28, R.App. 126, 209-211). The trio questioned Rasmussen about Begg's telephone call. (Id. at 319-21, 451, 626-28, R.App. 094-096, 127, 209-211). The confrontation was such that all parties testified that Rasmussen became upset and attempted to flee the area. (Id.).

Rasmussen brought the confrontation to the attention of Tom Clarity. (Id. at 451, 628, R.App. 127, 211). Clarity was Dobbs' supervisor and is the manager of purchasing.

(Id. at 426-27, R.App. 209-210). Rasmussen explained the confrontation to Clarity and Clarity informed Rasmussen that he would like to set up a meeting with Rasmussen, Dobbs, and Boise's Human Resources Department manager Jack Strongman. (Id. at 452-53, R.App. 129-129). At the time, Dobbs was on vacation. (Id. at 426, 451, R.App. 112, 127). Clarity indicated he would speak with Dobbs to set up the meeting when he returned from vacation. (Id. at 452, R.App. 128). Rasmussen recalls that Clarity instructed him in the meantime not to speak with Appellant unless the conversation was work related.

The same day, Bernath and Pearson were standing at the bottom of a ramp near the mill's receiving room discussing a work plan. (Id. at 313-15, 337, R.App. 090-092, 097). In the course of their discussion, Bernath and Pearson witnessed Rasmussen walking up and down a ramp near them three or four times and they could tell Rasmussen was upset. (Id.). A few minutes later Rasmussen approached them and as he walked by stated that he had been assigned to help that "fat lazy fucker" or words to that effect. (Id. at 314, 337, R.App. 091, 097). Bernath and Pearson believed Rasmussen was referring to Appellant. (Id.).

Some days later, Appellant confronted Rasmussen again asking him about the meeting. (Id. at 453, R.App. 129). Rasmussen stated that he had been instructed not to speak with Appellant and that he was setting up a meeting with Boise's Human Resources Department about it. (Id. at 453-54, R.App. 129-130).

About a week later, Appellant confronted Rasmussen again, asking him whether he had set up a meeting yet. (Id. at 142-143, 454, R.App. 061-062, 130). Rasmussen replied that he was instructed not to speak to Appellant and that he would receive advance notification of the meeting. (Id. at 143, 454, R.App. 062, 130). Within the next few days, Appellant met with Strongman to see if Rasmussen had met with him to set up a meeting. (Id. at 144, R.App. 063). Strongman replied that Rasmussen had not met with him to set up any meeting.<sup>5</sup> (Id. at 144, 410, R.App. 063, 109).

### *Events of October 18, 2001*

On the morning of October 18, 2001, Appellant approached Rasmussen while Rasmussen was working and again asked him about the meeting he was setting up with Boise's Human Resources Department. (Id. at 145, 456, R.App. 064, 131). Appellant became very angry and said "Well, Stacy, you don't have to talk to me, but . . . you're gonna listen." (Id. at 145, R.App. 064). Appellant then accused Rasmussen of misrepresenting that he had set up a meeting with Jack Strongman to discuss department morale issues. (Id. at 145, 617, R.App. 064, 206). Appellant stated "I have caught you in a big god damn lie, and you're going to pay for it" or words to that effect. (Id. at 451, 617, R.App. 127, 206).

Rasmussen described the confrontation as threatening and stated that he was scared. (Id. at 617-18, R.App. 206-207). Rasmussen believed Appellant was angry with

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<sup>5</sup> Clarity went on vacation shortly after meeting with Rasmussen concerning the September 27 incident. No evidence indicated that he ever spoke with Dobbs or anyone else prior to the October 18 incident.

him. Rasmussen diffused the situation by backing away. (Id.) Following the confrontation, Rasmussen was visibly upset and was shaking. (Id. at 618, R.App. 207). Rasmussen immediately went to the nearest telephone, which was in Begg's office, and contacted Dobbs. (Id. at 287, 457, R.App. 086, 132). Begg described Rasmussen as very upset. (Id. at 293-94, R.App. 088-089). Rasmussen was shaking so much that Begg had to dial the telephone for him. (Id. at 618, R.App. 207).

Rasmussen related the incident to Dobbs, stating that Appellant was harassing him. (Id. at 457, 618, R.App. 132, 207). Rasmussen informed Dobbs that he felt threatened. (Id. at 619, R.App. 208). Dobbs recalls that Rasmussen informed him that he could no longer do his job. (Id.) Only Dobbs and Rasmussen were present during this conversation. (Id. at 618, R.App. 207). Dobbs instructed Rasmussen to go to the office in the east warehouse and wait for him. (Id. at 461, R.App. 133).

### **Boise Launches an Investigation**

Dobbs immediately contacted Barb Johnson in Boise's Human Resources Department. He was aware of the Harassment Policy, had been previously instructed to contact Johnson when any situation arose that would potentially involve discipline, and he understood that whenever a claim of harassment was alleged, the potential for discipline existed. (Id. at 240, 428, 535, R.App. 079, 114, 189).

Johnson instructed Dobbs to obtain a statement from Rasmussen. (Id. at 241, 429, 535, R.App. 080, 115, 189). Only Dobbs and Rasmussen were present in the room when Dobbs took the statement. (Id. at 579, R.App. 202). Rasmussen described the incident to

Dobbs, stating that he felt harassed and threatened by Appellant's words and conduct. (R.App. 245, Ex. 53). Dobbs took notes of the conversation. (Tr. 579, R.App. 202).

After obtaining a statement from Rasmussen, Dobbs reported to Johnson. (Id. at 241-42, 429, 535-36, R.App. 080-081, 115, 189-190). After reading the statement, Johnson informed Dobbs to send Appellant home because he appeared to be the aggressor and she felt it was important for safety reasons to separate Appellant and Rasmussen. (Id. at 536-37, 541, R.App. 190-191, 193). Johnson directed Dobbs to advise Appellant that he was being sent home pending an investigation. (Id. at 242, R.App. 081).

#### *Appellant is Escorted From the Mill*

Approximately a half hour after Appellant confronted Rasmussen, Dobbs approached Appellant to inform him that Boise had received a harassment complaint against him and that Appellant was going to be sent home pending an investigation. (Id. at 146-147, 430-31, R.App. 065-066, 116-117). Dobbs proceeded to escort Appellant from the building. (Id. at 147, R.App. 066). Appellant chose the route he wished to take in exiting the building. (Id. at 147, 581, R.App. 066, 203). After Appellant left the building, he immediately went to the union office to speak with Robert Walls, Appellant's union representative. (Id. at 147, 362, R.App. 066, 098). Walls then called Dobbs requesting information concerning the incident. (Id. at 149, 362, R.App. 067, 098). Dobbs did not share any information with Walls and said Boise was investigating the incident. (Id.).

**Boise's Investigation Continues**

Pursuant to the Harassment Policy, Boise had an obligation to investigate the harassment claim. In furtherance of that obligation, in the afternoon of October 18, Rasmussen and Begg were interviewed by Boise's Human Resources employee Betty Leen. (R.App. 247-248, Ex. 55; Tr. at 228, 287-88, R.App. 077, 086-087).

The next morning, Leen interviewed Appellant. (R.App. 249-250, Ex. 56; Tr. 150-51, 230, R.App. 068-069, 078). With Appellant was his union representative, Robert Walls. (Id. at 151, R.App. 069). Walls had Appellant's permission to attend the meeting and other meetings on Appellant's behalf. (Id. at 386-87, R.App. 103-104). Leen discussed the allegations with Appellant. (R.App. 249-250, Ex. 56).

During the next several days, Leen and Johnson interviewed several store room employees, including Appellant, Clark, Janis Koerbitz, Rasmussen, Pearson, Joe Schwartz, Bernath and Gary Underdahl. (R.App. 251-269, Ex. 57-65; Tr. 153, 250, 539-41, 544-45, R.App. 070, 082, 191-195). In the course of investigating the harassment claim and interviewing Appellant's coworkers, in addition to obtaining information regarding Rasmussen's harassment claim, several witnesses brought up allegations concerning the September 27 rumor involving Rasmussen and Begg, as well as comments Appellant had made to them concerning their work habits. (Id.; Tr. 251, 253, 541, R.App. 083-084, 193).

**Boise Initially Imposes Discipline on Appellant**

After investigating the claims against Appellant and interviewing witnesses, Boise officials felt the information it obtained supported Rasmussen's claim. (Tr. 557, R.App. 196). Boise then held a meeting with Appellant, Walls, Johnson and Dobbs. (Id. at 402-03, R.App. 105-106). At that meeting, Boise offered Appellant a Last Chance Agreement. (Id. at 154-55, R.App. 071-072). Dobbs read the Last Chance Agreement to Appellant because it was within his job description. (Id. at 581-82, R.App. 203-204). However, Dobbs had no involvement in determining the disciplinary action. (Id. at 437, R.App. 118). In addition to the Last Chance Agreement, Appellant was to be given some time off. (Id. at 155, R.App. 072). Appellant refused to sign the Last Chance Agreement. (Id. at 269, 370, R.App. 085, 099).

Thereafter, Boise continued its discussions with Appellant's union representative and a formal grievance was filed. (Id. at 372-73, 406-07, 635-37, R.App. 100-101, 107-108, 212-214). Following months of discussions between Boise and Appellant's union, Boise decided not to insist upon a Last Chance Agreement or a suspension of Appellant and concluded the investigation. (Id. at 373-374, 568, R.App. 101-102, 200). Boise believed it had made Appellant aware that harassment would not be tolerated and that Appellant understood the Harassment Policy. (Id. at 559, 568, R.App. 197, 200). Boise officials also believed that because there was no actual violence, no further disciplinary action was necessary. (Id. at 562-63, 635-37, R.App. 198-199, 212-214). Appellant was

immediately reinstated with pay and he and Rasmussen continue to work at the mill. (Id. at 570, 615, 637, R.App. 201, 205, 214).

### *Appellant Commences a Lawsuit*

On September 16, 2003, Appellant commenced an action against Boise, Rasmussen and Dobbs wherein he asserted a claim for defamation per se. (R.App. 001-006).

## ARGUMENT

### I. STANDARD OF REVIEW.

The standards for appellate review of a summary judgment denial and the denial of a motion for judgment as a matter of law (“JMOL”) or judgment notwithstanding the verdict (“JNOV”) are substantially the same. Hoover v. Norwest Private Mortg. Banking, 632 N.W.2d 534, 545 n.9 (Minn. 2001); Longbehn v. Schoenrock, 727 N.W.2d 153, 159 n. 1 (Minn. Ct. App. 2007) (stating that Minn.R.Civ.P. 50.02 characterizes a motion for JNOV as a motion for JMOL, but does not change the standard of review).

On appeal from a denial of summary judgment, the record is reviewed to determine whether a genuine issue of material fact exists and whether the law was correctly applied. Murphy v. Allina Health Sys., 668 N.W.2d 17, 20 (Minn. Ct. App. 2003).

“A motion for a directed verdict presents a question of law for the trial court: whether the evidence is sufficient to present a fact question for the jury to decide.” Clafin v. Commercial State Bank, 487 N.W.2d 242, 247 (Minn. Ct. App. 1992). A

directed verdict should be entered when the evidence is insufficient as a matter of law to create a question of fact. Border State Bank of Greenbush v. Bagley Livestock Exch., Inc., 690 N.W.2d 326, 331 (Minn. Ct. App. 2004). Not every conflict in evidence gives birth to a jury question. Snortland v. Olsonawski, 238 N.W.2d 215, 217 (Minn. 1976) (citing Hanson v. Homeland Ins. Co., 45 N.W.2d 637, 638 (1951)). On appeal from a directed verdict denial, an independent determination of whether the evidence was sufficient to present a fact question to the jury is made. Boone v. Martinez, 567 N.W.2d 508, 510 (Minn. 1997); Reinhardt v. Colton, 337 N.W.2d 88, 94 (Minn. 1983).

The appellate court's role in reviewing a denial of a motion for JNOV or JMOL is to determine whether the record contains competent evidence to sustain the verdict. Pouliot v. Fitzsimmons, 582 N.W.2d 221, 224 (Minn. 1998). JNOV or JMOL is proper when a jury's findings are contrary to the law. McGrath v. TCF Bank Sav., 502 N.W.2d 801 (Minn. Ct. App. 1993); Orwick v. Belshan, 304 Minn. 338, 343, 231 N.W.2d 90, 94 (1975) (the grant of judgment notwithstanding the verdict is appropriate when the evidence requires the change as a matter of law). A JNOV or JMOL motion is also properly granted when the jury verdict has no reasonable support in fact. Molenaar v. United Cattle Co., 553 N.W.2d 424 (Minn. Ct. App. 1996); Betz by Betz v. Nelson, 367 N.W.2d 922 (Minn. Ct. App. 1985) (a motion for JNOV should be granted when the verdict is perverse and palpably contrary to the evidence).

**II. THE MINNESOTA SUPREME COURT SHOULD AFFIRM BECAUSE THE DECISION BY THE COURT OF APPEALS IS CONSISTENT WITH ESTABLISHED LAW.**

Contrary to the position Appellant requests the Court to adopt, the Minnesota Supreme Court has consistently held for more than two decades that malice in a defamation case becomes a jury issue only if the plaintiff first meets his or her initial burden of proof that sufficient evidence of malice in fact exists.<sup>6</sup> Frankson v. Design Space Int'l, 394 N.W.2d 140, 144-45 (Minn. 1986) (reversing a jury verdict in favor of plaintiff on the basis that, as a matter of law, the plaintiff failed to present sufficient evidence of defendant's alleged malice to submit the issue to the jury); Bol v. Cole, 561 N.W.2d 143, 150 (Minn. 1997) (awarding summary judgment to the defendant on the basis that the plaintiff made an insufficient showing of malice as a matter of law). See

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<sup>6</sup> Appellant not only requests the Minnesota Supreme Court to adopt a new legal standard for malice that is contrary to more than 22 years of legal authority, he also cites to the wrong legal standard of malice. Indeed, two legal definitions of malice are applicable in defamation cases. The first, which does not apply here, was articulated in United States Supreme Court decision New York Times v. Sullivan, 376 U.S. 254 (1964). That standard defines actual malice as "a showing that the publisher of a defamatory statement acted with knowledge that the statement was false or with reckless disregard for the truth or falsity of the statement." 376 U.S. at 280. However, this definition only applies to defamation actions involving public figures. The second legal definition of malice, applicable to this matter, was articulated by the Minnesota Supreme Court in Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 481 n. 5 (Minn. 1985). It provides that malice is generally proved by a showing of ill will or improper motive for the publication of defamatory statements. In his brief, Appellant cites to Tuan J. Pham v. Thang Dinh Le, 2007 WL 2363853, an unpublished decision of the Minnesota Court of Appeals, to establish that malice is proved by evidence that the defendants engaged in "purposeful avoidance of the truth." However, the malice standard at issue in Tuan J. Pham is the one interpreting the New York Times v. Sullivan standard relating to defamation against public figures. This standard does not apply in this matter and should not be considered by the Court.

also Michaelson v. Minn. Mining & Manuf. Co., 479 N.W.2d 58 (Minn. 1992) (finding insufficient evidence of malice as a matter of law to create a jury question).

In Frankson, the plaintiff was employed as a major projects manager for DSI, a company in the business of selling and leasing mobile offices and other modular structures. Frankson, 394 N.W.2d at 140. His compensation arrangement included a base salary plus commissions. Id. at 140-41. A dispute arose concerning the commission structure on a particularly large transaction plaintiff completed. Id. at 142. DSI attempted to resolve the dispute by paying plaintiff approximately one-third of the amount to which he believed he was entitled. Id. Plaintiff did not accept the payment. Id. A few months later, company officials decided to terminate plaintiff. Id. The termination letter, which was handed to plaintiff, stated the reason for his termination as the “failure to increase business as a major projects representative.” Id.

Plaintiff sued for defamation, contending that the statement in his termination letter was false and was made with malice. At trial, plaintiff presented evidence of his past sales achievements and of the sales projects he had worked on that year. Id. Testimony was provided from DSI that plaintiff had no sales in the quarter prior to his termination and that others in his position had made sales during this period. Id. The jury determined that the statement was untrue and was made with malice. Id. It awarded plaintiff \$70,000 in compensatory damages and \$125,000 in punitive damages. Id.

DSI appealed the jury’s malice finding and the Minnesota Supreme Court reversed. The Minnesota Supreme Court found that neither the language used, nor the

extent of publication to those involved in the decision making process, along with a copy being deposited in plaintiff's personnel file, would have allowed for a conclusion that the statement was malicious. Id. at 145. Plaintiff countered that the termination was retaliation for his commission dispute. Id. The Court, however, held that there was direct evidence submitted that plaintiff's termination was motivated by his sales record. Id. As a result, the Court determined that plaintiff's theory that his termination resulted from his dispute with management was nothing more than another possible reason for the action taken. Id. As such, the Minnesota Supreme Court concluded that the totality of the evidence could not allow the finding of malice to remove the qualified privilege and that the issue should not have been submitted to the jury. Id.

Similar to Frankson, the Court of Appeals correctly recognized here that the evidence Appellant offered as malice was insufficient as a matter of law to create a jury issue and should not have been presented to the jury. As addressed in detail below, the evidence offered by Appellant was contrary to law, contrary to the undisputed facts, mere speculation and conjecture, and a mere alternative reason for the actions taken by Boise. Because Appellant failed to submit admissible probative evidence of malice, the decision by the Court of Appeals should be affirmed.

**A. Appellant Has The Burden of Proof to Establish Malice.**

Once a defendant in a defamation case establishes an entitlement to a qualified privilege, the burden shifts to the plaintiff to show that the defendant made the statements with actual malice. Lewis v. Equitable Life Assur. Soc'y., 389 N.W.2d 876, 890 (Minn.

1986); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 257 (Minn. 1980) (plaintiff has the burden to prove the defendant acted with malice). Accordingly, Appellant had the sole burden to prove the existence of malice and he had to do so as a condition precedent to submit the issue to the jury. The purpose in keeping the burden on the plaintiff reflects an intent by the courts to ensure that mere speculation and conjecture will not be improperly elevated to malice and improperly influence the jury.

To meet his burden, Appellant thus had to demonstrate to the trial court that at the time alleged specific statements were uttered, Respondents made them with “ill will and improper motives, or causelessly and wantonly for the purpose of injuring” him. Bauer v. State, 511 N.W.2d 447, 449 (Minn. 1994) (however, not every personality conflict wherein the parties trade insults suffices as malice). This may be proven either by extrinsic evidence of personal spite or ill feeling, or by intrinsic evidence such as “the exaggerated language of the liable, the character of the language used, [and] the mode and extent of publication.” Bol, 561 N.W.2d at 150.

Malice can not be implied from the alleged statement itself or from the fact that the statement was false. Buchanan v. State Dept. of Health, 573 N.W.2d 733, 738 (Minn. Ct. App. 1998) (holding that the issuance of correction orders drafted during the course of work duties and department’s refusal to renew a license is insufficient evidence of malice as a matter of law); Michaelson v. Minn. Mining & Manuf. Co., 474 N.W.2d 174, 182 (Minn. Ct. App. 1991), aff’d, 479 N.W.2d 58 (Minn. 1992) (holding that a letter from the

employer candidly addressing concerns about employee's job performance lacked evidence of malice as a matter of law).

Minnesota courts have repeatedly held that mere conclusory assertions of malice, allegations of malice based on speculation, and allegations unsupported by the evidence are insufficient to establish malice as a matter of law. Harvet v. Unity Medical Center, Inc., 428 N.W.2d 574, 579 (Minn. Ct. App. 1998) (holding allegations of malice based upon conjecture and speculation are insufficient to create a jury question); Watson v. Ceridian Corp., 2003 WL 23024525 (Minn. Ct. App., Dec. 30, 2003) (holding that allegations of malice unsupported by the evidence or that are based upon mere speculation are insufficient to meet a plaintiff's burden of proof as a matter of law)<sup>7</sup>; Bolton v. Department of Human Services, 527 N.W.2d 149, 156, *reversed in part on other grounds*, 540 N.W.2d 523 (Minn. 1995) (dismissal is mandatory where the alleged malice is based on mere conjecture and speculation); Wallin v. State Dept. of Corrections, 598 N.W.2d 393, 402, 403 (Minn. Ct. App. 1999) (a claim of malice will not defeat a qualified privilege as a matter of law in the absence of sufficient facts demonstrating the animosity of the adverse party; holding that circulation of plaintiff's suspension, discharge, and potential instability was not evidence of ill will as a matter of law).

Where the alleged malice is based upon communications or events occurring in the context of employment investigations, malice is typically absent unless there is evidence

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<sup>7</sup> A true and accurate copy of this decision is contained in Respondents' Addendum.

that the alleged defamer published the defamatory statements asserted to individuals not involved in the disciplinary action against the employee. Fahrman v. Fredd, 2002 WL 1467451 (Minn. Ct. App., July 1, 2002).<sup>8</sup> A disagreement concerning the factual accuracy of an investigation and the conclusions reached therefrom is not grounds for finding malice. Guzhagin v. State Farm Mut. Auto. Ins. Co., 566 F. Supp. 2d 962, (D. Minn. 2008) (citing Bol, 561 N.W.2d at 150).

Additionally, allegations that the individuals who made alleged defamatory statements and those involved in the investigation had a “clear vendetta” against the plaintiff and made exaggerated and untrue representations during the course of the investigation were insufficient to exhibit malice as a matter of law where the plaintiff admitted that the persons conducting the investigation were “just doing their job” and acknowledged there was no evidence that the investigation was conducted “in such a way as to intentionally harm him.” Rudebeck v. Paulson, 612 N.W.2d 450 (Minn. Ct. App. 2000). Unsubstantiated theories that an employer or other employees were “out to get” an employee are insufficient to establish malice as a matter of law. Martin v. Mesaba Holding, Inc., 2002 WL 1315467 (Minn. Ct. App., June 18, 2002).<sup>9</sup>

Further, “[w]hen the only evidence presented of actual malice is that it was an alternative reason for the defendant's action, and there is direct evidence that probable cause existed for the action taken, no jury question exists with respect to actual malice.”

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<sup>8</sup> A true and accurate copy of this decision is contained in Respondents’ Addendum.

<sup>9</sup> A true and accurate copy of this decision is contained in Respondents’ Addendum.

El Deeb v. Univ. of Minn., 60 F.3d 423, 427 (8th Cir.1995). See also Frankson, 394 N.W.2d at 144-45 (citing with approval cases holding that a plaintiff can not establish malice merely by claiming retaliation as a possible reason for the employer's action without offering any evidence justifying an inference of retaliation).

**B. The Record was Void of any Admissible Probative Evidence to Establish Malice as to Dobbs or to Impute Dobbs' Alleged Feelings to Others.**

Appellant spends much of his brief attempting to establish that his former coworker and supervisor Dobbs "harbored obvious ill will and a deep dislike" for him. As support for this argument, Appellant points to isolated disagreements he had with Dobbs concerning staffing issues and the interpretation of Boise policies. These incidents do not establish malice and no witness, including Appellant, testified about any malice concerning Dobbs. The jury also tellingly made no finding of malice as to Dobbs. Instead, Appellant merely presented evidence that Dobbs was sometimes a difficult person to communicate with and that Dobbs and Appellant occasionally had workplace disagreements. There is absolutely no evidence in the record that Dobbs singled Appellant out or treated him differently from any of the other employees he supervised. Although the evidence indicated that perhaps Dobbs' management style was unpopular with some of his subordinates, it was uncontrovered that he treated all of the employees

he supervised the same.<sup>10</sup> As a result, this evidence falls far short of Appellant's burden to prove malice.

Appellant also contends that Dobbs' involvement in the investigation served as a basis to establish malice that could be imputed to Boise. This contention is belied by both the undisputed facts and the law. First, it is uncontroverted that Dobbs had no role in determining whether Appellant would be subject to discipline upon concluding the investigation and that he was merely present to hand out the discipline in accordance with Boise policy. Tr. 581-82, R.App. 203-04. Second, and as mentioned above, the jury found that Dobbs made no defamatory statements so it is impossible for Appellant to establish that Dobbs made any such statements with malice. Third, the Court of Appeals correctly determined that as a matter of law, Dobbs' feelings could not be imputed to Boise's actions. See Karnes v. Milo Beauty and Barber Supply Co., 441 N.W.2d 565 (Minn. Ct. App. 1989) (evidence of ill will harbored by one employee can not be imputed to others). As in Karnes, the Court of Appeals recognized that Dobbs did not author any alleged defamatory statements and that precludes a basis for any such imputation.<sup>11</sup>

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<sup>10</sup> Moreover, contrary to Appellant's argument concerning the alleged interaction between Clayton Bahr and Dobbs, Respondents are unable to locate any legal authority establishing that an alleged "smug look" could ever constitute a basis to establish malice, and, even if it could, it is nonsensical for an alleged interaction between Clayton Bahr and Dobbs to serve as evidence of malice where the alleged defamatory statements concerned Appellant.

<sup>11</sup> Accordingly, Appellant's argument that a jury instruction concerning the agency relationship between Boise and its management-level employees could serve as a basis to impute Dobbs' alleged malice to Boise is entirely without merit.

Although Appellant has been very creative in his repeated attempts to manufacture malice allegations relating to Dobbs, the evidence presented constitutes mere conclusory assertions, speculation, and allegations unsupported by the evidence and the jury's findings. See Harvet, 428 N.W.2d at 579. Appellant's arguments also are contrary to law as allegations of malice concerning Dobbs can not be imputed to Boise. Accordingly, Appellant is unable to satisfy his burden to establish a jury question regarding malice as a matter of law.

C. **Appellant's Malice Allegations Relating to Boise Were Mere Efforts to Second Guess the Investigation and Such Claims are Contradicted by the Controlling Legal Authority.**

Appellant alleges that the Court of Appeals erred when it decided that the evidence he construed as malice relating to Boise was insufficient to overcome the qualified privilege. However, the evidence presented by Appellant was even more tenuous than the evidence he presented concerning Dobbs. Indeed, Appellant introduced absolutely no probative evidence that Boise harbored any ill will toward him, that Boise acted with improper motives in conducting its investigation, or that Boise acted without cause for the purpose of injuring him. In fact, Appellant continues to work for Boise and his seniority status has improved since the conclusion of the harassment investigation.

Additionally, Appellant introduced no evidence that Boise widely published the alleged defamatory statements to individuals who were not directly involved in the

investigation.<sup>12</sup> He also admitted that he understood that Boise had an obligation to investigate Rasmussen's harassment claim pursuant to its Harassment Policy and Appellant did not contradict that Boise Human Resources officials were simply doing their job. Although Appellant may disagree with the conclusions Boise reached, as described above, a disagreement concerning the factual accuracy of an investigation and the conclusions drawn has been rejected as a basis to find malice. See Guzhagin, 566 F. Supp. 2d at 962.

Accordingly, Appellant is resigned to attempt to establish malice by relying on assertions that Boise escorted him from the mill prior to completing its investigation, that Boise tentatively determined that Appellant would be disciplined prior to the completion of the investigation, and that Boise's investigation touched on issues in addition to the harassment claim.<sup>13</sup> Taken collectively, these allegations are nothing more than an attempt to play Monday morning quarterback by suggesting how Boise could have conducted the investigation differently. As a matter of law, these allegations are plainly speculation and conjecture by their nature. See Harvet, 428 N.W.2d at 579 (conjecture

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<sup>12</sup> Appellant suggests that an October 18, 2001, email sent by Boise Human Resources personnel to the mill guard station is suggestive of malice. However, the email simply states that Appellant was temporarily prohibited from entering mill property. Significantly, this email was in response to Rasmussen's initial harassment claim. It was not shared with any persons outside of Boise's Human Resources Department or the guard station and does not identify the reasons for precluding Appellant from entering mill property. Accordingly, Appellant's contention that it serves as evidence of malice is without merit.

<sup>13</sup> Appellant also contends in his introduction that a jury note to the trial court during deliberations evinces malice. However, this note is not part of the record and it would be improper for it to be considered as evidence by the Minnesota Supreme Court.

and speculation are insufficient to create a jury question on malice); El Deeb, 60 F.3d at 427 (“[w]hen the only evidence presented of actual malice is that it was an alternative reason for the defendant's action, and there is direct evidence that probable cause existed for the action taken, no jury question exists with respect to actual malice.”).

Additionally, and contrary to the conclusion Appellant requests the Minnesota Supreme Court to reach, there was no evidence in the record that Boise had made a final decision to discipline Appellant before he was allowed to tell his side of the story. Instead, Boise listened to all of the evidence presented and made a tentative decision based on what it heard from the witnesses. Barb Johnson’s testimony confirms that Boise was making a tentative decision based on the evidence it had when she met with Appellant on October 25, 2001. This is the reality of what occurs in workplace investigations and there is simply nothing wrong with Boise’s actions. In fact, Appellant was interviewed by Boise prior to October 25 and had every opportunity to tell his side of the story. Moreover, after the October 25 meeting with Appellant, Boise cooperated with and had ongoing discussions with the union, reevaluated the evidence, agreed to decrease the discipline, and ultimately agreed to reimburse Appellant for the three days during which he had been suspended.

Also, Appellant did not dispute that Boise’s Human Resources Department was faced with a situation where Johnson objectively believed it was important to remove him from the mill until the issue was sorted out because Rasmussen’s allegations reasonably presented a scenario where there was the potential for violence in the workplace. It

would not be difficult to imagine the liability Boise would have faced had it not removed Appellant from the premises and an additional altercation occurred during which Rasmussen or Appellant was injured.

Legally speaking, the evidence concerning Boise's tentative disciplinary decision can not serve as evidence of malice as a matter of law because Johnson's tentative determination did not occur contemporaneously with the publication or republication of any of the alleged defamatory statements. Stuempges stands for the proposition that the existence of malice is considered at the time the statement itself is made and that malice is not determined by post-statement evidence. This makes sense because a statement can not be made with malice if the malice alleged does not even occur until after that statement is made.

Further, Appellant contends that Boise's investigation into issues brought up by his coworkers relating to matters other than Rasmussen's harassment claim serves as evidence of malice. However, the Court of Appeals correctly rejected this argument as an employer has an important interest in protecting itself against employees whose conduct harms operations. McBride v. Sears, Roebuck & Co., 235 N.W.2d 371, 374 (1975).

In any event, the district court determined that all of Boise's decisions were supported by a proper purpose and reasonable cause such that they are entitled to qualified privilege as a matter of law. Appellant has not challenged this decision. Accordingly, it is both illogical and legally impossible that these same actions and decisions could reasonably be accepted by the district court as evidence of malice.

Finally, Appellant has argued throughout these proceedings that Boise was “out to get” him and that it took Rasmussen’s harassment claim as an opportunity to “injure him with a severe disciplinary action.” These arguments are also belied by the record in that Appellant is still employed by Boise and received no demotion or other status change as a result of the investigation. Additionally, allegations that persons involved in an investigation had a “clear vendetta” against the plaintiff and made exaggerated and untrue representations during the course of the investigation are insufficient to exhibit malice. Rudebeck, 612 N.W.2d at 450; Martin, 2002 WL 1315467 (unsubstantiated theories that an employer or other employees were “out to get” an employee are insufficient to establish malice as a matter of law).<sup>14</sup>

**D. The Record was Void of any Admissible Probative Evidence to Establish Malice as to Rasmussen.**

Appellant contends that the Court of Appeals ignored alleged evidence of malice concerning Rasmussen. This assertion is simply incorrect. The Court of Appeals did not ignore the evidence, it simply concluded that the allegations failed to constitute malice as a matter of law and were insufficient to meet Appellant’s burden of proof to create a jury issue.

Specifically, Appellant presented evidence that Rasmussen referred to him, although not in his presence, as a “fat, lazy fucker.” Appellant contends that Rasmussen made this comment with anger. However, even assuming Rasmussen was upset when he uttered the vulgar comment, the controlling legal authority is clear that a mere personality

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<sup>14</sup> A true and accurate copy of this decision is contained in Respondents’ Addendum.

conflict, “where the parties simply ... trade insults” does not suffice to establish malice. See Bauer, 511 N.W.2d at 449.

Additionally, consider the context in which the comment was made. According to the uncontested record, the isolated vulgarity was uttered weeks before the harassment incident. It was also made to two coworkers outside of Appellant’s presence. There is no legal authority suggesting that one simple incident of name calling can be elevated to malice, especially in light of the several witnesses in this matter who testified there is vulgarity and name calling at the mill all the time and no witness testified that he or she was offended by it or believed it to have malicious intent. Accordingly, the Court of Appeals appropriately rejected this evidence.

Appellant also contends that the Court of Appeals chose to ignore evidence of Rasmussen’s alleged exaggerations and fabrications concerning his encounters with Appellant. Once again, this argument is without merit as the Court of Appeals did not ignore the evidence; rather, as above, the Court of Appeals concluded that it did not suffice to establish malice as a matter of law. Indeed, the controlling legal authority is plain that malice can not be implied from the alleged statement itself or from the fact that a statement was false or exaggerated. Buchanan, 573 N.W.2d at 738; Bol, 561 N.W.2d at 150. Thus, even if Rasmussen was incorrect in his interpretation of the events or exaggerated their nature, this is not malice. Accordingly, the Minnesota Supreme Court should affirm.

**III. REVERSAL OF THE DECISION OF THE COURT OF APPEALS WOULD EFFECTIVELY EVISCERATE THE EXISTENCE OF THE QUALIFIED PRIVILEGE DOCTRINE.**

If the Court of Appeals' decision here is reversed, it would constitute a vast departure from the substantial body of legal authority relied upon by the trial courts (and cited in this brief) and the threshold of evidence necessary to create a jury issue concerning malice would effectively evaporate. This would cause uncertainty for the trial courts as any evidence suggestive of malice would likely suffice to create a jury issue, even if it merely rises to the level of speculation and conjecture. It would also all but preclude the trial courts from their role as gatekeepers to examine the evidence presented and determine whether the plaintiff met its burden of proof to establish malice. Indeed, if Appellant prevails, mere speculation and conjecture would be routinely argued to juries in defamation cases and even the most speculative allegations of malice would remove the trial courts' discretion and ability to dispose of defamation claims prior to or at trial.

However, the negative consequences looming over the trial courts pale in comparison to the problems Minnesota employers and their workforce would encounter if Appellant's malice standard is adopted. Specifically, the floodgates would open as employers would be unable to effectively perform investigations. Employers would be placed in the tenuous position of ignoring workplace incidents for fear of being exposed to defamation claims that would automatically be decided by juries. This result becomes especially problematic for the vast majority of Minnesota employers like Boise with policies requiring them to initiate investigations when harassment claims are asserted. It would further expose employers to potential liability from the victim of the harassment.

Additionally, employees would become reluctant to assert harassment claims or bring workplace issues to the attention of management. Indeed, such claims could be easily misconstrued as evidence of malice. Further, it is logical to conclude that persons subjected to workplace harassment could be further victimized by harassers as the mere report of harassment could subject the individual to a jury trial for defamation. This would have a “chilling” effect on the relationship between employers and employees and it would reverse many years of progress made in the creation of safe, healthy work environments. Such a result is unacceptable as a matter of public policy.

This case exemplifies the purpose of a qualified privilege and the establishment of an evidentiary standard that must be satisfied by the alleged subject of the defamatory statement prior to submitting the issue to the jury. Without such standards, all employer-initiated investigations could be easily challenged. Additionally, if juries are presented with all of the alleged “wrongs” committed by an employer without limitation (and through the eyes of the accused employee), their objectivity is tainted and the qualitative impact of trial evidence could be improperly diminished by a mountain of mere speculation presented. If Appellant’s standard becomes law, employees would be even permitted to introduce malice allegations not directly related to the alleged defamatory statements themselves, as the trial court erroneously did here. This would reduce the qualified privilege to really no privilege at all and it would likely eviscerate it entirely. Certainly this result is inconsistent with the notions of fairness and substantial justice.

IV. **THE COURT OF APPEALS PROPERLY PERFORMED ITS GATEKEEPER FUNCTION TO DETERMINE THE EVIDENCE PRESENTED WAS INSUFFICIENT TO ESTABLISH MALICE TO OVERCOME THE QUALIFIED PRIVILEGE.**

Appellant contends that the Court of Appeals failed to view the evidence in a light most favorable to him, ignored evidence favorable to him, and viewed the evidence in a light more favorable to Respondents. However, Appellant ignores the substantial body of legal authority that, as described above, simply renders the evidence he presented not indicative of malice as a matter of law. Additionally, Appellant ignores the legal authority establishing that once a qualified privilege attaches, the plaintiff bears the burden of proof to show the existence of malice.

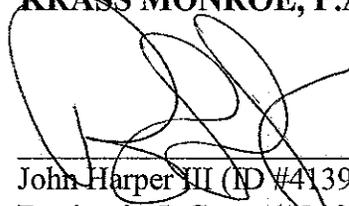
The Court of Appeals simply did what the trial court should have done: perform its gatekeeper function to determine whether the evidence was sufficient to create a jury issue. Unfortunately, the trial court bought into Appellant's throw-it-up-against-the-wall-and-see-what-sticks approach and it apparently thought it was wiser to make no decision at all. Although Appellant likely preferred the trial court's approach, he and the trial court are wrong. This case is not about whether the Court of Appeals viewed the evidence in the correct light; instead the issue is whether Appellant sustained his burden of proof to establish sufficient evidence of malice to create a jury issue. On the facts presented, and in light of the controlling legal authority, Appellant unquestionably fell far short of his burden. Accordingly, the Minnesota Supreme Court should affirm.

## CONCLUSION

In his brief, Appellant essentially offers a subjective and biased critique of Boise's investigation. While his 30,000-foot hindsight view of how Boise's investigation could have conducted it differently is interesting, it does nothing to assist in fact-finding. Regardless of Appellant's perspective on the investigation, Boise engaged in no malice when it transcribed what other employees said about Appellant and investigated their statements. As well, Boise certainly did not act maliciously when it attempted to discern the truth about the allegations and attempted to maintain a harassment-free work environment for its employees. In the end, there was simply no evidence of malice presented at trial relating to what Appellant asserted was defamatory. This is evident from even a cursory examination of his argument. Accordingly, Respondents Boise Cascade Corporation and Stacy Rasmussen respectfully request the Minnesota Supreme Court to affirm.

Dated: Dec 19, 2008

**KRASS MONROE, P.A.**



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STATE OF MINNESOTA

IN SUPREME COURT

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Case No. A07-1353

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LeRoy Bahr,

Appellant,

vs.

Boise Cascade Corporation aka Boise  
Paper Cascade Corporation, Stacy  
Rasmussen and Eural Dobbs,

Respondents.

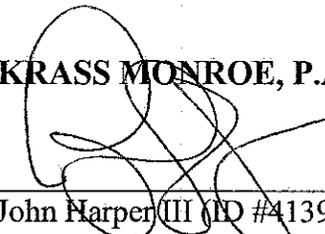
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**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 7,905 words, and the font size is 13 point. This brief was prepared using Microsoft Word 2003 software.

Dated this 19th day of December,  
2008.

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