

NO. A11-1093

4

---

STATE OF MINNESOTA  
IN COURT OF APPEALS

---

Jeff Moen,

Plaintiff/Respondent,

v.

Sunstone Hotel Properties, Inc.  
a Colorado Corporation, d/b/a  
Marriott Hotel,

Defendant/Appellant.

---

BRIEF OF APPELLANT AND ADDENDUM

---

GRAY, PLANT, MOOTY,  
MOOTY & BENNETT, P.A.  
Mark Mathison (#028709X)  
Dean LeDoux (#0176643)  
500 IDS Center, 80 South 8<sup>th</sup> Street  
Minneapolis, MN 55402  
Phone: 612.632.3247  
Fax: 612.632.4247  
[Mark.Mathison@gpmlaw.com](mailto:Mark.Mathison@gpmlaw.com)

ATTORNEY FOR APPELLANT

STEPHENSON & SUTCLIFFE, P.A.  
Mark G. Stephenson (#105235)  
1635 Greenview Drive, S.W.  
Rochester, MN 55902  
Phone: 507.288.7160  
Fax: (507) 287-1033  
[markgsjd@aol.com](mailto:markgsjd@aol.com)

ATTORNEY FOR RESPONDENT

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).

**TABLE OF CONTENTS**

	<b>Page</b>
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW .....	vi
STATEMENT OF THE CASE/FACTUAL BACKGROUND.....	1
I.    Statement of Facts .....	1
II.   Procedural History .....	5
III.  Relief Requested.....	7
LEGAL ARGUMENT .....	8
I.    THE TRIAL COURT ERRED WHEN DENYING APPELLANT’S MOTION FOR SUMMARY JUDGMENT ON APPELLEE’S BREACH OF CONTRACT CLAIM .....	8
A.    Moen’s Claim for Breach of Contract Requires Interpretation of the Collective Bargaining Agreement between Sunstone and Moen’s Union, and Therefore Must Be Assessed Under Section 301 of the Labor Management Relations Act .....	8
B.    The Plain Language of the CBA Makes Clear that the Grievance Procedure is the Exclusive Means of Resolving All Disputes Concerning the Meaning or Application of the CBA .....	12
C.    Even if the Grievance Procedure Could be Construed to be Ambiguous, Federal Labor Law Policy Requires an Interpretation that Gives Preference to the Parties’ Contractual Dispute Resolution Mechanism Rather than Judicial Remedies .....	15
1.    Any doubts as to coverage of a contractual grievance/ arbitration provision must be resolved in favor of the established procedure, unless the parties clearly and unequivocally provided otherwise.....	15
2.    The <i>Groves</i> decision does not govern the interpretation of the CBA in this case.....	17

3.	Courts have recognized <i>Groves</i> ' narrow application and have found grievance procedures similar to that in the CBA to be mandatory and exclusive.....	20
II.	THE TRIAL COURT ERRED IN FAILING TO GRANT SUNSTONE'S MOTION FOR A NEW TRIAL ON THE DEFAMATION CLAIM.....	24
A.	The Court Erred When it Modified the Alleged Defamatory Statement to which Sunstone had Stipulated Without Further Modifying the Special Verdict Form.....	25
1.	The Trial Court's modification of the alleged statement denied the jury the opportunity to decide whether the statement had even been made .....	27
2.	The Trial Court's modification of the alleged statement improperly removed from the jury the determination of "falsity" .....	29
3.	The Trial Court's error was compounded by its failure to give an instruction regarding "inferences" .....	31
B.	The Court Erred in Failing to Instruct the Jury on Application of the Qualified Privilege and Its Ruling that Defendant had a Reasonable Basis for Believing the Statement was True at the Time it was Made. ....	32
	CONCLUSION.....	34

## TABLE OF AUTHORITIES

	<b>Page</b>
<b><u>Case Law Authority</u></b>	
<u>Allis-Chalmers Corp. v. Lueck</u> , 471 U.S. 202 (1985) .....	8, 14, 16
<u>American Federation of State, County and Municipal Employees Council 75 v. Good Shepherd Health Care Sys.</u> , 2010 WL 3746424 (D. Or. July 16, 2010) .....	22
<u>Associated General Contractors of Illinois v. Illinois Conference of Teamsters</u> , 486 F.2d 972 (7 <sup>th</sup> Cir. 1973) .....	18
<u>Associated General Contractors of Illinois v. Illinois Conference of Teamsters</u> , 345 F.Supp. 1296 (D.C. Ill. 1972) .....	18
<u>AT &amp; T Technologies, Inc. v. Communications Workers of America</u> , 475 U.S. 643 (1986) .....	16
<u>Borgerson v. Cardiovascular Systems, Inc.</u> , 729 N.W.2d 619 (Minn.App. 2007) .....	9
<u>Breish v. Ring Screw Works</u> , 248 N.W.2d 526 (Mich. 1976) .....	18
<u>Cambern v. Sioux Tools, Inc.</u> , 323 N.W.2d 795 (Minn. 1982) .....	24
<u>Caterpillar v. Williams</u> , 482 U.S. 386 (1987) .....	8
<u>Cavanaugh v. Burlington Northern Railroad Co.</u> , 941 F.Supp. 872 (D.Minn. 1996) .....	32
<u>Clayton v. International Union Automobile Workers</u> , 451 U.S. 679 (1981) .....	16
<u>Communications Workers of America v. American Tel. and Tel. Co.</u> , 40 F.3d 426 (D.C. Cir. 1994) .....	14, 21
<u>D.H. Blattner &amp; Sons v. Firemen’s Insurance of Newark, New Jersey</u> , 535 N.W.2d 671 (Minn.App. 1995) .....	24, 30
<u>DelCostello v. International Bhd. of Teamsters</u> , 462 U.S. 151 (1983) .....	10

<u>Dickeson v. DAW Forest Products Co.</u> , 827 F.2d 627 (9 <sup>th</sup> Cir. 1987).....	18
<u>Fortune v. National Twist Drill &amp; Tool Div., Lear Siegler, Inc.</u> , 684 F.2d 374 (6 <sup>th</sup> Cir. 1982) .....	18
<u>Frazier v. Burlington Northern Santa Fe Corp.</u> , 788 N.W.2d 770 (Minn.App. 2010) .....	25, 29
<u>George v. Estate of Baker</u> , 724 N.W.2d 1 (Minn. 2006).....	29
<u>Groves v. Ring Screw Works</u> , 498 U.S. 168 (1990).....	<i>passim</i>
<u>Haynes v. U. S. Pipe &amp; Foundry Co.</u> , 362 F.2d 414 (5 <sup>th</sup> Cir. 1966).....	18
<u>Hines v. Anchor Motor Freight, Inc.</u> , 424 U.S. 554 (1976).....	9
<u>Hirman v. Rogers</u> , 257 N.W.2d 563 (Minn. 1977).....	32
<u>Ingram v. Kroger Co.</u> , 2000 WL 730424 (N.D.Tex., May 17, 2000) .....	20, 22
<u>Johnson v. Jensen</u> , 433 N.W.2d 472 (Minn.App. 1988), <u>aff'd in part, rev'd in part</u> , 446 N.W.2d 664 (Minn. 1989) .....	25
<u>Kalevig v. Holmgren</u> , 197 N.W.2d 714 (Minn. 1972) .....	23
<u>Karnewie-Tuah v. Frazier</u> , 757 N.W.2d 714 (Minn.App. 2008).....	8
<u>Lewis v. Equitable Life Assurance Society</u> , 398 N.W.2d 876 (Minn. 1986).....	32, 33
<u>Longbehn v. Schoenrock</u> , 2010 WL 3000283 (Minn.App., Aug. 3, 2010).....	25
<u>Paoletti v. Northwestern Bell Tel. Co.</u> , 370 N.W.2d 672 (Minn.App. 1985).....	10
<u>Republic Steel Corp. v. Maddox</u> , 379 U.S. 650 (1965).....	<i>passim</i>
<u>Rubey v. Vannett</u> , 714 N.W.2d 417 (Minn. 2006) .....	24
<u>Stevens v. Highway, City &amp; Air Freight Drivers</u> , 794 F.2d 376 (8 <sup>th</sup> Cir. 1986) .....	23
<u>Textile Union Workers of Am. v. Lincoln Mills</u> , 353 U.S. 448 (1957) .....	10
<u>Thomas v. LTV Corp.</u> , 39 F.3d 611 (5 <sup>th</sup> Cir.1994).....	22

United Broth. of Carpenters and Joiners of America v. Hensel Phelps Const. Co., 376 F.2d 731 (10<sup>th</sup> Cir. 1967)..... 18

United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981)..... 22

United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) ..... 10

United Steelworkers of American v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)..... 15

Vaca v. Sipes, 386 U.S. 171 (1967)..... 10, 23

Waldron v. Boeing Co., 388 F.3d 591 (8<sup>th</sup> Cir. 2004) ..... 23

Welch v. Professional Transit Management of Tucson, Inc., 2005 WL 2897354 (D. Ariz., Nov. 2, 2005)..... 21

Willett v. Seerup, 186 N.W. 225 (Minn. 1922) ..... 31

Zurko v. Gilquist, 62 N.W.2d 351 (Minn. 1954)..... 25

**Statutory Authority and Court Rules**

29 U.S.C. §173..... 10

29 U.S.C. §185..... 8, 9

Rule 51.04(b), Minn.R.Civ.P..... 25

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

### Issue One:

**Whether Respondent's breach of contract claim is preempted by federal law and thus should have been dismissed in connection with Appellant's Motion for Summary Judgment.**

- (1) Appellant filed a Motion for Summary Judgment on May 11, 2009, seeking, among other things, dismissal of Respondent's wrongful discharge claim on the grounds that it was preempted by federal labor law. App. 10.
- (2) By Order dated August 12, 2009, the Trial Court denied Appellant's Motion on the grounds that the grievance/arbitration process established by the relevant collective bargaining agreement was not exclusive and therefore did not preclude Respondent's judicial action. ADD-4.
- (3) When deciding an issue of law, a trial court's ruling on summary judgment is reviewable by the appellate court regardless of whether the ruling was challenged at trial or in a post-trial motion. *See Construction Mortgage Investors Co., v. Farr*, 2010 WL 311943 \*3 (Minn.App. Aug. 10, 2010).
- (4) Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965)  
Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)  
Communications Workers of America v. American Tel. and Tel. Co., 40 F.3d 426 (D.C. Cir. 1994)  
Welch v. Professional Transit Management of Tucson, Inc., 2005 WL 2897354 (D. Ariz., Nov. 2, 2005)

### Issue Two:

**Whether the Trial Court erred in denying Appellant's motion for a new trial because the Trial Court committed legal error when, in its instructions to the jury and on the special verdict form, it altered the substance of the alleged defamatory statement.**

- (1) After the close of evidence, Respondent requested that the Trial Court change the substance of the alleged defamatory statement to be submitted to the jury on the Special Verdict Form. The modification omitted material words from the alleged statement. Appellant had stipulated to the original statement, but not to the

modified version. However, the Special Verdict Form was not changed to indicate that Appellant had not stipulated to the modified version of the statement, and therefore gave the jury the impression that it had. ADD-47, App. 79.

- (2) Appellant's counsel objected to Respondent's request to modify the statement. When the objection was overruled, Appellant's counsel advanced a second request to modify the Special Verdict Form to ensure that it would not give the jury the impression that Appellant had stipulated to the modified version of the statement. This request was also denied. ADD-47, App. 187-88.
- (3) This issue was preserved for appeal by Appellant's counsel's objection and request to the Trial Court as stated above.

- (4) Frazier v. Burlington Northern Santa Fe Corp., 788 N.W.2d 770 (Minn.App. 2010)

D.H. Blattner & Sons v. Firemen's Insurance of Newark, New Jersey, 535 N.W.2d 671 (Minn.App. 1995)

George v. Estate of Baker, 724 N.W.2d 1 (Minn. 2006)

### **Issue Three:**

**Whether the Trial Court erred in denying Appellant's motion for a new trial because the Trial Court committed legal error when it failed to instruct the jury concerning its pretrial rulings, including but not limited to its rulings that (i) Appellant's investigation of Respondent's gun-related statements was adequate; (ii) Appellant's restatements to others of those statements were made with a reasonable basis for believing they were true; and (iii) that Appellant's statements were qualifiedly privileged as a matter of law.**

- (1) Following the close of evidence and prior to the delivery of the jury instructions, the Trial Court found that the evidence established *as a matter of law*: (i) that Sunstone's investigation of Moen's statements was sufficient; (ii) that Sunstone's agents had a reasonable basis and probable cause to believe the statements they made about Moen were valid at the time they made them; and (iii) that Sunstone's statements were qualifiedly privileged. App. 191.
- (2) The Trial Court did not convey these rulings to the jury in its instructions. *See generally* App. 57.
- (3) Counsel for Appellant was not given the opportunity to evaluate the rulings or request changes to the jury instructions as a result of them, because in connection

with the rulings the Trial Court stated that the jury instructions, which had been previously argued and discussed, would remain “as is.” App. 190.

- (4) Lewis v. Equitable Life Assurance Society, 398 N.W.2d 876 (Minn. 1986)

## STATEMENT OF THE CASE/FACTUAL BACKGROUND

### **I. Statement of Facts**

This case proceeds to this Court following trial and entry of judgment in the Olmsted County District Court. The action arises out of Respondent Jeff Moen's allegations that his employer, Appellant Sunstone Hotel Properties, Inc. ("Sunstone") wrongfully terminated his employment in violation of a collective bargaining agreement and defamed him in the process of doing so. At issue in this appeal is an order denying Sunstone's Motion for Summary Judgment, issued by The Honorable Joseph Chase, and several post-trial rulings made by The Honorable Gabriel Giancola.

On October 29, 2007, Sunstone, operating the Marriott Hotel in downtown Rochester (the "Hotel"), terminated the employment of bellhop Moen for making threatening statements concerning his possession of a handgun. Pursuant to the Hotel's Standards of Conduct and Performance, Moen's threatening statements constituted offenses warranting immediate termination and provided the necessary "just cause" for his discharge under the terms of the Collective Bargaining Agreement between Moen's union and the Hotel.

At the center of Moen's termination, and this lawsuit, is a short series of statements Moen made on the afternoon of October 25, 2007 – the day after he had attended a meeting with Hotel management concerning his possible discharge.<sup>1</sup> Fellow

---

<sup>1</sup> The meeting on October 24, 2007, arose from Moen's theft of parking in the Hotel's parking garage. Although his offense was a terminable one, Hotel managers advised Moen that although he had violated Hotel policy, they had elected to give him a written disciplinary warning rather than terminate his employment, in light of his many years of

bellhop R. M. testified that on that day Moen told him (i) that he had “bought a gun”; (ii) that he had “brought backup” to a grievance meeting on the previous day, and (iii) that he wished S. W. (another Hotel employee) had been present at the meeting so he could have “taken care of business” if need be. App. 111, 114-15, 118-19, 121-28 (Tr. 622:16-22; 625:16 – 626:4; 629:17-25; 633:4-19; 681:14 – 682:2; 686:22 – 687:2; 703:10 – 704:14; 705:22 – 706:8). M. testified that he took Moen to mean he had brought a gun to the grievance meeting and planned to harm one or more people in the room if he was not reinstated. App. 111-12, 121-24, 127-28 (Tr. 622:23 – 623:5; 681:7 – 682:2; 686:18 – 687:2; 705:22 – 706:8).

M.’s testimony concerning Moen’s statements was confirmed during the course of the trial. For example, another Hotel employee, valet M. H., confirmed M.’s testimony that Moen had, in fact, bought a handgun. App. 113, 133-34 (Tr. 624:6-22; 782:25 – 783:23). Additionally, when Moen told M. that he had hidden his gun in his jacket during the grievance meeting, M. k “pat[ted] down” Moen’s coat at the bellstand, at which point Moen told M. “it’s not there, it’s in my car. . . . Do you want to see it?” H. heard these comments as well. App. 115, 133-34 (Tr. 626:6-25; 782:25 – 783:23). Moen’s conduct in the days prior to his statements was also consistent with M.’s interpretation of Moen’s statements, as Moen had been distressed by his suspension and was extremely concerned about losing

---

service to the Hotel. App. 137-39, 140-41 (Tr. 882:13 – 884:17; 904:2 – 905:14); App. 229 (Tr.Ex. 9).

his job. App. 100, 107-08 (Tr. 394:3-24; 618:20 – 619:9).<sup>2</sup> Even Moen himself confirmed that he had made the statements. Specifically, immediately following his termination, Moen wrote a note, which he hand-delivered to M , in which he stated:

*- Why did you say anything – we talked – you know I'm just a bull-shitter – I would never harm anybody. No matter what occurred. You're still my friend. Jeff*

App. 231 (Tr.Ex.12).

All of this evidence established virtually conclusively, despite Moen's denials at trial, that Moen made the statements attributed to him.

When H heard Moen's comments, he reported them to S W ;

another co-worker, who in turn reported them to the Hotel's General Manager, Tom

McKenney. App. 129-30, 132, 142 (Tr. 730:13 – 731:2; 738:11-18; 906:5-12).

Understandably concerned by the statements, McKenney involved regional manager

Bruce Fairchild, who then involved Jill Johnson, Sunstone's Vice President of Human

Resources. App. 144-45, 148-49, 163 (Tr. 908:20 – 909:3; 912:20 – 913:3; 1003:3-18).

Sunstone thereafter conducted a thorough investigation that included interviews with

several witnesses. See App. 144-51, 153, 165-66 (Tr. 908:20 – 909:8; 909:24 – 910:10;

912:2 – 913:3; 914:25 -915:13; 917:5-12; 1005:7 – 1006:9); App. 230, 234, 236, 242

(Tr.Ex. 10, 14, 15, 110). These interviews gave Sunstone a reasonable basis for believing

---

<sup>2</sup> In a phone conversation with M during Moen's suspension several days earlier, Moen revealed to M that he had a three-part plan for addressing his potential termination by the hotel. Plan A was to beg for his job at the disciplinary meeting; Plan B was to exhaust the grievance process to obtain reinstatement; and Plan C Moen refused to disclose to M , telling M only that if he (Moen) had to resort to it, M would "find out" about it. App. 107-09 (Tr. 618:20 – 620:2).

that the statements had been made, and consequently Sunstone terminated Moen's employment. App. 154-56 (Tr. 928:10 – 929:7; 933:7-22); App. 230 (Tr.Ex. 10).

Moen's discharge was carried out consistently with the Collective Bargaining Agreement between Sunstone and Moen's union, UNITE HERE Local 21 (the "CBA") because his comments gave rise to "just cause" for his discharge. Although the CBA does not define "just cause," it incorporates by reference Sunstone's Standards of Conduct and Performance, which enumerates disturbing coworkers and disrupting the workplace as grounds for immediate termination. App. 194, 253 (Tr.Exs. 7 at 25; 118).<sup>3</sup> Moen's Union initially filed a grievance on Moen's behalf, alleging that the termination was carried out in violation of the CBA. App. 237 (Tr.Ex. 106); App. 176-77 (Tr. 1172:4 – 1173:25). The Union ultimately declined to pursue the grievance beyond the first step hearing, however, because it concluded that there was "very little likelihood" it could prove Sunstone did not have "just cause" to discharge Moen. App. 172-73, 178-80 (Tr.1033:23 – 1034:11; 1177:16 – 1179:9); App. 241 (Tr.Ex. 108).

Sunstone did not stop with terminating Moen, however. It also took a number of steps to secure the Hotel and to ensure the safety of its guests and employees. Sunstone contacted a workplace violence expert to assist in evaluating the situation, and it ordered armed private security personnel be hired to stand 24-hour guard at the Hotel. App. 148. 167-68 (Tr. 912:5-16; 1007:19 – 1008:14). Because of the severity of the statements,

---

<sup>3</sup> Six witnesses testified without dispute that they were frightened, intimidated, scared, disturbed, and upset by Moen's statements. They testified to being "in shock," "scared," and "genuinely afraid," and some witnesses testified that they had taken steps to protect themselves in their homes. App. 115, 120, 130-31, 135, 136, 144, 169 (Tr. 626:17-24; 644:9-14; 731:24 – 732:3; 795:6-16; 800:7-10; 908:13-16; 1018:4-14).

Sunstone also asked for *and received* a restraining order from the local District Court. *See Sunstone Hotels Corporation, et al, v. Jeff Moen*; District Court, Third Judicial Circuit Case No. 55-cv-07-10361 (Order dated November 5, 2007); App. 101-02, 105-06, 157-58, 170 (Tr. 442:11 – 443:14; 446:14 – 447:5; 945:23 – 946:13; 1019:1-4); App. 244 (Tr.Ex. 117).

In short, Moen's termination was based upon credible reports from genuinely frightened co-workers that Moen had told them he had bought a gun, had brought that "back up" to a grievance meeting on October 24, 2007, and had been prepared to "take care of business" if the meeting had not gone his way. Of course, during the process of investigating the allegations, securing the safety of the hotel, and ultimately terminating Moen's employment, Sunstone had need to repeat Moen's statements to hotel management, law enforcement and security personnel, an outside workplace violence expert, and Union representatives.

Despite the findings of his employer, the Court, and his own union, Moen filed suit against Sunstone for wrongful termination, in violation of the collective bargaining agreement, and for defamation.

## **II. Procedural History**

On April 16, 2009, following discovery, Sunstone moved for summary judgment, arguing, among other things, that Moen's breach of contract claim was based on rights and obligations established by the Collective Bargaining Agreement between Sunstone and Moen's Union, was subject to mandatory arbitration, and was thus preempted by federal labor law. App. 10. The Trial Court rejected Sunstone's argument by Order

dated August 12, 2009, concluding that the grievance and arbitration procedure established by the Collective Bargaining Agreement was not mandatory and, accordingly, that Moen was not bound by the results of the grievance/arbitration procedure and was free to pursue his claim in court. ADD-4. As a result, the Trial Court permitted both claims to proceed to a jury trial.

The matter was tried to a jury between October 18 and October 22, 2010. Following the close of the evidence, the Trial Court made two critical rulings/decisions in connection with the jury instructions and Special Verdict Form that fundamentally altered the course of the jury's deliberations.

First, although Sunstone had stipulated that one version of an alleged defamatory statement had been made by its employees, the Trial Court, at Moen's request and over Sunstone's objections, modified the alleged statement in a material way. Although Sunstone had not stipulated that the modified statement had been made, the Trial Court rejected Sunstone's request to amend the Special Verdict Form to require the jury to find specifically whether or not the modified statement had been made. Consequently, the Special Verdict Form effectively instructed the jury that Sunstone had made the modified statement and thus removed from the jury two questions of fact critical to defamation claims – whether or not the alleged defamatory statement had been made and, if made, whether or not it was false. *See infra* Section II.A.

Second, the Trial Court failed to instruct the jury that it had found as a matter of law that Sunstone had had a reasonable basis for believing the truth of the statements it had made concerning Moen. This post-evidentiary ruling immunized Sunstone from

liability for defamation unless Moen could prove that Sunstone made the alleged statements with actual malice. But when the Trial Court instructed the jury as to its need to find “actual malice,” it failed to instruct the jury that its answer to that question could not be based on finding that Sunstone did not have probable cause for believing the truth of the statements. *See infra* Section II.B.

These two post-evidentiary decisions by the Trial Court constituted clear, reversible error.

The jury ultimately issued a verdict in favor of Moen and awarding him just over \$470,000.00 damages. When Sunstone moved for judgment as a matter of law and/or a new trial on the basis of these and other errors, the Trial Court denied its motion.

### **III. Relief Requested**

For the reasons set forth herein, Sunstone respectfully requests this Court vacate the judgment of the Trial Court and remand with instructions to (i) dismiss Moen’s breach of contract claim with prejudice and (ii) award Sunstone a new trial on Moen’s defamation claim.

## LEGAL ARGUMENT

### I. THE TRIAL COURT ERRED WHEN DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT ON APPELLEE'S BREACH OF CONTRACT CLAIM<sup>4</sup>

#### A. Moen's Claim for Breach of Contract Requires Interpretation of the Collective Bargaining Agreement between Sunstone and Moen's Union, and Therefore Must Be Assessed Under Section 301 of the Labor Management Relations Act

Causes of action founded on the rights created by collective bargaining agreements are preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Caterpillar v. Williams, 482 U.S. 386, 394 (1987). This well-established rule is derived from the Supremacy Clause of the United States Constitution, U.S. Const. Art. 6 cl. 2, which gives Congress the power to preempt state law. A litigant may not escape the federal preemption doctrine by casting his claim in another light. Thus, when resolution of a state law claim, such as "breach of contract" or "wrongful discharge," is substantially dependent upon analysis of the terms of a collective bargaining agreement, the claim must be treated as a claim arising under Section 301 or dismissed entirely. See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985); Karnewie-Tuah v. Frazier, 757 N.W.2d 714, 720 (Minn.App. 2008).

That Moen's claim for breach of contract is substantially dependent upon, and requires interpretation of, the CBA is indisputable. First, Moen's Complaint cites or refers to the CBA repeatedly, and he specifically alleges (i) that the CBA prevented Sunstone from firing him except for "good cause"; and (ii) that Sunstone wrongfully

---

<sup>4</sup> The Court of Appeals reviews decisions to grant or deny summary judgment *de novo*. Allen v. Burnet Realty LLC, 801 N.W.2d 153, 156 (Minn. 2011).

discharged him “contrary to the Union contract.” App. 1 (Complaint ¶¶ IV, X). Because employment in Minnesota is presumed to be at-will, see Borgerson v. Cardiovascular Systems, Inc., 729 N.W.2d 619, 625 (Minn.App. 2007), the only source of entitlement of Moen’s alleged right is necessarily the CBA. Second, in his discovery responses, Moen cites the CBA as the sole basis for his wrongful discharge claim. App. 256 (Interrogatory 13 and Answer thereto). Thus, Moen’s cause of action for wrongful discharge requires the Court to interpret and apply the “just cause” dismissal clause of the CBA. Accordingly, Moen’s claim is preempted and must be treated in all respects as a Section 301 suit.

Section 301 of the Labor Management Relations Act provides employers, unions and, in certain circumstances, bargaining unit employees, with a federal remedy for breach of a collective bargaining agreement. 29 U.S.C. § 185(a). Generally, Section 301 gives the federal courts jurisdiction to resolve disputes concerning the meaning and application of collective bargaining agreements, or to compel arbitration if the agreement contains an arbitration clause. In certain cases, employees, also, may bring claims against their unions or their employers under Section 301. See Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 562-63 (1976) .

Section 301’s general authorization of Court resolution notwithstanding, it is a well-settled rule of labor law that parties to a collective bargaining agreement, including the bargaining unit employees, are bound by the agreed-upon grievance and arbitration procedures established by the agreement, and where the parties have agreed to exclusive, final and binding arbitration, disputes within the scope of the arbitration clause may *not*

be pursued in a breach of contract action under Section 301. See Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53(1965); see also DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 163 (1983); Hines, 424 U.S. at 562-63. This requirement reflects the Congressional policy that “[f]inal adjustment by a method agreed upon by the parties is . . . the desir[ed] method for settlement of grievance disputes.” 29 U.S.C. § 173(d). “[This policy] can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play. Courts are not to usurp those functions which collective-bargaining contracts have properly entrusted to the arbitration tribunal.” Hines, 424 U.S. at 562-63 (citing United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960)). The single exception is when an employee alleges and proves that his union violated its duty of fair representation in connection with its processing of the grievance. See Vaca v. Sipes, 386 U.S. 171, 185-86 (1967).<sup>5</sup>

Accordingly, bargaining unit employees such as Moen may bring Section 301 claims on their own for breach of a collective bargaining agreement only if (i) the grievance procedure is not exclusive, final and binding; or (ii) the Union has breached its duty of fair representation by wrongfully refusing to process the grievance to a higher stage. Here, neither of these prerequisites is present.

---

<sup>5</sup> Section 301 claims may be heard in federal courts or in any state court, provided the state court applies federal law. Textile Union Workers of Am. v. Lincoln Mills, 353 U.S. 448, 456 (1957); Paoletti v. Northwestern Bell Tel. Co., 370 N.W.2d 672, 674 (Minn.App. 1985).

Before proceeding, however, the Court should take note of what is *not* at issue in this appeal. First, it is not disputed that the grievance procedure in the CBA is “final and binding,” as the CBA itself provides exactly that. App. 194, 199 (CBA Art. 6.4(b), noting that the decision of the arbitrator “shall be final and binding upon both parties and employees involved.”). Second, there is no question that the Union did not violate its duty of fairly representing Moen when it pursued the grievance, as the Trial Court so found. ADD-18-23 (Order dated 8/12/2009 at 14-19). Thus, the sole question for resolution here is whether the Trial Court was correct in ruling that the grievance procedure set forth in the CBA was not intended by the parties to be the exclusive means of resolving disputes concerning the meaning or application of the CBA.

The Trial Court identified the central issue thusly: “The issue here is whether Plaintiff’s CBA is one in which the union and the employer have agreed to a mandatory grievance procedure (in which case this lawsuit is foreclosed), or not. This is a reasonably close question.” ADD-16 (Court Order dated 8/12/2009 at 12). The Trial Court first determined that on this question, the language of the CBA is ambiguous. *Id.* The Trial Court then concluded that to resolve this apparent ambiguity, it should apply “the strong policy favoring judicial enforcement of collective bargaining contracts.” ADD-16-17 (Court Order at 12-13 (citing Groves v. Ring Screw Works, 498 U.S. 168 (1990))). Application of this presumption led the Trial Court to conclude that the CBA’s grievance procedure was not mandatory and, consequently, that Moen’s court action for breach of contract did not require dismissal.

The Trial Court's analysis was erroneous in two respects. First, Article 6 of the CBA clearly and unambiguously makes the established grievance procedure the *exclusive remedy* for resolution of contractual disputes. Second, even if the language is ambiguous, federal labor law policy requires that doubts be resolved against a result that permits the employee to avoid the grievance procedure and pursue his claim in court.

**B. The Plain Language of the CBA Makes Clear that the Grievance Procedure is the Exclusive Means of Resolving All Disputes Concerning the Meaning or Application of the CBA**

The opening clause of CBA Article 6 clearly and unambiguously makes the grievance procedure mandatory. Section 6.1 expressly states:

“The grievance procedure set forth in this article is established for the specific purpose of providing prompt and amicable means of settlement of *all questions* arising under the terms of this agreement or the application of them.”

App. 194, 199 (emphasis added). One can hardly imagine a reasonable interpretation of this language that would allow the employer, the union, or the bargaining unit members to pick and choose which questions should be pursued under the contract and which should be pursued in court.

The Trial Court acknowledged this language, but rejected this interpretation, referring instead to Section 6.2 of the CBA, which states that “[a]n employee *may*, with or without the assistance of a shop steward, first attempt to resolve workplace disputes with the employee’s manager.” The Trial Court reasoned that use of the permissive “may” suggests that the grievance procedure is optional. ADD-15-17 (Court Order at 11-

13) (emphasis added). The Trial Court’s interpretation is clearly erroneous, particularly when one considers the entire clause, which reads:

“An employee may, with or without the assistance of a shop steward, first attempt to resolve workplace disputes with the employee’s manager. *If not resolved informally, the following shall be the grievance procedure.*”

App. 194, 199 (emphasis added).

That an employee “may” attempt to work out “workplace disputes” directly with his manager “informally” does not, *ipso facto*, mean that the employee may forego the grievance process and proceed to court at his discretion. The clause instead means exactly what it says – that the employee may seek an informal resolution to a workplace dispute and need not pursue the matter further *at all*. The clause goes on to state that if the dispute is not worked out informally, the process established in Section 6 of the CBA “*shall be the grievance procedure.*” The grammatical predicate to the mandatory “shall” is the failure of an informal resolution, not the employee’s decision to abandon the grievance procedure in favor of a judicial action.

The fact that the word “may” does not appear in Section 6.1, but in Section 6.2, supports Sunstone’s interpretation. Section 6.1 establishes the scope and purpose of the grievance procedure itself, which is to provide the means of resolving “all questions” concerning the meaning or application of the CBA. Section 6.2 merely gives employees the option of discussing matters with their supervisors and working out informal solutions before invoking the grievance machinery. In other words, employees are neither required to discuss the matter informally with supervisors nor required to invoke the grievance process for any particular dispute. They may invoke the grievance procedure without

discussing the matter with their supervisor by going directly to the Union's Business Agent, or they may work out an informal resolution. This clause simply reflects the realities of day-to-day life in the workplace: Workplace disputes of one form or another arise nearly constantly and are worked out informally with almost equal frequency, with no complaint, grievance or litigation.

The Trial Court's extensive reliance on the permissive "may" in Section 6.2 is not supported by the U.S. Supreme Court's construction of similar language in similar contexts. In Allis-Chalmers, 471 U.S. 202 (1985), for example, the Supreme Court held that disputes were required to be resolved exclusively through arbitration notwithstanding the arbitration provision's use of the word "may." Id. at 204 n.1. Similarly, in Maddox, the Supreme Court held that the following language did not permit the parties "to avoid the contract procedure . . . in favor of a judicial suit":

"Any Employee who has a complaint *may* discuss the alleged complaint with his Foreman in an attempt to settle it. Any complaint not so settled *shall* constitute a grievance within the meaning of this Section, 'Adjustment of Grievances'. 'Grievances *shall* be handled in the following manner:'"

379 U.S. at 658-59.

More recently, a federal Circuit Court of Appeals, construing language nearly identical to that at issue here, held that the language did not permit a union to forego the grievance and arbitration procedures simply because the applicable clause used the word "may." See Communications Workers of America v. American Tel. and Tel. Co., 40 F.3d 426 (D.C. Cir. 1994). The clause in question stated that "[a]ny dispute involving the true intent and meaning of [Article] 19.30 *may* be presented as a grievance and if not

resolved by the parties, *may* be submitted to . . . arbitration.” Id. at 434 (emphasis added). The District Court had concluded that the agreement’s use of the permissive “may” rendered submission of disputes arising under this particular provision exempt from arbitration. The Circuit Court reversed, noting that the arbitration procedures themselves provided that if differences between the union and employer arose, “the grievance procedures set forth in this Article 9 *shall* be employed in an effort to settle said differences.” Id. (emphasis added). The Circuit Court reasoned that the use of the word “may” “means only that such disputes, *if* they arise, will be subject to the mandatory grievance and arbitration procedures required.” Id. (emphasis in original). The reasoning of the D.C. Circuit is precisely on point and directly applicable to the CBA language in Article 6.

C. **Even if the Grievance Procedure Could be Construed to be Ambiguous, Federal Labor Law Policy Requires an Interpretation that Gives Preference to the Parties’ Contractual Dispute Resolution Mechanism Rather than Judicial Remedies**

1. **Any doubts as to coverage of a contractual grievance/ arbitration provision must be resolved in favor of the established procedure, unless the parties clearly and unequivocally provided otherwise**

More than fifty years of well-established Supreme Court jurisprudence establishes that all doubts concerning the application and scope of a collective bargaining agreement’s dispute resolution mechanism must be resolved in favor of the procedure selected by the parties. Beginning in 1960 with United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), the U.S. Supreme Court has directed lower courts to apply rules of interpretation that prevent employers, unions or

bargaining unit members from dodging their contracted-for dispute-resolution procedures. In Steelworkers, the Court expressly held that “[d]oubts should be resolved in favor of coverage [of the arbitration provision]” and that arbitration should be required “unless it may be said with *positive assurance* that the arbitration clause *is not susceptible* of an interpretation that covers the asserted dispute.” Id. at 582-83 (emphasis added).

The Supreme Court reiterated this view in Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965), when it barred employee suits to enforce contract rights under Section 301 unless the parties “expressly agreed that arbitration was not the exclusive remedy” and held that “all doubts must resolved against” an interpretation of the agreement that would permit individual suits to move forward. Id. at 657-58; see also AT & T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 650 (1986) (holding that contracts must be resolved in favor of arbitration, particularly where the clause provides for the arbitration of “any differences” regarding the interpretation of the collective bargaining agreement, and that only “the most forceful evidence” would exclude coverage); Allis-Chalmers, 471 U.S. at 204 n.1 (citing the “presumption that parties are not free to avoid the contract’s arbitration procedures”); Clayton v. International Union Automobile Workers, 451 U.S. 679, 687 (1981) (holding that it is important “to protect the integrity of the collective-bargaining process and to further that aspect of national labor policy that encourages private rather than judicial resolution of disputes arising over the interpretation and application of collective-bargaining agreements”).

This presumption applies regardless of context, whether the question is the scope of the arbitration provision and its application to particular disputes – as in the Steelworkers cases – or the “exclusivity” of the clause and its preclusion of a parties’ individual judicial suit under Section 301 – as in Maddox.

2. **The *Groves* decision does not govern the interpretation of the CBA in this case**

The Trial Court acknowledged this jurisprudence, but abandoned it in favor of what it termed a “contrary indication” in Groves v. Ring Screw Works, 498 U.S. 168 (1990). In light of Groves, the Trial Court *reversed the presumptions* established in the cases cited above, concluding that because the CBA did not contain “contract language that *plainly makes the grievance process mandatory and exclusive*”, Moen’s right to pursue a judicial remedy was not foreclosed. ADD-17 (Court Order at 13) (emphasis added).

The Trial Court’s reliance on Groves is misplaced and reflects a misreading of the Supreme Court’s interpretation of the scope of Section 301. Specifically, the collective bargaining agreement at issue in Groves did not include a provision for “final and binding arbitration.” Instead, the agreement required only that the union and the company attempt to resolve their differences voluntarily and, if they failed to do so, to resort to their economic weapons of strikes and lockouts. 498 U.S. at 170-71 & n.3. The Supreme Court was unwilling to apply a presumption of deferral to the contractual dispute resolution mechanism in these circumstances, holding that because the procedure chosen by the parties had no means of maintaining labor-management peace, it would not be

construed to restrict access to a judicial forum unless such an intent was clearly stated.  
Id. at 174-75.

The Court's opinion in Groves makes clear its unique and narrow scope.

First, the Court granted *certiorari* to resolve a split among the federal circuits. 498 U.S. at 169 n.1. Each of the cases cited as giving rise to the Circuit split arose in the same context and involved the same issue: Whether or not the courts will give deference to a grievance mechanism that does not provide for final and binding arbitration but instead directs the parties to resort to their economic weapons. In the Fifth and Sixth Circuits, the Circuit courts held that such a grievance procedure precluded Section 301 suits. See Fortune v. National Twist Drill & Tool Div., Lear Siegler, Inc., 684 F.2d 374 (6<sup>th</sup> Cir. 1982); Haynes v. U. S. Pipe & Foundry Co., 362 F.2d 414 (5<sup>th</sup> Cir. 1966). In the other circuits (and in one state supreme court), the opposite result was reached. See Dickeson v. DAW Forest Products Co., 827 F.2d 627 (9<sup>th</sup> Cir. 1987); Associated General Contractors of Illinois v. Illinois Conference of Teamsters, 486 F.2d 972, 976 (7<sup>th</sup> Cir. 1973); United Broth. of Carpenters and Joiners of America v. Hensel Phelps Const. Co., 376 F.2d 731, 737-38 (10<sup>th</sup> Cir. 1967); Breish v. Ring Screw Works, 397 Mich. 586, 248 N.W.2d 526 (Mich. 1976).

That these cases were viewed by the courts as lying beyond the reach of the established presumptions applied in more typical cases (where final and binding arbitration caps the grievance process) was made clear in Associated General Contractors of Illinois, where the District Court noted: "Certainly the cases holding that courts will defer to arbitration where that has been agreed upon are inapposite where, as here,

arbitration is expressly rejected.” Associated General Contractors of Illinois v. Illinois Conference of Teamsters, 345 F.Supp. 1296, 1299 (D.C. Ill. 1972); see also Dickeson, 827 F.2d at 629-30 (“Although parties to a collective bargaining agreement may choose to designate strikes as the sole means of objecting to management decisions, we think they must do so expressly before we may find judicial divestment. No preference need be accorded strikes as a noble dispute resolution mechanism.”); Hensel Phelps Const. Co., 376 F.2d at 737-38 (“Federal policy, as revealed by § 301 of the Labor Management Relations Act, undoubtedly favors arbitration as the method for resolving disputes arising under collective bargaining contracts. . . . In the case at bar however the contract does not provide for binding arbitration, and resort to the court was proper.”)

Second, the Supreme Court made clear that the Groves decision was factually unique and limited in scope:

“In our view, the statute’s [29 U.S.C. § 173(d)] reference to ‘the desirable method for settlement of grievance disputes’ . . . refers to the peaceful resolution of disputes over the application or meaning of the collective bargaining agreement. Of course, the parties may *expressly* agree to resort to economic warfare rather than to mediation, arbitration, or judicial review, but the *statute surely does not favor such an agreement.*”

Id. at 174 (emphasis added). The Court went on to adopt the reasoning if the Seventh Circuit in the case below:

“Unquestionably ‘the means chosen by the parties for settlement of their differences under a collective bargaining agreement [must be] given full play.’ See United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 566 (1960). But it is one thing to hold that an arbitration clause in a contract agreed to by the parties is enforceable. It is quite a different matter to construe a contract provision reserving the Union's right to resort to ‘economic recourse’ as an agreement to divest the courts of jurisdiction to resolve whatever dispute may arise. This we decline to do.”

Id. at 175.

These passages are critical to an understanding of the scope and reach of the Groves decision. The presumptions outlined in Steelworkers, Maddox and their progeny favor the broad application and exclusivity of grievance procedures that include final and binding arbitration clauses. *Of course* these presumptions have no role in construction of a collective bargaining agreement that does not require arbitration. The Groves Court's failure even to mention these opinions is telling, and it makes plain the Trial Court's error in assuming that Groves – an opinion of less than ten pages – silently overruled fifty years of well-established labor law.<sup>6</sup>

3. **Courts have recognized *Groves*' narrow application and have found grievance procedures similar to that in the CBA to be mandatory and exclusive**

Post-Groves decisions by the lower courts interpreting collective bargaining agreements support Sunstone's analysis.

---

<sup>6</sup> The Trial Court expressly relied in language in Groves stating that there exists a "strong presumption" favoring access to a neutral forum under Section 301. ADD-16. This "strong presumption" does not mean that disputes governed by an arbitration clause may also be brought in the courts as Section 301 suits. It means that Section 301 was intended by Congress to be broad enough to give the federal courts jurisdiction over enforcement claims even when the claims touched on conduct that would ordinarily come within the National Labor Relations Board's exclusive jurisdiction to adjudicate unfair labor practices. The Groves court noted this expressly in its opinion. 498 U.S. at 173. The reverse presumptions apply when the parties have agreed upon an arbitration procedure for the resolution of disputes. See 29 U.S.C. §173(d) ("Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.").

In Communications Workers of America, 40 F.3d at 434-35, a post-Groves decision cited *supra*, the Court cited the “heavy presumption in favor of mandatory arbitration of disputes under collective bargaining agreements” to find that the grievance procedure was mandatory notwithstanding its use of permissive language such as the word “may.” In this case, the Court rejected the employee’s arguments that they were not bound by the grievance procedures simply because the contract language stated that such disputes “may be presented as a grievance and may be submitted to arbitration.” *Id.* Similarly, the Court found that mandatory arbitration was to be presumed “unless the agreement *expressly provides* that arbitration is not the exclusive remedy.” *Id.* at 435.

Similarly, in Welch v. Professional Transit Management of Tucson, Inc., 2005 WL 2897354 (D. Ariz., Nov. 2, 2005), the District Court rejected the plaintiff’s argument that Groves permitted him access to the courts after his union refused to process his grievance through additional steps of the collective bargaining agreement’s multi-step procedure. In reaching this conclusion, the Court considered both Maddox and Groves and concluded that Groves was distinguishable on the grounds that the agreement at issue there required the parties to resort to economic warfare, which “undermined [the] Congressional purposes behind the LRMA.” *Id.* at \*3. For the Welch court, the dispositive question was not whether Groves was decided after Maddox (which was the dispositive question for the Trial Court, *see* App. 24 (Court Order at 12)), but whether the grievance procedure included a provision for final and binding arbitration or, instead, directed the parties to engage in economic warfare if they could not reach a voluntary agreement. *Id.* at \*\*3-4. Concluding that Groves was inapplicable, the Court then

concluded that “[a]ny doubts [as to whether the employees may avoid the contract procedures in favor of a judicial suit] are to be resolved against such an interpretation.”

Id. at \*4.

In Ingram v. Kroger Co., 2000 WL 730424 (N.D.Tex., May 17, 2000), the Court also noted that Groves was unique, finding:

“The question before the Court [in Groves] was whether, upon failure of the grievance procedures, a collective bargaining agreement that reserved the parties' rights to resort to economic weapons, such as strikes, lockouts and other job actions, could be construed to bar recourse to actions under §301 of the LMRA. The Court held that a contract provision reserving the union's right to resort to economic weapons cannot be construed as an agreement to divest the court of jurisdiction to resolve disputes. This is because Congress, in passing the LMRA, envisioned peaceful resolutions of disputes.”

Id. at \*3. In Ingram, the Court noted that the plaintiff's dissatisfaction with the results of the grievance procedure does not mean it failed to resolve their disputes. “Plaintiffs submitted their grievances to a grievance committee, and those grievances were denied. As the grievance proceedings were final under the CBA, Plaintiffs are bound by the decisions unless they can demonstrate that the Union breached its duty of fair representation.” Id. (citing United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 61 (1981); Thomas v. LTV Corp., 39 F.3d 611, 622 (5th Cir.1994)); see also American Federation of State, County and Municipal Employees Council 75 v. Good Shepherd Health Care Sys., 2010 WL 3746424 \*5 (D. Or. July 16, 2010) (noting that Groves decision turned on the fact that the parties were required to resort to economic weapons).

In light of the foregoing, because the CBA that governed Moen's grievance procedures specifically provides for final and binding arbitration, Groves is not

applicable, and any doubts concerning CBA's grievance procedure must be resolved in favor an interpretation providing for its exclusivity and finality.

This application of Section 301 does not mean, of course, that employees like Moen have no recourse. It does mean, though, that the recourse is limited. An employee may seek redress under Section 301 only when he *pleads and proves* that his union breached its duty of fair representation in handling his grievance. Vaca v. Sipes, 386 U.S. 171, 186-87 (1967); Waldron v. Boeing Co., 388 F.3d 591, 594 (8<sup>th</sup> Cir. 2004); Poaletti, 370 N.W.2d at 675. This paradigm only makes sense, since in joining the union the employee has made the union his exclusive agent for interacting with the employer and has, accordingly, ceded to the union certain of his rights. See Vaca, 386 U.S. at 182. ("The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity *subordinates the interests of an individual employee* to the collective interests of all employees in the bargaining unit" and accordingly, individuals are "stripped of traditional forms of redress by the provisions of federal labor law.") (emphasis added). The standard for proving a breach by the union of its duty of fair representation is a high one. Moen must show that the union's conduct was "arbitrary, discriminatory, or in bad faith." Id. at 190. "Mere negligence, poor judgment or ineptitude on the part of the union is insufficient to establish a breach of the duty of fair representation." Stevens v. Highway, City & Air Freight Drivers, 794 F.2d 376, 378 (8<sup>th</sup> Cir. 1986). For numerous reasons, including those set forth by the Trial Court in its August 12, 2009 order, see ADD-18-23 (Court Order at 14-19), Moen wholly failed to satisfy this standard.

Accordingly, the Trial Court's failure to grant Sunstone summary judgment on Moen's breach of contract claims was erroneous and should be reversed.

**II. THE TRIAL COURT ERRED IN FAILING TO GRANT SUNSTONE'S MOTION FOR A NEW TRIAL ON THE DEFAMATION CLAIM**

Sunstone is entitled to a new trial on Moen's defamation claim for an entirely different set of reasons. At key points during the trial, the Trial Court made rulings that fundamentally altered the course of the proceedings and affected the jury's deliberations, rendering it impossible for the jury to assess Moen's defamation claim correctly or to reach a correct result based on the evidence. Despite these errors, the Trial Court denied Sunstone's request for a new trial.<sup>7</sup>

A trial court's failure to provide proper instructions may require a new trial. Cambern v. Sioux Tools, Inc., 323 N.W.2d 795, 797 (Minn. 1982). A new trial is warranted if errors in the jury instructions or special verdict form destroyed the substantial correctness of the charge, caused a miscarriage of justice, or resulted in substantial prejudice to a party. D.H. Blattner & Sons v. Firemen's Insurance of Newark, New Jersey, 535 N.W.2d 671, 675 (Minn.App. 1995). When the erroneous instructions or verdict form resulted in an error of fundamental law or controlling principle, a new trial may be justified even if the prejudiced party made no objection before the jury

---

<sup>7</sup> In its Order of May 9, 2011, the Trial Court not only denied Sunstone's post-trial motion, it also granted Moen's request to strike the motion completely, on the grounds that it was not set for hearing within sixty days following Moen's service of notice of the filing of Trial Court's decision, citing MRCP 59.03. ADD-33-35. Although Sunstone believes the Trial Court's application of Rule 59.03 was an erroneous abuse of discretion and should be reversed, the decision does not affect the validity of Sunstone's appeal, as Sunstone's post-trial motion was timely filed and served. See Rubey v. Vannett, 714 N.W.2d 417, 424-25 (Minn. 2006).

retired. Johnson v. Jensen, 433 N.W.2d 472, 475 (Minn.App. 1988), aff'd in part, rev'd in part, 446 N.W.2d 664 (Minn. 1989); see also Kalevig v. Holmgren, 197 N.W.2d 714, 718-19 (Minn. 1972); Zurko v. Gilquist, 62 N.W.2d 351, 354 (Minn. 1954). Moreover, even where an error relating to jury instruction was not properly preserved, a court may review and consider "plain error in the instruction affecting substantial rights."

Minn.R.Civ.P. 51.04(b).

The Appeals Court's review of the Trial Court's denial of a new trial motion typically proceeds under an abuse-of-discretion standard. Longbehn v. Schoenrock, 2010 WL 3000283 \*2 (Minn.App., Aug. 3, 2010). However, in cases in which the new trial motion is based on an error of law, the standard of review is *de novo*. Frazier v. Burlington Northern Santa Fe Corp., 788 N.W.2d 770, 778 (Minn.App. 2010). Here, the Trial Court made two critical errors that essentially resulted in the imposition of directed verdicts on two critical issues that should have been reserved for the jury. Accordingly, these decisions are legal errors subject to *de novo* review.

**A. The Court Erred When it Modified the Alleged Defamatory Statement to which Sunstone had Stipulated Without Further Modifying the Special Verdict Form**

Before instructing the jury, the Trial Court made a major modification to the alleged defamatory statement in the Special Verdict Form, which tainted the jury verdict on the defamation claim. Question 3 of the Special Verdict Form submitted by Sunstone asked:

*"Was the following statement made by Sunstone false: 'Moen said he brought a gun to a meeting, said he intended to kill everyone at the meeting, including himself, if he was not reinstated and said he wished*

*S. W. had been at the meeting so he could have killed him if need be.’”*

App. 79 (Defendant’s First Amended Proposed Verdict Form).

Following the close of the evidence, Moen asked the Court to modify the question, arguing that the alleged statement should be changed to remove the words “said he” throughout. Over Sunstone’s vigorous objection, the Court changed the Special Verdict Form to read as follows:

*“Was the following statement made by Sunstone defamatory: ‘Moen brought a gun to a meeting and he intended to kill everyone at the meeting, including himself, if he was not reinstated and he wished S. W. had been at the meeting so he could have taken care of W. if need be.’”*

ADD-47-48 (Tr. 1192:7 – 1198:22). In issuing his ruling, the Trial Judge noted that his reasoning for doing so was unclear: “All right, I’m just going to shoot from the hip right at this time, and I’m going to make it [the alleged statement submitted to the jury] the following: ‘Was the following statement made by Sunstone defamatory?’ ‘That the employees of Sunstone alleged that Mr. Moen brought a gun to the meeting?’” App. 184-85 (Tr. 1195:23 – 1196:6).

In making the change, the Trial Court made an evidentiary finding concerning the specific statement Sunstone agents had made and inserted that finding into the Special Verdict Form. This error had a much greater impact than the more typical faulty instructions or erroneous legal statements that comprise many appeals. By instructing the jury as to the content of the alleged defamatory statement, the Trial Court denied the jury

the opportunity to make the very findings at issue: whether Sunstone actually made the statement and, if so, whether the statement was false.

1. **The Trial Court's modification of the alleged statement denied the jury the opportunity to decide whether the statement had even been made**

Sunstone had stipulated to the original version of the statement – that “Moen *said he brought a gun*” to the meeting. Sunstone’s proposed verdict form, which asked “Was the following statement made by Sunstone false,” makes the stipulation clear. Sunstone so stipulated because Sunstone employees had repeatedly testified as to what they had heard and/or learned about what Moen *had said* and how his statements were interpreted as threats. See, e.g., App. 118, 129-30, 133, 142-46, 159-61, 162, 166-67 (Tr. 629:15-21; 730:17 – 731:2; 782:6-12; 782:22-24; 906:5-12; 907:16-21; 909:4-8; 910:17-20; 957:17 – 958:1; 974:1-9; 1002:1-5; 1006:25 – 1007:10); App. 234, 236 (Tr.Ex. 14, 15). On the other hand, at no time did Sunstone stipulate that its agents made the modified statement – that “Moen brought a gun” to the meeting. Sunstone witnesses readily admitted that they *did not know* whether or not Moen *actually* had a gun in his possession during the meeting, and there is no evidence suggesting that any of the Sunstone managers in the disciplinary meeting knew whether or not Moen had a gun in his possession. See, e.g., App. 159-61 (Tr. 957:17 – 958:1; 974:1-9).

When the Trial Court stated that it intended to change the statement submitted to the jury over Sunstone’s objections, Sunstone requested that the Trial Court modify the Special Verdict Form further to ensure that the jury clearly understand that it must also find that the revised statement had been made. App. 187-88 (Tr. 1198:23 – 1199:20) (By

Attorney Hayes: “Well, then there should be a question in the jury form, your Honor, as to whether or not that statement was even said . . .”). Sunstone’s requested addition was necessary because Question 3, as originally formulated, stipulated to the pre-modified version of the statement, and the stipulation remained in place, erroneously, when the statement was modified.

The Trial Court denied Sunstone’s request to amend the Special Verdict Form, having reasoned that the issue is “going to be resolved by the jury.” See App. 184 (Tr. 1195:17-18). But the matter was *not* resolved by the jury; rather, the jury was directed to the finding. In the absence of the clarifying question requested by Sunstone’s counsel, the jury received a Special Verdict Form stating that the question of whether Sunstone agents had uttered the modified statement was not in dispute. Thus, the jury was never asked to determine whether or not the statement had been made.

Question 5 of the Special Verdict Form illustrates the prejudice. In Question 5, the jury was asked to determine whether or not the statement set forth in Question 3 (the modified version of the statement) had been “published” by Sunstone. The jury answered in the affirmative. ADD-48. However, “publication” was defined by the Trial Court as follows: “A defamatory statement or communication is published if it is communicated to and understood by at least one person other than Plaintiff.” App. 192 (Tr. 1235:9-13). Thus, a finding of “publication” requires the jury to find *both* that the statement was made *and* that it was understood by a third party. As a result of the Trial Court’s modification of the statement, the first half of that query was resolved for the jury, and this Court cannot determine from the verdict that the jury made an affirmative finding

that the modified statement was made, thus precluding the Court from determining that the error was harmless.<sup>8</sup> In such a case, a new trial is required. See, e.g., Frazier, 788 N.W.2d at 778-79 (granting a new trial on the issue of liability because the trial court failed to provide an instruction concerning the appropriate standard of care, and thus, reasoned the Court, “[t]he jury never determined whether BNSF complied with the federal standard because *it was never asked that question*”) (emphasis added); see also id. at 778 (“If the effect of the erroneous instruction cannot be determined, we will give the complainant the benefit of the doubt by granting a new trial.”); George v. Estate of Baker, 724 N.W.2d 1, 10 (Minn. 2006) (holding that when an incorrect instruction may influence the jury’s analysis, a new trial is warranted).

**2. The Trial Court’s modification of the alleged statement improperly removed from the jury the determination of “falsity”**

By altering the focus of the trial and the jury’s deliberations from whether or not Moen *said* he brought a gun to the meeting to whether or not Moen *actually brought* a gun to the meeting, the Trial Court changed the focus of the inquiry to what Moen did or did not *say* to what he did or did not *do*. Thus, the change impacted the jury’s finding of “falsity” when answering Question 4 on the Jury Verdict Form.

As stated above, Sunstone witnesses had repeatedly testified as to what they had heard and/or learned about what Moen *had said* and how his statements were interpreted as threats. Sunstone witnesses readily admitted that they *did not know* whether or not

---

<sup>8</sup> The Trial Court’s answer to Sunstone’s post-trial assignment of error on this point and the issue raised in Section II.C was to state that the errors were harmless. ADD-44 (Order dated 5/9/2011).

Moen *actually* had a gun in his possession during the meeting. In fact, whether Moen actually had a gun in his possession during the meeting – or was merely engaging in misguided bravado in talking to his co-workers – is beside the point, because Sunstone’s decision to discharge Moen was made on the basis of the disruptive comments and perceived threats, not a firm belief one way or the other that Moen actually possessed a gun.<sup>9</sup>

Thus, the Trial Court’s “shot from the hip” fundamentally impacted the jury’s ability to assess the question of “falsity.” In Question 3 of the Jury Verdict Form, the Trial Court instructed the jury that Sunstone agents had said “Moen brought a gun” to the meeting; Moen himself testified that he had not brought a gun to the meeting, see App. 98 (Tr. 246:10-14); and Sunstone witnesses admitted that they did not know whether or not Moen had brought a gun to the meeting. See App. 159-61 (Tr. 957:17 – 958:1; 974:1-9). In other words, the Trial Court’s modification of the statement effectively *required* a finding of falsity. See, e.g., D.H. Blattner & Sons, 535 N.W.2d 671 at 675-76 (finding error when jury instructions “read like a directed verdict”). Had the statement been submitted as Sunstone had requested, a completely different analysis of falsity would have been required, and the jury’s conclusion would have almost certainly been different.

---

<sup>9</sup> Sunstone’s Tom McKenney and Bruce Fairchild, and Local 21’s Brandt, all testified that Moen was terminated for making statements about his alleged possession of a weapon, not for actually having one. App. 156, 171-72, 174-75 (Tr. 933:7-22; 1032:7 – 1033:21; 1170:8 – 1171:3). All documentary evidence confirmed this testimony, including the Sunstone Disciplinary Action Form, the Sunstone Personnel Action Form, Sunstone’s Petition for Harassment Restraining Order, Brandt’s October 31, 2007 Correspondence, and Matthew Wakefield’s November 9, 2007 Correspondence. See App. 230, 233, 238, 243, 244 (Tr.Exs. 10, 13, 107, 116, 117).

3. **The Trial Court's error was compounded by its failure to give an instruction regarding "inferences"**

The Trial Court's error was compounded yet again by the Court's failure to instruct the jury that it could draw inferences concerning Moen's conduct based on Moen's statements. In light of the modification made to the statement, the jury should have been instructed that it was permitted to draw inferences concerning Moen's *actual conduct* from statements that he made. That is, if the jury found that Moen *said* he brought a gun to the meeting, then the jury could infer that he *did* bring a gun to the meeting. Such an inferential finding would have allowed the jury to find that the modified statement submitted to the jury (that "Moen brought a gun" to the meeting) was true rather than false.

Moen's answer to this argument during post-trial briefing was to assert that Sunstone could argue to the jury anything it wanted concerning inferences and implications. But it is well-established and has long been held that counsel's argument carries not nearly the same weight as the Trial Court's instructions. Willett v. Seerup, 186 N.W. 225 (Minn. 1922) (the jury must follow and apply the law as given by the trial judge, not the attorneys; failure to do so results in a perverse verdict that cannot be accepted); see also JIG 10.15 ("As judge I will apply the rules and tell you what you can and cannot consider as evidence."); JIG 10.25 ("Nothing the attorneys say during the trial, including opening statement and closing argument, is evidence. . . . What the attorneys say about the law may be different from what I say. *If this happens, you must rely on what I say about the law.*") (Emphasis added).

The foregoing anomaly rendered the jury's verdict on the defamation claim unupportable. In short, in defamation actions, words matter.

**B. The Court Erred in Failing to Instruct the Jury on Application of the Qualified Privilege and Its Ruling that Defendant had a Reasonable Basis for Believing the Statement was True at the Time it was Made.**

Following the close of evidence and prior to the delivery of the jury instructions, the Trial Court found that the evidence established *as a matter of law*: (i) that Sunstone's investigation of Moen's statements was sufficient; (ii) that Sunstone's agents had a reasonable basis and probable cause to believe the statements they made about Moen were valid at the time they made them; and (iii) that Sunstone's statements were qualifiedly privileged. App. 190-91 (Tr. 1222:10 – 1223:19). The significance of these rulings cannot be overstated. Qualified privilege is an absolute bar to liability for defamation, except in those cases in which the plaintiff is able to prove that the defendant abused its privilege by making the statements with "actual malice." Cavanaugh v. Burlington Northern Railroad Co., 941 F.Supp. 872, 879 (D.Minn. 1996); Lewis v. Equitable Life Assurance Society, 398 N.W.2d 876, 890 (Minn. 1986). Actual malice is more than negligence and is "probably even more than highly unreasonable conduct." Hirman v. Rogers, 257 N.W.2d 563, 566 (Minn. 1977).

To prove "actual malice," a plaintiff must prove that the defendant "made the statement from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff." Lewis, 398 N.W.2d at 891. In other words, a jury can find actual malice *either* from evidence that the defendant made the statement with "ill will" *or* from evidence that the defendant made the statement without cause in order to injure

the plaintiff. Id. The Trial Court’s instructions to the jury on “actual malice” tracked this disjunctive formulation. App. 193 (Tr. 1236:4-12) (instructing jury that a statement is made with actual malice if “one, it is made with ill will and improper purposes; or two, it is made without cause and without regard for the consequences”).

Yet, when the Trial Judge delivered this instruction, he failed to inform the jury that second part of that instruction was no longer in dispute in light of his earlier rulings. This was clear, reversible error because it allowed the jury to infer that Sunstone’s agents did not have a reasonable basis for believing in the truth of the statements they had made.<sup>10</sup> Specifically, although the jury marked “Yes” to Question 6 on the Special Verdict Form (which asked only whether Sunstone made the alleged statement “with actual malice” – see ADD-48), it is impossible to determine whether the jury’s response to Question 6 stemmed from a finding that Sunstone made the statement with “ill will” or from a finding that Sunstone made the statement “without cause.” Under Lewis, and as instructed by the Trial Court, either finding would support the actual malice finding, but both findings are not necessary. In this case, the latter issue had already been decided as a matter of law. In other words, the jury was *not* entitled to find that Sunstone made the alleged statement “without cause,” because the Trial Court had already concluded that the evidence established as a matter of law that “defendant’s statements were . . . based upon

---

<sup>10</sup> In his brief opposing Sunstone’s post-trial motion, Moen’s counsel argues that Sunstone failed to object to the Court’s failure to clarify its instructions in light of these rulings. However, the Court’s rulings came *after* counsel had already advanced their arguments concerning the jury instructions and Special Verdict Form. Moreover, when stating his rulings, the Trial Judge informed counsel that the jury instructions and verdict form “are going to stand as is” based on the earlier discussion, thus making it clear he would not entertain additional argument. App. 189-90 (Tr. 1221:25 – 1222:4).

reasonable or probable cause.” App. 191 (Tr. 1223:2-12). As with the modification to alleged defamatory statement, this error resulted in prejudice to Sunstone, because the jury’s verdict was very likely decided on an improper basis.

**CONCLUSION**

For the foregoing reasons, Sunstone respectfully requests this Court vacate the judgment of the Trial Court and remand with instructions to (i) dismiss Moen’s breach of contract claim with prejudice and (ii) award Sunstone a new trial on Moen’s defamation claim.

Dated: September 23, 2011

GRAY, PLANT, MOOTY,  
MOOTY & BENNETT, P.A.

By 

Mark Mathison (#028709X)  
Dean LeDoux (#0176643)  
Gray Plant Mooty  
500 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
Phone: 612.632.3247  
Fax: 612.632.4247  
Mark.Mathison@gpmlaw.com

Roger M. Stahl (#226634)  
Jerrie M. Hayes (#0282340)  
Rebecca B. Paape (#0386966)  
Wendlund Utz, Ltd.  
300 Wells Fargo Center  
21 First Street, S.W.  
Rochester, MN 55902  
Phone: 507.288.5440  
Fax: 507.281.8288

Of Counsel:

Michael J. Lorenger (*pro hac vice motion to  
be filed*)

Lorenger & Carnell PLC

651 S. Washington St.

Alexandria, VA 22314

Phone: 703.684.1800

Fax: 703.684.1805

[mlorenger@lorengercarnell.com](mailto:mlorenger@lorengercarnell.com)

**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132 for brief produced with proportional font and typeface in 13-point Times New Roman using Microsoft Word 2003.

The length of this brief is 10,164 words, excluding the Table of Contents and Table of Authorities.

Dated: September 23, 2011

GRAY PLANT MOOTY  
MOOTY & BENNETT

By: 

Mark Mathison (#028709X)  
Dean LeDoux (#0176643)  
500 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
Phone: 612.632.3247

Attorneys for Defendant/Appellant