
State of Minnesota
In Court of Appeals

JEFF MOEN,

Plaintiff/Respondent,

vs.

SUNSTONE HOTEL PROPERTIES, INC., a Colorado Corporation,
d/b/a MARRIOTT HOTEL,

Defendant/Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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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).

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LEGAL ISSUES

I. DID THE TRIAL COURT CORRECTLY RULE THAT RESPONDENT HAD THE RIGHT TO BRING HIS COMMON LAW BREACH OF CONTRACT CLAIM IN COURT?

Trial Court Held: The Collective Bargaining Agreement did not prohibit Respondent’s wrongful discharge suit.

1. Appellant moved for summary judgment. See Appellant’s App. Page10.
2. The trial court ruled: “I conclude the grievance procedure is voluntary and optional. I therefore find the judicial remedy appropriate and available.”
3. Appellant raised the issue in its notice of appeal.
4. Apposite Cases:

- a. Groves v. Ring Screw Works, Ferndale Fastener Div., 498 U.S. 168, 111, S.Ct. 498 (1990).
- b. In Re Estate of Barg, 752 N.W.2d 52, 63 (Minn., 2008).
- c. Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 506, 82 S. Ct. 519, 522 (1962).
- d. Orlando v. Interstate Container Corporation, 100 F.3d 296 (3rd Circuit (1996)).

II. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR A NEW TRIAL ON DEFAMATION?

Trial Court Held: It did not abuse its discretion.

1. Appellant moved for a new trial "on the merits of Plaintiff's complaint." See Appellant's Notice of Motion and Motion at Appellant's App. Page 37.
2. The Trial Court denied Appellant's motion as untimely heard and in the alternative denied the motion on its merits. See Appellant's App. Page 39.
3. Appellant appealed the denial of its motion for a new trial on the merits, but not the denial of the motion as untimely filed. See Issues Two and Three of Appellant's Appellate Brief, pages vi and vii.
4. Apposite Cases:
 - a. Lake Superior Center Authority v. Hammel, Green & Abrahamson, Inc., 715 N.W.2d. 458 (Minn., 2006), rev. denied 2006.
 - b. Ruby v. Vannett, 714 N.W.2d. 417 (Minn., 2006).
 - c. Halla Nursery, Inc. v. Baumann-Furrie & Co., 405 N.W.2d. 905 (Minn., 1990).

STATEMENT OF THE CASE

Respondent sued Appellant for wrongful discharge and defamation in Olmsted County District Court. On May 14, 2009, Appellant moved for summary judgment before the Honorable Joseph Chase, on the issues of federal preemption and qualified privilege. The court denied the motion on August 12, 2009. The case was tried on October 18-22, 2010 before the Honorable Gabriel Giancola, visiting Judge. The jury reached a verdict for Respondent on October 22, 2010. Respondent served notice of entry of Judgment on Appellant on November 2, 2010. Appellant moved for a new trial on December 3, 2010, setting the motion date for February 2, 2011 (90 days from the date of the motion) before the Honorable Kevin Lund, Judge of District Court. On February 2, 2011, Judge Lund ruled that he was not the proper Judge to hear the motion and rescheduled the matter before Judge Giancola for March 30, 2011. The motion was heard on May 9, 2011, before Judge Giancola. Judge Giancola struck Appellant's motion for new trial as untimely heard and in the alternative denied the motion in its entirety on its merits.

STATEMENT OF FACTS

The relevant facts in chronological order are:

1. Respondent began working for what was then the Kahler Hotel in

1985 as a courtesy van driver and valet. Trial Transcript (hereinafter T.T) pages 183-184. Respondent's Appendix (hereafter "R.App.") Pp. 1-2.

2. Appellant promoted Respondent to Bellman when Appellant's new Marriott hotel opened in 1986 or 1987. T.T. pp. 184-185, R.App., Pp. 2-3.

3. In September of 2005, Respondent's union and Appellant entered into a Collective Bargaining Agreement for the period September 1, 2005 to August 31, 2010. See trial exhibit 7, at Appellant's App. p.194. The CBA contained the following articles and statements:

a. At Article 5 DISCHARGE AND DISCIPLINE, the CBA stated: "No employee will be disciplined or discharged without just cause." See Appellant's App. p. 199.

b. Article 6 GRIEVANCE AND ARBITRATION PROCEDURE stated:

1. Heading 1 stated the grievance procedure "... is established for the specific purpose of providing prompt and amicable means of settlement of all questions arising under the terms of this agreement..." Appellant's App. p. 199

2. Heading 2 stated that the employee **may** attempt to resolve the matter with the manager. If there is no resolution, four steps are provided:

Step 1. Step one stated that the grievance **shall** be reduced to writing and states what should be written and who it should be delivered to.

Step 2. Step two stated that the union and company **shall** meet within 14 days. If the grievance is not settled, the employer is to issue a written response.

Step 3. Step three started with “**(Optional)** If the grievance is not settled at step 2, the union business agent **may** appeal the grievance to mediation within seven (7) calendar days....” It also describes the conduct of the mediation.

Step 4. Step four stated: “If the grievance is not settled at Step 3, or if the Union Business Agent chooses to skip Step 3, the Union **may** submit to arbitration...” and goes on to describe a more formal arbitration procedure. At step 4, part (b), the CBA states that the decision of the arbitrator is final and binding on the parties. See Appellant’s App. Pp. 199-200.

Missing from the CBA was any language stating that mediation or arbitration is the exclusive means of enforcing rights under the CBA, that arbitration is mandatory, that either party waives any rights to go to court under any condition or fact situation, or that access to the courts is prohibited. See Appellant’s App. Pp. 194-228.

4. On or around April of 2007, Respondent was featured in the Marriott Spirit to Serve brochure that showcases outstanding Marriott associates. See trial exhibit 2, pages 3 and 30-31 at R.App. pp. 57-59. Respondent was also featured in the Rochester Post Bulletin for his outstanding service. See trial exhibit 3 and T.T. pp. 189-193 at R. App. pp. 60 and 4-8.

5. After the award and publicity, fellow bellmen acted as if they were “jealous” of Respondent. Respondent’s manager started giving him trouble and snubbing him. T.T. Pp. 210-212, R. App., pp. 9-11.

6. In or around May of 2007, Respondent scheduled a three-day vacation to go hunting. The dates scheduled were October 25th to 28th, 2007. T.T. P. 233, R. App. p. 15.

7. Respondent purchased a .357 Ruger Magnum pistol in the spring or early summer of 2007. T.T. P. 220, R. App. p. 12. This is the pistol made famous in the “Dirty Harry” movies. It is about a foot long and has a big grip. T.T. P. 220, R. App. p. 12. It was too big to fit in the clothes Respondent wore on October 24, 2007 (see *infra*). T.T. P. 221, R. App. p. 13.

8. The only people who had seen the gun were Respondent’s hunting companions. TT. P. 223, R. App, p. 14.

9. When he purchased the pistol, in spring or early summer of 2007, Respondent told Mr. Robert M , a fellow bellman, that he had purchased the gun. T.T. P. 223, R. App. p. 14.

10. Up to October 6, 2007, all bellmen parked in the company parking ramp at times. Some parked all the time, some once in a while. No one ever got in

trouble for parking in the ramp. Respondent usually parked his vehicle about six blocks away. T.T. Pp. 233-235, R. App. pp. 15-17. See also T.T. P. 620, R. App. p. 30.

11. On October 16, 2007, Respondent arrived at work in the early morning and it was raining “like you wouldn’t believe;” so Respondent parked in the ramp. T.T. Pp. 234-235, R. App. pp. 16-17.

12. Appellant, through Mr. McKenney, suspended Respondent for eight days calling the parking “theft of company property and or services.” See Exhibit 9, Appellant App. P. 229 and T.T. p. 236, R. App. P. 18. A hearing was scheduled for October 24, 2007 to determine if Appellant would fire Respondent. T.T. Pp. 236, R. App., p. 18.

13. At the end of the meeting, Mr. Bruce Fairchild, Appellant’s most superior officer present, told Respondent the company accepted his apology and reinstated him. T.T. P. 248, R. App. p. 25. Respondent then went home. T.T. P. 248, R. App. p. 25.

14. Respondent testified that on the morning of the 25th of October when he returned to work he said:

a. That the only conversation he had with R M on the 25th was: “I see you got your job back.” I said, ‘Yah. Well, I’m very thankful to

have my job back.’ And that is basically all the exchange.” T.T. P. 249, R. App. p. 26.

b. That the only conversation he had with M H was “I said ‘Hi!’ to him, how are things going and that. That’s about all I said to him.”

See T.T, October 22, page 251. R. App. p. 27

c. Respondent specifically denied Appellant’s allegations about the conversation with Mr. M on October 25th in Trial Exhibit 10 (Disciplinary Report) Appellant App. p. 230, as follows:

1. “Q. Let’s go over that just a second here. The first sentence says that ‘Jeff informed another associate that he had purchased and brought a gun to the meeting with Bruce....First of all did you tell any associate that?

“A. Bob had information...

“Q. No. No. Did you tell anybody that?

“A. No.

“Q. Okay

“A. Never said a word.” T.T P. 272, R. App. p.28

2. “Q. Okay. Second sentence: ‘He told the associate he was prepared to take everyone out, including himself, if it did not go his way.’ Did you ever tell any associate that you were prepared to take everyone out and commit suicide on the 24th if that didn’t go your way?”

“A. No way. No.” T.T. P. 273, R. App. p. 29.

3. “Q. Okay. Third sentence: ‘In addition, he informed two associates that it was too bad S W was not present as he would have taken care of him also.’

“A. (Shakes head.)

“Q. Did you say that to anybody?

“A. No. No way.” T.T. P. 273, R. App. p. 29.

15. What Mr. M recalls of that conversation on the morning of October 25, 2007 is set forth in cross-examination where he was questioned about his “interview” with Mr. McKenney (exhibit 14) Appellant App. p. 234.

“Q. And that first sentence is just wrong, right? ‘Thursday, October 25th, 2007, Jeff told me had brought a—bought a gun for \$450. He needed backup for the meeting on Wednesday with Tom McKenney concerning his job back.’ That’s not what you told him?

“A. No. He brought backup to the meeting. Jeff had told me that he bought the gun for \$450 from Gregg Hoff’s neighbor. And later on – this did not happen in the same context. This looks like its fluid, you know.

“Q. Right.

“A. And it’s not fluid.

“Q. That’s your problem with it?

“A. It’s not fluid. The statement is not fluid. That’s not what happened.

“Q. Okay.

“A. Later on Jeff said he brought backup to the meeting, so I connected the dots myself.

“Q. So you connected them, but the way he wrote it,--

“A. It makes it sound –

“Q. –it makes it sound like that all happened at the same time?

“A. True. That’s it. That’s it.

“Q. And it didn’t?

“A. No. It happened at –it might have been ten minutes later, five minutes later. It wasn’t in the same sentence.

“Q. In fact ‘bought a gun’ was –

“A. He brought –he actually –what he said, he bought a .357, I said he–

“Q. Only when you put them together like that in a sentence do they look like he bought the gun to bring as backup?

“A. Exactly.

“Q. And that is what you thought was wrong at the time?

“A. Leading the witness, yes.

“Q. **Jeff never said to you that he brought a gun to the meeting on the 24th?**

“A. **He never told me that.**” See T.T. Pp. 681-683, R. App. pp. 31-33.

16. Mr. M also claims he told Mr. H only that Respondent brought backup to the meeting, not that he brought a gun. TT. P. 683 -684, R. App. pp. 33-34.

17. Mr. H, another bellhop, claims that Mr. M told him after Respondent had left for his vacation, that Respondent had told Mr. M that he brought a gun to the disciplinary meeting on the 24th. T.T. P. 782; R. App. p. 39.

18. Mr. W, another bellhop, had a conversation with Mr. H just after Respondent left for the day. He testified that Mr. H told him that Bob M had told him that Respondent had told him that he had brought a gun to the meeting and he didn't have to use it because the meeting went his way. T.T. Pp. 730-731, R. App. pp. 35-36. Mr. H agrees that he said something like that to Mr. W : T.T.P. 783-784, R. App. pp. 40-41.

19. Mr. W told Mr. McKenney (management) on the 25th that Mr. H told him that Bob M had told him that **Respondent had brought a gun to the meeting** and that if things had not gone the way they went, he would have taken care of the people in the room and then himself. T.T. Pp. 738-739, R. App. pp. 37-38. Mr. H confirms that he said that. T.T. P. 790, R. App. p. 42.

20. Mr. H made the leap from “brought backup” as he heard what Mr. M said (see #20 above) to he “brought a gun.” T.T. P. 819, R. App. p.43 and T.T. p. 961, R. App. p. 46.

21. Mr. Fairchild (management) contacted the Rochester Police on or about October 25, 2007 and reported to Captain Edwards that “...a Marriott employee, Jeffrey Wayne Moen, 12/29/48 had secretly brought the gun to a suspension meeting for him on 10/24/07 at Marriott.” T.T. Pp. 954-955, R. App. pp. 44,45 .

22. On October 29, 2007, Mr. McKenney confirmed to the Rochester police that Appellant was claiming Respondent had secretly brought a gun to a discipline hearing. T.T. Pp. 976-977. R. App. pp. 47-48. See Trial exhibit 16. R. App. pp. 61-63.

23. Appellant fired Respondent on October 29, 2007. Appellant's Disciplinary Action Report stated that Respondent was terminated because "Jeff informed another associate that he had purchased and brought a gun to his meeting....." Trial Exhibit 10, Appellant's App. p. 230.

24. On October 29, 2007, Appellant's employees, Mr. Fairchild, Mr. McKenney, Mr. M , and Mr. H , signed and filed a petition for a Harassment Restraining Order, citing specific past acts of harassment under oath stating "The following are specific acts of harassment committed by Respondent(s)... Respondent physically or sexually assaulted the Petitioner as follows: On information and belief **carried a concealed weapon to a disciplinary hearing.**" See exhibit 117 at Appellant's App. pp. 244.

25. On October 22, 2010, Appellant counsel argued to the Jury as follows:

"Mr. Moen's complaint is that Sunstone terminated him without just cause, violating Article 5 of the Collective Bargaining Agreement. If you find it more likely than not that Sunstone had fair, equitable, or rational reason for terminating Mr. Moen, then Sunstone did not violate the Collective Bargaining Agreement by ending his employment. Mr. McKenney and Mr. Fairchild both testified, and as the evidence on the action sheet read to Mr. Moen at the October 29th meeting, Mr. Moen was terminated for telling another employee that he had brought backup to the meeting." T.T. Pp. 1262-1263, R. App. pp. 54-55.

26. On the Special Verdict Form, the jury was asked: "Was Plaintiff terminated for just cause in conformance with the Collective Bargaining

Agreement? It answered “No.” See Special Verdict Question #1 at Appellant’s ADD. p. 47.

27. On October 22, 2010, in final argument, counsel for Appellant explained how her client came to the conclusion that Respondent had in fact brought a gun to the meeting:

“Now as Mr. McKenney and Mr. Fairchild have both testified, the statements made were that Mr. Moen had brought backup to the meeting. He was prepared to take care of business. He wished S had been there so he could have taken care of him, too, if need be. **When you have just in the previous breath said that you bought a gun, what other possible meaning could you attribute to these words?”** T.T.P. 1267, R. App. p. 56.

28. The jury was instructed: “A statement or communication is also false if the implication of the statement is false.” TT. P. 1235, R. App. p.53.

29. The jury was asked in the Special Verdict Form:

“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 Wolslager if need be.” The Jury answered: “Yes.” See Special Verdict Question #3, at App. Add. p. 48.

ARGUMENT

ISSUE I. THE TRIAL COURT CORRECTLY RULED THAT RESPONDENT HAD THE RIGHT TO BRING HIS COMMON LAW BREACH OF CONTRACT CLAIM IN COURT.

Summary Introduction: Appellant failed to meet its burden on summary judgment of proving that the federal Labor Management Relations Act prohibited Respondent's suit under the uncontested material facts before the court. The Trial Court ruled that the LMRA applied, that it could be applied in State Court, and that the CBA and LMRA did not prohibit Respondent's suit.

The Trial Court quite properly conducted a two-stage analysis. At stage one, the Trial Court held that the CBA had to be referenced by Respondent to make his case and that the Trial Court therefore had to reference the LMRA and the CBA to determine if Respondent could proceed in court. At step two, the Trial Court referenced the CBA and the LMRA and found that the language of the CBA did not make arbitration mandatory, exclusive, final, and binding, nor did it expressly prohibit access to the courts. The Trial Court then properly held that Respondent could proceed to trial on his claims.

Respondent notes that the word "preemption" appears to be used in two ways in most cases reviewed. The first determines that federal law does or does not apply (stage one above). The second step determines that State Court action is prohibited or allowed (stage two above). The parties do not appear to be contesting that federal law applies when interpreting the CBA. The parties' sole contention appears to be whether the CBA between the parties, under the LMRA, prohibits State Court action.

Standard of Review: On appeal from summary judgment, Appellate Court must determine whether the district court erred in its application of the law and whether any genuine issues of material fact remain. In so doing, all evidence must be viewed in the light most favorable to the non-moving party. **Fisher v. County of Rock**, 596 N.W.2d. 646 (Minn., 1999).

Analysis:

A. **The Labor Management Relations Act Encourages A Union Employee's Access To Judicial Remedies For Peaceful Resolution Of Disputes Between An Employer And Employee, And A Union.**

The Trial Court (The Honorable Joseph Chase) established the proper standard for review by correctly describing the federal legal environment within which he felt Respondent's wrongful discharge case originated, and the court's role. He noted in his Memorandum that the court should start from the assumption that the historic police powers of the States are not to be superseded by federal law unless Congress demonstrates its clear and manifest purpose to do so, citing **In Re. Estate of Barg**, 752 NW 2d 52, 63 (Minn. 2008), which cited **Cipollone v. Liggett Group Inc.**, 505 U.S. 504, 516 (1992). See Appellant's App., page 11. Thus, preemption is generally disfavored. **Id.**, citing **Martin ex rel. Hoff v. City of Rochester**, 642 NW2d1,11 (Minn.2002), citing **Cipollone**, **supra**. See Appellant's ADD., pp. 11-12.

The United States Supreme Court established the applicable test for federal preemption. See **Lingle v. Norge Division of Magic Chef, Inc.**, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). The test the courts presently use is whether Congress has signaled preemption of state law: a) through express language clearly and plainly preempting state law; or b) through action implying preemption of state law, either, i) through setting forth a scheme of federal regulation sufficiently comprehensive to infer that Congress is leaving no room for supplementary state regulation; or ii) where it is clear that applicable state law either conflicts with the federal law sufficiently that compliance with both is impossible, or obstructs the accomplishment and execution of congressional intent, purpose and objectives. See **Barg, supra**, citing **Cal.Fed.Sav. & Loan Ass'n v. Guerra**, 479 U.S. 272, 280 (1987), and **Rice v. Santa Fe Elevator Corp.**, 331 U.S. 218, 230 (1947); see also **Fla. Lime Avocado Growers. Inc. v. Paul**, 373 U.S. 132, 142-143 (1963) and **Hines v. Davidowitz**, 312 U.S. 52, 67 (1941). Application of this test is to be case by case, according to the specific legislative Act at issue. See **Lingle, supra**.

The Labor Management Relations Act (1947) meets none of these tests for preemption at the second stage regarding access to the courts (stage two) Rather, it is quite articulate in encouraging judicial review as a means of providing

peaceful resolution to workplace disputes. It provides that suits by employees for violation of contracts between an employer and a labor organization representing employees may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy. See 29 U.S.C.A. Section 185(a). Rather than prohibiting wrongful discharge suits as argued by Appellant, the Supreme Court has made it clear such suits are to be encouraged. Citing an earlier case, the Supreme Court affirmed that a wrongful discharge suit is precisely the kind of case Congress provided for in the LMRA. See Groves v. Ring Screw Works, Ferndale Fastener Division, 498 U.S. 168, 111 S.Ct. 498 (1990), citing Smith v. Evening News Association, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed. 246 (1962). The Groves Court further referenced the court's previous square holding that the LMRA authorized suits by and against individual employees as well as between unions and employers, including actions by an employee against an employer for wrongful discharge. See Groves, supra, citing Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 562, 98 S.Ct. 1048, 1055, 47 L.Ed.2d 231 (1976). The principles relied on by Groves are applicable to any union/ employer/ee dispute resolution context where a peaceful approach should be found, in accord with Congressional intent and purpose in such situations.

As the Trial Court here correctly stated, Minnesota State Courts have concurrent jurisdiction with federal courts, applying federal law. See Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 506, 82 S.Ct. 519, 522 (1962). Respondent's case neither conflicts with nor impedes Congressional intent, purpose or objective in the Labor Management Relations Act. Peaceful resolution of an employment dispute between employer and individual employee concerning and defining wrongful discharge has historically been the province of State law in Minnesota. The Trial Court's citation to Groves on the implementation of federal policy and how and when courts should deal with enforcement of a CBA in this context was appropriate.

Appellant acknowledges that Section 301 authorizes court resolution of disputes including wrongful discharge suits, but argues that Respondent may not do so here, both because the instant CBA's grievance procedure is mandatory, exclusive, final and binding, and because the union in this instance fairly represented Respondent. Appellant is wrong. Certainly, the parties did not agree that the grievance/arbitration process set forth in the CBA was mandatory and exclusive. It wasn't. Respondent also does not agree that access to the courts is prohibited by the CBA.

Appellant argues that the CBA was intended by the parties to be the

exclusive means of resolving disputes concerning the meaning or application of the CBA. Appellant, however, presented no evidence of the parties' intent outside the four corners of the CBA. Worse for Appellant, the language of the CBA falls short of the clear and definite language prohibiting access to the courts required to overcome the presumption against such a prohibition set out by **Barg, supra**. Appellant had the burden of overcoming these presumptions by pointing to language in the CBA or producing other evidence of intent that clearly made the grievance process mandatory, exclusive, binding and final or that expressly prohibited access to the courts. See **Livadas v. Bradshaw**, 512 US 107, 123-124; 114 S.Ct. 2068, 2078 (1994); **Groves v. Ring Screw Works, Ferndale Fastner Division**, 498 US 168, 111 S.Ct. 498 (1990) and **Alford v. General Motors Corporation**, 926 F.2d 528 (6th Circuit 1991). Appellant produced no proof and has failed to carry its burden of overcoming the presumption of access to the courts under § 301 of the LMRA.

B. The Trial Court Correctly Ruled that The Collective Bargaining Agreement At Issue Allows A Union Employee Access To Judicial Remedies By Not Prohibiting It, Under The LMRA.

Arbitration is a question of contract, and a party cannot be required to submit to Arbitration any dispute which he has not agreed to submit to Arbitration. When the employee does not agree to exclusive, mandatory, final, and binding

arbitration, he preserves his access to judicial review. See Orlando v. Interstate Container Corporation, 100 F.3d 296 (3rd Circuit 1996). In the CBA here, Respondent did not waive his right to judicial access, either directly or indirectly. The CBA here, although it offers a grievance procedure at the volition of the parties, it does not make that procedure mandatory, exclusive, final, and binding. The Trial Court was correct in finding that the CBA did not provide for a mandatory grievance process. It also did not expressly prohibit access to a judicial remedy.

The CBA's stated purpose is to "avoid disruption in the service and operation of the units covered by this contract and to secure the benefits intended to be derived by the Employer, its employees and the Union under these Articles of Agreement..." See Appellant's App., p. 196. Obviously, the purpose stated is to avoid interruption of business due to a strike and, equally clearly, a civil suit for an individual employee meets this stated purpose as well as arbitration.

The CBA here goes on to deal with general conditions of hiring and qualifications, layoff, recall and seniority and, from there, moves to discharge or discipline and offers a grievance and arbitration procedure. Respondent starts this analysis by advocating a common sense reading in the context of the language the parties actually used in their drafting. With that common sense reading in mind:

a. Article 6, Paragraph 1. GRIEVANCE AND ARBITRATION

PROCEDURE.

This paragraph says the grievance procedure "... is established for the specific purpose of providing prompt and amicable means of settlement of all questions arising under the terms of this agreement..." See Appellant's App., p. 199.

Appellant's attempt to infer that arbitration is mandated, exclusive, final and binding and that it prohibits access to the courts by emphasizing the word "all" here is weak to say the least. Reading the entire paragraph in the way one would normally read English, it is evident that the intent is aspirational. That is, reading the language used makes it clear that the purpose of the grievance procedure set forth is to provide "means" (i.e. one possible means since it doesn't rule out other means) of settlement for all questions arising under the CBA. That is not the same as saying the means of settlement is exclusive and mandatory, final, and binding in all situations. For instance, the CBA did not say arbitration was the exclusive means for resolving disputes. It certainly could have here or anywhere else in the CBA. We do not know why such language was not put in the CBA, but we do know it wasn't, strongly indicating that the parties did not intend arbitration to be the sole or exclusive means to resolve disputes. Clearly, neither party asked for such language or one party refused. The second sentence merely addresses the

union and employer's intention to make every effort to settle grievances quickly and amicably and with a minimum of friction. This second sentence should also be read as the equivalent of a "best efforts" and "peaceful resolution" aspiration which, again, is not the same as saying you are mandated to use any one means exclusively. The Trial Court was correct in saying that, when there is an absence of express language explicitly prohibiting resort to the courts, and in the absence of any other contract language plainly making the grievance process mandatory and exclusive, final and binding, it is an indication of the parties' intent to allow an individual employee his State Constitutional right to access the courts, recognizing that the parties could have selected alternative, more "mandatory" and "exclusive" wording if they had really wanted to do that. The parties here evidenced their intention not to prohibit access to the courts by omitting the required language. Respondent presented no other facts on the intent of the parties, leaving the Court with no choice but to find that they had no indication of contrary intent. Again, neither party asked for such language or one party refused.

b. Article 6, Paragraph 2. This paragraph contains the language set out in paragraph 3 of the "Facts" section at the beginning of this brief. The Trial Court was correct in its characterization of the intent indicated by that language. The first sentence allows an employee to choose whether or not to try to work things

out with his or her manager. It doesn't say anything about the procedure to be used, or give any steps by which its progress can be marked or ascertained. Using a common sense reading of the second sentence, that sentence assumes two things by its words: i) that someone makes a conclusion that the dispute is not (and cannot be) resolved informally under step one; and, ii) that there is then a further decision and step to invoke the more formal grievance procedure offered. The paragraph then continues with some more definite steps to be taken on the way to arbitration, once the procedure itself is on its way. The Trial Court quite rightly stated here: "These provisions describe how the grievance/arbitration processes are required to operate IF invoked..." See Appellant's App., p. 26. It is a simple maxim of contract law that a "may" is not the same as a "shall." "May" means you have a choice, while "shall" means you don't. It would have been easy for the employer and the union (together with their lawyers), all of whom have had experience writing CBAs, to write a provision requiring use of the grievance procedure set forth in the CBA, and only that procedure, and excluding any other procedure (and specifically that of judicial review) to resolve all questions and all disputes. It would have been equally easy to add a sentence where the parties agreed that the grievance process as set forth in the CBA would be sole, exclusive, final and binding. They did not do so. Nowhere in the CBA does it say that

mediation or arbitration is the exclusive means of enforcing rights under the CBA, that grieving is mandatory, that either party waives any rights to go to Court under any condition or fact situation, or that access to the courts is prohibited. See Appellant's App. pp. 199-227. There is a history in Minnesota of judicial review in wrongful discharge situations, giving some level of reassurance to both employers and employees that the procedures they have put in place will be properly implemented and enforced. "If the CBA contains a grievance/arbitration procedure, but the parties do not intend it to be an exclusive remedy, then a lawsuit for breach of the contract is proper even though such grievance procedures have not been exhausted." See Vaca v. Sipes, 386 U.S. 171, 184, 87 S.Ct. 903, 913 (1967), citing Republic Steel Corp. v. Maddox, 379 U.S. 650, 652, 85 S.Ct. 614, 616 (1965). The Trial Court was correct in ruling that the grievance procedure was voluntary and optional and that access to the courts was not prohibited.

C. The Trial Court Correctly Ruled That Respondent May Bring A Breach Of Contract Claim Against His Employer.

The LMRA has no language that strips an employee of the right to go to court or strips the employee of any other rights allowed him or her by State law or State Constitution. It is also well settled in the courts that an individual employee may bring suit against his employer for breach of a collective bargaining agreement. See Hines v. Anchor Motor Freight, Inc., 424 US 554, 562 (1976);

and Smith v. Evening News Association, 371 US 195, 198-200 (1962). The only exception to this is where the parties have evidenced an express agreement otherwise; that is, where arbitration is compelled by contract, and where a CBA clearly provides that the grievance procedure set forth is exclusive, final and binding, or there is language expressly barring an employee's access to the courts. See Livadas v. Bradshaw, 512 US 107, 114 S. Ct. 2068 (1994); Groves and Alford, supra. Here, however, there is no such language in the CBA and as the Trial Court correctly ruled, Respondent may bring his breach of contract claim against his employer in State Court. Appellant's citation to Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S. Ct. 614 (1965); Allis-Chalmers Corporation v. Lueck, 471 U.S. 202, 105 S. Ct. 1904 (1985); and Communication Workers of America v. American Telephone and Telegraph Company, 40 F. 3d. 426 (D.C. Circ., 1994) for the proposition that permissive language in a CBA should be interpreted to mandate arbitration is just plain wrong. To make arbitration provisions mandatory, a CBA must have some mandatory language making it so. The cases cited by Appellant have just such language, which Appellant fails to note. The first case, Maddox, supra described the grievance language of the CBA under discussion as follows:

“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.

This language is mandatory. Any dispute not settled **shall** constitute a grievance and it **shall** be handled Of course the word "may" did not make the process mandatory, the word "shall" made it mandatory. The second case, Lueck, supra, involved an insurance plan. Conflicts under the plan were to be resolved by the Joint Plant Insurance Committee according to a letter of understanding, which stated:

"Questions within the [Joint Plant Insurance] committee's scope **shall** be referred to it and shall not be processed in the first three steps of the grievance procedure...but **may** be presented for arbitration in the established manner once they have been discussed and have not been resolved. " FN 1

Again, it was not the word "may" that made the referral to the committee mandatory, but the word "shall" that made the referral mandatory. The third case is also improperly cited by Appellant. That case, Communication Workers of America v. American Telephone and Telegraph Company, supra, did indeed have an Article 9 in its CBA that used permissive language stating that the parties "may" grieve and "may" submit a dispute to arbitration. The CBA also had article 10.10 which stated that the grievance procedures outlined in Article 9 "**shall** be employed". 40 F. 3d at 434. Again, it wasn't the word "may" in Article 9 that

made arbitration mandatory, but the word “shall” in Article 10.10 that made arbitration mandatory. These cases clearly do not overrule or contradict **Groves, supra** or **Alford, supra**, nor do they make the word “may” read as the word “shall.”

Appellant tries to attack the Trial Court’s conclusion under **Groves, supra**, that Respondent’s “just cause” wrongful discharge claim is neither preempted under Section 301 of the LMRA nor precluded from judicial review or remedy. In its attack, Appellant states that **Groves** should be limited to its facts.

Appellant, by doing so, wrongly ignores the principles and basis on which the **Groves** decision was made (implementing Congressional intent and purpose in providing a peaceful resolution to workplace disputes), which have had wider application than Appellant would like the court to think. Worse, Appellant appears to be arguing that the United States Supreme Court is not capable of crafting language limiting its decisions. That is clearly not the case. See **Bush v. Gore**, 531 U.S. 98, 109; 121 S. Ct. 525, 532 (2000): “Our consideration is limited to the present circumstances....”

The **Groves** decision is also very close to our case, factually. The case involved a CBA very similar to ours: it prohibited discharges except for “just cause” (just like ours); it stated that the parties will make an earnest effort to settle

every dispute (just like ours); it contained a series of voluntary grievance steps (just like ours); it did not require arbitration (just like ours); and, it was silent on the use or prohibition of the judicial process (just like ours). Finding a peaceful solution where the CBA doesn't provide one was the basic principle the Groves Court applied to its analysis of the case. As the Court commented about the CBA: "Such resolution, by work 'stoppage or other interference' is not a happy solution from a societal standpoint of an industrial dispute, particularly as it relates to the claim of a single employee that he has been wrongfully discharged." Id. The court went on to comment that the strike allowed in that CBA was merely a method by which one party imposes its will upon its adversary, (and was anathema to Congressional intent and purpose). In reversing the Court of Appeals and other District Court decisions, the U.S. Supreme Court stated in Groves "In our view, an agreement to forbid any judicial participation in the resolution of important disputes would have to be written much more clearly," citing United Steelworkers of America v. America Mfg. Co., 363 US 564, 566, 80 S.Ct. 1343,1345, 4 L.Ed.2d 1403 (1960). Where a CBA mandates no means exclusively, an option can be neutral court resolution of the workplace dispute. Access to the judicial remedy, as the Groves Court noted, provides a peaceful resolution of workplace disputes, in harmony with Congressional intent and

purpose. That is the point of Groves.

With regard to the ‘split’ in the circuit courts, the problem the Groves Court faced was that the lower courts - in Groves and also in some but not all of the circuit courts - had construed the provision in the CBA that conflicted with congressional intent and purpose, to divest courts of jurisdiction. The Groves Court tried to reconcile both the split in the Courts and, specifically, the conflict with Congressional intent and purpose under the LMRA, by providing peaceful enforcement and resolution of that CBA and the workplace dispute. Holding that the employees could seek a judicial remedy under Section 301 of the LMRA, the Groves Court stated, “The strong policy favoring judicial enforcement of collective-bargaining contracts was sufficiently powerful to sustain the jurisdiction of the district courts over enforcement suits even though the conduct involved was arguably or would amount to an unfair labor practice within the jurisdiction of the National Labor Relations Board,” citing Smith v. Evening News Association, 371 US 195, 83 S.Ct.267, 9 L.Ed. 246 (1962); Atkinson v.Sinclair Rfg.Co., 370 US 238, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1962); Teamsters v. Lucas Flour Co., 369 US 95, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962); and Charles Dowd Box Co. v. Courtney, 368 US 502, 82 S.Ct. 519, 7 L.Ed.2d 483 (1962). The Groves Court stated that Section 301’s strong presumption favoring judicial enforcement of CBAs may be overcome whenever the parties clearly and expressly agreed to a

different method for adjustment of their disputes. It read the CBA concerned to provide for voluntary grievance procedures (no requirement that the parties submit disputes to binding arbitration) and, by its silence, not to exclude the parties from seeking judicial enforcement concerning “just cause” wrongful discharge. The Groves CBA to that extent, is precisely what we have here.

It is simply not true to say, as Appellant does, that the courts either did, or should, restrict the Groves decision to a situation involving a CBA that expressly advocates use of an economic “weapon” in dealing with a workplace dispute. Courts after Groves (which has been cited by more than two hundred cases) apply the wider principles we spoke of earlier and refer to the U.S. Supreme Court’s “reiteration” of Congressional policy favoring judicial enforcement of CBAs. For example, the Sixth Circuit (one of the circuits involved in the split of decisions before Groves), in Alford (another LMRA case), discussed the Groves holding:

“Recently, in *Groves v. Ring Screw Works, Ferndale Fastner Division* (citations omitted) the Supreme Court reiterated the policy favoring judicial enforcement of collective bargaining agreements. The court noted that “there is a strong presumption that favors access to a neutral forum for the peaceful resolution of disputes.” (Citations omitted). The Court concluded that any agreement purporting to divest the courts of jurisdiction to resolve disputes would have to be clearly written to evidence such an intent.” See Alford v. General Motors Corporation, 926 F.2d 528, 531 (6th Circuit, 1991). (Emphasis supplied).

The Alford Court, in ruling that the Alford CBA prohibited the employees

from bringing a breach of contract action against the employer, cited language which governed the “finality,” “exclusivity,” and binding nature of the grievance procedure but, beyond that, it cited the following additional language, expressly barring access to the courts:

“Neither the Corporation, nor the Union, nor any employee or group of employees, may initiate or cause to be initiated or press any court action claiming or alleging a violation of this Agreement or any local or other agreement amendatory or supplemental hereto...”

This language is an example of what the CBA at issue here is missing. The Alford holding is reinforced by Orlando v. Interstate Container Corporation, 100 F.3d 296 (3rd Circuit 1996). The Orlando Court framed the following question of law: does an arbitration award preclude review on the merits under Section 301 LMRA when the CBA does not provide that arbitration is the final, binding, or exclusive means of resolving the dispute.” Id., at 298. After remarking on the ‘cross currents’ in Labor law at the time, the Court reviewed ‘familiar decisions’ within that cross current, including Maddox and Groves. Distilling the law into principles by which it could make its decision, the Orlando court said about the CBA’s disposition of rights in that case (with mandated arbitration):

“Imposing finality deprives a party of the right to present the merits of an arbitration award for review by a court. The opportunity to seek correction of an allegedly incorrect resolution of a grievance is a valuable right and not

one to be denied cavalierly.... In short, the lack of a provision for finality or exclusivity does not overcome the presumption of access to the Courts for review on the merits.” Id. at 300.

The Orlando Court continued, a little further on near the end of its decision:

“This agreement was drafted by parties well-versed in labor matters and cognizant of that convention... As we stated in Communication Workers v. A T & T, 932 F.2d 199, 210 (3rd Circuit 1991), words such as “exclusive forum” support a finding that the parties intended to preclude judicial review. Where the words “final,” “binding,” or “exclusive” fail to appear, and where the parties have not shown a history of giving dispositive effect to arbitration decisions, we cannot conclude that they were intended to overcome the presumption favoring access to a judicial forum.” Id. at 301.

Most recently, in 2008 and 2009, the United States Supreme Court has signaled a new, more restricted, approach to preemption cases. In a tort case (failure to warn under the FDCA), the Supreme Court refused to prohibit Plaintiff’s State Court claims that Defendant had harmed Plaintiff by failing to properly warn of the hazard of administering the drug under State Law theories of “failure to warn”. See Wyeth v. Levine, 555 US 555, 129 S.Ct. 1187 (March 4, 2009). The Court specifically stated: “If Congress thought State law suits posed an obstacle to its objectives, it surely would have enacted an express preemption provision at some point during the FDCA’s 70 year history.” Wyeth, at 1200. The most recent case discussing Wyeth also refused to preempt Plaintiff’s State law claims under the federal act. See Stacel v. Teva Pharmaceuticals, 620 F.Supp.2d 899 (N.D. Ill., 2009). The LMRA specifically preempted bankruptcy, but it has not in over 70 years stated that it wished to preempt State Court claims of defamation and

wrongful discharge. To the contrary, 29 USCA §141 (b) states that one of the purposes of the federal act is to “protect the rights of individual employees...” Congress, in drafting the LMRA, did not intend to limit the rights of individual employees unless the parties had agreed otherwise and specifically expressed that in the language of their CBA. The Trial Court correctly ruled that Respondent had a right to sue in State Court.

With respect to the specific claim of wrongful discharge in Minnesota, there is a long legal history of dealing with wrongful discharge cases based on contract starting with **Pine River State Bank v. Mettill**, 333 NW2d 622 (Minn., 1983). Employee handbooks and their definitions of “just cause”, where they exist, have historically been interpreted under State law. At trial here, Appellant agreed that the definition for “just cause” (good cause) wrongful discharge under the CBA was identical to MNCIVJIG 55.50, which was submitted to the jury.

Further, any ambiguity in the intent of the parties to the CBA has to be interpreted against Appellant at summary judgment. Most importantly in this court’s review of our case, it is Appellant’s burden to prove that there is no issue of fact, and that they were entitled to Judgment as a matter of law, based on all uncontested material facts at the time Judge Chase ruled on Appellant’s motion for summary judgment. Appellant did not meet its burden. This court should affirm

the Trial Court's ruling against Appellant.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR A NEW TRIAL ON DEFAMATION.

Summary Introduction: Appellant moved the court for a new trial on defamation.

The trial court denied the motion as untimely heard under Rule 59.03. Appellant did not appeal denial of its motion on this ground.

In the alternative, the court denied Appellant's motion for a new trial on the merits. Appellant complains that the court did not fashion Special Verdict Question #3 as Appellant wished and erred in its choice of jury instructions. The court did not abuse its discretion in wording the Special Verdict Question #3 or in its choice of Jury Instructions.

Analysis:

A. The Trial Court Properly Denied Appellant's Motion For a New Trial As Untimely Heard.

Rule 59.03 of the Minnesota Rules of Civil Procedure states that a motion for new trial shall be heard within 60 days after notice of filing. Appellant's Motion for New Trial was scheduled by Appellant to be heard 90 days after it was noted. It was not heard for approximately 150 days after it was noted. It is undisputed that the motion was untimely heard under Rule 59.03 of the Minnesota

Rules of Civil Procedure. The court was well within its discretion to deny the motion as untimely. **Ruby v. Vannett**, 714 N.W.2d. 417 (Minn. 2006).

Appellant's sole reference to the Trial Court's dismissal of its motion on this ground is found in a footnote at page 24 of its brief. The footnote acknowledges that its motion was denied as untimely, but dismisses the denial of its motion for new trial claiming the denial "...does not affect the validity of Sunstone's appeal, as Sunstone's post-trial motion was timely filed and served." Appellant offers no reason why the trial court's denial of its motion as untimely heard should be reversed by this court. The trial court was well within its discretion to deny Appellant's new trial motion on this ground and the court should affirm the Trial Court's denial of the motion as untimely heard.

B. The Wording of Special Verdict Question #3 Was Appropriate Under the Facts of the Case.

The Trial Court gave Special Verdict Question #3 very nearly worded as Appellant requested it. The court removed one word in three places and gave the question to the jury. The court determined the question as given was proper under the facts of the case. The Trial Court had broad discretion to draft the question.

See **Dang v. St. Paul Ramsey Medical Center, Inc.**, 490 N.W.2d 653 (Minn. App., 1992). Appellant now has the burden of proving the court abused its broad discretion. It has not done so.

Appellant requested Special Verdict Question #3 in the following words: “Was the following statement made by Sunstone defamatory? “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.” The Trial Court removed the words “said” from the proposed question and gave it to the jury. Appellant objects to the removal of the words “said” because Appellant claims it meant to stipulate that Appellant had indeed stated that Respondent **said** he brought a gun to the meeting, but did not mean to stipulate that Appellant said Respondent actually brought a gun to the meeting. See Appellant’s brief, page 27. What Appellant intended to stipulate to or not is irrelevant to a discussion of whether or not the Trial Court abused its broad discretion. The question is whether or not the question given was reasonable under the facts of the case.

A quick summary of the evidence shows that the question given was appropriate under the facts of the case. 1) Respondent and Mr. M , the only two persons involved in the conversation forming the crux of Appellant’s allegations, both adamantly and specifically deny that Respondent said he brought a gun to the meeting. In short, there is no evidence at all that Respondent said he brought a gun to the meeting. 2) Mr. H claims he heard from Mr. M that Respondent brought a gun to the meeting. He then told Mr. W that

Respondent brought a gun to the meeting. 3) Mr. W _____, based upon what Mr. H _____ stated to him, stated to Mr. McKinney that Respondent brought a gun to the meeting. 4) Appellant quite clearly stated that Respondent brought a gun to the meeting in two statements made by Appellant to persons outside the company. In the first statement, as recorded in police reports, Appellant stated "...Moen had secretly brought a gun to a suspension meeting." In the second report, the Petition for Harassment Restraining Order, Appellant wrote "...carried a concealed weapon to a disciplinary meeting." Whether or not Appellant stipulated to having actually said that Respondent brought a gun to a meeting, uncontroverted facts show that Appellant did make that false statement. Further, even if Appellant had only falsely said Respondent **said** he brought a gun, that statement in itself is defamatory. See **Bradley v. Hubbard Broadcasting Company**, 471 N.W.2d. 670 (Minn. App., 1991) (false claim that employee retrieved personal correspondence from a supervisor's wastebasket); **Wirig v. Kinney Shoe Corporation**, 461 N.W.2d. 374 (Minn., 1990) (inference of theft by public firing of Wirig after reporting employee theft without naming Wirig). In addition, an allowable inference from even the claim that Appellant SAID he brought a gun to a meeting would be that he in fact did bring a gun to the meeting. This inference was clearly explained by counsel for Appellant in her closing argument (see fact paragraph # 27 above). Such a false inference is itself defamatory. See **Kuechle v. Life's**

Companion P.C.A. Inc., 653 N.W.2d. 214 (Minn. App. 2002). As Special Verdict #3 was finally worded, the court properly allowed the jury to judge actual statements that Appellant made or their false inference as defamatory. The court had before it evidence that Appellant had indeed said and also inferred that Respondent brought a gun to a meeting. It was well within the court's discretion to word the special verdict question to allow for the uncontroverted evidence that Appellant himself said both that Respondent said he brought a gun and said that he actually brought a gun to the meeting. The question allows for a finding of defamation from the inference and/or the statement. The question, as given, better matched the evidence than Appellant's requested question. Given the discretion allowed the Trial Court to choose appropriate jury questions and the facts, the court was well within its broad discretion to deny Appellant's motion for a new trial. See **Lake Superior Center Authority v. Hammel, Green & Abrahamson, Inc.**, 715 N.W.2d. 458 (Minn. App., 2006) and **Halla Nursery, Inc. v. Baumann-Furrie & Co.**, 405 N.W.2d. 905 (Minn., 1990).

Appellant has also argued that the wording of Special Verdict Question #3 somehow removed that question of falsity from the jury because the focus shifts from what Respondent said to what he did. The jury, however, had already answered the question about whether or not Respondent SAID he brought a gun when it answered Special Verdict Question #1 in the negative. See Fact

paragraphs 25 and 26 above. Question #1 asked if Respondent was terminated for just cause in conformance with the Collective Bargaining Agreement. Counsel for Appellant argued to the jury that it would have to find that there was just cause to terminate Respondent because he stated he brought a gun to the meeting. The jury found there was no just cause and thus found that Respondent did not state he brought a gun to the meeting. What Appellant now claims was still a fact issue after Special Verdict Question #3 had indeed already been answered in Question #1. Appellant's argument is without merit. Further, even if Appellant's wording for Special Verdict Question #3 had been presented to the jury, there is no doubt the jury would have found that Appellant's claim that Respondent said he brought a gun was false after so finding in Special Verdict Question #1. There is no possible prejudice to Appellant in the court's refusal to give Special Verdict Question #3 as requested by Appellant.

The jury had already determined that Respondent did not state he brought a gun to the meeting. The only question left for the jury when it got to Special Verdict question #3 was whether or not the false inference that he DID bring a gun to the meeting or the false claim that he said he brought a gun to the meeting, or the actual claim that he brought the gun to a meeting, was defamatory. The jury answered that question properly. The statement that he said he brought a gun to

the meeting, the inference that he brought a gun to an employment meeting, and the statement that he brought a gun to the meeting, are all defamatory. See Wirig, supra, Bradley, supra, and Kuechle, supra.

C. The Trial Court Properly Instructed the Jury on Inference.

Appellant moved for a new trial in part upon a claim that the court should have given an unspecified Jury Instruction on “Inference.” Appellant ignores the fact that the court, in fact, gave two Jury Instructions on “Inference.” First, the court gave MNCIVJIG 12.10 Direct and Circumstantial Evidence in which the Jury was instructed in part “...Two, a fact is proved by circumstantial evidence when that fact can be **inferred** from other facts proved in the case.” See T.T. page 1228, R. App.P. 50. Secondly, the court gave MNCIVJIG 50.25 in which the Jury was instructed as follows: “...A statement or communication is substantially true if the **implication** of the statement or communication is true.... A statement or communication is also false if the **implication** of the statement is false.” T.T. Pp. 1234-1235, R. App., Pp. 51,52. These MNCIVJIGs are tested and true. They both deal with “inferences.” Appellant has not said what is wrong with these instructions, nor has it proposed anything different. The Trial Court has broad discretion to give or not give Jury Instructions. See Dang, supra. The Trial Court also has broad discretion to grant or deny a motion for a new trial. See Lake Superior Center Authority, supra, and Halla, supra. The Trial Court did not

abuse its discretion when it gave the two authorized Jury Instructions rather than an unspecified instruction requested by Appellant, nor when it refused to grant a new trial for failing to give the unspecified jury instruction desired by Appellant.

D. The Trial Court Did Not Err In Not Giving The Jury An Instruction On Qualified Privilege.

Appellant failed to preserve this issue for the court. Appellant itself correctly explained to the Trial Court that it failed to preserve this issue in its memorandum supporting its motion for a new trial at page 26 (R.App. p. 64). It correctly stated the law:

“A motion for new trial may be granted for errors of law occurring during the trial only if objected to at the time....Failure to make a timely objection and to call the court’s attention to the error renders the error non-reviewable on appeal. **Strupp. v. Canniff**, 150 N.W. 2d. 574 (Minn. 1967). Minnesota Rules of Evidence, specifically Rule 103(a) also require the making of a specific timely objection to preserve an error affecting a substantive right of a party.”

See also **Kopveiler v. Northern Pacific Railway Company**, 160 N.W.2d. 142 (Minn., 1968); **Nelson v. Twin City Motor Bus Co.**, 58 N.W. 2d. 561, 565 (Minn. 1953) (on failure to object to jury instructions before the jury retires). Appellant did not object to the court’s failure to instruct on qualified privilege. This issue was not preserved for appeal and is not properly before this court.

Further, the complaint is without merit. MNCIVJIG 50.30 **Absolute and Qualified Privileges** states “The Committee recommends no instruction.” The

existence of a qualified privilege is a question of law, not fact. The existence of a qualified privilege is to be determined by the court. Malice, on the other hand, is a question of fact to be determined by a jury. See Lewis v. Equitable Life Assurance Soc’y, 389 N.W.2d. 876, 890 (Minn., 1986). The court did exactly the right thing. It found as a matter of law that there was a qualified privilege using the standards applicable to finding privilege. The only thing left to do was to ask the jury to determine if there was malice. The court properly instructed the jury on malice and did not abuse its discretion when it refused to grant Appellant a new trial on this ground. Appellant cites no cases or authorities for the proposition that an unspecified instruction on qualified privilege should have been given. Respondent hasn’t found any, either.

Appellant’s argument further misapprehends the elements of qualified privilege and malice. An employer’s interest in protecting itself and the public from employees provides a proper purpose and occasion to make a defamatory communication. See Wirig, supra. If an employer is investigating employee behavior and believes the defamatory statements, it has a qualified privilege. However, if it then makes the defamatory statement to persons who do not need to know, or for the purpose not to protect others but to injure the employee, or fails to investigate properly, it loses that privilege. See Wirig, supra. Instructing a jury

that the employer had a privilege is not useful to the jury when it decides whether or not the statements were made with malice. The JIG committee recommended against instructing the jury on qualified privilege and Appellant has pointed to no cases stating a court should instruct a jury on qualified privilege. The Trial Court was well within its discretion to refuse to give an instruction on qualified privilege and to deny a new trial on that ground.

CONCLUSION

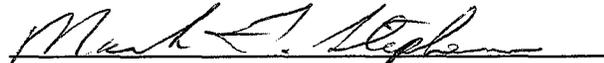
Appellant was a party to a CBA it entered into with Respondent's union. The CBA did not specifically or clearly state that arbitration was mandatory, exclusive, final, and binding. The CBA also did not expressly exclude Respondent's access to Court. The CBA thus did not prohibit Respondent's constitutional right to a trial on his wrongful discharge claim. The LMRA does not preempt Respondent's access to the courts under this CBA.

Appellant has also complained that the Trial Court erred in its denial of Appellant's motion for new trial. Appellant, however, failed to schedule the hearing of its motion within 60 days of Respondent's notice of entry of judgment. The trial court did not abuse its discretion when it denied Appellant's motion for a new trial as untimely heard. Further, the court was well within its discretion when it alternately denied Appellant's motion for a new trial on the merits.

Dated: Oct. 17, 2011

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RESPONDENT'S CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 2. The length of this brief is 9,956 words, excluding the Table of Contents and Table of Authorities. This brief was prepared using Microsoft Word 2010, 14-point Times New Roman.

Dated: Oct. 17, 2011

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