

NO. A11-1339

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State of Minnesota  
**In Court of Appeals**

Kathryn Brenny,

*Plaintiff-Respondent,*

vs.

The Board of Regents of the University of Minnesota,

*Defendant,*

and

John Harris, individually and in his capacity as Director of Golf,

*Defendant-Appellant.*

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**DEFENDANT-APPELLANT'S REPLY BRIEF**

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## ARGUMENT

As established in John Harris' ("Harris") opening brief, the exclusive method for reviewing employment decisions by a public administrative body (including the University) and its employees (including Harris) is by writ of certiorari to the Minnesota Court of Appeals. *See Grundtner v. Univ. of Minn.*, 730 N.W.2d 323 (Minn. App. 2007); *Shaw v. Bd. of Regents of Univ. of Minn.*, 594 N.W.2d 187 (Minn. App. 1999); *Kobluk v. Regents of Univ. of Minn.*, No. C8-97-2264, 1998 WL 297525 (Minn. App. June 9, 1998); *Hansen v. Indep. Sch. Dist. 820*, No. C4-96-2476, 1997 WL 423567 (Minn. App. July 29, 1997). The District Court should have dismissed Plaintiff's tortious interference claim against Harris for lack of subject matter jurisdiction pursuant to the certiorari rule.

Plaintiff's opposition to this appeal is noteworthy for the complete lack of legal authority to support it. Plaintiff makes blanket assertions regarding the applicability of the certiorari rule and states in conclusory fashion that her arguments are supported by Minnesota law. (*See, e.g.*, Pl. Brief at 16, 20-22.) But Plaintiff does not cite a single case that actually supports her arguments. Indeed, no such case exists. Plaintiff instead relies on irrelevant and non-binding case law, misrepresents and ignores relevant decisions from this Court and the Minnesota Supreme Court, and draws immaterial distinctions between her case and analogous cases cited by Harris. Contrary to the strained arguments in Plaintiff's brief, the law is very clear: Claims like Plaintiff's may only be reviewed on a writ of certiorari to the Court of Appeals. The District Court therefore lacked subject matter jurisdiction over Plaintiff's tortious interference claim.

## **I. HARRIS' ALLEGED PERSONAL MOTIVATION IS IRRELEVANT TO THE JURISDICTIONAL ANALYSIS**

Plaintiff's primary argument is that if a University "employee's actions are not within his/her discretion, authority or capacity of employment because they are made with malice and bad faith, the writ of certiorari process is inapplicable." (Pl. Brief at 16.) This erroneous conclusion is based on misconstrued, misapplied, and non-existent case law. In reality, an employee's alleged "malice" or "bad faith" is simply irrelevant to the application of the certiorari rule.

### **A. The University's and Harris' Decisions Were Quasi-Judicial**

Plaintiff's argument begins by setting out a three-factor framework for determining whether an administrative decision is "quasi-judicial." (Pl. Brief at 15 (quoting *Minn. Ctr. for Env'tl. Advocacy v. Metro Council*, 587 N.W.2d 838, 842 (Minn. 1999)).) Plaintiff's reference to the three-factor framework is misleading because there is no question that that the alleged actions by Harris and the University – by their nature discretionary acts affecting only Plaintiff – were "quasi-judicial."

"The action of an administrative agency may be either quasi-legislative or quasi-judicial in nature." *Anderson v. County of Lyon*, 784 N.W.2d 77, 81 (Minn. App. 2010); see also *Petition of N. States Power Co.*, 416 N.W.2d 719, 723 (Minn. 1987) ("As an administrative agency, the MPUC may exercise two different functions: a quasi-judicial function and a legislative function."). Quasi-legislative acts "affect the rights of the public generally." *Anderson*, 784 N.W.2d at 81. The district court can review quasi-legislative acts in a declaratory judgment action. *Id.* Quasi-judicial acts, on the other

hand, are “specific, discretionary acts that affect the rights of an individual.” *Id.* Quasi-judicial acts may only be reviewed by the Court of Appeals on a writ of certiorari. *Id.* The purpose of the three-factor framework is to help courts draw the line between quasi-judicial actions (which are subject to certiorari review) and quasi-legislative actions (which are not). *See Handicraft Block Ltd. P'ship v. City of Minneapolis*, 611 N.W.2d 16, 20 (Minn. 2000) (the factors are “to be used in distinguishing between quasi-judicial and quasi-legislative proceedings”); *Minn. Ctr. for Envtl. Advocacy*, 587 N.W.2d at 841 (the case from which the three factors were derived “sets the framework for determining if a decision is quasi-judicial or quasi-legislative”).

In some cases, the line between quasi-legislative or quasi-judicial acts is not readily apparent. An administrative agency may take an action that affects a large group of individuals, which makes it appear legislative, but the agency also gathers facts and listens to public comments before taking the action, which makes it appear judicial. *See, e.g., Minn. Ctr. for Envtl. Advocacy*, 587 N.W.2d at 842 (Metropolitan Council’s approval of a Transportation Improvement Program); *Anderson*, 784 N.W.2d at 81-82 (Board of Commissioners’ decision to modify employee benefits plan that applied to all county employees). In those cases, it is appropriate to apply the three factors to decide whether the action was quasi-legislative or quasi-judicial.

However, where a discretionary administrative decision affects just one person (e.g., a University employee), there is no doubt that the decision is quasi-judicial and no need to resort to the three-factor framework to reach that conclusion. Indeed, courts have uniformly held that University employment decisions are quasi-judicial and subject to the

certiorari rule. *See, e.g., Williams v. Bd. of Regents of the Univ. of Minn.*, 763 N.W.2d 646, 651 (Minn. App. 2009); *Grundtner*, 730 N.W.2d at 332; *Shaw*, 594 N.W.2d at 190; *Kobluk*, 1998 WL 297525 at \*4 (AA.61-64). Here, the alleged actions taken by the University and Harris affected only Plaintiff and her employment (as opposed to the public at large). By definition, these were quasi-judicial acts subject to certiorari review. *See Anderson*, 784 N.W.2d at 81.

What Plaintiff really takes issue with is the lack of formal court-like proceedings leading to the adverse employment actions that Plaintiff alleges Harris and the University took. However, any challenge to the sufficiency of the University's process is a dispute for the Court of Appeals to resolve on certiorari review, not a basis for rejecting certiorari to the Court of Appeals as a jurisdictional requirement. The Minnesota Supreme Court addressed this very issue in *Dokmo v. Indep. Sch. Dis. No. 11*, 459 N.W.2d 671 (Minn. 1990). The court in that case held that, on a writ of certiorari, the Court of Appeals reviews the factual record generated by the administrative body. *Id.* at 673. If the factual record is insufficient, the Court can remand for additional findings or reverse for lack of substantial evidence. *Id.* at 675. Thus, the sufficiency of the University's administrative proceedings is a specific issue that the Court of Appeals is mandated to review on a writ of certiorari. It is not a basis to deny certiorari review altogether and create subject matter jurisdiction in the District Court where no such jurisdiction exists.

Moreover, to the extent that the formality of the University's proceedings in this case was limited, it was because Plaintiff failed to use the University's internal grievance procedures – a fact which by itself is dispositive of Plaintiff's claim. The University

provides a process for administrative hearing and determination of employment-related claims. A University employee must exhaust this process before seeking review of a University employment action. *Stephens v. Bd. of Regents of Univ. of Minnesota*, 614 N.W.2d 764, 774 (Minn. App. 2000). Plaintiff does not allege that she even began – much less exhausted – the University’s grievance process. She should not now be heard to complain about the extent of the University’s proceedings. *See id.* (discharging writ of certiorari because of employee’s failure to exhaust administrative remedies). And if any such complaint is allowed, it must be made in a certiorari proceeding, and not to the District Court that lacks subject matter jurisdiction.

**B. Harris’ Alleged Malice and Bad Faith Are Irrelevant**

Plaintiff next argues that the certiorari rule does not apply when a University employee acts with malice or bad faith. (Pl. Brief at 16.) Plaintiff tries to shoehorn this argument into the three-factor framework for determining if an action is “quasi-judicial,” reasoning that actions “motivated by malice and bad faith necessarily are made without consideration for the appropriate ‘prescribed standard.’” (*Id.*) Plaintiff cites absolutely **no** legal authority to support this flawed argument.

By contrast, Harris established in his opening brief that courts have routinely held that the certiorari rule applies to employees’ tortious interference claims against their supervisors without regard to the supervisors’ alleged personal motivations. *See, e.g., Grundtner*, 730 N.W.2d at 333; *Kobluk*, 1998 WL 297525 at \*4; *Narum v. Burrs*, C8-97-563, 1997 WL 526304, \*2 (Minn. App. Aug. 26, 1997). Harris’ alleged “bad faith” and “malice” towards Plaintiff is wholly irrelevant to the jurisdictional analysis.

Moreover, Plaintiff's position makes no practical sense. If an executive branch supervisor's state of mind – i.e., whether he acted with bad faith or malice – determined whether a writ of certiorari was the exclusive means of reviewing the supervisor's decision, the issue would often need to be resolved at trial. Effectively, Plaintiff suggests that there should be a trial in District Court to determine whether the supervisor acted with bad faith or malice. But if no bad faith or malice is established, the District Court lacks jurisdiction such that there should not have been a trial in the District Court in the first place. It is impractical and illogical for Plaintiff to suggest that the question of subject matter jurisdiction of the District Court turns on a fact question that, in many cases, inherently must be resolved by a trial in the very District Court where jurisdiction over the dispute is lacking. In fact, rather than turning on a supervisor's state of mind, the jurisdiction question under the certiorari rule turns on whether the defendant is involved in decisions within his job responsibilities or whether he is acting as a private individual in a private capacity.

**C. Plaintiff's Proposed Exception to the Certiorari Rule Would Defeat the Directive that the Court of Appeals is to Decide Issues of Bad Faith or Malice.**

Allowing the District Court to review actions that are allegedly motivated by "bad faith" or "malice" would actually defeat the purpose of certiorari review and take away from the Court of Appeals one of the issues it is expressly charged with deciding on a writ of certiorari. On a writ of certiorari, the Court of Appeals decides whether an action was "arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it." *Dietz v. Dodge County*, 487 N.W.2d 237, 239

(Minn. 1992). The directive that the Court of Appeals determine issues of arbitrariness or oppression plainly encompasses questions of “bad faith” and “malice.” Thus, it is for the Court of Appeals to determine, on certiorari review, whether the executive branch’s actions are malicious and, if so, whether relief is necessary. Exempting alleged malicious actions from the certiorari rule would prevent the Court of Appeals from reviewing the very actions it is obligated to review and making the very determinations that the Minnesota Supreme Court has directed it to make.

**D. Plaintiff Misrepresents *Grundtner***

As explained in Harris’ opening brief, *Grundtner v. University of Minnesota*, 730 N.W.2d 323 (Minn. App. 2007) plainly illustrates that a tortious interference claim against a University supervisor is subject to the Court of Appeals exclusive jurisdiction on a writ of certiorari, notwithstanding an employee’s allegation that the supervisor acted with malice. Disregarding the facts, analysis and conclusion in *Grundtner*, Plaintiff argues that *Grundtner* stands for the opposite proposition that malice and bad faith remove an action from the certiorari rule. Plaintiff blatantly misrepresents the decision. The *Grundtner* court actually held that allegations of bad faith motivation (in that case, to hide or facilitate the supervisor’s illegal practices or punish the employee for opposing them) were directly related to the University’s discretionary decision to terminate the employee, which compelled the application of the certiorari rule. *See* 730 N.W.2d at 333. The court never held that malice or bad faith was an exception to the certiorari rule or removed the claim from the exclusive jurisdiction of the Court of Appeals. Plaintiff’s

twisted attempt use *Grundtner* as support for her position when *Grundtner* flatly contradicts her position shows that Plaintiff is grasping at straws.

Strangely, three pages after she relies on *Grundtner*, Plaintiff reverses course and argues that *Grundtner* is “inapposite.” (*Compare* Pl. Brief at 16, *with* Pl. Brief at 19.) While trying to distinguish *Grundtner*, Plaintiff once again misrepresents the decision. According to Plaintiff, “the court determined that the allegations concerning Perkins’ [the supervisor] illegal practices were not supported by the record and, accordingly, that the supervisor acted within his authority and capacity as an employee.” (*Id.* at 19.)<sup>1</sup> That is not what the court held.

Plaintiff confuses two completely separate sections of the *Grundtner* opinion. In one section, the court discussed Grundtner’s whistleblower claim, in which Grundtner alleged that a University employee named Denny ordered him to violate the law. *Grundtner*, 730 N.W.2d at 331. The court rejected that claim because there was no evidence that anyone at the University (including Denny) directed Grundtner to do anything illegal. *Id.* The section that Plaintiff quotes in her brief relates to this whistleblower claim against the University, which was based on actions taken by Denny. *Id.* That section does not address Grundtner’s tortious interference claim against his supervisor, a man named Perkins. *Id.*

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<sup>1</sup> Plaintiff also argues that *Grundtner* involved an employment termination decision. Harris will address this argument in Section III below.

The court addressed Grundtner's tortious interference claim against Perkins in a later section of the opinion. *See id.* at 332-33. In that section, the court noted Grundtner's allegation that Perkins "fired [Grundtner] for his own reasons in an effort to hide or facilitate his illegal practices or to punish [Grundtner] for opposing them." *Id.* at 333. The court did not state whether there was any evidence to support that allegation. The court did not need to. Despite the allegation that Grundtner's actions were personally motivated by bad faith reasons, the court held that Perkins was acting in his capacity as a University employee, not in his capacity as a private individual. *Id.* Reviewing Perkins' actions (including his alleged improper motives) would require the court to inquire into the University's discretionary employment decision-making, which is prohibited by the certiorari rule. *Id.* In short, the *Grundtner* decision did not, as Plaintiff argues, turn on whether there was evidence that Perkins acted maliciously. Just the opposite, it held that even a bad faith employment decision was subject to the certiorari rule if the supervisor was undertaking discretionary decisions (such as terminating a subordinate) in his capacity as a University official rather than non-University conduct as a private individual. *Id.* *See also Narum*, 1997 WL 526304, \*2 ("Respondent's claims have no relationship to anything appellant did while acting as a private individual or in a private capacity. There is no basis for holding that certiorari review, available for appellant's claims against the county, would not have been available for appellant's claims against respondent.").

Harris' alleged "malice" and "bad faith" towards Plaintiff are, likewise, irrelevant. This is purely an employment dispute in which University officials undertook

discretionary decisions with respect to the employment of a University subordinate. It has nothing to do with conduct by Harris in his private capacity outside of his employment as the University's Director of Golf. Plaintiff's tortious interference claim against Harris is, therefore, subject to certiorari review, regardless of any claimed "malice" by Harris. The District Court plainly lacks subject matter jurisdiction over Plaintiff's claim.

**E. Official Immunity and Indemnification Cases Are Off Point**

Finding no relevant law to support the District Court's jurisdiction over her claim, Plaintiff instead relies on law that has no bearing on the issue. Plaintiff cites *Waddell v. State*, 1998 WL 27292 (Minn. App. Jan. 27, 1998), a case involving the doctrine of official immunity. Official immunity has not been asserted in this case and is not analogous to the certiorari rule. The doctrine of official immunity is applied in determining whether a claim can be brought against a government official at all. *Elwood v. Rice County*, 423 N.W.2d 671, 677 (Minn. 1988). The certiorari rule determines the proper forum and process for challenging government action. *See Dietz*, 487 N.W.2d at 239. The certiorari rule does not prevent a government employee from bringing a claim; it simply requires that the claim be brought in the correct court – namely, the Court of Appeals on a writ of certiorari. *Id.* Because official immunity and certiorari review have different purposes, effects and applications, cases interpreting the doctrine of official immunity do not help define the parameters of the certiorari rule.

Plaintiff also cites Minn. Stat. § 3.736, subd. 9, governing indemnification of state employees by the state, and a letter from the University to Harris regarding its decision to

indemnify him. These documents define the legal responsibilities between the University and Harris. They have nothing to do with the proper forum for Plaintiff's claim and therefore are irrelevant to this appeal.

The question for the Court is whether the District Court has subject matter jurisdiction over Plaintiff's tortious interference claim against Harris. The question is not whether Harris is immune from suit or whether the University can or must indemnify Harris. The official immunity and indemnification cases cited by Plaintiff distract from the real issues and should be ignored.

## **II. PLAINTIFF FAILS TO PROPERLY ALLEGE MALICE BY HARRIS**

Even if Harris' alleged malice were relevant to the jurisdictional analysis, Plaintiff has failed to sufficiently plead malice. Plaintiff's threadbare allegation that Harris acted with malice is not enough to survive dismissal. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, 1954 (2009). Plaintiff must plead specific facts to support that allegation. In her brief, Plaintiff argues that Harris wanted to use Plaintiff as a "placeholder" to advance his son-in-law, Ernie Rose. (Pl. Brief at 17.)<sup>2</sup> But as explained in Harris' opening brief, Harris' alleged favoritism toward Rose fails, logically and as a matter of law, to show

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<sup>2</sup> Harris did not even hire Rose – Harris' predecessor did. Plaintiff argues in a footnote to her brief that Harris hired Rose after his previous one-year contract expired. (Pl. Brief at 6 n.1.) In support of this argument, Plaintiff does not cite any documents in the record. Instead, she cites her own Memorandum in Support of Motion to Amend, a document that is not evidence, that is not part of the record, and that relates to a motion that is not at issue in this appeal. In any event, Plaintiff's explanation of Rose's hiring fails to rebut the undisputed fact that Rose was already working for the University before Harris became the Director of Golf.

malice toward Plaintiff. (Harris Brief at 18.) Plaintiff also argues that Harris discriminated against Plaintiff because she was a woman and a lesbian. (Pl. Brief at 17.)<sup>3</sup> But as explained in Harris' opening brief, Plaintiff cannot use Harris' alleged prejudice as an example of malice. The MHRA provides that employees can make discrimination claims only against their employers – in this case, the University. Plaintiff has no cause of action for discrimination directly against Harris. Plaintiff cannot avoid this limitation on Harris' personal liability by cloaking what is truly an MHRA claim as one for tortious interference. (Harris Brief at 18.)

Plaintiff does not directly address any of these issues. Instead, Plaintiff argues that, because this Court declined to review the District Court's decision under Rule 12.02(e), Harris cannot raise the insufficiency of Plaintiff's malice allegation on appeal. (Pl. Brief at 18 n.4, 31-32.) But Harris does not argue in this appeal that Plaintiff failed to state a claim under Rule 12.02(e). Harris argues that Plaintiff failed to plead facts sufficient to establish subject matter jurisdiction under Rule 12.02(a).

Plaintiff chose to make the sufficiency of her malice allegation a jurisdictional issue. The centerpiece of Plaintiff's argument to the District Court and this Court in

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<sup>3</sup> Harris denies that he discriminated against Plaintiff. He did not even know Plaintiff was a homosexual until after she left the University. Moreover, Plaintiff's own description of the alleged discrimination defies common sense. Plaintiff alleges that Harris did not want the University to hire a lesbian, but the University hired Plaintiff with Harris' blessing. (AA.3 ¶¶ 9, 18.) Plaintiff also alleges that Harris began interfering with her employment contract the day after she signed it, on September 1. (AA.3 ¶ 28.) If Harris' alleged interference was motivated by discrimination, as Plaintiff claims, Harris would have had to discover that Plaintiff was a homosexual and immediately decide to interfere with her contract in the 24-hour period after she signed it. There is no such allegation and no evidence to support such an allegation.

favor of the District Court's jurisdiction is her allegation that Harris acted with malice. If Plaintiff's allegation of malice is, in fact, the key to the jurisdictional analysis (which, as discussed, it is not), then Harris is entitled to challenge the sufficiency of that allegation on a Rule 12.02(a) motion. Plaintiff's allegation is plainly insufficient. Harris' alleged nepotism and discrimination cannot, as a matter of law, form the basis of Plaintiff's malice allegation.

### **III. THE CERTIORARI RULE APPLIES TO HIRING, FIRING, AND ALL DISCRETIONARY EMPLOYMENT-RELATED DECISIONS IN BETWEEN**

Plaintiff argues that her tortious interference claim is not subject to certiorari review because "it does not concern a discretionary University employment decision." (Pl. Brief at 23.) That is absurd and contrary to well-established Minnesota law. Plaintiff complains about her job duties, job title and alleged "constructive discharge" from the University. She accuses Harris, her supervisor, of changing her responsibilities and interfering with the performance of her job duties. This dispute absolutely concerns Plaintiff's employment at the University and University employment decisions.

Although it is not fully clear from her brief, it seems Plaintiff is trying to argue that the certiorari rule is limited to decisions affecting the "term of employment" (e.g., hiring and firing). (*See* Pl. Brief at 23-29.) Harris already debunked this argument in his opening brief. (Harris Brief at 19-21.) Minnesota courts have held that the certiorari rule applies to all employment-related actions – not just hiring and firing decisions. *See, e.g., Dokmo*, 459 N.W.2d at 673 (reinstatement); *Kobluk*, 1998 WL 297525 at \* 3 (tenure). Courts have specifically applied the rule to actions that have nothing to do with the

duration of employment – like job promotions and the assignment of job duties. *See, e.g., Bahr v. City of Litchfield*, 420 N.W.2d 604, 606 (Minn. 1988) (promotion); *Hansen*, 1997 WL 423567 at \*1 (assignment of job duties).

Plaintiff tries to distinguish *Hansen v. Indep. Sch. Dist. No. 820*, 1997 WL 423567 (Minn. App. July 29, 1997), to no avail. In that case, as here, the plaintiff challenged a school's decision not to ask him to perform services under a contract. The court held that the district court lacked subject matter jurisdiction over that claim because it was subject to the certiorari rule. *Id.* at \*1. Plaintiff takes great pains to find a distinction between this case and *Hansen*, even pulling the *Hansen* appellate briefs to find more details about the factual background. (Pl. Brief at 26-27.) But after all that digging, the best “distinction” Plaintiff finds is that “the issue in *Hansen* was whether a superintendent's decision to not have Hansen work at the school over a five-year span, consistent with the parties' agreement, was subject to writ of certiorari.” (Pl. Brief at 27.) This is a distinction without a difference. Hansen claimed the school breached its contract by not allowing him to perform his duties under the contract. Plaintiff claims Harris interfered with her employment contract by not allowing her to perform her duties under the contract. The two cases are virtually the same.

Plaintiff also tries, and fails, to distinguish *Bahr v. City of Litchfield*, 420 N.W.2d 604 (Minn. 1988). In that case, an employee challenged the city's decision to promote two officers over him. *Id.* at 606. The court decided the promotion decision was subject to certiorari review. *Id.* Plaintiff argues that her claim, unlike the claim in *Bahr*, does not involve a promotion decision. Plaintiff reads *Bahr* too narrowly. The issue in *Bahr*,

generally, was favoritism. An employee wanted a certain job and complained when someone else got it. Plaintiff claims that Harris engaged in the same sort of favoritism towards Ernie Rose. Plaintiff wanted to be Associate Head Coach – Women’s Golf, but, according to Plaintiff, she was a mere figurehead while Rose was the de facto head coach. Here, as in *Bahr*, Plaintiff’s claim relates to an alleged employment decision that can only be reviewed on a writ of certiorari.

Despite the immaterial distinctions that Plaintiff tries to draw, *Hansen* and *Bahr* undercut the entire premise of Plaintiff’s argument – that the certiorari rule applies only to decisions affecting the “term of employment.” Neither case involved the beginning, end, or duration of employment. Rather, they involved job assignments that were given (or withheld) during the course of employment. Plaintiff’s tortious interference claim easily fits that description.

Plaintiff cites *Williams v. Bd. of Regents of the Univ. of Minn.*, 763 N.W.2d 646 (Minn. App. 2009) in support of her argument that her claim against Harris is not employment-related, but *Williams* actually supports Harris’, not Plaintiff’s, position. In that case, Jimmy Williams was approached by University men’s basketball coach Tubby Smith about being an assistant coach. When the University did not hire Williams, he sued the University and Athletics Director Joel Maturi for, among other things, intentional interference with contractual relations. The District Court dismissed Williams’ claims, including his tortious interference claim, for lack of subject matter jurisdiction. *Id.* at 650. Williams, who was represented by the same counsel as Plaintiff, did not even bother to appeal the dismissal of his tortious interference claim. Instead,

Williams' appeal was limited to his claims for estoppel (based on alleged pre-employment promises by Coach Smith) and negligent misrepresentation (based on alleged misrepresentations by the University as to Coach Smith's authority to hire Williams). *Id.* The Court of Appeals affirmed the District Court's dismissal of Williams' estoppel claim because review would necessarily involve inquiry into the University's discretionary decision-making about whether to hire Williams, which is a subject for certiorari review. *Id.* at 652. The negligent misrepresentation claim, on the other hand, was not subject to certiorari review because it "assume[d] that the university did not employ or discharge" Williams. *Id.* (emphasis added). Accordingly, review would not require any inquiry into the University's internal decision-making. *Id.* at 652-53. The *Williams* holding stands for the uncontroversial proposition that if a claim does not implicate employment-related decisions, certiorari review is not required. Claims related to hiring, firing, and employment-related decisions in between, however, are subject to certiorari review, a point made clear in *Williams*.

Plaintiff also cites *Willis v. County of Sherburne*, 555 N.W.2d 277 (Minn. 1996), *Clark v. Indep. Sch. Dist. No. 834*, 553 N.W.2d 443 (Minn. App. 1996), and *Longbehn v. City of Moose Lake*, 2005 WL 1153625 (Minn. App. May 17, 2005), but all three cases undermine Plaintiff's position. In each case, a public employee made a claim for wrongful discharge and/or breach of employment contract. In each case, the courts decided the certiorari rule applied to the wrongful discharge/breach of contract claims. *See Willis*, 555 N.W.2d at 282; *Clark*, 553 N.W.2d at 445 ("A judicial challenge to a

school district's decision on a teacher-related matter must proceed by writ of certiorari."); *Longbehn*, 2005 WL 1153625 at \*4.

The courts in *Willis*, *Clark* and *Longbehn* decided defamation and intentional infliction of emotional distress claims could be heard by the district court, but for reasons that do not apply here. The defamation and intentional infliction of emotional distress claims in those cases did not challenge any actions taken with respect to the terms and conditions of the plaintiffs' employment, did not require review of any discretionary administrative decision regarding the plaintiffs' employment, and would not interfere with public employers' prerogatives to manage their employees without judicial interference. *See Willis*, 555 N.W.2d at 282-83 (describing the alleged defamation as "separate and distinct" from the termination of plaintiff's employment); *Clark*, 553 N.W.2d at 446 (review of defamation claim would not require court to "scrutinize the school district's administrative decisions"); *Longbehn*, 2005 WL 1153625 at \*4. Accordingly, those claims were outside the scope of the certiorari rule.

Unlike the defamation and intentional infliction of emotional distress claims in *Willis*, *Clark*, and *Longbehn*, Plaintiff's tortious interference with contract claim challenges the University's and Harris' assignment of duties to her and the University's eventual decision to transfer Plaintiff to another department. These are exactly the sorts of administrative employment decisions that are protected by the certiorari rule. *See, e.g., Dietz*, 487 N.W.2d at 240 (certiorari rule exists to mitigate risk that judicial scrutiny will

usurp the executive branch's administrative prerogative); *Hansen*, 1997 WL 423567 at \*1.<sup>4</sup>

The courts in *Willis* and *Longbehn* also discussed statutory claims made by the plaintiffs, but that analysis is off point. In both cases, the statutes at issue specifically allowed claims to be brought in the district court. *Willis*, 555 N.W.2d at 283; *Longbehn*, 2005 WL 1153625 at \*5. Here, there is no statute that would remove Plaintiff's tortious interference claim from the scope of the certiorari rule.

One more case Plaintiff cites is easily distinguishable. In *Lueth v. City of Glencoe*, 639 N.W.2d 613 (Minn. App. 2002), a public employee brought a motion to compel arbitration of a dispute with his employer. The employee did not bring any cause of action against his employer in the district court or seek review of any employment decisions. *Id.* at 617. The court held that the employee's motion to compel arbitration was not subject to certiorari review. *Id.* Plaintiff, unlike the employee in *Lueth*, wants a court to hear the merits of her tortious interference claim against Harris. Only the Court of Appeals can review that claim.

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<sup>4</sup> Another distinction is that the tort claims in *Willis* and *Clark* were unrelated to the termination of the plaintiffs' employment. In *Willis*, the alleged defamation occurred more than a year before the plaintiff's termination and was "separate and distinct" from it. *Willis*, 555 N.W.2d at 282. In *Clark*, the alleged defamation occurred after the plaintiff's employment ended. *Clark*, 553 N.W.2d at 446. (Only *Longbehn*, an unpublished decision, involved alleged defamatory conduct that occurred shortly before the plaintiff's termination.) Here, Plaintiff's tortious interference claim is based on alleged conduct occurring during the course of her employment and is inextricably intertwined with employment-related decisions that she alleges led to the termination of her employment. (See *infra* Section IV.)

**IV. EVEN IF THE CERTIORARI RULE WERE LIMITED TO EMPLOYMENT TERMINATION CLAIMS, PLAINTIFF’S TORTIOUS INTERFERENCE CLAIM RELATES TO THE TERMINATION OF HER EMPLOYMENT**

As explained in Harris’ opening brief, even if the certiorari rule were limited to employment termination claims, the rule applies here because Plaintiff’s tortious interference claim is based on alleged actions by Harris that led to the termination of Plaintiff’s employment with the University. (Harris Brief at 21-22.) Plaintiff tries to separate Harris’ alleged conduct from the University’s eventual decision to transfer Plaintiff to a position at TCF Bank Stadium, but this distinction contradicts Plaintiff’s own description of the events. According to Plaintiff’s Amended Complaint, Harris limited Plaintiff’s duties, which caused Plaintiff to complain to other personnel in the Athletics Department, which caused Athletics Director Joel Maturi to try to re-assign Plaintiff to TCF Bank Stadium, which caused Plaintiff to quit. (See AA.3 ¶¶ 28-56.)

Plaintiff’s attempt to break this chain of events is puzzling. If Harris’ alleged conduct did not cause the termination of Plaintiff’s employment, as Plaintiff argues, then what legally cognizable harm did it cause? If Plaintiff has any claim at all against Harris (which she does not), it must be related to the termination of Plaintiff’s employment.<sup>5</sup>

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<sup>5</sup> Plaintiff writes in a footnote that the University’s decision not to file an *amicus curae* brief in this appeal is “conspicuous.” (Pl. Brief at 26 n.6.) But the University had no reason to file a brief – only the tortious interference claim against Harris is at issue. Moreover, it is unclear what the University would argue in an *amicus* brief that has not already been argued in Harris’ own briefs.

There is no doubt that claim is reviewable only on a writ of certiorari to the Court of Appeals.

**V. HARRIS' APPEAL IS CONSISTENT WITH – NOT AN UNCONSTITUTIONAL EXPANSION OF – CASE LAW ON THE CERTIORARI RULE**

In a last ditch effort to escape the certiorari rule, Plaintiff argues that Harris seeks to unconstitutionally “expand” the certiorari rule. (Pl. Brief at 29-31.) In “support” of this argument, Plaintiff cites only dissenting opinions. She does not cite any authoritative precedent. The reason for that is obvious: The holdings of this Court and the Minnesota Supreme Court consistently and unequivocally support Harris’ application of the certiorari rule to Plaintiff’s tortious interference claim.

Plaintiff argues that the discovery conducted to date “confirms how imperative it is” that Plaintiff be allowed to proceed in District Court. (Pl. Brief at 31.) Actually, the evidence “confirms” the opposite – the District Court lacks jurisdiction under the certiorari rule. The evidence uncovered to date firmly establishes that this is an employment-related dispute arising out of actions that Harris allegedly took as Plaintiff’s supervisor and during the course of his employment with the University.

But setting aside the evidentiary record that is not before the Court on this motion on the pleadings, the issue for the Court is the subject matter jurisdiction of the District Court. The District Court, based on Plaintiff’s allegations, lacks jurisdiction. Harris should not be put in a position in which he must submit to the District Court’s jurisdiction, only to later show on an evidentiary record that the District Court really did

not have jurisdiction after all. That would effectively negate the purpose of a Rule 12(a) motion to dismiss for lack of subject matter jurisdiction.

**CONCLUSION**

Harris does not, as Plaintiff argues, seek an “expansion” of the certiorari rule. To the contrary, Harris asks the Court to follow a long line of cases holding that a writ of certiorari is the exclusive method to review employment decisions by the University and its employees (like Harris). To allow Plaintiff’s tortious interference claim to proceed in the District Court, this Court would have to disregard well-established precedent and create new limitations on the certiorari rule that are unsupported by any previous decision of this Court or the Minnesota Supreme Court. The Court should decline Plaintiff’s invitation to re-write the law. For the reasons explained above and in Harris’ opening brief, the certiorari rule requires that Plaintiff’s tortious interference claim against Harris be dismissed for lack of subject matter jurisdiction. This Court should reverse the District Court’s denial of Harris’ motion to dismiss.

Dated: December 8, 2011

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**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App.

P. 132.01. The length of this brief is 5,722 words. This brief was prepared using  
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