

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Jerry L. Moore,

Respondent,

v.

John Hoff a/k/a Johnny Northside,

Appellant.

A11-1923

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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INTRODUCTION

Appellant's appeal is conceptually and structurally flawed.

The Appeal is conceptually flawed

Although Appellant has worked to articulate his 'legal' issue as whether the jury "verdict" violates the First Amendment if the jury relied on protected speech – this is a dodge. In actuality, Appellant is challenging the *jury instructions*, without using those words. Why not use the words? Because Appellant did nothing to timely challenge the jury instructions below. Appellant:

- Did not ever file a pleading containing proposed jury instructions (**RA:45**), let alone ones that triggered the district court to consider the First Amendment with regard to tortious interference with contract;¹
- Did not make any verbal objections to any draft jury instruction during the court's charging session; and
- Did not order the transcript of the charging session.

It is too late now for Appellant to challenge the jury instructions.

The Amicus brief acknowledges that the problem is the jury instructions (Amicus Brief Section II, p. 9-10). But the Amicus should not be permitted to raise new issues on appeal (that is, trying to make up for what Appellant did not litigate below).

¹ Finally, part way through the trial, Appellant identified standard JIGs as jury instructions. These cannot now be interpreted as seeking a First Amendment review or a jury finding of malice or anything similar.

Appeal is structurally flawed

It is clear that this appeal is intended to help someone. But even if successful, it is not going to help Appellant Hoff.

Hoff appears a mere stand-in. Amicus counsel and a journalist who did not attend the trial, and who is apparently married to a member of the Society Pro created this argument (after the trial),² and only *then* did Appellant make the argument. (This is well-documented in this litigation, and will be discussed below.) Although the media has a right to be interested, it lacks standing to create the argument and then perpetuate this appeal.

² See the blog post 'article' by David Brauer for MinnPost at <http://www.minnpost.com/braublog/2011/03/johnny-northside-damn-right-were-appealing-60000-judgment>, cited within an Amicus cite, <http://www.thedeets.com/2011/03/11/johnny-northside-trial-follow-up/>, which indicates that David Brauer talked to John Borger (Amicus counsel) who stated, "The award left media lawyers flabbergasted because, as Faegre & Benson's John Borger puts it, "If the statement was true, there should be no recovery. There is caselaw in Minnesota that the providing of truthful information is not a basis for tortious interference." The Amicus argues that the district court's ruling has upset or confused journalists. But what left media lawyers "flabbergasted" was the incorrect portrayal of what occurred at trial, by Brauer and Borger. See also (See Clark-Strike Aff. (May 16, 2011 filed with the district court) ¶5).

FACTUAL STATEMENT & PROCEDURAL HISTORY

(& RESPONSE TO UNTITLED PARAGRAPH AT APPELLANT BRIEF p. 4)

Plaintiff Jerry Moore (“Moore”) sued out this case in mid 2009, against Defendants John Hoff and Don Allen. (Complaint at **AA:1;RA:1-3**). John Hoff, who publishes a blog entitled, “The Adventures of Johnny Northside” (“Hoff”), has a law degree from the University of North Dakota, although he did not obtain a law license. (**T:37-8**).

Appellant is obviously concerned he will be challenged for not raising First Amendment issues in this litigation below. In the untitled paragraph at Appellant’s Opening-Brief p. 4, Appellant contends that Plaintiff Moore was the first to raise the First Amendment, in his Complaint. It is true that the Complaint used the words “First Amendment” (this is an obvious legal issue in many defamation cases). Appellant cites to his “Answer” as mentioning the First Amendment.³ But even on *notice* of First Amendment issues, Defendant Hoff missed his opportunity to bring any dispositive motions, where these issues usually get fleshed out. (**RA:1-2**).

Initially, Defendants Hoff and Allen were represented by licensed Attorney Albert T. Goins, Sr., Esq. (Answer at **AA:28**).

³ But the Answer was not filed until winter 2011. (**RA:2**).

Ironically, the first joust by Defendants was to bring a motion for a more definite pleading, presumably to facilitate a motion on legal and constitutional issues. (RA:1). But no substantive motion like that was ever brought.

Plaintiff brought a motion to disqualify defense counsel due to a conflict of interest between Defendants Hoff and Allen. (RA:1-2). Although this was denied, it seems undisputed that this was eventually the basis for Attorney Goins' withdrawal. Appellant certainly cannot contend that he was not on notice of the conflict issue.

Moore settled with Defendant Don Allen.⁴

The case proceeded to trial.

Trial

Pre-trial proceedings

By the time pre-trial pleadings were due pursuant to the Trial Order (RA:30), Hoff represented himself.⁵ He filed witness and exhibits lists, but no proposed jury instructions and no motions *in limine*. (RA:45; RA:1-2)

Plaintiff Jerry Moore timely filed all pre-trial pleadings, including proposed jury instructions. (RA:4;RA:5-18;RA30-33).

⁴ The district court discussed the settlement with the parties outside the hearing of the jury. (T:158-61).

⁵ The district court file will show a letter from Attorney Anfinson, who was performing some role just prior to trial which was less than officially representing Defendant Hoff.

Hoff was quickly thereafter represented by Paul Godfread, Esq. (RA:1 & 2).

Attorney Godfread appeared for the first time on **February 10, 2011**. (RA:27-29). The district court confirmed that Plaintiff had filed all pre-trial submissions as ordered. And, given that Defendant's lawyer was new to the case, expanded the time for Defendant to file pre-trial pleadings until **March 1**. *Id.* That would give Plaintiff one day to review Defendant Hoff's trial pleadings, with a pre-trial hearing set for that day (**March 2**). (*Id.*; RA:1-2).

Even after being given additional time to do so, Defendant Hoff still did not file any proposed jury instructions. (*See generally* RA:1-3;RA:45). Hoff filed one motion *in limine* relating to the Communications Decency Act ("CDA") (discussion of this legal issue at T:109-110 and Respondent's bench memo at RA:53-54).

Defendant did not address the First Amendment in any pre-trial pleading, or in any meaningful way before the district court.

The *district court* raised the First Amendment issues regarding the defamation claim. The district court decided to hold a hearing on **March 3, 2011**. (District court order at AA:29-35). Appellant did not purchase this transcript.

The district court initiated argument and ruling on two main issues: **1)** whether the allegedly defamatory statements were fact or opinion; and **2)** whether Jerry Moore was a limited purpose public figure. Presumably, the district court

raised these issues in furtherance of its duty to prepare legally-correct jury instructions.

1. Fact v. opinion

At the **March 3** hearing, the district court considered whether the statements were of 'fact' or opinion. *Id.* Plaintiff Moore assisted the district court with his bench memo at **RA:57-59** regarding opinion versus fact, and highlighting that opinion is absolutely protected under First Amendment analysis. Moore also assisted the district court by preparing an exhibit that pulled each allegedly defamatory statement out of the Complaint. (**RA:66**).

Appellant did not purchase that transcript, but it can be reasonably inferred that had Defendant Hoff *wanted* all of the allegedly defamatory statements to go to the jury, that the district court would not have needed to hold a hearing regarding the allegedly defamatory statements from the Complaint.

Yet Appellant appears to be arguing before this Court that the jury should have been given more opportunity to weigh the falsity of more statements. Not only did Appellant not raise these issues properly at the district court, Appellant affirmatively squandered those opportunities created for him by the district court.

Following the **March 3** hearing, the result was that only one allegedly defamatory statement went to the jury. **"Repeated and specific evidence in Hennepin County District Court shows that Jerry Moore was involved with a**

high-profile fraudulent mortgage at 1564 Hillside Av. N.” (See Special Verdict Form (SPV) at **AA:36**, hereinafter “The Falsity Sentence.” See also the district court’s order at **AA:30-31**). It was this one sentence for which the jury was asked to determine whether Moore had met his burden to prove falsity.

This Court can also note that Appellant did not appeal any of the determinations by the district court. In other words, Appellant lost his opportunity to allow the jury to determine by special verdict query whether additional statements (besides The Falsity Sentence) were indeed false. However, it can be inferred from the evidence adduced, that the jury found numerous statements besides The Falsity Sentence to be false.

2. *Private v. public person*

The district court also raised on **March 3**, the issue of whether Jerry Moore (a private person⁶) was a ‘limited purpose public figure.’ *Id.* Over the objection of Plaintiff Moore (see Moore’s bench memo at **RA:60-66**), the district court ruled that Jerry Moore was a limited purpose public figure as a matter of law.

Obviously ‘limited public person’ status informed the district court’s jury instructions for defamation, which asked the jury about falsity, defamatory meaning, and actual malice. (SVF at **AA:36**).

⁶ No one has ever argued that Jerry Moore is an elected official or government official.

Moore contends that the district erred as a matter of law in determining that he was a limited purpose public figure. Moore contends that his proposed “negligence” jury instructions (RA:15-17) should have been given.⁷

Appellant did not argue it was an issue of ‘public concern’

It is clear that below, neither the Appellant nor the Amicus argued that an issue of public concern was at issue. (AA:29-35). Note how Plaintiff Hoff’s bench memos touch on the ‘public concern’ facet of First Amendment law. (See, e.g., RA:60), and cited to case law. But Defendant Hoff never raised the issue, *even when the district court geared up a full day evidentiary hearing* to litigate First Amendment issue(s).

And Defendant Hoff did not raise this issue (public concern) after the trial in his motion to vacate.

Trial evidence

Rather than summarizing the entire trial, Respondent Moore here focuses on evidence that supports the tortious interference verdict.

⁷ The ‘public figure’ ruling ended up having no consequence for Moore regarding his defamation claim, because Moore did not meet his burden of proving falsity. (AA:36). However, now that Appellant and the Amicus are arguing on appeal that appellate courts should scour the trial evidence regarding tortious interference with contract in order to ensure the First Amendment is protected, Moore triggers the same rigorous analysis *also required by appellate courts* to determine whether the district court’s threshold determination regarding the Plaintiff’s statue was correctly made. (See argument below.)

Stevan Jackson

Stevan Jackson testified that he had known Jerry Moore since the mid 1980's. He knew Jerry Moore's reputation for being educated and articulate, for doing things for the community and being an upstanding citizen. (T:21-3).

Jackson testified that he's aware of the blog Adventures of Johnny Northside, and that Hoff is "pro Don Samuels" (a Minneapolis City Council Member). (T:24-5). Jackson stated that it seems that anyone who disagrees with Don Samuels or his group of people gets attacked by Hoff on his blog. After Hoff's blog posts, Jackson noted that Moore's reputation in the community was that of a 'criminal.' (T:25-6).

John Hoff

John Hoff testified that the Adventures of Johnny Northside is his blog and he has control of it. (T:47). Hoff testified that he has a degree in English and a law degree but no law license. (T:37-8). Hoff stated he was a journalist and he covers "news." (T:50). Hoff said he has studied journalistic ethics, including the tenets to:

- Avoid conflict of interest;
- Separate news from opinions;
- Balance competing points of view;
- Corrections should be published when errors are discovered; and
- Be judicious in naming criminal suspects until the filing of charges

But he did not necessarily agree that ethics demand that he allow persons who are the subject of adverse news stories to have a reasonable opportunity to respond.

(T:41-2).

Hoff disagreed that he was biased in favor of Don Samuels, but said he supports Samuels in a lot of things he does. (T:50). He did agree that he wrote a lot of negative things about Samuels' challenger in the 2009 City Council election, and that Jerry Moore supported the challenger (Natalie Johnson Lee) in that campaign.

(T:53-4).

In June 2009, Hoff received information that Jerry Moore was working at UROC⁸ at the U of M. (T:58-9). Don Allen had told him that Moore was working at UROC, and Hoff called "reliable people" who confirmed this. (T:61).

Hoff identified **Exhibit 101** as his **June 21, 2009** blog post and it was received into evidence. (T:60;RA:19-22). Hoff stated that it was true that 'movers and shakers' were upset about Moore's employment at UROC. (T:75).

Hoff waited for a week to publish his June 21 blog post, while 'people' were trying to talk to 'people' at the U. (T:90). Hoff stated that calls were made to the U of M about Moore, and that he had "specific and general" knowledge about this.

(T:92).

⁸ Urban Research and Outreach Center (see **Exhibit 101** at RA:21).

Colloquy with the Court about the 'defamation zone'

After the jury was released at the end of the first day of testimony, the district court picked up the thread of the CDA issue. Moore had dubbed the comments following a blog post as the 'defamation zone' in his Complaint.

When Attorney Godfread entered the case, he filed a motion *in limine* to exclude all comments below the blog posts. The district court had not yet ruled on the DCA issue, but stated that it appeared the discussion was getting into the 'defamation zone.' Moore's counsel stated, "I'm not going there because of defamation. I'm going there because of intentional interference." (T:94). Hoff's attorney heard this discussion and responded. Still, Defendant Hoff said nothing about any legal similarity between defamation and tortious interference.

Moore had provided a bench memo in response to Hoff's motion (filed by Attorney Godfread) regarding the CDA (RA:53-4), and contended:

- That immunity is always an affirmative defense and Defendant has the burden;
- The Act protects ISP's and intermediaries and JNS is not an intermediary (Blogspot is the intermediary);⁹ and
- There was an incitement by Hoff, aiding and abetting the intentional interference with Moore's employment contract, and that under four federal

⁹ Note that the URL of JNS is [JNS].blogspot.com.

cases that is outside any immunity that the CDA would provide even if it applied.

(T:96-7). Moore further contended that Blogspot can be used to allow all comments to publicly post, but Hoff was monitoring the comments and deciding which ones to publish, which made him a content provider, liable under case law interpreting the CDA. *Id.* Moore requested that the district court permit Moore to talk to the jury about the comments.

The following morning the district court ruled that Hoff could not be held liable for any of the comments to the blog post(s), but if during questioning witnesses admit to posting comments, then the comments can come in. (T:109-110). And if Moore can identify a poster, then they can be subpoena'd. (T:112).

Later, the parties redacted **Exhibits 101** and **102** so that no comments that had been excluded by the district court would go to the jury room. The district court accepted un-redacted versions as court exhibits. (RA:67-73).

Hoff's continued testimony

John Hoff continued testifying, and **Exhibit 102** was admitted. Hoff agreed that **Exhibit 102** was his post from **June 23, 2009** and that he authored everything on it. (T:127-28).

A known credible source at U of M gave information to a known, creditable source in the Hawthorne Neighborhood, who conveyed it to me earlier today:

Jerry Moore, the former Executive Director of JACC, who is currently involved in a lawsuit against JACC, was "let go" from his job at the University of Minnesota UROC program. According to the U of M source....

It was reportedly coverage on this blog which "blew open" the issue of Moore's hiring and forced the hand of U of M decision-makers after the issue had been quietly, respectfully brought to their attention over a week ago. I am told pages were printed from my previous blog post about Moore's hiring by UROC, including the extensive comment stream, and these pages got "waved around" a bit in a discussion at U of M.

...

Hoff testified that he approved the comments that were posted, and posted a comment of his own. (T:129). Hoff did not caution anyone that it would be illegal to attempt to get Moore fired. He claimed that "Source A" told him to be careful about frivolous and vexatious lawsuits.

Donald W. R. Allen, II

Don Allen testified that he is a marketing and PR consultant. (T:163). John Hoff contacted him and came to his office to find out his positions. Hoff indicated that the goal of his blog was to talk about Level 3 sex offenders, houses in the neighborhood, post pictures of black men that have gotten into trouble with the law and let people comment on the information. (T:165-66).

Initially, Allen guided 'hits' to Hoff's blog. And at first he linked from his blog to Hoff's blog. But he later removed the link because he became "concerned." *Id.* Allen did not like the way Hoff deconstructed black men. (T:168). When Allen removed the link, Hoff told him he had to be on the right 'team.' *Id.*

Allen stated that he had visited Hoff's blog a number of times and had left some comments there. He confirmed that "Goodpony" is Megan Goodmundson. (T:169). Allen studied Hoff's writing style to determine that Hoff was leaving allegedly anonymous comments to his own blog posts. (T:170).

Allen confirmed that he (Allen) had written some of the comments to **Exhibit 101 (RA:21-2)**. Allen wrote the 'comment' entitled "Don 'I said it' Allen said..." It was the content of an email that Allen had sent to Dr. McClaurin, the Executive Director of the U's UROC. (T:170-73).

Don "I said It" Allen said...

Email sent to Dr. McClaurin:

Dear Dr. McClaurin,

This email is to give you a heads up on a pending situation, that could possibly turn into a **public relations nightmare** for the University of Minnesota/Urban Research and Outreach Center.

On last week, allegedly – Mr. Jerry Moore and Mike Kestner were released from the Northside Marketing Task Force board of directors. This comes on the heels of several different scenarios involving Mr. Moore and his relationship with Tynessia Snoddy who is under indictment for mortgage fraud as reported on KSTP-TV-(Read

it here: <http://kstp.com/news/stories/S795057.stml?cat=1>).

Mr. Moore did a deal that remains in question where he received a \$5000 check for "new windows" at 1564 Hillside Avenue North. Mr. Moore put no new windows in said property. This was a conflict of interest, at the time he was JACC's executive director. More importantly - he was not a "window repairmen" either.

From the court documents that surfaced in the Larry Maxwell trail (sic) with an invoice for \$5000 to JL Moore Consulting and the current Jordan Area Community Council court case, I feel there could have been a (sic) error in judgment on the part of the UROC in collaborating with Mr. Moore.

There is enough public information to support the claims made in this email, I hope that the U of M's corrective action is swift and covert to avoid more media distribution of this information as it pertains to UROC, the U of M and the connection with Mr. Moore which would be "he gets a check" from the University of Minnesota to discuss Mortgage Foreclosures and other information in the community.

The current story out is here:

<http://adventuresofjohnnynorthside.blogspot.com/2009/06/former-jacc-executive-director-jerry.html>, **the Independent Business News Network will consider covering this on Tuesday**, but since our media group is trying to do business with the U of M, I will remain cordial and diplomatic - **for now**.

Dr. McClaurin, I would be glad to forward to you name of community stakeholders that are qualified to be topic specific for anything UROC needs to discuss in the community. I would also offer you the services of the public relationships branch of V-Media Marketing for any message distribution you might see fit.

If you have any question, please contact me at 612-[redacted].

Very best regards,

Donald W.R. Allen, II-Chairman
V-Media Development Corporation, Inc - a Minnesota Non-Profit,
Public Relations and Advocacy Organization

[addresses and phone numbers redacted]

June 22, 2009 12:17 AM

Bolded text is bolded in the original.
Bolded and underlined is the emphasis added.

Allen testified that John Hoff called him up knowing that Allen could get to Dr. McClaurin before Hoff could. Hoff said Moore can't work at the U of M, we have to stop this. Hoff said that Megan Goodmundson had made phone calls to the U of M already. (T:174).

Allen discussed the email above (which he later posted as a comment on Hoff's blog) and they decided that since Allen had closer ties to Dr. McClaurin, it would be better if Allen sent the email. Hoff asked him to send the email. Hoff and Megan Goodmundson were blind-copied on the email when it was sent. Hoff's goal was to disturb the employment of Moore. (T:175).

Allen also testified that he believed that the comment dated June 21, 2009, 11:14 AM is from Hoff (commenting on his own post). Allen said it reads 'Anonymous,' but when you look at the third paragraph, this is a trend in Hoff's comments.

“Let’s track down the contact information for these people, post this, and have a coordinated effort to remove Jerry Moore and restore credibility to the partnership.”

(T:176).

Allen stated that Hoff harbors ill will toward Moore. That Hoff doesn’t want Moore employed in North Minneapolis at any agency. That Hoff has issues with successful Blacks, Hispanics, Asians, and even poor Caucasians that live in North Minneapolis. Allen said he knew one of Hoff’s goals is to take down Moore by any means necessary. Moore supported one of Samuel’s opponents, and that is another reason Hoff despises Moore. **(T:178).**

Had Defendant Hoff raised First Amendment issues below, then Moore could have countered that *he* had a First Amendment right to vote for and work for Natalie Johnson Lee for public office. Because Hoff did not make the argument, Moore lost that opportunity to litigate his First Amendment rights in the district court.

Allen testified that Hoff, his followers and his blog led to Moore’s termination. **(T:180-82).** Based on what Allen knew, he believed the U of M did not want a negative publicity campaign. Because of Hoff’s attacks on individuals rather than issues, the U of M walked away from Jerry Moore. **(T:182-3).**

Allen testified that he wish he had never sent the email. That his wife is a Professor at the U of M, and when she became pregnant, Hoff blogged that she was carrying Allen's 'demon seed,' and that she was an idiot. And that now when you goggle his wife's name, you pull up Hoff's article. Allen ended by saying he wished he had never met John Hoff, talked to Hoff, or looked at his blog. (T:184).

Allen testified that Hoff made threats against him in an effort to intimidate him from testifying in the case. Allen received an anonymous threatening email the night before he testified. He also had an intimidating telephone call on the Saturday before his radio show. Allen said he felt intimidated about testifying at trial. (T:197-98).

Jerry Moore

Jerry Moore testified that he moved to Minneapolis in the 1980's, went to school, then worked for the Urban League and Jordan Area Community Council. (T:200-04). In about April 2009 he obtained a job at UROC. (T:205). He lost that employment with UROC in June 2009. (T:207-8).

UROC supervisors never criticized Moore's work. No projects were ending at the time he lost his job. (T:208-09). **Exhibit 103** was admitted, the letter that terminated Moore from UROC. (RA:26;T:210). The letter does not state that Moore was being terminated for any type of poor performance or misconduct. *Id.* Moore

believed he was in good standing with UROC and his employment would continue. (T:218).

Moore testified that Dr. McClaurin's 'right hand person' was Makeda Zulu-Gillespie. She worked closely with Moore and knew his work. (T:220).

Moore testified that he was never charged with any type of mortgage fraud crime. (T:210). He testified that the statements in **Exhibit 101** (Hoff's June 21, 2009 blog post) are false. (T:216;T:276-303).

Makeda Zulu-Gillespie

Makeda Zulu-Gillespie testified that she worked for UROC and that there were no problems with Moore's work when he was there. Dr. McClaurin made the decision to terminate Moore from employment. At the time of Moore's termination, there was no change in the U's need for assistance with that project. (T:225).

Michael Kestner

Michael Kestner was born and raised in North Minneapolis. In 2005 he started joining organizations on the north side. (T:259). Kestner met Jerry Moore on the Northside Marketing Task Force. (T:260).

Hoff explained the philosophy of his blog to Kestner. Kestner referred to it as "romancing the struggle": to draw out the entertainment value of North Minneapolis. (T:261-63).

Hoff accused Moore of mortgage fraud in statements to Kestner. Hoff ranted and exhibited ill will and 'bile' when he talked about Moore. (T:264-68).

Megan Goodmundson

Defendant Hoff called Megan Goodmundson to the witness stand. Goodmundson testified that she had told Hoff that Moore was "involved" with at least one fraudulent mortgage transaction. (T:337). The Falsity Sentence included the word "involved," and Hoff's defense placed emphasis on the word "involved." It is reasonable that the jury decided "involved" was too vague to prove false. After all, even judges and juries are "involved" in mortgage fraud cases (trials).

Closing Arguments

Defendant Hoff's closing argument addressed intentional interference with contract at T:435. The only argument made was that there was no evidence Hoff interfered. The jury obviously did not agree.

Defendant Hoff's closing then strayed into areas of law that had *not* been raised by Hoff outside the hearing of the jury and/or which were not supported by the evidence. (T:436-8).

- The U of M is a public institution;
- UROC specifically uses public money to help people in the neighborhood deal with housing and mortgage issues;

- Hoff's justification is that this is a matter of public interest;
- Hoff's writing involves matters of public concern, matters of politics, matters of public funds and their use, matters of crime and public safety, and matters that were controversial and under discussion in north Minneapolis.

It was improper for Hoff to raise these issues for the first time in Closing and in this manner. It prevented Moore from making argument to the district court about how to handle such issues. And it prevented the district court from ruling on them.

Plaintiff Objection To Defense Closing Argument

Plaintiff Moore objected to the Defense closing argument by saying "objection." Then at **T:486**, Moore explained his objection to the district court.

Hoff made no objections to Plaintiff's closing argument

It is not clear what the Amicus is arguing about Moore's closing argument.¹⁰ Defendant Hoff made no objections to any closing argument by Plaintiff. He did not make any objections:

¹⁰ Perhaps the Amicus brief is suggesting that Moore's arguments lack merit because Moore discussed the *blog posts* in closing argument. This is a strange argument, since it was Moore who offered **Exhibits 101** and **102** into evidence. The blog posts are *evidence* and they were properly discussed for various reasons (including but not limited to showing Hoff's motive). It is strange to argue, essentially, that Moore cannot even discuss the exhibits at closing. The legal standard is simply not that words cannot be considered in American trials.

- during closing argument,
- immediately after closing argument outside the presence of the jury, or
- in post-verdict motions.

And, of course, Appellant did not order the jury instruction transcript for this Court. Neither Appellant Hoff nor the Amicus should be allowed, now, to try to resurrect issues about Moore's closing argument.

The Verdict

The jury returned the verdict on **March 11, 2011**. See Special Verdict Form at **A:36**. The jury did not find that The Falsity Statement was **true**. The jury found that Moore had not met his burden of proving it was **false**. Those are not the same thing. Arguments by Hoff or the Amicus that the jury found the sentence was "true" are simply not accurate.

The jury was *not* asked whether the other statements in **Exhibits 101** and **102** were false. Hoff never asked the jury to answer those questions.

The jury was asked one damage question for all three claims. Consistent with the verdict, the Court filed judgment in favor of Moore on two claims, tortious interference with contract **and** interference with prospective employment advantage for a total of \$60,000.

The blogosphere erupts after trial

After the trial, the media started the rumor that the jury verdict for tortious interference was based on The Falsity Sentence. (See Moore's motion to strike at the district court level, as well as on appeal, and supporting affidavits.)

Society Pro Insinuated Itself Into District Court Matter

After trial, on or about **March 23, 2011**, and *before* Hoff filed any post-verdict motions, the Society Pro presumed to file a purported "amicus" memorandum at the district court.

As Moore pointed out in his memorandum filed with the district court,¹¹ the Society presumed to tell the district court and the parties about the case they had just tried. It turned out the Society had not performed *any* factual research, had not read a transcript.

Moore's motion to strike the Amicus brief in the district court, as well as litigation on appeal pointed out:

- The Society did not know the facts. The Society would not respond to Plaintiff counsel who was trying to tell them they did not know the facts;
- The Society had *given* Hoff his legal issue (Hoff, to his detriment, took it);

¹¹ Plaintiff's Memorandum of Law filed in Support of his Motion to Strike Pleading of Society, dated May 16, 2011.

- On appeal, in its purported request to file Amicus brief under Minn.R.Civ.App.P. 129, the Society (now joined by others) went far beyond Appellate Rule 129 and, once again, handed Hoff his appeal issue (this time refined), that the appellate court must peruse the record to ensure the First Amendment was respected below.

So Hoff jumped on that argument. And following the purported Amicus brief, Hoff filed post-verdict motions, including a motion for judgment as a matter of law and a motion for new trial.

Post-verdict motions denied

Hoff's post-verdict motions were denied. (A-Add-1, *et seq.*) The district court noted that for judgment as a matter of law, the district court must take into account all of the evidence in the case, view that evidence in a light most favorable to the jury verdict, and not weigh the evidence or judge the credibility of witnesses. (A-Add-2-3). The district court elucidated that standard. *Id.*

The district court also discussed the new trial standard, "the verdict [must be] so contrary to the preponderance of the evidence as to imply that the jury failed to consider all the evidence, or acted under some mistake or from some improper motive, bias, feeling or caprice, instead of honestly and dispassionately exercising its judgment." (A-Add-3-4).

This appeal followed.

ARGUMENT

I. Standard of Review.

The Appellant does not properly discuss the standard of review, either by the district court, or by Minnesota's appellate courts, of a post-trial motion for judgment as a matter of law, or motion for new trial. For the proposition that a First Amendment question of "constitutional fact" compels de novo review, Appellant cites to a federal case. Appellant Opening-Brief p. 9.

As recently as 2010, the Minnesota Supreme Court stated :

We review de novo a district court's decision to deny a motion for judgment as a matter of law. *Gilbertson v. Leininger*, 599 N.W.2d 127, 130 (Minn. 1999). We have said that when a district court considers a motion for judgment as a matter of law, it "must view the evidence in the light most favorable to the jury verdict, and should not grant [the motion] unless the evidence is practically conclusive against the verdict and reasonable minds can reach only one conclusion, (or) the jury's findings are contrary to the law applicable in the case." *Diesen v. Hessburg*, 455 N.W.2d 446, 452 (Minn. 1990) (citation omitted) (internal quotation marks omitted). We have also said, "An answer to a special verdict question should be set aside only if it is perverse and palpably contrary to the evidence, or where the evidence is so clear as to leave no room for differences among reasonable persons." *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 662 (Minn. 1999) (citation omitted) (internal quotation marks omitted).

We note that the Eighth Circuit has held that if a determination of liability is based on more than one ground, a verdict should be sustained if the plaintiff is entitled to recover on the basis of one of the grounds. *See Hinkle v. Christensen*, 733 F.2d 74, 76 (8th Cir. 1984). In essence, this means that if the plaintiff is entitled to recover on one ground, a court need not consider the other grounds. *Id.* We agree.

Moorhead Econ. Dev. Auth. V. Anda, 789 N.W.2d 860, 887-88 (Minn. 2010).

Appellant has turned this standard on its head. Rather than the burden being on Appellant to show why the jury verdict is palpably wrong, Appellant has essentially asked this Court to require Respondent to prove that the jury did not consider The Falsity Sentence. That clearly is not the standard.

The lack of focus on the appellate standard of review exacerbates problems with Appellant's analysis. For example, at Appellant Opening-Brief p. 17, Appellant states, "Furthermore, the trial court's claim that defendant 'did not present any evidence' in support of his argument is hardly persuasive, because it turns the governing law on its head. It was obviously plaintiff's burden to offer admissible and relevant evidence...." Surely, it was Plaintiff's burden to prove his claims *at trial*, but it was Defendant's burden *to prove his motion for judgment as a matter of law*.

Appellant contends that the review is "*de novo*" because he is raising legal issues. First, Appellant cites to *Harrison v. Comm'r of Pub. Safety*, 781 N.W.2d 918, 920 (Minn. Ct. App. 2010). That cite is in apposite. *Harrison* is a motor vehicle driver's license revocation proceeding, involving implied-consent case and the application of the Fourth Amendment. At page 920, *Harrison* cites to *Shane v. Comm'r of Pub. Safety*, 587 N.W.2d 639, 641 (Minn. 1998) for the proposition that "where the facts are **undisputed**, questions of law are reviewed *de novo*." (Emphasis added). The facts were heavily disputed at trial.

Having reviewed the Amicus request to file brief citing to *Bose Corp. v. Consumers' Union of U.S., Inc.*, 466 U.S. 485, 509 n. 27 (1984), Appellant cites the case for the proposition that First Amendment questions of 'constitutional fact' compel the U.S. Supreme Court's *de novo* review. But it is far from clear how the Minnesota Supreme Court (the highest court in a state that has a duty to protect *state* interests) would rule on this issue. In *State v. Nielson*, 2011 Minn. App. Unpub. LEXIS 1055 (Minn. Ct. App. 2011), the Court of Appeals held it could not grapple with an argument under the federal constitution because the Minnesota Supreme Court had not yet done so. It is not clear why this would be handled any differently in this case.

Stated another way, Appellant has not cited any *Minnesota* case that held that the appellate courts must conduct an independent review of the evidence. *Bose*, 466 U.S. at 508, n. 26.

Of course, Minnesota appellate review cases are not deficient on this angle, as they permit the reviewing court to parse the district court's new trial analysis. Properly, it seems, because the trial judge sat through the trial and observed the witnesses and the jury, this Court has deferred to the discretion of the district court in new trial motions.

And nothing about the citation to *Bose* get around the problem of Appellant failing to proffer any proposed jury instructions, to challenge any instructions the

district court planned to give, objecting to any jury instructions at trial, or disputing the instructions following the verdict. Note that the *Bose* included a challenge to the jury instruction. Indeed, Bose-Court noted that the High Court has rejected the contention that a jury finding of obscenity vel non is insulated from appellate review **so long as the jury was properly instructed**, and there is some evidence to support its findings. *Bose*, 466 U.S. at 507.

Nowhere does Appellant cite a case for the proposition that a defendant may withhold all objections (such as to jury instructions) and lie in wait until *after* a jury's verdict, and then claim that the court should have applied the law differently. Indeed, see cases cited by the district court at **A-App-2-3**.

Further, as the internal cite makes clear, the 'contrary to law' standard is really that "the evidence cannot sustain the verdict." *Diesen v. Hessburg*, 455 N.W.2d 446, 452 (Minn. 1990). The standard is *not*, as Appellant wants it to be, that there might have been one sentence that the jury should not have considered. Otherwise, no jury verdict would stay shut. All an appellant would need to do is point out one evidentiary error by the district court, allowing one testimonial sentence to go before the jury, for example, and the Appellant would win. That does not happen in the Minnesota appellate system. Here, the district court noted in

footnote 3 at **A-Add-5**,¹² that Appellant did not even object to The Falsity Sentence at trial. Indeed, at trial, Hoff discussed The Falsity Sentence over and over.

II. Appellant Did Not Correctly Appeal The Issue(s).

Appellant Hoff articulates the relief he requests in his opening-brief-conclusion as a request to *reverse* the **judgment** below. But Appellant only challenges one claim: intentional interference with contract. The “judgment” is a composite judgment. The Special Verdict Form asked the jury one damage question, to be filled out if the jury had found in favor of Plaintiff on any of the three claims (defamation, intentional interference, or interference with prospective employment advantage).

As is noted above, Defendant Hoff failed at any time to challenge the jury instructions or the SVF. It is too late now to do so.¹³

So this Court is faced with a situation where Appellant’s request is for half of the judgment to be “reversed” as a matter of law (the tortious interference claim). That still leaves the *entire amount* of the \$60,000 judgment intact, as \$60,000 is also

¹² Respondent understands that this footnote falls under the ‘new trial’ section of the district court order.

¹³ *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (the Court of Appeals will generally not review constitutional questions for the first time on appeal.). Parties cannot make new arguments (not made in the district court) on appeal. *See, e.g., Jacobson v. \$ 55,900 in U.S. Currency*, 728 N.W.2d 510, 522 (Minn. 2007), citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (an appellate court may not consider a question never litigated in district court). This footnote applies to all arguments by Respondent Moore that Appellant failed to litigate the appropriate issues below.

the amount awarded for interference with employment advantage.¹⁴ This Court can reject this entire appeal because the Appellant's entire argument is ineffectual to achieve the relief requested. (This is the problem created by the Amicus coming up with an argument based on a trial that they didn't even attend, let alone participate in.)

Although the appeal is articulated as an appeal from the denial of a motion for JAML, a closer reading of the Appellant's arguments (and including those of Amicus), shows that this is *really* an appeal from the denial of a motion for new trial.

The argument that the jury should not have been permitted to consider certain evidence (here framed as a First Amendment issue), or should not have been permitted to draw the conclusion that it drew, is really a request for a new trial. It is a sideways attack on the jury instructions given by the district court, without using the word 'jury instructions.' It is a way of saying, the district court should have done *something* to ensure that the jury did not improperly consider evidence. And the obvious way the district court does *something* is in the form of jury instruction. Note how the Amicus really acknowledges that this is about the jury instructions. (Amicus Brief p. 9-10). And the remedy for faulty jury instructions is a new trial.

¹⁴ As Plaintiff Moore pointed out in his opposition to Defendant's post-verdict motions, Hoff never raised any arguments regarding the interference with employment advantage claim. This is likely because Hoff really got his argument from the Amicus, and *they* only raised it with regard to tortious interference. The framework of this appeal likely now recognizes that is too late to challenge the verdict/judgment with regard to the interference with employment advantage claim.

Defendant Hoff did bring a post-verdict motion for new trial, below. The district court denied the motion for new trial. The district court correctly pointed out that,

In order to grant a motion for a new trial on the grounds that the evidence does not justify the verdict, “the verdict [must be] so contrary to the preponderance of the evidence as to imply that the jury failed to consider all the evidence, or acted under some mistake or from some improper motive, bias, feeling or caprice, instead of honestly and dispassionately exercising its judgment.” A motion for a new trial should be “granted cautiously and used sparingly.” A decision to grant a new trial rests in the sound discretion of the district court and will be reversed only upon a clear abuse of that discretion. [Citations omitted.]

(Add:4).

But Appellant did not appeal the district court’s denial of that motion. Why? Likely because he never challenged the jury instructions, and did not purchase the transcript of the charging session. Or because he realized he could not show the district court clearly abused its discretion.

Or perhaps Appellant realized his misstep below - failing to seek a new trial on the interference with employment advantage claim. Hoff never grappled below with the obvious problem that *even if* there were a problem with the jury instruction for tortious interference with contract, the damage amount for the two claims on which Plaintiff prevailed were combined in the SVF. Certainly, Hoff did not challenge the award on the interference with employment advantage claim on appeal. A new trial cannot be granted on less than all damage claims unless the

district court is able to say that the issue to be retried is so distinct and separable from the others that the trial of it alone may be had without injustice. *Swanson v. Thill*, 227 Minn. 122, 152 N.W.2d 85 (Minn. 1967).

But having failed to properly protect his jury instruction challenge, or his motion for new trial on two claims for which damages were collectively awarded, it is inappropriate for Appellant *or* the Amicus to attempt to cast an appeal that is in actuality an appeal from the denial of a motion for new trial (such as would be made if the jury was not properly instructed), as one ‘as a matter of law.’

Respondent asserts that even on the ‘issue of law’ that appellant urges, the analysis is fatally flawed. The Appellant/Amicus have picked one slice of First Amendment analysis, and tried to get this Court to focus on it to the exclusion of other aspects of that analytical framework. In doing so, they have deftly avoided the very appellate law they hope to have this Court consider.

Federal appellate courts do perform a First Amendment review in defamation cases, when there is a public issue or public figure involved.¹⁵ This is **step 1**. Amicus skipped over that vital step in the analysis (discussed in Section II, below), pointedly focusing this Court on just one prong of the analysis – the evidence before the jury in **public** issue and **public** figure cases.

¹⁵ And there has been some application to other state torts, but not a lot.

Then, having worked diligently to keep both the district court and this appellate court from focusing on **step 1** in the First Amendment analysis, the Amicus has actually argued that Respondent counsel violated *her* duty of candor to the court. (Amicus Brief p. 9, n. 4).¹⁶

Respondent Moore moved the Chief judge to strike Amicus brief on appeal, reasoning that if that brief was stricken, Moore would not need to brief for the Panel, all of the “Amicus” history below, to deal with the blog posts cited, or to use brief space to deal with slight variations in the Amicus argument. The Chief Judge ruled that this Panel is in the best position to decide the weight to be given to the ‘articles’ (website addresses to blog posts) which were not in the Record below, and the argument made by Amicus. Respondent does understand the ruling of the Chief Judge, and upon reflection, believes it is appropriate to alert this Panel to the unusual conduct of the Amicus in creating an issue and then perpetuating this appeal.

¹⁶ Apparently the argument by Amicus (which actually cites an ethics canon), is that Moore’s attorney should have: i) read every case she was involved in in the past; ii) decided whether there was any (even strained) argument that could assist Hoff (a lawyer with a lawyer); and iii) spontaneously make that argument to the district court. This is specious, and Amicus must know it. Aside from the obvious attack on Moore’s counsel (which will be ignored; note the Amicus cites *not one single case* for the strained proposition they put forth), Amicus knows that lawyers have a duty to their *own clients*, to assist *them* in the litigation, not the other side. Amicus’ argument is a strained attempt to explain why *Hoff* never litigated these issues in the district court.

When that is combined with the fact that Hoff only appealed one of the two claims that formed the basis of the damage award of \$60,000 and judgment,¹⁷ Moore asserts that this appeal is *not* designed to help John Hoff. It was created to help the Amicus. The Amicus lacks standing to make this appeal about its rights of its needs or even wants.

This appeal should be dismissed in its entirety because the relief requested cannot effectuate a reversal of the judgment.

III. STEP 1: JERRY MOORE'S STATUS MUST BE SCRUTINIZED ON APPEAL.

The same set of cases that the Appellant/Amicus relies on to support the notion that this appellate court is required by federal law to scour the trial evidence, makes clear that the **step 1** in that analysis, is to determine whether it is a private or public issue, and private or public person.

“At the outset, we note that ‘the classification of a [claimant] as a public or private figure is a question of law to be determined initially by the trial court and then carefully scrutinized by an appellate court.’ *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1081 n. 4 (3d Cir.) (citations omitted), *cert. denied*, 474 U.S. 864, 88 L. Ed. 2d 151, 106 S. Ct. 182 (1985)”, cited in *U.S. Healthcare, Inc.*,

¹⁷ It is too late, now, for Hoff to attempt to resurrect a challenge to the judgment against him for wrongful interference with prospective employment advantage. It would not be a proper reply brief topic, and by raising it here Moore is specifically cautioning Hoff not to try to raise that as a ‘reply’ issue.

United States Health Care Systems of Pennsylvania, Inc. and Health Maintenance Organization of New Jersey, Inc., 898 F.2d 914 (3d Cir. 1988).

Stated another way, because of the unique way that Appellant has postured this appeal (that because of one legal issue the entire judgment should be reversed), this Court may sustain the district court's judgment on any basis. *Cf.*, *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. Ct. App. 1995), *review denied* (Minn. Feb. 13, 1996) (this court may affirm a grant of summary judgment if it can be sustained on any ground).

As is discussed below, the greatest First Amendment protection is provided on issues of public concern, where the subject is a public official. This is really the point of the First Amendment, to permit citizens to criticize government. On the other hand, if the issue is private, or the subject is private, there is greatly diminished First Amendment 'interest,' and the State's interest in protecting its citizens from defamation, but also tortious interference with contract, is heightened.

One can discern in these decisions two forces that may reshape the common-law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern. When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern but the plaintiff is a private figure, as in *Gertz*, the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and

the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.

Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986).

The below chart shows graphically the graduated First Amendment protections of the speaker. The chart moves from lightest (where the most protections are afforded the speaker) to the darkest, where the State's interest is paramount.

Public issue, public person	Public issue, private person
Private issue, public person	Private person, private issue

No issue of 'public concern'

Although speech is generally protected, the Supreme Court has "long recognized that not all speech is of equal First Amendment importance. It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.'" *Dun & Bradstreet*, 472 U.S. at 758-59 (footnote and citations omitted). Such speech -- unlike expression that is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality," *Gertz*, 418 U.S. at 340 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 86 L. Ed. 1031, 62 S. Ct. 766 (1942)) -- requires heightened constitutional protection in the defamation context.

United States Healthcare v. Blue Cross of Greater Phila., 898 F.2d 914, 928-29 (3d Cir. 1988). Hoff never argued that the fodder for the trial was a ‘matter of public concern,’ at least not in any way that would have led to a judicial ruling or otherwise informed the trial. It was too late even by closing arguments to begin inserting that issue into the trial.¹⁸ It is surely too late now, on appeal, to argue for the first time in a reply brief, that this is an issue of public concern.

Ruling regarding public figure status was error

Jerry Moore argued below that he was a private person.

With due respect to the district court, that court erred in determining as a matter of law that Jerry Moore was a limited purpose public figure. Appellant Hoff did not order the transcript from **March 3**,¹⁹ so we are limited to the district court’s order in evaluating that decision.

The district court held that Jerry Moore was a ‘limited purpose public figure’ because he was Executive Director of JACC because it addressed housing issues. **(AA:30-33)**. But the district court’s analysis shows how it is flawed. The district court did not make any finding that Moore “thrust himself into the forefront of a

¹⁸ Inserting a couple of phrases about it being public funds or an issue of public concern during closing arguments, was improper argument. It denied Moore from weighing in on the legal issues, and it prevented a ruling from the district court. Moore timely objected at closing argument, with a detailed explanation to the district court outside the hearing of the jury.

¹⁹ It is the job of the Appellant to order a sufficient amount of transcript for this Court to be able to review the issues. Due to the meagerness of the record on appeal no choice but to affirm. *Webster v. Schwartz*, 262 Minn. 63, 114 N.W.2d 280 (Minn. 1962).

particular controversy.” The factual findings were that Moore became a Director of JACC, and then Executive Director. But not one of the findings shows Moore *as a matter of law* became a limited purpose public figure of his own volition. (If anything, those findings would be relevant in an analysis of ‘involuntary’ public figure - something the district court noted that Hoff never argued. This is, as the district court and *Metge* held, an exceedingly rare category.)

Further, the “findings” of the Court of Appeals in the *Metge* case cannot become “findings” in this case. *Metge v. Cent. Neighborhood Improvement Ass’n*, 549 N.W.2d 488, 495 (Minn. Ct. App. 2002). In *Metge*, there was a specific finding that, although a private non-profit corporation, the Central Neighborhood Improvement Association was ‘imbued with a public purpose’ and substantially supported by public funds. This finding was *not* made in Moore’s case. The *Metge* Court also found that *Metge* had “enhanced media access” to respond to criticisms of her. This was not found by the district court, below.

See also cases where a much greater “cause célèbre” was at issue, and the plaintiff was deemed *not* to be a limited-purpose public figure:

In *Time, Inc. v. Firestone*, 424 U.S. 448, 47 L. Ed. 154, 96 S. Ct. 958 (1976), the court found that plaintiff Mary Alice Firestone was not a limited purpose public figure regarding her divorce proceedings, despite the fact the divorce was a “cause celebre”. *Id.* at 454. Analyzing Firestone’s activities generating publicity, the court found that her “resort to the judicial process * * * is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court.” *Id.* at 454. (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376-77, 28 L.Ed. 2d 113, 91 S. Ct. 780 (1971)). The court also found

that the fact Firestone held a few press conferences did not convert her into a public figure. *Firestone*, 424 U.S. at 454-55 n. 3. The court also stated:

While participants in some litigation may be legitimate "public figures," either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the state or by others. There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom. *Id.* at 457.

In *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 61 L.Ed.2d 450, 99 S. Ct. 2701 (1979),²⁰ the Court held that the plaintiff, a nephew of Russian spies convicted during the 1950's, was not a public figure required to show actual malice on the part of Reader's Digest. Plaintiff was cited for contempt for failing to appear before a grand jury regarding the spy charges against his uncle and aunt. The Court found that while Wolston's failure to go before the grand jury and his contempt citation were newsworthy, Wolston did not engage in the type of behavior converting him to a public figure. The Court concluded: "[Our] reasoning leads us to reject the further contention of respondents that any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction." *Id.* at 168.

Within this state's jurisdiction, the leading case appears to be *Jadwin v. Minneapolis Sta & Tribune Co.*, 367 N.W.2d 476 (Minn. 1985). Jadwin was the promoter, president, and principal shareholder of two companies, Bond Fund and Minnesota Fund Management. As part of an effort to attract sales of a mutual fund, Jadwin placed ads, mailed literature, and issued press releases on the fund. A reporter for the defendant paper investigated Jadwin's business, and in a March 5, 1980 article, the paper criticized Jadwin's companies. When the paper refused to retract certain statements, Jadwin filed a libel suit on behalf of himself and the two corporations organized by him.

The trial court granted summary judgment to plaintiffs, holding that plaintiffs were private figures, but that because the defamatory matter involved an issue of public concern, even a private plaintiff had to show actual malice. *Id.* at 480.

²⁰ A criminal defendant does not automatically become a public figure, *see Wolston*, 443 U.S. 157, 61 L. Ed. 2d 450, 99 S. Ct. 2701 (1979).

Jacobson v. Rochester Communications Corp., 410 N.W.2d 830, * (Minn. 1987).

Jadwin was not a general purpose or involuntary public figure, and the court found that "though the case is close, we affirm the trial court's finding that Jadwin is not a public figure." *Id.* at 485. Though Jadwin engaged in business actions including attracting media attention, this court held that Jadwin did not perform the types of activities which would transform him into a public figure. "To hold, in effect, that soliciting public investment automatically transforms any small businessman into a public figure would, in our view, expand the category beyond the limits contemplated by *Gertz*. Jadwin at no time met the rationale of access to rebut the alleged libelous publication that is a distinguishing feature between private individuals and public figures." *Id.* at 486.

...

In light of these previous cases, we must determine whether Jacobson is a limited purpose public figure required to show actual malice. KWEB argues that Jacobson thrust himself to the forefront of a public controversy, his criminal trial, to influence the resolution. Specifically, KWEB asserts that Jacobson used his access to the media to further his views. Our review of the record indicates that while Jacobson was the subject of numerous articles relating to his trial, Jacobson did not engage in the type of voluntary activity which would support a finding that he is a public figure. His situation is similar to that of the plaintiff in *Firestone*, who was compelled to go to court in order to obtain her divorce. In the present case, Jacobson was required to face the criminal charges pressed against him, and he appeared in court to defend himself. His interview in the paper, although it allowed Jacobson to profess his innocence, was primarily a reaction to this court's decision that day reversing his criminal conviction and granting a new trial. Jacobson took no other actions nor sought any other notoriety; in short, we find that the facts in the present case do not support petitioner's contention that respondent is a voluntary public figure.

...

A community has a legitimate interest in the outcome of a felony trial, and our decision in no way affects the right to publish truthful information contained in public court records. *See Cox Broadcasting v. Cohn*, 420 U.S. 469, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975). We cannot, however, extend that protection to the publication of the statements in this case which are admitted to be inaccurate. *See Firestone*, 424 U.S. at 455. We hold that respondent Jacobson is a private individual, not a limited purpose public figure, for purposes of this defamation action, and is not required to show actual malice to establish a prima facie case.

Jacobson, supra.

In the case at bar, Moore was only a potential *witness* in the criminal proceedings concerning Larry Maxwell (never even called to the witness stand). According to the precedent cited above, even *Maxwell* would not become a limited-purpose public figure merely because a criminal case was filed against him. The district court makes clear that Moore did not hold a press conference or even contact the media himself. He was *contacted by* the media, in his role with JACC. And merely defending oneself does not transform someone into a public figure.

Further, the district court did not accurately determine what the 'controversy' was. Even if housing, or mortgage fraud were in general an issue of controversy in North Minneapolis, the controversy is not connected to The Falsity Statement. The Falsity Statement tied Jerry Moore to a potentially criminal act of mortgage fraud – though the district court did not find Jerry Moore had ever been charged with a crime.

Unless everyone “involved” even tangentially in a criminal case is to be made a ‘public figure,’²¹ the controversy at issue must be narrowly drawn to the topic over which the Minnesotan thrust himself into that very controversy. Here, the controversy was whether Jerry Moore was “involved” with mortgage fraud. The word “particular” controversy means there must be a connection between the controversy and the voluntary thrusting of oneself into it. There was no finding (factual or legal) that Moore had thrust himself into *that* controversy.

Finally, nothing about the alleged controversy that would have impacted others, other than Jerry Moore. The controversy found by the district court was a wide-spread, general issue relating to housing/mortgage fraud. Of course those issues touch a wide group of people. But whether *Jerry Moore* being “involved” in mortgage fraud (when he’s just a witness or perhaps named in a document, but not even charged) would not touch a wide group of people (or at least, there was no finding by the district court that it would).

As a matter of law, the district court erred in holding that Jerry Moore was a limited-purpose public figure. Because it was a private person, private issue, the defamation standard was the negligence standard. (See Moore’s proposed jury instructions for defamation.) Therefore, this Court need not reach **step 2** in the

²¹ Surely the media has an interest in broadening the definition of ‘public figure’ and having everyone be deemed a public figure – that way they can never be sued. States have an interest in protecting private people from defamation and other torts.

analysis, namely whether there was sufficient First Amendment protection regarding the jury's verdict.

Because Hoff failed to raise any First Amendment issues at the district court with regard to the tortious interference with contract claim, we do not know whether the district court would have held Moore to be any kind of public figure with regard to that claim. Note how in *United States Healthcare v. Blue Cross of Greater Phila.*, 898 F.2d 914 (3d Cir. 1988), two national healthcare companies jousting at each other with national advertising campaigns were found *not* to be limited purpose public figures.

IV. STEP 2: APPEAL IS 'STRAW MAN' ARGUMENT.

Even if this Court reaches **Step 2** of the First Amendment analysis, the district court must be affirmed.

Both Appellant and the Amicus reference numerous times the notion that a claim for tortious interference based on the allegedly defamatory statement, must be analyzed as a defamation claim. (See Appellant's Opening Brief p. 16, at which Appellant admits his post-verdict argument to the district court was that the tortious interference claim was based *solely* on The Falsity Sentence.) But this was never Moore's argument. Not before trial, or during trial, or after trial. This argument was invented by the Amicus after the trial, apparently to set up this appeal. Moore never argued that the Falsity Sentence was the only evidence supporting the tortious

interference claim. Once that card is removed from the bottom row, the house of cards falls.

Both Appellant, and the Amicus, have been put on repeated notice of this. They have set up a straw man, and knocked him down. But neither Appellant nor Amicus discuss the most poignant evidence at trial, or how the law should be applied to it. It is Appellant's job to show the district court erred in harmonizing the verdict with the evidence. It is not Moore's duty to show that the jury could not have considered certain evidence.

Moore here recalls to the reader that Defendant Hoff, below, squandered every opportunity to:

- Litigate First Amendment issues before the district court; or
- Request that the jury determine the falsity of *additional* statements (over and above The Falsity Statement).

And, of course, the jury never found that *all* of Hoff's statements on his blog posts were true. (Hoff did not even request special verdict queries regarding whether all statements on his blog posts were true.) He cannot now argue that every statement was true. That, alone, is a sufficient basis to affirm the district court, even if Hoff's argument was considered.

On Appeal, Amicus gave Hoff a more refined argument: that the jury should not have been permitted to consider any statement if doing so would infringe the

First Amendment. That standard is unwieldy. It appears what is being argued is that there was insufficient evidence of malice.

But given that this is Appellant/Amicus' argument, both failed to tell this Court what evidence is protected **speech**. And what is merely **conduct**. This is a fatal flaw, given that Appellant acknowledges that district court and Moore both analyzed evidence as *conduct*.

All of the evidence adduced at trial cannot be speech. And Appellant has not upheld his burden on appeal by merely saying so.²²

Further, although there is clearly a dispute over what is **speech** and what is **conduct** for purposes of a tortious interference with contract claim, Appellant failed to explain why *all* trial evidence considered by the jury was speech (as opposed to conduct). Indeed, Appellant failed to grapple with this issue at all.

A boycott can be mostly or even all speech. And yet a boycott, as with any mode of expression, designed to secure an unlawful objective is not protected by the First Amendment. *Jews for Jesus, Inc. v. Jewish Community Relations Council of New*

²² Amicus has a long section in which it states Moore argued there was evidence of conduct, and then summarized various statements from Moore's closing argument. But this misses the point. Merely because there was discussion of the blog posts during closing argument is not the issue. The issue is whether there was some conduct. Amicus fails to grapple with this issue. Further, as Moore has noted before, the law is simply not that no words can be used in trials. Indeed, if that were the law, we'd never have any trials, and no one would be liable either civilly or criminally. We know that most trials are *mostly* words. That intent and motive are not only regularly shown by words, that in this case there were admissions by Hoff as to his motive, on his blog posts. There is no prohibition against this evidence: it is the best evidence of intent.

York, Inc., 968 F.2d 286 (2d Cir. 1992) (a case in which plaintiffs alleged tortious interference with contract), citing *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 425-27 (1990). A threat coupled with a demand involves a direct denial of a civil right and it may be punished. *Id.*

In *Jews for Jesus*, the defendants attempted to sanction their boycott by citing to *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). This case was also cited by Appellant/Amicus. The Second Circuit distinguished the case.

Defendants erroneously rely on *Claiborne Hardware* to contend that the First Amendment renders their boycott (or threatened boycott) immune from liability. In *Claiborne Hardware*, black citizens in Claiborne County, Mississippi, boycotted white merchants in that county to force the government, as well as civic and business leaders, to effectuate the "rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself." 458 U.S. at 914. The boycott was enforced through peaceful picketing and speeches, as well as through violence and threats of violence. The Supreme Court of Mississippi affirmed a judgment against the boycotters that held them jointly and severally liable for all losses incurred by the targeted businesses as a result of the boycotters' tortious interference with those businesses.

The Supreme Court reversed and held that the boycotters could not be held liable for the losses caused by the non-violent elements of the boycott. According to the Court, the state could not prohibit the non-violent elements of a "politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution." *Id.* at 914-15; *see also id.* at 914 ("It is not disputed that a major purpose of the boycott . . . was to influence governmental action."). The Court further recognized that this was so despite the coercive nature of the boycott, stating that "speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *Id.* at 910; *see also Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). Finally, and most significantly for present purposes, the Court noted that it was not "presented with a boycott designed to secure aims that are themselves prohibited by a valid state law." *Claiborne Hardware*, 458 U.S. at 915 n. 49

(citing *Hughes*, 339 U.S. 460, 70 S. ct. 718, 94 L. Ed. 2d 985); *see also* *Claiborne Hardware*, 458 U.S. at 933 ("At times the difference between lawful and unlawful collective action may be identified easily by reference to its purpose. In this case, however, petitioners' ultimate objectives were unquestionably legitimate."). For these reasons, the boycotters' peaceful activity was protected and they could not be held liable for the white merchants' business losses.

Claiborne Hardware is therefore readily distinguishable. Unlike the boycott in that case, the threatened boycott and other concerted economic activity in the instant case, assuming plaintiffs' allegations to be true, were designed to achieve an objective prohibited by valid state and federal statutes. Moreover, in contrast to the boycott in *Claiborne Hardware*, the instant conduct was not political speech designed to secure governmental action to vindicate legitimate rights, but was a series of private communications in the context of a private dispute. Accordingly, the safe harbor carved out by *Claiborne Hardware* for certain boycott activity is unavailable to defendants.

The Second Circuit reversed the district court's dismissal of Plaintiffs' tortious interference claim and remanded the case.

In *Nicolosi Distributing, Inc. v. BMW of North America, LLC*, 2011 U.S. Dist. LEXIS 14586 (9th Cir. 2011), citing *CRST Van Expedited, Inc. v. Werner Enters.*, 479 F.2d 10909, 1107 (9th Cir. 2007), the Northern District of California discussed a tortious interference claim as "behavior" and "activity" as opposed to speech. *Ga. Pac. Consumer Prods., LP v. Von Drehle Corp.*, 618 F.3d 441 (4th Cir. 2010) discussed the activity as *conduct* (issue is whether defendant's conduct is unlawful or against public policy), and bad *act(s)*.

It is clear that evidence supporting an intentional interference with contract claim can include threats or intimidation, defamation, duress, undue influence,

misuse of inside or confidential information. *Crandall Corp. v. Navistar Int'l Transp. Co.*, 302 S.C. 265, 395 S.E.2d 179, 180 (S.C. 1990). In *Ariba, Inc. v. Rearden Commerce, Inc.*, the Northern District of California analyzed a competitive threat as tortious interference with contract. The Eighth Circuit analyzed a threat to get government officials to institute criminal charges as conduct supporting a tortious interference claim. The threat clearly used words. *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980).

Although Moore could not locate any Minnesota cases adopting Restatement of Torts (Second) §767 in evaluating a tortious interference with *contract* claim, *Lake County v. Huseby*, 2005 Minn. App. LEXIS 642 (Minn. Ct. App. 2005) did consider that Section in an interference with prospective economic advantage claim. Other states have applied that Restatement Section to tortious interference with contract claims. *See, e.g., MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928 (9th Cir. 2010); *Ga. Pac. Consumer Prods., LP v. Von Drehle Corp.*, 618 F.3d 441 (4th Cir. 2010); *Jefferson County School District No. R-1 v. Moody's Investor's Services, Inc.*, 175 F.3d 848 (10th Cir. 1999). The 7 factors include:

1. **the nature of the defendant's conduct,**
2. **the defendant's motive,**
3. the plaintiff's interests with which the defendant interfered,
4. the interests the defendant sought to advance,

5. the social interests in protecting the defendant's freedom of action and the plaintiff's contractual interests,
6. the proximity or remoteness of the defendant's conduct to the interference, and
7. the relations between the defendant and the plaintiff.

Factors 1 and 2 above are highlighted because a court should give greatest weight to the first two factors. *Id.* at 955-56. As discussed below, the nature of Hoff's conduct, combined with his motive, should be sufficient to sustain the verdict. (Moore also contends that the following factors also weigh in favor of the verdict.)

See also BCD, LLC v. BMW Mfg. Co., LLC, 360 Fed. Appx. 428 (4th Cir. 2010), in which the standard applied for tortious interference with contract was conduct carried out for an improper purpose, such as malice or spite, or through improper means, such as violence or intimidation. A party is justified, however, when acting in the advancement of its legitimate business interests or legal rights. If a legitimate purpose or right exists, the improper purpose must predominate in order to create liability.

In applying this standard to the facts of this case, consider:

- the evidence of Hoff's threat via email from Don Allen to create a **public relations nightmare**,

- Allen (in the email Hoff told him to send) stating they would remain cordial and diplomatic **for now**,
- the coordinated effort in the June 21 blog (Exh. 101) (let's have a coordinated)
- working 'behind the scenes' to get Moore fired,
- waiting a week to blog about it so that others could make calls behind the scenes,
- Hoff's ill will toward Moore,
- Hoff not wanting Black men to be successful,
- Hoff's attacks on Moore for campaigning for Natalie Johnson Lee (which Moore had a right to do),
- Hoff's desire to prevent Moore from working *anywhere* in North Minneapolis, and finally,
- Hoff wanting to take down Jerry Moore "by any means necessary"

is sufficient evidence to support an improper motive by Hoff. Appellant has not shown that it is not sufficient. Even if Hoff had a right to post news stories on his blog, he went far beyond this in his conduct (threats, intimidation, getting others to call the U).

Now that he lost the trial, Appellant and Amicus both portray Hoff as a guy who only wanted to tell the truth and publish it,²³ and if someone acted, that is not on him. Indeed, the majority of the cases cited by both Appellant and Amicus are cases in which the factual fodder for the tortious interference claim is only the story itself.²⁴ But there is a vast difference between publishing a new story (or even commentary) and letting people make of it what they will, and *taking actions* to get people to *do something* based on your ‘stories.’ Hoff clearly took action (contacted Allen and got him to send the email, having decided Allen’s email would have the most impact), calling others, writing a post to the blog in which he called for a “coordinated effort” to get Moore fired. That’s not speech.

And should there be any doubt, Hoff’s motive tips the scale. Even if one were to decide that there was some protected speech by Hoff, which the Fourth Circuit discusses as pursuing legitimate business interests or legal rights, Hoff’s motive tips the scale. Hoff’s motive was *not* to express himself. Hoff’s motive was to take down Jerry Moore using “any means necessary.” Hoff did not just want to protect some public institution from having a mortgage defrauder working for it, Hoff wanted to prevent Hoff from working *anywhere* in North Minneapolis. He did not want Moore as a Black man to be successful. He wanted to punish Moore for asserting *his* First Amendment right to campaign for Natalie Johnson Lee. And, of course, Hoff bragged

²³ At Hoff’s Brief p. 15, he argues that he was only telling the U of M about Moore’s mortgage fraud. The jury did *not* find that Moore had committed mortgage fraud.

²⁴ See *Hustler Magazine*, 485 U.S. at 53, in which the factual fodder for the non-defamation tort was the magazine article *itself*.

in his June 23 post (Exh. 102) about getting Moore fired. These facts are, of course, in *addition* to the facts discussed by the district court at **A-Add:4-5**.²⁵

This is consistent with the case Moore cited below in opposition to post-verdict motions, *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) permitted a promissory estoppel claim against a media defendant to forward, because it was supported by evidence that the newspaper had published a confidential informant's name, and was therefore not based on the same conduct as a defamation claim.

Appellant has done nothing to show that the jury's special verdict form answers were so "perverse and palpably contrary to the evidence" or that it is clear that the jury "[left] no room for differences among reasonable persons." *Moorehead*, *supra*, citing *Kelly*.

²⁵ The district court reviewed evidence adduced at trial at **A-Add:4-5** including direct evidence: 1) Hoff actively worked to get Moore fired from his job; 2) contacting people at the U of M and encouraging others to do the same; 3) threatening to launch a negative public relationships campaign; 4) telling Don Allen to send an email to the decision-maker at the U (Dr. McClaurin), threatening a negative publicity campaign; and 5) Lobbying to get Plaintiff fired. As the district court pointed out, the jury also heard circumstantial evidence that Moore was fired one day after the email from Don Allen. Further, Defendant Hoff acknowledged that it was his goal to get Plaintiff fired, and that he was working "behind the scenes" to do so. Indeed, Hoff took credit for getting Moore fired. *Id.*

CONCLUSION

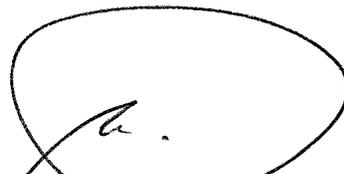
For all of the foregoing reasons, Respondent Moore respectfully requests that this Court affirmed the district court's judgment.

CERTIFICATE OF WORD COUNT

This Brief, utilizing automatic word count in Word Office 2010 is no more than 13,146 words, all inclusive.

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