

NO. A07-1353

State of Minnesota
In Supreme Court

LeRoy Bahr,

Appellant,

v.

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

Respondents.

APPELLANT'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

Near the end of their deliberations in this case, the jury sent a note to the trial judge with the following concern (paraphrased):

“Many of our relatives work at the paper mill. We are concerned that Boise Cascade will retaliate against them if we return a verdict in favor of the Plaintiff.”

This statement by the jury is revealing. First, it demonstrates that, during the trial in this matter, the evidence that Boise Cascade and Stacy Rasmussen acted with malice was more than palpable. There obviously was an air or aura of malice during the trial of this matter. Second, the jury’s statement demonstrates why appellate courts should respect and be deferential to the decision reached by a jury; and why appellate courts should not be overturning jury verdicts on a whim or by caprice – **because appellate court judges were not present during the actual, live trial.** They were not there to observe first hand the demeanor, attitude, facial expressions, voice inflections, and credibility of the numerous individuals who appeared as witnesses at trial.

ISSUE

- 1. Viewing all of the evidence and all reasonable inferences from the evidence in the light most favorable to sustaining the jury verdict, was there sufficient evidence in the record for a jury to find malice on the part of Respondents Boise Cascade and Stacy Rasmussen?**

The District Court denied Respondents’ motions for summary judgment, directed verdict and judgment notwithstanding the verdict on this issue; allowed the case to proceed to trial; and ultimately submitted this issue to the jury for determination. The jury determined that the defamatory statements

made by Boise Cascade and Stacy Rasmussen were made with actual malice. The Minnesota Court of Appeals reversed, holding that the jury's finding of malice was contrary to the evidence.

Most apposite cases:

*Stuempges v. Parke, Davis & Co., 297 N.W.2d 252 (Minn. 1980).

*Nicklown v. Menard, Inc., 1992 WL 153434 (Minn.App.) (unpublished) (copy provided in App. at 33).

*Hengesteg v. Ecolab, Inc., 1992 WL 89647 (Minn.App.) (unpublished) (copy provided in App. at 29).

STATEMENT OF THE CASE

In September 2003, Appellant, LeRoy Bahr ("Bahr"), commenced this lawsuit claiming that Boise Cascade Corporation ("Boise"), Eural Dobbs ("Dobbs") and Stacy Rasmussen ("Rasmussen") defamed him.

At the close of discovery, Boise, Dobbs and Rasmussen filed motions for summary judgment seeking dismissal of all of Bahr's claims. The District Court denied the summary judgment motions and the case proceeded to trial by jury on January 16, 17, 18 and 19, 2007. Both at the close of the plaintiff's case-in-chief and at the close of defendants' case-in-chief, Boise, Dobbs and Rasmussen moved the District Court for a directed verdict on all of Bahr's claims. The District Court denied all of the directed verdict motions and submitted the case to the jury for determination. The jury returned a verdict in favor of Bahr and against Boise and Rasmussen. As to Bahr's claims against Boise, the jury awarded Bahr damages

totaling \$27,200. As to Bahr's claims against Rasmussen, the jury awarded Bahr damages totaling \$1,000.

After the trial, Bahr petitioned the District Court for taxation of costs, disbursements and pre-judgment interest against Boise and Rasmussen. Boise and Rasmussen filed a motion for judgment notwithstanding the verdict ("JNOV"). The District Court denied the motion for JNOV and awarded Bahr costs, disbursements and pre-judgment interest totaling \$8,515.70.

Boise and Rasmussen appealed to the Minnesota Court of Appeals. In a decision filed on August 5, 2008, the Court of Appeals reversed the District Court judgment in favor of Bahr and remanded the matter back to the District Court for consideration of Boise and Rasmussen's costs and disbursements as the prevailing parties.

Bahr then petitioned the Minnesota Supreme Court for review. By an Order dated October 21, 2008, the Minnesota Supreme Court granted review.

STATEMENT OF FACTS

Bahr has been employed at Boise's paper mill in International Falls since 1965. Trial Transcript ("Tr.") at 95-96. Since 1984, Bahr has worked in the storeroom as a stores keeper. Tr. 96. Dobbs also was employed by Boise as a stores keeper, and, for many years, he and Bahr were co-workers. Tr. 102-105. In 2001, Eural Dobbs, as the Superintendent of Stores, was Bahr's supervisor. Tr. 105-109. Dobbs had been promoted to Superintendent of Stores in 1998. Tr. 414.

In 2001, Rasmussen also was a stores keeper in the storeroom and he and Bahr were co-workers. Tr. 424-425. Rasmussen is Dobbs' nephew. Tr. 424.

Shortly after being promoted to the superintendent position, Dobbs' attitude towards Bahr became very negative and critical. Tr. 105-111. Other store room employees, observed the negative, critical and, at times, harsh manner in which Dobbs interacted with and treated Bahr in the workplace. Tr. 306-311, 332-335.

Shortly after Dobbs took the position as Superintendent of Stores, Dobbs gave Bahr a poor performance evaluation in which Dobbs basically said that Bahr was not a good employee. Tr. 217-221. Bahr had a good work record with the company and this was the first negative performance evaluation he had ever received in all the years he had worked at Boise. Tr. 102. When Bahr asked Dobbs to give specific reasons for the poor evaluation, Dobbs curtly responded by stating, "that's the way I grade it, that's the way it is." Tr. 221.

Dobbs also would frequently holler at and act hostile towards Bahr. Tr. 109, 115-132. On June 21, 2001, Bahr was in the office area of the stores department making labels for another Boise employee. Tr. 111-112. Suddenly, Dobbs came running up the stairs and started screaming and yelling at Bahr because Bahr did not have his safety glasses on. Tr. 111-114. Bahr had his prescription eyeglasses in his hand and his safety glasses were sitting on the table right next to him. Bahr informed Dobbs that he had just taken his safety glasses off and put his prescription eyeglasses on to read the keyboard and screen on the computer. The

label maker is in the office area and it is the employees' option on whether or not to wear safety glasses in that area; it is not mandatory, and Bahr was not wearing his safety glasses because he needed his prescription glasses to utilize the computer for making the labels. Dobbs continued to scream and holler at Bahr about making the labels. Tr. 111-114.

Also, in the summer of 2001, during the annual outage at the mill, Dobbs informed Bahr that Bahr would have to sell his remaining vacation accrual back to the company if he could not use that vacation before his anniversary date. Tr. 129-132. Bahr then made reasonable arrangements with other employees in the stores department and through the human resources department so that he could use his vacation days prior to his anniversary date, and then he wouldn't have to sell the vacation back to the company. Even under these arrangements which Bahr had made, Dobbs refused to let Bahr take the vacation days and was essentially forcing Bahr to sell his vacation back to the company. Tr. 129-132.

During the time that Dobbs was employed as a storeskeeper (prior to becoming the Superintendent of Stores), he worked primarily in the west warehouse. Tr. 414-415. During the time when Dobbs worked in the west warehouse as a storeskeeper, the west warehouse was staffed with three to five employees working together on a typical day. Tr. 107-108, 306, 335-336, 415. When Dobbs was working as a rank and file employee in the west warehouse, he often worked overtime on the average of 3 to 4 nights per week, 4 hours of

overtime per night, just to keep up with the work in the west warehouse. Tr. 107-108, 415. After Dobbs became the Superintendent of Stores, he assigned only Bahr to the west warehouse and refused to provide Bahr with any help to run the stores operation in the west warehouse. Tr. 107-109. As the only person working in the west warehouse, Bahr simply could not keep up. Tr. 115-117, 308. On the other hand, while Bahr was working alone in the west warehouse, Dobbs was typically assigning five or six employees to the east warehouse. Tr. 129. There were approximately 18,000 line items in the west warehouse, which Bahr had to manage alone; whereas, in the east warehouse, there were only 8,000 line items and Dobbs was typically assigning five to six employees in the east warehouse. Tr. 98, 118, 129. Bahr and his co-workers brought this up to Dobbs on numerous occasions that one employee could not keep up with the work load in the west warehouse, especially where it used to take three employees to do the work that Dobbs was now expecting only one employee to do. Tr. 107-109, 115-129, 310-311, 332-337. In response, Dobbs would belittle Bahr and would curtly respond that Bahr did not need any help over there. Tr. 119, 333-335.

During the outage in the summer of 2001, there was more freight than usual in the west warehouse due to the outage. Tr. 123-124, 333. Bahr asked Dobbs on many different occasions for extra help because Bahr could not keep up. Tr. 333-336. Dobbs would respond by simply telling Bahr that he would just have to do it alone. Tr. 334-335. The storeroom employees were laughing about the situation,

because, again, Dobbs had not assigned any employees to assist Bahr in the west warehouse. The fact that Dobbs was consistently requiring Bahr to work alone in the west warehouse, while assigning 4 or 5 employees to the east warehouse, became kind of a standing joke amongst the employees in the storeroom. Tr. 333, 336.

In September 2001, Bahr and his union steward, Bobbi Bernath, went to Dobbs to try to request additional help for Bahr in the west warehouse. Dobbs responded by curtly telling Bahr, "if you don't like it here, maybe you should find another job." Tr. 335.

In late September 2001, an incident occurred in the storeroom regarding a rumor which started about Stacy Rasmussen and another storeroom employee, Robin Begg. In describing this "rumor incident" at trial, Jared Pearson testified that he had told two other storeroom employees, Julie Kucera and Judy Clark, that, while he was driving fork truck, he saw that Rasmussen was in Robin Begg's office for about 4 hours one day. Tr. 317. Pearson did not intend to start any sort of a rumor or insinuation with that statement to Kucera and Clark. However, the next day, September 27, 2001, Kucera and Clark kidded Rasmussen about what Pearson had said regarding Rasmussen being in Begg's office for a number of hours the previous day. Tr. 317. Rasmussen then apparently became upset and went to talk to Begg about the rumor. Tr. 318. Then, at the 9:00 o'clock break, Begg called over to the break room and Bahr answered the phone. Tr. 318. Pearson testified

that he could hear there was a lot of excitement on the phone and Bahr stated to Begg that he didn't say anything like that. Tr. 318. Bahr then handed the phone to Bobbi Bernath, as Begg was trying to find the person who had started the rumor. Tr. 318. Finally, Pearson ended up with the phone and he admitted to Robin Begg that he had made the statements about Rasmussen being in her office for 4 hours. Tr. 318. Begg proceeded to berate Pearson over the phone for starting the rumor, and she also caught him in the parking lot later that day and berated him again. Tr. 318-319.

Pearson also attempted to talk to Rasmussen about the situation, but Rasmussen just went into a frenzy when Pearson attempted to talk to him. Tr. 319-321. Rasmussen started hollering and screaming like he was being attacked by Pearson, but Pearson never came within 8 feet of Rasmussen. Tr. 319-321. Pearson just wanted to talk to him about the rumor incident, but Rasmussen kept hollering: "I can't talk to you – I was told I can only talk to you in front of Jack Strongman; now get away from me." Tr. 319-321. Pearson said that Rasmussen reacted like he was being attacked by somebody, but Pearson was not doing anything that could even be perceived as an attack or being physical in any form. Tr. 319-321. Pearson testified that Rasmussen was just overly dramatic and that he [Pearson] had never seen an adult act like that. Tr. 320. Pearson testified that he was alone when he approached Rasmussen on this occasion to attempt to talk to him about the rumor incident. Tr. 321.

Earlier that same morning (September 27, 2001), Jared Pearson had another encounter with Rasmussen. Rasmussen had been assigned to work in the west warehouse that day. Tr. 444. Immediately after the daily assignments were handed out that morning, Pearson and Bernath encountered Rasmussen on the ramp of the central warehouse. Tr. 313, 337-338. Rasmussen appeared agitated and frustrated, as he was walking up and down the ramp and kind of spinning circles. Tr. 313, 337-338. As Bernath and Pearson approached him, Bernath asked him what was wrong and Rasmussen responded by angrily stating that he had to "go help that lazy fat fucker," referring to LeRoy Bahr. Tr. 314, 337-338. In his trial testimony, Rasmussen admitted that he made this vulgar, angry statement specifically about Bahr. Tr. 444-447.

When Bahr learned what Rasmussen had said and that Rasmussen was apparently upset with him, Bahr eventually asked Rasmussen why he was so mad at Bahr because Bahr had never done anything that would justify Rasmussen being mad. Tr. 141-142. Rasmussen replied by throwing his arms up in air and stating that he was under orders that he couldn't talk to Bahr and that they were going to have a meeting with Jack Strongman in Human Resources to get this straightened out. Tr. 142. Bahr responded by stating that he hoped that they would have a meeting, and Bahr stated that, as soon as one was scheduled, to let him know because he wanted to be there. Tr. 142.

A few days later, Bahr asked Stacey again if the meeting had been scheduled. Tr. 142-143. Rasmussen stated no, and stated that as soon as he found out when the meeting was going to be, he would be in touch with Bahr. Tr. 143. A few more days passed again and, as Bahr and Rasmussen passed each other during the work day, Bahr again asked Stacey if he had heard anything about the meeting date. Tr. 143. Rasmussen responded by again throwing his arms in the air and stating that he had strict orders that he could not talk about it, and that it will all be straightened out at the meeting. Tr. 143. Bahr indicated that, if he had a chance, he would go to talk to Jack Strongman about the meeting, date and time. Tr. 143.

Then, on October 16, 2001, Bahr was delivering some items to the main office, so he stopped in to talk to Jack Strongman about the meeting. Tr. 144, 410. Bahr asked Strongman if Rasmussen had been in contact with Strongman about setting up some sort of a meeting regarding the storeroom. Tr. 144-145, 410. Strongman stated that nobody had been in to talk to him about any such meeting. Tr. 144, 410. Bahr again asked Strongman if he was sure that nobody from the storeroom had been down to talk to him. Tr. 144, 410. Strongman again responded by saying that he was sure. Tr. 144. Bahr then stated that he wanted to set up a meeting to discuss issues in the storeroom. Tr. 144, 410. Strongman indicated that would be agreeable and they talked about having the meeting the following Tuesday or Wednesday. Tr. 144, 410. Bahr then specifically told

Strongman that he (Bahr) was going to talk to Rasmussen about the fact that Rasmussen had never actually talked to Strongman about any such meeting. Tr. 144-145, 410-411. In response, Strongman stated that would be fine [for Bahr to talk to Rasmussen about this]. Tr. 144-145, 410-411.

A couple of days later, during the morning of October 18, 2001, Bahr was at the receiving area unloading a trailer of cartons. Tr. 145. Rasmussen also was there picking up freight for the east warehouse. At trial, Bahr provided the following description of what transpired in this exchange between he and Rasmussen on October 18th:

. . . but I'd seen Stacy and I told him that -- first I asked him about the meeting and he said that he didn't know nothing and not to talk to us. So I said, well, Stacy, you don't have to talk to me, but you can listen. I said I have been down there and seen Jack Strongman and Jack said that you were not down there. I said if you want to call Jack Strongman a liar, that's up to you. But I said, Jack, said that we were going to have a meeting on Tuesday or Wednesday. Well, that's just when he went and flew his arms up in the air and started hollering and screaming and down the ramp he went.

Tr. 145. Bahr also testified that, during this encounter, he was just using his everyday, conversational tone of voice. Tr. 145-146.

After Rasmussen went down the ramp and left the area, Bahr resumed his normal workday. Tr. 146. A short time later, Dobbs approached Bahr while Bahr was unloading carton in the warehouse. At trial, Bahr provided the following testimony of what transpired next:

I was out unloading cartons in the warehouse because we had cartons that the paper and stuff was put in and that was my job for that day. And I seen Eural coming out there and he came up to me and he said park the truck. Okay. He said get out. So I parked the truck and got out. And I said what's up? He said I've got orders to escort you out. I said what? He said I've got orders to escort you out. I said what's going on? He said I ain't telling you. I had – I just couldn't believe it. I was just stunned. And I said what's going on, Eural? And he said I can't talk to you. And I said you know, Eural, you've been waiting for this day for a long time. So I said let's go. And we proceeded to go out.

Tr. 146-147.

Boise's Human Resources Manager, Jack Strongman, testified at trial that, before escorting an employee out of the mill and placing the employee on suspension, it is standard company practice and procedure that the employee is supposed to be informed as to the reasons for this action being taken. Tr. 408-409.

That same day (October 18th), shortly after Bahr was escorted out of the mill, Boise's Human Resources Department sent out an e-mail to other employees in the mill, stating: "As of October 18, 2001, LeRoy Bahr is prohibited from entering mill property." Trial Exh. No. 7 (App. 1); Tr. 244.

LeRoy Bahr's son, Clayton Bahr, also is employed at Boise. He was working on October 18, 2001, which is the day LeRoy Bahr was escorted out of the mill by Eural Dobbs. Tr. 472. After Dobbs had escorted LeRoy Bahr out of the mill on October 18, Dobbs was acting very smug when he encountered Clayton Bahr in the mill. Tr. 472-475. Clayton Bahr had encountered Dobbs in the mill on many prior occasions. Clayton Bahr testified that Dobbs would often pass his

[Clayton's] work station, but they would never interact; Dobbs would never look at him and most of the time he would pass Clayton's work station with his head down. Tr. 473. However, on October 18, 2001, after Dobbs had escorted LeRoy Bahr out of the mill, Clayton Bahr had a couple of encounters with Dobbs in the mill and, both times, Dobbs looked directly at Clayton with a real smug smile on his face. Tr. 472-475. Clayton Bahr testified that he was very upset by Dobbs' obvious smugness on the day that LeRoy Bahr was escorted out of the mill. Tr. 472-475.

Later in the day, on October 18, 2001, Betty Leen, a Human Resources Coordinator in Boise's Human Resources Department, met with Stacey Rasmussen and Robin Begg to begin the Human Resources Department's investigation into Rasmussen's harassment complaint against Bahr. Leen prepared typewritten notes of her meeting with Rasmussen and Begg. Trial Exh. No. 55 (App. 2); Tr. 228-230. Leen's notes state that, "Stacey [Rasmussen] and Robin [Begg] are claiming **informal harassment** charge against LeRoy Bahr, Storekeeper." Trial Exh. No. 55 (emphasis added). The typewritten notes then go on to detail Stacey Rasmussen's statements to Betty Leen, describing the harassment perpetrated by Bahr. The harassment described by Rasmussen is that Bahr started a rumor about Rasmussen being in Begg's office for four hours; that Rasmussen's wife had heard about the rumor; that it had caused problems in his relationship with his wife; and that since Bahr's actions had touched Rasmussen's personal life outside of the mill, he

(Rasmussen) decided to bring it to the attention of Human Resources as a harassment complaint. Trial Exh. No. 55. In his interview with Betty Leen, Rasmussen also stated that, "LeRoy [Bahr] yells and shouts and he is almost to the point of physical violence." Rasmussen also stated to Leen that, "he checks his lunch bucket before he goes home because he senses that LeRoy might put something in it, and he also checks his garage at home because he is worried." Trial Exh. No. 55. Also, according to Betty Leen's typewritten notes from the October 18 meeting with Stacey Rasmussen and Robin Begg, Robin and Stacey stated, "they like their jobs; they want the harassment stopped and want to be able to do their jobs; they believe that LeRoy needs a wake-up call." Betty Leen's notes also indicate that Rasmussen and Begg stated, "LeRoy will do as little as possible because he is mad at Boise for taking away one of the positions." They also stated to Leen that Bahr is "persuasive, conniving and twists stories." After typing her notes of the information she obtained from Stacey Rasmussen and Robin Begg during their meeting on October 18, 2001, Ms. Leen provided her notes to Barb Johnson and to the Human Resources Manager, Jack Strongman, for the two of them to follow up and pursue the matter further. Tr. 230, 234, 248-249, 540. Barb Johnson also was a Human Resources Coordinator at the mill in International Falls. Tr. 236-237. She also was involved in the investigation being conducted against Bahr. Tr. 399, 403-404. Eural Dobbs and Barb Johnson were the principal

management level employees involved in eventually deciding upon the course of disciplinary action to be taken against Bahr. Tr. 255-256, 554-556.

Again, in her typewritten notes, Leen states that Robin Begg also was claiming harassment charges against Bahr. Trial Exh. No. 55. However, at trial, Robin Begg testified that she never complained about harassment from LeRoy Bahr and she never had any harassment issues or complaints against Bahr. Tr. 288-292. Begg also testified that she felt Bahr had good work habits; that she has no recollection of ever expressing concerns or making statements to others that Bahr was a conniving person or somebody who twists stories. Tr. 288-292. Begg testified that, when she and Rasmussen met with Betty Leen, it was regarding Rasmussen's harassment accusations against Bahr, but Begg herself did not have any harassment issues with Bahr, and she has never had any such issues with Bahr's behavior as a co-worker. Tr. 288-292. Robin Begg also testified that, in the years she worked with LeRoy Bahr, she never observed Bahr yelling or shouting at anybody, and she has never observed or experienced Bahr acting in a physically violent manner. Tr. 291. Begg testified that, over the years working with Bahr, she feels that he has good work habits and she has never observed him engage in any work slowdowns. Tr. 292. Begg testified that the only real disagreement she has ever had with Bahr had to do with an issue over vacation scheduling. Tr. 290. Also, when Robin Begg and Stacey Rasmussen met with Betty Leen on October 18, 2001, Begg and Rasmussen already knew that Bahr had absolutely nothing to

do with the rumor about Rasmussen being in Begg's office for extended periods of time. Tr. 285-287.

Bahr and his union representative, Bob Walls, met with Betty Leen on October 19, 2001. Tr. 150. At this point, Bahr still did not know why he had been escorted out of the mill and he did not know what his employment status was with the company. Tr. 149-150. At trial, Bahr provided the following testimony regarding his meeting with Betty Leen:

We went into the meeting and sat down and Betty started asking me questions: How long have I worked in the mill? Just different things like this. And I said, Betty, I said you know before we go too far, I said, I would like to know why I got escorted out of the mill. And she said, LeRoy, you got escorted out of the mill because you started a rumor about Stacy Rasmussen being in Robin Begg's office for about four hours. And I looked at Betty and I said this is a joke. And Betty said, LeRoy, this is not a joke. This is serious. And I said, no, Betty, it's a joke. And she got kind of a little bit upset because I made them comments. And I said, Betty, when you find out what the real story is, I said, then you will agree with me.

Tr. 151; Trial Exh. No. 56 (App. 4). During this meeting with Betty Leen, Bahr explained in detail and made it very clear that he had absolutely nothing to do with the rumor incident which apparently was the basis for Rasmussen's harassment charge. Tr. 151-152; Trial Exh. No. 56. After the meeting with Betty Leen, Bahr and his union representative, Bob Walls, believed that management was going to investigate further into this "rumor incident" to confirm that Bahr was not involved. Tr. 152, 365-366.

Then the Boise Human Resources Department conducted interviews with other employees, supposedly for the purpose of finding out more about the “rumor incident” and to what extent, if any, Bahr had been involved in starting the rumor about Rasmussen and Begg.

On October 19, 2001, Betty Leen interviewed employee Judy Clark. Trial Exh. No. 57 (App. 6). However, even though Judy Clark had some direct involvement in the rumor incident (see discussion above), Betty Leen’s typewritten notes from the interview show that she did not even discuss the “rumor incident” with Judy Clark. Id. Instead, Betty Leen talked to Judy Clark more about negative issues having to do with Bahr’s character and his work habits. Id.

Then, on October 22, 2001, Barb Johnson conducted a phone interview with Jared Pearson. Tr. 252-253; Trial Exh. No. 60 (App. 7). During that interview, Jared Pearson confirmed that he was the one responsible for the “rumor incident” and that Bahr had absolutely nothing to do with it. Trial Exh. No. 60; Tr. 253.

Barb Johnson then interviewed Stacy Rasmussen again. Trial Exh. No. 59 (App. 8). This interview occurred on October 22, 2001. During this interview, Rasmussen now claimed that, during his encounter with Bahr on October 18, 2001, Bahr threatened him and that this was primarily the basis for Rasmussen’s harassment complaint against Bahr. Id.

Before even meeting with Bahr to obtain his version of what transpired in this supposed October 18th incident with Rasmussen, Eural Dobbs, Barb Johnson

and Jack Strongman had already decided that, on the basis of this incident, they were going to impose a three day disciplinary suspension without pay and would only allow Bahr to come back to work on a "last chance agreement." Tr. 555-557. They were going to be meeting with Bahr on October 25th to interview him about the October 18th "incident" with Rasmussen. Tr. 555-557. Their plan was to go ahead with the pre-determined disciplinary action, unless Bahr's version of the "incident" was much different than Rasmussen's. Tr. 555-557.

When Dobbs and Barb Johnson finally interviewed Bahr on October 25th, Bahr's description of the October 18th "incident" was completely different than Rasmussen's description. Trial Exh. No. 63 (App. 12).

Also, on October 25, 2001, Barb Johnson interviewed employee Gary Underdahl. Trial Exh. No. 64 (App. 16). Underdahl was the only eyewitness to this supposed October 18th "incident" between Bahr and Rasmussen. In his interview, Underdahl told Barb Johnson:

What I saw, LeRoy came back w/ truck, talked to Stacy, he left. Didn't hear a thing, no voices raised. Was at receiving door, they were 20 to 30 feet away. Heard no shouting. I left. * * *

If I heard shouting or screaming, I think I would have said something.

Trial Exh. No. 64 (App. 16).

Despite the fact that Bahr's description of the "incident" was completely different than Rasmussen's description, and despite the fact that a third-party

eyewitness (Underdahl) had corroborated Bahr's version of the "incident", Dobbs went ahead and imposed the pre-planned disciplinary action against Bahr – a three day disciplinary suspension without pay and that Bahr would not be allowed to return to work until he signed a last chance agreement, in lieu of termination. Tr. 557; Trial Exh. Nos. 65 and 66 (App. 17-18). In imposing this disciplinary action on Bahr, Boise officially adopted Rasmussen's allegations that Bahr had confronted him in a hostile and threatening nature and that Bahr had harassed Rasmussen in violation of the company's Harassment Policy. Trial Exh. No. 66 (App. 18). The Boise disciplinary document against Bahr, dated October 26, 2001 (signed and issued by Dobbs), officially states that Bahr "had a confrontation with [Rasmussen] that was very hostile and threatening in nature." The disciplinary document also states that "you [Bahr] have, **in fact**, committed a major infraction of Company Policy, harassment, which should not, and will not, be tolerated. The Company has a moral and legal obligation to provide a **hostile-free** workplace for all employees." *Id.* (emphasis added); see also Trial Exh. No. 68 (App.20) (Employee Discussion Notice issued by Eural Dobbs to LeRoy Bahr as documentation of the disciplinary suspension being imposed upon Bahr).

After being presented with the last chance agreement and the disciplinary action to be imposed, Bahr and Walls talked about the issue. Tr. 370-371. Bahr decided that he absolutely would not sign the last chance agreement because he was adamant that he had done nothing wrong; he had not threatened or acted

hostile towards Rasmussen; he did not harass him and he did not violate the company's harassment policy. Tr. 158, 370-371.

Then, Bahr contacted the Boise Human Resources Department to file harassment charges against Eural Dobbs because of this situation of the unwarranted discipline being imposed on Bahr due to these baseless allegations. Tr. 158, 406. Strongman and Bahr arranged for Bahr to meet with Betty Leen on this issue. On November 1, 2001, Bahr took all of his information and documentation and had a 2 1/2 hour meeting with Betty Leen regarding this whole situation. Tr. 158-159; Trial Exh. No. 67 (App. 21). Immediately after Bahr's meeting with Betty Leen, Boise Human Resources contacted the union representative, Bob Walls, and informed Walls that Boise was dropping the last chance agreement, that Bahr would be allowed to return to work, but that the 3-day disciplinary suspension and the incident would still be part of Bahr's permanent record. Tr. 160. Since the union and Bahr disagreed with any disciplinary action arising from this situation, they continued on with their grievance under the union contract, challenging the disciplinary action. Tr. 167-168, 373-374.

With the last chance agreement being dropped as of November 1, 2001, Bahr could have returned to work. However, he was unable to do so because this experience and the false allegations against him were so mentally and emotionally devastating, that Bahr had to take a three month medical leave from work. Tr. 161; see also Trial Exh. No. 5 (Boise Accident and Sickness Certification Form for

Bahr's medical leave of absence) (App. 26). He was so humiliated and embarrassed about the false allegations against him that, for many months, he isolated himself at his rural home and did not go into town because he feared and was very apprehensive about encountering people who may know about the situation or ask him about what had happened. Tr. 161-168. He could not sleep at night; he could not concentrate; his stomach was constantly in knots; and he was experiencing physical symptoms that made him feel like he was having a heart attack. Tr. 161-168. Bahr's treating physician diagnosed Bahr as suffering from situational depression and anxiety, for which the doctor prescribed anti-depressants. Tr. 163; Trial Exh. No. 5 (App. 26). Bahr's doctor kept Bahr out on medical leave for approximately three months. Tr. 163; see also Trial Exh. No. 10 (Return to Work Form, dated January 23, 2002, signed by Bahr's treating physician, Dr. Berlin) (App. 27).

Bahr eventually returned to work in January 2002, but he and the union continued to press forward with the grievance challenging the three day disciplinary suspension. Tr. 167-168, 373-374. By way of an Employee Discussion Notice dated August 22, 2002, Boise unilaterally attempted to reduce the suspension to a written warning, but Bahr and his union continued to press on with the grievance since Bahr had not done anything that justified any disciplinary actions against him. Trial Exh. No. 8 (App. 28). Interestingly, the Employee Discussion Notice dated August 22, 2002, again states that Bahr created a "Hostile

Work Environment” and that he had a confrontation with Rasmussen on October 18, 2001, which “[Rasmussen] felt . . . was very hostile and threatening in nature.”

Id. The document then goes on to say that “it was determined that you did act in a manner that was inappropriate and therefore are being issued this written warning.”

Id. However, this Employee Discussion Notice does not include the language that Bahr committed harassment or that he violated the company’s Harassment Policy.

Id.

In May 2003, on the eve of the arbitration hearing for Bahr's grievance challenging the disciplinary action taken against him, Boise management finally conceded and realized that they had no factual basis for any disciplinary actions against Bahr and that Bahr had not engaged in any harassment or other wrongdoing. Tr. 167-168, 373-374. Consequently, Boise management dropped all disciplinary actions against Bahr. Tr. 167-168, 373-374.

Bahr then commenced this lawsuit for defamation in September of 2003.

ARGUMENT

I. STANDARD OF REVIEW

In district court, summary judgment may only be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56. Whenever reasonable persons may draw different conclusions from the evidence, summary judgment is inappropriate.

Hedlund v. Hedlund, 371 N.W.2d 232 (Minn. Ct. App. 1985). The Minnesota

Supreme Court has stated: **"We have often cautioned that summary judgment is not a substitute for trial."** Utecht v. Shopko Dept. Store, 324 N.W.2d 652, 653 (Minn. 1982) (emphasis added).

Summary judgment is to be granted only where the evidence is such that no reasonable jury could return a verdict for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986). All doubts and facts must be resolved in the non-moving party's favor. Wagner v. Schengmann's So. Town Liquor, 485 N.W.2d 730 (Minn. Ct. App. 1992). The court views the evidence and the inferences which may be drawn from it in the light most favorable to the non-moving party. See Enterprise Bank v. Magna Bank, 92 F.3d 743, 747 (8th Cir. 1996); see also Adkinson v. G.D. Searle & Co., 971 F.2d 132, 134 (8th Cir. 1992). The court must resolve all controversies in favor of the non-moving party, take the non-movant's evidence as true, and draw all justifiable inferences in the non-movant's favor. Miners v. Cargill Communications, Inc., 113 F.3d 820, 823 (8th Cir.), cert. denied 118 S.Ct. 441 (1997). The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. See Enterprise Bank, 92 F.3d at 747; see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986).

[T]he court must draw all reasonable inferences in favor of the non-moving party, and it may not make credibility determinations or weigh the evidence. Credibility

determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) (emphasis added) citing Lytle v. Household Mtg., Inc. 494 U.S. 545, 554-555 (1990); Liberty Lobby, Inc. 477 U.S. at 254; Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696, n. 6 (1962) and quoting Liberty Lobby, Inc., 477 U.S. at 255.

In reviewing a district court's ruling on a summary judgment motion, the appellate court must determine (1) whether any issues of material fact exist; and (2) whether the trial court erred in its application of the law. Denelsbeck v. Wells Fargo & Co., 666 N.W.2d 339, 345 (Minn. 2003).

Minn. R. Civ. P. 50.01 provides that the trial court may grant a motion for judgment as a matter of law only when “there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.” The same legal standard applies to a motion for judgment as a matter of law, whether it is made during trial (directed verdict) or after trial (JNOV). Minn. R. Civ. P. 50.01 and 50.02; see also Mertes v. Estate of King, 501 N.W.2d 660 (Minn.App. 1983). The legal standard for a directed verdict or JNOV is not significantly different from the legal standard for summary judgment. Howie v. Thomas, 514 N.W.2d 822 (Minn.App. 1994). In ruling on a motion for directed verdict or a motion for JNOV, the trial court may grant the motion only if the evidence is insufficient to

sustain a verdict for the non-moving party, and the court must view the decision as a question of law; consider all evidence in favor of the non-moving party; determine the credibility of witnesses and draw all reasonable inferences in favor of the non-moving party. Midland Nat'l Bank of Minneapolis v. Perranoski, 299 N.W.2d 404 (Minn. 1980); Nelson v. Wilkins Dodge, Inc., 256 N.W.2d 472 (Minn. 1977).

“Unless [the appellate court] is able to determine that the evidence is practically conclusive against the verdict or that reasonable minds could reach but one conclusion against the verdict, the trial court’s order denying the motion for JNOV should stand.” Cox v. Crown Coco, Inc., 544 N.W.2d 490, 496 (Minn.App. 1996) quoting Seidl v. Trollhaugen, Inc., 305 Minn. 506, 507, 232 N.W.2d 236, 239 (1975). “In reviewing the denial of JNOV, this court must affirm if the record contains ‘any competent evidence reasonably tending to sustain the verdict.’” Cox, 544 N.W.2d at 495 quoting Rettman v. City of Litchfield, 354 N.W.2d 426, 429 (Minn. 1984).

In a defamation case strikingly similar to the case presently before this Court, the Minnesota Supreme Court provided the following guidance:

In reviewing jury verdicts, we permit ourselves only a limited role. All testimony must be considered in the light most favorable to the prevailing party, and a verdict will only be disturbed if it is **“manifestly and palpably contrary to the evidence.”** Review is even more limited when the jury verdict must consider the **demeanor of the witnesses.**

Stuempges v. Parke, Davis & Company, 297 N.W.2d 252, 256 (Minn. 1980)

quoting Carpenter v. Mattison, 300 Minn. 273, 276, 219 N.W.2d 625, 629 (1974)

(emphasis added) (other citations omitted).

II. VIEWING ALL OF THE EVIDENCE AND ALL REASONABLE INFERENCES FROM THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO SUSTAINING THE VERDICT, THERE CLEARLY WAS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT A FINDING OF MALICE ON THE PART OF BOISE AND RASMUSSEN.

If the defendant establishes that the defamatory statements are protected by qualified privilege, the plaintiff can overcome and nullify the qualified privilege by showing that the defamatory statements were made with malice. Bol v. Cole, 561 N.W.2d 143, 150 (Minn. 1997). Malice is a question of fact to be determined by the trier of fact. Id. Malice is defined as ill-will or design to injure the plaintiff causelessly or wantonly. Id. Malice can be shown by extrinsic evidence of personal spite, as well as by intrinsic evidence such as the exaggerated language of the defamatory statement, the character of the language used, the mode and extent of publication, and other matters in excess of the privilege. Id. A qualified privilege is lost if abused. Lewis v. Equitable Life Assur. Soc’y., 389 N.W.2d 876, 890 (Minn. 1986). “Actual malice” can be established by evidence that the defendants engaged in “purposeful avoidance of the truth.” Tuan J. Pham v. Thang Dinh Le, 2007 WL 2363853 (Minn.App.) (unpublished) (copy provided in App. at 35) *citing* Hartke-Hanks Commc’ns, Inc. v. Connaughton, 491 U.S. 657, 692, 109

S.Ct. 2678, 2698 (1989).

“Another consideration when determining malice is whether there were reasonable grounds for the employer’s statements.” Hengesteg v. Ecolab, Inc., 1992 WL 89647 (Minn.App.) (unpublished) (copy provided in App. at 29) citing Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 380 (Minn. 1990). The plaintiff may prove malice “by evidence that leads to an inference that [defendants] knew the statements were false . . .” Frankson v. Design Space International, 394 N.W.2d 140, 144 (Minn. 1986) citing Froslee v. Lund’s State Bank, 131 Minn. 435, 155 N.W. 619 (1915).

Malice can be shown by direct proof of personal spite. Bauer v. State, 511 N.W.2d 447, 451 (Minn. 1994). “Actual malice means what it says: ill-will and improper motive or wishing wantonly and without cause to injure the plaintiff.” Id. at 449.

In Nicklows v. Menard, Inc., 1992 WL 153434 (Minn.App.) (unpublished) (copy provided in App. 33) the defendant, Menard, challenged the sufficiency of the evidence of actual malice in a defamation action initiated by its former employee, Nicklow. The Minnesota Court of Appeals affirmed the verdict in favor of the plaintiff, finding that there was sufficient evidence that the statements were made with actual malice. The court found the following evidence to be sufficient to prove actual malice and overcome the qualified privilege:

Nicklow was terminated for using drugs, even though he showed no physical signs of drug use and no evidence of drugs was found on his person or in his vehicle. Goplen [store manager] told Nicklow that he would not be reinstated even if he obtained a "clean" drug test. Menard refused to reinstate him after he obtained a "clean" drug test. Furthermore, the evidence showed news of Nicklow's termination had spread throughout the store. Evidence of Menard's actions involving Nicklow's termination and extensive publication of his termination are sufficient to show actual malice in this case.

In another defamation case very similar to the case presently before the Court, the Minnesota Supreme Court rejected the defendant/employer's argument that there was insufficient evidence to support the jury's determination that the employer had acted with malice in defaming the plaintiff. Stuempges v. Parke, Davis & Company, 297 N.W.2d 252 (Minn. 1980). Stuempges was a long term employee of Parke, Davis & Company and he had a good work record. In Stuempges' fifteenth year with the company, Jones became Stuempges' new supervisor. Immediately, there was conflict and tension between the two of them on a variety of issues. Jones eventually forced Stuempges to resign. In response to a reference check regarding Stuempges' past employment with the company, Jones made a number of defamatory statements about Stuempges, including a statement that Stuempges "was a poor salesperson and was not industrious." In analyzing whether there was sufficient evidence that Parke, Davis & Co. (through its manager/supervisor, Jones) acted with malice, the Minnesota Supreme Court stated:

One of the underpinnings of Stuemppes' case was that Jones was motivated by malice toward him and that the statements to Hammer were an attempt to blackball him in the profession. He introduced evidence that a personality conflict existed between him and Jones, that Jones was hostile toward him because he refused to conduct the prescription survey, and that Jones told him during the February 25 meeting that he would be blackballed in the industry unless he resigned. Although Parke Davis introduced contrary evidence, the jury was not compelled to accept its interpretation. Since the evidence supports a jury finding that Jones acted with malice in making the statements to Hammer, it was reasonable for the jury to have determined that the conditional privilege of fair comment concerning the character of a past employee had been abused.

Id. at 258.

In the case at bar, the Minnesota Court of Appeals actually misstated the legal standard to be applied in analyzing the evidentiary record. The Court of Appeals incorrectly stated that the “[e]vidence must be viewed ‘in the light most favorable to the party against whom judgment was granted.’” Court of Appeals Opinion, p. 6 (App. 48) quoting Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). While this may have been an innocent misstatement (or statement out of context) by the Court of Appeals, it appears that the Court of Appeals actually did apply and utilize this incorrect, reverse standard in analyzing the evidentiary record in this case. The Court of Appeals ignored evidence favorable to Bahr and viewed the evidence in a light more favorable to Boise and Rasmussen.

The record contains extensive evidence of Dobbs' ill will and hostility

towards Bahr. Dobbs was a management level employee of Boise and he was Bahr's direct supervisor. Yet, the Court of Appeals summarily refused to impute Dobbs' ill will or malice to Boise. The Court of Appeals erroneously stated: "... we discern no basis for imputing Dobbs' ill feelings to Boise . . . Bahr's supervisor, Dobbs, did not author the allegedly defamatory statements." Court of Appeals Opinion, p. 11 (App. 53). The Court of Appeals' view of the evidence on this issue is just plain wrong, especially in this context where all of the evidence, and all reasonable inferences from the evidence, have to be viewed in the light most favorable to sustaining the jury verdict (i.e., in the light most favorable to Bahr).

Dobbs was directly involved in the investigation and decision-making process leading up to the disciplinary actions taken against Bahr. Dobbs was present at the investigative meeting with Bahr and Bahr's union representative on October 25th – to obtain Bahr's version of the alleged October 18th incident. Trial Exh. No. 63 (App. 12). At the conclusion of that meeting, Dobbs caucused with Barb Johnson to confirm that they would proceed with the disciplinary suspension and last chance agreement (that they had decided upon before they even met with Bahr). Trial Exh. No. 63 (App. 15). Dobbs also was present at the meeting with Bahr the next day (October 26th) so that Dobbs could officially issue the disciplinary action and documents to Bahr in person. Trial Exh. No. 65 (App. 17). The discipline documents (which contain defamatory statements about Bahr) were

in fact issued by Dobbs himself. See Trial Exhibit 66 (App. 18); Trial Exhibit 68 (App. 20). In all of these underlying events, Dobbs was acting in the course and scope of his employment as a management level employee of Boise. Yet, inexplicably, the Court of Appeals summarily ignored this evidence and refused to impute Dobbs' malice to Boise.

The Court of Appeals also ignored the evidence of Dobbs' obvious smugness towards Bahr's son at work (on October 18th) after Bahr was escorted out of the mill for the alleged incident with Rasmussen. While Boise may contend that Dobbs' smugness meant nothing or that the plaintiff's view of this evidence was merely speculation, Boise's view or interpretation of this evidence (or Boise's "spin" on this evidence) is irrelevant here, because this piece of evidence, along with all of the other evidence, has to be viewed in the light most favorable to Bahr.

Also the trial judge specifically instructed the jury, as follows:

Boise Cascade Corporation is a corporation and act [sic] only through its officers and management employees in this case. The conduct of an officer or managing employee acting within the scope of his or her employment or authority is the conduct of the corporation.

Tr. at 667-668.

With these instructions from the trial judge, and the extensive evidence that Dobbs harbored obvious ill will and a deep dislike for Bahr, the jury clearly had a basis to impute and connect Dobbs' malice towards Bahr to the corporate

defendant, Boise. Compare Stuemppges v. Parke, Davis, 297 N.W.2d 252, 258 (Minn. 1980).

While, obviously, Boise would never outright admit to harboring ill will towards Bahr or having intent to injure him, the greater weight of the evidence shows that there clearly was malice on the part of Boise management, especially when all of this evidence is viewed in the light most favorable to Bahr. Before having Bahr escorted out of the mill and placing him on suspension without pay, Boise management made no attempt to interview Bahr to obtain his side of the story. Bahr, a **forty year employee** of the mill, was treated like a common criminal when an e-mail went out (on October 18th) to the guard station stating very abruptly that Bahr was prohibited from entering mill property. Before Boise management even interviewed Bahr and Gary Underdahl regarding the alleged October 18th "incident", management had already decided on the disciplinary action to be taken against Bahr. Then, when Bahr and Underdahl's statements regarding the October 18th incident showed that Rasmussen's story was a fabrication, Boise management completely disregarded and ignored Bahr and Underdahl's statements and proceeded with the disciplinary action against Bahr on the stated basis that Bahr had created a "hostile work environment"; that he "had a confrontation with [Rasmussen] that was very hostile and threatening in nature"; and that Bahr "in fact, committed a major infraction of Company Policy, harassment . . ." Trial Exh. Nos. 66 and 68 (App. 18-20).

Also, there was evidence presented at trial regarding the numerous inconsistencies in Boise's stated reasons for the disciplinary actions against Bahr. First, Boise was stating it was due to Bahr starting the rumor about Rasmussen and Begg. Then it was because Bahr had engaged in work slow downs. Then, finally, Boise indicated that it was because, on October 18th, Bahr had interacted with Rasmussen in a hostile, threatening and harassing manner, even though Boise's own investigation, which included the statement from Gary Underdahl, showed that this simply did not happen. Also, at trial and in her deposition, Barb Johnson stated that the reason Bahr was disciplined was based on everything they learned in the investigation, including the rumor incident (which Bahr was not involved in); the work slow downs; the October 18th "incident" with Rasmussen; and the information provided by Joe Schwartz. However, these various explanations are not consistent with what is stated in the disciplinary documents issued by Dobbs.

From all of the evidence presented and argued at trial regarding this obvious predisposition on the part of Boise management to use and adopt Rasmussen's fabricated harassment claims against Bahr as an opportunity to injure Bahr with severe disciplinary action, the jury certainly had a basis to conclude that, during the time frame when all of this was taking place, Boise was acting with malice towards Bahr.

There also was more than sufficient evidence presented at trial to support the jury's affirmative answer to the malice question on the special verdict form, as to

the defamation claim against Rasmussen. Rasmussen's angry "lazy fat fucker" comment about Bahr is, by itself, clear evidence that Rasmussen harbored ill will and spite towards Bahr. Boise and Rasmussen fail in their attempt to classify Rasmussen's comment as nothing more than the typical type of vulgar language which one would normally encounter in a mill setting. Again, the Respondents' view or interpretation of this evidence (or their "spin" on this evidence) is irrelevant here, because this piece of evidence, along with all of the other evidence, has to be viewed in the light most favorable to Bahr. The evidence presented at trial (when viewed in the light most favorable to Bahr) clearly shows that Rasmussen made this comment with real and obvious anger and spite.

In addition, this Court certainly should consider, as the jury likely did (but which the Court of Appeals chose to ignore), Rasmussen's gross exaggerations and fabrications regarding his supposed encounters with Bahr. In addition to his exaggerated and fabricated description of Bahr's behavior relative to the October 18th encounter, Rasmussen also exaggerated and fabricated a story about this supposed exchange he had with Bahr, Bobbi Bernath and Jared Pearson on September 27, 2001. Rasmussen claims that Bahr, Bernath and Jared Pearson were threatening and intimidating him, and that they had him cornered and backed up against a wall. When Bahr, Bernath and Pearson testified at trial, they provided a completely different version of this supposed incident. All three confirmed that this was a one-on-one exchange between Pearson and Rasmussen, and that Bernath

and Bahr were not in any way involved in the discussion, even though Bernath and Bahr did witness the encounter from afar. They testified that Rasmussen was going crazy, yelling, waving his arms in the air, running around and acting like Pearson was attacking him, when Pearson was not doing anything which could even remotely be interpreted as threatening or hostile.

As further evidence of Rasmussen's malice towards Bahr, consider Rasmussen's actions towards Bahr on October 18th. After reporting to Dobbs that Bahr had threatened and harassed him, Rasmussen then provided a statement to Betty Leen regarding his harassment complaint against Bahr. Look (in Betty Leen's typewritten notes) at the exaggerated language Rasmussen uses in describing Bahr. Rasmussen states that Bahr "yells and shouts and [that] he is almost to the point of physical violence." He goes on to describe how he checks his lunch bucket at work and his garage at home because he is afraid that Bahr might plant something. Furthermore, on October 18th, Rasmussen informed Betty Leen that Bahr was responsible for spreading the rumor, even though the evidence at trial, including Rasmussen's own testimony, showed that Rasmussen already knew (prior to October 18th) that Bahr had absolutely nothing to do with the rumor incident. With respect to Rasmussen's statements about Bahr on October 18th and October 22nd, Rasmussen clearly was providing this fabricated and exaggerated information (first to Dobbs) and then to the human resources department with the intent and purpose of getting Bahr in trouble. In fact, as stated in Betty Leen's

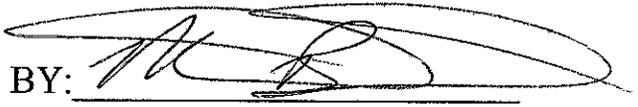
notes from the October 18th meeting, Rasmussen specifically stated that he was doing all of this because "LeRoy needs a wake-up call." The Court of Appeals did not even consider or analyze any of this evidence. Instead, the Court of Appeals simply (and erroneously) concluded that "while 'exaggerated *language*' can prove malice ..., Bahr provides no examples of such language." Court of Appeals Opinion, p. 12 (App. 54) (emphasis in original).

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Minnesota Supreme Court reverse the decision of the Court of Appeals and that the District Court judgment in favor of Bahr be reinstated in its entirety.

Dated: 11-19-08

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STATE OF MINNESOTA
IN SUPREME COURT

Case No. A07-1353

LeRoy Bahr,

Appellant,

vs.

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

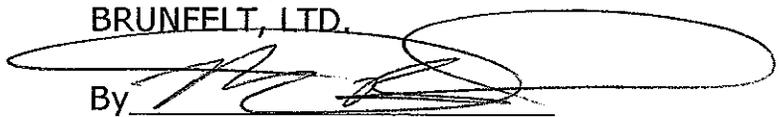
Respondents.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 9,298 words, and the font size is 14 point. This brief was prepared using Microsoft Word 2007 software.

Dated: 11-19-08

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