

NO. A11-1093

STATE OF MINNESOTA
IN COURT OF APPEALS

Jeff Moen,

Plaintiff/Respondent,

v.

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

Defendant/Appellant.

APPELLANT'S REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ARGUMENT

Appellant Sunstone Hotel Properties, Inc. (“Sunstone”) submits this Reply Brief in response to the brief of Respondent Jeff Moen (“Moen”). Sunstone respectfully submits that Moen’s breach of contract claim, which arises out of the Collective Bargaining Agreement between Sunstone and Moen’s union, UNITE HERE Local 21 (the “CBA”), should have been dismissed on summary judgment. Sunstone also submits that critical rulings made by the Trial Court following the close of the evidence were erroneous and entitle Sunstone to a new trial on Moen’s defamation claim.¹

I. The CBA’s Grievance/Arbitration Procedure is Exclusive and Therefore the Trial Court Erred in Denying Sunstone’s Motion for Summary Judgment on Moen’s Wrongful Discharge Claim

A. Moen Misconstrues the Legal Framework of Federal LMRA Preemption and the Applicable Presumptions

In urging this Court to conclude that the courts have jurisdiction to adjudicate his breach of contract claim, Moen relies almost exclusively on a so-called “presumption” in favor of “judicial enforcement of collective bargaining agreements,” citing principally Groves v. Ring Screw Works, 498 U.S. 168 (1990), but also such seminal Supreme Court decisions as Livadas v. Bradshaw,

¹ In this brief, Sunstone uses the following abbreviations for convenience: “Appellant’s App.” refers to Appellant’s Appendix, submitted with its Opening Brief; “ADD” refers to Appellant’s Addendum, attached to its Opening Brief; “Supp. App.” refers to Appellant’s Supplemental Appendix, attached hereto (which includes all unreported Minnesota court opinions cited in both of Appellant’s briefs); Resp. App. refers to Respondent’s Appendix, attached to Respondent’s Opposition Brief.

512 U.S. 107 (1994) and Hines v. Anchor Motor Freight, 424 U.S. 554 (1976). Moen then urges this Court to find that the “exclusivity” language in the CBA’s grievance/arbitration clause is not sufficiently definitive to overcome this “presumption.” Unfortunately, Moen’s argument only sows confusion, as it amounts to a misreading and misconstruction of more than fifty years of federal labor law.

In general, Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, preserves access to the courts for management, unions and employees in certain cases, and, as a result, there exists a “strong federal policy” favoring judicial enforcement of collective bargaining agreements. This principle was first laid down in Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), when the Supreme Court held that Congress’s purpose in giving the federal courts jurisdiction to resolve collective bargaining agreement disputes was to ensure that such agreements would be consistently interpreted in accordance with a uniform body of federal common law. The Lincoln Mills line of cases generally hold that courts may hear and resolve enforcement suits (i) where the conduct amounts to an unfair labor practice and thus otherwise would be committed to the exclusive jurisdiction of the NLRB, Teamsters v. Lucas Flour Co., 369 U.S. 95, 101-02 and n.9 (1962); (ii) to vindicate “uniquely personal rights” of employees such as questions concerning wages and discharges, Smith v. Evening News Ass’n, 371 U.S. 195 (1962); and (iii) to compel a party to a collective bargaining agreement to honor the arbitration clause. Lincoln Mills, 353 U.S. at 458-59. In all of these

cases, federal law as developed by the federal courts – not state law – controls the interpretation of the labor contracts.

Thus, the “presumption” Moen so frequently invokes is really the federal policy of ensuring that the federal courts develop a body of federal common law governing the interpretation of collective bargaining agreements. Moen’s mistake is to argue that this “strong federal policy” amounts to a “presumption” that judicial enforcement is favored over private enforcement even when the employer and union have included a grievance/arbitration procedure in their collective bargaining agreement. In fact, the rule (established by the very federal common law that arose after Lincoln Mills) is exactly the opposite: When a collective bargaining agreement includes a grievance/arbitration procedure, the courts presume that the procedure is intended to be exclusive, final and binding, thus precluding a party’s Section 301 suit. The principal case Moen pushes to support his position makes this clear, as the Supreme Court stated in Groves: “[The] presumption favoring access to a judicial forum is overcome *whenever the parties have agreed upon a different method for the adjustment of their dispute.*” 498 U.S. at 173-74 (emphasis added) (citing Section 203(d) of the LMRA, 29 U.S.C. §173(d)).

In other words, a party overcomes the general “presumption of access to the courts” simply by pointing to a grievance/arbitration procedure that is exclusive, final and binding. In determining whether a grievance/arbitration procedure is exclusive, final and binding, the presumption of arbitrability comes into play;

namely, when the parties to a collective bargaining agreement have chosen a non-judicial dispute resolution mechanism, that mechanism is *presumed* to be the exclusive, final and binding method for questions of interpretation and application of the CBA and will be so interpreted unless it is clear that the parties' intent was otherwise. United Steelworkers of America v. Lukens Steel Co., 969 F.2d 1468, 1474 (3rd Cir. 1992) (post-Groves decision). This principle was enunciated in Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) and has been reiterated in subsequent years in too many cases and too many contexts to count.²

Thus, the parties need not *expressly prohibit* the company's, union's or employee's rights to judicial relief, as Moen suggests; instead, the grievance/arbitration procedure itself creates that prohibition, because the procedure is presumed to be exclusive, final and binding unless the language expressly states otherwise. Communications Workers of American v. American Tel. and Tel. Co., 40 F.3d 426, 434-35 (D.C. Cir. 1994).

² See, e.g., Lukens Steel Co., 969 F.2d at 1475; Ceres Marine Terminals, Inc. v. International Longshoreman's Ass'n, Local 1969, ALF-CIO, 683 F.2d 242, 243-44 (7th Cir. 1982); Atchley v. Heritage Cable Vision Associates, 926 F. Supp. 1381, 1386 (N.D. Ind. 1996); see also Local 771, IATSE, AFL-CIO v. RKO General, Inc., 546 F.2d 1107, 1116 (2nd Cir. 1977); Flowers v. Runyon, 1999WL 259523 *3-*4 (E.D. La. Apr. 28, 1999); Prudden v. E.J. Brach Corp., 946 F. Supp. 572, 578 (N.D. Ill. 1996); Painters Dist. Council No. 2 v. Tiger Stripers, Inc., 582 F.Supp. 860, 864 (E.D. Mo. 1984).

B. Moen's Textual Arguments that the CBA's Grievance/Arbitration Procedure is not Exclusive Miss the Mark

Against this jurisprudential backdrop, the Court can assess Moen's two principal arguments for the proposition that the CBA's grievance/arbitration procedure is not mandatory: First, that the CBA's procedure cannot be mandatory or exclusive because it does not use the words "mandatory" or "exclusive"; and second that the CBA's use of the word "may" renders the procedure optional.

Moen's arguments are non-starters, as the courts have routinely and repeatedly held that grievance/arbitration provisions need not use the words "mandatory" or "exclusive", or make exclusive use of the word "shall" to the exclusion of "may," in order to be considered exclusive, final and binding. In Local 771, IATSE, AFL-CIO v. RKO General, Inc., 546 F.2d 1107, 1116 (2nd Cir. 1977), for example, the Second Circuit construed the arbitration provision as being mandatory, despite the lack of words such as "mandatory" or "exclusive." The Court also held, as so many other courts have held, that a contract's use of the word "may" does not render an arbitration procedure optional. Similarly, in Painters Dist. Council No. 2 v. Tiger Stripers, Inc., 582 F.Supp. 860(E.D. Mo. 1984), the Court rejected the plaintiff's argument that the word "may" rendered the grievance procedure optional, and in so holding noted that the plaintiff's argument "runs counter to the *settled federal policy* of construing labor contracts in favor of finding *mandatory* grievance procedures." Id. at 864 (emphasis added). In Prudden v. E.J. Brach Corp., 946 F. Supp. 572, 578 (N.D. Ill. 1996),

the Court rejected outright the plaintiff's argument that grievance procedures must use the word "exclusive" to be construed as such. The Court held that the legal standard is that "grievance procedures are exclusive unless the parties expressly agree otherwise, not that such procedures are made exclusive only by an explicit provision to that effect." State supreme courts also adhere to these interpretive canons, as the Colorado Supreme Court noted in Albertson's, Inc. v. Rhoads, 582 P.2d 1049 (Colo. 1978), when it held that a provision stating that "[t]he union may present a grievance" had to be construed as establishing an exclusive procedure. Id. at 1050; see also Chapple v. Fairmont Gen. Hosp., Inc., 384 S.E.2d 366, 372 (W.Va. 1989) (noting that "multiple federal courts have held that the use of the word 'may' or 'can' in a grievance procedure does not imply the option of a remedy other than arbitration") (citing cases from the Second, Third, Fourth, Sixth, Seventh and Eighth Circuits).³

Perhaps the fallacy of Moen's argument is best seen in Maddox itself, where the Supreme Court held that language nearly identical to the language at issue here established an exclusive grievance/arbitration procedure. Indeed, the similarities in language and the sequencing of the individual clauses are striking, and thus Moen's attempt to distinguish the case falls short.

³ As a result of this heavy presumption in favor of mandatory arbitration, Moen's one-liner that the CBA's use of the term "means" must be construed to mean "one possible means since it doesn't rule out other means" is without merit, as the argument requires the Court to impose a presumption against arbitrability rather than in favor of it.

First, the Maddox contract states that the purpose of the grievance procedure is to provide “prompt, equitable adjustment of claimed grievances.” 379 U.S. at 658. The CBA states that “[t]he grievance procedure set forth in this article is established for the specific purpose of providing prompt and amicable means of settlement of all questions arising under the terms of this agreement or the application of them.” Appellant’s App. 199. In this preamble, the CBA’s language is actually broader and more exclusive than the language at issue in Maddox, in that the CBA applies to “questions arising under the . . . agreement” (as opposed to questions that are already defined as “grievances” as suggested by the Maddox contract), and the CBA covers “all questions” (a term notably absent from the Maddox contract).

Second, the Maddox contract then provides: “Any employee who has a complaint *may* discuss the alleged complaint with his Foreman in an attempt to settle it.” 379 U.S. at 658 (emphasis added). Similarly, the CBA states: “An employee *may*, with or without the assistance of a shop steward, first attempt to resolve workplace disputes with the employee’s manager.” Appellant’s App. 199 (emphasis added). The Supreme Court studied the use of the word “may” in this context and found that it simply meant that “an employee may, if he chooses, speak to his foreman himself without bringing in his grievance committeeman and formally embarking on Step 1 [of the grievance procedure].” The Court went on: “Use of the permissive ‘may’ does not of itself reveal a clear understanding between the contracting parties that individual employees, unlike either the union

or the employer, are free to avoid the contract procedure and its time limitations in favor of a judicial suit. Any doubts must be resolved against such an interpretation.” 379 U.S. at 658-59. This is the exact interpretation of nearly identical language urged by Sunstone here.

Third, the Maddox contract then goes on to state: Any complaint not so settled *shall* constitute a grievance within the meaning of this Section.” 379 U.S. at 658 (emphasis added). Nearly identically, the CBA states: “If not resolved informally, the following *shall* be the grievance procedure.” Appellant’s App. 199 (emphasis added). In both contracts, the stated purpose, the opportunity to resolve disputes informally, and the sequence and language of the text are substantively identical. Significantly (in light of Moen’s argument) the contract at issue in Maddox does not use the words “mandatory” or “exclusive,” but the lack of such language did not stop the Supreme Court from finding that the Maddox contract to be mandatory and exclusive.

In Communications Workers of America, the result was the same, and Moen’s attempt to distinguish the case fails. There, Article 19 of the contract, which governed matters related to the employee pension, stated (i) that disputes over the plan “may” be submitted as a grievance and “may” be submitted to arbitration; and (ii) that the plans were “*not*” subject to arbitration. 40 F.3d at 434-35. Still, relying on the “heavy presumption in favor of mandatory arbitration of disputes under collective bargaining agreements,” the Court construed an

entirely different provision of the contract to require submission of the pension plan dispute to arbitration and preclude the plaintiffs' Section 301 suit. Id.

The Supreme Court reached a similarly compelling result in Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985), and Moen's attempt to distance himself from this ruling is similarly unavailing. In Allis-Chalmers, certain insurance plan disputes were exempted from the first three steps of the standard grievance procedure. Instead, the contract stated that such issues "shall be referred" to the Joint Plan Insurance Committee and, if not resolved before the Committee, "may be presented for arbitration." Id. at 204 n.1. Moen tries to distinguish the case by pointing out that the word "shall" required such questions to be referred to the Committee. The significance of the ruling, however, is that the *later sentence*, which stated that disputes not resolved by the Committee "may" be presented for arbitration, was interpreted to *require* mandatory arbitration. Id.

Moen's attempt to distinguish these clearly analogous cases comes down to this: He asserts that in these decisions the Courts properly allowed the word "shall" to trump the word "may," but that this Court should give priority to the word "may" in the CBA. Moen's suggested distinction is hardly a principled one, but more important, it ignores the canon of construction at the core of these decisions. In all three of these cases, as well as the others cited above, the strong presumption in favor of finding arbitrability, exclusivity and finality is the driving force behind the interpretation of the collective bargaining agreements and the results reached. This Court should follow the lead of these courts, if for no other

reason than to adhere to the mandate laid down by the Supreme Court in Allis-Chalmers that “interpretive uniformity and predictability” require “labor contract disputes to be resolved by reference to federal law” and “also require that the meaning given a contract phrase or term be subject to uniform federal interpretation.” 471 U.S. at 211. Indeed, it is here that the Trial Court erred. By focusing on the use of the word “may” and ruling that the CBA does not contain “contract language that *plainly makes the grievance process mandatory and exclusive,*” see ADD-17 (emphasis added), the Trial Court *reversed the presumptions* in favor of arbitration.

C. Moen’s Heavy Reliance on the Groves Decision is Misplaced

In an effort to steer around the case law stacked against him, Moen leans heavily on the Groves decision, going so far as to suggest that the grievance/arbitration procedure considered in Groves is virtually identical to the one in the CBA. See Oppos. Brf. at 25-26. Significantly, however, the Groves provision is extraordinarily *unlike* the CBA provision in the single respect that matters most: Instead of providing for final and binding arbitration, it is capped with an impasse and directs the parties to resort to their economic weapons as the sole means of resolution. 498 U.S. at 170-71 n.3. As described in Sunstone’s Opening Brief, this aspect of the case drove its result. Moreover, cases interpreting Groves have reached the same conclusion, as the cases cited in

Sunstone's Opening Brief indicate.⁴ See also Rice v. Providence Regional Med. Ctr. Everett, 2009 WL 2342449 *4 (W.D. Wash. 2009) (post-Groves decision citing Maddox favorably for the proposition that the language of a grievance/arbitration procedure must "reveal a clear understanding" that the parties are free to proceed with a judicial suit); Painters Dist. Council No. 2, 582 F.Supp. at 864 (post-Groves decision referring to "the settled federal policy of construing labor contracts in favor of finding *mandatory* grievance procedures") (emphasis added); Prudden, 946 F. Supp. at 577 (post-Groves decision holding that "[o]nly if the parties to the CBA expressly agree that the agreement's remedies are not exclusive" may the employee proceed to court); Lukens Steel Co., 969 F.2d at 1475 (post-Groves decision holding that "[t]he presumption of arbitrability may be overcome if the collective bargaining agreement contains an *express provision* excluding a particular grievance from arbitration.") (emphasis added).

Despite asserting that Groves has been cited "in more than two hundred cases,"⁵ Moen himself cites only *two* post-Groves decisions in support of his

⁴ Although Sunstone cited four such cases in its Opening Brief, see Opening Brf. at 20-22, Moen has attempted to distinguish only one of those cases, Communications Workers of America. Moreover, Moen's attempt to distinguish this case related to a different legal point (the nature of the contract language at issue rather than the application of the presumption in favor of arbitrability after Groves) and was unavailing in any event, as described above.

⁵ Counsel for Appellant checked the "citing references" to Groves on Westlaw and, at the time of filing, found the case cited only 47 times by other courts. In stark contrast, Allis-Chalmers, which supports Sunstone's interpretation and which was decided only five years before Groves, has been cited by other courts more

position: Orlando v. Interstate Container Corp., 100 F.3d 296 (3rd Cir. 1996) and Alford v. General Motors Corp., 926 F.2d 528 (6th Cir. 1991). Opp. Brf. at 28-30. His reliance on these two cases is misplaced.

In Orlando, the issue faced by the Court was not whether the arbitration provision was mandatory and exclusive, but whether it was final. The employer advanced two arguments in favor of finding “finality”: (i) that the preface to the entire collective bargaining agreement, which stated generally that the contract as a whole was the “final” agreement between the parties, should be read to render the arbitration provision “final and binding”; and (ii) that “finality” could be inferred solely from “exclusivity,” which was not in dispute. The Court rejected the first argument, finding that the cited language was a “standard integration clause” that meant only that the agreement was the final agreement. 100 F.3d at 300. It rejected the second argument because it could not *infer* finality simply from the existence of exclusivity. Id. at 300-01. The lesson from Orlando is that there is a difference between construing language that is vague or ambiguous in favor of finality or exclusivity, on the one hand, and creating such terms out of whole cloth when nothing in the agreement supports their existence, on the other. This is in stark contrast to the CBA at issue here, where the text itself requires that “all questions” be resolved by the grievance/arbitration procedure. Even construing that language unreasonably in favor of Moen creates – at most – an

than 2,300 times. Of course, many of the cites to both cases concern unrelated points of law.

ambiguity concerning exclusivity, which must be resolved in favor of mandatory arbitration.

Alford is inapposite for a different reason. There the Court determined that the grievance/arbitration procedure at issue precluded the employees' Section 301 suits because it was clearly "exclusive" and "final," in part because of the contract's language expressly barring civil suits. 926 F.2d at 530. However, while Moen touts this language with much fanfare, nothing in the Alford decision suggests that such language is *required*. Instead, at most the opinion stands for the proposition that the language used in that particular contract was sufficient to bar the employees' Section 301 suits under those particular circumstances. Moreover, the Court's citation of Groves does not support Moen's position here, as the Court specifically quoted Groves' reference to "the *peaceful* resolution of disputes" and expressly noted that the Groves Court reached the decision it did "because the collective bargaining agreement implied that a *strike, or other job action*, was the exclusive remedy for failure of successful resolution of a grievance." Id. at 531 and 531 n.3 (emphasis added).⁶

⁶ Beginning on page 30 of his Opposition Brief, Moen argues that the Supreme Court has begun narrowing the preemption doctrine, citing for this assertion a tort law case concerning the Federal Food, Drug and Cosmetic Act. This vague and broad-brush argument has no application here, as the specific scope and application of the federal preemption doctrine depends on numerous factors, including the substantive area of law, the particular federal statutes and interests involved, and the nature of the plaintiff's claims in a particular suit. Moreover, Moen's blanket, unsupported assertion that "in over 70 years" the LMRA has not been held to preempt state law claims such as defamation and wrongful discharge is demonstrably false. Wrongful discharge claims and defamation claims that

D. Moen's Additional Arguments are Unpersuasive

Moen also suggests that Sunstone's failure to point to any other facts or evidence of exclusivity undermines its position. See Oppos. Brf. at 17. This argument fails to establish that the grievance/arbitration procedure is optional, but it is further undermined by two other significant facts.

First, it is telling that before filing his judicial action, Moen asked the Union to represent him, and the Union processed his grievance through part of the grievance machinery before determining itself that Moen had been terminated for "just cause." App. 172-73, 178-80 (Tr. 1033:23 – 1034:11; 1177:16 – 1179:9); App. 24 (Tr.Ex. 108). It was not until Moen decided that the collective bargaining agreement's remedial mechanism no longer suited his individual interests that he filed suit. Moen's conduct indicates that even he knew the CBA's grievance/arbitration procedure was mandatory. See Prudden, 946 F. Supp. at 579 n.6 (finding persuasive employer's argument that employee "recognized the exclusivity of the CBA's grievance procedures by demanding Union representation . . ."); cf. Tomasetti v. Prudential Ins. Co. of America, 1996 WL 604752 *3 (E.D. Cal., July 2, 1996 ("Because Plaintiff here initiated arbitration

require interpretation of a collective bargaining agreement are exactly the types of state law claims that have been repeatedly held to be preempted. See, e.g., Garley v. Sandia Corp., 236 F.3d 1200 (10th Cir. 2001) (breach of implied employment agreement and defamation); Byrd v. VOCA Corp. of Washington, D.C., 962 A.2d 927 (D.C. 2008) (wrongful discharge in violation of public policy).

proceedings under the terms of the CBA with the exclusive representation of the Union, he cannot now pursue his remedies in a judicial forum.”).⁷

Second, Moen’s argument is further undermined by the express notation in the CBA that Step 3 of the grievance/arbitration procedure is “Optional.” Appellant’s App. 200. Certainly, the parties’ use of the express term “Optional” in connection with Step 3 provides powerful evidence that steps not so limited were intended to be mandatory. See Rice v. Providence Regional Med. Ctr. Everett, 2009 WL 2342449 *4 (W.D. Wash. 2009) (finding arbitration mandatory, not optional, in part because another step in the grievance procedure was expressly noted as being “Optional,” indicating that had the parties intended to make any other aspect of the procedure optional they would have so stated).

For all of these reasons, as well as those set forth in Sunstone’s Opening Brief, the Trial Court’s denial of Sunstone’s Motion for Summary Judgment on Moen’s wrongful discharge claim should be reversed and the case should be remanded with directions that the Trial Court dismiss the claim with prejudice.

⁷ As a bargaining unit member who had ceded to the Union the right to be his “exclusive bargaining representative” – *see* Appellant’s App. 196 (CBA §1) – Moen is bound by the Union’s decision to abandon the claim prior to exhausting the grievance/arbitration procedure, unless he can prove that the Union violated its duty of fair representation. See Vaca v. Sipes, 386 U.S. 181, 191 (1967); Vera v. Saks & Co., 424 F.Supp.2d 694, 704-05 (S.D.N.Y. 2006); Atchley v. Heritage Cable Vision Assocs., 926 F. Supp. 1381, 1386-87 (N.D. Ind. 1996); Cole v. Pathmark of Fairlawn, 672 F. Supp. 796, 798, 803-04 (D.N.J. 1987).

II. The Trial Court’s Modification of the Alleged Defamatory Statement and its Failure to Modify the Actual Malice Instruction in Light of its Rulings Following Close of the Evidence Require a New Trial

In its Opening Brief, Sunstone assigned two principal errors to the Trial Court’s rulings following the close of the evidence. First, the Trial Court unilaterally modified the Special Verdict Form to change the content of the alleged defamatory statement from “Moen said he brought a gun to a meeting” to “Moen brought a gun to a meeting.” Compare Appellant’s App. 79-81 with 82-84 (Sunstone’s First Amended Proposed Verdict Form and the jury’s Special Verdict Form).⁸ This modification stripped from the jury an ability to determine whether or not the modified statement had been made and whether it was true or false. Second, the Trial Court made three critical rulings concerning the application and existence of the qualified privilege which required the Jury Instruction for “actual malice” to be modified. However, the Trial Court did not notify the jury of these rulings or modify the “actual malice” instruction, thus rendering the jury incapable of reaching a correct verdict.

A. Moen’s Defense of the Trial Court’s Unilateral Modification of the Alleged Defamatory Statement is Unconvincing

Moen advances two arguments in support of the Trial Court’s modification of the critical statement. First, Moen argues that the Trial Court’s decision to change the statement from “Moen said he brought a gun” to “Moen brought a gun”

⁸ The actual statements are significantly longer, but for shorthand purposes Sunstone refers to them as the “Moen said he brought a gun” version and the “Moen brought a gun” version.

was “reasonable under the facts of the case” because it was “uncontroverted” that Sunstone made the second version of the statement. Oppos. Brf. 35. Second, Moen argues that even if the Trial Court’s decision was erroneous, Question 1 on the Special Verdict Form (regarding the existence of “Just Cause”) solved the problem, rendering the error harmless. Neither of these arguments has merit.

1. **Moen Mischaracterizes the Evidence to Support his Argument**

First, the evidence does not show what Moen says it does, and it certainly does not show that anything is “uncontroverted.” The differences are evident even when considering Moen’s brief itself, comparing Moen’s argument on pages 34-35 (which he supports with “facts” that he presents *without* citation to the Record) with his recitation of cited facts on pages 8-9. Specifically:

(i) In arguing that it is “uncontroverted” that Sunstone made the “Moen brought a gun” version of the statement, Moen asserts that H heard from M that “Respondent brought a gun” to the meeting. Oppos. Brf. 34. But in his recitation of *cited* facts he notes that H testified that M told him that “Respondent *had told* Mr. M that he brought a gun” to the meeting. Id. at 8.

(ii) In his argument, Moen asserts that H then told W that “Moen brought a gun” to the meeting. Id. at 34. But again, in the *cited* facts he notes that W’s version of the statement was that M said “Respondent *had told* him that he had brought a gun” to the meeting. Id. at 8.

(iii) Again in his argument section, Moen asserts that W told McKenney that Moen “brought a gun” to the meeting. Id. at 35. In fact, again according to Moen’s own statement of *cited* facts, what W told McKenney was that M had *told him* that. Id. at 9. Moreover, McKenney himself testified that what W told him was that “Jeff [Moen] *had told them* that he had brought a gun” to the meeting. Appellant’s App. 143 (Tr. 907: 16-21).

Compare Oppos. Brf. at 8-9 (paragraphs 17-19) with Oppos. Brf. at 34-35.

Clearly, even Moen's own Record citations do not support his assertions.

Additionally, Moen's reliance on a police report (Resp. App. 61) and Sunstone's statements to the District Court, Third Judicial Circuit, in connection with its request for a restraining order is misplaced. The police report recites only what the reporting officer thought he received from "BOLO," which similar to an internal bulletin board, and the reporting officer testified that he did not know where this information came from or who reported it. See Suppl. App. 1-2 (Tr. 540:17 – 541:19). And of course, statements made to a judicial tribunal are absolutely privileged, and thus cannot form the basis of a defamation claim in any event. See Mahoney & Hagberg v. Newgard, 729 N.W.2d 302 (Minn. 2007).

Finally, the actual evidence shows that the true nature of what Sunstone's agents said, what they meant, and how these statements were interpreted overwhelmingly supports the "Moen said he brought a gun" version of the alleged statement and not the "Moen brought a gun" version. See Opening Brief at 27 (citing Record regarding Sunstone's agents' testimony concerning what they said, heard or learned about what Moen *had said*) and 30 n.9 (citing Record evidence that Moen was terminated for making threatening statements, not for possession of a firearm). Indeed, even had one of the Sunstone employees uttered the "Moen brought a gun" version of the statement in the course of any of these internal discussions, there is no evidence that the statement was understood and interpreted

to mean that Moen actually brought a gun to the meeting. See, e.g., Appellant's App. 159-61 (Tr. 957:17 – 958:1, 974:1-9) (testimony of McKenney that he never knew whether or not Moen actually brought a gun to the meeting).

Accordingly, Moen's alleged evidence of the "Moen brought a gun" version of the statement is woefully inadequate.

Of course, it is absolutely critical to remember that this appeal is not about whether or not any particular evidence is sufficient to support any particular jury verdict. The issue is whether it was proper for the Trial Court to modify the alleged defamatory statement over Sunstone's objection without inserting the requested correcting question to allow the jury to determine whether or not the modified statement had been made. See State v. Moore, 699 N.W.2d 733, 373 (Minn. 2005) (Reasoning that there is a distinction between determining whether the evidence was sufficient to support a verdict, on the one hand, and "instructing the jury as a matter of law that an element of the offense has been established", on the other). Sunstone was willing to stipulate to one version of the statement, but not the other, and thus the Trial Court's unilateral modification amounted to nothing less than a directed verdict on a critical question of fact that should have been reserved for the jury.

Moreover, when considered in light of Moen's testimony that he did not bring a gun to the meeting, and Sunstone's agents' testimony that they had no idea if Moen brought a gun or not, instructing the jury that Sunstone's agents stated that Moen had, in fact, "brought a gun to the meeting" directed a finding of falsity

as well. It can hardly be disputed that the truth or falsity of the “Moen brought a gun” version of the statement is very different from the truth or falsity of the “Moen said he brought a gun” version. By deciding that a particular statement was made and that it was false, the Trial Court left little role for the jury, which constitutes reversible error.⁹ In Ericson v. Hallaway, 2008 WL 3896872 (Minn. App., Aug. 26, 2008), for example, this Court granted a new trial to a defamation defendant when the Trial Court improperly stripped from the jury several key elements of the claim. This Court noted: “In private plaintiff/private matter defamation cases, the Minnesota Supreme Court has placed the burden of establishing *each element* of the claim on the plaintiff.” Id. at *14 (emphasis added). The Court further noted that questions of truth and falsity of allegedly defamatory statements are “inherently within the province of the jury.” Id. at *13.

2. **Moen’s Assertion that the Trial Court Properly Inferred one Statement from the Other only Compounds the Error**

Moen appears to recognize the disconnect between the two versions of the statement, and he attempts to minimize and merge them by arguing that the “Moen said he brought a gun” version of the statement implies the “Moen brought a gun” version of the statement. Thus, he argues, it was appropriate for the Trial Court to

⁹ The Trial Court’s modification affected the jury’s consideration of both whether the statement was made and whether it was false. Moen attempts to minimize these issues by arguing that the modification makes little difference because both versions of the statement are “defamatory.” However, whether or not the stipulated statement or the statement actually given to the jury – or both – are “defamatory” is irrelevant to this appeal. The Trial Court’s modification affected the jury’s assessment of whether the statement was made and whether it was false, two wholly separate elements of the defamation claim.

tell the jury that it was the second statement – the apparently implied statement – that had been made.

Moen’s argument confuses very different implications and inferences. Sunstone does not dispute that if Moen said he brought a gun to the meeting, one could infer that Moen had, in fact, brought a gun to the meeting. Indeed, if an individual says he has engaged in specific conduct, the jury can be permitted to infer that he did engage in that conduct, and in fact Sunstone argues in its Opening Brief the Trial Court should have issued this instruction clearly. Nor does Sunstone dispute that a statement can be false either directly or by implication. But Moen’s argument is far different. Moen argues that the first statement’s implication of the second is so strong and indisputable that the Trial Court was justified in making the inferential leap itself instead of leaving that issue for the jury. Of course, it is one thing to allow the jury to consider whether the statement “Moen said he brought a gun” is substantially false because it falsely implies that “Moen brought a gun.” It is quite different for the Trial Court to make that finding in advance and codify it in the Special Verdict Form. In short, whether the jury would have determined that one statement implied the other can never be known because the Trial Court made the inferential leap itself.

3. The Jury’s Answer to Question 1 of the Special Verdict Form Does Not Render the Question 3 Error Harmless

Moen argues that Question 1, which asks whether Moen was terminated for Just Cause – clears up the issue, rendering any error in Question 3 harmless.

Moen reasons that because the jury found that Sunstone did not have Just Cause to discharge him, it *must have found* that Moen did *not* say he brought a gun to the meeting. Thus, Moen reasons, by the time the jury considered Question 3, it had *already determined* that Moen had *not* made the gun-related statements and, therefore, even had Question 3 been posed as Sunstone had requested, the jury had already decided that the “Moen said he brought a gun” version of the statement was false.

Moen’s analysis is deficient on at least three levels. First, conclusions concerning whether Moen did or did not make any gun-related statements are not embedded within the jury’s consideration of the existence or non-existences of Just Cause. “Just Cause” was defined by the Trial Court merely as the breach of “the standards of job performance that the defendant established and uniformly applied.” Appellant’s App. 69. Thus, the jury’s Just Cause finding cannot be said to be premised on any particular finding regarding Moen’s statements. Second, Moen’s argument further illustrates the prejudice Sunstone suffered when the Trial Court modified the statement. A jury is not required to consider the Special Verdict Form questions in the order they are given, and the Court cannot assume that the questions were considered in that order. It would not have been unreasonable for the jury to have considered Question 3 *first*, as Question 3 relates directly the central factual issues of the case. Thus, if this Court were to accept Moen’s reasoning, it would necessarily follow that the Trial Court’s modification of Question 3 likely polluted the jury’s consideration of Question 1. See Olson v.

Brenhaug, 1992 WL 203292 *3 (Minn.App., Aug. 25, 1992) (When wording of special verdict form can mislead the jury, new trial is warranted). Finally, because the wrongful discharge claim should have been dismissed, the Just Cause question never should have been presented to the jury in the first place. Thus, if Moen's argument is accepted, reversal of the Trial Court's summary judgment decision on the wrongful discharge claim requires a new trial on the defamation claim so that the jury can consider the defamation questions in isolation.¹⁰

B. The Trial Court's Failure to Inform the Jury of its Rulings on Qualified Privilege Renders the Jury's Finding of "Actual Malice" Deficient and Requires Remand for a New Trial

Moen misses the point when he argues that that because there is no standard jury instruction regarding "Qualified Privilege" the Court could not have committed reversible error in failing to give such a non-existent instruction. Oppos. Brf. at 39-41. Sunstone is not suggesting that the Trial Court was required to give a "Qualified Privilege" *instruction*. Instead, the Trial Court's error was its failure to modify the "Actual Malice" instruction to account for its ruling that Sunstone's agents had a reasonable basis and probable cause to believe in the truth of their statements about Moen at the time they made them. A finding of "actual malice" can result from a *either* a finding that the defendant made the alleged statement with ill will *or* a finding that the defendant did not have cause to believe

¹⁰ It is also worth noting that the Trial Court's decision to make an evidentiary finding on this critical aspect of the case is a legal error that is reviewed *de novo*, and Moen's suggestion that the Court review this issue under an abuse-of-discretion standard is incorrect. Frazier v. Burlington Northern Santa Fe Corp., 788 N.W.2d 770, 778 (Minn.App. 2010).

the statement it made. Lewis v. Equitable Life Assurance Society, 389 N.W.2d 876, 891 (Minn. 1986); Appellant’s App. 193 (Tr. 1236:4-12) (Trial Court’s jury instructions regarding “Actual Malice”). The Trial Court should have modified this instruction to inform the jury that only one of those grounds was still in issue. At this point, the error requires reversal because there is “no principled mechanism for determining what evidence the jury actually considered” in determining the presence of actual malice. Ericson, 2008 WL 3896872 at *15.¹¹

Finally, contrary to Moen’s argument, at no time did Sunstone admit that it failed to preserve any of these errors for trial. Moen supports this argument simply by citing to Sunstone’s post-trial brief in which it sets forth the general, boilerplate standards for new trial motions. See Oppos. Brf. at 39; Resp. App. at 64. Sunstone addressed this argument in its Opening Brief. See Opening Brf. at 33 n.10. Moreover, when an erroneous instruction or verdict form results in an error of fundamental law or controlling principle, a new trial is justified even if the prejudiced party made no objection before the jury retired. Johnson v Jensen, 433 N.W.2d 472, 475 (Minn.App. 1988), aff’d in part, rev’d in part, 446 N.W.2d 664 (Minn. 1989); see also Kalevig v. Holmgren, 197 N.W.2d 714, 718-19 (Minn. 1972); Zurko v. Gilquist, 62 N.W.2d 351, 354 (Minn. 1954). Further, where an error relating to jury instruction was not properly preserved, a court may review

¹¹ The principle at issue here – that the Trial Court’s mistaken submission of a theory of recovery requires reversal when it is impossible to know if the jury considered the errant theory in reaching its decision – is well-known. See, e.g., Gilbert v. Brindle, 237 N.W.2d 83, 84-85 (Minn. 1975); Kaiser-Bauer v. Mullan, 609 N.W.2d 905, 911 (Minn.App. 2000).

and consider “plain error in the instruction affecting substantial rights.”

Minn.R.Civ.P. 51.04(b). These principles are controlling here.

C. **The Trial Court’s Decision to Strike Sunstone’s Post-Trial Motion is Immaterial to this Appeal**

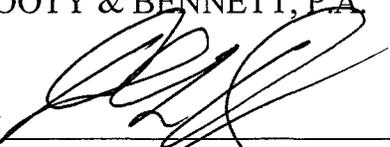
Moen seems to suggest that the Trial Court’s striking of Sunstone’s post-trial motion as a result of an untimely hearing should have some impact on this appeal. Oppos. Brf. 32-33. But as the Minnesota Supreme Court clearly and unequivocally held in Ruby v. Vannett, 714 N.W.2d 417, 424-25 (Minn. 2006), an untimely hearing on a post-trial motion does not divest the trial court of jurisdiction or render the case unappealable, so long the post-trial motion was timely filed and served. Here, Sunstone’s post-trial motion was timely filed and served, and thus the Trial Court’s determination that the hearing was untimely does not impact the appeal.

CONCLUSION

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

Dated: October 31, 2011

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CERTIFICATION OF BRIEF LENGTH

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