

NO. A11-1339

State of Minnesota
In Court of Appeals

Kathryn Brenny,

Plaintiff-Respondent,

vs.

The Board of Regents of the University of Minnesota,

Defendant,

and

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

Defendant-Appellant.

BRIEF AND APPENDIX OF RESPONDENT KATHRYN BRENNY

FAFINSKI MARK & JOHNSON, P.A.
Donald Chance Mark, Jr. (#67659)
Shannon M. McDonough (#259512)
Peter A. T. Carlson (#350448)
Flagship Corporate Center, Suite 400
775 Prairie Center Drive
Eden Prairie, MN 55344
Tel: (952) 995-9500
Fax: (952) 995-9577
donald.mark@fmjlaw.com
shannon.mcdonough@fmjlaw.com
peter.carlson@fmjlaw.com

Attorneys for Plaintiff-Respondent
Kathryn Brenny

ANTHONY OSTLUND BAER
& LOUWAGIE, P.A.
Richard T. Ostlund (#144277)
Randy G. Gullickson (#185607)
3600 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Tel: (612) 349-6969
Fax: (612) 394-6996
ROstlund@aoblaw.com
RGullickson@aoblaw.com

Attorneys for Defendant-Appellant
John Harris

(Additional Counsel listed on following page)

OFFICE OF THE GENERAL COUNSEL,
UNIVERSITY OF MINNESOTA

Brent P. Benrud (#253194)

360 McNamara Alumni Center

200 Oak Street S.E.

Minneapolis, MN 55455

Tel.: (612) 624-4100

Fax: (612) 626-9624

brent.benrud@ogc.umn.edu

Attorneys for Defendants

The Board of Regents

of the University of Minnesota

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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Statement of the Issues

- I. Whether the trial court has subject matter jurisdiction over Respondent Kathryn Brenny's ("Brenny") tortious interference with contract claim where her Amended Complaint avers that Appellant John Harris ("Harris") acted maliciously and in bad faith, such that he was acting outside of the course and scope of his authority and employment, and where the claim does not implicate a public employment decision.

The district court correctly determined that it had subject matter jurisdiction over Brenny's tortious interference with contract claim based on the nature of the allegations and the factual averments in the Amended Complaint.

Most apposite cases: *Willis v. County of Sherburne*, 555 N.W.2d 277 (Minn. 1996); *Williams v. Board of Regents of Univ. of Minn.*, 763 N.W.2d 646 (Minn. Ct. App. 2009)

Statement of the Case

On January 12, 2011 Brenny commenced this proceeding in Hennepin County District Court against Harris, individually and in his capacity as Director of Golf, and The Board of Regents of the University of Minnesota (the “University”). Brenny alleged five counts, including a claim against Harris individually for tortious interference with contract, a claim against both Harris and the University for violation of Minnesota Statute § 181.64, and three claims against the University for violation of the Minnesota Human Rights Act—1) sex and/or sexual orientation discrimination; 2) sexual harassment; and 3) reprisal/retaliation.

Harris moved the district court, the Honorable William R. Howard presiding, to dismiss Brenny’s claim of tortious interference with contract for 1) failure to state a claim for relief; and 2) lack of subject matter jurisdiction. The district court denied Harris’ motion on both grounds. It held that Brenny alleged sufficient facts showing that Harris acted maliciously and in bad faith towards her. As such, the district court determined that she had properly alleged a claim for tortious interference with contract against Harris, her supervisor. It also found that it had subject matter jurisdiction because Harris’ actions were outside the course and scope of his employment and that his interference with Brenny’s contract did not implicate a public employment decision.

Harris and the University also brought a motion to dismiss Brenny’s claim under Minnesota Statute § 181.64. The district court granted this motion.

Harris filed his notice of appeal on July 27, 2011. Harris also sought discretionary review under Minnesota Rule of Civil Appellate Procedure 105.01 of the district court’s

denial of his motion to dismiss Brenny's tortious interference claim for failure to state a claim. Brenny similarly sought discretionary review of the district court's dismissal of her claim under Minnesota Statute § 181.64. This court denied both Harris and Brenny's petitions for discretionary review.

This Court is now presented Harris' interlocutory appeal of the limited issue of whether the district court has subject matter jurisdiction to consider Brenny's claim of tortious interference against Harris.

Statement of the Facts

Harris' Statement of the Facts selectively excerpts the facts alleged in the Amended Complaint that he believes are most supportive of his appeal. His failure to provide this Court with the full picture of the facts at issue in this matter is telling. Harris' apparent strategy for combating the allegations made by Brenny regarding his malicious and discriminatory treatment of her based on her sexual orientation and gender is to pretend those allegations do not exist. Naturally, removing reference to Harris' malicious treatment of Brenny presents an incomplete account of Brenny's allegations. Harris' omission and distortion of these essential facts limits the Court's ability to fully and fairly review the rationale and authority supporting the district court's decision denying Harris' motion to dismiss on the grounds of subject matter jurisdiction. For these reasons, Brenny includes a complete recitation of the material facts below.

A. Harris Recruits and Hires Brenny from North Carolina for the University's Associate Head Coach Position of Women's Golf.

In 2010, Harris was employed as the Director of Golf for the University. (Appellant's Appendix ("A.App.") 3-4.) Because of a vacancy, Harris began the hiring process for the associate head coach of the University's women's golf team (the "Women's Head Coach") in July 2010. (A.App. 4 at ¶ 8.) Harris did not want to hire a lesbian and factored the candidate's sexual orientation into his search and/or hiring decision for the Women's Head Coach position. (A.App. 4 at ¶ 9.)

In July 2010, Harris reached out to Brenny about serving as Women's Head Coach of the golf team. (A.App. 4 at ¶ 10.) Harris told Brenny to think about it and call him

back. (*Id.*) Brenny, who is homosexual, was living in North Carolina at the time that Harris first contacted her. (A.App. 5 at ¶ 12.) When Brenny called Harris back, she indicated she was very interested in the position. (A.App. 5 at ¶ 13.) As an accomplished alumni of the NCAA Division I golf program at Wake Forest University, Brenny understood that the job of Women’s Head Coach entailed significant responsibilities and leadership, including providing instruction to players, recruiting (both on campus and off campus), and traveling with the team to golf tournaments. (A.App. 5 at ¶ 11.)

In response to Brenny’s interest in the Women’s Head Coach position, Harris told her to submit a resume. (*Id.*) Brenny accessed the University’s job application website and read the following job description:

Associate Head Coach – Women’s Golf / Duties and Responsibilities

The position will report to The Director of Golf

The responsibilities include, but are not limited to:

1. Serving as the Associate Head Coach, Woman’s Golf.
2. Assist in selection, supervision, and coaching of the team toward a positive experience and athletic excellence.
3. Assist in identification, and recruitment of qualified student-athletes; demonstrate commitment to recruitment of students of color.
4. Assist in development and execution of plans for the season; including tournament schedules, practice schedules and conditioning programs.
5. Assist in overseeing and monitoring of student-athletes[’] academic effort and performance.
6. Assist with special events and tournaments; planning and conducting clinics, camps, seminars, and outreach to public service.

7. Establishment and maintenance of effective relationships within the athletics department, the University, community, booster club, alumni, and high school coaches.
8. Commitment to and responsibility for adhering to all rules and regulations of the Department, the University, the Big Ten Conference, and the NCAA.

(A.App. 5 at ¶ 14.)

In early August of 2010, Brenny met with Harris to discuss the Women's Head Coach position. (A.App. 5 at ¶ 15.) During this meeting, Harris informed Brenny that he could not hire his son-in-law, Ernie Rose, to be Women's Head Coach because Rose did not have a college degree. (A.App. 6 at ¶ 16.) Instead, he hired Rose as Director of Instruction.¹ (*Id.*) Shortly thereafter, with Harris' encouragement, Brenny applied for the position through the University's website. (A.App. 6 at ¶ 17.) On or about August 21, 2010, Brenny interviewed with Harris for the position of Women's Head Coach. (A.App. 6 at ¶ 18.) Harris offered her the position, and she accepted the offer. (*Id.*)

After accepting the offer, on August 25, 2010, Brenny received a Memorandum of Agreement ("MOA") from Senior Athletic Director Elizabeth Eull. (A.App. 6 at ¶ 19.) The MOA provided that Brenny was to "fulfill the duties of said position as posted in the job description." (A.App. 6 at ¶ 22.) Brenny executed the MOA on or about August 30,

¹ Harris' brief avers, without support, that he did not hire his son-in-law Rose as the director of instruction. (App. Brief at 5, n.5.) This is inaccurate and misleading. In the summer of 2010, Rose's one-year contract with the University ended. (Brenny's Memorandum in Support of Motion to Amend, dated May 6, 2011, at 5.) Harris chose to hire Rose for the 2010-2011 season as the director of instruction. (*Id.*) On top of this, Harris negotiated a new agreement for Rose with the University for the year term, and secured a more than two-fold increase in his pay under the agreement. (*Id.* at 5-6.) While Brenny and the associate head coach of men's golf were paid \$44,000 for the year, Harris paid Rose \$49,500 for the year. (*Id.*)

2010. (A.App. 6 at ¶ 23.) Around the same time, Harris also hired John Carlson to be the associate head coach of men's golf. (A.App. 6 at ¶ 24.) Carlson's background, as well as his job description, mirrored Brenny's. (A.App. 6 at ¶¶ 25, 26.)

Brenny's MOA contained a provision concerning the renewal of Brenny's employment at the end of its term. (A.App. 43 at ¶ VI.) It stated that, in accordance with the University's policies and procedures for professional and administrative employees (the "P&A Policies and Procedures"), the University could provide Brenny with notice of the non-renewal of her appointment (e.g., her contract would not be renewed at the end of the contract term), and then the University could reassign her to other or no duties without just cause. (*Id.*) This provision and the related P&A Policies and Procedures mandated that the University could only reassign Brenny's duties if it first provided her with official written notice of the non-renewal. (*Id.*; Respondent's Appendix ("R.App.") 1.)²

² This Court may consider the P&A Policies and Procedures because they are referenced in the MOA and are therefore a necessary component of the MOA. *See In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995) ("In deciding a motion to dismiss, however, the court may consider the entire written contract when the complaint refers to the contract and the contract is central to the claims alleged."). The relevant policy is included with Brenny's appendix at R.App. 1-4. This policy and procedure was also a part of the record before the district court. See Ex. W to May 6, 2011 Affidavit of Alyson M. Palmer submitted in support of Brenny's Motion to Amend.)

B. Harris Intentionally Procures the Breach of Brenny's Contract by Refusing to Allow Her to Perform her Job Duties.

Harris first learned that Brenny is a lesbian after she was hired. (A.App. 7 at ¶ 27.) Beginning on September 1, 2010, just after Brenny began her employment at the University, Harris began to interfere with Brenny's performance of her job duties. (A.App. 7 at ¶ 28.) This included, but was not limited to, the following acts by Harris:

- 1) Not allowing Brenny to travel with the women's team to Charleston, South Carolina for the first tournament of the year, but instead requiring her to assist with the men's tournament at Spring Hill Golf Club;
- 2) Delegating administrative tasks to Brenny, including clerical work, and escorting recruits for the men's golf team to a University football game;
- 3) Refusing to allow Brenny to meet with the members of the women's team, and telling her that she had "nothing to talk to these girls about";
- 4) Limiting Brenny's ability to email the members of the team to only one email a day;
- 5) Prohibiting Brenny from providing golf instruction to the women's team, telling her that the seniors on the team were "[Ernie Rose's] team" and that Rose was to serve as their instructor;
- 6) Telling Brenny she should not talk to the members of the women's team about golf instruction, but instead only about "boys, life, and school"; and

7) Instructing Brenny not to respond to emails from prospective student-athletes.

(A.App. 7 at ¶ 28.) In contrast to Brenny, Carlson, the associate head coach for men's golf, was allowed to fulfill the duties as set forth in his identical job description. (A.App. 8 at ¶ 29.)

C. Brenny Complains to Eull and Crum About Harris' Interference With the Terms of her Contract.

On or about September 13, 2010, less than two weeks after beginning her employment, Brenny went to Eull to complain about Harris' unfair treatment of her. (A.App. 8 at ¶ 30.) In particular, Brenny informed Eull that Harris was interfering with Brenny's performance of the duties of Women's Head Coach as they were set out in her MOA. (A.App. 8 at ¶ 31.) In fact, rather than allowing Brenny to fulfill the role for which she was hired, Harris was instructing Rose to perform and act as the Women's Head Coach. (*Id.*) Eull told Brenny to discuss Harris' unfair treatment with Associate Athletic Director David Crum. (*Id.*) On or about September 15, 2011, Brenny met with Crum and expressed her concerns that she was not allowed to perform the job for which she was hired: Women's Head Coach. (A.App. 8 at ¶¶ 32, 33.)

On or about Friday, September 17, 2010, Brenny met with Eull, Crum and Harris. (A.App. 9 at ¶ 34.) During this meeting, Brenny was informed that the University was providing her with a new job description and was told to spend the rest of the day and weekend reviewing the new job description in order to decide if she was "on board" with Harris' program. (A.App. 9 at ¶ 35.) Brenny understood this new job description and

Harris's words during the September 17 meeting as an ultimatum: that is, accept the new job description or quit. (A.App. 9 at ¶ 36.) The new job description provided:

Katie Brenny – Associate Head Coach

The position will report to The Director of Golf

The responsibilities include, but are not limited to:

1. Watch, evaluate and monitor the players at home while both teams travel – for non-traveling men and women. Travel as needed and appropriate with the women's team.
2. Assist in recruiting process with specific duties to update recruiting results weekly for both teams; demonstrate commitment to recruitment of students of color.
3. Act as the communication coordinator for web page, facebook, boosters and alumni.
4. Assist in overseeing and monitoring of student-athletes['] academic effort and performance; act as the academic liaison for coaches with academic counselor and tutors; monitor grades of all student-athletes, both men and women.
5. Monitor the conditioning program for both teams; act as the liaison with the strength coach.
6. Establish and maintain effective relationships with the athletics department, the University, community, booster club, alumni, and high school coaches.
7. Assist with the Gopher Invitational at Spring Hill.
8. Commitment to and responsibility for adhering to all rules and regulations of the Department, the University, the Big Ten Conference, and the NCAA.

(Id.)

On or about Tuesday, September 21, 2010, Brenny again met with Eull, Crum and Harris. (A.App. 9 at ¶ 37.) At this meeting, Brenny presented them with a letter expressing her concerns about how she had been treated and requested that the University reconsider its position about her job description. (A.App. 9 at ¶ 38.) Notwithstanding,

Brenny affirmed her commitment to the golf program and her intentions to fulfill the job duties she had been hired to perform. (*Id.*)

D. Harris' Mistreatment of Brenny Continues After Brenny's Meetings With Eull and Crum.

Despite Brenny's efforts to address the issue, Harris's mistreatment of Brenny continued. (A.App. 10 at ¶ 40.) This included: 1) excluding Brenny from a joint men's and women's team event and dinner at Harris' home, to which Rose and Carlson were invited to attend; 2) delegating administrative tasks to Brenny, including making travel arrangements for the women's team and responding to Harris' emails; 3) refusing to allow Brenny to travel with the women's team to tournaments in Vail, Colorado, Chicago, Illinois, and Las Vegas, Nevada; and 4) referring all questions about the women's team to Rose during a dinner with on-campus recruits. (*Id.*) Further, Brenny also learned that Rose was undermining Brenny's relationship and credibility with the players on the women's team, by telling the team that hiring Brenny was the worst decision the University's golf program has ever made. (A.App. 10 at ¶ 41.) Brenny also learned that Rose told players on the women's golf team that the reason Brenny did not travel with the team was because Harris discovered she was a homosexual and did not want her on the road with the team. (A.App. 11 at ¶ 52.)

E. Athletic Director Joel Maturi Tells Brenny to Quit or Comply With Harris' Demands.

On October 12, 2010, Brenny met with Athletic Director Joel Maturi. (A.App. 10 at ¶ 42.) During the meeting, Brenny expressed her concerns over not being allowed to perform the duties of Women's Head Coach. (A.App. 10 at ¶ 43.) Maturi told

Brenny that her choices were to either quit or comply with Harris' demands. (A.App. 10 at ¶ 44.) About a week later, Brenny contacted HR Executive Assistant Ellen Downing about how to begin the University's internal grievance process. (A.App. 11 at ¶ 45.) That same day, Maturi summoned Brenny to meet with him. (A.App. 11 at ¶ 46.) Brenny met with Maturi on or about October 20, 2010, and during that meeting Maturi stated that he did not see that there was a resolution to Brenny's situation with Harris and indicated the University would offer her a severance package. (A.App. 11 at ¶ 48.) A few days later, the University alternatively offered to transfer Brenny to a sales position at TCF Bank Stadium—a position clearly outside the University's golf program. (A.App. 11 at ¶ 49.) Brenny's work environment within the golf program grew so intolerable that she ultimately accepted a separation agreement with the University. (A.App. 11 at ¶ 50.)

On October 27, 2010, Brenny executed a separation agreement. (A.App. 11 at ¶ 51.) Shortly after, pursuant to Minnesota Statute § 363A.31, Brenny rescinded the separation agreement. (A.App. 11 at ¶ 53.) Following Brenny's rescission, the University informed Brenny of its intention to issue a notice of non-renewal of her MOA and reassign her to the sales position at TCF Bank Stadium. (A.App. 11 at ¶ 54.) Because the sales position did not entail coaching duties and was outside of the golf program altogether, this amounted to a constructive discharge of Brenny. (A.App. 11 at ¶¶ 55, 56.) Brenny served her Amended Complaint on January 21, 2011.

Argument

Perhaps the most startling aspect of Harris' brief is his refusal to accept Brenny's allegations as true, which he must do on a Rule 12 motion. Harris' distortion of the facts and allegations in Brenny's Amended Complaint undermine the arguments in his brief because they are based on an inaccurate premise. When Brenny's actual allegations are viewed under Minnesota law, it is clear that the district court has subject matter jurisdiction. Harris' interference with Brenny's contract was done with malice and bad faith and took his conduct outside of the course and scope of his authority and employment with the University. As a result, his tortious interference was not a quasi-judicial action that triggers review by writ of certiorari. Furthermore, because Harris' interference with Brenny's contract did not constitute a discretionary University employment decision, it does not require review by writ of certiorari.

Finally, Harris' brief to this Court gratuitously alleges that Brenny is pursuing her case as a media and marketing tool. This argument has absolutely no relevance to the limited issue that is before this Court. Moreover, to suggest that Brenny would chose to have her personal life and all of its intimacies placed under a microscope for the world to see and take apart piece-by-piece is absurd. Once the distractions offered by Harris are removed, it is clear the district court has subject matter jurisdiction over Brenny's tortious interference with contract claim.

I. The District Court Has Subject Matter Jurisdiction Over Brenny's Tortious Interference With Contract Claim because Harris' Tortious Acts Fall Outside of the Quasi-Judicial Doctrine.

Harris moved the district court to dismiss Brenny's tortious interference claim on the grounds that it lacked subject matter jurisdiction to hear the claim. The district court properly denied Harris' claim, finding that it had subject matter jurisdiction for two principal reasons: 1) Harris' actions were made with malice and bad faith, and were therefore not within the course and scope of his official authority; and 2) Harris' tortious interference with Brenny's contract involved conduct that does not implicate a discretionary employment decision by the University. (Appellant's Addendum ("A.Add") 10-11.) The district court's ruling must be affirmed and Brenny must not be required to bring her claim only by a writ of certiorari. (*Id.*)

The limited issue before this Court is whether Harris' malicious and bad faith conduct, which the district court determined supported Brenny's claim of tortious interference with contract, is nonetheless subject to the protections afforded to public employment decisions. On a motion to dismiss under Minnesota Rule of Civil Procedure 12.02, all factual allegations must be accepted as true and all inferences must be drawn in the favor of the nonmoving party. *N. States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963); *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). "The plaintiff must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims (here, the right to jurisdiction), rather than facts that are merely consistent with such a right." *Stalley v. Catholic Health Initiatives*, 509 F.3d 517,

521 (8th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).³ The issue of whether a district court has subject matter jurisdiction over a claim is a question of law and is subject to de novo review. *Burkstrand v. Burkstrand*, 632 N.W.2d 206, 209 (Minn. 2001).

- a. **Brenny’s claim is not subject to review by writ of certiorari because Harris’ acts were outside of the scope and authority of his employment and Harris is personally liable for his tortious acts.**

Contrary to Harris’ argument, Brenny’s claim of tortious interference with contract does not arise directly from, and necessarily require review of, the University’s employment decisions. Rather, Brenny’s claim goes to Harris’ malicious and bad faith actions in interfering with her contract—actions that went beyond Harris’ discretionary authority. The district court identified this distinction and correctly analyzed the issue under established Minnesota law.

- i. *Minnesota case law supports the conclusion that Harris’ malicious and bad faith actions are not subject to review by writ of certiorari.*

In order to determine if a decision is quasi-judicial, the Minnesota Supreme Court has set forth the following three factors to consider: “(1) investigation into a disputed claim and weighing of evidentiary facts; (2) application of those facts to a prescribed standard; and (3) a binding decision regarding the disputed claim.” *Minn. Ctr. For Entl. Advocacy v. Metro Council*, 587 N.W.2d 838, 842 (Minn. 1999) (hereinafter “MCEA”); *Anderson v. County of Lyon*, 784 N.W.2d 77, 82 (Minn. Ct. App. 2010) (finding the board’s decision did not demonstrate any of the indicia of quasi-judicial acts set forth in

³ *Stalley* examined the analogous federal standard for dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

MCEA and, as such, “separation-of-powers principles do not constrain the district court’s jurisdiction”). Discretionary decisions in the employment context involving hiring or termination are subject to review by writ of certiorari. *See Willis v. County of Sherburne*, 555 N.W.2d 277, 279-283 (Minn. 1996) (holding breach of contract claim alleging wrongful termination is subject to writ of certiorari, but district court had subject matter jurisdiction over claim of defamation).

Where an employee’s actions are not within his/her discretion, authority or capacity of employment because they are made with malice and bad faith, the writ of certiorari process is inapplicable. Actions that are motivated by malice and bad faith necessarily are made without consideration for the appropriate “prescribed standard.” In fact, one of the central cases relied upon by Harris articulates this very principle. In *Grundtner v. University of Minnesota*, the court recognized that an employment decision could be exempt from the writ of certiorari process where the employee’s claim related to the supervisor’s actions outside of his authority and capacity as a University employee. 730 N.W.2d 323, 333 (Minn. Ct. App. 2007) (finding issue of scope and authority inapplicable because, in considering the facts and record on summary judgment, the court determined that the supervisor, Perkins, “acted within his authority and capacity as a University employee”); *see also Narum v. Burrs*, No. C8-97-563, 1997 WL 526304, *2 (Minn. Ct. App. Aug. 26, 1997) (A.App. 45-46) (finding because there are no allegations that plaintiff’s supervisor acted as a private individual or in his private capacity, there is no basis for finding writ of certiorari unavailable over claims against plaintiff’s

supervisor). A decision rooted in malice and bad faith, by definition, does not involve the application of facts to a prescribed standard.

Here, Brenny has expressly alleged that Harris' actions were "motivated by malice and bad faith towards Plaintiff" and that his "conduct . . . took him outside the course and scope of his authority and duties as Director of Golf, and renders him personally liable to Plaintiff." (A.App. 15 at ¶¶ 86-87.) Shortly after she began her employment, Harris learned Brenny was a lesbian. Whether motivated by this knowledge or by the fact that Brenny was a woman (while her counterpart with the men's golf team, Carlson, was not), Harris prevented Brenny from performing her job duties (while allowing Carlson to perform his duties). Bigotry, combined with his desire to use Brenny as a placeholder in order to advance his son-in-law Rose, drove Harris to tortiously interfere with Brenny's MOA with the University.

The interference was repeated, intentional, and conspicuous. It included the following:

1. Preventing Brenny from traveling and coaching the women's team during their first tournament of the year and instead requiring her to assist with the men's golf team's tournament;
2. Upon learning Brenny had scheduled a women's golf team meeting and photograph, instructing Brenny that he did not want her to meet with the team, and stating: "you have nothing to talk to these girls about." Brenny was directed to cancel the meeting and photograph;

3. Prohibiting Brenny from providing golf instruction to the women's team because the seniors on the team were "[Ernie Rose's] team." When asked what Brenny was supposed to talk to the seniors about, Harris stated that Brenny could talk to them about "boys, life, and school" but nothing about instruction;
4. Requiring Brenny to escort several men's golf team recruits to a University football game;
5. Prohibiting Brenny from sending more than one email a day to the members of the women's team;
6. Prohibiting Brenny from responding to emails she received from prospective student-athletes; and
7. Delegating menial and administrative tasks to Brenny, including typing up the schedules for the men's golf team.

Harris has erroneously argued that Brenny's pleadings do not adequately support her claim that Harris acted with malice and bad faith.⁴ As set forth above, Brenny has

⁴ Harris' argument that Brenny fails to allege that Harris acted with malice and bad faith is unavailing. Furthermore, this issue is not even properly before this Court. Harris' appeal is strictly limited to the narrow issue of subject matter jurisdiction per Minnesota Rule of Civil Procedure 12.02(a). In fact, Harris' petition to this Court for discretionary review of the trial court's denial of his Rule 12.02(e) motion to dismiss was expressly denied by this Court's Order of September 20, 2011. Harris' attempt to raise these arguments before the Court now is improper and must be disregarded. This Court's September 20, 2011 Order also bars Harris from raising his argument that the Minnesota Human Rights Act precludes a common-law tort claim against Harris. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider "only those issues that the record shows were presented and considered by the trial court in deciding the matter before it"). See also Section II *supra*.

averred, with considerable detail and heft, that Harris acted with malice and bad faith. The district court considered this very issue in ruling on Harris' motion to dismiss Brenny's tortious interference claim under Minnesota Rule of Civil Procedure 12.02(e). The district court's holding, which is not before this court on appeal and is the law of the case, determined that Brenny pled that Harris acted with malice and in bad faith. (A.Add. 13.) Harris' arguments to the contrary are not only improper, but they selectively ignore significant portions of Brenny's allegations that concern this very issue.

Harris goes to great length to argue that the decision in *Grundtner* is controlling. That decision, however, is factually and legally inapposite. There, Grundtner, a former University employee, alleged that his supervisor, Perkins, intentionally interfered with a prospective economic advantage by terminating his employment in order to hide or facilitate the supervisor's illegal practices. 730 N.W.2d at 333. Notwithstanding Grundtner's claims, because the matter was before the district court on summary judgment, the court determined that the allegations concerning Perkins' illegal practices were not supported by the record and, accordingly, that the supervisor acted within his authority and capacity as an employee. *Id.* at 331, 333 ("No one at the university ordered appellant [Grundtner] to violate the law. There is no evidence of pressure or directives requiring appellant [Grundtner] to violate the law.") Thus, not only did Perkins' tortious actions expressly concern the termination of Grundtner's employment, but the facts did not support the claim that Perkins acted outside of the scope of his authority. Here, Harris' actions did not concern the termination of Brenny's employment—rather, he

interfered with the fulfillment of her job duties—and her allegations, which must be accepted as true, establish that Harris acted outside of the scope of his authority and employment.

Harris' acts were made with malice, ill will, and bad faith and thus fall outside of the deferential penumbra of quasi-judicial decision making. The district court properly ruled that it had subject matter jurisdiction over Brenny's claim of tortious interference against Harris.

ii. Minnesota courts have consistently refused to extend executive branch protections to state employees acting with malice and beyond the scope of their employment.

Despite the clamor raised by Harris in his brief, the district court's finding that it has subject matter jurisdiction over Brenny's claim is hardly controversial. Because Brenny has alleged that Harris' acts were beyond the scope of his discretion and authority, Brenny's claim must be analyzed as though she had asserted a claim against a third party for tortiously interfering with her contract with the University. A third party's tortious interference would not receive the protection of a quasi-judicial decision merely because Brenny's contract was with the University. The focus would instead be on the nature of the third party's tortious conduct. The same analysis applies in this case: Harris' tortious conduct must be viewed outside of the scope of quasi-judicial decision-making.

Indeed, the University, Harris' former employer, has informed Harris that its decision to defend and/or indemnify him depends on whether Harris acted in the scope and authority of his employment. In a January 26, 2011 letter to Harris from the

University's former President, Robert Bruininks, the University indicates that it will defend and indemnify Harris because it determined that Harris was "acting within the course and scope of [his] University employment." (R.App. 5.)⁵ However, Bruininks declares that "[s]hould at any time our understanding of the facts related to this case change, the University reserves the right to reconsider and alter our determination regarding your coverage under this Policy." (*Id.*) The University's apparent uncertainty regarding whether Harris was acting within the scope and authority of his employment corroborates the district court's decision that it has subject matter jurisdiction over Brenny's claim of tortious interference.

The issue of whether an employee's supervisor acts with malice has been directly addressed in the analogous context of official immunity. In *Waddell v. State of Minnesota*, which involved a claim of tortious interference with contract by an employee against his supervisor, the supervisor contended that he was protected from the claim by the doctrine of official immunity. No. C9-97-1026, 1998 WL 27292, *2 (Minn. Ct. App Jan. 27, 1998) (R.App. 8-9.) The *Waddell* court disagreed and held that because malicious acts by an official are exempt from official immunity, "official immunity cannot logically protect an official from a tortious interference claim by an employee of

⁵ This Court may consider matters of public record on a motion to dismiss. See *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (explaining that in considering a Rule 12(b)(6) motion to dismiss, a court may consider "some materials that are part of the public record...") (quotation omitted); 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil 2d* § 1357, at 299 (1990) (court may consider "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint"). Bruinink's letter to Harris was attached as Exhibit Y to the Supplemental Affidavit of Randy G. Gullickson, dated February 21, 2011.

the official's organization.” *Id.* Likewise, this principle is set forth in the Minnesota Tort Claims Act, Minnesota Statute § 3.736. The statute provides that the state will not pay for injury to or loss of property caused by an employee if they are not acting within the scope of office or employment. Minn. Stat. § 3.736, subd. 1. *See also id.*, subd. 9 (“This subdivision [on Indemnification] does not apply in case of malfeasance in office or willful or wanton actions or neglect of duty....”). Thus, as in the context of official immunity, and under the Minnesota Tort Claims Act, it is axiomatic that where an employee is acting with malice and is necessarily outside of the course and scope of his employment, the writ of certiorari requirement is similarly inapplicable.

Harris argues that if the Brenny's claim is allowed to proceed, the “certiorari rule would be meaningless” because any plaintiff could allege that his/her supervisor acted with bad faith and malice. (App.'s Br. 16.) This argument is a red-herring. It ignores the fact that Brenny's position is supported by Minnesota law. Moreover, to the extent an employee has been subjected to malicious and bad faith treatment at his/her supervisor's hands, as set forth *infra*, he/she is entitled to review before the district court. This result does not render the certiorari rule meaningless. Instead, it supports the uncontroversial conclusion that there are certain specified types of discretionary employment decisions that trigger review by writ of certiorari—and certain types of malicious conduct that are not subject to review by writ of certiorari. Brenny's tortious interference claim is not subject to writ of certiorari and the district court correctly held that it has jurisdiction to hear Brenny's claim.

- b. Brenny’s claim is not subject to review by writ of certiorari because Harris’ interference with Brenny’s contract does not implicate a discretionary employment decision by the University.**

Brenny’s tortious interference claim is also not subject to review by writ of certiorari because it does not concern a discretionary University employment decision. In *Grundtner*, the court identified the threshold question as whether the plaintiff’s claim concerned the decision to terminate the employee:

The pertinent question becomes whether the claim is “separate and distinct from the termination of [] employment” or whether the claim arises out of a common nucleus of operative facts....Of equal importance is whether the court’s necessary inquiry into the facts surrounding a party’s tort claims involves inquiring into the discretionary decision to terminate the individual.

730 N.W.2d At 333 (quoting *Willis*, 555 N.W.2d at 282) (internal citation omitted).

The *Willis* court directly addressed the scope of discretionary employment decisions. The court held that it had jurisdiction over the former employee’s defamation claim because the inquiry into the allegations of the defamation claim would not delve “into the county board’s discretionary decision to terminate Willis.” 555 N.W.2d at 282-83. Similarly, in *Williams v. Board of Regents of University of Minnesota*, 763 N.W.2d 646, 652-53 (Minn. Ct. App. 2009), the court held that a negligent misrepresentation claim did not require “an inquiry into the facts surrounding a tort claim would necessarily involve an inquiry into the discretionary decision of the University to terminate an individual.”

Where the claim does not implicate a quasi-judicial employment decision, Minnesota’s courts have consistently and clearly held that the district courts have subject

matter jurisdiction. *Willis*, 555 N.W.2d at 282-83 (involving defamation claim); *Williams*, 763 N.W.2d at 652-53 (involving negligent misrepresentation claim); *Lueth v. City of Glencoe*, 639 N.W.2d 613, 618 (Minn. Ct. App. 2002) (involving motion to compel arbitration); *Clark v. Indep. Sch. Dist. No. 834*, 553 N.W.2d 443, 446 (Minn. Ct. App. 1996) (involving defamation and intentional infliction of emotional distress); and *Longbehn v. City of Moose Lake*, No. A04-1214, 2005 WL 1153625, *4 (Minn. Ct. App. May 17, 2005) (R.App. 10-18.) (involving defamation and negligent and intentional infliction of emotional distress). Thus, and contrary to the position Harris would have this Court take, where the claim at issue does not require an inquiry into the University's discretionary employment decision, the claim is not subject to review by writ of certiorari.

Just as with the defamation claim in *Willis*, Brenny's claim that Harris tortiously interfered with her contract does not concern the University's decisions regarding her term of employment. Brenny's tortious interference claim is based on Harris' malicious interference with her MOA through his systematic relegation of her role in the team's affairs, including his prohibitions against Brenny coaching and instructing the women's golf team, traveling with and coaching the team during their tournaments, conducting meetings with the team members, and recruiting new student-athletes. Brenny was not allowed to work and perform the responsibilities of a women's golf coach as set forth in her MOA. The issues involved in this claim do not implicate the University's decision to hire Brenny, or its decision to attempt to transfer her to ticket sales at TCF Stadium. Thus, unlike the tortious interference claims in *Grundtner* and *Kobluk v. Regents of*

University of Minnesota, Brenny's allegations do not scrutinize or call into question the University's internal management processes. *Grundtner*, 730 N.W.2d at 333 (challenging supervisor's decision to terminate appellant); *Kobluk*, No. C8-97-2264, 1998 WL 297525, *3-4 (challenging interference with University's tenure review process). Harris' malicious and bad faith refusal to allow Brenny to perform the duties of Women's Head Coach is "separate and distinct from the [University's] termination of [her] employment." *Grundtner*, 730 N.W.2d at 333. This distinction is dispositive and further validates that Brenny's claim is not a wrongful termination claim against the University cloaked as a tortious interference claim against Harris. Brenny has asserted facts "that affirmatively and plausibly suggest that the pleader has the right [s]he claims." *Stalley*, 509 F.3d at 521. As such, the district court has jurisdiction to hear Brenny's tortious interference with contract claim.

Harris goes to great length to recite the many inapposite court decisions involving hiring, tenure, promotions and firing. These cases are irrelevant to the issue before this Court. Brenny's tortious interference claim does not implicate the University's hiring procedure (*Michurski v. City of Minneapolis*, No. C8-02-238, 2002 WL 1791983, *2 (Minn. Ct. App. Aug. 6, 2002)), application for tenure (*Kobluk*, 1998 WL 297525 at *1), promotion decision (*Bahr v. City of Litchfield*, 420 N.W.2d 604, 605 (Minn. 1988)) or termination procedure (*Grundtner*, 730 N.W.2d at 333). Review of Harris' claim will not require the district court to inquire into a discretionary decision made by the University.

Harris' attempt to contort Brenny's claim into the distinct employment decisions involving hiring, tenure, promotions and firing is meritless.⁶

Moreover, *Hansen v. Independent School District No. 820*, No. C4-96-2476, 1997 WL 423567 (Minn. Ct. App. July 29, 1997), the only case Harris cites in support of his argument that a change in responsibilities is subject to writ of certiorari, does not even stand for that proposition. There, Hansen, a teacher, entered into an agreement to sever his employment relationship with the school district. (Brief of Appellant Independent Sch. Dist. No. 820, R.App. 28-29.)⁷ Hansen requested to be placed on part-time employment status and remain on inactive teacher status. (R.App. 28.) The written agreement specifically stated that the school district was willing to allow Hansen to remain on employee status, but it was only subject to the conditions set forth by the school district's superintendent. (R.App. 29.) Finally, the agreement stated that Hansen was prohibited from entering "the school premises as an employee...unless invited to come upon the premises by the superintendent of the District and Hansen shall perform no services unless specifically requested in writing by the District." (*Id.*) During the

⁶ Notably, the University has not requested leave to participate as *amicus curiae*. If the University's discretionary employment decision were truly in contest, it would have a significant reason to seek leave to participate. The University's decision to not participate as *amicus curiae*, given the issue involved in this appeal, is conspicuous. The University's silence further corroborates Brenny's position that review of Harris' tortious interference with Brenny's duties and responsibilities does not require inquiry into a discretionary University decision.

⁷ Because *Hansen* is unpublished and does not include a full statement of facts, reference to the briefs is necessary to fully understand the facts. See *Vlahos v. R&I Const. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004) (instructing that the "danger of miscitation is great because unpublished decisions rarely contain a full recitation of the facts") (internal citations omitted).

term of the agreement, at its discretion, the school board elected not to request any services from Hansen. (R. App. 30.) Nor did Hansen ask that the school district request that he perform any services during the term of the agreement. (*Id.*) At the end of the five-year term of the agreement, Hansen sought retirement benefits through the teachers' retirement association. (R.App. 30-31.) The teachers retirement association denied his request for benefits that accrued during the term of the agreement because Hansen did not perform any services for the school district during the term. (Brief of Respondent Keith Hansen, R.App. 58.) Hansen thereafter brought his claim alleging breach of contract and misrepresentation against the school district for not allowing or requesting him to perform services during the term of the agreement. (R.App. 31, 59.) The court of appeals determined that Hansen's claims were subject to writ of certiorari because they concerned the school district's decision to "not request him to perform any services during the term of the agreement." *Hansen*, 1997 WL 423567 at *1.

As is plainly evident from the facts set forth above, Harris' claim that *Hansen* involves conduct that is "practically identical" is erroneous. Instead, the issue in *Hansen* was whether a superintendent's decision to not have Hansen work at the school over a five-year span, consistent with the parties' agreement, was subject to writ of certiorari. (R.App. 31, 9); 1997 WL 423567 at *1-2. The court of appeals determined that the decision implicated a discretionary hiring decision and was subject to writ of certiorari. *Id.* at *1-2.

Likewise, Harris' claim that the conduct in *Bahr v. City of Litchfield* is "practically identical" to the conduct challenged by Brenny misses the mark. (App.'s Br. 21.) In

Bahr, the city made a formal hiring decision regarding the promotion of two police department employees to a sergeant position. 420 N.W.2d at 605. The Litchfield Police Civil Service Commission conducted oral and written examinations and ranked the candidates based on their performances. *Id.* The Commission then certified the names of two individuals for appointment to the two permanent sergeant positions. *Id.* The *Bahr* court determined that a challenge to the Commission's hiring decision was subject to writ of certiorari. *Id.* at 606 (analyzing whether the sixty-day notice requirement of writ of certiorari was met). The conduct in *Bahr* is clearly not on point with the allegations in this suit. Rather, *Bahr* articulates the principle that a formal promotion procedure, like a hiring decision, is subject to writ of certiorari.

Harris also conflates the specific allegations supporting Brenny's claim under her tortious interference allegation with her claims under the Minnesota Human Rights Act. Harris states that Brenny's tortious interference claim includes the averment that Harris' actions led to her constructive discharge. (App.'s Br. 21.) In actuality, Brenny claims that the University's decision to transfer her to TCF Stadium to sell tickets to football games was a constructive discharge. (A.App. 11, ¶¶ 54-56.) By inaccurately combining the two, Harris confuses the analysis and suggests that Brenny's tortious interference claim actually implicates a termination decision. This is not the case and Harris' suggestion otherwise must be disregarded.

Finally, Harris attempts to distract the Court from the limited issues before it on this appeal by arguing that because Brenny has not alleged a count of breach of contract against the University, she cannot make out a claim for tortious interference with contract

against Harris. (App.'s Br. 7, n.7.) Notwithstanding the fact that this issue is beyond the scope of this appeal, Minnesota law does not require that a party plead these claims in tandem—i.e., alleging a tortious interference claim and a breach of contract claim. Brenny has suitably alleged all of the necessary elements to her tortious interference claim against Harris.

Brenny's tortious interference claim, as with the defamation claim in *Willis*, and the negligent misrepresentation claim in *Williams*, does not implicate a discretionary University employment decision. Harris' tortious interference did not concern hiring, tenure, promotion or firing. It pertains only to Harris' actions after hiring, and does not implicate the University's decision to transfer Brenny to TCF Stadium to sell football tickets. Harris' appeal on this basis must be denied.

c. Harris asks the Court to expand the quasi-judicial doctrine in a way that would violate the Minnesota Constitution.

This Court must limit the application of the quasi-judicial doctrine in order to avoid violating the Minnesota Constitution. Allowing Harris' malicious and bad faith acts to receive the protections of review by writ of certiorari would expand the quasi-judicial doctrine beyond its avowed purpose. This interpretation goes far beyond preservation of separation of powers. Instead, it gives the executive branch the upper hand by foreclosing judicial review of its malicious and damaging actions and necessarily limiting the principle of checks and balances in favor of dictatorial power.

Careless application of the quasi-judicial doctrine carries with it inherent dangers which have been repeatedly recognized by several dissenting Minnesota Supreme Court

justices. For example, in *Dokmo v. Independent School District No. 11*, Justice Wahl observed:

In effect, the school district argues dichotomous positions: on the one hand, that it did not terminate Dokmo, so it was not required to follow statutory termination procedures, and on the other hand, that it did terminate Dokmo, so she could only challenge its action by writ of certiorari. To allow the school district to have it both ways is unfair and not in accordance with law.

459 N.W.2d 671, 678 (Minn. 1990) (Wahl, J., dissenting; joined by Yetka, J. and Keith, J).

Similarly, in *Tischer v. Housing and Redevelopment Authority of Cambridge*, Justice Paul Anderson cautioned:

By our decision in *Willis* and here today, we have essentially established a system by which a government entity can shield itself from any meaningful review of its actions under an employment contract. There are genuine issues of material fact regarding Tischer's breach of contract action. She is entitled to a forum in which she can make a record which, upon appeal, would provide us with a meaningful basis to make a decision. Anything less would result in us blindly deferring to a government entity's decision.

693 N.W.2d 426, 435 (Minn. 2005) (Anderson, J., dissenting; joined by Page, J.).

Other dissenting justices have voiced similar concerns about the application and impact of the quasi-judicial doctrine. *See, e.g., Dietz v. Dodge County*, 487 N.W.2d 237, 242 (Minn. 1992) ("Under the majority's decision, however, the choice to make an adequate record is left in the hands of a participant in the controversy. That unavoidably produces a one-sided record. That, combined with our deference for the lower tribunal, is virtually guaranteed to result in an affirmance of the tribunal's decision. Such a process

can hardly be mistaken for a meaningful review”) (Gardebring, J., dissenting; joined by Wahl, J.); *Willis*, 555 N.W.2d at 283 (“When an employee raises an issue limited to interpretation of the provisions of his or her employment contract, however, such concerns are not ordinarily implicated. I do not believe this court’s holding in *Dietz* was intended to give governmental bodies the right to breach their employment contracts free from judicial intervention. As *Willis* warns, such an application of the writ of certiorari procedure would, in effect, make ‘second class citizens’ out of public employees”) (Keith, C.J., dissenting; joined by Gardebring, J. and Page, J.).

Brenny is entitled “to a forum in which she can make a record which, upon appeal, would provide us with a meaningful basis to make a decision. Anything less would result in us blindly deferring to a government entity’s decision.” *Tischer*, 693 N.W.2d at 435 (Anderson, J., dissenting; joined by Page, J.). Justice Paul Anderson’s concerns are directly implicated in the present matter. In fact, the substantial discovery Brenny has conducted, and the facts she has uncovered, confirms how imperative it is that Brenny be allowed to proceed before the district court and make her own record. Requiring Brenny to bring her claim of tortious interference with contract by writ of certiorari would prejudice Brenny’s ability to have her claim fully and fairly decided.

II. Harris Improperly Seeks Review of the Sufficiency of Brenny’s Pleadings Under Rule 12.02(e).

The issue before this Court concerns the limited and narrow matter of whether the district court correctly determined that it has subject matter jurisdiction over Brenny’s claim against Harris of tortious interference with contract. Harris’ attempt to expand the

appeal to include a review of the sufficiency of the pleadings is improper and not before the Court. Indeed, this Court's September 20, 2011 Order previously rejected Harris' attempt to raise such an issue.

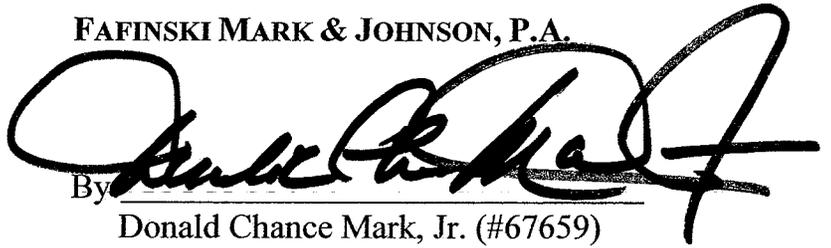
The end-run attempt at broadening the scope of the appeal is further evidence of Harris' efforts towards dodging and distracting the Court from the facts alleged by Brenny, which this Court must accept as true. Harris' arguments concerning the sufficiency of the pleadings, the scope of remedy available under the Minnesota Human Rights Act, and which cite to *Ashcroft v. Iqbal*, *Twombly*, and their progeny, must be disregarded. This improper expansion of his appeal is in contravention of this Court's order of September 20, 2011, denying Harris' petition for discretionary review. Harris' arguments in this vein must be disregarded and his appeal should be denied for the foregoing reasons.

Conclusion

Harris' appeal to this court fails to accept Brenny's allegations in her Amended Complaint as true. The failure to account for them, let alone respond to them, is fatal to Harris' appeal. As set forth above, the district court has subject matter jurisdiction over Brenny's claim because Harris' tortious interference concerned Brenny's fulfillment of her job duties and was made with malice and bad faith. Review by writ of certiorari is inapplicable because Harris acted outside of the course and scope of his authority and employment. Moreover, Harris' tortious interference did not involve a discretionary employment decision for which writ of certiorari review is required. Accordingly, Harris' appeal must be denied.

Respectfully submitted,

FAFINSKI MARK & JOHNSON, P.A.

A large, stylized handwritten signature in black ink, appearing to read 'Donald Chance Mark, Jr.', is written over a horizontal line.

By

Donald Chance Mark, Jr. (#67659)
Shannon M. McDonough (#259512)
Peter A. T. Carlson (# 350448)

Flagship Corporate Center, Suite 400
775 Prairie Center Drive
Eden Prairie, MN 55344
Telephone: 952.995.9500
Facsimile: 952.995.9577
donald.mark@fmjlaw.com
shannon.mcdonough@fmjlaw.com
peter.carlson@fmjlaw.com

Dated: November 28, 2011

STATE OF MINNESOTA
IN COURT OF APPEALS

Kathryn Brenny,

Plaintiff-Respondent,

vs.

The Board of Regents of the
University of Minnesota,

Defendant,

and

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

Defendant-Appellant.

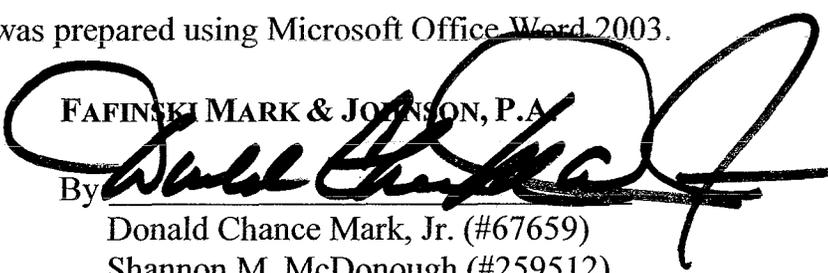
**CERTIFICATION
OF BRIEF LENGTH**

**APPELLATE COURT CASE NO.
A11-1339**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 8,503 words. This brief was prepared using Microsoft Office Word 2003.

Dated: November 28, 2011

FAFINSKI MARK & JOHNSON, P.A.

By 

Donald Chance Mark, Jr. (#67659)

Shannon M. McDonough (#259512)

Peter A. T. Carlson (# 350448)

Flagship Corporate Center, Suite 400

775 Prairie Center Drive

Eden Prairie, MN 55344

Telephone: 952.995.9500

Facsimile: 952.995.9577

donald.mark@fmjlaw.com

shannon.mcdonough@fmjlaw.com

peter.carlson@fmjlaw.com