



NO. A11-1923

State of Minnesota  
**In Court of Appeals**

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Jerry L. Moore,

Respondent,

vs.

John Hoff, a/k/a Johnny Northside,

Appellant.

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**APPELLANT'S BRIEF AND APPENDIX**

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

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STATE OF MINNESOTA  
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Respondent,

CASE NO: A11-1923

v.

John Hoff, a/k/a "Johnny Northside,"

CERTIFICATE OF COMPLIANCE

Appellant.

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I, Paul Godfread certify that Appellant's Memorandum complies with Rule 132 of the Minnesota Rules of Appellate Procedure. I further certify that used Pages '09 version 4.01 to prepare this memorandum and that the memorandum contains 5,329 words.

Dated: January 30, 2012

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## STATEMENT OF THE CASE

This action was brought by Jerry Moore, whose temporary employment with the University of Minnesota ended the day after a blog post critical of him and his involvement in mortgage fraud was posted online by John Hoff. Moore's position at the University of Minnesota was related to researching housing and mortgage issues in Minneapolis, a topic that Hoff had regularly writes about.

Moore subsequently sued Hoff, Don Allen, and John Doe defendants for defamation and tortious interference based on Hoff's blog posts that Moore alleged led to his termination. Moore eventually settled with defendant Allen, who then testified on Moore's behalf, and failed to identify any of the John Does.

Prior to trial, the trial court ruled that Moore was a limited purpose public figure, due to his frequent involvement in Minneapolis politics and his numerous, willing media appearances in stories relating to housing issues in North Minneapolis. The case proceeded to trial, where the jury found that the allegedly defamatory statement in Hoff's blog about Moore's participation in mortgage fraud was not false. The jury did however find that Hoff had tortiously interfered with Moore's contract and prospective economic advantage.

Hoff then moved for judgment as a matter of law, or in the alternative a new trial. Hoff argued that under Minnesota law and the First Amendment, because the jury found that the statement was true and the blog post therefore not defamatory, the statement could not as a matter of law form the basis of a tortious interference claim. The trial court denied Hoff's motion, ruling that the jury's

findings on the tortious interference claims had reasonable support in the factual record. The trial court did not address Hoff's First Amendment arguments. Defendant then filed a timely notice of appeal.

## STATEMENT OF LEGAL ISSUES

1. Does a jury verdict for tortious interference violate the First Amendment, if the jury relied, even in part, on protected speech such as a true statement as evidence to support that verdict?
2. Does a verdict violate for tortious interference violate the First Amendment, if the evidence it was supposedly based on was not specifically identified by the trial court and the trial court failed to carefully scrutinize the evidence in order to determine whether the evidence was expressive and protected by the First Amendment?

*In its Order and Memorandum of August 22, 2011, the trial court failed to address Hoff's First Amendment arguments and the related tortious interference precedent set in Minnesota courts.*

## APPOSITE CASES

*Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984)

*Fox Sports Net North, LLC v. Minnesota Twins Partnership*,  
319 F.2d 329 (8th Cir. 2003)

*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)

*Wild v. Rarig*, 234 N.W.2d 775, 793 (Minn. 1975)

The issue of First Amendment protection was first raised by *plaintiff* throughout his Complaint (A-1) (arguing erroneously that the First Amendment somehow did not apply to defendant Hoff), the issue was raised again in defendant's Answer (A-15), and was raised again with greater specificity along with references to the application to Minnesota tortious interference law throughout defendant's post trial motions (A-40).

## STATEMENT OF FACTS

John Hoff is a blogger who writes about issues in North Minneapolis, particularly issues of crime, home foreclosures, and mortgage fraud. Hoff began writing his blog titled “The Adventures of Johnny Northside” in 2008 using a free service called Blogspot.<sup>1</sup> Hoff as a grassroots journalist<sup>2</sup> allowing him to cover news specific to north Minneapolis.<sup>3</sup> Hoff’s coverage would include coverage of local political figures that may have escaped the attention of the more established media because he believes that the public ought to have information about such figures.<sup>4</sup> Hoff’s blog makes use of public documents such as police reports by printing them online.<sup>5</sup>

Jerry Moore was one of the public figures<sup>6</sup> taken to task by Hoff in his blog. Moore then alleged that Hoff had defamed him and tortiously interfered with his contract and prospective employment with the University of Minnesota by writing a blog post on June 21, 2009.<sup>7</sup> However, by that time, Moore was already the subject of controversy within the neighborhood because of alleged financial impropriety during his tenure as executive director of the Jordan Area Community Council (JACC), an altercation with another JACC board member, and alleged

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<sup>1</sup> *Id.* 47:14-48:6

<sup>2</sup> *Id.* 49:25-50:3

<sup>3</sup> *Id.* 52:1-7

<sup>4</sup> *Id.* 54:5-15

<sup>5</sup> *Id.* 55:4-10

<sup>6</sup> The trial court held that Jerry Moore was a limited purpose public figure. Order and Memorandum appears in the Appendix at A-29.

<sup>7</sup> See Second Amended Complaint generally at A-1.

involvement with a mortgage fraud scheme.<sup>8</sup>

Moore's tenure as executive director of JACC was controversial. Among other things, some board members objected to his salary and his choices in expenditures.<sup>9</sup> JACC held a board election on January 12, 2009 where Jerry Moore hit three people, which<sup>10</sup> led to his termination.

Hoff learned that after Moore was terminated by JACC, he had been hired by the University of Minnesota's UROC program, which studied housing and mortgage issues in Minneapolis.<sup>11</sup>

Hoff's June 21 blog post focused on the issue of having a public institution such as the University of Minnesota hiring Moore, who had been involved in numerous controversies in north Minneapolis and especially Moore's likely involvement in mortgage fraud.<sup>12</sup> The allegedly defamatory statement that appeared in the June 21 post was: "[r]epeated and specific evidence in Hennepin County District Court shows Jerry Moore was involved with a high-profile fraudulent mortgage at [REDACTED]."<sup>13</sup> At trial, Hoff described the "repeated and specific evidence" that he was referring to as Jerry Moore's name appearing in a criminal complaint against Larry Maxwell as a recipient of proceeds from the fraud as well as the documents that establish Moore's involvement such as a check for \$5,000 written to Jerry Moore, an invoice from JL Moore

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<sup>8</sup> Transcript 63:24-65:1

<sup>9</sup> 340:6-18, 341:1-25

<sup>10</sup> 342:16-343:17

<sup>11</sup> *Id.*

<sup>12</sup> *See* Ex. 101

<sup>13</sup> Ex. 101

Consulting bearing Moore's address at [REDACTED], a HUD statement indicating a payment made to Jerry Moore, as well as testimony given in the Maxwell trial.<sup>14</sup> The rest of the June 21 post describes why in Hoff's opinion the University's decision to hire Moore was a bad development for both the University and the Jordan neighborhood.<sup>15</sup>

The fraudulent transaction involving [REDACTED] involved the theft of John Foster's identity.<sup>16</sup> Foster, who testified at trial, had applied for a refinance of his mortgage with Common Sense Mortgage in 2003 which he believes was the source of documents used in the identity theft.<sup>17</sup> In early 2006, Moore briefly held a position at Common Sense Mortgage.<sup>18</sup> Foster kept meticulous financial records and in 2006 noticed several problems indicating that his identity had been stolen and used to take out several mortgages.<sup>19</sup> Mr. Foster learned that mortgages on [REDACTED] had been taken in his name because mortgage statements were mailed to his true address.<sup>20</sup>

There is little in the record by way of evidence from Moore's employer, the University of Minnesota. A University employee, Makeda Zulu-Gillespie testified that hiring and firing decisions were made by Irma McClaurin who did not

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<sup>14</sup> Transcript 77:19-78:17, Moore indicated the address on the invoice was his at 280:3.

<sup>15</sup> Ex. 101

<sup>16</sup> Transcript 399:18

<sup>17</sup> *Id.* 399

<sup>18</sup> *Id.* 288:12-17

<sup>19</sup> *Id.* 400:20-401:12

<sup>20</sup> *Id.* 403:24-404:5

testify.<sup>21</sup> When asked whether she knew of any University employee being fired based on blog postings, Gillespie said, “I don’t know why people are - - are let go.”<sup>22</sup> The letter Moore received gave no indication as to the cause of his termination, but merely stated that his temporary, part-time, and casual position at the University had ended and directed him to a listing of vacant positions at the University so that he could apply.<sup>23</sup>

During trial, Hoff had been serving as an Army National Guard Reservist in Minnesota. Shortly after the conclusion of the trial, Hoff was called to active duty and has been deployed to Afghanistan as part of Operation Enduring Freedom.

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<sup>21</sup> *Id.* 225:23-25

<sup>22</sup> *Id.* 228:1-7

<sup>23</sup> Exhibit 103

## STANDARD OF REVIEW

The trial court's denial of defendant motions for judgment as a matter of law or new trial were premised upon errors of law. Where the appellant "raises only a question of law, our review is de novo." *Harrison v. Comm'r of Pub. Safety*, 781 N.W.2d 918, 920 (Minn. App. 2010) (addressing constitutional challenges). Additionally, First Amendment questions of "constitutional fact" compel *de novo* review. *Bose Corp. v. Consumers' Union of United States, Inc.*, 466 U.S. 485, 509 n.27 (1984).

## ARGUMENT

This action began as one for defamation and tortious interference. Plaintiff based his claims on certain comments that defendant John Hoff had posted on his blog, known as "The Adventures of Johnny Northside." The gist of those comments was that plaintiff had participated in mortgage fraud, and plaintiff's objection to those comments formed the linchpin of his lawsuit against Hoff.

At the conclusion of the district court trial, however, the verdict returned by the jury included a finding that defendant's claim about plaintiff's participation in mortgage fraud was true. This caused plaintiff's cause of action for defamation to be dismissed. However, the jury awarded plaintiff \$60,000 on the tortious interference claims.

Defendant's subsequent motion for judgment as a matter of law or a new trial was denied because, according to the trial court, there was reasonable support in the record for the tortious interference counts, and the jury found that

defendant's conduct "taken as a whole" amounted to interference. If the trial record is examined, however, it is clear that the jury was not presented with any evidence supporting the tortious interference claims that was separate and distinct from defendant's allegations about plaintiff's involvement in mortgage fraud, his efforts to bring them to public attention, and his argument that because of them, plaintiff should not be employed by the University of Minnesota. Consequently, given the jury's finding that defendant's allegations were true, the First Amendment bars plaintiff's tortious interference claims, just as it does his action for defamation. This Court on appeal must make an independent examination of the record in order to ensure the First Amendment has not been violated.

**I. Minnesota Law Does Not Permit Liability for Tortious Interference To Attach In The Case Of True Statements.**

A plaintiff suing for tortious interference must show that alleged interference was improper. *R.A., Inc. v. Anheuser-Busch, Inc.*, 556 N.W. 2d 567, 571 (Minn. App. 1996). Minnesota courts have followed the Restatement of Torts rule that true statements cannot constitute *improper* interference. *Glass Service Co. Inc. v. State Farm Mut. Auto Ins. Co.*, 530 N.W.2d 867, 871 (Minn. App. 1995); *Fox Sports Net North, LLC v. Minnesota Twins Partnership*, 319 F.2d 329, 337 (8th Cir. 2003). The Restatement at section 772(a) states in relevant part:

"One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person . . . truthful information."  
Restatement (Second) of Torts § 772(a) (1979).

At trial, plaintiff failed to show Hoff's alleged interference was improper or wrongful, because the jury found that Hoff's statements were true and plaintiff failed to provide evidence of any other independent actions taken by Hoff that could have otherwise supported the verdict. The trial court therefore erred in denying defendant's post-trial motion, since the element of wrongfulness cannot be satisfied as a matter of law. Plaintiff failed to produce any evidence of wrongful behavior or any evidence of actions taken by Hoff other than communicating true statements and opinions. There is no indication whatsoever in the record that Hoff otherwise acted improperly (such as by bribing, threatening, or coercing the University). In fact, the record does not contain any other evidence that could have lead to an interference verdict. Hoff's statements were true and Hoff had legitimate justification for making the statements because it was done for an entirely legitimate purpose.

The wrongfulness element fails as a matter of law precisely because Hoff's publication of true statements and opinion are not the kind of behavior that tortious interference law is meant to remedy. The evidence about Hoff's statements and actions taken as a whole cannot demonstrate any tortious interference under Minnesota law.

The trial court impermissibly circumvents the protections that are built in to defamation law by reframing a defamation claim as tortious interference. *See Beverly Hills Foodland, Inc. v. United Food and Commercial Workers Union, Local 655*, 39 F.3d 191, 196 (8th Cir. 1994). The trial court's error in deferring to

the jury's interpretation of other unidentified evidence also inappropriately allowed a verdict to stand that was very likely based on protected speech. This violates both Minnesota common law and the First Amendment.

“Speech does not lose its protected character. . . simply because it may embarrass others or coerce them into action.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982). However, it appears that the trial court came to precisely the opposite conclusion in its denial of defendant's motion for a judgment as a matter of law. All of plaintiff's claims were based on defendant's speech and its subsequent effect.

“The Free Speech Clause of the First Amendment — “Congress shall make no law . . . abridging the freedom of speech” — can serve as a defense in state tort suits.” *Snyder v. Phelps*, 131 U.S. \_\_\_\_ (2011); *citing Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (no liability for intentional infliction of emotional distress for statements about a public figure without proving elements of defamation). Were this Court to allow the verdict to stand, Hoff would be punished for exercising his right to truthfully discuss issues of public concern, public figures and public funds. Hoff's speech is Constitutionally protected because it contains true statements and opinions about a limited purpose public figure in regards to topics that are of public concern.

Hoff's true blog post about Jerry Moore's prior involvement in mortgage fraud and later hiring by a public institution to work with mortgage and housing issues is exactly the kind of public statement about public issues that the First

Amendment was created to protect. The First Amendment guarantees "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710 (1964). If Hoff's expressive activity can be punished, that robust public debate is obliterated. Moore was a limited purpose public figure who was involved in at least one instance of mortgage fraud. Here, the trial court failed to protect public debate and expressive activity.

## **II. The Record Shows No Evidence Presented To The Jury Supporting Plaintiff's Tortious Interference Claims That Was Not Integrally Related To Defendant's True Statements About Plaintiff's Mortgage Fraud.**

The trial court's rejection of defendant Hoff's post-trial motions was based on the court's assertion that "the jury's findings on plaintiff's tortious interference claims had reasonable support in the factual record." Order and Memorandum, Add. 4. According to the trial court:

[T]he Court heard direct testimony regarding Defendant's active involvement in getting Plaintiff fired by contacting leaders at the University of Minnesota and threatening to launch a negative public relations campaign if Plaintiff remained in their employment. By way of example, Don Allen testified that he sent an email to the University of Minnesota, at Defendants's behest, threatening negative publicity and lobbying to get Plaintiff fired. In addition to Mr. Allen's direct testimony, the jury also heard circumstantial evidence supporting the jury's verdict. The Court heard testimony that Plaintiff was terminated from his position at the University of Minnesota one day after transmission of the email from Mr. Allen. Furthermore, during this same time period, Defendant acknowledged that it was his goal to get Plaintiff fired and that he was working 'behind the scenes' to do so. After the fact, Defendant took personal responsibility for Plaintiff's termination and announced his ongoing, active involvement in the University's actions. The direct evidence, combined with the

inferences drawn from the circumstantial evidence presented, supports the jury's verdict.

*Id.*, at 5.

However, all of the evidence described in this passage relates exclusively to defendant Hoff's expressive activity, in communicating information that the jury found was true. A tortious interference claim is no more viable than one for defamation where the behavior complained of is that defendant communicated truthful information. See *Glass Service Co., Inc. v. State Farm Mut. Auto. Ins. Co.*, 530 N.W.2d, 867, 871 (Minn. App. 1995), citing *Restatement (Second) of Torts* §772, cmt. b (1979). Yet all of the behavior cited by the trial court directly involved Hoff's efforts to convey his concerns about plaintiff's mortgage fraud to the University. All of the actions listed by the court flowed from defendant's belief that plaintiff had engaged in fraud and should therefore not be employed by the University. All involved defendant communicating variations of this claim to University officials and others. And all of the actions were therefore part of the expressive activity derived directly from the statement that the jury determined was true.

Specifically, defendant's efforts at "getting Plaintiff fired by contacting leaders at the University of Minnesota and threatening to launch a negative public relations campaign," Order, Add. 5, consisted of nothing more than defendant telling University officials about plaintiff's mortgage fraud, and

informing them that if they failed to terminate plaintiff, Hoff would communicate information about this to the broader public. Similarly, the actions of Don Allen cited by the trial court “threatening negative publicity and lobbying to get Plaintiff fired,” *id.*, (even if they could properly be attributed to defendant), consisted only of Allen acting as a conduit for the information obtained from defendant Hoff about plaintiff’s mortgage fraud. And defendant’s supposed “acknowledg[ment] that it was his goal to get Plaintiff fired and that he was working ‘behind the scenes’ to do so,” along with his taking “personal responsibility for Plaintiff’s termination” and “his ongoing, active involvement in the University’s actions,” *id.*, were all connected to his expressive activity—his efforts to communicate accurate information to University officials about plaintiff.

Thus every action cited by the trial court in approving the tortious interference verdict was integrally related to defendant Hoff directly or indirectly conveying information to the University or the public about plaintiff’s mortgage fraud along with his entirely legitimate belief that such behavior should disqualify plaintiff from employment there. These actions cannot be separated from the actual statement itself about plaintiff, and they are no less subject to the protections of the First Amendment and the strictures of defamation law than is that statement simply because plaintiff chooses to repackage them as tortious interference. The barriers that the courts have erected in order to protect true statements, especially those

involving public figures and issues of public concern, are not a jurisprudential Maginot Line around which plaintiffs may skitter simply by the use of creative pleading.

Defendant's post-trial motions were grounded primarily on this argument (as acknowledged by the trial court), namely that "the jury's award in favor of plaintiff on the tortious interference claims were premised solely upon the same statement that formed the basis of plaintiff's defamation claim," Order and Memorandum, *id.* But though the court responded that plaintiff did provide "direct and circumstantial evidence . . . independent of and distinct from his defamation claim," *id.*, Add. 7, nowhere in the long passage from the court's decision quoted above—or in any other part of its decision—does the court address how the evidence that it refers to is in fact distinct and separate from the mortgage fraud allegation, which it *must* be in order for plaintiff's tortious interference claims to surmount the restrictions imposed by defamation law principles and the First Amendment.

The trial court also rejected defendant's argument that the jury's verdict on the tortious interference claims relied on the same statement that supported plaintiff's defamation claim, by contending that "Defendant does not present any evidence in support of this argument, nor does the Court find it necessary to invade the province of the jury." *Id.*, Add. 6-7. According to the Order and Memorandum, "[i]t is not the Court's function

to determine on what theory the jury arrived at its verdict;” instead “it is the Court’s responsibility to interpret the special verdict form ‘and harmonize the jury’s responses where possible.’” *Id.* (citation omitted).

The untenability of this explanation is obvious. The whole point of defendant’s post-trial motion was that in light of the jury’s finding that the statement about plaintiff’s participation in mortgage fraud was true, and that because no other evidence unrelated to this statement was presented, the trial court was obligated as a matter of constitutional law to rule in defendant’s favor, that the First Amendment objection raised in the motion was outside the jury’s province, and that where a jury relies on a “theory” that is prohibited by the protections of the Constitution, its verdict must be rejected.

Furthermore, the trial court’s claim that defendant “did not present any evidence” in support of his argument is hardly persuasive, because it turns the governing law on its head. It was obviously *plaintiff’s* burden to offer admissible and relevant evidence demonstrating that defendant engaged in behavior unprotected by the First Amendment that improperly interfered with plaintiff’s employment. And once the jury found that the statement about mortgage fraud was true, it was the trial court’s responsibility in addressing defendant’s post-trial motion to determine if plaintiff had in fact presented such evidence to the jury, a responsibility that the trial court plainly failed to shoulder.

Again, because the substance of all of the communications from defendant to the University involved variations on the theme of plaintiff's mortgage fraud (coupled with defendant's belief that plaintiff should therefore not be retained by a public institution to investigate mortgages), and because all of defendant's actions were integrally related to those communications, the jury's finding that the statement about plaintiff participating in mortgage fraud was true obliterates not only plaintiff's action for defamation, but his tortious interference claims as well.

The trial court also contends that "the jury found Defendant's statement was not false, but that his conduct, *taken as a whole*, amounted to an intentional interference with Plaintiff's employment contract and prospective employment advantage." *Id.*, Add. 7-8. This claim, however, far from providing assurance that the verdict was sound, suggests exactly the opposite, directly acknowledging that the jury may well have considered defendant's protected expression in reaching its decision, since that expression was a significant part of his conduct taken as a whole. The First Amendment does not permit the trial court to uphold a verdict by using sleight of hand such as this. As described above, essentially all facets of defendant's "conduct" related to defendant's efforts to communicate his concerns about plaintiff's fraudulent behavior to University officials, and there is simply nothing in the trial record showing otherwise. Thus contrary to the trial court's conclusion, the jury's responses cannot be harmonized.

And because the trial record contains nothing that could independently support the jury's verdict on the tortious interference claims, defendant was entitled to judgment as a matter of law.

**III. Even If Independent Evidence Supporting The Tortious Interference Claims Had Been Presented, The Trial Court Failed To Consider The Requirements Of The First Amendment In Assessing It.**

Even if the trial court were correct in stating that there was evidence supporting the tortious interference claims which was independent and distinct from defendant's communications about plaintiff's mortgage fraud, the First Amendment still requires a far more careful and critical analysis of that evidence than was employed by the trial court. This is especially important in actions such as those for tortious interference, where there is significant possibility that the behavior complained of by the plaintiff involves expressive activity. As one commentator notes, because the "interference in each case is often accompanied by the use of unflattering words, it is not uncommon for a claim for defamation or disparagement to be combined with a claim for either type of intentional interference." Robert D. Sack, *Sack on Defamation* §13.4 (4<sup>th</sup> ed. 2010).

This brief described earlier how Minnesota's appellate courts have rejected attempts by a plaintiff to carve out separate tort claims premised on statements also used to support a defamation claim where those statements are true, and that such claims must be analyzed according to defamation law rules. A corollary of this principle is that the trial court must thoroughly

scrutinize the evidence offered in these kinds of actions, even where the plaintiff claims that portions of the evidence are separate from the statement supporting the defamation claim, in order to insure that expressive activity protected by the First Amendment is not improperly sanctioned.

If it turns out that this evidence includes communications made by the defendant, then no matter how the cause of action is framed, defamation law rules will normally need to be applied. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988) (requiring on First Amendment grounds that a public figure pursuing intentional infliction of emotional distress claim must establish falsity and actual malice). *See also Wild v. Rarig*, 234 N.W. 2d 775, 793 (Minn. 1975) (“It seems to us that, regardless of what the suit is labeled, the thing done to cause any damage to [plaintiff] eventually stems from and grew out of the defamation,” and therefore “this phase of the matter has crystallized into the law of defamation and is governed by the special rules which have developed in that field.”).

Thus even if the trial court in the present action is right in asserting that plaintiff Moore provided evidence in support of his tortious interference claims that was “independent and distinct from his defamation claim,” Add. 7-8., in other words, that had nothing to do with the substance of the statement made by defendant Hoff which the jury found to be true, the trial court was still obligated to reject the verdict unless all of that independent and distinct evidence was permissible under governing principles of

defamation law.

The trial court entirely fails to acknowledge this. Nowhere in its Order and Memorandum is there any description of the “independent and distinct” evidence supposedly supporting the jury verdict, to say nothing of a description that is sufficiently specific to permit a determination as to whether it might be considered expressive activity, and whether it might be false. As noted, the few examples of evidence that are cited by the trial court in its Memorandum all integrally involve the communications made by defendant Hoff relating to the fact of plaintiff’s participation in mortgage fraud or statements made by others such as Don Allen, for which Hoff cannot be liable.<sup>24</sup> Nowhere does the trial court point to any evidence unrelated to that topic, which might then be false. And nothing in the trial court’s discussion addresses evidence that might satisfy any of the other requirements imposed on defamation actions. Correspondingly, neither plaintiff’s Complaint nor any of his submissions in response to defendant’s post-trial motion identify any such evidence.

Decades of precedent construing the First Amendment—especially with respect to defamation actions—have produced rules designed to insure that before juries may decide questions involving protected speech, the trial court must first be presented by plaintiff with and must then carefully examine the specific statements that are at issue. Thus, for example, Minnesota courts

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<sup>24</sup> The trial court granted a pre-trial motion made by Hoff citing 47 U.S.C. § 230(c)(1) and (e)(3) which exempts online services providers, such as Hoff from tort liability based on third party content such as comments. The trial court order appears in the Transcript at 110:9-111:8.

have long held that in defamation actions, the challenged language needs to be specifically described in the Complaint: “Minnesota law has generally required that in defamation suits, the defamatory matter be set out verbatim.” *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 326 (Minn. 2000).

Similarly, before particular statements may be submitted to the jury or be used to support a defamation judgment, the trial court is required to determine *as a matter of law* whether they may be considered defamatory: “The district court makes an initial determination of whether the statements are reasonably capable of carrying a defamatory meaning,” and “this determination is made as a matter of law.” *Schlieman v. Gannett MN Broadcasting, Inc.*, 637 N.W.2d 297, 307 (Minn. App. 2001). (Minn. 1985). The trial court is obligated to determine as a matter of law whether plaintiff’s evidence could plausibly satisfy this standard, both before submitting the language at issue to the jury, and in response to post-trial motions raising the First Amendment issue: “The question whether the evidence in the record . . . is sufficient to support a finding of actual malice is a question of law [based] on the unique character of the interest protected by the actual malice standard.” *Diesen v. Hessburg*, 455 N.W.2d 446, 453-54 (Minn. 1990), *Harte-Hanks Communications, Inc., v. Connaughton*, 491 U.S. 657 (1989). Courts “have a constitutional duty to exercise independent judgment and determine whether the record establishes actual malice with

convincing clarity." *Bose Corp. v. Consumers' Union of United States, Inc.*, 466 U.S. 485, 514 (1984).

The trial court erred because even if the record had shown that defendant had committed some tortious conduct or unlawful activities in addition to the exercise of free speech; tort liability "must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity." *NAACP*, 458 U.S. at 933–34. The trial court made no such distinction.

In sum, where a tortious interference claim may, in whole or part, involve communications made by the defendant, they must be specifically identified by the plaintiff, and they must be scrutinized by the trial court before submission to the jury according to the criteria described above. Here, however, neither the trial court nor plaintiff even acknowledge this, to say nothing of demonstrating that the mandates of precedent have been satisfied with respect to the evidence of tortious interference that the trial court claims was presented to the jury that was "independent of and distinct from his defamation claim." Order and Memorandum, Add. 7-8.

## CONCLUSION

For all of the reasons stated above, this Court should reverse the judgment of the trial court and order that judgment as a matter of law be granted in defendant Hoff's favor or that the action be remanded for a new trial.

Dated: January 30, 2012

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul Godfread", written over a horizontal line.

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