

No. A11-1923

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Jerry L. Moore,

Plaintiff/Respondent,

vs.

John Hoff a/k/a Johnny Northside,

Defendant/Appellant.

**BRIEF OF AMICI CURIAE MINNESOTA PRO CHAPTER, SOCIETY OF
PROFESSIONAL JOURNALISTS; THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS; AND THE SILHA CENTER FOR THE STUDY OF
MEDIA ETHICS & LAW**

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Introduction

As *amici*, the Minnesota Pro Chapter of the Society of Professional Journalists, The Reporters Committee for Freedom of the Press, and The Silha Center for the Study of Media Ethics & Law support Defendant/Appellant John Hoff in his request for reversal of the judgment below and for, at minimum, a new trial.¹ The public perceives this as a case in which a jury held Hoff responsible under a claim of tortious interference based upon a communication that the jury also determined was true. Although Plaintiff/Respondent Jerry Moore discounted that perception during post-trial proceedings in the district court, his closing argument to the jury dwelt extensively on Hoff's truthful statement.

Minnesota law precludes tortious interference claims based on true statements. Hoff's statement about Moore as a public figure involved in a matter of public concern also enjoyed First Amendment protection. In order to avoid infringing upon First Amendment rights, courts at every level must independently examine the basis for jury verdicts that might constitute a forbidden intrusion on the field of free expression. In the present case, the district court deferred too much to the jury. Moore's closing argument created a real risk of juror confusion regarding the relevance of Hoff's truthful statements, and thus impermissibly tainted the jury's verdict. Consequently, this Court should reverse.

¹ *Amici* certify that no counsel for any party authored this brief in whole or in part. No person other than *amici*, their members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Identification of Amici

The **Society of Professional Journalists**, a voluntary, non-profit organization, was founded as Sigma Delta Chi in 1909. It is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism, and for more than a century has been dedicated to perpetuating a free press. The Minnesota Pro Chapter (“MN-SPJ”) has become one of the nation’s largest and most active professional chapters since its founding in 1956. The work of the Society’s members centers upon written and broadcast journalism, and increasingly appears online.

The Reporters Committee for Freedom of the Press (“Reporters Committee”) is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee is based in Arlington, Virginia, and its executive director is Lucy A. Dalglish. The Reporters Committee has provided representation, guidance and research in First Amendment and freedom of information litigation since 1970. In recent years, it has taken the lead in building coalitions with other media-related organizations to protect reporters’ rights to keep sources confidential and to monitor legislative efforts that impact the public’s right to know. It also has aggressively sought opportunities to speak out nationwide through *amicus curiae* briefs filed on behalf of journalists. In the last four decades the Reporters Committee has played a role in virtually every significant press freedom case that has come before the U.S. Supreme Court, as well as in hundreds of cases in federal and state courts. The Reporters Committee has also emerged as a major national and international resource in free speech issues, disseminating information in a variety of forms, including a quarterly

legal review, a daily blog, a twenty-four-hour hotline, and various handbooks on media law issues.

The Silha Center for the Study of Media Ethics & Law (“Silha Center”) is a research center located within the School of Journalism and Mass Communication at the University of Minnesota. Its primary mission is to conduct research on, and promote understanding of, legal and ethical issues affecting the mass media. The Silha Center also sponsors an annual lecture series, hosts forums and symposiums, produces a newsletter and other publications, supports graduate students, and provides information about media law and ethical issues to the public.

Argument

I. Minnesota Law Precludes Tortious Interference Claims based upon True Statements.

Outside the context of online publications, Minnesota courts long have held that merely providing truthful information cannot provide the basis for an action for tortious interference with contract or with prospective economic advantage, and both federal and state courts have rejected attempts by plaintiffs to evade the requirements of defamation law when the claim essentially is a defamation claim.

In *Glass Service Co., Inc. v. State Farm Mut. Auto. Ins. Co.*, 530 N.W.2d 867, 871 (Minn. App. 1995), this Court affirmed summary judgment in favor of the defendant, an insurance company that provided truthful information to its insureds, and rejected the tortious interference claims of the plaintiff, a company that repaired windshields. The court expressly invoked the RESTATEMENT (SECOND) OF TORTS, §772 cmt. b (1979) (no

liability for interference on part of one who merely gives truthful information to another).

The Eighth Circuit has applied *Glass Service* as settled Minnesota law. *Fox Sports Net North, LLC v. Minnesota Twins Partnership*, 319 F.3d 329, 337 (8th Cir. 2003.)

Equally applicable here is the First Amendment principle that courts do not allow plaintiffs to evade the requirements of libel law by presenting their claims under a different legal label. Injuries to reputation are defamation-type damages, for which plaintiffs must prove the elements of a defamation claim regardless of how the claim is labeled. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988); *Mt. Hood Polaris, Inc. v. Martino (In re Gardner)*, 563 F.3d 981, 992 (9th Cir. 2009) (“[W]hen a claim of tortious interference with business relationships is brought as a result of constitutionally-protected speech, the claim is subject to the same First Amendment requirements that govern actions for defamation.”); *Beverly Hills Foodland, Inc. v. United Food and Commercial Workers Union, Local 655*, 39 F.3d 191, 196 (8th Cir. 1994) (“At the outset we note the malice standard required for actionable defamation claims during labor disputes must equally be met for a tortious interference claim based on the same conduct or statements. This is only logical as *a plaintiff may not avoid the protection afforded by the Constitution and federal labor law merely by the use of creative pleading.*” (emphasis added)); *see generally NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (First Amendment applies to claims for tortious interference with business relations).

The same result applies as a matter of state common law, as the Minnesota Supreme Court established decades ago:

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. Business interests may be impaired by false statements about the plaintiff which, because they adversely affect his reputation in the community, induce third persons not to enter into business relationships with him. We feel that 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.

Wild v. Rarig, 302 Minn. 419, 447, 234 N.W.2d 775, 793 (1975). That court and others have applied the principle repeatedly in the following years.²

In the present case, the public perceived that this principle had been ignored, because the jury awarded damages to Moore despite a finding that Moore's online

² See, e.g., *MSK EyES Ltd. v. Wells Fargo Bank*, 546 F.3d 533, 544 (8th Cir. 2008) ("Claims arising out of purported defamatory statements, such as tortious interference, are properly analyzed under the law of defamation."); *European Roasterie, Inc. v. Dale*, Civ. No. 10-53 (DWF/JJG), 2010 WL 1782239, at *5 (D. Minn. May 4, 2010) ("Tortious interference claims that are duplicative of a claim for defamation are properly dismissed."); *ACLU v. Tarek Ibn Ziyad Acad.*, Civ. No. 09-138 (DWF/JJG), 2009 WL 4823378, at *5 (D. Minn. Dec. 9, 2009) (same); *Guzhagin v. State Farm Mut. Auto. Ins. Co.*, 566 F. Supp. 2d 962, 969 (D. Minn. 2008) (dismissing tortious interference claim with prejudice because "a Minnesota plaintiff is not permitted to avoid defenses to a defamation claim by challenging the defamatory statements under another doctrine"); *Pinto v. Internationale Set, Inc.*, 650 F. Supp. 306, 309 (D. Minn. 1986) ("[I]n Minnesota, a plaintiff cannot elude the absolute privilege by relabeling a claim that sounds in defamation."); *Mahoney & Hagberg v. Newgard*, 729 N.W.2d 302, 310 (Minn. 2007) ("Regardless of the label, appellant's claims are in essence defamation claims ..., and we find that absolute privilege operates to bar all of the claims at issue on this appeal."); *Pham v. Le*, Nos. A06-1127, A06-1189, 2007 WL 2363853, at *7-8 (Minn. App. Aug. 21, 2007) (unpublished) (applying *Wild v. Rarig* and *NAACP v. Clairborne Hardware*, dismissing tortious interference claim arising from same statements as unsuccessful defamation claim); *Zagaros v. Erickson*, 558 N.W.2d 516, 523 (Minn. App. 1997) (plaintiff asserted claim of "negligent trial testimony;" court followed *Wild* and held that defamation standards and privileges apply to any "claim [that] is essentially relabeling a defamation claim"); *McGaa v. Glumack*, 441 N.W.2d 823, 827 (Minn. App. 1989) ("In Minnesota, one 'cannot evade the absolute privilege by relabeling a claim that sounds in defamation.'") (citations omitted).

statement was true. News of that result generated confusion, consternation, and commentary in Minneapolis and around the country.³ As reflected in comments to those postings, some commenters expressed fears that they might face similar consequences despite the truth of their own statements, and wondered how the law could permit that result.

The post-trial proceedings did nothing to allay those fears. In denying Hoff's post-trial motions, the district court held that even though the jury found the statements to be true,

[Defendant's] conduct, taken as a whole, amounted to an intentional interference with Plaintiff's employment contract and prospective employment advantage. Despite Defendant's argument to the contrary, Plaintiff provided direct and circumstantial evidence in support of his tortious interference claims, independent of and distinct from his defamation claim. These findings are not "palpably contrary to the

³ See, e.g., Martha Neil, *Firestorm re \$60K Award Against Blogger, Despite Lack of Defamation, May be Focusing on Wrong Issue*, ABA JOURNAL, March 16, 2011, http://www.abajournal.com/news/article/firestorm_re_60k_award_against_blogger_despite_lack_of_defamation/ (suggesting that the jury's verdict may be explained by an imprecise verdict form); Bob Collins, *Sometimes the Truth Doesn't Set You Free*, MPR NEWS, March 11, 2011, http://minnesota.publicradio.org/collections/special/columns/news_cut/archive/2011/03/sometimes_the_truth_doesnt_set.shtml (describing the closing argument of Moore's counsel as calling the First Amendment "really not relevant" to the case); Johnny Northside Trial Follow-Up, <http://www.thedeets.com/2011/03/11/johnny-northside-trial-follow-up/> (March 11, 2011) (providing links to a number of articles written on the case); Posting of Eugene Volokh to *The Volokh Conspiracy, \$60,000 Damages for Blogging the Truth About Someone, Intending to Get the Person Fired*, <http://volokh.com/2011/03/11/60000-damages-for/> (March 11, 2011, 4:51 PM) (suggesting that the result in this case is "unconstitutional and quite wrong"); Benjamin R. Skjold and Carl F. Engstrom, *Free Speech Threat or Jury Error? Verdict Against Blogger "Johnny Northside" Likely the Result of Special Verdict Form*, <http://www.skjoldparrington.com/newsroom/articlebank/JohnnyNorthsideVerdict.php> (suggesting that the verdict was the result of a flawed verdict form).

evidence,” nor is the evidence “so clear as to leave no room for differences among reasonable people.”

This development, likewise, attracted attention—and skepticism—both in the Twin Cities and elsewhere. *See, e.g.*, Sheila Regan, *Johnny Northside \$60,000 Judgment Upheld in Blog Battle*, TWIN CITIES DAILY PLANET, August 31, 2011, available at <http://www.tcdailyplanet.net/news/2011/06/06/johnny-northside-60000-judgment-upheld-northside-blog-suit> (describing Judge Reilly’s denial of Hoff’s post-trial motions); Eric E. Johnson, *trial Court Upholds \$60K Award Against Johnny Northside*, BLOG LAW BLOG, <http://bloglawblog.com/blog/?p=3367> (criticizing the ruling).

Neither the Plaintiff’s Memorandum of Law in Opposition to Defendant Hoff’s Post-Trial Motions nor the district court’s August 22, 2011, Order denying Hoff’s motions directly acknowledged the continuing vitality of the principle that statements must be false in order to support a claim for tortious interference. This Court can and should do so now, both to reassure the public and to proceed to the next analytical step.

II. Moore’s Closing Argument Blurred the Lines between the Defamation and Tortious Interference Claims.

During the post-trial stage, Moore attempted to dodge the consequences of the jury’s “not false” finding in the defamation count by asserting boldly:

At no time did Moore ever contend that the falsity sentence was the basis for his interference claims against Hoff. ... The interference claims were not based on the same conduct or statements as the claim for defamation.

Plaintiff’s Memorandum of Law in Opposition to Defendant Hoff’s Post-Trial Motions at 3 & n.2.

Moore's closing argument presented a starkly different picture. Moore repeatedly turned to Hoff's blog as proof of unjustified interference. For example, he made the following arguments:

- [Hoff's] "blog was an opportunity to exhibit his bile. ... Exhibit 102 is the one – there's a picture of Jerry Moore on the front (indicating). The title, 'JACC Blog Exclusive: Former JACC Executive Director, Jerry Moore, let go from the U of M UROC.' And then it goes on, 'It was reportedly coverage on this blog which blew open the issue of Moore's hiring and forced the hand of the U of M decision makers after the issue had been quietly, respectfully brought to their attention over a week ago.' Brags about getting Jerry Moore fired. That isn't about speech. That's about conduct and it can be pursued in a lawsuit." Tr. at 455-56.
- "[Y]ou can knit all the circumstantial evidence together and come to the strong conclusion that the blog telling Mr. Allen to send an e-mail and then the e-mail in fact caused the termination. Now all you have to find is that there was interference and that the breach was caused and I'll come back to that." Tr. at 460-61.
- "We don't think you have to go much farther but then look what happened, Exhibit 3, one day, one day after the June 21 post (indicating), Jerry Moore's—a letter of termination was drafted for Jerry Moore, Exhibit 103, one day. That alone, ladies and gentlemen, is evidence that John Hoff procured the breach and was the cause of the breach. That close of timing is evidence." *Id.* at 461-62.
- "You will get the actual elements of these two counts and I want to talk first about intentional interference with employment contract. ... Intentionally caused the breach: Took actions, drafted the blog, told Allen to put the link to his blog in an e-mail, told Allen to send the e-mail to the decision maker who decided to fire him and then bragged about it the next day, that his blog had been waved around over at the University of Minnesota." *Id.* at 462.
- The decision was made by Irma McClaurin. Look at who Don Allen's e-mail was sent to that included the link to John Hoff's site, Irma McClaurin." *Id.* at 463.

In short, the last thing the jury heard from Moore before retiring to deliberate was that his termination was caused by (1) Hoff's blog and (2) an email that referenced Hoff's blog.

The district court's jury instructions did not disentangle the claims.⁴ The district court did not sufficiently explain to the jurors how they should proceed if they determined that the statement underlying Moore's case ("Repeated and specific evidence in Hennepin County District Court shows that Jerry Moore was involved with a high-profile fraudulent mortgage at 1564 Hillside Avenue North") was true. The trial court listed the elements of Moore's two intentional interference claims. *Id.* at 476. It did not explain to the jury that tortious interference claims may not be based upon true statements. Nor did it explain to the jurors that if they found the statement quoted above to be true that they would have to find that Hoff interfered with Moore's contract and

⁴ Unfortunately for the clarity of the verdict, the district court received no assistance from counsel in this regard.

Although Hoff did not provide detailed jury instructions, that is understandable, given that his attorney became involved in this case only shortly before trial and has acknowledged that he had no prior experience in First Amendment or defamation law. See January 30, 2012, Affidavit of Paul Godfread in Support of Appellant's Motion for Extension of Time in which to File Brief, ¶3.

Moore's counsel, in contrast, must have been aware of at least the *Wild v. Rarig* line of cases. She attempted without success to distinguish *Wild* just a few years ago, in *Dunham v. Opperman*, 2007 WL 1191599, at *6-7 (Minn. App. April 24, 2007) (unpublished), *rev. denied*. Moore's counsel owed her own duty of candor to the district court under Rule 3.3(a)(2) of the Rules of Professional Conduct. If she had brought the *Wild* line of cases to the attention of the district court prior to the jury charge, the confusion evident in the jury verdict could have been avoided on this appeal. Instead, she seems to have taken advantage of her opponent's inexperience. That became vividly apparent when MN-SPJ sought to participate as an *amicus curiae* in post-trial proceedings in the district court. Moore's counsel objected, contending that MN-SPJ had an "improper purpose" of attempting "to 'coach' the inexperienced attorney" who was representing Hoff. See Plaintiff's Rule 11 Motion Served 3-28-11 but Not Filed at p. 1, attached as Exhibit B to May 16, 2011, Affidavit of Jill Clark, Esq. in Support of Plaintiff's Memorandum of Law filed in Support of his Motion to Strike Pleading of Society. (The district court denied that motion to strike by Order dated May 24, 2011.)

prospective advantage in some other, unjustified and improper manner. *Amici* urge this Court to look to the broader aspects of this case and take such “action as the interest of justice may require,” Minn. R. Civ. App. 103.04, by recognizing the fundamental flaws in the jury instructions.

Such line-blurring has consequences. As discussed in the next section, appellate courts cannot ignore the possibility that a jury’s verdict, although arguably proper on some evidence, was tainted by its consideration of an impermissible basis for liability.

III. The First Amendment Requires that this Court Conduct an “Independent Examination of the Whole Record” to Ensure that the Verdict below was Justified.

In cases raising First Amendment issues, “an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.”

Milkovich v. Lorain Journal Co., 497 U.S. 1, 17 (1990) (internal quotations omitted).

This principle arises from *New York Times v. Sullivan*, 376 U.S. 254 (1964), a case best known for constitutionalizing the law of libel and for holding that a public official may not recover damages for harm to his reputation absent a showing of actual malice.

There, the Court noted that the plaintiff/respondent might seek a new trial and thus took it upon itself to determine whether the evidence could supporting a finding of actual malice and thereby a judgment for the public-official plaintiff. *Id.* at 285. Since *New York Times*,

the Court has twice considered its teachings on the scope of appellate review. *See* 1

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§1:11 (4th ed. 2010) (discussing independent review).

In *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), the Court considered a perceived conflict between FED. R. CIV. P. 52(a) (“[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”) and the doctrine of independent review articulated in *New York Times*. The Supreme Court held that “the clearly-erroneous standard of Rule 52(a) ... does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times Co. v. Sullivan*.” *Id.* at 514.

Bose was a product disparagement case in which the maker of Bose loudspeakers sued *Consumer Reports* over a less-than-flattering review. The district court conducted a bench trial and then entered a verdict for Bose on grounds that the statement that instruments heard through the speakers tended to wander “about the room” (as opposed to “along the wall”) was false and disparaging and that *Consumer Reports* published the statement either knowing it was false or with reckless disregard for the truth—*i.e.*, with actual malice. *Id.* at 489. The First Circuit reversed on grounds that the evidence did not support a finding of actual malice, *id.*, and the Supreme Court affirmed. The Supreme Court recognized that “Rule 52(a) commands that ‘due regard’ shall be given to the trial judge’s opportunity to observe the demeanor of the witnesses” and that the rule of independent review “permits this opportunity to be given its due.” *Id.* at 499–500. It further explained that “‘First Amendment questions of ‘constitutional fact’ compel this Court’s *de novo* review.’” *Id.* at 509 n.27 (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 54 (1971) (plurality opinion)). As Judge Robert Sack of the Second U.S. Circuit

Court of Appeals has noted: “Reference to the term ‘de novo’ was significant, because it implies the most searching, least deferential approach by a reviewing court.” 1 SACK, *supra* §1:11; *see also* 2 SACK, *supra* §16:5.2 (discussing *Bose*).

The Court relied on *Bose* five years later in *Harte-Hanks Communications, Inc. v. Connaughton*, a public-figure libel case in which a jury had found actual malice based on evidence that the defendant, a newspaper, failed to interview a key witness to the events in question and failed to listen to crucial audiotapes. 491 U.S. 657, 694 (1989). In affirming that verdict, the Court nevertheless rejected the Sixth Circuit’s approach of identifying “subsidiary” facts that the jury “could have” found. *Id.* at 689 (citing *Connaughton v. Harte-Hanks Commc’ns, Inc.*, 842, F.2d 825, 843–44 (6th Cir. 1988)). As the Court explained, the Sixth Circuit held that such findings would not have been clearly erroneous and that, considered cumulatively, they provided clear and convincing evidence of actual malice. *Id.* at 689–90. In the Supreme Court’s view, the case should have been decided “on a less speculative ground.” *Id.* at 690. It went on to identify findings that the jury “must” have made and held that these findings supported the conclusion that the newspaper acted with actual malice. *Id.*

The Ninth Circuit has described as “difficult business” the twin tasks of deferring to the jury on credibility determinations while examining for itself the full factual record to determine whether “the believed evidence establishes actual malice.” *Eastwood v. Nat’l Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997); *see also* 2 SACK, *supra* § 16:5.2 (discussing various courts’ interpretation of the independent review standard). Despite the difficulties in its application, the First Amendment requires independent

review in cases such as this one to ensure that “libel judgments do not constitute punishment of unliked speakers.” 2 SACK, *supra* §16:5.5. Distilled to its basics, “independent review” is a straightforward standard. In the words of Judge Sack: “The reviewing court, then, must find on the basis of everything available to it simply this: that the judgment below was justified.” *Id.*

The standard of independent review applies beyond the issue of actual malice present in *New York Times*, *Bose*, and *Harte-Hanks*. *Milkovich*, for example, involved the constitutional protections available for statements of opinion and did not address the actual malice standard. 497 U.S. at 8. Nevertheless, it noted its obligation to “make an independent examination of the whole record.” *Id.* at 17; *see also* 1 SACK, *supra* §1:11 n.283; 2 SACK, *supra* §16:5.2–3 (citing cases).

Even more pertinent is *NAACP v. Claiborne Hardware Co.*, a case in which the Mississippi Supreme Court affirmed a finding of liability against defendants who engaged in a civil-rights era boycott of white merchants on the theory that they maliciously interfered with the merchants’ businesses. 458 U.S. 886, 894 (1982). There was evidence in the case that some of the defendants had used violence to enforce the boycott. Thus, on review, the Supreme Court held that because “the nonviolent elements of petitioners’ activities are entitled to the protection of the First Amendment” it had a “special obligation ... to examine critically the basis on which liability was imposed.” *Id.* at 915–16. Likewise, this Court has a special obligation to examine critically and independently the basis on which Hoff was held liable for intentional interference with

Moore's employment contract and prospective employment advantage and to ensure that Hoff's constitutionally protected speech did not serve as grounds for that verdict.

In denying Hoff's Motion for Judgment as a Matter of Law or in the Alternative for a New Trial, the district court did not mention the independent review requirements of *New York Times* and its progeny and instead used a standard of review that was extremely deferential to the jury's findings of facts. It held:

By special verdict, 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. Despite Defendant's argument to the contrary, Plaintiff provided direct and circumstantial evidence in support of his tortious interference claims, independent of and distinct from his defamation claim. These findings are not "palpably contrary to the evidence," nor is the evidence "so clear as to leave no room for differences among reasonable people."

August 22, 2011, Order at 7. The district court cited the following evidence as supportive of Moore's claim:

- "[D]irect 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;"
- Testimony by Don Allen that "he sent an email to the University of Minnesota, at Defendant's behest, threatening negative publicity and lobbying to get Plaintiff fired;"
- Plaintiff's termination from his position at the University one day after transmission of Mr. Allen's email;
- Hoff's acknowledgement that he wanted to get Plaintiff fired and was working "behind the scenes" to do so;
- That "Defendant took personal responsibility for Plaintiff's termination and announced his ongoing, active involvement in the University's actions."

Id. at 5. This analysis serves only to intensify concerns that the jury impermissibly based its verdict on constitutionally protected speech. The district court’s analysis—which focuses on what the court and jury “heard,” *see id.*, and not on what the jury *actually found*—is of the same speculative character that the Supreme Court rejected in *Harte-Hanks*. *See Harte-Hanks*, 491 U.S. at 690.

Even if evidence sufficient to support the jury’s verdict on the interference claims exists *somewhere* in the record, a critical, independent examination of the trial court transcript will show that this evidence was hardly presented to the jury as the intended focus of its deliberations. Instead, in his closing argument, Moore repeatedly turned to Hoff’s blog as proof of unjustified interference. *See* p.8 above. In short, the last thing the jury heard from Moore before retiring to deliberate was that his termination was caused by (1) Hoff’s blog and (2) an email that referred to Hoff’s blog. Thus, even if some record evidence—unlike Hoff’s truthful statement— might support Moore’s intentional interference claims in a manner that does not offend the First Amendment, Moore did not rely on that evidence in his closing argument.

In its August 22, 2011, Order, the district court did not address the impact of Moore’s closing argument, and the jury’s verdict form does not allow this Court to ascertain whether it based its decision regarding the tortious interference claims on the truthful statement or something else. As the Supreme Court stated in *Claiborne*, when damages allegedly arise both from unlawful conduct and the exercise of free speech, an imposition of 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.” 458 U.S. at 933–34.

If a verdict is not supported by such findings, it cannot stand. *See id.*; *New York Times*, 376 U.S. at 284 (“Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. Because of this uncertainty, the judgment must be reversed and the case remanded.”).

Conclusion

This appeal involves issues that affect interests extending far beyond those of the parties. Increasingly, members of the public turn to blogs created by “citizen journalists” such as Hoff to learn about what is happening in their communities and around the world. It is vital that existing laws, developed to protect traditional forms of media from end-runs around the constitutional requirements of libel law, apply as well to online expression.

This Court should reverse the judgment below. Established legal principles lead to the conclusion that the jury’s verdict in favor of Moore based on tortious interference cannot stand, because that verdict is tainted by the likelihood that it was based on the same truthful statement as Moore’s failed claim for defamation.

Regardless of the precise determination on appeal, this Court’s opinion should emphasize that it will apply the same rules to publicly accessible online statements that it would to a printed or spoken version of the same material: (1) regardless of what the suit

is labeled, when the thing done to cause any damage to the plaintiff arises from an allegedly false and defamatory statement, the suit is governed by the constitutional requirements and other special rules applicable in defamation actions; (2) no liability for tortious interference can arise when one merely gives truthful information to another; and (3) in cases involving protected expression, an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.

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