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INTRODUCTION

Despite being almost 53 pages long, Respondent's brief contains very little analysis or argumentation directly addressing the main issues raised by Appellant on this appeal. And to the extent that Respondent does confront those issues, his brief repeatedly mischaracterizes the record and distorts the governing law, often egregiously.

As Appellant's brief describes, the principal appeal issue is whether the trial court in denying Appellant's post verdict motion JMOL, failed as a matter of law to scrutinize the evidence in order to insure that protected expression was not relied on by the jury in reaching its verdict. *See, e.g.*, Appellant's Statement of Legal Issues, Appellant's Brief, 4. But rather than offering any specific rebuttal to this issue based on the actual trial record or applicable precedent, Respondent mostly seeks to divert attention from it by discussing matters that are not before the Court and not relevant to its decision, inventing claims about what Appellant is "really" appealing even though never mentioned in Appellant's brief, distorting the trial court record in an apparent effort to limit the scope of review, and mischaracterizing the standard of review. Consequently, Respondent's brief provides neither factual nor legal grounds for affirming the trial court's decision.

1. APPELLANT PROPERLY PRESENTED HIS FIRST AMENDMENT ISSUES TO THE TRIAL COURT

Respondent claims that Appellant did not properly raise his First Amendment defenses when before the trial court. Appellant's Answer expressly referred to the First Amendment in a variety of ways, asserting it as an affirmative defense as well as contending that Hoff's statements were privileged. *See Answer* generally; affirmative defenses at ¶ 83-110. Furthermore, Appellant's post verdict motions directly addressed his First Amendment arguments. Respondent fails to describe when Appellant should have raised the First Amendment defenses, but in any event, the record makes clear that those issues were presented to the trial court.

2. RESPONDENT MISCHARACTERIZES THE APPEAL AS A CHALLENGE TO THE JURY INSTRUCTIONS.

At intervals throughout his brief, Respondent insists that this appeal is really about jury instructions, even though Appellant has never identified that as an issue, either in the notice of appeal or in his initial brief. According to Respondent, "In actuality, Appellant is challenging the jury instructions, without using those words. Why not use those words? Because Appellant did nothing to challenge the jury instructions below." Respondents' Brief, 1. But this argument merely shows the extent to which Respondent misapprehends Appellant's position and the law governing the appeal.

There is no question that the jury instructions could have been better framed by the trial court, so as to better reflect the fact that a tortious interference claim cannot be based on protected expression, and that there must be competent separate and independent evidence of the interference. At the same time, however, the instructions given to the jury were not clearly subject to an objection by Appellant. If Respondent had "in actuality" presented clear, independent evidence of interference, it is considerably more likely that the verdict would have been adequately supported, and the instructions sufficient. [FN. –amicus]

The problem with the verdict became visible only after it was returned, after Respondent failed to present any evidence to the jury showing behavior by Appellant that was separate from communications about the mortgage fraud. That, combined with special verdict finding that Appellant's claim about Respondent's mortgage fraud was not false, produced a verdict that was untenable on First Amendment grounds. Considering the evidence in the record and the jury instructions as given, the verdict must be set aside as a matter of law.

The function of jury instructions is obviously not to make the jury as competent in applying the governing law as the trial court is, nor to enable the jury to address every possible legal contingency that might be prompted by a particular verdict. Thus contrary to Respondent's claim, an objection to the jury instructions by Appellant was not required to preserve his First Amendment position. Instead, Appellant's challenge to the verdict was appropriately addressed in his motion

JMOL, asking the Court to perform its role of applying the law, after the defect in the verdict became apparent caused by the ambiguity about the jury's findings.

Indeed, the trial court acknowledged the legitimacy of Appellant's motion, never suggesting that Appellant's First Amendment objection was somehow invalid because he had not taken exception to the jury instructions.[1] For these reasons, there is no merit to Respondent's claim that because Appellant did not contest the jury instructions, he cannot now challenge the verdict on First Amendment grounds as a matter of law.

3. MINNESOTA LAW REQUIRES AN INDEPENDENT REVIEW OF THE RECORD IN FIRST AMENDMENT CASES

Respondent contends that because this appeal follows from a jury verdict, it is strictly subject to the standard of review that generally applies when a verdict is challenged (the evidence is to be viewed in the light most favorable to the jury verdict, and the verdict must be sustained unless the evidence is practically conclusive against it, Respondent's Brief, 25, citing *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860 (Minn. 2010)). But Respondent's argument here fails, because it stubbornly ignores the impact of First Amendment precedent in this case.

Appellant's initial brief (at 10) describes how Minnesota law requires that a claim for tortious interference based on expressive activity must essentially satisfy the legal criteria applicable to a defamation action. Furthermore, since the trial court determined that Respondent is a "public figure" for purposes of this action,

one of the criteria that he must satisfy is clear and convincing proof of "actual malice" on the part of Appellant. *Chafoulias v. Peterson*, 668 N.W.2d 642, 654 (Minn. 2008).

As also noted in Appellant's initial brief (at 21-22), the United States Supreme Court has held that where the actual malice standard applies and judgment is rendered in favor of the plaintiff, on appeal, the Court must independently scrutinize the record in order to determine if plaintiff in fact sustained his burden. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 514 & n. 31 (1984). Respondent nonetheless makes the peculiar argument that regardless of what *Bose* may have said about the need for de novo review of the record, "it is far from clear how the Minnesota Supreme Court (the highest court in a state that has a duty to protect *state* interests) would rule on this issue." Respondent's Brief, 27 (emphasis in original). "Stated another way, Appellant has not cited any Minnesota case that held that the appellate courts must conduct an independent review of the evidence." *Id.*

This argument is peculiar because it is so obviously in error. More than 20 years ago, the Minnesota Supreme Court in *Diesen v. Hessburg*, 455 N.W.2d 446, 452 (Minn. 1990), a case cited by Respondent, expressly acknowledged and applied the rule discussed in *Bose*: "[W]e nevertheless address whether the record establishes actual malice with convincing clarity . . . due to the independent review standard set forth by the United States Supreme Court." Later in its *Diesen* opinion, the Court makes the point even more explicitly: "Further, '[t]he 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.'" *Id*., 453-54 (brackets and ellipsis in original), *quoting Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685 (1989). And again, in the present case, this scrutiny applies equally to the evidence contained in the record that supposedly sustains the tortious interference verdict, owing to the distinct possibility that expressive behavior was relied on by the jury in reaching its decision.[2]

4. THE RECORD SIMPLY CONTAINS NO INDEPENDENT EVIDENCE SUPPORTING TORTIOUS INTERFERENCE

It bears emphasizing that Appellant's initial brief certainly made clear that a principal issue on this appeal is whether the record does contain any credible, independent evidence supporting the tortious interference verdict, thus giving Respondent an unqualified opportunity to cite such evidence from the record in his response. Yet Respondent's brief contains virtually no discussion about independent evidence, and as in the trial court, most of what Respondent does refer to involves aspects of Appellant's communications concerning Respondent's involvement in mortgage fraud. Nowhere in Respondent's brief is there any discussion about evidence of conduct by Hoff other than his communication about Moore's involvement in mortgage fraud. As argued in Appellant's initial brief, without that independent evidence, the verdict must be overturned.

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[2] The Court in *Diesen* noted as well that "[g]ranting JNOV is also proper when the jury's findings are 'contrary to the law applicable in the case.'" 455 N.W.2d at 452 (citation omitted).

Instead of pointing to evidence in the record that is distinct from the communication about Moore's involvement in mortgage fraud, Respondent's brief (at 50) attempts to grossly mischaracterize the record by suggesting that perhaps some of Hoff's communication constituted threats or intimidation. However, the specific examples Respondent provides to support this claim serve to undermine it, because they all involve legitimate communications about the mortgage fraud, encouraging others to take action, or are completely irrelevant (e.g. Hoff's supposed "attacks on Moore for campaigning for" a city council candidate). Instead of providing independent evidence of interference, Respondent offers inconsistent and contradictory[3] assumptions about Hoff's motives for speaking. But even if we assume the worst of motivations, because there is nothing in the record other than protected speech about a public figure, the verdict cannot stand.

5. RESPONDENT FAILED TO FILE A NOTICE OF REVIEW AND THEREFORE CANNOT CHALLENGE RESPONDENT'S PUBLIC FIGURE STATUS.

In his brief, Respondent seeks to challenge the trial court's determination that he is a "public figure" for purposes of this action and thus required to establish the existence of actual malice. Respondent's Brief, 34. According to Respondent, the district court's "analysis" on this issue "is flawed." *Id*., 37. Respondent's argument is unavailing, however, for two reasons.

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[3] Throughout the proceedings, Hoff was accused of being a supporter of and mouthpiece for Minneapolis City Councilmember Don Samuels. *See e.g.* Second Amended Complaint ¶12. Mr. Samuels, who testified for Hoff, could fairly be described as a successful black man. Yet strangely, Respondent accuses Hoff accused of not wanting to see a black man become successful. Respondent's brief, 51.

First, Respondent never filed a notice of review citing the trial court's ruling on the public figure issue, and therefore under Minn. R. Civ. App. P. 106, he is barred from contesting it now in conjunction with Appellant's appeal.[4] "Generally, this court will not consider challenges to issues decided adversely to a respondent when the respondent on appeal has not filed a notice of review." *Marchio v. Western Nat. Mut. Ins. Co.,* 747 N.W.2d 376, 382 (Minn. App. 2008). "Even if the district court decision is ultimately in favor of respondent, the respondent must nonetheless file a notice of review to challenge that portion of the decision decided adversely against the respondent." *City of Duluth v. Duluth Police Local*, 690 N.W.2d 357, 359 (Minn. App. 2004).

Second, Respondent is **clearly** a public figure. Just a few years ago, this Court issued a decision having remarkably close factual parallels with the present action, holding that the plaintiff there was also a public figure. In *Metge v. Central Neighborhood Improvement Assn.*, 649 N.W.2d 488, 497 (Minn. App. 2002), the Court determined that plaintiff "Metge qualified as a limited-purpose public figure" because she was the executive director of a Minneapolis neighborhood association that "was imbued with a public purpose," received substantial public funding, and was the subject of regular media attention. Metge had also "assumed a purposeful and prominent role" in controversies involving the direction of the association and its activities.

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[4] Similarly, Respondent also discusses whether the comments posted to the blog should have been considered as evidence. They were not submitted to the jury and Respondent did not appeal the trial court order excluding the comments as evidence.

All of these characteristics are present with respect to Respondent Moore's involvement in the Jordan Area Community Council, also a Minneapolis non-profit neighborhood organization. Thus, even if the issue was properly before the Court on appeal, Respondent would be classified as a public figure, just as Metge was.

6. THE APPEAL ENCOMPASSES BOTH TORTIOUS INTERFERENCE CLAIMS

Respondent argues that only a portion of the verdict was appealed. But Appellant's motion for judgment as a matter of law and new trial clearly indicate that both tortious interference claims were challenged and repeatedly refer to those claims in the plural. Hoff Post Trial Motions at 1-2. Additionally, Special Verdict Form Question 8 combined the counts in assessing damages for "interference with a contractual relationship and/or prospective advantage," and therefore an appeal of one is necessarily an appeal of both. Special Verdict Form, 2. And the trial court expressly acknowledges both. Add-4. Thus, there is simply no basis for respondent to assert that only one of two tortious interference claims were appealed.

7. RESPONDENT'S ATTEMPTED DISTINCTION BETWEEN SPEECH AND CONDUCT HAS NO LEGITIMACY

Respondent hopes to persuade this Court that even if some of the activity engaged in by Appellant Hoff may have been expressive and protected by the First Amendment, other aspects of his behavior were simply "conduct," and therefore not protected. As Respondent puts it, "both [Appellant and amici] failed to tell

this Court what evidence is protected speech. And what is merely conduct. This is a fatal flaw." Respondent's Brief, 45 (emphasis in original). However, Respondent's attempted distinction is entirely specious, along with the claim that Appellant never sought to address the issue.

The courts have often recognized that in many contexts, the separation between speech and conduct is artificial, and by itself is an unreliable guide to determining what the First Amendment covers:

> "First Amendment protection is not limited to the written or spoken word; it extends to some expressive activity, because the activity by itself may be communicative." *State v. Machholz,* 574 N.W.2d 415, 419 (Minn. 1998). To determine if conduct is sufficiently expressive to receive the protections of the First Amendment, we look to see whether "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington,* 418 U.S. 405, 410–11 (1974).

State v. Stockwell, 770 N.W.2d 533, 537 (Minn. App. 2009). *See also Texas v. Johnson*, 491 U. S. 397, 404 (1989) ("we have acknowledged that conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments'") (citation omitted).

Appellant's initial brief describes how every example of Appellant's behavior cited by the trial court in its order and memorandum rejecting Appellant's post-verdict motion JMOL was clearly and integrally related to his expressive activity—was part of an unbroken continuum of effort on Appellant's part to call attention to Respondent's mortgage fraud, and **through communicating with others**, to see that an individual having that sort of record was not employed by the University.

This certainly satisfies the test described in *Stockwell*--plainly there was an intent by Appellant "to convey a particularized message," and "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."

Given the actual examples of evidence referred to by the trial court, as well as the transcript of the trial itself, the court's suggestion that the verdict "on plaintiff's tortious interference claims has reasonable support in the factual record," Add., 4, is not simply implausible, it is demonstrably wrong. In his brief, Respondent also purports to cite instances of Appellant's behavior that were not expressive, and that were independent of his expressive activity. Respondent's Brief, 50. But as in the case of the trial court's memorandum, all of those examples are based on a failure to recognize that Appellant's First Amendment protection extends well beyond the simple posting of comments on his blog: "An individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated." *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653, 2666 (2011). Such restraints are precisely what Respondent and the trial court would impose on Appellant.

Respondent is attempting to punish Appellant's speech because of its contents and what it communicates. Everything that Respondent alleges is the basis of the tortious interference verdicts was intertwined with the allegedly defamatory statement. The verdict is an unconstitutional intrusion upon

Appellant's First Amendment rights precisely because the alleged interference flows directly from the informative or persuasive nature of his speech.

CONCLUSION

Respondent has not and can not articulate a theory where the record could support the verdict. For that reason and for the reasons described in Appellant's brief and this Reply brief, Defendant Hoff is entitled to judgment as a matter of law or a new trial.

Dated: April 10, 2012

Respectfully submitted,

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