

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Jerry Moore,

Court of Appeals No. A11-1923

Respondent,

v.

**RESPONDENT'S RESPONSE TO
SEVERAL ORGANIZATIONS'
REQUEST TO SUBMIT AMICUS
BRIEF**

John Hoff a/k/a Johnny Northside,

Appellant.

INTRODUCTION

Respondent Jerry Moore is quite familiar with the Minnesota Pro Chapter, Society of Professional Journalists ("Society Pro"), one of the organizations requesting leave to file brief of amicus curiae in this appeal. Although Respondent does not oppose the concept of an amicus brief, he does oppose the way in which the Society Pro has timed its briefs in this case, as explained below.

Respondent also seeks a briefing schedule.

AUTHORITY FOR THIS RESPONSE

Minnesota Rule of Civil Appellate Procedure 129 does not state whether parties to the appeal may respond to a request for leave to file amicus brief. However, in past appeals, Respondent counsel has received orders of this Court granting leave to file amicus brief, which commented that the parties did not object to the request. This has communicated to Respondent that he may object.

STATEMENT OF FACTS

Just prior to the start of trial in March 2011, the district court held an evidentiary hearing. The evidentiary hearing was well-attended by local media. However, after that, many of the disappeared. With one exception, no local media attended the entire trial. (Moore's memorandum supporting his motion to strike the Society Pro's pleading, at Clark Appellate-Aff. Exh. A).

The jury verdict in favor of Jerry Moore was read March 11, 2011. (Clark Appellate-Aff. Exh. B). The special verdict form (SVF) indicates at Q1 that the jury found Plaintiff had not met his burden of proving falsity of the one statement being scrutinized for defamation. *Id.* (The "falsity sentence"). The jury found in favor of Moore on his claims of intentional interference with contract and interference with prospective employment relations. *Id.*

Following the trial, local media started a rumor: that the evidence supporting the intentional interference claim was the 'falsity sentence.' That rumor caught fire in the media. But it was never based in fact. And Hoff had never made that argument, before during or after the trial. (Clark Appellate-Aff. Exh. C, Memorandum p. 1-2).

On March 23, 2011, the Society Pro filed a memorandum of law with the district court, giving legal voice to the media rumor, and contending that the only evidence supporting the intentional interference claim, was 'falsity sentence' at SVF Q1. (Clark Appellate-Aff. Exh. D, see Memorandum pps. 3-6). The Society Pro had

not sought prior permission from the district court to file its “amicus” brief. And, the Society Pro filed its “amicus” brief before Hoff had filed any post-verdict motions. It seems that the timing of the Society Pro “amicus” brief was meant to *educate* Hoff’s attorney about what legal argument to make.

That presumption was borne out when on April 1, 2011, Hoff filed his post-verdict motions, parroting the Society Pro legal argument (that the ‘falsity sentence’ was the only support for the intentional interference with contract claim). (Clark Appellate-Aff. Exh. E, Memorandum pps. 2-4).

By the time Moore responded to Hoff’s post-verdict motions on May 25, 2011, he was required to respond to both Hoff’s brief, and that of the Society Pro. Moore objected to the Society Pro’s “district court amicus brief” and request for oral argument, and moved to strike it because it was ‘redundant’ and ‘immaterial.’ (Clark Appellate-Aff. Exh. C & F). Moore’s brief below stated,

The Society’s “memorandum” also cited to a 2009 version of *Appellate Rules Annotated*, §129.1 and 129.3. *Id.*

...*Appellate Rules Annotated*, ...Section 129.3 states, ...

The purpose of an amicus curiae brief is to inform the court of facts or matters of law that may have escaped its consideration **not to repeat or emphasize arguments already put forth by a party. ... The Seventh Circuit Court of Appeals urges counsel for amicus curiae to ascertain before the amicus brief is written the arguments which will be made by the party whose position an amicus supports so that unnecessary repetition or restatement of arguments will be avoided.**

(Emphasis added). Moore’s concern was that the Society Pro did not want to be a friend of the Court, that the Society Pro really wanted to *litigate* the issue *for Hoff*. *Id.*

The District Court denied Hoff’s post-verdict motions. (Clark Appellate-Aff. Exh. G).

Now, on appeal,¹ Hoff has essentially made the Society Pro’s argument from its March 23 district-court memorandum: that statements the jury found “true” cannot form the basis of a different tort. (See Hoff statement of the case filed with this Court, Clark Appellate-Aff. Exh. H, p. 2).

Now the Society Pro (and others) have requested leave to file an amicus brief. This “request” is filed prior to Hoff’s brief on the merits. In the guise of explaining the “applicants’ interest” pursuant to Minn.R.Civ.App.P. 129, the Society Pro *again* preceded Hoff’s brief on the merits - by filing its argument *on the merits*. (See Society Pro’s argument at pages 2-4 of its appellate filing. Note how the Society Pro has refined its district court argument for appeal. Instead of merely arguing (as it did below), that the “true” statement was only evidence supporting the non-defamation torts, it now claims that Hoff was entitled to a trial completely free of any *possibility* that the jury considered constitutionally-protected speech. Note how the Society Pro cites appellate case law (citing a defamation case for the proposition that an appellate court must make its own examination of the record).

¹ It is unclear whether this appeal will go forward, given this Court’s order dated November 16, 2011.

RESPONDENT'S CONCERNS ABOUT AN AMICUS BRIEF

Society Pro should not be allowed to duplicate or emphasize

In the district court, the Society Pro's brief was parroted by Hoff. Below, Moore noted that the role of an amicus is not to reiterate the arguments made by parties. Or perhaps it is more accurate in this case to say that the role of the amicus is not to brief the issues *for* the party.

Moore has no issue with the concept of an amicus brief. But in this case, Moore is concerned at what has gone before. The Society Pro's request to file amicus brief should either be denied because it would repeat or emphasize Hoff's argument. Or, if granted, this Court should order that the amicus must brief a *different* issue –not the one briefed by Hoff.

If Hoff briefs the issue that was created by bloggers that did not attend the trial (that the “true” statement cannot support the intentional interference claim), then the Society Pro should not be permitted to brief the same issue. Obviously, if Hoff changes his issue and briefs something different, the same concept should apply to the Society Pro's brief.

Court of Appeals should issue briefing schedule to protect Moore

The Rules of Appellate Procedure do not automatically ensure that the Respondent will have the amicus brief before he is required to respond to the main brief. In light of the history of this case at the district court, Respondent requests a briefing schedule that clarifies that the Amicus cannot file its brief until after the

Opening Brief of the Appellant is filed, and that the Respondent brief is not due until after the Amicus brief is served and filed, permitting Moore sufficient time to respond to the Amicus brief (or seek other relief).

CONCLUSION

Respondent respectfully requests that those seeking leave to file an Amicus brief: 1) be limited to one brief; 2) that their briefing be limited to those issues *not* raised by Hoff in his Opening Brief; and 3) that the Amicus brief may not be filed until after the Opening Brief of Hoff, and that Moore will have thirty (30) days from the date of service of the Amicus brief to file his respondent brief or motion about the amicus brief's content.

Date: November 23, 2011

ATTORNEY FOR RESPONDENT

Jill Clark, Esq. (196988)
Jill Clark, LLC
2005 Aquila Avenue North
Golden Valley, MN 55427
PH: (763) 417-9102
FAX: (763) 417-9112