**STATE OF MINNESOTA**
**COUNTY OF HENNEPIN**

**DISTRICT COURT**
**FOURTH JUDICIAL DISTRICT**

Jerry L. Moore,

Plaintiff,

v.

Donald W.R. Allen, individual and as Principal of V-Media Development Corporation, Inc. a Minnesota Non-Profit corporation, John Hoff a/k/a Johnny Northside, and John Does 1-5,

Defendants.

Civil No. **27-cv-09-17778**

**Plaintiff's Memorandum of Law filed in Support of his Motion to Strike Pleading of Society**

## INTRODUCTION

There are only two parties left in this case: Plaintiff Moore, and Defendant Hoff.

For reasons that are unclear, the Society of Professional Journalists ("Society") filed a pleading in this case although it is undisputed it was never served, never a party, and never moved to intervene. The Society then presumed to schedule "oral argument" in Plaintiff's case. Not only did Plaintiff not permit the filing, but Plaintiff began objecting to the pleading on the day the Society filed it.

Plaintiff now moves to strike the Society's pleading pursuant to Minn.R.Civ.P.12.06, because the pleading is: 1) not in Compliance with Minn.R.Civ.P. 11; 2) Redundant; and 3) Immaterial. ***Plaintiff does not seek oral argument on this motion.*** Rather, he seeks a ruling prior to May 31, 2011 striking the pleading and the purported "oral argument" of the Society.

## FACTUAL STATEMENT

It is undisputed that Defendant Don Allen settled his dispute with Jerry Moore, and that as of the commencement of trial there were only 2 parties in this case: Plaintiff Jerry Moore and Defendant John Hoff.

On or about March 23, 2011, the Society filed its first pleading in this case entitled a "motion," and "memorandum." (Clark Strike-Aff. Exh. A).

It is undisputed that the "motion" was not styled as a motion to intervene, but instead was styled as a motion "for leave to participate as Amicus Curiae." *Id.* Further, it is undisputed that the "memorandum" filed therewith, did not set forth why the Society may intervene in this matter. *Id.*

Still further, the "memorandum" cited as its "authority" to intervene in this case only a Rule of Appellate procedure, Rule 129. *Id.* at p. 2. The Society's "memorandum" also cited to a 2009 version of *Appellate Rules Annotated, §129.1 and 129.3. Id.*

Because the Society cited this rule and these sections of *Appellate Rules Annotated,* Plaintiff believes he is entitled to presume that they read them. Section 129.1 begins, "Minn.R.Civ.App.P. 129 governs the procedure for obtaining leave of the **appellate courts** to file an amicus curiae brief." (Emphasis added). Two sentences later that very section states, "**An amicus curiae does not participate in oral argument** except with the express permission of the appellate court." (Emphasis added).

Section 129.3 states, "A request to file an amicus curiae brief must be filed with the **appellate** court...." (Emphasis added). That Section continues at paragraph 3,

> 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.

It is undisputed that the Society filed its pleading in the trial court (not in an appellate court), and that the Society did not cite any law that would make appellate rules applicable to the trial court.

And, instead of awaiting *permission* to file its brief, and instead of seeking or awaiting *permission* to set on oral argument (as are required in Appellate Rule 129, the only authority cited by the Society – see Exh. C to Clark Strik-Aff. ), the Society presumptuously filed its brief and set on oral argument.

Further, at the point the Society filed it, Hoff had not yet filed post-verdict motions. This means that Hoff had the Society's brief by the time he filed his own.

On or about March 24, 2011, upon receiving the pleadings of the Society, Plaintiff left a voicemail for the Society's counsel asking for a call back. The Society's attorney never returned the call. (Clark Strike-Aff. ¶2). The voicemail from Plaintiff also indicated that the Society clearly did not know the facts of the case. (Not verbatim but the content.) *Id.*

In response, the Society's Attorney sent an email to Plaintiff stating, "I listened to your voicemail. If there is information you think I should receive, feel free to send me an email." (Clark Strike-Aff. Exh. D, email sent by Attorney Borger at 8:22 a.m.).

Plaintiff wrote back,

> You should have asked me before filing the motion. You have a duty under Rule 11 to investigate the facts – before filing.
>
> There is no legal authority (that I can see) for your "district court amicus" brief. Further, even if this were at the Court of Appeals and your "client" was granted permission to file an amicus brief: a) the permission must precede the brief; and b) the Amicus does not get to argue.
>
> ...

> Your "client" has wrongfully insinuated itself into these legal proceedings (you do not represent a party and [] you have no right to schedule argument on anything) and your papers must be withdrawn.
>
> If you think you had some legal authority to do what you did, please provide it by the end of the day. (This is an attempt to resolve this issue without need for Rule 11 proceedings.)

(Clark Strike-Aff. Exh. D, email sent by Attorney Clark at 8:30 a.m.).

Plaintiff never received any email response from the Society – ever. (Clark Strike-Aff. ¶3).

On March 28, 2011, Plaintiff served but did not file a Rule 11 motion. (Clark Strike-Aff. ¶4).

The Society did not withdraw or modify any of its pleadings, except to *add* an oral argument date of May 31, 2011.

Now that Hoff has filed post-verdict motions, it is clear that the Society's brief is redundant and immaterial.

## I. SOCIETY'S PLEADING SHOULD BE STRICKEN.

The Society's pleading should be stricken under Minn.R.Civ.P.12.06.

### A. Rule 12.06 is appropriate vehicle to strike Society pleadings.

Minnesota Rule of Civil Procedure 12.06 reads,

> **12.06 Motion to Strike.**
>
> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party, or upon its own initiative at any time, **the court may order any pleading not in compliance with Rule 11 stricken** as sham and false, **or may order stricken** from any pleading any insufficient defense or any **redundant, immaterial**, impertinent or scandalous matter.

(Emphasis added).

"Minn. R. Civ. P. 12.06 says a motion to strike may be made on the grounds the pleadings are a sham and false, or constitute an 'insufficient defense,' or contain 'redundant, immaterial, impertinent or scandalous matter.'" *Tarutis v. Commissioner of Revenue*, 393 N.W.2d 667, 669, n. 1 (Minn. 1986). The Society's pleading is not a Complaint or Answer, so it is not the type of pleading to which a responsive pleading is required. Rule 12.06 has been used to strike pleadings other than complaints and answers. *See, e.g., Untiedt v. Schmit*, 2001 Minn. App. LEXIS 129 (Minn. Ct. App. 2001).

Further, prior to the promulgation of the Rules of Civil Procedure, a motion to strike was used to object to the filing of a purported intervenor. *See, e.g., Hoidale v. Cooley*, 143 Minn. 430 (Minn. 1919) (motion to strike intervenor's answer because no basis to intervene); *Regan v. Babcock*, 188 Minn. 192 (Minn. 1933). (Motion to strike intervenor's complaint); *Twin City Milk Producers Ass'n v. Helger*, 199 Minn. 124 (Minn. 1937) (Motion to strike portions of intervenor's complaint). The Society did not specifically move to intervene and has not plead or shown that it can satisfy the criteria set forth in Minnesota Rule of Civil Procedure 24. However, it appears that it desires the rights of an intervenor (to litigate within the case as a party), without having to meet the criteria.

**B. Society's pleadings are Redundant and Immaterial.**

Now that Hoff has filed his post-verdict motions, it is clear that the Society's pleadings are redundant and immaterial. Beginning at page 2 of Hoff's pleadings, he makes the same argument made by the Society: that if a statement was true, then it cannot form the basis of a tortuous interference claim. Plaintiff does not agree with that argument, and does oppose it. But for purposes of this memorandum Plaintiff merely points out that it is the same argument

made by the Society. The Society's pleadings, therefore, are redundant and immaterial to oral argument, and to this Court's determination.

## II. To the Extent Necessary, the Society's Pleadings Violate Rule 11.

Plaintiff first sought informal disclosure by the Society of law that supports this *trial court* request to act as Amicus. None was forthcoming. Then, Plaintiff served but did not file a Rule 11 motion, in compliance with the 'safe harbor' provisions of Rule 11. (Rule 11 at Clark Strike-Aff. Exh. E). The Society did not withdraw its pleadings. The Society did not modify its pleadings or at any time add or provide Plaintiff with any *law* supporting: i) filing an amicus motion at the *trial court level;* ii) filing a brief on the merits without awaiting *permission* of the trial court on the issue; and/or iii) scheduling oral argument without specific permission of the trial court.

The Society's pleadings violate Rule 11 (either as a free-standing Rule or as referenced inside Rule 12.06) because:

> (b) the [] legal contentions therein are [**not**] warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law....

*See* Rule 11.01(b); and because:

> (c) the allegations and other factual contentions [**do not**] have evidentiary support ....

*See* Rule 11.01(c). The Society did not include *any* facts in its memorandum. Nor is there any reasonable basis to assume it knows the facts of *this* trial or will learn them in the near future. Plaintiff does not see any evidence that the Society purchased a transcript of the trial. Further, based on the knowledge of Plaintiff counsel, no member of the Society attended the trial on any regular basis such that they could have known what fact were adduced at trial. (Clark Strike-Aff. ¶5).

Plaintiff timely served a Rule 11 motion on the Society and more than 21 days have passed since that service. The Society has not withdrawn or modified its pleadings to deal with the problems identified by Plaintiff. (Clark Strike-Aff. ¶4).

## III. Moore is Prejudiced by having to respond to Multiple Briefs.

Allowing the Society to insinuate itself into this proceeding without having to file and having granted a motion to intervene sets a bad precedent. Coverage of this trial went national. Imagine if societies all across the country had sought to file amicus briefs? Or, the multiple blogs whose personnel clogged the hallways outside the trial on certain days sought to file amicus? No party who has worked diligently to try an efficient case should be beleaguered by multiple briefs, particularly not from non-parties. Plaintiff counsel has already expended around $1,000 of legal work on the Society's papers – which should not have had to occur. (Clark Strike-Aff. ¶6).

Finally, as a practical matter, it appears the Society's work is done. The Society may well have sought to "coach" Hoff and his attorney as to this argument. If so, then that coaching has occurred (see Hoff's memorandum).[1] Moore should not have to respond to a non-party's brief which is not even on point to this case. And, Hoff should not be allowed an "additional" lawyer on this argument at oral argument.

## IV. No Monetary Sanctions Sought at this Time.

Plaintiff seeks the timely relief of striking the Society's pleadings and striking their oral argument. If that occurs, Plaintiff will not seek any monetary sanction. If the Society withdraws its pleadings and request to speak in this case at a non-party at oral argument, Plaintiff will not seek any fees. This position is taken in large part to allow a speedy resolution

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[1] More's the pity, as the Society did *not* know this case or this trial, and its argument may have misled Hoff. But that was Hoff's decision.

to this issue without having to set *this* matter on for hearing (Plaintiff is not requesting oral argument), full briefing by the Society, etc.

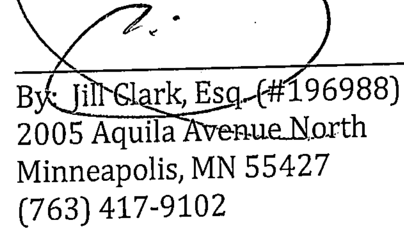
However, if the Society continues to pursue this matter, Plaintiff does reserve the right to seek attorney fees, which will be higher by that point.

## CONCLUSION

For all of the above reasons, Plaintiff Jerry Moore respectfully requests that this Court strike the pleadings of the Society and strike the Society's counsel's appearance from the oral argument.

Dated: May 16, 2011

**ATTORNEY FOR PLAINTIFF**



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