STATE OF MINNESOTA

DISTRICT COURT

HENNEPIN COUNTY

FOURTH JUDICIAL DISTRICT

Jerry L. Moore,

Plaintiff,

vs.

John Hoff a/k/a/ Johnny Northside,

Defendant.

File No. 27-CV-09-17778
The Honorable Denise D. Reilly

REPLY MEMORANDUM OF *AMICUS CURIAE* MINNESOTA PRO CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS

Introduction

Treating Plaintiff Jerry Moore's motion and memorandum dated May 16, 2011, as the equivalent of a response to the March 23 *amicus* motion and memorandum of the Minnesota Professional Chapter of the Society of Professional Journalists, MN-SPJ submits this reply. The Court should grant MN-SPJ's request to participate as *amicus curiae* in this proceeding, and should deny Plaintiff's motion to strike MN-SPJ's request.

MN-SPJ does not object to the Court ruling upon this *amicus* role based on the motion papers (provided that the paper submissions close with this memorandum) and without oral argument, prior to the post-trial motion hearing scheduled for May 31.

Argument

I. MN-SPJ's *Amicus* Motion was Appropriate and Timely.

Amicus participation at the trial court level is unusual but not unprecedented, particularly in a case attracting widespread public attention. For example, the decision of the district court in *Perry v. Schwarzenegger*, 2009 U.S. Dist. LEXIS 55594 (N.D. Cal. June 30, 2009) (federal court challenge to California constitutional amendment prohibiting gay

marriage) lists appearances of various counsel for *amici* on a motion for preliminary injunction.

In the present case, the jury's March 11verdict awarded damages to plaintiff despite a finding that defendant's statement was true. News of that result generated confusion, consternation, and commentary in Minneapolis and around the country. *See, e.g.*, http://www.abajournal.com/news/article/firestorm_re_60k_award_against_blogger_despite_lack_of_defamation/ ; http://minnesota.publicradio.org/collections/special/columns/news_cut/archive/2011/03/sometimes_the_truth_doesnt_set.shtml ; http://www.thedeets.com/2011/03/11/johnny-northside-trial-follow-up/ ; http://volokh.com/2011/03/11/60000-damages-for/ ; http://www.skjoldparrington.com/newsroom/articlebank/JohnnyNorthsideVerdict.php. As reflected in comments to those postings, some expressed fears that they might face similar consequences despite the truth of their own statements, and wondered how the law could permit that.

MN-SPJ shared those concerns, and filed its motion to formally apprise the Court of the broader ramifications of the case. MN-SPJ reviewed the special verdict form, which contained the facts pertinent to and discussed in the *amicus* memorandum it ultimately filed. Its March 23 filing followed what it understood to be a March 16 motion by Defendant to stay entry of judgment on the verdict, pending post-trial motions.

The Minnesota Rules of Civil Procedure do not specify a procedure for *amicus* participation in the district courts. In the Minnesota state appellate courts, "most" petitions for leave to participate as amicus curiae are granted, Herr & Hanson, APPELLATE RULES ANNOTATED, §129.3, p. 675 (2010 edition), and the brief may be filed with leave of the

appellate court, Minn. R. Civ. P. 129.01. That rule sets time limits for seeking leave, which the appellate courts sometimes waive. In federal appellate courts, a motion for leave to file "must be accompanied by the proposed brief," Fed. R. App. P. 29(b), which gives the court an opportunity to evaluate the utility of the proposed brief. In this case, MN-SPJ's accompanying memorandum was very brief and provided a basis for the court to evaluate the utility of the unusual procedure of amicus participation at the district court level. The court was and remains free to disregard the memorandum if it denies the motion or does not consider the memorandum of any assistance.

Plaintiff's memorandum inconsistently asserts both that MN-SPJ's memorandum is "redundant" with Defendant's memorandum (Pltf. Mem. at 5-6) and that Plaintiff will be "prejudiced" if it must respond to MN-SPJ's authorities (Pltf. Mem. at 7). A comparison of the memoranda of MN-SPJ and Defendant demonstrates that despite some similarities, they are not redundant. To the extent that they do overlap, Plaintiff logically cannot be prejudiced by having to respond to an authority or legal principle discussed in both memoranda.

II. MN-SPJ's did not Act with any Improper Purpose.

Through his attorney's affidavit and Exhibit B, Plaintiff suggests that MN-SPJ acted with "[i]mproper purposes [that] include: i) ... get[ting] the memorandum into the hands of the defense counsel to 'coach' the inexperienced attorney; or ii) to bring the Faegre & Benson *imprimatur* to the defense without frontally aligning with loose cannon Hoff."

Plaintiff's assertions have no merit and make no sense. MN-SPJ sought *amicus* participation to make the Court aware of well-established law, at a time when this Court would have a clear opportunity to apply that law in a way that might alleviate the concerns of

MN-SPJ's members and other members of the public. That is a typical and proper role of *amici* in any court.

Plaintiff's criticism that an *amicus* memorandum could "'coach' the inexperienced [defense] attorney" reveals much about Plaintiff's own motivation. Was Plaintiff trying to gain unfair advantage from that perceived inexperience of his opponent's counsel, who had stepped into the case on short notice? Was Plaintiff attempting to keep defense counsel, and the Court itself, from becoming aware of the legal principles that MN-SPJ discussed? That in itself would have been improper. As far as MN-SPJ can tell after inquiry of Defendant's counsel, Plaintiff's counsel never brought these Minnesota precedents to the attention of this Court. If Plaintiff's counsel was aware of them, she had a duty of candor to the Court under Rule 3.3(a)(2) of the Rules of Professional Conduct and should have disclosed them, regardless of what defense counsel did. She must have been aware of at least the *Wild v. Rarig* line of cases, because 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) (copy provided as Borger Aff. Ex. 1), *rev. denied.* In addition, those issues (including mention of *Wild* and *Glass Services Co.*) were addressed last summer by her and by the undersigned counsel in *Stepnes v. Ritschel*, United States District Court for the District of Minnesota, Court File No. 0:08-cv-5296 ADM/JJK. *See* excerpts from docket entries 261 (CBS summary judgment memorandum, caption page and pp. 1-4, 15-16, 29-33), 270 (contestant plaintiffs memorandum in opposition, pp. 1, 16, 18, 22, 24-25), and 294 (CBS reply memorandum, cover page and pp. 11-12) (attached as Borger Aff. exhibits 2, 3, and 4) (full documents available through PACER). In *Stepnes*, the tortious interference claims were voluntarily dismissed with prejudice by the plaintiffs asserting them. *Id.*, docket entry 305

(stipulation of dismissal) (attached as Borger Aff. Ex. 5). Those claims do not remain in the case as it is now on appeal by a different plaintiff. *See Stepnes v. Ritschel*, 2011 U.S. Dist. LEXIS 3027, at *20-21, 49-50, 71-72 (D. Minn., January 12, 2011), *appeal pending on other issues*.

Conclusion

The Court should allow the Minnesota Pro Chapter of the Society of Professional Journalists to participate in this action as an *amicus curiae*. It should deny Plaintiff's motion to strike MN-SPJ's submissions.

In considering Defendant's post-trial motions, the Court should apply the same rules to publicly accessible online statements that it would to a print version of the same material.

Dated: May 20, 2011

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STATE OF MINNESOTA

HENNEPIN COUNTY

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Jerry L. Moore,

Plaintiff,

vs.

John Hoff a/k/a/ Johnny Northside,

Defendant.

File No. 27-CV-09-17778
The Honorable Denise D. Reilly

AFFIDAVIT OF JOHN P. BORGER IN SUPPORT OF REPLY MEMORANDUM OF *AMICUS CURIAE* MINNESOTA PRO CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

JOHN P. BORGER, being first duly sworn on oath, states:

1. I am one of the attorneys for the *Amicus Curiae* Minnesota Pro Chapter of the Society of Professional Journalists. My offices are located at 2200 Wells Fargo Center, Minneapolis, Minnesota 55402.

2. I submit this affidavit in support of the reply memorandum of Minnesota Pro Chapter of the Society of Professional Journalists.

3. Attached hereto as Exhibit 1 is a copy of *Dunham v. Opperman*, 2007 WL 1191599, at *6-7 (Minn. App. April 24, 2007) (unpublished) *rev. denied.*

4. Attached hereto as Exhibit 2 is a copy of *Stepnes v. Ritschel*, United States District Court for the District of Minnesota, Court File No. 0:08-cv-5296 ADM/JJK. docket entry 261 (CBS summary judgment memorandum, caption page and pp. 1-4, 15-16, 29-33).

5. Attached hereto as Exhibit 3 is a copy of *Stepnes v. Ritschel*, United States District Court for the District of Minnesota, Court File No. 0:08-cv-5296 ADM/JJK, Docket entry 270 (contestant plaintiffs memorandum in opposition, pp. 1, 16, 18, 22, 24-25).

6. Attached hereto as Exhibit 4 is a copy of *Stepnes v. Ritschel*, United States District Court for the District of Minnesota, Court File No. 0:08-cv-5296 ADM/JJK, Docket entry 294 (CBS reply memorandum, cover page and pp. 11-12).

7. Attached hereto as Exhibit 5 is a copy of *Stepnes v. Ritschel*, United States District Court for the District of Minnesota, Court File No. 0:08-cv-5296 ADM/JJK, Docket entry 305 (Stipulation for Dismissal of the Actions of Non-Stepnes Plaintiffs With Respect to CBS Defendants).

Dated: May 20, 2011

John P. Borger

Subscribed and sworn to before me
this 20th day of May, 2011.

Notary Public

GINGER PLAUCK
Notary Public
Minnesota
My Commission Expires January 31, 2015

fb.us.6833775.01

Westlaw.

Not Reported in N.W.2d, 2007 WL 1191599 (Minn.App.)
(Cite as: 2007 WL 1191599 (Minn.App.))

HOnly the Westlaw citation is currently available.

Court of Appeals of Minnesota.
Ali DUNHAM, et al., Appellants,
v.
Darin OPPERMAN, Respondent.

No. A06–750.
April 24, 2007.
Review Denied July 17, 2007.

Hennepin County District Court, File No. 27–CV–04–006654.
Jill Clark, Jill Clark, P.A., Golden Valley, MN, for appellants.

Andrew T. Shern, Chris Angell, Murnane Brandt, St. Paul, MN; and Linda L. Holstein, Anh Le Kremer, Holstein Law Firm, Minneapolis, MN, for respondent.

Considered and decided by HALBROOKS, Presiding Judge; HUDSON, Judge; and ROSS, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge.

*1 Appellants challenge four separate orders issued by the district court, arguing that the district court (1) erred when it dismissed their claim for tortious interference with contract, (2) abused its discretion when it denied their motion to compel, (3) abused its discretion when it dismissed their case with prejudice as a sanction for discovery violations and inappropriate conduct, and (4) erred when it denied their motion to disqualify. Because we conclude that the district court did not abuse its discretion when it denied appellants' motion to compel and did not err when it dismissed appellants' claim for tortious interference with contract and denied their motion to disqualify, we affirm in part. But because we conclude that the district court abused its discretion when it dismissed appellants' claim with prejudice, we reverse in part and remand.

FACTS

Appellants Debra Ali Dunham (Ali) and Audian Dunham (Audie) joined the Wayzata Country Club (WCC) as members in 1988. In 2001, Ali discovered that her husband, Audie, was having an affair with Karen Roer, another WCC member. After Ali told Roer's husband about the affair, Roer allegedly began a "mission to destroy" Ali. Ali complained that some of Roer's friends, including respondent Darin Opperman, also made it their mission to damage Ali's reputation and to get her kicked out of the WCC.

In August 2001, Roer obtained a restraining order against Ali, and on June 27, 2002, Ali was arrested at the WCC for violating the restraining order, after she allegedly called Roer a "slut" during a WCC event. As a result of her arrest, the Wayzata city prosecutor brought criminal charges against Ali; in September 2002, the WCC held its own hearing regarding Ali's alleged misconduct. After hearing testimony from both Audie and Ali, as well as the Roers, the WCC board determined that it would wait until the conclusion of the criminal trial before it made any recommendations regarding the situation. In October 2002, Ali was tried in criminal court for allegedly violating the harassment restraining order but was acquitted by a jury.

Despite her acquittal, Ali and the entire Dunham family were expelled from the WCC on November 22, 2002. In its expulsion letter to the Dunhams, the WCC board stated that it found "substantiation for the allegation" that Ali called Roer a "slut," which constituted "willful misconduct under the Bylaws." The letter further stated that "[b]ased on this conclusion, and given prior misconduct as noted in previous correspondence and discussions between officials of the Club and you, the Board has determined that your expulsion from the Club is warranted."

On May 4, 2004, the Dunhams brought suit against Opperman, alleging tortious interference with contract, defamation, conversion of personal property, negligent infliction of emotional distress, and civil conspiracy.[FN1] The Dunhams filed an amended complaint on June 28, 2004, omitting the conversion claim. The Dunhams now appeal from four separate

EXHIBIT 1

orders of the district court.

> FN1. Ali also brought an action against Roer, alleging intentional infliction of emotional distress, malicious prosecution, abuse of process, defamation, intentional interference with contract, and conversion, and an action against the WCC, alleging that she was expelled from the WCC because she challenged the WCC's allegedly discriminatory policies and practices relating to dress code and gender-specific golf tournaments. The Dunhams' motion to consolidate the three lawsuits was denied on July 14, 2004. On May 28, 2004, the district court granted Roer's motion for summary judgment, dismissing all claims brought by Ali against Roer. The dismissal of Ali's claims against Roer was affirmed by this court in *Dunham v. Roer*, 708 N.W.2d 552, 573 (Minn.App.2006), *review denied* (Minn. Mar. 28, 2006). The Dunhams' lawsuit against the WCC proceeded to a bifurcated trial; the statutory discrimination claims were tried by the district court and the common-law claims were tried by a jury. On May 20, 2005, the jury issued its verdict denying the Dunhams any recovery, and on July 6, 2005, the district court followed suit. This court affirmed in *Dunham v. Wayzata Country Club*, No. A05–1784 (Minn.App. Sept.19, 2006), *review denied* (Minn. Dec. 12, 2006).

February 2, 2005 Order

*2 The Dunhams' claim for defamation was based on the allegations contained in paragraph 5.3 of the amended complaint and three letters that Opperman wrote to the WCC board. Paragraph 5.3 states:

> It is also alleged that Opperman was responsible for working together with one or more other individuals to defame Dunham and lower her reputation in the community. Dunhams have, in this early stage of this litigation, quoted as many statements as she can, but Dunhams need additional discovery in order to determine which statements were made (and their exact quotes) due to the plan acted upon by Opperman and other/s. Dunhams allege that this is somewhat analogous to a fraud claim where the information is in the hands of the defendant/s and therefore cannot necessarily be fully articulated in this Complaint. Dunhams are aware of defamation cases that cite a need to articulate the precise words of the defamatory statement in the Complaint, but allege that these facts (and particularly the allegation of a separate civil conspiracy claim in addition to defamation) warrant an opportunity to amend the Complaint to add specific statements. Dunhams will amend this Complaint as soon as possible in this litigation. Dunhams reserve the right to discovery, investigate and amend regarding allegations that Oppermand [sic] and/or other defendant/s, in concert, worked to portray Dunham in a false light (such as Dunham being a criminal defendant), in such a widespread manner that Dunham will literally be unable to repair her reputation or re-establish her reputation in the community. In addition, Dunham reserve [sic] the right to amend to include allegations concerning false statements made by Opperman and/or other defendant/s in tortiously interfering with Dunham's membership at the Club.

The first letter written by Opperman, dated June 12, 2001, was delivered to WCC President Thomas Howard in order to "report an incident of conduct unbecoming a member." In the letter, Opperman stated that while she was eating dinner at the WCC with Roer and another individual on June 7, 2001, Ali approached their table, gestured with her middle finger toward Roer, and stated to Opperman and the other member, "You better hope she's not sleeping with one of your husbands." Opperman stated that she was writing the letter "in the hope that the Board will address th[e] issue personally with Ms. Dunham and ask her to refrain from making inappropriate comments to club members and their children."

The second letter written by Opperman, dated June 10, 2002, was delivered to WCC President Karl Reuter and accused Ali of "intimidating and harassing" her by making a point of "stopping her golf game ... on the course in order to glare and point." Opperman also accused Ali of monitoring the number of times that respondent was golfing at the WCC per month.[FN2]

> FN2. As a "wait member," Opperman could only play two rounds of 18 holes or four rounds of 9 holes per month plus one round of golf as a guest of a full golf member.

Finally, on October 11, 2002, Opperman mailed a

letter to Reuter and WCC Vice President Mark Eckerline, stating that Ali's accusations at her criminal trial that Opperman harassed and intimidated her children were "an out and out lie," and that she would "deal" with the accusations "in the appropriate forum at the appropriate time."

*3 Opperman moved for dismissal of the allegations contained in paragraph 5.3 pursuant to Minn. R. Civ. P. 12, alleging that they were vague and not pleaded with sufficient specificity. On February 2, 2005, the district court issued an order denying in part and granting in part Opperman's motion to dismiss, concluding that paragraph 5.3 "fail[ed] to satisfy the required level of specificity," as "[p]laintiff's attempted reservation of claims based on future investigation, discovery, or a change in the law [wa]s not sufficient to overcome the clear deficiencies in the allegations contained in Paragraph 5.3."

Opperman also moved for summary judgment with regard to the three letters she sent to the WCC, which allegedly defamed Ali. With regard to the first letter, Opperman argued that because the letter formed the basis for the district court's issuance of the restraining order in 2001, the statements were "substantially true," and thus not actionable. The district court agreed, concluding that the statements contained in the letter did not "constitute actionable defamation" because "the substance of the statements [was] found to be true." Thus, the district court dismissed the Dunhams' claim of defamation resulting from the June 12, 2001 letter.

With regard to the second letter, Opperman argued that summary judgment was appropriate because "the alleged defamatory statements were statements of opinion." But the district court disagreed, stating that "[t]he fact that one of the statements contained in the letter is prefaced with 'I understand' is not dispositive on the question of subjective opinion." Instead, the district court concluded that "[w]hen taken as a whole, the letter, and the specific statements contained therein, could be read as assertions of objective facts that convey a defamatory meaning." Thus, the district court denied Opperman's motion for summary judgment with regard to the June 10, 2002 letter.

Finally, with regard to the third letter, Opperman argued that the "statements contained in th[e] letter [were] true as a matter of law" because the district court "determined [Ali] Dunham was not entitled to receive a restraining order against Karen Roer" based on those statements. Conversely, the Dunhams asked the district court "to interpret the jury verdict in [Ali] Dunham's criminal trial as a finding of 'not guilty of calling Karen Roer a "slut" at the WCC' or 'that the precise factual scenario at issue in Opperman's October 11, 2002 letter had already been tested in front of a jury.' " But the district court found that both of these assertions "test[ed] the bounds of reason" and concluded that the determination regarding whether the allegations made by Ali at her trial were a lie "present[ed][a] genuine issue[ ] for determination by the fact-finder." Thus, the district court also denied Opperman's motion for summary judgment as to the October 11, 2002 letter.

Opperman also moved for dismissal of the Dunhams' tortious-interference claim, arguing that where the same allegations support both a defamation and tortious-interference claim, the tortious-interference claim should be dismissed. Relying on *Wild v. Rarig*, 302 Minn. 419, 234 N.W.2d 775 (1975), the district court dismissed the Dunhams' tortious-interference claim, concluding that "the defamation claim encompasses the tortious interference claim (which may be an element of damages in the defamation action)" and that defamation provides a broader scope of recovery that might include, among other things, loss of business relationships.

*4 Further, the district court denied Opperman's rule 12 motion to dismiss the Dunhams' negligent-infliction-of-emotional-distress claim but granted Opperman's motion to dismiss the civil-conspiracy claim under rule 12 because "the vague and conclusory allegations [were] not sufficient to state a claim upon which relief may be granted." Finally, the district court denied the Dunhams' motion to strike and their rule 56 motion for continuance.

June 27, 2005 Order

Opperman's second motion for summary judgment was scheduled to be heard by the district court on April 28, 2005. On April 22, 2005, the Dunhams moved to compel discovery, requesting that their motion be heard at the same time as Opperman's summary-judgment motion. But the Dunhams did not serve an accompanying notice of motion with a hearing date. Although the hearing was subsequently continued to May 3, 2005, due to the Dunhams' counsel

being ill, the district court denied the Dunhams' motion to compel discovery as untimely because the motion "was not served and filed at least 14 days prior to April 28, 2005" and "was not brought in compliance with the Court's Scheduling Order which provided that all non-dispositive motions be served and filed so as to be heard no later than April 29, 2005."

July 21, 2005 Order

After the district court denied Opperman's second motion for summary judgment, Opperman noticed the depositions of Ali for June 13, 2005, and Audie for June 14, 2005. On the morning of June 13, approximately one hour before Ali's deposition was to begin, the Dunhams' counsel called Opperman's counsel to cancel Ali's deposition, stating that she had misread the notice and mistakenly believed that Ali's deposition was to occur on Saturday, June 18, 2005. On June 20, 2005, the district court held a telephone conference to discuss the rescheduling of Ali's deposition. Because the case was to be tried sometime during the district court's three-week trial block beginning July 18, 2005, the district court told the parties that the depositions should be completed as soon as possible. During the telephone conference, there was some discussion about scheduling the depositions on a Tuesday, and the district court was apprised of the fact that Ali had golf commitments on Tuesdays. But the district court instructed that if Tuesdays worked for counsel, then the depositions would have to take place at that time and that Ali's golf conflicts would not be considered for scheduling purposes.

Opperman subsequently served notice of taking the videotaped deposition of Ali for 9:00 a.m. on Tuesday, July 5, 2005, giving the Dunhams two weeks' notice of the date and time. Audie's deposition was noticed for 5:00 p.m. on July 5, 2005, after the completion of Ali's deposition. On Friday, July 1, 2005, the Dunhams' counsel contacted Opperman's counsel and requested that Audie's rather than Ali's deposition take place at 9:00 a.m. on the 5th because of a business commitment that Audie had during the time he was scheduled to be deposed. Opperman's counsel denied the Dunhams' request. The Dunhams' counsel subsequently called the Dunhams on the morning of July 1, 2005, and left a message on their voicemail, notifying them that the request to switch Ali's deposition time with Audie's had been denied and that Ali should appear at her originally scheduled time of 9:00 a.m. Audie claims that he did not receive the voicemail message until Sunday, July 3, 2005, and that he could not reach Ali at that time because she was "up north."

*5 At approximately 8:30 a.m. on July 5, 2005, Audie contacted the district court's law clerk and informed the clerk that Ali was "up north," could not be contacted, and consequently would not be able to attend her deposition scheduled for 9:00 a.m. Audie also informed the law clerk that he would appear at 9:00 a.m. for his deposition and that Ali could be deposed after he was finished. The district court subsequently found that, contrary to Audie's assertion in his affidavit, the law clerk did not okay the scheduling change. Instead, the law clerk informed Audie that the issue should be worked out by the attorneys involved and that he should not call the district court regarding such matters.

When Ali did not appear for her deposition at 9:00 a.m. on July 5, 2005, counsel for both sides contacted the district court for a telephone conference. Opperman's counsel informed the district court that they had previously denied the Dunhams' request to switch Ali and Audie's deposition times and that Ali had failed to appear for her deposition at 9:00 a.m. The Dunhams' attorney told the district court that Ali was up north, could not be contacted on her cell phone, and that she would report immediately for the deposition when she returned between 11:00 a.m. and noon. The district court instructed the parties to wait until Ali arrived and to commence with her deposition before deposing Audie.

Ali eventually arrived for her deposition at 12:40 p.m. on July 5, 2005, and counsel began her deposition. During the deposition, Ali lied under oath about where she had been at 9:00 a.m. that morning, stating "[e]xactly at nine I was probably outside of Melrose, Minnesota." The district court found that Ali continued to "lie[ ] repeatedly" when questioned about her whereabouts and activities the morning of July 5, when she should have been attending her deposition. Specifically, when asked whether she had been on a golf course playing golf at 9:00 a.m., Ali responded, "That is not true," and she "proceeded to fabricate a story about how she had been given an exception by the Minnesota Women's Golf Association to submit a practice round score from the previous Friday as her tournament score." After being confronted by Op-

perman's counsel with information indicating that she had posted a score on the morning of July 5 at Olympic Hills Golf Course, Ali untruthfully stated that she stopped by the golf course on her way to the deposition to turn in her Friday score, but maintained that she did not play a round of golf that morning. Later, Ali lied again when she stated that although she did play some golf on the morning of July 5, she did not play all 18 holes, because she received a message from Audie that her failure to appear for her deposition at 9:00 a.m. had become an issue.

Opperman subsequently brought a motion for attorney fees and sanctions, arguing that the Dunhams' case should be dismissed as a sanction for Ali lying under oath at her deposition and for failing to make herself available for her deposition on a "golf day" in direct contravention of the district court's "order." The district court found that Ali's decision "to play a round of golf on Tuesday, July 5, 2005 rather than appear as noticed for her deposition was intentional, and in flagrant disregard of the Court's directive during the June 20th telephone conference." The district court further found that "[t]he decision of Ali and Audie Dunham to conceal the truth about Ms. Dunham's non-appearance for her deposition as noticed was intentional and outrageous," as "[b]oth Dunhams admit[ted] in their subsequent affidavits that they agreed Ms. Dunham should not 'volunteer' any information about her having played golf that morning." Finally, the district court stated that "[t]he Dunhams' subsequent explanations for these occurrences [we]re totally lacking in credibility." Thus, the district court concluded that because the Dunhams "engaged in conduct that constitute[d] a fraud upon the Court and offend[ed] the basic principles underlying our judicial system ... [s]uch extreme and outrageous behavior must be met with the most severe of sanctions—dismissal." The district court dismissed the Dunhams' case with prejudice and ordered the Dunhams to pay Opperman $1,785 as reasonable costs and attorney fees.

February 2, 2006 Order

*6 In September 2005, the Dunhams moved, inter alia, to disqualify the district court judge and to vacate all orders signed by the district court after July 6, 2005, including the district court's dismissal of the Dunhams' case. Specifically, the Dunhams argued that the district court judge, who also presided over their lawsuit against the WCC, had evidenced a bias against them in their case against the WCC with regard to posttrial motions made in that case. The Dunhams also alleged that the district court judge had engaged in ex parte communications with the Fourth Judicial District Chief Judge, a staff person from the jury room at the Hennepin County Government Center, and an unidentified juror, all following the WCC trial but prior to hearing the Dunhams' posttrial motions.

On December 9, 2005, the Dunhams' attorney asked the district court to disclose information that she believed may be relevant to the question of disqualification so that the Dunhams could "articulate a precise motion to disqualify." But in a December 12, 2005 letter sent to counsel, the district court stated that because the Dunhams had never scheduled a hearing on their motion to disqualify, there were no motions pending before the district court, and thus no order would be forthcoming. The Dunhams' attorney sent the district court another letter, indicating her disappointment that the district court failed to respond to the Dunhams' request for information related to the question of disqualification. Relying on the Minnesota Supreme Court's decision in *State v. Dorsey*, 701 N.W.2d 238 (Minn.2005), the letter also asked the district court to make the requested disclosures and issue a ruling as to whether the district court judge would voluntarily recuse himself from the case. On January 17, 2006, the Dunhams served an amended motion to disqualify that put the matter on for hearing on January 31, 2006. The district court subsequently denied the Dunhams' motion to disqualify.[FN3]

FN3. On July 7, 2005, at a hearing on the Dunhams' posttrial motions in the WCC case, the district court explained that its communications were specifically in response to concerns relayed by jurors who had been contacted by the Dunhams' counsel after the WCC trial was completed.

DECISION

I.

The Dunhams argue that the district court erred when it dismissed their claim of tortious interference with contract, contending that the district court's determination that a party cannot claim both defamation and intentional interference with contract is unsupported by caselaw. On appeal of a case dismissed for failure to state a claim on which relief can be granted, the only question before an appellate court is whether

the complaint sets forth a legally sufficient claim for relief. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn.1997). Thus, we review do novo the legal sufficiency of the claims presented. *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 912 (Minn.App.2003).

The district court, relying on *Wild v. Rarig*, 302 Minn. 419, 234 N.W.2d 775 (1975), dismissed the Dunhams' tortious-interference-with-contract claim, concluding that the Dunhams' defamation claim encompassed the tortious-interference claim. In *Wild*, the plaintiff brought a claim against the defendant alleging, inter alia, defamation and interference with business relationships. 302 Minn. at 423–24, 234 N.W.2d at 781. One issue before the Minnesota Supreme Court on appeal was whether a two-year or a six-year statute of limitations should apply to plaintiff's wrongful-interference-with-business-relationships claim when the claim was based on defendant's alleged defamation of plaintiff. *Id.* at 442, 234 N.W.2d at 790. Defendants argued that the wrongful-interference claim should be barred by the two-year statute of limitations because the claim was essentially the same as plaintiff's defamation claim "since the means allegedly used to interfere was defamation." *Id.* at 443, 234 N.W.2d at 790–91. The supreme court concluded that while the six-year statute of limitations should generally apply to a claim for wrongful interference with business relationships, the claim for wrongful interference by means of defamation was "essentially a part of [plaintiff's] cause of action for defamation," and thus the two-year statute of limitations should be applied. *Id.* at 447, 234 N.W.2d at 793. The supreme court stated:

> *7 The defamation which is the means used to interfere with his business relationships action is the same defamation that [plaintiff] seeks to recover damages for under his defamation claim. 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 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. Defamation provides a much broader scope of recovery than wrongful interference with business relationships. Under present defamation law, a victim of defamation may recover, under proper circumstances, general damages; special damages, including among others, loss of business relationships; and possibly punitive damages.

Id. at 447, 234 N.W.2d at 793. Thus, the supreme court applied the two-year statute of limitations to plaintiff's interference-with-business-relations claim. *Id.*

The Dunhams argue that *Wild* is distinguishable from the current case because the court in *Wild* "did not prohibit [two] theories of liability based on the same facts," but instead simply found a similarity between the defamation and tortious-interference claims "*for purposes of analyzing statute of limitations issues.*" We disagree. The Dunhams' amended complaint alleges in paragraphs 4.2 and 4.3 that Opperman "knew about and intentionally interfered with [the Dunhams'] contractual relationship without justification" when "Opperman wrote a June 12, 2001 letter to the WCC 'in hope that the [WCC] w [ould] address this issue' and have Dunham 'forfeit her membership.' " Because Opperman's letters to the club, including the letter sent on June 12, 2001, also form the basis for the Dunhams' defamation claim against Opperman, we conclude that the district court did not err when it determined that the tortious-interference claim is encompassed by the defamation claim and therefore should be dismissed.

II.

The Dunhams also contend that the district court abused its discretion when it denied their motion to compel, arguing that (1) Opperman was able to obtain discovery orders without including a notice of motion, motion, or memorandum and without having a hearing and (2) Opperman was granted an order allowing additional discovery after the April 28, 2005 deadline for non-dispositive motions. In essence, the Dunhams' argument is a claim that the district court has been unfair throughout discovery by favoring Opperman over the Dunhams.

"[T]he [district court] judge has wide discretion to issue discovery orders and, absent clear abuse of that discretion, normally its order with respect thereto will not be disturbed." *Shetka v. Kueppers, Kueppers, Von*

Feldt & Salmen, 454 N.W.2d 916, 921 (Minn.1990); *see also Minn. Twins P'ship v. Hatch*, 592 N.W.2d 847, 850 (Minn.1999) (citing *Shetka*). Appellate courts give great deference to district court judges to determine the procedural calendar of a case. *Rice v. Perl*, 320 N.W.2d 407, 412 (Minn.1982). Therefore, denial of a motion to continue discovery is reviewed for abuse of discretion. *Alliance for Metro. Stability*, 671 N.W.2d at 919. The district court must address two questions before granting a motion to continue or compel: (1) whether the plaintiff has been diligent in obtaining or seeking discovery; and (2) whether the plaintiff is seeking discovery in the good-faith belief that material facts will be uncovered or merely engaging in a fishing expedition. *Rice*, 320 N.W.2d at 412; *Hasan v. McDonald's Corp.*, 377 N.W.2d 472, 475 (Minn.App.1985).[FN4]

FN4. Opperman contends that the supreme court's decision in *Rice* applies only to continuances and not motions to compel. But this court has applied the two-prong test articulated in *Rice* to cases where a party sought a motion to compel, such as in the unpublished decision *Kimmel v. Twp. of Ravenna*, No. A05–362, 2005 WL 3372716, at *7 (Minn.App. Dec.13, 2005), *review denied* (Minn. Feb. 22, 2006).

*8 Minn. R. Gen. Pract. 115.04(a) provides:

> No motion shall be heard until the moving party pays any required motion filing fee, serves a copy of the following documents on the other party or parties, and files the original with the court administrator at least 14 days prior to the hearing:
>
> (1) Notice of motion and motion;
>
> (2) Proposed order;
>
> (3) Any affidavits and exhibits to be submitted in conjunction with the motion; and
>
> (4) Any memorandum of law the party intends to submit.

Minn. R. Gen. Pract. 115.06 states that "[i]f the moving papers are not properly served and filed, the hearing may be cancelled by the court. If responsive papers are not properly served and filed in a non-dispositive motion, the court may deem the motion unopposed and may grant the relief requested without a hearing."

Here, the district court denied the Dunhams' motion because it was not brought in compliance with the scheduling order. The scheduling order required that all nondispositive motions be heard by April 29, 2005. And, therefore, in order to comply with the scheduling order and rule 115.04, motion papers had to be filed no later than April 15, 2005. But the Dunhams' motion to compel and their request for their motion to be heard at the same time as Opperman's summary-judgment motion on April 28, 2005, was not filed until April 22, 2005. Because the Dunhams were not diligent in seeking discovery, we conclude that the district court did not abuse its discretion when it denied the Dunhams' motion on the ground that it was untimely.

III.

The Dunhams argue that the district court abused its discretion when it dismissed their case with prejudice, contending that sanctions are only warranted in "extreme situations" where a "pattern" of abuse has taken place. "[C]ourts are vested with considerable inherent judicial authority necessary to their vital function—the disposition of individual cases to deliver remedies for wrongs and justice freely and without purchase; completely and without denial; promptly and without delay, conformable to the laws." *Patton v. Newmar Corp.*, 538 N.W.2d 116, 118 (Minn.1995) (quotation omitted). Thus, "[t]he task of determining what, if any, sanction is to be imposed is implicated by the broad authority provided the [district] court." *Id.* at 119. A party "challenging the [district] court's choice of a sanction has the difficult burden of convincing an appellate court that the [district] court abused its discretion—a burden which is met only when it is clear that no reasonable person would agree [with] the [district] court's assessment of what sanctions are appropriate." *Id.* (third alteration in original) (quotation omitted) (holding that district court did not abuse its discretion when it dismissed plaintiff's claim on summary judgment after excluding evidence as a sanction for its spoliation).

In addition to a district court's broad inherent authority to determine whether and what sanctions should be imposed under certain circumstances, a district court also has express authority to sanction a

party for discovery abuses under the Minnesota Rules of Civil Procedure. Minn. R. Civ. P. 37.04 provides:

> *9 If a party ... fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice ... the court in which the action is pending on motion may make such orders in regard to the failure as are just, including any action authorized in Rule 37.02(b)(1), (2), and (3).

Minn. R. Civ. P. 37.02(b)(3) states that a district court may issue an "order ... dismissing the action or proceeding or any part thereof" if a party disobeys an order to provide or permit discovery. In addition, "[a] party who willfully and without justification or excuse fails to comply with discovery orders ... and continues to refuse to cooperate with the court forfeits the right to a trial on the merits." *State by Humphrey v. Ri-Mel, Inc.*, 417 N.W.2d 102, 108-09 (Minn.App.1987) (citation omitted), *review denied* (Minn. Feb. 17, 1988). In determining whether a district court has abused its discretion in imposing discovery sanctions, appellate courts have relied on the following factors: (1) whether the court set a specific date for discovery, (2) whether the court warned the party about the possible sanction, (3) whether the failure to cooperate with discovery was an isolated event or part of a pattern, and (4) whether the failure to comply was willful or without justification. *Breza v. Schmitz*, 311 Minn. 236, 237, 248 N.W.2d 921, 922 (1976) (willful or without justification); *Beal v. Reinertson*, 298 Minn. 542, 544, 215 N.W.2d 57, 58 (1974) (specific date for discovery); *Sudheimer v. Sudheimer*, 372 N.W.2d 792, 795 (Minn.App.1985) (warning about possible sanctions); *Williams v. Grand Lodge of Freemasonry AF & AM*, 355 N.W.2d 477, 480 (Minn.App.1984) (isolated event or part of a pattern), *review denied* (Minn. Dec. 20.1984). This court reviews a district court's discovery sanctions for an abuse of discretion. *Chicago Greatwestern Office Condo. Ass'n v. Brooks*, 427 N.W.2d 728, 730 (Minn.App.1988).

The district court dismissed the Dunhams' case as a sanction for (1) Ali choosing to play golf (in direct contravention of the district court's instructions) instead of appearing for her deposition at 9:00 a.m. on July 5, 2005, and (2) Ali and Audie repeatedly lying under oath about Ali's whereabouts on the morning of her deposition in an attempt to cover up the fact that she was playing golf. But the Dunhams argue that the district court's dismissal of their case as a sanction for their behavior was "too drastic," as neither Ali nor Audie actually violated a court order. The Dunhams further assert that while they wish they would have made different decisions, Ali's trip up north and their decision not to be forthcoming about it were not direct lies and was "hardly the type of outrageous conduct that warrants dismissal of the entire case." The Dunhams further justify their conduct by claiming that Opperman and her husband, Vance Opperman, were also not forthcoming in their depositions and that members of the WCC lied under oath at trial in the Dunhams' case against the WCC without any consequences.

***10** Two Minnesota cases are particularly relevant to our analysis of this issue. In *Williams*, plaintiffs Williams and Jones brought suit against defendants alleging, inter alia, that defendants had conspired with a judge in order to infringe upon their rights. 355 N.W.2d at 479. Defendants' counsel noticed the depositions of both plaintiffs, and when the plaintiffs claimed that they did not receive notice, defendants renoticed the depositions for a few weeks later. *Id.* Plaintiffs again failed to appear for their depositions and, instead, moved for a protective order to delay or prevent the taking of depositions. *Id.* The district court denied plaintiffs' motion and determined that plaintiffs should participate in discovery. *Id.* Defendants again noticed the depositions of both plaintiffs, informing them that failure to appear could result in the dismissal of their case. *Id.* Nonetheless, only Jones appeared for his deposition, as Williams again refused to attend the deposition and sought another protective order. *Id.* As a result, the district court dismissed Williams's complaint. *Id.* On appeal, this court affirmed the district court's dismissal of Williams's case, reasoning that because Williams had a history of refusing to appear at depositions, had been dismissed from an earlier lawsuit for a similar reason, and had been warned of the consequences of missing the deposition, the district court did not err by dismissing Williams's case as a sanction for his failure to cooperate in discovery. *Id.* at 480.

Similarly, in *Breza*, plaintiff brought an action after suffering personal injuries in a motor-vehicle accident. 311 Minn. at 236, 248 N.W.2d at 922. After holding a pretrial conference on various motions, the district court issued an order compelling plaintiff to answer defendants' interrogatories and to submit to oral deposition. *Id.* Plaintiff's action was subsequently

dismissed with prejudice by the district court upon defendants' motion when plaintiff failed to comply with the district court's order. *Id.* The Minnesota Supreme Court affirmed the district court's dismissal of plaintiff's action, stating that plaintiff "forfeited her right to a trial of her case on the merits" when she "willfully and without justification or excuse refused to comply with discovery orders and deliberately and in bad faith, with the intent to delay the trial, continued to refuse to cooperate with the court and defendants' counsel to bring the case to a prompt and expeditious conclusion." *Id.* at 237, 248 N.W.2d at 922 (quotation marks removed); *see also O'Neil v. Corrick*, 307 Minn. 497, 497–98, 239 N.W.2d 230, 230 (1976) (concluding that the district court "properly dismissed plaintiff's action and granted defendants summary judgment" where "[p]laintiff failed to comply with an order that he either provide full and complete answers to written interrogatories within 30 days or have his action dismissed").

*11 But these cases are distinguishable from the facts before us. Here, although the district court instructed the parties to take the Dunhams' depositions as soon as possible and also warned Ali that her golf conflicts should not be considered for scheduling purposes, the district court did not actually order Ali to attend her deposition on a certain date and time. In addition, neither the district court nor Opperman's counsel warned the Dunhams that their failure to attend the depositions at the times noticed would lead to dismissal of their claim. Further, the record indicates that this was the first time that either of the Dunhams had failed to cooperate with discovery or had lied or attempted to mislead opposing counsel or the court.

We view this as a close case. We understand and even sympathize with the district court's frustration and agree that the Dunhams' conduct, including their deliberate attempt to mislead both Opperman's counsel and the district court, is very disturbing. We are further troubled by the Dunhams' failure to admit even now that their lies and misdirection were intentional. But while we reaffirm our deference to the district court's authority to craft sanctions, we must also accord weight to precedent, holding that dismissal is only an appropriate sanction when exceptional circumstances are present. And, in our review of the caselaw, we have not found a case in which dismissal of all claims—the ultimate sanction—was ordered and upheld on appeal without a prior warning or violation of a specific court order.

For example, in *Beal*, plaintiff refused at a pretrial conference to turn over his income tax returns for review. 298 Minn. at 543, 215 N.W.2d at 58. The district court ordered that plaintiff produce the tax returns, but plaintiff did not respond to requests for the tax returns and refused to produce the returns at his deposition. *Id.* The district court subsequently dismissed plaintiff's claim with prejudice. *Id.* On appeal, the Minnesota Supreme Court determined that the district court's decision to dismiss plaintiff's action was "too drastic," and thus reversed and remanded the case, ordering plaintiff to comply with the pretrial discovery order within 10 days from the date of its decision and stating that if plaintiff failed to comply, the district court should dismiss the case with prejudice. *Id.* at 544, 215 N.W.2d 57, 215 N.W.2d at 59. In doing so, the court noted its statement in *Firoved v. Gen. Motors Corp.*, 277 Minn. 278, 283–84, 152 N.W.2d 364, 368 (1976), that

> [a]n order of dismissal on procedural grounds runs counter to the primary objective of the law to dispose of cases on the merits. Since a dismissal with prejudice operates as an adjudication on the merits, it is the most punitive sanction which can be imposed for noncompliance with the rules or order of the court or for failure to prosecute. It should therefore be granted only under exceptional circumstances. The primary factor to be considered in determining whether to grant a dismissal with or without prejudice is the prejudicial effect of the order upon the parties to the action, although under extraordinary circumstances a dismissal with prejudice might be justified even though no prejudice to defendant is shown. Obviously, the prejudice to plaintiff of such a dismissal is certain and usually permanent. As to defendant, the ordinary expense and inconvenience of preparation and readiness for trial, which can be adequately compensated by the allowance of costs, attorney's fees, or the imposition of other reasonable conditions, are not prejudice of the character which would justify either a refusal to permit plaintiff to dismiss without prejudice or a dismissal with prejudice. The defense has the burden of showing particular prejudice of such a character that some substantial right or advantage will be lost or endangered if plaintiff is permitted to dismiss and reinstitute the action. Such prejudice should not be presumed nor inferred from the mere

fact of delay.

*12 *Beal*, 298 Minn. at 543–44, 215 N.W.2d at 58.

Here, Ali's failure to attend her deposition at the scheduled time and the Dunhams' subsequent conduct, although very troubling, did not go to the merits of the case. Accordingly, we conclude that the circumstances were not so "exceptional" as to warrant dismissal of the Dunhams' case, and thus that the district court abused its discretion when it dismissed the Dunhams' claim with prejudice. *See Kmart Corp. v. County of Becker*, 639 N.W.2d 856, 859 n. 2 (Minn.2002) (noting that dismissal with prejudice is the most extreme sanction available and should be invoked "only under exceptional circumstances"). On remand, we note that the district court has discretion to order further sanctions, short of dismissal, if it deems it appropriate.

IV.

Finally, the Dunhams argue that the district court violated the Canons of Judicial Ethics by talking to the Fourth Judicial District courthouse staff and with a juror in the WCC case and thus should have disqualified itself and vacated its dismissal of the Dunhams' claims. The district court's refusal to set aside a dismissal can only be reversed on appeal if the refusal is an abuse of the district court's judicial discretion. *Butkovich v. O'Leary*, 303 Minn. 535, 536, 225 N.W.2d 847, 849 (Minn.1975). But "[w]hether a judge has violated the Code of Judicial Conduct is a question of law, which we review de novo." *State v. Dorsey*, 701 N.W.2d 238, 246 (Minn.2005). Judges must be sensitive to the appearance of partiality and should take measures necessary "to assure that litigants have no cause to think their case is not being fairly judged." *McClelland v. McClelland*, 359 N.W.2d 7, 11 (Minn.1984). Disqualifying bias or prejudice "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from her participation in the case." *In re Welfare of D.L.*, 479 N.W.2d 408, 415 (Minn.App.1991), *aff'd*, 486 N.W.2d 375 (Minn.1992). "[A]dverse rulings are not a basis for imputing bias to a judge." *Ag Servs. of Am., Inc. v. Schroeder*, 693 N.W.2d 227, 236–37 (Minn.App.2005).

Minn. R. Civ. P. 60.02 states that "[o]n motion and upon such terms as are just, the court may relieve a party ... from a final judgment ..., order, or proceeding and may order a new trial or grant such other relief as may be just for the following reasons: ... (f) [a]ny other reason justifying relief from the operation of the judgment." Minn. R. Civ. P. 63.03 provides that "[a] judge or judicial officer who has presided at a motion or other proceeding or who is assigned by the Chief Justice of the Minnesota Supreme Court may not be removed except upon an affirmative showing of prejudice on the part of the judge or judicial officer." *See also Matson v. Matson*, 638 N.W.2d 462, 464 (Minn.App.2002) (affirming district court's denial of motion for recusal and noting that under rule 63.03 a party seeking to remove a judge is required to make an affirmative showing of the judge's prejudice or bias after that judge has already presided over a proceeding in the action).

*13 The Dunhams state that they have a constitutional right to an impartial judge, but they fail to articulate how or why the district court judge violated their constitutional right. The Dunhams cite *Powell v. Anderson*, 660 N.W.2d 107 (Minn.2003), and *Dorsey* for the proposition that a violation of the Canons of Judicial Ethics may require a judge to disqualify himself or herself and to vacate earlier decisions.

Canon 3D(1) of the Minnesota Code of Judicial Conduct provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where ... the judge has a personal bias or prejudice concerning a party or a party's lawyer." Further, the Advisory Committee's Commentary to Canon 3D(1) explains that

> [u]nder this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3D(1) apply.
>
> A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

Thus, "it is possible that a judge with judicially-acquired bias or prejudice concerning a party could be required to recuse herself if the bias or prejudice is such that the judge's impartiality is subject to rea-

sonable question." *Dorsey*, 701 N.W.2d at 248. "When reviewing a judge's decision not to disqualify herself, we must make an objective examination of whether the judge's impartiality could reasonably be questioned." *Id.* But "judges are presumed to have the ability to set aside 'nonpersonal' knowledge and make decisions based solely on the merits of cases before them." *Id.* at 249. Moreover, "the requirement that a judge must disqualify herself if she 'has personal knowledge of disputed evidentiary facts' is a narrow prohibition," as "personal knowledge ... does not include the vast realm of general knowledge that a judge acquires in her day-to-day life as a judge and citizen." *Id.* at 247 (footnote omitted). Disqualification of a judge may be based upon the Code of Judicial Conduct, and a judge's failure to disqualify himself or herself may require the judge's decision to be vacated. *Powell*, 660 N.W.2d at 115–16, 121.

In this case, the Dunhams fail to articulate any specific reason why the district court judge should be disqualified. While the Dunhams state that the district court judge communicated with a staff person at the Hennepin County Government Center and an unidentified juror, as well as the Chief Judge of the Fourth Judicial District, there is no evidence in the record to support the Dunhams' argument that the district court had a judicially acquired bias or prejudice concerning either party or that the district court's impartiality should be questioned. Therefore, we conclude that the district court did not err when it denied the Dunhams' motion to disqualify.

***14 Affirmed in part, reversed in part, and remanded.**

Minn.App.,2007.
Dunham v. Opperman
Not Reported in N.W.2d, 2007 WL 1191599 (Minn.App.)

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Paul C. Stepnes, Pete Girard, Jan Girard, David B. Holland, Terry Yzaguirre, Ray Neset, Bennett Ross Taylor, Jr., and Judith Wallen Taylor,

Plaintiffs,

v.

Peter Ritschel (individual capacity), Jane Moore (individual capacity), City of Minneapolis, CBS Broadcasting, Inc., foreign corporation, and Esme Murphy (individual),

Defendants.

Case No. 0:08-cv-5296 ADM/JJK

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY CBS DEFENDANTS AGAINST CONTESTANT PLAINTIFFS AND LENDER PLAINTIFFS [REDACTED]

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EXHIBIT 2

INTRODUCTION

CBS Broadcasting Inc., owner of WCCO-TV, and WCCO reporter Esmé Murphy (together, the "CBS Defendants"), move for partial summary judgment to dismiss all claims asserted against them by Jan Girard, Pete Girard, David B. Holland, Terry Yzaguirre, and Ray Neset (together, the "Contestant Plaintiffs"), and by Bennett Ross Taylor, Jr. and Judith Wallen Taylor (together, the "Lender Plaintiffs").

This lawsuit arises from a July 15, 2008 WCCO news report (the "Broadcast") that raised questions about a controversial scheme in which a real estate developer promised to "give away" a $1.8 million house to a single contestant, but only if he raised $5 million dollars from $20 entry fees. The contest required entrants to guess the number of variously sized and shaped nails, screws and other fasteners in a container; the closest number (without going over) would "win" the house. *See generally* First Amended Complaint ("Compl.").

WCCO reported that the developer had been arrested, that police believed the contest was illegal, that the prize home was in foreclosure, that the charity supposedly associated with the contest did not exist, and that an advertised "weekly prize" had never been awarded. *See* DVD of Broadcast (previously filed at Doc. 49-14). The developer, Plaintiff Paul Stepnes, asserts a defamation claim against the CBS Defendants. Discovery remains open as to Stepnes, and the present motion does not involve his claims.

Discovery has closed as to the seven other plaintiffs. This motion addresses the claims of the five Contestant Plaintiffs, who claim to have entered "one or both of the

contests that Stepnes sponsored," Compl. ¶2, and the two Lender Plaintiffs, a married couple who loaned Stepnes $176,000 two years before the Broadcast, *id.* ¶8. Each set of plaintiffs alleges that the Broadcast caused the contest to fail and that the CBS Defendants thereby tortiously interfered with their contracts with Stepnes by preventing him from fulfilling the terms of those contracts. *Id.* ¶¶130-33. Plaintiffs' claims cannot withstand scrutiny.

First, the Contestant Plaintiffs never completed any contract with Stepnes. Four did not even enter the contest before the Broadcast, and the fifth never submitted an actual number for the nails and other fasteners in the container. Thus, the Contestant Plaintiffs seek to hold the CBS Defendants liable for interfering with contracts that did not exist on the date of the Broadcast. A tortious interference with contract claim premised on such facts lacks any semblance of legitimacy.

Second, because Stepnes's guessing-game contest constituted an illegal lottery under Minnesota law, any alleged contract arising from participation in the contest is unenforceable and, therefore, cannot support a tortious interference claim.

Third, the Lender Plaintiffs base their interference with contract claim on two promissory notes with Stepnes that were executed in 2006 (more than two years prior to the Broadcast), for which Stepnes never made a single monthly payment as required, and which had come due in full. Stepnes had *already breached* these contracts long before the Broadcast. The Lender Plaintiffs cannot in good faith claim that the Broadcast caused any contractual breach.

Fourth, not even a scintilla of evidence exists in the record that the CBS Defendants intended to procure the alleged breaches of contract, as to either the Contestant or Lender Plaintiffs. The absence of this essential element dooms any interference with contract claim.

Fifth, *none* of the Contestant Plaintiffs can establish a number submitted with their entries. Testimony shows that both Stepnes and the Contestant Plaintiffs either destroyed or failed to preserve key evidence relating to contest entries. Thus, the Contestant Plaintiffs cannot possibly establish that any one of them would have won the contest, which allowed for only one winner. Because they received refunds of any entry fees, they suffered no provable damages.

Sixth, despite Plaintiffs' unsupportable contention that $5 million in sales "was achievable" as a yield from the contests, Compl. ¶19, the contest was an abject failure before the Broadcast aired. Between the beginning of the contest on May 9, 2008, and the Broadcast on July 15, 2008, Stepnes sold approximately 200 entries, grossing less than $4,000 while incurring more than $11,000 in out-of-pocket expenses. Stepnes needed to net more than $2 million in a few months just to be able to redeem the prize home from foreclosure and pay off the Lender Plaintiffs. Moreover, unless he sold 250,000 entries, he had no obligation to award the prize home at all, much less to *one* of the Contestant Plaintiffs. Given all of this, neither the Contestant Plaintiffs nor the Lender Plaintiffs can demonstrate that the Broadcast was the proximate cause of their alleged damages.

Finally, these Plaintiffs admit that their claims arise solely from the allegedly defamatory remarks in the Broadcast, and that the Broadcast neither is about them nor refers to them in any way. It is well-settled that a plaintiff may not circumvent the burden of proving each of the elements of a defamation claim by recasting the claim as something else. Because the Broadcast was not "of and concerning" the Contestant and Lender Plaintiffs, their claims arising from the alleged damages caused by the Broadcast fail as a matter of constitutional and common law.

For each of these independent reasons, and as discussed in more detail below, the claims by the Contestant and Lender Plaintiffs against the CBS Defendants never had any merit, and this Court now should dismiss them all.

STATEMENT OF UNDISPUTED MATERIAL FACTS

The Irving House and the Lender Plaintiffs

1. Plaintiff Paul Stepnes, a "developer of distinctive residential properties," purchased a house at 2857 Irving Avenue South in Minneapolis in October 2004. *See* Declaration of Michael D. Sullivan ("Sullivan Decl.") Ex. 1 ("3/16/2007 Affidavit of Paul Stepnes") ¶2. His plan was to demolish the existing structure and build a "new 'old' farmhouse" home as his "flagship property." *Id.* ¶3.

2. This new flagship property (the "Irving House") was, according to its general contractor, "the most ambitious project [Stepnes] had done." Sullivan Dec. Ex. 2 ("3/16/2007 Affidavit of Robert Gustafson") ¶3. "No cost was spared" – the home included "the finest available finishes and fixtures" and "even has an elevator." *Id.*

41. Contestant Plaintiffs began discussing filing this lawsuit with Stepnes as early as two days after the Broadcast, in July 2008. *See* P. Girard Dep. at 36:12-39:3; J. Girard Dep. at 19:10- 25:5. They filed their Complaint on September 30, 2008.

The Plaintiffs' Claims

42. The Lender Plaintiffs do not challenge any conduct by the CBS Defendants except the reporting and airing of the Broadcast. *See* Sullivan Decl. Ex. 33 ("J. Taylor Dep.") at 23:19-25:6; B. Taylor Dep. at 40:18-41:22, 159:15-160:23, 195:21-196:2.

43. The Contestant Plaintiffs likewise do not challenge any conduct by the CBS Defendants except the reporting and airing of the Broadcast. *See generally* Compl.; *see, e.g.*, Holland Dep. at 111:20-112:24; Neset Dep. at 117:13-118:1.

ARGUMENT

The Court should grant summary judgment in favor of the CBS Defendants because no genuine dispute of material fact exists and applicable law supports the CBS Defendants' request for relief. *See* Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The Contestant and Lender Plaintiffs cannot avoid that result unless they set forth specific admissible evidentiary facts showing that there is a genuine issue for trial. *Forrest v. Kraft Foods, Inc.*, 285 F.3d 688, 691 (8th Cir. 2002); *Anderson*, 477 U.S. at 252; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). They cannot do so here.

I. THE CONTESTANT AND LENDER PLAINTIFFS CANNOT ESTABLISH MULTIPLE ELEMENTS OF THEIR CLAIMS.

To establish a claim for tortious interference with contract under Minnesota law, each Contestant and Lender Plaintiff "'must prove that: (1) a contract existed; (2) the alleged wrongdoer ... had knowledge of the contract; (3) the alleged wrongdoer intentionally interfered with the contract; (4) the alleged wrongdoer's actions were not justified; and (5) damages were sustained as a result.'" *Minnesota Deli Provisions, Inc. v. Boar's Head Provisions Co.*, --- F.3d ---, 2010 WL 2104283, at *6 (8th Cir. May 27, 2010) (quoting *Guinness Import Co. v. Mark VII Distribs., Inc.*, 153 F.3d 607, 613 (8th Cir. 1998)); *see also Manion v. Nagin*, 394 F.3d 1062, 1067 (8th Cir. 2005).

The undisputed record in this case demonstrates that the Contestant Plaintiffs cannot establish even the first element (existence of a valid contract), and that none of these plaintiffs can establish elements (2), (3), or (5).[3] Plaintiffs' claims must fail if they lack even a single element. *Sterling Capital Advisors, Inc. v. Herzog*, 575 N.W.2d 121, 127 (Minn. App. 1998).

[3] Plaintiffs also cannot meet the fourth element (that defendants' actions were not justified). *See, e.g., Glass Serv. Co. v. State Farm Mut. Auto Ins. Co.*, 530 N.W.2d 867, 871 (Minn. App. 1995) (insurance company justified in informing insureds of policy limitation and in suggesting alternative windshield vendors); *Dulgarian v. Stone*, 652 N.E.2d 603, 609 (Mass. 1995) ("There is no indication that the report was broadcast for any reason other than the reporting on an issue of public concern. There is no indication that the conversation with Allstate personnel was improper or carried on for any purpose other than journalism."). Full discussion of that element, however, would overlap the merits of the Stepnes defamation claims, as to which discovery remains open.

Placid Co., 479 N.Y.S.2d 862, 868 (N.Y. App. Div. 1984) (holding that there could be no claim for tortious interference with a contract that was breached prior to defendant's action).

II. THE CONTESTANT AND LENDER PLAINTIFFS CANNOT DISGUISE DEFICIENT DEFAMATION CLAIMS BY ASSERTING CLAIMS FOR TORTIOUS INTERFERENCE.

The Contestant and Lender Plaintiffs' claims are premised *entirely* on the CBS Defendants reporting and airing of the Broadcast. *See generally* Compl. ¶¶130-34. Indeed, they have made clear that no other conduct by the CBS Defendants is at issue. *See* SOF ¶¶42-43. As Plaintiff Ben Taylor put it:

> And what happened is that [the contest] was going along just fine,[6] and what happened is that WCCO and Esme Murphy, they had this broadcast. And, basically, what that did is what we call in the mortgage business, it kind of tainted the file.
>
> So, in other words, there was a lot of bad press that was done on that and it was not reported properly and it caused – it caused the contest to fail, which in fact made it so that our – we were not able to get our liens paid out of that property. And it was done in such a way that [it] was not truthful and when the public saw that it stopped the contest in its tracks.

B. Taylor Dep. at 41:8-22.

By the reasoning of the Contestant and Lender Plaintiffs, therefore, allegedly defamatory statements would create a broad right of action, enforceable not only by a subject of the statement but also by anyone else *affected* by such a statement. In other

[6] Mr. Taylor later testified that he had no personal knowledge that the contest was doing well prior to the Broadcast, but that Stepnes had led him to believe that it was. B. Taylor Dep. at 163:12-164:12.

words, if the Court were to accept Plaintiffs' theory, possible plaintiffs in this case could include the dozens of other contestants, anyone else to whom Stepnes owed money, the friends and family of Stepnes who might have benefited from a successful contest, the businesses where Stepnes may have purchased goods and services with newfound wealth from a successful contest, the beneficiaries of any philanthropic giving Stepnes might have done after a successful contest, and so on.

If this reasoning had any validity, *every* news report, statement, or other utterance would, like a stone thrown into a pond, create spreading ripples of liability to everyone potentially affected. However, both as a matter of First Amendment protection and under the common law, only the subject of a statement can assert a claim for defamation. *E.g.*, *Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966) ("There must be evidence showing that the attack was read as specifically directed at the plaintiff."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 291 (1964) (finding that defamation liability was "constitutionally infirm" where challenged statements were not "of and concerning" the plaintiff); *Michaelis v. CBS, Inc.*, 119 F.3d 697, 701 (8th Cir. 1997) ("In order for a statement to be defamatory, it must assert a defamatory fact against the plaintiff."); *Thorson v. Albert Lea Publ'g Co.*, 190 Minn. 200, 205, 251 N.W. 177, 179 (1933) (defamatory statements about one person are not actionable by another person, even if that person is a relative of the first); *Covey v. Detroit Lakes Printing Co.*, 490 N.W.2d 138, 143 (Minn. App. 1992) ("Essential to any defamation action is a determination that the alleged defamatory statement concerns or is understood to concern the plaintiff."). This constitutional and common law "of and

concerning" requirement "stands as a significant limitation on the universe of those who may seek a legal remedy for communications they think to be false and defamatory and to have injured them." *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 399-400 (2d Cir. 2006); *see generally* 1 SACK ON DEFAMATION § 2:9.5 (4th ed. 2010) ("[A] statement about a person is only 'of and concerning' that person, not friends, relatives, or associates.").

It makes no difference that the Contestant and Lender Plaintiffs have called their claim interference with contract rather than defamation. Plaintiffs seeking damages for injuries flowing from the content of a publication or broadcast, no matter how they may label their claims, must satisfy all of the requirements that govern such claims. Plaintiffs "may not avoid the protection afforded by the Constitution ... merely by the use of creative pleading." *Beverly Hills Foodland, Inc. v. UFCW Local 655*, 39 F.3d 191, 196 (8th Cir. 1994) (noting that the actual malice standard required for an actionable defamation claim "must equally be met for a tortious interference claim based on the same conduct or statements"); *see also Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (dismissing claim for infliction of emotional distress by subject of advertisement parody because he could not prove the elements of a cause of action for defamation); *Johnson v. CBS, Inc.*, No. CIV-3-95-624, 1996 WL 907735, at *2 (D. Minn. Sept. 4, 1996) ("This court reads *Beverly Hills Foodland* to apply a malice standard to tortious interference claims where both defamation and tortious interference, based on the same facts, are pled."); *Wild v. Rarig*, 302 Minn. 419, 447, 234 N.W.2d 775, 793 (1975) ("special rules" governing defamation actions apply to wrongful interference claim

where, "regardless of what the suit is labeled, the thing done to cause any damage to [the plaintiff] eventually stems from and grew out of the defamation.").[7] Minnesota courts routinely dismiss tortious interference claims arising from alleged defamatory statements.[8]

Here, the Contestant and Lender Plaintiffs claim to be aggrieved by the alleged defamation of another person. Because they have no viable cause of action for defamation themselves, they cannot maintain a claim arising from the same conduct when styled as a claim for tortious interference with contract.

---

[7] Counsel for the Lender and Contestant Plaintiffs has tried and failed to distinguish *Wild* in other litigation. *See Dunham v. Opperman*, No. A06-750, 2007 WL 1191599, at **6-7 (Minn. App. April 24, 2007) (unpublished) (affirming dismissal of interference-with-contract claims based on same statements as defamation claim).

[8] *E.g.*, *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 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) (dismissing tortious interference claim because "in Minnesota, a plaintiff cannot elude the absolute privilege by relabeling a claim that sounds in defamation"); *Pham v. Le*, Nos. A06-1127, A06-1189, 2007 WL 2363853, at *7-8 (Minn. App. Aug. 21, 2007) (unpublished) (dismissing tortious interference claim arising from same statements as unsuccessful defamation claim); *McGaa v. Gkumack*, 441 N.W.2d 823, 827 (Minn. App. 1989) ("In Minnesota, one 'cannot elude the absolute privilege by relabeling a claim that sounds in defamation'") (citations omitted).

CONCLUSION

For all the foregoing reasons, summary judgment should be entered dismissing with prejudice all claims by plaintiffs Jan Girard, Pete Girard, David B. Holland, Ray Neset, Bennett Ross Taylor, Jr., Judith Wallen Taylor, and Terry Yzaguirre against CBS Broadcasting Inc. and Esmé Murphy.

Dated: June 17, 2010

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ATTORNEYS FOR DEFENDANTS CBS BROADCASTING INC. AND ESMÉ MURPHY

UNITED STATED DISTRICT COURT
DISTRICT OF MINNESOTA

Case No. 08-cv-5296 (ADM/JJK)

Paul C. Stepnes, Pete Girard, Jan Girard, David B. Holland, Terry Yzaguirre, Ray Neset, Judith Taylor and Ben Taylor,

Plaintiffs,

PLAINTIFFS

v.

Peter Ritschel, *et al*,

Defendants.

MEMORANDUM OF

IN OPPOSITION TO DEFENSE MOTIONS TO DISMISS RE "NON-STEPNES" PLAINTIFFS

INTRODUCTION AND PLAN OF RESPONSE

Both sets of Defendants have moved to dismiss the tortious interference claims of the "non-Stepnes" Plaintiffs. Plaintiffs have already expressed their concern to the Court that the concepts alleged by Defendants in these motions are intertwined with the claims of Paul Stepnes. And the Court has indicated by letter that these Plaintiffs' claims are legally distinct from those of Stepnes.

This memorandum responds to *both* motions to dismiss. It addresses *only* the claims of the "non-Stepnes" Plaintiffs. It provides some background about Paul Stepnes and the Contests, which appears necessary to discuss these claims. But it does not attempt to discuss all facets of those, and it should not be presumed that this is the entirety of the evidence.

EXHIBIT 3

City-Defendants also allege that Stepnes was arrested for "unlawful gambling." That is not accurate. The authority to detain filled out by Sgt. Ritschel, cited the statute for concealing one's identity. See authority to detain at **exhibit f**, and **exhibit A** within. (Stepnes SJ-Decl. ¶31).

WCCO did have an improper purpose. It's purpose was to create controversy and sell controversy. An Intern working at WCCO in the summer 2008 testified under oath that it was his understanding "if the contest were legal, there would be no reason to do the story." (Stepnes SJ-Decl. **exhibit q**, exhibit 6 within, pages 81-82). Therefore, the motive of Esme Murphy and WCCO was to try to make the Contest *appear* illegal. (Stepnes SJ-Decl. ¶33).

ARGUMENT

I. SUMMARY JUDGMENT STANDARD NOT MET BY DEFENDNTS.

Upon a motion for summary judgment, the initial burden of proof is allocated to the movant in the form of demonstrating "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986); Nelson v. Kingsley, 208 B.R. 918, 920 (8th Cir. BAP 1997). Defendants have not met this burden.

> Once met, the burden then shifts to the nonmoving party "to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex*, at 324, 106 S.Ct. at 2553 (quoting Fed.R.Civ.P. 56(c), (e)); *see Matsushita*, at 587, 106 S.Ct. at 1356; *Tenbarge v. Ames Taping Tool Sys., Inc.*, 128 F.3d 656, 658 (8th Cir.1997); *In re Kingsley*, 208 B.R. at 920.

and running after the wrongful demise of Contest #1 – when WCCO broadcast its story, the Defendants have filed separate motions, separate briefs, acting as if they are all in isolation. Both sets of Defendants pretend that the other does not exist. This is not the theory of Plaintiffs' case.

Tortious interference with contract is a tort for which joint and several liability is appropriate. *See, e.g.*, Bel-Bel Int'l Corp. v. Community Bank, 162 F.3d 1101 (11th Cir. 1998); Enercomp. Inc. v. McCorhill Pub., Inc., 873 F.2d 536 (2d Cir. 1989) (judgment of joint and several liability for tortious interference with contract). If Defendants address this in their reply brief, Plaintiffs may need to request additional briefing. Defendants were well-apprised of this theory, but chose to ignore it when they filed these motions. They should not gain an advantage from that type of briefing.

Further, Stepnes has significant additional information about how Ritschel and Murphy worked together to cause him harm – a topic best discussed in the Stepnes motions.

II. PLAINTIFFS CAN MEET ALL ELEMENTS OF CLAIM OF INTERFERENCE.

Plaintiff can, indeed, meet all elements of a tortuous interference with contract claim. (See cases cited at CBS-memo p. 16). However, it is clear that Defendants have *not* alleged in this motion, that element (4) cannot be met (improper motive). Just in case, Plaintiffs cite to Stepnes SJ-Decl. ¶¶33 (showing

Stepnes knew that to sue the City for that conduct, he had to attempt to mitigate his damages. And, he tried valiantly to make Contest #2 work. But Contest #2 was crippled by the intentional interference with Contest #1 – and that contributed to the harm caused to the Contestant Plaintiffs.

WCCO also, knew there were contestants. Taken in the light best for Plaintiffs, the broadcast script shows that the goal of that story was to taint future purchasers, and to cause current customers to balk. Surely a jury could find thusly. The self-serving allegation by CBS that it was only reporting a matter of public concern is the facts taken in the light best for Defendants. That is not the standard on summary judgment.

3. **Plaintiffs were damaged.**

A jury could decide that Plaintiffs were damaged due to Defendants' conduct, and that Plaintiffs can be compensated.

As discussed at length above, the contests were not already "failures." They could not get up and running, because each time they were starting to flourish, another disaster caused a shut down.

It is important to note that Defendants misstate the theory of Plaintiffs. The Complaint is quite clear. The Defendants cause the demise of the contests, which caused Paul Stepnes to breach the contracts with the Plaintiffs. In the case of the Lenders, the contract was to pay the from the contests (instead of from selling the house – a modification agreed to by the parties to the contracts). There is no need

III. THESE PLAINTIFFS DO NOT HAVE A DEFAMATION CLAIM.

These Plaintiffs are not pursuing a defamation claim. Their theory is *not* that the only bad conduct of CBS was the airing of the broadcast. Instead, they allege that CBS/WCCO pressured Stepnes to breach their contracts with Stepnes. That is a classic tortious interference theory. These Plaintiffs are not alleging they were defamed. There are many ways that defendants can induce a breach. The way in which these defendants did it is just one.

Wild v. Rarig, cited at p. 31-32 of the CBS memo, did not discuss this situation. In that case, the issue was the statute of limitations. Further, the issue was whether the conduct *relating to the one, single plaintiff* sounded more properly in defamation or intentional interference. These Plaintiffs are not alleging that they were (themselves) defamed). They have a separate claim for tortious interference with contract. Stepnes' defamation claim is legally distinct from the claims discussed in this motion.

IV. PLAINTIFFS HAVE NO 1983 CLAIMS.

These Plaintiffs are not pressing §1983 claims (or Monell claims). Plaintiff counsel would have been happy to clarify that for City-Defendants if asked (either in formal discovery or informal conversation). Further, at this time, these Plaintiffs dismiss Sgt. Jane Moore from their tortious interference claim.

CONCLUSION

For all of these reasons, Plaintiffs respectfully request that the CBS-defendants' motion for summary judgment be denied, and that the City-Defendants' motion for summary judgment (except as to Jane Moore) be denied.

Dated: July 8, 2010-07-08

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s/jillclark

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Paul C. Stepnes, Pete Girard, Jan Girard, David B. Holland, Terry Yzaguirre, Ray Neset, Bennett Ross Taylor, Jr., and Judith Wallen Taylor,

Plaintiffs,

v.

Peter Ritschel (individual capacity), Jane Moore (individual capacity), City of Minneapolis, CBS Broadcasting, Inc., foreign corporation, and Esme Murphy (individual),

Defendants.

Case No. 0:08-cv-5296 ADM/JJK

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY CBS DEFENDANTS AGAINST CONTESTANT PLAINTIFFS AND LENDER PLAINTIFFS

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EXHIBIT 4

June 25, 2007) ("Eighth Circuit law is clear that a naked self-serving affidavit, by itself, in the absence of any evidence in the record, is insufficient to create a genuine issue of material fact in dispute and accordingly is insufficient to defeat a motion for summary judgment."). Here, there is no writing memorializing the purported modifications,[3] nor any other documentary evidence suggesting that Stepnes and the Lender Plaintiffs orally modified the terms of the notes to provide that Stepnes would pay the Lender Plaintiffs from the proceeds of the contest. Stepnes's declaration, stating only that such a modification occurred, is insufficient to defeat the CBS Defendants' motion.

F. THE CONTESTANT AND LENDER PLAINTIFFS MISSTATE THE RECORD AND IGNORE THE LAW IN THEIR EFFORT TO AVOID ESTABLISHED AUTHORITY BARRING THEIR CLAIMS.

16. After asserting in their complaint and testifying in their depositions that the *sole* conduct they challenge by the CBS Defendants is the Broadcast – and as such clearly seek to circumvent the limits of defamation law, *see generally* CBS Mem. at 15, 29-32, Plaintiffs now allege that "[t]heir theory is *not* that the only bad conduct of CBS

[3] Given that a modification of the notes plainly would be subject to Minnesota's Statute of Frauds, the absence of such a writing is especially curious. *See* Minn. Stat. § 513.05 (requiring contracts for interests in real estate to be in writing); Minn. Stat. § 513.33 (requiring agreements by creditors "to take certain actions, such as ... forbearing from exercising remedies under prior credit agreements" to be in writing); *see also Massey v. Mortgage Elec. Registration Sys.*, No. 09-1144 (RHK/JSM), 2010 U.S. Dist. LEXIS 51899, at *7-8 (D. Minn. May 25, 2010) ("Minn. Stat. § 513.33 expressly applies to agreements to forebear 'from exercising remedies under prior credit agreements,' such as the right to foreclose on a defaulted mortgage.") (citation omitted); *Odens Family Props., LLC v. Twin Cities Stores, Inc.*, 393 F. Supp. 2d 824, 829 (D. Minn. 2005) (stating that "[a]ny modification of a contract falling under the statute of frauds must be in writing.").

was the airing of the broadcast. Instead, they allege that CBS/WCCO pressured Stepnes to breach their contracts with Stepnes." Opp. at 24. This statement comes without citation or reference to *any* record evidence – because there is none. On this ground, as well, claims by the Contestant and Lender Plaintiffs should be dismissed.

CONCLUSION

For all the foregoing reasons, and those set out more fully in the CBS Defendants' opening memorandum, summary judgment should be entered dismissing with prejudice all claims by the Contestant and Lender Plaintiffs against the CBS Defendants.

Dated: July 15, 2010

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Paul C. Stepnes, Pete Girard, Jan Girard, David B. Holland, Terry Yzaguirre, Ray Neset, Bennett Ross Taylor, Jr., and Judith Wallen Taylor,

Plaintiffs,

vs.

Peter Ritschel (individual capacity), Jane Moore (individual capacity), City of Minneapolis, CBS Broadcasting, Inc., foreign corporation, and Esme Murphy (individual),

Defendants.

Civil No. 0:08-cv-5296 ADM/JJK

STIPULATION FOR DISMISSAL OF THE ACTIONS OF NON-STEPNES PLAINTIFFS WITH RESPECT TO CBS DEFENDANTS

IT IS HEREBY STIPULATED AND AGREED, by and among certain parties acting through their respective undersigned attorneys, as follows:

1. Pursuant to Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure, plaintiffs Pete Girard, Jan Girard, David B. Holland, Terry Yzaguirre, and Ray Neset (collectively "the Contestant Plaintiffs"), and plaintiffs Bennett Ross Taylor, Jr. and Judith Wallen Taylor (collectively "the Lender Plaintiffs") dismiss their actions against defendants CBS Broadcasting Inc. and Esme Murphy (collectively "the CBS Defendants").

2. This dismissal is with prejudice.

EXHIBIT 5

3. This dismissal is without costs or fees to any party as to the actions affected by the dismissal (those of the Contestant Plaintiffs, the Lender Plaintiffs, and the CBS Defendants), which means that CBS Defendants will not seek any fees from any attorney for the Lender Plaintiffs or the Contestant Plaintiffs, and CBS Defendants will withdraw their Rule 11 motion within 2 days of their representative signing this stipulation.

4. Defendants Peter Ritschel (individual capacity), Jane Moore (individual capacity), and the City of Minneapolis (collectively "the City Defendants"), and the CBS Defendants consent to the foregoing dismissal with prejudice of those actions against the CBS Defendants.

5. Plaintiff Paul C. Stepnes continues to pursue his action against the CBS Defendants. This Stipulation of Dismissal does not have any collateral estoppel effect on the action maintained by Plaintiff Stepnes.

Dated: July 28, 2010

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Dated: July 28, 2010

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STATE OF MINNESOTA DISTRICT COURT

HENNEPIN COUNTY FOURTH JUDICIAL DISTRICT

Jerry L. Moore,

Plaintiff,

vs.

John Hoff a/k/a Johnny Northside,

Defendant.

File No. 27-CV-09-17778
The Honorable Denise D. Reilly

AFFIDAVIT OF SERVICE BY FACSIMILE AND U.S. MAIL

Shelley Beety of the City of Shakopee, County of Scott, in the State of Minnesota, being duly sworn, says that on the 20th day of May, 2011, she served the following documents:

1. Reply Memorandum of *Amicus Curiae* Minnesota Pro Chapter of the Society of Professional Journalists;

2. Affidavit of John P. Borger in Support of Reply Memorandum of *Amicus Curiae* Minnesota Pro Chapter of the Society of Professional Journalists

on Jill Clark the attorney for the Plaintiff and Paul Godfread the attorney for the Defendant in this action by transmitting by facsimile directed to said attorneys at the following facsimile numbers placing a copy thereof in an envelope and arranging for the deposit of same, postage prepaid, in the United States Mails at Minneapolis, Minnesota, directed to said attorneys at the following addresses:

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Shelley Beety

Subscribed and sworn to before me
this 20th day of May 2011.

Notary Public

GINGER PLAUCK
Notary Public
Minnesota
My Commission Expires January 31, 2015

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