

IN THE SUPREME COURT OF MISSOURI

BRIAN WANDERSEE and)
ADVANCED CLEANING)
TECHNOLOGIES, INC.,)
)
Respondents,)
)
v.) Case No. SC 88832
)
BP PRODUCTS NORTH AMERICA)
INC., f/k/a AMOCO OIL CO.,)
)
Appellant.)

Appeal from the Circuit Court of St. Louis County, Missouri
Case No. 03CC-001622 M CV
Hon. John A. Ross
Division 15

On Transfer from the Missouri Court of Appeals, Eastern District

APPELLANT’S SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES..... xiii

JURISDICTIONAL STATEMENT 1

SUMMARY OF THE CASE 3

STATEMENT OF FACTS..... 5

 I. The Plaintiffs 5

 II. The Defendants..... 5

 III. The Machine..... 6

 IV. Tami Weeks’ Allegations Of Wandersee’s Attempts To Sell The
 Machine Without Amoco’s Knowledge..... 6

 V. Benhart’s Investigation Of Weeks’ Allegations Prior To Contacting
 The Police..... 8

 (i) Benhart contacted Dave Johnson of PDQ..... 8

 (ii) Benhart performed an independent internal investigation..... 8

 (iii) Benhart asked an Amoco real estate attorney to perform a
 second internal investigation 8

 (iv) Benhart spoke to Amoco’s Regional Vice President 9

 VI. Weeks’ And Payette’s Witness Statements And Judge Cohen’s
 Signing Of The Search Warrant 9

 VII. The Search Of Plaintiffs’ Warehouse And Seizure Of The Machine 11

VIII.	The Additional Witness Statements Of ACT Employees And Wandersee’s Indictment.....	12
	(i) Paul Faix’s witness statement	12
	(ii) Janet Faix’s witness statement	12
	(iii) Christopher O’Bannon’s witness statement	12
	(iv) Diane Dremann’s witness statement	13
IX.	The Lawsuit And Procedural History.....	14
X.	Plaintiffs’ Alleged Damages At Trial.....	15
XI.	Amoco’s Objections And The Trial Court’s Rulings	19
	A. Damages	19
	B. Jury Instructions	20
XII.	The Verdict.....	21
XIII.	Post-Trial Proceedings	21
XIV.	Appellate Proceedings.....	22
XV.	Proceedings In This Court.....	23
	POINTS RELIED ON	24
I.	THE TRIAL COURT ERRED IN DENYING AMOCO’S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFFS FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THE ELEMENT OF ACTUAL MALICE OF THEIR INJURIOUS FALSEHOOD CLAIMS, AS	

REQUIRED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION, IN THAT 24

(A) BENHART’S ALLEGEDLY INADEQUATE INVESTIGATION BEFORE CONTACTING THE POLICE WAS NOT SUFFICIENT TO PROVE ACTUAL MALICE BECAUSE THERE WAS NO EVIDENCE THAT HE KNEW HIS STATEMENTS WERE FALSE OR HAD SERIOUS DOUBTS ABOUT THE TRUTH OR FALSITY OF HIS STATEMENTS 24

(B) PLAINTIFFS CANNOT PROVE ACTUAL MALICE BY ARGUING THAT AMOCO WAS LIABLE UNDER A THEORY OF CORPORATE KNOWLEDGE; THE EVIDENCE AT TRIAL WAS UNDISPUTED THAT BENHART DID NOT KNOW THAT HIS STATEMENTS TO THE POLICE WERE FALSE AND THERE WAS NO EVIDENCE THAT ANYONE ELSE AT AMOCO KNEW THAT BENHART WAS REPORTING FALSE INFORMATION TO THE POLICE..... 24

II. THE TRIAL COURT ERRED IN DENYING AMOCO’S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFFS FAILED TO PROVE THE ELEMENT OF CAUSATION OF THEIR INJURIOUS FALSEHOOD CLAIMS

IN THAT NUMEROUS SUPERCEDING OR INTERVENING ACTS, INCLUDING WITNESS STATEMENTS GIVEN TO THE AUTHORITIES, JUDGE COHEN’S INDEPENDENT DECISION TO SIGN THE SEARCH WARRANT, AND THE PROSECUTOR’S INDEPENDENT DECISION TO SEEK AN INDICTMENT, SEVERED CAUSATION BETWEEN AMOCO’S STATEMENTS AND PLAINTIFFS’ DAMAGES..... 26

III. THE TRIAL COURT ERRED IN DENYING AMOCO’S MOTION FOR A NEW TRIAL BECAUSE THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY SUBMITTING A MODIFIED FORM OF MAI 3.05 IN THAT IT ERRONEOUSLY INSTRUCTED THE JURY THAT PLAINTIFFS WERE NOT REQUIRED TO PROVE THE ELEMENT OF ACTUAL MALICE AS PART OF THEIR BURDEN OF PROOF IN THEIR INJURIOUS FALSEHOOD CLAIMS; THE TRIAL COURT’S INSTRUCTION ERRONEOUSLY DELETED THE CRITICAL DEFINITIONAL PHRASE OF RECKLESS DISREGARD 27

IV. THE TRIAL COURT ERRED IN DENYING AMOCO’S MOTION FOR A NEW TRIAL BECAUSE THE TRIAL COURT IMPROPERLY REFUSED TO SUBMIT AMOCO’S ALTERNATIVE INSTRUCTION DEFINING RECKLESS DISREGARD AS HAVING A HIGH DEGREE OF AWARENESS

OF THE PROBABLE FALSITY OF THE STATEMENT OR ENTERTAINING SERIOUS DOUBTS AS TO THE TRUTH OF THE STATEMENT, WHICH CONSTITUTES THE ELEMENT OF ACTUAL MALICE, AS REQUIRED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION, FOR PLAINTIFFS TO PROVE THEIR INJURIOUS FALSEHOOD CLAIMS 28

V. THE TRIAL COURT ERRED IN DENYING AMOCO’S MOTION FOR A NEW TRIAL BECAUSE THE TRIAL COURT IMPROPERLY FAILED TO INSTRUCT THE JURY ON THE QUALIFIED PRIVILEGES APPLICABLE TO PLAINTIFFS’ INJURIOUS FALSEHOOD CLAIMS, THEREBY DENYING AMOCO OF THESE DEFENSES TO PLAINTIFFS’ CLAIMS..... 29

VI. THE TRIAL COURT ERRED IN DENYING AMOCO’S MOTION FOR A NEW TRIAL BECAUSE THE TRIAL COURT IMPROPERLY PERMITTED NON-RECOVERABLE MEASURES OF DAMAGES FOR LOST PROFITS, FOREGONE WAGES, ATTORNEYS’ FEES, AND DAMAGES BEYOND THE YEAR 2000 30

VII. THE TRIAL COURT ERRED IN DENYING AMOCO’S MOTION FOR AN ORDER FOR REMITTITUR BECAUSE THE VERDICT WAS EXCESSIVE IN THAT THE DAMAGES AWARDED IN

THE FORM OF LOST PROFITS, FOREGONE WAGES, NON-PARTY ATTORNEYS' FEES, AND DAMAGES AFTER THE YEAR 2000 WERE INADMISSIBLE AND LEGALLY UNSUPPORTED	31
ARGUMENT.....	32
I. THE TRIAL COURT ERRED IN DENYING AMOCO'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFFS FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THE ELEMENT OF ACTUAL MALICE OF THEIR INJURIOUS FALSEHOOD CLAIMS, AS REQUIRED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION, IN THAT	32
(A) BENHART'S ALLEGEDLY INADEQUATE INVESTIGATION BEFORE CONTACTING THE POLICE WAS NOT SUFFICIENT TO PROVE ACTUAL MALICE BECAUSE THERE WAS NO EVIDENCE THAT HE KNEW HIS STATEMENTS WERE FALSE OR HAD SERIOUS DOUBTS ABOUT THE TRUTH OR FALSITY OF HIS STATEMENTS	32
(B) PLAINTIFFS CANNOT PROVE ACTUAL MALICE BY ARGUING THAT AMOCO WAS LIABLE UNDER A THEORY OF CORPORATE KNOWLEDGE; THE	

EVIDENCE AT TRIAL WAS UNDISPUTED THAT BENHART DID NOT KNOW THAT HIS STATEMENTS TO THE POLICE WERE FALSE AND THERE WAS NO EVIDENCE THAT ANYONE ELSE AT AMOCO KNEW THAT BENHART WAS REPORTING FALSE INFORMATION TO THE POLICE..... 32

A. Standard Of Review For Cases Involving The First Amendment..... 33

B. The Elements Of A Claim For Injurious Falsehood 35

C. Plaintiffs Failed To Prove Reckless Disregard Of The Truth Or Falsity Of The Statement By Arguing That Benhart’s Preliminary Investigation Was Allegedly Inadequate 36

D. Plaintiffs Cannot Prove Actual Knowledge Of The Falsity Of The Statement By Relying On A Theory Of Corporate Knowledge 42

1. Plaintiffs Impermissibly Raise Their New Theory Of Liability For The First Time On Appeal 42

2. Plaintiffs’ New Theory Confuses The Element Of Actual Malice With The Law Of Agency..... 43

3.	Missouri Law Does Not Support Plaintiffs’ New Theory Of Liability	44
4.	The Policy Implications For Adopting Plaintiffs’ New Theory Concerning Corporate Knowledge Are Significant.....	49
II.	THE TRIAL COURT ERRED IN DENYING AMOCO’S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFFS FAILED TO PROVE THE ELEMENT OF CAUSATION OF THEIR INJURIOUS FALSEHOOD CLAIMS IN THAT NUMEROUS SUPERCEDING OR INTERVENING ACTS, INCLUDING WITNESS STATEMENTS GIVEN TO THE AUTHORITIES, JUDGE COHEN’S INDEPENDENT DECISION TO SIGN THE SEARCH WARRANT, AND THE PROSECUTOR’S INDEPENDENT DECISION TO SEEK AN INDICTMENT, SEVERED CAUSATION BETWEEN AMOCO’S STATEMENTS AND PLAINTIFFS’ DAMAGES.....	51
A.	Standard Of Review For Cases Involving The First Amendment.....	51
B.	Plaintiffs Failed to Present Substantial Evidence of Causation.....	52
(i)	The witness statements of Plaintiffs’ employees Weeks and Payette upon which Detective Drew based his decision to seek a search warrant	53

- (ii) Judge Robert Cohen’s independent decision to sign the search warrant based upon Drew’s affidavit..... 53
- (iii) The Overland Police Department’s subsequent criminal investigation..... 55
- (iv) The witness statements given by Plaintiffs’ employees Paul Faix, Diane Dremann, Janet Faix, and Christopher O’Bannon 55
- (v) The prosecutor’s independent decision to seek an indictment based on the Overland Police Department’s investigation..... 55

- III. THE TRIAL COURT ERRED IN DENYING AMOCO’S MOTION FOR A NEW TRIAL BECAUSE THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY SUBMITTING A MODIFIED FORM OF MAI 3.05 IN THAT IT ERRONEOUSLY INSTRUCTED THE JURY THAT PLAINTIFFS WERE NOT REQUIRED TO PROVE THE ELEMENT OF ACTUAL MALICE AS PART OF THEIR BURDEN OF PROOF IN THEIR INJURIOUS FALSEHOOD CLAIMS; THE TRIAL COURT’S INSTRUCTION ERRONEOUSLY DELETED THE CRITICAL DEFINITIONAL PHRASE OF RECKLESS DISREGARD 58
 - A. The Standard Of Review For A Denial Of A Motion For New Trial 58

B.	The Trial Court Erred In Submitting A Modified MAI Instruction.....	58
IV.	THE TRIAL COURT ERRED IN DENYING AMOCO’S MOTION FOR A NEW TRIAL BECAUSE THE TRIAL COURT IMPROPERLY REFUSED TO SUBMIT AMOCO’S ALTERNATIVE INSTRUCTION DEFINING RECKLESS DISREGARD AS HAVING A HIGH DEGREE OF AWARENESS OF THE PROBABLE FALSITY OF THE STATEMENT OR ENTERTAINING SERIOUS DOUBTS AS TO THE TRUTH OF THE STATEMENT, WHICH CONSTITUTES THE ELEMENT OF ACTUAL MALICE, AS REQUIRED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION, FOR PLAINTIFFS TO PROVE THEIR INJURIOUS FALSEHOOD CLAIMS	64
A.	The Standard Of Review For A Denial Of A Motion For New Trial	64
B.	The Trial Court Erred In Refusing To Submit An Instruction Defining Reckless Disregard.....	64
V.	THE TRIAL COURT ERRED IN DENYING AMOCO’S MOTION FOR A NEW TRIAL BECAUSE THE TRIAL COURT IMPROPERLY FAILED TO INSTRUCT THE JURY ON THE QUALIFIED PRIVILEGES APPLICABLE TO PLAINTIFFS’	

INJURIOUS FALSEHOOD CLAIMS, THEREBY DENYING AMOCO OF THESE DEFENSES TO PLAINTIFFS' CLAIMS.....	66
A. The Standard Of Review For A Denial Of A Motion For New Trial	66
B. The Trial Court Erred In Failing To Instruct On The Qualified Privileges.....	66
VI. THE TRIAL COURT ERRED IN DENYING AMOCO'S MOTION FOR A NEW TRIAL BECAUSE THE TRIAL COURT IMPROPERLY PERMITTED NON-RECOVERABLE MEASURES OF DAMAGES FOR LOST PROFITS, FOREGONE WAGES, ATTORNEYS' FEES, AND DAMAGES BEYOND THE YEAR 2000	72
A. The Standard Of Review For A Denial Of A Motion For New Trial	72
B. The Trial Court Erred In Permitting Non-Recoverable Measures Of Damages	72
1. Lost Profits.....	72
a. Plaintiffs' Non-Contiguous Anterior Period Was Inadequate As A Matter of Law	74
b. Plaintiffs Failed To Eliminate Other Potential Causes	78
2. Foregone Wages	81

3.	Steve Amick’s Attorneys’ Fees	84
4.	Plaintiffs’ Damages Terminated In 2000	85
VII.	THE TRIAL COURT ERRED IN DENYING AMOCO’S MOTION FOR AN ORDER FOR REMITTITUR BECAUSE THE VERDICT WAS EXCESSIVE IN THAT THE DAMAGES AWARDED IN THE FORM OF LOST PROFITS, FOREGONE WAGES, NON- PARTY ATTORNEYS’ FEES, AND DAMAGES AFTER THE YEAR 2000 WERE INADMISSIBLE AND LEGALLY UNSUPPORTED	86
	CONCLUSION	87
	CERTIFICATE OF COMPLIANCE	88
	CERTIFICATE OF SERVICE.....	89

TABLE OF AUTHORITIES

CASES

<u>Adams v. White</u> , 488 S.W.2d 289 (Mo. Ct. App. 1972).....	1
<u>Ameristar Jet Charter, Inc. v. Dodson Int’l Parts, Inc.</u> , 155 S.W.3d 50 (Mo. banc 2005)	30, 83
<u>Annbar Assocs. v. Am. Express Co.</u> , 565 S.W.2d 701 (Mo. Ct. App. 1978) .	24, 26, 35, 52
<u>Anuhco, Inc. v. Westinghouse Credit Corp.</u> , 883 S.W.2d 910 (Mo. Ct. App. 1994).....	30, 73, 79, 80
<u>Bose Corp. v. Consumers Union of U.S., Inc.</u> , 466 U.S. 485 (1984).....	33
<u>Brown v. St. Louis Public Service Co.</u> , 421 S.W.2d 255 (Mo. banc 1967).....	61, 62
<u>Canto v. J.B. Ivey & Co.</u> , 595 So.2d 1025 (Fla. Dist. Ct. App. 1992).....	43
<u>Coney v. Fagan</u> , 97 P.3d 1252 (Or. Ct. App. 2004).....	43
<u>Coonis v. Rogers</u> , 429 S.W.2d 709 (Mo. 1968)	73, 74, 77
<u>Courtney v. Kansas City</u> , 775 S.W.2d 269 (Mo. Ct. App. 1989).....	58
<u>Cova v. American Family Mut. Ins. Co.</u> , 880 S.W.2d 928 (Mo. Ct. App. 1994).....	60
<u>Deckard v. O’Reilly Automotive, Inc.</u> , 31 S.W.3d 6 (Mo. Ct. App. 2000)	60, 71
<u>Duffy v. Lading Edge Products, Inc.</u> , 44 F.3d 308 (5th Cir. 1995).....	39
<u>Dvorak v. O’Flynn</u> , 808 S.W.2d 912 (Mo. Ct. App. 1991).....	24, 37, 38, 62
<u>Epps v. Ragsdale</u> , 429 S.W.2d 798 (Mo. Ct. App. 1968)	62
<u>Fillmore v. Maricopa Water Processing Systems, Inc.</u> , 120 P.2d 697 (Ariz. Ct. App. 2005)	43

<u>Giddens v. Kansas City S. Ry. Co.</u> , 29 S.W.3d 813 (Mo. banc 2000).....	27, 35, 51, 58
<u>Graphic Arts Mut. Ins. Co. v. Pritchett</u> , 469 S.E.2d 199 (Ga. Ct. App. 1996).....	49
<u>Harte-Hanks Communications, Inc. v. Connaughton</u> , 491 U.S. 657 (1989).....	33, 37, 63
<u>Highfill v. Hale</u> , 186 S.W.3d. 277 (Mo. banc 2006)	26, 56
<u>Howsman v. Howsman</u> , 77 S.W.3d 752 (Mo. Ct. App. 2002).....	42
<u>In re H.L.L.</u> , 179 S.W.3d 894 (Mo. banc 2005)	passim
<u>In re Westfall</u> , 808 S.W.2d 829 (Mo. banc 1991)	40
<u>Ince v. Money’s Bldg. & Dev., Inc.</u> , 135 S.W.3d 475 (Mo. Ct. App. 2004)	31, 86
<u>Inland Freight Lines v. U.S.</u> , 191 F.2d 313 (10th Cir. 1951).....	49
<u>Intertel, Inc. v. Sedgwick Claims Mgmt. Servs.</u> , 204 S.W.3d 183 (Mo. Ct. App. 2006).....	28, 65
<u>Jack L. Baker Co., Inc. v. Pasley Mfg. and Dist. Co.</u> , 413 S.W.2d 268 (Mo. 1967).....	30, 77
<u>Jackson v. Cannon</u> , 147 S.W.3d 168 (Mo. Ct. App. 2004).....	42
<u>John Doe a/k/a Tony Twist v. McFarlane</u> , 207 S.W.3d 52 (Mo. Ct. App. 2006).....	34
<u>Juarez v. Ameritech Mobile Communications, Inc.</u> , 957 F.2d 317 (7th Cir. 1992).....	47
<u>Karashin v. Haggard Hauling & Rigging, Inc.</u> , 653 S.W.2d 203 (Mo. banc 1983).....	60
<u>Li v. Metro. Life Ins. Co.</u> , 998 S.W.2d 828 (Mo. Ct. App. 1999).....	47
<u>Lohrenz v. Donnelly</u> , 350 F.3d 1272 (D.C. Cir. 2003).....	40

<u>Masson v. New Yorker Magazine, Inc.</u> , 960 F.2d 896 (9th Cir. 1992).....	39
<u>Morrow v. Missouri Pac. Ry. Co.</u> , 123 S.W. 1034 (Mo. Ct. App. 1909).....	73
<u>Motsinger v. Queen City Basket Co.</u> , 408 S.W.2d 857 (Mo. 1966)	61
<u>Murray v. Holnam, Inc.</u> , 542 S.E.2d 743 (S.C. Ct. App. 2001)	43
<u>Nebraska Pub. Employees Local Union 251 v. Otoe County</u> , 595 N.W.2d 237 (Neb. 1999).....	47
<u>New York Times v. Sullivan</u> , 376 U.S. 254 (1964)	25, 33, 37, 50
<u>Peck v. Siau</u> , 827 P.2d 1108 (Wash. Ct. App. 1992)	47
<u>Phoenix Newspapers, Inc. v. Church</u> , 537 P.2d 1345 (Ariz. Ct. App. 1975).....	43
<u>Seymour v. New York State Elec. & Gas Corp.</u> , 215 A.D.2d 971 (N.Y. 1995).....	43
<u>Slater v. Missouri Edison Company</u> , 245 S.W.2d 457 (Mo. Ct. App. 1952).....	48, 49
<u>Southwest Bank of Polk County v. Hughes</u> , 883 S.W.2d 518 (Mo. Ct. App. 1994).....	25, 46, 47
<u>St. Amant v. Thompson</u> , 390 U.S. 727 (1968)	37
<u>St. Louis Realty Fund v. Mark Twain South County Bank</u> , 651 S.W.2d 568 (Mo. Ct. App. 1983)	84
<u>State ex rel. BP Products N. Am. Inc. v. Ross</u> , 163 S.W.3d 922 (Mo. banc 2005).....	14, 33, 35
<u>State v. Jordan</u> , 181 S.W.3d 588 (Mo. Ct. App. 2005).....	72
<u>State v. Thompson</u> , 659 S.W.2d 766 (Mo. banc 1983)	1

<u>Tillman v. Supreme Exp. & Transfer, Inc.</u> , 920 S.W.2d 552 (Mo. Ct. App. 1996).....	27, 60
<u>United States v. Sawyer Transp., Inc.</u> , 337 F. Supp. 29 (D. Minn. 1971).....	49
<u>Walker v. State</u> , 78 S.E.2d 545 (Ga. Ct. App. 1953).....	49
<u>Wandersee v. BP Products N. Am. Inc.</u> , No. ED 88237, 2007 WL 1745618 (Mo. Ct. App. June 19, 2007).....	passim
<u>Warner v. Kansas City Star Co.</u> , 726 S.W.2d 384 (Mo. Ct. App. 1987).....	34, 51
<u>Williams v. Pulitzer Broadcasting Co.</u> , 706 S.W.2d 508 (Mo. Ct. App. 1986).....	38
<u>Wolk v. Teledyne Indus., Inc.</u> , 475 F. Supp. 2d 491 (E.D. Pa. 2007).....	44
<u>Wright v. Over-the-Road & City Transfer Drivers, Helpers, Dockmen, and Warehousemen</u> , 945 S.W.2d 481 (Mo. Ct. App. 1997)	38, 62

STATUTES

Mo. Rev. Stat. § 537.068 (2001)	31, 86
Mo. Rev. Stat. § 542.266 (2001)	53
Mo. Rev. Stat. § 542.271 (2001)	53
Mo. Rev. Stat. § 542.276 (2001)	53

OTHER AUTHORITIES

MAI 3.05	passim
Restatement (Second) of Agency § 247 (1958)	43
Restatement (Second) of Agency § 275 (1958)	44, 45, 46, 47
Restatement (Second) of Torts § 594 (1977)	passim
Restatement (Second) of Torts § 623A (1977).....	passim

Restatement (Second) of Torts § 632 (1977)	26, 52
Restatement (Second) of Torts § 633 (1977)	30, 76, 79, 80
Restatement (Second) of Torts § 646A (1977).....	67
Restatement (Second) of Torts § 647 (1977)	21, 29, 68, 70

RULES

Missouri Supreme Court Rule 70.02	60
Missouri Supreme Court Rule 83.02	1
Missouri Supreme Court Rule 83.04	1, 23
Missouri Supreme Court Rule 83.09	2

JURISDICTIONAL STATEMENT

As set forth in Appellant's Motion to Dismiss filed on January 24, 2008, this Court lacks jurisdiction over this appeal because Plaintiffs-Respondents Brian Wandersee and Advanced Cleaning Technologies, Inc. failed to file a timely Application for Transfer under Missouri Supreme Court Rule 83.04. On June 19, 2007, the Missouri Court of Appeals, Eastern District, issued its opinion reversing the trial court's Judgment and remanding the case for entry of Judgment in favor of Defendant-Appellant BP Products North America Inc. See Wandersee v. BP Products N. Am. Inc., No. ED 88237, 2007 WL 1745618 (Mo. Ct. App. June 19, 2007). Plaintiffs filed a Rule 83.02 transfer application on July 16, 2007, which the Court of Appeals denied on August 9, 2007. Plaintiffs did not file their Application for Transfer with this Court until September 26, 2007. Under Rule 83.04, this Application was untimely because it was filed thirty-three days after the Court of Appeals denied transfer under Rule 83.02. The jurisdictional requirement is that transfer applications must be filed within fifteen days after the Court of Appeals' denial of transfer. See Rule 83.04. This fifteen-day limitation is mandatory and "neither counsel nor the court is at liberty to ignore or wink at that limitation." Adams v. White, 488 S.W.2d 289, 294 (Mo. Ct. App. 1972). At Plaintiff's request, the Court of Appeals improperly recalled the mandate, even though it lacked the authority to do so. See State v. Thompson, 659 S.W.2d 766, 768 (Mo. banc 1983) ("This Court long ago has held that once an appellate court transmits its mandate to the trial court, it divests itself of jurisdiction over the cause.").

For these reasons, this Court should dismiss Case No. SC 88832 for lack of jurisdiction, retransfer this case to the Court of Appeals under Rule 83.09, and order the Court of Appeals to reinstate its June 19, 2007 opinion and reissue its September 4, 2007 mandate.

SUMMARY OF THE CASE

This case is about the potential civil liability of a citizen who allegedly failed to perform an adequate preliminary investigation of suspected criminal activity before contacting the police. This case implicates free speech under the First Amendment and a person's right to report suspicious behavior to the police.

Plaintiffs Brian Wandersee and Advanced Cleaning Technologies, Inc. ("ACT") claim that BP Products North America Inc., formerly known as Amoco Oil Company ("Amoco"), through its Regional Security Advisor Ron Benhart, failed to investigate adequately a report of criminal activity before contacting the Overland Police Department for further investigation. On July 23, 1999, Tami Weeks telephoned Benhart and reported that her employer – Wandersee, president of ACT – was deliberately attempting to sell a car wash machine without Amoco's knowledge. She believed Amoco owned the car wash machine and provided evidence, such as serial numbers, to that effect. Benhart performed a multi-phased internal investigation, determined that he should report Weeks' allegations to the proper authorities, and referred the matter to the police.

The police reviewed documents proving Amoco's ownership of the car wash, obtained incriminating witness statements from many of Plaintiffs' own employees, and searched ACT's warehouse and found the Amoco car wash with parts stripped from it by Plaintiffs. The police then arrested Wandersee, and a St. Louis County grand jury indicted him for theft. The prosecutor subsequently dismissed the charge for reasons unrelated to Amoco's involvement.

Plaintiffs sued Amoco for injurious falsehood and sought, among other things, damages for ACT's lost profits, "foregone wages" to ACT employees, and attorneys' fees for a non-party named Steve Amick.

Amoco objected to Plaintiffs' proffered evidence of damages, several jury instructions, and filed motions for directed verdict due to Plaintiffs' failure to prove the essential elements of actual malice and causation. The trial court overruled these objections, denied the motions, and submitted Plaintiffs' claims to the jury.

The jury returned a verdict in favor of Plaintiffs against Amoco and awarded the sum of six hundred five thousand three hundred fifty dollars (\$605,350) in damages. The trial court entered Judgment in accordance with the verdict. Amoco filed a timely appeal.

The Missouri Court of Appeals, Eastern District, reversed the Judgment and remanded the case for entry of Judgment notwithstanding the verdict in favor of Amoco. The Court of Appeals correctly found that "the trial court improperly submitted the case to the jury in that Plaintiffs failed to present substantial evidence to support necessary elements of injurious falsehood, namely Defendants' mental state." Wandersee, 2007 WL 1745618, at *2. The Court of Appeals also agreed "that the trial court erred in its jury instructions and damages award." Id. Because the trial contained evidentiary error, jury instruction error, resulted in a prejudicial verdict unsupported by the law and the facts, and severely punished a citizen for reporting an allegation of suspected criminal activity to the proper authorities for further investigation, this Court should now reverse the trial court's Judgment and remand this case to the trial court with instructions to enter Judgment in favor of Amoco, or, in the alternative, for a new trial.

STATEMENT OF FACTS

I. The Plaintiffs.

Plaintiffs are Brian Wandersee (“Wandersee”) and Advanced Cleaning Technologies, Inc. (“ACT”), formerly known as OSCO Enterprises, Inc.¹ Wandersee is the owner and president of ACT. (Tr. 163, lns. 8-20.) ACT distributes car wash machines, supplies and parts, and it installs and services the machines. (LF 19-20 and 64.) ACT distributed car wash machines for Defendant PDQ Manufacturing, Inc. (“PDQ”) in 1995 through part of 1998. (Tr. 613, lns. 17-25; Tr. 614, lns. 3-7; Tr. 616, lns. 6-7, 13-15.) During that time, ACT installed and serviced PDQ car wash machines, including those purchased by Defendant BP Products North America Inc. (“Amoco”). (Id.; Tr. 616, lns. 22-24.)

II. The Defendants.

Defendants are Amoco and PDQ.² Amoco is a refiner and distributor of petroleum products and, formerly, owned and operated gasoline stations in the St. Louis metropolitan area. (Tr. 138, lns. 3-18; Tr. 139, lns. 3-11.) PDQ manufactures and sells

¹ At the time of the circumstances involved in this case, ACT operated under its former name of OSCO Enterprises, Inc. To reflect the names of the parties, Amoco will refer to the corporate Plaintiff as ACT.

² Paul Faix and Janet Faix were also named as Defendants in this action but settled with Plaintiffs prior to trial.

car wash machines. (Tr. 453, Ins. 17-25.) Amoco bought PDQ car wash machines for installation at Amoco gas stations in the St. Louis metropolitan area. (Ex. V.)

III. The Machine.

In December 1997, Amoco ordered three PDQ Laserwash 4000 car wash machines. (Tr. 415, Ins. 8-20.) PDQ shipped the machines in December 1997. (Tr. 457, Ins. 12-17; Ex. T; A 65.) Amoco paid PDQ for the machines on January 6, 1998. (Ex. U; A 66.) PDQ paid ACT a commission and installation fee for the sale of all three machines on January 12, 1998. (Ex. 15.) ACT installed two of the three machines in March and April 1998 at Amoco gas stations in the St. Louis area. (LF 64.) In June 1998, PDQ terminated the distributor agreement with ACT. (Tr. 616, Ins. 6-15.) The third Amoco car wash machine (the “Machine”) remained at ACT’s facility at 1604 Fairview in Overland, Missouri for nineteen months, from December 1997 until July 26, 1999. (LF 64-65.) Amoco paid PDQ \$99,916.67 for the Machine, which included the installation fee. (Ex. U; A 66.) The Machine was ordered by Steve Amick (“Amick”), an Amoco employee at the time who subsequently became an ACT employee, for a location at O’Fallon Road and Route K in St. Charles County, Missouri. (Ex. A; A 47-51.) That gas station was never built, and the Machine was never installed. (Tr. 580, Ins. 23-25; Tr. 582, Ins. 12-19.)

IV. Tami Weeks’ Allegations Of Wandersee’s Attempts To Sell The Machine Without Amoco’s Knowledge.

Ron Benhart, a former police officer, is the Regional Security Advisor for Amoco. (Tr. 504, Ins. 21-25; Tr. 571, Ins. 16-18.) In that capacity, Benhart provides security

advice to Amoco business units, provides investigative support, and acts as an intermediary between Amoco and law enforcement authorities. (Tr. 571, Ins. 19-22; Tr. 572, Ins 3-16.) If there is an allegation that Amoco has been the victim of a crime, Benhart assists in the investigation of the allegation and then confers with the proper authorities regarding the matter. (Tr. 572, ln. 10 through Tr. 573, ln. 11.)

On July 23, 1999, Benhart received a telephone call from a woman named Tami Weeks (“Weeks”). (Tr. 575, Ins. 5-10.) Weeks informed Benhart that she was a former employee of ACT still acting in a contract capacity, and that Wandersee and Amick were attempting to sell the Machine that she believed was owned by Amoco. (Tr. 574, Ins. 11-23; Tr. 575, Ins. 9-16.) She told Benhart that, based on her conversations with Wandersee and Amick, they had inappropriately obtained the Machine. (Id.) Specifically, she told Benhart that Wandersee and Amick claimed to have “commandeered” the Machine, that Amick while employed by Amoco had “buried the paperwork so deep that it wouldn’t be found,” called it a “freebie” and claimed that ACT could sell it at a “100 percent” profit. (Id.; 576, ln. 24 through Tr. 577, ln. 2.) Weeks told Benhart that she had confirmed the Machine’s serial number through a conversation with Dave Johnson from PDQ, and that it was Amoco’s Machine. (Tr. 575, ln. 22 through Tr. 576, ln. 4.) She gave Benhart the serial number. (Tr. 575, Ins. 5-15.) Weeks told Benhart that she had a document evidencing Wandersee’s attempted sale of the Machine and gave that document to Benhart as well. (Tr. 576, Ins. 17-19.)

V. Benhart's Investigation Of Weeks' Allegations Prior To Contacting The Police.

Benhart did not contact the police immediately after speaking with Weeks. (Tr. 577, Ins. 13-23.) Instead, Benhart performed an internal investigation into Weeks' allegations. Benhart's purpose was to determine if the "elements" of a possible crime existed to report to the police for investigation. (Tr. 562, Ins. 8-14; Tr. 584, In. 22 through Tr. 585, In. 6.) His preliminary investigation consisted of the following:

(i) Benhart contacted Dave Johnson of PDQ. (Tr. 578, In. 10 through Tr. 579, In. 19.) Through this call, Benhart verified that the serial number provided by Weeks matched the serial number on the Amoco Machine. (Tr. 578, Ins. 17-22.) Johnson also provided Benhart with an Amoco purchase order for the Machine (executed by Amick), an order verification form, a delivery verification form, and proof of full payment by Amoco. (Tr. 579, Ins. 1-11.)

(ii) Benhart performed an independent internal investigation. Benhart continued his internal investigation prior to calling the police to determine if Plaintiffs had the Machine for a legitimate reason. (Tr. 579, In. 20 through Tr. 580, In. 1.) Benhart reviewed Amoco records to see if Amoco owned the gas station referenced in the purchase order provided by PDQ, and if that station had a car wash machine. (Tr. 580, Ins. 4-22.) His investigation revealed that the Machine was never installed. (Tr. 580, Ins. 23-25.)

(iii) Benhart asked an Amoco real estate attorney to perform a second internal investigation. To verify the results of his own investigation, Benhart contacted Margo McDermed, an Amoco real estate attorney. (Tr. 581, Ins. 1-13.) Benhart asked her to

investigate whether the station referenced in the PDQ purchase order ever existed. (Tr. 581, ln. 14 through Tr. 582, ln. 1.) McDermed performed the additional search, and informed Benhart that no such station was ever built. (Tr. 582, lns. 12-19.)

(iv) Benhart spoke to Amoco's Regional Vice President. Benhart "still wanted to know whether or not that [ACT] had any authorized use or purpose for having the Machine." (Tr. 583, lns. 8-17.) Therefore, he called Gordon Hankey, Amoco's Regional Vice President, to see if there was any authorized reason why Plaintiffs would still have the Machine. (Tr. 582, ln. 17 through Tr. 584, ln. 3.) Hankey informed Benhart that there was no reason for Plaintiffs to have the Machine and that he was "surprised" because he had previously ended Amoco's relationship with Plaintiffs. (Tr. 584, lns. 4-10.)

After Benhart completed the foregoing preliminary investigation, he contacted the Overland Police Department regarding Weeks' allegations. (Tr. 516, lns. 9-14.)

VI. Weeks' And Payette's Witness Statements And Judge Cohen's Signing Of The Search Warrant.

Benhart traveled to Overland, Missouri on July 26, 1999, to meet with the police. (Tr. 587, lns. 16-18.) Benhart told the Overland police about Weeks' allegations. (Tr. 274, lns. 5-7.) Benhart gave Detective Charles Drew the documents showing Amoco's purchase of, and payment for, the Machine, and the delivery of the Machine to ACT. (Exs. A, T, U, V, and 11; A 47-51, 65, 66, 67-73, 36-43.)

That same day, Weeks went to the police department and gave a written statement. (Ex. J; A 54-56.) She was accompanied by Keith Payette, a part owner of ACT and former employee, who also gave a written statement to Detective Drew. (Ex. K; A 57.)

In her written statement, Weeks told the police that Wandersee and Amick stated: (a) that they had a “PDQ machine new in the box;” (b) that they obtained it from Amoco when Amick worked there and that he had “buried the paperwork so deep” that Amoco was not aware of its existence; (c) that it was a “free machine” that they had “commandeered from Amoco;” (d) that whoever sold it would get an “extra commission;” and (e) that ACT had it in storage for more than a year and that “Amoco never found out so [Wandersee] wanted it sold as soon as possible.” (Ex. J; A 54-56.) Weeks also stated that, through conversations with PDQ and ACT’s Vice President, Paul Faix, she had confirmed that the serial numbers on the machine that Wandersee told her to sell matched the serial numbers on the Amoco-owned Machine. (Id.)

In Payette’s written statement, he told the police that: (a) upon delivery of the Machine, ACT “re-directed” it to its warehouse; (b) he “thought that this was somewhat strange;” (c) he subsequently learned that “Brian Wandersee had directed the sales staff to tell customers that [ACT] had a PDQ unit” for sale; (d) he “also thought this was strange because the unit was Amoco’s;” and (e) “Brian [Wandersee] had informed that [ACT] had appropriated the machine from Amoco for free and that the company would receive 100% of the money that a customer would pay for it.” (Ex. K; A 57.)

After reviewing the documents provided by Benhart, and obtaining the statements of Weeks and Payette regarding Wandersee’s conduct, Detective Drew applied for a search warrant for ACT’s warehouse at 1604 Fairview in Overland. (Tr. 277, ln. 8 through Tr. 278, ln. 9.) He filed an application along with his affidavit in support on July 26, 1999. (Ex. I; A 52-53.) In his affidavit, Detective Drew relied on the documents

from Amoco for only one item of information: that Amoco had paid PDQ more than \$90,000 for a Laserwash car wash machine which PDQ shipped to ACT in December 1997. (Id.; Tr. 279, ln. 25 through Tr. 284, ln. 18.) The rest of Drew's search warrant affidavit relied exclusively on Weeks' statements. (Id.; Tr. 274, ln. 8 through Tr. 276, ln. 4.) According to Detective Drew's affidavit, Weeks stated that Wandersee "asked her to sell one PDQ Laserwash Car Washing System possessed by [ACT]" and that Wandersee "stated to her that it was a free machine commandeered from Amoco." (Ex. I; A 52-53.)

Detective Drew presented the search warrant application and his affidavit to St. Louis County Circuit Court Judge Robert Cohen on July 26, 1999. (Id.; Tr. 361, lns. 3-25; Tr. 368, ln. 23 through Tr. 369, ln. 7; Tr. 381, ln. 21 through Tr. 382, ln. 2.) Judge Cohen signed the search warrant for the ACT warehouse. (Tr. 285, lns. 13-14.) Detective Drew's affidavit contained no statements from Benhart, and Drew did not inform Judge Cohen of any statements from Benhart. (Tr. 361, lns. 3-25; Tr. 368, ln. 23 through Tr. 369, ln. 7; Tr. 381, ln. 21 through Tr. 382, ln. 2.) Judge Cohen did not rely on any statements from Benhart in signing the search warrant. (Id.)

VII. The Search Of Plaintiffs' Warehouse And Seizure Of The Machine.

The Overland police served the search warrant at ACT's facility at 1604 Fairview on July 26, 1999. (Tr. 285, lns. 13-25.) The police found the Machine in ACT's possession as Weeks had described. (Id.) Many parts from the Machine were missing. (Id.; Ex. Z; A 74-75.) ACT employees had stripped the Machine for ACT's use at Wandersee's request. (Ex. M, N, and O.) The police arrested Wandersee for stealing on July 27, 1999. (Tr. 256, lns. 16-23.)

VIII. The Additional Witness Statements Of ACT Employees And Wandersee's Indictment.

After Wandersee's arrest, the police conducted additional investigation. (Tr. 286, lns. 3-25.) Four more witnesses – all ACT employees – further incriminated Wandersee:

(i) Paul Faix's witness statement. Paul Faix was Vice President of ACT at the time of Wandersee's arrest. (Tr. 372, lns. 21-22.) In his witness statement, he informed the police that: (a) Amick and Wandersee stated that the Machine was owned by Amoco; (b) Wandersee stated that it was "OK to try to sell this machine to anybody;" (c) Wandersee wanted to sell the Machine in the Kansas City area to "get back at PDQ;" (d) Amick said that he had "buried the paperwork from Amoco" and that "they will never find it;" and (e) Wandersee stated that he had "ripped off Amoco with this machine." (Ex. L; A 58-59.)

(ii) Janet Faix's witness statement. Janet Faix was the secretary of ACT prior to Wandersee's arrest. In her witness statement, Janet Faix informed the police that: (a) Wandersee was attempting to sell the Amoco machine kept at ACT's warehouse; (b) Wandersee referred to it as a "free machine from Amoco;" (c) ACT servicemen "always took parts off of this Machine" and that customers were billed for those parts; and (d) Wandersee ordered her not to speak with the police unless she notified him beforehand. (Ex. M; A 60-61.)

(iii) Christopher O'Bannon's witness statement. Christopher O'Bannon was a technician for ACT while the Machine was in ACT's possession. (Ex. O; A 64.) In his witness statement, he informed the police that: (a) "instead of waiting on parts from PDQ,

we were instructed to take parts off the unit at the warehouse;” (b) “during this time of robbing parts off that unit [] Brian Wandersee and Steve Amick would sometimes joke about calling the unit at the warehouse a ‘freebie;’” and (c) the sale of the Machine was discussed at the warehouse. (Id.)

(iv) Diane Dremann’s witness statement. Diane Dremann was the service manager at ACT prior to Wandersee’s arrest. In her witness statement, she informed the police that: (a) ACT obtained three car wash machines for Amoco; (b) ACT installed two of those machines but the third stayed at the warehouse; (c) if ACT was “in need of part [sic] we took it from the machine that was at the warehouse;” (d) after ACT lost the PDQ distributorship, “the machine was our only source for special parts;” and (e) “Brian [Wandersee] always thought Amoco had deep pockets.” (Ex. N; A 62-63.)

After completing this additional investigation, Detective Drew submitted the investigative report to the St. Louis County prosecutor. (Tr. 287, lns. 20-25; Tr. 288, lns. 13-21.) Prosecutor J.B. Lasater was assigned to the case. (Tr. 915, lns. 1-8.) Prosecutor Lasater elected to seek an indictment based on the six ACT employee witness statements, the Machine purchase and delivery documents provided by Benhart, and the fact that ACT stripped parts from the Machine. (Tr. 920, lns. 10-14; Tr. 928, lns. 10-14.) Prosecutor Lasater did not rely on any statements from Benhart in making this decision. (Tr. 916, lns. 4-15 and 21-25 through Tr. 917, ln. 3.) Prosecutor Lasater presented the case to the grand jury, which indicted Wandersee for stealing of \$750.00 or more. (Tr. 917, lns. 7-12.)

After depositions in the criminal case, Prosecutor Lasater filed a *nolle prosequi* “for further investigation.” (Tr. 918, ln. 16 through Tr. 919, ln. 3.) Prosecutor Lasater decided to *nolle prosequi* the case because he perceived credibility problems with certain of ACT’s employees. (Tr. 934, lns. 1-6.) His decision was not related in any way to the information provided by Amoco. (Tr. 939, lns. 8-14.)

IX. The Lawsuit And Procedural History.

Plaintiffs filed this action on April 17, 2003. (LF 18-35.) Wandersee originally alleged that Amoco committed the torts of injurious falsehood and false arrest and sought recovery for a variety of damages, including damages to ACT, legal fees, accounting fees, humiliation, embarrassment, disgrace, fright, injury to feeling, injury to reputation, emotional trauma, mental anguish, and punitive damages. (*Id.*) ACT alleged that Amoco committed the tort of injurious falsehood and sought recovery for lost revenue, future lost revenue, expenses, and punitive damages. (*Id.*)

Amoco filed a Motion for Summary Judgment on Plaintiffs’ claims on statute of limitations grounds. (LF 60-61.) On May 6, 2004, the trial court granted Amoco’s motion on Wandersee’s false arrest claim but denied the motion on the injurious falsehood claims. (*Id.*) Amoco filed a Petition for Writ of Prohibition and/or Mandamus seeking review of the trial court’s ruling as it applied to Plaintiffs’ injurious falsehood claims. (LF 64.) This Court found that the five-year statute of limitations applied to injurious falsehood claims and limited Plaintiffs’ damages allegations to pecuniary losses. State ex rel. BP Products N. Am. Inc. v. Ross, 163 S.W.3d 922, 927-29 (Mo. banc 2005).

This Court's opinion did not address any of the issues raised in Amoco's appeal now pending before the Court.

Plaintiffs proceeded to trial on their remaining claims – one count of injurious falsehood against each Defendant. Plaintiffs alleged that Benhart made the following two allegedly false statements to the Overland police: (a) that Wandersee had “unauthorized possession” of the Machine; and (b) that Steve Amick falsified a purchase order for the Machine and had it delivered to ACT. (LF 684.)

X. Plaintiffs' Alleged Damages At Trial.

Trial commenced on February 28, 2006, and the jury returned a verdict on March 9, 2006. (Tr. 1, ln. 1; Tr. 1145, lns. 17-18.) Wandersee provided all calculations for Plaintiffs' claimed lost profits and “foregone wages” for him and his family members. (Tr. 719, ln. 3 through Tr. 725, ln. 18; Tr. 727, ln. 7 through Tr. 730, ln. 4; Tr. 732, ln. 16 through Tr. 735, ln. 1; Tr. 740, ln. 16 through Tr. 750, ln. 24.) He also explained what he described as ACT's obligation to pay Amick's attorneys' fees. (Ex. 71; Tr. 738, ln. 9 through Tr. 739, ln. 20.)

Wandersee provided changing bases and calculations during trial for alleged lost profits damages. Prior to and during trial, Wandersee initially projected Plaintiffs' lost profits for 1999 through 2004 using the following method: (1) Wandersee used ACT's annual gross sales from fiscal year 1998 as the base year; (2) he compared 1998 sales to each succeeding year to form a “differential” in gross sales; (3) Wandersee applied an arbitrary 7.5% “net profit margin” calculation to the differential to predict a net profit during each successive year; and (4) Wandersee then added the projected net profits

during those years to establish a lost profits total. (LF 137 and 374; Tr. 701, ln. 2 through Tr. 705, ln. 7; Tr. 711, lns. 16-25.) Wandersee used ACT's 1998 tax return as the basis for this projection. (Tr. 704, lns. 18-24.)

Defendants objected to the lost profits calculation because it did not establish profits during a legally sufficient "anterior period" contiguous to the business interruption, which was his July 1999 arrest. (Tr. 705, ln. 8 through Tr. 718, ln. 17.) The trial court nevertheless permitted Wandersee to project lost profits on certain conditions. (Tr. 714, lns. 9-15.) The trial court temporally capped lost profits at 2001 and required Wandersee to expand his "anterior period" backwards to 1996. (Id.; Tr. 730, ln. 5 through Tr. 732, ln. 11.)

Thereafter, Wandersee changed his lost profits projection. He then used income tax returns for fiscal years 1996 through 1998 as the basis for his projection. (Tr. 719, ln. 3 through Tr. 725, ln. 18; Exs. 35 A-C.) Wandersee took these income tax returns and asserted a previously undisclosed projected "growth rate" of 25.5% for gross sales annually, plus an average "net profit margin" of 5.5% and applied both of those figures to the fiscal year income tax returns for 1999, 2000, and 2001 to determine "lost profits." (Tr. 722, lns. 3-25; Tr. 727, ln 7 through Tr. 730, ln. 4; Tr. 732, ln. 16 through Tr. 735, ln. 1.) Wandersee testified that this evidenced \$192,610 in lost profits in 1999-2001. (Tr. 719, ln. 3 through Tr. 735, ln. 1.)

Wandersee testified that ACT was profitable during the first ten months of fiscal year 1999 (October 1, 1998 – July 27, 1999) until his arrest on July 27, 1999. (Tr. 867, ln. 8-11.) However, Wandersee did not produce any records before or during trial

substantiating this claim. (Tr. 867, lns. 8-21.) He concluded that there was no reason for a downturn in ACT's profits in 1999 other than the seizure of the Machine and his subsequent arrest. (Tr. 732, ln. 23 through Tr. 733, ln. 3; Tr. 764, ln. 15 through Tr. 765, ln. 10.)

Wandersee also testified that ACT was obliged to repay "foregone wages" to himself, Laura Wandersee (his wife), Jane Wandersee (his mother), and Herb Wandersee (his father) in the total amount of \$365,000. (Tr. 740, ln. 16 through Tr. 750, ln. 24.) The trial court likewise temporally capped "foregone wages" damages at 2001. (Tr. 750, lns. 4-5.) Wandersee testified that following the termination of seven ACT employees after his arrest (including those who had given statements to the police), Laura, Herb, and Jane Wandersee replaced those employees and assumed their duties. (Tr. 744, ln. 13-15; Tr. 745, lns. 7-9 and 19-23; Tr. 779, lns. 2-11 and 18 through Tr. 783, ln. 8.) He testified that these family members agreed to defer payment of their wages. (Tr. 744, ln. 22 through Tr. 745, ln. 4; Ex. 72; A 45-46.) Wandersee agreed that these wages were a necessary expense of ACT under any circumstances, akin to rent or utility bills. (Tr. 779, lns. 2-17.)

Wandersee also testified regarding the attorneys' fees for non-party Amick. (Tr. 738, ln. 9 through Tr. 739, ln. 20.) The basis was an ACT corporate minute in which ACT resolved that it "should" pay Amick's legal expenses of \$25,000. (Ex. 71; A 44.) Neither Wandersee nor ACT ever paid Amick's legal expenses. (Tr. 197, lns. 21-22; Tr. 198, lns. 9-14.)

On cross examination, Wandersee was confronted with an ACT corporate minute entitled “Special Meeting of the Shareholders” (hereinafter the “Corporate Minute”) dated January 7, 1999 – more than six months before his arrest and the seizure of the Machine. (Ex. CC; A 76-77.) The Corporate Minute describes ACT’s loss in sales exceeding \$1.1 million during the first quarter of fiscal year 1999 alone. (Id.; Tr. 765, ln. 19 through Tr. 772, ln. 3; Tr. 842, ln. 22 through Tr. 845, ln. 25.) ACT’s Corporate Minute states that Wandersee had “deep concern for the financial direction of the company for the current fiscal year, given the results of the first quarter and in the projections for the balance of the fiscal year ending September 30, 1999.” (Ex. CC; A 76-77.) It states that due to downward industry trends, mergers among the major oil companies, and “considerable EPA regulatory issues being raised,” that ACT was expecting no further car wash equipment sales during that fiscal year. (Id.) The Corporate Minute further notes that ACT’s “profit margins would be considerably lower given escalating competition in the market place” and that “a plan was discussed to prepare the business financially for the anticipated downturn in revenues and profits.” (Id.) Finally, the Corporate Minute states that all salary levels were frozen and that Wandersee himself was forfeiting his salary indefinitely. (Id.) Plaintiffs failed to disclose the Corporate Minute during discovery. Amoco obtained it from Plaintiffs’ independent accountant through a subpoena. (A 76-77.)

Donna Smith is a public accountant with a certification in business valuation. (Tr. 987, ln. 23 through Tr. 988, lns. 1-21.) She testified on behalf of Amoco and identified numerous flaws in Plaintiffs’ lost profits claim. (Tr. 998, ln. 12 through Tr. 1010, ln. 6.)

Smith opined that lost profits could not be reliably calculated due to a complete lack of net profit information during the “ten-month gap” between ACT’s 1998 tax return and the seizure of the Machine – the business interruption – on July 26, 1999. (Tr. 998, ln. 12 through Tr. 1001, ln. 22.)

Moreover, Smith offered the only testimony regarding market conditions in the car wash industry prior to and after ACT’s business interruption. (Tr. 995, lns. 12-23; Tr. 1001, ln. 24 through Tr. 1008, ln. 8.) She testified that there were numerous market forces both nationally and regionally, including an influx of competition and a severe downturn in profits to Plaintiffs’ end-users in the oil and gas industry, limiting ACT’s profitability during the ten-month gap. (Tr. 1001, ln. 24 through Tr. 1006, ln. 8; Tr. 1008, lns. 3-18.)

XI. Amoco’s Objections And The Trial Court’s Rulings.

A. Damages.

Amoco filed a motion *in limine* before trial to exclude, among other things, Plaintiffs’ claims for lost profits, foregone wages, and Amick’s attorneys’ fees. (LF 114-517.) The trial court denied the motion with respect to lost profits and foregone wages. (Tr. 22, ln. 15 through Tr. 26, ln. 14; Tr. 29, lns. 12-18.). The trial court granted the motion as to Amick’s attorneys’ fees, but permitted this damage at trial nonetheless. (Tr. 11, ln. 1 through Tr. 12, ln. 19.) Amoco also filed a Motion to Strike Plaintiffs’ Claims for Lost Profits and/or Motion for Sanctions against Plaintiffs for failing to produce business records for fiscal year 1999, the year of the “business interruption” – the arrest.

(LF 569-638.) The trial court denied this motion and permitted Wandersee to testify to these measures of damages.

Amoco objected to the trial court's allowance of testimony regarding each of these measures of damages. (Tr. 705, ln. 8 through Tr. 716, ln. 9; Tr. 727, lns. 12-16; Tr. 729, lns. 3-6; Tr. 730, ln. 5 through Tr. 732, ln. 11; Tr. 733, lns. 13-15; Tr. 734, lns. 16-18; Tr. 739, lns. 15-18; Tr. 740, lns. 24-25; Tr. 743, lns. 14-18; Tr. 746, lns. 16-23; Tr. 749, lns. 6-11.) At the close of evidence, Amoco's counsel argued that these damages should be excluded from submission to the jury. (Tr. 1090, ln. 21 through Tr. 1094, ln. 21.) The trial court treated this as a request for a withdrawal instruction on damages and refused it. (Tr. 1095, lns. 16-21.) Moreover, Amoco joined in PDQ's written withdrawal instruction on damages which the trial court also refused. (Tr. 1103, lns. 5-18.)

B. Jury Instructions.

Plaintiffs submitted a modified version of MAI 3.05 that excluded the definitional phrase for "reckless disregard" – a necessary element of Plaintiffs' injurious falsehood claims. (LF 704.) Amoco objected and requested that MAI 3.05 be given in an unmodified form. (Tr. 1099, ln. 10 through Tr. 1100, ln. 8.) Amoco also joined in PDQ's offer of MAI 3.05 in unmodified form. (LF 720; A 31; Tr. 1104, ln. 6 through Tr. 1105, ln. 1.) The trial court overruled the objections and refused the unmodified MAI 3.05 instruction. (Tr. 1099, ln. 16 through Tr. 1100, ln. 4; Tr. 1106, lns. 17-22.) Because the modified instruction removed the definition of "reckless disregard," Amoco tendered a separate instruction containing that definition which the trial court also rejected. (LF 694; A 33; Tr. 1101, lns. 17-24.)

Amoco also submitted two separate jury instructions based on the qualified privileges set forth in Restatement (Second) of Torts, §§ 594 and 647 (1977), and applicable to injurious falsehood claims. (LF 695 and 696; A 34-34.) The court refused both. (Tr. 1101, ln. 25 through Tr. 1102, ln. 17.)

At the close of Plaintiffs' evidence, Amoco moved for a directed verdict because Plaintiffs failed to satisfy the elements of actual malice and causation for their injurious falsehood claims. (LF 663-669; Tr. 908, ln. 11 through Tr. 909, ln. 21.) The trial court denied Amoco's motion. (Id.) Amoco renewed its motion for a directed verdict at the close of all evidence. (Tr. 1088, ln. 21 through Tr. 1090, ln. 18.) The trial court also denied this motion. (Id.)

XII. The Verdict.

On March 9, 2006, the jury returned a verdict in favor of Plaintiffs and against Amoco and awarded Plaintiffs \$605,350. (LF 738.) The jury rejected punitive damages. (Id.) The jury returned a verdict in favor of PDQ on Plaintiffs' claims. (LF 739.)

XIII. Post-Trial Proceedings.

The trial court entered written judgment in accordance with the verdict on March 22, 2006. (LF 810-811; A 1-2.) Amoco filed a timely post-trial motion requesting a judgment notwithstanding the verdict based on the failure of essential elements of Plaintiffs' injurious falsehood claims or, in the alternative, for a new trial based on insufficient evidence and error regarding evidence of damages and jury instructions, or for a new trial on damages. (LF 812-1052.) In the second alternative, Amoco requested a remittitur order. (Id.) Amoco also requested a set-off from the judgment in the amount

of \$9,500 as a result of Paul Faix's and Janet Faix's settlement prior to trial. (Id.) The trial court granted the set-off, but denied all other relief. (LF 1108.) Amoco filed its Notice of Appeal. (LF 1113-1176.) The trial court entered an Amended Judgment and Order on June 5, 2006. (LF 1108; A 3.) Amoco, therefore, filed a second Notice of Appeal. (LF 1177-1256.)

XIV. Appellate Proceedings.

After briefing and oral argument, on June 19, 2007, the Missouri Court of Appeals, Eastern District, issued its opinion reversing the trial court's Judgment and remanding the case for entry of Judgment in favor of Amoco. See Wandersee v. BP Products N. Am. Inc., No. ED 88237, 2007 WL 1745618 (Mo. Ct. App. June 19, 2007). The Court of Appeals found that "the trial court improperly submitted the case to the jury in that Plaintiffs failed to present substantial evidence to support necessary elements of injurious falsehood, namely Defendants' mental state." Id. at *2. Specifically, the Court of Appeals held that a "review of the record reveals Plaintiffs failed to prove either that Defendant knew its statements to police were false or acted with a reckless disregard for the truth of its statements." Id. The Court of Appeals also found "that the trial court erred in its jury instructions and damages award." Id.

On July 16, 2007, Plaintiffs filed a combined Motion for Rehearing, Rehearing En Banc and Application for Transfer ("Motion for Rehearing"). The Court of Appeals denied Plaintiffs' Motion for Rehearing on August 9, 2007.

On September 4, 2007, the Court of Appeals issued notice to counsel of record that the mandate in this case had been sent to the trial court.

On September 6, 2007, Plaintiffs filed a Motion to Recall Mandate, alleging that their counsel did not receive prior notification of the denial of the Motion for Rehearing. But only one of their two lawyers filed an Affidavit stating that he had not received the notice in a timely fashion. On September 10, 2007, Amoco filed its Suggestions in Opposition to Plaintiffs' Motion to Recall Mandate. On September 11, 2007, the Court of Appeals summarily granted Plaintiffs' Motion and entered an Order recalling the mandate, setting aside the August 9, 2007 Order, and again denying Plaintiffs' Motion for Rehearing that same day.

On September 26, 2007, Plaintiffs filed their Application for Transfer with this Court under Rule 83.04. On November 16, 2007, Amoco filed its Suggestions in Opposition to Plaintiffs' Application for Transfer. On December 18, 2007, this Court sustained Plaintiffs' Application for Transfer.

XV. Proceedings In This Court.

On January 24, 2008, Amoco filed a Motion to Dismiss for Lack of Jurisdiction. (A 120.) On January 31, 2008, Plaintiffs filed their Suggestions in Opposition. (A 151.) On February 19, 2008, this Court summarily denied the Motion to Dismiss. (A 158.)

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN DENYING AMOCO'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFFS FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THE ELEMENT OF ACTUAL MALICE OF THEIR INJURIOUS FALSEHOOD CLAIMS, AS REQUIRED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION, IN THAT:

(A) BENHART'S ALLEGEDLY INADEQUATE INVESTIGATION BEFORE CONTACTING THE POLICE WAS NOT SUFFICIENT TO PROVE ACTUAL MALICE BECAUSE THERE WAS NO EVIDENCE THAT HE KNEW HIS STATEMENTS WERE FALSE OR HAD SERIOUS DOUBTS ABOUT THE TRUTH OR FALSITY OF HIS STATEMENTS; AND

(B) PLAINTIFFS CANNOT PROVE ACTUAL MALICE BY ARGUING THAT AMOCO WAS LIABLE UNDER A THEORY OF CORPORATE KNOWLEDGE; THE EVIDENCE AT TRIAL WAS UNDISPUTED THAT BENHART DID NOT KNOW THAT HIS STATEMENTS TO THE POLICE WERE FALSE AND THERE WAS NO EVIDENCE THAT ANYONE ELSE AT AMOCO KNEW THAT BENHART WAS REPORTING FALSE INFORMATION TO THE POLICE.

Annbar Assocs. v. Am. Express Co., 565 S.W.2d 701 (Mo. Ct. App. 1978)

Dvorak v. O'Flynn, 808 S.W.2d 912 (Mo. Ct. App. 1991)

New York Times v. Sullivan, 376 U.S. 254 (1964)

Southwest Bank of Polk County v. Hughes, 883 S.W.2d 518 (Mo. Ct. App. 1994)

II.

THE TRIAL COURT ERRED IN DENYING AMOCO'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFFS FAILED TO PROVE THE ELEMENT OF CAUSATION OF THEIR INJURIOUS FALSEHOOD CLAIMS IN THAT NUMEROUS SUPERCEDING OR INTERVENING ACTS, INCLUDING WITNESS STATEMENTS GIVEN TO THE AUTHORITIES, JUDGE COHEN'S INDEPENDENT DECISION TO SIGN THE SEARCH WARRANT, AND THE PROSECUTOR'S INDEPENDENT DECISION TO SEEK AN INDICTMENT, SEVERED CAUSATION BETWEEN AMOCO'S STATEMENTS AND PLAINTIFFS' DAMAGES.

Annbar Assocs. v. Am. Express Co., 565 S.W.2d 701 (Mo. Ct. App. 1978)

Highfill v. Hale, 186 S.W.3d. 277 (Mo. banc 2006)

Restatement (Second) of Torts § 632 (1977)

III.

THE TRIAL COURT ERRED IN DENYING AMOCO'S MOTION FOR A NEW TRIAL BECAUSE THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY SUBMITTING A MODIFIED FORM OF MAI 3.05 IN THAT IT ERRONEOUSLY INSTRUCTED THE JURY THAT PLAINTIFFS WERE NOT REQUIRED TO PROVE THE ELEMENT OF ACTUAL MALICE AS PART OF THEIR BURDEN OF PROOF IN THEIR INJURIOUS FALSEHOOD CLAIMS; THE TRIAL COURT'S INSTRUCTION ERRONEOUSLY DELETED THE CRITICAL DEFINITIONAL PHRASE OF "RECKLESS DISREGARD."

Giddens v. Kansas City S. Ry. Co., 29 S.W.3d 813 (Mo. banc 2000)

In re H.L.L., 179 S.W.3d 894 (Mo. banc 2005)

MAI 3.05

Tillman v. Supreme Exp. & Transfer, Inc., 920 S.W.2d 552 (Mo. Ct. App. 1996)

IV.

THE TRIAL COURT ERRED IN DENYING AMOCO'S MOTION FOR A NEW TRIAL BECAUSE THE TRIAL COURT IMPROPERLY REFUSED TO SUBMIT AMOCO'S ALTERNATIVE INSTRUCTION DEFINING "RECKLESS DISREGARD" AS HAVING A HIGH DEGREE OF AWARENESS OF THE PROBABLE FALSITY OF THE STATEMENT OR ENTERTAINING SERIOUS DOUBTS AS TO THE TRUTH OF THE STATEMENT, WHICH CONSTITUTES THE ELEMENT OF ACTUAL MALICE, AS REQUIRED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION, FOR PLAINTIFFS TO PROVE THEIR INJURIOUS FALSEHOOD CLAIMS.

In re H.L.L., 179 S.W.3d 894 (Mo. banc 2005)

Intertel, Inc. v. Sedgwick Claims Mgmt. Servs.,

204 S.W.3d 183 (Mo. Ct. App. 2006)

V.

THE TRIAL COURT ERRED IN DENYING AMOCO'S MOTION FOR A NEW TRIAL BECAUSE THE TRIAL COURT IMPROPERLY FAILED TO INSTRUCT THE JURY ON THE QUALIFIED PRIVILEGES APPLICABLE TO PLAINTIFFS' INJURIOUS FALSEHOOD CLAIMS, THEREBY DENYING AMOCO OF THESE DEFENSES TO PLAINTIFFS' CLAIMS.

In re H.L.L., 179 S.W.3d 894 (Mo. banc 2005)

Restatement (Second) of Torts § 594 (1977)

Restatement (Second) of Torts § 647 (1977)

VI.

THE TRIAL COURT ERRED IN DENYING AMOCO'S MOTION FOR A NEW TRIAL BECAUSE THE TRIAL COURT IMPROPERLY PERMITTED NON-RECOVERABLE MEASURES OF DAMAGES FOR LOST PROFITS, FOREGONE WAGES, ATTORNEYS' FEES, AND DAMAGES BEYOND THE YEAR 2000.

Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.,

155 S.W.3d 50 (Mo. banc 2005)

Anuhco, Inc. v. Westinghouse Credit Corp., 883 S.W.2d 910 (Mo. Ct. App. 1994)

Jack L. Baker Co., Inc. v. Pasley Mfg. and Dist. Co., 413 S.W.2d 268 (Mo. 1967)

Restatement (Second) of Torts § 633 (1977)

VII.

THE TRIAL COURT ERRED IN DENYING AMOCO'S MOTION FOR AN ORDER FOR REMITTITUR BECAUSE THE VERDICT WAS EXCESSIVE IN THAT THE DAMAGES AWARDED IN THE FORM OF LOST PROFITS, FOREGONE WAGES, NON-PARTY ATTORNEYS' FEES, AND DAMAGES AFTER THE YEAR 2000 WERE INADMISSIBLE AND LEGALLY UNSUPPORTED.

Ince v. Money's Bldg. & Dev., Inc., 135 S.W.3d 475 (Mo. Ct. App. 2004)

Mo. Rev. Stat. § 537.068 (2001)

ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING AMOCO'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFFS FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THE ELEMENT OF ACTUAL MALICE OF THEIR INJURIOUS FALSEHOOD CLAIMS, AS REQUIRED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION, IN THAT:

(A) BENHART'S ALLEGEDLY INADEQUATE INVESTIGATION BEFORE CONTACTING THE POLICE WAS NOT SUFFICIENT TO PROVE ACTUAL MALICE BECAUSE THERE WAS NO EVIDENCE THAT HE KNEW HIS STATEMENTS WERE FALSE OR HAD SERIOUS DOUBTS ABOUT THE TRUTH OR FALSITY OF HIS STATEMENTS; AND

(B) PLAINTIFFS CANNOT PROVE ACTUAL MALICE BY ARGUING THAT AMOCO WAS LIABLE UNDER A THEORY OF CORPORATE KNOWLEDGE; THE EVIDENCE AT TRIAL WAS UNDISPUTED THAT BENHART DID NOT KNOW THAT HIS STATEMENTS TO THE POLICE WERE FALSE AND THERE WAS NO EVIDENCE THAT ANYONE ELSE AT AMOCO KNEW THAT BENHART WAS REPORTING FALSE INFORMATION TO THE POLICE.

A. Standard Of Review For Cases Involving The First Amendment.

This case involves speech in the context of an injurious falsehood claim, actual malice, and the First Amendment of the United States Constitution and, therefore, compels an independent review by this Court.

Missouri has adopted § 623A of the Restatement (Second) of Torts, which states that injurious falsehood and defamation claims are very similar torts in that they “[b]oth involve the imposition of liability for injuries sustained through publication to third parties of a false statement affecting the plaintiff.” Id. § 623A, cmt. g. (1977); Ross, 163 S.W.3d at 928. Injurious falsehood requires that the publisher knew of the falsity of the statement or “did not have the basis of knowledge or belief professed by his assertion.” Id. at § 623, cmt. d. The Restatement states that this is the same test required to impose liability in cases of defamation against public figures and notes that the United States Supreme Court has called this requirement “actual malice.” New York Times v. Sullivan, 376 U.S. 254, 280 (1964).

The United States Supreme Court has stated that cases involving actual malice and the First Amendment require appellate courts to “‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’” Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984) (citing New York Times v. Sullivan, 376 U.S. at 284-86). In Harte-Hanks Communications, Inc. v. Connaughton, the court stated that in “determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full.” 491 U.S. 657, 688 (1989). The court found that: “[T]he

reviewing court must examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.” Id. at 688-89 (alterations in original) (internal citations omitted).

Missouri recognizes this de novo standard of review:

In our review, we are obliged to determine for ourselves the presence of actual malice by an independent review of the entire record. In this respect First Amendment cases are unlike other jury-tried cases, where the jury’s verdict is sustained if, disregarding all contrary evidence and inferences therefrom, the verdict is supported by evidence in the record viewed most favorably to the verdict. In First Amendment cases, the reviewing court must make an independent review of the evidence to determine for itself whether actual malice was present.

Warner v. Kansas City Star Co., 726 S.W.2d 384, 386-87 (Mo. Ct. App. 1987) (internal citations omitted). “On appeal of cases involving the First Amendment, we are obliged to determine for ourselves whether the speech at issue is protected by independently reviewing the entire record.” John Doe a/k/a Tony Twist v. McFarlane, 207 S.W.3d 52, 57 (Mo. Ct. App. 2006). Accordingly, this Court should independently review the entire record to determine whether Plaintiffs satisfied their burden of proof, showing no

deference to the verdict or the trial court's denial of Amoco's motion for judgment notwithstanding the verdict.

If this Court rejects the foregoing standard, the normal standard of review for the denial of a judgment notwithstanding the verdict applies. "A case should not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence." Giddens v. Kansas City S. Ry. Co., 29 S.W.3d 813, 818 (Mo. banc 2000). Under either standard, Plaintiffs failed to satisfy their burden of proof on essential elements of their injurious falsehood claims. The Judgment should be reversed and entered in favor of Amoco.

B. The Elements Of A Claim For Injurious Falsehood.

Plaintiffs failed to present a submissible case for injurious falsehood. The elements of injurious falsehood are:

- (1) the publication of a statement harmful to the interests of the plaintiff,
- (2) the falsity of the statement,
- (3) the publisher had knowledge that the statement was false or acted in reckless disregard of the truth or falsity of the statement, and
- (4) the publisher's statement caused pecuniary loss to the plaintiff.

Ross, 163 S.W.3d at 928; Annbar Assocs. v. Am. Express Co., 565 S.W.2d 701, 707 (Mo. Ct. App. 1978) (quoting Restatement (Second) of Torts § 623A (1977)).

To establish a submissible claim for injurious falsehood, a plaintiff must first prove that the publisher either knew the statement was false or acted in reckless disregard of its truth or falsity. Annbar Assocs., 565 S.W.2d at 707-08. A plaintiff's burden of

proof on this element is heightened to the “clear and convincing” standard. See MAI 3.05. Here, Plaintiffs failed to prove by clear and convincing evidence that Benhart acted with a reckless disregard for the truth or that he knew his statements to the police were false. Consequently, the trial court erred in denying Amoco’s motion for judgment notwithstanding the verdict.

C. Plaintiffs Failed To Prove Reckless Disregard Of The Truth Or Falsity Of The Statement By Arguing That Benhart’s Preliminary Investigation Was Allegedly Inadequate.

The undisputed record supports the Court of Appeals’ holding that “Plaintiffs failed to show that Defendant exhibited reckless disregard for the truth.” Wandersee, 2007 WL 1745618, at *3.

Plaintiffs’ entire case at trial was based on what further investigation Benhart allegedly could have done, but did not do, prior to contacting the police. Indeed, Plaintiffs’ counsel’s closing argument regarding Amoco began with the premise that “Now what did Amoco do? What Amoco did is Amoco leaped before it looked” and ended with “This case is about lies and inaccuracies intentionally, because they failed to look.” (Tr. 1113, lns. 23-24; Tr. 1141, lns. 4-5.) (See also Tr. 44, ln. 17 through Tr. 47, ln. 18 for Plaintiffs’ counsel’s opening statement detailing what Benhart did not learn prior to contacting the Overland police.) Further, Plaintiffs’ lengthy cross-examination of Benhart was based almost solely on this theory. (Tr. 545, ln. 14 through Tr. 547, ln. 14; Tr. 549, ln. 11 though Tr. 550, ln. 24; Tr. 552, ln. 3 through Tr. 559, ln. 1.)

But it is well settled that there is no duty to investigate, and the failure to investigate is not sufficient to establish reckless disregard. See, e.g., Harte-Hanks, 491 U.S. at 688; St. Amant v. Thompson, 390 U.S. 727, 731 (1968), New York Times, 376 U.S. at 287-88. The failure to investigate is a negligence standard, not a reckless disregard standard. See Dvorak v. O’Flynn, 808 S.W.2d 912, 917 (Mo. Ct. App. 1991) (noting that when reckless disregard is the standard, “mere negligent publication by the defendant is insufficient”). The United States Supreme Court has repeatedly held that a failure to investigate cannot establish reckless disregard of the truth or the falsity of a statement. In New York Times v. Sullivan, the court concluded that although the Times could have verified the accuracy of an advertisement by checking the news stories in its own files, “We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.” 376 U.S. at 287-88. In St. Amant v. Thompson, the court held that “reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” 390 U.S. at 731. In Harte-Hanks, the court again stated that “failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard.” 491 U.S. at 688.

Missouri law also provides that a failure to investigate cannot support an injurious falsehood claim, recognizing that “the United States Supreme Court has held that mere

proof of failure to investigate, without more, cannot establish reckless disregard for the truth. Rather, the publisher must act with a high degree of awareness of . . . probable falsity.” Wright v. Over-the-Road & City Transfer Drivers, Helpers, Dockmen, and Warehousemen, 945 S.W.2d 481, 497 (Mo. Ct. App. 1997) (emphasis added).

The facts in the case Dvorak v. O’Flynn are remarkably similar to the present case. Though a defamation case, it employs the same reckless disregard standard applicable to injurious falsehood claims. Dvorak, 808 S.W.2d at 918. In Dvorak, the court reversed the plaintiff’s judgment due to a failure to provide clear and convincing evidence of reckless disregard. Id. A defendant, Brockelsby, relayed another defendant’s allegation to his superiors that plaintiff had cheated on a police aptitude/application exam. Id. Brockelsby relied on the allegation of the co-defendant and performed no additional investigation: “Brockelsby did not question the other candidates, did not review the test himself, and refused to speak to plaintiff’s psychiatrist about the incident.” Id. The court held that the evidence was insufficient to sustain the jury’s verdict and noted that: “Our court has stated that a failure to investigate does not of itself indicate a reckless disregard of the truth of a statement.” Id. (citing Williams v. Pulitzer Broadcasting Co., 706 S.W.2d 508, 512 (Mo. Ct. App. 1986)). The court’s ruling in Dvorak compels a reversal of judgment here and entry of judgment in favor of Amoco.

The Restatement supports the ruling in Dvorak. It provides the following example, directly analogous to the present case:

A, advertising his cigarettes, broadcasts over television a listing and rating of the ten most popular tunes of the week.

In doing so he omits songs published by B, which are in fact among the ten most popular. As a result B loses customers for his songs. A believes that his rating is correct and that he has made a sufficient investigation to justify it, although a reasonably diligent investigation would have disclosed the facts. A is not liable to B.

Restatement, § 623A, cmt. d, illus. 7.

The precept that a failure to investigate or perform a reasonably diligent investigation cannot constitute reckless disregard is as much a matter of logic as it is a matter of law. A speaker cannot act in reckless disregard of the truth or falsity of things that he did not discover through investigation in the first place.

Ironically, Plaintiffs' very theory that Benhart was ignorant of information that they believe he could have discovered prior to contacting the police is fatal to their claims. If Benhart was ignorant of facts, he could not have acted in reckless disregard of their significance. The evidence is self-defeating.

Case law is equally clear that an alleged inadequate investigation is not sufficient by itself to show reckless disregard for the truth. See, e.g., Duffy v. Lading Edge Products, Inc., 44 F.3d 308, 315 (5th Cir. 1995). But "where the publisher undertakes to investigate the accuracy of a story and learns facts casting doubt on the information contained there, it may not ignore those doubts, even though it had no duty to conduct the investigation in the first place." Masson v. New Yorker Magazine, Inc., 960 F.2d 896, 901 (9th Cir. 1992) (on remand from the Supreme Court); see also Lohrenz v. Donnelly, 350 F.3d 1272, 1284 (D.C.

Cir. 2003) (noting that “once a publisher has obvious reasons to doubt the accuracy of a story, the publisher must act reasonably in dispelling those doubts.”). It is the plaintiff’s burden to present clear and convincing evidence that the publisher “entertained serious doubts as to the truth” or “had a high degree of awareness of the probable falsity” of the statement. In re Westfall, 808 S.W.2d 829, 836-837 (Mo. banc 1991) (providing the definition of “reckless disregard”); see also MAI 3.05.

Here, there was no evidence that Benhart doubted the truth of his statements to the police, let alone had “a high degree of awareness of the probable falsity” of his statements. Indeed, the evidence was precisely the opposite and that evidence was not in dispute. Benhart actually withheld contacting the police until he believed his preliminary investigation supported Weeks’ allegation sufficiently to relay it to the police for further investigation.³ This case began with a telephone call from Wandersee’s employee, whistleblower Tami Weeks, to Benhart alleging that Wandersee was attempting to sell the Machine without Amoco’s knowledge. (Tr. 575, ln. 5 through Tr. 577, ln. 9.) Benhart did not consider Weeks’ telephone call, standing alone, a sufficient basis upon which to contact the police. (Tr. 577, ln. 13 through Tr. 578, ln. 9.) Therefore, prior to contacting the Overland police, he: (a) contacted Dave Johnson of PDQ (Tr. 578, ln. 10 through Tr. 579, ln. 19.); (b) performed an independent internal investigation into Amoco’s records (Tr. 579, ln. 20 through Tr. 580, ln. 25.); (c) asked an Amoco real estate attorney to perform a second

³ Benhart informed the police that he had only performed a “preliminary investigation” prior to contacting them. (Tr. 544, lns. 18-21.)

internal investigation (Tr. 581, ln. 1 through Tr. 582, ln. 19.); and (d) spoke to Amoco's Regional Vice President. (Tr. 582, ln. 17 through Tr. 584, ln. 10.)

Benhart's stated purpose was to determine if "elements" of a possible crime existed to report to the police for further investigation. (Tr. 562, lns. 8-14; Tr. 584, ln. 22 through Tr. 585, ln. 6.) Through his preliminary investigation, Benhart confirmed that the serial number provided by Weeks was for the Machine, obtained the purchase order, verified the payment, verified the shipment, verified Amoco's ownership of the Machine, established that the station for which the Machine was ordered was never built, and verified that the Machine was not active at any other station in the field, before coupling that information with Weeks' serious allegations and contacting the police. There was absolutely no evidence of reckless disregard to support the verdict.

The Court of Appeals reached this same conclusion, stating that:

Plaintiffs presented no evidence that Defendant entertained serious doubts about the Security Advisor's statements. To the contrary, the record reflects that Security Advisor made a concerted effort to investigate, confirming serial numbers and contacting officers within his company to acquire information about the Machine. Plaintiffs did not show that Defendant possessed any reservations, much less serious doubts as to the truth of its publication. Therefore, Plaintiffs failed to prove that Defendants possessed a reckless disregard for the truth or falsity of its publication.

Wandersee, 2007 WL 1745618, at *3.

The entire basis for Plaintiffs' injurious falsehood claim is expressly rejected by the law of Missouri, the Restatement, and the United States Supreme Court. This Court, therefore, should enter an order for judgment notwithstanding the verdict in favor of Amoco.

D. Plaintiffs Cannot Prove Actual Knowledge Of The Falsity Of The Statement By Relying On A Theory Of Corporate Knowledge.

In the Court of Appeals, Plaintiffs modified their entire theory of liability against Amoco in this case. Instead of arguing – as they did before the trial court – that Benhart, as Amoco's agent, did not adequately investigate Weeks' allegations prior to contacting the policy, Plaintiffs asserted that Benhart was merely an innocent actor and that Amoco corporate was actually at fault based on "corporate knowledge." Plaintiffs' misplaced legal premise is that Amoco is a corporate entity charged with the knowledge of all of its employees and records. Plaintiffs' new theory of liability should be rejected for a number of reasons.

1. **Plaintiffs Impermissibly Raise Their New Theory Of Liability For The First Time On Appeal.**

First, as a threshold matter, Plaintiffs' tactic is impermissible. "On appeal, a party is bound by the position he [or she] took in the circuit court and will not be heard on a different theory." Jackson v. Cannon, 147 S.W.3d 168, 172 (Mo. Ct. App. 2004) (quoting Howsman v. Howsman, 77 S.W.3d 752, 757 (Mo. Ct. App. 2002)). Plaintiffs should be precluded from raising this theory for the first time on appeal.

2. Plaintiffs' New Theory Confuses The Element Of Actual Malice With The Law Of Agency.

Second, the tort of injurious falsehood focuses on the publisher's statement and the publisher's knowledge and actions at the time the statement was made. Here, Plaintiffs distort the element of actual malice by claiming that although Benhart was the publisher of the statement, the court should consider Amoco's corporate knowledge at the time the statement was made. Plaintiffs' new theory confuses the elements of injurious falsehood with the law of agency.

Courts have held that employers can be held liable for torts such as defamation, injurious falsehood, and tortious interference by relying on principles of agency. See, e.g., Fillmore v. Maricopa Water Processing Systems, Inc., 120 P.2d 697 (Ariz. Ct. App. 2005); Coney v. Fagan, 97 P.3d 1252, 1254-56 (Or. Ct. App. 2004); Murray v. Holnam, Inc., 542 S.E.2d 743, 748 (S.C. Ct. App. 2001); Seymour v. New York State Elec. & Gas Corp., 215 A.D.2d 971, 973 (N.Y. 1995); Canto v. J.B. Ivey & Co., 595 So.2d 1025, 1028 (Fla. Dist. Ct. App. 1992); Phoenix Newspapers, Inc. v. Church, 537 P.2d 1345, 1359 (Ariz. Ct. App. 1975). These cases reflect the Restatement (Second) of Agency § 247, which provides that a "master is subject to liability for defamatory statements made by a servant acting within the scope of his employment, or, as to those hearing or reading the statement, within his apparent authority." Id. In these cases, the courts often make two separate and distinct inquiries: (1) did the employee knowingly or recklessly publish a defamatory statement; and (2) was the employee acting within the course and scope of his employment when he made such statement. Here, Plaintiffs blur these two inquiries

together, arguing that Amoco's corporate knowledge can be used to satisfy the element of actual malice. But this confuses the law. "Defamation and injurious falsehood are intentional torts," see Wolk v. Teledyne Indus., Inc., 475 F. Supp. 2d 491, 504 (E.D. Pa. 2007), and the proper focus is on the publisher's knowledge and actions at the time – not of his employer.

3. Missouri Law Does Not Support Plaintiffs' New Theory Of Liability.

As stated by the Court of Appeals, "Plaintiffs ask this Court to conclude that a corporation has actual knowledge of a falsity when one employee makes a statement that conflicts with another employee's knowledge, learned in an unrelated circumstance." Wandersee, 2007 WL 1745618, at *2. The Court of Appeals found that "Missouri law does not support such a conclusion." Id.

Indeed, the law is directly to the contrary. It is described in the Restatement (Second) of Agency § 275 (1958), and applies to Plaintiffs' new theory here. Comment b is directly on point and explains how § 275 applies when one agent acts with incomplete knowledge despite the fact that another agent possesses that information:

If knowledge, as distinguished from reason to know, is the important element in a transaction, **and the agent who has the knowledge is not one acting for the principal in the transaction, the principal is not affected by the fact that the agent has the knowledge. In many situations, in order for one to be responsible, it is necessary that the act**

should be done with knowledge in a subjective sense, and
it is not sufficient that one has means of information.

Id. (emphasis added).

This is precisely the situation Plaintiffs describe here: (a) Benhart performs a preliminary investigation; (b) there exist documents and potentially other Amoco agents with information Benhart did not uncover; (c) Benhart contacts the police with the results of his investigation. Under that fact pattern as presented by Plaintiffs, § 275 provides that Amoco is **not affected** by the knowledge of other agents and documents. Absolute knowledge is **not imputed** to the corporation. Rather, Benhart's conduct is evaluated in the "subjective sense" and it is "not sufficient that [he] has means of information." Id.

Comment d brings this concept full circle:

The principal is bound only by the agent's knowledge which appears to be important in view of the agent's duties and prior knowledge. **The principal is not affected by information acquired by an agent which seems irrelevant to him because he does not know that the principal or another agent of the principal is transacting business in which such knowledge is relevant.**

Id. Here, Plaintiffs presented no evidence that any agent at Amoco had information inconsistent with Benhart's preliminary investigation **and** knew that Benhart would be

reporting incomplete information to the authorities.⁴ As such, the Restatement provides that neither “corporate knowledge” nor liability attaches to Amoco under those circumstances. Plaintiffs’ assertion that all information possessed by corporate agents binds the corporate entity, in absolute terms, in determining liability is a legal fiction.

Missouri courts have reached the same conclusion. In Southwest Bank of Polk County v. Hughes, 883 S.W.2d 518 (Mo. Ct. App. 1994), the court held:

Defendants cite to no case holding that a principal is charged with knowledge of a fraud if one of its agents has knowledge of some facts which, coupled with other facts unknown to the agent, arguably constitute the fraud, where the agent has no authority or responsibility to investigate. Such a holding would be at odds with the following principle from Restatement (Second) of Agency § 275 [quoting comment d].

⁴ Moreover, the information Plaintiffs claim was in Amoco’s records was given to the police during the investigation. (Tr. 519, Ins. 19-22.) Despite this disclosure, the prosecutor sought an indictment anyway.

Id. at 525.⁵ The Court of Appeals found the circumstances here analogous to those in Southwest Bank. Wandersee, 2007 WL 1745618, at *3.

Other cases are consistent with § 275 of the Restatement (Second) of Agency. See, e.g., Nebraska Pub. Employees Local Union 251 v. Otoe County, 595 N.W.2d 237, 253-54 (Neb. 1999); Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317, 320-21 (7th Cir. 1992); Peck v. Siau, 827 P.2d 1108, 1101-12 (Wash. Ct. App. 1992). In Li v. Metro. Life Ins. Co., 998 S.W.2d 828 (Mo. Ct. App. 1999), the plaintiff sued MetLife and its agent based on his false statements. Id. at 829. The plaintiff dismissed the agent and proceeded solely against MetLife. Id. The verdict directing instruction submitted by MetLife stated that the jury must find **the agent** knew his statements were false. Id. at 830. The plaintiff objected, arguing that the issue was MetLife’s corporate knowledge, not the knowledge of the agent. Id. The court held that absent evidence MetLife specifically directed the agent to make a misstatement, the only pertinent inquiry was into the knowledge of the agent:

⁵ The “agent” referenced in this quote is the non-investigating agent. As applied to this case, it is an agent possessing knowledge different than Benhart. For example, it would be an agent who knew Amoco originally ordered the Machine for a service station that eventually was not built, but who did not know Benhart was acting without this information. In that scenario, which is what Plaintiffs describe here, that agent’s knowledge cannot be imputed to Amoco to declare “corporate knowledge.”

Here, there was no evidence that MetLife expressly directed Wu to make misstatements and plaintiffs fail to identify any superior who directed Wu to make any misstatements. Because there is no evidence that MetLife directed or intended Wu to make false representations, the converse instruction appropriately refers to Wu's rather than MetLife's knowledge of the falsity of the representations.

Id. at 831.

Li applies here. Plaintiffs introduced no evidence that anyone at Amoco was aware of the alleged falsity of Benhart's statements, yet directed him to make those statements anyway. The reason for this is (a) no such evidence exists and (b) Plaintiffs' case was based on the premise that Benhart performed an inadequate investigation.

Plaintiffs rely almost exclusively on Slater v. Missouri Edison Company, 245 S.W.2d 457 (Mo. Ct. App. 1952). But Slater does not support Plaintiff's erroneous interpretation of the controlling rule of law. Slater involved a statutory trespass case in which a team of employees was working to relocate a power line, which included cutting down trees. Id. at 459-460. During the relocation project, one team member did not adequately inform another team member where to cut trees. Id. As a result, the other team member cut down plaintiff's trees. Id. at 460.

Unlike the "team members" in Slater working on the relocation project that caused the plaintiff's damage, Amoco did not have a "team" of employees investigating Plaintiffs' alleged theft. Benhart was the only person responsible for the investigation,

which Plaintiffs admit. Unlike Slater, Benhart had no contact with any Amoco employees or knowledge of any Amoco documents that suggested that Plaintiffs did not steal the car wash machine. Instead, the knowledge he had that Plaintiffs stole the car wash machine came from Weeks, Plaintiffs' own employee. Thus, this case does not create a conflict with Missouri law.

The other cases cited in Plaintiffs' Application for Transfer are likewise distinguishable. None involved a claim for defamation or injurious falsehood. Instead, these cases involved criminal liability of corporate officers, see United States v. Sawyer Transp., Inc., 337 F. Supp. 29 (D. Minn. 1971); Walker v. State, 78 S.E.2d 545 (Ga. Ct. App. 1953); Inland Freight Lines v. U.S., 191 F.2d 313 (10th Cir. 1951), or the application of a state-specific statute. See Graphic Arts Mut. Ins. Co. v. Pritchett, 469 S.E.2d 199 (Ga. Ct. App. 1996). None supports the liability of Amoco for its corporate knowledge in this case.

4. The Policy Implications For Adopting Plaintiffs' New Theory Concerning Corporate Knowledge Are Significant.

The policy implications for adopting Plaintiffs' new theory concerning corporate knowledge are significant. Under Plaintiffs' theory, every agent must know the contents of every document belonging to a multinational corporation anywhere in the world. Every agent must possess the knowledge of every other corporate agent. If there is not a flawless flow of information between all corporate agents, a finding of intentional conduct on the part of the corporation is assumed. All information possessed by corporate agents would bind the corporation. Here, Benhart would have been compelled

to interview every employee in Amoco's world-wide organization and review every document in the company's possession before asking the police to investigate a potential crime. In light of the time and expense of such an arduous task, some companies would be reluctant to report potentially criminal activity simply to avoid the possibility of civil liability. This is clearly contrary to sound public policy. See New York Times v. Sullivan, 376 U.S. at 272 ("The interests of the public here outweigh the interest of [the plaintiff] or any other individual. The protection of the public not merely requires discussion, but information."). This Court should reject Plaintiffs' theory.

II.

THE TRIAL COURT ERRED IN DENYING AMOCO'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFFS FAILED TO PROVE THE ELEMENT OF CAUSATION OF THEIR INJURIOUS FALSEHOOD CLAIMS IN THAT NUMEROUS SUPERCEDING OR INTERVENING ACTS, INCLUDING WITNESS STATEMENTS GIVEN TO THE AUTHORITIES, JUDGE COHEN'S INDEPENDENT DECISION TO SIGN THE SEARCH WARRANT, AND THE PROSECUTOR'S INDEPENDENT DECISION TO SEEK AN INDICTMENT, SEVERED CAUSATION BETWEEN AMOCO'S STATEMENTS AND PLAINTIFFS' DAMAGES.

A. Standard Of Review For Cases Involving The First Amendment.

As stated above, this Court should conduct a de novo review because this case involves speech. See Warner, 726 S.W.2d at 386-87. Alternatively, the normal standard of review for the denial of a judgment notwithstanding the verdict applies. "A case should not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence." Giddens, 29 S.W.3d at 818.

B. Plaintiffs Failed to Present Substantial Evidence of Causation.

Plaintiffs failed to establish that Amoco was the legal cause of their alleged damages. To impose liability on a defendant for injurious falsehood, a defendant must be the legal cause of a plaintiff's pecuniary loss. Annbar Assocs., 565 S.W.2d at 707; Restatement (Second) of Torts § 632 (1977). In § 632, the Restatement states:

The publication of an injurious falsehood is a legal cause of pecuniary loss if:

- (a) it is a substantial factor in bringing about the loss, and
- (b) there is no rule of law relieving the publisher from liability because of the manner in which the publication has resulted in loss.

The Restatement provides that “[t]his means that it must be a substantial factor in determining the conduct of third persons which brings about the loss.” Id. at cmt. b.

Plaintiffs identified two allegedly false statements made by Ron Benhart to the police in July 1999 upon which their injurious falsehood claims were based: (a) that Brian Wandersee had “unauthorized possession” of the Machine; and (b) that Steve Amick falsified a purchase order for the Machine and had it delivered to ACT. (LF 684.) Plaintiffs failed to establish that these statements to Detective Drew were the legal cause of Plaintiffs’ alleged damages. Third parties undertook numerous actions, decisions, and legally required procedural measures after Benhart’s statements to Drew that intervened and superceded to sever causation. Moreover, these actions were taken without reliance on Benhart’s alleged statements.

These intervening or superceding acts were:

(i) The witness statements of Plaintiffs' employees Weeks and Payette upon which Detective Drew based his decision to seek a search warrant. Detective Drew testified that he could not seek the search warrant based on Benhart's statements. (Tr. 274, ln. 5 through Tr. 275, ln. 6.) He required the witness statements from Weeks and Payette to apply for the warrant. (Id.; Tr. 295, lns. 2-10, 17 through Tr. 296, ln. 3) He testified that his search warrant application, insofar as it related to Wandersee's attempted theft of the Machine, was based solely on these witness statements. (Tr. 275, ln. 7 through Tr. 276, ln. 4.) Drew relied on Benhart only to establish ownership of the Machine, not for any elements of the crime relating to Wandersee's conduct. (Id.)

(ii) Judge Robert Cohen's independent decision to sign the search warrant based upon Drew's affidavit. This is perhaps the most obvious break in causation.⁶ As a matter of law, no search warrant could have been issued absent Judge Cohen signing the warrant application. See Mo. Rev. Stat. §§ 542.266, 542.271, 542.276 (2001). Detective Drew, who presented the warrant application and affidavit to Judge Cohen, testified that the only information provided by Amoco that he subsequently presented to Judge Cohen was proof of ownership of the Machine. (Tr. 280, lns. 2-14; Tr. 283, ln. 21 through Tr. 284, ln. 9; Ex. I; A 52-53.) All of the information regarding Wandersee's conduct came from the witness

⁶ See Tr. 276, ln. 5 through Tr. 278, ln. 9 for Drew's step-by-step description of the independent analysis from police officer, to prosecutor, to judge preceding the execution of a search warrant.

statements of Weeks and Payette. (Tr. 280, ln. 23 through Tr. 283, ln. 20; Tr. 284, lns. 10-14; Ex. I; A 52-53.)

Neither of the statements upon which Plaintiffs based their claim was ever relayed to Judge Cohen:

Q: You did not tell Judge Cohen that Ron Benhart, a former police officer, that you trusted, had used the term “unauthorized possession,” did you?

A: That’s correct.

Q: Judge Cohen didn’t even know that, right?

A: That’s correct.

Q: So regardless of what you thought of that statement from Ron Benhart, assuming he even made that statement, Judge Cohen didn’t consider it, right?

A: No, sir.

* * * * *

Q: The search warrant affidavit that you presented for Judge Cohen’s consideration did not even contain an allegation that Steve Amick had forged a purchase order, did it?

A: No, sir.

Q: Judge Cohen didn’t consider that fact in granting a search warrant?

A: No.

(Tr. 368, ln. 23 through Tr. 369, ln. 7; Tr. 381, ln. 21 through Tr. 382, ln. 2; see also Ex. I; A 52-53; Tr. 361, lns. 3-25.) Judge Cohen indisputably did not rely on Benhart’s allegedly false statements in deciding to sign the search warrant. Accordingly, there is an undisputed

break in causation between the utterance of the allegedly false statements and the supposed damage to Plaintiffs caused by Wandersee's subsequent arrest and indictment.

(iii) The Overland Police Department's subsequent criminal investigation. Plaintiffs claimed that Benhart should have done additional investigation before going to the police in July 1999. However, all of the information Plaintiffs claimed Benhart should have learned and presented to the police from the outset was subsequently learned by Amoco and presented to the police prior to Wandersee's indictment. (Tr. 291, ln. 21 through Tr. 293, ln. 8; Tr. 379, ln. 21 through Tr. 381, ln. 20.) Even with this additional information, the authorities still sought the indictment based on the numerous ACT employee witness statements confirming his attempts to sell the Machine and remove parts from it. (Id.)

(iv) The witness statements given by Plaintiffs' employees Paul Faix, Diane Dremann, Janet Faix, and Christopher O'Bannon. (Exs. L, M, N, and O; A 58-64.) The undisputed testimony from Detective Drew and Prosecutor Lasater is that these statements and the parts-stripped Machine, coupled with the prior statements of Weeks and Payette, were the basis of the continued criminal investigation and subsequent decision to seek an indictment. (Tr. 286, ln. 7 through Tr. 288, ln. 2; Tr. 916, lns. 4-15; Tr. 920 lns. 10-14; Tr. 928, lns. 10-14.)

(v) The prosecutor's independent decision to seek an indictment based on the Overland Police Department's investigation. Prosecutor Lasater did not rely on Benhart's allegedly false statements in deciding to prosecute Wandersee and seek an indictment:

Q: Okay, now what items from the report did you rely on in making your decision whether or not to seek an indictment in the Wandersee matter?

A: The statements of the witnesses and also physical evidence that was seized during the execution of the search warrant.

Q: Who were the witnesses that you were referring to, if you recall?

A: Those witnesses would have been Tami Weeks, Paul and Janet Faix, Chris O'Bannon, Keith Payette, the witness statements contained within the report.

Q: Did you rely on any statements from Ron Benhart from Amoco?

A: No.

* * * * *

Q: In making that decision, did you rely on any alleged statement by Ron Benhart that [ACT] had "unauthorized possession" of the car wash machine at issue?

A: No.

Q: In making that decision, did you rely on any statements from Ron Benhart [] regarding Steve Amick?

A: No.

(Tr. 916, lns. 4-15 and 21-25 through Tr. 917, ln. 3.) Hence, there can be no causation between those statements, the prosecution, and the indictment. Prosecutor Lasater's decision to seek an indictment against Wandersee was based on the statements from Wandersee's own employees.

Each of these acts and circumstances, independently and cumulatively, sever causation between Benhart's alleged statements to Detective Drew and Plaintiffs' alleged damages. This Court's recent ruling in Highfill v. Hale, 186 S.W.3d. 277 (Mo. banc 2006),

is instructive. In that false imprisonment case, this Court held that independent evaluations and determinations by police and prosecutors investigating and filing charges against the plaintiff were intervening acts severing causation between the defendant's complaint to police and the plaintiff's arrest, even where the complaint was "totally false." Id. at 281.

Here, although the jurors could have found that Benhart made the statements to the police, they could not have found that these statements legally caused the damages that followed. The undisputed testimony was that there was no reliance on these statements during the various requisite stages of the investigation and indictment that followed. Consequently, Plaintiffs failed to establish that Amoco was the legal cause of the alleged damages and, as a result, this Court should reverse the Judgment.

III.

THE TRIAL COURT ERRED IN DENYING AMOCO'S MOTION FOR A NEW TRIAL BECAUSE THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY SUBMITTING A MODIFIED FORM OF MAI 3.05 IN THAT IT ERRONEOUSLY INSTRUCTED THE JURY THAT PLAINTIFFS WERE NOT REQUIRED TO PROVE THE ELEMENT OF ACTUAL MALICE AS PART OF THEIR BURDEN OF PROOF IN THEIR INJURIOUS FALSEHOOD CLAIMS; THE TRIAL COURT'S INSTRUCTION ERRONEOUSLY DELETED THE CRITICAL DEFINITIONAL PHRASE OF "RECKLESS DISREGARD."

A. The Standard Of Review For A Denial Of A Motion For New Trial.

This Court reviews the trial court's denial of Amoco's motion for new trial under the abuse of discretion standard. In re H.L.L., 179 S.W.3d 894, 896 (Mo. banc 2005). "Where there is conflicting evidence on liability, a new trial on all issues is desirable." Courtney v. Kansas City, 775 S.W.2d 269, 272 (Mo. Ct. App. 1989). In the present case, a new trial is warranted due to evidentiary error regarding jury instructions. Consequently, a new trial is necessary.

B. The Trial Court Erred In Submitting A Modified MAI Instruction.

The trial court erred in instructing the jury. Specifically, the trial court erred by striking the definition of "reckless disregard" from MAI 3.05. Jury instruction error warrants reversal when the merits of the action have been materially affected and when the error is properly preserved. Giddens, 29 S.W.3d 813, 818 (Mo. banc 2000). Such is the case here.

The trial court erred in submitting an improperly modified form of MAI 3.05 as the burden of proof instruction (Instruction #4). (LF 726; A 32.) MAI 3.05 is the approved burden of proof instruction for defamation of a public figure. In its proper and complete form, it instructs the jury as follows:

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon plaintiffs to cause you to believe that the evidence has clearly and convincingly established that the [statement referred to in the evidence] was false and that defendant [made the statement] with knowledge that it was false or with reckless disregard for whether it was true or false **at a time when defendant had serious doubt as to whether it was true.** However, on all other propositions of fact, the burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely true than not true. In determining whether or not you believe a proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

(emphasis added) (See LF 720; A 31 for unmodified MAI 3.05 submitted by PDQ.) The Restatement recognizes this is the appropriate burden of proof for injurious falsehood claims as well. Restatement (Second) of Torts, § 623A (1977), cmts. b and d. Indeed, in all cases where “actual malice” is the burden of proof, MAI 3.05 is the proper instruction on that burden. Deckard v. O’Reilly Automotive, Inc., 31 S.W.3d 6, 16 (Mo. Ct. App. 2000) (holding that MAI 3.05 was appropriate instruction in defamation case because the existence of a qualified privilege raised the burden to actual malice).

The trial court deleted the critical definitional phrase of reckless disregard – which is in bold above – from the instruction. (LF 726; A 32.) It is well-settled that: “Where an MAI instruction is available and applicable, its use is mandatory. It is erroneous to deviate from the MAI form.” Tillman v. Supreme Exp. & Transfer, Inc., 920 S.W.2d 552, 554 (Mo. Ct. App. 1996) (citing Cova v. American Family Mut. Ins. Co., 880 S.W.2d 928, 930 (Mo. Ct. App. 1994)). Moreover, “[w]here an instruction includes a term or phrase defined by MAI, it is error not to use the MAI definition.” Karashin v. Haggard Hauling & Rigging, Inc., 653 S.W.2d 203, 206 (Mo. banc 1983).

As modified, the instruction left the jury with an incomplete and confused understanding as to Plaintiffs’ actual burden in proving that Amoco acted with reckless disregard of the truth or falsity of its alleged statements. As reflected in Rule 70.02, this confusion is precisely the concern that MAI instructions are intended to rectify. In advocating that this Court adopt Rule 70.02, the Supreme Court Committee on Jury Instructions stated the well-reasoned necessity for the Rule:

There are hundreds of currently acceptable instructions which use language more favorable to one side or the other than the proposed instructions. If counsel are permitted to “improve” the approved instructions, even within the confines of specific precedents, the value of these instructions will be lost.

MAI, 6th Ed., pp. XLIII-XLIV (2002) (adopted by this Court in, e.g., Motsinger v. Queen City Basket Co., 408 S.W.2d 857, 860 (Mo. 1966)).

In Brown v. St. Louis Public Service Co., 421 S.W.2d 255 (Mo. banc 1967), this Court noted:

This court, by its adoption of Missouri Approved Instructions, promulgated precise approved instructions. [] The special committee carefully considered the precise words to use in each approved instruction in order to provide simple, concise and understandable instructions.

Id. at 257. In short, words and phrases are carefully considered prior to inclusion in an MAI instruction. This Court clearly considered the definition of “reckless disregard” in MAI 3.05 to be important. Were the definition not important, the words “at a time when defendant had serious doubt as to whether [the statement] was true” would not have been included for the jury’s edification.

Moreover, deviation from an MAI instruction is presumptively prejudicial and Amoco does not need to show prejudice beyond the mere fact that the instruction was modified by Plaintiffs and given by the trial court. Instead, the burden shifts to Plaintiffs

to convince this Court that no prejudice resulted from the modification. As this Court has long held:

[W]here there is deviation from an applicable MAI instruction which does not need modification under the facts in the particular case, prejudicial error will be presumed unless it is made perfectly clear by the proponent of the instruction that no prejudice could have resulted from such deviation.

Brown, 421 S.W.2d at 259; see also Epps v. Ragsdale, 429 S.W.2d 798, 801 (Mo. Ct. App. 1968) (holding that the plaintiff who submitted modified MAI instruction “has not shown non-prejudice and could hardly do so in view of the confusion created by omitting an applicable definition and defining its inappropriate counterpart.” (emphasis added)). Such is the gravity of modifying an MAI instruction.

Despite this shifting burden, it is worth noting the obviousness of the resulting prejudice. By striking the definition of reckless disregard from MAI 3.05, the trial court opened the door for the jury to hold Amoco liable under what was effectively a negligence standard. Dvorak, 808 S.W.2d at 917. Without the definition of reckless disregard to guide them, the jury was allowed to determine that Amoco’s investigation prior to contacting the Overland police was insufficient, despite the fact that this showing is grossly deficient to establish reckless disregard and actual malice. See Dvorak, 808 S.W.2d at 917; Wright, 945 S.W.2d at 497.

Further, the stricken definition is the portion of MAI 3.05 instructing the jury that reckless disregard is a subjective inquiry. See Harte-Hanks, 491 U.S. at 688. As modified and submitted, Instruction #4 suggests an objective inquiry. The jury was never charged to determine whether Plaintiffs proved by clear and convincing evidence that Benhart subjectively held “serious doubts” as to the truth of his statements at the time of utterance – Plaintiffs’ true burden, and a proposition that found no evidentiary support at trial.

The trial court instructed the jury in error by striking the critical “reckless disregard” definitional phrase from MAI 3.05. The resulting jury confusion and prejudice to Amoco is apparent from the legally unsupportable verdict. A new trial is warranted.

IV.

THE TRIAL COURT ERRED IN DENYING AMOCO'S MOTION FOR A NEW TRIAL BECAUSE THE TRIAL COURT IMPROPERLY REFUSED TO SUBMIT AMOCO'S ALTERNATIVE INSTRUCTION DEFINING "RECKLESS DISREGARD" AS HAVING A HIGH DEGREE OF AWARENESS OF THE PROBABLE FALSITY OF THE STATEMENT OR ENTERTAINING SERIOUS DOUBTS AS TO THE TRUTH OF THE STATEMENT, WHICH CONSTITUTES THE ELEMENT OF ACTUAL MALICE, AS REQUIRED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION, FOR PLAINTIFFS TO PROVE THEIR INJURIOUS FALSEHOOD CLAIMS.

A. **The Standard Of Review For A Denial Of A Motion For New Trial.**

This Court reviews the trial court's denial of Amoco's motion for new trial under the abuse of discretion standard. *In re H.L.L.*, 179 S.W.3d at 896.

B. **The Trial Court Erred In Refusing To Submit An Instruction Defining "Reckless Disregard."**

Amoco offered a separate alternate instruction defining "reckless disregard":

INSTRUCTION NO. _____

The term "reckless disregard" as used in these instructions means that Amoco had a high degree of awareness of the probable falsity of its statement to the Overland Police Department or it entertained serious doubts as to the truth of its statement to the Overland Police Department.

(LF 694; A 33.) The trial court rejected it. Unlike the shifting burden noted above with regard to a modified MAI instruction, this Court reviews the refusal to give a tendered instruction for an abuse of discretion. Intertel, Inc. v. Sedgwick Claims Mgmt. Servs., 204 S.W.3d 183, 193 (Mo. Ct. App. 2006). The arguments noted above apply with equal force here and are adopted and incorporated herein.

V.

THE TRIAL COURT ERRED IN DENYING AMOCO'S MOTION FOR A NEW TRIAL BECAUSE THE TRIAL COURT IMPROPERLY FAILED TO INSTRUCT THE JURY ON THE QUALIFIED PRIVILEGES APPLICABLE TO PLAINTIFFS' INJURIOUS FALSEHOOD CLAIMS, THEREBY DENYING AMOCO OF THESE DEFENSES TO PLAINTIFFS' CLAIMS.

A. The Standard Of Review For A Denial Of A Motion For New Trial.

This Court reviews the trial court's denial of Amoco's motion for new trial under the abuse of discretion standard. In re H.L.L., 179 S.W.3d at 896.

B. The Trial Court Erred In Failing To Instruct On The Qualified Privileges.

The trial court erred in failing to instruct the jury on the existence of the qualified privileges applicable to this injurious falsehood case:

INSTRUCTION NO. _____

Even if you find in favor of Plaintiffs under Instruction Number _____, your verdict must be for Defendant Amoco if you believe:

First, Tami Weeks told Amoco that Plaintiffs intended to sell the Car Wash for their own benefit, and

Second, Amoco reasonably believed that Tami Weeks' statement affected a sufficiently important interest of Amoco, and

Third, the Overland Police Department's knowledge of the statement was of service in the lawful protection of Amoco's interest in the Car Wash, and

Fourth, Amoco did not know that its statement to the Overland Police Department was false or it did not act in reckless disregard of the truth or falsity of its statement.

Restatement (Second) of Torts § 594 (1977) (applied to injurious falsehood claims pursuant to Restatement (Second) of Torts § 646A (1977)).

INSTRUCTION NO. _____

Even if you find in favor of Plaintiffs under Instruction Number _____, your verdict must be for Defendant Amoco if you believe:

First, Amoco told the Overland Police Department that Plaintiffs had unauthorized possession of the Car Wash, and

Second, Amoco had a legally protected interest in the Car Wash, and

Third, Amoco believed that Plaintiffs were claiming an interest in the Car Wash that is inconsistent with Amoco's claims, and

Fourth, Amoco's statement to the Overland Police Department was honest and in good faith, even though his belief may not have been correct or reasonable.

Restatement (Second) of Torts § 647 (1977).

(LF 695-696; A 34-35.)

The Restatement (Second) of Torts recognizes two qualified privileges to the tort of injurious falsehood. These qualified privileges are found in Restatement (Second) of Torts §§ 594 and 647 (1977). Their applicability to the facts of this case was never in dispute. The trial court found that the privileges would apply. (Tr. 1102, lns. 14-17.) However, the trial court refused to instruct on either privilege. (Tr. 1101, ln. 25 through Tr. 1102, ln. 17.)

In consequence, the trial court effectively held that a citizen making a statement to police in order to protect his own (or another's) welfare and/or property interests is afforded no greater protection from civil liability than any speaker under any other circumstances. This is not, and cannot be, the law in Missouri. The qualified privileges protect citizens who communicate in an effort to protect their interests or the interests of others, and the jury must be instructed as to these privileges.

The privilege of "Protection of the Publisher's Interest" set forth in § 594 of the Restatement applies directly to this case:

An occasion makes a publication conditionally privileged if
the circumstances induce a correct or reasonable belief that

- (a) there is information that affects a sufficiently important interest of the publisher, and
- (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.

Restatement, § 594.

It is not even necessary that the publisher's interest actually be in danger – it is enough that the circumstances lead a reasonable man to believe that the interest is in danger and the publication is reasonably necessary for its protection. Id. at cmt. h. (emphasis added). Comment h provides the following illustration:

A sees B, a stranger, about to drive off in a car that appears in every particular to be A's car. A calls to a policeman to prevent B from stealing his car. The privilege applies although the car actually belongs to B.

Directly on point to the present case, comment j provides that “an owner of property may communicate his reasonable belief that it is in danger of theft or harm to his employee or a police officer since these persons have a legal duty to assist him in the protection of his property interests.” Id. at cmt. j.

The trial court's refusal to instruct on this privilege effectively denies these well-reasoned protections to the citizens of Missouri. The policy considerations are significant. The rejection of this privilege would discourage citizens from reporting suspected criminal activity to police for fear of potential civil liability should their belief later prove mistaken. This cannot be the well-reasoned policy of Missouri.

Our society seeks to encourage citizens to report suspected criminal activity to the proper authorities for further investigation.⁷ To deny citizens this protection risks a chilling effect on reports to the police, or worse – encourages citizens to perform their own investigations into suspected criminal activity, a practice potentially dangerous for both the citizen and the suspected wrongdoer. The trial court’s ruling denies these protections to Missouri citizens and cannot be sanctioned by this Court. This Court must order a new trial and affirm the existence of this critical privilege in Missouri.

Similarly, § 647 of the Restatement (Second) provides a conditional privilege that specifically applies to injurious falsehood claims. Section 647 is the “Conditional Privilege of Rival Claimant,” which states: “A rival claimant is conditionally privileged to disparage another’s property in land, chattels or intangible things by an assertion of an inconsistent legally protected interest in himself.” Id. The § 647 privilege “differs from the conditional privilege stated in § 594 in that it goes further and permits the publisher to assert a claim to a legally protected interest of his own provided that the assertion is honest and in good faith, even though his belief is neither correct nor reasonable.” Id. at cmt. b (emphasis added).

⁷ The import of the citizen’s role in this regard was dramatically illustrated through the recovery of two kidnapped boys in eastern Missouri. But for the role of Missouri citizens providing critical tips to the police for further investigation, that incident may not have met such a positive end.

A “claimant” is “one who asserts that he has property in land, chattels or intangible things,” and that “if two persons claim one or more of the same legally protected interest, they are ‘rival claimants.’” Id. at cmt. c. A rival claimant is privileged to assert an inconsistent interest unless a trier of fact is persuaded he did not believe in the possible validity of his claim. Id. at cmt. d. In this case, Amoco is clearly a “rival claimant” seeking to enforce its interest in the Machine.

Despite the obvious applicability of one or both of these qualified privileges, the trial court refused to instruct the jury accordingly. The untenable result in this case illustrates the need to instruct a jury on the protections afforded persons attempting to aid in the lawful protection of their interests or the interests of another. The trial court erred in refusing to instruct the jury on one or both of the applicable privileges. Moreover, if a court determines that a qualified privilege applies, and the plaintiff presents a factual issue as to whether the publisher abused his privilege, the jury must decide this fact question. Deckard, 31 S.W.3d at 16. The trial court’s refusal to instruct on the qualified privileges invaded this province of the jury and constitutes reversible error.

VI.

THE TRIAL COURT ERRED IN DENYING AMOCO'S MOTION FOR A NEW TRIAL BECAUSE THE TRIAL COURT IMPROPERLY PERMITTED NON-RECOVERABLE MEASURES OF DAMAGES FOR LOST PROFITS, FOREGONE WAGES, ATTORNEYS' FEES, AND DAMAGES BEYOND THE YEAR 2000.

A. The Standard Of Review For A Denial Of A Motion For New Trial.

This Court reviews the trial court's denial of Amoco's motion for new trial under the abuse of discretion standard. In re H.L.L., 179 S.W.3d at 896.

B. The Trial Court Erred In Permitting Non-Recoverable Measures Of Damages.

The trial court erred in admitting and permitting the jury to award non-recoverable damages for: (a) lost profits, (b) "foregone wages," (c) attorney's fees; and (d) beyond the year 2000. Plaintiffs sought \$192,610 in lost profits, \$365,000 in foregone wages, and \$25,000 for criminal defense attorneys' fees of Amick that were submitted to, and awarded by, the jury in error. Each error was prejudicial to Amoco, and this Court should order a new trial on all issues. In the alternative, this Court should order a new trial on damages. This Court reviews a trial court's admission of evidence for an abuse of discretion. State v. Jordan, 181 S.W.3d 588, 594 (Mo. Ct. App. 2005).

1. Lost Profits.

The trial court erred in denying Amoco's motion *in limine*, overruling objections at trial, and rejecting withdrawal instructions regarding Plaintiffs' evidence of lost profits.

Plaintiffs' claim for lost profits was speculative and lacked the foundation required under Missouri law. In Missouri, "[p]roof of lost profits is exacting. Speculation as to probable or expected lost business profits is spurned, and proof of lost profits must be substantial." Anuhco, Inc. v. Westinghouse Credit Corp., 883 S.W.2d 910, 923 (Mo. Ct. App. 1994). As this Court held almost forty years ago in Coonis v. Rogers, 429 S.W.2d 709 (Mo. 1968):

In evaluating the sufficiency of evidence to sustain awards of damages for loss of business profits, the appellate courts of this state have made stringent requirements, refusing to permit speculation as to probable or expected profits, and requiring a substantial basis for such awards. "The general rule as to the recovery of anticipated profits of a commercial business is that they are too remote, speculative, and too dependent upon changing circumstances to warrant a judgment for their recovery. []"

Id. at 713-14 (quoting Morrow v. Missouri Pac. Ry. Co., 123 S.W. 1034 (Mo. Ct. App. 1909)).

Further, it is incumbent on a plaintiff to prove "net profits," not "gross profits." Id. (holding that the net profit calculation is "indispensable"). Finally, in order to lay a foundation for future lost profits, a plaintiff must prove net profits for a "reasonable time anterior" to the interruption of the business. Id. Plaintiffs' foundation for lost profits fails to meet literally every aspect of this "stringent" and "exacting" standard.

At trial, Plaintiffs based their lost profits projection on income tax returns for fiscal years 1996 through 1998. (Tr. 719, ln. 3 through Tr. 725, ln. 18; Exs. 35 A-C.) Plaintiffs used these income tax returns and asserted a 25.5% “growth rate” for gross sales annually, plus an average “net profit margin” of 5.5% and applied those percentages to the fiscal year income tax returns for 1999, 2000, and 2001 to determine “lost profits.” (Tr. 722, lns. 3-25; Tr. 727, ln 7 through Tr. 730, ln. 4; Tr. 732, ln. 16 through Tr. 735, ln. 1.) The calculation is speculative and lacks foundation because: (a) it is not based on a “reasonable anterior” time period; and (b) it does not eliminate other factors for the downturn in profits.⁸ Accordingly, the trial court erred in admitting this evidence and submitting lost profits to the jury as a measure of damages.

a. Plaintiffs’ Non-Contiguous Anterior Period Was Inadequate As A Matter of Law.

Plaintiffs’ lost profits projection did not apply a “reasonable anterior period” and, in fact, did not apply a true anterior period at all. “[P]roof of income and expenses to the business for a reasonable time anterior to its interruption, with a consequent establishing of net profits during the previous period, is indispensable.” Coonis, 429 S.W.2d at 714.

⁸ It is important to note that this calculation departs from Wandersee’s methodology prior to trial and during his early testimony at trial. The change in testimony and methodology is described *supra*. This moving target and method further illustrate the speculative nature of Wandersee’s damages projections.

Plaintiffs did not establish reliable net profits during the reasonable anterior period and, therefore, submission of lost profits damages to the jury was error.

Plaintiffs' "anterior period" was fiscal years 1996 through 1998 – ending September 30, 1998. This "anterior period" is unreasonable as a matter of law because it does not chronologically connect with the "interruption of business" on July 26, 1999.⁹ It is not a true anterior period because it ignores the entire ten-month period of October 1, 1998 through July 25, 1999 leading up to the business interruption. Therefore, it cannot be used to determine profit trends at the time of the business interruption.

Prior to trial, Plaintiffs testified that they do, and did, keep sales records reflecting profits on a month-to-month basis that would have illustrated the profitability of ACT during that ten-month gap. (LF 139.) Again at trial, Wandersee testified that he could provide these materials. (Tr. 867, Ins. 8-21.) Unsurprisingly, they were not provided.

Plaintiffs presented no evidence of gross sales, overhead, expenses, or the "indispensable" net profits during the ten months contiguous to the business interruption. Without this data, Plaintiffs' method for projecting lost profits was nothing more than self-serving speculation – particularly since Plaintiffs presented no evidence of specific lost sales or customers.

The only documentary evidence admitted showing ACT's profitability during the ten-month gap was the Corporate Minute. (Ex. CC; A 76-77.) The Corporate Minute

⁹ This is the date the Overland police served the search warrant on Plaintiffs' warehouse. Wandersee was arrested on July 27, 1999.

reflects that ACT's business was actually in rapid decline during the ten-month gap and that ACT was in such dire financial straits that all salary levels were frozen and that Wandersee forfeited his own wages in a desperate attempt to keep the business afloat. (Id.)

This damning evidence – wholly inconsistent with Plaintiffs' undocumented and self-serving testimony – underscores that the anterior period must be for a reasonable time contiguous to the business interruption. Ignoring such a significant ten-month gap prior to the business interruption opens the door to abuse through self-serving speculation and fraud that significantly fail Missouri's stringent lost profits analysis.

The Restatement (Second) of Torts § 633 (1977) describes a plaintiff's burden in submitting lost profits in an injurious falsehood case. Comment h provides that a party must show that profits "theretofore constant or increasing, have fallen off []" (emphasis

added).¹⁰ The purpose is clear. Missouri has long applied a stringent standard to the admissibility of lost profits because of the complexities of business markets and the individuals and entities who participate in them. As this Court stated in Coonis, lost profits are “too dependent upon changing circumstances to warrant a judgment for their recovery.” Coonis, 429 S.W.2d at 714. It is incongruous with these well-settled principles to permit a non-contiguous “anterior period” with a ten-month gap between it and the business interruption to govern the lost profits calculus.

This case is similar to Jack L. Baker Co., Inc. v. Pasley Mfg. and Dist. Co., 413 S.W.2d 268 (Mo. 1967). There, this Court rejected plaintiff’s lost profits claim:

We hold that these tax returns did not provide the requisite substantial basis for determining probable lost profits. There is no evidence to show a steady trend from loss to profit from the inception of the corporate operations on March 1, 1962, to the year 1964. There was no evidence to show a month by month increase in business in 1962. The tax return gave no

¹⁰ Accountant Donna Smith testified and explained the logical importance of a contiguous anterior period: “In fact, the before and after method is a basic method for determining lost profits, and so you need to look at what’s transpired immediately prior to the incident, and how is that different from what transpired after the incident. So you have to have a clean demarcation right at the time of the incident.” (Tr. 993, ln. 23 through Tr. 994, ln. 2; see also Tr. 998, ln. 18 through Tr. 1001, ln. 19; Tr. 1009, lns. 3-18.)

breakdown by months and plaintiff did not see fit to introduce a corporate month by month profit and loss analysis as it did with respect to 1963.

Id. at 271. Here, Plaintiffs made no showing of ACT's month-to-month net profits contiguous to the business interruption. Because the business interruption occurred ten months into fiscal year 1999, and because Plaintiffs claimed a lost profit for the entire year of fiscal year 1999, they necessarily claimed that all of the lost profits for that year occurred during the two-month time period following the business interruption. Wandersee acknowledged this at trial. (Tr. 764, ln. 15 through Tr. 765, ln. 1.) Accordingly, a month-to-month calculus is essential to determining Plaintiffs' lost profits.

There is no evidence of actual net profits during the ten-month anterior period contiguous to the business interruption in this case. The only documentary evidence attributable to Plaintiffs' business during that period – the Corporate Minute – was directly to the contrary and illustrates a hemorrhaging enterprise suffering a severe decline in profits months prior to the business interruption. The trial court erred in permitting the jury to consider and award lost profits damages.

b. Plaintiffs Failed To Eliminate Other Potential Causes.

The trial court also erred in permitting lost profits because Plaintiffs failed to eliminate other potential causes. In Missouri, “recovery for lost profits is not permitted when uncertainty exists as to whether lost profits would have occurred or whether lost

profits emanated from the wrong.” Anuhco, Inc., 883 S.W.2d at 923. To say “uncertainty exists” in this case is an understatement.

The Restatement (Second) of Torts § 633 (1977) describes a plaintiff’s burden to eliminate uncertainty in submitting lost profits in an injurious falsehood case. Comment h states that a plaintiff must “prove the pecuniary loss necessary to recovery by showing that after the publication the sales of his goods, theretofore constant or increasing, have fallen off and by eliminating all other reasonably likely causes, such as new competition, a general decline in the market for such goods, or defects in the goods themselves.” Id. at cmt. h (emphasis added).

Plaintiffs offered no evidence “eliminating” other causes “such as new competition” in the market or “a general decline in the market.” Plaintiffs performed no market analysis and failed to eliminate other possible causes for ACT’s alleged lost profits. They offered only Wandersee’s self-serving and conclusory testimony:

Q: Were – is there any other factor, based on your experience with [ACT] since 1994, that would have caused your sales to hit one million dollars as opposed to the 2.7 projected by the –

A: Any reason other than still this continuing allegation issue?

Q: Yes.

A: No, we were well-placed in the industry.

* * * * *

Q: Okay, did the accusations made by the defendants in this case cause these sales to be lower than what you believe they should have been?

A: They continued to impact our business, yes.

Q: Was there anything else that was happening in the marketplace that would have had a significant reduction on the sales of [ACT] during the year 2001?

A: No.

(Tr. 732, ln. 23 through Tr. 733. ln. 3.)¹¹

The only analysis regarding other causative elements was performed by Ms. Smith, an accountant certified in business valuation. (Tr. 995, lns. 12-23; Tr. 1001, ln. 24 through Tr. 1008, ln. 8.) Unsurprisingly, her research and market analysis was consistent with the industry pitfalls referenced in Plaintiffs' own Corporate Minute. (Tr. 1001, ln. 24 through Tr. 1006, ln. 8; Tr. 1008, lns. 3-18.)

Contrary to the strict requirements of Missouri law, there most certainly was "uncertainty [] as to whether lost profits would have occurred or whether lost profits emanated from the wrong." Anuhco, Inc., 883 S.W.2d at 923. Plaintiffs completely failed in their burden to eliminate other causes for the downturn in ACT's profits. And more, Plaintiffs' own Corporate Minute shows drastically reduced profits prior to the business interruption due to the very causes set forth in the Restatement – "new competition [and] a general decline in the market for such goods." Restatement at § 633, cmt. h.

¹¹ Plaintiffs did not even offer similar self-serving testimony excluding other causes for lost profits in 1999.

The trial court abused its discretion in permitting evidence of lost profits at trial and in permitting the jury to consider it as damages. Accordingly, a new trial is warranted. In the alternative, a new trial on damages is warranted.

2. Foregone Wages.

Plaintiffs sought “foregone wages” in the amount of \$365,000 for: (a) Brian Wandersee; (b) Laura Wandersee; (c) Jane Wandersee; and (d) Herb Wandersee from August 1999 through 2001.¹² (Tr. 740, ln. 16 through Tr. 750, ln. 24.) This measure of damages refers to the wages that ACT and these individuals agreed to defer until a later date. (Tr. 744, ln. 22 through Tr. 745, ln. 4; Ex. 72; A 45-46.) The trial court erred in denying Amoco’s motion *in limine* on this point as well as Amoco’s numerous objections during trial. There is no authority in Missouri supporting “foregone wages” as a recoverable corporate damage. In fact, the law is to the contrary.

First, ACT’s payment of these wages at a later date is simply a deferment of an independent salary obligation. The undisputed testimony at trial was that the services rendered by Wandersee, Laura Wandersee, Jane Wandersee and Herb Wandersee were necessary to ACT’s business. Indeed, these positions were open to be filled by the Wandersee family because Brian Wandersee fired the employees who provided witness statements incriminating him in the attempted theft of the Machine. (Tr. 744, ln. 13-15;

¹² To the extent “foregone wages” are sought as losses to the individuals, Laura Wandersee, Jane Wandersee, and Herb Wandersee are not parties to this lawsuit and do not have standing to recover damages.

Tr. 745, Ins. 7-9 and 19-23; Tr. 779 Ins. 2-11 and 18 through Tr. 783, ln. 8.) As Herb Wandersee testified:

Q: Now, sir, you said that your son either fired or terminated in some way seven of his employees, is that right?

A: That's correct.

* * * * *

Q: Okay, now do you know – well, you do know, don't you, that those at least seven of the employees were people that gave statements to the police concerning your son in this case?

A: Yes.

(Tr. 177, Ins. 17-19; Tr. 178, Ins. 1-4.) Because the services provided – purchasing, technician work, secretarial, billing, bookkeeping, sales, management – were necessary to the operation of ACT under any circumstances both before and after the business interruption, the wages are a business expense. (Tr. 170 Ins. 16-21; Tr. 601, Ins. 10-20; Tr. 741, Ins. 4-9.) As Wandersee testified:

Q: Now, sir, with respect to all of these family members that you hired after your arrest. Those people all replaced employees who were already previously employed by the company, is that right?

A: That's correct.

Q: So those services that they were performing after your arrest, those services were needed prior to the arrest, is that correct?

A: They were paid positions, yes.

Q: But the services that your family members were performing, those services were needed prior to the arrest, is that correct?

A: They were being done so, yes.

(Tr. 779, lns. 2-11.) Requiring Amoco to pay those wages is akin to requiring Amoco to pay ACT's utility bills, rent, or any other business expense from 1999-2001. (Tr. 779, lns. 12-17.)

In fact, by foregoing these wages until a later date, ACT actually enjoyed the benefits of these corporate monies over that three-year period. Requiring Amoco to pay these "foregone wages" does not compensate a damage; it provides ACT with three years' worth of free labor.

Second, as part of the indispensable net profits calculation discussed above, employee wages are actually to be deducted from the corporate profit analysis. Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc., 155 S.W.3d 50, 56 (Mo. banc 2005). "Foregone wages" damages contemporaneous with the claimed lost profits period of 1999-2001 negates the wage deduction necessary to determine net profits. In effect, Plaintiffs, on one hand, reduced wage expenses from their lost profits analysis but, on the other hand, received that reduction right back in the form of "foregone wages." Therefore, the award of "foregone wages" constitutes double dipping. This is improper

and constitutes a non-recoverable windfall for Plaintiffs.¹³ Id. at 54 (“A party should be fully compensated for its loss, but not recover a windfall.”).

Because of error concerning “foregone wages,” a new trial is warranted. In the alternative, a new trial on damages is warranted.

3. Steve Amick’s Attorneys’ Fees.

The trial court erred in permitting Plaintiffs to recover \$25,000 in attorney fees of a non-party. Plaintiffs asked for, and received, the attorneys’ fees of a co-defendant in the criminal matter, Steve Amick, who is not a party to this case. Plaintiffs offered no support for this claim other than a unilateral, self-serving corporate minute stating that “the company should reimburse the legal defense of Steve Amick.” (See Ex. 71; A 44; Tr. 738, ln. 9 through Tr. 739, ln. 20) (emphasis added). See St. Louis Realty Fund v. Mark Twain South County Bank, 651 S.W.2d 568, 575 (Mo. Ct. App. 1983) (noting that “the general rule regarding self-serving documents is that ‘declarations of a party favorable to himself which are not a part of the *res gestae* are hearsay, self serving and inadmissible as evidence in his favor.”).

Plaintiffs did not pay Amick’s legal fees. Amick’s attorney testified that he was paid by Mr. Amick, not the Plaintiffs. (Tr. 197, lns. 21-22; Tr. 198, lns. 9-14.) Amick even testified that he did not ask Plaintiffs to pay those fees. (Tr. 131, lns. 23-24.)

¹³ Wandersee actually recovered his 1999 “lost wages” despite the fact that he waived his salary months prior to being arrested. (Tr. 843, ln. 23 through Tr. 844, ln. 6; Ex. CC; A 76-77.)

Clearly, there is no actual damage to Plaintiffs. The trial court erred in allowing this measure of damages.

4. Plaintiffs' Damages Terminated In 2000.

The trial court erred in refusing to sever Plaintiffs' damages at fiscal year 2000, and not 2001. This is a causation issue. Prosecutor Lasater testified that he did not rely on either of the two alleged statements by Benhart. The only information he relied upon from Amoco regarded ownership of the Machine and was reflected in the documents provided to the police. Accordingly, Lasater's decision to seek an indictment, and the subsequent decision by the grand jury to indict in May 2000, sever causation and all damages calculations should terminate at that time.

Because of errors concerning Plaintiffs' categories of damages, Amoco was prejudiced in that the jury returned a grossly excessive verdict. A new trial, therefore, is warranted. In the alternative, a new trial on damages is warranted.

VII.

THE TRIAL COURT ERRED IN DENYING AMOCO'S MOTION FOR AN ORDER FOR REMITTITUR BECAUSE THE VERDICT WAS EXCESSIVE IN THAT THE DAMAGES AWARDED IN THE FORM OF LOST PROFITS, FOREGONE WAGES, NON-PARTY ATTORNEYS' FEES, AND DAMAGES AFTER THE YEAR 2000 WERE INADMISSIBLE AND LEGALLY UNSUPPORTED.

If this Court does not reverse the judgment, award a new trial, or a new trial on damages, it should enter a remittitur order pursuant to Mo. Rev. Stat. § 537.068 which states, in relevant part:

A court may enter a remittitur order if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages.

Id.; see also Ince v. Money's Bldg. & Dev., Inc., 135 S.W.3d 475, 478-79 (Mo. Ct. App. 2004). Although Amoco asserts that the submission of all damages identified *supra* was in error as an evidentiary matter and does not waive that position, once submitted and awarded, the final verdict clearly exceeds fair and reasonable compensation for Plaintiffs' damages. In support of this request, Amoco incorporates herein its arguments with regard to the admissibility and manifest weight of the damages evidence as stated *supra*. Accordingly, Amoco requests an order for remittitur extracting all damages regarding the

identified non-recoverable damages for lost profits (\$192,610), foregone wages (\$365,000), attorneys' fees (\$25,000), and damages beyond the year 2000.

CONCLUSION

For these reasons, the trial court erred in denying each of Amoco's alternative requests for judgment notwithstanding the verdict, a new trial, a new trial on damages, and remittitur. This Court should reverse the trial court's Judgment and remand this case to the trial court with instructions to enter judgment in favor of Amoco as a matter of law, or, in the alternative, grant Amoco a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Missouri Supreme Court Rule 84.06(b) and (c), the undersigned certifies that the foregoing Appellant's Substitute Brief complies with the type-volume limitations, using thirteen point double-spaced typeface and based on the number of words of text in the brief as determined by the word count of Microsoft Word, which is the word-processing system used to prepare the Brief. Based on that word count, the number of words in this brief is 21,720.

In accordance with Rule 84.06(g), Appellants also file herewith a 3 ½ inch floppy disk containing in Microsoft Word format the full Appellant's Substitute Brief, saved in a format that allows for text copying and searching, which has been scanned for viruses and is virus-free.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Appellant's Substitute Brief, Appellant's Appendix to Substitute Brief, and a copy of a 3½ inch floppy disk containing the Substitute Brief were served via Federal Express to Joseph R. Dulle, Esq., Stone, Leyton & Gershman, 7733 Forsyth Blvd., Suite 500, St. Louis, MO 63105, and Lee G. Kline, Esq., Gartenberg & Kline, P.C., 7777 Bonhomme, Suite 1910, St. Louis, MO 63105, counsel for Respondents, this 23rd day of February, 2008.
