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

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APPELLANT'S SUBSTITUTE REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

Plaintiffs contend that there is "absolutely irrefutable evidence" that Amoco knew that Plaintiffs were rightfully in possession of the car wash machine, "but lied about it to the police." (Resp'ts Br. 39, 49.) This is a gross, and deliberate, mischaracterization of the record. There is no evidence that any person at Amoco lied to the police, and Plaintiffs have pointed to no one. The so-called "irrefutable" evidence of Amoco's knowledge of falsity are documents that show Amoco's purchase of the Machine and its delivery to ACT. Ron Benhart, Amoco's security officer and the person in charge of the internal investigation, gave those documents to the police on July 23, 1999. The other evidence is a computer record that Benhart never even knew about or saw before he went to the police the first time. Nor is there any evidence that anyone who would have known about that document knew Benhart was going to the police with incorrect information. Benhart did not lie about the documents, and Plaintiffs' "corporate knowledge" theory reveals that even they do not believe he "lied." Plaintiffs' theory has evolved from a "failure to investigate" theory at trial to a "corporate knowledge" theory on appeal. Under either theory, Plaintiffs do not actually contend that Benhart lied, which makes their use of that term troubling and disingenuous. They merely contend that Amoco had information in its files and computers that was inconsistent with two statements Benhart allegedly made to the police. Under Plaintiffs' theory, Amoco is still liable for injurious falsehood because all corporate knowledge – including all information and data located in files and computer systems – is imputed to the person responsible for the alleged false statements even if he did not know about them when he first reported the incident to

police, and even if no one else knew he was going to the police with information that was different than what was in those files. This is not the law.

Because the trial resulted in a 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 reverse the trial court's Judgment and remand this case to the trial court with instructions to enter Judgment in favor of Amoco. In the alternative, this Court should reverse and remand to the trial court based on jury instruction and evidentiary error.[1]

ARGUMENT

I. This Court Should Apply A De Novo Standard Of Review Because Injurious Falsehood Raises First Amendment Issues.

It is well-settled in Missouri that when the issue on appeal involves actual malice, the constitutional implications compel a de novo standard of review. Plaintiffs do not dispute that injurious falsehood claims require a showing of actual malice under the First Amendment of the United States Constitution. This should end the inquiry because it is this constitutional aspect of the claims that compels a de novo standard of review. See, e.g., Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688-89 (1989); John Doe a/k/a Tony Twist v. McFarlane, 207 S.W.3d 52, 57 (Mo. Ct. App. 2006);

[1] Plaintiffs failed to respond to the jurisdictional defect for their failure to file a timely application for transfer.

Warner v. Kansas City Star Co., 726 S.W.2d 384, 386-87 (Mo. Ct. App. 1987); Restatement (Second) of Torts § 623A (1977).

Plaintiffs cite to an earlier decision in this case by this Court as a "suggestion" that their injurious falsehood claims "should not be regarded as defamation claims." See State of Missouri ex rel. BP Products North America Inc. v. Ross, 163 S.W.3d 922 (Mo. 2005); (Resp'ts' Br. 26.) It is correct that an injurious falsehood claim is not identical to a standard defamation claim. The reason for the distinction, however, is fatal to Plaintiffs' attempt to avoid de novo review. The distinction between an injurious falsehood claim and a standard defamation claim is that injurious falsehood requires the heightened showing of actual malice. This Court's opinion in Ross verifies this. In describing the elements of an injurious falsehood claim, this Court specifically noted that a plaintiff must prove that the speaker "knows that the statement is false or acts in reckless disregard of its truth or falsity." Id. at 928. This is the very definition of actual malice.[2] See Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 70 (Mo. 2000) ("'Actual malice' is defined as a false statement made 'with knowledge that it was false, or with reckless disregard for whether it was true or false at a time when defendant had serious doubts as to whether it was true.'"); Wright v. Over-the-Road & City Transfer Drivers,

[2] In setting forth these elements, this Court cited the Restatement (Second) of Torts § 623A (1977) and Annbar Assocs. v. American Express Co., 565 S.W.2d 701, 707 (Mo. Ct. App. 1978), both of which require a showing of actual malice.

Helpers, Dockmen, and Warehousemen, 945 S.W.2d 481, 493 (Mo. Ct. App. 1997) (same).

Plaintiffs also claim that de novo review is inappropriate because "[i]n defamation cases, the de novo standard of review is only employed when the plaintiff is a public figure." (Resp'ts' Br. 26-27, n.6.) While that is an accurate statement of the law of defamation, it is inapposite here. An injurious falsehood claim always applies the actual malice standard used in public figure defamation cases. See Annbar Assocs., 565 S.W.2d at 707. Unlike defamation cases, there is no two-tiered approach to evaluating injurious falsehood claims – actual malice is required in all cases. The private or public nature of an injurious falsehood plaintiff is irrelevant.

II. Plaintiffs Failed To Prove By Clear And Convincing Evidence The Element Of Actual Malice.

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.

To present a submissible case of injurious falsehood, Plaintiffs were required to prove that Benhart either had actual knowledge that his statements to the police were false or acted in reckless disregard of the truth or falsity of his statements at a time when he had serious doubts as to whether they were true. Plaintiffs cannot prove either of these.

A. Plaintiffs Failed To Prove Reckless Disregard Of The Truth Or Falsity Of The Statements By Arguing That Benhart's Preliminary Investigation Was Allegedly Inadequate.

Plaintiffs argued to the jury that Benhart acted in reckless disregard of the truth. 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. (See Tr.1113:23-24; 1141:4-5; see also Tr.44:17-47:18 for Plaintiffs' counsel's opening statement detailing what Benhart did not learn prior to contacting the Overland police.) In fact, Plaintiffs' lengthy examination of Benhart was based almost solely on this theory. (Tr.545:14-547:14; 549:11-550:24; 552:3-559:1.)

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 Harte-Hanks, 491 U.S. at 688; New York Times v. Sullivan, 376 U.S. 254, 287-88 (1964). Missouri law 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." Wright, 945 S.W.2d at 497; see also Dvorak v. O'Flynn, 808 S.W.2d 912, 918 (Mo. Ct. App. 1991) (noting that when reckless disregard of the truth is the applicable standard, "mere negligent publication by the defendant is insufficient").

Also, an alleged inadequate investigation is not sufficient by itself to show reckless disregard for the truth. To prove their claims for injurious falsehood, Plaintiffs were required to prove by clear and convincing evidence that Benhart "entertained serious

doubts as to the truth" or "had a high degree of awareness of the probable falsity" of his statements. In re Westfall, 808 S.W.2d 829, 836-837 (Mo. 1991). Plaintiffs presented no such evidence. "To the contrary, the record reflects that [Benhart] 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." Wandersee v. BP Products N. Am. Inc., No. ED 88237, 2007 WL 1745618 (Mo. Ct. App. June 19, 2007), at *3; (See Tr.578:1-22; 579:20-580:1-22; 581:1-13; 582:17-584:3.)

No doubt realizing that they are unable to prove that Benhart acted in reckless disregard of the truth, Plaintiffs have now abandoned this theory of liability on appeal before this Court.

B. Plaintiffs Cannot Prove Actual Knowledge Of The Falsity Of The Statements By Relying On A Theory Of Corporate Knowledge.

Instead of arguing reckless disregard of the truth, as they did at trial, Plaintiffs now claim that Amoco had actual knowledge of the falsity of Benhart's statements based on a theory of collective "corporate knowledge." Plaintiffs maintain that Amoco should be held liable because information in its computer system was inconsistent with Benhart's statements to the police. Plaintiffs' new theory confuses the elements of injurious falsehood with the law of agency. A corporation acts through its agents, so the proper focus is on Benhart, the Amoco agent who made the alleged false statements.

1. Amoco Did Not Waive Its Argument That Plaintiffs Failed To Prove Benhart's Actual Knowledge Of The Falsity.

Plaintiffs contend that Amoco somehow did not preserve its argument that Plaintiffs failed to prove Benhart's actual knowledge – as opposed to Amoco's corporate knowledge. Plaintiffs cite no authority in support of this position.

Plaintiffs' contention is belied by the testimony of witnesses at trial and the arguments advanced by the parties. The evidence presented at trial centered on the actions and the state of mind of Benhart, who was acting as Amoco's agent when he investigated Tami Weeks' allegation and when he went to the police. This makes sense because a corporation speaks and acts through its agents and employees. See Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 165-66 (2001); Ritter v. BJC Barnes Jewish Christian Health Systems, 987 S.W.2d 377, 384 (Mo. Ct. App. 1999). As stated above, Plaintiffs' theory at trial was that Benhart performed an inadequate investigation. Amoco argued in its motion for a directed verdict at the close of Plaintiffs' evidence that "[t]here is absolutely no evidence showing that Amoco, through Ron Benhart, 'entertained doubts as to the truth of its statement or was aware that its statement was false.'" (LF667) (emphasis added). In its motion for judgment notwithstanding the verdict, Amoco argued that Plaintiffs failed to establish intent or reckless disregard. (LF812.) Amoco outlined the steps that Benhart took and the information he learned before contacting the police, including confirming the serial numbers, the purchase order, the payment, the shipment, and the ownership of the Machine. (LF821.) Thus, Benhart's

actual knowledge plainly was at issue, even though Plaintiffs called it "lack of knowledge" or "failure to investigate."

Plaintiffs note that Amoco did not object to Plaintiffs' verdict director on the grounds that they failed to distinguish between Amoco's and Benhart's knowledge. However, the verdict director expressly calls for the name of the "defendant," which was Amoco, not Benhart. MAI states that it is the plaintiff's burden to establish the statement was false and "that defendant *(describe the acts of publication, such as 'published the newspaper article', or 'wrote the letter', etc.)* with knowledge that it was false or with reckless disregard for whether it was true or false at a time when defendant had serious doubts as to whether it was true." MAI 3.05 (emphasis added). Supreme Court Rule 70.02(b) directs the exclusive use of the Missouri Approved Instructions whenever an approved instruction is applicable. This Court has explained that use of the MAI is key to the integrity of the court system. Brown v. St. Louis Pub. Serv. Co., 421 S.W.2d 255, 158 (Mo. 1967). MAI instructions, promulgated and approved by this Court, are authoritative, and all courts are bound by them. Syn, Inc. v. Beebe, 200 S.W.3d 122, 128 (Mo. Ct. App. 2006). The parties and the trial court merely followed the form of the required MAI instruction by identifying the defendant by name. This adherence to proper MAI form does not constitute a waiver, and Plaintiffs have cited no authority to the contrary.

2. Missouri Law Does Not Support Plaintiffs' Theory Of Corporate Liability.

Plaintiffs argue that "Amoco's computer system contained information that was directly contrary to [Benhart's] statements, supporting the jury's conclusion that Amoco had actual knowledge of the falsity of those statements." (Resp'ts.' Br. 31.) Missouri law does not support such an illogical and far-reaching conclusion.

Plaintiffs do not even mention the Restatement (Second) of Agency § 275 (1958). Comment b is directly on point and explains how § 275 applies when one agent acts with incomplete knowledge despite the fact that another agent or source 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).

Here, Amoco's liability is not affected by the information contained in its computer system. Rather, the proper focus is on Amoco's agent, Benhart, and his conduct is evaluated in the subjective sense, *i.e.*, what did he know when he initially went

to the police. It is undisputed that Benhart did not know, or even have reason to suspect, that his statements to the police were inaccurate.[3] Through his preliminary investigation, Benhart confirmed that the serial number provided by Weeks was for the Machine, verified Amoco's ownership of the Machine, established that the destination gas station on the purchase order was never built, verified that the Machine was not active at any other station in the field, and verified that there was no authorized reason for Plaintiffs to have the Machine and/or sell it 19 months after it was purchased, before coupling that information with Weeks' serious allegations and contacting the police.[4] (See Appellant's Br. 8-9.)

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[3] Plaintiffs refer to five alleged falsehoods. (Resp'ts' Br. 31-32.) They submitted only two allegedly false statements to the jury (LF729), so the other three should be disregarded. Those two false statements – that ACT had authorized possession of the Machine and that Steve Amick, while employed at Amoco, falsified a purchase order for a car wash and had it delivered to ACT – were allegedly made by Benhart. (Tr.267:3-12.)

[4] Plaintiffs' contention that Amoco "does not seriously argue" that its records show its accusations were false is incorrect. Amoco believes that, after Steve Amick requested that the Machine be sent to his future employer, ACT, Plaintiffs had unauthorized possession of the Machine when they kept it for 19 months after they never installed it in the intended station, removed parts from the Machine for their own pecuniary benefit without permission, and attempted to sell the Machine at "100% profit" without Amoco's knowledge or permission.

This application of § 275 is buttressed by the United States Supreme Court's seminal decision in New York Times v. Sullivan – which Plaintiffs notably ignored in their brief. In Sullivan, the plaintiff was an elected commissioner of the city of Montgomery, Alabama. He sued the New York Times, alleging that he had been libeled by statements in a full-page advertisement in the newspaper. 376 U.S. at 256. The advertisement described alleged events that occurred in Montgomery and urged support for Dr. Martin Luther King, Jr. Id. at 256-58. It was undisputed that some of the statements in the advertisement were inaccurate. The newspaper's advertising department manager testified that he had approved the advertisement for publication because he knew of nothing to cause him to believe that anything was false. "Neither he nor anyone else at the Times made an effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories relating to some of the described events or by any other means." Id. at 261.

The United States Supreme Court held that the plaintiff failed to prove the Times' actual malice. Importantly, even though there was evidence that the Times published the advertisement without checking its accuracy against news stories in the newspaper's own files which would have shown that the advertisement contained false information, the Court stated that:

> **The mere presence of the stories in the files does not, of course, establish that the Times "knew" the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in**

the Times' organization having responsibility for the publication of the advertisement.

Id. at 287 (emphasis added).

The Supreme Court's holding on these First Amendment issues in New York Times v. Sullivan is directly on point and is binding authority here. Cooper v. Aaron, 358 U.S. 1, 18 (1958); see also Kraus v. Board of Education of the City of Jennings, 492 S.W.2d 783, 784-785 (Mo. 1973). As recognized by this Court, under Sullivan, proof of actual malice is a First Amendment issue. Henry v. Halliburton, 690 S.W.2d 775, 781 (Mo. 1985).[5] Indeed, in Henry, this Court referred to it as "constitutional malice." Adopting Plaintiffs' proffered "corporate knowledge" theory as applied to the actual malice standard would reject long-settled constitutional law.

Amoco's computer records do not establish that Amoco had actual knowledge of the falsity. As the United States Supreme Court noted in Sullivan, the state of mind required for actual malice demands that the information be brought home to the publisher of the statement. In this case, the "publisher" was Benhart. Plaintiffs failed to present any evidence at trial, and have pointed to none here, showing that Benhart, who made the

[5] This Court has routinely adhered to New York Times v. Sullivan in considering First Amendment issues. See, e.g., Henry, 690 S.W.2d at 781; In re Westfall, 808 S.W.2d at 835; and Nazeri v. Missouri Valley College, 860 S.W.2d 303, 309 (Mo. 1993).

statements, was aware of these computer records or that he knew that his statements were false.[6]

Nor is there any evidence to suggest that Amoco expressly directed Benhart to make these statements to the police. See Li v. Metro. Life Ins. Co, 998 S.W.2d 828, 831 (Mo. Ct. App. 1999). Nor is there any evidence that any agent at Amoco, including Merry Fissehazion, had information inconsistent with Benhart's preliminary information **and** knew that Benhart would be reporting incomplete information to the authorities.

Plaintiffs' corporate liability theory is internally inconsistent. On one hand, Plaintiffs argue that "Amoco approached the police" and that Amoco "made the false statements to the police." (Resp'ts' Br. 46, 52.) What Plaintiffs really mean, of course, is that Benhart, acting as Amoco's agent, approached the police and made false statements to the police. Benhart is the primary actor and the sole publisher of the statements. On the other hand, Plaintiffs contend that when it comes to proving the publisher's actual knowledge, Benhart's mental state is somehow irrelevant and that instead, the jury should consider Amoco's corporate knowledge. This argument is inconsistent with the elements

[6] Plaintiffs do not contend that Benhart knew about Form 44. Rather, they contend that Amoco's agents should be charged with that information. Benhart was never asked at trial about Form 44, but he did testify that he did not know, at the time he went to the police, that Amoco had appropriated funds for a service station where the Machine would have been installed. (Tr.546:12-24.)

of an injurious falsehood claim, which focuses on the publisher's statement and the publisher's knowledge. Even if the "publisher" is considered to be Amoco, Plaintiffs must prove that the person within Amoco responsible for the publication knew that the information was false. See New York Times v. Sullivan, 376 U.S. at 257. They cannot.

Plaintiffs rely almost exclusively on Slater v. Missouri Edison Company, 245 S.W.2d 457 (Mo. Ct. App. 1952). Plaintiffs, citing Slater, argue that Missouri law has charged corporations with the composite knowledge of their corporate records relating to the transactions at issue. This is simply not true. Slater, which did not even involve corporate records, does not support Plaintiffs' 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. 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, there is no evidence that Benhart had contact with any Amoco employees or knowledge of any Amoco documents that suggested that Plaintiffs did not have authorized possession of the Machine. Instead, the knowledge he had that Plaintiffs had unauthorized possession of the Machine came from Tami Weeks, Plaintiffs' own employee. (Tr.574:11-25; 575:5-16.) Thus, this case does not create a conflict with Missouri law.

The other cases cited by Plaintiffs 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.

3. The Policy Implications Of Adopting Plaintiffs' Corporate Knowledge Theory Are Significant.

Plaintiffs argue that Amoco had actual knowledge of the falsity of Benhart's statements because such statements were inconsistent with information in Amoco's computer system. Plaintiffs invite this Court to adopt a bright-line rule holding any company responsible for an intentional tort when its employee unknowingly makes a statement inconsistent with information maintained on the company's computer system. Such a proposed rule is unworkable. Plaintiffs' proposed rule is based on the flawed premise that there is a perfect flow of information in a company. But there are all types of barriers: employees may not have access to all databases and files; information could be stored on laptops, discs, and storage tapes; and data could be keyed incorrectly.

Plaintiffs contend that their proposed rule would prevent corporations from shielding themselves from tort liability by selecting agents ignorant of key facts. First, the United States Supreme Court has already addressed this concern in St. Amant v. Thompson, 390 U.S. 727, 731-32 (1968), and rejected it as insufficient to overcome the constitutional protections of the actual malice standard. Id. (noting heightened actual malice standard governs despite that "[i]t may be said that such a test puts a premium on

ignorance [and] encourages the irresponsible publisher not to inquire"). Second, Missouri law already provides the protection Plaintiffs seek. A company cannot willfully or knowingly choose an ignorant speaker and deliberately withhold information from him in order to perpetrate a fraud or a misrepresentation on a third party. See Li v. Metro. Life Ins. Co., 998 S.W.2d at 830-31 (discussing cases holding that a corporate defendant cannot willfully send an ignorant speaker to perpetrate a fraud on a third party).

Plaintiffs' theory would require that a company, concerned that a crime may have been or is being perpetrated against it, scour all of its records and data – a process which could literally take months for larger companies – to ensure perfect knowledge in the speaker prior to contacting the authorities. This is not, and cannot be, the law because it is nothing more than a "failure to investigate" theory of liability called by another name. Under Plaintiffs' theory, even if a company initiated a thorough and lengthy investigation in good faith but still failed to uncover all of the information necessary to achieve perfect knowledge in the speaker, the company would be held liable for an intentional tort, based on actual malice, and even subjected to punitive damages. Plaintiffs' own brief illustrates that their "corporate knowledge" theory is really nothing more than a re-packaged "failure to investigate" theory. Plaintiffs state that "Amoco did not object when Plaintiffs focused on Amoco's corporate state of mind during closing argument" and then quote this excerpt of that closing as illustrative of their "corporate knowledge" argument:

> Now what did Amoco do. What Amoco did is Amoco **leaped before it looked**. Amoco **did not look** at its corporate records. [ ] Amoco **couldn't even find** the purchase order on

> its own computer. Amoco **couldn't even find** the appropriation of a million dollars for the gas station.

(Resp'ts' Br. 23-24.) Even Plaintiffs concede that it ultimately boils down to the quality of a company's internal investigation and its ability to locate all information and data such that the speaker acts with perfect knowledge. And it is well settled that a poor investigation, or even no investigation at all, cannot sustain a showing of actual malice.

In sum, Plaintiffs failed to prove the element of actual malice – either by showing reckless disregard or actual knowledge of the falsity. For this reason, 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.

III. Plaintiffs Failed to Present Substantial Evidence of Causation.

In the alternative, this Court can determine that there is no evidence of causation. Plaintiffs agree that the proper causation analysis is set forth in the Restatement (Second) of Torts § 632 (1977). They emphasize the following language contained in comment c:

> It is enough that the disparagement is a factor in determining his decision, even though he is influenced by other factors without which he would not decide to act as he does.

Id. Plaintiffs claim this means that superseding and intervening causes can be disregarded – that independent decisions by third party actors, such as Judge Cohen and Prosecutor Lasater, with no reliance on any allegedly "disparaging" statement by Amoco, are of no consequence. Plaintiffs, however, ignore the distinction between the alleged

"disparagement" and the search of Plaintiffs' warehouse, Wandersee's arrest, and his indictment. This distinction is critical to the causation analysis.

The "disparagement" is Benhart's alleged statements that: (a) Wandersee had "unauthorized possession" of the Machine; and (b) Steve Amick falsified a purchase order for the Machine and had it delivered to ACT. (LF684.) Following Benhart's statements, the police independently investigated Wandersee, obtained multiple incriminating witness statements from Wandersee's own employees, obtained a search warrant, performed the search, arrested Wandersee, and obtained an indictment. (See Appellant's Br. 9-13.)

It is the July 1999 search and arrest, and June 2000 indictment that Wandersee has always argued caused economic harm to his business because he claims these facts became known to his potential customers.[7] See Resp'ts' Br. 42 ("The arrest and indictment led directly to Plaintiffs' ultimate damages."). The distinction between these events and Benhart's earlier "disparaging" statements is important because for causation to exist, the police, the judge, and the prosecutor must have relied on the alleged "disparagement" in deciding to sign search warrants, arrest Wandersee, prosecute, and indict him. There is no dispute that, at minimum, Judge Cohen and Prosecutor Lasater

[7] Plaintiffs presented no evidence or testimony from any customer who supposedly refused to do business with them.

did not rely in any way on either of the alleged "disparaging" statements.[8] (Appellant's Br. 53-57.)

These independent acts and decisions without reliance on the "disparaging" statements supersede and intervene to sever causation between Benhart's statements and the alleged decisions of Plaintiffs' customers to withhold their business. There is no causation in fact under Restatement (Second) of Torts § 632.

Further, it is this distinction between "disparaging" statements and the subsequent actions of the police, judge, and prosecutor that renders this Court's opinion in Highfill v. Hale, 186 S.W.3d 277 (Mo. 2006), germane. This Court held that independent evaluations by police and the prosecutor severed causation between the defendant's "disparaging" comments and the damages caused by the plaintiff's subsequent arrest. Plaintiffs' attempt to distinguish Highfill on the basis of an independent observation by the police is unavailing. Indeed, it renders Highfill more analogous because, here, upon searching Plaintiffs' warehouse, the police found that Plaintiffs had stripped parts from

[8] Plaintiffs cite an isolated and out of context excerpt from Detective Drew's testimony in which he states that he would not have been able to pursue his investigation absent the alleged statements from Benhart. Drew merely acknowledged the truism that without a victim, which in this case was Amoco, there would be no subsequent criminal investigation. (Tr.295:17-296:3.) Regardless, Drew's testimony has no bearing on the undisputed lack of reliance by Judge Cohen and Prosecutor Lasater. It is their lack of reliance that severs causation.

the Machine. (Tr.285:13-25; A74-75.) The appropriation of parts could not have been part of Benhart's statements to the police. It was not known until the police independently discovered it, evaluated it, and elected to proceed to arrest and indict Wandersee. (Tr.917:11-918:7; 920:10-14.) Indeed, Prosecutor Lasater testified that the discovery of the "physical evidence" – the parts-stripped Machine – was the basis for the determination that the Machine had been wrongfully appropriated by Plaintiffs. (Id.) The fact that Plaintiffs had been stripping parts from the Machine was a new, independent discovery upon which the police and prosecutor based their subsequent actions, which brings this case squarely within this Court's holding in Highfill.

IV. The Trial Court Erred In Modifying MAI 3.05.

Plaintiffs fail in their burden to "make perfectly clear [ ] that no prejudice could have resulted from [the] deviation" from an MAI instruction. Brown, 421 S.W.2d at 259. Moreover, Plaintiffs' mischaracterization of the law and record require clarification.

First, none of Plaintiffs' standards regarding a trial court's discretion to approve jury instructions applies to the modification of MAI 3.05. (Resp'ts' Br. 47-48.) MAI 3.05 is an approved instruction. As such, the trial court did not have "broad discretion" to modify it as Plaintiffs claim. Indeed, modification is so discouraged that the burden shifts to the Plaintiffs to "make perfectly clear" that "no prejudice could have resulted," which Plaintiffs have failed to do. Brown, 421 S.W.2d at 259. Plaintiffs claim that no prejudice could have resulted from the incomplete MAI instruction because the jury had evidence of "corporate knowledge" that Benhart's statements were false. As noted

above, this belated "corporate knowledge" theory misstates the law and is, in fact, simply an attempt to re-name "failure to investigate" liability which has long been rejected by Missouri courts, and the United States Supreme Court, in actual malice cases. It is undisputed that the instruction was inaccurate as a matter of law. Therefore, the jury was presented with incomplete guidance regarding Plaintiffs' true burden of proof. It can hardly be argued that it is "perfectly clear" that such a circumstance is devoid of potential prejudice.

Second, Plaintiffs' reference to the "elements" described in Ross misses the point. A burden of proof instruction is not a verdict director. It does not merely recite the "elements" of the claim. It sets forth the burden of proof applicable to those elements. The appropriate burden of proof is a question of law and, as to injurious falsehood claims, it is a question that has been decided. See Restatement Second of Torts § 623A; Annbar, 565 S.W.2d at 707. A plaintiff's burden in proving the element of actual malice, an element recognized by this Court in Ross, is identical to that of a plaintiff in a public figure defamation case, and that burden is defined in MAI 3.05.

Plaintiffs do not dispute that a showing of actual malice is required. Indeed, even as modified, Instruction #4 (modified MAI 3.05) contains the "reckless disregard" element – but it excludes the explanation of what reckless disregard is and how the jury is to evaluate it. (LF726.) Essentially, the "burden of proof" portion of the burden of proof instruction was deleted. The trial court's modification of that mandatory instruction, in effect, modified the law in such a way as to render Plaintiffs' burden of proof significantly below what Missouri law requires.

Plaintiffs contend that "[t]here is no MAI instruction governing burden of proof in injurious falsehood cases" and that this gives a trial court free reign to "modify MAI instructions." (Resp'ts' Br. 48.) This is not the law. An MAI instruction need only be "available and applicable" and when those criteria are satisfied, the use of an MAI instruction is "mandatory." Tillman v. Supreme Exp. & Transfer, Inc., 920 S.W.2d 552, 554 (Mo. Ct. App. 1996). This precept applies with equal force when an MAI instruction contains a definitional phrase such as the one deleted by the trial court here. See Karashin v. Haggard Hauling & Rigging, Inc., 653 S.W.2d 203, 206 (Mo. 1983). Here, MAI 3.05 was "available and applicable." The instruction need not be specifically titled an "injurious falsehood" instruction. It simply must accurately state the law as applied to the case. Deckard v. O'Reilly Automotive, Inc., 31 S.W.3d 6 (Mo. Ct. App. 2000), instructs that in all cases in which actual malice is a required showing, MAI 3.05 is "available and applicable." An injurious falsehood case is one such case. See Restatement Second of Torts § 623A, comments b and d; Annbar Assocs., 565 S.W.2d at 707. The trial court committed reversible error by striking the critical "reckless disregard" definitional phrase from MAI 3.05.

V. The Trial Court Erred In Failing To Submit An Instruction Defining "Reckless Disregard" And Instructions On The Qualified Privileges.

Plaintiffs' response to Amoco's arguments on these points is essentially the same: No harm could have resulted from the failure to submit these instructions to the jury because, based on their "corporate knowledge" theory, Plaintiffs proved that

Benhart's statements were "knowingly false" to Amoco. (Resp'ts' Br. 51.) As noted above, Plaintiffs' corporate knowledge theory is legally unsound, would result in absurd policy implications, and was already rejected decades ago by the United States Supreme Court in New York Times v. Sullivan.

Moreover, Plaintiffs' assertion that the trial court refused to instruct on qualified privilege defenses "because the privileges were not applicable to the facts of the case" is false and, tellingly, without citation to the record. (Resp'ts' Br. 51.) On the contrary, the trial court found that the privileges exist, but nevertheless failed to instruct on them. (Tr.1102:14-17.)

VI. 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) Steve Amick's attorney's fees; and (d) beyond the year 2000.[9]

A. Lost Profits.

Plaintiffs' argument focuses on the amount of lost profits claimed and the specificity of that amount. However, Amoco does not contend that the trial court erred in

[9] Plaintiffs' assertions that Amoco failed to object to lost profits and "foregone wages" damages is absurd. (Resp'ts' Br. 53-54, 65-66.) Amoco spent significant time with the trial court on these issues before, during, and after trial, filed motions in limine, made repeated objections, obtained rulings, joined in withdrawal instructions, and filed a post-trial motion. (See Appellant's Br. 19-21.)

allowing Plaintiffs to present an imperfect amount of damages to the jury. The trial court erred as a matter of law because it permitted Plaintiffs to submit lost profits damages at all, given the failure to satisfy the threshold requirement of showing net profits "for a reasonable time anterior to the [business] interruption" and that net profits "theretofore constant or increasing, have fallen off."[10] Coonis v. Rogers, 429 S.W.2d 709, 713-714 (Mo. 1968); Restatement (Second) of Torts § 633 (1977). Indeed, the Court of Appeals recently noted the distinction between the "fact of damages" and the "amount of damages" when it said that a plaintiff "must establish the *fact* of damages with reasonable certainty even though it is not always possible to establish the *amount* of damages with the same degree of certainty." Cadco, Inc. v. Fleetwood Enterprises, Inc., 220 S.W.3d 426, 434 (Mo. Ct. App. 2007). It is this threshold requirement that Missouri law mandates must be proven with certainty.

Plaintiffs failed to meet their burden in proving the threshold fact of damages because they provided no evidence of the existence of "constant or increasing" net profits during the ten-month gap contiguous to the business interruption. In fact, the only evidence presented at trial regarding the profitability of ACT during that ten-month gap is the Corporate Minute, which shows a business in marked decline with great concerns for

[10] Plaintiffs incorrectly argue that these requirements are fact questions. They are evidentiary questions of law for the courts. See Annbar, 565 S.W.2d at 708 ("Evidence of damage on this [lost profits] theory is clearly too speculative to admit [ ], evidence in support of this theory should not be received on a new trial.").

its current and future profitability due to circumstances having no relationship to Benhart's statements many months later. (Ex. CC; A76-77.) It is no wonder Plaintiffs refused to produce evidence of net profits during the ten-month gap.[11]

Moreover, Plaintiffs' response illustrates that they failed to "eliminat[e] all other reasonably likely causes, such as new competition, a general decline in the market for such goods, or defects in the goods themselves." Restatement (Second) of Torts § 633 (1977). Plaintiffs merely refer to the unsupported, self-serving speculation of Wandersee. They offer nothing else because Wandersee presented no evidence that he had eliminated these other causes. Yet the Corporate Minute establishes that other factors including "new competition [and] a general decline in the market" were adversely impacting ACT's profitability during the contiguous anterior period.

These threshold requirements exist to promote an objectively provable underlying basis for lost profits. The requirements are in place to prohibit the type of speculation masquerading as evidence presented here.

B. Foregone Wages.

Plaintiffs cited no case providing for "foregone wages" as a measure of damages because no such case exists. Allowing "foregone wages" as a measure of damages in

[11] Plaintiffs again contend that they have no financial records for the operation of the business during that ten-month gap. That assertion, if believed, is irrelevant. It was Plaintiffs' burden to generate and present proof of net profits during that anterior period.

these circumstances is tantamount to providing ACT with three years worth of free labor at Amoco's expense.

Because Plaintiffs find no support in the law for "foregone wages" as a measure of damages, they misconstrue this Court's opinion in Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc., 155 S.W.3d 50 (Mo. 2005). Plaintiffs argue that because they deducted employee wages as part of their lost profits calculation, and because Ameristar did not require it, their lost profits damages were actually under-calculated. They contend that because of this under-calculation, the award of "foregone wages" is appropriate because it corrects their mistake. This is not the law.

Ignoring that Plaintiffs waived this argument through their own calculation of damages at trial, it nevertheless is based on the false premise that Ameristar rejects the deduction of employee salaries in the lost profits analysis. Ameristar does not stand for that proposition. It stands for the opposite. In quoting Ameristar, Plaintiffs omit the most significant portion of the opinion as applied to this case:

> These variable expenses may include expenses for fuel, maintenance, depreciation, interest, insurance, salaries and benefits for particular employees and rental of storage space so long as the party claiming lost profits damages can produce evidence of the estimated lost revenue of the unit of business or property damaged and all ascertainable variable expenses directly tied to it.

Id. at 56. Ameristar holds that employee salaries and benefits, if tied to the "unit of business" damaged, are "variable expenses" deducted in calculating lost profits. The case involved lost profits linked to a discrete "portion" and "volume" of business damaged – a single airplane. This Court held that only the expenses linked to the airplane should be deducted because that was the volume of business damaged. Id. at 57.

This case, however, does not involve a claim of damages to a "portion" of Plaintiffs' business but to the entirety of their business. Therefore, the salaries of employees necessitated to run the entirety of that business are "salaries and benefits of employees" that are linked to the "unit of business" allegedly damaged. Id. at. 56. This is Ameristar's holding and it controls here. Because Plaintiffs claimed that the entirety of their business was damaged, as opposed to only a portion of that business, employee salaries constitute a variable expense within the well-reasoned holding of Ameristar. Consequently, Plaintiffs' theory that they short-changed themselves by deducting employee wages as an expense and, therefore, were entitled to recoup them under a "foregone wages" theory of damages must be rejected.

C. Steve Amick's Attorneys' Fees.

The trial court erred in permitting Plaintiffs to recover $25,000 in attorneys' fees of a non-party, Steve Amick. Plaintiffs' argument is premised on the general admissibility of a corporate minute, which is a collateral issue necessitated by the fact that Plaintiffs produced a corporate minute as evidence that they intended to pay Mr. Amick. The issue is that Amick's attorneys' fees are not Plaintiffs' damages. Plaintiffs claim that they are entitled to recover the attorneys' fees of a non-party in a separate

matter because they gratuitously promised themselves that they would do so, and despite the fact that they never even did make the payment. Plaintiffs have provided no authority to support this as a recoverable measure of damages, nor can they. The trial court clearly erred in allowing Plaintiffs to recover this so-called damage.

CONCLUSION

This Court should reverse the judgment and grant judgment in favor of Amoco as a matter of law. In the alternative, this Court should grant a new trial or a new trial on damages. In the second alternative, this Court should enter the order for remittitur requested herein.

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 Reply 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 7,722.

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

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Appellant's Substitute Reply Brief and a copy of a 3½ inch floppy disk containing the Substitute Reply Brief were hand served 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 25th day of April, 2008.

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