IN THE SUPREME COURT OF MISSOURI

BRIAN WANDERSEE and ADVANCED CLEANING TECHNOLOGIES, INC.,	)	**Case No. SC 88832**
Respondents,	)	
v.	)	
BP PRODUCTS NORTH AMERICA INC.,	)	
Appellant.	)	

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

Respondents' Substitute Brief

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I. THE PARTIES

A. Plaintiffs

Plaintiff Advance Cleaning Technologies, Inc., formerly known as OSCO Enterprises ("ACT"),[1] is a distributor and installer of car wash systems, supplies and parts, as well as a service provider to the car wash industry. (Lf. 19-20, 64). Plaintiff Brian Wandersee ("Wandersee") is the owner and President of ACT. (Tr. 163, lns. 8-20). Wandersee purchased ACT in 1995 from his father, who founded the business in 1972. (Tr. 163, lns. 16-20; 161, lns. 14-17).

B. Defendants

Defendant BP Products North American Inc., formerly known as Amoco Oil Company ("Amoco"), is a refiner and distributor of petroleum products that formerly owned and operated gasoline stations in the St. Louis area. (Tr. 138, lns. 3-18); 139, lns. 3-11). Defendant PDQ Manufacturing, Inc. ("PDQ") is the world's largest manufacturer of "touch-free in-bay automatic car equipment." (Tr. 453, lns. 17-21).

II. FACTUAL BACKGROUND

A. Amoco's New Station Procedures

[1] At trial, the parties generally referred to ACT as OSCO. Because Amoco uses ACT in its Brief, Respondent will do so as well.

By 1997, Amoco opened 4 to 5 new stations annually in the St. Louis area. (Tr. 79, lns. 9-11, 14-17). Steve Amick ("Amick") headed Amoco's new station development in St. Louis. (Tr. 77, lns. 1-3; Tr. 79, lns. 2-5). Amoco expected a station to open within 120 days of ground breaking. (Tr. 81, lns. 1-9). To accommodate this accelerated schedule, Amick would request and obtain corporate approval for purchases of capital equipment prior to commencement of construction. (Tr. 81, ln. 14 - Tr. 83, ln. 16). The major components of an Amoco gas station included pumps, tanks, dispensers, and car wash systems. (Tr. 81, ln. 23 – 82, ln. 4).

Amoco tracks the approval and funding of all new station construction on a computer-generated form called a "44.". (Tr. 93, ln.5 – 96, ln. 17; 84, ln. 18 – 86, ln. 5). A 44 has two stages. First, Amoco establishes a Preliminary 44 once Amoco has approved a location, which provides for a $50,000 budget to complete the permitting process. (Tr. 94, lns. 8-18). With the establishment of a Preliminary 44, Amoco assigns each proposed station a unique "SS" number and a unique appropriation numbers (sometimes called a "44 number") so that the station's progress might be tracked within Amoco's computer system (Tr. 84, ln. 18-25; TR. 85, ln. 1-16).

The Preliminary 44 sets the stage for the second step in the process, which is the approval of the Final 44, which authorizes the issuance of purchase orders to

vendors of all the major components of the Station. (Tr. 94, ln. 19 – 95, ln. 5). Amoco's field representatives (such as Mr. Amick) provided their supervisors with weekly reports on all Temporary and Final 44s in progress. (Tr. 92, ln. 3-11).

The Final 44 is saved in Amoco's computer system whether or not the station is built. (Tr. 86, lns. 4-13). Amoco never deleted the Form 44 information once it was entered. (Tr. 86, ln. 10-13). Thereafter, Amoco can access the station information by inputting the reference numbers. (Tr. 85, ln. 25; Tr. 86, ln. 1-5)

B. The O'Fallon Station

In 1997, Amoco began evaluating the intersection of O'Fallon Road and Route K, in O'Fallon, Missouri for a new station (" O'Fallon Station") (Tr. 98, lns. 6-9). In July of 1997, Amick submitted and received approval for a Preliminary 44 for the location. (Tr. 98, ln. 24 – 99, ln. 3; 100, ln. 18 – 101, ln. 4; Pl's Ex. 45).

In September of 1997, Amoco retained an engineering firm to apply to the city of O'Fallon for permits for the O'Fallon Station. (Tr. 98, ln. 24 – 99, ln. 8; Pls' Exs. 6a-6g.). Also at this time, Amoco began negotiations to lease the property for the O'Fallon Station. (Tr. 111, ln. 2 – 112, ln. 6; Pls' Ex. 8).

In December of 1997, Amick learned that the City of O'Fallon had approved the O'Fallon Station. (Tr. 105, lns. 9 – 24; 110, lns. 1-7). Amick submitted a request for a Final 44 for the site, which included the standard request for approval of the purchase of capital equipment for the station. (Tr. 105, ln.25 – 108, ln. 9).

Sometime prior to December 5, 1997, Amoco approved the Final 44 for the O'Fallon Station and budgeted in excess of $1,000,000 for its construction. (Tr. 527, lns. 14-19; 529, lns. 13-25).

C. The O'Fallon Car Wash

In 1997, PDQ was Amoco's approved manufacturer of car wash systems. (Tr. 144, lns. 1-2). ACT was the exclusive distributor of PDQ car wash systems in Southern Illinois and Eastern Missouri. (Tr. 396, ln. 17; 397, ln. 9). ACT was also an approved service provider and installer of PDQ car washes for Amoco. (Tr. 143, ln. 6 – 144, ln. 4).

On December 5, 1997, Amoco sent a purchase order to PDQ for a car wash system for the O'Fallon Station (the "O'Fallon Car Wash"). (Tr. 415, ln. 8 – 416, ln. 19; Def's Ex. A). At the same time, Amoco ordered two PDQ car wash systems for other St. Louis stations[2]. (*Id*.) PDQ sent Amoco written verification of the orders. (Tr. 428, lns. 10-14; Pls' Ex. 12). In addition, PDQ sent Amoco a bill of lading and an invoice for the machines. (Tr. 428, ln. 23 – 429, ln. 25; Pls' Exs. 14, 11). Amoco and PDQ agreed that PDQ would ship the machines to ACT's warehouse. (Tr. 442, ln. 25 – 443, ln. 14; see also Pls' Ex. 11). Shortly thereafter, PDQ called Wandersee and asked whether ACT could take delivery of and store

[2] One PDQ car wash system was for the "Howdershell Stations" and the other was for the "Mexico Road Station."

the three car wash systems until Amoco needed them. (Tr. 620, ln. 25 – 621, ln. 9).

It was common for Amoco to warehouse equipment with vendors to accommodate Amoco's fast track construction schedule. (Tr. 89, ln. 18 – 90, ln. 1). Amoco did not maintain any storage facilities in St. Louis. Moreover, Amoco was reluctant to store equipment on site because Amoco did not guard its construction sites. (Tr. 91, lns. 4-24). This was undisputed by Amoco at trial.

On January 6, 1998, Amoco paid for the three car wash systems with a single check in the amount of $437,697.92. (Def's Ex. U). The check included $99,916.67 for the O'Fallon Car Wash, of which $4,650 was earmarked for, and in fact paid to ACT for prepayment of ACT's installation fee. (Pls' Ex. 11).

On December 24, 1997, PDQ shipped the three PDQ car wash systems to ACT's warehouse as previously agreed. (Tr. 439, lns. 6-9; Tr. 442, ln. 1 – 443, ln. 10; see also Pls' Ex. 14).

During 1998, Amoco called ACT and arranged for delivery, erection and installation of two of the three PDQ car wash systems. (Tr. 622, ln. 16 – 625, ln. 10; Plaintiffs' Ex. 18). Amoco never directed ACT to do antyhing with the O'Fallon Car Wash after authorizing its shipment to ACT. (Tr. 343, lns. 15-18).

On February 10 1999, Wandersee met with Mary Fissenhasion ("Fissenhasion"), Amoco's St. Louis market manager and company account

executive. (Tr. 139, ln. 24 – 140, ln. 11; Tr. 631, ln. 12 – 633, ln. 6. Fissenhasion was in charge of the general operations of Amoco owned or operated stations. (Tr. 140, lns. 12-24). Fissenhasion was not Steve Amick's supervisor (as Amoco would later represent to the police). (Tr. 150, lns. 19-23).

At the time of this meeting, both the Mexico Road and the Howdershell Stations had opened for business and Fissehasion was aware of the proposed O'Fallon Station. (Tr. 142, lns. 6-9; Tr. 148, ln. 21 – 145, ln. 5). Wandersee informed Fissehasion that ACT still had the O'Fallon Car Wash in storage. (Tr. 631, ln. 12 – 633 ln. 6; Pls' Ex. 24). Fissehasion responded that it was not in her budget and that she did not know who to contact about it. (Pls' Ex. 24).

In early 1999, Amoco sold its St. Louis gas station operations. (Tr. 139, lns. 5-23). Thereafter, ACT hired Amick. (Tr. 17, lns. 17-25).

D. Amoco's False Statements

On July 26, 1999, Amoco's Security Advisor, Ron Benhart ("Benhart") met with then detective Charles Drew ("Detective Drew") of the Overland Missouri Police Department, accompanied by two former ACT employees, Tammi Weeks and Keith Payette. (Tr. 504, lns. 12-16; Tr. 247, ln. 23 – 248, ln. 10). Benhart misrepresented to Detective Drew that:

1. ACT and Wandersee had unauthorized possession of the O'Fallon Car Wash (Tr. 254, lns. 3-10);

2. Steve Amick had falsified the purchase order for the O'Fallon Car Wash (267, lns. 3 -15);

3. Amoco never had plans for a gasoline station at the proposed O'Fallon Station site (Tr. 313, lns. 6-24; Tr 314, lns. 19-22);

4. It was the ordinary practice of Amoco to ship and store car wash systems to the proposed installation site (Tr. 308, lns. 11-15); and

5. Fissehasion was Steve Amick's supervisor at the time he worked for Amoco (Tr. 329, lns. 11; 330, lns. 13).

Detective Drew also interviewed Weeks and Payette (Tr. 534, lns. 16-21; 535, lns. 17-20)(Tr. 256, lns. 13 – 15). Detective Drew testified that it was Amoco—not Weeks or Payette—who told him that ACT had unauthorized possession of an Amoco owned PDQ car wash. (Tr. 335, lns. 9-14).

E. The Arrest Indictment

Based solely upon the information provided by Amoco, Detective Drew applied for, received and served a search warrant the same day that he met with Amoco. (Tr. 343, lns. 14-17; Tr. 285, lns. 13-25). The next day, the Overland police arrested Wandersee and Amick for unauthorized possession of the O'Fallon Car Wash. (Tr. 384, lns. 4, Tr. 358, lns. 10).

Detective Drew testified that Amoco's misrepresentations were critical to the arrests:

Q. Stealing or theft, or what you investigated Mr. Wandersee for was the charge of unauthorized possession of a car wash; is that correct?

A. That's correct.

Q. You went through every witness statement you had in your report with counsel, did you not?

A. Yes, sir.

Q. Does any of them say Mr. Wandersee had unauthorized possession of a car wash?

A. No, sir.

Q. You didn't hear from Tami Weeks, is that correct?

A. Hear what?

Q. You didn't hear from Tami Weeks that this gentleman had unauthorized possession of a car wash?

A. That's correct.

Q. You didn't hear from their favorite witness, Keith Payette, Mr. Wandersee had authorized possession of a car wash, did you?

A. That's correct.

Q. You didn't hear from one person who reported to you they were employees of ACT at any time in your entire life that this gentleman had unauthorized possession of the car wash that you described in this document, true or false?

A. That's correct.

Q. Now if you didn't hear from anybody that told you they were ACT employees, and its not contained in Mr. Benhart's statements, where did you hear it, from your conversations with Mr. Benhart, correct?

A. That's correct.

Q. And could you have applied for an affidavit to get a search warrant without Mr. Benhart telling you that this gentleman and his company had unauthorized possession of the car wash?

A. That correct.

Q. You could not, isn't that true?

A. That's correct.

Q. Had you not had that information, you wouldn't have been able to move for an indictment. Is that true, sir?

A. **That's correct**.

Q. Had you not had that information, you wouldn't have arrested this gentleman. Is that true, sir?

A. **That's correct.**

(Tr. 385, ln. 8 - 386, ln. 20)(emphasis added).

In May of 2000, Overland indicted Wandersee and Amick for stealing over $750 in connection with the theft of the O'Fallon Car Wash. (Tr. 194, lns. 3-11; Pl's Ex. 33), alleging that:

> "between Monday, December 29, 1997 and Monday July 26, 1999 … appropriated a PDQ Laser Wash 4000 car wash system … owned by Amoco … without the consent of Amoco and with the purpose to deprive the victim thereof."

(Pl's Ex. 33). Wandersee and Amick where not charged with stealing parts off of the machine. (Tr. 196, lns. 16-19)[3].

[3] In fact, the testimony at trial established that Amoco expected that ACT would utilize parts from warehoused equipment to service equipment in operation. (Tr. 117, lns. 1-13). Amoco offered no conflicting testimony. Amoco filed a counterclaim for conversion of the parts, but dismissed the claim with prejudice prior to submission of the case to the jury. (Tr. 1079, ln. 20 – 1080, ln. 12).

On November 6, 2000, the day before trial, the St. Louis County prosecutor *nolle prosequi* the charges against both Wandersee and Amick. (Tr. 921, lns. 6-20; 918, lns. 16-21; 740, lns. 4-6).

F. Plaintiffs' Damages

1. Legal Costs

Both Wandersee and Amick retained counsel to represent them in the criminal proceedings. (Tr. 921, lns. 6- 20; 740, lns. 4 – 6). Wandersee incurred legal charges of $40,000 for his criminal defense. (Tr. 71, ln. 12 – 72, ln. 12; 184, ln. 6 – 186, ln. 24). Amick incurred legal expenses of $25,000. (Tr. 193, lns. 1 – 3; 195, ln. 24 – 196, ln. 19). ACT agreed to indemnify Amick for those expenses. (Tr. 738, lns. 9 - 19).

2. Loan Costs

The arrest had a ripple effect throughout ACT's business. Customers began calling and inquiring about the arrest. (Tr. 689, lns. 14-16). ACT's longstanding lender received an anonymous phone call that Wandersee and an associate had been arrested for theft. (Tr. 203, ln. 2; Tr 209, ln. 8). As a result, the lender demanded that ACT "further collateralize the loan [existing] … with additional real estate collateral from the parents and their guarantees. We drafted a forbearance agreement, which essentially outlines how we will proceed from that point forward, and provide a maturity date on that to give a chance to find another

bank to take over the loans." (Tr. 209, ln. 25; Tr. 210, ln. 8). These forebearance agreement included a fee of $59,000 and required that ACT pay a loan guarantee fees of $45,000 and the bank's legal fees, all of which totaled $103,713.39. (Tr. 763, ln. 5, Tr. 764, ln. 1).

3. Lost Profits

Amoco raised numerous objections to ACT's calculation of lost profits resulting in several limiting rulings from the Court[4]. (Tr. 705, ln. 8 through Tr. 716,

[4] Amoco accuses Plainitffs of improprieties during discovery regarding evidence of lost profits, including an alleged failure to disclose a Corporate Minute and failing to monthly profit and loss statements. (App. Sub. Br., at 18-20). Amoco raised all of these issues before the trial court. (See Amoco's Motion To Strike Plaintiffs' Claims For Lost Profits and/or Motion for Sanction, LF 569-572). The trial court is vested with broad discretion to control discovery and to choose the remedy to address discovery violations. *Gallagher v. DaimlerChrysler Corp*., 238 S.W.3d 157, 162 (Mo. App. 2007). The trial court's sound judgment will not be disturbed absent a clear abuse of that discretion. *Id*. Here, Amoco admits that it received the Corporate Minute prior to trial and cross-examined Plaintiff regarding that document (App. Sub. Br., at 18; A 76-77; LF. 843-847; Defendant's Exhibit CC). With regard to monthly financial records ACT did not keep in the ordinary course of business and neither governmental entities or ACT's lenders required their

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.). Once the trial court established the ground rules, ACT's calculation of lost profits followed a fairly typical analysis. ACT operates on an October 1 fiscal year. (Tr. 701, lns. 1-21). ACT proved a 25.5% average annual sales increase for 1996-98 using sales figures from tax returns and financial statements previously produced in the litigation. (Tr. 721, ln. 19 – 722, ln. 25).[5] ACT then compared its actual sales for 1999- 2001 with a projected sales figure based upon an assumed 25.5% annual increase.

For example, in 1999, the year of the arrest, ACT realized sales of only $1 million. ACT projected "no arrest" sales based upon its formula of $2,173,000, resulting in lost sales of $1,158,000. (Tr. 728, lns. 4-18).

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retention. (Tr. 1047, ln. 24 – 1048, ln. 2), even Amoco's business valuation expert witness testified that she does not keep such records in the ordinary course of her own business. (Tr. 1049, lns. 10-12).

[5] In 1996, ACT had gross sales of $1 million and taxable income of $70,000. (Tr. 720, lns. 4-18). In 1997, ACT had gross sales of $2.3 million with taxable income of $97,000. (Tr. 720, ln. 24 – 721, ln. 8). In 1998, ACT's gross sales reached $2.7 million , resulting in $199,000 in taxable income. (Tr. 721, lns. 11-18).

Beginning in June of 2000 and continuing through June of 2001, nine articles appeared in local newspapers and car wash trade journals discussing the arrest. (Tr. 688, ln. 7; Tr. 689, ln. 16; Tr. 903, ln. 24, Tr. 904, ln. 21; Plaintiffs' Exh. 47). Amoco's damage expert conceded that such negative publicity can impact revenues. (Tr. 1012, ln. 5; Tr. 1013, ln. 6). ACT's 2000 gross sales were only $1.7 million and should have been $2,727,000 (Tr. 729, lns. 9-19). ACT's 2001 sales were $2,029,000 (Tr. 733, lns. 20-24), but should have been $3,422,000. (Tr. 734, lns. 7-13).

Using the same tax returns and financial statements, ACT computed an average net profit from sales for the three (3) preceeding years. (Tr. 722, lns. 3-9). ACT started with gross revenues and subtracted "all the expenses of the business costs of goods sold, overhead salaries, rent, everything, corporate revenue taxes that were paid" to determine lost net profits. (Tr. 720, ln. 19-22). To calculate its lost profits for the subject years, ACT multiplied its yearly lost sales figure by its historical net profit percentage. Using this formula, ACT lost profits of $63,690.00 in 1999 (Tr. 729, lns. 1-8), $52,305.00 in 2000 (Tr. 733, lns. 11-17), and $76,615.00 in 2001. (Tr. 734, lns. 7; Tr. 735, ln. 1).

4. Lost Salaries

ACT laid off seven office employees because of decreased sales following the arrest. (Tr. 168, lns. 4 - 21) Wandersee, his wife, mother and father all worked

full time – without pay – for ACT until 2001 to replace those employees deferring payment until ACT's profitability normalized. (735, lns. 12 – 16; Tr. 741, lns. 10 - 17). ACT executed a corporate resolution acknowledging its responsibility to pay these wages. (Tr. 601, lns. 9 – 25; Pl's Ex. 72). Wandersee claimed wages for himself in the amount of $125,000, for his wife in the amount of $91,000, for his mother in the amount of $58,000, and for his father in the amount of $91,000. (Tr. 750, ln. 9-24).

G. The Jury Instructions

The parties submitted competing instructions for injurious falsehood. Both versions required the jury to find that "Amoco"—not any specific Amoco employee—published a false statement regarding Plaintiffs. (LF 697, 707-8). For example, Amoco's proposed converse instruction read:

INSTRUCTION NO. ___

> Your verdict must be for Defendant Amoco unless you believe:
>
> First, Defendant Amoco told the Overland Police Department that Plaintiff ACT had unauthorized possession of Defendant Amoco's Car Wash, and
>
> Second, the statement was false when it was made to the Overland Police Department; and

> Third, at the time the statement was made, Defendant Amoco either knew that the statement was false or acted in reckless disregard of the truth or falsity of the statement; and
>
> Fourth, Defendant Amoco should have recognized that the statement was likely to casue economic damage to Plaintiffs; and
>
> Fifth, as a direct result of the statement, Plaintiffs Brian Wandersee and ACT, suffered economic damages.

(LF 697).

Amoco objected to Plaintiffs' proposed instruction because it did not include the "reckless disregard" standard proposed by Amoco. (Tr. 1099, lns. 8-15). Amoco did not object to the fact that, as with Amoco's verdict director, Plaintiffs' instruction required that the jury conclude only that "Amoco" published a false statement that "Amoco" knew to be false.

Amoco did not object when Plaintiffs focused on Amoco's corporate state of mind during closing argument:

> Now what did Amoco do. What Amoco did is
>
> Amoco leaped before it looked. Amoco did not
>
> look at its corporate records. Amoco goes down to

> the Overland Police Department and says Mr. Wandersee has – Osco has, unauthorized possession of my car wash. Now Amoco couldn't even find the purchase order on its own computer system. Amoco couldn't even find the appropriation of a million dollars for the gas station.

(Tr. 1113-4).

Plaintiffs asked the jury to award $610,000 in economic damages. (Tr. 1116, lns. 2-3; Tr 1117, lns. 3-4). The jury returned a verdict of $605,350, which is consistent with the amount that Plaintiffs requested less the $4,650 installation fee ACT received when Amoco purchase the O'Fallon Car Wash in 1997.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED AMOCO'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFFS SUBMITTED SUBSTANTIAL EVIDENCE TO SUPPORT ALL OF THE ELEMENTS OF AN INJURIOUS FALSEHOOD CLAIM.

A. Standard Of Review For Denial of Motion for JNOV

Amoco faces a difficult burden to support the reversal of the trial court's denial of its JNOV motion:

> Upon review, this Court must determine whether Plaintiff made a submissible case. "This Court takes the evidence in the light most favorable to the verdict, **giving the prevailing party all reasonable inferences from the verdict and disregarding the unfavorable evidence**." *Nemani v. St. Louis University*, 33 S.W.3d 184, 185 (Mo. banc 2000). **When reasonable minds can differ on the questions before the jury, we will not disturb the jury's verdict and JNOV is not appropriate**. *Echard v. Barnes-Jewish Hosp.*, 98 S.W.3d 558, 565 (Mo. App. 2002). We "will reverse the jury's verdict for insufficient evidence **only where there is a complete absence of**

probative fact to support the jury's conclusion."

Giddens v. Kansas City Southern Ry. Co., 29 S.W.3d 813, 818 (Mo. banc 2000).

Steele v. Evenflo Co., 178 S.W.3d 715, 718 (Mo. App. 2005) (emphasis added).

Amoco argues that the Court should disregard the traditional standard of review in favor of *de novo* review reserved for defamation claims.

This Court already suggested that Plaintiffs' claims should not be regarded as defamation claims in *State of Missouri ex rel. BP Products North America Inc. v. Ross*, 163 S.W.3d 922 (Mo. banc 2005). In that decision, the Court analyzed whether the two-year defamation statute of limitations or the five-year general tort limitations period governed Plaintiffs' injurious falsehood claim. Amoco argued that the two-year statute should apply because "the plaintiffs' injurious falsehood claims are really defamation claims." *Id*., at 925. The Court pointed out that "the plaintiff's injurious falsehood claims…exist independently of any underlying claim for defamation" and that "the torts of defamation and injurious falsehood protect different interests." *Id*., at 927, 929. The Court held that the general five-year statute of limitations governed Plaintiffs' injurious falsehood claims[6]. *Id*., at 929.

[6] Even without the Supreme Court's guidance in *Ross*, there is no reason to apply the heightened standard of review here. In defamation cases the *de novo* standard of review is only employed when the plaintiff is a public figure. *Phila.*

Plaintiffs believe that the Court should apply the historical JNOV standard of review. However, there is no doubt under any standard that Amoco knowingly made false statements resulting in the unwarranted arrest of Wandersee and Amick.

B. Denial Of Judgment Notwithstanding The Verdict Was Appropriate Because Plaintiffs Presented Substantial Evidence Supporting All The Elements Of An Injurious Falsehood Claim.

1. Amoco Failed To Preserve For Review Its Submissibility Argument That Benhart's Not Amoco's, Knowledge Of The Falsity Of The Statements Controls

Amoco did not preserve its argument that Benhart's knowledge of or reckless disregard for the falsity of Amoco's statements should have been submitted to the jury instead of the verdict director speaking only to Amoco's corporate knowledge. Rule 72.01 directs that "[a] motion for a directed verdict

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Newspapers v. Hepps, 475 U.S. 767, 775 (U.S. 1986) (rejecting an actual malice standard in defamation cases involving speech of private concern with private figure plaintiffs); *Englezos v. Newspress & Gazette Co*., 980 S.W.2d 25, 31 (Mo. App. 1998) (holding that a private plaintiff does not have to prove actual malice in a defamation case). Wandersee and ACT are private plaintiffs and not public figures.

shall state the specific grounds therefor." Rule 72.01; *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 163 (Mo. App. 1997). A motion for directed verdict must include the specific reasons or grounds for the motion in order to preserve an issue for appellate review. *Pope v. Pope*, 179 S.W.3d 442, 454 (Mo. App. 2005).

On appeal, Amoco argues that the trial court erred in refusing to grant its JNOV because Plaintiffs failed to prove that "Benhart [as opposed to Amoco] acted with a reckless disregard for the truth or that he knew his statements to the police were false." (App. Sub. Br. 36) However, Amoco never raised this distinction between Benhart's knowledge and Amoco's knowledge below.

In its Motion for Directed Verdict, Amoco in fact argued that *Amoco's* knowledge was dispositive, not Benhart's, stating:

> "Legal malice requires Plaintiffs to prove that **Amoco knew** its statement to the police department was false or it acted in reckless disregard of the truth or falsity of its alleged statement."

(LF 667; Amoco's Motion for Directed Verdict at Close of Plaintiff's Evidence, ¶10; emphasis added). Amoco acknowledged that its corporate knowledge was the critical component of Plaintiffs' injurious falsehood claim:

> The general elements of injurious falsehood with respect to this care are as follows: (1) **Amoco published** a statement harmful to the interests of Plaintiffs, (2) **Amoco's statement** to the police department was false, (3) **Amoco had knowledge** that the statement was false or Amoco acted in reckless disregard of the truth or falsity of the statement by contacting the police department, and (4) **Amoco's statement caused** pecuniary loss to Plaintiffs.

(LF 664; Amoco's Motion for Directed Verdict at Close of Plaintiff's Evidence, ¶5; emphasis added)

In its JNOV motion, Amoco reiterated the argument it made in its Motion for Directed Verdict that Amoco's knowledge controls (Amoco's Memorandum of Law In Support Of Its Motion JNOV, pg. 3; LF 819), stating that it was Plaintiff's burden "to present clear and convincing evidence that **Amoco** had a high degree of awareness of the probable falsity of **its** alleged statement to the police department…" (LF 820; emphasis added).

Amoco never drew any distinction at trial between its knowledge and its agent's knowledge. For example, Amoco offered a verdict director that required

the jury to conclude only that "Amoco" knew its statements were false or exhibited reckless disregard for the truth. (LF 694, 697). Amoco did not object to Plaintiffs' verdict director (or the converse instruction ultimately given) on the grounds that they failed to distinguish between Amoco's and Benhart's knowledge.

The case of *Li v. Metro Life Ins. Co*., 998 S.W.2d 828 (Mo. App. 1999), cited by Amoco for the proposition that the jury should have been charged with determining whether Benhart knew the statements were false, is instructive. (App. Sub. Br. pg. 54). In *Li*, the defendant MetLife submitted a verdict director that would have required the jury to find that MetLife's agent knew his statements were false and objected to the plaintiff's instructions on the ground that they failed to draw the distinction. *Id*. Amoco did neither.

Amoco accuses Plaintiffs of "inventing" a theory of corporate liability on appeal. However, the parties submitted the case under instructions and a verdict director speaking only to Amoco's knowledge and argued it that way to the jury. Ironically, even had the trial court accepted Amoco's proposed definitional instructions, the case still would have turned on Amoco's collective knowledge—as it should have (*see* discussion *infra* at 33-39). It is Amoco that has "invented" an argument for appeal.

Amoco has failed to preserve its submissibility arguments for appeal.

2. Plaintiffs Presented Clear and Convincing Evidence of Intent/Reckless Disregard and/or Knowledge of Actual Falsity of the Statements by Amoco.

It is clear from the trial record that there was sufficient evidence that Amoco knew its statements to the police were false. Amoco's computer system contained information that was directly contrary to its statements, supporting the jury's conclusion that Amoco had actual knowledge of the falsity of those statements.

When Amoco approached the Overland police, Amoco knew that the following statements were false:

1. ACT and Wandersee had unauthorized possession of the proposed O'Fallon Car Wash. In fact, Amoco specifically authorized the delivery and storage of the O'Fallon Car Wash at ACT. (Tr. 439, lns. 6-9; Tr. 442, ln. 1 – 443, ln. 10; see also Pls' Ex. 14);

2. Amick falsified the purchase order for the proposed O'Fallon Car Wash. (Tr. 254, lns. 3 – 10; 267, lns. 3 -15). In fact, the O'Fallon Car Wash was ordered by C.D. Rhodes; (Tr. 415, ln. 89 – 416, ln. 19; Def's Ex. A);

3. Amoco never had plans for a gasoline station at the proposed O'Fallon Station site. (TR. 313, lns. 6-24; Tr 314, lns. 19-22). In fact, Amoco had authorized both a Preliminary and Final 44 for the station, allocating over

$1,000,000 to construct the new station, and had spent tens of thousands of dollars during the permitting process. (Tr. 527, lns. 14-19; 529, lns. 13-25);

4. It was the ordinary practice of Amoco to ship and store car wash systems at the proposed installation site. (Tr. 308, lns. 11-15). To the contrary, Amoco shipped the O'Fallon Car Wash and two (2) additional car wash systems for different stations to ACT for storage. This was common practice because Amoco did not have the ability to store equipment and the construction sites were unguarded. (Tr. 91, lns. 11-21); and

5. Fissehasion was Amick's supervisor at the time he worked for Amoco. (Tr. 329, lns. 11; 330, lns. 13) Fissenhasion was not Amick's supervisor. (Tr. 150, lns. 19-23).

The issue in this case, as submitted without objection to the jury is not Benhart's knowledge, but Amoco's. There is no doubt, and Amoco does not seriously argue, that Amoco's Form 44 and other records demonstrated its accusations were false. Amoco's extensive discussion of whether a "failure to investigate" constitutes negligence rather than "recklessness" is irrelevant to Amoco's liability for injurious falsehood. Even if recklessness were the appropriate standard, Amoco's knowing misstatements obviate the need to resort to the lesser standard.

Amoco's position is not supported by the law or facts and is bad public policy. If correct, Amoco's new legal theory would permit corporations to shield themselves from tort liability by selecting agents ignorant of facts otherwise known to the corporation to do the company's bidding. Any corporation of any size, especially one the size of Amoco, could effectively eliminate intentional tort liability at the corporate level.

3. Even If Amoco Preserved Its Submissibility Argument, Amoco Is Still Liable For Injurious Falsehood Because Amoco Acted Knowingly And It Is Not Necessary To Prove That Amoco's Agent, Benhart, Acted With The Requisite Knowledge.

Since 1952, Missouri law has charged corporations with the composite knowledge of their corporate records relating to the transaction at issue. *Slater v. Missouri Edison Co*., 245 S.W.2d 457 (Mo. App. 1952).

In *Slater*, the plaintiff sued Missouri Edison for trespass, claiming that Missouri Edison cut down trees on plaintiff's property. Missouri statutes allow a plaintiff to recover treble damages where a defendant cuts another's trees, but another statute restricts the plaintiff to single damages where the defendant had probable cause to believe it owned the trees. It appeared to be undisputed that the agent who physically cut the trees did not "know" or have "probable cause" to believe that he was cutting the plaintiff's trees. *Id*., at 460. Moreover, it appeared

that the laborer's supervisor, who did know the correct boundary lines, did not properly instruct the laborer. *Id.* Despite the laborer's honest mistake, the Court affirmed a verdict against Missouri Edison who, as an entity, "was well aware that it had no right" to cut the plaintiff's trees:

> It may be doubtless conceded that Love's [Missouri Edison's agent] own action was the product of honest mistake growing out of his misunderstanding of what he himself was supposed to do. However, Love is not the one against whom the penalty of the statute is sought to be invoked. **On the contrary, it is Missouri Edison Company which is being held to account; and the question, therefore, is not whether Love, but whether Missouri Edison Company, had probable cause to believe that it had the right to cut the trees on plaintiff's land.**
>
> The conceded facts of the case furnish the inescapable answer to the question. The defendant corporation could only act through its officers and agents, and it was to be charged with the

> composite knowledge which had been acquired by its several officers and agents while acting within the scope of their respective duties in planning and executing the relocation of the line into Bowling Green.

Id. (emphasis added). *See also, Graphic Arts Mut. Ins. Co. v. Pritchett*, 469 S.E.2d 199, 201 (Ga. App. 1995) and *Walker v. State*, 78 S.E.2d 545, 549 (Ga. App. 1953), citing to *Slater* ("[A corporation] cannot escape liability on the ground that the agent who actually performed the forbidden act on behalf of the corporation was entirely innocent, in that such agent lacked knowledge which was possessed by other agents of the corporation, or which is attributable to it as being a part of its documents and records.")(emphasis added); *United States v. Sawyer Transport, Inc*., 337 F. Supp. 29, 30-31 (D. Minn. 1971) ("[A]ctual knowledge of falsity in the possession of the defendant corporation to be gleaned from its own records … cannot be excused merely by asserting that one employee knew of the logs and another of other facts but that neither knew what the other did."); *Inland Freight Lines v. United States*, 191 F.2d 313, 315 (10th Cir. 1951); *Graphic Arts Mut. Ins. Co. v. Pritchett*, 469 S.E.2d 199, 201 (Ga. App. 1995) *See also New York Central and Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909); 18 Am. Jur. 2d Corporations § 144.

There is no dispute that knowing publication of a false statement will support a claim for injurious falsehood. *State of Missouri ex rel. BP Products North Am. Inc., v. Ross*, 163 S.W.3d 922 (Mo. banc 2005). Amoco adopts the Court of Appeals' statement of the submissibility issue: "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." (Amoco Sub. Br. At 44).

That is *not* what Plaintiffs ask this Court to do. Nor is it what Plaintiffs asked the Court of Appeals or the jury below to do.

Having said that, Plaintiffs do know, and Amoco does not dispute, that Ms. Fissenhasion (who was in charge of the general operations of Amoco's owned gas stations in St. Louis (Tr. 140, lns. 12-24)) knew the true state of affairs, and have no doubt that Amick's supervisors and other Amoco personnels were well aware that Plaintiffs were lawfully in possession of the machine by virtue of the internal distribution of weekly 44 reports. These agents obtained their information in connection with the development of the O'Fallon Station, hardly an "unrelated circumstance" or under circumstances where the information would"[seem] irrelevant to him," to quote the Restatement comment cited by Amoco. (Amoco Sub. Br. At 45). Their knowledge should be imputed to Benhart under *Slater* and could arguably end the Court's analysis.

However, this case presents a different and stronger case than *Slater*. Here, Amoco maintained a corporate record of Plaintiffs' innocence in its computer system--the Form 44 generated in connection with the O'Fallon Station. The Form 44, along with Amoco's records maintained in connection with the purchase of the O'Fallon wash system, remained a part of Amoco's collective consciousness throughout these entire proceedings. Amoco maintained these records for the specific purpose of tracking the history and progress of its stations, and the Form 44 was the subject of weekly reports to supervisors watching that progress. That Amoco chose an agent ignorant of those records to pursue Plaintiffs, or that the agent performed an apparently selective investigation of the O'Fallon station, should not control this litigation.

On several levels, this case is not analogous to *Southwest Bank of Polk County v. Hughes*, 883 S.W.2d 518 (Mo. App. 1994) cited by Amoco. *Southwest Bank* did not involve a third party's effort to impute corporate knowledge to a tortfeasor. Instead, the bank sued Hughes, its former President. While President, and without the bank's approval, Hughes caused the bank to transfer title of real estate to co-defendants Cahoj who, on the same date, transferred an undivided half interest in the property to Hughes and his wife. *Id*., at 520. The Bank asserted that Hughes' acquisition of an interest in the property constituted a breach of his fiduciary duty and was "constructively fraudulent and void.".

Hughes alleged that the Bank could not challenge the transaction because it was aware of it by virtue of the fact that a Bank employee, Kelley, had notarized the deed at the direction of Hughes. *Id*., at 519. The Court of Appeals initially pointed out that cases involving the imputation of agent's knowledge to their principal are invariably fact specific. *Id.*, at 524. In *Southwest Bank*, the issue was whether the Bank knew the transaction was fraudulent, since it was undisputed that the Bank technically "knew" that the transaction had occurred. *Id.* It had, after all, been consummated by its President and notarized by another officer who had "no authority or responsibility to investigate." *Id.,* at 525. Other than Hughes' own knowledge of his misdeed, there was no evidence that Kelley's bare knowledge of the transaction should have put him on notice that it was fraudulent: "there is nothing in the trial record establishing that Kelley had knowledge of any facts indicating the transaction was, in the words of Plaintiff's petition, 'constructively fraudulent' as to Humansville Bank." *Id.*

Here, the information known to Fissenhasion and others at Amoco, and contained in the O'Fallon Form 44, standing alone, put Amoco on notice that its allegation of theft was unfounded. This is not a situation like *Southwest Bank* where the character of the Form 44 information is determinative, or where it would be necessary for Amoco to draw inferences from otherwise innocuous information.

Simply stated, Amoco knew that Plaintiffs were rightfully in possession of the equipment, but lied about it to the police.

Plaintiffs are not asking the Court to hold that "every agent must know the contents of every document belonging to a multi-national corporation." (Amoco's Sub. Br. At 49). Neither is Plaintiffs asking the Court to hold that Benhart should have or had to interview "every employee in Amoco's world-wide organization." *Id.* at 50. Although interviews of Amick's supervisors or of Mary Fissenhasion would have sufficed before reporting Amick to the police, Plaintiffs' position is far simpler and far less catastrophic than Amoco asserts. Plaintiffs believe that Missouri should charge Amoco with the basic information maintained in its computer system on the Form 44 because Amoco maintained that information for the specific purpose of approving, monitoring and memorializing the purchase of the O'Fallon car wash system,

Plaintiffs submit that this conclusion is sound public policy that will insure that corporations, big or small, will not cherry pick agents to perform corporate functions based on what they do or do not know about a particular transaction. Legally and ethically, corporations should be charged with at least some basic knowledge of a transaction, especially where it is documented to preserve such knowledge and, more important, where the corporation looks to impose criminal liability on another arising from that transaction.

4. Plaintiffs Presented Sufficient Evidence of Causation.

The issue of causation is ordinarily a question for the jury. *Lange v. Marshall*, 622 S.W.2d 237, 238 (Mo. App. 1981). This Court will only rarely and under clear and compelling circumstances reverse a jury's finding on causation. *Carter v. Boys' Club of Greater Kansas City*, 552 S.W.2d 327, 331 (Mo. App. 1977).

Amoco correctly identifies the "substantial factor" test set forth in Restatment (Second) of Torts §632, 633 as the legal standard of causation.[7]. (App. Sub. Br. at 52). Comment c to §632 discusses the "substantial factor" standard as follows:

> In order for the false statement to be a substantial factor in determining the conduct of an intending or potential purchaser or lessee, it is not necessary that the conduct should be determined exclusively or even predominately by the publication of the statement. **It is enough that the disparagement is a factor in determining his decision, even though he is influence by other factors without which he would not decide to act as he does.**

[7] Plaintiffs also presented evidence meeting the more stringent "but-for" test of causation in the form of Detective Drew's testimony that he would not have sought a search warrant, the arrest or indictment without the statements of Amoco. (Tr. 385, ln. 8 - 386, ln. 20).

Restatement 2d Torts, § 632 Comment c (emphasis added).

Plaintiffs presented the jury with ample evidence that Amoco's false statements were a substantial factor causing Wandersee and Amick's arrest. Detective Drew testified that:

Q. And could you have applied for an affidavit to get a search warrant without Mr. Benhart telling you that this gentleman and his company had unauthorized possession of the car wash?

A. That's correct.

Q. You could not, isn't that true?

A. That's correct.

Q. Had you not had that information, you wouldn't have been able to move for an indictment. Is that true, sir?

A. That's correct.

Q. Had you had that information, you wouldn't have arrested this gentleman. Is that true, sir?

A. That's correct.

(Tr. 385, ln. 8 - 386, ln. 20).

The arrest and indictment led directly to Plaintiffs' ultimate damages. That a car wash dealer publicly accused of stealing car washes would experience lost sales and service business, particularly when news of the arrest was circulated in local papers of general circulation and in nationally distributed car wash trade publications, is hardly "surprising, unexpected, or freakish." *Horn v. B.A.S.S.*, 92 F.3d 609, 612 (8th Cir. 1996). (Tr. 688, ln. 7; Tr. 689, ln. 16; Tr. 903, ln. 24, Tr. 904, ln. 21; Plaintiffs' Exh. 47). Amoco's own expert conceded as much at trial. (Tr. 1012, ln. 5 - 1013, ln. 6).

Amoco cites several events that it characterizes as intervening and superceding causes of Plaintiffs' losses. However, Amoco's assumption that any event occurring after its tortious conduct breaks the chain of legal causation set in motion by its lies is incorrect. Under Missouri law, an intervening act does not necessarily break the causal chain. *Tompkins v. Cervantes*, 917 S.W.2d 186, 190-191 (Mo. App. 1996). ("The mere existence of an intervening cause or causes does not necessarily absolve the original negligent actor from responsibility.") Rather, for an intervening act to constitute a "superceding" event and cut off liability, it must be of a wholly "independent", "distinct", "successive", and "unrelated" character. *Jordan v. General Growth Dev. Corp.*, 675 S.W.2d 901, 903 (Mo. App. 1984). It will not be a superceding cause if it is a **foreseeable and natural product** of the original conduct. *Id*. (emphasis added); *Tompkins*, 917 S.W.2d at 191 ("Appellants

rightly point out that an intervening cause insulating an original tortfeasor from liability **may not be one which is itself a foreseeable and natural product of the original act**") (emphasis added).

Each of the alleged intervening acts cited by Amoco was the natural and foreseeable product of Amoco's false statements to the police and the investigation it set in motion:

1. A detective seeking a search warrant: Detective Drew testified that he could not have sought the search warrant but-for Amoco's statement. A Judge's signing of the search warrant: The only evidence presented to the Judge was Detective Drew's report, which Detective Drew admitted he would not have presented to the Judge but-for Amoco's false statements.

2. The Police's investigation of the accused thief.

3. Witness statements taken by the Police in response to the report of a theft.

4. A Prosecutor's indictment of the accused thief on the charge theft: The Prosecutor testified that no one other than Detective Drew testified at the grand jury hearing, and that the Prosecutor did no independent investigation prior to presenting Detective Drew's report to the grand jury. (Tr. 922, lns. 22-24; 927, lns. 4-10; Tr. 933, ln. 21 – 934, ln. 20). Furthermore, the Prosecutor testified at trial that without Benhart's report to Detective Drew, there could have been no crime of stealing:

Q. Okay, and I guess what you are saying is that – let me ask you this. Is it against the law to sell someone else's property if someone else consents to it?

A. If someone else consents to it, no.

Q. Okay, who provided you in that report with the information that Amoco didn't consent to what allegedly Osco is doing with the machines. What did you base that decision upon?

A. I believe that was inferred from the original statement from Mr. Benhart from the fact that Amoco didn't even know about what they paid for it.

(Tr. 928, lns. 15-24).

Each of Amoco's supposed superceding causes were clearly the natural and foreseeable result of Amoco's false report that Plaintiffs stole the O'Fallon Car Wash.

The sole decision relied upon by Amoco, *Highfill v. Hale*, 186 S.W.3d 277 (Mo. 2006) does not help Amoco's cause. In *Highfill*, there was particularly bad

blood between neighbors Hale and Highfill. Hale falsely reported to police that Highfill shot her. When the police came to investigate, they discovered that Highfill had constructed a covert system designed for surveilling Hale. *Id*., at 279. The police arrested Highfill for stalking. The prosecutor refused to press charges and Highfill sued Hale for false imprisonment. *Id*. The Supreme Court concluded that Highfill did not state a claim for false imprisonment, but in so doing, held that Amoco's conduct here would be actionable:

> Merely reporting facts to a police officer, and leaving it to that officer's discretion whether to make an arrest, does not subject the reporter to liability for false arrest. Even reporting incorrect information may not subject the reporter to liability, if the intent was not to direct the police to arrest a specific individual. **It "requires something more than only furnishing wrong information" to be liable for instigating an arrest. For example, evidence that a defendant "knowingly provided false, incomplete, or misleading information" may support a false imprisonment action.**

Id. at 280-81(internal citations omitted; emphasis added).

On the issue of causation, both the trial court and Supreme Court found a "disconnect" because the police independently discovered the stalking while investigating a claimed shooting: "The deputies reviewed the stalking statute and consulted the prosecutor before deciding to arrest the Highfills. If this decision was erroneous, Hale is not responsible for it simply because the deputies were on her property when they observed the fence." *Id.* at 281. This conclusion is obviously a far cry from holding that the police's investigation would have constituted a superceding cause had Hale called them to investigate the surveillance system that day.

Amoco approached the police for the specific purpose of reporting the theft of the O'Fallon System. Amoco cannot now complain that the authorities took the very actions Amoco contemplated when Amoco filed its false report. Those actions were the natural, probable *and intended* result of Amoco's report.

II. THE TRIAL COURT'S DENIAL OF AMOCO'S MOTION FOR A NEW TRIAL DID NOT CONSTITUTE AN ABUSE OF DISCRETION

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

This Court will reverse the trial court's denial of motion for a new trial only in the case of an abuse of discretion. *Kansas City v. Keene Corp*., 855 S.W.2d 360 (Mo. banc 1993). The trial court's ruling must be clearly against the logic of the

circumstances and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Norris v. Nationwide Mut. Ins. Co*., 55 S.W.3d 366, 369 (Mo. App. 2001). If reasonable people can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *City of Pleasant Valley v. Baker*, 991 S.W.2d 725, 727 (Mo. App. 1999).

The trial court's denial of Amoco's Motion for a New Trial did not constitute an abuse of discretion

B. There Is Substantial Evidence to Support The Jury's Verdict

As discussed above, Plaintiffs presented ample evidence of Amoco's knowledge of the falsity of its statements to the police and that these statements caused Plaintiffs' damages. *See* Part I.A.2 *supra.*

C. Amoco Has Failed To Demonstrate Abuse Of Discretion And Prejudice By The Trial Court In Its Evidentiary And Jury Instruction Rulings.

1. The Trial Court Did Not Err When It Modified MAI 3.05

Courts review jury instructions as a whole to determine whether they fairly and adequately instruct the jury as to the applicable substantive law. *Scheerer v. Hardee's Food Sys*., 92 F.3d 702, 707 (8th Cir. 1996) (applying Missouri law). The trial court has wide discretion in the formulation of jury instructions. *Id*. ("A

judge is not required to give every proposed instruction, nor is he or she required to accept the particular phraseology proposed by any given litigant.")

To reverse a jury verdict on grounds of instructional error, Amoco must show that: 1) the offending instruction misdirected, misled or confused the jury, and 2) prejudice resulted from the error. *Holder v. Schenherr*, 55 S.W.3d 505, 507 (Mo. App. 2001). The burden of proof rests with the party alleging error. *Id.* Here, there was no miscarriage of justice by the jury instructions, and the trial judge was well within his range of discretion in submitting the instructions.

MAI 3.05 is the approved instruction for defamation of a public figure. There is no MAI instruction governing burden of proof in injurious falsehood cases. The Court is free to give non-MAI instructions or to modify MAI instructions where MAI does not provide a required instruction. There is no presumption of error under those circumstances. *Means v. Sears, Roebuck & Co.*, 550 S.W.2d 780, 786 (Mo. 1977) ("Yet, where no approved instruction is applicable so that modification of the approved instruction is required, there is no error.")

MAI 3.05, unmodified, is not a correct statement of the law as it applies to an injurious falsehood claim. As already discussed, it is questionable whether plaintiffs' injurious falsehood claims should be governed by the heightened scrutiny given public figure defamation claims. *See*, discussion *supra* at 21; *See*

also, State ex rel. BP Prods. N. Am. Inc. v. Ross, 163 S.W.3d 922, 929 (Mo. banc 2005). The Supreme Court's recitation of the elements of an injurious falsehood claim in *Ross* does not include the "serious doubt" language of MAI 3.05. Likewise, Restatement (Second) of Torts §623A comments b and d, cited by Amoco, do not mention the language omitted from MAI 3.05.

Most important, Amoco cannot show that it was prejudiced by the redaction of the language. There was absolutely irrefutable evidence that Amoco *knew* that its statements to the police were false. The case could have been submitted to the jury without any reference to recklessness in the instructions and the same result would have followed. Amoco's prejudice argument is built upon the same misconception as its submissibility argument—that Benhart's subjective knowledge, separate and apart from Amoco's corporate awareness, is somehow relevant. That is not the proper analysis. Amoco was not prejudiced by the modification of MAI 3.05.

b. The Trial Court Did Not Abuse Discretion By Refusing to Submit an Instruction Defining "Reckless Disregard."

Where the alleged error is failure to define terms used in the verdict-director, the challenging party has been required to prove the instruction misdirected, misled or confused the jury. *Murphy v. Springfield*, 794 S.W.2d 275, 279 (Mo. App. 1990). The decision to submit a definitional instruction is a matter within the sound

discretion of the trial court. *DeWitt v. American Family Mut. Ins. C*o., 667 S.W.2d 700, 711 (Mo.banc 1984); *Murphy v. Springfield*, 794 S.W.2d 275, 278 (Mo. App. 1990). The use or non-use of definitions not mandated by MAI is left to the sound discretion of the trial judge. MAI, LVII (2002) ("That is why disputes over requirements of definition are left, ordinarily, to the sound discretion of the judge. Someone must decide.")

Moreover, there has been a trend away from reversal for error in instruction, unless there is a substantial indication of prejudice. *Murphy*, 794 S.W.2d at 280; *Fowler v. Park Corp*., 673 S.W.2d 749, 757 (Mo. banc 1984) ("Retrials are burdensome. There has been in recent years a trend away from reversal for error in instruction, unless there is a substantial indication of prejudice.").

As already discussed, Amoco knew that its statements were false. The inclusion of recklessness language in the verdict director was harmless surplusage. Since Amoco's proposed instruction only applies to the recklessness portion, the receipt of it by the jury was not prejudicial in that there was ample evidence for the jury to find Amoco knew the statements were false.

The trial court's rejection of Amoco's proffered instructions was not in error.

c. <u>There Was No Error In Rejecting Amoco's Instruction On Qualified Privileges Because Such Instruction Was Not Supported By The Facts.</u>

The trial court made no error in failing to instruct the jury on the existence of alleged qualified privileges, because the privileges were not applicable to the facts of this case, and the proffered instructions misstated the facts and the law, and were in violation of Rule 70.02.

Rule 70.02(b) provides:

> Where [a Missouri Approved Instruction] must be modified to fairly submit the issues in a particular case, or where there is no applicable MAI so that an instruction not in MAI must be given, then such modifications or such instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts.

See *Preston v. Wal-Mart Stores*, 923 S.W.2d 426, 428 (Mo. App. 1996)

The qualified privileges instruction proffered by Amoco, and rejected by the trial court, violated the above rule.

While the Restatement (Second) of Torts, Section 647 provides a conditional privilege that specifically applies to injurious falsehood claims, the failure to instruct did not materially alter the outcome of the case. The Section 647 privilege only permits a publisher to assert a claim to a legally protected interest of his own

if the assertion is **honest and in good faith**, even though his belief is neither correct nor reasonable. *Id*. at cmt. b (emphasis added).

Here, Amoco could not have honestly and in good faith made the false statements to the police because Amoco **knew** that its statements were false. There is no privilege for **knowingly** making injuriously false statements, and there was ample evidence of Amoco's knowing state of mind when it made such statements. The Trial Judge was correct in rejecting Amoco's incorrect jury instructions.

2. Amoco Has Not Shown An Abuse Of Discretion By The Trial Court In Admitting Evidence Of Plaintiffs' Damages.

The admissibility of evidence lies within the sound discretion of the trial court and will not be disturbed absent abuse of discretion. *Nelson v. Waxman*, 9 S.W.3d 601, 603-604 (Mo. banc 2000) (internal citations omitted). "The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." *Id.*

There was nothing about the trial court's rulings on evidence presented of (a) lost profits, (b) foregone wages, (c) attorney's fees, and (d) damages beyond year 2000 that were so unreasonable and arbitrary as ought to shock this Court's sense of justice. No new trial on damages is warranted.

a. Lost Profits

Amoco did not preserve this issue by proper objections at trial and therefore this point on appeal should be stricken from the Appellant's brief. The Appellant's pretrial motions *in limine*, in and of themselves, preserved nothing for appeal. *Littles v. Cummins*, 854 S.W.2d 45, 46 (Mo. App. 1993). Appellant's objection to introduction of evidence of lost profits damages in 1999 was too general (Tr. 729, lns. 3-6), and Appellant's objection to the introduction of evidence of damages for 2000 and 2001 vaguely referred to some previous objection. (Tr. 733, lns. 13-15; 734, lns. 16-17). A general objection preserves nothing for review as objections must be made with sufficient specificity to advise the trial court of the ground or reason for excluding evidence. *State v. Cannady*, 660 S.W.2d 33, 36 (Mo. App. 1983). Appellant cannot now raise a point to which no proper objection was raised in the trial court:

> It has been further stated by our Supreme Court, in *Galloway v. Galloway*, Mo., 169 S.W.2d 883 (887), that the reason for a requirement that proper specific objection be first made in the trial court is: "In the making of objections the trial judge should be apprised of the grounds upon which objections are based that he may rule with intelligent fairness—opposing counsel should

> be likewise apprised, for, should the grounds specified be denied valid ones, counsel may then avail of other, but proper, meas of adducing the proof."

Browning v. City of St. Louis, 384 S.W.2d 868, 871 (Mo. 1964).

Missouri courts have held that lost profits are recoverable in a variety of breach of contract, tort, and business interruption cases. *Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc*., 155 S.W.3d 50, 55 (Mo. banc 2005).

The Missouri Supreme Court recently discussed the burden of proof for lost profits claims in *Ameristar Jet Charter:*[8]

> For an award of lost profits damages, a party must produce evidence that provides an **adequate basis** for estimating the lost profits with **reasonable certainty**. Loss of profits refers to the amount of net profits a plaintiff would have realized if its clients had not been lost as a result of a defendant's actions. While an estimate of prospective or anticipated profits must rest upon more than mere speculation, **uncertainty as to the amount of profits that would have been made does not prevent a**

[8] Amoco cites to *Ameristar* it in its discussion of including employee wages in a lost profits calculation, but fails to cite to it on this point. (App. Sub. Br., at 83)

> **recovery**. The claimant must establish the fact of damages with **reasonable certainty**, but it is not always possible to establish the amount of damages with the same degree of certainty.
>
> In some cases, the evidence weighed in **common experience demonstrates that a substantial pecuniary loss has occurred**, but at the same time it is **apparent that the loss is of a character which defies exact proof**. In that situation, it is reasonable to require a **lesser degree of certainty** as to the amount of loss, **leaving a greater degree of discretion to the court or jury. This principle is applicable in the case of proof of lost profits.**

Ameristar Jet Charter, Inc., 155 S.W.3d at 55 (internal citations omitted; emphasis added). *See also Lundell Mfg. Co. v. ABC, Inc*., 98 F.3d 351, 365 (8th Cir. 1996) ("Decreased income after the defendant's damaging conduct is sufficient to support an award for lost profits so long as the record discloses a **reasonable basis from which the amount can be inferred or approximated**. Simply because the loss of profits cannot be shown with precision, defendant who caused the damages, may not be heard to say that no damages may be awarded")(emphasis added).

Plaintiffs established lost profits with reasonable certainty by first establishing three year's worth of revenues and profits prior to the interrupting event. Wandersee testified that revenue in 1996 was $1 million with profits of $70,521 (Tr. 720, lns 9-18); which increased to $2.3 million and $97,000 respectively in 1997 (Tr. 720 ln. 24 – Tr. 721, ln. 8); further increasing to $2.7 million and $199,000 in 1998 (Tr. 721, lns. 11-15). Wandersee then testified that revenues sharply decreased in 1999, the year of the arrest, falling to $1.02 million. Wandersee had expected, based on the trend established during the years 1996-1998, along with his knowledge of the industry, to have 1999 sales of $2.17 million (the average of the prior three years' sales). (Tr. 727, ln. 7 – 728, ln. 8).

The lost profits projection was supported by income tax returns for fiscal years 1996 through 1998. (Tr. 719, ln. 3 through 725, ln. 18; Exhs. 35 A-C.) From this historical information, Plaintiffs calculated a 25.5% growth rate for gross sales annually and an average "net profit margin" of 5.5%. Plaintiffs applied those percentages to the fiscal year income tax returns for 1999, 2000, and 2001 to determine lost profits. (Tr. 722, lns. 3-25; 727, ln 7 through 730, ln. 4; 732 ln. 16 through 735, ln. 1.) Wandersee testified that his arrest for theft, and the resulting negative publicity, was the only factor in the downturn in sales. (Tr. 689, lns. 14-16; Tr. 203, ln. 2; 209, ln. 8; Tr. 732, ln. 21; Tr. 733, lns. 3-25, Tr. 734, ln. 8; Tr. 764, ln. 10; Tr. 765, ln. 18). Wandersee has extensive knowledge of the car wash

market and testified that the lost profits were the result of no factor other than his arrest. (*Id*.) Tax return data used by Plaintiffs' at trial can provide competent evidence of lost profits:

> We believe **BBSerCo's historical performance prior to Green Bay's fraud, as shown by the tax returns, was sufficient to prove BBSerCo suffered lost profits** as a result of the fraud.
>
> …
>
> The **tax return evidence supports the jury's determination that BBSerCo would have continued to progress** if Green Bay's fraud had not disrupted its business plan and financing obligations.

BBserCo, Inc. v. Metrix Co., 324 F.3d 955, 963 (8th Cir. 2003) (internal citations omitted; emphasis added).

i. Plaintiffs' Anterior Period Was Reasonable And The Trial Court Did Not Abuse Its Discretion.

Amoco complains that the anterior period used by Plaintiffs' to calculate lost profits was "inadequate as a matter of law" because it was non-contiguous and that lost profits are unrecoverable without monthly or quarterly financial reports. However, Appellant cites no authority for this proposition. Indeed, the language

used by the authorities cited by Appellant is that Plaintiffs must use only a "**reasonable anterior** period" *Coonis*, 429 S.W.2d at 714 ("[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.")

Plaintiffs calculated lost profits using operating results for fiscal years 1996 through 1998 – ending September 30, 1998. Plaintiffs chose that anterior period because it included complete fiscal years of operation encompassing the full annual sales cycle, with its ebbs and flows of orders. The fiscal year provided the most accurate picture of operations. Obviously, fiscal years 1996-98 preceded and were "anterior" to 1999.

Amoco was free to and did argue its position to the jury, however:

> Although Lundell's and Paulsen's testimony is inconsistent, it does not cause us to conclude that there was no reasonable basis for calculating lost profit damages. The jury was free to accept or reject the opinion of either one of these witnesses. The discrepancy between the two witnesses does not make the damage amounts lacking in a reasonable basis, but only demonstrates the opinions of different witnesses.

Lundell Mfg. Co. v. ABC, Inc., 98 F.3d 351, 365-366 (8th Cir. 1996).

Appellant characterizes Wandersee's testimony as "self-serving". (App. Sub. Br., at 79). Presumably, all of Plaintiffs *and* Amoco's testimony was designed to serve the proferring party. Judging the credibility of a witness is firmly within the province of the fact-finder (here, the jury), who has the opportunity to observe the demeanor of the witness. *Crawford v. Detring,* 965 S.W.2d 188, 189 (Mo. App. 1998) ("We keep in mind that a trial court is free to believe or disbelieve all, part, or none of the testimony of any witness.")

Appellant also complains that the Plaintiffs did not have monthly and/or quarterly accounting records to prove past profits. However, Amoco's own expert witness testified that ACT was **not** required by its bank or by any governmental agency to keep such monthly or quarterly financial records. (Tr. 1047, ln. 24 – 1048, ln. 2). Even more tellingly, Amoco's expert witness further testified that she does not keep such financial records in the normal course of operating her **own** litigation support business. (Tr. 1049, lns. 10-12).

Plaintiffs supported their claim for annualized lost profits with annual information. Missouri law requires only reasonable proof of lost profits, and leaves it to the opposing party to discredit the evidence:

> Gasser presented evidence at trial concerning the net profits from sales to JKV, that is, income and expenses

for the appropriate "reasonable time anterior to the interruption of his business as well as the consequent establishing of net profits for the previous period." The evidence presented was the best that Gasser had available, all the records of his business from 1978 through 1986. **Simply because JKV alleges that the books and records should have been kept in a different or better fashion does not mean that a remedy is precluded.** Gasser presented evidence of lost profits by way of Mrs. Gasser, who kept the books for the pharmacy and Mr. Hauber who projected the profits. The jury, as the trier of fact, had before it the evidence as to lost profits. **The jury, being the sole judge of the weight to be given the testimony of witnesses may choose to believe or disbelieve any part of that testimony. JKV had ample opportunity to discredit the evidence by way of cross-examination**, which was obviously, at least in part successful as the jury returned a verdict in an amount approximately half what Gasser requested. Because this court finds that Gasser produced

> sufficient evidence of lost profits, **the decision of the trial court to grant the judgment notwithstanding the verdict must be reversed and the jury verdict reinstated**.

Gasser v. John Knox Village, 761 S.W.2d 728, 734 (Mo. App. 1988) (internal citations omitted; emphasis added).

Just as in *Gasser*, Plaintiffs' should not be precluded for obtaining a remedy simply because Amoco believes that they should have kept their business records in a fashion not required by the federal government.

Amoco further contends that an ACT Corporate Minute, showing that ACT had sales of $500,000 during the first quarter of 1999, somehow establishes that Plaintiffs' revenue projection of $2.17 million for 1999 was so unreasonable that no rational jury could have found otherwise. However, Amoco's own expert admitted to the commonsense mathematical conclusion that $500,000 in sales during one quarter might translate into $2 million in sales for an entire year consisting of four quarters. (Tr. 1029, lns. 11-14). Certainly, Amoco presented no evidence—aside from Wandersee's wrongful arrest, of course—of why ACT would have sales in quarters two, three and four of 1999 that were less than the $500,000 in sales it received during the first quarter of the same yar. The jury was well within its discretion to conclude that the $500,000 in sales reported in ACT's first quarter 1999

Corporate Minute supported, rather than undermined, Wandersee's testimony that had his business not been damaged by the arrest, ACT would have had sales of $2 million for all four quarters of fiscal 1999.

The trial court did not abuse discretion, nor shock our sense of justice, by allowing Plaintiffs' evidence of lost profits

ii. Plaintiffs Established The Arrest As The Cause Of Its Lost Profits To The Exclusion Of Other Causes

Amoco argues that the trial court should have excluded Plaintiffs' damages because Plaintiffs failed to eliminate all other causes of its lost profits. However, Wandersee testified:

> 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 733. ln. 3.)

Appellant cannot deny that such evidence was presented to the jury, so instead it attacks the credibility of Wandersee, labeling his testimony as "self-serving" and "conclusory". However, it is the law in Missouri that the factfinder judges the credibility of witnesses, not a reviewing court. *Atkins v. Clark,* 644 S.W.2d 365, 369 (Mo. App. 1982) *(*"The Court of Appeals may not substitute its judgment for that of the trial court as to the credibility of witnesses.") (internal citations omitted).

Amoco attempted to offer contrary evidence through its expert, speculating on possible causes aside from Wandersee's arrest for ACT's loss of sales,

including industry consolidation, environmental requirements, and changing economic conditions both generally and within the industry. On cross-examination, however, Amoco's expert admitted to not "do[ing] the complete analysis that I would do, because we stopped the work." (Tr. 1025, lns. 15-18). Amoco's expert further testified that she did not do *any* of the following analyses that she normally would have done in a business evaluation in order to render an opinion on lost profits:

1. She did not complete industry resource work. (Tr. 1025, ln. 19 – 1026, ln. 1).

2. Did not research general economic conditions. (Tr. 1025, lns. 2-4).

3. Did not research the scope of the company. (Tr. 1025, lns. 5-8).

4. Did not complete research on local economic factors. (Tr. 1025, lns. 9-16).

5. Did not complete research of the effects of Amoco's consolidation and sale of company owned gas stations on the car wash industry. (Tr. 1039, lns. 2-12).

6. Did not complete research necessary to quantify any possible impact of environmental concerns (Tr. 1040, lns. 1-9),

7. The only research she did do was to have a verbal conversation with a former Amoco employee who told her that Amoco was planning to enter the car

wash service business in competition with ACT. (Tr. 1042 ln. 20 – 1043, ln. 10). This former Amoco employee gave her no documentation supporting this alleged entry into the car wash service industry, nor did she verify the statements with any current representative of Amoco.

Amoco's expert admitted that she could come to no dollar amount—whether equal to or differing from Wandersee's or even zero—of Act's lost profits[9]. (Tr. 1027, lns. 8-13).

Based on the verdict, the jury presumably found Wandersee's testimony more persuasive, and, based on the equivocal testimony of Amoco's expert, was entitled to do so.

b. Foregone Wages

Appellant next complains of Plaintiffs' evidence of foregone wages as an element of damages. Once again Appellant failed to preserve this issue for appeal. Appellant did not object to testimony of Wandersee's Father and Mother on the issue or that of Wandersee about himself and his wife. (Tr. 735, lns. 12-16; Tr. 741, lns. 10-17; Tr. 750, ln.9-24). Failure to object to the introduction of evidence at a trial

[9] Amoco insinuates in its brief that Plaintiffs withheld the financial data necessary for Amoco's expert to make her analysis. Plaintiffs offered to produce financial records for 1996-2005 in the electronic format that it kept its books in the ordinary course of business.

preserves nothing for review. *Holtmeier v. Dayani*, 862 S.W.2d 391,404 (Mo. App. 1993).

Even with a proper objection, the evidence complained of is admissable. *Ameristar Jet* resolved a split among Missouri appellate cases on whether fixed or variable expenses (or both) should be deducted from estimated lost revenues in calculating lost profits damages. Here is what the Supreme Court held:

> This Court holds that in tort actions, variable expenses, not fixed expenses, should be deducted from estimated lost revenues in the calculation of lost profits damages. These variable expenses are expenses that are tied directly to the unit of business or property damages as a result of the defendant's actions.

Ameristar Jet Charter Inc. v. Dodson Int'l Parts, Inc., 155 S.W.3d 50 (Mo. banc 2005)

Expenses that a plaintiff would have incurred, regardless of the loss of marginal revenue, are not subtracted from the lost revenue calculation because these expenses are incurred regardless. The only expenses that must be subtracted from the lost revenues to determine lost profits are those expenses specifically tied to the production of the additional revenue. In *Ameristar Jet*, the Court held that salaries and benefits for accounting, clerical, and administrative staff, are all fixed

expenses and should not be deducted from lost revenue calculations. *Ameristar Jet*, 155 S.W.3d at 57.

"Fixed expenses" are defined under Missouri law as those that a business would have incurred in the operation of its business, regardless of its loss of revenue due to the acts of the defendant. *Ameristar Jet*, at 57 ("Owner's evidence was that it would have incurred these expenses in the operation of its business, regardless of its loss of the use of this airplane in its fleet").

Appellant admits, and in fact argues, that these salaries were fixed expenses, not variable, because the Plaintiffs would have incurred these salaries whether they had lost revenue or not:

> Because the services provided – purchasing, technician work, secretarial, billing, bookkeeping, sales, management – were **necessary to the operation of ACT under any circumstance** both before and after the business interruption, the wages are a business expense.

(App. Sub. Br., at 82; emphasis added).

These salaries are clearly fixed expenses, which would have been incurred whether a business interruption occurred or not. Therefore, the expenses of these salaries which were subtracted from Plaintiffs' revenue when calculating its profit percentage for its anterior period, should not have been subtracted.

Because ACT did not actually pay those salaries during the business interruption period, but accrued them, Plaintiffs' lost profits number at trial was understated by exactly the amount of the fixed overhead wages. The total pecuniary loss to the business (excluding damages for attorney's and bank fees) was $365,000 + 119,000 = $484,000, whether one characterizes all the $484,000 as lost profits, or some as lost profits and some as foregone wages. There is support in the law and evidence for a lost profits number equaling the total jury verdict.

c. There Was No Abuse of Discretion In Allowing Documentary Evidence of Steve Amick's Attorneys' Fees.

Appellants argue that the corporate minute in which the Plaintiffs agreed to reimburse the legal defense fees of Steve Amick was "unilateral"[10] and "self-serving". (Ap. Sub. Br., at 84). However, Appellant failed to object to the oral testimony regarding Amick's legal fees. (Tr. 193, lns. 1-3; 195, ln. 24-196, ln. 19). Failure to object to the introduction of evidence at trial preserves nothing for appeal. *Holtmeier*, 862 S.W.2d at 404.

In addition, Appellant misreads *St. Louis Realty Fund v. Mark Twain South County Bank*, 651 S.W.2d 568, 575 (Mo. App. 1983) as holding that the corporate

[10] Amoco does not explain in what situation a corporate minute could be "multilateral", or why that's even relevant to its sufficiency to support a jury verdict on appeal.

minute is inadmissible because all self-serving documents are inadmissible. Instead, the Court of Appeals held that documents not part of the *res gestae* of a transaction, or not created within the normal course of business, are inadmissible. *St. Louis Realty Fund*, 651 S.W.2d at 575 ("The general rule regarding self-serving documents is that 'declarations of a party favorable to himself **which are not part of the res gestae** are hearsay, self serving and inadmissible'") (emphasis in original). However, within the very same paragraph as quoted by Amoco (but absent from its brief) is the allowance of documents produced during the normal course of business:

> The documents were also prepared in the normal course of the bank's business. As such, the documents were clearly part of the *res gestae* of the note transaction and were properly admitted into evidence.

St. Louis Realty Fund 651 S.W.2d 568 at 575.

The Plaintiffs testified that the corporate minute was prepared within the normal course of business, and Amoco has offered no contradictory evidence of the circumstances of the minute's preparation. Furthermore, there was evidence in addition to the Corporate Minute, namely, the testimony of Amick, his criminal defense attorney and Wandersee Furthermore, and therefore the Corporate Minute was merely cumulative evidence. The trial court did not abuse its discretion in

admitting this evidence nor did it err in permitting the jury to award damages for Amick's legal fees.

d. Plaintiffs' Damages Did Not Terminate In 2000, Because There Was Sufficient Evidence For The Jury To Conclude That Wandersee's Business Suffered Damages From His Wrongful Arrest And Raid During 2001.

Appellate argues that Prosecutor Lasater did not rely on Amoco's statements in his decision to seek and indictment, and that this cuts of Amoco's liability for the damage done to Wandersee's business as a matter of law. Appellate's argument should be rejected and the Trial Court did not err by refusing to grant a JNOV, directed verdict, or to order a new trial.

Under the laws of causation explained *infra*, the Prosecutor's indictment of Wandersee was not a superceding cause of Wandersee's damages. Rather, the Prosecutor's indictment was the foreseeable and natural product of Amoco's false accusation of theft, and therefore does not sever Amoco's liability. In fact, Prosecutor Lassater testified that without Benhart's statement that Wandersee's possession of the car wash machine was unauthorized, there was no crime.

Moreover, the witnesses presented evidence at trial that the harmful effects of the arrest and raid caused pecuniary losses that extended for more than one year.

There was sufficient evidence presented to sustain the jury's verdict. Clearly the various articles continued to be published until June of 2001.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING REMITTITUR.

The trial court has broad discretion in ordering remittitur, and its decision whether or not to reduce damages will not be disturbed on appeal absent an abuse of discretion. *Botanicals on the Park, Inc. v. Microcode Corp*., 7 S.W.3d 465, 470 (Mo. App. 1999). The trial court abuses its discretion if the award is "so grossly excessive that it shocks the conscience and convinces this court that both the trial judge and the jury have abused their discretion." *Id*. In reviewing whether a verdict is excessive, we are "limited to a consideration of the evidence which supports the verdict excluding that which disaffirms it." *Coggins v. Laclede Gas Co*., 37 S.W.3d 335, 342-343 (Mo. App. 2000). Considering all the evidence in favor of the verdict, and disregarding all the unfavorable evidence, the verdict does not shock the conscience and the judge thereby did not abuse his discretion in denying remittitur.

CONCLUSION

For each of the foregoing reasons, the trial court's decision in denying each of Amoco's alternative requests for judgment notwithstanding the verdict, a new trial, a new trial on damages, and remittitur were not in error and should not be

disturbed. This Court should affirm the judgment and deny each of Amoco's requests, and grant the Plaintiff such additional relief as is just under the circumstances.

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the requirements of Rule 84.06 and Local Rule 365. This brief contains 13,275 words (excluding the cover, signature block, this certificate, table of contents and table of authorities) as determined by the software application for Microsoft Word. The diskette filed with this brief bears a copy of the brief and has been scanned for viruses and is virus-free.

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