

**IN THE SUPREME COURT OF MISSOURI**

---

**No. SC95175**

**MARY ANN SMITH D/B/A SMITH'S KENNEL,**

**Appellant**

**v.**

**THE HUMANE SOCIETY OF THE UNITED STATES and MISSOURIANS  
FOR THE PROTECTION OF DOGS,**

**Respondents.**

---

**SUBSTITUTE BRIEF OF RESPONDENT**

**MISSOURIANS FOR THE PROTECTION OF DOGS**

---

Respectfully submitted,

**HUSCH BLACKWELL LLP**

Bryan O. Wade, MO Bar #41939  
Ginger K. Gooch, MO Bar #50302  
901 St. Louis Street, Suite 1800  
Springfield, MO 65806  
main: 417.268.4000  
fax: 417.268.4040  
bryan.wade@huschblackwell.com  
ginger.gooch@huschblackwell.com

**ATTORNEYS FOR RESPONDENT  
MISSOURIANS FOR THE  
PROTECTION OF DOGS**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	2
STATEMENT OF FACTS.....	4
ARGUMENT.....	7
CONCLUSION .....	21
CERTIFICATE OF COMPLIANCE .....	22

## TABLE OF AUTHORITIES

### Cases

<i>Bogan v. General Motors Corp.</i> , 437 F. Supp.2d 1040 (E.D. Mo. 2006).....	12
<i>Bogan v. General Motors Corp.</i> , 500 F.3d 828 (8 <sup>th</sup> Cir. 2007).....	12
<i>Bosch v. St. Louis Healthcare Network</i> , 41 S.W.3d 462 (Mo.banc 2001) .....	7, 17
<i>Breeden v. Hueser</i> , 273 S.W.3d 1 (Mo.App. 2008) .....	9
<i>Castle Rock Remodeling v. BBB</i> , 354 S.W.3d 234 (Mo.App. 2011) .....	7, 8, 13-16
<i>Farrow v. St. Francis Medical Center</i> , 407 S.W.3d 579 (Mo.banc 2013).....	9, 12, 18
<i>Klein v. Victor</i> , 903 F. Supp. 1327 (E.D. Mo. 1995).....	19
<i>Lovelace v. Long John Silver’s, Inc.</i> , 841 S.W.2d 682 (Mo.App. 1992) .....	12
<i>McCormack v. Maplewood-Richmond Heights</i> , 935 S.W.2d 703 (Mo.App. 1996) .....	12
<i>Nazeri v. Missouri Valley College</i> , 860 S.W.2d 303 (Mo.banc 1993).....	7-9, 17-18
<i>Others First Inc. v. Better Business Bureau</i> , 105 F. Supp.3d 923 (E.D. Mo. 2015).....	8, 14
<i>Owner Oper. Indep. Drivers v. New Prime, Inc.</i> , 133 S.W.3d 162 (Mo.App. 2004).....	9
<i>Prop. Exch. &amp; Sales, Inc. v. King</i> , 822 S.W.2d 572 (Mo.App. 1992).....	9
<i>Rice v. Hodapp</i> , 919 S.W.2d 240 (Mo.banc 1996) .....	8
<i>Shurn v. Monteleone</i> , 769 S.W.2d 188 (Mo.App. 1989).....	18
<i>Smith v. Humane Society</i> , 2015 WL 3946781 (Mo.App. June 29, 2015) .....	6
<i>State ex rel. Diehl v. Kintz</i> , 162 S.W.3d 152 (Mo.App. 2005).....	8, 16
<i>State ex rel. Henley v. Bickel</i> , 285 S.W.3d 327 (Mo.banc 2009) .....	7, 17
<i>State ex rel. Union Elec. Co. v. Dolan</i> , 256 S.W.3d 77 (Mo.banc 2008).....	7, 17
<i>Sullivan v. Pulitzer Broadcasting Co.</i> , 709 S.W.2d 475 (Mo.banc 1986) .....	18, 20

*Willman v. Dooner*, 770 S.W.2d 275 (Mo.App. 1989) ..... 12

Other Authorities

MAI 23.06(2)..... 9

## STATEMENT OF FACTS

### 1. The Parties

Respondent Missourians for the Protection of Dogs (“Missouri for Dogs”) is a Missouri nonprofit corporation. LF 21. Missouri for Dogs is a political action committee formed to support Proposition B, a 2010 statewide ballot measure to stop puppy mill cruelty. LF 67. Respondent The Humane Society of the United States (“HSUS”) authored a report entitled “Missouri’s Dirty Dozen” (LF 36), a press release and article concerning the report (LF 67-71), a document entitled “Summary Report: Missouri’s Dirty Dozen (LF 63), a document entitled “Update Report: Missouri’s Dirty Dozen” (LF 72), and a press release concerning the Update Report (LF 98).

Appellant Mary Ann Smith (“Smith”) resides in Dent County, Missouri and does business as Smith’s Kennel, one of the kennels listed in the above HSUS documents. LF 21.

### 2. Smith Files Her Fourth Amended Petition

On April 17, 2014, Smith filed her Fourth Amended Petition. LF 21. Each count of Smith’s Fourth Amended Petition is based on allegedly defamatory statements, which she claims in Paragraphs 5-8 of her General Allegations are contained in a report entitled “Missouri’s Dirty Dozen,” a press release and article concerning the report, an update report entitled “March 2011 Update Report: Missouri’s Dirty Dozen” and a press release concerning the same. LF 21-25.

Paragraphs 5 through 8 of the Fourth Amended Petition quote the allegedly defamatory statements contained in the report, the article, the update report, and the press

releases but none of the allegedly defamatory statements are attributable to Missouri for Dogs. LF 21-25. The only statement arguably linked to Missouri for Dogs is the press release attached as Exhibit “C,” (LF 67) but Exhibit “C” reflects on its face that the press release was created and distributed by Humane Society employees. LF 67. Further, the press release, referring to Missouri’s Dirty Dozen, plainly states: “The investigative report compiled by The Humane Society of the United States . . . .” LF 67-68. Smith alleges in Paragraphs 5-8 that the defendants “acted in concert.” LF 21-25.

The exhibits to Smith’s Fourth Amended Petition, which contain the allegedly defamatory statements, make clear that the “Dirty Dozen,” the update report, and the summary report are based on publicly available federal and state inspection reports. LF 37 (“156: Total number of MO state violations among the Dirty Dozen (data was only received for six of the top 12 dealers); 830: Pages of recent USDA inspection report violations and enforcement records among the Dirty Dozen”); LF 40 (“The Humane Society of the United States submitted a Freedom of Information Act request to the USDA . . . .”); LF 65 (reference to 156 and 830 statistics); LF 68 (“The violations, drawn directly from federal or state kennel inspection reports. . .”); LF 70 (“report synthesizes information gleaned from state and federal inspection reports . . .”).

### **3. Missouri for Dogs Moves to Dismiss Smith’s Fourth Amended Petition**

Missouri for Dogs joined in HSUS’s motion to dismiss Smith’s Fourth Amended Petition and separately moved to dismiss Smith’s Fourth Amended Petition on the ground that Counts I-III of Smith’s Fourth Amended Petition are based on the allegedly defamatory statements set out in Paragraphs 5 through 8 of her First Amended Petition,

and none of those statements are attributable to Missouri for Dogs. LF 120-124. Missouri for Dogs asserted that Smith alleged no defamatory word attributable to Missouri for Dogs. LF 121.

**4. The Court Dismisses Smith’s Fourth Amended Petition; Smith Appeals**

On June 4, 2014, the court entered its Order and Judgment dismissing Smith’s Fourth Amended Petition. LF 141. The court indicated it was granting HSUS’s motion to dismiss, joined in by Missouri for Dogs, but made no other factual or legal findings. LF 141.

Smith filed her Notice of Appeal on July 9, 2014.

**5. The Court of Appeals Reverses and Remands; This Court Grants Transfer**

On June 29, 2015, the court of appeals issued its opinion reversing and remanding the case for further proceedings on the basis that the claim that Smith’s kennel was a “puppy mill” was a factual contention rather than mere opinion in the totality of the circumstances sufficient to support Smith’s claim for defamation and that Smith’s Fourth Amended Petition stated a claim for false light invasion of privacy sufficient to withstand a motion to dismiss. *See Smith v. Humane Society of the United States, et. al*, 2015 WL 3946781 (Mo.App. S.D. June 29, 2015).

On October 27, 2015, this Court granted transfer.

**6. Missouri for Dogs Joins in the Statement of Facts of HSUS**

Missouri for Dogs joins in and incorporates here the Statement of Facts set out in the Substitute Brief of Respondent HSUS.

## ARGUMENT

**I. The trial correctly dismissed Smith’s claims for defamation, because Smith failed to state a claim for defamation upon which relief could be granted against Missouri for Dogs, in that Missouri for Dogs did not author or publish the alleged defamatory statements and the alleged defamatory statements are not specific to Smith and are protected opinions not actionable in defamation.**

**(responds to Smith’s Point I)**

### **A. Standard of Review**

“A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff’s petition.” *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329 (Mo.banc 2009) (quoting *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo.banc 2001)); *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo.banc 1993). “In order to withstand the motion, the petition must invoke ‘substantive principles of law entitling plaintiff to relief and . . . ultimate facts informing the defendant of that which plaintiff will attempt to establish a trial.’” *Bickel*, 285 S.W.3d at 329-330 (quoting *State ex rel. Union Elec. Co. v. Dolan*, 256 S.W.3d 77, 82 (Mo.banc 2008)) (ellipses in original).

“In determining whether a plaintiff can survive a motion to dismiss a defamation claim for failure to state a cause of action, there are two primary components. First, we must determine whether the statement is capable of having a defamatory meaning. Whether language is defamatory and actionable is a question of law.” *Castle Rock Remodeling, LLC v. Better Business Bureau of Greater St. Louis, Inc.*, 354 S.W.3d 234,

239 (Mo.App. 2011); *State ex rel. Diehl v. Kintz*, 162 S.W.3d 152, 155 (Mo.App. 2005). “[T]he words must be stripped of any pleaded innuendo and construed in their most innocent sense.” *Id.* (citation omitted). “The alleged defamatory words must also be considered in context, and the words are given their plain and ordinarily understood meaning.” *Id.* (citation omitted). “Assuming [the statement] is capable of a defamatory meaning, we must also inquire if one or more privileges would shelter the defendant from legal action.” *Castle Rock*, 354 S.W.3d at 241. “Truth is an absolute defense.” *Others First Inc. v. Better Business Bureau*, 105 F. Supp.3d 923, 930 (E.D. Mo. 2015) (citing *Rice v. Hodapp*, 919 S.W.2d 240, 243 (Mo.banc 1996)).

**B. Missouri for Dogs raised this argument in its Motion to Dismiss**

The court of appeals ruled it would “not consider the additional grounds raised by Missouri for Dogs” because “under our standard of review, we consider only grounds raised in the motion to dismiss that was actually decided.” 2015 WL 3946781 at \*10 n.6.

But Missouri for Dogs raised these grounds in the motion to dismiss it filed, which both joined in the Humane Society’s motion and raised separate grounds for dismissal in the same document. LF 120-124. The trial court simply stated that it was granting the motion “[f]or the reasons set forth in Defendant’s Motion.” LF 141. The Judgment notes the motion to dismiss filed by the Humane Society, “was joined in by Defendant Missouri for the Protection of Dogs.” LF 141.

The court of appeals erred in refusing to consider Missouri for Dog’s separate grounds for dismissal because those arguments were before the trial court when it decided the motion to dismiss and the trial court specifically referenced Missouri for

Dogs's joinder in the motion when it granted the Humane Society's motion to dismiss. "This court must affirm the trial court's ruling 'if the motion [to dismiss] could have been sustained on any of the meritorious grounds raised in the motion,' regardless of whether the trial court relied on that particular ground." *Breeden v. Hueser*, 273 S.W.3d 1, 6 (Mo.App. 2008) (quoting *Owner Oper. Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 133 S.W.3d 162, 166 (Mo.App. 2004)); *Prop. Exch. & Sales, Inc. v. King*, 822 S.W.2d 572, 573 (Mo.App. 1992) ("In reviewing the action sustaining the motion to dismiss, we must affirm the dismissal of the suit if that dismissal can be sustained on any ground which is supported by the motion to dismiss submitted by the defendants regardless of whether the trial court relied on that ground.")

### **C. Missouri for Dogs did not author or publish the statements**

Under Missouri law, to state a claim for defamation, a plaintiff must allege 1) publication, 2) of a defamatory statement, 3) that identifies the plaintiff, 4) that is false, 5) that is published with the requisite degree of fault, and 5) that damages the plaintiff's reputation. *Farrow v. St. Francis Med. Ctr.*, 407 S.W.3d 579, 598 (Mo.banc 2013); MAI 23.06(2).

In a libel case, a "plaintiff must make her allegations *in haec verba*, or in the exact words alleged to be defamatory." *Nazeri*, 860 S.W.2d at 313. In Paragraphs 5 through 8 of her Fourth Amended Petition, Smith quotes the printed material she claims defamed her. LF 21-25. As to involvement of Missouri for Dogs in the alleged defamation, Smith claims "defendants acted in concert." LF 21-25.

Smith does not state a claim for defamation in Counts I and II against Missouri for Dogs as a matter of law by alleging that “defendants acted in concert” when a facial review of each of the alleged defamatory publications demonstrates that they were authored by HSUS, not Missouri for Dogs. *See* LF 36 (on HSUS logo paper and states “Researchers at The Humane Society of the United States (HSUS) have spent weeks poring over state and federal inspection reports, investigators’ photographs, and enforcement records received via the Freedom of Information Act to compile a list of some of the worst puppy mills in Missouri . . . .”); LF 63 (on HSUS logo paper and states “Researchers at The Humane Society of the United States (HSUS) have spent weeks poring over state and federal inspection reports, investigators’ photographs, and enforcement records received via the Freedom of Information Act and state Sunshine Law requests to compile a list of some of the worst puppy mills in Missouri . . . .”); LF 67-68 (press release from Leslie Porter at The Humane Society of the United States stating “The investigative report, compiled by The Humane Society of the United States, was released at a press conference in St. Louis.”); LF 70 (email from Wayne Pacelle, President of HSUS, stating “I stepped down from a platform a couple of hours ago at the Humane Society of Missouri headquarters in St. Louis to announce the results of The HSUS’s latest investigative report, Missouri’s Dirty Dozen.”); LF 72 (Update Report on HSUS logo paper and states “Late last year, researchers at The Humane Society of the United States (HSUS) spent weeks poring over state and federal inspection reports, investigators’ photographs, and enforcement records to compile a list of some of the worst puppy mills in Missouri . . . .”); and LF 98-99 (press release on HSUS logo paper

and states “The 28-page report, compiled by The Humane Society of the United States, was released at a press conference in Jefferson City.”)

The only alleged defamatory statement in Paragraphs 5-8 of her Fourth Amended Petition which Smith arguably attributes to Missouri for Dogs is a single quote in a press release attributed to the “campaign manager” for Missouri for Dogs: “These puppy mills have an undeniable record of unconscionable violations of the minimal humane care standards in place, according to our study of their records.” LF 23. Assuming *arguendo* that this single statement is sufficiently pled for purposes of analyzing a defamation claim against Missouri for Dogs, the attributed statement is a broad statement of opinion not defamatory as a matter of law for the reasons set out below and in the Brief of Respondent HSUS.

As to each of the other alleged defamatory statements, however, Smith’s general allegation that “defendants acted in concert” to defame her cannot state a claim for defamation against Missouri for Dogs as a matter of law where each document shows on its face that it was authored by HSUS. Under these circumstances, Smith does not satisfy the publication requirement of a defamation claim as against Missouri for Dogs.<sup>1</sup>

---

<sup>1</sup> Missouri for Dogs acknowledges that Smith generally pleads that “Defendants published” the “Dirty Dozen” report and the update report on October 5, 2010 and March 9, 2011, the date of each respective report. LF 25; 36; 72. But, this is not sufficient to withstand a motion to dismiss where the face of the respective reports indicates they were

“Publication is an essential element of actionable defamation. Publication requires a showing that the defendant delivered or caused to be delivered the allegedly libelous material to a third person.” *Willman v. Dooner*, 770 S.W.2d 275, 282 (Mo.App. 1989) (internal cites omitted). *See also McCormack v. Maplewood-Richmond Heights Sch. Dist.*, 935 S.W.2d 703, 711 (Mo.App. 1996) (“An essential element in any defamation case is that the defendant have made a false statement *to a third person.*”) (emphasis in original); *Lovelace v. Long John Silver’s, Inc.*, 841 S.W.2d 682, 684 (Mo.App. 1992) (affirming dismissal of defamation claim because “[i]f the statements were not published then the claim of defamation fails.”). *See also Bogan v. General Motors Corp.*, 437 F. Supp.2d 1040, 1050 (E.D. Mo. 2006), *reversed and remanded on other grounds in Bogan v. General Motors Corp.*, 500 F.3d 828 (8<sup>th</sup> Cir. 2007) (finding publication requirement not satisfied in defamation claim against GM based on a single quote from a GM spokesman in newspaper article authored by a St. Louis Post-Dispatch reporter.)

**D. The allegedly defamatory statements are not specific to Smith**

The trial court’s judgment dismissing Counts I and II of Smith’s Fourth Amended Petition should also be affirmed because the allegedly defamatory statements recited in Paragraphs 5-8 of Smith’s Fourth Amended Petition are not specific to Smith. LF 21-25.

In order to be actionable in defamation, the allegedly defamatory statement must identify the plaintiff. *Farrow*, 407 S.W.3d at 598. Smith asserts she was defamed not authored by HSUS and Smith alleges no facts concerning publication to any third party by Missouri for Dogs.

because of any particular statement about *her* or *her kennel* in the “Dirty Dozen” report but because her kennel was included in the report and because HSUS allegedly used a flawed methodology to compile the report. *See* App’s Br. 12-13. In fact, only the “Dirty Dozen” report and the Update Report specifically refer to Smith and her kennel, and she challenges none of the specific references in either report, which quote directly from federal and state inspection reports of her kennel. LF 48, 78-79. None of the alleged defamatory statements in Paragraphs 5-8 of Smith’s First Amended Petition is specific to Smith or her kennel and therefore are not actionable as defamatory. LF 21-25. *See Castle Rock*, 354 S.W.3d at 240 (“In order to be defamatory, a statement must be clear as to the person addressed.” “[T]he statement in the report that the nature of the complaints and the business response to them is often more important than the number of complaints is not specific to Castle Rock, and thus, cannot be considered defamatory.”) Because none of the statements recited in Paragraphs 5-8 of her Fourth Amended Petition are specific to Smith, the trial court correctly dismissed Counts I and II for failure to state a claim upon which relief can be granted.

**E. The allegedly defamatory statements are protected opinions based on underlying, objectively truthful facts**

The trial court also correctly dismissed Counts I and II because Smith’s true argument—that her inclusion in the “Dirty Dozen” list and the methodology by which HSUS arrived at the list of “examples of some of the worst licensed kennels in the state”—defamed her are protected opinions not actionable in defamation. The court considered and rejected this argument in *Castle Rock*, when the court affirmed dismissal

of retailer's claims for libel, slander, and tortious interference with business expectancy and rejected retailer's argument that its "C" rating from the Better Business Bureau and BBB report discussing 17 complaints filed against retailer were actionable:

[N]either the nature of the information provided nor the language used on BBB's website would lead a reasonable person to believe that the rating is a statement of actual fact. Moreover, . . . BBB's "C" rating of Castle Rock is not sufficiently factual to be susceptible of being proved true or false. Although one may disagree with BBB's evaluation of the underlying objective facts, the rating itself cannot be proved true or false. Therefore, the rating is protected as opinion under the First Amendment.

*Castle Rock*, 354 S.W.3d at 243.

The same applies here. While some may disagree, and Smith obviously does disagree, with HSUS's evaluation of the federal and state kennel inspection reports, the obviously subjective rating of "Dirty Dozen" cannot be proved true or false. Smith's challenge to the list itself and the methodology used in arriving at the list are matters of opinion not actionable in defamation. *See also Others First*, 105 F.Supp.3d at 933 (granting judgment as a matter of law for BBB because "underlying facts reported in the release . . . are true" and the release contained non-actionable opinions based on those facts).

That the ranking and the inclusion of Smith's Kennel are matters of protected opinion is even clearer here than in *Castle Rock*, where HSUS states multiple times throughout the "Dirty Dozen" report and related documents that the reports are based on

publicly available state and federal inspection reports. Smith suggests that the reports are misleading because they do not set forth all of the facts on which the reports are based. App’s Br 22-25. But, there is no legal requirement in *Castle Rock* or elsewhere that an author may only create a list or ranking or rate “best” and “worst” or “examples of some of the worst” by listing all facts considered in arriving at the opinion. Here, HSUS did more than it was legally required to do by making clear that its opinions were based on publicly available federal and state inspection reports. LF 37 (“156: Total number of MO state violations among the Dirty Dozen (data was only received for six of the top 12 dealers; 830: Pages of recent USDA inspection report violations and enforcement records among the Dirty Dozen”); LF 40 (“The Humane Society of the United States submitted a Freedom of Information Act request to the USDA . . . .”); LF 65 (reference to 156 and 830 statistics); LF 68 (“The violations, drawn directly from federal or state kennel inspection reports. . . .”); LF 70 (“report synthesizes information gleaned from state and federal inspection reports . . . .”). HSUS explained to readers how it arrived at its ranking and its conclusions about which kennels to include in the list, and this explanation made clear to the reader that federal and state inspection reports were available concerning the kennels in question should the reader desire to investigate further and arrive at his or her own conclusions.

The court of appeals utilized a flawed analysis because it failed to recognize that Smith does not dispute the truthfulness of the factual material on which the reports are based. Further, the decision conflicts with *Castle Rock* and *Kintz* because the court of appeals failed to strip the alleged defamatory words “of any pleaded innuendo” and

construe the words “in their most innocent sense” and also failed to consider the alleged defamatory words “in context,” giving the words “their plain and ordinarily understood meaning.” *Castle Rock*, 354 S.W.3d at 239; *Kintz*, 162 S.W.3d at 155. Instead, the court of appeals seemed to suggest, without citation to any authority, that being labeled a “puppy mill” might be defamatory per se and also could support Smith’s false light claim. 2015 WL 3946781 at \*9. The court of appeals improperly disregarded and/or ignored the political context of the speech and also improperly failed to construe “puppy mill” in its most innocent sense and in the context of the objective, truthful facts upon which the opinion of “puppy mill” was based and instead assumed that “puppy mill” could give rise to a false light claim, and perhaps even amount to defamation per se, all without support from any authority.

Missouri for Dogs also incorporates here the arguments of Respondent HSUS on the issue of whether the trial court correctly dismissed Counts I and II of Smith’s Fourth Amended Petition for failure to state a claim upon which relief can be granted.

**II. The trial court correctly dismissed Smith’s claim for invasion of privacy, because Smith failed to state a claim for invasion of privacy upon which relief could be granted, in that the statements upon which Smith based her invasion of privacy claim are actionable if at all only in defamation.**

**(responds to Smith’s Point II)**

**A. Standard of Review**

“A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff’s petition.” *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329 (Mo.banc 2009) (quoting *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo.banc 2001)); *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo.banc 1993). “In order to withstand the motion, the petition must invoke ‘substantive principles of law entitling plaintiff to relief and . . . ultimate facts informing the defendant of that which plaintiff will attempt to establish at trial.’” *Bickel*, 285 S.W.3d at 329-330 (quoting *State ex rel. Union Elec. Co. v. Dolan*, 256 S.W.3d 77, 82 (Mo.banc 2008)) (ellipses in original).

**B. Smith does not state a claim for invasion of privacy**

The trial court correctly dismissed Count III of Smith’s Fourth Amended Petition for failure to state a claim upon which relief can be granted because Smith’s remedy, if any, for the allegedly false statements in Paragraphs 5 through 8 of her Fourth Amended Petition is in defamation. There is no dispute that Smith’s invasion of privacy claim is based on the very same statements she asserts are false and for which she seeks recovery in defamation under Counts I and II. LF 28-33. For the reasons set out in Point I, Smith

does not state a claim for defamation. The trial court correctly dismissed all three counts of Smith's Fourth Amended Petition.

There is no cause of action for invasion of privacy based on allegedly untrue statements. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 317 (Mo.banc 1993) (“The case at bar is nothing more than the classic defamation action where one party alleges that the other published a false accusation concerning a statement of fact.’ Recovery for untrue statements that cause injury to reputation should be in defamation.”) (quoting *Sullivan v. Pulitzer Broadcasting Co.*, 709 S.W.2d 475, 481 (Mo.banc 1986)). See also *Shurn v. Monteleone*, 769 S.W.2d 188, 191 (Mo.App. 1989) (affirming dismissal of count that attempted to allege invasion of privacy based on intentional false statements).

This Court recently repeated and embraced the rule from *Sullivan* and *Nazeri* in *Farrow v. Saint Francis Medical Center*, 407 S.W.3d 579, 602 (Mo.banc 2013), where this Court upheld summary judgment in favor of defendant on plaintiff's claim for false light invasion of privacy on the ground that plaintiff's claim was indistinguishable from her defamation claim and thus not actionable:

The crux of Farrow's allegations is that Doctor made several false statements about her job performance that resulted in her termination from Hospital. Farrow's attempt to frame this cause of action as one where she merely wanted to be left alone is insufficient to differentiate it from her defamation claim. Here, Farrow is seeking to protect her reputation in the outside world, specifically with Hospital and the medical community where

she resides. As such, her allegation is more akin to a classic defamation claim rather than a false light invasion of privacy claim. The circuit court properly granted summary judgment in Doctor's favor on Count VII.

Smith's claim, if any, is for defamation, and she is not entitled to bring a second defamation claim dressed as an invasion of privacy claim under Missouri law.

Smith claims that HSUS and Missouri for Dogs cannot have it both ways, and that she either states a claim for defamation or for invasion of privacy. App's Br 37. But Smith cites no authority to support her argument that she must necessarily state a claim for defamation or invasion of privacy, if not both. Under Missouri law, the statements with which Smith takes issue are not defamatory because 1) they were not published by Missouri for Dogs, 2) they were not about Smith, and 3) they are protected statements of opinion. Under Missouri law, the statements with which Smith takes issue did not invade her privacy because they are statements and her remedy, if any, for false statements is defamation. Smith states no claim for defamation or for invasion of privacy, the only claims alleged in her Fourth Amended Petition. The court in *Klein v. Victor*, 903 F. Supp. 1327, 1338 (E.D. Mo. 1995), in dismissing plaintiff's claims for invasion of privacy, grappled with this very issue in analyzing statements that plaintiff alleged were false both for purposes of her defamation claim and for her invasion of privacy claim: "Here, the very false light plaintiffs complain of is clearly contained in the disputed statements. For plaintiff to be portrayed in a false light, it would be necessary that the disputed statements be false. If these statements are false, then these claims are no more

than defamation claims, and Missouri courts would treat them as such, as *Sullivan* clearly held.”

The court of appeals erred in reversing the decision of the trial court because the court of appeals relied on the very same statements Smith alleges are defamatory to find that Smith could also state a claim for false light invasion of privacy. Such a conclusion is contrary to *Nazeri* and *Farrow*.

Missouri for Dogs also incorporates here the arguments of Respondent HSUS on the issue of whether the trial court correctly dismissed Count III of Smith’s Fourth Amended Petition for failure to state a claim upon which relief can be granted.

## CONCLUSION

For the reasons stated herein, Respondent Missourians for the Protection of Dogs requests that this Court reverse the decision of the Court of Appeals and affirm the judgment of the trial court dismissing Smith's Fourth Amended Petition with prejudice for failure to state a claim upon which relief can be granted; and for such other and further relief as the Court deems just.

HUSCH BLACKWELL LLP

By: /s/ Bryan Wade  
Bryan O. Wade, MO Bar #41939  
Ginger K. Gooch, MO Bar #50302

901 St. Louis Street, Suite 1800  
Springfield, MO 65806  
main: 417.268.4000  
fax: 417.268.4040  
bryan.wade@huschblackwell.com  
ginger.gooch@huschblackwell.com

Attorneys for Respondent  
Missourians for the Protection of Dogs

IN THE SUPREME COURT OF MISSOURI

MARY ANN SMITH d/b/a	)	
SMITH'S KENNEL,	)	
	)	Appellant,
	)	
v.	)	Case No. SC95175
	)	
THE HUMANE SOCIETY OF THE UNITED	)	
STATES and MISSOURIANS FOR THE	)	
PROTECTION OF DOGS,	)	
	)	Respondents.)

**CERTIFICATE OF COMPLIANCE WITH  
RULE 84.06 AND CERTIFICATE OF SERVICE**

STATE OF MISSOURI    )  
  ) ss.  
COUNTY OF GREENE    )

Pursuant to Rule 84.06(c), counsel for Respondent certifies that this brief complies with the limitations contained in Rule 84.06(b). There are 5,159 words in this brief. Counsel for Respondent relied on the word count of his word processing system in making this certification.

Further, counsel for Respondent states that Respondent's Substitute Brief in the within cause was by him caused to be served, by the Court's electronic filing system and/or by first class mail, postage prepaid, the following number of copies, addressed to the following named persons at the addresses shown, all on this 4th day of February, 2016:

Mr. Bill Thompson  
Clerk of the Supreme Court of Missouri  
207 West High Street  
Jefferson City, MO 65101

1 e-file copy

David L. Steelman  
Stephen F. Gaunt  
901 Pine Street, Suite 110  
P.O. Box 1257  
Rolla, Missouri 65402

1 e-file copy

Bernard Rhodes  
Lathrop & Gage LLP  
2345 Grand Blvd.  
Suite 2400  
Kansas City, MO 64108

1 e-file copy

HUSCH BLACKWELL LLP

By: /s/ Bryan Wade

Bryan O. Wade, MO Bar #41939

Ginger K. Gooch, MO Bar #50302

901 St. Louis Street, Suite 1800  
Springfield, MO 65806

Attorneys for Respondent  
Missourians for the Protection of Dogs