IN THE SUPREME COURT OF MISSOURI

SC94253

DEBORAH BARKLEY,
Plaintiff-Appellant,

vs.

McKEEVER ENTERPRISES, INC., d/b/a PRICE CHOPPER,
Defendant-Respondent.

Appeal from the Circuit Court of Jackson County, Missouri
Case No. 1016-CV31675, Division No. 5
The Honorable James F. Kanatzer

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This case was tried before a jury in the Circuit Court of Jackson County, Missouri commencing October 22, 2012. The jury reached its verdict on October 25, 2012 finding in favor of Defendant-Respondent McKeever Enterprises, Inc. d/b/a Price Chopper ("Respondent") and against Plaintiff-Appellant Deborah Barkley ("Appellant" or "Barkley"). The trial court entered its Judgment in conformance with the jury's verdict on October 30, 2012. Appellant appealed and on April 15, 2014 the Missouri Court of Appeals, Western District entered its Opinion affirming the trial court and finding in favor of Respondent. Appellant filed a Motion to Transfer pursuant to Supreme Court Rule 83.05 which this Court granted on August 19, 2014. This Court therefore has jurisdiction pursuant to Missouri Supreme Court Rule 83.04 and Article V, section 10 of the Missouri Constitution.

STATEMENT OF FACTS

A. Factual History

On Sunday, May 24, 2009, Appellant Deborah Barkley entered the Price Chopper grocery store located at 4201 S. Noland Road in Independence, Missouri, with her husband Jim Barkley ("Mr. Barkley") and their three granddaughters. (Tr. Vol. I at 339, 348). The Barkleys had planned to host an impromptu barbeque at their home that evening and needed some items from the grocery store. (Tr. Vol. I at 347). In addition to food items, Barkley had wanted to pick up some glucose strips for her glucose meter. (Tr. Vol. I at 350). Shortly after they entered the Price Chopper, Barkley remembered she had left her glucose meter and reusable shopping bags in the car. (Tr. Vol. I at 349). Barkley and one of her granddaughters, Shay, went back to the car to retrieve the glucose meter and bags. (Tr. Vol. I at 349-50). When they returned inside Price Chopper, Barkley was separated from Mr. Barkley and her two other granddaughters. (Tr. Vol. I at 350; Ex. 1, part 2). Barkley testified she and Shay looked for glucose strips in the pharmacy department but never found them. (Tr. Vol. I at 350; Ex. 1, part 2). Around 6:12 p.m., Barkley concealed two paper notebooks, two LED book lights, one pen holder, and one tube of toothpaste in a red reusable shopping bag over her left shoulder. (Tr. Vol. II at 748; Ex. 1, part 2). At 6:14 p.m., Barkley picked up a package of AAA batteries and folded them in half before she concealed them in her pocket. (Tr. Vol. II at 748-749; Ex. 1, part 2). At 6:17 p.m., Barkley and Shay met up with Mr. Barkley at the checkout registers and, by this time, Mr. Barkley had several items in a shopping cart. (Tr. Vol. II at 749-750; Ex. 1, part 8). Mr. Barkley placed the items in his

cart on the conveyor belt while Barkley walked behind the checkout register and handed the Price Chopper sacker several reusable shopping bags. (Tr. Vol. I at 366-67; Vol. II at 750; Ex. 1, part 8). Barkley never gave the Price Chopper sacker the red reusable shopping bag which contained the concealed merchandise; she claimed she forgot those items that were in the red bag. (Tr. Vol. I at 368-69; Vol. II at 750-51; Ex. 1, part 8). Barkley never presented the concealed merchandise for payment at the checkout. (Tr. Vol. I at 368, Vol. II at 750-51; Ex. 1, part 8).

Price Chopper's loss prevention officers, Jason Herrington and Cody Millard, saw Barkley on closed circuit digital surveillance concealing those items in her bag and continued to watch Barkley on video from the loss prevention office in the store until Barkley attempted to leave. (Tr. Vol. II at 625, 627, 746-751). At 6:20 p.m., the Barkleys and their three granddaughters attempted to leave Price Chopper through the vestibule when Millard approached Barkley and presented his badge. (Tr. Vol. I at370, Vol. II at 751-52; Ex. 1, part 9). At 6:21 p.m., Mr. Millard identified himself as a loss prevention officer and advised Barkley that she had let the store with unpaid merchandise. (Tr., Vol. II at 752; Ex. 1, part 9). At the same time, Herrington approached Barkley in the vestibule. (Tr. Vol II at 623; Ex. 1, part 9). Herrington took Barkley's purse and the red reusable shopping bag which contained the concealed merchandise. (Tr. Vol. II at 752; Ex. 1, part 9). Millard explained to Mr. Barkley that his wife was being detained for shoplifting. (Tr. Vol. II at 752-53). Millard and Herrington then escorted Barkley to the loss prevention office where a surveillance and camera system existed which videotaped the loss prevention office as well

as others in the office for safety concerns. (Tr. Vol. II at 559-562; 752-53; Ex. 1, part 9). Thus the events that occurred in the loss prevention office on May 24, 2009 were videotaped.

Inside the loss prevention office, Herrington asked Barkley to sit on a bench inside the loss prevention office and she complied. (Tr. Vol. I, 374-75, Vol. II at 753; Ex. 1, part 10). Herrington removed the merchandise from Barkley's red bag and searched her purse for identification as well as to determine if additional merchandise was concealed. (Tr. Vol. II at 627). Millard filled out paperwork regarding the incident. This paperwork which Millard was completing consisted of several pages and included relevant identification information regarding Barkley, a narrative report of the incident, photographs of Barkley as well as the concealed merchandise, a Notification of Apprehension and Trespassing, and a Missouri Civil Demand Notice. (Tr. Vol. II at 759-762). Herrington also sought to determine the monetary value of the concealed merchandise because pursuant to store policy, if the value exceeded a certain amount, loss prevention officers were required to contact the police and have the shoplifter prosecuted; if the amount was less than the designated amount, it was within the discretion of the loss prevention officers whether the shoplifter would be prosecuted and the police called. (Tr. Vol. II at 627-631). Herrington had the concealed merchandise rung up by the cashier. The amount exceeded the designated amount and it was at this time, when Herrington made his initial price check, that the police were called. (Tr. Vol. II at 653).

Derica Mata, a store manager, was called as an observer in the loss prevention office as a female witness per Respondent's policy. (Tr. Vol. II at 625, 753, 789; Ex. 1, part 10).

There had been no physical contact with Barkley and she was not handcuffed before she was seated on the bench in the loss prevention office. (Tr. Vol. I at 453, Ex. 1, part 10). While being detained in the loss prevention office, Barkley asked to call her husband who was waiting outside, and her request was declined. (Tr. Vol, I at 380-81). Price Chopper's policy is to not permit detainees to make phone calls during the detention period for the safety of their employees. (Tr. Vol. II at 635). Against the loss prevention officers' instructions, Barkley reached into her pocket for her cellular phone and attempted to call her husband. (Tr. Vol. I at 380-81, Vol. II at 634-35, 755, Ex. 1, part 10). Millard took away Barkley's cellular phone. (Tr. Vol. I at 381, Ex. 1, part 10).

As Herrington and Millard were handling the merchandise and preparing their report at the loss prevention office desk, which included recording and photographing the concealed merchandise, Barkley stood up from the bench and approached Herrington from behind. (Tr. Vol. I at 385-86, 443-43, 455-56, Vol. II at 636; p. 649; Ex. 1, part 10). Herrington and Millard told Barkley to return to her seat on the bench, but Barkley refused. (Tr. Vol. I at 387, 390-91, Vol. II at 634-36, 756; Ex. 1, part 10). Barkley stated, "I'm not sitting on the bench until you listen to me." (Tr. Vol. I at 454, Vol. II at 635). Barkley admitted that her refusal to sit on the bench was against the officers' directives. (Tr. Vol. I at 454). Because Barkley refused to follow the officers' instructions to sit on the bench, Herrington handcuffed Barkley. (Tr. Vol. I at 386-87; Vol. II at 636, 756; Ex. 1, part 10). Barkley resisted being handcuffed. (Tr. Vol. II at 636-37; Ex. 1, part 10). Although procedure was to handcuff with hands behind the back, Barkley complained of pain, so Herrington

immediately moved the handcuffs to Barkley's front. (Tr. Vol. II at 637-38; Ex. 1, part 10).

After being handcuffed in front, Barkley told Herrington, "I'm not sitting back down until you listen to me." (Tr. Vol. I at 391, Vol. II at 640). Herrington again told Barkley to sit down and pointed toward the bench. (Tr. Vol. II at 640-42; Ex. 1, part 10). At that point, Barkley ran for the loss prevention office door, grabbed the door handle with both hands, and pulled the door partially open. (Tr. Vol. II at 643; Ex. 1, part 10). Herrington grabbed Barkley's torso in a bear hug while Barkley was gripping the door handle in order to keep her from leaving the loss prevention office. (Tr. Vol. II at 643-44; Ex. 1, part 10). After a few tries, the officers were able to break Barkley's grip on the door handle. (Tr. Vol. II at 644-65; Ex. 1, part 10). Herrington then swept Barkley's legs with his leg and guided her to the ground to retain control of the situation. (Tr. Vol. II at 645, 680; Ex. 1, part 10). Herrington testified that Barkley was hysterical, loud and struggling against the officers while on the floor, so the handcuffs were moved to her back. (Tr. Vol. II at 646-47). Barkley refused to allow the officers to return her to her feet, so she sat on the floor and would not permit the officers to help her to the bench. (Tr. Vol. II at 647-49; Ex. 1, part 10). Eventually, Barkley agreed to once again sit on the bench. (Tr. Vol. II at 647-49, Ex. 1, part 10). Both officers lifted Barkley up under her arms, and she walked with assistance to the bench and sat down. (Tr. Vol. II at 657; Ex. 1, part 10).

The police arrived at 6:51 p.m. (Ex. 1, part 10). Barkley was released to police at 7:07 p.m. after being detained for 46 minutes. (Ex. 1, parts 9 & 10).

B. Procedural History

Appellant filed her original Petition on October 20, 2010 alleging in five counts claims of false imprisonment, battery, assault, invasion of privacy and negligent supervision as well as a request for punitive damages. Respondent timely filed its Answer on December 9, 2010. (L.F. at 1). Appellant subsequently filed, on June 14, 2012, an Amended Petition, which alleged the original five counts and added a sixth count for malicious prosecution. (L.F. at 6; 28-33). Respondent filed its Answer to the Amended Petition on June 21, 2012. Its Answer included an affirmative defense based upon the Merchant's statute § 537.125 RSMo. (L.F. at 6; 34-42).

During the pendency of the case, Respondent filed, on July 9, 2010, a Motion for Partial Summary Judgment based upon the Merchant's statute. (L.F. at 6). Following Appellant's Response and Respondent's Reply, the trial court entered its Order on September 26, 2012, denying the Motion for Partial Summary Judgment without comment.

Respondent filed a Motion *in Limine* prior to trial which contained, among other matters, issue no. 2: a request to exclude "Any Evidence Concerning Any Other Lawsuit Involving McKeever Enterprises, Inc.," and issue no 3; a request to exclude "Any Evidence that Jason Herrington Received Any Employee Warning Report After May 24, 2009." The lawsuit referenced in the motion *in limine* involved the detention of a minor juvenile suspected of assisting others in shoplifting and whether that juvenile was improperly released to someone other than her parent or legal guardian. None of the loss prevention officers involved in the Barkley case were involved in the case about the juvenile. Respondent

argued that the case was not relevant, and any probative value was outweighed by its prejudicial value. (L.F. at 12-3).

The warnings referenced in the motion *in limine*, issue no. 3, were warnings for foul language that occurred after the date of the incident on May 29, 2009 and for conduct that allegedly occurred after May 29, 2009. Respondent argued that because the reports were not given to Herrington as a result of the May 29, 2009 incident and were given to Herrington after the May 29, 2009, they had no probative value and were unfairly prejudicial to the Respondent. (L.F. at 14-15).

The trial court took up the motions *in limine* on the morning of April 17, 2012. The Respondent continued to argue as to issue no. 2 that the situation and conduct in the prior case was not similar to the case at bar, that the loss prevention officers involved in the lawsuit were not the same officers as in the Barkley case, and that even if probative, it was more prejudicial. The Appellant contended that the evidence was relevant to conduct, treatment, policy, and lack of supervision (Tr. Vol. I at 19-23). Respondent asked the trial court to sustain motion in limine no. 3 because it dealt with subsequent conduct, was not relevant, and any probative value was outweighed by prejudice to the Respondent. Appellant maintained that it was relevant for "course of manner and disposition" and the "way he conducts his activities at McKeever." Appellant also argued it was relevant to punitive damages. (Tr. Vol. I at 23-27).

The trial court ruled on the motions in limine on the first morning of trial on October 22, 2012. The court granted the motion *in limine* as to issue no. 2, finding that as to any

evidence concerning other lawsuits that the "evidence cannot be introduced in plaintiff's case-in-chief. The Court determines that the prejudicial effects would outweigh any probative value." (Tr. Vol. I at 63). The trial court also granted the motion *in limine* as to issue no 3, concluding that not only was this type of evidence contrary to public policy of the state, but also for the "reasons and arguments outlined in the defendant's motion in limine." (Tr. Vol. I at 63). The Defendant subsequently sought to offer at trial the evidence outlined in issues no. 2 and 3 of Defendant's Motion *in Limine.* Specifically the Appellant asked to admit exhibits related to Herrington's subsequent employment evaluations. The trial court continued to exclude the evidence. The Defendant made an offer of proof. Following the offer of proof, the trial court made no further ruling on the matter. (Tr. Vol II at 848-854).

At the conclusion of the case, Appellant sought only to have the battery and false imprisonment claims submitted to the jury. (Tr. Vol. II at 860). During the formal instruction conference, the trial court took up the issue of the proper submission of the verdict director for battery, and the Respondent's affirmative defense under the Merchant's statute. While there was no dispute between the parties that MAI 23.02 (Instruction No. 9) was the proper verdict director for battery, the parties differed as to whether a tail should be added to Instruction No. 9 referencing the jury to an affirmative defense instruction (Instruction No. 10). Instruction No. 10, offered by Respondent and objected to by Appellant, was an affirmative defense premised on the Merchant's statute and the use of reasonable force to detain. (Tr. Vol. II at 862-867). The Appellant specifically objected to the giving of the instructions, stating

> that defense submits inapplicable and inappropriate defenses to plaintiff's battery claim. It misstates the law with respect to plaintiff's battery claim and the law with respect to defenses to battery. Further, we object because it is not supported by the evidence and misleads the jury as to the law and the evidence.

(Tr. Vol. II at 863-864).

The trial court concluded that the submission of Instruction No. 9 with the tail referencing Instruction 10, the affirmative defense, and the affirmative defense Instruction No. 10 were proper, holding

> I also, when we were having our informal conference and discussing this, reviewed the MAI as well as the Comments, and I believe that the evidence adduced in this case makes the instruction applicable, so I am going to allow Instruction No. 10 to be submitted to a jury.

(Tr. Vol. II. at 867).

Following deliberations, the jury returned verdicts in favor of Respondent and against Appellant as to both the battery and false imprisonment counts. (Tr. Vol. II. at 932-933; L.F. at 62-64). Appellant timely appealed to the Missouri Court of Appeals, Western District. (L.F. at 9; 88-89). Following briefing and arguments, the appellate court entered its majority opinion on April 15, 2014 affirming the judgment. The Appellant filed a Motion to Transfer, which was granting, after Suggestions in Opposition were requested by this Court and filed

by Respondent. This Case now stands before this Honorable Court.

LEGAL ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN REFUSING APPELLANT'S PROPOSED VERDICT DIRECTOR ON THE BATTERY CLAIM AND IN GIVING INSTRUCTIONS NUMBERS 9 AND 10, WHICH DIRECTED THE VERDICT ON THE BATTERY CLAIM IN FAVOR OF APPELLANT UNLESS THE JURY BELIEVED THAT RESPONDENT HAD PROVEN THE AFFIRMATIVE DEFENSE OF RESISTING INVASION OF PROPERTY AS HYPOTHESIZED IN MODIFIED M.A.I. 32.10 BECAUSE INSTRUCTIONS NUMBERS 9 AND 10 ARE CONSISTENT WITH MISSOURI LAW IN THAT THE RESTATEMENT (SECOND) OF TORTS §§ 77-82, 120 A AND MO. REV. STAT. § 537.125 ALLOW A MERCHANT TO USE REASONABLE MEANS TO DETAIN A SUSPECTED SHOPLIFTER AND THAT SUCH REASONABLE DETENTION SHALL NOT RENDER THE MERCHANT CIVILLY LIABLE

A. STANDARD OF REVIEW

"Whether a jury was instructed properly is a question of law that this Court reviews *de novo*." *Doe 1631 v. Quest Diagnostics, Inc.*, 385 S.W. 8, 13 (Mo. 2013) (en banc). However, the appellate court presumes that the proper instructions were given to the jury. *Leonard Missionary Baptist Church v. Sears, Roebuck and Co.*, 42 S.W.3d 833, 836 (Mo. App. 2001). The burden of proof regarding a claim of instructional error rests with the party

alleging the error. *Van Volkenburgh v. McBride*, 2 S.W.3d 814, 821 (Mo. App. 1999) (citing *Cornell v. Texaco, Inc.*, 712 S.W.2d 680, 682 (Mo. 1986) (en banc)). Instructional error does not mandate reversal. *See Sorrell v. Norfolk Southern Ry. Co.*, 249 S.W.3d 207 (Mo. 2008). "To reverse a jury verdict on grounds of instructional error, appellant must show that: 1) the instruction as submitted misled, misdirected, or confused the jury, and 2) prejudice resulted from the instruction." *Cornell*, 712 S.W.2d at 682. When an instruction was erroneous, but does not prejudice the complaining party, a harmless error results.

A jury instruction must be supported by substantial evidence which, if true, is probative and from which the jury can reasonably decide the case. *Holder v. Schenherr*, 55 S.W.3d 505, 507 (Mo. App. 2001) (citing *Doe v. Alpha Therapeutic Corp.*, 3 S.W.3d 404, 419 (Mo. App. 1999). "In determining whether there was substantial evidence to support the giving of a particular instruction, we view the evidence in the light most favorable to the party tendering the instruction." *Van Volkenburgh*, 2 S.W.3d at 821 (citing *Porter v. Bi-State Development Agency*, 710 S.W.2d 435, 437 (Mo. App. 1986)). Rule 70 contemplates frequent situations in which no MAI is applicable and provides for the modification of an existing MAI or the drafting of a not-in MAI instruction. See *Rule 70.02(e);* Peel v. Credet Acceptance Corp, 408 SW3d 191, 200 (Mo App 2013). The test for a modified or a "not-in-MAI." instruction is whether it follows the substantive law or can be readily understood by the jury. Id.

In the present case the modified MAI 32.10 was supported by substantive law, was readily understandable by the jury and did not mislead or confuse the jury.

B. ARGUMENT

Appellant argues in her Point I that this Court should set aside judgment in favor of Respondent because the trial court erred by refusing to give her proposed verdict director on the battery claim which made no reference to any affirmative defense. (Appellant's Substitute Brief at 18). Appellant argues that Respondent is not entitled to the affirmative defense to battery of resisting invasion of property because an instruction providing an affirmative defense to employees of merchants attempting to prevent a shoplifter from fleeing during their investigation of the incident "is an entirely new and unrecognized defense. "(Appellant's Substitute Brief at 22). Appellant further argues that any affirmative defense regarding Respondent's attempt to recover its property or to keep the Appellant from leaving its property to prevent an investigation as to concealed merchandise was not supported by the evidence because Respondent already possessed the property in question. (Appellant's Substitute Brief at 24). Appellant claims that the trial court erred in giving Instruction No. 9, the verdict director on battery which referenced defendant's affirmative defense, and by giving Instruction No. 10, based upon M.A.I. 32.10, the affirmative defense to battery of resisting invasion of property. However, no error occurred because Respondent, as a merchant, is authorized by law to use reasonable force to detain a suspected shoplifter and to prevent him from fleeing prosecution. Instructions Nos. 9 and 10 therefore were consistent with Missouri law.

1. Respondent Was Entitled to the Affirmative Defense Instruction

Resisting Invasion of Property, Patterned After MAI 32.10

Because the Merchant's Statute § 537.125 Permits the Detention of a Person Suspected of Shoplifting by Reasonable Manner and Reasonable Length of Time

Historically, Missouri courts have held that a private citizen could not effectuate a citizen's warrantless arrest or detain an individual based upon probable cause or reasonable grounds. *See generally*, *Pandjiris v. Hartman*, 94 S.W. 270 (Mo. 1906); *Titus v. Montgomery Ward & Co.*, 123 S.W. 2d 574(Mo. App. 1939). This interpretation of common law placed a shopkeeper in the untenable position of allowing a suspect to leave the premises, risking the loss of merchandise or taking the risk of attempting to recapture the property by detaining an individual and face liability for wrongful detention.

In 1941, this Court held in *Teel v. May Department Stores Co.*, 155 S.W. 2d 74, 78 (Mo. 1941) that the need for protecting one's property outbalanced the need for protecting personal liberty to the extent that a private citizen could effect a warrantless arrest on the existence of probable cause or reasonable grounds, both as to the offense and as to the person arrested, where the arresting party's property was involved. The Court further recognized the application of the Restatement of Torts to the issue of reasonable detention and the use of reasonable force. ("Nevertheless, it is well established, as the Restatement recognizes, that the owner of property has the right to take action (by force or confinement reasonable under the circumstances) in defense of his property. [Restatement of Torts, secs. 77-80.]") *Id.* at 702-703.

This development in the common law, which occurred in Missouri as well as numerous other states, and which affected the rights of shopkeepers, was formally recognized by W. Prosser and Incorporated in the Restatement (Second) of Torts with the addition of § 120A – Temporary Detention for Investigation. The principle enunciated in *Teel*, with certain modifications, was codified by the Missouri General Assembly in 1961 through passage of the Merchant's Privilege Statute, § 537.125. *See Helming v. Adams*, 509 S. W. 2d 159, 166 (Mo. App. 1974). In particular, the statute requires that any such detention be done in a "reasonable manner and in a reasonable length of time." § 537.125.3 RSMo. Whether the detention was done in a reasonable manner and in a reasonable length of time has been held to be a rebuttable presumption under the statute. *Schwane v. Kroger Co.*, 480 S.W. 2d 113, 118-119 (Mo. App. 1972).

Appellant has consistently argued that Respondent was not entitled to the affirmative defense because the use of reasonable force was not used to recover the stolen property, itself, or to prevent the Appellant from leaving with the stolen property in order to prevent an investigation into whether Appellant had concealed merchandise. (Appellant's Substitute Brief at 24). Appellant's arguments show a fundamental misunderstanding of the Merchant's statute and the privilege it provides.

Section 537.125.2 states in relevant part:

> Any merchant, his agent or employee, who has reasonable grounds or probably cause to believe that a person has committed or is committing a wrongful taking of merchandise

> or money from a mercantile establishment, may detain such person in a reasonable manner and for a reasonable length of time *for the purpose of investigating whether there has been a wrongful taking of such merchandise or money*. Any such reasonable detention shall not constitute an unlawful arrest or detention, nor shall it render the merchant, his agent or employee, criminally or civilly liable to the person so detained.

(emphasis added) Subsection .3 further provides that the finding of unpurchased merchandise concealed upon the person or among the belonging of such person

> shall be evidence of reasonable grounds and probable cause for the detention in a reasonable manner and for a reasonable length of time, of such person by a merchant, his agent or employee, *in order that recovery of such merchandise may be effected.*

(emphasis added). Subsection .4 permits a merchant who has reasonable grounds or probable cause to believe that a person has wrongfully taken property and who has detained such person to "contact law enforcement officers and instigate criminal proceedings."

Therefore the Merchant statute permits a merchant with probable cause to believe a person has taken property to detain such person (1) to reasonably recover property without reasonable delay; (2) to reasonably investigate the matter without unreasonable delay; or (3) release the person to the authorities without unreasonable delay. *See* § 537.125 RSMo. That is exactly what occurred in this case. The statute does not limit the reasonable manner and a

reasonable length to simply determining that the person possessed concealed merchandise or to only prevent the person from leaving with the merchandise from the store. The trial court properly found that the Merchant's statute and its accompanying privileges applied to this case and that the Respondent was entitled to an affirmative defense under the statute.

2. Respondent Was Entitled to The Affirmative Defense Instruction of Resisting Invasion of Property, Patterned After M.A.I. 32.10, Because the Instruction Is Authorized by Missouri Law

The court did not err in giving Instructions Nos. 9 and 10 for two reasons. First, the resisting invasion of property defense, as set forth in M.A.I. 32.10, contemplates a defendant's defensive measures against a plaintiff's interference with property, including detaining the plaintiff for investigation and for transfer to law enforcement, if necessary. Second, the Missouri Merchant's statute, Mo. Rev. Stat. § 537.125, authorizes merchants "to detain such a person in a reasonable manner," and immunizes the merchant from civil liability for the same. The same statute protects a merchant from civil liability for the employment of reasonable force when a suspected shoplifter resists efforts to detain him or attempts to flee the merchant's custody and avoid prosecution.

a. M.A.I. 32.10 References Restatement (Second) of Torts §§ 77 and 80 Which Authorizes Detention of an Intruder Caught in the Act of Taking Property

Appellant's argument is that M.A.I. 32.10, the resisting invasion of property affirmative defense to battery, is only appropriate when the merchant uses force to regain

control of the property and not when the merchant uses force against a suspected shoplifter who attempts to flee or to resist the merchant's attempts to detain her. Since the property Appellant removed from the store had already been recovered, Appellant reasons, Instruction No. 10 should not have been given at all and Instruction No. 9 should not have included reference to the affirmative defense.

Appellant's narrow interpretation of M.A.I. 32.10 is not supported by the language of the approved instruction or the comments which follow it. The plain language of M.A.I. 32.10 does not limit its use to *only* those times when defendant uses force against the plaintiff while the plaintiff is in the throes of interfering with the defendant's property. The paragraph beginning "First," requires that an "unlawful act" be identified. M.A.I. 32.10 does not require that the unlawful act be the original act of interfering with the defendant's property. The unlawful act could be the plaintiff's attempts to flee detention after having been caught in the act. In the present case, Appellant's unlawful acts were disobeying the loss prevention officer's instructions to remain seated, then attempting to flee the loss prevention office. Instruction No. 10 stated those unlawful acts in the paragraph beginning with "First." (LF p. 54). The alleged battery occurred during the detention and investigation period after Barkley refused to stay seated and not when Appellant was originally apprehended by loss prevention officers. (Tr. Vol. I, pp. 453-54, 458-59).

The idea that M.A.I. 32.10 can be used as a defense to battery occurring during detention is contemplated the comments to the instruction. Committee Comment D. to M.A.I. 32.10 refers to Restatement (Second) of Torts §§ 77 to 82 (1965). These sections of

the Restatement (Second) of Torts address the right of an actor to use reasonable force, not likely to cause death or serious bodily harm to prevent another's intrusion upon the actor's land or chattel. Section 77, Defense of Possession by Force Not Threatening Death or Serious Bodily Harm states that "[a]n actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to prevent or terminate another's intrusion upon the actor's land or chattels . . ." if the intrusion is not privileged; the actor reasonably believes the intrusion can be prevented or terminated only by the force used, and the actor has first requested the other to desist and the other has disregarded the request. *See* Restatement (Second) of Torts § 77.

(Second) of Torts § 80 states as follows:

> The actor is privileged intentionally *to confine another* or to put him in apprehension of a harmful or offensive contact for the purpose of preventing or terminating the other's intrusion upon the actor's possession of land or chattels under the same conditions as create a privilege to inflict a harmful or offensive contact or other bodily harm upon the other for the same purpose.

Restatement (Second) of Torts § 80 (emphasis added). According to § 80, an actor is privileged to confine someone who intrudes upon his property just as he is privileged to use reasonable force not intended to cause serious bodily harm. *See* Restatement (Second) of Torts § 77. Therefore, Appellant is incorrect that M.A.I. 32.10 only applies to battery which occurs while the plaintiff is in the course of interfering with the defendant's property.

Comment (c). of § 80 refers to the 1918 decision of *Hartman v. Hoernle*, 201 S.W.

911, 912 (Mo. App. 1918), wherein the court held that a defendant was only entitled to resist trespass to his land and the taking of his melons by reasonable force, but not deadly force. In a modern civilized society, no force is usually necessary to stop an interference with property. *See* Restatement (Second) of Torts § 80, cmt. (a). ("It is seldom that the actor finds it necessary to impose a confinement upon another to protect against intrusion [against] his interest in the exclusion possession of his land or chattels. Such situations, however, when they exist are governed by the rule stated in this Section.") Today, if someone attempts to take something that is not theirs, the owner will likely call the police rather than engage the perpetrator with nondeadly force at his own peril. In the case of merchants where theft is a common problem, loss prevention techniques have been put in place to address shoplifting with civility and, hopefully, without force. Therefore, a merchant's need to defend a battery claim will almost always arise after the alleged shoplifter has surrendered the stolen merchandise and is being detained for investigation and, if necessary, prosecution.

b. <u>The Missouri Merchant's Statute and §§ 77-82 of the Restatement (Second) of Torts Authorizes A Retailer to Detain A Disobedient Suspected Shoplifter With Reasonable Force</u>

Mo. Rev. Stat. § 537.125 allows merchants the legal authority to "detain such person in a reasonable manner for a reasonable length of time for the purpose of investigating whether there has been a wrongful taking of such merchandise. . ." Mo. Rev. Stat. § 537.125. The legislature even declared that such a detention was not an unlawful arrest or detention and that merchants were immune from "criminal or civil liability to the person so

detained." Implied in the merchant's statute from the "reasonable manner" language of § 537.125.2 is that a merchant may use reasonable force to detain a suspected shoplifter. According to the statute, so long as a merchant uses reasonable force to detain a suspected shoplifter, he is not civilly liable for his efforts taken to detain the suspected shoplifter. This privilege would be meaningless if reasonable force cannot be used. It makes no sense to assume that shoplifters caught in the act will simply comply with the request to wait for police to arrive. Other jurisdictions which have passed merchant privilege statutes similar to Missouri have discussed the reasonableness of both the detention and the use of force. *See e.g., Jacques v. Sears, Roebuck & Co,* 285 N.E. 2d 871, 874 (N.,Y. 1972) (under merchant privilege act, continuing investigation permits detention until police arrive); *Cooke v. J.J. Newberry & Co.*, 232 A. 2d 425, 427-428 (N.J. Super. App. Div. 1967) (under merchants act, a detention of 27 minutes until police arrive was not unreasonable); *see also, Super X Drug of Kentucky Inc. v. Rice*, 554 S.W. 2d 903, 906-907 (Ky App. 1977); *Com. V. Rogers*, 945 N.E. 2d 295, 306 (Mass. 2011); *Gortzrez v. Smitty's Super Val. Inc*., 680 P. 2d 807, 814-815 (Ariz. 1984).

While both the Merchants statute as well as §§ 77-82 of the Restatement (Second) of Torts contemplate the use of "reasonable force," the Merchants statute and Missouri case law have been silent as to what physical force, if any, is allowable in a continued detention. Clearly Missouri courts have contemplated the use of force by a merchant to detain a shoplifter. *See e.g., Caverton v. J.C. Penny Co.*, 631 S.W. 2d 608, 610 (Mo. App. 1993). (suggesting use of unreasonable force in a merchant's case became a part of a false

imprisonment claim); *Peak v. W.T. Grant Co.*, 386 S.W. 2d 685, 692 (Mo. App. 1964) (suggesting § 537.125 is an available defense in a false arrest and imprisonment case which included forcible detention).

The Restatement (Second) of Torts § 120 A- Temporary Detention for Investigation, provides that if one has a reasonable believe that another has tortuously taken chattel, that person is privileged, without arresting, to detain the suspect for a reasonable time necessary to reasonably investigate the facts. As to the use of reasonable force, § 120A comment (h) states

> Reasonable force may be used to detain the [suspect]: but . . . the use of force intended or likely to cause serious bodily harm is never privileged for the sole purpose of detention to investigate, and it becomes privileged only where the resistance of the other makes it necessary for the actor to use such force in self-defense. In the ordinary case, the use of force at all will not be privileged until the other has been requested to remain; and it is any where there is not time for such a request, or it would obviously be futile, that force is justified.

Comment (h) defines the allowable force reasonable to detain. Utilizing comment (h) it is clear that a Missouri merchant may use reasonable force to continue to detain a suspect after a request has been made for the suspect to remain unless time does not permit a request or the request would be futile.

Most affirmative defenses under the Merchant's statute arise out of false

imprisonment. *See* MAI 31.13. However, in *Cannon v. Venture Stores, Inc.*, 743 S.W.2d 473 (Mo. App. 1987), an instruction modeled after M.A.I. 32.10 was given in a case where the father of a minor girl who was detained by a store's loss prevention office was injured when he forced his way into the store's security office after being told he could not enter the security office. The father sued the store for assault and battery which occurred while he was attempting to gain access to the security office. *Cannon v. Venture Store*, 743 S.W.2d at 474. The jury returned a verdict in favor of the store, and the father appealed. *Id.* The father argued that the instructions on the affirmative defenses to battery should not have been given as three separate instructions. *Id.* at 476. The court held M.A.I. did not prohibit giving separate instructions, found no error, and affirmed the judgment of the trial court. *Id.* The importance of *Cannon* to the present case is that the appellate court found no instructional error when the trial court gave a defense of property instruction to a battery claim pursuant to M.A.I. 32.10 when the battery occurred in the course of the store's detention of a suspect and not in the course of subduing the suspect during the act of shoplifting. *Id.* In fact, the father's conduct in *Cannon* of forcing his way to the security office against the store security officer's instructions had nothing to do with his daughter's alleged act of shoplifting. If the *Cannon* court found no instructional error in submitting M.A.I. 32.10 on a battery claim brought by a third person who attempted to intervene while the store was conducting its investigation, it follows that there was no instructional error in submitting an instruction based upon M.A.I. 32.10 in this case where it was the suspected shoplifter herself who complains she was battered during the store's investigation.

No Missouri cases address the affirmative defense to battery of resisting invasion of property specifically in the context of the Merchant's statute, Mo. Rev. Stat. § 537.125. However other courts with similar statutes have held that an affirmative defense to battery existed under a merchant's statute provided the merchant used reasonable force. *See e.g.*, *Redding v. Shelton's Harley Davidson, Inc.*, 534 S.E.2d 656 (N.C. App. 2000); *Kmart Corp. v. Perdue*, 708 So.2d 106, 110 (Ala. 1997)).

In the present case, the complained of batteries were done as Appellant attempted to flee or were done only to detain Appellant, not to hurt her. For this reason, Instructions Nos. 9 and 10 were supported by Mo. Rev. Stat. § 537.125 and the facts in this case. This Court should conclude that Mo. Rev. Stat. § 537.125 authorizes a merchant to use reasonable force to physically detain an uncooperative or fleeing suspected shoplifter and that the merchant may argue M.A.I. 32.10, resisting invasion of property, against a civil battery claim arising therefrom. In giving Instructions 9 and 10 in this case, which are consistent with the law, the trial court did not err.

3. Instructions Nos. 9 and 10 Did Not Prejudice Barkley

Appellant argues that Instructions Nos. 9 and 10 prejudiced her because the instructions misstated Missouri law. As argued above, the instructions were consistent with Missouri law and supported by the evidence. Appellant maintains she was prejudiced by these instructions even though the jury saw the videotape of Appellant running for the door in the loss prevention office and refusing the officers' directives to sit on the bench. (Ex. 1, part 10). Although she sustained no diagnosable injuries as a result of Respondent's efforts to stop her from fleeing,

she maintains she is entitled to damages for battery nonetheless. (Tr. Vol. II at 832-34, 899). The transcript reflects that the jury deliberated, reached a verdict, and were back in the jury room to deliver their verdict in only 56 minutes. (Tr. Vol. II at 931-33). The jury simply rejected Appellant's claims against Respondent.

The instructions properly asked the jury to consider the conduct of the loss prevention officers and the loss prevention office in response to Appellant's refusal to follow orders and attempt to flee. Therefore under the law and facts in this case, Instructions No. 9 and 10 were properly submitted to the jury and the Appellant was not prejudiced.

II. THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NUMBER 10, WHICH SUBMITTED THE AFFIRMATIVE DEFENSE OF RESISTING INVASION OF PROPERTY AS HYPOTHESIZED IN M.A.I. 32.10 BECAUSE IT WAS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT THE EVIDENCE SHOWED RESPONDENT'S LOSS PREVENTION OFFICERS DID NOT TOUCH APPELLANT UNTIL SHE ROSE FROM WHERE LOSS PREVENTION OFFICERS HAD INSTRUCTED HER TO SIT AND TOLD THE OFFICERS SHE WOULD NOT RETURN TO HER SEAT

A. STANDARD OF REVIEW

Whether a jury was instructed properly is a question of law that this Court reviews *de novo*." *Doe 1631 v. Quest Diagnostics, Inc.*, 385 S.W. 8, 13 (Mo. 2013) (en banc). The burden of proof regarding a claim of instructional error rests with the party alleging the error. *Van Volkenburgh v. McBride*, 2 S.W.3d 814, 821 (Mo. App. 1999) (citing *Cornell v. Texaco,*

Inc., 712 S.W.2d 680, 682 (Mo. 1986) (en banc)). Instructional error does not mandate reversal. *See Sorrell v. Norfolk Southern Ry. Co.*, 249 S.W.3d 207 (Mo. 2008). "To reverse a jury verdict on grounds of instructional error, appellant must show that: 1) the instruction as submitted misled, misdirected, or confused the jury, and 2) prejudice resulted from the instruction." *Cornell*, 712 S.W.2d at 682. When an instruction was erroneous, but does not prejudice the complaining party, a harmless error results.

A jury instruction must be supported by substantial evidence which, if true, is probative and from which the jury can reasonably decide the case. *Holder v. Schenherr*, 55 S.W.3d 505, 507 (Mo. App. 2001) (citing *Doe v. Alpha Therapeutic Corp.*, 3 S.W.3d 404, 419 (Mo. App. 1999). "In determining whether there was substantial evidence to support the giving of a particular instruction, we view the evidence in the light most favorable to the party tendering the instruction." *Van Volkenburgh*, 2 S.W.3d at 821 (citing *Porter v. Bi-State Development Agency*, 710 S.W.2d 435, 437 (Mo. App. 1986)).

B. ARGUMENT

1. The Appellant's Alleged Error is Not Preserved for Review

At trial, Appellant argued to the trial court that Instruction No. 10 should not be accepted or submitted to the jury because it misstated the law with respect to the battery claim and the law with respect to the defense of battery. Appellant also generally objected to the instruction on the basis that it was not supported by the evidence and mislead the jury. (Tr. Vol. II at 863-864). At no time did Appellant suggest to the trial court that the instruction was improper because the instruction hypothesized that all the batteries occurred

after the alleged attempt to flee when in fact, a battery had allegedly occurred prior to the attempt to flee.

This Court has held that when an alleged error on appeal relating to an instruction differs from the objections made to the trial court, the error may not be reviewed on appeal. *Giddens v. Kansas City S. Ry. Co.*, 29 S.W. 3d 813, 823 (Mo. banc 2000). In that Appellant has raised a different challenge to Instruction No. 10 than that which was made to the trial court, the claim has not been preserved. While this Court may exercise its discretion and review for plain error, Respondent respectfully suggests to this Court that it should decline to do so. *See State v. Ousley*, 419 S.W. 3d 65, 75 (Mo. banc 2013) (plain error review is discretionary when manifest injustice or a miscarriage of justice has resulted). For instructional error to rise to the level of plain error, an appellant must demonstrate that the trial court so misdirected or failed to instruct the jury as to cause manifest injustice or a miscarriage of justice. *Id.* The Appellant has failed to argue or demonstrate either manifest injustice or a miscarriage of justice. Therefore plain error should be declined.

2. Instruction No. 13 Was Supported By Competent and Substantial Evidence

Appellant argues that the trial court erred in giving Instruction No. 10 because it instructed the jury on the affirmative defense with the presumption that the force used against Appellant occurred after her attempt to flee when the evidence showed physical contact between the loss prevention officer and Barkley prior to that time. The logic of Appellant's argument demonstrates that if any error occurred, it was harmless error. Appellant claims

Instruction No. 10 was given in error because the jury should have been instructed that the affirmative defense applied to *all* of Respondent's physical contact with Appellant and not just that contact after Appellant attempted to flee. If the jury was instructed that Respondent's use of force against Appellant was only justified if it was to prevent her from fleeing, then the jury should have returned a verdict in favor of Appellant as to the prior alleged batteries. Instead, the jury returned a defense verdict for Respondent on both the battery claim and the false imprisonment claim in 56 minutes. (Tr. Vol. II at 931-32). Moreover, the jury may have found that Appellant did not meet her burden of proof on Instruction No. 9 to demonstrate that the batteries caused Barkley bodily harm. (LF at 53). Appellant admitted during her direct testimony that she had not received any medical treatment which she related to the incident. (Tr. Vol. at 438). Barkley's treating physician testified that Appellant had not complained to her of any injuries related to the incident at Price Chopper and that she related none of her physical complaints to the incident. (Tr. Vol. II at 832-34). The jury's verdict could have reflected that Appellant had not proven her battery claim and that they did not need to consider the affirmative defense in Instruction No. 10. For that reason, if any error occurred in submitting Instruction No. 10, such error did not prejudice Appellant and, therefore, constitutes harmless error.

III. THE TRIAL COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF APPELLANT'S TREATING PHYSICIAN, DR. MARJON GILLBANKS, THAT APPELLANT HAD TWICE OBTAINED A DOCTOR'S EXCUSE FROM JURY DUTY PRIOR TO THE INCIDENT AT PRICE CHOPPER

BECAUSE SUCH TESTIMONY WAS RELEVANT AND PROBATIVE TO APPELLANT'S CLAIM FOR DAMAGES FOR PERSONAL INJURY IN THAT EVIDENCE THAT APPELLANT HAD TWICE BEEN EXCUSED FROM JURY DUTY BY HER PHYSICIAN DEMONSTRATED THAT HER PREEXISTING INJURIES HAD SIGNIFICANTLY LIMITED HER ACTIVITIES AND PHYSICAL ABILITIES PRIOR TO THE INCIDENT AT PRICE CHOPPER

A. STANDARD OF REVIEW

"A trial court 'enjoys considerable discretion in the admission or exclusion of evidence, and, absent clear abuse of discretion, its actions will not be grounds for reversal.'" *Peterson v. Progressive Contractors, Inc.*, 399 S.W.3d 850, 869 (Mo. 2013) (citing *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 756 (Mo. 2011) (en banc)). It abuses this discretion when its ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful deliberate consideration. *In re Care & Treatment of Donaldson*, 214 S.W. 3d 331, 334 (Mo. Banc 2007). "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion. *St. Louis Cnty. v. River Bend Estates Homeowner's Ass'n,,* 408 S.W. 3d 116, 123 (Mo. Banc 2013). On appeal, the appellate court presumes that rulings within the discretion of the trial court are correct and the appellant bears the burden of showing that the trial court abused its discretion. *Peterson v. Progressive Contractors, Inc.*, 399 S.W.3d 850, 869 *(Mo. 2013)* (citing *Skay v. St. Louis*

Parking Co., 130 S.W.3d 22, 26 (Mo. App. 2004)). "Error is not prejudicial 'unless there is a reasonable probability that the trial court's error affected the outcome of the trial.'" *Id.* (citing *Elliott v. State*, 215 S.W.3d 88, 93 (Mo. 2007) (en banc)).

B. ARGUMENT

1. The evidence of Dr. Gillbanks was both logically and legally relevant

Appellant argues that testimony from her treating physician, Dr. Marjon Gillbanks, that she had twice excused Barkley from jury duty two years prior to the incident at Price Chopper, was neither logically relevant nor legally relevant. (Appellant's Substitute Brief at 34-37). Specifically, Appellant argues that Dr. Gillbanks' testimony on that issue was irrelevant because she had already conceded that she had severely limiting preexisting conditions. The Appellant claims that as a result of the admission of the evidence she was prejudiced.

Relevancy is found if the evidence logically tends to support or establish a fact at issue. *State v. Hutchinson*, 957 S.W. 2d 757, 763 (Mo. banc 1997). Evidence is logically relevant if such evidence tends to make a material fact more or less probable than it would without the evidence. *State v. Sladek*, 835 S.W. 2d 308, 314 (Mo. banc 1992); *Mengwasser v. Anthony Kempker Trucking, Inc.*, 312 S.W.3d 368, 372 (Mo. 2010). Logical relevance has a very low threshold. *State v. Anderson*, 76 S.W. 3d 275, 277 (Mo. banc 2002). In this case the Appellant placed her medical condition at issue. In fact, during closing arguments, Appellant argued that a result of the conduct of the loss prevention officers she suffered pain "when she got off the bench to see the police officers. She could hardly walk and had those problems for awhile." (Tr. Vol. II at 897-898). The Appellant alleged that the conduct of the officers created pain to

her shoulder, back, neck and head. (Tr. Vol. II at 897-898). Dr. Gillbanks gave Appellant a doctor's excuse for jury service in 2007 because of "musculoskeletal problems, she is unable to sit comfortably for any length of time." (Tr. Vol. II at 820-821). The doctor further stated on the excuse that "she spent a lot of time in bed and in a recliner, and sitting on a jury would not be conducive to her good health." (Tr. Vol II at 821). Similarly, Dr. Gillbanks gave Appellant a doctor's excuse for jury service in 2011 "[b]ecause she continues to have chronic pain with any amount of being in one position as told to me, and that including sitting . . . ." (Tr. Vol. II at 821).

The evidence regarding Dr. Gillbanks' basis for writing jury excuses for Appellant, based upon her ability to sit for periods of time, was logically relevant to a material fact in the case: the Appellant's alleged injuries as a result of the incident as well as her alleged pain and suffering. The fact that Appellant did not allege permanent injuries does not render this evidence logically irrelevant. Therefore the trial court did not abuse its discretion in admitting this evidence based upon logical relevance.

Likewise, to be legally relevant evidence, the probative value of the evidence must outweigh any detrimental effect, including any "unfair prejudice, cumulativeness, confusion of the issues, misleading the jury, undue delay or waste of time." *State v. Davis*, 318 S.W 3d 618, 640 (Mo. banc 2010). In this case, Dr. Gillbanks testified that in 2007, Appellant was unable to sit in a chair for eight to twelve hours due to her chronic pain from her pre-existing injuries. (Tr. Vol. II, at 820-22). At trial, Appellant conceded for the first time that she did not relate her post-incident medical treatment to the incident at Price Chopper. (Tr. Vol. I, at 438; Vol. II,

at 290-94). Appellant had testified prior to trial that she had injured her right shoulder, neck, back, and left leg in the incident, and that her medical treatment was related to the incident at Price Chopper. (Tr. Vol. I at 286-95). Dr. Gillbanks testified that Appellant had reported nothing to her that would give her a medical basis to conclude that any injury had resulted from the incident at Price Chopper. (Tr. Vol. II at 832-34).

Dr. Gillbanks' testimony regarding the Appellant's medical condition was relevant in that it logically tended to prove or disprove a fact in issue, i.e., whether the injuries and pain that Appellant claimed were the result of the incident or her preexisting condition. Evidence of Appellant's physical condition at the time the jury duty excuses were written in 2007 was relevant and probative because the testimony provided context for how Appellant's preexisting condition affected her physical abilities prior to the incident so that the jury could weigh an appropriate damage award for personal injuries if liability for battery was determined in Appellant's favor. Despite Appellant's admission that she did not relate her subsequent medical treatment to the incident, Appellant never withdrew her claim for monetary damages for bodily injury. (Tr. Vol. I at 438; Vol. II at 899). Respondent knows of no case where a party is precluded from adducing evidence on a contested material fact, simply because the other party made some form of concession or admission related to that material fact. Appellant testified at trial that during and after the incident her arms were sore from the handcuffs, her left leg was numb, and her right leg, low back, hips, and head were hurting after the incident. (Tr. Vol. I at 418, 420, 433). In closing arguments, Appellant asked the jury to award her $35,000 in damages for "that battery and injuries that were directly caused from it," (Tr. Vol. I

at 286-95; Vol. II at 899). Evidence regarding her physical condition prior to the incident was probative to establish Appellant's physical condition prior to the incident. "In an action for personal injuries, the health and physical condition of the injured person both prior and subsequent to the occurrence is material. In any such case, competent evidence tending to prove or disprove the nature and extent of the injuries alleged to have been received is admissible." *Eickmann v. St. Louis Public Service, Co.*, 323 S.W.2d 802, 806 (Mo. 1959).

A trial judge has wide latitude on whether to admit or exclude evidence, and discretion to determine the materiality and relevancy of evidence. *Giles v. Riverside Transport, Inc.*, 266 S.W.3d 290 (Mo. App.2008). "The admission or exclusion of evidence is within the sound discretion of the trial court and will not be reversed unless there is a substantial or glaring injustice. *Fierstein v. DePaul Health Center*, 24 S.W.3d 220, 225 (Mo. App. 2000). Furthermore, relevant evidence is not inadmissible simply because it is prejudicial. *State v. Wood*, 596 S.W.2d 394, 403 (Mo. 1982). The trial court held that the testimony regarding the jury duty excuses was relevant and probative to establish Barkley's pre-existing condition and to "buttress" Barkley's claim that she had pre-existing injuries. (Tr. Vol. I, at 286-95; Tr. Vol. II, at 813).

Appellant claims her right to due process was violated by the admission of Dr. Gillbanks' testimony regarding the medical excuses for jury service. This Court has held that if such a claim is not raised in the Points Relied On, it is not properly before the Court. *Smith v. Brown & Williamson Tobacco Corp.*, 410 S.W. 3d 623, 630, fn. 2 (Mo. banc 2013). Appellant

did not raise a constitutional and/or due process claim in her Points Relied On. Therefore this claim should not be considered by this Court.

In this case, the trial court's decision to admit Dr. Gillbanks' testimony regarding Appellant's two prior excuses from jury duty due to the seriousness of her preexisting condition cannot be said to be so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful deliberate consideration. *In re Care & Treatment of Donaldson*, 214 S.W. 3d at 334. Therefore the trial court's judgment should be affirmed.

2. Statements of Respondent's counsel during closing arguments did not effect Appellant's substantial rights or result in manifest injustice

Appellant also argues in Point III of her brief that defense counsel's thanking of the jury for honoring their jury summonses during closing arguments was prejudicial. (Appellant's Substitute Brief at 39). Appellant's counsel made no objection to the comment at trial. (Tr. Vol. II, at. 921). An objection to a comment made during closing argument must be timely made, which necessitates that it be made at the earliest opportunity after the objectionable character of the evidence becomes apparent to allow the trial judge to correct that which is later claimed to be error. *Warren Davis Prop. V, L.L.C. v. United Fire & Cas. Co.*, 111 S.W.3d 515, 529 (Mo. App. 2003). "Generally, failure to object to an argument or statement at the time it is made to a jury results in a waiver of any right to complain to the argument or statement on appeal." *Glasscock v. Miller*, 720 S.W.2d 771, 777 (Mo. App. 1986) (citing *Mueller v. Storbakken*, 583 S.W.2d 179, 186 (Mo. 1979) (en banc). This is because if objection is not

timely made, the trial court has no opportunity to take corrective action. *Id.* (citing *Hensic v. Afshari Enterprises, Inc.*, 599 S.W.2d 522, 526 (Mo. App. 1980)). Absent objection by Appellant's counsel, this Court may only review for plain error. *See* Mo. R. Civ. P. 84.13(c); *see also Koedding v. Kirkwood Contractors, Inc.*, 851 S.W.2d 122, 126 (Mo. App. 1993). Plain error will only require reversal is one that, on its face, establishes that the error affected his substantial rights resulting in manifest injustice or miscarriage of justice has occurred. Rule 84.13(a) & (c); *see also Ruhl ex rel. Axe v. Ruhl*, No. WD 75358, 2013 WL 2990666 (Mo. App. June 18, 2013) (citing *Downard v. Downard*, 292 S.W.3d 345, 348 (Mo. App. 2009)). The comment did not affect the plaintiff's substantial rights or result in manifest injustice because the jury was already aware that Dr. Gillbanks had twice excused Barkley from jury duty for medical reasons. As discussed above, Dr. Gillbanks' testimony on this issue was relevant and probative on the seriousness of the plaintiff's preexisting condition. Therefore, the trial court's judgment should be affirmed.

IV. THE TRIAL COURT DID NOT ERR IN REFUSING BARKLEY'S OFFER OF PROOF OF EXHIBITS 88, 89, AND 90 AND THE JACKSON COUNTY CIRCUIT COURT FILE IN *RIZO V. McKEEVER* BECAUSE THE OFFERED EXHIBITS WERE IRRELEVANT TO APPELLANT'S CLAIMS, INADMISSIBLE CHARACTER EVIDENCE, AND PREJUDICIAL TO RESPONDENT IN THAT EXHIBITS 88 AND 89 WERE WRITTEN REPORTS OF RESPONDENT'S LOSS PREVENTION OFFICER'S CONDUCT AFTER THE DATE OF APPELLANT'S INCIDENT, THE *RIZO* CASE INVOLVED

DIFFERENT LOSS PREVENTION OFFICERS AND A DIFFERENT CLAIM OF WRONGDOING, EXHIBITS 88, 89 AND 90 AND THE *RIZO* FILE WERE EVIDENCE OTHER ALLEGED BAD ACTS BY RESPONDENT'S LOSS PREVENTION OFFICERS OFFERED TO PROVE CONDUCT IN CONFORMITY THEREWITH, AND SUCH EVIDENCE SUGGESTED RESPONDENT WAS A BAD COMPANY

A. STANDARD OF REVIEW

A trial court 'enjoys considerable discretion in the admission or exclusion of evidence, and, absent clear abuse of discretion, its actions will not be grounds for reversal.'" *Peterson v. Progressive Contractors, Inc.*, 399 S.W.3d 850, 869 (Mo. 2013) (citing *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 756 (Mo. 2011) (en banc)). "On appeal, we presume that rulings within the discretion of the trial court are correct and the appellant bears the burden of showing that the trial court abused its discretion." *Id.* "Error is not prejudicial 'unless there is a reasonable probability that the trial court's error affected the outcome of the trial.'" *Id.* (citing *Elliott v. State*, 215 S.W.3d 88, 93 (Mo. 2007) (en banc)).

B. ARGUMENT

1. The Trial Court Did Not Err in Refusing to Admit Appellant's Exhibits 88, 89, and 90

Appellant argues that the Court erred in excluding evidence that Respondent's loss prevention officer Jason Herrington, received Employee Warning Reports before and after Barkley's incident on May 24, 2009 because Appellant sought punitive damages.

(Appellant's Substitute Brief at 40) Herrington received an Employee Warning Report on December 6, 2008, for failing to inform manager of a customer (employee) contact and overstepping his authority in handling the customer contact; on September 7, 2009, for using foul language towards a shoplifter; on July 22, 2010 for tardiness; and on March 17, 2011 for treating shoplifters in a disrespectful manner. (Tr. Vol. I at 23). The trial court correctly excluded evidence of these Warning Reports because such evidence was irrelevant, not so connected with the particular acts alleged that the they showed disposition, intention or motive, and therefore were unfairly prejudicial to Respondent. "Evidence is not relevant and should be excluded, if the danger of unfair prejudice outweighs the probative value of the evidence." *Emerson v. Garvin Group, LLC*, 399 S.W.3d 42, 47, n. 9 (Mo. App. 2013) (citing *Kroeger-Eberhart v. Eberthart*, 254 S.W.3d 38, 43 (Mo. App. 2007)).

In this case, the proffered reports did not demonstrate that the conduct referenced in the reports was sufficiently similar to the conduct which was the subject of the litigation. As noted in *Benedict v. Northern Pipeline Construction*, 44 S.W. 3d 410, 422 (Mo. App. 2001), before admitting similar occurrence evidence, a trial court must determine if the evidence is relevant and the occurrence bares sufficient resemblance to the injury causing incident, while weighing the possibility of undue prejudice and confusing of issues. This case is unlike *Krysa v. Payne*, 176 S.W. 3d 150, 159 (Mo. App. 2005), a case involving fraud in the selling of structurally damaged cars, wherein the trial court permitted an employee, who had testified about the sale of a specific truck which had underlying unibody and structural damage and further testified that such a sale was the standard practice of the car dealership, to then testify

about other vehicles which were sold without disclosing hidden unibody and structural damage. The case at bar is likewise dissimilar to *Charles F. Curry & Co. v. Hedrick*, 378 S.W. 2d 522, 536 (Mo. 1964) which involved a dispute about the sale of a Lockheed Lodestar twin engine airplane. An issue existed about the care of the airplane and whether a defendant acted in a manner to permit an award of punitive damages. The defendant had stated that the airplane could "set there till the damn wings fell off." The court permitted evidence regarding the subsequent conduct of the defendant regarding the airplane, including that he permitted it to sit for 15 months or longer while it deteriorated.

In this case, without any additional details than that which have been set forth above and which were summarily addressed in the reports, the trial court found, in its discretion, that the reports were irrelevant, and alternatively that any probative value was outweighed by their prejudicial impact. The trial court's discretionary decision was not without careful consideration and does not shock the conscious.

Additionally, as a general rule, evidence of a person's character or a trait of his character is inadmissible if offered solely for the purpose of proving that the person acted in conformity with that character on a particular occasion. *See, e.g., State v. Driscoll*, 55 S.W.3d 350, 354-55 (Mo. 2001). This is so not because such evidence is irrelevant but because "evidence on the collateral issue of character … comes with too much dangerous baggage of prejudice, distraction from the issues, and surprise." *Williams v. Bailey*, 759 S.W.2d 394, 396 (Mo. App. 1988). Ordinarily, evidence of the reputation of a defendant in a civil assault and battery case is not admissible. *Parker v. Wallace*, 431 S.W.2d 136, 140

(Mo. 1968) (citations omitted).

Any evidence that Jason Herrington received an Employee Warning Report was properly excluded by the trial court because the probative value of such evidence is substantially outweighed by the danger of unfair prejudice, undue delay, confusion of the issues and misleading the jury. Evidence of these reports certainly does not tend to show that Mr. Herrington called Barkley by a derogatory name or used excessive force toward Barkley on May 24, 2009.

2. The Trial Court Did Not Err in Excluding Evidence of Respondent's Involvement in the *Rizo v. McKeever Enterprises, Inc.* Case

Appellant argues that the Court erred in excluding evidence of Respondent's prior conduct in *Rizo, et al. v. McKeever Enterprises, Inc.*, Jackson County Circuit Court, Case No.: 0816-CV11527. The trial court properly excluded this evidence because it constituted improper character evidence of Respondent, and because the loss prevention officers in this case were not involved in the detention of the suspect in the *Rizo* case. (Tr. Vol. I, at 22). Furthermore, in the *Rizo* case, the jury found Respondent liable for improperly releasing a minor to someone other than her parent or legal guardian and not for battery of a suspected shoplifter. (Tr. Vol. I, at 19-20). Therefore, the issue in the *Rizo* case did not involve a battery and was under circumstances quite different from what the jury was to examine in the present case. The trial court properly excluded the evidence.

The *Rizo* case file does not meet the test for relevance. To be admissible, evidence must be relevant. *Kenton v. Hyatt Hotels Corp.*, 693 S.W.2d 83, 88 (Mo. 1985) (en banc).

Generally, Missouri courts will not admit evidence that other lawsuits have been brought against a particular defendant. *See e.g., Terry v. Mossie*, 59 S.W. 3d 611, 612 (Mo. App. W.D. 2001). In *Barr v. Plastic Surgery Consultants, Ltd.*, 760 S.W.2d 585 (Mo. App. 1988), the court held that prior lawsuits against a surgeon were inadmissible in a medical malpractice action against the same surgeon. The court concluded that the probative value of the lawsuits was slight in that the fact that they had been filed did not demonstrate whether or not the surgeon was competent. The court also concluded that the potential for prejudice to the defendant and confusion of the jury was large. *Id.* at 587.

Just as in *Barr*, evidence of the *Rizo* lawsuit against Respondent was properly excluded because it did not help prove or disprove whether Respondent was liable to Appellant for battery or false imprisonment. The only purpose the *Rizo* file would serve is to suggest that Respondent's store is bad, which is improper character evidence and prejudicial to Respondent. Thus the trial court did not abuse its discretion in excluding the evidence and the judgment should be affirmed.

CONCLUSION

The judgment of the trial court should be affirmed. This Court should find that the trial court did not err in giving Instructions Nos. 9 and 10 because they were supported by Missouri law and were supported by substantiated and competent evidence. This Court should also find that the trial court did not err in admitting Dr. Gillbanks' testimony that she excused Barkley from jury duty on two occasions prior to the subject incident because such evidence was probative to her preexisting condition which plaintiff placed at issue on that if such ever occurred, the error was not prejudiced. Finally, this Court should find that the trial court properly excluded Exhibits 88, 89, and 90 and the Jackson County Court file for the unrelated *Rizo* case on the grounds that those exhibits were irrelevant to the subject incident and highly prejudicial to McKeever, or alternatively, any error attributed to the exclusion of the evidence, was not prejudiced.

Defendant-Respondent respectfully requests that this Court issue an opinion affirming the trial court's judgment.

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RULE 84.06(c) CERTIFICATION

Undersigned counsel for Defendant-Respondent hereby certifies that this Respondent's Brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b) and (c) in that it contains 12,444 words and 1071 lines of mono-spaced type as counted using Microsoft Word 2007 and complies with Rule 84.06(g) in that Respondent's Brief has been scanned for viruses and that it is virus-free and has been formatted in Microsoft Word 2007.

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Dated: September 30, 2014

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Substitute Brief of Defendant-Respondent and Appendix was mailed, postage prepaid, this 30th day of September, 2014 to:

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