IN THE SUPREME COURT OF MISSOURI

MOUNA APPERSON, Appellant, v. NATASHA KAMINSKY, ET AL., Respondents.	))))))))	Cause No.: SC101020

APPEALED FROM THE CIRCUIT COURT
OF THE COUNTY OF SAINT LOUIS, MISSOURI
THE HONORABLE DAVID LEE VINCENT, III, CIRCUIT JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

John D. Kershman, #56357
Maximilian J. Mueller, #75688
Ahearn Kershman, LLC
230 S. Bemiston Ave., Suite 1005
Clayton, Missouri 63105
Office: (314) 373-7135
john@ak-stl.com
max@ak-stl.com
Attorneys for the Appellant

Justin K. Gelfand, #62265
Margulis Gelfand, LLC
7700 Bonhomme Ave., Suite 750
St. Louis, Missouri 63105
Office: (314) 390-0234
justin@margulisgelfand.com
Attorney for the Appellant

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This is the rare case where the parties that prevailed below are not even attempting to defend the basis on which the trial court granted directed verdicts or the different basis upon which the two-judge majority decision of the Court of Appeals affirmed. Indeed, when reading Respondents' brief, it is easy to lose sight of the fact that Respondents all but concede reversal is appropriate—and they noticeably ignore the questions this Court granted transfer to resolve. Instead, Respondents go to great lengths to argue facts that should be tried by a jury and law that would require this Court to overturn long-standing precedent for no good reason. But this Court should not take the bait.

The ultimate grounds for the trial court's decision to grant Respondents' directed verdicts are the same as the reasoning relied on by the Majority of the Court of Appeals—both holding that because Appellant did not present third party testimony in support of his damages, his defamation claim fails as a matter of law. Appellant sought and was granted transfer to this Court based on his argument that the trial court and court of appeals erred as a matter of law. Respondents literally do not even suggest in their brief that the trial court and court of appeals were right in their reasoning, nor that Appellant's argument is wrong. Instead, they expect this court to ignore the errors below entirely and allow their verdicts to stand on different grounds which no prior court in this case has heard or ruled on. Respondents approach this case as if the decisions (and their reasoning) giving rise to the case pending before this Court never even happened. But they did, and that is what this case is about.

As an initial matter, Respondents do not even attempt to defend the basis on which the trial court granted directed verdicts: a misreading of two cases, *Bauer* and *Fireworks*. *See Bauer v. Ribaudo*, 975 S.W.2d 180 (Mo. Ct. App. 1997); *The Fireworks Restoration Co., LLC v. Hosto*, 371 S.W.3d 83 (Mo. Ct. App. 2012). Indeed, they do not even address, let alone grapple with, either case—despite the fact that these are they cases upon which their motions for directed verdict were founded. But what jumps off the pages of their brief is that Respondents also do not defend the basis upon which the majority opinion of the Court of Appeals upheld the trial court's directed verdicts: a misreading of two *different* cases, *Taylor* and *Kenney*. *See Taylor v. Chapman,* 927 S.W.2d 542 (Mo. Ct. App. 1996); *Kenney v. Wal–Mart Stores, Inc.*, 100 S.W.3d 809 (Mo. banc 2003). At its core, Respondents' decision not to try to defend what transpired in the courts below is not surprising because the trial court's directed verdicts as affirmed by the Court of Appeals is as legally wrong as it is factually unwarranted.

Instead, Respondents attempt to throw a Hail Mary by asking this Court to make credibility determinations as to evidence and testimony presented at trial and to somehow find—as a matter of law—not only that Kaminsky's and Norman's false statements that Apperson is a "rapist" were true, but also that the abundance of concrete, specific ways in which Apperson's reputation was harmed is not credible and is somehow speculative. This approach ignores that binding precedent expressly forbids that on appeal. *See Delacroix v. Doncasters, Inc.*, 407 S.W.3d 13, 26 (Mo. Ct. App. 2013) ("In reviewing whether a case was submissible, this Court considers the evidence and all reasonable inferences drawn therefrom in the light most favorable to the plaintiff and disregards all contrary evidence

and inferences.") (emphasis added). And for good reason; these are classic jury questions requiring credibility determinations in a trial courtroom. Apperson compellingly testified at trial that those statements were false and, at a minimum, that creates a factual question that must be resolved by a jury.

But there is another well-settled consequence arising out of Respondents' failure to address—let alone defend—the bases upon which they obtained directed verdicts: this constitutes clear-cut waiver in this Court. *See, e.g., Boyer v. Grandview Manor Care Ctr., Inc.*, 793 S.W.2d 346, 347–48 (Mo. 1990) ("It is, of course, axiomatic that issues not presented in the points to be argued in an appellate brief are abandoned and will not be considered by a reviewing court") (internal citations omitted); *DePaul v. Div. of Emp. Sec.*, 676 S.W.3d 495, 497 (Mo. Ct. App. 2023) ("In the absence of a stated policy by this Court, it behooves a respondent to always address the merits of the appellant's points on appeal, rather than risk having this Court decide the case on the merits without the benefit of the respondent's arguments"). Respondents curiously approach this case as if the only false statements at issue are that Apperson is a "rapist" and/or a "serial rapist." But it is about so much more than that: a calculated, coordinated smear campaign that destroyed Apperson's reputation through a series of false statements.

As we set out in our opening brief, this case matters profoundly for the state of defamation law in Missouri. To affirm, this Court would have to rewrite Missouri law to create a new and unique requirement for defamation plaintiffs to present third-party testimony supporting their damages; set aside 20 years of precedent to grant a directed verdict on grounds entirely different from the grounds raised by Respondents and accepted

by the court at the trial level; independently advocate for Respondents by addressing Appellant's points on appeal which Respondents deliberately chose to ignore; and, as to the false statements about Apperson being a rapist, serial rapist, and serial abuser, this Court would have to make credibility determinations that Apperson's testimony that those statements were false should not be believed. And, in doing so, this Court would make Missouri the only jurisdiction in the country that requires third-party testimony to support damages in a defamation case of this nature.

I. Appellant Presented Sufficient Evidence that Respondents' Statements Were False, Were Published with the Requisite Degree of Fault, and Damaged Appellant.

a. Standard of Review

i. This case is not about "contradictory factual inferences".

Respondents cite a string of personal injury cases for the unremarkable proposition that "this Court will not supply missing evidence or give the plaintiff the benefit of unreasonable, speculative, or forced *inferences*." Respondents' Brief at 15 (*Brock v. Dunne*, 637 S.W.3d 22, 27 (Mo. 2021); *State v. Lehman*, 617 S.W.3d 843, 847 (Mo. 2021) (emphasis added; internal quotations omitted). "If the plaintiff's evidence presents a situation from which liability or nonliability may be equally *inferred*, the court must declare that no case has been made." Respondents' Brief at 15 (quoting *Farnham v. Boone*, 431 S.W.2d 154, 156 (Mo. 1968) (emphasis added; internal quotations omitted). "In other words, if the plaintiff's evidence—including the admissions the plaintiff makes on cross-examination, *see Erdman* [*v. Condaire, Inc.*], 97 S.W.3d [85,] 88 [(Mo. App. E.D. 2002)]—affords no more than equal support for either of two inconsistent and contradictory

inferences as to the ultimate and determinative fact, liability is left in the field of conjecture, and there is a failure of proof." Respondents' Brief at 15 (quoting *Stark v. American Bakeries Co.*, 647 S.W.2d 119, 125 (Mo. 1983)) (emphasis added, internal quotations omitted). While Respondents accurately recite Missouri case law, they are entirely irrelevant to the issues now before this Court—because Apperson present sufficient evidence to make a submissible case without having to rely on inferences.

Brock concerns a negligence claim in which this Court held an inference as to the requisite mental state to increase a risk of injury to the plaintiff is improper where the only evidence was that the defendant removed a safety guardrail. *Brock*, 637 S.W.3d at 29-30. This Court concluded, "[e]ven though direct evidence of intent may be rare, there is still not sufficient evidence here to make a reasonable inference that Edwards lifted the safety gate with the intention and purpose to increase the risk of injury to Brock" and "[m]aking such an inference is neither reasonable nor rational given the circumstances surrounding this case." *Id*. *Farnham* was a humanitarian negligence case in which this Court held that where "*the only source of evidence* on the exact occurrence of the collision, is too vague and indefinite to support a finding of when a situation of immediate danger arose," the necessary inferences for a verdict in the plaintiff's favor were relegated to "guesswork, speculation, or conjecture" which did not amount to substantial evidence. *Farnham*, 431 S.W.2d at 158 (emphasis added). In *Erdman*, the Court of Appeals held that a plaintiff may prove ultimate facts by circumstantial evidence (due to a lack of direct evidence) but that "the circumstantial evidence must be substantial, and it must establish the desired inference with such certainty as to cause it to be the more reasonable and probable of the conclusions

to be drawn." *Erdman*, 97 S.W.3d at 92-93. In *Stark*, this Court similarly held that where a plaintiff proves an essential element by circumstantial evidence which necessarily requires an inference in the plaintiff's favor, the plaintiff's burden had not been met where the inference he sought was no more probable than any other. *Stark*, 647 S.W.2d at 125.

But these cases are a far cry from what Apperson established in his case-in-chief at trial. Each of these cases concerned a plaintiff seeking *to prove an essential element by circumstantial evidence and thereby relying on inferences*. But Apperson has not relied on circumstantial evidence to prove Respondents' statements that he is a rapist are false. Rather, Apperson introduced direct evidence in the form of his testimony denying he raped them—making this a classic jury question requiring a credibility determination by the fact-finder. Therefore, the holdings in these cases simply have no application to Appellant's claims. None of these cases even remotely stands for the proposition that an inference in a defendant's favor supersedes a plaintiff's direct evidence on an essential element for directed verdict purposes. And in the context of directed verdicts, as here, that makes sense because "[c]onflicting evidence and inferences are disregarded." *Keveney v. Missouri Military Acad.*, 304 SW 3d 98, 104 (Mo. 2010).

ii. Respondents waived any arguments in support of their directed verdict which are not related to damages.

In a last-ditch effort to save the trial court's directed verdicts and the majority opinion of the Court of Appeals affirming those verdicts, Respondents do not actually defend what they argued at the trial court or the basis affirming the directed verdicts at the Court of Appeals. Instead, Respondents rely on new grounds which were never raised

before the trial court. Rather than address the grounds on which they obtained a directed verdict which were affirmed on appeal, Respondents ask this Court to overturn 20 years of precedent to allow them to support their directed verdicts on entirely different grounds. Respondents acknowledge, as they must, that three decisions of the Court of Appeals—decided by panels in the Eastern District, the Western District, and the Southern District and dating as far back as 2004—"ha[ve] ruled that a respondent urging affirmation of a directed verdict may not raise new arguments for the first time on appeal." Respondents' Brief at 17 (citing *Kottman v. Missouri State Fair,* 451 S.W.3d 331, 335 n.2 (Mo. App. W.D. 2014); *Rice v. BNSF Railway Co.*, 346 S.W.3d 360, 369 (Mo. App. S.D. 2011); *Cupp v. Nat'l Passenger Corp.*, 138 S.W.3d 766, 772-73 (Mo. App. E.D. 2004)). But in a desperate attempt to save this case from reversal, Respondents assert that "all three of these cases are blatantly wrong." *Id*. As such, Respondents ask this Court to abrogate *Kottman, Rice,* and *Cupp*, and to allow them to raise new arguments at this stage. Indeed, the fact that Respondents are not even attempting to defend the bases on which they prevailed below speaks volumes.

Kottman, Rice, and *Cupp* are well-reasoned, consistent with this Court's precedent, and comport with this Court's Rules. These cases simply stand for the uncontroversial proposition that an argument not presented to the trial court is not properly preserved for appeal. And while this certainly applies to an appealing party, it logically applies to respondents as well. Had Respondents' motions for directed verdict been denied, their arguments first raised on appeal purportedly supporting a directed verdict would have been waived. *See* Rule 78.07; *see also Johnson v. Allstate Indem. Co.,* 278 S.W.3d 228, 234

(Mo. Ct. App. 2009) ("A defendant's failure to file a motion for directed verdict which states the specific grounds therefore not only precludes the defendant from obtaining judgment notwithstanding the verdict in its favor, but also further precludes it from obtaining appellate review of the trial court's failure to enter judgment notwithstanding the verdict.").

Though typically discussed in the context of an appellant's points on appeal, this Court has long held that issues not presented to and expressly decided by the trial court are not the proper subject of appeals. "The requirements for preserving constitutional issues[1] for appeal are in place 'to permit the trial court an opportunity to fairly identify and rule on the issue.'" *Mayes v. St. Luke's Hosp. of Kan. City*, 430 S.W.3d 260, 267 (Mo. 2014) (citing *Land Clearance for Redevelopment Auth. of Kansas City, Missouri v. Kansas Univ. Endowment Ass'n*, 805 S.W.2d 173, 175 (Mo. banc 1991)). "It is well recognized that a party should not be entitled on appeal to claim error on the part of the trial court when the party did not call attention to the error at trial and did not give the court the opportunity to rule on the question." *Id*. A party seeking review of a trial court decision must have raised the issue before the trial court in order to give it an opportunity to *actually make* a decision; and it must be raised at the earliest opportunity. *Id*. The trial court is in the best position to observe the evidence, weigh the credibility of witnesses, and make decisions based on its observations.

[1] "This requirement is not limited to constitutional questions […]" *Mayes*, 430 S.W.3d at 267.

Respondents had ample opportunity to raise any and all grounds in support of their motions for directed verdict with the trial court. They deliberately chose to base their motions on one claim: that Appellant failed to present "any evidence" of damages. At the close of Appellant's case at trial, neither Respondent even suggested that Appellant had failed to present a submissible case as to falsity or the requisite degree of fault, or any other reason other than his damage. As such, the trial court never had an opportunity to determine whether these newly-raised grounds for directed verdicts supported their entry. This Court should not substitute its judgment—and view of the evidence—for that of the trial court when the trial court never ruled on these issues. Just as Appellant cannot raise issues for the first time on appeal and in accordance with 20 years of precedent, Respondents should not be permitted to raise new grounds in support of their motions for directed verdict at this stage.

This Court should reject Respondents' contention outright, uphold 20 years of precedent, and reverse the order granting a directed verdict because it was legally erroneous and that is why no party is defending it on appeal.

b. Appellant made a submissible case as to the falsity of Respondents' statements that he is a rapist.

Notwithstanding waiver, even if this Court were to address the merits of Respondents' new arguments, it bears noting at the outset that their claim that Appellant failed to establish the falsity of Respondents' statements that he is a rapist, serial rapist, and serial abuser are largely based on a blatant misreading of the record below. Respondents claim, "[w]hile Apperson denied at trial to ever raping Norman, he also

admitted that he had previously texted her admitting that he had ejaculated inside her without her consent, and that this constituted rape." Respondents' Brief at 20 (emphasis added). The suggestion that Appellant admitted to ejaculating inside Norman without her consent is demonstrably false; Appellant made an apology to Norman without ever admitting to any wrongdoing—because "it was easier to just say [he was] sorry" in an informal conversation with his ex-significant other. Tr.169:24-170:1; 170:14-171:4-14.[2] When expressly asked on the witness stand whether he did in fact ejaculate inside her without her consent, he unequivocally testified under oath, "No." Tr. 171:18-19.

To be clear, no inferences need to be made regarding the falsity of Respondents' statements, and any inferences Respondents conjure up in support of their directed verdicts must be disregarded in reviewing the grant of their directed verdicts. *See Keveney*, 304 SW 3d at 104. Appellant presented direct evidence that the statements that he is a rapist are false, and that he never ejaculated inside Norman without her consent. (*See* Tr. 170:2-6; Tr. 171:12-19). He also testified that he apologized to Norman when she accused him of ejaculating inside her without consent despite never having done so, because "it was easier to just say I'm sorry, than it was to say anything else." Tr. 171:16-17. There is no contradictory testimony, and this Court is unambiguously not "confronted with the unusual

[2] Apperson testified, "I did apologize. We had this conversation. This was a -- there was a lot going on for her at this time, and it was easier to just say I'm sorry, than it was to say anything else." Tr. 171:14-17. When asked immediately thereafter, "[d]id you ejaculate in her without her consent?" Apperson answered, "No." Tr. 171:18-19. Exhibit E—which Respondents cite to support their claim that Apperson admitted to ejaculating inside Norman without consent, does not contain the admission Respondents claim it does; it contains an apology consistent with Apperson's testimony. (Ex. E, Rsp.Apx.A3).

and rare situation in which the plaintiff in a defamation case admits at trial that he previously told the defendant that the statement in question was true" as Respondents insist. Respondents' Brief at 20. Similarly, there are no "contradictory but equally-plausible inferences that can be made" because Appellant's testimony is not contradictory at all. *Id*. And, though not the factfinder in a jury trial, the trial court agreed on the record that Appellant's testimony was not contradictory: "I think if you understand Mr. Apperson's testimony, he's apologizing just to kind of the [sic] deescalate the conversation, not necessarily because of what he is saying, his ejaculation issue or anything like that, but he knows that she may be going through, […] and if that is disturbing her enough, he just wants to apologize and get it over with, but his explanation would be that he's not apologizing for that, that episode." Tr. 175:3-13. This was the observation of the trial court based on what actually transpired at trial—and to the extent Respondents want to interpret the evidence and testimony differently, that is a question for the jury, not for the Missouri Supreme Court.

Indeed, "[t]he jury is the sole judge of the credibility of witnesses and the weight and value of their testimony and may believe or disbelieve any portion of that testimony." *Keveney*, 304 SW 3d at 105 (internal quotation and citation omitted). The authorities cited by Respondents relating to inferences stemming from circumstantial evidence have no bearing on this case, where the element in question was proven by direct evidence; it is a simple credibility determination for the jury—and, in any event, has no relevance to the issue actually pending before this Court.

c. Appellant far exceeded his burden in establishing that Respondents acted with the requisite degree of fault.

"Missouri has joined the majority of states, and applies a fault standard for defamation claims requesting actual damages on behalf of a private figure." *Englezos v. Newspress and Gazette Co.*, 980 S.W.2d 25, 31 (Mo. App. 1998). "As such," with regard to the requisite degree of fault, "a private figure must prove only [that the] defendant was at fault in publishing the statement." *Id*. There is "no Missouri authority for application of a standard other than fault." *Id*.

Respondents argue Appellant failed to establish that they acted negligently with respect to their repeated statements that Appellant is a rapist. Respondents then go on to claim for the first time that a directed verdict is therefore apparently proper based on Norman's subjective belief that Appellant's apology text message was an admission to rape—only when viewed in the light most favorable to Norman (as opposed to the non-moving party) and drawing improper inferences (in favor of Norman, not the non-moving party), all in direct contravention of longstanding precedent.

As it relates to Kaminsky, Respondents inexplicably assume, without any evidence, that "[a] reasonable investigation by her would have turned up Norman's accusation and the accompanying text message from Apperson apologizing for raping her." Respondents' Brief at 23. This entirely ignores the fact that Appellant's claims against Kaminsky are not merely based on Kaminsky's false statements that Appellant raped Norman. Kaminsky also publicly stated that Appellant raped Kaminsky—a statement which she admitted she knew was false, and which she does not defend on appeal. (*See* Tr. 279:1-22). To be clear,

Kaminsky was adamant at trial that her statements were true; but that does not entitle her to a directed verdict. In fact, it is precisely the type of factual dispute which makes this case appropriate for submission to the jury.

Even if this Court were to address Respondents' contention on the merits, it is plainly misguided—because the evidence that Respondents acted *intentionally* was overwhelming, let alone sufficient, for purposes of establishing a submissible case. At trial, neither Kaminsky nor Norman denied having publicly said that Appellant is a rapist, serial rapist, serial abuser, someone who has been criminally charged with tax evasion, a stalker, someone who has threatened to kill them, and someone who was not allowed within 500 feet of Kaminsky—all as alleged in this lawsuit. (*See* Tr. 291:16-294:10; 357:4-361:19; 98:9-24). In fact, when Kaminsky was asked at trial, "[s]o the real disagreement, the only disagreement that we have is whether what you publicly said about Mr. Apperson was true; correct[?]" Kaminsky answered, "Yes, sir." Tr. 295:15-296:5. Similarly, Norman did not deny that, ultimately, the only real disagreement between the parties was whether the statements she and Kaminsky made about Appellant were true. (*See* Tr. 372:17-373:18). Neither Respondent has ever disputed that she was at fault in causing the statements to be published or said. Neither Respondent has ever claimed she was not at fault in making her statements about Appellant. Rather, they only maintain that they are not liable for defamation because the statements, in their view, are true. Respondents' false statements, especially when viewed in the light most favorable to Appellant, were not only negligent—they were intentional.

The major flaw in Respondents' argument here is that it ignores the falsity element of a defamation claim altogether. Under Respondents' view, even if the jury believed the statements that Appellant is a rapist are false, they cannot be liable because they subjectively believed them to be true. Because both Kaminsky and Norman stated Appellant raped them personally, they necessarily had personal knowledge of whether those statements were actually true; no investigation was necessary. Nonetheless, they argue that their subjective belief, *i.e.,* opinion, about the truth of each statement is enough. Indeed, under their theory, all a defamation defendant needs to do to survive a lawsuit is testify as to her subjective opinion that a statement is true—even when the statements concern matters which are not opinions and are false statements of fact.

There is no dispute that Kaminsky and Norman publicly stated Appellant raped each of them and therefore was a rapist. They now seem to suggest that the truth of this allegation is a matter of opinion subject to interpretation. Missouri recognizes "an absolute privilege for expressions of opinion, broadly holding that any alleged defamatory statements that can be characterized as 'opinions,' are subject to the First Amendment absolute privilege." *Henry v. Halliburton*, 690 S.W.2d 775, 779 (Mo. 1985) (internal citation omitted). However, this exception does not allow defendants to escape liability simply by relying on a false premise that their defamatory statement—in *their* view—constitutes an opinion. "In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990), the Supreme Court clarified that [its defamation precedent] was not intended to create a wholesale defamation exemption for anything that might be labeled 'opinion' because expressions of opinion may, in fact, often imply an assertion of objective fact." *Smith v. Humane Soc'y of United States*, 519

S.W.3d 789, 798 (Mo. 2017) (internal citations omitted). Chief Justice Rehnquist's example in *Milkovich* is instructive:

> If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.' As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" It is worthy of note that at common law, even the privilege of fair comment did not extend to 'a false statement of fact, whether it was expressly stated or implied from an expression of opinion.'

Milkovich v. Lorain J. Co., 497 U.S. 1, 18–19 (1990) (internal citations omitted). This is precisely the case here. Viewing the evidence in the light most favorable to Appellant and ignoring all evidence and inferences to the contrary, Kaminsky and Norman's opinion that Appellant raped them is based on incorrect and incomplete facts, and their assessment of them is erroneous. Their subjective belief about the truth of their statements is irrelevant because their statements imply a false assertion of fact.

Kaminsky and Norman each admittedly publicized that Appellant raped them and was a rapist. Their statements are assertions of fact which are either objectively true or false. Kaminsky and Norman necessarily had personal knowledge of the truth or falsity of their statements. Thus, it follows that, because there is no dispute that Respondents were responsible for making their statements about Appellant, *i.e.* the statements were intentional—a finding in Appellant's favor as to the falsity element satisfies the fault element as well.

Respondents literally ask this Court to disregard any jury finding as to the falsity of their admittedly intentional and public statements that Appellant is a rapist. Regardless of whether their statements were objectively false, they ask this Court to find that they cannot be negligent if they subjectively believed their own false statements. This Court should reject that absurd contention.

d. Kaminsky made a judicial admission as to damages, and both Respondents admitted Appellant's reputation was damaged.

i. Appellant's argument is preserved.

Respondents' claim that Appellant's arguments relating to judicial admissions are not preserved is wrong. "Questions relating to motions for directed verdict that are granted at trial" "need not be included in [a motion for new trial] to preserve the allegations of error." Rule 78.07(a). Respondents' reliance on *Williams* to support their preservation argument is misplaced, because *Williams* concerns preservation under Rule 78.07(a)(2), while Appellant's points relied on are preserved under Rule 78.07(a)(3). *Williams v. St. Charles Auto Mart, Inc.*, 690 S.W.3d 495, 500-03 (Mo. App. E.D. 2024).

Even in the absence of Rule 78.07's express language that allegations of error relating to motions for directed verdict need not be raised in a motion for new trial, Appellant did so anyway. Appellant timely filed a motion for new trial in the trial court. L.F. 89, L.F. 90. In his motion and corresponding memorandum of law, Appellant alerted the Court to Respondents' admissions. *Id*. Appellant noted that the court erred because "a court cannot find evidence insufficient as to an element of a claim where, as here, the Defendants have admitted that element." L.F. 90 (citing *People v. Lobaugh*, 233 Cal. Rptr.

683, 686 (Cal. Ct. App. 1987) (holding defendant could not challenge sufficiency of the evidence as to allegations he admitted)). Appellant notes that, a "directed verdict may be proper" even in a plaintiff's favor where a defendant "'in her pleadings or by her counsel in open court admits, or by her own evidence establishes, [the elements of the claim], or where there exists no real dispute of the basic facts supported by uncontradicted testimony essential to the claim.'" *Id*. (citing *Williams v. Thompson*, 489 S.W.3d 823, 827 (Mo. App. 2015). Throughout his motion, Appellant argues that the trial court erred in granting directed verdicts because it failed to consider that Respondents admitted the damages element. The allegation of error is preserved.

ii. Both Respondents admitted that Appellant's reputation had been damaged.

There is no dispute Kaminsky admitted in her answer to Appellant's operative petition that falsely accusing somebody of serially committing sex crimes, falsely calling that person a rapist, and falsely calling somebody a serial rapist all negatively impact that persons' reputation. L.F. 31. The inquiry ends there; if the jury found Kaminsky's statements that Appellant is a rapist, serial rapist, and serially commits sex crimes were false, Appellant met his burden as to the damages relating to those counts because Kaminsky admitted as much in her answer.

Respondents' claim in their brief that these matters were outside of Kaminsky's personal knowledge are belied by the record. For example, Kaminsky admitted during her testimony that she knew Appellant had been removed from his office space as a direct result of an email she sent to the landlord of that company. (Tr. 254:6-256:9). Kaminsky

testified that she told the landlord Appellant raped her, wanted them to do something about it, and eventually learned that she was successful. (*Id*.) And this is consistent with documentary evidence of text messages she sent to a third party boasting about her success and stating, "Think of all of the posts I made, how people jumped on. People have banned [Apperson] from their spaces." (Tr. 271:10-273:12). Kaminsky knew that her false statements damaged Appellant's reputation, and she admitted it in her answer and testimony at trial.

While Norman's admissions were not as direct as Kaminsky's, Norman never denied that she was successful in damaging Appellant's reputation. Norman testified that statements like hers could and should damage an individual's reputation. This, coupled with uncontroverted evidence that Norman told Appellant's roommates he raped her and that they later ousted him from his own home as a direct result of her statements, is ample evidence of damages—especially in the directed verdict context.

e. Appellant made a submissible claim for damages.

i. Appellant presented evidence of when Norman declared him to be a rapist.

Respondents argue that, although Norman admitted to making the statements at issue in this case, she never testified to when she made them, and therefore Appellant's claim fails. This argument is misguided for three reasons: (1) because there is no requirement that a defendant *personally* testify to making a defamatory statement at an exact specified time, (2) Norman *did* personally testify about when she made her false

statements about Appellant, and (3) Appellant presented ample additional evidence about when Norman made her statements.

Norman testified that she told a number of people that Appellant raped her. (*See, e.g.,* Tr. 365:4-6). Appellant introduced documentary evidence showing that, on or about November 30, 2017, Norman publicly stated, "Tasha has been working patiently for months […] She has been working on my behalf as well as many other women." (Tr. 273:17-275:14). Kaminsky confirmed that this statement was true. (*Id*.) Norman specifically testified that she personally told several of Appellant's roommates that he is a rapist. (Tr. 357:15-364:16). She testified that in November of 2017, she truthfully posted on Facebook that Kaminsky had been working on her behalf *for months*, and that she knew Kaminsky was repeating her statements that Appellant was a rapist. (*Id*. (emphasis added)). She further testified that she *verbally* told Appellant's roommates that he was a rapist, but that she had moved away from Missouri by October 2017. (*Id*. *See also*, Tr. 366:10-11; 386:20-25.) She testified that she made her statements about Appellant throughout 2017 until 2019, and that she stated Appellant was a rapist. (Tr. 366:9-16).

In summary, Appellant presented sufficient evidence about when Norman made her statements that Appellant is a rapist for the jury to assess whether those statements caused (some or all of) Appellant's damages. By her own admission, Norman's statements were made from 2017 through 2019 and began "months" before November 2017.

ii. Appellant includes all defamatory statements and the individuals who made them in his lawsuit.

Respondents conclude their arguments with a claim that "Apperson cannot differentiate between damages resulting from the *true* statements in Counts I through IV and the allegedly false statements in Counts X through XII", and that he therefore cannot recover. Respondents' Brief at 27 (emphasis added).

This argument is a non-starter. As a threshold matter, Respondents' argument presumes the defamatory statements at issue in Counts I through IV were true. But they were not true—and, more importantly for the issue actually pending before this Court, the jury was never given an opportunity to make that factual finding, despite Appellant presenting a submissible case on all counts. As such, that is not a valid assumption, particularly in the directed verdict context. Respondents' argument falls flat there. There are no grounds to assume their statements that Appellant is a rapist are true.

More importantly, unlike in *Taylor* and *Kenney*, Appellant is seeking damages for every defamatory statement by Kaminsky and Norman and has included them both as joint and several tortfeasors in this lawsuit. There are no unactionable statements at issue or statements made by others that are not party to this suit. Given the opportunity, the jury should have apportioned fault and determined what portion of the damages was attributable to each defendant.[3]

[3] *See, e.g., Lippard v. Houdaille Indus., Inc.*, 715 S.W.2d 491, 518 (Mo. 1986) ("[A]pportionment is made in cases of separate repetitions of the same defamatory statements or separate acts resulting in alienation of affections.)

II. Respondents' Position on Appeal Underscores that Fact Questions Need to be Resolved by the Jury, Not by This Court on Appeal

At its core, Respondents argue that the evidence fails to establish defamation, but not because it is insufficient—and, for purposes of this appeal, that is what matters. On appeal, Respondents ignore the grounds upon which their directed verdicts were granted, the reason the Court of Appeals affirmed the directed verdicts, and the questions this Court granted transfer to address. Instead, Respondents ask this Court to *interpret* portions of the record in particular ways, including by making improper (and unnecessary) inferences and assumptions. For instance, Respondents acknowledge that there is a factual dispute about whether their statements that Appellant is a rapist are false, but that this Court can infer that they were true based on inferences they invent at this stage and which have no place in reviewing the grant of a directed verdict. And similarly, Respondents acknowledge that they made the statements at issue about Appellant, but that it can be inferred that they subjectively believed them to be true—based on an "investigation" into their own personal knowledge of the truth—and that therefore there is no substantial evidence they were negligent. And the list goes on. But these are classic fact questions that should be resolved by a jury, not by this Court on appeal. In other words, these may very well constitute fair closing arguments for Respondents to make to a jury—to which Appellant would fairly respond based on the evidence and testimony at trial—but this is a basis for reversal, not affirmance.

III. Conclusion

This case epitomizes precisely why granting a directed verdict is a "drastic measure," *Englezos*, 980 S.W.2d at 30, that is presumptively reversible error. *See, e.g., Lane House Const., Inc. v. Triplett*, 533 S.W.3d 801, 803-04 (Mo. Ct. App. 2017) ("A *presumption is made in favor of reversing the trial court's grant of a directed verdict* unless the facts and any inferences from those facts are so strongly against the plaintiff as to leave no room for reasonable minds to differ as to the result") (emphasis added).

There is now no real dispute that the trial court misinterpreted Missouri precedent in determining that Appellant failed to present a submissible case on the damages element of his defamation claim—all based on legally erroneous arguments advanced by Respondents. Now, Respondents are not even defending what they argued at the trial court level and the grounds on which the trial court based its decision.

On appeal, a two-judge majority of the Court of Appeals affirmed, further misreading Missouri law and creating a new rule—unique to Missouri—requiring defamation plaintiffs to present third-party testimony in order to submit their case to the jury. That has never been the law in Missouri (or anywhere else), and for good reason. Now before this Court, Respondents are not even defending the grounds on which the two-judge majority of the Court of Appeals panels based its decision—tacitly conceding Appellant's position reflected in the dissenting opinion is meritorious.

In light of the errors of the trial court and Court of Appeals, this Court should reverse. Affirming the directed verdicts in this case has far reaching consequences not just for Apperson but for all defamation plaintiffs in Missouri. Respondents do not even attempt

to acknowledge those consequences or grapple with the trial court and Court of Appeal's reasoning, because it is clear this Court should reverse and, in doing so, clarify the law.

Based on the foregoing and the arguments set out in Appellant's opening brief, this Court should reverse the trial court's decision granting the Respondents' Motions for Directed Verdict and remand this case for a new trial.

Respectfully submitted,

AHEARN KERSHMAN, LLC

John D. Kershman, #56357
Maximilian J. Mueller, #75688
230 S. Bemiston Ave., Suite 1005
Clayton, Missouri 63105
Office: (314) 373-7135
john@ak-stl.com
max@ak-stl.com
Attorneys for the Appellant

- and -

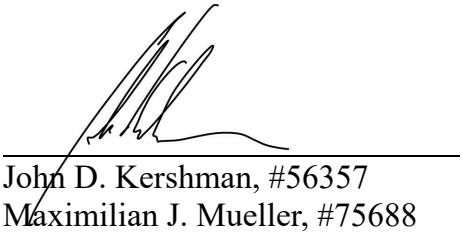
/s/ Justin K. Gelfand

Justin K. Gelfand, #62265
Margulis Gelfand, LLC
7700 Bonhomme Ave., Suite 750
St. Louis, Missouri 63105
Office: (314) 390-0234
justin@margulisgelfand.com
Attorney for the Appellant

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Appellant Mouna Apperson's Substitute Reply Brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this Brief is 6,965, exclusive of the cover, any certificate required by Rule 84.06(c), and signature blocks.

The undersigned further certifies that this Brief was scanned for viruses and found to be virus-free.

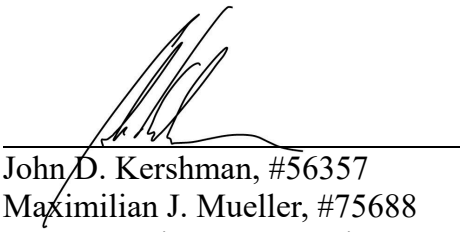


John D. Kershman, #56357
Maximilian J. Mueller, #75688
230 S. Bemiston Ave., Suite 1005
Clayton, Missouri 63105
Office: (314) 373-7135
john@ak-stl.com
max@ak-stl.com
Attorneys for the Appellant

CERTIFICATE OF SIGNED ORIGINAL AND CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attorney filing the foregoing document signed the original of the same. Said original will be maintained, as required by the Rules of Civil Procedure. The undersigned further certifies that, on August 18, 2025, the foregoing was served via this Court's electronic filing system upon the following:

John M. Reeves
7733 Forsyth Blvd.
Suite 1100-1192
St. Louis, MO 63105
Attorney for Respondents



John D. Kershman, #56357
Maximilian J. Mueller, #75688
230 S. Bemiston Ave., Suite 1005
Clayton, Missouri 63105
Office: (314) 373-7135
john@ak-stl.com
max@ak-stl.com
Attorneys for the Appellant