

IN THE SUPREME COURT OF MISSOURI

JOHN DOE (TONY TWIST),)
)
 Appellant,)
)
v.) Supreme Court No. SC84856
)
TCI CABLEVISION, etc., et al.,)
)
 Respondents.)

APPEAL FROM THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

HONORABLE ROBERT H. DIERKER
CIRCUIT JUDGE
DIVISION 3

RESPONDENTS' SUBSTITUTE BRIEF

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JURISDICTION STATEMENT

Respondents/Defendants Todd McFarlane, Todd McFarlane Productions, Inc., TMP International, Inc. and Todd McFarlane Entertainment, Inc. and Image Comics, Inc. adopt Appellant's Jurisdictional Statement as a correct statement of this Court's jurisdiction over this appeal.

STATEMENT OF FACTS

The massive Substitute Brief of Plaintiff (“Plaintiff’s Brief” or “Pl. Brief”) recites page upon page of evidence to establish what no one disputes, namely, (a) that “Tony Twist” is the nickname of both Plaintiff and the fictional New York mobster Antonio Twistelli, who occasionally appeared in the *Spawn* comic book series created and published by some of the Defendants, (b) that Defendant Todd McFarlane (creator of *Spawn*) knew of Plaintiff at the time he gave his fictional mobster the nickname Tony Twist, (c) that none of the Defendants obtained Plaintiff’s consent for use of his nickname, and (d) that Plaintiff is a former professional hockey player and public figure who has been paid to endorse certain St. Louis commercial products.

Defendants generally dispute the remainder of Plaintiff’s Statement of Facts. Accordingly, they set forth below a statement of undisputed facts relevant to this appeal, and also correct certain factual misstatements in Plaintiff’s Brief.

Defendants

Todd McFarlane created the *Spawn* comic book series in the early 1990s. (TR 644-649.) Before that, he worked as an artist for the two largest comic book companies, Marvel Comics and DC Comics, and received awards for his work on *The Amazing Spiderman*, the top selling comic book at the time. (TR 631-638, 641.) Mr. McFarlane is a Canadian citizen and a hockey fan. (TR 623, 626.) He admits that he dislikes the level of fighting that takes place in professional hockey games. (TR 883)

Todd McFarlane Productions, Inc. (“TMP”) oversees the creation, publication and licensing of each *Spawn* comic book and the various *Spawn*-related comic book

series, such as *Curse of Spawn and Violator*. (TR 645; McFarlane Dep., Vol. I, 7-8, 14-16.)

TMP International, Inc. (“McFarlane Toys”) is a toy company that manufactures *Spawn* action figure toys and other toys. Mr. McFarlane is the sole shareholder of McFarlane Toys, which was incorporated in December 1993. (TR 693-694; McFarlane Dep., Vol. I, 7980.) McFarlane Toys has never produced a toy or action figure that is based on the Twistelli character or uses the name Tony Twist. (TR 695.)

Todd McFarlane Entertainment, Inc. (“McFarlane Entertainment”) is involved in the creative process of television, cable and motion picture projects relating to *Spawn*. (Fitzgerald 6-7.) It was not incorporated until 1998, which was after this lawsuit was filed. (Pl. Brief 20.) There was no evidence (a) that it ever did anything related to the claims in the case, (b) that it ever did anything involving either the Twistelli character or the name Tony Twist, or (c) that it ever received any revenues from any source. Indeed, the revenue chart prepared by plaintiff’s damages expert does not even list McFarlane Entertainment. (Plaintiff’s Exhibit 218.)

Image Comics, Inc. publishes comic books by various artists. (TR 731.) It was founded in 1993—around the time of Issue No. 11 of *Spawn*, and thus after the creation of the fictional Twistelli character. (TR 730.) Image Comics has no editorial control over the comic books it publishes and does not name any characters, review plots or approve artwork. (TR 734.) In fact, it generally doesn’t see a completed copy of any comic book it publishes until after the comic book has been printed (at a third-party

printer) and shipped. (TR 735.) As publisher, Image Comics provides various administrative services to the artists whose comic books it publishes, *e.g.*, arranging for printing, placing advertisements and dealing with distributors. (TR 733-37.) For those publishing services, Image Comics receives a flat publisher's fee of \$1,800 per issue for *Spawn* — \$2,500 per issue for certain other titles — regardless of the number of comic books sold. (TR 737-39.) Todd McFarlane is the president of Image Comics and a minority shareholder. (TR 729-734.)

Plaintiff

Plaintiff/Appellant Anthony Rory Twist is a Canadian citizen and a former professional hockey player who was drafted by the St. Louis Blues in 1988. (TR 311, 316-319.) He was traded to the Quebec Nordiques in 1991, rejoined the Blues about three years later, and played with the St. Louis team through the 1999 season. (TR 317-318.) Plaintiff's nicknames include "Tony Twist" and "Twister." (TR 311, 470; Phillips Dep. 33.) During his years in hockey, he developed a reputation as an "enforcer" for his vicious fighting style. (TR 218, 32122.) Plaintiff and his expert witness, Professor Brian Till, both admitted at trial that the fictional character Antonio Twistelli, a portly Sicilian mob boss, bore no resemblance to the plaintiff. (TR 213-214, 263, 449, 465-466; Defendants' Exhibits MCF--FF, MM, 00-UU.)

Antonio Carlo Twistelli: A Minor Character in the Fictional World of *Spawn*

The first issue of the *Spawn* comic book was published in the Spring of 1992. (TR 651.) *Spawn* is the tale of a government assassin, Al Simmons, who is murdered just as he starts to question the morality of his job. Desperate to see his beloved wife one last

time, he makes a deal to return to Earth, not knowing that the devil will send him back after his wife has remarried and that he will be endowed with superpowers as a “Hellspawn” (a soldier in Hell’s army). (L.F. 844-845, ¶ 5; TR 647-648; Plaintiff’s Exhibit 16, Issue Nos. 1-10.)

Issue No. 6 of *Spawn*, published in November 1992, introduced an unnamed fictional character depicted as the head of a New York mafia criminal syndicate. (TR 652-53; Plaintiff’s Exhibit 16, Issue No. 6.) The mafia don reappeared in Issue 7 of *Spawn*, published in January 1993, this time referred to by the name “Antonio Twist” and by his street nickname, “Dracula.” (TR 653; Plaintiff’s Exhibit 16, Issue No. 7.)

Spawn Issue N. 15, published in November 1993, contains the first reference to the name “Tony Twist” as the nickname of the Twistelli character. The character himself does not appear in that issue. (TR 655-66; Plaintiff’s Exhibit 16, Issue No. 15.) Eventually, the character’s full name was revealed as “Antonio Carlo Twistelli.” (TR 652-53; 805.)

Out of a total of 90 issues of *Spawn* admitted into evidence, the Twistelli character appeared or was referred to in twelve issues. (Plaintiff’s Exhibit 16, Issue Nos. 6, 7, 16, 21-25, 34, 46, 47 and 72.) The character also appeared or was referred to in Issues 1 and 3 of the related *Violator* comic book series and Issues 17-19 of the *Curse of the Spawn* comic book series. (Plaintiff’s Exhibits 17, 18.) In those various issues, at least five different names have been used in the *Spawn* series to identify the character: Antonio Twist, Dracula, Tony Twist, Antonio Twistelli and Tony Twistelli. (TR 655.)

TMP created, produced and owns the rights to each *Spawn* or *Spawn*-related comic book in which the name “Tony Twist” has appeared. (McFarlane Dep., Vol. I, 11-12.) Mr. McFarlane created the images and story lines in those comic books as an employee of TMP. (*Id.*)

How Mr. McFarlane Chooses Names for His Characters

Mr. McFarlane testified that he gives the characters in his comic books interesting or fun names. (TR 653.) For example, he has named main characters in *Spawn* after his friends and relatives. (TR 651.) He chose the name “Al Simmons” for the main character who dies and returns to earth as *Spawn* because the real Al Simmons was Mr. McFarlane’s college roommate. (TR 649.) Mr. McFarlane acknowledged that he never asked Mr. Simmons’ permission to use his name. (TR 650.) Likewise, the character Wanda Blake, Al Simmons’ widow, has the same first name as Mr. McFarlane’s wife. (TR 651.) The character Cyan, who is Wanda Blake’s daughter in the series, is named after one of Mr. McFarlane’s daughters. (TR 664.)

Mr. McFarlane gave some of the other characters in the series the same names as certain professional hockey players. (TR 654-655.) In the letters-to-the-editor section of *Spawn* Issue No. 20, he responded to a reader’s letter asking him about the names of certain Quebec Nordique hockey players found in *Spawn* and confirmed that Tony Twist was one of the names used. (Plaintiff’s Exhibit 16, Issue No. 20.) Similarly, in response to a letter to the editor published *Spawn* Issue No. 24, Mr. McFarlane wrote that “Antonio Twistelli a.k.a. Tony Twist is actually the name of a hockey player for the Quebec Nordiques.” (Plaintiff’s Exhibit 16, Issue No. 24.)

Each issue of *Spawn* includes the disclaimer, “Any similarities to persons living or dead is purely coincidental.” (Plaintiff’s Exhibit 16.)

Publication of the *Wizard Spawn Tribute* by Wizard Press

Wizard magazine is a trade publication for the comic book industry, published by Wizard Press of Congers, New York. (TR 658.) It is not connected in any way with any of the Defendants; instead, it reports on the industry for comic book fans. Wizard Press was a defendant in this case, but was dismissed by Plaintiff before trial.

In 1996, Wizard Press published a special issue of its magazine entitled *Wizard Spawn Tribute*. (Plaintiff’s Exhibit 1.) The issue contained a variety of articles and features, including an interview with Mr. McFarlane, a *Spawn* trivia contest, and various articles on different aspects of the comic book series. Writer Scott Beatty wrote an article for the issue entitled “Spawning Ground” in which he offered his perspective on Mr. McFarlane’s method for naming characters in his comic book. (Plaintiff’s Exhibit 1 at pp. 28-31; TR 660.) Mr. McFarlane did not edit or review the article prior to its publication; nor did he have any right or ability to do so. (*Id.*)

In his “Spawning Ground” article, Mr. Beatty identified eighteen comic book characters who, according to the article, each had a “real-life persona.” Mr. Beatty coined the term “real-life persona.” Mr. McFarlane never told him that any character in the *Spawn* comic books was based upon a real person. (TR 661.) In the article, each of the featured characters includes an image from the comic book juxtaposed with a photographic image of the supposed “real-life persona”—none of whom resembled the fictional characters. This is because none of the characters in *Spawn* are based upon the

“real-life personas” of anyone. (TR 661.) For example, the comic book character Terry Fitzgerald is a tall, handsome African-American man who works for the CIA; the real Terry Fitzgerald is short, stocky, Canadian and white. (TR 661-665.) Similarly, the comic book Wanda (widow of Al Simmons) is an African-American while Mr. McFarlane’s wife is not. (Plaintiff’s Exhibit 1.) So, too, the comic book character “Twitch” Williams is a man while the purported “real-life persona” is a woman. (*Id.*)

In the case of the comic book character Antonio “Tony Twist” Twistelli, Mr. Beatty’s article identified Plaintiff as the “real-life persona” and stated that the Twistelli character “is named for former Quebec Nordiques hockey player Tony Twist, now a renowned enforcer (*i.e.*, goon) for the St. Louis Blues of the National Hockey League.” (*Id.*) The editors of Wizard juxtaposed an image of the fictional character with one of Plaintiff’s hockey cards. (*Id.*) Despite Mr. Beatty’s choice of words, Plaintiff is not the “real-life persona” of the Twistelli comic character—a fact that Plaintiff readily admitted at trial. (TR 447-448.)

The Spawn Movie, Animated HBO Series and Toys

TMP, as the owner of the copyrights in *Spawn*, has licensed the creation of a live action movie, an animated television series on HBO, and toys, action figures, trading cards, and other items based upon *Spawn* and its characters.

HBO produced an animated series called “*Todd McFarlane’s Spawn*,” which was based on the story line and characters in the *Spawn* comic book and which ran for three seasons. (McFarlane Dep., Vol. I, 41-43, 55-56; Plaintiff’s Exhibits 23, 26.) HBO telecast the first half-hour episode on its Home Box Office premium cable network in

1998. (Plaintiff's Exhibit 165.) Five other half-hour episodes followed during that first season. Those six episodes were compiled later into video recordings in VHS, laser disc and DVD format for home use. (McFarlane Dep., Vol. I, 46-47, 48-49; Plaintiff's Exhibits 23, 24 and 25.) Along with other characters from the comic book, the Twistelli character appeared or was referred to in episodes from the first season of *Todd McFarlane's Spawn*. He did not appear and was not mentioned in the second or third seasons of the show. (Plaintiff's Exhibits 23 and 24.)

There is no evidence that HBO or the Defendants used the name "Tony Twist" or the image or likeness of the Plaintiff in any advertising for the HBO series. Each episode of the HBO series and each of the video recordings of that show conclude with the following disclaimer:

The characters and events depicted in this motion picture are fictional. Any similarity to actual persons, living or dead, is purely coincidental.

(Plaintiff's Exhibits 23, 24 and 25.)

The Twistelli character did not appear in the live-action movie based on the *Spawn* comic book. (TR 676.) The character is included as a trading card in the *Spawn* trading card series licensed by TMP. There is no reference to Plaintiff or his hockey profession on the trading card. (TR 355-56; Plaintiff's Exhibit 77.)

McFarlane Toys manufactured action figure toys based on several of the *Spawn* characters. It never manufactured a "Tony Twist" toy or action figure or any other product based upon or resembling the Twistelli character. (TR 695.) There is no

evidence that Plaintiff's nickname, Tony Twist, or his image or likeness or identity were used to advertise any toy or action figure produced by McFarlane Toys.

For a period of three to four months several years ago, McFarlane Toys included a *Spawn* comic book in the packaging for two of its action figures—Overt-Kill and Tremor. (TR 699-705.) In both comic books, the Twistelli character appeared on one page. Neither the character nor the name Tony Twist appeared on the front or back cover of the comic book packaged with the toy or on the toy packaging itself. Thus the only way a purchaser of the toy would discover the presence of the Twistelli character was to buy the product, open the package, remove the comic book insert, and read it. (TR 703.) After that three to four month period, McFarlane Toys never again packaged those toys with comic books. (TR 704-706.)

Pre-trial Dismissal of Most of Plaintiff's Claims

Plaintiff's Amended Petition originally included a defamation claim (Count II) and a conspiracy claim (Count V) against the Defendants. (LF 683-717.) The trial court dismissed those claims in its Memorandum and Order of March 4, 1999. (LF 1000-10.) In so doing, the trial court determined that “[t]he distinctions between the Plaintiff and the character portrayed in Defendants’ comic book series make it impossible to recognize that the character Anthony Twistelli refers to Plaintiff.” (LF 1006.) Plaintiff has not appealed this finding or the order dismissing his defamation and conspiracy claims.

Plaintiff's Admissions at Trial

The case went to the jury on the sole claim that the Defendants intentionally used his name— but not his image or likeness—without his consent as the name of a cartoon

mafioso in a comic book series. Plaintiff admitted at trial that the fictional mobster—a fat, middle-aged Sicilian immigrant with slicked-back dark hair—bore no physical resemblance to him. (TR 465-66.) He further admitted that the Twistelli character is fictional, as are all the other characters in *Spawn*. (TR 447-48.) The only similarity between Plaintiff and the fictional Twistelli character is the nickname Tony Twist. (TR 465-66.) Plaintiff and his expert witness, Professor Brian Till, both admitted that other than the nickname “Tony Twist,” the fictional Twistelli character bore no similarity to Plaintiff. (TR 213-14, 263, 449, 465-66.)

Plaintiff’s Alleged Damages: A Tale of Two “Experts”

Plaintiff never earned more than \$18,000 a year on endorsements and never received an endorsement deal based on the gross revenues of the company whose product he endorsed. (TR 426, 431-33; Image Exh. C.) Nevertheless, Plaintiff’s damages experts, Rocky Arcenaux and Brian Till, each opined that the “fair market value” of the use of Plaintiff’s name by Defendants was equal to a percentage of the gross revenues of all Defendants from all *Spawn*-related products—*not* all Twistelli-related products but all *Spawn*-related products. (Arcenaux Depo. at 25-26; TR 136, 156.) Arcenaux opined that the fair market value of the use of Plaintiff’s name by Defendants was equal to 20% of the combined gross revenues of all Defendants from all *Spawn*-related products—15% for the use of the name plus an additional 5% because of the expected negative impact on Plaintiff’s future endorsements from the association with *Spawn*. (Arcenaux Depo. at 25, 47-48, 85-87.) Till opined that the fair market value of the use of Plaintiff’s name by Defendants was equal to 15% of the combined gross revenues of all *Spawn*-related

products in which the Twistelli character appears, plus 9% of the gross revenues of all other *Spawn*-related products. (TR 136, 156.)

Both Arceneaux and Till based their opinions on commercial product endorsement advertisements involving the exclusive use of a celebrity's name, image and identity done with the express intention of identifying the celebrity endorser with the product in the minds of the consuming public. (Arceneaux Depo. at 79, 93-94, 117-18, 130; TR 131, 182-84, 196-98, 273.) Both men conceded that they did not know whether the use of the name Tony Twist by any of the Defendants resulted in any increased revenue to any Defendant. (TR 242-243, Arceneaux Dep., 110.) Nor did either of them give any consideration to Plaintiff's prior history of endorsement income. (TR 169-171; Arceneaux Dep., 36-38.)

Contrary to the assumptions—and calculations—of his two expert witnesses, Plaintiff testified that: (1) he had never received an endorsement fee based on the gross revenues of the company whose product he endorsed (TR 426, 431-433); (2) his hockey income over the years had not been adversely affected by *Spawn* or any *Spawn*-related products (TR 433-434); (3) he had no endorsement income until after the *Spawn* comic book was on the market (TR 432-433); and (4) no charities ever refused to associate with him or refused to allow him to appear on their behalf because of *Spawn* (TR 414-416.)

The Verdict

At trial, Plaintiff's financial expert calculated to the dollar each Defendant's gross revenues from *Spawn*-related sales (as opposed to Twist-related sales), and then added those numbers together to arrive at a total combined gross revenues of \$122,708,261 for

all Defendants. (TR 551; Exh. 218.) As the jury's calculation on the verdict form shows, it came up with the \$24.5 million verdict by taking 20% of the combined gross revenues received by all the Defendants on all *Spawn*-related products. (LF 1287-89.)¹

The verdict, which was entered against each Defendant jointly and severally, thus makes each liable for 20% of the \$86.9 million in gross revenues of a toy company that never manufactured a Tony Twist toy, along with tens of millions of dollars in gross revenues received by the other Defendants from a live-action motion picture (that does not have a Twist character), an HBO animated series (only one season of which contained a Twist character) and other derivative products not related to the Twist character.

For example, Image Comics owns no rights to the contents of the comic books it publishes; those rights are held by the creators. Thus TMP owns all rights to the *Spawn*

¹A company called EAS allegedly offered Plaintiff an endorsement deal during the pendency of this lawsuit but then withdrew it after Plaintiff sent it a copy of the HBO animated *Spawn* series and the *Wizard Spawn Tribute* published by Wizard Press. (TR 478; Phillips Dep. 13-14; Exh. 1.) It is undisputed that EAS never saw any issue of the *Spawn* comic book series before it allegedly withdrew the endorsement offer. (Phillips Dep. 52.) It is also undisputed that plaintiff never had another company refuse to do an endorsement deal because of the existence of a fictional New York mobster nicknamed Tony Twist. (TR 414, 417.) The jury did not award any damages for this alleged lost endorsement deal.

comic books. (TR 730-33.) Accordingly, Image Comics did not license any derivative rights in the comic books and did not receive *any* revenues from any motion picture, television series, soundtrack, toy, T-shirt, or other derivative work based upon any comic book. (TR 730-32.) Image Comics merely published the name “Tony Twist” in some of the *Spawn* comic books (where the character appears or is mentioned) and in a few related advertisements for those comic books that it placed in *Previews*, a monthly catalogue sent to newsstands, comic book stores, and other retailers. (TR 743-44, 746.) Image Comics never published or otherwise used the image or photograph of Plaintiff. (TR 467, 758-59.)

From its founding through 1998, Image Comics received approximately \$417,000 in publisher fees and revenues for publishing *Spawn* comics. (TR 752-53; Image Exh. F.) It earned approximately \$26,000 in profits on those revenues. (TR 753; Image Exh. F.) From its founding through 1998, Image Comics had average annual net income for *all* of its publishing activities of approximately \$49,000. (TR 562.) Under the verdict, it was liable for an amount fifty times greater than the total revenues it received from publishing all *Spawn* comics and nearly five-hundred times greater than its average annual net income for all of its publishing activities.

Finally, of course, the verdict consists entirely of revenues from products that do not bear Plaintiff’s image or likeness and which were never advertised or promoted by the use of Plaintiff’s identity in any way.

Defendants Hockey Marketing: One Junior Hockey Event

Plaintiff makes much of Defendants' efforts at marketing *Spawn* to hockey fans. However, the record shows that the sum total of Defendants' hockey-related marketing consisted of one "Spawn night" sponsored by McFarlane Toys at the arena of a Junior Hockey League team called the Detroit Whalers that played near the suburban Detroit headquarters of McFarlane Toys. (TR 677-678.) Promotional *Spawn* materials were distributed to fans in attendance, and Mr. McFarlane was on hand to sign autographs. (TR 677-681; Plaintiff's Exhibit 63.) It is undisputed that Defendants did *not* use the Twistelli character or the name "Tony Twist" to promote this event. (*Id.*) Defendants conducted no other *Spawn*-related promotional affairs with any other hockey team. (TR 679.) McFarlane Toys has made a series of toys based on the ice machines that clean ice rinks during hockey game intermissions, but none of these referred in any way to the Twistelli character, the name "Tony Twist," or Plaintiff.

Defendants Have Never Trademarked Plaintiff's Name

So, too, Plaintiff's assert that Defendants have somehow obtained a trademark registration for Plaintiff's name. (See Plaintiff's Substitute Brief 13, 32, 78.) Citing to the Deposition of Brian Cunningham, an editor at Wizard Press, as sole support for this statement, Plaintiff asserts that "[b]y Todd McFarlane claiming a trademark in the name Tony Twist, it means that McFarlane perceives it as having **value** to him, and wants to protect it. . . . It means that Todd McFarlane believes he **owns** the name Tony Twist." (Pl. Brief at 32, citing Deposition of Brian Cunningham at 108-111) (emphasis in original).

Plaintiff's assertion is false. In the portions of Mr. Cunningham deposition that Plaintiff cites, Plaintiff's counsel asked him to read the copyright and trademark notice on the inside cover of *his* company's *Wizard Spawn Tribute* magazine and to interpret it. Mr. Cunningham, who is not a lawyer, opined that the notice meant that Mr. McFarlane owned the trademark in the name Tony Twist. (Cunningham Dep. at 111.) Mr. Cunningham is simply wrong. The notice reads:

Spawn®, its logo and its symbol are registered trademarks 1996 of Todd McFarlane Productions, Inc. All other related characters are trademark™ and copyright© 1996 Todd McFarlane Productions, Inc.

(Cunningham Dep. at 108; Plaintiff's Exhibit 1.) Under the plain language of this notice, TMP is claiming, at most, trademark and copyright ownership in the fictional mafia don *character*—and not the name “Tony Twist” independent of the Twistelli character. Lest there be any confusion, Defendants herewith state that none of them claims any trademark or copyright interest in the name Tony Twist or in Plaintiff's image, likeness or identity.

ARGUMENT

Introduction

The *Spawn* comic book series is a fantasy tale of a murdered CIA agent who returns from Hell with superhuman powers. One character who occasionally appears in the comic book (and the first season of the HBO animated cartoon series) is Antonio Carlo Twistelli, a fat Sicilian mob boss. Twistelli lives in a surreal version of New York

City, where he heads a powerful crime family. His nickname, Tony Twist, is the same nickname as Plaintiff Anthony R. Twist, a Canadian who lives in St. Louis and once played professional hockey. It is undisputed that the only similarity between Plaintiff and Twistelli is the nickname Tony Twist. It is further undisputed that Defendants never published Plaintiff's image or likeness or otherwise used his image or likeness to promote any comic book or any other product.

On July 5, 2000, the jury below entered a single verdict against all of the Respondents for \$24.5 million. The damage award was not only greater than the net worth of the Defendants but it was \$24,482,000 greater than Plaintiff ever earned in annual endorsement income. As shown on the verdict form, the jury arrived at the damage amount by calculating 20% of the gross revenues of each of the defendants and then adding those amounts together, thus holding Image Comics, for example, liable for 20% of the nearly \$87 million in gross revenues of a toy company that never made a Tony Twist toy.

The jury's verdict was not merely outrageous and contrary to the common law. It represented a dangerous precedent that could chill free speech within Missouri and place an intolerable burden on interstate commerce by subjecting the entire entertainment industry to the risk of ruinous liability in Missouri for works of expression protected *everywhere else in the nation*. For example, whatever benefit Image Comics supposedly derived from the occasional use of the name Tony Twist in connection with a fictional New York mob boss pales in comparison to the benefit derived by the singer Kim Carnes from use of the name Bette Davis in the title and lyrics of her 1991 Grammy award-

winning song “Bette Davis Eyes,” or by Stephen King from the use of the name *and persona* of baseball pitcher Tom Gordon in the title and text of his novel *The Girl Who Loved Tom Gordon*, or by the producers of any number of motion pictures and plays, including “Searching for Bobby Fisher”—all of whom use not merely the names but the identities of real persons in fictional portrayals.

Take the song “Mrs. Robinson,” written by Paul Simon and performed with Art Garfunkel for the soundtrack of the motion picture “The Graduate.” The final stanza twice uses the name and identity of one of America’s most famous athletes:

Where have you gone, Joe DiMaggio?

A nation turns its lonely eyes to you.

What’s that you say, Mrs. Robinson?

Joltin’ Joe has left and gone away.

Under Plaintiff’s theory, Mr. DiMaggio’s estate could claim 20% of the gross revenues from the song, from the album, from the soundtrack album, from the motion picture, from the videotape and DVD sales and rental of the motion picture, from the current Broadway production of “The Graduate,” and even from the recent Kennedy Center televised tribute to Paul Simon, where James Taylor performed the song.

Fortunately, the common law of Missouri and the free speech protections of Article I, Section 8 of the Missouri constitution and the First Amendment of the United States constitution guard against such a result. While this case may be one of first impression in this Court, it is hardly the first time a court in this nation has confronted a tort claim—whether for libel, invasion of privacy, or right of publicity—where the

plaintiff is a public figure seeking redress for the use (or abuse) of his identity in a published work of expressive art. As discussed below, the state and federal decisions in the decades since the United States Supreme Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964) render Plaintiff's claim non-actionable as a matter of law.

Standard Of Review

In *Jungerman v. City of Raytown*, this Court articulated the correct standard for review of a judgment granted notwithstanding the verdict:

Judgment notwithstanding the verdict for the defendant is appropriate only if the plaintiff fails to make a submissible case. On appeal from a JNOV, appellate courts review the evidence in the light most favorable to the plaintiff, with the benefit of all reasonable inferences. Where JNOV is based on an issue of law, the trial court's conclusions are reviewed de novo.

925 S.W.2d 202, 204 (Mo. 1996) (*en banc*) (citations omitted).

However, the usual deferential review of the evidence is inappropriate under the circumstances of this case because the United States Constitution requires a different rule of law than was submitted to the jury. When the First Amendment of the United States Constitution establishes a different rule of law than that applied by the original finder of fact, this Court is under a duty not only to elaborate upon constitutional principles but also "to review the evidence to make certain that those principles have been constitutionally applied." In cases in which the Court must determine "the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . .

the rule is that [it] examine[s] for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment protect. [The Court] must make an independent examination of the whole record, so as to assure [itself] that the judgment does not constitute a forbidden intrusion on the field of free expression.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (internal quotations and cited cases omitted).

I. THE TRIAL COURT’S GRANT OF JNOV SHOULD BE AFFIRMED BECAUSE PLAINTIFF FAILED TO MAKE A SUBMISSIBLE CASE IN THAT HE FAILED TO PROVE THAT DEFENDANTS USED HIS NAME AS A SYMBOL OF HIS IDENTITY. (Responds to Portion of Plaintiff’s Brief Points I. A, B & C.)

By the time Plaintiff’s right-of-publicity claim reached trial, the alleged appropriation—which once included Plaintiff’s “commercial image, persona, autograph, and likeness” (LF1003)—had shrunk to the use only of the name Tony Twist. Under Missouri law, the first threshold requirement for such a claim is proof that Defendants used the name not merely as a name but as a symbol of *Plaintiff’s* identity. Plaintiff failed to satisfy that requirement at trial; indeed, he admitted the contrary. Moreover, by abandoning his appeal of the trial court’s order dismissing his defamation claim, Plaintiff allowed that order to become a final judgment containing findings that foreclose any contention that Image Comics (or any Defendant) used the name as a symbol of Plaintiff’s identity.

A. Under Missouri Law, Mere Use Of A Plaintiff’s Name Is Not Actionable; Plaintiff Must Establish That The Defendant Used His Name “As A Symbol Of His Identity.”

Name appropriation is somewhat of a misnomer. Although this Court has not previously confronted a right-of-publicity claim involving use of a celebrity’s name, it has faced the issue in the context of an organization using the name, identity and biography of a private individual on a grant application. In *Nemani v. St. Louis University*, 33 S.W.3d 184 (Mo. banc 2000), the university defendant submitted an application for a National Institute of Health grant in which it identified plaintiff as a “research assistant professor” and included other information about him. So, too, in *Haith v. Model Cities Health Corp.*, 704 S.W.2d 684 (Mo. Ct. App. W.D. 1986), the defendant identified the plaintiff physician in its application for a government grant and disclosed various information about him, including his salary.²

Both this Court and the Court of Appeals were careful to explain that mere use of the plaintiff’s name, without more, would be non-actionable. As this Court emphasized in *Nemani*, 33 S.W. 3d at 185:

Not all uses of another’s name are tortious. “It is the plaintiff’s name as a symbol of [his] identity which is involved here, and not

² Similarly, in the first such case in this state—*Munden v. Harris*, 134 S.W. 1076 (Mo. Ct. App. 1911)—the appropriation included the use of a photograph of the young boy (and thus his identity) in a print advertisement.

[his name] as a mere name.” *Haith v. Model Cities Health Corp.*, 704 S.W.2d 684, 687 (Mo. Ct. App. 1986), *citing* William L. Prosser, ‘Privacy,’ 48 Cal.L.Rev. 383 (1960). Name appropriation occurs where a defendant “makes use of the name to pirate the plaintiff’s identity for some advantage.”

That threshold is even higher where the plaintiff is a celebrity—an issue not before the courts in *Nemani* or *Haith*. *See Haith*, 704 S.W.2d at 688 (“‘Right of Publicity,’ in the sense used by a celebrity has nothing to do with this case.”). In *Bearfoot, Inc. v. Chandler*, 965 S.W.2d 386 (Mo. Ct. App. E.D. 1998), the court explained that the right of publicity for celebrities “provides a cause of action where the defendant has been unjustly enriched by misappropriation of a person’s valuable public persona or image.” *Id.* at 389.

This initial threshold—whether it be “name as symbol of identity” or “valuable persona or image”—applies with special force in the context of works of fiction, such as motion pictures and novels and comic books. That is because every work of fiction has characters, and every character has a name, and every name is shared by real people, each of whom would have a cause of action under Plaintiff’s theory the moment a defendant admitted that he named a fictional character after that real person. Even Plaintiff admitted that there are other people out there named Tony Twist and Anthony Twist. (Tr. 463-64.)³

³ Indeed, a phone directory search on Yahoo.com reveals listings around the country for dozens of real people named Homer Simpson, Elmer Fudd, and Clark Kent.

In St. Louis, for example, there are numerous listings in the telephone directory for men with the same name as the captain of the Starship Enterprise on the original *Star Trek*. Under existing Missouri law, however, none of those James Kirks could pass the threshold test—even if the creator of *Star Trek* admitted he got the idea for the name from one of those men—unless he could prove that the TV show used more than just his name. *Newton v. Thomason*, 22 F.3d 1455, 1461 (9th Cir. 1994) (use of country music singer's name as name of character in TV series was not misappropriation of name because no evidence that fictional character resembled plaintiff); *T. J. Hooker v. Columbia Pictures Indus.*, 551 F. Supp. 1060, 1062 (N.D. Ill. 1982) (use of famous woodcarver's name as name of fictional cop in TV series is nonactionable because defendants did not use name “as a means of pirating plaintiff's identity”).

B. The JNOV Should Be Affirmed Because Plaintiff Waived His Right To Challenge The Determination In The 1999 Order That, As A Matter Of Law, The Twistelli Character Was Not “Of And Concerning” The Plaintiff.

The trial court dismissed Plaintiff's defamation claim in its Memorandum and Order of March 4, 1999 (the “1999 Order”). In so ruling, the trial court was first required to determine as a matter of law whether the comic books claimed to be libelous were capable of having a defamatory meaning. *Ampleman v. Scheweppe*, 972 S.W.2d 329, 332 (Mo. Ct. App. E.D. 1998) (“Courts are empowered to decide as a matter of law that a statement claimed to be libelous is not reasonably capable of a defamatory meaning”)

(citing *Pape v. Reither*, 918 S.W.2d 376, 379 (Mo. Ct. App. E.D. 1996)). In doing so, the trial court made the following findings (LF1006):

Upon examination of the extrinsic facts, this Court is not convinced that a person of ordinary intelligence would understand Defendants' publication to convey factual assertions "of and concerning" Plaintiff. Other than using the Plaintiff's name, Defendants' publication does not make any reference to the Plaintiff. The distinctions between the Plaintiff and the character portrayed in Defendants' comic book series make it impossible to recognize that the character Anthony Twistelli refers to Plaintiff.

Accordingly, the trial court dismissed the defamation claim with prejudice. (LF 1007.)

Plaintiff is bound by those findings because he waived his right to challenge them on appeal. Although he included the 1999 Order, along with other pretrial orders, in his Notice of Appeal, he did not address the 1999 Order in any of his points argued on appeal. As the Court knows, "[p]oints not raised on appeal are deemed abandoned." *Hedrick v. Chrysler Corp.*, 900 S.W.2d 233, 235 (Mo. Ct. App. E.D. 1995) (citing *Boyer v. Grandview Manor Care Center*, 793 S.W.2d 346, 347-48 (Mo. banc. 1990)); *Speedie Food Mart, Inc. v. Taylor*, 809 S.W.2d 126, 129 (Mo. Ct. App. 1991) ("Issues not presented in the points to be argued on appeal are deemed abandoned and will not be considered").

Thus the trial court's factual findings in the 1999 Order are now part of a final judgment binding upon Plaintiff. Those findings refute Plaintiff's right-of-publicity

claim, regardless of whether the threshold standard is proof that Defendants used his name “as a symbol of his identity” or misappropriated his “public persona or image” through use of his name.

C. The JNOV Should Be Affirmed Because Plaintiff Admitted That Defendants Used Only The Name “Tony Twist” and Did Not Use His Likeness, Image or Identity.

But even without the final determinations in the 1999 Order, Plaintiff admitted as much on the witness stand:

Q. [Y]ou don't believe that you look like the character Tony Twist in the comic book, do you?

A. God, no, I don't want to look like that. (Tr. 449.)

Q. Now, we all know this character, and while he certainly has the same name as your name, Tony, would you agree with me that other than the name, as far as appearance, he looks nothing like you?

A. That's correct. (Tr. 465-66.)

Q. You don't believe that the comic book “Spawn” depicts the true life of Tony Twist, the hockey player, do you?

A. God, I hope not.

Q. You understand, don't you, that it's purely a fictional character?

A. I do understand that.

Q. And you understand that all of the other characters in the book are purely fictional characters?

A. *I understand that also.* (Tr. 447-48.)

D. The JNOV Should Be Affirmed Because The Only Possible Use Of Plaintiff's Name As A Symbol Of His Identity Is A Constitutionally Protected Use.

Although Plaintiff noted that he was a hockey enforcer and the fictional character Twistelli had once been a mob enforcer, he admitted that what he did for a living as a hockey enforcer “is different than what a mob enforcer does for a living.” (Tr. 474.) While he emphasizes that Mr. McFarlane is a hockey fan and—at least in his brief in the court of appeals (at p. 81)—that Mr. McFarlane has gone on record regarding his dislike of hockey enforcers and their fighting, he tries to avoid the obvious inference from that evidence, namely, that Mr. McFarlane’s use of the name Tony Twist for a fictional former mob “enforcer” was an attempt by Defendants to evoke Plaintiff’s persona as a hockey “enforcer” in order to criticize or parody hockey fighting.

Understandably, Plaintiff tries to tread gingerly around the “enforcer” analogy, since he knows that any such caricature of hockey enforcers, no matter how outrageous, is unquestionably protected by the First Amendment. *See, e.g., Hustler Magazine v. Falwell*, 485 U.S. 46, 53-55 (1988)(holding that outrageous and offensive caricatures of public figures are entitled to full protection under the First Amendment); *Cardtoons v. Major League Baseball Players Assoc.*, 95 F.3d 959, 968-69 (10th Cir. 1996) (use of baseball players’ names and identity in parody trading cards “receives full protection under the First Amendment”).

But Plaintiff cannot avoid the “enforcer” analogy—or its First Amendment implications—because it forms the principal basis for his argument that Defendants used his name as a symbol of identity. He concedes that “[i]f all the Respondents did was to name the Spawn character ‘Tony Twist,’ and no more, it might be doubtful whether Appellant would have a viable cause of action.” (Pl. Brief 69.) To prove that Defendants did more than that, he points triumphantly to the *Wizard Spawn Tribute* as establishing a link to his identity. But this allegedly essential link in the magazine is that the fictional mob boss (and former mob enforcer) is based upon Plaintiff, who is “a renowned enforcer (i.e., ‘goon’) for the St. Louis Blues of the National Hockey League.” (Pl. Exhibit 1.) Thus leaving to one side whether Defendants can be bound by statements in a fan magazine, the link Plaintiff emphasizes to save his claim is, if accepted, a link that drives that claim smack into the wall of the First Amendment.

**II. THE TRIAL COURT’S GRANT OF JNOV SHOULD BE AFFIRMED
BECAUSE USE OF THE NAME “TONY TWIST” IN AN EXPRESSIVE
WORK OF ART IS PROTECTED UNDER THE FIRST AMENDMENT TO
THE U.S. CONSTITUTION AND ARTICLE I, SECTION 8 OF THE
MISSOURI CONSTITUTION AND THEREFORE NOT ACTIONABLE.**

(Responds to Portion of Plaintiff’s Brief Point I. A.)

**A. Contrary to Plaintiff’s Unique Reading of *New York Times v. Sullivan*,
the First Amendment Distinguishes Between Comic Books and
Portable Toilets.**

Plaintiff contends that a \$24.5 million verdict against the creators and publisher of works of visual and fictional art raises no free speech concerns. To support this astonishing proposition, he argues that a comic book is merely a “product”—and thus as bereft of First Amendment protection as an automobile or a portable toilet. (Pl. Br. 67.)

Plaintiff’s attempt to reinterpret more than a quarter century of First Amendment decisions dating back to *New York Times v. Sullivan*, 376 U.S. 254 (1964), runs aground on two undisputed facts:

1. He is a public figure, and
2. Defendants used his name in works of expressive art.

These two facts distinguish this case from Plaintiff’s three Missouri precedents, all of which involved right-of-privacy claims by private individuals complaining of the use of their identities in commercial contexts. As one of those cases explains, a right of privacy claim for name appropriation is different from a celebrity’s right of publicity claim:

“private, ordinary citizens have a cause of action in privacy for the appropriation of their names or likenesses. ‘Right of Publicity’ in the sense used by a celebrity has nothing to do with this case.” *Haith v. Model Cities Health Corp. of Kansas City*, 704 S.W.2d 684, 688 (Mo. Ct. App. 1986), citing *Munden v. Harris*, 134 S.W. 1076 (Mo. Ct. App. 1911))
Indeed, the *Munden* case—the very first appropriation case in Missouri—recognized the private/public distinction back in 1911 (*id.* at 1079):

It ought, however, to be added that though a [plaintiff's identity] is property, its owner, of course, may consent to its being used by others. This consent may be express, or it may be shown by acts which would be inconsistent with the claim of exclusive use, as if one should become a man engaged in public affairs, or who, by a course of conduct, has excited public interest.

Even more important, none of the three Missouri appropriation cases involved the type of noncommercial expression entitled to the highest level of protection under the First Amendment and the Missouri constitution. The appropriation in *Munden* occurred in a commercial advertisement, and the appropriations in *Nemani v. St. Louis University*, 33 S.W.2d 184 (Mo. banc 2000) and *Haith, supra*, occurred in applications for grant money. All three cases involved the use of the plaintiff's name as a symbol of his identity in a direct solicitation for money or business. Here, by contrast, there can be no dispute that *Spawn* comic books are expressive works of fictional and visual art.

While this may be a case of first impression in this Court, courts across the nation have uniformly rejected commercial appropriation claims in the context of a variety of expressive works on the ground that such works are entitled to the highest level of protection under the First Amendment to the U.S. Constitution. *E.g.*, *Gugliemi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, 603 P.2d 454 (Cal. 1979) ("It is clear that works of fiction are constitutionally protected in the same manner as political treatises and topical news stories"); *ETW Corp. v. Jireh Publishing, Inc.*, 99 F. Supp. 2d 829 (N.D. Ohio 2000) (rejecting commercial appropriation claim by professional golfer Tiger

Woods over sale of lithographs featuring his likenesses, holding that “paintings and drawings are protected by the First Amendment”); *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal.Rptr. 2d 305, 307-08 (Cal.App. 1997)(fictionalized motion picture which used the plaintiff’s name and childhood identity was privileged under the First Amendment: “Popular entertainment is entitled to the same constitutional protection as the exposition of political ideas”).

Plaintiff tries to ignore this body of constitutional law and instead offers the facile contention that this is simply “a property case”—a position that has been repeatedly rejected by the very precedents plaintiff ignores. *See, e.g., Cartoons v. Major League Baseball Players Assoc.*, 95 F.3d 959, 969-74 (10th Cir. 1996). The label “property right” does not immunize his cause of action from constitutional scrutiny. As the Supreme Court held in *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964), “Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.”

Courts have applied this holding full force to **all** other publication torts, ranging from intentional infliction of emotional distress, *e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (applying heightened scrutiny to public figure’s right to recover for a hurtful but non-libelous publication tort because a higher standard “is necessary to give adequate ‘breathing space’ to the freedoms protected by the First Amendment”), to the

right of publicity, *e.g.*, *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001) (holding that noncommercial speech is entitled to full First Amendment protection in right-of-publicity claim brought by actor Dustin Hoffman against *Los Angeles Magazine*).

In sole support of his contention that his “property right” is immune to constitutional scrutiny, Plaintiff relies upon *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), which Plaintiff contends stands for the proposition that “the right of publicity claim is **not** protected by the 1st Amendment.” (Pl. Brief 60; emphasis in original.)

At best, Plaintiff’s characterization of *Zacchini* is wishful thinking. That case involved an Ohio statutory claim for appropriation arising out of broadcast of a performer’s entire performance. Hugo Zacchini, the star of a “human cannonball” circus act, sued a local television station that filmed his entire act over his objection and broadcast it on the local news. Significantly, he sued the station **not** for the appropriation of his name or his identity but for the appropriation of the economic value of his entire performance. In upholding his claim, the five-member majority emphasized that the defendant had broadcast not merely Mr. Zacchini’s image but his entire performance, explaining that “[t]he broadcast of a film of petitioner’s entire act poses a substantial threat to the economic value of that performance.” *Id.* at 575. Significantly, the Supreme Court was careful to limit the scope of its holding by pointing out that Mr. Zacchini’s claim was far different than a claim (like the one here) for appropriation of a name: “[B]roadcast of petitioner’s entire performance, ***unlike the unauthorized use of***

another's name for purposes of trade . . . goes to the heart of petitioner's ability to earn a living as an entertainer." *Id.* at 576 (emphasis added).

Zacchini has no bearing on any issue before this Court. No Defendant here appropriated any portion of Plaintiff's professional performances. As the Court of Appeals below correctly pointed out, "*Zacchini* does not carve out a wholesale exception to the First Amendment for right of publicity or misappropriation of name claims." (Slip Opinion A59.) "Subsequent Supreme Court treatment of *Zacchini* confirms the very specific nature of its holding." (*Id.* A58; citations omitted). See J.T. McCarthy, THE RIGHTS OF PUBLICITY AND PRIVACY, §1.10[B] (1999) ("*Zacchini* case involved only a small slice of the Right of Publicity and its holding was based on an unusual and narrow set of facts"); *Cardtoon, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 973 (10th Cir. 1996) (describing *Zacchini* as a "red herring"; reading it not as a right of publicity case but rather as a "right of performance" case).

Recently, a court confronted *Zacchini* in a right-of-publicity lawsuit by golfer Tiger Woods against an artist who was selling lithographs of him. Woods emphasized that his claim was a "property" claim that was governed by the very same Ohio law construed by the Supreme Court in *Zacchini*. *ETW Corp. v. Jireh Publishing, Inc.*, 99 F. Supp.2d 829, 834 (N.D. Ohio 2000). In upholding the defendant's First Amendment defense and dismissing Tiger Woods' claim, the court had no trouble distinguishing *Zacchini*, which it emphasized "involved the broadcast of a performer's *entire* act without his consent." *Id.* (emphasis in original).

That Plaintiff would so heavily rely upon such an odd case—and so distort its holding—simply underscores the hollowness at the core of this appeal.

B. The JNOV Should Be Affirmed Because Defendants’ Use Of The Name “Tony Twist” In An Expressive Work Of Art Is Not A “Commercial Use” Under The Right Of Publicity.

Even if Plaintiff could somehow overcome the common law hurdle—*i.e.* name as symbol of identity—the first constitutional hurdle is far higher. It requires that the alleged appropriation be for a *commercial* use, not an expressive one. As the Restatement phrases it, an actionable appropriation is one that is committed “for the purposes of trade.” RESTATEMENT (THIRD) OF UNFAIR COMPETITION, §46 (1995). Section §47 explains:

The name, likeness and other indicia of a person’s identity are used “for the purposes of trade” under the rule stated in §46 if they are used in advertising the user’s goods or services **However, use “for purposes of trade does not ordinarily include the use of a person’s identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.**

RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 47 (1995)(emphasis added).

The reason for the distinction between commercial and expressive uses is obvious. Without it, publications ranging from *People* to *The Sporting News* to *Forbes* to *Mad Magazine* would be guilty of mass commercial appropriation in each issue. As Comment

C to § 47 explains, “use of another’s identity in a novel, play, or motion picture is also not ordinarily an infringement. The fact that the publisher or other user seeks or is successful in obtaining a commercial advantage from an otherwise permitted use of another’s identity does not render the appropriation actionable.” *Id.* The three Missouri appropriation cases fit snugly within this “commercial use” prerequisite because they all involve the unauthorized use of a person’s identity either (a) in a product-endorsement advertisement, *Munden v. Harris, supra*, or (b) on a grant application for money, *Nemani, supra*, and *Haith, supra*. These cases are in line with their counterparts around the country, including cases involving celebrities, where the right of publicity is invoked in the context of an advertisement in which the misappropriation creates a misleading impression that the celebrity is endorsing a product. *E.g., Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992)(radio ad for Doritos that featured an impersonator of plaintiff’s singing style and voice held to violate his right of publicity); *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (9th Cir. 1996)(use of basketball star’s former name in television car commercial violated his right of publicity).⁴

⁴ Plaintiff’s portable toilet and automobile cases stand for the same proposition. Indeed, no speech was involved in *Carson v. Here’s Johnny Portable Toilets*, 698 F.2d 831 (6th Cir. 1983). Instead the issue was whether the defendant could use “Here’s Johnny” as the name of its portable toilet. *Carson* also included claims for false endorsement and unfair competition under the § 43(a) of the Lanham Act, 15 U.S.C. §1125(a). *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), involved pure commercial speech: a television advertisement.

There is every reason for this Court to join the “vast majority of relevant cases [that] reach the conclusion that the fictional use of human identity is not actionable as either invasion of privacy by ‘appropriation’ or infringement of the Right of Publicity.” 2 J.T. McCarthy, *THE RIGHTS OF PUBLICITY AND PRIVACY*, §8.9[A](1996) (numerous citations omitted). *See, e.g., Cardtoons, supra*, 95 F.3d at 970 (parody baseball cards “are not commercial speech—they do not merely advertise another unrelated product”); *Matthews v. Wozencraft*, 15 F.3d 432, 439 (5th Cir. 1994) (“Courts long ago recognized that a celebrity’s right of publicity does not preclude others from incorporating a person’s name, features or biography in a literary work, motion picture, news or entertainment story.”); *Ruffin-Steinback v. Depasse*, 82 F. Supp. 2d 723 (E.D. Mich. 2000) (appropriation of names and likenesses of singing group in TV “docu-drama” nonactionable because not a “commercial use”). Significantly, these cases (and numerous others gathered at the section of McCarthy, *THE RIGHTS OF PUBLICITY AND PRIVACY* cited above) involve the appropriation of the plaintiff’s *entire* identity — not merely his name. Thus their reasoning applies *a fortiori* here.

That Image Comics, TMP and Mr. McFarlane earn money as artists and publishers is constitutionally irrelevant. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) (“If a profit motive could somehow strip communications of otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels.”).

The Restatement’s requirement that a person’s identity be used “for purposes of trade” is crucial because it prevents a right of publicity claim from violating the freedom

of speech guaranteed by the First Amendment of the United States Constitution and Article I, Section 8 of the Missouri Constitution.⁵

A recent thoughtful explication of the divide between commercial and expressive speech is found in *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001). In that case, the actor Dustin Hoffman sued the publisher of *Los Angeles Magazine* over an article entitled “Grand Illusions” that featured film stills from *North By Northwest*, *Rear Window*, *Saturday Night Fever* and other famous movies. Using computer technology, the magazine altered the stills to make it appear that the actors were wearing that season’s fashions. The final still in the article was from the movie *Tootsie*. In the original, Mr. Hoffman was posed in drag in front of an American flag in a red evening dress and heels. In the altered version, the flag and Mr. Hoffman’s head remained the same but his body

⁵ The freedom of speech guarantee in Article I, Section 8 of the Missouri Constitution provides a separate and independent state-law ground for affirming the Trial Court’s judgment. As this Court has stated, there are “many instances in which it might be argued that the Missouri Constitution provides more extensive rights than are provided by the United States Constitution.” *Missouri v. Vanatter*, 869 S.W.2d 754, 757 n.1 (Mo. 1994)(en banc). The trial court expressly stated that its legal analysis was mandated by Article I, Section 8 of the Missouri Constitution. Nowhere in Plaintiff’s Brief (or even in his Brief or Reply Brief before the Court of Appeals) does he mention Article I, Section 8 of the Missouri Constitution. Accordingly, Appellant has waived any challenge to the trial court’s conclusion.

had been replaced by the body of a male model in the same pose but wearing a silk evening gown and high-heeled sandals. The text read, “Dustin Hoffman isn’t a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels.” *Id.* at 1183.

The trial court found defendant liable for violating Mr. Hoffman’s right of publicity and entered judgment for \$3 million. On appeal, the Ninth Circuit first had to determine whether the use of Mr. Hoffman’s name, identity, and image was a commercial or expressive use. Reviewing the applicable authorities, the appellate court explained, “Although the boundary between commercial and noncommercial speech has yet to be clearly delineated, the ‘core notion of commercial speech’ is that it ‘does no more than propose a commercial transaction.’” *Id.* at 1184 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983)). The distinction does not come up in many right of publicity cases “because the challenged use of the celebrity’s identity occurs in an advertisement that ‘does no more than propose a commercial transaction’ and is clearly commercial speech.” 255 F.3d at 1185 (citations omitted). In *Hoffman*, though, the distinction was an issue because the makers of the gown and the shoes were identified. As the court explained, “If the altered photograph had appeared in a Ralph Lauren advertisement, then would we be facing a case much like [the commercial use cases] cited above.” *Id.* But such was not the case before it:

Viewed in context, the article as a whole is a combination of fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors. Any commercial aspects are

“inextricably entwined” with expressive elements, and so they cannot be separated out “from the fully protected whole.”

Id. at 1185 (citations omitted).

Here, by contrast, there is not even a colorable argument that Defendant’s use of the name Tony Twist was a commercial one. Nowhere did any Defendant attempt to use Plaintiff’s name, image or identity as part a commercial endorsement, *e.g.*, “Hockey player Tony Twist loves reading *Spawn* comics.” That Image Comics may have mentioned the *fictional* Twist character in an advertisement for an issue of *Spawn* in which the fictional character appeared does not convert expressive speech into commercial speech. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) (an advertisement for a work of fiction that uses the celebrity’s identity is not a “commercial” use); *Newton v. Thomason*, 22 F.3d 1455, 1461 (9th Cir. 1994) (“commercial purpose means more than merely using a person’s name as part of a cast of characters in a television program advertisement that highlights the program’s general plot”); *William O’Neil & Co., Inc. v. Validea.Com Inc.*, 202 F.Supp.2d 1113, 1118-19 (C.D.Cal. 2002) (“[I]f a defendant publishes material that is protected by the First Amendment, he or she cannot be liable for truthful advertisements of the material.”).

So, too, Plaintiff’s attempt to transform Mr. McFarlane’s truthful response to a letter to the editor in an issue of *Spawn* or his truthful response to a question from a journalist from Wizard Press into an unprotected form of commercial speech is not only bizarre but begs the central question. If the use of the name Tony Twist is nonactionable in the comic book itself—a principle that Plaintiff seems to accept—then a truthful

reference to that use cannot become actionable just because it happens to appear in a different section of the comic book or in a third-party publication. Mr. McFarlane did not claim in his response to the letter or the journalist’s question that Plaintiff endorsed the comic book or otherwise approved the use of his name. The letters sections of comic books—or newspapers or magazines—are no less protected under the First Amendment and the Missouri constitution than the rest of the editorial content of the publication.

Because the undisputed evidence established that Defendants’ publication of the name “Tony Twist” was not a “commercial use,” Plaintiff failed as a matter of law to meet this second threshold requirement for a claim of commercial appropriation.

C. The JNOV Should Be Affirmed Because *New York Times V. Sullivan* Prevents Public Figures From Using Other Tort Claims To Circumvent Heightened Protections Afforded Publishers In Defamation Cases Based on the Same Publication.

The third threshold hurdle—even higher than the prior two—has emerged in the aftermath of *New York Times v. Sullivan*, 376 U.S. 254 (1964), the landmark case that provided publishers with heightened protections in defamation lawsuits filed by public figures. In the years since that decision, several public-figure litigants who have sued publishers for defamation have attempted to circumvent the *New York Times* standard by including other tort claims in their lawsuit. Not surprisingly, the federal and state courts have repeatedly rebuffed this stratagem, holding that *New York Times* bars an attempt to dress an invalid defamation claim in the costume of another personal tort. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (1st Amendment requires that non-

reputational claim against publisher be governed by the same standard governing libel claim); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522-24 (4th Cir. 1999)(1st Amendment precludes award of publication damages for non-reputational tort claims unless plaintiff satisfies the proof standard of *New York Times*); *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977) (“The same standards of constitutional protection apply to an invasion of privacy as to libel claims”).

This stratagem is precisely what Plaintiff attempted here. While he vehemently contends that his lawsuit “was not a defamation type action” and “did not seek personal defamation damages” (Pl. Brief 62), his own pleadings refute his denials. His Amended Petition included a claim for defamation (Count II). (LF705-707.) And even though the trial court dismissed that claim, the sole claim Plaintiff submitted to the jury—Count I—indisputably alleged defamation and sought, in Plaintiff’s words, “personal defamation damages.” Paragraph 82 of Count I alleges that Defendants’ “misappropriation and use of Tony Twist’s name” injured Plaintiff by portraying him “in unflattering, damaging, defamatory and inflammatory negative ways, thereby exposing Plaintiff to hatred, contempt, ridicule, obloquy, humiliation, vilification and scorn and has caused him to be shunned or avoided.” (LF704.) That same paragraph also alleges that as a result of the misappropriation of his name, Plaintiff “has sustained damage to his reputation and good name.” All of these same allegations are repeated again in paragraph 83 of Count I. (LF704-05.) Additional “defamation” allegations are found in the numerous earlier paragraphs of the Amended Petition incorporated by reference in paragraph 70 of Count

I, including paragraphs 28, 35, 36, 37, 38, 62, 63, 68 and 69. (LF690-702.) In short, Plaintiff's pleadings at trial trump his rhetoric on appeal.

A similar case arose in Illinois when the Dick Tracy comic strip ran a series featuring a corrupt, mafia-controlled recording studio with the same name as the plaintiff recording studio. *Flip Side, Inc. v. Chicago Tribune Co.*, 564 N.E.2d 1244, 1254 (Ill. App. 1st Dist. 1991). In addition to a claim for defamation, the lawsuit included claims for invasion of privacy and intentional infliction of emotional distress. The appellate court dismissed the defamation claim on precisely the same grounds evoked by the trial court here, explaining that “it is readily apparent that the Flipside episode is all fanciful adventure and does not purport to be factual. . . . [N]o reader would reasonably conclude that these references to characters, businesses, places and events are factual.” 564 N.E.2d at 1253. The court held that dismissal of the defamation claim mandated dismissal of the other tort claims as well: “Since counts II and III of the complaint are based upon the same publication alleged in count I, it would serve no useful purpose to treat counts II and III separately, as the same requirements that the publication must be reasonably understood as describing actual facts about the plaintiffs and the same first amendment considerations must be applied.” *Id.* at 1254. Citing *New York Times v. Sullivan*, the Illinois appellate court stated, “This is not merely an aphorism of Illinois law, it is part of the First Amendment guarantee of free speech which we all enjoy as Americans.” *Id.*

These holdings apply full force here. As the pleadings make clear, this case began with the Plaintiff claiming defamation and proceeded to trial on a misappropriation claim replete with allegations of defamation, including “personal defamation damages.” A

public figure cannot save an invalid defamation claim by dressing it up as another publication tort.

III. THE JNOV SHOULD BE AFFIRMED BECAUSE A RIGHT OF PUBLICITY AS BROAD AS PLAINTIFF SEEKS WOULD VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The publications and the broadcasts at issue here all moved in interstate commerce. Article I, Section 8, Clause 3 of the United States Constitution grants Congress the power to regulate interstate commerce. The United States Supreme Court has recognized that when a state places an intrastate restriction on conduct that creates an undue burden on interstate commerce, that restriction may violate the dormant Commerce Clause. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (state law regulating length of trucks). Just as a state law regulating the length of trucks is invalid under the dormant Commerce Clause if it poses an undue burden on interstate commerce, so, too, a right of publicity law would be invalid if it substantially interferes with the interests of other states.

This is no academic hypothetical. The first defendant named in the caption of this lawsuit is a national cable television provider. “Technology does not currently allow content providers to control efficiently access to their material according to geographic criteria.” *PSINET, Inc. v. Chapman*, 167 F.Supp.2d 878, 881 (W.D.Va., 2001). If this Court were to adopt Plaintiff’s theory as the rule of law for right of publicity claims in Missouri, conduct legal throughout the United States would be illegal here. The resulting restriction on the sale and transmission of movies, books, and comic books within

Missouri would place an undue burden on interstate commerce in violation of the dormant commerce clause. *Wendt v. Host Intl., Inc.*, 197 F.3d 1284, 1288 (1999) (Kozinski, J, dissenting from denial of rehearing *en banc*).

IV. THE TRIAL COURT’S GRANT OF JNOV SHOULD BE AFFIRMED BECAUSE THERE WAS NO EVIDENCE THAT DEFENDANTS DERIVED ANY BENEFIT OR CAUSED HIM ANY HARM FROM THE USE OF HIS NAME. (Responds to Portion of Plaintiff’s Brief Points I. B and I. C.)

Plaintiff’s appeal cannot clear one, much less all three, of the threshold hurdles discussed above. But even if one could posit a jurisdiction where (1) mere name-sameness was enough, (2) there was no distinction between commercial and expressive uses, (3) *New York Times v. Sullivan* afforded no protection to publishers beyond pure defamation claims, and (4) the First Amendment applied only to works of political expression (and not artistic expression), the JNOV would still have to be affirmed for the reasons set forth in the trial court’s decision. As the trial court correctly found, “the evidence wholly fails to support [the] propositions” that the Defendants “derived advantage from the use or publication of plaintiff’s name, or plaintiff suffered harm as a result.” (LF 1400) Plaintiff was required to put on evidence of both of these elements under Missouri law—*see Nemani, infra*, 33 S.W.3d at 185—and he failed to do so.

So, too, the damage award was based solely on the testimony of the two experts that the trial court correctly determined should not have been allowed to testify. Thus, as

more fully discussion in Section IV, *infra*, there was no evidence on a crucial element of the claim, namely, damages.

In addition, we direct the Court's attention to the parenthetical at the end of the JNOV portion of the trial court's decision:

(The Court omits discussion of the patent absurdity of holding corporate defendants liable for damages inflicted prior to their existence, and the very real absence of evidence to support the claim against Image Comics, which served purely as a publishing conduit and exercised no editorial control over publications that it handled for the creators.)

(LF 1400) That language provides additional compelling grounds for granting the JNOV on behalf of the following three Defendants:

Image Comics

The JNOV applies *a fortiori* to Image Comics for the additional reasons alluded to in the above-quoted parenthetical because Image Comics (1) came into existence after the creation of the Twistelli character, (2) has no editorial control over the content of any issue of *Spawn*, and (3) receives a flat publishing fee regardless of how many issues of a particular comic book are sold (and thus cannot possibly "derive advantage from the use or publication of plaintiff's name").

Moreover, there is no evidence that Plaintiff "suffered harm as a result" of Image Comics' publication of the *Spawn* comic books. The sole evidence of harm offered by Plaintiff was his contention that he lost an oral \$100,000 endorsement deal with EAS

after Plaintiff sent one of its employees copies of the HBO animated *Spawn* video and the *Wizard Magazine* tribute to *Spawn*. The jury apparently shared the trial judge's view that the EAS evidence "was wholly unbelievable" (LF 1395) because it did not include any lost endorsement amount in the damage award, which was based solely on the 20%-of-gross-revenues theory. But even if the jury had included an award for the EAS endorsement, it is undisputed that EAS never saw an issue of the comic book, either before or after it supposedly yanked the alleged oral deal. Thus there was no evidence that Plaintiff "suffered harm as a result" of the only thing Image Comics did in this case: publish comic books.

McFarlane Entertainment

So, too, the JNOV applies *a fortiori* to McFarlane Entertainment for the additional reasons alluded to in the above-quoted parenthetical from the trial court's decision and because McFarlane Entertainment (1) came into existence after the filing of the lawsuit, and (2) had no involvement in any event giving rise to the lawsuit. There was, quite literally, no evidence introduced against McFarlane Entertainment.

McFarlane Toys

So, too, the JNOV applies *a fortiori* to McFarlane Toys for the additional reasons alluded to in the above-quoted parenthetical from the trial court's decision and because McFarlane Toys never made or distributed a Tony Twist toy.

V. ALTERNATIVELY, THE TRIAL COURT’S GRANT OF A NEW TRIAL SHOULD BE AFFIRMED FOR ANY ONE OF THE FOLLOWING REASONS: (A) THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE; (B) THE VERDICT WAS BASED ENTIRELY ON INCOMPETENT EXPERT TESTIMONY; (C) THE VERDICT FORM IMPROPERLY IMPOSED JOINT AND SEVERAL LIABILITY ON THE DEFENDANTS; (D) THE VERDICT DIRECTING INSTRUCTIONS FAILED TO PROPERLY INSTRUCT THE JURY ON THE ELEMENTS OF PLAINTIFF’S RIGHT OF PUBLICITY CLAIM. (Responds to Portion of Plaintiff’s Brief Point II.)

Standard of Review

“[I]f any ground advanced in support of a new trial is demonstrably correct, the order should be affirmed.” *Linkogel v. Baker Protective Serv’s*, 626 S.W.2d 380, 387 (Mo. Ct. App. E.D. 1981). Here, the trial court’s grant of a new trial is supported on at least four different grounds.

First, the trial court granted a new trial on the grounds that the verdict was against the weight of the evidence. Missouri Rule of Civil Procedure 78.02 gives the trial court “virtually unfettered discretion” to award a new trial when a jury verdict in favor of a plaintiff is against the weight of the evidence. *O’Neal v. Agee*, 8 S.W.3d 238, 241 (Mo. Ct. App. E.D. 1999); *Hyde v. Butsch*, 861 S.W.2d 819, 820 (Mo. Ct. App. E.D. 1993).

“[T]he trial court may employ its authority under Rule 78.02 in favor of a defendant ‘with virtual certainty that the ruling is immune from appellate interference.’” *O’Neal*, 8

S.W.3d at 241 (quoting *Carpenter v. Chrysler Corp.*, 853 S.W.2d 346, 359 (Mo. Ct. App. 1993)). Deference to the trial court's ruling on a new trial motion applies to questions of fact, but not to matters of law. *Sanders v. National R.R. Passenger Corp.*, 930 S.W.2d 36, 39 (Mo. Ct. App. E.D. 1996). Thus, where the trial court applies the correct legal standard to its analysis of the weight of the evidence, its ruling is entitled to almost complete deference.

Second, the trial court also granted a new trial on the grounds that the damages testimony of Plaintiff's expert witness should not have been admitted. The decision to admit or exclude expert testimony lies within the discretion of the trial court. *Anglim v. Missouri Pac. R.R. Co.*, 832 S.W.2d 298, 308 (Mo. banc 1992); *Nugent v. Owens-Corning*, 925 S.W.2d 925, 931 (Mo. Ct. App. E.D. 1996). Moreover, "[i]f a trial court's decision to exclude evidence is correct for any reason, it will be affirmed on appeal." *State of Missouri ex rel. Missouri Hwy. & Transp. Comm'n v. Sisk*, 954 S.W.2d 503, 509 (Mo. Ct. App. 1997).

Third, the trial court granted a new trial on the grounds that the verdict form improperly instructed the jury to impose liability jointly and severally on all Defendants. The use of the incorrect verdict form is presumptively prejudicial. *Chambers v. McNair*, 692 S.W.2d 320, 325 (Mo. Ct. App. E.D. 1985).

Finally, the trial court granted a new trial on the grounds that the verdict directing instructions failed to properly instruct the jury on the necessary elements of Plaintiff's Right of Publicity claim. A jury instruction must include every essential element to prove the plaintiff's claim, and failure to submit every element of a claim constitutes

reversible error. *Vogel v. A.G. Edwards & Sons*, 801 S.W.2d 746, 750 (Mo. Ct. App. 1990).

A. The Trial Court Correctly Exercised Its Discretion in Granting Defendants a New Trial On the Grounds that the Jury’s Verdict Was Against the Manifest Weight of the Evidence. (Responds to Portion of Plaintiff’s Brief Points II. F.)

In addition to its grant of a JNOV, the trial court alternatively granted a new trial on the ground that the jury’s verdict was against the weight of the evidence. Because the trial court correctly applied the law in making this determination, its ruling was within the trial court’s discretion and must be affirmed.

Plaintiff contends that the trial court abused its discretion by (1) improperly converting its otherwise discretionary “against the weight of the evidence” ruling into a non-discretionary ruling that Plaintiff failed to make a submissible case, and (2) by misstating and misapplying the law. (Pl. Brief 125-127). Plaintiff is mistaken on both counts.

First, the trial court did not improperly make a non-discretionary ruling. In his Substitute Brief, Plaintiff misstates the trial court’s holding by misleadingly collapsing two paragraphs into one and adding a “therefore” transitional phrase that does not exist. According to Plaintiff, after stating that the weight of the evidence did not support a finding that the defendants benefited in any way from the use of the name Tony Twist, the trial court went on to declare that “*therefore* ‘Plaintiff’s case must fail.’” (Plaintiff’s Substitute Brief at 125). Plaintiff argues that this converts the trial court’s otherwise

discretionary “against the weight of the evidence” holding into a non-discretionary “failed to make a submissible case” holding. (*Id.* at 125-126, citing *Lifritz v. Sears Roebuck & Co.*, 472 S.W.2d 28 (Mo. Ct. App. E.D. 1971)).

Plaintiff fails to explain that the trial court’s declaration — “plaintiff’s case must fail” — is not part of its “against the weight of the evidence” holding. Rather, it comes at the end of the *following* paragraph, which happens to be the final, summarizing paragraph of the trial court’s entire memorandum. Indeed, the phrase “plaintiff’s case must fail” is the very last phrase in the memorandum. It is simply the trial court’s final, emphatic summation of its earlier JNOV ruling and has no bearing on the court’s discretionary new trial ruling.

Second, the trial court correctly applied the law in its “against the weight of the evidence” ruling. Although Plaintiff ignores the threshold requirement in *Nemani* and *Haith* that he prove Defendants used his name as a symbol of his identity, he does acknowledge that Missouri law requires him to prove that Defendants derived a benefit from their use of his name. (Pl. Brief 68, 71, citing *Haith*, 704 S.W.2d at 687). That is precisely the legal standard the trial court applied when it determined that the jury’s verdict was against the weight of the evidence because “[n]o rational person could believe that the use of plaintiff’s name as the *nom de guerre* of a swarthy *mafioso* in a comic book series, having absolutely nothing to do with hockey, either benefited defendants or injured plaintiff in any way” (LF 1404). Thus, the trial court did not misapply the law in finding the verdict against the weight of the evidence.

As this Court has explained, the trial court's order granting a new trial to a defendant on the ground that the verdict was against the weight of the evidence can be overturned "only in cases where no verdict in favor of [the defendant] could *ever* be permitted to stand." *Lupkey v. Weldon*, 419 S.W.2d 91, 93 (Mo. banc 1967). Here, Plaintiff had the burden of proof on every element of his claim against the Defendants. That means that if Plaintiff failed to meet that burden, the Defendants would prevail even if they presented no evidence. Therefore, because a verdict for Defendants could stand without any evidence having been adduced in their favor, the trial court was completely within its discretion in granting a new trial on the ground that the verdict was against the weight of the evidence. *See Carpenter*, 853 S.W.2d at 360; *Gilomen v. Southwest Mo. Truck Ctr., Inc.*, 737 S.W.2d 499, 503 (Mo. Ct. App. W.D. 1987).

B. The Trial Court's Grant Of A New Trial Should Be Affirmed Because The Jury Verdict Was Based Entirely On Incompetent And Inadmissible Expert Testimony.

As demonstrated on the jury's verdict form, 100% of the damage award in this case was based on the expert testimony of one witness, Rocky Arcenaux, who opined that Plaintiff was entitled to 20% of the gross revenues generated by all *Spawn*-related products. (Arcenaux Depo. at 25-26; LF 1287-89). In its decision granting a new trial, the trial court held that Arcenaux's testimony, along with that of Plaintiff's other expert, Brian Till, was inadmissible because their opinions lacked foundation sufficient to justify admission under § 490.065 RSMo. (1994). The trial court correctly ruled that Plaintiff's

expert testimony should have been excluded because their opinions bore no relation to the actual facts of the case.⁶

Both Arcenau and Till offered opinions that the “fair market value” of the use of Plaintiff’s name in the *Spawn* comic books and HBO series equaled some percentage of the gross revenues of all *Spawn*-related products produced by all of the Defendants — 20% for Arcenau, a mix of 15% and 9% for Till. Their opinions were necessarily based on hypothetical scenarios rather than personal knowledge of all material facts because each admitted that he had no knowledge of Plaintiff’s past marketability or whether any Defendant actually sold any additional products as a result of the use of Plaintiff’s name. (TR 168-69, 242-43, 264-65; Arcenau Depo. at 30, 36, 38-39, 109). *See Hobbs v. Harken*, 969 S.W.2d 318, 322 (Mo. Ct. App. W.D. 1998) (expert opinion not based solely on evidence admitted in the case but instead based on an assumption as to what the evidence may show or on an analogy to some other factual scenario is hypothetical in nature). “Where . . . an opinion is hypothetical in nature, it must not be founded on mere

⁶ Plaintiff argues that Defendants failed to object to Till’s testimony. (He makes no such contention with respect to Arceneaux’s testimony, upon which the entire jury verdict was based.) In fact, the trial court correctly found that the Defendants timely objected. (LF 1403). Although Till had started testifying before defendants renewed their prior objections (TR 143), his testimony continued for nearly 150 pages after the objections were overruled. (TR 144-290).

assumption or surmise, but on facts within the expert’s knowledge or upon hypothetical questions *embracing proven facts.*” *Id.* at 323 (emphasis added). In order to be admissible, therefore, their opinions needed to be based upon expertise and hypothetical or analogous scenarios that bore at least *some* resemblance to the actual facts of the case. As the trial court recognized, their opinions did not even come close to this standard.

The actual relevant facts for the two experts, viewed in the light most favorable to Plaintiff, included (1) the use by some — but not all — of the Defendants of Plaintiff’s name alone as the name of a fictional comic book character who occasionally appeared in the comic book and bore no resemblance (physical or otherwise) to the Plaintiff, and (2) no use by any Defendant of Plaintiff’s name or identity in any product endorsements. Accordingly, for Till’s and Arcenaux’s fair market value opinions to be admissible, they needed to be based on expertise and analysis related to the non-exclusive use of an athlete/celebrity’s name only, without anything else, *not* to identify the celebrity but to identify something or someone completely different — in this case, a cartoon character in a work of fiction that bears no resemblance to the celebrity. No other use of the celebrity’s name or identity should have been included in the expert’s analysis.

Instead, both experts based their fair market value opinions on experience or hypothetical or analogous scenarios involving the *exclusive* use of an athlete’s *name, likeness and image* in *product endorsements and advertising* done with the express intention of *identifying the endorser* with the product in the minds of the consuming public. (TR 131, 182-84, 196-98, 273; Arcenaux Depo. at 47, 79, 93-94, 117-118, 130). Neither expert’s opinion, therefore, came close to “embracing proven facts” at trial.

The sufficiency of an analogous or hypothetical scenario — and the opinion upon which it is based — is within the broad discretion of the trial court. *See Rust v. Hammons*, 929 S.W.2d 834, 838-39 (Mo. Ct. App. 1996) (citing *Riley v. Union Pac. R.R.*, 904 S.W.2d 437, 445 (Mo. Ct. App. 1995)). However, where the opinion of the expert is drawn from a hypothetical scenario because the expert lacks personal knowledge of all material facts — as with Till and Arcenaux in this case — “it is error to admit the testimony if the question does not embody substantially all of the material facts relating to the subject or omits necessary elements.” *Rust*, 929 S.W.2d at 839 (quoting *Wiley*, 729 S.W.2d at 233). As the *Wiley* court explained, the hypothetical or analogous scenario “need not include all material facts in evidence but it must fairly hypothesize the material facts reasonably relevant to and justly presenting the questioner’s theory of the case so that an answer of assistance to the jury in proper determination of the case may be elicited.” *Wiley*, 729 S.W.2d at 233. Neither Till nor Arcenaux even bothered to try “fairly hypothesizing the material facts reasonably relevant” to Plaintiff’s claims, and thus neither opinion offered any assistance to the jury in making a proper determination based on the facts of the case. *Rust*, 929 S.W.2d at 839; *Wiley*, 729 S.W.2d at 233. Indeed, the jury’s verdict form makes it clear that the jury was misled by this expert testimony.

Arcenaux also offered two additional unsupported opinions. He stated that Plaintiff’s “unwilling association with Spawn products has had a chilling effect on his future endorsement income.” (Arcenaux Depo. at 26). This was his basis for adding an additional 5% of gross revenues to his “standard” 15% in order to arrive at 20%.

(Arcenau Depo. at 47-48). Moreover, he testified that he believed this “chilling effect” would be immediate, and that within a week of being associated with *Spawn*, Plaintiff would not be able to get endorsements or continue associations with children’s charities. (Arcenau Depo. at 89). He admitted that he had not attempted to find out whether Plaintiff’s marketability had been adversely affected or if Plaintiff had lost any endorsement deals because of *Spawn*. (Arcenau Depo. at 39). Instead, he simply assumed the evidence would support his “chilling effect” opinion. When the evidence came in, however, it directly refuted Arcenau’s opinion: Plaintiffs’ endorsement income and opportunities steadily increased after the Twistelli character began appearing in *Spawn*, and his charitable work grew as well. (TR 432-433; 414-416). Arcenau’s “chilling effect” opinion — and his entire gross revenues theory — was thus pure speculation and properly excluded.

He also opined that “Tony Twist and Tony Twist’s persona has monetary or commercial value to all *Spawn* products.” (Arcenau Depo. at 26). Just as with his other opinions, however, Arcenau had no factual basis for this opinion beyond his statement that when he negotiates an exclusive endorsement deal for one of his athletes he asks for the right to share in “derivative products.” (Arcenau Depo. at 109-110). Notably, he did not testify that he ever had any success in obtaining the right to share in derivative products for his clients. The trial court was entirely within its discretion in excluding this speculative and irrelevant testimony.

As this Court has long recognized, “[t]he opinion of an expert need not rise to the level of absolute certainty but must be supported by a substantial factual evidentiary

base.” *State v. Maxie*, 513 S.W.2d 338, 345 (Mo. 1974) (Bardgett, J.). None of Plaintiff’s experts’ opinions had any factual evidentiary base, and therefore were properly excluded. Absent this expert testimony, the jury verdict was itself without evidentiary basis. As discussed in Section III, *supra*, this supports the trial court’s JNOV ruling. It also supports the trial court’s grant of a new trial.

**C. The Grant Of A New Trial Should Be Affirmed Because The Verdict Form Improperly Instructed The Jury To Hold Each Defendant Jointly And Severally Liable For Damages Based On A Percentage Of Gross Revenues Of All Of The Other Unrelated Defendants.
(Responds to Portion of Plaintiff’s Brief Points II. D.)**

Over the objections of Image Comics and the other Defendants, the jury was instructed to award damages against each Defendant jointly and severally based on the combined economic benefit allegedly derived by all Defendants from the use of Plaintiff’s name. The jury was not required to identify how much of that alleged benefit was derived by each Defendant. Accordingly, when the jury returned its verdict awarding \$24.5 million in damages — an award it expressly based on a percentage of the combined gross revenues of all Defendants — the entire amount was assessed jointly and severally against each Defendant. The trial court recognized the severity of this instructional error and granted a new trial. (LF 1402) Because there is no factual or legal basis to support the verdict form submitted to the jury over Defendants’ objection, the trial court’s grant of a new trial should be affirmed.

Citing *Linkogel v. Baker Protective Serv's*, 626 S.W.2d 380, 386-87 (Mo. Ct. App. E.D. 1981), Plaintiff contends that because he alleged that all Defendants were “joint tortfeasors” who “participated in the wrongdoing,” he was entitled to one verdict form assessing damages jointly and severally against each Defendant. (Pl. Brief at 104). Plaintiff has failed to apply the correct law to the actual facts of the case.

First, Plaintiff's sole basis for arguing that all the Defendants “participated in the wrongdoing” is his unsupported charge that “the inter workings of McFarlane and the corporate respondents comprised a singular enterprise that McFarlane controlled.” (Pl. Brief at 104). Plaintiff's unsubtle attempt to pierce the corporate veil of these corporate entities must be rejected as it was neither pleaded nor proved at trial and is completely without evidentiary basis. Moreover, Plaintiff's conspiracy claim was dismissed before trial by the trial court, a ruling which Plaintiff did not appeal.

Second, while it is true that in the traditional negligence context, Missouri law provides that “a judgment against joint tort-feasors must be for a single amount and cannot be split up,” *Chambers v. McNair*, 692 S.W.2d 320, 324 (Mo. Ct. App. E.D. 1985) (citing *Linkogel*, 626 S.W.2d at 387), “[t]he term ‘joint tort-feasor’ includes a **single indivisible harm** caused by independent, separate, but concurring wrongful acts of two or more persons.” *Beare v. Yarbrough*, 941 S.W.2d 552, 555 (Mo. Ct. App. E.D. 1997) (citing *Brickner v. Normandy Osteopathic Hosp., Inc.*, 687 S.W.2d 910, 912 (Mo. Ct. App. 1985)) (emphasis added). An “indivisible injury” results only when two or more causes combine to produce “an injury incapable of division on any reasonable basis.” *Id.* An injury is “incapable of division on any reasonable basis” when it is “**impossible** to

determine in what proportion each [defendant] contributed to the injury.” *McDowell v. Kawasaki Motors Corp. USA*, 799 S.W.2d 854, 861 (Mo. Ct. App. W.D. 1990) (emphasis added).

Under Missouri law, therefore, if the jury had awarded any damages for Plaintiff’s alleged loss of the \$100,000 EAS endorsement opportunity, some (but not all) of the defendants may have been jointly and severally liable since the loss would have been a single indivisible *injury* and it would have been impossible to determine what portion of that injury was caused by the HBO video and what portion was caused by the *Wizard* magazine that Plaintiff sent to EAS. But the jury awarded no such damages.

Instead, the jury only awarded “damages” based on Plaintiff’s “right of publicity” theory, under which a celebrity plaintiff can recover the pecuniary benefit obtained by a defendant who has been unjustly enriched by misappropriation of the celebrity’s valuable public image. *Bearfoot, Inc. v. Chandler*, 965 S.W.2d 386, 389 (Mo. Ct. App. E.D. 1998). There is no factual or legal basis to hold McFarlane Toys or Image Comics or any single Defendant liable for any damages based upon an “economic benefit” obtained by one of the other Defendants.

For example, there was no evidence that McFarlane Toys received any benefit from the use of Plaintiff’s name because it never made a Tony Twist toy or action figure, and never used the name Tony Twist or even the Twistelli character to advertise any of its products. So too, the evidence established that McFarlane Entertainment received no benefit from the use of Plaintiff’s name because it did not even exist until 1998 and had no revenues from *any* *Spawn* product.

There is no legal or logical basis to hold any of the Defendants liable for a percentage of another Defendant's revenues. The problem with this verdict may be best illustrated by the plight of Image Comics, although it applies with equal force to each of the other Defendants. Image Comics is a publisher, yet it was held liable for, among other things, 20% of a toy company's \$86.9 million in toy revenues. Image Comics does not control, license or receive any revenue for any derivative right in *Spawn*, including toys. It merely publishes comic books for a flat fee. Thus, even assuming that Plaintiff could prove that Image Comics itself derived some unjust economic benefit from the use of Plaintiff's name in the comic books it published, Image Comics cannot be held liable for any benefit derived by another Defendant from that other Defendant's use of Plaintiff's name.

Moreover, even if we apply the Missouri test for joint-and-several-liability to Plaintiff's evidence in this case, there can be no contention that it is "impossible to determine in what proportion each defendant contributed" to the injury because Plaintiff's expert witness Jay Barrington did just that by calculating to the dollar each Defendant's alleged portion of the total amount and preparing a chart showing that breakdown by Defendant. (TR 551; Exh. 218) The trial court was thus correct when it stated that it "should have instructed the jury to award damages based specifically on the benefit derived by each defendant from that defendant's own conduct . . ." (LF 1402-03) For this reason, the trial court's grant of a new trial should be affirmed.

D. The Grant of a New Trial Should be Affirmed Because the Verdict Directing Instructions Failed to Properly Instruct the Jury on the Necessary Elements of Plaintiff's Right of Publicity Claim. (Responds to Portion of Plaintiff's Brief Points II. A, B & C.)

For the reasons set forth in the JNOV sections of this brief, the case should never have been submitted to the jury. Thus, an attempt to highlight errors in jury instructions that never should have been given in the first place is a difficult task because one is forced to assume the existence of the facts that did not exist. With that caveat, we turn to the trial court's grant of a new trial on the grounds that it failed to properly instruct the jury on the necessary elements of Plaintiff's right of publicity claim. Failure to submit every element of a claim in a verdict directing instruction constitutes reversible error. *Vogel v. A.G. Edwards & Sons*, 801 S.W.2d 746, 750 (Mo. Ct. App. 1990). Id. Accordingly, the grant of a new trial on the court's failure to properly instruct the jury should be affirmed for the following reasons.

1. *The Verdict Directing Instructions Failed To Reference The Following Additional Necessary Elements of Plaintiff's Right Of Publicity Claim:*

That The Defendants Used Plaintiff's Name As A Symbol of Plaintiff's Identity; and

That Defendants Used Plaintiff's Name In Commercial Speech, Or That Defendants' Acted With Actual Malice In Using

***Plaintiff's Name In Non-Commercial Speech. (Responds to
Portion of Plaintiff's Brief Points II. A and II. B.)***

The trial court submitted Plaintiff's verdict directing Instruction Nos. 6, 8, 10, 12 and 14 against all of the Defendants, each of which read:

Your verdict must be for plaintiff and against defendant [name inserted] if you believe:

First, defendant [name inserted] intentionally used or published plaintiff's name, and

Second, defendant [name inserted] derived advantage from the use or publication of plaintiff's name, or plaintiff suffered harm as a result of defendant [name inserted] use or publication of plaintiff's name, and

Third, plaintiff did not consent to the use or publication, and

Fourth, as a direct result thereof, plaintiff sustained damage.

(L.F. 1241, 1243, 1245, 1247, 1249). As discussed in detail in the JNOV Sections, *supra*, these verdict directing instructions were woefully lacking in the necessary elements of Plaintiff's right of publicity claim.

First, as an absolute threshold matter, Plaintiff should have been required to prove that Defendants used his name not merely as a name, but ***as a symbol of his identity***. (See Section I, *supra*). The jury in this case was required to find only that Defendants used Plaintiff's name.

Second, Plaintiff should have been required to prove that Defendants used his name in some form of ***commercial speech***. (See Section II B, *supra*). Absent proof of a

commercial use, Plaintiff — because he is a public figure — should have been required to prove that Defendants acted with *actual malice* in using his name in non-commercial speech. (See Sections II A and C, *supra*, discussing application of *New York Times v. Sullivan*, 376 U.S. 254 (1964); see also, *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2001) (“a public figure . . . can recover damages for noncommercial speech from a media organization . . . only by proving ‘actual malice’”) (discussed in Section II B, *supra*)). The jury was given no such instructions here.

The trial court ultimately recognized that the verdict directing instructions it submitted did not accurately enunciate the elements of Plaintiff’s right of publicity claim, and ordered a new trial on that basis. The fact that the trial court did not directly discuss the *Sullivan* actual malice standard or the commercial speech requirement does not alter its basic conclusion that the verdict directing instructions were faulty. The trial court’s grant of a new trial based on erroneous verdict directing instructions was correct and should be affirmed.

2. *The Disjunctive Submission In The Verdict Directing Instruction Was Incorrect Because There Was No Evidence Of Advantage To The Defendants From Their Use Of Plaintiff’s Name. (Responds to Portion of Plaintiff’s Brief Point II. C.)*

The trial court used Plaintiff’s verdict directing Instruction Nos. 6, 8, 10, 12 and 14, which allowed the jury to find for Plaintiff if Defendants *either* derived advantage *or* inflicted harm. The submission of these instructions was erroneous because there was

absolutely no evidence that Defendants derived any commercial advantage from the use of Plaintiff's name. The trial court recognized its error and granted a new trial, stating:

Moreover, in instructing the jury to find for plaintiff if defendants either derived any advantage or inflicted harm, the Court erred, since the evidence that defendants derived an advantage from the use of plaintiff's name is absent.

(L.F. 1402).

Where an instruction is given in the disjunctive, each alternative submitted in the instruction must be supported by the evidence. *Ladish v. Gordon*, 879 S.W.2d 623, 628 (Mo. Ct. App. 1994). If each allegation set forth in the instruction is not supported by the evidence, the giving of the instruction is error. *Id.*

Here, the record is devoid of evidence that Defendants derived any advantage from the use of Plaintiff's name. Plaintiff's own experts testified that there was no evidence that a single product was sold as a result of the use of Plaintiff's name. (T. 242-243; Arceneaux Dep., 110). Therefore, the giving of Plaintiff's verdict directing instructions 6, 8, 10 and 12 was error. (L.F. 1241, 1243, 1245, 1247, 1249). Moreover, the astonishing amount of the award indicates that the jury was totally misled by the improper jury instructions, severely prejudicing all of the Defendants. Accordingly, the grant of a new trial should be affirmed.

V. THE TRIAL COURT’S DENIAL OF INJUNCTIVE RELIEF SHOULD BE AFFIRMED BECAUSE THE RELIEF SOUGHT BY PLAINTIFF WAS DANGEROUSLY OVERBROAD AND CONSTITUTED AN ILLEGAL PRIOR RESTRAINT OF SPEECH. (Responds to Portion of Plaintiff’s Brief Point III.)

Standard of Review

In “suits of an equitable nature . . . the decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976); Mo. R. Civ. P. Rule 73.01(c). “[T]he molding of an appropriate injunctive decree rests largely in the sound discretion of the trial court, which is vested with broad discretionary power to shape and fashion the relief it grants” *City of Bridgeton v. City of St. Louis*, 18 S.W.3d 107, 113 (Mo. Ct. App. E.D. 2000). *Accord, McBee, v. Gustaaf Vandecnocke Revocable Trust*, 986 S.W.2d 170 (Mo. banc 1999)(trial court “afforded much discretion” in deciding whether to award equitable relief).

A. The Denial Of Injunctive Relief Should Be Affirmed Because The Trial Court Did Not Abuse Its Discretion And There Was Substantial Evidence To Support Its Decision.

We cannot improve upon the trial court’s compelling discussion of its examination of the record and its reasoning for denying injunctive relief to Plaintiff. Its reasoning applies *a fortiori* to Image Comics, McFarlane Toys and McFarlane Entertainment for the reasons set forth in Sections II and III, *supra*, and Sections B and C, below.

B. The Denial Of Injunctive Relief Should Be Affirmed Because The Trial Court Correctly Determined That The Relief Sought Was Dangerously Overbroad.

In *Metmor Financial, Inc. v. Landoll Corp.*, 976 S.W.2d 454, 463 (Mo. Ct. App. W.D. 1998), the Court of Appeals warned that “[a] permanent injunction should be granted sparingly in clear cases only, and the decree should be framed to afford relief to which the complainant is entitled and not to interfere with legitimate and proper action against whom it is directed.” These concerns are especially heightened where the injunction is aimed at expression because it “is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finally drawn that the risks of freewheeling censorship are formidable.” *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975).

Nevertheless, Plaintiff asked for entry of an injunction prohibiting the Defendants “from publishing, producing or distributing any product (including but not limited to any comic book, trading card, video, book, poster or internet site) which includes or uses in any manner the name Tony Twist.” (Supplemental Legal File, SLF 127) His proposed injunction — which would ban every imaginable use of the name Tony Twist — violates every concern articulated by the Court of Appeals in *Metmor Financial* and the U.S. Supreme Court in *Southeastern Promotions*. Even without addressing the state and federal Constitutional issues (discussed below), there is no basis for such an injunction, particularly in light of Plaintiff’s grudging acknowledgment in his Substitute Brief that

the mere use of the name Tony Twist as the name of the Twistelli character in the comic books and other media is not unlawful. (Pl. Brief at 69).

C. The Denial Of Injunctive Relief Should Be Affirmed Because The Trial Court Correctly Determined That It Would Constitute An Unconstitutional Prior Restraint.

Plaintiff sought an injunction that would prohibit Defendants from engaging in a variety of expressive activities unrelated to the subject matter of this lawsuit and indisputably protected by the First Amendment — *e.g.*, a parody of plaintiff, a commentary on his fighting style, a factual report on this lawsuit.

Such an injunction is barred by an unbroken wall of First Amendment precedents dating back to *Near v. Minnesota*, 283 U.S. 697 (1931). As this Court knows, “[a]ny prior restraint on expression comes before this Court with a heavy presumption against its constitutional validity.” *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971). As Chief Justice Burger wrote in *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 567 (1976), “prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. * * * If it can be said that a threat of criminal or civil sanctions after publication “chills” speech, prior restraint “freezes” it at least for a time.” This heavy presumption of invalidity includes works of entertainment. *Southeastern Promotions*, 420 U.S. at 557-58 (holding that live drama and other forms of entertainment are protected by the same 1st Amendment presumption against prior restraints).

A proponent of a prior restraint thus “carries a heavy burden of showing justification for the imposition of a such a restraint.” *Organization for a Better Austin*, 402 U.S. at 420. He must not only establish a compelling need for such extraordinary relief but also demonstrate that his proposed injunction “fit[s] within one of the narrowly defined exceptions to the prohibition against prior restraints” and includes “procedural safeguards that reduce the danger of suppressing constitutionally protected speech.” *Southeastern Promotions*, 420 U.S. at 560. Plaintiff never attempted to meet any element of this heavy burden.

Instead, as he tried to do with *Zacchini*, Plaintiff presents a distorted interpretation of a United States Supreme Court decision — this time, *Pittsburgh Press v. Human Relations Commission*, 413 U.S. 376 (1973) — in an effort to pretend that the high court has given its stamp of approval to such injunctions. (Pl. Brief at 131). In fact, *Pittsburgh Press* was a pure commercial speech case that upheld an order preventing a newspaper from carrying “help wanted” classified ads in which the employer made gender designations (*e.g.*, “Men Wanted”) that constituted unlawful employment practices. In an analysis germane to the earlier discussion here of the distinction between commercial use and expressive use of the name Tony Twist, the Court explained that the ads at issue “did no more than propose a commercial transaction” — in fact, an illegal one — and thus were “classic examples of commercial speech” that fell outside the protection of the First Amendment. *Id.* at 386. Such is not the case here. The trial court’s judgment should be affirmed.

CONCLUSION

For the reasons set forth above, Image Comics, Inc., and the McFarlane Defendants and each of them respectfully request this Court affirm the trial court's grant of the judgment notwithstanding the verdict, or in the alternative, the trial court's grant of a new trial and affirm the trial court's denial of injunctive relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing were served on the following this the 14th day of January, 2003 to:

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Certificate of Compliance with Rule 84.06

I hereby certify that the foregoing Substitute Brief of Respondents complies with all requirements of Supreme Court Rule 84.06(b) and (g) in that:

1. Respondents' Substitute Brief (excluding the cover, certificate of service, certificate required by Rule 84.06(c), signature block, and appendix) contains 18,572 words, based upon the word count of the word-processing software used by the undersigned and, therefore, does not exceed the 27,900 words allowed under Rule 84.06(b).

2. Respondents' Substitute Brief has been formatted and saved on the accompanying diskette in Microsoft Word 97, Version SR-2. The diskette has been scanned for viruses and found to be virus-free by the anti-virus software used by the undersigned.

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