

**IN THE SUPREME COURT OF MISSOURI
No. SC94253**

**DEBORAH BARKLEY
Appellant,**

vs.

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

**TRANSFER FROM THE MISSOURI COURT OF APPEALS WESTERN
DISTRICT**

**APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
THE HONORABLE JAMES F. KANATZER
DIVISION 5**

SUBSTITUTE BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This appeal is from a judgment of the Jackson County Circuit Court entered on Jury verdicts rendered in an action to recover money damages for false imprisonment and battery.

The issues on appeal do not involve the construction of either the Federal or Missouri Constitutions, the validity of any treaty or statute of the United States, or any authority exercised under the laws of the United States, the construction of the revenue laws of this State, the Title to any State office, determinations regarding any offense punishable by death, or any other matters that fall within the exclusive jurisdiction of the Missouri Supreme Court. Therefore, jurisdiction of this appeal was vested in the Court of Appeals pursuant to Article V, Section 3 of the Constitution of the State of Missouri, as amended.

Appellant appealed the trial court's final judgment to the Missouri Court of Appeals for the Western District. The Court of Appeals affirmed, and Appellant sought timely transfer to this Court. The Court accepted transfer.

STATEMENT OF FACTS

BACKGROUND

Mrs. Barkley was a longtime customer of the Defendant, McKeever's Price Chopper grocery store, located in Independence, Missouri (Tr. 349). On May 24, 2009, she went to the Defendant's grocery store with her husband and three grandchildren, ages 3, 4 and 5 (Tr. 339). At the time, Mrs. Barkley was 54 years old and disabled as the result of three neck surgeries, a right shoulder surgery, four TMJ surgeries, and cubital tunnel and carpal tunnel surgeries, all of which left her with permanent injuries (Tr. 340-341). She was on pain medicines Oxycontin, Roxicet, and Felxeril for muscle spasms (Tr. 342). Her prior injuries were chronic and lifelong (Tr. 344). The purpose of the trip to the Defendant's store was to buy food and supplies for a family barbecue as well as for her to purchase accessories for diabetes testing equipment (Tr. 347, 350). She had her purse and several reusable canvas grocery bags with her (Tr. 361). She was accompanied in the store by her granddaughter but became separated from her husband and the two other grandchildren (Tr. 351). Because her husband had the shopping cart, as Plaintiff walked through the store she placed two spiral notebooks, a book light, toothpaste, a pencil holder and batteries in one of her bags intending to pay for them (Tr. 359). When she met up with her husband and the other children they checked out with

the items he had, but she forgot about, and did not pay for, the items in her bag (Tr. 368).

THE DETENTION

As Plaintiff, her husband and her grandchildren were leaving the store they were stopped by Defendant's loss prevention officers ("LPOs") who informed her that she was being stopped because she failed to pay for the items in her shopping bag (Tr. 371; Ex. 1, Part 9 time stamp 18:21:03 to 18:21:36). Mrs. Barkley's shopping bags and her purse were confiscated by the officers and she was led to a closed room in the store called the loss control room used by the LPOs for surveillance and detention of shoplifting suspects (Tr. 371-372). The events in the loss control room were recorded by a surveillance camera and the video recording was received into evidence as Ex. 1, Part 10 (Tr. 432, The video shows a time stamp. To locate specific events on the video, Plaintiff will cite to specific times as appropriate). The video system was not designed to record sound thus there is no sound on the video (Tr. 327). As Mrs. Barkley was led into the loss control room, one of the LPOs, Mr. Herrington, told her to sit down and pointed to a bench and she complied (Tr. 375; Ex. 1, Part 10 time stamp 18:21:51). The LPOs carried her purse and the shopping bags into the room and placed them on the counter where they were searched (Tr. 375; Ex. 1, Part 10 time stamp 18:22:17). The unpaid for merchandise was taken from the bag and placed on a counter where it was

cataloged, documented and photographed (Tr. 375-376; Ex. 1, Part 10 time stamp 18:22:25). The LPOs then searched Mrs. Barkley's purse, taking out her medications and her wallet with personal items and her driver's license (Tr. 377-378; Ex. 1, Part 10 time stamp 18:22:30). As she was being led to the loss control room, Mrs. Barkley tried to explain to the LPOs that she had simply forgotten about the items in the shopping bag and offered to pay for them but they ignored her explanation (Tr. 381). As the video demonstrates, Mrs. Barkley was calm, peaceful and compliant for the LPOs (Ex. 1, Part 10 time stamp 18:21:51 to 18:22:12). As she sat on the bench, she decided that she should contact her husband to let him know that it appeared that she would be awhile and that he should make arrangements to have the grandchildren picked up and taken home (Tr. 381). She therefore took her cell phone from her pocket and placed a call to him (Ex. 1, Part 10 time stamp 18:23:44). Upon observing her using her cell phone an LPO grabbed the phone from her, read the number she was calling and tossed it onto the counter near her purse thereby preventing her from making the call (Ex. 1, Part 10 time stamp 18:24:00). The LPOs thereafter continued to refuse to notify her husband about what was going on and she was not permitted to have any outside communication (Tr. 382-384). The LPOs kept the store merchandise, made a copy of Mrs. Barkley's driver's license and then all of her personal items except her medications were put back into her purse (Ex 1, Part 10 time stamp

18:24:32). They then placed her purse and her shopping bags on top of a file cabinet but they kept her medications separately on the counter (Ex. 1, Part 10 time stamp 18:24:38).

THE BATTERIES

Upon seeing her medication being separated from her purse Plaintiff, who had continued to sit calmly on the bench (Ex. 1, Part 10 time stamp 18:21:51 to 18:27:21), became concerned about her medicine and the fact that there was no communication with her husband (Tr. 384-385). Therefore, she stood up and walked slowly and calmly over to Mr. Herrington to ask about her medication and discuss her desire to communicate with her husband (Tr. 384-386; Ex. 1, Part 10 time stamp 18:27:30). As the video clearly demonstrates, she was not moving toward the door and was not trying to flee (Tr. 385; Ex. 1, Part 10 time stamp 18:27:31 to 18:27:34). Mr. Herrington, upon seeing her approach, immediately and abruptly reached for his handcuffs with one hand and grabbed Mrs. Barkley with the other to handcuff her (Ex. 1, Part 10 time stamp 8:27:35). Plaintiff testified that, as he grabbed her, Mr. Herrington said “I didn’t tell you to get up off the fucking bench” (Tr. 387). He then swung her around causing her to collide with a file cabinet as he attempted to handcuff her arms behind her back, but she had little flexibility as a result of previous shoulder and neck surgeries and told him she was disabled and that he was hurting her, so he handcuffed her with her arms in

front of her (Tr. 387; Ex. 1, Part 10 time stamp 18:27:50). Mrs. Barkley further testified that Mr. Herrington then became enraged and called her a “druggie”, again used profanity and told her to sit on the bench (Tr. 390). Mr. Herrington admitted in his testimony that he was agitated at this point and may have used profanity (Tr. 685). As a result of this treatment, Mrs. Barkley was frightened and even more desirous of communicating with her husband and told Mr. Herrington she would not sit down until he listened to what she had to say (Tr. 391). Mr. Herrington then reached out to grab Plaintiff (Tr. 391; Ex. 1, Part 10 time stamp 18:28:17). In response Mrs. Barkley, while still handcuffed, turned and reached for the door intending to call out for her husband and to get away from Mr. Herrington (Tr. 394; Ex. 1, Part 10 time stamp 18:28:18). The video shows that Mr. Herrington then grabbed her around her upper body from behind and pulled her away from the door (Tr. 394; Ex. 1, Part 10 time stamp 18:28:19). He then “leg swept” her legs out from under her throwing her to the tile floor where she landed face down (Tr. 394-395; Ex. 1, Part 10 time stamp 18:28:20). The other LPO also grabbed her and the two then forcefully pulled her arms behind her back and re-handcuffed her (Tr. 395; Ex. 1, Part 10 time stamp 18:28:37). She was then roughly jerked off the floor and dropped back onto it in a sitting position with her legs folded under her and her arms handcuffed behind her back (Tr. 399; Ex. 1,

Part 10 time stamp 18:29:01). While she was left in that position Mr. Herrington again called her a drug dealer and called her names (Tr. 420).

The LPO Manager testified that before Plaintiff was detained and taken to the control room, the LPO's intended to have her prosecuted. The police were called about four minutes after she was detained (Tr. 653; Ex. 1, Part 10 time stamp 18:25:00). Defendant did not need to investigate for the purpose of deciding whether or not prosecute (Tr. 569, 570). Before either of the batteries shown on the video occurred, Defendant had completed its investigation such that it had satisfied itself that in Defendant's opinion, Plaintiff had wrongfully taken merchandise; the merchandise had been recovered; and, Defendant had determined and documented Plaintiff's address and identity, and summoned the police (Tr. 653; Ex. 1, Part 10). Plaintiff was acquitted on the shoplifting charge in Municipal Court (Tr. 579).

EVIDENCE OF SIMILAR CONDUCT BY DEFENDANT

At Trial, Plaintiff offered Exhibits 88, 89 and 90, employee warning statements regarding Mr. Herrington, which exhibits were refused, over objection, by the Trial Court (Tr. 852). Plaintiff made an offer of proof which was refused by the Trial Court. (Tr. 852-854) Exhibit 88 was a report, made by the Defendant, that its employee, Jason Herrington, had used extreme foul language and made verbal threats of harm towards a shoplifter on September 7, 2009, which was considered

to be excessive force under the Defendant's guidelines. Exhibit 89 was a March 2011 warning report, again referring to Mr. Herrington, stating that he treated suspected shoplifters in a disrespectful, degrading and unprofessional manner on multiple dates. Exhibit 90 was a report dated December 12, 2008, stating that Mr. Herrington had over stepped his authority in handling a customer contact on December 6, 2008. The reports are all written on the same form (Exhibits 88, 89 and 90). The warning reports stated that Mr. Herrington would be suspended or terminated upon a further occurrence. (Exhibits 88, 89 and 90).

Plaintiff offered the Jackson County Circuit Court file of Gilbert Rizzo v. McKeever Enterprises d/b/a Price Chopper, Case No. 0816-CV11527, to show that Defendant searched and handcuffed a thirteen year old girl without justification and subjected her to verbal abuse and yelling, including racial epithets (Tr. 853). The Trial Court sustained Defendant's objection and refused to receive such evidence (Tr. 854).

EVIDENCE THAT PLAINTIFF REFUSED JURY DUTY

Mrs. Barkley was severely injured in an accident in 1995 when a bookcase collapsed and fell down on top of her (Tr. 340). As a result she had seven surgeries and was off work for four and a half years (Tr. 340). Plaintiff's counsel told the Jury during opening statement that there would be evidence of this prior injury and that Mrs. Barkley's prior condition was chronic before the incident at Defendant's

store (Tr. 305, 323). Plaintiff's counsel also told the Jury in opening statement that because of the prior injury and disability, Mrs. Barkley had to take strong pain medicines prescribed by her doctors, which medicines she had with her at the time of the incident (Tr. 305). Plaintiff herself told the Jury that the prior injuries and surgeries left her with permanent injuries and chronic pain (Tr. 342). On the day of the incident she was still being prescribed pain medicine and muscle relaxers for these pre-existing conditions (Tr. 342). She expected those injuries to be lifelong (Tr. 343-344).

Prior to trial, Defendant deposed Dr. Gillbanks, one of Mrs. Barkley's doctors, and read the majority of the doctor's deposition at Trial (Tr. 818-834). Due to her disability, Mrs. Barkley sought a medical excuse for Jury duty in 2007 and again in 2011 (Tr. 820-821). Dr. Gillbanks believed Mrs. Barkley's physical disabilities would preclude her from serving as a juror and provided her with a written medical excuse on both occasions (Tr. 821-822). The circumstances regarding the Jury excuses were reflected in Dr. Gillbanks' medical records and were discussed in her deposition (Tr. 820-822). Her testimony regarding Jury Duty was as follows:

Question: I'm going to hand you what has been marked as Exhibit

2. Is this one of the records contained within your file, Doctor?

Answer: Yes, it is.

Question: And this references a telephone call that was received from Mrs. Barkley here in your office and it was answered by Deborah Hays?

Answer: Yes.

Question: And what was the purpose of that call?

Answer: She wanted to get out of Jury Duty.

Question: I'm going to hand you what's been marked as Exhibit 3. Did you write a letter in response to her telephone call asking to get out of Jury Duty?

Answer: I did.

Question: And what's the date of that letter here?

Answer: February 12, 2007.

Question: And it says on here she is on disability because of musculoskeletal problems, she is unable to sit comfortably for any length of time; is that correct?

Answer: That is correct.

Question: Was that your opinion as of the date February 12th?

Answer: It was.

Question: Let me hand you what's been marked as Exhibit 4. This

looks like a prescription date 09/16/2011, but it's not actually a prescription, what is it?

Answer: It's a Jury Duty excuse.

Question: And did you write this?

Answer: My nurse wrote it, I signed it.

Question: And what is – why were you excusing – trying to get her excused from Jury Duty on September 16, 2011?

Answer: Because she continues to have chronic pain with any amount of being in one position as told to me, and that includes sitting, where you could be on a Jury for eight to 12 hours, only being up for bathroom and other privileges, and she said she cannot do that.

Question: So would that condition of hers have been the same back in February 12th of 2007 as it was in September 2011?

Answer: Very close yes.

Question: So she couldn't sit for long periods of time either of those dates with any time in between?

Answer: Yeah.

Plaintiff's counsel made an oral Motion in Limine seeking to preclude the evidence regarding Jury duty when counsel for Defendant suggested it would come up in Defendant's opening statement (Tr. 286). Plaintiff argued to the Trial Court that

there was voluminous evidence of Plaintiff's prior injury, disability and numerous surgeries and that Defendant simply wanted to prejudice the Jury against the Plaintiff by arguing that Plaintiff twice sought to avoid serving for Jury duty (Tr. 813). Defendant argued that not being able to serve showed some evidence of a pre-existing condition (Tr. 288). Secondly, Defendant suggested it somehow bore on her veracity (Tr. 288). At this point in the proceeding Plaintiff's counsel had already discussed her substantial prior injury with the respective jurors during Voir Dire (Tr. 290). The Trial Court overruled Plaintiff's Motion in Limine, but limited its use to cross examination of Plaintiff to establish her pre-existing condition (Tr. 293). Later during the Trial, but immediately before Defendant read the testimony of Dr. Gillbanks, Plaintiff again objected to the admission of the Doctor's testimony concerning Plaintiff's excuse for Jury Duty (Tr. 812). By this time Plaintiff had already testified and rested her case (Tr.611). She had conceded her disability prior to the incident at Defendant's store (Tr. 813). There was no evidence in the case that she wasn't disabled beforehand (Tr. 813). The Trial Court recognized Plaintiff's admissions regarding her prior injuries and damages, but the Trial Court, stating that counsel for Defendant could use the evidence to buttress the fact that Plaintiff was disabled before the incident at Defendant's store, overruled Plaintiff's objection (Tr. 813). The Trial Judge stated he could not stop the evidence from being admitted but stated that Defendant couldn't use the

testimony in argument (Tr. 813). Dr. Gillbanks' testimony was then admitted (Tr. 818).

In his final remark to the Jury at the conclusion of his closing argument, counsel for Defendant stated:

“We're very concerned and very appreciative of the fact that when you guys got your summons to come, you honored it and you didn't try to get out of it. Thank you for coming.”

THE JURY'S VERDICTS

Plaintiff submitted claims of false imprisonment and battery to the Jury. It returned verdicts for Defendant on both Counts (LF 63).

POST-TRIAL MOTIONS

Plaintiff timely filed a Motion for New Trial and expected that the Trial Court would set it for hearing as required by the Sixteenth Judicial Circuit's local rules. Defendant filed Suggestions in Opposition to the Motion (LF. 70) and the Trial Court then issued its Order denying the Motion without a hearing. Plaintiff thereafter timely filed her Notice of Appeal LF. 88).

POINTS RELIED ON

POINT I

The Trial Court erred in refusing Plaintiff's proposed verdict directing instruction submitting her battery claim without reference to the affirmative defense of resisting invasion of property, hypothesized in M.A.I. instruction 32.10, and instead giving Defendant's proposed Instruction Numbers 9 & 10, which submit the affirmative defense because the Instructions do not comply with the requirements of Rule 70.02 in that Plaintiff's proposed verdict directing instruction, was required to be given to the exclusion of any other instructions on the same subject; and, because Defendant's Proposed Instructions (1) hypothesized facts not supported by the evidence, (2) included unauthorized deviations from M.A.I. 32.10 by failing to hypothesize unlawful conduct as required in M.A.I. 32.10 paragraph 1, (3) misstated the law in that they purport to authorize the use of force in response to conduct which is not unlawful, and (4) misdirected, misled and confused the jury as to the findings of fact necessary to support the defense presented in such Instructions thereby resulting in prejudicial error.

Doe v. Quest Diagnostics, Inc., 395 S.W.3d 9 (Mo. 2013)

Norfolk S. Ry. v. Crown Power & Equip. Co., 385 S.W.3d 445 (Mo. App. W.D. 2012)

Teel v. May Dep't Stores Co., 155 S.W.2d 74 (Mo. 1941)

Teel v. May Dep't Stores Co., 176 S.W.2d 440 (Mo. 1943)

POINT II

The Court erred in giving Instruction No. 10, Defendant's affirmative defense to battery, because it was not supported by competent and substantial evidence in that Instruction No. 10 hypothesized that all of the batteries inflicted upon Plaintiff were inflicted after and as a result of her alleged attempt to flee the loss prevention office when in fact the evidence showed that the first battery was inflicted upon her before her alleged attempt to flee the loss prevention office.

Doe, 395 S.W.3d 8

POINT III

The Trial Court erred by admitting Defendant's evidence, over timely objection, that Plaintiff had on two occasions gotten out of jury duty because that evidence was legally irrelevant in that such evidence did not logically tend to prove or disprove a fact in issue because Plaintiff had admitted the prior physical condition purportedly sought to be proved by such evidence, there was ample other evidence of such pre-existing condition and such prior medical condition was not in dispute, and because the admission of such evidence was legally irrelevant in that it was cumulative to significant evidence of her physical condition, and its probative value, if any, was

outweighed by its prejudice because it alienated and fostered resentment by the jurors who were serving and did result in prejudice to Plaintiff's right to a fair and impartial jury.

Adkins v. Hontz, 337 S.W.3d 711 (Mo. App. W.D. 2011)

City of Kan. City v. Pitts, 870 S.W.2d 474 (Mo. Ct. App. 1994)

Westerman v. Shogren, 392 S.W.3d 465 (Mo. App. W.D. 2012)

Williams v. Trans State Airlines, Inc., 281 S.W.3d 854 (Mo. App. E.D. 2009)

POINT IV

The Trial Court erred in refusing Plaintiff's offer of proof consisting of Exhibits 88, 89 and 90 and the Jackson County Circuit Court file containing evidence of a separate claim against Defendant because such evidence was relevant to the submission of punitive damages in that Exhibits 88, 89 and 90 showed that Defendant's employee Jason Herrington had been found by Defendant to be too aggressive, used excessive force and used foul language under sufficiently similar circumstances both before and after the incident involving Plaintiff and evidence from the separate lawsuit also showed sufficiently similar conduct by Defendant on another occasion and such evidence was competent, material, relevant and therefore admissible for purposes of proving the mental elements of the Plaintiff's punitive damages claim as well as corroborating Plaintiff's claim of such conduct, and the

exclusion of such evidence was prejudicial to Plaintiff.

Brockman v. Regency Financial Corp., 124 S.W.3d 43 (Mo. Ct. App. 2004)

Guthrie v. Mo. Methodist Hosp., 706 S.W.2d 938 (Mo. App. W.D. 1986)

Letz v. Turbomeca Engine Corp., 975 S.W.2d 155 (Mo. App. W.D. 1997)

Rinehart v. Shelter General Ins. Co., 261 S.W.3d 583, 591 (Mo. App. W.D. 2008)

ARGUMENT

POINT I

The Trial Court erred in refusing Plaintiff's proposed verdict directing instruction submitting her battery claim without reference to the affirmative defense of resisting invasion of property, hypothesized in M.A.I. instruction 32.10, and instead giving Defendant's proposed Instruction Numbers 9 & 10, which submit the affirmative defense because the Instructions do not comply with the requirements of Rule 70.02 in that Plaintiff's proposed verdict directing instruction, was required to be given to the exclusion of any other instructions on the same subject; and, because Defendant's Proposed Instructions (1) hypothesized facts not supported by the evidence, (2) included unauthorized deviations from M.A.I. 32.10 by failing to hypothesize unlawful conduct as required in M.A.I. 32.10 paragraph 1, (3) misstated the law in that they purport to authorize the use of force in response to conduct which is not unlawful, and (4) misdirected, misled and confused the jury as to the findings of fact necessary to support the defense presented in such Instructions thereby resulting in prejudicial error.

Standard of Review

The applicable law with respect to reviewing the propriety of jury instructions was recently summarized by this Court in Doe v. Quest Diagnostics, Inc., 395 S.W.3d 8 (Mo. 2013). Whether a jury was instructed properly is a question of law the court reviews *de novo*. Id. at 13. If an instruction fails to follow an applicable M.A.I., instruction error is presumed unless it is clearly established that the error did not result in prejudice. Id. at 13. Where there is no applicable M.A.I., the instruction given will be reviewed to determine whether it follows the applicable substantive law by submitting the ultimate facts required to sustain the verdict. Id. at 13. If the court finds the instruction erroneous, it must then determine whether the error misdirected, misled or confused the jury resulting in prejudicial error and justifying a new trial. Id. at 13. The basic principle applicable to the submission of instructions is they should not be given if there is no evidence to support them. Id. at 15. Instructions must be supported by substantial evidence or the reasonable inferences derived therefrom. Id. at 15. Instructions which are at variance with the charge or which are broader in scope than the evidence are improper. Id. at 15. When an instruction is shown to be improper, the burden shifts to the opposing party to show that it was not prejudicial. Id. at 15. **An error is prejudicial and requires a new trial if it**

materially affects the merits of the action by misdirecting, misleading, or confusing the jury. Id. at 15.

The Batteries

A battery is defined as the willful harmful or offensive touching of the person of another. The evidence in this case, primarily Defendant's own surveillance video, demonstrates, and the Court's instructions identified, two separate batteries. The first occurred when Plaintiff walked across the control room to talk to the LPO, (Ex. 1, Part 10 time stamp 18:27:34). The second occurred almost a minute later after Plaintiff, who was then in handcuffs, tried to open the loss control room door as the LPO was reaching for her again (Ex. 1, Part 10 time stamp 18:28:18). Neither of these batteries were committed for the purpose of determining whether Plaintiff had taken merchandise or for the purpose of recovering merchandise as the testimony and the video clearly demonstrate that those purposes had long since been accomplished. The LPOs activity at the time of the batteries was related solely to Defendant's loss control procedures such as taking Plaintiff's picture for its "Trespass Log", trying to get Plaintiff to sign a release, and giving Plaintiff a statement of charges Defendant demanded that she pay, etc (Tr. 654, 761, 762).

The First Battery

The loss control room video shows that in the first battery, the LPO grabbed

Plaintiff by the arm and forced it behind her back while spinning her around causing her to strike a file cabinet (Ex. 1, Part 10 time stamp 18:27:35 to 18:27:40). He then tried to force both of her arms behind her back to handcuff her and, when he could not do so without causing obvious severe pain, he handcuffed her with her arms in front of her body (Ex. 1, Part 10 time stamp 18:27:47). By any reasonable, objective standard, these touchings were offensive and caused Plaintiff pain, anxiety and concern about what would happen next.

The Second Battery

The second offensive touching occurred when, after a brief conversation as they stood facing each other, the LPO reached for Plaintiff's arms again and in response she turned and tried to open the loss control room door (Ex. 1, Part 10 time stamp 18:28:17). The two LPOs then grabbed her by her arms and shoulders from behind, pulled her away from the door, "leg swept" her to the floor, pinned her to the floor by placing a knee in her back as she lay face down on the concrete floor, forced her arms behind her back, handcuffed her and pulled her up by her arm and then forced her to sit on the floor in an unnatural, uncomfortable position for an extended period of time all of which caused her pain and was offensive to her (Ex. 1, Part 10 time stamp 18:28:17 to 18:29:06). This second battery caused Plaintiff even more pain, injury, anxiety and humiliation. (Tr. 420).

At both of the times Defendant battered Plaintiff, the property in question (the allegedly stolen merchandise) had already been recovered and was in Defendant's possession. The merchandise had been photographed, catalogued, price checked and was sitting on the counter. (Ex. 1, Part 10 time stamp 18:27:30). Thus, the undisputed evidence shows that, prior to the occurrence of the batteries, Defendant's investigation was complete and Defendant was detaining Plaintiff merely for the purpose of causing her to be prosecuted and documenting Defendant's own files.

The Instructions

Faced with the fact that at the time of the batteries Defendant had already initiated criminal prosecution, recovered the property and had all the means and information necessary to identify and prosecute Plaintiff, Defendant did not even purport to defend its conduct as having been committed *in order to prevent Plaintiff from taking Defendant's property* as stated in M.A.I. 32.10. Instead, Defendant modified 32.10 to hypothesize that the batteries were justified *to prevent Plaintiff from fleeing the loss prevention office* thereby submitting an entirely new and unrecognized defense.

Supreme Court Rule 70.02 provides that where M.A.I. contains an applicable instruction, it must be given without modification and to the exclusion of any other instruction. As noted in Norfolk Southern Ry. v. Crown Power &

Equip. Co., 385 S.W.3d 445 (Mo. App. W.D. 2012) a jury instruction must be based on the proper duty of care and a proper instruction must follow the applicable substantive law and must recite the appropriate ultimate facts to be found. Id. at 458-459. Further, a jury instruction must be based on a recognized legal duty. Id. at 459. The instructions given to the jury concerning Plaintiff's battery claim at Defendant's request do not comply with these principles.

M.A.I. 23.02 is the applicable verdict directing instruction for the tort of battery. M.A.I. 23.02 (1990). It contains a "tail" to be added if an affirmative defense is submitted. Two possible affirmative defenses are referred to in the Committee Comment to M.A.I. 23.02, comments G (provocation) and H (public official possessing a legal right to touch Plaintiff). M.A.I. also contains four specific affirmative defense instructions for battery claims. These instructions hypothesize affirmative defenses based upon consent (M.A.I. 32.08), ejecting a trespasser (M.A.I. 32.09), resisting an invasion of property (M.A.I. 32.10) and self-defense (M.A.I. 32.11). Clearly, none of these instructions in any way fit the facts of this case.

Defendant did not claim or offer an instruction submitting that its LPOs were provoked into battering Plaintiff and did not claim that they were acting as public officials possessing the legal right to touch or batter Plaintiff. There was no evidence or claim that Plaintiff consented to the batteries. There was no evidence

or claim that Plaintiff was trespassing or that Defendant was trying to eject her for trespassing. Finally, Defendant did not claim the batteries were committed in the course of recovering its property or keeping Plaintiff from leaving with its property to prevent an investigation into whether Plaintiff had concealed merchandise. Any such claim would not be supported by the evidence, which clearly showed that Defendant already had possession of the property in question (Tr. 375-376; Ex. 1, Part 10). Because the evidence did not establish any recognized or authorized affirmative defense to the tort of battery, Plaintiff tendered and asked the court to give the jury M.A.I. 23.02 without the affirmative defense “tail” (Tr. 863-866). Defendant objected to Plaintiff’s proposed instruction and tendered its own verdict directing instruction, which included an affirmative defense “tail”. In addition, Defendant tendered and the Court gave instruction Number 10, which Defendant identified as being M.A.I. 32.10, an authorized affirmative defense to the tort of battery. The instructions in question were as follows:

Plaintiff’s proposed Instruction

Your verdict must be for Plaintiff if you believe:

First, Defendant intentionally pulled Plaintiff’s arms behind her back, handcuffed her, knocked her to the floor and pulled her to a sitting position as her hands were handcuffed behind her back, and

Second, Defendant thereby caused Plaintiff bodily harm.

The Court refused this instruction (Supplemental Legal File p.3; Tr. 863-866) and instead gave the following instructions at Defendant's request:

Instruction Number 9

Your verdict must be for Plaintiff if you believe:

First, Defendant intentionally pulled Plaintiff's arms behind her back, handcuffed her, knocked her to the floor and pulled her to a sitting position as her hands were handcuffed behind her back, and

Second, Defendant thereby caused Plaintiff bodily harm, unless you believe that Plaintiff is not entitled to recover by reason of Instruction Number 10.

Instruction Number 10

Your verdict must be for Defendant McKeever Enterprises, Inc. on Plaintiff Deborah Barkley's claim for battery if you believe:

First, Plaintiff Deborah Barkley either refused to follow the Defendant's Loss Prevention Officers' instructions or attempted to flee the Loss prevention Office, and

Second Defendant's Loss Prevention Officers handcuffed and leg swept Plaintiff for the purpose of resisting Plaintiff's attempt

to flee the Loss Prevention Office, and

Third, Defendant's Loss Prevention Officers used only such force as was reasonable and necessary to prevent Plaintiff from fleeing the Loss Prevention Office.

Both instructions were given over the objection of Plaintiff. (LF p.54; Tr. 863-866). While Instruction Number 10 supposedly submitted M.A.I. 32.10, it clearly contained substantial modifications, which were not identified to the Court as required by M.A.I., in that it did not define an unlawful act as required in M.A.I. Instruction 32.10 which reads as follows:

M.A.I. 32.10 (1969 New) Affirmative Defenses—Battery Actions—Resisting Invasion of Property

Your verdict must be for Defendant if you believe:

First, Plaintiff attempted to (*here describe unlawful act such as "enter Defendant's home" or "take Defendant's property"*) when Plaintiff had no right to do so, and

Second, Defendant (*here describe defense measures such as "struck Plaintiff"*) for the purpose of resisting Plaintiff's attempt,

and

Third, Defendant used only such force as was reasonable and

necessary to prevent Plaintiff from (*here repeat act described in Paragraph First*).

By failing to hypothesize unlawful acts and the same conduct, the instruction deviates from M.A.I. in both paragraphs First and Third as required by M.A.I. The Trial Court erred.

The Court's Instruction No. 10 is clearly flawed and erroneous. It does not accurately state the law because failing to obey the instructions of an LPO is not an unlawful act nor is attempting to leave the premises. It does not hypothesize facts which are supported by the evidence because the undisputed evidence shows that the first battery had nothing to do with her "attempt to flee" as hypothesized in paragraph "second" of the instruction.

By its very terms, M.A.I. 32.10 only hypothesizes a defense where reasonable force is used for the purpose of "resisting [an] invasion of property". It does not hypothesize a defense for batteries committed in aid of enforcing LPOs' instructions, or in aid of prosecution, in aid of arrest, in aid of detention, in aid of confinement or anything of the sort. Yet by Instruction 10 the jury was directed that it must find for Defendant if it believed that reasonable force was used because either Plaintiff refused to follow instructions or simply because she attempted to flee. Neither of these acts amounted to unlawful conduct and the instruction thus clearly misstates the law and misdirects the jury. Unless this court is willing to

declare that it is unlawful to merely refuse to follow a merchant's instructions, regardless of how inappropriate, unreasonable or unfair they may be, and without even submitting fairness or reasonableness of the instruction or the detention, it must find this instruction to be erroneous.

Defendant did not offer, and Plaintiff has not located, any authority in the law of Missouri, or elsewhere for that matter, for the proposition that a merchant has the legal right to batter an alleged shoplifter simply for refusing to follow instructions or to prevent her from leaving its premises **after** it had completed its investigation into whether there had been a taking and has recovered its property. Undoubtedly this is because it is not the law. The combined effect of the Trial Court's rulings and submissions is that an applicable M.A.I. instruction was refused in favor of a modified M.A.I. instruction which does not apply to the issues tried, misstates the law, misdirects the jury as to the conduct constituting a defense to battery and, was not supported by the evidence.

These submissions were error, and Plaintiff's objections and contentions were duly raised and preserved by Plaintiff's counsel in the formal instruction conference and in Plaintiff's Motion for New Trial. (Tr. 863-867; LF 65).

Prejudicial Effect

Defendant bears the burden of establishing that its failure to follow M.A.I. was not prejudicial. Doe, supra at 15. Assuming, without conceding that

M.A.I. 32.10 as approved by the Committee was applicable to the facts of this case, Defendant's modifications to that instruction were clearly prejudicial.

Instead of being required to find and base its verdict upon Plaintiff's committing an unlawful act, the jury was instructed to find for Defendant if it believed that Plaintiff merely refused to follow the LPOs' instructions. Neither the lawfulness nor the reasonableness of the instructions were hypothesized and the jury was not required, or even permitted, to consider such issues. This cannot and should not be the law. The jury is presumed to have followed this Instruction. It must, therefore, be presumed to have applied and followed an incorrect statement of the law to decide Plaintiff's claim.

For more than 70 years Missouri law has recognized that while a merchant has the right to detain a customer "to protect its property", that right is not unlimited and a merchant can only employ reasonable measures to investigate and recover its property. Teel v. May Dep't Stores Co., 176 S.W.2d 440 (Mo. 1943) Section 537.125 R.S.Mo. Defendant's instructions ignore these limitations by expanding the purposes for and circumstances under which a merchant may employ the use of force. In so doing, they misstate the law and misdirect the jury and the only effective remedy for this error is a new trial.

POINT II

The Court erred in giving Instruction No. 10, Defendant's affirmative defense to battery, because it was not supported by competent and substantial evidence in that Instruction No. 10 hypothesized that all of the batteries inflicted upon Plaintiff were inflicted after and as a result of her alleged attempt to flee the loss prevention office when in fact the evidence showed that the first battery was inflicted upon her before her alleged attempt to flee the loss prevention office.

Standard of Review

Whether a jury was instructed properly is a question of law which the court reviews *de novo*. The basic principle applicable to the submission of instructions is that they should not be given if there is no evidence to support them. Instructions must be supported by substantial evidence and reasonable inferences to be derived therefrom. Instructions which are broader in scope than the evidence are improper. When an instruction is shown to be improper, the burden shifts to the opposing party to show that it was not prejudicial. An error is prejudicial requiring a new trial if it materially affects the merits of the action by misdirecting, misleading, or confusing the jury. Doe, supra at 13 and 15.

The Evidence

The evidence showed that Defendant's LPOs detained Plaintiff and in the course of doing so battered her on two separate occasions. In the first battery the LPO grabbed her by the arm and forced it behind her back while spinning her around causing her to strike a file cabinet (Ex. 1, Part 10 time stamp 18:27:34). He then tried to force both of her arms behind her back to handcuff her and when he could not do so without causing obvious severe pain he handcuffed her with her arms in front of her body (Ex. 1, Part 10 time stamp 18:27:50). This initial battery caused Plaintiff pain, anxiety and concern about what would happen next. Up to this point in time Mrs. Barkley made no attempt to "flee" the loss prevention office (Ex. 1, Part 10 time stamp 18:21:45 to 18:28:17). Defendant's Instruction No. 10 which submitted that both batteries were justified because she had attempted to flee is unsupported by the evidence and misleading, as Plaintiff objected at trial (Tr. 863, 864), and contended in her Motion for New Trial (L.F.65). Simply stated, the Defendant's Instruction hypothesized, as a defense to the initial battery, an act which had not yet occurred. The second battery occurred when, after a brief conversation as they stood facing each other, Mr. Herrington reached for Plaintiff's arm again and she turned and tried to open the loss prevention room door (Ex. 1, Part 10 time stamp 18:28:18). The LPOs then grabbed her arms and shoulders from behind, pulled her away from the door, "leg

swept” her to the floor, pinned her to the floor by placing a knee in her back as she lay face down on the concrete floor, forced her arms behind her back, handcuffed her and pulled her up by her arm and then deposited her back on the floor. Thus, the undisputed evidence clearly proved multiple batteries, one of which occurred before she allegedly attempted to “flee the loss prevention office” and the second after she reached for the door. Instruction 10, however, ignores this evidence and instructs the jury that the alleged attempt to flee precipitated all of the batteries. This submission simply ignores the evidence and is not supported by the evidence. The Court had no evidence upon which to instruct, and the jury simply had no evidence or reasonable inference upon which to find, that a battery inflicted before Plaintiff allegedly turned and tried to open the door was justifiably inflicted because of an attempt to flee. Yet, the Court’s Instruction as to both batteries provides:

“Third, Defendant’s Loss Prevention Officers used only such force as was reasonable to prevent Plaintiff from fleeing the Loss Prevention Office.”

When the evidence does not support an instruction given to the jury, the proper and appropriate remedy is a new trial. Thus, the Court erred in giving Instruction No. 10 over Plaintiff’s objection and in overruling Plaintiff’s Motion for a New Trial. Doe, 395 S.W.3d at 14; Norfolk Southern Ry, 385 S.W.3d at 18.

POINT III

The Trial Court erred by admitting Defendant's evidence, over timely objection, that Plaintiff had on two occasions gotten out of jury duty because that evidence was legally irrelevant in that such evidence did not logically tend to prove or disprove a fact in issue because Plaintiff had admitted the prior physical condition purportedly sought to be proved by such evidence, there was ample other evidence of such pre-existing condition and such prior medical condition was not in dispute, and because the admission of such evidence was legally irrelevant in that it was cumulative to significant evidence of her physical condition, and its probative value, if any, was outweighed by its prejudice because it alienated and fostered resentment by the jurors who were serving and did result in prejudice to Plaintiff's right to a fair and impartial jury.

STANDARD OF REVIEW

The Trial Court has broad discretion over the admissibility of evidence and Appellate Courts will not interfere with their decisions unless there is a clear showing of abuse of discretion. Hancock v. Shook 100 S.W. 3d 786, 795 (Mo. banc 2003) The Trial Court is in the best position to evaluate whether the potential prejudice of evidence outweighs its relevance. It is vested with broad discretion in ruling questions of relevancy and evidence and, absent a clear showing of abuse of

that discretion, the Appellate Court should not interfere with the Trial Court's ruling. Giles v. Riverside Transport, Inc., 266 S.W. 3d 290, 295 (Mo. App 2008) State v. Hawkins 778 S.W. 2d 780, 782-83 (Mo. App 1989). The Trial Court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the Court and it is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful and deliberate consideration. If reasonable persons can differ about the propriety of the action taken by the Trial Court, then it cannot be said that the Trial Court abused its discretion. Williams v. Trans States Airlines, Inc., 281 S.W. 3d 854, 872 (Mo. App. E.D. 2009). For evidentiary error to cause reversal, prejudice must be demonstrated. State v. Reed, 282 S.W. 3d 835, 827 (Mo. banc 2009).

ARGUMENT

The Trial Court abused its discretion in admitting the testimony of Dr. Gillbanks that Plaintiff sought to get out of jury duty on two prior occasions as that evidence only served to prejudice the Plaintiff in the eyes of the jury. Plaintiff objected to the relevance of Dr. Gillbanks' testimony first by way of Motion in Limine and, secondly, during trial immediately before Dr. Gillbanks' testimony was read to the jury. These objections were overruled by the Trial Court.

Appellate Courts in this State have long dealt with the issue of legal

and logical relevance. The Court of Appeals, in Westerman v. Shogren, 392 S.W. 3d 465 (Mo. App. W.D. 2012), recently recited the general rule to be as follows:

“ ‘To be admissible, evidence must be **logically** and legally relevant.’

Secrist v. Treadstone, LLC, 356 S.W. 3d 276, 281 (Mo. App W.D. 2011)

(quoting Claus v. Intrigue Hotels, LLC, 328 S.W. 3d 777, 786 (Mo. App

W.D. 2010)). **Logical relevance** refers to the tendency of evidence “to make

the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the

evidence”. (quoting State v. Tisius, 92 S.W. 3d 751, 760 (Mo. banc 2010)).

Legal relevance, on the other hand, “is a determination of the balance

between the probative and prejudicial effect of the evidence” (quoting Claus,

328 S.W. 3d 787). That balance requires the Trial Court to “ weigh the

probative value, or usefulness, of the evidence against its costs, specifically

the dangers of unfair prejudice, confusion of the issues, undue delay,

misleading the Jury, waste of time, or needless presentation of cumulative

evidence” (Adkins v. Hontz, 337 S.W. 3d 711,720 (Mo. App. W.D. 2011))

(quoting Kroeger-Eberhart v. Eberhart, 254 S.W. 3d 38,43 (Mo. App. E.D.

2007)). If the cost outweighs the usefulness, the evidence is not legally

relevant and should be excluded. Id.”

Id. at 474

In the present case, it is questionable whether there was in fact any logical relevance to the fact that Plaintiff “got out of” jury duty. Although Defendant argued that her excuse for jury duty demonstrated her prior physical condition, there wasn’t any dispute about Plaintiff’s disability or prior medical condition, and it is hard to understand how being excused from jury duty could make the fact of her prior chronic condition, injury and disability any more evident than it already was. Mrs. Barkley herself testified that prior to the incident at Price Chopper she had had 3 neck surgeries, four TMJ surgeries, shoulder surgery and carpal and cubital tunnel surgeries, all of which left her disabled and with chronic and permanent lifelong injuries. The Doctor’s testimony, apart from and without reference to the jury duty issue, confirmed her medical history and condition as did her medical records, all of which documented her prior condition and need for significant medications. Thus, the ultimate legitimate point to be made by Defendant, that she was in poor physical condition before the batteries, was proven by the doctor’s direct descriptions of her condition, which were already in evidence, and not that she sought to get out of jury duty. The, evidence that she got out of jury duty, if offered to buttress her already established and undisputed pre-existing physical condition, was at best, simply cumulative and offered no new information at all, except that she twice got out of jury duty, a logically and legally irrelevant fact. In and of itself, whether Plaintiff did not serve jury duty in the past

was wholly irrelevant to any issue in the case, but did inject prejudice into the case. Dr. Gillbanks' opinion was that Mrs. Barkley should have been excused from jury duty.

Even assuming, however, that "getting out of jury duty" was somehow logically relevant, it was not legally relevant. To be legally relevant, the prejudicial effect of the testimony had to be considered by the Trial Court. In this case, the unfair prejudice was that the evidence alienated the jury from the Plaintiff because the jurors, in this case, as opposed to Appellant, did in fact serve their duty as jurors. jury duty is a hardship and sacrifice. Its members are required to be away from their families, work and daily routines, often having to miss events and to make that time up on top of already busy schedules and commitments. There would be obvious and understandable resentment against Plaintiff by the jurors sitting in her four day Trial upon being told that Plaintiff, on two occasions, sought to avoid jury duty.

There is an extremely strong public policy in favor of the right to Trial by jury, which right is protected by the 7th Amendment to the U.S. Constitution, as well as by Article I § 22 (a) of the Missouri Constitution, and such right is sacrosanct. The City of Kansas City v. Pitts, 870 S.W. 2d 474 (W.D. 1994). The right to a jury trial, however, is not fully protected if the Trial Court permits the jury to become prejudiced against a party by erroneously admitting improper

evidence. Parties at trial have a constitutional right to a fair and impartial jury and are entitled to unbiased jurors. The Trial Court's ruling on this issue is clearly contrary to the standards recited above requiring the Court to weigh the probative value against the prejudicial effect of such evidence. This case presents such a textbook example of the rules regarding the determination of relevant evidence that reasonable minds cannot differ on the conclusion that it was error to admit such evidence. The Trial Court's rationale for admitting the objectionable evidence was that it couldn't stop Defendant's counsel from buttressing other evidence of Plaintiff's disability and physical condition (Tr. 813). The Court certainly could have refused to admit the evidence and its stated rationale demonstrates the Court's lack of careful deliberation of the issue (Tr. 813). Defendant could still have been allowed to use parts of Dr. Gillbanks' testimony to prove Plaintiff couldn't sit or stand for long periods without letting the jury know she tried to get out of jury duty.

Defendant sought early on in the trial to bring before the jury the fact that Plaintiff had twice avoided jury duty (Tr. 286). Defendant got the opportunity and seized it to read Dr. Gillbanks' testimony to the jury late in the case. It then ended its closing argument with this statement to the jurors:

“We’re very concerned and very appreciative of the fact that when you guys got your summons to come, you honored it and you didn’t try to get out of it.

Thank you for coming.”

Defendant’s final comment was cleverly designed to misuse the jury issue to remind the jurors that Mrs. Barkley twice would not perform her duty and make the sacrifices they had made. While it is common for counsel to thank a jury for its service, it’s a different matter to praise them for not trying “to get out of it”. The evidence that Plaintiff got out of jury duty and counsel’s statement were intended to cause the jurors to resent Mrs. Barkley. They clearly did and the anger and resentment led to quick verdicts against her and deprived her of the fair, earnest and diligent deliberation that she was entitled to, free from bias. Had the evidence properly been refused, counsel would not have made the same remark at closing. Clearly the prejudice of the objectionable evidence outweighed the minute value, if any, of its usefulness and the evidence should have been excluded. The Trial Court’s erroneous statement at the time of its ruling that it couldn’t stop the evidence from being admitted indicates a lack of careful consideration, such that it did constitute an abuse of discretion. Adkins v. Hontz, 337 S.W. 3d 711,718 (Mo. App. W.D. 2011).

POINT IV

The Trial Court erred in refusing Plaintiff's offer of proof consisting of Exhibits 88, 89 and 90 and the Jackson County Circuit Court file containing evidence of a separate claim against Defendant because such evidence was relevant to the submission of punitive damages in that Exhibits 88, 89 and 90 showed that Defendant's employee Jason Herrington had been found by Defendant to be too aggressive, used excessive force and used foul language under sufficiently similar circumstances both before and after the incident involving Plaintiff and evidence from the separate lawsuit also showed sufficiently similar conduct by Defendant on another occasion and such evidence was competent, material, relevant and therefore admissible for purposes of proving the mental elements of the Plaintiff's punitive damages claim as well as corroborating Plaintiff's claim of such conduct, and the exclusion of such evidence was prejudicial to Plaintiff.

STANDARD OF REVIEW

The Trial Court has broad discretion over the admissibility of evidence and Appellate Courts will not interfere with their decisions unless there is a clear showing of abuse of discretion. Hancock v. Shook 100 S.W. 3d 786, 795 (Mo. banc 2003) The Trial Court is in the best position to evaluate whether the potential prejudice of evidence outweighs the relevance. It is vested with broad

discretion in ruling on questions of relevancy and evidence and, absent a clear showing of abuse of that discretion, the Appellate Court should not interfere with the Trial Court's ruling. Giles v. Riverside Transport, Inc. 266 S.W. 3d 290, 295 (Mo. App 2008). State v. Hawkins, 778 S.W. 2d 780, 782-83 (Mo. App 1989). The Trial Court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the Court, and it is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful deliberate consideration. The party appealing the ruling must also show that it was prejudiced by the evidence's exclusion. Thornton v. Gray Auto Parts Co., 62 S.W. 3d 575, 585 (Mo. App. W.D. 2001).

ARGUMENT

Plaintiff pled and submitted to the Jury a claim for punitive damages. A submission of punitive damages requires clear and convincing proof of a culpable mental state and the Defendant's evil motive or reckless indifference to the rights of others. Downey v. McKee, 218 S.W. 3d 492, 497 (Mo. App. 2007). It has been held that when such intent is the focus of the inquiry, "evidence should be allowed to take a wide range," and a party's actions toward others which tend to demonstrate intent in the case is relevant. Brockman v. Regency Financial Corp., 124 S.W. 3d 43, 51 (Mo. App. 2004). Evidence of past actions by an individual or group of individuals is relevant as bearing upon the intent with which they later

perform a similar act. Russell v. Frank, 154 S.W. 2d 63, 66 (Mo. banc 1941).

When intent or mental culpability must be proven, a party's actions towards others tending to demonstrate the intent with which the party may have acted in the present case becomes relevant and evidence of other acts of a party are admissible if those acts are sufficiently connected with the wrongful acts that they may tend to show Defendant's disposition, intention or motive in the commission of the acts for which punitive damages are claimed. Brockman supra, at 51. Evidence of conduct not directly related to the claim becomes admissible if the acts are sufficient to show the Defendant's disposition, intention, or motive in the acts central to the current claim of damage. Rinehart v. Shelter General Ins. Co., 261 S.W. 3d 583, 591 (Mo. App. W.D. 2008).

Appellant submitted a claim for punitive damages (Instruction No. 12) modeled after M.A.I. 10.01, which read:

“If you find the issues in favor of Plaintiff Deborah Barkley on her claim for damages from battery, and if you believe the conduct of Defendant as submitted in Instruction Number 9 was outrageous because of Defendant's evil motive or reckless indifference to the rights of others, then in addition to any damages to which you find Plaintiff entitled under Instruction Number 11, you may award Plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish Defendant and to deter

Defendant and others from like conduct.”

At Trial Plaintiff attempted to offer Exhibits 88, 89, and 90, Defendant’s own internal incident reports prepared by Defendant, as evidence that Defendant’s employees had acted in a similar manner on other occasions both before and after Plaintiff’s incident. The Trial Court admitted some business records of the Defendant which showed that Mr. Herrington had acted aggressively before, but refused conduct reports that Mr. Herrington was aggressive on other occasions prior to the incident and on at least two occasions following Plaintiff’s incident. Exhibit 88 was a report, made by the Defendant, that its employee, Jason Herrington, had used extreme foul language and made verbal threats of harm towards a shoplifter on September 7, 2009, which was considered to be excessive force under the Defendant’s guidelines. Exhibit 89 was a March 2011 warning report, again referring to Mr. Herrington, stating that he treated suspected shoplifters in a disrespectful, degrading and unprofessional manner on multiple dates. Exhibit 90 was a report dated December 12, 2008, stating that Mr. Herrington had over stepped his authority in handling a customer contact on December 6, 2008. The reports are all written on the same form (Exhibits 88, 89 and 90). Plaintiff also sought to offer evidence from the Jackson County Circuit Court’s file of a lawsuit, Rizzo v. McKeever Enterprises, Inc., Case No. 0816-CV11527, alleging very similar conduct by Defendant arising out of an incident

with another person prior to Plaintiff's incident. Defendant objected to such evidence as not being relevant and the Court sustained Defendant's objection and the evidence was not received.

All of the proffered evidence describes other conduct of the Defendant sufficiently similar to that complained of by Plaintiff and shows the disposition, mental state, lack of care, and course of conduct under similar circumstances by the Defendant. In the present case, Plaintiff claimed that Defendant's employees physically abused her, called her derogatory names, and used profanity against her. The claim in the Rizzo case was that Defendant's employees used profane language and called a detained person in their custody derogatory names. That conduct occurred just months before Plaintiff's incident and clearly is evidence of sufficiently similar conduct. Exhibits 88, 89 and 90 are reports prepared by the Defendant that specifically involve LPO Herrington and describe his aggressive behavior, disrespectful conduct with suspected shoplifters and the use of excessive force. That conduct is sufficiently similar to the conduct complained of by Plaintiff that it should have been admitted into evidence.

The Trial Court refused the admission of Exhibits 88 and 89 because they occurred after the date of the incident involving Mrs. Barkley. The simple fact that the conduct occurred subsequently, in and of itself, does not make it inadmissible. It was similar to prior incidents and showed a continuing and

consistent course and pattern of conduct by Defendant without remediation. Evidence of conduct occurring during subsequent events to those for which damages are sought may be relevant and admissible to the issue of exemplary damages if so connected with the particular acts as tending to show Defendant's disposition, intention, or motive and the commission of the particular acts for which damages are claimed. Letz v. Turbomeca Engine Corp., 975 S.W. 2d 155 (Mo. App. W.D. 1997). Other Courts have also upheld the admission of evidence of subsequent acts to the conduct complained of. Guthrie v. Missouri Methodist Hospital, 706 S.W. 2d 938, 942 (Mo. App. W.D. 1986); Charles F. Curry and Co. v. Hendrick, 378 S.W. 2d 522, 536 (Mo. 1964) and cases cited therein.

In the present case, the test for admissibility of the proffered evidence was whether or not the conduct described therein was sufficiently similar to the conduct complained of by Plaintiff in the present case. Clearly it was, and the Trial Court's ruling was against the logic of the circumstances and the ruling is unreasonable such that it warrants reversal. Plaintiff was certainly prejudiced, because in a submission of a claim for punitive damages, as with other claims requiring proof of intent, the evidence of other similar conduct by a Defendant is necessary. Where, as here, the Defendant denies any evil motive or improper intention, or disposition, other similar conduct is the only way to prove these elements of the punitive damage instruction. The trial Court's refusal of the proffered evidence is

prejudicial and the judgment on the verdict should be reversed and a new trial granted.

CONCLUSION

Despite clear evidence of multiple batteries inflicted upon Plaintiff, the jury found for Defendant. That finding was the result of improper instructions which greatly expand upon the so called “merchants privilege”, the exclusion of relevant, material evidence which would have documented Defendant’s excessive and unlawful practices and the admission of irrelevant, prejudicial evidence which was intended to and did cast Plaintiff in a bad light in the eyes of the jury. For these reasons, the Judgment in favor of Defendant must be set aside and Plaintiff must be awarded a new trial on all issues.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing Appellant's Brief complies with the limitations contained in Rule 84.06(c) and that:

- (1) The signature block above contains the information required by Rule 55.03;
- (2) I hereby attest that I have on file all holograph signatures for any signatures indicated by a "conformed" signature (/s/) within this efiled document.
- (3) The brief complies with the limitations contained in Rule 84.04(b);
- (4) The brief contains 10,274 words, as determined by the word count feature of Microsoft Word.

I further certify that two (2) copies of the foregoing Substitute Brief with attached Appendix have been served on counsel for Respondent by U.S. Postal Mail, postage pre-paid, on the 10th day of September, 2014.

/s/ Frederick G. Thompson, IV
Frederick G. Thompson, IV