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JURISDICTIONAL STATEMENT

Respondent concurs with the Jurisdictional Statement set forth in Appellants' brief at pages 4 and 5 thereof.

STATEMENT OF FACTS

Respondent and Appellants live directly next door to each other in rural Gasconade County. *L.F. 19*. Both parties have over the previous several years, instituted legal action and filed complaints against the other for a variety of issues. *L.F. 19, 76, 149, 156-161, 162-205, 292-304, 33,. 340.* Prior to September 21, 2001, Appellants had constructed an eight-foot high metal fence between the properties of Appellants and Respondent, and had installed "one-way glass" and security cameras on the fence, facing Respondent's home. *L.F. 72, 73.* Appellants had spray painted the side of the fence facing Respondent's property with drawings and phrases.

On September 21, 2001, Respondent contacted the Gasconade County Ambulance Service's non-emergency number to request medical assistance. *L.F. 42*. She stated that she felt that she may have been shot due to ringing in her ears and a burning along her arm, but did not name whom she felt were her attackers. *L.F. 88-90, 91, 98.* Deputies Casey Hatton and Matthew Oller from the Gasconade County Sheriff's Department were dispatched to Respondent's residence. *L.F. 69, 97-100.*

Upon arriving at the scene, Deputy Oller observed the painted metal fence with its cameras and "one-way glass". *L.F. 45*. Oller described the fence and its accoutrements as having "atrocious looking paintings on it, ugly, and it had surveillance cameras pointed at her (Respondent's) house on top of it." *L.F. 45, 72*. Oller felt it "readily evident" that "the fence had been painted that way and the camera had been situated where they were and the one-way glass had been situated where it was to be able to watch Ms. Hale, and, of course, Ms. Hale would know that she was being watched." *L.F.*

75. Oller reviewed "the stalking statute" in his book of statutes, and concluded that the "statute fit what was going on with that fence." *L.F. 75, 77.*

Oller then telephoned Ada Brehe-Krueger, the Prosecuting Attorney for Gasconade County and advised her of what he had seen. He asked her "if an arrest was made for the stalking violation, if she (Ms. Brehe-Krueger) would consider filing charges…". *L.F. 77, 78*. The Prosecutor responded affirmatively. *L.F. 78*. Oller maintained, at his deposition, that the previous interactions between Appellants and Respondent, including telephone calls from Respondent to law enforcement officials, "absolutely" did not "have anything to do with [his] decision to have charges brought this time or at least to have an arrest made". *L.F. 78,79.*

Appellants were ultimately arrested for stalking. No arrests were made or charges filed as a result of the call from Respondent to the non-emergency dispatcher in which she stated that she may have been shot. *L.F. 84*. When asked if previous calls to authorities prompted the arrest on September 21, 2001, Oller stated "Probably not, because they weren't arrested for any of the complaints that [Respondent] called in for. They were arrested because of the fence, and the glass, and one had nothing to do with the other, other than how [Oller] got there." *L.F. 85.*

Appellants went on to contend that Deputy Oller used excessive force against Appellant James Highfill in the arrest of Mr. Highfill. *L.F. 19-25*. Appellants further claim that, after transportation to the Montgomery County Jail, their civil rights were violated. *L.F. 19-25*. Appellants brought suit in the Circuit Court of Gasconade County, and the case was ultimately transferred to Osage County. *L.F. 1, 12, 13*.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IS GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT IN THAT:

(a) THE INDEPENDENT ACTIONS OF DEPUTY OLLER AND THE PROSECUTING ATTORNEY OF GASCONADE COUNTY IN ARRESTING AND DIRECTING THE ARREST OF APPELLANTS CREATED A DISCONNECT SO THAT, AS A MATTER OF LAW, RESPONDENT CAN HAVE NO CIVIL LIABILITY FOR FALSE IMPRISONMENT, AND

(b) NO GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER A CONNECTION EXISTS BETWEEN THE RESPONDENT'S PREVIOUS CONDUCT AND THE ARREST OF APPELLANTS.

***Rankin v. Venator Group Retail, Inc.*, 93 S.W.3d 814, (Mo. App. 2002)**

Missouri Revised Statute §544.216 (2000)

ARGUMENT

Standard of Review

Pursuant to Missouri Supreme Court Rule 74.04, a motion for Summary Judgment may be granted "when a movant demonstrates that there is no genuine issue as to any material fact and that movant is entitled to judgment as a matter of law." *Rankin v. Venator Group Retail, Inc.*, 93 S.W.3d. 814 (Mo.App.E.D. 2002). The appropriate standard for reviewing a summary judgment is *de novo, Id*. See also *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.* 854 S.W.2d. 371, 376 (Mo. banc 1993). If there exists genuine issues as to any material fact, summary judgment should not be granted. *Id.*

I. THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT IN THAT:

(a) THE INDEPENDENT ACTIONS OF DEPUTY OLLER AND THE PROSECUTING ATTORNEY OF GASCONADE COUNTY IN ARRESTING AND DIRECTING THE ARREST OF APPELLANTS CREATED A DISCONNECT SO THAT, AS A MATTER OF LAW, RESPONDENT CAN HAVE NO CIVIL LIABILITY FOR FALSE IMPRISONMENT, AND

(b) NO GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER A CONNECTION EXISTS BETWEEN THE RESPONDENT'S PREVIOUS CONDUCT AND THE ARREST OF APPELLANTS.

A. The independent actions of Deputy Oller and the Prosecuting Attorney in arresting and directing the arrest of Appellants created a disconnect so that, as a matter of law, Respondent can have no civil liability for false imprisonment.

The elements for a claim for false imprisonment are (1) the detention or restraint of the Plaintiff against his will; and (2) the unlawfulness of the detention or restraint. *Rankin v. Venator Group Retail, Inc*. 93 S.W.3d. 814, 822 (Mo.App. 2002). The arresting officer in a false imprisonment action is charged with knowing all of the facts that could be attained through due diligence prior to making the arrest. *Parrot v. Reis*, 441 S.W.2d. 390, 392 (Mo.App. 1969). However, the arrest of an innocent person by a police officer does not constitute false imprisonment provided that the officer has a reasonable belief that the person is guilty of the offense for which he is arrested. *Rustici v. Weidemeyer*, 673 S.W.2d. 762, 769 (Mo. banc 1984). Justification is a complete and total defense to a cause of action or claim for false arrest. *Id*. at 767.

Clearly, the undisputed and material facts of this case establish that Respondent did not physically restrain or detain Appellants. The false imprisonment claim asserted by Appellants against Respondent Hale is based upon and controlled by a narrow strand of Missouri cases that establish some potential liability in false imprisonment cases where the Defendant does not actually and physically effectuate the detention or restraint of the Plaintiff. See *Wehrman v. Liberty Petroleum Company, Inc*., 382 S.W.2d. 56, 61 (Mo.App. 1964). See also *Rustici*, supra; *Smith v Allied Supermarkets, Inc*., 525 S.W.2d. 848, 852 (Mo. banc 1975).

However, the facts in the case at bar are remarkably similar to those in the Eastern District Court of Appeals case styled *Rankin v. Venator Group Retail, Inc*. 93S.W.3d.

814, 822 (Mo.App. 2002). In *Rankin*, the Plaintiff entered a Lady Foot Locker store located at a shopping mall. The store manager assisted the Plaintiff in accessing a dressing room. The Plaintiff asserted that she entered the dressing room with one jogging suit that required two (2) hangers, but the store manager asserted that the Plaintiff entered the dressing room with two (2) jogging suits on two (2) hangers. When the Plaintiff left the store, apparently without buying anything, the store manager checked the dressing room and found only one (1) jogging suit and two (2) hangers. The store manager then telephoned the police to report a theft of the other jogging suit. *Id.* at 817.

Two (2) police officers responded to the store. The police officers located the Plaintiff in the mall based upon a description furnished by the store manager. *Id.* The police officers approached the Plaintiff and asked her if she had the jogging suit, which the Plaintiff denied. The Plaintiff consented to a search and no jogging suit was found. The police then searched the Plaintiff's car, again finding no jogging suit. *Id.* at 818.

Before leaving, the police officers asked the Plaintiff not to return to the store. Despite those warnings, the Plaintiff went back to the store and while there confronted the store manager and asked for an explanation of why the manager had called the police. During her confrontation with the store manager, the Plaintiff became angry and upset, and began crying and yelling. At that time, the police officers reentered the mall and heard the loud voices coming from the store. As they entered the store, they heard yelling and screaming. The officers arrested the Plaintiff for disturbing the peace, although the store manager did not ask them to do so. *Id.*

The Plaintiff subsequently filed a petition for damages for false imprisonment against the store manager, claiming that the store manager "instigated" the Plaintiff's

detention by supplying information to the police officers that lead to her arrest and detention. *Id.* At trial, however, the trial court refused to submit a jury instruction that would allow the jury to hold the store manager liable for false imprisonment on that basis, as no evidence was adduced upon which to base the instruction. *Id.* at 819.

On appeal, this Court upheld the ruling of the trial court, basing it's reasoning on the fact that the store manager had called the police only with regards to the possible theft of a jogging suit and not in regard to the ultimate offense for which the Plaintiff was arrested. Further, the Court observed that the police officers had completed their investigation of that allegation and found no evidence that the Plaintiff had taken the jogging suit. Additionally, the Court observed that the ultimate arrest had no relation to the call initiated by the store manager. *Id.* Moreover, the Court specifically noted that it was only when the Plaintiff returned to the store to confront the store manager that the police officers, on their own, arrested the Plaintiff for disturbing the peace. *Id.* at 820. The Court found that, based upon these facts, there was no evidence to support the Plaintiff's allegation that the store manager initiated the Plaintiff's arrest for disturbing the peace. *Id.*

In the case at bar, undisputed facts show that Respondent's call on September 21, 2001 was to a non-emergency number, and stated that she felt she had been shot due to a ringing in her ears and a burning sensation in her arm. When the arresting officers arrived, they observed the corrugated metal fence that had been built by Appellants between Appellants' and Respondent's property and further noticed the one-way glass and surveillance cameras mounted on the fence. Additionally, they noted that the side of the fence facing Respondent's property had been spray-painted with graffiti. Only upon

observing these items did Deputy Oller review the stalking statute, and then make a call to the Prosecuting Attorney of Gasconade County to determine if the fence, with it's accoutrements, met the definition of stalking. Again, only upon being advised by the Prosecuting Attorney that, if the Appellants were arrested, she would consider filing stalking charges against them, did Deputy Oller place the Appellants under arrest.

Appellants first argue, on page 12 of their brief, that Appellants' actions do not fall within the definition in RSMo. §565.225 (2000) of stalking. However, whether or not their actions actually constituted stalking is irrelevant as to this appeal. If Deputy Oller or his supervisor, Sheriff Ebker, caused the arrest of Appellants due to misapplication of the stalking statute, there is absolutely no evidence in the record that would suggest that Respondent Mary Hale requested such an arrest, referred the arresting officer to the stalking statute, or even implied that she was being stalked. Appellants argue that a number of previous telephone calls from Respondent to law enforcement officials show an alleged course of conduct that resulted in Deputy Oller supposedly fabricating an excuse to arrest the Appellants. However, the deposition of Deputy Oller clearly refutes such an implication. In his deposition, Deputy Oller and previous counsel for Appellants had the following exchange:

> Q. Did the fact that Mary Hale had made numerous complaints prior to this incident have anything to do with your decision to have charges brought this time or at least to have an arrest made?
>
> A. Absolutely not.
>
> Q. Did you and Casey Hatton discuss the numerous complaints that Mary Hale had made prior to this?
>
> A. No. We discussed the fence. *L.F. 78, 79.*

Additionally, Deputy Oller stated that if the Prosecuting Attorney, Ada Brehe-Krueger had directed him to not arrest the Appellants, that he "absolutely" would not have arrested them. *L.F. 79.* Deputy Oller stated, "I asked her if she would consider filing charges, and she said she would. I believe the exact words were, if I made an arrest, would you consider filing charges based upon what I have seen here today? She said she would." *L.F. 79.*

Appellants rely on *Smith v. Allied Supermarkets*, 542 S.W.2d 848, 852-853 (Mo. banc 1975) and *Day v. Wells Fargo Guard Service Co.*, 711 S.W.2d 503, (Mo. banc 1886). Those cases have one key differentiating fact from the case at hand. In both *Smith* and *Day*, the complaining parties had made a number of calls to law enforcement officials complaining of a certain act or related series of actions on the part of the arrested party. While the arrest was only made after an extended investigation into the allegations, the Courts in those respective cases found that evidence taken from five (5) months to six (6) weeks prior to the incident still led to a causal effect of the arrest. It is crucial to note that in both cases the calls made to the arresting entities complained of the crime for which the individual was arrested.

However, the facts in *Rankin* directly mirror the circumstances in this action. At least in *Rankin* the store manager reported to the police that she believed the Plaintiff had committed some offense. Here however, the facts establish that during her call to the non-emergency number maintained by the Gasconade County Sheriff's Department, Respondent Hale did not even designate who she believed had shot her and, more importantly, did not allege at any time prior to Appellants' arrest that Appellants were the ones who shot her. *L.F. 88, 91.* When the actual arrest is conducted by a third party, the

Defendant must have instigated the arrest by suggestion, encouragement, and countenance. *Linkogel v. Baker Protective Services, Inc.*, 626 S.W.2d 380, 384 (Mo. App. E.D. 1981). There is no evidence in this case to support that Respondent made any suggestion, encouragement, or countenance that the Appellants had shot her, or stalked her on the date in question.

As pointed out by Appellants in their brief, justification is a complete defense to the cause of action of false imprisonment. *Rankin*, 93S.W.3d at 822. No action for false imprisonment may be maintained for an arrest which is lawful, no matter at whose instigation nor for what motive the arrest was made. *Wehmeyer v. Mulvihill*, 130 S.W.2d 681, 684 (1910); *Rolth v. Burlington Northern Railroad Company*, 708 S.W.2d. 211, 216 (Mo. App. W.D. 1986).

The arrest and subsequent restraint and detention of the Appellants by the Gasconade County Sheriff's deputies were lawful and therefore justified. §544.216 RSMo. (2000) provides the circumstances under which an arrest without a warrant can be lawfully effectuated by a deputy sheriff. It states, in pertinent part:

> Any sheriff or deputy sheriff, and any county or municipal law enforcement officer in this State…may arrest on view, without a warrant, any person he sees violating or who he has reasonable grounds to believe has violated any laws of this State, including a misdemeanor, or has violated any ordinance over which such officer has jurisdiction. The power of arrest authorized by this section is in addition to all other powers conferred upon law enforcement officers, and shall not be construed so as to limit or restrict any other power of a law enforcement officer.

As a result of this statute, Deputy Oller's arrest was made upon his good-faith belief that the stalking statute had been violated, and further based upon his belief that charges would be brought against the Appellants by the Prosecuting Attorney. This

resulted in the arrest being lawful, and the restraint and detention therefrom being justified as a matter of law. See *Rustici v. Weidemeyer*, 673 S.W.2d. 762, 770 (Mo. banc 1984).

Even when taken in a light most favorable to Appellants, there is no documentary or testamentary evidence in the record that would establish that any previous disputes between Appellants and Respondent impacted the arrest of Appellants for stalking, with the possible exception of the court case in which the Circuit Court of Gasconade County determined the corrugated metal fence in question to be a nuisance. Appellants now seek to further persecute Respondent by seeking to hold her liable for bringing the police to an area where they were allegedly and arguably committing the crime of stalking. However, the facts are clear, and there is no evidence, implication or documents to support that anything other than the independent actions of Deputy Oller and the Prosecuting Attorney led to Appellants' arrest based solely on information obtained on the date of arrest at the site of the arrest.

B. No Genuine Issues of Material Fact Exist

While Appellants dedicate five (5) pages of their brief to the assertion that genuine issues of material fact exist, they fail to state what disputed facts exist. Instead, they rely on an unsubstantiated argument (which is contrary to the only documentary evidence in the file) that previous calls from Respondent to law enforcement officials played a role in the arrest of Appellants on September 21, 2001.

Appellants entire argument centers around the statement of Sheriff Ebker that, "if the calls don't stop, someone's gonna (*sic*) get arrested." See L.F. 143. However, Deputy Oller clearly states that the previous calls did not have an impact on his arrest, and Sheriff

Ebker indicates in his deposition, when asked if that comment took place, and whether he made the comments, that "I could have. I don't specifically recall it. I think it is a possibility that I said something like that." *L.F. 282.* Ebker goes on to state that making a call to the Prosecuting Attorney for an independent evaluation of whether or not charges should be filed is "a standard procedure, if we get into a situation where we feel that we want to get a second opinion of what is going on, then that is part of the reason why I give [deputies] cell phones, so they can get a hold of me or get a hold of the Prosecutor, and they've got those resources available to them." *L.F. 283* The trial judge had absolutely nothing at his disposal, other than unsubstantiated arguments from counsel for Appellants, that would indicate that the previous calls (which, it should be noted, have never been specifically determined to be justified or unjustified) had anything to do with the arrest.

The simple facts are that all evidence in the legal file show, without refute, that the Appellants were arrested for stalking based upon the fence with its accoutrements. If it is to be believed that the previous calls led to the arrest, then it belies logic that Co-Defendants Oller and Ebker would not utilize that fact to attempt to lay blame upon Respondent, Mary Hale. Instead, they stand by the validity of their arrest, and essentially vindicate Respondent Hale by stating that her actions had nothing to do with the arrest. Appellants created a nuisance, took actions that fall within the definition of stalking and harassment, and now seek to further that harassment through maintaining this action. The evidence in the record, which is undisputed, demonstrates that the Appellants were arrested because of their actions of September 21, 2001, and not due to Respondent's phone calls to the Gasconade County Sheriff's Department and other law enforcement

officials. Even when considering the evidence in the light most favorable to the Appellants, there simply is no evidence of a connection between the previous calls and the arrests.

Finally, Appellants seek to influence this Court by arguing that Prosecutor Brehe-Krueger did not file charges against the Appellants for stalking. *L.F. 142 and Appellants Brief at 17*. It is, as stated in Respondent's Suggestions in Support of Motion for Summary Judgment, not material and inconsequential as to whether there was an actual violation of §565.225 RSMo, as to Appellants' claim against Respondent. Respondent concedes that whether or not there was an actual violation of the statute may be material and consequential as to Appellants' claim against Defendants Oller and Ebker. However, based upon the similarity in facts to the *Rankin* case, such an issue is immaterial as applied to Respondent Hale, due to her name involvement in the actual arrest.

Even giving full consideration of all the facts, including the ongoing bilateral conflict between the Appellants and Respondent, there are simply no genuine issues of material fact with regards to the substantiation of probable cause, or to the reasoning for, justification, or cause of the arrests of Appellants.

CONCLUSION

The trial Court was correct when it granted Respondent's Motion for Summary Judgment; concluding that the original report made by Respondent on September 21, 2001, was sufficiently disconnected from the subsequent arrest of Appellants so that, as a matter of law, Respondent could have no civil liability for false imprisonment. Additionally, it has been shown that there are not genuine issues as to material facts that would create a cause of action under which Respondent could be held liable for false imprisonment. For the foregoing reasons, the trial Court's order should be affirmed in its entirety.

WHEREFORE, Respondent prays for an order of this Court affirming the decision of the Honorable Jeffrey W. Schaeperkoetter of the 20th Judicial Circuit, Osage County, and for such other and further relief as the Court deems just and proper.

Respectfully Submitted,
BANDRE, HUNT& SNIDER, L.L.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of October in the year 2004, two copies of Respondent's Brief were served on Appellants via United States Mail, postage prepaid in care of their counsel, Christopher A. Slusher and Raymond P. Bozarth, 216 E. McCarty St, Jefferson City, Missouri 65101.

_____

CERTIFICATE OF COMPLIANCE

By submitting this brief, the undersigned counsel for Respondent hereby certifies the following:

1. This brief conforms with Missouri Rule of Civil Procedure 55.03;

2. This brief conforms with Missouri Rule of Civil Procedure 84.06(b) relating to length;

3. The number of words used in this brief, not including appendix is 4,621.

Respectfully Submitted,
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CERTIFICATE OF VIRUS FREE DISK

COMES NOW Respondent, by and through counsel and certifies that, pursuant to applicable rule of this Court, they have submitted a computer disk containing their brief which has been scanned and has been designated as free of viruses.

Respectfully Submitted,
BANDRE, HUNT& SNIDER, L.L.C.

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