IN THE SUPREME COURT OF MISSOURI

CAROLYN KENNEY,	)	
	)	
Respondent,	)	
	)	
3.	)	No. SC84770
	)	
WAL-MART STORES, INC.)		
	)	
Appellant.	)	

ON TRANSFER FROM THE
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

SUBSTITUTE BRIEF OF RESPONDENT CAROLYN KENNEY

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JURISDICTIONAL STATEMENT

This is a defamation action in which judgment was entered on the jury's verdict in favor of Respondent, Carolyn Kenney. On August 30, 2002, the Missouri Court of Appeals for the Western District transferred the appeal to this Court pursuant to Rule 83.02 of the Missouri Rules of Civil Procedure. Therefore, this appeal is within the jurisdiction of this Court pursuant to Article V, section 10 of the Missouri Constitution.

STATEMENT OF FACTS[1]

A. Background Facts

In the fall of 1993, Chris Kenney became involved in a relationship with Angela

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[1] Citations to the Legal File and the Transcript are designated by the abbreviations "LF __" and "TR __." Citations to Appellant's Substitute Brief are designated by the abbreviation "App. Brief __." Citations to the exhibits included in the Record on Appeal are designated by the abbreviation "ROA Exh. __."

Mueller (then Angela Miles). (TR 518). As a result of that relationship, Ms. Mueller became pregnant and gave birth to a girl, Lauren Kenney, on April 13, 1995. (TR 518-19, 522). From the time of Lauren's birth in April of 1995, through August of 1996, Chris regularly had custody of Lauren, keeping her at least every other weekend for two or three days and sometimes keeping her during the week as well. (TR 522-23). When Chris had custody of Lauren, he would generally stay at the home of his mother, Carolyn Kenney, the plaintiff in this action. (TR 524). Angela often let Carolyn pick up Lauren when Lauren was staying with Chris for the weekend. (TR 1275).

During the pretrial conference in this case, the trial court found that "as a matter of law Christopher Kenney is the father of [Lauren] and that he had the right to have [Lauren] as a matter of law on Labor Day weekend [of 1996] and that it was not a violation of law or kidnapping for him to be in custody of [Lauren]." (TR 88).

In late August of 1996, Chris learned that Angela was planning to leave the state of Missouri, with Lauren, to go to Georgia. (TR 528-29). Angela would not tell Chris when she would be returning to Missouri with his daughter. (TR 530). As a result of this conversation, Chris met with a lawyer to discuss his rights with regard to Lauren. (TR 530). Chris filed a lawsuit to establish clear visitation rights late in the afternoon

of Friday, August 30.[2] (TR 531). A hearing in the matter was scheduled for Tuesday, September 3. (TR 537). At the time that Chris filed this lawsuit, Chris's attorney advised him that he might want to keep Lauren until the hearing in order to protect his custody rights. (TR 653-54).

During the week prior to Labor Day weekend of 1996, Chris had made arrangements with Angela to have custody of Lauren over Labor Day weekend. (TR 535-36). On Friday, August 30, Carolyn picked Lauren up at Angela's mother's house. (TR 867). Angela told Carolyn that she could keep Lauren all weekend. (TR 873). Carolyn understood this to mean that Angela did not expect Lauren to be returned until Monday, September 2. (TR 874). On Saturday, August 31, Chris spoke with Angela on the phone and Angela indicated that she had changed her plans and that she wanted Lauren back that day instead of at the end of the weekend. (TR 542-43).

Earlier on the morning of Saturday, August 31, before Chris spoke with Angela, Carolyn had taken Lauren to a festival in Independence, Missouri. (TR 544). After speaking with Angela, Chris went to the festival to meet his mother and Lauren. (TR 544-45). While at the festival, Chris decided that he was going to keep Lauren until the hearing on Tuesday in order to protect his custody rights and to be sure that Angela

[2] All date references refer to 1996 unless otherwise noted.

would not take Lauren from Missouri permanently. (TR 545-46). Chris was concerned that if he gave Lauren to Angela, Angela might leave the state with Lauren before a custody hearing could occur. (TR 554). Chris decided to take Lauren to the Lake of the Ozarks for the weekend in order to avoid a confrontation with Angela. (TR 547). Before leaving for the lake, Chris called Angela and informed her that he was keeping Lauren until Tuesday. (TR 547-48). Later that day, after Chris had arrived at the lake, Chris called Angela again to tell her that Lauren was okay and that there would be a hearing on Tuesday and she would be able to get Lauren back after the hearing. (TR 552-53).

On Sunday, September 1, Angela filed a Missing Person Report with Officer Thomas Blow of the Kansas City Police Department. (TR 1017; ROA Exh. 115). Initially, Officer Blow resisted filing a report because it appeared that Lauren was with her father and Officer Blow told Angela that if Lauren was found with her father then the report would be dropped. (TR 1036-37). Officer Blow testified that when he first spoke to Angela she indicated that Lauren was with her father. (TR 1051-53). After Officer Blow indicated that he would not file a Missing Person Report on the basis of those facts, Angela changed her story to indicate that she did not know where Lauren was or who she was with. (TR 1051-53). Because Officer Blow was unable to determine the exact whereabouts of Lauren, he filed a Missing Person Report. (TR

1022-24).

On Tuesday, September 3, Chris went to the scheduled hearing where a custody order was issued. (TR 556-57). After the custody order was entered, Lauren was returned to Angela. (TR 557).

2. Facts Pertinent to Carolyn Kenney's Defamation Action

On Sunday, September 1, Angela and members of her family prepared a poster regarding Lauren that was posted at various locations around Kansas City (hereinafter the "Poster"). (TR 1287; ROA Exh. 2). The Poster indicated that "Lauren Gabrielle Kenney [was] missing from Kansas City North" and that she was "last seen 1:30 pm on 8/30/96 leaving her home with paternal grandmother Carolyn Kenney." (ROA Exh. 2). The Poster further indicated that Lauren was seen leaving with Carolyn in a vehicle with "no visible license plate" and that Lauren was with Carolyn Kenney at an "unknown location." (ROA Exh. 2). The Poster included a photograph of Carolyn Kenney but did not include a photograph of Chris Kenney. (ROA Exh. 2).

A copy of the Poster was placed in the Missing Children's Network display case at Wal-Mart's Lee's Summit store. (TR 422-23). This display case typically contained posters that notified the public of child abductions. (ROA Exh. 4; App. Brief 23). On Sunday, September 1, a woman notified Peggy Lohman, an assistant manager at the Lee's Summit store, that the Poster had been placed in the display case and that the Poster was false. (TR 1221-23).

The Poster was also observed by Patty Wyke, who testified that she saw the Poster in the display case at the Lee's Summit store during the week immediately following Labor Day weekend 1996 or during the week after that. (TR 422, 432). Mrs. Wyke indicated that the Poster was on the second row of the display case and was held up by a tack. (TR 434-35). Because Patty Wyke knew that Lauren was with Angela at that time, she spoke with a male manager at the Lee's Summit store and informed him that the Poster was not true. (TR 432-33). The manager that Mrs. Wyke spoke with did not look at the Poster, but simply indicated that he could not take the Poster down. (TR 433-34). Mrs. Wyke testified that the manager did not take her complaint seriously, stating: "He really kind of blew me off. He seemed irritated." (TR 434). Mrs. Wyke indicated that she argued with the manager about the matter because she was appalled that he would leave the Poster up, but "[h]e pretty much blew me off." (TR 436).

Patty Wyke returned to the Lee's Summit store several days later and discovered that the Poster was still in the display case. (TR 436). Mrs. Wyke spoke with a different male manager at the Lee's Summit store, explained that the Poster was not true, and told the manager that if Wal-Mart would contact the police department they would find out that the Poster was not true. (TR 437). The manager refused to attempt to verify the truthfulness of the Poster. (TR 437). The manager told Mrs. Wyke that

he was not able to take the Poster down, that he wasn't going to make a phone call to attempt to verify the accuracy of the Poster, and that he was too busy. (TR 437-38). Mrs. Wyke indicated that Wal-Mart management "really didn't give me much credit." (TR 438).

On October 1, 1998, Carolyn Kenney filed an action for defamation against Wal-Mart, alleging that Wal-Mart had caused her injury by displaying a poster in its Lee's Summit store that implied that Mrs. Kenney had kidnapped Lauren or had taken Lauren without a right to do so. (LF 15-17). The case was tried to a jury from December 4 through December 11, 2000. At the outset of the trial, the trial court indicated that it was finding that the Poster was capable of defamatory meaning but that the issue of whether the Poster was actually defamatory was for the jury to decide. (TR 79, 89-90). The trial court also held, as a preliminary matter, that the fair report privilege was not applicable to the facts of the case. (TR 79).

Prior to closing arguments, the trial court held an instruction conference that spans 45 pages in the transcript. (TR 1359-1404). The discussion of the verdict director spans 27 pages. (TR 1366-93). During the instruction conference, Wal-Mart made numerous objections to Mrs. Kenney's proposed verdict director [Instruction No. 6]. (TR 1366-93). However, Wal-Mart did not object to the verdict director on the basis that it failed to include proof of falsity as an element of Mrs. Kenney's case. (Tr

1366-93). Instead, Wal-Mart chose to present the issue of truth as an affirmative defense. (TR 1393).

On December 11, 2000, the jury returned a verdict for Carolyn Kenney, awarding Mrs. Kenney actual damages of $33,750 and punitive damages in the amount of $392,083. (LF 98). The trial court entered judgment in accordance with the jury's verdict on December 21, 2000. (LF 99-100).

On August 30, 2002, the Missouri Court of Appeals for the Western District (hereinafter "Western District"), issued its opinion reversing the judgment of the trial court and remanding the case for new trial. The Western District also transferred the appeal to this Court, pursuant to Rule 83.02 of the Missouri Rules of Civil Procedure, on the grounds that the case presented questions of general interest and importance and that there was a need for this Court to reexamine the existing law of defamation. The Western District's opinion was based upon three primary conclusions. First, the Western District concluded that this Court changed Missouri defamation law in Overcast v. Billings Mutual Ins. Co., 11 S.W.3d 62, 70 (Mo. Banc 2000), by requiring a plaintiff who is not a public official or public figure to prove falsity as an element of her defamation claim. Second, the Western District concluded that the trial court erred in giving a verdict director based on MAI 23.06(1) because that verdict director does

not include proof of falsity as an element of the Plaintiff's claim. Finally, the Western District concluded that the trial court's failure to modify MAI 23.06(1) constituted plain error because the issue of truth was disputed in this case.

3. Resume of Pertinent Witness Testimony

Direct Examination of Patty Wyke

Q. And describe for us what you saw – first of all, when was that in relation to, let's say, the Labor Day Weekend of 1996?

A. It was after Labor Day weekend. In the middle of the week. It was either that week immediately following Labor Day weekend or the week after that. So one to two weeks, within that time period.

(TR 422).

Q. Now, you saw this document the middle of the week after Labor Day or the middle of the week of the week after Labor Day, correct?

A. Correct.

Q. To your knowledge, at that time, as far as you knew, was Lauren Kenney back with her mother?

A. Yes.

Q. And what, if anything, did you do when you saw this poster that said she was missing and last seen with her father and grandmother?

A. I went back into the store and asked that – Wal-Mart has those, like, greeter-type people.

I asked one of them if they could help me with something that was in a case or if they could allow me to speak with a manager. They did.

A man came forward who told me he was some type of a floor manager or someone in authority. I told him that I knew of a person that was in their case, and I knew it not to be true and that it should be taken down.

Q. All right. Why did you go to the trouble of doing that?

A. Well, because I know that it wasn't true and if this were my picture in the missing persons case at Wal-Mart, I would hope someone would do the same for me.

Q. All right. The man who came to you, did he identify himself as being some member of management at Wal-Mart?

A. He did.

Q. All right. And what was his response when you – did he look at the poster in the bulletin board?

A. He did not, no.

Q. What was his response to you when you tried to tell him this?

A. He told me that he couldn't take those things down. He didn't know where the key was, he didn't have authority to take it down. He really kind of blew me off. He seemed irritated.

(TR 432-34).

Q. At some point in time after this conversation you had with the male assistant manager, whatever he was at the Wal-Mart store, did you go back there on a later

date?

A. I did. Actually, that evening I kind of argued with him a little bit because I was just appalled at it. He pretty much blew me off.

I did go back to the Wal-Mart store at a later date and looked at it. It was still up.

Q. In relation to the first time you saw it, how much later did you go back?

A. Several days.

Q. All right. And when you went back in the store on the next occasion, did you go by the missing children's bulletin board again?

A. I did. Actually, I went to it curious to know if they had ever done anything about it.

Q. What did you find?

A. It was still there.

Q. And when you say "it," you mean the poster that had Carolyn Kenney's picture?

A. Correct.

Q. The same poster that said that Lauren Kenney was missing.

A. Correct.

Q. And did you talk with anyone at the Wal-Mart store about that?

A. I did.

Q. Tell us about that.

A. I again went and asked for a member of management to speak with me about something in the missing children's case, and they brought again a male manager to

speak with me. It was a different person, however.

I told him the same story; that I knew this not to be true; that if they would just call the police department, they would find out that it was, in fact, was not true and was never true and kind of a hoax.

They refused to do that, even to make the phone call.

Q. And did they take it down while you were there?

A. No.

Q. Did they give you the excuse that time they didn't know where the key was?

A. They said they were unable to take those down. The person I spoke to said they were unable to take those things down. They weren't going to make a phone call. They were too busy. They really didn't give me much credit.

(TR 436-38).

Direct Examination of Tom Montgomery

Q. I want to go beyond the company policy for the man who is in charge of community programs --

A. Okay.

Q. – who has responsibility for the part of the company that operates in connection with the National Center, these bulletin boards all over the United States where thousands of people come in every day and look at the bulletin boards.

Do you think it is wrong, not just a violation of policy but wrong for Wal-Mart to continue to display, if it did, a poster that it had information that it was told was

wrong or may have been wrong.

A. It is our policy not to – the reason we use the National Center is a safeguard, again, like I said before, for Wal-Mart and the public because we know the information is correct on here. It's never our goal to let anything stay up on there especially anything that we would – that would be incorrect.

Q. Because?

A. Because?

Q. Yeah. Why is it your goal not to let stuff stay up there that is incorrect?

A. Well, it's not – we don't leave anything up there that – we don't put anything up there from the public except – this is from the National Center, and that's what we put up there. Why would we not want to put that up there?

Q. Yeah.

A. Because that's the right thing to do. Why would I want to publish something or leave something up that was incorrect?

Q. It would be the wrong thing to do, wouldn't it?

A. Yes.

(TR 699-700).

Cross-Examination of Tom Montgomery

Q. All right. Does that mean that part of an associate's job at Wal-Mart is not to keep the walls free of debris?

A. As part of their job to keep it free of debris?

Q. Yes.

A. That is a job that every associate has a responsibility to do. If it's something out there that is not Wal-Mart authorized or from Wal-Mart and at least the store has not authorized it, it is to be taken down.

Q. Does that include the front doors?

A. Definitely. Front doors, walls, any location.

Q. Does that include the children's missing board?

A. Definitely. It would include that board also.

(TR 802-03).

Redirect Examination of Tom Montgomery

Q. (BY MR. MANNERS) Would you leave the poster up until the last week of the month under your policy even if you found out it was wrong?

A. You mean if the National Center called us and said I have sent you a wrong poster?

Q. Sure.

A. No. We would take it down.

Q. All right. Because you wouldn't want inaccurate information in that case?

A. That's correct.

Q. Okay. It would be a violation of company policy to leave up inaccurate information?

A. Yes.

(TR 826).

Direct Examination of Peggy Lohman

Q. All right. What did the document look like to you when you first saw it?

A. Walking up to the cabinet, it looked like the rest of them. It was in black and white. It was pretty nondescript. It was pretty ordinary.

(TR 1228).

Cross-Examination of Angela Miles Mueller

Q. You got Lauren back on September 3rd?

A. It was a Tuesday evening. That was September 3rd.

Q. And we've got a calendar here. Tuesday, September 3rd, that's the day after Labor Day. That's when you got Lauren back, correct?

A. Yes.

Q. And on September 4th, was she missing as far as you were concerned?

A. She was with me so, no, she was not.

Q. How about on September 5th?

A. No.

Q. Sixth?

A. No.

Q. Seventh, eighth, ninth, tenth?

A. No.

(TR 1341-42).

POINTS RELIED ON

1. The Trial Court Did Not Err In Denying Wal-Mart's Motion For Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict Because Carolyn Kenney Made A Submissible Case Of Defamation In That There Was Sufficient Evidence To Support The Jury's Determination That The Poster Was Defamatory.

Duggan v. Pulitzer Publishing Co., 913 S.W.2d 807 (Mo. App. 1995)

Nazeri v. Missouri Valley College, 860 S.W.2d 303 (Mo. Banc 1993)

Ribaudo v. Bauer, 982 S.W.2d 701 (Mo. App. 1998)

2. The Trial Court Did Not Err In Denying Wal-Mart's Motion For Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict Because Carolyn Kenney Made A Submissible Case Of Defamation In That There Was Sufficient Evidence To Support The Jury's Determination That Wal-Mart Published The Poster.

Brenneke v. Department of Missouri, Veterans of Foreign Wars of the United States of America, 984 S.W.2d 134 (Mo. App. 1998)

Willman v. Dooner, 770 S.W.2d 275 (Mo. App. 1989)

RESTATEMENT (SECOND) TORTS § 577 (1977)

3. The Trial Court Did Not Err In Denying Wal-Mart's Motion For Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict Because Carolyn Kenney Made A Submissible Case Of Defamation In That There Was Sufficient Evidence To Support The

Jury's Determination That Wal-Mart Negligently Published The Poster.

Overcast v. Billings Mutual Insurance Co., 11 S.W.3d 62 (Mo. Banc 2000)

4. The Trial Court Did Not Err In Denying Wal-Mart's Motion For Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict Because Carolyn Kenney Made A Submissible Case Of Defamation In That There Was Sufficient Evidence To Support The Jury's Determination That The Poster Was Not True.

Turnbull v. The Herald Co., 459 S.W.2d 516 (Mo. App. 1970)

5. The Trial Court Did Not Err In Denying Wal-Mart's Motion For Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict Because Carolyn Kenney Made A Submissible Case Of Defamation In That There Was Sufficient Evidence To Support The Jury's Determination That Publication Of The Poster Caused Carolyn Kenney To Suffer Actual Damages.

Boyd v. Schwan's Sales Enterprises, Inc., 23 S.W.3d 261 (Mo. App. 2000)

Kennedy v. Jasper, 928 S.W.2d 395 (Mo. App. 1996)

6. The Trial Court Did Not Err In Denying Wal-Mart's Motion For Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict Because Carolyn Kenney Made A Submissible Case Of Defamation In That The Trial Court Properly Held That The Fair Report Privilege Was Not Applicable Under The Facts Of This Case And Carolyn Kenney Overcame Any Potential Application Of The Fair Report Privilege By Establishing Actual Malice.

Carter v. Willert Home Products, Inc., 714 S.W.2d 506 (Mo. Banc 1986)

Lami v. The Pulitzer Publishing Co., 723 S.W.2d 458 (Mo. App. 1986)

RESTATEMENT (SECOND) TORTS § 611 (1977)

7. The Trial Court Did Not Err In Denying Wal-Mart's Motion For Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict On The Issue Of Punitive Damages Because Carolyn Kenney Made A Submissible Case On The Issue Of Punitive Damages In That There Was Sufficient Evidence To Support The Jury's Determination That Carolyn Kenney Established Actual Malice.

Carter v. Willert Home Products, Inc., 714 S.W.2d 506 (Mo. Banc 1986)

Englezos v. The Newspress and Gazette Co., 980 S.W.2d 25 (Mo. App. 1998)

8. The Trial Court Did Not Err In Denying Wal-Mart's Motion For A New Trial With Regard To The Formulation Of Instruction Number Six Because The Modifications Made To

Instruction Number Six Were Warranted By The Facts In This Case And No Prejudice Resulted From Those Modifications.

Deckard v. O'Reilly Automotive, Inc., 31 S.W.3d 6 (Mo. App. 2000)

Gaines v. Property Servicing Co., 276 S.W.2d 169 (Mo. 1955)

Overcast v. Billings Mutual Insurance Co., 11 S.W.3d 62 (Mo. Banc 2000)

MO. R. CIV. P. 70.02

MO. R. CIV. P. 70.03

9. The Trial Court Did Not Commit Plain Error In The Formulation Of Instruction Number Six Because Instruction Number Six Properly Stated The Elements Of A Claim Of Defamation Against A Private Figure And No Manifest Injustice Or Miscarriage Of Justice Resulted From The Giving Of Instruction Number Six.

Balderree v. Beeman, 837 S.W.2d 309 (Mo. App. 1992)

Overcast v. Billings Mutual Insurance Co., 11 S.W.3d 62 (Mo. Banc 2000)

Nazeri v. Missouri Valley College, 860 S.W.2d 303 (Mo. Banc 1993)

MO. R. CIV. P. 70.03

MO. R. CIV. P. 84.13

ARGUMENT

1. The Trial Court Did Not Err In Denying Wal-Mart's Motion For Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict Because Carolyn Kenney Made A Submissible Case Of Defamation In That There Was Sufficient Evidence To Support The Jury's Determination That The Poster Was Defamatory.

"The standard of review of denial of a JNOV is essentially the same as for review of denial of a motion for directed verdict." Giddens v. Kansas City Southern Railway Co., 29 S.W.3d 813, 818 (Mo. Banc 2000). "JNOV for the defendant is only appropriate if the plaintiff fails to make a submissible case." Balke v. Central Missouri Electric Coop., 966 S.W.2d 15, 20 (Mo. App. 1997). "Because submissibility presents a question of law," an appellate court's review is de novo. Environmental Protection, Inspection and Consulting, Inc. v. Kansas City, 37 S.W.3d 360, 369 (Mo. App. 2000).

"In determining whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict." Giddens, 984 S.W.2d at 818. The court should "disregard the defendant's evidence except as it may aid the plaintiff's case." Benoit v. Missouri Highway and Transportation Comm'n, 33 S.W.3d 663, 667 (Mo. App. 2000). "A motion for JNOV should only be granted when all the evidence and reasonable inferences to be drawn therefrom are so strong against the prevailing party that there is no room for reasonable minds to differ." Missouri Highway Transportation Comm'n v. Kansas City Cold Storage, Inc., 948 S.W.2d 679, 685 (Mo. App. 1997).

"A statement is defamatory if it tends so to harm the reputation of another as to

lower him in the estimation of the community or to deter third persons from associating or dealing with him." Deckard v. O'Reilly Automotive, Inc., 31 S.W.3d 6, 19 (Mo. App. 2000). In Nazeri v. Missouri Valley College, 860 S.W.2d 303 (Mo. Banc 1993), this Court recognized three standards that have commonly been used in determining whether a communication is capable of a defamatory meaning. First, "in determining whether a statement of fact is defamatory . . . the words must be stripped of any pleaded innuendo . . . and construed in their most innocent sense." Id. at 311. In addition, "the alleged defamatory words must be considered in context, giving them their plain and ordinarily understood meaning." Id. Finally, "the words alleged 'are to be taken in the sense which is most obvious and natural and according to [the] ideas they are calculated to convey to those to whom they are addressed.'" Id.

While this Court indicated that each of the above-stated standards should be considered in determining whether a particular statement is capable of a defamatory meaning, it is important to note how this Court actually applied these standards to the facts in the Nazeri case. In Nazeri, the appellant had filed a lawsuit against an individual who had stated, among other things, that "[appellant] lives with S____ A____, who is a well known homosexual and has lived with her for years." Id. at 307. In arguing that these words were not defamatory, the respondent claimed that these

words did not say that appellant was a homosexual; they merely said that she lived with a homosexual. Id. at 311. In rejecting this argument, this Court stated as follows: "Although respondents' argument has technical merit, an objective reading simply does not allow these words an innocent sense. Respondent's comments clearly insinuate that appellant is a homosexual. . . . The allegation that appellant 'left' her husband and children to live with a 'well known homosexual' would most obviously and naturally be interpreted to mean that appellant abandoned her family for the purpose of engaging in an adulterous and unchaste relationship with a lesbian woman." Id.

This Court's application of the above-stated standards is telling in two regards. First, although this Court recognized that allegedly defamatory communications "must be stripped of any pleaded innuendo . . . and construed in their most innocent sense," this Court's analysis focused on consideration of what was insinuated by the communication. Id. Second, the language that this Court used in stating its conclusion indicates that this Court depended primarily upon the standard that calls for taking the words "in the sense which is most obvious and natural and according to [the] ideas they are calculated to convey to those to whom they are addressed." Id.

In Nazeri, this Court clearly rejected the respondent's argument for an overly literal interpretation of the defamatory statement. Other Missouri courts have also rejected overly literal interpretations of defamatory language. See, e.g., Deckard, 31

S.W.3d at 20-21 (Finding that when a company states that somebody has taken money from a customer's account, and that a particular employee has been dismissed as a result of that occurrence, the obvious and natural interpretation is that the employee took the money.); Duggan v. Pulitzer Publishing Co., 913 S.W.2d 807, 810 (Mo. App. 1995) (Finding that a statement that a judge was barred from hearing criminal cases leads to the natural inference that the judge had improperly handled criminal cases.).

The Poster implies that Carolyn Kenney kidnapped Lauren or took Lauren without a right to do so. The Poster indicates that Lauren is missing and states that Lauren was "last seen . . . leaving her home with" Carolyn. (LF 20). The Poster further indicates that Lauren left with Carolyn in a vehicle with "no visible license plate" and that Lauren is with Carolyn at "an unknown location." These words imply that Carolyn kidnapped Lauren or took Lauren without a right to do so.

Wal-Mart argues that the Poster merely says that Lauren is missing and does not say that Carolyn kidnapped Lauren or took Lauren without a right to do so. This is no different from the argument raised by the respondent in Nazeri; that he had merely said the appellant lived with a homosexual, not that the appellant was a homosexual. This Court rejected the overly literal interpretation of the statement in Nazeri, and this Court should likewise reject Wal-Mart's overly literal interpretation of the Poster in this case. Although the Poster does not say "Carolyn Kenney kidnapped Lauren or took Lauren

without a right to do so," that is the clear implication of the Poster. Indeed, if the Poster was only about Lauren Kenney, and not about Carolyn Kenney, then one wonders why it contained a picture of Carolyn Kenney that would allow persons reading the Poster to more easily identify her.

Wal-Mart also suggests that the Poster conveys the message that both Lauren and Carolyn are missing. (App. Brief 30). However, this interpretation is simply not supported by the language used in the Poster. The Poster prominently displays the claim that Lauren is missing and then describes the circumstances under which Lauren left with Carolyn. The Poster does not describe Carolyn as missing. The natural implication of the Poster is that Carolyn Kenney kidnapped Lauren or took Lauren without a right to do so; not that Carolyn is missing along with Lauren.

When the Poster is viewed as a whole, it plainly conveys the message that Carolyn Kenney kidnapped Lauren or took Lauren without a right to do so. Wal-Mart apparently finds fault with the fact that Carolyn Kenney's defamation claim focuses on the implied message of the Poster as a whole rather than focusing on individual lines of the Poster in isolation. (App. Brief 27-28). However, Missouri law does not require that defamatory language be considered in isolation. To the contrary, Missouri courts have consistently held that defamatory language must be read in connection with the whole publication and not in isolation. Chastain v. Kansas City Star, 50 S.W.3d 286,

288 (Mo. App. 2001); Matyska v. Stewart, 801 S.W.2d 697, 700 (Mo. App. 1991); Hagler v. The Democrat-News, Inc., 699 S.W.2d 96, 99 (Mo. App. 1985). When the Poster in issue is read as a whole, it definitely implies that Carolyn Kenney kidnapped Lauren or took Lauren without a right to do so.

Finally, it is important to consider the location where the Poster was displayed. The Poster was displayed in a display case that contains other posters that notify the public about abducted children. As Wal-Mart points out in its brief, many of the posters in this display case expressly state that an individual is responsible for the kidnapping or abduction of a child. (App. Brief 29; ROA Plaintiff's Exh. 4). Furthermore, Peggy Lohman, a Wal-Mart manager, testified that the Poster "looked like other ones" that were put in the display case and that "[w]alking up to the cabinet, it looked like the rest of them." (TR 848, 1228). If a Wal-Mart manager was not able to distinguish the Poster at issue in this case from the other posters in the display case that dealt with kidnapped or abducted children, then it seems unlikely that a member of the general public would make such a distinction. Most people seeing the Poster would assume, as Peggy Lohman did, that the Poster was another child-abduction notice. Thus, the natural and ordinary interpretation of the Poster, when viewed in conjunction with the other posters in the display case, is that Carolyn Kenney was responsible for a child abduction.

It is entirely appropriate to consider the fact that the Poster was displayed in a case with child-abduction notices because Missouri courts have recognized that defamatory words must be considered in context. Deckard, 31 S.W.3d at 19; Ribaudo v. Bauer, 982 S.W.2d 701, 704 (Mo. App. 1998). In Ribaudo, the court considered a party's argument that the trial court had overemphasized the fact that allegedly defamatory statements were made in the context of a political campaign. Ribaudo, 982 S.W.2d at 705. The court rejected this argument, stating that "[t]he context in which the statements were made is extremely relevant and important. The statements cannot be considered in a vacuum." Id. As this Court recognized in Nazeri, allegedly defamatory words must be considered in the context of the persons "to whom they are addressed." Nazeri, 860 S.W.2d at 311. In this case, the Poster was addressed to people who were looking at a display case that provided information about abducted children, and the Poster should be considered in that context.

When the Poster is looked at as a whole, and is considered in the context of the display case in which it was displayed, it is clear that the Poster implies that Carolyn Kenney kidnapped Lauren or took Lauren without a right to do so. The trial court properly concluded that a poster that implies that a person has kidnapped a child or taken a child without a right to do so is a communication that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter

third persons from associating or dealing with him." Deckard, 31 S.W.3d at 19.

2. The Trial Court Did Not Err In Denying Wal-Mart's Motion For Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict Because Carolyn Kenney Made A Submissible Case Of Defamation In That There Was Sufficient Evidence To Support The Jury's Determination That Wal-Mart Published The Poster.

"The standard of review of denial of a JNOV is essentially the same as for review of denial of a motion for directed verdict." Giddens, 29 S.W.3d at 818. "JNOV for the defendant is only appropriate if the plaintiff fails to make a submissible case." Balke, 966 S.W.2d at 20. "Because submissibility presents a question of law," an appellate court's review is de novo. Environmental Protection, Inspection and Consulting, Inc., 37 S.W.3d at 369.

"In determining whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict." Giddens, 984 S.W.2d at 818. The court should "disregard the defendant's evidence except as it may aid the plaintiff's case." Benoit, 33 S.W.3d at 667. "A motion for JNOV should only be granted when all the evidence and reasonable inferences to be drawn therefrom are so strong against the prevailing party that there is no room for reasonable minds to differ." Missouri Highway Transportation Comm'n, 948 S.W.2d at 685.

In the context of a defamation action, publication "is simply the communication of defamatory matter to a third person." Dean v. Wissmann, 996 S.W.2d 631, 633 (Mo. App. 1999). In order to establish publication, the plaintiff must establish "that the defendant delivered or caused to be delivered the allegedly libelous material to a third

person." Willman v. Dooner, 770 S.W.2d 275, 282 (Mo. App. 1989) (emphasis added). In this case, Wal-Mart published the Poster in that Wal-Mart caused the content of the Poster to be delivered to third persons by continuing to display the Poster in its display case after it had been made aware of the Poster's presence.

Publication by failure to remove defamatory material is also recognized in the Restatement of Torts, which states in pertinent part as follows:

> One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.

RESTATEMENT (SECOND) TORTS § 577(2) (1977). Aside from the decision of the Western District in this case, Missouri courts have not expressly adopted this Restatement section. Dominick v. Sears, Roebuck & Co., 741 S.W.2d 290, 294 (Mo. App. 1987). However, the definition of "publication" stated in section 577(2) is wholly consistent with the definition of "publication" stated in the Willman decision. In essence, both definitions recognize that an entity will be deemed to have published defamatory material if the entity's conduct causes the defamatory material to be delivered to third persons.

Because Missouri courts have already recognized that publication includes conduct that causes defamatory material to be delivered to third persons, this Court

need not expressly adopt section 577(2) in order to find that Carolyn Kenney made a submissible case with regard to the issue of publication. However, if this Court does choose to expressly adopt section 577(2), that decision would be consistent with the conclusion reached by the majority of courts that have considered the issue.

Of those jurisdictions that have considered the failure-to-remove theory of publication that is recognized in section 577(2), all but one have adopted this theory. Tacket v. General Motors Corp., 836 F.2d 1042, 1046 (7th Cir. 1987); S.Bell Tel. & Tel. Co v. Coastal Transmission Serv., Inc., 307 S.E.2d 83, 88 (Ga. App. 1983); Hellar v. Bianco, 244 P.2d 757, 759 (Cal. App. 1952); Tidmore v. Mills, 32 So.2d 769, 777-78 (Ala. App. 1947); Fogg v. Boston & L.R. Co., 20 N.E. 109, 110 (Mass. 1889); Woodling v. Knickerbocker, 17 N.W. 387, 388 (Min. 1883); but see Scott v. Hull, 259 N.E.2d 160, 162 (Ohio App. 1970). The general acceptance of the failure-to-remove theory of publication is not surprising given that the theory involves nothing more than the simple application of common sense to the question of publication.

As Missouri courts have recognized, the essence of publication is the delivery of defamatory material to third persons. There is no reason to distinguish between the action of initially posting a poster, and the action of continuing to display a poster, when both actions result in delivery of the defamatory content of the poster. Perhaps recognizing that the principle stated in section 577(2) is merely a matter of common

sense, Wal-Mart does not argue against adoption of section 577(2). Instead, Wal-Mart argues that there is not sufficient evidence in the record to support the jury's conclusion that Wal-Mart published the Poster. In making this argument, Wal-Mart completely disregards the applicable standard of review in this action.

In determining whether the evidence was sufficient to support the jury's conclusion that Wal-Mart published the Poster, this Court should "[view] the evidence in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences which conflict with that verdict." Brenneke v. Department of Missouri, Veterans of Foreign Wars of the United States of America, 984 S.W.2d 134, 137 (Mo. App. 1998). Wal-Mart's description of the facts pertaining to publication is directly contrary to this standard in that Wal-Mart presents the evidence in a light most favorable to the non-prevailing party and disregards the evidence that supports the jury's verdict. (App. Brief 28-30). When the facts are truly viewed in a light most favorable to the result reached by the jury, the facts support the jury's conclusion that Wal-Mart published the Poster by continuing to display the Poster in its display case after it had been made aware of the Poster's presence.

Patty Wyke testified that she was in the Lee's Summit store during the middle of the week immediately following Labor Day weekend or the week after that. (TR

422). Mrs. Wyke indicated that, because she knew that the Poster was not true, she spoke with a male Wal-Mart manager and informed him that the Poster was not true and should be taken down. (TR 432-33). Mrs. Wyke testified that she went back to the Lee's Summit store several days later and the Poster was still in the display case. (TR 436-37). At that point she spoke with a different male manager and informed him that the Poster was not true and should be taken down. (TR 437-38).

Wal-Mart argues that Patty Wyke's testimony is speculative. However, the cases that Wal-Mart cites in this regard do not support Wal-Mart's argument. In American Family Mutual Insurance Co. v. Robbins, 945 S.W.2d 52 (Mo. App. 1997), the court noted that the defendant's testimony as to whether the decedent was on the wrong side of the road was speculative because the defendant had only testified that the decedent "may have been" or "possibly could have been"on his side of the road. Id. at 56. In Judy v. Arkansas Log Homes, Inc., 923 S.W.2d 409 (Mo. App. 1996), the court indicated that the witnesses' testimony that they "believed" they had purchased a home was speculative because they did not testify that they had, in fact, purchased the home. Id. at 418. In each of these cases, the court concluded that the testimony in question was speculative because the witness equivocated regarding the primary focus of the testimony. In contrast, Patty Wyke did not equivocate with regard to the primary focus of her testimony.

Although Patty Wyke's testimony is indefinite with regard to the date that she first went to the Lee's Summit store, her testimony definitely states that she went into the store after Labor Day weekend and that she returned to the store several days later. (TR 422, 432-33, 436-37). Unlike the testimony in American Family Mutual Insurance Co. and Judy, Mrs. Wyke's testimony is not indefinite with regard to the pertinent facts. Under the failure-to-remove theory of publication, the pertinent facts are notification of the Poster's presence and the continued display of the Poster for a significant period of time after notification. Mrs. Wyke's testimony establishes that Wal-Mart was notified of the Poster's presence after Labor Day weekend, and that Wal-Mart allowed the Poster to remain in the display case for several days. Thus, regardless of whether these events occurred during the week following Labor Day weekend, or two weeks after Labor Day weekend, the evidence establishes that the Poster was displayed for a period of time that is sufficient to establish publication under the failure-to-remove theory.

Even if the evidence is interpreted in a light most favorable to Wal-Mart (and contrary to the applicable standard of review), the testimony of Patty Wyke and Peggy Lohman is still sufficient to establish that the Poster was displayed in the Lee's Summit store for at least six days after Wal-Mart was first notified of the Poster's presence.

Peggy Lohman, a Wal-Mart manager, testified that she was notified of the

Poster's presence on Sunday, September 1. (TR 1221-22). Patty Wyke testified that she spoke with a male Wal-Mart manager during the middle of the week following Labor Day weekend or the week after that. (TR 422). Therefore, Mrs. Wyke's testimony establishes that she spoke with a Wal-Mart manager on Wednesday, September 4, at the very earliest. Mrs. Wyke further testified that she returned to the Lee's Summit store "several days" later. (TR 436-37). The word "several" is commonly defined as meaning "more than two,"[3] so Mrs. Wyke's testimony establishes that she returned to the Lee's Summit store three or more days after her first encounter with a Wal-Mart manager. This would mean that Patty Wyke returned to the Lee's Summit store on Saturday, September 7, at the earliest. Thus, even if Patty Wyke's testimony is interpreted in a manner that gives Wal-Mart every benefit of the doubt, her testimony, in conjunction with Peggy Lohman's testimony, establishes that the Poster was in the display case for at least six days after the Poster was first brought to Wal-Mart's attention on September 1, and for at least three days after Mrs. Wyke first notified Wal-Mart management of the Poster's presence on September 4.

In short, it makes no difference that Patty Wyke testified that she was at the

[3] The Oxford American Dictionary defines "several" as meaning "a few, more than two but not many." OXFORD AMERICAN DICTIONARY, p. 833 (1980).

Lee's Summit store during one of two time periods. Her presence at the Lee's Summit store during either time period would be sufficient to establish that the Poster was displayed in the store for a substantial period of time after the Poster was brought to Wal-Mart's attention. The only factual issue that is indefinite is whether the Poster was in Wal-Mart for one or two weeks after it was brought to Wal-Mart's attention. Either way, the period of time involved is more than sufficient to establish that Wal-Mart published the Poster. Indeed, section 577(2), which sets forth the Restatement standard for the failure-to-remove variety of publication, indicates that a delay of one hour in removing defamatory material is sufficient to establish publication. RESTATEMENT (SECOND) TORTS § 577(2), Ill. 15.

Obviously, Wal-Mart's description of the facts concerning publication depends almost entirely upon the testimony of Peggy Lohman. However, the jury was not required to believe Peggy Lohman's testimony. Benoit, 33 S.W.3d at 667 ("A jury can believe or disbelieve any part of a witnesses testimony."). The jury was free to believe Patty Wyke's testimony and to accept only those portions of Peggy Lohman's testimony that were consistent with Patty Wyke's testimony. Under the applicable standard of review, this Court should assume that the jury did just that.

In its reply brief, Wal-Mart may attempt to argue that the failure-to-remove theory of publication should not apply in this case because there is no evidence that

Wal-Mart adopted the contents of the Poster or desired the continued publication of the Poster. This argument is simply not supported by the evidence. Patty Wyke notified Wal-Mart management of the Poster's presence, but the managers that Mrs. Wyke spoke with were dismissive and refused to take the Poster down. (TR 432-36). Based on Wal-Mart's refusal to remove the Poster, the jury may infer that Wal-Mart did intend to adopt the contents of the Poster or did desire the continued publication of the Poster. Indeed, this is the very essence of the failure-to-remove theory of publication. Wal-Mart may also attempt to argue in its reply brief that the failure-to-remove theory of publication should not apply in this case because Carolyn Kenney did not establish that Wal-Mart "intentionally and unreasonably" failed to remove the Poster. Once again, this argument is simply not supported by the evidence. Wal-Mart was notified of the Poster's presence and was informed that the Poster was false, yet Wal-Mart refused to remove the Poster. (TR 432-38). This evidence is sufficient to establish that Wal-Mart's failure to remove the Poster was intentional and unreasonable.

When the facts are viewed in a light most favorable to the jury's verdict, in accordance with the applicable standard of review, the evidence was more than sufficient to establish that Wal-Mart published the Poster by failing to remove the Poster after it was made aware of its presence.

3. The Trial Court Did Not Err In Denying Wal-Mart's Motion For Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict Because Carolyn Kenney Made A Submissible Case Of Defamation In That There Was Sufficient Evidence To Support The Jury's Determination That Wal-Mart Negligently Published The Poster.

"The standard of review of denial of a JNOV is essentially the same as for review of denial of a motion for directed verdict." Giddens, 29 S.W.3d at 818. "JNOV for the defendant is only appropriate if the plaintiff fails to make a submissible case." Balke, 966 S.W.2d at 20. "Because submissibility presents a question of law," an appellate court's review is de novo. Environmental Protection, Inspection and Consulting, Inc., 37 S.W.3d at 369.

"In determining whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict." Giddens, 984 S.W.2d at 818. The court should "disregard the defendant's evidence except as it may aid the plaintiff's case." Benoit, 33 S.W.3d at 667. "A motion for JNOV should only be granted when all the evidence and reasonable inferences to be drawn therefrom are so strong against the prevailing party that there is no room for reasonable minds to differ." Missouri Highway Transportation Comm'n, 948 S.W.2d at 685.

Because Carolyn Kenney is a private figure, in order to make a submissible case of defamation she was required to establish that Wal-Mart negligently allowed the Poster to remain in the display case in its Lee's Summit store after Wal-Mart was made aware of the Poster's presence. Overcast v. Billings Mutual Insurance Co., 11 S.W.3d

62, 70 (Mo. Banc 2000). The evidence presented by Carolyn Kenney was more than sufficient to establish Wal-Mart's negligence in this regard.

Patty Wyke testified that when she first spoke with a Wal-Mart manager about the Poster, the manager did not even bother to look at the Poster. (TR 433-34). Mrs. Wyke indicated that she even argued with the manager about the matter because she was "appalled" that the Poster was on display in Wal-Mart, but the manager "pretty much blew [her] off." (TR 436). When Mrs. Wyke returned to the Lee's Summit store several days later, and discovered that the Poster was still on display, she spoke with a different Wal-Mart manager. (TR 436-37). Mrs. Wyke reiterated to this manager that the Poster was not true and told him that if he would call the police department to verify the contents of the Poster he would find out that the Poster was not true. (TR 437). However, the manager told her that he "[wasn't] going to make a phone call" and that he was "too busy." (TR 437-38).

Patty Wyke's testimony plainly establishes that Wal-Mart management was indifferent to her concerns about the Poster being on display and that Wal-Mart management did not make any effort to remove the Poster or to verify its accuracy. Her testimony shows that, although Wal-Mart had been informed of the Poster being displayed on its premises and that Poster falsely implicated Carolyn Kenney in the

kidnapping or wrongful taking of Lauren Kenney, Wal-Mart did not take this situation seriously and did not appear to give this situation any real consideration.

Wal-Mart devotes more than a page of its brief to describing the procedures that it employs in placing posters in the Missing Children's Network display case. (App. Brief 40-41). However, the existence of these procedures is not pertinent to the issue of publication in this case. Mrs. Kenney submitted her case under a failure-to-remove theory of publication. Therefore, the issue is not whether Wal-Mart was negligent in allowing the Poster to be placed in the display case in the first instance, but whether Wal-Mart was negligent in failing to remove the Poster after it was notified of the Poster's presence.

Even if Wal-Mart employed procedures that were intended to avoid the placement of unauthorized posters in the display case, this does not establish that Wal-Mart was free of negligence in allowing an unauthorized poster to remain in the display case after Wal-Mart was notified of the poster's presence. In fact, Wal-Mart acknowledges in its brief that "[i]t is a violation of company policy to display any [material other than that provided by NCMEC] in the display case." (App. Brief 41). Thus, by allowing the unauthorized Poster to remain in the display case, Wal-Mart violated its own company policy.

The evidence in the record supports the conclusion that Wal-Mart was not only

negligent in allowing the Poster to remain in the display case after it was notified of the Poster's presence, but that Wal-Mart was blatantly indifferent to the Poster's presence or to the questionable truthfulness of the Poster. This is more than sufficient to establish that Wal-Mart published the Poster with the requisite degree of fault.

4. The Trial Court Did Not Err In Denying Wal-Mart's Motion For Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict Because Carolyn Kenney Made A Submissible Case Of Defamation In That There Was Sufficient Evidence To Support The Jury's Determination That The Poster Was Not True.

"The standard of review of denial of a JNOV is essentially the same as for review of denial of a motion for directed verdict." Giddens, 29 S.W.3d at 818. "JNOV for the defendant is only appropriate if the plaintiff fails to make a submissible case." Balke, 966 S.W.2d at 20. "Because submissibility presents a question of law," an appellate court's review is de novo. Environmental Protection, Inspection and Consulting, Inc., 37 S.W.3d at 369.

"In determining whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict." Giddens, 984 S.W.2d at 818. The court should "disregard the defendant's evidence except as it may aid the plaintiff's case." Benoit, 33 S.W.3d at 667. "A motion for JNOV should only be granted when all the evidence and reasonable inferences to be drawn therefrom are so strong against the prevailing party that there is no room for reasonable minds to differ." Missouri Highway Transportation Comm'n, 948 S.W.2d at 685.

Truth constitutes an affirmative defense to a defamation claim. MO. CONST. ART. I, § 8; MO. R. CIV. P. 55.08; R.S.Mo. § 509.090; Rice v. Hodapp, 919 S.W.2d 240, 243 (Mo. Banc 1996). "The issue of falsity relates to the defamatory facts implied by a statement – in other words, whether the underlying statement about the plaintiff

is demonstrably false." Overcast v. Billings Mutual Insurance Co., 11 S.W.3d 62, 73 (Mo. Banc 2000). "The test to be administered in determining accuracy is whether the article is substantially true." Turnbull v. The Herald Co., 459 S.W.2d 516, 519 (Mo. App. 1970). In this case, the evidence established that certain statements in the Poster were false after September 3 and that the implication of the Poster was false at all times.

1. False statements in the Poster.

To the extent that the Poster stated that Lauren was "missing" and had not been seen by Angela since Friday, August 30, the Poster was undisputedly false after September 3. Lauren was returned to Angela after the custody hearing on Tuesday, September 3. (TR 557). This time frame is important because the events that serve as the basis for Carolyn Kenney's defamation claim occurred after September 3. In the verdict director, the jury was asked if it believed that "After September 3, 1996, Defendant displayed a poster on its Missing Child bulletin board containing the statement that Lauren Kenney was missing and that she was last seen with Carolyn Kenney." (LF 95). Thus, this case was submitted to the jury under a theory that depended on events occurring after September 3, and it is undisputed that Lauren Kenney was not missing after September 3 and that any claim that Angela had not seen

Lauren since August 30 was false after September 3.

It is important to remember that Carolyn Kenney's defamation claim was submitted to the jury under a failure-to-remove theory of publication. Under this theory, the issue should be whether the statements in the Poster were true at the time that Wal-Mart published the Poster by failing to remove the Poster. Mrs. Kenney claimed that Wal-Mart published the Poster after September 3 by failing to remove the Poster. Therefore, if the statements in the Poster were false after September 3, then the statements were false for purposes of Mrs. Kenney's defamation action.

Undoubtedly, Wal-Mart will argue that it makes no difference that the facts stated in the Poster were false after September 3 because they were allegedly true at some point prior to September 3. Mrs. Kenney does not agree that Lauren was ever "missing." However, assuming for the sake of argument that Lauren was missing prior to September 3 and was not missing after September 3, this argument still does not withstand logical analysis. A party cannot escape liability for publishing false and defamatory statements merely by claiming that those statements would have been true had they been published at some point in the past. The status of a particular statement as true or false may change with the passage of time, but at any given point in time the statement is either true or false. In this case, the statements in the Poster were false during the pertinent publication period which was after September 3.

It is also important to note that Wal-Mart is mistaken in its assertion that Carolyn Kenney "allowed that the statements in the poster that formed the basis for her complaint were true." (App. Brief 44). Wal-Mart cites to page 913 of the Transcript in support of this assertion. Apparently, Wal-Mart is referring to the following passage:

> Q. (BY MR. SEIGFREID) Now, Ms. Kenney, you don't contend that all of the information on this missing persons poster made by Angela Miles or her family is untrue do you?
>
> A. No.

(TR 913). Agreeing that not every statement in a poster is untrue is hardly the same as agreeing that any particular statement is true. Furthermore, while Mrs. Kenney acknowledged in her testimony that some of the statements on the Poster were true (TR 914-19), she indicated that the statements that Lauren is "missing" and that Lauren was "last seen" on August 30 were not true after September 3, 1996. (TR 988).

2. The implication that Carolyn Kenney kidnapped Lauren or took Lauren without a right to do so was false at all times.

To the extent that the Poster implies that Carolyn Kenney kidnapped Lauren or took Lauren without a right to do so, the Poster was never true. Prior to trial in this case, the trial court held that Christopher Kenney "had the right to have [Lauren] as a matter of law on Labor Day weekend [of 1996] and that it was not a violation of law or kidnapping for him to be in custody of [Lauren]."

(TR 88). Furthermore, the evidence established that Chris had made arrangements with Angela to have Lauren over Labor Day weekend and that Carolyn picked Lauren up at Angela's mother's house on Friday, August 30, with Angela's knowledge and consent. (TR 535-36, 867, 873). In short, the record clearly establishes that Angela turned Lauren over to Mrs. Kenney willingly and at a planned transfer, and that Mrs. Kenney did not kidnap Lauren or take Lauren without a right to do so.

Contrary to the actual facts, the Poster strongly implies that Mrs. Kenney kidnapped Lauren or took Lauren without permission to do so . The Poster states that Lauren was "LAST SEEN 1:30 PM ON 8/30/96 LEAVING HER HOME WITH PATERNAL GRANDMOTHER, CAROLYN KENNEY, IN A 1996 OR 1997 WHITE HONDA ACCORD-NO VISIBLE LICENCE PLATE." (ROA Exh. 2). This language strongly insinuates that Carolyn took Lauren without her mother's knowledge or consent. Therefore, in the language of the Turnbull decision, the "gist or sting" of the Poster was that Lauren was kidnapped or wrongfully taken by Carolyn Kenney, and this "gist or sting" was false at all times.

In Turnbull, the plaintiff sued a newspaper that had published an account of his arrest for burglary. Turnbull, 459 S.W.2d at 518. The newspaper article was accurate in stating that plaintiff had been arrested. Id. However, the plaintiff claimed that the paper made false defamatory statements about him in that the paper incorrectly stated

the amount that was stolen and the paper incorrectly stated that some of the items found in plaintiff's possession were stolen from a particular jewelry store [the "Bill Mueler store"]. Id. The newspaper asserted an affirmative defense of truth, claiming that the content of the article was substantially true. Id. at 518-19.

In addressing the defense of truth as it related to that portion of the article that incorrectly stated the amount that was stolen, the court stated as follows: "[I]n an arrest for burglary it would make no great difference what value the items bore. The sting of the article is the arrest of plaintiff suspected of burglary." Id. at 519. The court held that plaintiff could not prevail in his defamation claim with regard to this portion of the article because the variance in the amount that was stolen would not alter the damage caused to the plaintiff. Id.

In addressing the defense of truth as it related to that portion of the article that incorrectly stated that items found in plaintiff's possession had been stolen from the Bill Mueller store, the court reached the opposite conclusion. The court noted that because the article incorrectly stated that plaintiff possessed items stolen from the Bill Mueller store, a reader might mistakenly infer that plaintiff had burglarized that store when he was never charged with any such burglary. Id. at 519-20. In effect, the court held that, just because plaintiff had been charged with one burglary, this did not mean that the newspaper was free to state that plaintiff had burglarized a different store when that

was not the case.

The facts in this case are similar to the second situation addressed by the Turnbull court. The Poster stated that Lauren is missing and implied that Lauren was missing because she had been kidnapped or wrongfully taken by Carolyn Kenney. Even if the Poster was accurate in stating that Lauren is missing – which Mrs. Kenney does not concede – this does not mean that it is acceptable for the Poster to imply that Lauren is missing because she was kidnapped or wrongfully taken by Mrs. Kenney. The evidence clearly establishes that Lauren was not kidnapped or wrongfully taken by Mrs. Kenney. Therefore, the gist or sting of the Poster was not substantially true and Wal-Mart's affirmative defense of truth must fail.

5. The Trial Court Did Not Err In Denying Wal-Mart's Motion For Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict Because Carolyn Kenney Made A Submissible Case Of Defamation In That There Was Sufficient Evidence To Support The Jury's Determination That Publication Of The Poster Caused Carolyn Kenney To Suffer Actual Damages.

"The standard of review of denial of a JNOV is essentially the same as for review of denial of a motion for directed verdict." Giddens, 29 S.W.3d at 818. "JNOV for the defendant is only appropriate if the plaintiff fails to make a submissible case." Balke, 966 S.W.2d at 20. "Because submissibility presents a question of law," an appellate court's review is de novo. Environmental Protection, Inspection and Consulting, Inc., 37 S.W.3d at 369.

"In determining whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict." Giddens, 984 S.W.2d at 818. The court should "disregard the defendant's evidence except as it may aid the plaintiff's case." Benoit, 33 S.W.3d at 667. "A motion for JNOV should only be granted when all the evidence and reasonable inferences to be drawn therefrom are so strong against the prevailing party that there is no room for reasonable minds to differ." Missouri Highway Transportation Comm'n, 948 S.W.2d at 685.

1. Carolyn Kenney presented sufficient evidence to support the jury's determination that she was entitled to actual damages.

As Wal-Mart recognizes in its own brief, a plaintiff in a defamation action can recover for personal injuries such as "psychological or emotional distress, or depression." (App. Brief 48). In Boyd v. Schwan's Sales Enterprises, Inc., 23 S.W.3d 261 (Mo. App. 2000), the court held that evidence of depression and embarrassment caused by defamatory statements was sufficient to support a finding of actual damages. Id. at 264. While the court noted that evidence of embarrassment and depression was provided both by the plaintiff's deposition testimony and by a psychiatric evaluation, the court did not indicate that a psychiatric evaluation is a necessary predicate to a finding of actual damages. Id. In fact, the court rejected the defendant's argument that the plaintiff's actual damages for emotional distress must be "'medically diagnosable and of sufficient severity so as to be medically significant.'" Id. at 265.

In this case Carolyn Kenney testified that, as a result of the Poster being posted at the Lee's

Summit store, she was embarrassed, hurt and shocked and she suffered emotional distress. (TR 899, 909, 921). Mrs. Kenney indicated that the reason she did not seek medical treatment for her emotional distress was that she didn't want to allow the Poster to hurt her family, husband and children. (TR 910). This evidence of emotional distress and embarrassment is sufficient to support the jury's determination that Carolyn Kenney was entitled to actual damages. As the Boyd court recognized, emotional distress does not have to be medically diagnosable in order to serve as a basis for an award of actual damages in a defamation case. Boyd, 23 S.W.3d at 265. It is sufficient that the plaintiff provide testimony regarding the existence of emotional distress, as Carolyn Kenney did in this case.

Missouri courts have also recognized that damage to a plaintiff's reputation can be inferred from comments that other people make to the plaintiff. In Kennedy v. Jasper, 928 S.W.2d 395 (Mo. App. 1996), the court addressed a situation in which the defendant had posted signs claiming that the plaintiff was a sex offender. Id. at 398. In determining whether publication of the defamatory communication had caused damage to the plaintiff's reputation, the court indicated that such damage could be inferred from the fact that some people had referred to the plaintiff as a molester. Id. at 400.

In this case there was evidence from which the jury could infer damage to Carolyn Kenney's reputation. Although Carolyn Kenney acknowledged that no one had actually said to her "I respect you less because of the Poster that Wal-Mart displayed," she testified that people had made painful comments to her that indicated they viewed her in a lesser fashion. (TR 981-82). Based on this testimony – that people made painful comments to Carolyn Kenney as a result of the Poster being displayed – the jury could reasonably infer that Carolyn Kenney's reputation had been damaged in the eyes of the individuals who made the painful comments. Pursuant to the applicable standard of

review, this Court should give Mrs. Kenney "the benefit of all reasonable inferences," including the inference of damage to her reputation. Brenneke, 984 S.W.2d at 137.

The cases that Wal-Mart cites in its actual-damages argument do not support Wal-Mart's position that Carolyn Kenney failed to present sufficient evidence to establish actual damages. In Bauer v. Ribaudo, 975 S.W.2d 180 (Mo. App. 1997), the plaintiff claimed that he had suffered actual damages because he had lost votes and had suffered a financial loss as a result of the alleged defamatory communication. Id. at 182-83. The actual damages alleged in Bauer are of a completely different nature than the actual damages that Carolyn Kenney established in this case. Carolyn Kenney did not claim any type of financial harm, and she certainly did not claim that she lost any votes as a result of Wal-Mart's display of the Poster. The Bauer case dealt with a completely different type of damages and has no bearing on the determination of damages in this case.

In Taylor v. Chapman, 927 S.W.2d 542 (Mo. App. 1996), the plaintiff provided absolutely no evidence of damages, but instead based her claim for damages on her statement that "people lose their trust in the person that is supposed to be managing their building." Id. at 544-45. Aside from this statement, the plaintiff did not provide any evidence that she had suffered emotional distress and did not offer any evidence that anyone had made any comment to her relating to the alleged defamatory communication. Id. Again, the Taylor case is clearly distinguishable from this case in

which Carolyn Kenney testified that she suffered emotional distress as a result of the Poster being displayed at the Lee's Summit store, and testified that people made painful comments to her as a result of the Poster being displayed.

In Coats v. The News Corp., 197 S.W.2d 958 (Mo. 1946), the court noted that although "[p]laintiff had evidence of mental anguish and physical suffering," the jury did not have to believe this evidence and the verdict for nominal actual damages should be affirmed. Id. at 963. Based on this assessment, it would seem that if the jury had chosen to believe the plaintiff's evidence of "mental anguish," and had awarded a more sizable verdict, the court would also have affirmed that result. In short, once the plaintiff has presented evidence of "mental anguish," the jury may choose whether to believe this evidence and may enter what it considers to be an appropriate verdict based upon its determination. In this case, Carolyn Kenney presented evidence of "emotional distress," which is presumably similar to "mental anguish." (TR 899, 909, 921). Thus, the jury was free to believe her evidence and award a substantial verdict, just as the jury in Coats was free to disbelieve the plaintiff's evidence and award only nominal damages.

2. Wal-Mart should not be relieved of liability pursuant to the incremental harm doctrine because Wal-Mart did not preserve this issue for appeal and because this doctrine has

not been adopted by Missouri courts and should not be adopted by this Court.

Although Wal-Mart addresses the incremental harm doctrine under the actual-damages analysis in its brief, Wal-Mart did not address the incremental harm doctrine in its motion for new trial or the suggestions in support thereof. (LF 101-57). Therefore, Wal-Mart has failed to preserve this issue for appeal. MO. R. CIV. P. 78.07; Foster v. Barnes-Jewish Hospital, 44 S.W.3d 432, 439 (Mo. App. 2001).

Wal-Mart may argue, as it did in the underlying appeal, that it is not invoking the incremental harm doctrine, but is merely discussing the doctrine as it relates to the facts in this case. In Mrs. Kenney's view this is a distinction without merit. The reality is that Wal-Mart devotes four pages of its brief (App. Brief 49-52) to the discussion of incremental harm cases and to arguments regarding Mrs. Kenney's alleged failure to establish the degree of incremental harm caused by Wal-Mart's defamatory statements. Regardless of how Wal-Mart attempts to characterize its incremental harm argument, the important point is that Wal-Mart is improperly attempting to address an issue on appeal that it did not address in its motion for new trial or the suggestions in support thereof. (LF 101-07). Missouri courts have consistently recognized that new issues may not be raised for the first time on appeal. State v. American Tobacco Co., Inc., 34 S.W.3d 122, 129 (Mo. Banc 2000); Rosenfeld v. Thoele, 28 S.W.3d 446, 449 (Mo. App. 2000). Therefore, it is improper for Wal-Mart to raise the incremental harm doctrine for the first time on appeal and this Court should disregard the portion of Wal-Mart's brief (App. Brief 49-52) that discusses this doctrine.

Assuming, for the sake of argument, that Wal-Mart is entitled to raise the incremental harm doctrine for the first time on appeal, Wal-Mart is still not entitled to any relief under this doctrine because this doctrine has not been adopted by Missouri courts and is contrary to Missouri law.

The incremental harm doctrine holds that when the true or un-actionable components of a particular communication have substantially damaged the plaintiff's reputation, and no additional harm results from the remaining defamatory components of the communication, then the plaintiff may not recover damages because no additional harm was caused by the defamatory components of the communication. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 522 (1991); Desnick v. American Broadcasting Companies, Inc., 44 F.3d 1345, 1350 (7th Cir. 1995). Missouri courts have not adopted this doctrine. Indeed, counsel for Mrs. Kenney has not found a single Missouri case that even discusses the incremental harm doctrine. Furthermore, Missouri courts should not adopt this doctrine because it is contrary to existing Missouri law and is founded on questionable policy.

The United States Supreme Court has held that the incremental harm doctrine is not compelled by the First Amendment. Masson, 501 U.S. at 523. Instead, the Court has indicated that the doctrine may be adopted by individual state courts based upon "state tort law doctrines of injury, causation, and damages calculation." Id. Missouri tort law does not support adoption of the incremental harm doctrine.

Although Missouri courts have not addressed the incremental harm doctrine, Missouri courts have generally held, in the context of torts, that when an indivisible injury is caused by two or more persons, both persons are held jointly and severally liable for the whole injury, even if the same injury would have resulted had only one party acted. Barlow v. Thornhill, 537 S.W.2d 412, 418 (Mo. Banc. 1976); Sanders v. Wallace, 817 S.W.2d 511, 517 (Mo. App. 1991). The incremental harm doctrine is directly contrary to the indivisible injury rule because the incremental harm doctrine holds that when two causes combine to produce a single injury, and either one of the causes could have produced that injury, the existence of one cause serves as a basis for denying liability that might arise from the other

cause.

In this case Wal-Mart argues that, because Carolyn Kenney may have received similar injuries from other defamatory communications, Mrs. Kenney should be denied the right to recover on her claim of defamation against Wal-mart. This argument is directly contrary to the spirit of Missouri law as expressed in the indivisible injury rule. Just because Mrs. Kenney may have received similar injuries due to the actions of other parties, this does not mean that Mrs. Kenney cannot hold Wal-Mart responsible for its actions in displaying the Poster in its Lee's Summit store.

Apparently recognizing the shortcomings of the incremental harm doctrine, several courts have rejected the doctrine. See, e.g., Crane v. The Arizona Republic, 972 F.2d 1511, 1524 (9th Cir. 1992); Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1568 (D.C. Cir. 1984) (vacated and remanded on other grounds). In rejecting the incremental harm doctrine, judge (now justice) Scalia stated as follows:

> [T]he theory must be rejected because it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety. The law, however, proceeds upon the optimistic premise that there is a little bit of good in all of us – or perhaps upon the pessimistic assumption that no matter how bad someone is, he can always be worse. . . . Even the public outcast's remaining good reputation, limited in scope though it may be, is not inconsequential.

Liberty Lobby, Inc., 746 F.2d at 1568. As judge Scalia eloquently recognized, the incremental harm doctrine is bad policy because it creates a group of second-class citizens who are not capable of being defamed. This Court should reject the incremental harm doctrine for the same reason.

Because Wal-Mart failed to preserve the incremental harm issue for appeal by failing to raise

that issue in its motion for new trial, this Court should disregard the portion of Wal-Mart's brief that discuses the incremental harm doctrine. However, even if this Court chooses to consider the incremental harm doctrine for the first time on appeal, this Court should refuse to apply that doctrine in this case because the doctrine has not been adopted by Missouri courts and should not be adopted by this Court.

7. The Trial Court Did Not Err In Denying Wal-Mart's Motion For Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict Because Carolyn Kenney Made A Submissible Case Of Defamation In That The Trial Court Properly Held That The Fair Report Privilege Was Not Applicable Under The Facts Of This Case And Carolyn Kenney Overcame Any Potential Application Of The Fair Report Privilege By Establishing Actual Malice.

"The standard of review of denial of a JNOV is essentially the same as for review of denial of a motion for directed verdict." Giddens, 29 S.W.3d at 818. "JNOV for the defendant is only appropriate if the plaintiff fails to make a submissible case." Balke, 966 S.W.2d at 20. "Because submissibility presents a question of law," an appellate court's review is de novo. Environmental Protection, Inspection and Consulting, Inc., 37 S.W.3d at 369.

"In determining whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict." Giddens, 984 S.W.2d at 818. The court should "disregard the defendant's evidence except as it may aid the plaintiff's case." Benoit, 33 S.W.3d at 667. "A motion for JNOV should only be granted when all the evidence and reasonable inferences to be drawn therefrom are so strong against the prevailing party that there is no room for reasonable minds to differ."

Missouri Highway Transportation Comm'n, 948 S.W.2d at 685.

1. The fair report privilege does not apply under the facts of this case.

"A defendant who asserts the [fair report] privilege has the burden of establishing its applicability." Williams v. Pulitzer Broadcasting Co., 706 S.W.2d 508, 511 (Mo. App. 1986). In this case, Wal-Mart has failed to meet this burden for a number of reasons.

1. The fair report privilege does not apply to non-media defendants.

Missouri courts have only applied the fair report privilege in cases that involve a media entity. In fact, every Missouri case that Wal-Mart cites regarding the fair report privilege addresses application of the privilege to articles that were published in newspapers. Furthermore, Missouri courts have described the privilege as a privilege that pertains to the media. Hoeflicker v. Higginsville Advance, Inc., 818 S.W.2d 650, 652 (Mo. App. 1991) (Indicating that "a qualified privilege exists for the media to report on the filing of a petition."); Lami v. The Pulitzer Publishing Co., 723 S.W.2d 458, 459 (Mo. App. 1986) ("The existence of a qualified privilege for a newspaper to publish information contained in public records has been found in a variety of contexts.").

Although no Missouri court has directly addressed the issue of whether the scope of the fair report privilege should be expanded to cover non-media defendants, there are good reasons for not expanding the scope of the privilege. As the

Restatement of Torts recognizes, "[t]he basis of th[e] privilege is the interest of the public in having information made available to it as to what occurs in official proceedings and public meetings." RESTATEMENT (SECOND) TORTS § 611 cmt. a (1977). Because the purpose of the privilege is to protect those entities that report on official proceedings and public meetings, it is logical to limit application of the privilege to those entities that are in the business of reporting on official proceedings and public meetings. Missouri courts have not previously expanded the scope of the fair report privilege to cover non-media defendants and Carolyn Kenney asserts that the underlying rationale of the privilege does not require this Court to expand the scope of the privilege in this case.

2. The fair report privilege does not apply to the Poster because the Poster was not published for the purpose of reporting on an official action.

The Restatement of Torts indicates that the fair report privilege applies to "[t]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern." RESTATEMENT (SECOND) TORTS § 611 (1977). As the Western District

noted in the underlying opinion, the Poster does not fall within the scope of the privilege because the Poster does not "report" on any "official action or proceeding." Although the Poster contains some basic facts that were also recited in a police report, this does not establish that the Poster was reporting the contents of the police report.

The distinction between reporting on a police report, and reporting facts that happen to be included in a police report, is made clear when the Poster is compared to the news report that was broadcast on television regarding the same events:

> Police are on the lookout for a missing girl who may have been abducted by a relative. The child was last seen . . . with her paternal grandmother, Carolyn Kenney. Family members believe the girl's father and grandmother are now with her at an unknown location. . . . If you have any information, please call the Juvenile Division of the Kansas City Police Department or your local law enforcement agency.

(ROA Exh. 111). As Wal-Mart noted in its brief, the Eighth Circuit Court of Appeals held that this publication was subject to the fair report privilege. But application of the privilege to the television report is understandable because the television report clearly reported on police action and invited viewers to contact the police. In contrast, the Poster makes no reference to the police and gives no indication that it is reporting on police actions.

In short, a defamatory statement is not entitled to protection under the fair report privilege merely because some of the facts contained in that statement are also included in a police report. Stated another way, the fair report privilege does not apply to particular facts, rendering those facts forever incapable of being the subject of a defamation action. Rather, the fair report privilege applies to statements that report an official action. Thus, a party is not entitled to protection of the fair report privilege merely because some facts contained in the party's statements also happened to be included in a police report.

3. Wal-Mart is not entitled to protection under the fair report privilege because Angela was not protected by the privilege.

In the underlying opinion, the Western District held that Wal-Mart could not claim protection of the fair report privilege because the original publisher of the Poster, Angela, would not be entitled to protection under the privilege. The Western District concluded that Angela would not be entitled to protection of the privilege due to application of the self-reported-statement exception which is described as follows: "A person cannot confer this privilege upon himself by making the original defamatory

publication himself and then reporting to other people what he had stated." RESTATEMENT (SECOND) TORTS § 611 cmt. c (1977).

Wal-Mart does not deny that the fair report privilege generally is inapplicable when a party is reporting her own statement to an official authority. Rather, Wal-Mart argues that the self-reported-statement exception should not apply in this case because Angela did not act with a malicious motive or contrive to have the police report issued for improper purposes. In other words, Wal-Mart argues for an exception to the exception; what might be referred to as a good-faith exception to the self-reported-statement exception.

Carolyn Kenney is not aware of any Missouri authority that supports the application of a good-faith exception to the self-reported-statement exception. Furthermore, in light of the underlying purpose of the fair report privilege, Mrs. Kenney believes that adoption of a good-faith exception to the self-reported-statement exception is unwarranted.

Under the fair report privilege, if a party is reporting statements that were made in an official proceeding, that party is protected in the event that those statements turn out to be false. Obviously, if the party reporting on the official proceeding is the same party that made the statements in the official proceeding, then that party should know whether the statements are false and does not require protection under the fair report

privilege. In other words, a party cannot claim immunity from her own false statements merely because she first made those false statements in an official proceeding.

Even if this Court did believe that a good-faith exception to the self-reported-statement exception is necessary, that good-faith exception would not apply under the facts of this case. The record indicates that the Kansas City Police Department was initially reluctant to file a missing person report because, when Angela first reported the incident, she indicated that Lauren was with her father. (TR 1036-37, 1051-53). After it became apparent that the police would not file a report based on the facts that Angela had initially presented, Angela changed her story and claimed that she did not know who Lauren was with. (TR 1051-53). This record hardly supports application of a good-faith exception. To the contrary, it appears that Angela was willing to say whatever she needed to say in order to get the police to issue a missing person report, and was not acting in good faith when making her report to the police. Therefore, the self-reported-statement exception was applicable to Angela's statements and, to the extent that Wal-Mart stands in Angela's shoes with regard to application of the fair report privilege, Wal-Mart is not entitled to claim protection of the privilege.

4. Wal-Mart is not entitled to protection under the fair report privilege because Wal-Mart was not aware of the official report that allegedly served as

the basis for the Poster.

Missouri courts have limited application of the fair report privilege to parties who were actually aware of the public documents upon which the defamatory communication was allegedly based. For instance, in Lami the court found that the fair report privilege applied after noting that the reporter had filed an affidavit stating that she had obtained the information in her article from the public reports in question. Lami, 723 S.W.2d at 460. Equally telling was the fact that the Lami court described the fair report privilege as a "common law privilege accorded to the press by reason of having taken the information from an official record." Id. at 459. Similarly, in applying the fair report privilege, the court in Bierman v. The Pulitzer Publishing Co.. 627 S.W.2d 87 (Mo. App. 1981), attached importance to the fact that "[t]he information for the news article was obtained directly from the arrest warrants, bonds and affidavits of the prosecuting attorney." Id. at 88.

The basis for limiting the fair report privilege to parties who actually have knowledge of public documents can be found in the underlying rationale for the privilege. The privilege is intended to protect "the interest of the public in having information made available to it as to what occurs in official proceedings and public meetings." RESTATEMENT (SECOND) TORTS § 611 cmt. a (1977). Therefore, in applying the privilege, a court should focus on whether the party that published a

defamatory communication was attempting to covey its knowledge of what "occur[red] in official proceedings and public meetings." In other words, because the privilege is intended to protect a party who is attempting to convey its knowledge of official reports and events, the privilege should only apply to a party who does, in fact, have some knowledge of the official reports or events.

In this case, Wal-Mart has presented absolutely no evidence indicating that it was aware of the Investigation Report (ROA Defendant's Exh. 116) or the Missing Person Report (ROA Defendant's Exh. 115) prior to the time that it displayed the Poster in its Lee's Summit store. Because such evidence is a prerequisite to application of the fair report privilege, and Wal-Mart bears the burden of establishing that the privilege is applicable, Wal-Mart has failed to meet its burden of proof and the trial court properly denied Wal-Mart immunity under the privilege.

5. The fair report privilege does not apply because the Poster displayed in Wal-Mart's Lee's Summit store was not a fair and accurate representation of the information contained in the Investigation Report and the Missing Person Report.

Contrary to Wal-Mart's assertion, it is not "incontestable" that the Poster displayed at the Lee's Summit store was fair and accurate. In fact, the Poster displayed at the Lee's Summit store was not a fair and accurate representation of the Investigation Report and the Missing Person Report

because it omitted important facts and improperly emphasized other facts, with the result that it did not convey a substantially correct account of those documents.

In Shafer v. Lamar Publishing Co., 621 S.W.2d 709 (Mo. App. 1981), the court quoted the following language from section 611 of the Restatement:

> Not only must the report be accurate, but it must be fair. Even a report that is accurate so far as it goes may be so edited and deleted as to misrepresent the proceeding and thus be misleading. Thus, although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it.

Id. at 712 (quoting RESTATEMENT (SECOND) TORTS § 611 cmt. f).

There are a number of facts that were included in the Missing Person Report and the Investigation Report, but were either omitted from the Poster or were distorted in the Poster, including the following:

- The Investigation Report indicates that Angela had told Carolyn when she would pick up Lauren, but the Poster fails to mention this fact. By failing to mention that Angela had spoken with Carolyn about when she would pick up Lauren, the Poster gives the false impression that Lauren was unexpectedly abducted rather than picked up at an arranged meeting.
- Although neither of the reports describes Carolyn's car, the Poster describes Carolyn's car and states that it has "no visible license plate." By including this extra information that is not found in the reports, the Poster gives the false impression that Lauren was suddenly abducted by car rather than picked up at an arranged meeting.

- The Investigation Report lists Chris Kenney as the suspect, yet the Poster includes a photograph of Carolyn but not Chris. By using Carolyn's photograph while not using a photograph of Chris, the Poster gives the false impression that Carolyn is the focus of any investigation pertaining to Lauren.
- While the Investigation Report indicates that Carolyn "picked up" Lauren, and the Missing Person Report states that Angela "took" Lauren to Carolyn, the Poster states that Lauren was "last seen . . . leaving her home with" Carolyn. The phrasing in the Poster makes it sound as if Lauren was unexpectedly taken from her home, although both reports clearly indicate that Lauren went with Carolyn as part of an arranged transfer.

The above omissions and distortions make it clear that the Poster did not merely report the contents of the Missing Person Report and the Investigation Report, but instead implied that Carolyn Kenney had abducted Lauren. In the words of the Restatement, items in the Poster have been "omitted or misplaced in such a manner as to convey an erroneous impression to those who . . . read it." RESTATEMENT (SECOND) TORTS § 611 cmt. f (1977).

2. Even if the trial court erred in holding that the fair report privilege was not applicable, no prejudice resulted from this error because the jury found that Wal-Mart acted with actual malice and a finding of actual malice overcomes a qualified privilege such as the fair report privilege.

The fair report privilege is a qualified privilege. Duggan, 913 S.W.2d at 811; Lami, 723 S.W.2d at 459. "[A]ctual malice in the publication of a statement will destroy the immunity of a qualified privilege." Wright v. Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, 945 S.W.2d 481, 490 (Mo. App. 1997); see also McDowell v. Credit Bureaus of Southeast Missouri, Inc., 747 S.W.2d 630, 631 (Mo. Banc 1988); Carter v. Willert Home Products, Inc., 714 S.W.2d 506, 512 (Mo. Banc 1986). Missouri courts apply the same actual malice standard when determining if a plaintiff can recover punitive damages that is applied when determining if a plaintiff can overcome a qualified privilege. Carter, 714 S.W.2d at 512. Therefore, because Carolyn Kenney established actual malice for purposes of her punitive damages claim, Wal-Mart would not be entitled to immunity under the fair report privilege even if the privilege was applicable in this case.

This Court addressed this very issue in the Carter case. In Carter, this Court concluded that the trial court had erred in determining that a qualified privilege was not applicable and in refusing to give the instruction that is required when a qualified privilege applies. Carter, 714 S.W.2d at 513. However, this Court held that because the trial court had instructed on punitive damages and the jury had found for the plaintiff on the punitive damages claim, the jury had necessarily found the actual malice that would be necessary to overcome the qualified privilege. Id. at 513-14. Thus, no prejudice resulted from the trial court's erroneous determination that the qualified privilege was not applicable. Id. Pursuant to the analysis in Carter, even if the trial court erred in determining that Wal-Mart was not entitled to immunity under the fair report privilege, no prejudice would result from this error because the court instructed on punitive damages and the jury found that the facts

supported a finding of actual malice.

Obviously, this analysis depends upon the validity of the jury's determination that the facts in this case established actual malice. Mrs. Kenney recognizes that Wal-Mart has challenged the jury's determination that the facts in this case established actual malice. (App. Brief 47-49). Mrs. Kenney also recognizes that the actual malice analysis is exactly the same with regard to the question of whether Wal-Mart was entitled to immunity under the fair report privilege and the question of whether Carolyn Kenney was entitled to punitive damages. Rather than engage in the exact same analysis twice, Mrs. Kenney instead refers this Court to Point VII of her argument in which she fully addresses the issue of actual malice.

8. The Trial Court Did Not Err In Denying Wal-Mart's Motion For Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict On The Issue Of Punitive Damages Because Carolyn Kenney Made A Submissible Case On The Issue Of Punitive Damages In That There Was Sufficient Evidence To Support The Jury's Determination That Carolyn Kenney Established Actual Malice.

"[T]o recover punitive damages, [a plaintiff] must prove malice. . . . 'Actual malice' is defined as a false statement made 'with knowledge that it was false, or with reckless disregard for whether it was true or false at a time when defendant had serious doubt as to whether it was true.'" Overcast, 11 S.W.3d at 70.[4] "[T]he question of malice is a jury question, unless there is no substantial evidence of express or actual malice." Englezos v. The Newspress and Gazette Co., 980 S.W.2d 25, 34 (Mo. App. 1998) (Internal quotation marks omitted.). "Actual knowledge of the falsity of a publication is difficult to prove. Thus, most successful plaintiffs have relied on a finding of reckless disregard for the truth or falsity of the publication to establish actual malice." Id. at 33. "A defendant acts with reckless disregard for the truth or falsity when it publishes a defamatory statement with a high degree

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[4] As Mrs. Kenney indicated in Point VI of her argument, the actual malice standard applies both with regard to recovering punitive damages and with regard to overcoming a claim of qualified privilege. See Deckard, 31 S.W.3d at 21. Therefore, as Mrs. Kenney indicated in Point VI, all of the analysis contained in this point (Point VII) is equally applicable to the issue of whether Mrs. Kenney overcame the fair report privilege in Point VI.

of awareness of the probable falsity of the statement." Deckard, 31 S.W.3d at 21.

In this case, there is ample evidence in the record to support the jury's conclusion that Carolyn Kenney established actual malice. Although Wal-Mart claims that "[t]here is no evidence . . . Wal-Mart was aware or had any reason to be aware that the poster may have been false" (App. Brief 61), the evidence in the record establishes that at least two individuals notified at least three different Wal-Mart managers on at least three separate occasions that the Poster was false.

Peggy Lohman testified that on Sunday, September 1, a customer brought the Poster to her attention and told her that the Poster was not true. (TR 1221-23). Patty Wyke testified that she told a male manager that the Poster was not true during the middle of the week following Labor Day weekend or during the middle of the week after that. (TR 422, 432). Patty Wyke also testified that she returned to the Lee's Summit store several days later and spoke to a different male manager and notified him that the Poster was not true. (TR 436-38). Not only do these facts refute Wal-Mart's statement that it had no reason to be aware that the Poster was false; these facts also refute Wal-Mart's claim that it "immediately sought to remove the Poster from the display case." (App. Brief 61-62). To the contrary, the above-referenced evidence establishes that the Poster remained up for at least six days after Wal-Mart was first notified of the Poster's presence and of the Poster's false content.[5]

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[5] As Mrs. Kenney explained in Point II of her argument, if Patty Wyke's first conversation with a manager occurred on the Wednesday following Labor Day weekend at the earliest, and Patty Wyke's second conversation with a Wal-Mart manager occurred on the Saturday following Labor Day weekend at the earliest,

then the Poster was up at least six days after Peggy Lohman was first notified of the Poster's presence on the Sunday during Labor Day weekend.

The evidence also establishes that the Wal-Mart managers who dealt with Patty Wyke were indifferent to her explanations that the Poster was false. The first manager that Mrs. Wyke spoke with did not even take the time to look at the Poster. (TR 433-34). Mrs. Wyke testified that this first manager seemed "irritated" with her and "blew [her] off." (TR 434). When Mrs. Wyke returned to the Lee's Summit store several days later, and found that the Poster was still in the display case, she spoke with a second manager and asked him to call the police department to verify that Lauren Kenney was not missing. (TR 437). This manager refused to make a phone call in order to verify the information conveyed by the Poster. (TR 437-38). He indicated that he was too busy to verify the Poster's contents. (TR 438). Mrs. Wyke stated that he "really didn't give [her] much credit." (TR 438).

Although both of these managers told Mrs. Wyke that they didn't have authority to remove the Poster (TR 434, 437-38), Tom Montgomery, the Wal-Mart official who was in charge of the program involving the display cases, testified that it was the job of all Wal-Mart Associates to remove inaccurate information from the display cases. (TR 802-03). Mr. Montgomery also testified that it would be both wrong and a violation of Wal-Mart policy to leave inaccurate information in the display case. (TR 699-70, 826).

Wal-Mart's recitation of the facts pertaining to punitive damages completely overlooks the applicable standard of review in this case. "In determining whether the evidence was sufficient to support the jury's verdict, [the court views] the evidence in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences which conflict with that verdict." Brenneke, 984 S.W.2d at 137. Rather than examining the evidence in a light most favorable to the result reached by the jury,

Wal-Mart completely ignores the testimony of Patty Wyke and instead focuses on evidence that it claims conflicts with the jury's verdict. When the evidence is viewed in a light most favorable to the jury's verdict, it is clear that there was ample evidence to support the jury's conclusion that Carolyn Kenney established actual malice.

In its reply brief, Wal-Mart may attempt to undermine Patty Wyke's testimony, as it has done repeatedly in the underlying proceedings. It is understandable that Wal-Mart is unhappy with Mrs. Wyke's testimony, as Mrs. Wyke's testimony cast Wal-Mart's management in an extremely unflattering light. Nevertheless, Wal-Mart has consistently failed to state any supportable basis for discounting Mrs. Wyke's testimony.

In previous briefing, Wal-Mart has attempted to characterize Mrs. Wyke's testimony as suspect because Mrs. Wyke was unable to remember the exact dates of some events. However, as Mrs. Kenney has explained in Point II of this brief, Mrs. Wyke's inability to remember the exact dates of some events does not undermine her testimony with regard to issues in which the exact dates are insignificant. In the context of the punitive damages issue, Mrs. Wyke testified quite clearly, and in some depth, about her interactions with Wal-Mart's management. There is nothing in the record to indicate that Mrs. Wyke's testimony in this regard was suspect.

Wal-Mart has also previously attempted to undermine Patty Wyke's testimony

by noting that Carolyn Kenney depends upon Mrs. Wyke's testimony, at least in part, to support her arguments regarding several different issues in this case. To the best knowledge of counsel for Mrs. Kenney, there is no rule in Missouri law which indicates that testimony is suspect if it is used to support more than one proposition. Therefore, it makes absolutely no difference whether Mrs. Kenney depends on Patty Wyke's testimony to support one argument or twenty. If Mrs. Wyke's testimony was properly admitted into evidence, then that testimony can be used to support any issue to which that testimony is relevant.

Aside from generally attacking the evidence that Carolyn Kenney presented on the issue of punitive damages, Wal-Mart claims that the evidence presented by Carolyn Kenney is not sufficient to establish actual malice because it merely establishes a failure to investigate. This argument mischaracterizes both the law and the facts. As Wal-Mart recognizes in its brief, "failure to investigate a statement before it is published does not establish actual malice." (App. Brief 60) (Emphasis added). However, when a party fails to investigate the truthfulness of a publication after that party is presented with evidence that the publication is false, the party's failure in that regard is sufficient to establish actual malice.

In this case, the evidence presented by Carolyn Kenney doesn't go to establish that Wal-Mart failed to investigate before publication. Instead, Mrs. Kenney presented

evidence that, after the Poster was displayed in the Lee's Summit store, Wal-Mart was notified on three separate occasions that the Poster was false and Wal-Mart refused to take any action to verify the accuracy of the Poster. Refusing to verify the accuracy of a poster after you have been notified that it is false is entirely different from failing to investigate the accuracy of a poster before it is published. While failure to investigate before publication merely shows carelessness on the part of the publisher, refusal to investigate after being informed of the probable falsity of a publication shows a total disregard for whether the publication is true or false.

It is also important to note that Carolyn Kenney's claim for punitive damages was not based solely on evidence of Wal-Mart's failure to investigate. In Englezos, the court recognized that although failure to investigate does not, in itself, establish actual malice, evidence of failure to investigate may still be considered in conjunction with other evidence of actual malice. Englezos, 980 S.W.2d at 28. Such evidence is pertinent to a finding of actual malice because it "tend[s] to show that a publisher did not care whether [a publication] was truthful or not." Id.

In this case, Mrs. Kenney presented evidence establishing that Wal-Mart's management displayed an attitude of indifference as to whether the Poster was true or false. The Wal-Mart managers that dealt with Patty Wyke acted as if they did not believe it made any difference whether the Poster was true or false. In fact, one of the

managers seemed to be irritated that Mrs. Wyke had even approached him about the Poster, and both of the managers treated the matter in a dismissive manner. Thus, Mrs. Kenney had no need to depend on Wal-Mart's failure to investigate in order to establish an inference of indifference on the part of Wal-Mart's managers. The actions of Wal-Mart's management essentially said "we don't care if the Poster is true or false, we're not taking it down."

Carolyn Kenney's claim for punitive damages is also supported by the fact that Wal-Mart had no factual basis for its defamatory statements. In Carter, this Court recognized that when a party makes a defamatory statement, and the evidence establishes that the party "could not have had a factual basis" for making that statement, this indicates a reckless disregard for the truth of the statement that is sufficient to establish actual malice. Carter, 714 S.W.2d at 512. In this case, there is no evidence that Wal-Mart had any knowledge regarding the facts alleged in the Poster at the time the Poster was displayed. Therefore, because Wal-Mart could not have had a factual basis for making the statements in the Poster at the time the Poster was displayed, Wal-Mart's action in displaying the Poster establishes a reckless disregard for the truth of the Poster that is sufficient to establish actual malice.

In its brief, Wal-Mart essentially argues that a different punitive damages standard should apply under the facts of this case. This argument has no basis in law

or reason. Wal-Mart is apparently arguing that, when a publication occurs by a party's action in failing to remove a defamatory statement from its property, that party should only be held liable for punitive damages if they have a specific intent to harm the plaintiff. Wal-Mart does not indicate any basis for this argument under Missouri law. Indeed, this argument is directly contrary to the well-established rule in Missouri that actual malice exists when a party publishes a statement "'with knowledge that it was false, or with reckless disregard for whether it was true or false at a time when defendant had serious doubt as to whether it was true.'" Overcast, 11 S.W.3d at 70. Furthermore, there is no logical reason to base the standard for punitive damages on the method of publication. If a party publishes a false statement, and that publication meets the existing standard for actual malice, then punitive damages should be allowed.

In previous briefing, Wal-Mart has attempted to argue that it cannot be held liable in this case for publishing a statement that meets the standard for actual malice because it did not actually "publish" any statement. In this regard, Wal-Mart apparently means that it cannot be found to have "published" a statement if it did not originally "author" the statement. This argument is completely contrary to the failure-to-remove theory of publication. If the failure-to-remove theory of publication is a valid theory of publication in Missouri – as Mrs. Kenney asserts is the case – then Wal-Mart "published" the Poster regardless of whether it originally authored the Poster.

Wal-Mart is certainly free to challenge the failure-to-remove theory of publication, and it has done so elsewhere in its brief. However, Wal-Mart has presented no rational basis for holding that an action can constitute publication for purposes of establishing the elements of a defamation claim, but not constitute publication for purposes of determining whether punitive damages are warranted in that defamation claim.

Finally, Wal-Mart argues that it should not be held liable for punitive damages because it has altruistic motives in maintaining the Missing Children's Network display case. However, Wal-Mart's motives in maintaining the display case have no bearing on the propriety of punitive damages in this case. Carolyn Kenney does not allege that Wal-Mart is at fault simply for maintaining the display case. Rather, Mrs. Kenney claims that Wal-Mart is at fault for failing to remove a false and defamatory poster that was placed in the display case and of which Wal-Mart had notice. Wal-Mart may well have commendable motives for maintaining the display case in its Lee's Summit store, but this does nothing to change the fact that Wal-Mart's managers acted with reckless disregard for whether the Poster that was placed in the display case was true or false.

9. The Trial Court Did Not Err In Denying Wal-Mart's Motion For A New Trial With Regard To The Formulation Of Instruction Number Six Because The Modifications Made To Instruction Number Six Were Warranted By The Facts In This Case And No Prejudice Resulted From Those Modifications.

"The use of Missouri Approved Instructions is mandatory in any case where the instructions apply." Gorman v. WalMart Stores, Inc., 19 S.W.3d 725, 731 (Mo. App. 2000). If a party submits an instruction different from that required by MAI, error is presumed. Citizens Bank v. Schapeler, 869 S.W.2d 120, 128 (Mo. App. 1993). However, an MAI instruction may be modified "to fairly submit the issue in a particular case." MO. R. CIV. P. 70.02(b); Gorman, 19 S.W.3d at 731. "In order to overturn a jury verdict based on an erroneous instruction, the complaining party must show that the error was prejudicial or that the instruction 'misdirected, misled, or confused the jury.'" Lay v. P & G Health Care, Inc., 37 S.W.3d 310, 329 (Mo. App. 2000).

Carolyn Kenney did not deviate from MAI; she merely modified instruction 23.06(1) in order to "fairly submit the issue[s]" in this case. Thus, there was no error in the trial court's giving of Mrs. Kenney's proposed verdict director. Furthermore, even if Mrs. Kenney's modifications to the verdict director were viewed as error, there was no prejudice that resulted from such error. Wal-Mart makes several distinct arguments regarding Mrs. Kenney's verdict director and Mrs. Kenney addresses each of these arguments in turn.

1. Use of the words "displayed" and "displaying."

Wal-Mart claims that the trial court erred in allowing Carolyn Kenney to use the words "displayed" and "displaying" to describe the act of publication in the first and second paragraphs of

the verdict director. However, use of the words "displayed" and "displaying" is entirely consistent with the language of MAI 23.06(1).

The first paragraph of MAI 23.06(1) indicates that a party should insert words that describe the act of publication. MAI does not indicate that some variation of the word "publish" must be used in this description. In fact, in MAI 23.06(2) – the alternative defamation instruction for public figures – the instruction specifically indicates in the third paragraph that the phrase "wrote such letter" would be a proper way to describe an act of publication. Thus, MAI recognizes that the act of publication may be described in different ways, depending upon the facts of a particular case. Recognizing this fact, plaintiffs in defamation cases have frequently used a word other than "publish" when describing the act of publication. See, e.g., Overcast, 11 S.W.3d at 68 (Using the phrase "wrote the statement" as meaning published.); Deckard, 31 S.W.3d at 18 (Using the word "stated" in place of "published.").

In light of the language in MAI 23.06(1) & (2), and the cases that have recognized the use of various words in place of "publish," it is clear that there is nothing wrong per se with using a word other than "publish" in the verdict director. Nor is there anything wrong with using variations of the word "display" when that word describes the act of publication. Wal-Mart's argument that the word "display" does not convey the same information to the jury as the word "publish" is a semantic distinction without merit.

"A publication is simply the communication of defamatory matter to a third person." Nazeri, 860 S.W.2d at 313. Wal-Mart implies that the word "publication" is a word of special legal meaning that cannot be replaced by a similar word. However, the case that Wal-Mart cites for this proposition actually states as follows: "'Publication' . . . is a word of art, which includes any communication by the defendant to a third person." Childs v. Williams, 825 S.W.2d 4, 8 (Mo. App. 1992). Both of

these definitions indicate that the concept of "publication" encompasses any act that communicates defamatory matter to a third person. Therefore, when the defamatory matter is communicated by displaying that information in the form of a poster, use of the word "display" is an entirely appropriate manner of describing the publication.

Wal-Mart claims that the word "display" does not "necessarily entail an effort to communicate a message to another person." (App. Brief 65). However, this assertion is disingenuous at best, considering that Wal-Mart acknowledges in its own brief that it normally displays posters in the missing children's display case in order to convey information to others. (App. Brief 16-17).

Carolyn Kenney's use of variations of the word "display" in her verdict director was entirely appropriate and was necessary "to fairly submit the issue[s]" in this case.

2. Failure to use the words "intentionally and unreasonably."

Wal-Mart argues that, because the verdict director in this case was based on a failure-to-remove form of publication, the verdict director should have incorporated the exact language used in Restatement of Torts section 577(2). However, Wal-Mart has failed to preserve this issue for appeal because Wal-Mart did not make a specific objection at trial regarding the failure to use this language and Wal-Mart did not offer an alternative instruction that incorporated this language.

Rule 70.03 states that "[c]ounsel shall make specific objections to instructions considered erroneous." MO. R. CIV. P. 70.03. The failure of a party to make a specific objection to an instruction before the jury retires results in waiver of that issue for appeal. MO. R. CIV. P. 70.03; Vintila v. Drassen, 52 S.W.3d 28, 43 (Mo. App. 2001). If a party objects to an instruction on one

ground, but fails to object on a second ground, the party waives the right to appeal on the second ground. Brown v. Wallace, 52 S.W.3d 21, 24 (Mo. App. 2001); Coon v. Dryden, 46 S.W.3d 81, 92 (Mo. App. 2001). Furthermore, numerous Missouri cases have held that a party waives the right to allege that error resulted from the failure to use certain language in an instruction when that party fails to offer an alternative instruction that incorporates the proposed language. See, e.g., Jungerman v. Raytown, 925 S.W.2d 202, 207 (Mo. Banc 1996); Vintila, 52 S.W.3d at 43.

Wal-Mart did not argue in the instruction conference that the verdict director should use the words "intentionally and unreasonably." (TR 1366-76). Instead, Wal-Mart argued that the trial court should not recognize the method of publication described in section 577(2). (TR 1366-76). Furthermore, Wal-Mart did not offer an alternative instruction that incorporated the words "intentionally and unreasonably." Thus, while Wal-Mart has arguably preserved the issue of whether section 577(2) should be recognized at all, Wal-Mart has not preserved the issue of whether an instruction based on section 577(2) should use the words "intentionally and unreasonably."

Even if Wal-Mart had preserved this issue for review, Wal-Mart's argument regarding the use of the words "intentionally and unreasonably" is not well-founded because the general premise that a defamation instruction must track the language of the Restatement is not supported by Missouri law. For example, Restatement section 577(1) – which provides the standard definition of publication (as opposed to the failure-to-remove variety of publication) – uses the phrase "intentionally or by a negligent act" in defining publication. RESTATEMENT (SECOND) TORTS § 577(1) (1977). However, the standard MAI for private plaintiffs – MAI 23.06(1) – does not include these words. Therefore, it appears that MAI does not generally track the language of associated Restatement sections.

3. Use of the phrase “After September 3, 1996.”

Wal-Mart argues that use of the phrase “After September 3, 1996" was error because it assumes disputed facts. However, a review of the language in the verdict director indicates that the instruction does not assume any facts. The instruction stated in pertinent part as follows:

> Your verdict must be for Plaintiff if you believe:
>
> First, After September 3, 1996, Defendant displayed a poster on its Missing Child bulletin board containing the statement that Lauren Kenney was missing and that she was last seen with Carolyn Kenney

(LF 95). This language does not assume any facts. The language merely asks the jury to determine if they believe that the described event occurred. The jury is not informed that the Poster was displayed “After September 3, 1996.” Rather, the jury is asked if they believe that this occurred. Asking the jury if they believe a fact is entirely different from telling the jury to assume that a fact is true.

The language used in the instruction merely sets forth Carolyn Kenney’s theory of publication. If Mrs. Kenney’s theory of publication is that Wal-Mart allowed the Poster to remain on display after September 3, 1996, how is Mrs. Kenney supposed to

present this issue to the jury without mentioning the pertinent date? Indeed, as discussed previously in this section, Wal-Mart has criticized Mrs. Kenney for failing to adequately describe the method of publication. It would appear that Wal-Mart wants Mrs. Kenney to fully describe the method of publication without giving any details of how the publication is alleged to have occurred. In short, the phrase "After September 3, 1996" is neutral language that was properly used to present Mrs. Kenney's theory of publication to the jury.

4. Modification pursuant to MAI 19.01.

Wal-Mart's argument regarding the verdict directing modification from MAI 19.01 is merely an attempt to reargue the issue of whether this Court should employ the incremental harm doctrine. In essence, Wal-Mart argues that this Court should recognize the incremental harm doctrine and that, if this Court does recognize the doctrine, then this Court should not allow the modification called for by MAI 19.01. Mrs. Kenney has already fully explained, in Point V of her argument, why this Court should not recognize the incremental harm doctrine, and she will not repeat her arguments here. Suffice it to say that this Court should not recognize the incremental harm doctrine and the modification pursuant to MAI 19.01 is entirely consistent with existing Missouri law.

MAI 19.01 recognizes that, when a case involves two or more potential causes

of injury, the language of the verdict directing instruction may be modified to reflect that fact. The Committee Comment to MAI 19.01 indicates that the modification is intended to incorporate basic tort principles that have long been recognized by this Court:

> The general rule is "that if a defendant is negligent and his negligence combines with that of another, or with any other independent, intervening cause, he is liable, although his negligence was not the sole negligence or the sole proximate cause, and although his negligence, without such other independent, intervening cause, would not have produced the injury."

Gaines v. Property Servicing Co., 276 S.W.2d 169, 173-74 (Mo. 1955); MAI 19.01, Committee Comment. The Notes on Use to MAI 19.01 acknowledge that this modification may be warranted in a wide variety of cases.

In this case, Wal-Mart presented a substantial amount of evidence to the jury that was intended to establish that Carolyn Kenney's injuries resulted from causes other than Wal-Mart's publication of the Poster in its Lee's Summit store. Wal-Mart reiterates this same argument on page 68 of its substitute brief, and cites to many of the pertinent portions of the transcript in which such evidence was presented to the jury. (App. Brief 68). Because Wal-Mart presented evidence that was intended to establish

that Carolyn Kenney's injuries resulted from other causes, Mrs. Kenney was entitled to modify the verdict director pursuant to MAI 19.01. This modification was necessary in order to notify the jury that Wal-Mart could be held accountable if it contributed to cause Mrs. Kenney's injuries, even if there were other causes that also contributed to her injuries.

Wal-Mart presented the issue of multiple causes of injury to the jury and Wal-Mart cannot now complain that Mrs. Kenney modified the verdict director accordingly to encompass the evidence of multiple causes of injury. Wal-Mart wants to have the benefit of presenting evidence of other potential causes of injury, but Wal-Mart does not want the jury to be properly instructed regarding how to consider multiple causes of injury. Wal-Mart cannot have it both ways. As trial counsel for Carolyn Kenney aptly stated during the instruction conference: "Counsel [for Wal-Mart] has been permitted to talk about multiple causes of damage throughout this trial. And that fact alone, I believe, warrants the giving of an MAI 19.01 modification." (TR 1388).

10. The Trial Court Did Not Commit Plain Error In The Formulation Of Instruction Number Six Because Instruction Number Six Properly Stated The Elements Of A Claim Of Defamation Against A Private Figure And No Manifest Injustice Or Miscarriage Of Justice Resulted From The Giving Of Instruction Number Six.

In the underlying opinion, the Western District reversed the jury verdict in favor of Carolyn Kenney based upon its conclusion that the trial court committed plain error in submitting a verdict directing instruction modeled on MAI 26.03(1). The Western District concluded that this Court, in the Overcast decision, modified the law of defamation with regard to private persons by requiring a plaintiff to prove falsity in all defamation actions. Based on this assumption, the appellate court concluded that MAI 26.03(1) no longer reflects the law of defamation regarding private figures and held that the trial court erred in submitting a verdict director based on MAI 26.03(1).

Carolyn Kenney contends that it was inappropriate for the Western District to raise this issue, sua sponte, in its underlying opinion. Furthermore, Mrs. Kenney asserts that the trial court committed no error in submitting the verdict director because the Overcast decision did not change the law of defamation with regard to a defamation action by a private person against a non-media defendant. Finally, Mrs. Kenney asserts that, even if the trial court did commit some error in submitting the applicable MAI instruction, this error does not rise to the level of plain error that warrants reversal.

1. Given the procedural record in this case, Wal-Mart should not be allowed to obtain relief under plain error review.

Missouri Rules of Civil Procedure provide appellate courts with discretion to consider unpreserved issues under plain error review. MO. R. CIV. P. 84.13(c). The rules do not require appellate courts to consider unpreserved issues under plain error review. This Court has recognized that "[t]he plain error rule should be used sparingly and does not justify a review of every trial error that has not been properly preserved for appellate review." State v. McMillin, 783 S.W.2d 82, 98 (Mo. Banc 1990).

The basic standard for objections to instructions is found in rule 70.03, which states in pertinent part as follows: "No party may assign as error the giving or failure to give instructions unless that party objets thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. . . . The objections must also be raised in the motion for new trial in accordance with Rule 78.07." MO. R. CIV. P. 70.03.

Missouri courts have recognized that there are significant policy reasons underlying the general practice of requiring an issue to be raised at trial or in a motion for new trial in order for the issue to be preserved for appeal. "The purpose of an objection is to eliminate error, if possible, by allowing the trial court to rule intelligently. . . . It is a settled principle of Missouri trial practice that to preserve trial court error it is necessary to give the trial court the opportunity to correct the error . . . without the delay, expense, and hardship of appeal and retrial." Pollard v. Kissner, 965 S.W.2d 281, 288 (Mo. App. 1998); see also Layton v. Pendleton, 864 S.W.2d 937, 940 (Mo. App. 1993) ("Allegations of error in a new trial motion must be sufficiently definite to direct the trial court's

attention to particular acts or rulings asserted to be erroneous, so the court can have the opportunity to correct any error without delay, expense, or hardships of appeal."). As the venerable Judge Lamm stated in a decision of this Court:

> A motion for a new trial . . . fills a substantial and useful office in administering justice through the courts. Questions are suddenly sprung on a trial judge by versatile and ingenious counsel during the hotfoot of a trial, which he perforce must decide without taking time to consider. No mortal judge is allowed to be so incomparably recondite and read as to know all the law all the time. If he know all the law some of the time, or some of the law all the time, or some of the law some of the time (thereby putting himself outside of the class of those who know none of the law none of the time), he rises to a permissible high-water mark of excellence. Accordingly, the office of a motion for a new trial is to gather together those rulings complained of as erroneous and solemnly and formally present them, one by one, in black and white, to the judge, in order that he have a last chance to correct his own errors without delay, expense or other hardships of an appeal.

Maplegreen Realty Co. v. Mississippi Valley Trust Co., 141 S.W. 621, 624 (Mo. 1911).

In light of the cases cited above, it is clear that an appellate court should engage in plain error review with great reluctance, and only after determining that there are exceptional circumstances that warrant the application of plain error review. In determining whether plain error review is appropriate with regard to the issue in this case – whether the verdict director should have placed the burden of proof of falsity upon Mrs. Kenney – it is important to consider Wal-Mart's complete failure to address this issue in the underlying proceedings.

Prior to closing arguments, the trial court held an instruction conference that spans 45 pages in the transcript. (TR 1359-1404). The discussion of the verdict director alone spans 27 pages. (TR 1366-93). During the instruction conference, Wal-Mart made numerous objections to Mrs. Kenney's proposed verdict director. (TR 1366-93). However, Wal-Mart did not object to the verdict director on the basis that it failed to place the burden on Mrs. Kenney to establish falsity. (Tr 1366-93). Instead, Wal-Mart chose to present the issue of truth as an affirmative defense. (TR 1393). Wal-Mart also failed to raise this issue in its extensive post-trial motion and did not address this issue in the underlying appeal. This issue was raised for the first time by the Western District, sua sponte, in its underlying opinion.

On this record, it is clear that Wal-Mart had ample opportunity to object to Mrs. Kenney's verdict director on the basis that it did not place the burden on Mrs. Kenney to establish falsity. If Wal-Mart had raised such an objection, Mrs. Kenney's trial counsel would have had an opportunity to modify the verdict director accordingly. Furthermore, the trial court would have had the opportunity to intelligently consider the potential for error in order to avoid the delay, expense and hardship of appeal. As noted above, the very purpose of requiring objections at trial and in motions for new trial is to allow the trial court to correct such errors while there is still an opportunity to do so. This is especially true of instructional errors because the trial court holds an instruction conference for the express purpose of addressing issues of instructional error before the instructions are submitted to the jury.

It is also important to consider that Wal-Mart is a sophisticated defendant and presumably would have raised this issue at trial if it had believed that doing so would have been to its advantage. Instead, Wal-Mart neglected to raise this issue in the underlying proceedings and now seeks reversal

on the basis of this issue after a six-day trial, an extended instruction conference, and one round of appellate review.

Mrs. Kenney contends that, based upon the procedural record in this case, it is simply inappropriate to consider the alleged instructional error under plain error review. Accordingly, Mrs. Kenney encourages this Court to exercise its discretion by declining to consider the alleged instructional error under plain error review.

2. The trial court did not commit error in submitting instruction number six because the instruction reflects current Missouri law regarding the elements of a defamation claim by a private figure against a non-media defendant.

1. The law of defamation prior to the Overcast decision.

In order to consider the Overcast decision in proper context, one must consider the substantial body of defamation law existing prior to the Overcast decision. When this body of law is taken into account it becomes apparent that, in order to interpret the Overcast decision in the manner that the Western District has interpreted it, one must conclude that this Court overruled a number of defamation cases.

In Nazeri v. Missouri Valley College, 860 S.W.2d 303 (Mo. Banc 1993), this Court held that the plaintiff in a defamation action need only plead and prove the unified defamation elements set out in the applicable MAI verdict director. Id. at 313. This standard has been consistently followed by Missouri courts. Boyd v. Schwan's

Sales Enterprises, Inc., 23 S.W.3d 261, 264-65 (Mo. App. 2000); Duggan v. Pulitzer Publishing Co., 913 S.W.2d 807, 810 (Mo. App. 1995). Therefore, pursuant to the standard set forth in Nazeri, in order to determine the elements of a defamation action one must determine the applicable verdict director based upon the facts in the specific case.

The issue of truth in a defamation action has traditionally been treated as an affirmative defense in Missouri. MO. CONST. ART. I, § 8; R.S.Mo. § 509.090; Rice v. Hodapp, 919 S.W.2d 240, 243 (Mo. Banc 1996); Walker v. Kansas City Star Co., 406 S.W.2d 44, 52 (Mo. 1966) ("The issue of truth in a defamation suit is an affirmative defense to be pleaded by defendants."). In keeping with this general rule, the Missouri Rules of Civil Procedure treat truth in defamation as an affirmative defense and the Missouri Approved Instructions provide a model instruction to set forth the affirmative defense of truth. MO. R. CIV. P. 55.08; MAI 32.12 [1969 New].

Despite the general rule that truth is treated as an affirmative defense, Missouri law has recognized that the plaintiff must bear the burden of proof on the issue of falsity under certain circumstances. Most notably, Missouri courts have distinguished between private persons and public figures in accord with the constitutional standards delineated by the United States Supreme Court. New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (Setting forth the standard for a defamation action by a public figure.);

Glover v. Herald Co., 549 S.W.2d 858 (Mo. Banc 1977) (Applying the standard from New York Times Co.). In this regard, the Missouri Approved Instructions include separate verdict directing instructions for defamation claims by public figures and private persons. The verdict directing instruction for a defamation claim by a public figure requires the plaintiff to establish that the allegedly defamatory statement was false. MAI 23.06(2) [1980 New].

Missouri courts have also recognized that in a defamation claim by a private person against a media defendant, the plaintiff bears the burden of establishing that the allegedly defamatory statement was false. Buller v. Pulitzer Publishing Co., 684 S.W.2d 473, 479 (Mo. App. 1984) ("[P]ublic officials, public figures and private persons suing media defendants must establish that the defendant published a false statement of fact."); Anton v. St. Louis Suburban Newspapers, Inc., 598 S.W.2d 493, 498 (Mo. App. 1980).

In Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), the United States Supreme Court addressed the burden of proof that is imposed upon a private person in a defamation action against a media defendant. In Hepps, the Court noted that truth has traditionally been treated as an affirmative defense in a defamation action because there is a presumption under common law that an individual's reputation is good and that the defaming statements were presumptively false. Id. at 770

(Discussing Pennsylvania common law.). Nevertheless, the Court recognized that the common law presumption of falsity must fall to constitutional standards under appropriate circumstances. Id. at 776. Specifically, the Court held that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." Id. at 777. The Court clearly limited its holding to the facts at hand and specifically indicated that it was not addressing the separate issue of whether these "standards would apply if the plaintiff sues a nonmedia defendant." Id. at 779, n.4.

Subsequent to the Hepps decision, Missouri courts have continued to adhere to the rule that a private person is only required to bear the burden of establishing that a defamatory statement is false when the defamation action is brought against a media defendant. In Balderree v. Beeman, 837 S.W.2d 309 (Mo. App. 1992), the court specifically addressed the impact of the Hepps decision, recognizing that "Hepps holds that the common law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for 'speech of public concern.'" Id. at 326. The court held that the Hepps standard did not apply to the facts before it because the defendant was not a media defendant. Id.

The Hepps standard has been incorporated into the Missouri Approved Instructions by way of the Committee Comment to MAI 23.06(2). That Comment

states in pertinent part as follows:

> In Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), a narrow opinion limited to a private plaintiff suing a media defendant for libel in a matter of public concern, the court shifted the burden of proof on truth-falsity to the plaintiff. Concurring justices would have extended the shift in similar cases against any defendant. Paragraph Second of MAI 23.06(2) already imposes the burden on a public official plaintiff. Prudence would suggest that such a paragraph Second should be included in MAI 23.06(1) when a private plaintiff is suing a media defendant on a publication of public concern.

MAI 23.06(2) [1980 New], Committee Comment (1990 Revision).

In light of the relevant Missouri case law and the comments to the Missouri Approved Instructions, the rules for selecting an appropriate verdict director in a defamation action can be condensed as follows: (1) if the defamation action involves a claim by a public figure or public official against any defendant, the appropriate verdict director is MAI 23.06(2); (2) if the defamation action involves a claim by a private person against a media defendant, the appropriate verdict director is MAI 23.06(1), but the verdict director should be modified to include paragraph Second of MAI 23.06(2); and (3) if the defamation action involves a claim by a private person

against a non-media defendant, the appropriate verdict director is MAI 23.06(1). This has been the law in Missouri since the Nazeri decision in 1993. Furthermore, because the cases that establish the above categories all preceded the Nazeri decision, this Court was presumably aware of these categories when it held that the elements in a defamation action are determined by the applicable MAI verdict director.

2. The Overcast decision.

In Overcast v. Billings Mutual Insurance Co., 11 S.W.3d 62 (Mo. Banc 2000), an insured brought a defamation action against his insurer based upon a letter that denied coverage for a fire loss on the grounds that the loss resulted from the insured's intentional act. Id. at 64-65. The verdict directing instruction used at trial was modeled on MAI 23.06(2). Id. at 68. In addressing the insured's defamation claim, this Court stated as follows:

> The elements of defamation in Missouri are: 1) publication, 2) of a defamatory statement, 3) that identifies the plaintiff, 4) that is false, 5) that is published with the requisite degree of fault, and 6) damages the plaintiff's reputation. Nazeri v. Missouri Valley College, 860 S.W.2d 303 (Mo. banc 1993).

Id. at 70. As the Western District noted in the underlying opinion, although the Overcast decision cites to Nazeri for this list of six elements, this list of elements is not specifically stated anywhere in the Nazeri decision.

The Western District reads Overcast as overruling Nazeri to the extent that Nazeri would allow a plaintiff to submit a defamation claim under MAI 23.06(1), the verdict director for private

persons that does not require the plaintiff to prove that the defamatory statement was false. Carolyn Kenney asserts that the Western District is mistaken in reading Overcast in this manner. When the Overcast case is read in the context of the facts that were before this Court, it appears that this Court was merely applying the standard from Nazeri by stating the elements of defamation that are set forth in MAI 23.06(2), the instruction that was used at trial. In other words, because the case was presented to the jury under MAI 23.06(2), and MAI 23.06(2) requires the plaintiff to prove the falsity of the defamatory statement, this Court included falsity as an element of the plaintiff's claim of defamation.

In discussing the defamation claim in Overcast, this Court did not even hint that it intended to overrule the Nazeri decision. Nor does the Overcast decision indicate that this Court intended to overrule the line of cases which hold that a private person is only required to prove falsity in a defamation action against a media defendant (Balderree, Buller and Anton). To the contrary, it appears that this Court believed it was following the standard set forth in Nazeri in that this Court cited Nazeri as support for the stated elements of the defamation claim.

The Overcast decision is consistent with Nazeri in holding that a plaintiff must prove the elements of defamation that are set forth in the applicable MAI verdict director. In Overcast, the verdict director was modeled on MAI 23.06(2). Overcast, 11 S.W.3d at 70. Presumably MAI 23.06(2) was used because the defamatory statement in issue was subject to a qualified privilege.[6] MAI and Missouri courts

[6] "A communication is held to be qualifiedly privileged when it is made

recognize that MAI 23.06(2) is the proper verdict director to use when a qualified privilege is applicable. MAI 23.06(1) [1980 New], Notes on Use (1980 New) ("Use MAI 23.06(2) if the court determines that qualified privilege is applicable."); McDowell v. Credit Bureaus of Southeast Missouri, Inc., 747 S.W.2d 630, 632 (Mo. App. 1988) ("Current Missouri approved jury instructions require that in a libel case, if the court determines that a qualified privilege applies, MAI 23.06(2) must be used.").

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in good faith upon any subject-matter in which the person making the communication has an interest or in reference to which he has a duty." Estes v. Lawton-Byrne-Bruner Insurance Agency Co., 437 S.W.2d 685, 690 (Mo. App. 1969); see also Cash v. Empire Gas Corp., 547 S.W.2d 830, 833 (Mo. App. 1976). This qualified privilege applies to documents sent by insurance companies. Estes, 437 S.W.2d at 690-91.

Thus, MAI 23.06(2) was the proper verdict director in the Overcast case and this Court simply listed the elements of proof set forth by the applicable verdict director. The Overcast decision does not indicate that the same elements would apply in a case in which MAI 23.06(1) was the proper verdict director.

Obviously, this Court is the only entity that can state with certainty whether or not the Overcast decision intended to overrule a substantial body of Missouri defamation law. However, it is the experience of counsel for Mrs. Kenney that this Court is not in the habit of making substantial changes in Missouri law without at least addressing the cases that it is overruling and expressly indicating that those cases have, in fact, been overruled. The Overcast decision merely cites Nazeri as supporting authority and does not address the line of cases that holds that a private person is only required to prove falsity in a defamation action against a media defendant (Balderree, Buller and Anton). Therefore, it seems most likely that the Overcast decision was not intended to make substantial changes to Missouri defamation law, but was instead intended as an application of the existing defamation law as expressed in Nazeri.

3. It is neither necessary nor appropriate for this Court to change the existing law of defamation in this case.

In the discussion above, Carolyn Kenney has explained that she does not believe this Court

intended to change the law of defamation in Overcast by overruling Nazeri and the line of cases that holds that a private person is only required to prove falsity in a defamation action against a media defendant (Balderree, Buller and Anton). In this section, Mrs. Kenney further contends that it is not necessary for this Court to make any alteration to Missouri defamation law and that it would be inappropriate to make any such change in this case.

As noted previously, Missouri defamation law is consistent with the current standards established by the United State Supreme Court. In Hepp, the United States Supreme Court held that a private person bringing a defamation claim against a media defendant is required to prove the falsity of the defamatory statement in issue. Hepp, 475 U.S. at 777. However, the Hepp Court specifically declined to extend this holding to situations involving non-media defendants. Id. at 779, n.4. Missouri courts have acknowledged the standard set forth in Hepp and have likewise declined to extend this standard to non-media defendants. Balderree, 837 S.W.2d at 326. Missouri Approved Instructions have incorporated the Hepp standard by indicating that the second paragraph of MAI 23.06(2) should be included in MAI 23.06(1) when a private person's defamation claim is against a media defendant. MAI 23.06(2) [1980 New], Committee Comment (1990 Revision). Thus, Missouri case law and instructions are currently in line with existing standards set forth by the United States Supreme Court and no changes to the existing law of defamation are necessary.

More important, even if this Court were inclined to change Missouri defamation law by requiring a private person to establish falsity in a defamation claim against a non-media defendant, it would be inappropriate to make such a change in this case because this issue is only before this Court on plain error review.

If Mrs. Kenney is correct in her assertion that the Overcast decision did not change the law of defamation regarding a claim by a private person against a non-media defendant then, pursuant to the standard set forth in Nazeri, MAI 23.06(1) was the appropriate verdict directing instruction in the underlying case. Wal-Mart was free to argue before the trial court that the law of defamation should be changed to require a private person to prove falsity in a claim against a non-media defendant, but Wal-Mart failed to make this argument. Had Wal-Mart raised this argument below, then the issue would be preserved for appeal and it would be proper for this Court to make a prospective change in the law of defamation starting with this case. However, because Wal-Mart did not raise this argument before the trial court, this issue can only be considered under plain error review and the facts in the underlying trial simply do not support a finding of plain error.

Assuming that the Overcast decision did not alter Missouri defamation law, this Court could only find plain error by concluding that the trial court committed plain error in failing to give an instruction that was not warranted by Missouri law as it existed at

the time of trial. While a party is certainly free to argue for a change of law, and to pursue that argument on appeal, this does not mean that a trial court commits plain error by failing to change existing Missouri law when it has not been requested to consider such a change. The concept of plain error simply does not extend to a situation in which a trial court fails to anticipate a change in the law that has not yet occurred.

In relation to the discussion of the plain error standard, Mrs. Kenney would note that the brief of Amicus Curiae, St. Louis Post-Dispatch, does not appear to argue that this Court has changed the law of defamation, but rather that this Court should change the law of defamation. Although Amicus counsel has done an admirable job of presenting an argument in favor of the modification of Missouri defamation law, it is nonetheless true that this case is not an appropriate vehicle for making such a change. The issue addressed in the Amicus Brief – whether Missouri law should be changed to require a private person to prove falsity in a defamation claim against a non-media defendant – cannot be addressed under plain error review. This argument may be pursued in the future if a party makes the proper argument at trial and preserves the issue for appeal, but given the procedural posture of the current case the arguments of Amicus counsel are inapposite.

4. Even if the trial court did err in submitting instruction number six, this error did not rise to the level of plain error that warrants reversal.

If this Court concludes that the Overcast decision changed Missouri defamation law by overruling this Court's decision in Nazeri, and the appellate court decisions in Balderree, Buller and Anton, it does not necessarily follow that the trial court committed plain error in submitting Mrs. Kenney's verdict director. "[U]nless a claim of plain error facially establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted,' this Court will decline to exercise its discretion to review for plain error." State v. Brown, 902 S.W.2d 278, 284 (Mo. Banc 1995).

1. The standard for plain error review.

"In order for the appellate court to grant relief under the plain error rule, the appellant must 'go beyond a mere showing of demonstrable prejudice to show manifest prejudice affecting his substantial rights.' The appellant must demonstrate that the error affected his rights so substantially that a miscarriage of justice or manifest injustice will occur if the error is left uncorrected. The burden is on the appellant to prove the decisive effect on the jury." French v. Missouri Highway and Transp. Comm., 908 S.W.2d 146, 153 (Mo. App. 1995); see also Nelson v. Waxman, 9 S.W.3d

601, 607 (Mo. Banc 2000). "The doctrine of plain error is rarely applied in civil cases." French, 908 S.W.2d at 153. This Court has indicated that "[f]or instructional error to rise to the level of plain error, the trial court must have so misdirected or failed to instruct the jury so that it is apparent that the instructional error affected the verdict." State v. Deck, 994 S.W.2d 527, 540 (Mo. Banc 1999).

In Deck, this Court considered a situation in which the instruction on mitigating circumstances in a capital case failed to include the last two paragraphs of MAI-CR3d 313.44A. Id. at 539-40. This Court concluded that, because the instructions as a whole had effectively guided the jury in the deliberation process, no plain error resulted from the failure to follow the approved instruction. Id. at 541.

In State v. Doolittle, 896 S.W.2d 27 (Mo. Banc 1995), this Court addressed a situation in which the instruction that was given on a charge of attempted robbery failed to define the object crime as required by MAI-CR3d 304.06(4). Id. at 28-29. While this Court found that this failure constituted plain error under the facts in Doolittle, this Court indicated that it was not determining "whether the failure to include a contested element of a crime in an instruction will always result in plain error." Id. at 30.

In this case, the trial court followed MAI by submitting the instruction designated for a defamation claim by a private person. Thus, the alleged error is less apparent than the instructional error addressed in Deck and Doolittle because the

instructional error in those cases involved a failure to follow MAI. The trial court's error in this case, if any, was the failure to recognize that this Court had changed a substantial body of defamation law in a single line of the Overcast decision. Again, Mrs. Kenney contends that Overcast did not change Missouri defamation law. However, if Overcast did make a change in Missouri law that rendered MAI 23.06(1) obsolete, this result is not directly stated in Overcast and the trial court should not be faulted for failing to infer these extended consequences of the Overcast decision. In other words, there is a substantial difference between failing to follow MAI as it is written, and failing to determine that a particular MAI section has been rendered obsolete by an opinion that does not even reference that MAI section.

It is also significant that this is a civil case. In the underlying opinion, the Western District concluded that there is no logical reason for treating instructional error differently in a criminal case and a civil case. Mrs. Kenney respectfully disagrees. Without engaging in an extended discussion of criminal law and procedure, Mrs. Kenney asserts that criminal law is distinguishable from civil law in that defendants in criminal cases are entitled to rights and protections that may not extend to the defendant in a civil case. Simply stated, the law generally recognizes that the stakes are higher in criminal cases because the defendant's life or liberty is in jeopardy. This distinction should be considered when addressing an instructional error under plain error review.

Indeed, some Missouri courts have simply declined to consider allegations of instructional error under plain error review in a civil case – at least when the record shows that the defendant had an opportunity to object to the instruction during the instruction conference and simply failed to do so. Senu-Oke v. Modern Moving Systems, Inc., 978 S.W.2d 426, 431 (Mo. App. 1998).

2. Applying the standard for plain error review to the facts in this case.

Carolyn Kenney has fully discussed the facts pertaining to the falsity of the defamatory statements in Point IV of this brief and she will not reiterate that discussion in its entirety. However, several points bear repeating.

First, contrary to Wal-Mart's assertions and the discussion in the Western District's opinion, Mrs. Kenney has not admitted that the facts in the Poster were substantially true. While Mrs. Kenney has acknowledged that some of the statements made in the Poster are true, she has maintained throughout the course of this litigation that the overall message of the Poster was blatantly false. Furthermore, to the extent the Poster implied that Mrs. Kenney had kidnapped Lauren or taken Lauren without a right to do so, the Poster was never true. Indeed, during the pretrial in this case, the trial court found that "as a matter of law Christopher Kenney is the father of [Lauren] and that he had the right to have [Lauren] as a matter of law on Labor Day weekend [of 1996] and that it was not a violation of law or kidnapping for him to be in custody of [Lauren]." (TR 88). Thus, any implication that Mrs. Kenney kidnapped Lauren or took Lauren without permission is

undisputably false.

It is also important to consider the fact that the jury deliberated on the issue of truth in that the jury was instructed on the affirmative defense of truth. (LF 96). Mrs. Kenney is mindful of the fact that the Western District rejected this line of reasoning in the underlying opinion. However, Mrs. Kenney believes that it is appropriate to consider this fact in determining whether the alleged error resulted in manifest injustice or a miscarriage of justice. Obviously, when the jury is instructed on the affirmative defense of truth, the jury necessarily deliberates on the issue of truth, whereas if the jury is not instructed on the affirmative defense of truth then it would not even consider this issue under MAI 23.06(1). There is clearly a difference between the error of allowing a jury to consider the issue of truth under the wrong burden of proof, and the error of not allowing the jury not to consider the issue at all. Granted, the difference is one of degree, but the degree of prejudice is highly material to the determination of whether manifest injustice or a miscarriage of justice resulted from the error.

This Court should also consider that the issue of falsity was presented to the jury in Mrs. Kenney's punitive damages instruction. (LF 97). In Balderree v. Beeman, the jury was given a verdict directing instruction based on MAI 23.10(1), a slander instruction that did not require the jury to find that the statements were false. Balderree, 837 S.W.2d at 326. The jury was also given an instruction based on MAI

32.12 presenting the affirmative defense of truth, and an instruction based on MAI 4.15 presenting the issue of punitive damages. Id. at 326-27. In considering a challenge to the verdict director on the basis that the verdict director did not present the issue of falsity as an element of the plaintiff's case, the court concluded that any error was cured by the giving of the punitive damages instruction. Id. at 327 ("[I]n assessing punitive damages the jury found . . . that [defendant] made the slanderous statements with knowledge they were false or with reckless disregard for whether they were true or false at a time when she had serious doubts as to their truth. Consequently, even if [the verdict director] should have hypothesized the slanderous statements were false, such omission was cured by [the punitive damages instruction] and the jury's finding of malice implicit in its award of punitive damages.").

This case is similar to Balderree in that, although the jury was not instructed on the issue of falsity in the verdict director, the issue was presented to the jury in both the affirmative defense instruction and the punitive damages instruction. Thus, the jury's consideration of the issue of falsity under these two instructions serves to cure any error in the verdict directing instruction. At the very least, the fact that the jury considered the issue of falsity in two separate instructions, and found against Wal-Mart in both instances, should indicate that any infirmity in the verdict director did not result in manifest injustice.

Finally, in considering whether any manifest injustice or miscarriage of justice resulted from the giving of Mrs. Kenney's verdict director, this Court should take into account Wal-Mart's complete failure to address this issue in the underlying proceedings, as discussed in Section A of this Point. Wal-Mart failed to raise this issue during the extensive pretrial instruction conference, in its motion for new trial or in its appeal in the Western District. In fact, Wal-Mart proceeded as if it bore the burden of proof on the issue of truth by submitting this issue in an affirmative defense instruction.

Wal-Mart did not take any steps in the underlying proceedings to bring the alleged instructional error to the attention of the trial court or Mrs. Kenney's trial counsel so that the court or trial counsel could address the issue in order to avoid the delay, expense and hardship of appeal or retrial. Instead, Wal-Mart neglected to raise this issue and now seeks reversal on the basis of this issue after a six-day trial, an extended instruction conference, and one round of appellate review. Mrs. Kenney contends that it would be a manifest injustice and an immense waste of judicial resources to allow Wal-Mart to obtain a reversal on this issue at this point in the case.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's judgment entered in accordance with the jury's verdict.

Respectfully submitted,

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