IN THE SUPREME COURT OF MISSOURI

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

ON TRANSFER FROM THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

SUBSTITUTE BRIEF OF APPELLANT WAL-MART STORES, INC.

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I. JURISDICTIONAL STATEMENT

This is an appeal of a judgment of the Circuit Court of Jackson County in favor of Respondent Carolyn Kenney on her action for defamation. On August 30, 2002,

following the issuance of an opinion reversing and remanding a jury verdict in favor of Respondent Carolyn Kenney, the Missouri Court of Appeals, Western District, properly transferred the appeal to this Court pursuant to Rule 83.02 of the Missouri Rules of Civil Procedure on the ground that this case presents questions of general importance and interest. Therefore, this appeal is within the jurisdiction of this Court under Article V, § 10 of the Missouri Constitution.

II. STATEMENT OF FACTS

A. Facts Relevant To The Questions Presented For Determination.

This appeal concerns a defamation action that centers on a child custody dispute that escalated into a game of brinkmanship over the Labor Day weekend in 1996. Wal-Mart was unwittingly drawn into this sordid affair when the family of the child's mother made a Wal-Mart store in Lee's Summit, Missouri, a passive instrument in the mother's efforts to recover the child from the father by placing, without authorization, a poster inside the store's display case for the Missing Children's Network. As a final touch, the Respondent Carolyn Kenney, the child's paternal grandmother, brought this action against Wal-Mart, for which a jury awarded her actual and punitive damages in the amount of $425,833.

Angela Mueller is the mother of Lauren Kenney, who was sixteen months old in September, 1996. (TR. 522, 869, 1265) The child's father is Mueller's former boyfriend, Christopher Kenney. (TR. 518-19, 522) From the date of the child's birth, Mueller has been the custodial parent. (TR. 523, 1273) Mueller and Christopher Kenney did not have a formal arrangement regarding visitation rights. (TR. 1275) Generally,

Christopher Kenney would keep Lauren one or two weekends each month for a two to three day visit. (TR. 523, 528, 624, 1275) Because Christopher Kenney lived in an apartment with a roommate, he would keep Lauren at his parents' home. (TR. 524, 860, 1275) Thus, Carolyn Kenney would frequently collect Lauren from Mueller. (TR. 1275)

On Friday, August 30, 1996, Christopher Kenney and Carolyn Kenney made arrangements with Mueller to have Lauren spend the evening at Carolyn Kenney's home. (TR. 531, 535-36, 867, 1276-77) Christopher Kenney agreed to return Lauren to Mueller the next day, Saturday, August 31. (TR. 615) That afternoon, Carolyn Kenney collected Lauren at the home of Mueller's mother. (TR. 868-69, 1278) After spending the afternoon shopping, Carolyn Kenney returned to her home with Lauren. (TR. 875-76) At ten or eleven that evening, Christopher Kenney arrived to spend the evening with Lauren at his parents' home. (TR. 536-38, 876)

Before arrangements were made to have Lauren spend the evening with the Kenneys, Mueller informed Christopher Kenney she intended to travel to Georgia with her sister, Stephanie Seabrook, so that Mueller and Lauren could visit Seabrook. (TR. 528-29, 1275-76) Though Mueller did not intend to move to Georgia, Christopher Kenney feared that she might do so. (TR. 616, 1276) Thus, without apprising Mueller, late Friday afternoon, after Carolyn Kenney had received Lauren from Mueller, Christopher Kenney instructed his attorney to file a petition for determination of parentage and child custody in the Circuit Court for Clay County, Missouri. (TR. 531, 609-10, 654) A hearing was scheduled for Tuesday, September 3. (TR. 546)

On Friday evening, Christopher Kenney, ever more apprehensive that Mueller would not return from Georgia, mulled his attorney's suggestion that he not return Lauren until after the hearing. (TR. 538, 614) He and his father, Thomas Kenney, discussed whether he should secrete Lauren until the hearing on Tuesday. (TR. 1121-22) The next morning, Saturday, August 31, Mueller telephoned the Kenney residence to make arrangements to collect Lauren that afternoon. (TR. 542, 878, 1281) She spoke briefly with Carolyn Kenney and then with Christopher Kenney, informing Christopher that because she intended to leave for Georgia earlier than she had planned she would need to pick up Lauren late that afternoon. (TR. 543-44) Christopher acceded to her request. (TR. 544) Carolyn Kenney then took Lauren to a local festival in Independence. (TR. 544, 879)

Two hours later, Christopher Kenney joined Carolyn Kenney and Lauren at the festival. (TR. 545, 880) After he arrived, he decided to take decisive action. (TR. 546) He hit upon the idea of taking Lauren to the weekend home of his roommate's mother at the Lake of the Ozarks where he would keep her until the hearing on Tuesday. (TR. 546-47) After the festival he and Carolyn Kenney took Lauren to McDonald's for lunch, where he then prevailed upon Carolyn Kenney to travel with him. (TR. 549, 552, 891-92) Carolyn Kenney telephoned Thomas Kenney to inform him that she, Christopher Kenney, and Lauren were traveling to the Lake of the Ozarks. (TR. 1082) Anxious to evade Mueller, Christopher Kenney did not take time to pack any personal effects. (TR. 547, 552, 892) As he was leaving the city, Christopher Kenney telephoned Mueller by

cellular telephone to let her know that he would not return Lauren until Tuesday, but he did not disclose where they would spend the weekend. (TR. 548, 883-84, 1337-38)

Frantic, Mueller drove to the Kenney residence. Finding Lauren was not there, she, Seabrook, and her father unsuccessfully searched the festival for Lauren. (TR. 1282-84) Mueller then spoke to other members of the Kenney family who were unable to tell her where Lauren was being kept. (TR. 1287) At 1:00 p.m. on Sunday, September 1, concerned for Lauren's welfare, Mueller contacted the Kansas City Police Department. (TR. 1017, 1289, 1298) Officer Bussiere took her statement and completed an Investigation Report. (TR. 1011-16; ROA Defendant's Exh. 116) Detective Thomas Blow, who was then conducting investigations for the department's Juvenile Section, interviewed Mueller. (TR. 1010, 1017, 1298)

Having been told by Mueller that she last saw Lauren on Friday when Carolyn Kenney collected her, Blow telephoned Thomas Kenney to inquire whether he knew where the child was being kept. (TR. 1020-21) Though Blow informed him that if he could speak with the father or grandmother it would not be necessary to list Lauren as a missing person or to conduct an investigation, Thomas Kenney related only that Lauren was with her father. (TR. 1021, 1038, 1060, 1123-24) He was otherwise uncooperative and refused to disclose where Lauren was being held. (TR. 1023, 1060-61) Uncertain as to the child's location, Blow then completed a Missing Person's Report and issued a Pick-Up Order. (TR. 1017-20, 1022, 1024; ROA Defendant's Exhs. 112, 115) The Pick-Up Order, which directed law enforcement officers who came into contact with the child to detain her, was transmitted to law enforcement agencies throughout the nation, the

State of Missouri, and the Kansas City metropolitan area through the National Crime Information Center and the Missouri Uniform Law Enforcement ("MULE") system. (TR. 1024-1028)

That same day, Sunday, September 1, Mueller and members of her family prepared an 8½ x 11 missing person's poster. (TR. 1287; ROA Plaintiff's Exh. 2) A copy of the poster is attached as an Appendix to this brief. The poster related that Lauren is missing; she was last seen leaving her home with Carolyn Kenney at 1:30 p.m. on August 30, 1996; and she is now with Christopher Kenney and Carolyn Kenney at an "unknown location." (ROA Plaintiff's Exh. 2). She and eight or nine family members then set about posting roughly one hundred of the posters at McDonald's restaurants, grocery stores, and on light stanchions throughout the Kansas City metropolitan area. (TR. 1287-88, 1291) An unidentified person slipped one of the posters through a space between the two locked, sliding glass doors of the display case for the Missing Children's Network at the Lee's Summit Wal-Mart. (TR. 670-71, 1225-26, 1290-91)

While shopping at a Food Barn grocery store on the morning of Monday, September 2, Thomas Kenney happened upon Mueller and her mother who had just posted a poster at the store. (TR. 1090, 1104) Though he again refused to disclose Lauren's location, he saw fit to apprise Mueller that the matter would soon be resolved because Christopher Kenney had arranged for a hearing on Tuesday, so that it was unnecessary to post the posters. (TR. 1090, 1104-5, 1107-08) Thomas Kenney then went to a local McDonald's restaurant and three local grocery stores in order to have the posters removed. (TR. 1089)

On Sunday evening, Mueller and her mother approached a local television station, KSHB-TV41, to enlist its assistance in recovering Lauren. (TR. 1291) After interviewing Mueller and reviewing the police reports, the station agreed to make a broadcast concerning Lauren's disappearance. (TR. 1292) On the evening of Monday, September 2, the station broadcast the following report:

> Police are on the lookout for a sixteen month-old girl who may have been abducted by a parent or relative. Sixteen month-old Lauren Kenney is pictured here with her mother. The child was last seen Friday afternoon when she left her house with her paternal grandmother Carolyn Kenney. Family members believe the girl's father and grandmother are now with her at an unknown location.

(TR. 1293-97; ROA, Defendant's Exh. 111)[1]

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[1] Carolyn Kenney brought a defamation action against Scripps Howard Broadcasting Company, the owner of the television station. On June 28, 2000, the United States District Court entered summary judgment in favor of Scripps Howard. *Kenney v. Scripps Howard Broadcasting Co.*, No. 98-1079-CV-W-BD, , 2000 WL 33173915 (W.D. Mo. June 28, 2000) (Addendum A), *aff'd on other grounds*, 259 F.3d 922 (8th Cir. 2001). The court held that the news report was not defamatory, that the critical facts in the report were substantially true, and that the report was privileged pursuant to the Missouri fair report privilege.

On the evening of Sunday, September 1, a woman appeared at the courtesy desk of the Lee's Summit Wal-Mart. (TR. 1221-23) The woman directed the store's assistant manager, Peggy Jo Lohman, to the display case for the Missing Children's Network, pointed to the Mueller poster, and explained "I know this lady…she didn't do this." (TR. 1223) Lohman observed that the poster was not affixed to the board, but rather was "sitting standing up…left of center" on the floor of the display case. (TR. 1225-26) She assured the woman she would unlock the display case and remove the poster to ascertain whether it was an authorized poster. (TR. 1223) The woman then left the store. (*Id.*) Lohman unsuccessfully attempted to unlock the cabinet with the thirty keys she carried. (TR. 1223-24) Searching for a duplicate key in the store's office, she grabbed a handful of keys from the hundreds that were kept in the office. (TR. 1229-30) She spent the next hour attempting to open the display case, but was again unsuccessful. (TR. 1230) By this time, it was 10:00 p.m. when the store was scheduled to close. (TR. 1231)

The next morning, Monday, September 2, Lohman informed Ann Collins, the store's manager, that there was a poster in the display case that did not bear the logo of the National Center for Missing and Exploited Children and that she was unable to find the key for the display case. (TR. 1231-32) Lohman again tried unsuccessfully to open the display case. (TR. 1234) Collins, too, searched for a key. (TR. 1235) The next morning, Tuesday, September 3, Dan Harris, the assistant manager who was responsible for the maintenance of the display case, returned to work. (TR. 1213, 1236) On arriving at work that morning, Lohman observed the poster lying on Harris' desk. (TR. 1236, 1259)

Carolyn Kenney and Christopher Kenney returned to Kansas City with Lauren on the afternoon of Monday, September 2. (TR. 553, 637, 895) Carolyn Kenney returned home, but Christopher Kenney, having learned from his father that Mueller was looking for him, repaired with Lauren to a hotel room in Blue Springs. (TR. 553-54, 637-38, 895) The next day, Tuesday, September 3, Christopher Kenney placed Lauren with his aunt, Therese Yost, while he attended the custody hearing. (TR. 554, 640) The circuit court awarded Mueller primary custody of Lauren. (TR. 623) Following the hearing, the attorneys for Mueller and Christopher Kenney reached agreement that Christopher Kenney would surrender Lauren to Mueller at the Clay County Sheriff's office in Liberty, Missouri. (TR. 641) After Lauren was finally returned to Mueller, the Kansas City Police Department cancelled the Pick-Up Order at 7:15 p.m. on September 3, 1996. (TR. 1028)

B. The Missing Children's Network

In January 1996, Wal-Mart formed the Missing Children's Network to support the efforts of the National Center for Missing & Exploited Children ("NCMEC"). (TR. 667-68, 710-11) The Missing Children's Assistance Act of 1984 established the NCMEC to serve as a clearinghouse for information and to provide direct assistance in locating missing children. 42 U.S.C.A. §§ 5771-5780 (West 2000). Wal-Mart's partnership with the NCMEC principally entails the maintenance of a display case in the entryway of each of its 2,500 stores, Sam's Clubs, and distribution centers that is exclusively dedicated to the display of missing children's posters that are prepared by the NCMEC. (TR. 665-66, 668, 710-11, 720, 804) Each NCMEC poster conveys information about a missing child,

incorporates the child's photograph, and bears the 1-800 number and logo of the NCMEC. (ROA Plaintiff's Exh. 4) Seventeen posters are displayed in the case. (TR. 675, 737) On a monthly basis, the NCMEC selects the posters that are to be displayed in six regional zones and sends them in packets to Wal-Mart's home office. (TR. 734, 736, 738) Wal-Mart then distributes the packets to each of its stores. (TR. 734, 739) At each store, one employee is assigned the responsibility for maintaining the display case. (TR. 740) After the store receives its monthly packet, this employee removes the posters from the previous month and replaces them with the new posters. (TR. 734, 801; ROA Plaintiff's Exh. 3)

Since its inception, the Missing Children's Network has featured 2,884 children, and of these children 1,800 have been recovered. (TR.743-44) By December 2000, 49 children had been recovered as a direct result of their having been featured in Wal-Mart stores. (TR. 744)

C. Course Of Proceedings And Disposition In Court Below.

On September 1, 1998, Carolyn Kenney filed this action for defamation against Wal-Mart. (L.F. 15) She alleged the poster that was placed inside the Missing Children's Network display case implied she had kidnapped Lauren, and she had thus sustained injury to her professional and personal reputation. (L.F. 16-17) The case was tried to a jury from December 4 through December 11, 2000.

At the outset of the trial, the trial court made two critical legal rulings. First, the trial court declared, "the publication [the poster] is capable of defamatory meaning as a matter of law and…that it's not capable of being construed as a totally innocent

communication." (TR. 79) The trial court later reiterated that it "is finding as a matter of law that the poster is defamatory." (TR. 89) But then the trial court finally settled on the conclusion that, "I'm not finding it is defamatory. That is for the jury… ." (TR. 90) And the trial court held that Wal-Mart was not entitled to assert the fair reporting privilege. (TR. 79)

At the close of Carolyn Kenney's evidence, Wal-Mart moved for a directed verdict on the grounds that Carolyn Kenney failed to prove the elements necessary to make out a prima facie case of defamation, that the poster was privileged under the fair report privilege, and that because there was no evidence of actual malice there was no basis for the imposition of punitive damages. (TR. 1152-55; L.F. 69) The trial court denied the motion. (TR. 1162) Wal-Mart renewed its motion for a directed verdict at the close of all evidence. (TR. 1352; L.F. 77) The motion rested on the contentions that the poster was not defamatory, that the poster was substantially true, that the poster was subject to the fair report privilege, that Wal-Mart had not published the poster, that Carolyn Kenney had not suffered actual damages, and that punitive damages were not warranted because there was no evidence of actual malice. (L.F. 77) Again, the trial court denied the motion. (TR. 1353)

Wal-Mart submitted MAI 23.06(2) as a verdict director. (TR. 1392-93; L.F.67, 86-87) Wal-Mart's submission of 23.06(2) was informed by Wal-Mart's contention that the poster was privileged. (TR. 1403) Over Wal-Mart's objection, the trial court rejected Wal-Mart's submission in favor of Carolyn Kenney's modified verdict director, which made material modifications to MAI 23.06. (TR. 1366-91; L.F. 86-87) The verdict

director, instruction number 6, asked the jury only to determine whether Wal-Mart "displayed a poster" rather than whether the poster had been "published," while the first paragraph opened with the phrase, "After September 3, 1996" which implicitly embraced a variant of the failure to remove form of defamation liability. (L.F. 95; see also TR. 1366-70) And the last paragraph of instruction number 6 incorporated the phrase "directly caused or directly contributed damage" from MAI 19.01 in place of the phrase in the final paragraph of MAI 23.06 that "plaintiff's reputation was thereby damaged." (L.F. 95; see also TR. 1383-1391)

At Wal-Mart's request, the trial court instructed the jury that Wal-Mart was not liable if the poster was "substantially true." (TR. 1397; L.F. 96) But the trial court denied Wal-Mart's request that the jury be instructed on the fair report privilege. (TR. 1361-64) And over Wal-Mart's objection, the trial court submitted to the jury an instruction on punitive damages. (TR. 1360-61, 1398-99; L.F. 97)

On December 11, 2000, the jury returned a verdict for Carolyn Kenney awarding her actual damages in the amount of $33,750 and punitive damages in the amount of $392,083. (L.F. 98; TR. 1470) The trial court entered judgment in accordance with the verdict on December 21, 2000. (L.F. 99) Wal-Mart moved for judgment notwithstanding the verdict or, in the alternative, a new trial on January 22, 2001. (L.F. 101) On April 4, 2001, the trial court denied the motion. (L.F. 160) Wal-Mart timely filed its notice of appeal on April 16, 2001. (L.F. 190)

On August 30, 2002, the Missouri Court of Appeals, Western District, issued its opinion reversing the judgment and remanding the case to the Circuit Court of Jackson

County. Additionally, the court of appeals 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 the there was a need for this Court to reexamine the existing law of defamation. The opinion of the court of appeals rests on three holdings. First, the trial court committed plain error in the formulation of the verdict director because the jury was not instructed that an action for defamation requires Kenney to prove that the poster was false, which was at odds with this Court's articulation of the elements of a cause of action for defamation. The court of appeals concluded this error affected the jury's verdict because the record demonstrated that the poster was substantially true in its alleged insinuation that Kenney was involved in the concealment of Lauren Kenney. Second, as an issue of first impression, the court of appeals concluded that a property owner's failure to remove a defamatory statement from its property is a form of publication. Third, the court of appeals determined that on remand Wal-Mart could not invoke the fair report privilege because Mueller had repeated in the poster the same allegedly defamatory statements she had made to the police officers. The court of appeals declined to address Wal-Mart's remaining points on appeal: Kenney did not make a submissible case of defamation because the poster was not capable of a defamatory meaning; assuming that Wal-Mart's alleged failure to remove the poster was a form of publication, Kenney did not make a submissible case of defamation because there was an absence of credible, substantive evidence that Wal-Mart had intentionally and unreasonably failed to remove the poster from its store; assuming that Wal-Mart's alleged failure to remove the poster was a form of publication, Kenney

did not make a submissible case of defamation because there was an absence of credible, substantive evidence that Wal-Mart had negligently published the poster in its store; Wal-Mart had met its burden of showing that the allegedly defamatory statements in the poster were substantially true; Kenney did not make a submissible case of defamation because there was an absence of credible, substantive evidence that she had suffered actual damages; Kenney did not make a submissible case of punitive damages because there was an absence of credible, substantive evidence that in allegedly permitting the continued presence of the poster in its store Wal-Mart had acted with actual malice; and, alternatively, the trial court erred in denying Wal-Mart's motion for a new trial because the trial court made material modifications to the verdict director prescribed by MAI 23.06 that materially affected the merits of the case.

III. POINTS RELIED ON

1. The trial court erred in denying Wal-Mart's motion for directed verdict and post-trial motion for judgment notwithstanding the verdict because Carolyn Kenney failed to make a submissible case of defamation in that there was insufficient evidence that the poster was defamatory.

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

Chastain v. Kansas City Star, 50 S.W.3d 286 (Mo. App. W.D. 2001)

Appleman v. Scheweppe, 972 S.W.2d 329 (Mo.App.E.D. 1998)

2. The trial court erred in denying Wal-Mart's motion for directed verdict and post-trial motion for judgment notwithstanding the verdict because Carolyn Kenney

failed to make a submissible case of defamation in that there was insufficient evidence that Wal-Mart unreasonably failed to remove the poster from its store.

Tacket v. General Motors Corp., 836 F.2d 1042 (7th Cir. 1987)

RESTATEMENT (SECOND) TORTS § 577(2) (1977)

3. The trial court erred in denying Wal-Mart's motion for directed verdict and post-trial motion for judgment notwithstanding the verdict because Carolyn Kenney failed to make a submissible case of defamation in that there was insufficient evidence that Wal-Mart negligently published the poster in its Lee's Summit store.

Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62 (Mo. 2000)

4. The trial court erred in denying Wal-Mart's motion for directed verdict and post-trial motion for judgment notwithstanding the verdict because Carolyn Kenney failed to make a submissible case of defamation in that Wal-Mart proved that the poster was substantially true.

Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62 (Mo. 2000)

Rice v. Hodapp, 919 S.W.2d 240 (Mo. 1996) (en banc)

Thurston v. Ballinger, 884 S.W.2d 22 (Mo.App.W.D. 1994)

5. The trial court erred in denying Wal-Mart's motion for directed verdict and post-trial motion for judgment notwithstanding the verdict because Carolyn Kenney failed to make a submissible case of defamation in that there was insufficient evidence that the publication of the poster in the Lee's Summit Wal-Mart caused her to suffer actual damages.

Arthaud v. Mutual of Omaha Ins. Co., 170 F.3d 860 (8th Cir. 1999)

Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62 (Mo. 2000) (en banc)

Taylor v. Chapman, 927 S.W.2d 542 (Mo.App.E.D. 1996)

Austin v. American Ass'n of Neurological Surgeons, 253 F.3d 967 (7th Cir. 2001)

Tonnessen v. Denver Publ'g Co., 5 P.3d 959 (Colo. Ct. App. 2000)

6. The trial court erred in denying Wal-Mart's motion for directed verdict and post-trial motion for judgment notwithstanding the verdict because Carolyn Kenney failed to make a submissible case of defamation in that the poster was privileged under the fair report privilege.

Erickson v. Pulitzer Publ'g Co., 797 S.W.2d 853 (Mo.App.E.D. 1990)

Rosenberg v. Helsinki, 616 A.2d 866 (Md. Ct. App. 1992)

Kurczaba v. Pollock, 742 N.E.2d 425 (Ill.App. 2000)

RESTATEMENT (SECOND) TORTS § 611 (1977)

7. The trial court erred 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 failed to make a submissible case of punitive damages in that there was no evidence of actual malice.

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

Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62 (Mo. 2000) (en banc)

8. Alternatively, the trial court erred in denying Wal-Mart's motion for a new trial because the trial court committed error in the formulation of Jury Instruction Number Six in that the trial court made material modifications to the verdict director prescribed by MAI 23.06 that materially affected the merits of the case.

Gorman v. Wal-Mart Stores, Inc., 19 S.W.3d 725 (Mo.App.W.D. 2000)

Lay v. P & G Health Care, Inc., 37 S.W.3d 310 (Mo.App.W.D. 2000)

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

9. Alternatively, the trial court erred in denying Wal-Mart's motion for a new trial because the trial court committed plain error in the formulation of Jury Instruction Number Six in that the instruction did not instruct the jury that an action for defamation requires Carolyn Kenney to prove that the allegedly defamatory statements in the poster were false.

Overcast v. Billings Mut. Ins. Co., 11 S.W. 3d 62 (Mo. 2000) (en banc)

IV. ARGUMENT

1. The Trial Court Erred In Denying Wal-Mart's Motion For Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict Because Carolyn Kenney Failed To Make A Submissible Case Of Defamation In That There Was Insufficient Evidence That The Poster Was Defamatory.

A "judgment notwithstanding the verdict is appropriate only if the plaintiff fails to make a submissible case." *Jungerman v. City of Raytown*, 925 S.W.2d 202, 204 (Mo. 1996) (citation omitted). The standard of review "of a JNOV is essentially the same as for review of a motion for a directed verdict." *Giddens* v. *Kansas City S. Ry. Co.*, 29 S.W.3d 813, 818 (Mo. 2000), *cert denied*, 532 U.S. 990 (2001). In reviewing the denial of a motion for JNOV, this Court "view[s] the evidence in the light most favorable to the

plaintiff[s], and give[s] to the plaintiff the benefit of all reasonable beneficial inferences." *Washington by Washington v. Barnes Hosp.*, 897 S.W.2d 611, 615 (Mo. 1995) (en banc) (citations omitted). A court should grant a motion for JNOV where "there is no room for reasonable minds to differ" as to the alternative disposition of the case. *Id.* (internal quotation marks and citation omitted).

A case is not to be submitted to the jury "unless each and every fact essential to liability is predicated upon legal and substantial evidence." *Id.* (internal quotation marks and citation omitted). "Liability cannot rest upon guesswork, conjecture or speculation beyond inferences reasonably to be drawn from the evidence." *Probst v. Seyer*, 353 S.W.2d 798, 802 (Mo. 1962) (citations omitted). "Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of facts can reasonably decide the case." *Zeigenbein v.Thornsberry*, 401 S.W.2d 389, 393 (Mo. 1966) (internal quotation marks and citation omitted). This Court reviews de novo "whether the evidence in a given case is substantial." *Probst*, 353 S.W.2d at 802 (citations omitted). "This Court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion." *Seitz v. Lemay Bank and Trust Co*., 959 S.W. 2d 458, 461 (Mo. 1998) (en banc) (internal quotation marks and footnote omitted). What is more, this Court "should reverse a plaintiff's verdict without remand … if it is persuaded that the plaintiff could not make a submissible case on retrial." *Warren v. Paragon Tech. Group*, 950 S.W.2d 844, 846 (Mo. 1997) (citation omitted).

In order to make a submissible case of defamation, Carolyn Kenney was required to prove: "(1) publication, (2) of a defamatory statement, (3) that identifies…[her], (4) that is false, (5) that is published with the requisite degree of fault, and (6) that damages…[her] reputation." *Overcast v. Billings Mut. Ins. Co.,* 11 S.W.3d 62, 70 (Mo. 2000) (en banc). Measured against this standard, Kenney failed to adduce sufficient evidence to present a claim of defamation to the jury. Most fundamentally, the poster was not defamatory.

The issue of whether the poster is capable of a defamatory meaning is a question of law for the court to determine. *Brown v. Kitterman*, 443 S.W.2d 146, 150 (Mo. 1969) (citation omitted); *see also Henry v. Halliburton,* 690 S.W.2d 775, 779 (Mo. 1985) (citations omitted) (The court "must determine in the first instance whether a statement is capable of a defamatory meaning"). In remanding this appeal to the circuit court, the Court of Appeals did not consider Wal-Mart's contention that the poster is not capable of a defamatory meaning. That this issue is a question of law well illustrates the need to address this issue prior to remand. A finding by this Court that the poster does not hold a defamatory meaning obviates the need for retrial of this case. Indeed, if the poster is not defamatory, Kenney cannot make a submissible case of defamation and judgment should be rendered to Wal-Mart.

"A statement is defamatory if it tends 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…[her]." *Henry,* 690 S.W.2d at 779 (citation omitted). The issue centers on "whether the communication reasonably conveyed the meaning ascribed to it by the

plaintiff and, if so, whether the meaning was defamatory in character." *Coots v. Payton*, 280 S.W.2d 47, 51 (Mo. 1955) (citation omitted).

Two interpretative standards govern this inquiry. First, "the words must be stripped of any pleaded innuendo…and construed in their most innocent sense… ." *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 311 (Mo. 1993) (en banc) (citations omitted). Second, the "alleged defamatory words must be considered in context, giving them their plain and ordinarily understood meaning." *Id.* (citations omitted). That is, the "words are to be taken in the sense which is most obvious and natural according to the ideas they are calculated to convey to those to whom they are addressed." *Id.* (internal quotation marks and citation omitted). Though the "standards are not absolutely consistent…they should be read together." *Id.* If a "statement is capable of two meanings (one defamatory and one nondefamatory) and one can *reasonably* be construed in an innocent sense, the court must hold the statement nonactionable as a matter of law." *Chastain v. Kansas City Star*, 50 S.W.3d 286, 288 (Mo. App.W.D. 2001) (citation omitted) (emphasis in original); *see also Appleman v. Scheweppe*, 972 S.W.2d 329, 333 n.2 (Mo.App.E.D. 1998) (same).

The trial court erred in determining that the poster was capable of a defamatory meaning. (TR. 79, 90) Carolyn Kenney did not isolate the language in the poster that she contended was defamatory. Rather, she made the sweeping assertion that the "clear implication" of the poster was that she was a criminal who was being sought by the police because she had kidnapped Lauren Kenney. (L.F. 16-17) At trial, she suggested the poster was defamatory because it "could reasonably be understood by people who

read it to mean [Carolyn Kenney] was responsible for the disappearance of her granddaughter." (TR.1378) The poster does not, however, bear the meanings ascribed to it by Carolyn Kenney.

The poster is couched in neutral language. The poster relates without amplification that Lauren Kenney is missing; she was last seen leaving her home with Carolyn Kenney at 1:30 p.m. on August 30, 1996; and she is now with Christopher Kenney and Carolyn Kenney at an "unknown location." (ROA Plaintiff's Exh. 2). Its text does not assign responsibility for Lauren Kenney's disappearance, speak of abduction, kidnapping, criminal acts, or make reference to Lauren Kenney's mother or her status as custodial parent. So the reader may reasonably conclude Christopher Kenney is the child's single parent. And the poster refers to Carolyn Kenney as the child's "paternal grandmother," rather than leaving it to conjecture as to whether she has any legitimate relationship with the child. The poster may thus reasonably be read to say nothing more than that Lauren Kenney, who was last seen with her grandmother, is missing and is now at some unknown location with her grandmother and father – all of which is true. It states only that Lauren Kenney is missing, describes her physical appearance, relates the circumstances surrounding her disappearance, and notes that she is with Carolyn Kenney and Christopher Kenney "at unknown location." (ROA Plaintiff's Exh. 2; L.F. 20)

The poster makes no mention of abduction, kidnapping, criminal acts, or the police.[2] The poster does not assign responsibility for Lauren's disappearance to Carolyn Kenney. Its neutral character is placed in sharp relief when compared to the language of the typical poster issued by the National Center for Missing and Exploited Children ("NCMEC"), which prepares the posters that are displayed in the display case at the Lee's Summit Wal-Mart. The NCMEC poster introduced by Kenney at trial relates that the child that is its subject was "abducted by her non-custodial grandmother" and that a "felony warrant for kidnapping" was issued for the "abductor." (ROA Plaintiff's Exh. 4)

It is germane, moreover, that the Missing Children's Network display case is intended to alert viewers to the identities of missing children rather than to notify viewers of kidnappers who are sought by the authorities. Indeed, Patty Wyke testified that she would "always stop to look" at the display case because she is the mother of "four children" and found it "very sad" to view the missing children that were profiled. (Tr.

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[2] In stark contrast, the TV-41 report states that the police are searching 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." (ROA Defendant's Exh. 111) (emphasis added). The district court nonetheless held that the report "is not capable of … having a defamatory meaning." *Kenney*, 2000 WL 33173915 at *4 (Addendum A), *aff'd on other grounds*, 259 F.3d 922 (8th Cir. 2001).

422) The display case is not the equivalent of the FBI Most Wanted Persons display at the post office.

Therefore, whether read in its most innocent sense or in accordance with its plain and ordinary meaning, the poster conveys only the meaning that someone is searching for Lauren Kenney and that she is with Carolyn Kenney and Christopher Kenney. It does not even remotely intimate that Carolyn Kenney kidnapped or abducted Lauren Kenney. Read in its most innocent sense, the poster suggests nothing more than that both Carolyn Kenney and Lauren Kenney are missing. At most, the poster may arguably be taken in its natural sense to convey that Lauren Kenney is the subject of a custody dispute and that Christopher Kenney and Carolyn Kenney have withheld custody from the other parent. And even if this interpretation could in some manner be thought to intimate a criminal act, which the trial court concluded was not the case (TR. 88), the poster is nonetheless non-defamatory because it can reasonably be construed in an innocent sense to suggest nothing more than that Lauren was missing. *Chastain*, 50 S.W.3d at 288; *see also Appleman*, 972 S.W.2d at 333 n.2 (same); *Deckard*, 31 S.W.3d at 19 (the defendant's statement that the plaintiff was fired for "loss of confidence" does not necessarily convey the meaning that the plaintiff was fired for theft; the statement was not defamatory because it could reasonably be interpreted as a loss of trust or loss of confidence in the plaintiff's managerial skills); *Jordan v. City of Kansas City, Mo.*, 972 S.W.2d 319, 324 (Mo.App.W.D. 1998) (letter notifying the plaintiff of violations of municipal ordinances was not defamatory because the letter did not charge him with criminal conduct).

That the poster was not defamatory is given exceptional salience by the fact that Carolyn Kenney's reputation was not harmed by publication of the poster. (TR. 982) She did not suffer physical, emotional, or financial injury. (TR. 965) What is more, Patty Wyke, a friend of Carolyn Kenney and the Kenney family, who was the only other witness who offered what might loosely be characterized as reputational testimony, testified that the matter had not affected her relationship with Carolyn Kenney. (TR. 464)

The poster's purported statement or, more precisely, innuendo that Carolyn Kenny was to some degree implicated in the concealment of Lauren Kenney from her mother was substantially – if not completely – true. Therefore, as a matter of law, Carolyn Kenney's cause of action for defamation fails, and the Court should grant judgment to Wal-Mart.

2. The Trial Court Erred In Denying Wal-Mart's Motion For Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict Because Carolyn Kenney Failed To Make A Submissible Case Of Defamation In That There Was Insufficient Evidence That Wal-Mart Either Published The Poster In Its Store Or Intentionally And Unreasonably Failed To Remove The Poster From Its Store.

A "judgment notwithstanding the verdict is appropriate only if the plaintiff fails to make a submissible case." *Jungerman v. City of Raytown*, 925 S.W.2d 202, 204 (Mo. 1996) (citation omitted). The standard of review "of a JNOV is essentially the same as for review of a motion for a directed verdict." *Giddens* v. *Kansas City S. Ry. Co.*, 29 S.W.3d 813, 818 (Mo. 2000), *cert denied*, 532 U.S. 990 (2001). In reviewing the denial

of a motion for JNOV, this Court "view[s] the evidence in the light most favorable to the plaintiff[s], and give[s] to the plaintiff the benefit of all reasonable beneficial inferences." *Washington by Washington v. Barnes Hosp.*, 897 S.W.2d 611, 615 (Mo. 1995) (en banc) (citations omitted). A court should grant a motion for JNOV where "there is no room for reasonable minds to differ" as to the alternative disposition of the case. *Id.* (internal quotation marks and citation omitted).

A case is not to be submitted to the jury "unless each and every fact essential to liability is predicated upon legal and substantial evidence." *Id.* (internal quotation marks and citation omitted). "Liability cannot rest upon guesswork, conjecture or speculation beyond inferences reasonably to be drawn from the evidence." *Probst v. Seyer*, 353 S.W.2d 798, 802 (Mo. 1962) (citations omitted). "Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of facts can reasonably decide the case." *Zeigenbein v.Thornsberry*, 401 S.W.2d 389, 393 (Mo. 1966) (internal quotation marks and citation omitted). This Court reviews de novo "whether the evidence in a given case is substantial." *Probst*, 353 S.W.2d at 802 (citations omitted). "This Court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion." *Seitz v. Lemay Bank and Trust Co*., 959 S.W. 2d 458, 461 (Mo. 1998) (en banc) (internal quotation marks and footnote omitted). What is more, this Court "should reverse a plaintiff's verdict without remand … if it is persuaded that the plaintiff could not make a submissible case on retrial." *Warren v. Paragon Tech. Group*, 950 S.W.2d 844, 846 (Mo. 1997) (citation omitted).

Carolyn Kenney rested her action on her contention that Wal-Mart published the poster by failing to remove the poster after Wal-Mart was notified of its presence. (TR. 1369-70; *see also* L.F. 16) The first paragraph of the verdict director, which was submitted by Carolyn Kenney, asked the jury to determine whether "*After* September 3, 1996, Defendant *displayed* a poster on its Missing Child bulletin board… ." (L.F. 95) (emphasis added). The trial court's effected this modification of MAI 23.06 in order to submit to the jury the issue of whether Wal-Mart had published the poster through its alleged failure to remove the poster from its store. (TR. 1375-76)

"One of the essential elements of the tort of libel is publication, which is simply the communication of defamatory matter to a third person." *Dean v. Wissmann*, 996 S.W.2d 631, 633 (Mo.App. W.D. 1999) (citations omitted). This is the first case in which a Missouri court has been squarely presented with the issue of whether a property owner's failure to remove a defamatory statement from its property constitutes an act of publication. The court of appeals and the trial court answered in the affirmative. In reaching this conclusion, the court of appeals failed to consider whether on this record this is an appropriate case in which to apply this form of defamation liability. And the court of appeals did not confront concomitant issues of what a plaintiff must prove in a failure to remove action and what damages are recoverable in such an action. As these are questions of law that will confront courts in the litigation of such cases in the future, each compels disposition by the Court.

This is not an appropriate case in which to apply this form of defamation liability. The failure to remove form of defamation liability finds expression in section 577(2) of the Second Restatement of Torts:

> 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). Missouri has neither embraced nor rejected this approach. *Dominick v. Sears, Roebuck & Co.,* 741 S.W. 2d 290, 294 (Mo. App. E.D. 1987) ("We have found no Missouri case that has recognized such a theory of libel. Even if this theory was adopted by Missouri courts it would not be applicable here.") This basis of liability imposes a duty to remove "only when the defendant knows that the defamatory matter is being exhibited on his land or chattels, and *he is under no duty to police them or to make inquiry as to whether such a use is being made."* RESTATEMENT (SECOND) TORTS § 577(2) cmt. p (1977) (emphasis added). "Failing to remove a libel from your building, after notice and opportunity to do so, is a form of adoption." *Tacket v. General Motors Corp.,* 836 F.2d 1042, 1046 (7th Cir. 1987). Putting aside whether a property owner's failure to remove a defamatory statement after being afforded an opportunity to do so evinces an intent to permit the continued publication of the statement, this record does not afford a sufficient evidentiary basis to visit this form of defamation liability on Wal-Mart.

Carolyn Kenney failed to present evidence from which the conclusion can be drawn that Wal-Mart adopted the statements made in the poster. On the evening of September 1, Lohman was the only manager on duty at the Lee's Summit store. (TR. 1221-22) She was called to the courtesy desk where she found a slender, young white woman who asked that she look at a poster in the display case. (TR. 1222-23) The woman then "pointed up to the cabinet, and she says, I know this lady. She didn't do this." (TR. 1223) Lohman assured her she would remove the poster and ascertain whether it was an authorized poster. (*Id*) Though she did not have a key for the display case, during the next five to ten minutes, Lohman unsuccessfully attempted to open the display case with each of the thirty keys that she carried. (TR. 1224,1228) At some point, the woman left the store. (TR. 1224) Lohman, however, continued to attempt to unlock the display case. She went to the cash office to ascertain whether there was a duplicate key for the display case. (TR. 1229) Finding "hundreds" of loose keys, she grabbed "handfuls" of them and spent the next hour attempting to open the display case. (TR. 1229-30) Once again, she was unsuccessful. (TR. 1231) By this time, it was 10:00 p.m. when the store was scheduled to close. (*Id*)

At 8:00 a.m. the next morning, Monday, September 2, Lohman informed Collins, the store manager, there was a "piece of paper" in the display case that "did not have the missing children's logo on it." (TR. 1231-32) She and Collins searched unsuccessfully for one hour for a duplicate key, and Lohman again attempted unsuccessfully to open the display case. (TR. 1234, 1247-48) Collins told Lohman she would call Harris. (TR. 1248). Lohman spoke to the front-end supervisors to ascertain whether they had been

asked to put the poster in the display case. (TR. 1237) She was told that no store employee had placed the poster in the display case. (TR. 1240-41) Harris returned to work on Tuesday, September 3. (TR. 1236) When Lohman arrived at work Tuesday morning she saw the "flier" lying on "his [Harris'] desk section." (TR. 1236, 1262)

Lohman's testimony was corroborated by Christopher Kenney who testified that sometime after the Labor Day weekend, he learned that a poster had been placed in the Lee's Summit store. (TR. 581) He spoke by telephone with a "man" at the store who assured him that "there was no way this poster that somebody brought in would be put in their box or their glass case." (TR. 581-82) He put Christopher Kenney on hold so that he could take a look at the display case. (TR. 583) When he returned to the telephone, he told Christopher Kenney "he had it…and that he took it down." (TR. 583)

Against this evidence, Carolyn Kenney mustered only Wyke's utterly indeterminate testimony that she first saw the poster at the Lee's Summit store "*either* that week immediately following Labor Day weekend *or* the week after that. So one to two weeks, *within that time period*." (TR. 422) (emphasis added) She also maintained that when she returned to the store "several days" later the poster remained in the display case. (TR. 436) Wyke's testimony is sheer conjecture that does not constitute substantial evidence that the poster remained in the display case for an inordinate period after Wal-Mart was made aware of its presence. *See American Family Mut. Ins. Co. v. Robbins*, 945 S.W.2d 52, 56 (Mo. App. E.D. 1997) (Defendant's testimony that the other party to an automobile accident "*may have been* on my…side of road" and "*possibly could have been* on my side of the road" was "speculation" that "cannot be considered substantial

evidence that the deceased was on the wrong side of the road.") (emphasis in original); *Judy v. Arkansas Log Homes, Inc.*, 923 S.W.2d 409, 418 (Mo.App. W.D. 1996) (Testimony by witnesses that they "believed" they had purchased a home from the defendant did not "rise to the level of 'substantial, probable evidence' that would remove from the realm of conjecture the question of whether the… [plaintiff] in fact purchased an ALH home.").

On this record, Carolyn Kenney did not establish by substantial evidence that Wal-Mart intentionally and unreasonably failed to remove the poster. At most, the poster remained in the display case for two days after Wal-Mart was made aware of its presence. What is more, Wal-Mart immediately took prompt action to remove the poster after Wal-Mart became aware that the poster was in the display case. There is no evidence from which a jury could conclude that Wal-Mart "adopted its contents or desired its continued publication." *Tacket*, 836 F.2d at 1047 (holding that where a defamatory sign remained for three days on the wall of the defendant's manufacturing facility a reasonable jury could not infer that the defendant "'intentionally and unreasonably' kept the sign in view").

Therefore, it makes no difference at all in the outcome of this case whether a property owner's failure to remove a defamatory statement from its property is a form of publication under Missouri law. Under any formulation of the concept of publication, Wal-Mart did not publish the poster. Carolyn Kenney failed to make a submissible case of defamation, and the Court grant judgment to Wal-Mart.

3. The Trial Court Erred In Denying Wal-Mart's Motion For A Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict Because Carolyn Kenney Failed To Make A Submissible Case Of Defamation In That There Was Insufficient Evidence That Wal-Mart Negligently Published The Poster In Its Lee's Summit Store.

A "judgment notwithstanding the verdict is appropriate only if the plaintiff fails to make a submissible case." *Jungerman v. City of Raytown,* 925 S.W.2d 202, 204 (Mo. 1996) (citation omitted). The standard of review "of a JNOV is essentially the same as for review of a motion for a directed verdict." *Giddens* v. *Kansas City S. Ry. Co.*, 29 S.W.3d 813, 818 (Mo. 2000), *cert denied*, 532 U.S. 990 (2001). In reviewing the denial of a motion for JNOV, this Court "view[s] the evidence in the light most favorable to the plaintiff[s], and give[s] to the plaintiff the benefit of all reasonable beneficial inferences." *Washington by Washington v. Barnes Hosp.*, 897 S.W.2d 611, 615 (Mo. 1995) (en banc) (citations omitted). A court should grant a motion for JNOV where "there is no room for reasonable minds to differ" as to the alternative disposition of the case. *Id.* (internal quotation marks and citation omitted).

A case is not to be submitted to the jury "unless each and every fact essential to liability is predicated upon legal and substantial evidence." *Id.* (internal quotation marks and citation omitted). "Liability cannot rest upon guesswork, conjecture or speculation beyond inferences reasonably to be drawn from the evidence." *Probst v. Seyer,* 353 S.W.2d 798, 802 (Mo. 1962) (citations omitted). "Substantial evidence is that which, if

true, has probative force upon the issues, and from which the trier of facts can reasonably decide the case." *Zeigenbein v.Thornsberry*, 401 S.W.2d 389, 393 (Mo. 1966) (internal quotation marks and citation omitted). This Court reviews de novo "whether the evidence in a given case is substantial." *Probst*, 353 S.W.2d at 802 (citations omitted). "This Court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion." *Seitz v. Lemay Bank and Trust Co*., 959 S.W. 2d 458, 461 (Mo. 1998) (en banc) (internal quotation marks and footnote omitted). What is more, this Court "should reverse a plaintiff's verdict without remand … if it is persuaded that the plaintiff could not make a submissible case on retrial." *Warren v. Paragon Tech. Group*, 950 S.W.2d 844, 846 (Mo. 1997) (citation omitted).

In order to make a submissible case of defamation, Carolyn Kenney was required to prove that Wal-Mart "published [the poster] with the requisite degree of fault." *Overcast*, 31 S.W.3d at 18 (citation omitted). "The requisite degree of fault for a private figure…is negligence." *Id.*, 11 S.W.3d at 70. The court of appeals left unresolved the issue of how this element of fault applies where the publication takes the form of a defendant's alleged failure to remove defamatory material published by another. This is a fundamental legal question that will confront courts in the disposition of such cases in the future. The Court should, therefore, resolve this question.

That the failure to remove defamatory material is a form of publication well demonstrates that the element of fault applies equally in such a case. Missouri law requires both that defendant publish the defamatory statement *and* that the defendant's

act of publication be negligent. *Overcast*, 11 S.W.2d at 70 (citation omitted). Where defamation takes the form of a failure to remove defamatory material the plaintiff establishes publication by demonstrating that after being made aware of the presence of the defamatory material the defendant intentionally and unreasonably failed to remove the defamatory material. RESTATEMENT (SECOND) TORTS § 577(2)(1977). The plaintiff must then further demonstrate that the defendant's act of publication was negligent. That is, the plaintiff must prove that the defendant failed to exercise reasonable care to prevent a third party from publishing a defamatory statement on its property. The court of appeals, compounding the error of the circuit court, failed to harmonize the elements of a cause of action for defamation with the Restatement's formulation of the failure to remove form of defamation liability. The Court should make clear that this form of defamation liability does not supplant the elements of a cause of action for defamation.

On this record, it is manifest Carolyn Kenney cannot make a submissible case of defamation. There is, therefore, no need for this Court to remand this case to the trial court for a retrial. At trial, she was unable to adduce any evidence that Wal-Mart negligently permitted the poster to be published in its Lee's Summit store. Indeed, the evidence establishes that Wal-Mart took every reasonable precaution to prevent the placement of illicit material in the Missing Children's Network display case. Wal-Mart maintains the display case pursuant to a verbal agreement with the NCMEC. (TR. 667) Since the program's inception in January 1996, Wal-Mart has never received a complaint regarding the misuse of the display cases at its stores, including the Lee's Summit store.

(TR. 733, 1241) The display case comprises a bulletin board encased within an aluminum frame and two sliding glass doors with a lock. (TR. 670-71; ROA Plaintiff's Exh. 3) There is a slight gap between the two doors. (TR. 677) The display case is always locked in order to ensure that only NCMEC posters are displayed on the board. (TR. 671, 673) Seventeen posters are displayed in the case – four vertical and four horizontal with an NCMEC poster in the middle. (TR. 675, 737; ROA Plaintiff's Exh. 3, Defendant's Exh. 142) Wal-Mart displays only posters that are prepared by the NCMEC. (TR. 690-91, 700) It is a violation of company policy to display any other material in the display case. (TR. 683, 690, 693, 700, 719, 1241-42) Each month the NCMEC sends to Wal-Mart's home office a packet of replacement posters which are then distributed to individual stores. (TR. 734, 739) Upon receipt, each store removes from the display case the seventeen posters that were displayed during the previous month and replaces them with the new posters. (TR. 734) At each store, one employee is assigned the responsibility for maintaining the display case. (TR. 740) Harris, an assistant manager, held this responsibility at the Lee's Summit store in late August – early September 1996. (TR. 1213) He was the only employee who had possession of a key to the display case. (TR. 1214) On this record, Carolyn Kenney failed to make a submissible case that Wal-Mart negligently published the poster in its Lee's Summit store. The Court should, therefore, grant judgment to Wal-Mart.

4. The Trial Court Erred In Denying Wal-Mart's Motion For Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict Because Carolyn Kenney Failed To Make A Submissible Case Of Defamation In That Wal-Mart Proved That The Poster Was Substantially True.

A "judgment notwithstanding the verdict is appropriate only if the plaintiff fails to make a submissible case." *Jungerman v. City of Raytown,* 925 S.W.2d 202, 204 (Mo. 1996) (citation omitted). The standard of review "of a JNOV is essentially the same as for review of a motion for a directed verdict." *Giddens* v. *Kansas City S. Ry. Co.*, 29 S.W.3d 813, 818 (Mo. 2000). In reviewing the denial of a motion for JNOV, this Court "view[s] the evidence in the light most favorable to the plaintiff[s], and give[s] to the plaintiff the benefit of all reasonable beneficial inferences." *Washington by Washington v. Barnes Hosp.,* 897 S.W.2d 611, 615 (Mo. 1995) (en banc) (citations omitted). A court should grant a motion for JNOV where "there is no room for reasonable minds to differ" as to the alternative disposition of the case. *Id.* (internal quotation marks and citation omitted).

A case is not to be submitted to the jury "unless each and every fact essential to liability is predicated upon legal and substantial evidence." *Id.* (internal quotation marks and citation omitted). "Liability cannot rest upon guesswork, conjecture or speculation beyond inferences reasonably to be drawn from the evidence." *Probst v. Seyer,* 353 S.W.2d 798, 802 (Mo. 1962) (citations omitted). "Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of facts can reasonably

decide the case." *Zeigenbein v.Thornsberry,* 401 S.W.2d 389, 393 (Mo. 1966) (internal quotation marks and citation omitted). This Court reviews de novo "whether the evidence in a given case is substantial." *Probst,* 353 S.W.2d at 802 (citations omitted). "This Court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion." *Seitz v. Lemay Bank and Trust Co*., 959 S.W. 2d 458, 461 (Mo. 1998) (en banc) (internal quotation marks and footnote omitted). What is more, this Court "should reverse a plaintiff's verdict without remand … if it is persuaded that the plaintiff could not make a submissible case on retrial." *Warren v. Paragon Tech. Group,* 950 S.W.2d 844, 846 (Mo. 1997) (citation omitted).

The trial court erred in denying Wal-Mart's motions for a directed verdict and for judgment notwithstanding the verdict because the poster was substantially true. Truth is an "absolute defense" to defamation. *Rice v. Hodapp,* 919 S.W.2d 240, 243 (Mo. 1996) (en banc) (citing MO. CONST. ART. I, §8). "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,* 11 S.W.3d at 73. "A person is not bound to exact accuracy in his statements about another, if the statements are essentially true." *Thurston v. Ballinger,* 884 S.W.2d 22, 26 (Mo.App.W.D. 1994). "The test to be administered in determining accuracy is whether the article is substantially true." *Turnbull v. Herald Co.,* 459 S.W.2d 516, 518 (Mo.App. E.D. 1970). That is, whether "the gist or sting of the statement was true." *Id*. (internal quotation marks omitted).

In the course of its determination that it was plain and reversible error for the trial court to instruct the jury that Wal-Mart must prove that the allegedly defamatory statements in the poster were substantially true, the court of appeals concluded that the poster was indeed substantially true in its statements that Lauren Kenney was missing on the day of its publication and that Kenney was "involved" in the concealment of the child from her mother. The court of appeals did not find any evidence in the record that the sting or gist of the poster was false. Therefore, regardless of whether Kenney had the burden of proving that the offending statements in the poster were false or whether Wal-Mart had the burden of proving that the offending statements in the poster were substantially true, there is no need for a retrial. If Kenney bears the burden of demonstrating falsity, she cannot on this record make a submissible case of defamation. On the other hand, if it was Wal-Mart's burden to demonstrate substantial truth, Wal-Mart met its burden of proof on the affirmative defense and judgment should be granted to Wal-Mart. *Warren v. Paragon Tech. Group,* 950 S.W.2d at 846

The allegedly defamatory statements in the poster were substantially true. At trial, Kenney, too, allowed that the statements in the poster that formed the basis for her complaint were true. (TR. 913) She contended only that the poster was false after September 3 insofar as Lauren Kenney was returned to Mueller on the afternoon of September 3. (Tr. 92, 988, 1395) Putting aside that Kenney presented no credible, substantial evidence that the poster remained in the display case after September 3, Kenney's contention is of no moment. The issue is not whether the statements about Lauren Kenney were false, but rather the issue is whether the statements "about …

[Kenney are] demonstrably false." *Overcast*, 11 S.W.3d at 73. Applying this standard, the gist or sting of the poster's purported statement (or more precisely, its putative innuendo) that Kenney was involved in the concealment of Lauren Kenney was substantially true. There is no dispute that acting in concert with Christopher Kenney, Carolyn Kenney secreted Lauren Kenney at a home at the Lake of the Ozarks and in a Blue Springs hotel room from the afternoon of Saturday, August 31, through the evening of Tuesday, September 3. (Tr. 641, 892-896) It is, moreover, incontrovertible that Lauren Kenney was with Carolyn Kenney from Friday, August 30, through the late afternoon of Monday, September 2. (TR. 892, 895, 918, 920) She made no effort to apprise Mueller of Lauren Kenney's location.

What is more, it is equally incontrovertible that from Mueller's perspective Lauren Kenney was missing from Saturday, August 31 through Tuesday, September 3. Mueller had no idea where her daughter was being kept. (TR. 1279-80) Mueller last saw Lauren Kenney at 1:30 p.m. on Friday, August 30, when Carolyn Kenney collected the child at the home of Mueller's mother. (TR. 918, 1278) And Lauren Kenney was not returned to Mueller until the afternoon of September 3. (TR. 92, 988, 1395) Despite Christopher Kenney's assurance that Mueller could collect Lauren Kenney on Saturday afternoon, when Mueller went to the Kenney residence she found that Lauren Kenney, Christopher Kenney, and Carolyn Kenney were nowhere to be found. (TR. 544, 1282) The concerted efforts of Mueller and her family to locate Lauren were unsuccessful. (TR. 1283-84) Ultimately, the Kansas City Police Department determined that Lauren Kenney's disappearance was sufficiently serious to warrant the issuance of a Pick-Up Order, which

directed law enforcement officers who came into contact with the child to detain her. (TR. 1024) The order was issued to law enforcement agencies throughout the nation, the State of Missouri, and the Kansas City metropolitan area through the National Crime Information Center and MULE. (TR. 1026-27) The order remained extant from 1:00 p.m. on September 1, 1996, through 7:15 p.m. on September 3, 1996. (TR. 1025, 1028)

Wal-Mart established that the putative statements or innuendo in the poster that implicated Carolyn Kenney in the concealment of Lauren Kenney from her mother were true. Therefore, regardless of who properly bears the burden of proof on this issue, Carolyn Kenney's action for defamation fails. The Court should, therefore, grant judgment to Wal-Mart.

5. The Trial Court Erred In Denying Wal-Mart's Motion For A Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict Because Carolyn Kenney Failed To Make A Submissible Case Of Defamation In That There Was Insufficient Evidence That The Publication Of The Poster In The Lee's Summit Store Caused Carolyn Kenney To Suffer Actual Damages.

A "judgment notwithstanding the verdict is appropriate only if the plaintiff fails to make a submissible case." *Jungerman v. City of Raytown,* 925 S.W.2d 202, 204 (Mo. 1996) (citation omitted). The standard of review "of a JNOV is essentially the same as for review of a motion for a directed verdict." *Giddens* v. *Kansas City S. Ry. Co.,* 29 S.W.3d 813, 818 (Mo. 2000), *cert denied,* 532 U.S. 990 (2001). In reviewing the denial of a motion for JNOV, this Court "view[s] the evidence in the light most favorable to the

plaintiff[s], and give[s] to the plaintiff the benefit of all reasonable beneficial inferences." *Washington by Washington v. Barnes Hosp.*, 897 S.W.2d 611, 615 (Mo. 1995) (en banc) (citations omitted). A court should grant a motion for JNOV where "there is no room for reasonable minds to differ" as to the alternative disposition of the case. *Id.* (internal quotation marks and citation omitted).

A case is not to be submitted to the jury "unless each and every fact essential to liability is predicated upon legal and substantial evidence." *Id.* (internal quotation marks and citation omitted). "Liability cannot rest upon guesswork, conjecture or speculation beyond inferences reasonably to be drawn from the evidence." *Probst v. Seyer*, 353 S.W.2d 798, 802 (Mo. 1962) (citations omitted). "Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of facts can reasonably decide the case." *Zeigenbein v.Thornsberry*, 401 S.W.2d 389, 393 (Mo. 1966) (internal quotation marks and citation omitted). This Court reviews de novo "whether the evidence in a given case is substantial." *Probst*, 353 S.W.2d at 802 (citations omitted). "This Court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion." *Seitz v. Lemay Bank and Trust Co*., 959 S.W. 2d 458, 461 (Mo. 1998) (en banc) (internal quotation marks and footnote omitted). What is more, this Court "should reverse a plaintiff's verdict without remand … if it is persuaded that the plaintiff could not make a submissible case on retrial." *Warren v. Paragon Tech. Group*, 950 S.W.2d 844, 846 (Mo. 1997) (citation omitted).

"The essence of defamation is an invasion of the plaintiff's interest and reputation." *Jenkins v. Revolution Helicopter Corp., Inc.*, 925 S.W.2d 939, 944 (Mo.App. W.D. 1996) (citation omitted). Therefore, recovery for defamation requires evidence that the publication of the defamatory statement actually damages the plaintiff's reputation. *Overcast,* 11 S.W.3d at 70; *Nazeri*, 860 S.W.2d at 312. The court of appeals nonetheless did not find it necessary to reach Wal-Mart's argument that Kenney had not presented substantial evidence that the publication of the poster caused her to suffer actual damages. In the absence of such evidence, the remand of this case to the circuit court is an idle exercise inasmuch as Carolyn Kenney cannot make a submissible case of defamation.

Actual damages entail "quantifiable professional or personal injury, such as interference with job performance, psychological or emotional distress, or depression." *Arthaud v. Mutual of Omaha Ins. Co.,* 170 F.3d 860, 862 (8th Cir. 1999) (applying Missouri law) (collecting cases). Carolyn Kenney's evidence of actual damages consisted of little more than offended sensibilities: she felt "[e]mbarrassed, shocked, mad." (TR. 899) She did not find it necessary to seek medical treatment. (TR. 910, 965) Nor did the poster's publication cause her to miss work or suffer financial loss. (TR. 965) Most tellingly, she was at a loss to name any person who by reason of the poster's publication holds her in lower esteem. (TR. 982) And Wyke – the only other witness who adverted to this issue – said that the poster's publication had not affected her relationship with Carolyn Kenney. (TR. 464) The record thus provides no evidence that Carolyn Kenney suffered actual damages. *See Bauer v. Ribaudo,* 975 S.W.2d 180, 182-

83 (Mo.App. E.D. 1997) (holding that the plaintiff, a politician, failed to prove that he suffered actual damages where he could neither name a person who changed his vote as a result of the publication of a defamatory allegation in a television commercial nor present any evidence that his standing in the polls was diminished after the commercial was broadcast; his belief that "people refused his ballot" was not sufficient evidence of injury); *Taylor v. Chapman*, 927 S.W.2d 542, 544-45 (Mo.App. E.D. 1996) (holding that the plaintiff failed to prove that the publication of a defamatory statement in a letter caused her to suffer actual damages where she was not adversely affected in her position as a property manager, she did not seek medical treatment, and she suffered no symptoms associated with emotional distress); *see also Coats v. News Corp.*, 197 S.W.2d 958, 963 (Mo. 1946) (holding that where a defamatory article in a newspaper did not have any effect on the perception of the plaintiff by those who knew him and did not have an "effect on plaintiff's employment and compensation" the plaintiff "suffered no actual harm to his reputation")

That the placement of the poster in the Lee's Summit store did not cause injury to Carolyn Kenney is made manifest by her assertions that the contemporaneous actions of other parties had caused her to suffer emotional harm and injury to her reputation. Earlier in 1996, Carolyn Kenney was terminated by Hallmark Cards, Inc. (TR. 856-57) She maintained that her termination caused "irreparable injury to her reputation." (TR. 937-38) Her termination impaired her ability to find employment. (TR. 858) And she received treatment from a psychologist for emotional problems she suffered following her termination. (TR. 857, 962, 966) She told Dr. Thomas Vinton, her family physician,

that her termination had injured her reputation. (TR. 963-64) What is more, when she was evaluated in February and March 1998, two and a half years after the publication of the poster, by Dr. Aileen Utley, a psychologist, she again related that her termination had injured her reputation. (TR. 977-78, 980) Most arrestingly, she made no mention to Dr. Utley about the publication of the poster at the Lee's Summit store. (TR. 978) It is, therefore, germane that Carolyn Kenney made no effort to show what incremental harm to her reputation was caused by the placement of the poster in the Lee's Summit store. On this evidence, whatever emotional injury or damage to her reputation Carolyn Kenney suffered can only be ascribed to her termination by Hallmark Cards.

Carolyn Kenney also maintained that she had been harmed by the news report that had been broadcast by television channel 41 on the evening of Monday, September 2. This report, which was far more explicit than the poster, suggested that Lauren "may have been abducted by a relative," adverting by name only to Carolyn Kenney, and announced that Lauren was the subject of a search by the Kansas City Police Department. (ROA Defendant's Exh. 111; TR. 1293-97) The report "hurt" Carolyn Kenney "very deeply," and she suffered consequent emotional distress. (TR. 910, 937) And she allowed that its broadcast may have injured her reputation. (TR. 937)

It is incontrovertible, moreover, that the injury Carolyn Kenney suffered by publication of the news report and the publication of the poster was the same. (TR. 959) Therefore, Carolyn Kenney's reputation had already been destroyed by the broadcast of

the privileged news report.[3] She may thus obtain damages only for any *incremental* harm done to her reputation by placement of the poster in the Lee's Summit store. *See Mason v. New Yorker Magazine, Inc.*, 501 U.S. 496, 523, 111 S.Ct. 2419, 2436 (1991) ("Of course, state tort law doctrines of injury, causation, and damages calculation might allow a defendant to press the argument that the statements did not result in any incremental harm to a plaintiff's reputation."); *Austin v. American Ass'n. of Neurological Surgeons,* 253 F.3d 967, 974 (7th Cir. 2001) ("[T]he victim of defamation can obtain damages only for any incremental harm done to his reputation -- if his reputation has already been destroyed by truthful information, he has no remedy.") (citations omitted) (emphasis in original); *Tonnessen v. Denver Publ'g Co.,* 5 P.3d 959, 965 (Colo. Ct. App. 2000) (holding that a defamatory statement is not actionable where it merely conveys the same allegation contained in a statement by another that is privileged under the fair report privilege); *Haynes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222, 1227 (7th Cir. 1993) ("[F]alsehoods which do no *incremental* damage to the plaintiff's reputation do not injure the only interest that the law of defamation protects.") (emphasis in original); *Desnick v. American Broad. Cos., Inc.,* 44 F.3d 1345, 1350 (7th Cir. 1995) ("If a false accusation cannot do any incremental harm to the plaintiff's deserved reputation because the truth if known would have demolished his reputation already, he has not been harmed *by the false accusation* and therefore has no remedy.") (citation omitted) (emphasis in original).

[3] What is more, Christopher Kenney testified that Mueller's poster remained affixed to the window of a popular local tavern in late September or October of 1996. (TR. 644)

Because Carolyn Kenney could not show the degree to which the publication of the poster in the Lee's Summit store caused her to suffer actual damages, Carolyn Kenney failed to make a submissible case of defamation.

Carolyn Kenney failed to present credible, substantial evidence that the publication of the poster in the Lee's Summit store caused her to suffer any damages. Her failure to prove that she had suffered any injury is placed in sharp relief by the undisputed evidence that she had suffered injuries to her reputation through other discrete acts of publication. The record demonstrates that by her own admission she had suffered emotional injuries and the effacement of her reputation prior to the publication of the poster. What is more, the publication of the poster was occasioned by the contemporaneous publication of a television broadcast that she asserted had caused her injury. Carolyn Kenney failed to make a submissible case of defamation. The Court should, therefore, grant judgment to Wal-Mart.

6. The Trial Court Erred In Denying Wal-Mart's Motion For Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict Because Carolyn Kenney Failed To Make A Submissible Case Of Defamation In That The Poster Was Privileged Under The Fair Report Privilege.

A "judgment notwithstanding the verdict is appropriate only if the plaintiff fails to make a submissible case." *Jungerman v. City of Raytown,* 925 S.W.2d 202, 204 (Mo. 1996) (citation omitted). The standard of review "of a JNOV is essentially the same as for review of a motion for a directed verdict." *Giddens* v. *Kansas City S. Ry. Co.*, 29

S.W.3d 813, 818 (Mo. 2000), *cert denied*, 532 U.S. 990 (2001). In reviewing the denial of a motion for JNOV, this Court "view[s] the evidence in the light most favorable to the plaintiff[s], and give[s] to the plaintiff the benefit of all reasonable beneficial inferences." *Washington by Washington v. Barnes Hosp.*, 897 S.W.2d 611, 615 (Mo. 1995) (en banc) (citations omitted). A court should grant a motion for JNOV where "there is no room for reasonable minds to differ" as to the alternative disposition of the case. *Id.* (internal quotation marks and citation omitted).

A case is not to be submitted to the jury "unless each and every fact essential to liability is predicated upon legal and substantial evidence." *Id.* (internal quotation marks and citation omitted). "Liability cannot rest upon guesswork, conjecture or speculation beyond inferences reasonably to be drawn from the evidence." *Probst v. Seyer*, 353 S.W.2d 798, 802 (Mo. 1962) (citations omitted). "Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of facts can reasonably decide the case." *Zeigenbein v.Thornsberry*, 401 S.W.2d 389, 393 (Mo. 1966) (internal quotation marks and citation omitted). This Court reviews de novo "whether the evidence in a given case is substantial." *Probst*, 353 S.W.2d at 802 (citations omitted). "This Court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion." *Seitz v. Lemay Bank and Trust Co*., 959 S.W. 2d 458, 461 (Mo. 1998) (en banc) (internal quotation marks and footnote omitted). What is more, this Court "should reverse a plaintiff's verdict without remand … if it is persuaded that the plaintiff could not make a submissible case on

retrial." *Warren v. Paragon Tech. Group,* 950 S.W.2d 844, 846 (Mo. 1997) (citation omitted).

Without elaboration, the trial court concluded that Wal-Mart could not interpose the fair report privilege. (TR. 79) The trial court erred. Missouri applies the formulation of the fair report privilege in section 611 of the Second Restatement of Torts. *Hoeflicker v. Higginsville Advance, Inc.,* 818 S.W.2d 650, 651 (Mo.App. W.D. 1991); *Shafer v. Lamar Publ'g Co., Inc.,* 621 S.W.2d 709, 711 (Mo.App. W.D. 1981). In this formulation, an "accurate and complete" report of an "official action" is privileged. *Hoeflicker,* 818 S.W.2d at 651 (holding RESTATEMENT (SECOND) TORTS § 611 (1997). The privilege encompasses police reports. *See Erickson v. Pulitzer Publ'g Co.,* 797 S.W.2d 853, 857 (Mo.App. E.D. 1990); *Biermann v. Pulitzer Publ'g Co.,* 627 S.W.2d 87-88 (Mo.App. E.D. 1981); *see also* RESTATEMENT (SECOND) TORTS, § 611 cmt. d. ("The filing of a report by an officer…of the government is an action bringing a reporting of the governmental report within the scope of the privilege."). "Whether the privilege exists in the circumstances proven is a question of law and is not to be submitted to the jury." *Hoeflicker,* 818 S.W.2d at 652 (citation omitted). Where the privilege applies, the plaintiff may prevail only if she establishes the report "is not fair and accurate." *Duggan v. Pulitzer Publ'g Co.,* 913 S.W.2d 807, 811 (Mo.App. E.D. 1995) (citation omitted); *Erickson,* 797 S.W.2d at 857 (citation omitted); *see also Shafer,* 621 S.W.2d at 713 (Where the fair report privilege applies, "the question of malice, knowledge of falsity, in this type of case becomes immaterial and the test rather is whether or not the report is fair and accurate").

Missouri courts have not spoken to the issue of whether a non-media defendant may assert the privilege. The Second Restatement of Torts remarks that though the privilege is "commonly exercised by newspapers, broadcasting stations and others who are in the business of reporting news to the public," the privilege nonetheless "extends to *any person* who makes an oral, written or printed report to pass on the information that is available to the general public." RESTATEMENT (SECOND) TORTS § 611 cmt. c (1977) (emphasis added). Therefore, the better view is that the privilege applies equally to reports of official action made by non-media actors. *See Kurczaba v. Pollock,* 742 N.E.2d 425, 442 (Ill.App. 2000); *Rosenberg v. Helinski*, 616 A.2d 866, 874 (Md. Ct. App. 1992), *cert. denied,* 509 U.S. 924 (1993) (citations omitted); *Green Acres Trust v. London,* 688 P.2d 617, 626 (Ariz. 1984) (en banc); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 773, 105 S.Ct. 2939, 2952 (1985) (White, J., concurring) ("[T]he First Amendment gives no more protection to the press in defamation suits than it does to others exercising the freedom of speech.") Thus understood, the fair report privilege clearly applied to the poster inasmuch as the poster reports information that is contained in the Investigation and Missing Person Reports that were issued by the Kansas City Police Department. Because the original publication of the poster was privileged, Wal-Mart may invoke the fair report privilege. *See Willman v. Dooner*, 770 S.W.2d 275, 282 (Mo. App. W.D. 1989) ("Because the original publication was privileged, defendants in the case at bar could not be held liable for any subsequent republication").

What is more, it is incontestable the poster is fair and accurate. The September 1, 1996, Investigation Report classifies the offense as a "child custody violation" and names Christopher Kenney as the suspect. (ROA Defendant's Exh. 116) The report provides a "description of the incident:"

> On 9/1/96 at 1300 hrs. the victim Miles [Mueller], Angela…responded to NPD to make a child custody violation report. The victim Miss Miles stated on 8-30-96 at 1300 hrs. the listed suspect's mother Kenney, Caroline [sic]…picked up her granddaugher Kenney, Lauren…Miss Miles stated she would pick up the child on 8-31-96 from Ms. Kenney. Ms. Miles stated now she does not know were (sic) the baby is but has talked to the suspect and he stated "I have the baby" we will talk about it on Thursday" [sic] Miss Miles stated the suspect is the father of the baby and they have never been married, and she does not have any type of court orders against the suspect.

(ROA Defendant's Exh. 116; TR. 1015-16) The September 1, 1996, Missing Person Report notes that Lauren was last seen on August 30, 1996, at 1:00 p.m. and conveys this information:

> The mother stated that she took the juvenile to the juvenile's grandmother, Caroline [sic] Kinney [sic]…The grandmother

> then left the residence with the child and the child has not been seen by the mother since that time. The grandfather, Tom Kinney [sic], stated that the juvenile is with her father, Chris Kinney [sic]. Chris will be filing custody papers in Clay County Missouri.

(ROA Defendant's Exh. 115) The poster relates without amplification the information that is contained in these reports: Lauren is missing; she was last seen leaving her home with Carolyn Kenney at 1:30 p.m. on August 30, 1996; and she is now with Christopher Kenney and Carolyn Kenney at an "unknown location." (ROA Plaintiff's Exh. 2).

Its neutral character is made especially salient by comparing it to the news report that was broadcast by television channel 41 on September 2:

> 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 Defendant's Exh. 111) (emphasis added) Thus, in stark contrast to the poster, the news report adverts to a possible abduction and a police search, while mentioning only Carolyn Kenney by name (though the Investigation Report names Christopher Kenney as

the suspect, he is nowhere named in the news report). The Eighth Circuit held that the news report was "a fair abridgement of the information contained in the official police documents produced regarding Lauren Kenney" and was thus "shielded by the fair report privilege." *Scripps Howard,* 259 F.3d at 924. By parity of reasoning, the fair report privilege encompasses the poster.

The court of appeals concluded that because the self-reported statement exception applied, Wal-Mart could not assert the privilege. In so holding, the court of appeals found that Mueller had simply repeated in the poster the allegedly defamatory statements she had made to Officer Blow. The court of appeals erred. Comment c. 2 of section 611 of the Second Restatement of Torts states that "[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 § 577(2)(1977). The exception "aims to deter those persons who [act] out of a corrupt defamatory motive." *Rosenberg v. Helsinki*, 616 A.2d 866, 877 (Md. Ct. App. 1992); *see also Green Acres Trust v. London*., 688 P.2d 617, 626 (Ariz. 1984) (the exception applies to "the speaker who by design uses the privilege to republish defamation he previously made during the public proceeding"); *Williams v. Williams*, 246 N.E.2d 333, 337 (N.Y. Ct. App. 1969) (the New York statutory privilege does not protect a person who maliciously institutes a judicial proceeding alleging defamatory charges and then disseminates a press release based on the allegations of the complaint). Therefore, the better view is that "the privilege will be forfeited only if the defamer illegitimately fabricated or orchestrated events so as to appear in a privileged forum in the first place." *Rosenberg*, 616 A.2d at

877. Applying this standard, the privilege applied to Mueller's publication of her poster and Wal-Mart was entitled to a JNOV. Mueller's sole motivation in contacting the police department was to find and recover her child. She testified that she made a complaint to the police department because she "wanted Lauren back." (Tr. 1339 – "I wasn't mad. I didn't want to – I just wanted Lauren back. That's all I wanted. That's it.") There is no evidence in the record that Mueller was actuated by a malicious motive or that she contrived to have a police report issued so that she could defame Kenney without the risk of liability.

7. The Trial Court Erred In Denying Wal-Mart's Motion For A Directed Verdict And Post-Trial Motion For Judgment Notwithstanding The Verdict On The Issue Of Punitive Damages Because Carolyn Kenney Failed To Make A Submissible Case Of Punitive Damages In That There Was No Evidence Of Actual Malice.

Carolyn Kenney did not make a submissible case for punitive damages. To the contrary, she rested her demand for punitive damages on the suggestion that Wal-Mart made no effort to ascertain whether the poster was accurate. (TR. 1159) Though her argument does not find support in either the law or the facts, the trial court twice denied Wal-Mart's motions for a directed verdict on this issue and over Wal-Mart's objection submitted the issue of punitive damages to the jury. (TR. 1162, 1353, 1360-61, 1398-99; L.F. 97) The trial court clearly erred.

In order to make a submissible case for punitive damages, Carolyn Kenney was required to prove by clear and convincing evidence that Wal-Mart made the defamatory

statements with actual malice. *Englezos v. Newpress & Gazette Co.*, 980 S.W.2d 25, 23 (Mo.App. W.D. 1998). Actual malice denotes that the statement was 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 doubts as to whether it was true." *Overcast*, 11 S.W.3d at 70. "A defendant acts with reckless disregard for the truth or falsity when it publishes a defamatory statement with a high degree of awareness of the probable falsity of the statement." *Id.* (citation omitted). But a failure to investigate a statement before it is published does not establish actual malice. *Englezos*, 980 S.W.2d at 34.

The jury awarded Kenney $392,083.00 in punitive damages. Quite obviously, the issue of whether the record affords an adequate basis for an award of punitive damages will figure prominently in a retrial of this case. Nevertheless, the court of appeals did not address whether Kenney had made a submissible case of punitive damages or whether punitive damages are recoverable in a defamation action that rests on the defendant's failure to remove defamatory material.

It is an ineradicable fact that Wal-Mart did not author the poster or place it in the Missing Children's Network display case. Given this circumstance alone, there is no legal basis for an award of punitive damages in this case. *Cf. Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. 1996) (en banc) (Punitive damage are a "remedy … so extraordinary or harsh that it should be applied only sparingly").

At a minimum, where liability rests on the defendant's failure to remove a defamatory statement, the plaintiff should not be permitted to recover punitive damages in the absence of clear and convincing evidence that the defendant's continued

publication of the defamatory statement was actuated by a specific intent to injure the plaintiff's reputation. In the absence of such evidence, the imposition of punitive damages should be confined to the author and original publisher of the defamatory statement. This proposition applies with particular force where, as here, a third party places allegedly defamatory material in a display case that the property owner maintains solely to serve a public interest. This Court's consideration of the propriety of the jury's award of punitive damages in this case cannot be divorced from the altruistic reasons that inform Wal-Mart's maintenance of the Missing Children's Network display case. As there is no evidence that Wal-Mart acted with actual malice, the trial court erred in denying Wal-Mart's motion for directed verdict and post-trial motion for judgment notwithstanding the verdict on the issue of punitive damages.

On this record, there was no basis for the submission of punitive damages to the jury. There is no evidence that a Wal-Mart employee placed the poster in the display case at the Lee's Summit store. (TR. 912-13) To the contrary, Wal-Mart's company policy provided that only posters prepared by the NCMEC may be displayed in the case. (TR. 690-91, 700) It is a violation of company policy to display any other material in the display case. (TR. 683, 690, 693, 700, 719, 1241-42) The display case is always locked in order to ensure that only NCMEC posters are displayed. (TR. 671-73) And only Harris possessed a key to the display case in the Lee's Summit store. (TR. 1214)

There is no evidence, moreover, Wal-Mart was aware or had any reason to be aware that the poster may have been false. When Wal-Mart was made aware the poster had been placed in the display case, Wal-Mart immediately sought to remove the poster

from the display case. (TR. 581-83, 1223-36) At most, the poster remained in the display case for two days after Wal-Mart became aware of its presence – a delay that owed to an inability to unlock the display case. (TR. 1223-36, 1262) In all events, Wal-Mart's efforts to remove the poster were informed by the fact that the poster was not an NCMEC poster rather than awareness that the poster may not have been truthful. (TR. 1254)

8. Alternatively, The Trial Court Erred In Denying Wal-Mart's Motion For A New Trial Because The Trial Court Committed Error In The Formulation Of Jury Instruction Number Six In That The Trial Court Made Material Modifications To The Verdict Director Prescribed By MAI 23.06 That Materially Affected The Merits Of The Case.

Wal-Mart submitted MAI 23.06(2) as a verdict director. (TR. 1392-93; L.F. 67, 86-87) Over Wal-Mart's objections, the trial court rejected Wal-Mart's submission in favor of Carolyn Kenney's modified verdict director, which made material modifications to MAI 23.06. (TR. 1366-91; L.F. 86-87) "The use of Missouri Approved Instructions is mandatory in any case where the instructions apply." *Gorman v. Wal-Mart Stores, Inc.*, 19 S.W.3d 725, 731 (Mo.App. W.D. 2000) (citation omitted). An instruction may be modified "to fairly submit the issues in a particular case." *Id.* (internal quotation marks and citation omitted) But where a "MAI is applicable, and does not violate the substantive law, and there is evidence to support it, the trial court should not modify it to comport with what the court believes to be a better instruction." *Id.* (internal quotation marks and citation omitted). Where an instruction is submitted and deviates from the

MAI format, "the appropriate appellate review requires a four-step analysis: (1) if MAI prescribes a particular form of instruction its submission is mandatory because if the MAI instruction is not given, prejudicial error is presumed; (2) the submitting party has the burden of demonstrating that the instruction did not create a prejudicial effect; (3) the court must determine if the instruction created such a prejudicial effect; and (4) in order to be grounds for reversal, the error must materially affect the merits of the case." *Lay v. P & G Health Care, Inc.*, 37 S.W.3d 310, 329 (Mo.App. W.D. 2000) (citation omitted). A trial court's instructional error is reversible where "the error substantially prejudiced a party." *Id.*, 37 S.W.3d at 329-30.

The verdict director, instruction number six, provided:

> 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, and
>
> Second, Defendant was at fault in *displaying* such poster on its bulletin board, and
>
> Third, Such poster tended to expose Plaintiff to contempt or ridicule, and

Fourth, Such poster was read by the public, and

Fifth, The poster directly caused or directly contributed to cause damage to Plaintiff,

Unless you believe Plaintiff is not entitled to recover by reason of Instruction No. 7.

(L.F. 95) (emphasis added) Thus composed, the verdict director made two material alterations to MAI 23.06: (1) The first and second paragraphs required only "display" rather than "publication;" and (2) the fifth paragraph incorporated MAI 19.01, supplanting the requirement that "plaintiff's reputation was thereby damaged" with the provision that "the poster directly caused or directly contributed to cause damage to plaintiff."

It is familiar law that MAI 23.06 supplies the verdict director for a cause of action for defamation. *Englezos*, 980 S.W.2d at 31. The trial court concluded, however, that the evidence warranted modification of the first two paragraphs of MAI 23.06 to submit to the jury the failure to remove form of defamation liability articulated in section 577(2) of the Second Restatement of Torts. (TR. 1376-76) On this basis, the trial court employed the word "display" rather than the word "publish" in the first and second paragraphs of the verdict director. (L.F.95) This modification materially affected the merits of the case because it relaxed Carolyn Kenney's burden of proof.

Publication requires the "communication of defamatory matter to a third person." *Nazeri,* 860 S.W.2d at 313; *see also Childs v. Williams,* 825 S.W.2d 4, 8 (Mo.App. E.D. 1992) ("Publication…is a word of art… ."") (internal quotation marks and citation omitted). That is, Carolyn Kenney was required to show that Wal-Mart engaged in "some act by which written or printed words are brought to the attention of a third person." RESTATEMENT (SECOND) TORTS § 577 cmt. a (1997). Therefore, in the context of this case, for liability to attach Wal-Mart must have either placed or permitted a third party to place the poster in the display case. Carolyn Kenney produced no such evidence. But with the use of the more elastic word "display" in the verdict director the jury was effectively told that a finding of liability required only that they determine that the poster was present in the display case. The word "display" means only to "exhibit" or "show." Oxford Desk Dictionary (Oxford University Press 1995). A display of an object does not necessarily entail an effort to communicate a message to another person. One can thus conclude Wal-Mart displayed a poster simply by finding that it was exhibited in its store.

Though the trial court concluded that modification of MAI 23.06 was necessary to encompass the failure to remove form of defamation liability, the trial court nevertheless failed to incorporate in instruction number six the elements for this form of liability that are enunciated in section 577(2) of the Second Restatement of Torts. Section 577(2) provides:

> One who *intentionally and unreasonably* fails to remove defamatory matter *that he knows* to be exhibited on land…in

his possession or under his control is subject to liability for its continued publication.

RESTATEMENT (SECOND) TORTS § 577(2) (1977) (emphasis added). The first and second paragraphs of instruction number six omit mention of the critical element that Wal-Mart intentionally and unreasonably continued publication of the poster after Wal-Mart was made aware of its presence in the display case. If the court concludes that under the facts of this case the adoption of this form of liability is appropriate, the court should remand the case to the trial court for a new trial so that the issue of whether this form of liability may be visited on Wal-Mart can properly be presented to a jury.

The phrase "After September 3, 1996," in the first paragraph of instruction number six was also prejudicial in that it assumed a disputed fact. Wyke was the only witness who suggested the poster remained displayed in the display case at the Lee's Summit store after September 3, 1996. She testified that she first saw the poster in the display case "*either* that week immediately following Labor Day weekend *or* the week after that. So one to two weeks, *within that time period*." (TR. 422) (emphasis added). Against this conjectural testimony, Lohman testified that she last saw the poster lying on Harris' desk on the morning of Tuesday, September 3. (TR. 1236, 1262) And Christopher Kenney testified that sometime after Labor Day weekend, he telephoned the Lee's Summit store and was assured that the poster had been removed. (TR. 583) Thus, the first paragraph of instruction number six invited the jury to impose liability solely on the basis of Wyke's indeterminate testimony.

Paragraph five of instruction number six effected a material modification of the last paragraph of MAI 23.06, incorporating the phrase "directly caused or *directly contributed to cause* damage" from MAI 19.01. (L.F. 95) (emphasis added) The trial court explained that "Nazeri v. Valley College and Carlson v. K-Mart were both decided after the MAI instruction was drafted and the Court believes that the holdings in Nazeri and Carlson are in conflict with the language in 23.06…and the Court believes that the fifth paragraph submitted by Plaintiff correctly follows the holdings… ." (TR. 1390-91) The trial court clearly erred. *Nazeri* only eliminates the distinction between defamation per se and defamation per quod, requiring that a plaintiff "prove *actual damages* in all cases." *Nazeri*, 860 S.W.2d at 312 (emphasis added). And *Carlson* is a falling merchandise case that merely holds that where discrete acts of negligence by two actors combine to cause injury to a plaintiff the phrase "direct result of the occurrence" in MAI 4.1 should be modified by the phrase "directly caused or contributed to cause" in MAI 19.01, so that the jury can "identify which causes of injury the plaintiff is entitled to be compensated for." *Carlson v. K-Mart Corp.*, 979 S.W.2d 145 (Mo. 1998) (en banc). There is no suggestion in either decision that in a defamation action where a plaintiff alleges that her reputation was damaged not only by the defendant's act of publication but also by the discrete acts of publication by other parties the plaintiff may recover damages simply by asserting that the defendant's publication in some manner contributed to cause damage to her reputation. If a person's reputation has been destroyed by a defamatory publication, a subsequent defamatory publication cannot cause additional injury to that person's reputation. MAI 19.01 has no application in defamation actions.

The modification of the last paragraph of MAI 23.06 operated to materially affect the merits of the case. Carolyn Kenney's evidence of actual damages consisted of little more than offended sensibilities: she felt [e]mbarrassed, shocked, mad." (TR. 899) She did not miss work, suffer financial loss or seek medical treatment. (TR. 899, 910, 965) There was no evidence the placement of the poster in the Lee's Summit store caused any person to hold her in lower esteem. (TR. 982) What is more, she allowed that the September 2 broadcast of the news report by television channel 41 concerning Lauren's disappearance may have injured her reputation. (TR. 937) She did not dispute that the injuries she suffered by reason of the broadcast of the news report and the placement of the poster in the Lee's Summit store were the same. (TR. 959) And she maintained that her termination by Hallmark Cards in early 1996 had caused "irreparable injury to her reputation." (TR. 937-38) On this record, instructing the jury that it is only necessary for them to find that the publication of the poster in the Lee's Summit store "directly *contributed* to cause damage" to Carolyn Kenney diverted the jury's attention from a central issue in this case – whether the publication of the poster caused Carolyn Kenney to suffer actual damages.

9. Alternatively, the trial court erred in denying Wal-Mart's motion for a new trial because the trial court committed plain error in the formulation of Jury Instruction Number Six in that the instruction did not instruct the jury that an action for defamation requires Carolyn Kenney to prove that the allegedly defamatory statements in the poster were false.

The trial court submitted to the jury MAI 23.06 as the verdict director. The verdict director, instruction number six, provided:

> 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, and
>
> Second, Defendant was at fault in *displaying* such poster on its bulletin board, and
>
> Third, Such poster tended to expose Plaintiff to contempt or ridicule, and
>
> Fourth, Such poster was read by the public, and

Fifth, The poster directly caused or directly contributed to cause damage to Plaintiff,

Unless you believe Plaintiff is not entitled to recover by reason of Instruction No. 7.

(L.F. 95) The trial court also submitted to the jury an instruction regarding the affirmative defense of substantial truth. (L.F.96) Therefore, the jury was instructed that it was Wal-Mart's burden of proof to prove that the poster was substantially true. Wal-Mart did not object to this part of the jury instructions.

The court of appeals correctly held that the trial court committed plain error in the formulation of instruction number six. In *Overcast*, this Court made clear that it is the plaintiff's burden to prove that a defamatory statement is false. *Overcast,* 11 S.W.3d at 70. Therefore, the trial court erred in its formulation of instruction number six inasmuch as the verdict director did not instruct the jury that one of the elements of a cause of action for defamation is that Carolyn Kenney must prove the falsity of the defamatory statements in the poster. *See Crabtree v. Bugby*, 967 S.W.2d 66, 71 (Mo. 1998) ("Once this Court has resolved the elements of a cause of action … neither the trial court nor the court of appeals is free to redefine the elements in every case that comes before them").

Because Wal-Mart did not object to this part of instruction number six, this Court reviews the instruction for plain error. That is, this Court will "reverse only if we find a manifest injustice or miscarriage of justice resulted." *Nelson v. Waxman*, 9 S.W.3d

601, 607 (Mo. 2000) (citation omitted). This standard requires that a judgment be reversed where a trial court error in the formulation of a jury instruction "affected the jury's verdict." *State v. Haney*, 51 S.W.3d 519, 535-36 (Mo. App. W.D. 2001) (citation omitted). The verdict director materially influenced the jury's verdict.

Kenney argued that the poster was defamatory because it "could reasonably be understood by people who read it to mean [Carolyn Kenney] was responsible for the disappearance of her granddaughter." (TR.1378) Nevertheless, it is an ineradicable fact that acting in concert with Christopher Kenney, Kenney secreted Lauren Kenney at a home at the Lake of the Ozarks and a Blue Springs hotel room from the afternoon of Saturday, August 31, through the evening of Tuesday, September 3. (TR. 641, 892-896) As the Court of Appeals observed, the jury may nonetheless have been unpersuaded as to the truthfulness of the poster, so that if the jury had been instructed that Kenney had to prove the falsity of the poster, "the outcome may very well have been different."

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the trial court and direct entry of judgment in favor of Appellant Wal-Mart Stores, Inc. In the alternative, the Court should direct the court of appeals to remand this matter for a new trial on all issues.

Respectfully submitted,

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ADDENDUM A

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the type-volume limitations set forth in MO. R. CIV. P. 84.06 (b) in that the brief is _____ words, including footnotes. In accordance with MO. R. CIV. P. 84.06, Special Rule No. 1, I further certify that the enclosed computer diskette has been scanned for viruses and is virus-free.

_____
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CERTIFICATE OF SERVICE

I hereby certify that one (1) copy of the foregoing brief of Appellant-Wal-Mart Stores, Inc., together with a 3½ disk containing the brief in Microsoft Word 2000, were served, by placing same in the United States Mail, postage prepaid, this ___ day of September, 2001 to:

Michael W. Blanton, Esq.
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Blue Springs, Missouri 64015

_____
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APPENDIX