IN THE SUPREME COURT OF MISSOURI

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

ON TRANSFER FROM THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

SUBSTITUTE REPLY BRIEF OF APPELLANT WAL-MART STORES, INC.

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INTRODUCTION

This appeal presents profound questions of social policy and individual responsibility. *See United States v. Cunningham*, 103 F.3d 553, 555 (7th Cir. 1996) ("Causal ascription is purposive. In law it is based on social ideas about responsibility; it is policy driven."). Wal-Mart did not author or publish (in any conventional sense) the poster. Therefore, this Court cannot affirm the judgment unless it determines this is an appropriate case in which to adopt the principle that a property owner's failure to remove a purportedly defamatory statement from its property constitutes an act of publication. It is germane that this is not a case in which a tavern owner permitted patently slanderous graffiti to remain on a restroom wall. Rather, Wal-Mart's liability, which includes a $392,083 punitive damages award, rests on what Carolyn Kenney characterizes as Wal-Mart's "blatant indifference" to an inconspicuous poster that was illicitly slipped by an unidentified third person into a locked display case.

The Missing Children's Network is a charitable enterprise that the record cogently demonstrates does much social good. (Tr. 743-44) Indeed, at an October 2, 2002, White House Conference on Missing, Exploited, and Runaway Children, President Bush observed that the "kidnapping of a child is every parent's worst nightmare." Remarks by the President at White House Conference on Missing, Exploited, and Runaway Children, *available at* http//www.whitehouse.gov./news/releases/2002/10/20021002-4.html. The President, moreover, commended "Toys 'R' Us, … Wal-Mart, Home Depot, [and] Ford Dealerships" as "good corporate citizens" for their assistance in recovering missing and abducted children. *Id.* And he urged "other companies" to "make available the

resources necessary to help us … fight against abduction and to help save those lives … of those who have fallen prey to one of the worst crimes in our society." *Id.*

The Court must also take into account the fact that Carolyn Kenney is not innocent. It is telling that in Carolyn Kenney's 132-page brief, the critical fact that Carolyn Kenney made the conscious decision to abet Christopher Kenney's efforts to withhold and conceal Lauren from Angela Mueller goes unremarked. (Tr. 891-92) She thus consciously interjected herself into a custody dispute. On this record, Carolyn Kenney alone bears responsibility for any injury she suffered.

Carolyn Kenney is not seeking restitution for injury to her reputation. Indeed, she complains only of offended sensibilities. Though she reads the poster as implying she "kidnapped … or took Lauren without a right to do so" (Respondent's Substitute Br., pg. 39), Carolyn Kenney did not file suit against Mueller, the author of the poster, or the local tavern where the poster remained displayed for one month after Lauren was surrendered to Mueller. (Tr. 644) Rather, Carolyn Kenney seized on the decidedly adventitious circumstance that one of Mueller's family members slipped a copy of the poster into the display case. At bottom, Carolyn Kenney seeks to invoke and expand a novel form of defamation liability, yet to find expression in Missouri, so as to exact a recovery from Wal-Mart.

Indeed, Carolyn Kenney failed to make a submissible case of defamation. Most fundamentally, the poster was substantially true, non-defamatory, and subject to the fair report privilege. Even if the poster was actionable, Carolyn Kenney failed to adduce sufficient evidence that Wal-Mart intentionally and unreasonably failed to remove the

poster from the display case. In the final analysis, the jury's verdict was the product of material modifications of the MAI verdict directors.

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.

Carolyn Kenney imbues the poster's neutral statements with defamatory meaning. She contends the poster "implies" she "kidnapped or took Lauren" without consent." (Respondent's Substitute Br., pg. 37) Her reading is based on the poster's accurate statements (Tr. 914, 916-17, 919-20) that Lauren was "'last seen … leaving her home' with Carolyn" in a "vehicle with 'no visible license plate'." She conveniently elides the fact that the poster actually states Lauren was "last seen leaving her home with *paternal grandmother*, Carolyn Kenney … and is now with *her father*, Christopher Kenney, & *Grandmother* at unknown location." (ROA Plaintiff's Exh. 2)

In determining whether a statement is defamatory "the words must be stripped of any pleaded innuendo … and construe[d] in their most innocent sense." *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 311 (Mo. 1993). Therefore, "if a statement is capable of two meanings (one defamatory and one non-defamatory) and can be *reasonably* 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. Ct. App. W.D. 2001) (citation omitted) (emphasis in original); *see also Appleman v. Schweppe*, 972 S.W.2d 329, 333 n.2 (Mo. Ct. App. E.D. 1998) (emphasis in original) Applying these principles, the poster is not defamatory.

The poster is, however, couched in neutral language. Its text does not assign responsibility for Lauren's disappearance, speak of abduction, kidnapping, criminal acts, or make reference to Mueller or her status as custodial parent. So the reader may reasonably conclude that Christopher Kenney is the child's single parent. And the poster refers to Carolyn Kenney as the child's "paternal grandmother," rather than leaving to conjecture whether she has any legitimate relationship with the child. The poster may thus reasonably be read to say nothing more than that Lauren, 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. (Tr. 914, 916-17, 919-20) Because the poster reasonably bears an innocent meaning, it is immaterial whether Carolyn Kenney is correct in suggesting its text in somehow implies that Carolyn Kenney "took Lauren without a right to do so." (Respondent's Substitute Br., pg. 41) (What is more, applying Carolyn Kenney's construction of the poster, its text may also be read to suggest that Lauren was wrongfully *withheld* from her mother; the caption of the poster is "Missing" not "Kidnapped" or "Abducted." And Carolyn Kenney does not deny that she and her son refused to apprise Mueller where her daughter was. (Tr. 920))

Carolyn Kenney argues that Wal-Mart assigns the poster an "overly literal interpretation." (Respondent's Substitute Br., pg. 38) This contention does not bear scrutiny. As *Nazeri* instructs, Wal-Mart simply advances an "objective reading" of the

poster. *Nazeri,* 860 S.W.2d at 311. It is Carolyn Kenney that seeks to interpolate words into the poster through the facile notion that the "clear implication of the Poster" is she "kidnapped" or "took" Lauren. (Respondent's Substitute Br., pg. 38) She argues that in this sense this case is analogous to *Nazeri*. *Nazeri,* however, cuts the other way. There, this Court found defamatory the defendant's statements the plaintiff "lives with S— A---, who is a well known Homosexual and has lived with her for years," and that plaintiff left her husband and children to live with S--- A—." *Id.,* 860 S.W.2d at 311. The Court rejected the defendant's argument that he did not insinuate plaintiff was a homosexual or an adulteress, finding that "living with somebody" is a "common euphemism for a sexual relationship" and that the "allegation that [plaintiff] 'left' her husband … to live with a 'well known homosexual' would most obviously an naturally mean [she] abandoned her family for the purpose of engaging in an adulterous … relationship with a lesbian woman." *Id.* The poster, however, does not contain words that can reasonably insinuate that Carolyn Kenney engaged in unlawful or immoral conduct. Nowhere does the poster use the words "kidnapped," "taken," "concealed," "wrongful," "unlawful," "crime," "criminal," "illegal," "search," "authorities," "law enforcement," or "police." And the poster states that Carolyn Kenney is the child's grandmother and Christopher Kenney is her father, rather than leaving the reader to surmise what relationship these persons have to the missing child.

Carolyn Kenney also attempts to tease out a defamatory meaning from the poster's mere presence in the Missing Children's Network display case, arguing that because some subjects of the NCMEC posters have been abducted, readers of Mueller's

poster would necessarily infer that Carolyn Kenney abducted Lauren. (Respondent's Substitute Br., pgs. 39-41) But as is argued in Wal-Mart's opening brief, the argument cuts the other way. (Appellant's Substitute Br., pg. 29-30) In stark contrast to the NCMEC poster that was introduced by Carolyn Kenney at trial, the Mueller poster does not advert to abduction. It is germane, moreover, that the display case is intended to alert viewers to the identities of missing children rather than to the identities of suspected kidnappers. Indeed, Patty Wyke testified she would "always stop to look" at the display case because she found it "very sad" to view the missing children that were profiled. (Tr. 422) The display case is not the equivalent of the post office's FBI Most Wanted Persons display. Carolyn Kenney's argument, which rests not on context but on osmosis, is fanciful.

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.

Carolyn Kenney contends Wal-Mart published the poster by "causing the content of the poster to be *delivered* to third persons by continuing to display the Poster … after it had been made aware of [its] presence." (Respondent's Substitute Br., pg. 43) (emphasis added) She does not contend Wal-Mart displayed – or permitted a third person to display – the poster. Nonetheless, she argues that because Missouri law recognizes

that a defendant who "causes defamatory material to be delivered to third persons is liable for defamation," the Court need not adopt the principle that the failure to remove a defamatory statement is an act of publication. (Respondent's Substitute Br., pg. 44) She is mistaken. Publication entails "communication" -- the *act* of transmitting or imparting information to another. *See Dean v. Wissmann,* 996 S.W.2d 631, 633 (Mo. Ct. App. W.D. 1999) ("One of the essential elements of the tort of libel is publication, which is simply the communication of defamatory matter to a third person."). Liability for defamation extends only to those "persons who *cause or participate* in the publication" of the defamatory statement. *McDonald v. R.L. Polk & Co.,* 142 S.W.2d 635, 638 (Mo. 1940) (emphasis added). Carolyn Kenney makes no effort to explain how a person who takes no action – does not publish, ask another to publish, or permit another to publish a defamatory statement – becomes a participant in the "delivery" (the publication) of the defamatory statement. There is simply no support for Carolyn Kenney's peculiar notion that inaction is tantamount to publication. *See* RESTATEMENT (SECOND) TORTS § 577(2) cmt. p (1977) (The duty to remove "arises only when the defendant knows that the defamatory matter is being exhibited on his land … *he is under no duty to police them or to make inquiry as to whether such a use is being made*.") (emphasis added).

In order to affirm, the Court must, therefore, adopt and find applicable to the facts of this case the failure to remove form of defamation liability. Carolyn Kenney states, "Wal-Mart does not argue against adoption of section 577(2)." (Respondent's Substitute Br., pg. 45) To the contrary, as Wal-Mart argues in its opening brief (pg. 34), this is not an appropriate case in which to recognize the doctrine. The doctrine rests on the

principle that "[f]ailing 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). There is no evidence from which the inference can be drawn that Wal-Mart adopted the poster's contents or desired its continued publication. Significantly, the poster was a nondescript notice slipped into the display case alongside seventeen other posters. (Tr. 675, 737) There was nothing in the poster's appearance or content that would call attention to its presence. Carolyn Kenney's allusion to illustration 15 in section 577(2) is singularly inapt. (Respondent's Substitute Brief, pg. 49) There the Restatement offers the paradigmatic case of a tavern owner who fails to remove defamatory graffiti he discovers on the restroom's wall. RESTATEMENT (SECOND) OF TORTS § 577(2) cmt. p, illus. 15 (1977). Viewing the evidence in a manner most favorable to the verdict, Wal-Mart was not made aware of the poster's presence until Wyke or Christopher Kenney notified store personnel. (Tr. 433, 581-83, 1222-23) And even then the poster's only conspicuous feature was the absence of the NCMEC logo. (Tr. 1254-55)

This case does not provide an adequate evidentiary basis for applying of this form of defamation liability. It is critical to observe section 577(2) imposes liability only where the property owner "*intentionally and unreasonably* fails to remove defamatory matter." RESTATEMENT (SECOND) TORTS § 577(2) (1977) (emphasis added). Putting aside whether the poster remained in the display case for an inordinate period after Wal-Mart received notice and whether anyone viewed the poster, there is no evidence Wal-Mart intentionally and unreasonably failed to remove the poster. No witness testified that

after being informed of the poster's presence, Wal-Mart decided to allow the poster to remain displayed in the display case. Though Wyke and Lohman offer sharply divergent accounts, both ascribe the delay in removing the poster to the inability of store personnel to locate the key for the display case. (Tr. 434, 1224, 1228-1230, 1234, 1247-48) And Christopher Kenney testified that when he asked that the poster be removed, the "man" at the store assured him "he had it … [a]nd that he took it down." (Tr. 581-583)

That Wyke's testimony does not constitute substantial evidence as to the number of days the poster remained in the display case is made manifest by Carolyn Kenney's inability to parse Wyke's nebulous testimony. Asked when she first saw the poster at the Lee's Summit store, Wyke testified: "It was after Labor Day Weekend. In the middle of the week. It was *either* that week immediately following Labor Day *or* the week after … So one to two weeks, within that time period." (Tr. 422) (emphasis added) Carolyn Kenney allows Wyke thus places herself in the store during "one of two time periods." (Respondent's Substitute Br., pg. 49) Yet she does not find Wyke's testimony speculative, though Wyke cannot say during which week she was in the store. No matter. In Carolyn Kenney's view, Wyke's testimony establishes at the very least that the poster remained in the display case "for at least three days after Mrs. Wyke first notified Wal-Mart management of the Poster's presence on September 4. " (*Id*.) Therefore, even if the Court credits Wyke's testimony and reads it as Carolyn Kenney suggests, the poster's presence for a mere three days after Wyke informed store personnel "is inconsistent with the inference" Wal-Mart "adopted its contents or desired its continued publication." *Tacket,* 836 F.2d at 1047 (holding that where a sign remained for three days on the wall

of defendant's facility a jury "could not infer [defendant] 'intentionally and unreasonably' … kept this sign in view.").

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.

Carolyn Kenney conflates the elements of fault and publication. In order to make a submissible case of defamation, Carolyn Kenney was required to prove Wal-Mart both published the poster and was negligent in its publication. *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 70 (Mo. 2000) (en banc). She argues the element of fault relates to "whether Wal-Mart was negligent in failing to remove the Poster." (Respondent's Substitute Br., pg. 54). She is mistaken. Wal-Mart's purported act of publication is its failure to remove the poster after being made aware of the poster's presence. Therefore, the element of fault must necessarily apply to Wal-Mart's conduct before it was made aware of the poster's presence. If the law were otherwise, there would be no element of fault where publication takes the form of a failure to remove. What is more, as sound public policy, a property owner should not be visited with liability for failure to remove a defamatory statement where the owner took reasonable measures to prevent the unauthorized placement of material on its property.

Carolyn Kenney made no effort to prove Wal-Mart negligently permitted someone to slip the poster into the display case. It is uncontroverted that, as Wal-Mart recounts in its opening brief (pgs. 40-41), Wal-Mart took every reasonable precaution to prevent the placement of unauthorized material in the display case.

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.

"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 . Carolyn Kenney asserts "the 'sting' of the poster is its purported implication that "Lauren was kidnapped or wrongfully taken by Carolyn Kenney." (Respondent's Substitute Br., pg. 61) She argues that because the act of publication is Wal-Mart's failure to remove, the issue is whether the poster was false at the time Wal-Mart was made aware of its presence and failed to remove it. (Respondent's Substitute Br., pg. 58) She plainly errs. This would have the paradoxical effect that the author and original publisher would have no liability for a defamatory statement that was true at the time of original publication, but a property owner who had not participated io its publication would nonetheless be liable if the statement were no longer true at the time he was made aware of its presence. Therefore, here, Mueller would have had no liability to Carolyn Kenney because the poster's purported

implication that Carolyn Kenney wrongfully withheld Lauren from her was true when the poster was slipped into the display case on September 1.

That the poster arguably remained in the display case after Christopher Kenney surrendered Lauren to her mother is of no moment. As the Court of Appeals soundly concluded, "the 'sting' of the poster" was "not the fact that the child was missing or the time frame thereof" but rather Carolyn Kenney's "insinuated involvement" in "withholding custody of the child from the mother." *Carolyn Kenney v. Wal-Mart Stores, Inc.*, No. WD 59936, 2002 WL 1991158 at *10 (Mo. Ct. App. W.D. August 30, 2002). Prescinding whether the poster holds this insinuation, it is undeniably true that Carolyn Kenney was complicit in withholding the child from Mueller. 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 August 31 through the evening of September 3. (Tr. 892-896, 641) She made no effort to apprise Mueller of Lauren's location. The defamatory insinuation somehow lurking in the poster's otherwise neutral content is demonstrably true.

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.

Carolyn Kenney cannot plausibly assert that the poster's presence in the display case caused her actual damages. The ineradicable fact is that she complains only of offended sensibilities: she felt "[e]mbarassed, shocked, mad." (Tr. 899) She offered no evidence that she had suffered an injury to her reputation. Asked to name one person who holds her in lower esteem, she drew a blank. (Tr. 982) Nor did she prove that she suffered a quantifiable professional or personal injury.

As evidence of her actual damages, Carolyn Kenney points to her testimony that she "suffered emotional distress." (Respondent's Substitute Br., pgs. 64-65) Her testimony does not provide substantial evidence of actual damages. She merely testified she "was embarrassed … hurt … shocked." (Tr. 910) The record shows she failed to substantiate her allegations of emotional distress. She testified that she did not seek medical treatment, so as not to "hurt" her family. (Tr. 910) Yet she sought treatment from Dr. Aileen Utley, a psychologist, who evaluated her in February and March 1998, a few months before Carolyn Kenney filed this action on September 1, 1998. During her treatment, she complained only of emotional injury she suffered in consequence of her termination by Hallmark Cards in 1996. (Tr. 977-78, 980)

In its opening brief, Wal-Mart cited the incremental harm doctrine as support for its argument that because Carolyn Kenney allows she suffered emotional distress because of the contemporaneous, privileged publication of the news broadcast by television channel 41 the evening of September 2 (Tr. 921, 959), she did not make a submissible case of defamation because she failed to show the poster's publication caused her any degree of additional injury. (Appellant's Substitute Br., pgs. 50-52) Wal-Mart does not contend the incremental harm doctrine applies here, but rather that the doctrine amplifies the requirement that a plaintiff prove that publication of a defamatory statement actually damages her reputation. *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*.") (emphasis added).

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.

Though Missouri courts have yet to speak to whether a non-media defendant may assert the fair report privilege, those courts that have, and the Second Restatement of Torts, hold that the doctrine applies equally to reports of official action by non-media actors. (*See* Appellant's Substitute Br., pg. 55) It is not surprising Carolyn Kenney cites

no authority in support of her assertion that "it is logical to limit application of the privilege to those entities that are in the business of not reporting on official proceedings …." (Respondent's Substitute Br., pg. 75) That the advent of the internet has diminished the role of traditional media illustrates the utter fatuity of that assertion.

Carolyn Kenney argues the Court should not limit application of the self-reported statement exception to only those persons who act out of a corrupt motive. She states that a person who both makes statements in an official proceeding then reports those statements "should know whether a statements are false." (Respondent's Substitute Br., pg. 79) A person can, however, in good faith, be mistaken in what she states in an official proceeding and later reports in a publication. For example, in *Rosenberg v. Helsinki*, 616 A.2d 866, 877 (Md. Ct. App. 1992), a psychologist repeated to a journalist his testimony in a child custody proceeding that a child had been abused by her father. He was mistaken. Nonetheless, the Maryland Court of Appeals held that his statement was shielded by the fair report privilege:

> There is not the remotest indication … Dr. Rosenberg sought in bad faith to testify at the … hearing with some perverse wish to harm Mr. Helinski … by trumpeting defamatory matter to a television audience … [H]e was engaged as an expert witness … [and] testified in that capacity … He had no personal stake in the outcome of the hearing … [I]in response to [a reporter's] questions, he … accurately and fairly recounted … his testimony. In these circumstances, to deny the privilege to a witness reporting his own testimony, while the privilege is available to any other court spectator … would defy logic.

Id., 616 A.2d at 877. As Wal-Mart argues in its opening brief, the better view is "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." *Id*.

Carolyn Kenney contends Mueller acted in bad faith by changing her story while Detective Blow was interviewing her. (Respondent's Substitute Br., pg. 79) Blow testified only that he suspected "Mueller knew where the child was. " (Tr. 1052) Tellingly, he stated she did not provide him with false information. (Tr. 1059) And Mueller testified without contradiction that her only motivation in making a police report was to recover her child. (Tr. 1339)

Carolyn Kenney's suggestion that the privilege can have no application in this case because Wal-Mart was not "aware of the Investigation Report … or the Missing Person Report" is equally fallacious. (Respondent's substitute Br., pg. 81) Why this is so she does not explain. She does not contend Wal-Mart was the author or original publisher of the poster. Therefore, the issue of whether the privilege applies centers solely on the action of Mueller – the author and original publisher of the poster. If the rule were otherwise, the author of a privileged publication could avail herself of the privilege and avoid liability, while another who merely republished the report or permitted its continued publication would be liable to the subject of the report. Thus, a business that posted a newspaper article on its bulletin board could be held liable for its publication. Quite obviously, this result would subvert "[t]he basis of this privilege," that is, "the interest of the public in having information made available to it as to what occurs in official proceedings. …" *Shafer v. Lamar Publ'g Co., Inc.*, 621 S.W.2d 709, 711 (Mo.

Ct. App. W.D. 1981). Because the original publication was privileged, Wal-Mart may invoke the privilege. *See Willman v. Dooner*, 770 S.W.2d 275, 282 (Mo. Ct. 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.")

Where the privilege applies, "the question of malice, or knowledge of falsity, in this type of case becomes immaterial and *the test rather is whether or not the report is fair and accurate*." *Shafer*, 621 S.W.2d at 713 (emphasis added). Carolyn Kenney is thus mistaken in asserting "Missouri courts apply the same actual malice standard when determining if a plaintiff can recover punitive damages that is applied when determining if a plaintiff can overcome a claim of qualified privilege." (Respondent's Substitute Br., pg. 85) No matter. Applying either standard, Carolyn Kenney failed to overcome the privilege The poster is a fair and accurate report of the reports generated by the police department. Carolyn Kenney responds by trotting out a parade of decidedly trifling differences between the content of the police reports and the content of the poster. These entail such "omissions and distortions" as the poster's use of the phrase "last seen … leaving her home with paternal grandmother," whereas the police reports use the word "took" and "picked up;" the poster does not state when Carolyn Kenney promised she would return Lauren to Mueller, whereas the police reports do; the poster relates that Carolyn Kenny's automobile has "no visible plate," whereas the police reports only describe the automobile; the poster incorporates her photograph, whereas the police reports do not. (Respondent's Substitute Br., pgs. 83-84) There is no substance to

Carolyn Kenney's argument that the "omissions and distortions … implied Carolyn Kenney had abducted Lauren." (*Id.*, pg. 84)

In *Kenney v. Scripps Howard Broadcasting*, 259 F.3d 922 (8th Cir. 2001), the Eighth Circuit held that the fair report privilege applied to the news report that was broadcast by channel 41 on September 2, 1996. 259 F.3d at 924. The news broadcast, which mentioned only Carolyn Kenney's name, adverted to the circumstance that Lauren "may have been abducted by a relative." (ROA, Defendant's Exh. 111) Carolyn Kenney seeks to distinguish the case on the spurious basis that the television report stated that the police were looking for Lauren. (Respondent's Substitute Br., pg. 76) She argues this makes clear that the report was one that related official action. The purpose of the privilege is not to encourage a person to report what government agency has taken an action, but rather to advance "the interest of the public in having information made available to it *as to what occurs in official proceedings*. …" *Shafer*, 621 S.W.2d at 711 (emphasis added). The Eighth Circuit's conclusion that the news report, which explicitly mentions abduction, is a fair and accurate report of the police reports applies with equal force to the poster, which omits mention of abduction.

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.

That the record affords no basis for a punitive damages award is made manifest by Carolyn Kenney's counter-factual assertion that "Wal-Mart had no factual basis for *its* defamatory statements." (Respondent's Substitute Br., pg. 95) (emphasis added) It is incontestable that Wal-Mart did not author, place, or permit placement of the poster in the display case. Given this circumstance alone, there is no legal basis for awarding punitive damages.

Carolyn Kenney offers no cogent argument as to where in the record there is clear and convincing evidence Wal-Mart published the poster with actual malice. She again conjures Wyke's testimony to show "Wal-Mart's management displayed an attitude of indifference as to whether the poster was true or not." (Respondent's Substitute Br., pg. 94) Aside from the manifold infirmities in Wyke's testimony and Carolyn Kenney's treatment of it, this testimony cannot afford an evidentiary basis for a punitive damages award. It is the same evidence that Carolyn Kenney draws upon to sustain her claim for the failure to remove as an act of publication. Thus, the fallacy in Carolyn Kenney's argument is that she points to Wyke's testimony as substantial evidence of both Wal-Mart's liability for the continued publication of the poster and Wal-Mart's actual malice. This testimony becomes an elixir establishing liability for actual and punitive damages.

To the extent Wyke's testimony has any bearing at all – and it does not, it is whether Wal-Mart permitted the continued publication of the poster. *Cf.*, *Englezos v. News Press & Gazette Co.*, 980 S.W.2d 25, 35 (Mo. Ct. App. W.D. 1998) (Evidence that the defendant was negligent "in failing to further corroborate evidence from biased sources … supports the submission of actual damages; it does not provide a basis for submitting punitive damages.") Her testimony does not bear on whether Wal-Mart acted with actual malice. At most, her testimony established that at sometime she apprised store personnel she believed the poster was inaccurate, but store personnel with whom she spoke were unable to open the display case and remove the poster. (Tr. 433-34, 437-38)

It has been held that a newspaper does not act with actual malice in failing to corroborate allegations of criminal conduct from biased sources and in reporting inaccurate information obtained from other sources. *Englezos*, 980 S.W.2d at 35. By extension, a property owner does not act with actual malice where it takes reasonable efforts to prevent publication of unauthorized statements on its property, but then fails to either effect the immediate removal of a nondescript statement or to verify its accuracy.

In its opening brief, Wal-Mart argues that if this Court concludes that the failure to remove form of liability is consonant with Missouri law, this Court should further instantiate the principle that this form of liability does not afford a basis for punitive damages in the absence of clear and convincing evidence that defendant's continued publication of the defamatory statement was actuated by a specific intent to injure plaintiff's reputation. (Appellant's Substitute Br., pg. 60-61) Carolyn Kenney cavils that this argument has "no basis in law or reason," (Respondent's Substitute Br., pg. 95) but

points only to the proposition that "[i]f a party publishes a false statement, and that publication meets the existing standard for actual malice, then punitive damages should be allowed." (*Id.*, pg. 96) Of course, this unremarkable proposition can have no application here. Wal-Mart did not author or publish the poster. Nor is there even the suggestion Wal-Mart affirmatively decided to allow the poster to remain displayed. Where a defendant does not make or publish a defamatory statement, the imposition of punitive damages is contrary to sound public policy. *Cf. Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. 1996) (en banc) (Punitive damages are a "remedy … so extraordinary or harsh … applied only sparingly.")

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.

MAI 23.06(2) requires that in submitting the issue of publication to the jury the court "*describe [the] act such as 'published a newspaper article'*." The trial court erred in formulating the verdict director because its first paragraph does not describe the act that forms the basis for Carolyn Kenney's complaint. She chose to present to the jury the failure to remove form of defamation liability. (Tr. 1369-70) Therefore, she sought to impose liability on Wal-Mart for "continued publication" of the poster. *Dominick v. Sears, Roebuck & Co.*, 741 S.W.2d 290, 294 (Mo. Ct. App. E.D. 1987). In asking the jury whether "After September 3, 1996, Defendant displayed a poster," the trial court

failed to submit to the jury the act of publication for which Carolyn Kenney sought to impose liability. The word "display" means only to "show" or "exhibit." Therefore, the jury could conclude Wal-Mart published the poster simply by finding the poster was present in the display case after September 3, 1996. Instruction number six thus failed to instruct the jury of the need to determine whether Wal-Mart had by some act of commission or omission permitted the poster to remain displayed. Concomitantly, the trial court erred in failing to ask the jury whether Wal-Mart had published the poster. As Carolyn Kenney recognizes, it is only appropriate to incorporate "variations of the word 'display' *when that word describes the act of publication*." (Respondent's Substitute Br., pg. 100) (emphasis added)

Wal-Mart submitted MAI 23.06(2) as a verdict director. (Tr. 1392-93; L.F. 67, 86-87) Over Wal-Mart's objection, the trial court rejected Wal-Mart's submission in favor of Carolyn Kenney's modified verdict director. (Tr. 1336-91; L.F. 86-87) Wal-Mart made clear that the modified verdict director was erroneous because "[t]here is no cause of action in this state *for the mere display* of material claimed to be defamatory." (Tr. 1367) (emphasis added) What is more, Wal-Mart contended that Missouri law recognizes a cause of action for defamation only where there is "publication of defamatory information," which entails "*a willful, intentional act* with respect to the publication of defamation." (*Id.*, 1367-68) (emphasis added) The trial court, however, found this to be an appropriate case to adopt and apply section 577(2). (Tr. 1375-76)

Wal-Mart further argued that Missouri had not adopted section 577(2). Nevertheless, the trial court submitted a verdict director that failed to incorporate the

critical element that must be proven to establish liability for continued publication, that is, that Wal-Mart "intentionally and unreasonably" failed to remove the poster. Carolyn Kenney argues that Wal-Mart has failed to preserve this issue for appeal by failing to offer a jury instruction that incorporated this requirement. (Respondent's Substitute Br., pg. 101) She is mistaken. Wal-Mart made explicit its objections to the verdict director, which entailed its opposition to the application of section 577(2) and the submission of a verdict director that did not require an intentional act. (Tr. 1367, lines 15-25, 1368, lines 1-12, 1370, line 25, 1371, lines 1-20, 1375, lines 12-21) The issue was thus properly preserved. If this Court finds this an appropriate case in which to adopt section 577(2), the Court should remand this case to the trial court for a new trial so the issue may properly be presented to a jury.

Carolyn Kenney is also mistaken in her assertion that the phrase "After September 3, 1996" does not assume a disputed fact because"[t]he language merely asks the jury to determine if they <u>believe</u> that the described event occurred." (Respondent's Substitute Br., pg. 104) The phrase appears in the first paragraph of instruction number six, which submits the issue of publication to the jury. Thus, the only question that this paragraph poses is whether the poster had been "displayed." Because the word "displayed" is used in the paragraph there was no reason to specify a date. There is no temporal aspect to the question of whether Wal-Mart displayed a poster. And by incorporating this phrase in the first paragraph of instruction number six, the trial court necessarily placed undue emphasis on Wyke's testimony.

The trial court erred in incorporating the phrase "directly or indirectly contributed to cause damage" from MAI 19.01, which materially modified the last paragraph of MAI 23.06. (L.F. 95) By its own terms, MAI 19.01 applies only where the cause of action is negligence. MAI 19.01 has no application to an action for defamation. Defamation requires proof of actual damages. *E.g.*, *Nazeri,* 860 S.W.2d at 313. That is, Carolyn Kenney was required to show "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). Carolyn Kenney testified she had suffered mental anguish and injury to her reputation because of termination from Hallmark in 1996 and because of the contemporaneous broadcast of the Channel 41 news report. (Tr. 937-38, 959) Therefore, incorporating MAI 19.01 in instruction number six operated to effectively reintroduce the defamation per se rule that *Nazeri* repudiated. *Nazeri*, 860 S.W.2d at 313. On this record, the modification of the verdict director failed to submit to the jury the issue of whether the poster's publication 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 An Action For Defamation Requires Carolyn Kenney To Prove That The Allegedly Defamatory Statements In The Poster Were False.**

Where the issue of the truth of a defamatory statement is presented to the jury as an affirmative defense, the jury may more readily nullify the requirement that the

defamatory statement be false. Carolyn Kenney nonetheless contends that any error in the verdict director's formulation was cured because the jury was presented an instruction on punitive damages, so "the jury considered the issue of falsity in two instructions." (Respondents Substitute Br., pg. 131) For this proposition, she cites *Balderee v. Beeman*, 837 S.W.2d 309 (Mo. Ct. App. S.D. 1992). There the court held that "even if [an] instruction … should have hypothesized the … statements were false," the omission was "[p]resumably" cured by the jury's finding of malice implicit in its award of punitive damages." *Id*. at 327. The court's three-sentence analysis is hardly an authoritative guide for whether the failure of the trial court to properly instruct the jury on the issue of falsity affected the verdict. In deliberating on the propriety of an award of punitive damages, a jury is not instructed to consider the truth or falsity of a statement. Rather, the jury solely considers whether the defendant acted with actual malice. The punitive damages instruction did not cure the error in the formulation of the verdict director.

This Court should confirm that in all actions for defamation the plaintiff bears the burden of proving falsity. There is no sound reason to distinguish between media and non-media publishers. *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 … than it does to others ….") As Amicus Curiae observes, the public policy considerations arguing in favor of shifting to the plaintiff the burden of proving falsity apply with particular force to a publication concerning a missing child. (Br. Of Amicus Curiae, pg. 12)

In arguing the verdict director did not affect the case's outcome, Carolyn Kenney repeats the same fallacious argument that is the leitmotif of her brief - the poster falsely implies she kidnapped or took Lauren. (Respondent's Substitute Br., pg. 129) Putting aside the neutral character of its text, the most generous reading of the poster is that it implies Carolyn Kenney is in some manner involved in Lauren's concealment. And this is true. Carolyn Kenney's argument that Lauren was not kidnapped or taken from her mother is a non sequitur.

CONCLUSION

For the foregoing reasons and those set forth in Wal-Mart's opening brief, the Court should reverse the judgment and direct entry of judgment in favor of Appellant Wal-Mart Stores, Inc. In the alternative, the Court should reverse the judgment and remand this matter for a new trial on all issues.

Respectfully submitted,

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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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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 21st day of October, 2002 to:

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