SC 95175

IN THE SUPREME COURT OF MISSOURI

MARY ANN SMITH d/b/a SMITH KENNELS
Plaintiff-Appellant

vs.

THE HUMANE SOCIETY OF THE UNITED STATES
and
MISSOURIANS FOR THE PROTECTION OF DOGS
Defendants-Respondents

Appeal from the Circuit Court of Dent County, Missouri
Case No. 11DE-CC00004
The Honorable Ronald D. White

MARY ANN SMITH'S SUBSTITUTE APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES **PAGE**

MISCELLANEOUS **PAGE**

STATEMENT OF THE ISSUES

In their Joint Application for Transfer, Defendants listed the issues as follows:

1. Does name-calling in the midst of a political campaign – here, Defendants called Plaintiff the owner of a "puppy mill" as part of a campaign to urge Missouri voters to support a statewide public referendum on the "Puppy Mill Cruelty Prevention Act" – lose its First Amendment protection as a non-actionable statement of opinion where, as here, the speaker identifies the material upon which the opinion is based?

2. Should Missouri recognize the tort of false light invasion of privacy where the claimant affirmatively alleges that the offending statements are defamatory, *i.e.*, are capable of damaging claimant's reputation, or should the claimant be restricted to claims for defamation in such cases?

3. Even if Missouri allows a false light invasion of privacy claim where the claimant alleges that the offending statements are defamatory, is the author of such statements entitled to a privilege to comment on matters of legitimate public interest, here a referendum on a statewide ballot measure?

As will be explained in this brief, none of these questions are, in fact, presented here. As the court of appeals held, the reports, press releases and statement at issue implied the existence of other, non-disclosed facts. And rather than simple "name calling", Defendants' statements "implied verifiable factual information, not statements of

opinion." Opinion at 16. Furthermore, categorization of plaintiff's kennel as a "puppy mill" with the definitions utilized by Defendants in their reports, press releases, and statements, was and is a factual contention. The Court of Appeals opinion simply cannot be construed as sanctioning causes of action for defamation for "opinions."

As to the second "question", because the false light claim is based on implications, context, editing, omissions, and statements other than those asserted to be defamatory, there is no issue presented as to whether a claimant is restricted to claims for defamation where defamation lies. In addition, Defendants contend that there *is* no actionable defamation here, period, in which case there can be no duplication. Rather than argue this is a classic defamation claim, Defendants contend there is no defamation claim available to plaintiff.

Finally, as to the third point, Defendants are mixing elements of two different privacy torts, public disclosure of private facts and false light. Defendants also ignore the actual malice requirement adopted in Missouri for false light claims, which fully protects First Amendment interests and affords more protection than that of a defamation defendant alleged to have defamed a private individual.

The real questions here are will this Court follow the overwhelming majority of jurisdictions, including the Missouri Court of Appeals, in recognizing false light invasion of privacy where that claim does not present a "classic case" of defamation, and does meet all the elements of a false light claim; and will this Court, for the first time, adopt a wholesale defamation exemption for anything that might be labeled opinion and reject its

holding in *Nazeri v. Missouri Valley College*, 860 S.W.2d 303 (Mo. banc 1993) and the United States Supreme Court authority relied upon in that case.

JURISDICTIONAL STATEMENT

This is an appeal from an order and judgment entered on June 4, 2014 by the Honorable Ronald D. White, assigned to this case pending in the Circuit Court of Dent County, Missouri, granting Defendant Humane Society of the United States's Motion to Dismiss Plaintiff's Fourth Amended Petition with prejudice, which was joined in by Defendant Missourians for the Protection of Dogs. Plaintiff's suit against defendants alleged defamation and false light invasion of privacy.

On July 9, 2014, Plaintiff appealed to the Missouri Court of Appeals for the Southern District. On June 29, 2015, the appellate court reversed the trial court's judgment and remanded, finding that Plaintiff had pled a cause of action for defamation and false light invasion of privacy. On October 27, 2015, this Court accepted transfer after a timely request by Defendants on August 5, 2015 and has jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution to hear this appeal.

STATEMENT OF FACTS

Because the order appealed from is one granting a motion to dismiss with prejudice, (L.F. 141), the facts set forth here focus on plaintiff's allegations.

Plaintiff Mary Ann Smith d/b/a Smith's Kennel is a federal and state licensed facility where dogs are raised and bred. (L. F. 21, 48).

Plaintiff alleged Defendants The Humane Society of the United States (HSUS) and Missourians for the Protection of Dogs, acting in concert, authored a report released on October 5, 2010 entitled "Missouri's Dirty Dozen", which stated that Plaintiff's dog kennel was one of the "Dirty Dozen", listed "Mary Ann Smith, Smith's Kennel, Salem" as being among the "the worst puppy mills in Missouri", and stated that "Missouri's Dirty Dozen was selected as examples of some of the worst licensed kennels in the state, based on the number and severity of state and/or federal animal welfare violations." The report indicated that "one thing they [The Dirty Dozen] have in common is atrocious violations of basic humane standards for dogs and their care." (L. F. 21-22). Plaintiff also alleged that the Defendants, acting in concert, released a summary report and various press releases in connection with the report. (L. F. 22). The press release included the statement: "These puppy mills were *singled out from the hundreds of high-volume commercial breeders* in Missouri for repeatedly depriving dogs of the basics of humane care …". (L.F. 22-23). The release also stated that "[a]t puppy mills in Missouri, dogs are crammed into small and filthy cages, denied veterinary care, exposed to extremes of heat and cold, and given no exercise or human affection." (L.F. 23).

Plaintiff further alleged that Defendants, acting in concert, issued an "Update Report: Missouri's Dirty Dozen" on March 9, 2011, once again with press releases, which included a comment by HSUS's CEO that "The licensed puppy mills identified in this report have an undeniable record of flagrant disregard for even the most minimal humane care standards for dogs." (L. F. 24-25).

Copies of the reports, summary reports, and press releases were incorporated by reference into the Petition. (L. F. 22-27).

Plaintiff's claims sound in three counts. Count I is for defamation – negligence, Count II is for defamation – false statements, and Count III is for invasion of privacy – false light. (L. F. 25, 26-27, 28). The pleading sets forth statements which are alleged to be false and support a claim under Counts I and II, (L. F. 25, 27). Among the allegations was that the report had a section entitled "How we selected some of the worst kennels in Missouri" which falsely claimed a thorough investigation and that ***selections were "based upon the number and severity of state and/or federal animal welfare violations***." (L. F. 22, 25, 36). It was also alleged that plaintiff's kennel was falsely called a "puppy mill", a term that the court of appeals noted was defined by implication in the report. (Opinion at 16).

Plaintiff also asserted, with respect to Count III, that beyond the false statements, the reports and statements falsely implied that Plaintiff was "as bad as and engaged in the same conduct as the other kennels listed in the reports, which had more and/or more severe state and/or federal animal welfare violations," (L. F. 28), and "falsely implied that Plaintiff was a cruel and inhumane person." (L. F. 29). The reports and press

releases allegedly "placed Plaintiff before the public in a false light and attributed to her characteristics, conduct, or beliefs that are false" which are "highly offensive to a reasonable person." (L. F. 30). The pleadings contained additional details regarding the false implications and statements relied upon for the false light claim. (L. F. 28-32). As to the original report, it was alleged:

> [the "dirty dozen" report] falsely implied that Plaintiff had dogs who had developed interdigital cysts from being "forced to stand continually on wire flooring". The report also falsely implied that Plaintiff and her kennel "were singled out from the hundreds of high volume commercial breeders in Missouri for repeatedly depriving dogs of the basics of humane care, according to state and/or federal state inspection reports for each dealer," and falsely implied that Plaintiff's kennel was among the worst of the worst and repeatedly deprived dogs of the basics of humane care. It was also falsely implied that Plaintiff's kennel and dogs received little to no medical care, lived in squalid conditions with no exercise, socialization, or human interaction, and are confined inside cramped wire cages for life; dogs at Plaintiff's kennel are crammed into small cramped cages, denied veterinary care, exposed to extremes of heat and cold, and given no exercise or human affection. These statements further falsely implied that Plaintiff's kennel inspection "violations" were "horrific", and that the state and federal inspections reports of Plaintiff and her kennel "reveal[ed] shocking abuses and mistreatment of dogs". These statements were also made in public

without any acknowledgement of explanatory facts and circumstances which, when added to facts recited in the reports and press releases, would naturally tend to create a less objectionable public opinion of Plaintiff and her kennel. For example, no mention was made of various inspections of Plaintiff's kennel which indicated no violation of applicable state or federal animal welfare violations, and the quotes from the inspections were taken out of context and/or edited to make them sound more significant or ominous than they actually were. For all the reasons stated above, the statements described in paragraphs 5 and 6 of this petition created a false impression of Plaintiff and her kennel in the minds of members of the public and lead others to believe things about her and her kennel that are not true.

(L. F. 29-30). With respect to the update report, it was alleged as follows:

[The update report] also falsely implied that Plaintiff continued to have violations similar to those in the original "Dirty Dozen" report, issued in October 2010. It was also published without any acknowledgement of explanatory facts and circumstances which, when added to facts recited in the report, would naturally tend to create a less objectionable public impression of Plaintiff and her kennel. For example, no mention was made of various inspections of Plaintiff's kennel which indicated no violation of applicable state or federal animal welfare violations, and *the quotes from the inspection reports were taken out of context and/or edited to make them*

> *sound more significant or ominous than they actually were*. Defendant HSUS obtained 3 different pictures of the Bulldog they claim was "sick" in the Update Report. Two of the three photographs showed an active, alert healthy appearing dog. The third one showed the dog lying on a pillow, apparently half asleep. Defendants deliberately chose the third photograph to include in the report and excluded the other photographs in an effort to portray the dog, and Plaintiff, in as unfavorable a light as possible.

(L. F. 31).

Defendant HSUS filed a Motion to Dismiss Plaintiff's Fourth Amended Petition, in which Defendant Missourians for the Protection of Dogs joined. (L. F. 101-119; 123). Missourians for the Protection of Dogs also filed their own Motion to Dismiss. (L. F. 120-126). The trial court granted Defendant HSUS's Motion to Dismiss Plaintiff's Fourth Amended Petition for failure to state a claim and dismissed Plaintiff's Fourth Amended Petition with prejudice. (L. F. 141). It noted Missourians for the Protection of Dogs joinder in HSUS's motion and dismissed all claims against both Defendants, but did not rule on Missourians for the Protection of Dogs separate motion. Id.

On June 29, 2015 the appellate court reversed the trial court's judgment, concluding that Plaintiff had pled valid claims of defamation and false light invasion of privacy. (Op. at 1.).

On August 5, 2015, Defendants jointly applied for this court to accept transfer, which was sustained on October 27, 2015.

POINTS RELIED ON

POINT I

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FOURTH AMENDED PETITION WITH PREJUDICE FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER RULE 55.27(a)(6) BECAUSE PLAINTIFFS PLEADED FACTS WHICH IF TRUE ENTITLE PLAINTIFF TO RELIEF IN THAT COUNTS I AND II SET FORTH FACTS ESTABLISHING DEFENDANTS' PUBLICATION OF FALSE STATEMENTS OF FACT AND FALSE STATEMENTS IMPLYING KNOWLEDGE OF FACTS WHICH IDENTIFIED PLAINTIFF, DAMAGED PLAINTIFF'S REPUTATION, AND WERE PUBLISHED WITH THE REQUISITE DEGREE OF FAULT.

Milkovich v. Lorain Journal Co., et al., 110 S. Ct. 2695 (1990)

Nazeri v. Mo. Valley College, 860 S.W.2d 303, 306 (Mo. banc 1993)

Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 70 (Mo. banc 2000)

POINT II

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FOURTH AMENDED PETITION WITH PREJUDICE FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER RULE 55.27(a)(6) BECAUSE PLAINTIFFS PLEADED FACTS WHICH IF TRUE ENTITLE PLAINTIFF TO RELIEF IN THAT COUNT

III SET FORTH FACTS ESTABLISHING DEFENDANTS GAVE PUBLICITY TO MATTERS CONCERNING PLAINTIFF'S KENNEL THAT PLACED HER BEFORE THE PUBLIC IN A FALSE LIGHT WHICH WOULD BE HIGHLY OFFENSIVE TO A REASONABLE PERSON, WITH KNOWLEDGE OF OR RECKLESS DISREGARD OF THE FALSITY OF THE PUBLICIZED MATTER AND THE FALSE LIGHT IN WHICH PLAINTIFF WOULD BE PLACED.

Section 652(E) of the Restatement (Second) of Torts

Meyerkord v. Zipatoni Co., 276 S.W.3d 319, 323 (Mo.App. 2008)

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FOURTH AMENDED PETITION WITH PREJUDICE FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER RULE 55.27(a)(6) BECAUSE PLAINTIFFS PLEADED FACTS WHICH IF TRUE ENTITLE PLAINTIFF TO RELIEF IN THAT COUNTS I AND II SET FORTH FACTS ESTABLISHING DEFENDANTS' PUBLICATION OF FALSE STATEMENTS OF FACT AND FALSE STATEMENTS IMPLYING KNOWLEDGE OF FACTS WHICH IDENTIFIED PLAINTIFF, DAMAGED PLAINTIFF'S REPUTATION, AND WERE PUBLISHED WITH THE REQUISITE DEGREE OF FAULT.

STANDARD OF REVIEW

The trial court's grant of a motion to dismiss is reviewed *de novo*. *City of Lake Saint Louis v. City of O'Fallon*, 324 S.W.3d 756, 759 (Mo. banc 2010). In so doing, the

appellate court will consider only the grounds raised in the motion to dismiss and will not consider matters outside the pleadings. Id.; citing *Brennan By and Through Brennan v. Curators of the Univ. of Mo.,* 942 S.W.2d 432, 434 (Mo. App.1997). The court assumes that all of the plaintiff's allegations are true and liberally grants to the plaintiff all reasonable inferences from the alleged facts. *Lebeau v. Commissioners of Franklin County, Missouri,* 422 S.W.3d 284, 288 (Mo. banc 2014). The petition is reviewed "in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." *City of Lake Saint Louis,* 324 S.W.3d at 759. Courts do not weigh the factual allegations contained in the petition to determine whether they are credible or persuasive. *Nazeri v. Mo. Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993). If a petition states *any* set of facts which, if proved, entitles the petitioner to relief, it should not be dismissed for failure to state a claim. *Martin v. City of Washington*, 848 S.W.2d 487, 489 (Mo. banc 1993).

ARGUMENT

In Count I of her fourth amended petition, Plaintiff asserted a claim of defamation based upon negligence against both defendants, while in Count II she asserted that both defendants had knowingly or recklessly defamed her with false statements. (L. F. 25-28).

The elements of a defamation claim under Missouri law are: "1) publication, 2) of a defamatory statement, 3) that identifies the plaintiff, 4) that is false, 5) that is published with the requisite degree of fault, and 6) damages the plaintiff's reputation." *Overcast v. Billings Mut. Ins. Co.,* 11 S.W.3d 62, 70 (Mo. banc 2000). The requisite degree of fault for a private figure, like Plaintiff, is negligence. Id. This is true even

when the subject of the statement is a matter of public concern. *Englezos v. The Newspress And Gazette Company*, 980 S.W.2d 25, 31 (Mo. App. 1998).

Defendant Humane Society of the United States' motion to dismiss Plaintiff's fourth amended petition under Rule 55.27(a)(6) for failure to state a claim, in which Defendant Missourians for the Protection of Dogs joined, did not assert that plaintiff failed to allege any of the elements of a claim for defamation except to the extent that its "opinion" arguments constitute a claim that Plaintiff failed to allege "statements". It contended that the statements alleged are "absolutely privileged" as statements of opinion and constituted inherently subjective "rankings and grades". (L. F. 102-109; 123). With respect to Counts I and II, those are the only issues raised in the motion to dismiss and therefore the only issues before this court. 324 S.W.3d at 759.

However, there is no First Amendment Constitutional protection from defamation claims attached to comments simply because they might be categorized as an "opinion". As the United States Supreme Court in *Milkovich v. Lorain Journal Co., et al.*, 110 S. Ct. 2695 (1990) said:

> We do not think … *Gertz* [*v. Robert Welch, Inc.*, 94 S. Ct. 2997 (1974)] was intended to create a wholesale defamation exemption for anything that might be labeled "opinion"…. Not only would such an interpretation be contrary to the tenor and context of the passage [in *Gertz*], but it would also ignore the fact that expressions of "opinion" may often imply an assertion of objective fact.

Id. at 2705. The Court went on to illustrate the point as follows: "If a speaker says, 'in my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth." Id. at 2705-6. Citing Judge Friendly with approval, the Court concluded "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" Id. The Court then summed up its determination of the Constitutional issues presented:

> We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment. The dispositive question in the present case then becomes whether a reasonable fact finder could conclude that the statements imply an assertion [of perjury].

Id. at 2707.

The United States Supreme Court has declared that "there is no constitutional value in false statements of fact." *Gertz,* 94 S. Ct. at 3007. See also *Hustler Magazine v. Falwell,* 485 U.S. 46, 52, 108 S. Ct. 876, 880 (1988)("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the market place of ideas…."; *Herbert v. Lando,* 441 U.S. 153, 171, 99 S. Ct. 1635, 1646 (1979)("Spreading false information in and of itself carries no First Amendment credentials.").

Furthermore, the Court in *Milkovich* reiterated that there are public policy considerations in defamation actions beyond the First Amendment:

> [T]here is also another side to the equation; we have regularly acknowledged the 'important social values which underlie the law of defamation,' and recognized that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation."

Id.

The Missouri Supreme Court in *Nazeri v Missouri Valley College*, 860 S. W. 2d 303, 314 (Mo. banc 1993), following *Milkovich*, stated as follows:

> The United States Supreme Court, however, has rejected the notion that there is a wholesale defamation exemption for anything that might be labeled opinion, noting that expressions of opinion may often imply an assertion of objective fact. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18, 110 S.Ct. 2695, 2705, 111 L.Ed.2d 1 (1990). The test to be applied to an ostensible opinion is whether a reasonable fact finder could conclude that the statement implies an assertion of objective fact. *Id*. at 21, 110 S.Ct. at 2707; see also *Benner v. Johnson Controls, Inc.*, 813 S.W.2d 16, 20 (Mo.App.1991). 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. Whether the speaker himself subjectively believed the statement is ordinarily not a factor in establishing the defamatory character of the statement, although proof of subjective falsity

may serve to establish malice where that is required for recovery. *Milkovich*, 497 U.S. at 20 n. 7, 110 S.Ct. at 2706 n. 7.

See also *Overcast v. Billings Mutual Insurance Co.*, 11 S.W.3d 62, 73 (Mo. banc 2000).[1]

Interestingly, as recognized in *Nazeri*, 860 S. W.2d at 314, n. 6, the United States Supreme Court has not only rejected a privilege based upon categorization of a comment as an "opinion", 110 S. Ct. at 2705, but observed that purported opinions may defame "[e]ven if the speaker states the facts upon which he bases his opinion, **if those facts are either incorrect or incomplete, *or if his assessment of them is erroneous…"*** Id. at 2706. The "facts" in Defendants' statements were incorrect, incomplete, and erroneously assessed and presented.

As demonstrated above the real question is can the Plaintiff prove the facts affirmatively stated or implied about the plaintiff are false, regardless of categorization as "opinion". The "Dirty Dozen" report and associated statements should be viewed in their

[1] *Nazeri* does include the comment that "the First Amendment's guarantee of freedom of speech makes expressions of opinion absolutely privileged", 860 S.W. 2d at 314, but that language is followed by the quotes above, recognizing the limitations of any so-called "opinion" privilege and the fallacy of any analysis that simply looks at whether something could be labeled "opinion". To the extent that litigants may attempt to grasp onto this language without acknowledging or understanding those limitations, their argument starts from a false premise and goes nowhere.

entirety to evaluate the defamatory statements branding Plaintiff's kennel as one of "Missouri's Dirty Dozen" and their associated implications of undisclosed material facts. The introductory paragraphs, at a minimum, claim that a comprehensive investigation was conducted by Defendants and imply that they had reviewed facts not disclosed in the report:

> **Researchers at The Humane Society of the United States (HSUS) have spent weeks poring over state and federal inspection reports, investigators' photographs, and enforcement records received via the Freedom of Information Act to compile a list of some of the worst puppy mills in Missouri, known as "Missouri's Dirty Dozen"** …. One thing they have in common is atrocious violations of basic humane standard for the dogs in their care.

(L. F. 36). As pled in the Fourth Amended Petition, the entire publication suggests that after a thorough investigation, and a considered, objective process, Plaintiff ran one of the twelve worst "puppy mills" in the state and committed atrocious violations of basic humane standards on its animals. This fact, whether affirmatively stated or implied, is patently untrue as alleged in the petition.

The report indicates that Defendants' categorization of Plaintiff's kennel as one of the "dirty dozen" is supported by objective facts within the possession of the Defendants and is based upon facts, some of which are undisclosed, that can be proven true by Defendants. Readers could justifiably infer, as apparently intended by Defendants, that the disclosed and undisclosed facts and documentation would provide objective factual

support to the naming of Plaintiff as a "puppy mill" and among the worst licensed kennels in the state. Defendants did not expect readers to duplicate its apparently exhaustive investigation to learn the missing facts for themselves.

It is evident that not all of the facts that purportedly were the basis of naming the "Dirty Dozen" were set forth in the report. For example, only a few heavily edited and selected facts concerning the kennels named in the report were stated. The facts allegedly obtained by Defendant concerning the hundreds of other kennels in the State of Missouri to which the named kennels were supposedly compared were not mentioned. Defendants indicate that among all licensed kennels in Missouri, Plaintiffs kennel had more or more severe state and federal animal welfare violations than at least the majority of other kennels and that they obtained and considered those undisclosed records of other kennels which were not included in the report for independent verification by the reader of the publication. This point is inarguable, and relies not solely on implications, but also on HSUS's statement that its "researchers" "spent weeks poring over state and federal inspection reports, investigators' photographs, and enforcement records received via the Freedom of Information Act to compile a list of some of the worst puppy mills in Missouri, known as "Missouri's Dirty Dozen". (L. F. 36). As specifically alleged in the petition, in the press release accompanying release of the report, Defendants stated that plaintiff's was among the "puppy mills" "singled out from the hundreds of high-volume commercial breeders in Missouri for repeatedly depriving dogs of the basics of humane car, such as food, shelter from the heat and cold, and/or basic veterinary care…." (L. F. 29, 67).

Here, as in *Nazeri*, "[t]he remarks *pleaded in the petition* consist of outright expressions of fact and ostensible expressions of opinion which very strongly imply underlying facts", and there is no First Amendment protection prohibiting the defamation claim. 860 S.W.2d at 314.

In its motion to dismiss, HSUS relied heavily on *Castle Rock Remodeling, LLC v. Better Business Bureau of Greater St. Louis*, 354 S.W.3d 234 (Mo. App. 2011), and attempted to categorize its defamatory statements as only a subjective ranking. However, the case here does not involve a simple rating system like in *Castle Rock*. In upholding the dismissal of the plaintiff's petition in *Castle Rock,* the court was careful to note that the Better Business Bureau affirmatively stated that "BBB's rating of a business reflects the "BBB's opinion about the business and BBB's judgment." Id. at 242-3. No such disclaimers exist in Defendants' report. Indeed, the report fails to state that the matter is only the Defendants' opinion. Rather, it implies that the underlying objective facts, both disclosed and undisclosed, support its statement about the Plaintiff as one of the twelve worst "puppy mills" in Missouri. Comparing the subjective BBB grade and its disclaimers at issue in *Castle Rock* with the claimed investigation here of all kennels in Missouri implying an effort based on objective facts to find the worst of the worst "puppy mills" is an exercise in attempting to force a round peg into a square hole. The whole stated premise of its report, which claimed a thorough investigation, including "researchers" spending "weeks poring over state and federal inspection reports", (L.F. 36), a "painstakingly documented report", (L.F. 70), and that selections were "based upon the number and severity of state and/or federal animal welfare violations," (L. F. 36),

was an objective fact based listing of offenders. How can this *not* be read as implying additional, undisclosed facts? Furthermore, **either Plaintiff had more or more severe violations of those regulations, as stated in the report, or she did not. And she was either selected because of that, as claimed in the report, or she was not. These statements can be proven or disproven.** In fact, counsel for defendant HSUS admitted that this statement about the basis for selection was not true with respect to Mrs. Smith in oral argument before the court of appeals. He claimed she was selected because her son, Jason Smith, was a Missouri State Representative who opposed Defendants' ballot initiative. It was politics, in which Mrs. Smith herself was not involved, which led to her being listed in the "Dirty Dozen": not the "number and severity" of her violations. The language of the report does not suggest to the reader that this was simply a matter of HSUS's opinion. And there is little question that the challenged statements could reasonably be "interpreted as stating actual facts about the [plaintiff]." 357 S.W.2d at 242. It is very evident from the numerous claims regarding the investigation that Defendants *wanted* readers to believe that these statements were not just opinions, but "painstakingly documented", "undeniable" (L.F. 68), and absolutely factual.

As the court of appeals noted, the term "puppy mill", which Defendants simply shrug off as "name-calling in the midst of a political campaign" (Joint Application for Transfer, at page 1), is defined in the context of the report and press releases.[2] For

[2] As even the case most relied upon by Defendants acknowledges, a court "must examine the totality of the circumstances to determine whether the ordinary reader would have

example, the press release on October 5, 2010, issued with the report, stated: "At puppy mills in Missouri, dogs are crammed into small and filthy cages, denied veterinary care, exposed to extremes of heat and cold, and given no exercise or human affection." (L.F. 69). Puppy mills according to Defendants are places with these conditions. By calling Mrs. Smith's kennel a "puppy mill", Defendants were telling the public that all these conditions existed at her facility. They did not, a fact which can be proved.

In sum, Defendants do not assert that Plaintiff failed to plead any element of defamation. Rather, the entire basis for their motion is that the "Missouri's Dirty Dozen" reports and press releases were mere opinion not susceptible to defamation claims. This is categorically untrue, both factually and legally, and the facts pled in the Fourth Amended Petition, which must be taken as true, clearly lay out a claim for defamation under Missouri law.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTIONS TO DISMISS PLAINTIFF'S FOURTH AMENDED PETITION WITH PREJUDICE FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER RULE 55.27(a)(6) BECAUSE PLAINTIFFS PLEADED FACTS WHICH IF TRUE ENTITLE PLAINTIFF TO RELIEF IN THAT COUNT III SET FORTH FACTS ESTABLISHING DEFENDANTS GAVE PUBLICITY TO MATTERS CONCERNING PLAINTIFF'S KENNEL THAT

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treated the statement as opinion." *Castle Rock Remodeling, LLC v. Better Business Bureau of Greater St. Louis,* 354 S.W.3d 234, 241 (Mo. App. 2011).

PLACED HER BEFORE THE PUBLIC IN A FALSE LIGHT WHICH WOULD BE HIGHLY OFFENSIVE TO A REASONABLE PERSON, WITH KNOWLEDGE OF OR RECKLESS DISREGARD OF THE FALSITY OF THE PUBLICIZED MATTER AND THE FALSE LIGHT IN WHICH PLAINTIFF WOULD BE PLACED.

STANDARD OF REVIEW

The trial court's grant of a motion to dismiss is reviewed *de novo*. *City of Lake Saint Louis v. City of O'Fallon,* 324 S.W.3d 756, 759 (Mo. banc 2010). In so doing, the appellate court will consider only the grounds raised in the motion to dismiss and will not consider matters outside the pleadings. Id.; citing *Brennan By and Through Brennan v. Curators of the Univ. of Mo.,* 942 S.W.2d 432, 434 (Mo. App.1997). The court assumes that all of the plaintiff's allegations are true and liberally grants to the plaintiff all reasonable inferences from the alleged facts. *Lebeau v. Commissioners of Franklin County, Missouri,* 422 S.W.3d 284, 288 (Mo. banc 2014). The petition is reviewed "in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." *City of Lake Saint Louis,* 324 S.W.3d at 759. Courts do not weigh the factual allegations contained in the petition to determine whether they are credible or persuasive. *Nazeri v. Mo. Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993). If a petition states *any* set of facts which, if proved, entitles the petitioner to relief, it should not be dismissed for failure to state a claim. *Martin v. City of Washington*, 848 S.W.2d 487, 489 (Mo. banc 1993).

ARGUMENT

Section 652(E) of the Restatement (Second) of Torts spells out the elements of the tort of false light invasion of privacy as follows:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

According to the comments in the Restatement (Second) of Torts, "to constitute a tort of invasion of privacy by publicity which places one in a false light in the public eye, there must be established as one of the elements of the tort, that the publicity was false, that is, it depicts the plaintiff as something or someone which he or she is not. **In other words, the publicity attributes to the plaintiff characteristics, conduct, or beliefs that are false, and so the plaintiff is placed before the public in a false position.**" Rest. 2nd Torts § 652E. The Restatement further provides:

> [I]t is not, however, necessary to the action for invasion of privacy that the plaintiff be defamed. It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position.

> When this is the case and the matter attributed to the plaintiff is not defamatory, the rule here stated affords a different remedy, not available in an action for defamation.

Rest. 2nd Torts § 652E.

A cause of action for false light invasion of privacy was recognized in Missouri, utilizing those Restatement elements, in *Meyerkord v. Zipatoni Co.*, 276 S.W.3d 319, 323 (Mo.App. 2008). The court stated:

> [W]e hold that a person who places another before the public in a false light may be liable in Missouri for the resulting damages. **In recognizing this cause of action, we note that as a result of the accessibility of the internet, the barriers to generating publicity are quickly and inexpensively surmounted. Moreover, the ethical standards regarding the acceptability of certain discourse have been diminished. Thus, as the ability to do harm grows, we believe so must the law's ability to protect the innocent.**

276 S.W.3d at 323 (Emphasis added)(Citations omitted).[3] The court in *Meyerkord* noted that "the majority of jurisdictions addressing false light claims have chosen to recognize

[3] If anything, "public discourse" has become more course and less civil since *Meyerkord* mentioned this growing concern. Those disappointed in this development can look to false light as one way to put the brakes back on cyberbullying and no holds barred *ad*

false light as a separate actionable tort." Id. at 323-4. It cited 28 States and the District of Columbia as among that majority. (See *West v. Media General Convergence, Inc.,*53 S.W.3d 640 (Tenn. 2001) and the 28 additional cases cited in *Meyerkord* footnote 1.) In footnote 2, it cited cases from 8 States as constituting the minority refusing to recognize the tort of false light invasion of privacy. Since *Meyerkord*, Hawaii, Alabama, New Hampshire, and Nevada have joined that majority. 109 Haw. 520, 535, 128 P.3d 833, 848 (2006)("Moreover, we believe the interests of an individual in securing his or her privacy is a primary state concern and that a claim for false light invasion of privacy is 'deeply rooted in local feeling and responsibility'"); *Tanner v. Ebbole,* 88 So.3d 856 (Ala. 2011); *Laramie v. Stone,* 999 A.2d 262 (N.H. 2010)(affirming in part judgment for false light invasion of privacy); *Franchise Tax Bd. of Cal. v. Hyatt,* 335 P.3d 125, 141 (Nev. 2014)("We, like the majority of courts, conclude that a false light cause of action is necessary to fully protect privacy interests, and we now officially recognize false light invasion of privacy as a valid cause of action along with the other three privacy causes of action that this court has adopted.")[45]

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hominum attacks on the internet. For information on this topic, see the government's "stopbullying.gov" website.

[4] It does not appear that any State has joined the minority since *Meyerkord* was decided on December 23, 2008.

[5] For an excellent and thorough discussion of the important policy considerations supporting recognition of false light, see "*Let there be false light: resisting the growing*

The court in *Meyerkord* noted that "[w]e have acknowledged this Restatement classification [of four different privacy torts], but have yet to recognize a cause of action for false light invasion of privacy", citing *Sullivan v. Pulitzer Broadcasting Co.,* 709 S.W.2d 475 (Mo. banc 1986). While there is now a clear consensus that false light invasion of privacy should be recognized, with only a small minority of jurisdictions holding otherwise, the Court in *Sullivan* considered the issue of false light invasion of privacy at a time when it appears only 12 of the 33 jurisdictions eventually adopting the tort had done so, and two jurisdictions, North Carolina, as noted in the opinion, and West Virginia, had recently declined to adopt false light. Nonetheless, this Court did not reject false light. Instead, it left the door open for an appropriate case in the future which would justify recognition of the tort of "false light invasion of privacy", while noting that the case before it was a "classic defamation action" in which there was no claim "that another has created a false impression in the public eye." Id. at 480-481.

Meyerkord followed this Court's guidance in *Sullivan* and addressed the "ancillary issues" mentioned there in such a manner as to minimize concerns about duplication of the defamation cause of action and first amendment tension, the issues mentioned by jurisdictions rejecting false light. Id. at 324. It noted the distinctions between false light and defamation, in particular false light's unique focus on the interest of a person to be

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trend against an important tort", Nathan Ray, 84 Minn. L. Rev. 713 (2000). Of course, as noted above, that trend against recognition ground to a halt, and momentum continues with the majority view adopting the cause of action.

left alone.[6] It also noted that in defamation, where "the issue is truth or falsity, the marketplace of ideas provides a forum where the answer can be found, while in privacy cases, resort to the marketplace merely accentuates the injury." To address an invasion of the right to be left alone in the marketplace of ideas, the plaintiff would have to make

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[6] One other distinction minimizing the duplication between defamation and false light, frequently noted among cases adopting false light, is that false light requires *publicity*, not just publication. Comment *a* to Section652E of the Restatement (Second) of Torts refers back to Comment *a* to Section 652D, which states:

> "Publicity", as it is used in this Section, differs from "Publication," as that term is used in § 577 in connection with defamation. "Publication," in that sense, is a word of art, which includes any communication by the defendant to a third person. "Publicity," on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.
>
> Thus it is not an invasion of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons.

herself *more* public and increase the invasion of her privacy. How is someone like Mrs. Smith supposed to take on the well funded publicity machine of HSUS, and if she could how does that remedy the assault on her right to be left alone? *Meyerkord* also addressed concerns about tensions between the First Amendment and invasion of privacy by adopting an actual malice standard that goes *beyond* that of defamation of private individuals. *Overcast,* 11 S.W.3d at 70.

This Court has had several opportunities to reject *Meyerkord* and false light invasion of privacy, most recently in *Farrow v. Saint Francis Medical Center*, 407 S.W.3d 579 (Mo. banc 2013), but has not done so. In *Farrow*, the court explained that one of its reasons for not recognizing false light in *Sullivan* was its view that the false light claim there was "the plaintiff's attempt to … circumvent the shorter statute of limitations period for defamation." Id. at 600-601. This Court also indicated that where a viable claim for defamation exists, relief should not also be available under false light. It distinguished, rather than criticized, *Meyerkord* by noting that the claim before it in *Farrow*, like that in *Sullivan*, was "akin to a classic defamation claim rather than a false light invasion of privacy claim." Id. at 602. The plaintiff's employment related claim in *Farrow*, unlike Mrs. Smith's, had nothing to do with being left alone.

The court of appeals correctly applied *Meyerkord* here. Plaintiff pled factual averments sufficient to establish each of the false light elements in her Fourth Amended Petition, which the Court must take as true for purposes of this appeal. Indeed, the Plaintiff pled that the Defendants' "Missouri's Dirty Dozen" report "placed Plaintiff before the public in a false light and attributed to her characteristics, conduct, or beliefs

that are false." (L. F.30). Plaintiff also pled that "[t]he false light in which Plaintiff was placed by the reports … was and is highly offensive to a reasonable person." Id. See also (L. F. 32). Finally, Plaintiff alleged that Defendants "had knowledge of or acted in reckless disregard as to the falsity in the publicized matters … and the false light in which Plaintiff was placed, and acted with knowledge that they misrepresented Plaintiff's activities, characteristics, and beliefs …" (L. F. 30, 32). As such, both elements have been adequately pled under Missouri law.

Defendants' challenge to Count III is based on their incorrect assertion that Plaintiff's claim for false light rests solely on defamatory statements alleged in the "Missouri's Dirty Dozen" report. Plaintiff's allegations in Count III set forth instead a false light claim based on the the false implications of the context of the report, not particular false statements. In other words, the misleading context of the "Dirty Dozen" reports and press releases attributes to the Plaintiff characteristics, conduct, or beliefs that are false, and thus Plaintiff and her dog kennel were placed before the public in a false position**.** This is true even if the factual statements in the report are, taken individually, accurate.

Plaintiff's petition is lengthy, specific and detailed, and will not be repeated *verbatim* as the court can read it in the legal file, but some examples of the alleged implications from the context of the reports are appropriate. Plaintiff alleges that the report falsely implied Plaintiff was as bad as the other kennels listed in the "Missouri's Dirty Dozen" report, which had more and or more severe state and or federal animal welfare violations. (L. F. 30-31). Moreover, Plaintiff alleges Defendants included

photographs of dogs not owned by Plaintiff which appeared sick or mistreated and kennels other than Plaintiff's which left dogs exposed, were rickety looking, not well constructed, and not as nice, spacious or well maintained as Plaintiff's kennel, thereby falsely implying that her dogs and kennel resembled those shown. Id. The report was alleged to have falsely implied, although it did not directly state, that Plaintiff had dogs who had developed interdigital cysts from being "forced to stand continually on wire flooring" (L. F. 29, 48). The update report was alleged to have falsely implied that "plaintiff continued to have violations similar to those in the original "Dirty Dozen" report". (L. F. 31). As alleged, the statements in question "falsely implied that at Plaintiff's kennel "dogs received little to no medical care, lived in squalid conditions with no exercise, socialization, or human interaction, and are confined inside cramped wire cages for life…." (L. F. 29).

Additional alleged facts, which must be taken as true, are that the Defendants published the report without any acknowledgement of explanatory facts and circumstances which, when added to facts recited in the report, would naturally tend to create a less objectionable public impression of Plaintiff and her kennel. (L. F. 30-31). For example, no mention was made of various inspections of Plaintiff's kennel which indicated no violation of applicable state or federal animal welfare violations, and the quotes from the inspection reports were alleged to have been deliberately taken out of context and or edited to make them sound more significant or ominous than they actually were. Id.

Plaintiff was, in these reports and other statements, lumped with breeders that had "over 500 pages of Animal Welfare Act violations", disposed of "unwanted dogs by 'clubbing the dogs'", failed to "discover and dispose of animals that had died", (L. F. 37), kept dogs who were "very thin with ribs prominent, tucked abdomen, and palpable hip bones and vertebrae" (L. F. 63), and kept dogs in "stacked in cages that allow feces and urine to rain down on the dogs in lower tiers." (L. F. 64). This inappropriate association of Plaintiff with these other breeders clearly "attributes to the Plaintiff characteristics, conduct, or beliefs that are false" and presents a classic false light claim. It does not rely on the falsity of specific claims expressly made about Plaintiff which are incorporated into the defamation counts. These allegations are not in Plaintiff's Count I or II, and Count III does not just repeat the same defamatory statements that form the basis for the defamation claims. She is not simply seeking recovery for untrue statements encompassed in her defamation claims.

That a false light claim can be based upon associations made in or suggested by the statements in questions is well established. "Associating a person with activities repugnant to him … is a common way of casting someone in a false light." *Sullivan v. Conway*, 157 F.3d 1092, 1098-9 (7th Cir. 1998). The association can be expressly made or implied, as in *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985). There, an actress was found to have a cause of action for false light against a "provocative" magazine which published nude photographs of her taken for a different magazine, because the appearance of the photographs in Hustler magazine implied that she was the kind of person willing to be shown naked in the vulgar setting of that

publication. See, in particular, 769 F.2d at 1136 and 1138. Plaintiff's association here in Defendants' statements with those who would starve or club dogs, among others, likewise wrongfully attributes to plaintiff characteristics, conduct, or beliefs that are repugnant to her and is similarly an appropriate basis for a false light claim.

It is also important to point out that the ultimate purpose behind a false light claim is to protect the interest of a "person's right to be let alone." *Meyerkord*, 276 S.W.3d at 324. The court further explained, "[W]here the issue is truth or falsity, the marketplace of ideas provides a forum where the answer can be found, while in privacy cases, resort to the marketplace merely accentuates the injury." *Id*. at 325 (Emphasis added). Here, Plaintiff was a private person running her dog kennel business. Defendants yanked Plaintiff out of her rural Missouri home into the limelight. In Count III she claims damage to "her right to be left alone". (L. F. 32-33). She is not claiming damage to her reputation with respect to the false light claim.[7] Id.

Plaintiff has explained above how Defendants' argument that Plaintiff is trying to claim both false light and defamation for the same statements is inaccurate and a misrepresentation of the pleadings. Plaintiff's claims can both be brought and are not

[7] HSUS in its motion to dismiss noted that although plaintiff did not claim damage to her reputation in Count III, she alleged the loss of business associations. This claim is related to special economic business loss damages, not a claim for compensation simply for damage to reputation. Claims for false light may seek recovery for "special damage of which the invasion is a legal cause." Rest. 2d TORTS, §652H.

identical. They assert different damages and depend on different actions of Defendants for liability. However, there is another fundamental flaw in Defendants' attempt to avoid liability by contending that defamation and false light are simply restatements of the same claim: Defendants cannot avoid liability on both on that basis.

Defendants are trying to have it both ways regarding defamation and false light. First, they contend that Plaintiff does not have a defamation claim because the alleged statements were not of fact but of opinion. In other words, she has failed to plead a claim for defamation. Then they turn right around and argue that Plaintiff cannot have a false light claim because she ***has*** pled a claim based on defamatory statements. If Defendants' argument that the alleged false statements are not defamatory prevails, then her false light claim is clearly not foreclosed in that Plaintiff has adequately pled that the report placed her before the public in a false position, and she is not duplicating the remedy provided by a claim for defamation. **Both arguments cannot prevail. They are absolutely inconsistent.**

Ironically, this argument by Defendants that the individual statements are not actionable in defamation, helps contrast the two causes of action. Defendants themselves have distinguished them.

Defendants' other challenge to Count III consists of an attempt to graft a "lack of legitimate public interest" exception onto claims for false light invasion of privacy. However, the authority they rely on predates the recognition of the tort of false light invasion of privacy in *Meyerkord* and mixes the elements of various actions for invasion of privacy.

"Invasion of Privacy" is the general term used to describe four different torts, each of which has distinct elements which must be proved. *Buller v. The Pulitzer Publishing Co.*, 684 S.W. 2d 473, 480-1 (Mo. App. 1984). One of those torts is "unreasonable publicity given to the other's private life", which is not at issue in this case where Plaintiff asserts "publicity that unreasonably places the other in a false light before the public." The elements of unreasonable publicity given to another's private life are set forth in Restatement (Second) of Torts, §652A as follows:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) *is not a matter of legitimate concern to the public.*

(Emphasis added.) Thus, that particular invasion of privacy tort includes as an element that the matter publicized not be a matter of legitimate public concern, in contrast to the tort in question here, false light invasion of privacy, which does not contain that element. The absence of that "not a matter of legitimate concern to the public*"* requirement in the elements of false light invasion of privacy is telling, and indicates that Defendants' attempt to graft it onto the Restatement elements should be rejected.

The case principally relied upon by Defendants in this regard, *Hagler v. The Democrat-News, Inc.*, 699 S.W.2d 96 (Mo. App. 1985) predates *Meyerkord*, where the tort of false light invasion of privacy was first recognized, utilizing the elements set out in the Restatement, as well as the United States Supreme Court decision in *Milkovich* and

the Missouri Supreme Court decisions in Sullivan v. Pulitzer Broadcasting Co., 709 S.W.2d 475 (Mo. banc 1986) and *Nazeri*. Futhermore, the authority *Hagler* relies on considers the disclosure of private facts invasion of privacy tort, which as noted has lack of legitimate public concern as a specific element. Interestingly, one of the cases cited in *Hagler*, Buller v. Pulitzer Publishing Co., 684 S.W.2d 473, 482-3 (Mo. App. 1984) discusses both a disclosure of private facts and false light claim, and only discusses the "legitimate public interest" with respect to the disclosure of private facts count. This Court has indicated that *Hagler's* applicability to false light claims is questionable because "the theory of recovery sounds more like 'public disclosure of private facts' than a 'false light' invasion of privacy." *Sullivan,* 709 S.W.2d at 478. Plaintiffs agree. *Hagler* found the necessity of lack of public interest in the matter publicized in the context of a claim for public disclosure, where that is a specific element, and not in the context of a true false light claim, where there is no such requirement.

In summary, false light and disclosure of private facts are two different torts, although both are types of "invasion of privacy", and they have distinct elements. One of the elements of disclosure of private facts, as might be expected, is that the facts be private, not matters of public interest. No such element is required or appropriate for false light, where, unlike disclosure of private facts (where the facts need not be false but must be private), the key is whether the Defendant placed Plaintiff in a false light highly offensive to a reasonable person, and did so with knowledge or reckless disregard.

Finally, Defendants challenge the validity of false light claims as contrary to the First Amendment. This issue has been considered and addressed by the courts adopting

the tort of false light. Defendants' argument has also been rejected by the United States Supreme Court. See *Time, Inc. v. Hill,* 385 U.S. 374, 87 S. Ct. 534 (1967); *Cantrell v. Forest City Publishing Co., et al.,* 419 U.S. 245, 95 S. Ct. 465 (1974). As specifically held in *Meyerkord,* the Restatement elements for false light, as written, pass Constitutional muster and do not improperly invade First Amendment protections on speech. 276 S.W.3d at 324-325. The "actual malice" standard in the Restatement "strikes the best balance between allowing false light claims and protecting First Amendment rights." Id. And if the "First Amendment does not require the states to require proof of actual malice to impose liability for defamation involving a private plaintiff, *whether or not the issue is one of public concern or interest",* 980 S.W.2d at 31, there is no reason to conclude it requires it as part of a false light claim, which *does* contain an actual malice standard and therefore affords the defendant *more* protection for its comments.

For all the reasons stated above, when Count III is read in its entirety, it is clear that Plaintiff has adequately pled averments of fact, which must be taken as true, which satisfy the elements of false light invasion of privacy. The "Missouri's Dirty Dozen" report, press releases, and update created a false impression of Plaintiff and her kennel in the minds of members of the public and led others to believe things about her and her kennel that were not true. The end result is that Plaintiff's privacy has been invaded, her history, activities, and beliefs have been misrepresented, and her right to be left alone has been compromised.

CONCLUSION

For the above reasons, Plaintiffs respectfully request that this Court reverse and remand this case for further proceedings after finding the trial court erred in dismissing plaintiff's fourth amended petition.

Respectfully Submitted,

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CERTIFICATION OF COMPLIANCE WITH RULE 84.06(c)

The undersigned hereby certifies, pursuant to Rule 84.06(c), that:

1. This brief includes the information required by Rule 55.03, including the undersigned's address, Missouri Bar number, telephone number, fax number, and electronic mail address;

2. This brief complies with the limitations contained in Rule 84.06(b);

3. This brief, including the certificate of service, this certificate, and the signature block, contains 10,006 words according to the word-processing system used to prepare the brief; and

4. This brief contains 946 lines of type according to the line count of the word-processing system used to prepare the brief.

5. Microsoft Word was used to prepare Appellants' brief.

6. This brief has been scanned for viruses and is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that a copy the foregoing brief was served via the court's electronic filing system this 16th day of December, 2015, and served upon the following:

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