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 REPLY BRIEF

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I. Introduction and general reply.

The briefs of defendants and amici curiae rest entirely upon the foundation that the statements alleged to be defamatory were expressions of pure opinion and did not imply the existence of other, undisclosed facts. That proposition, however, is inaccurate, contrary to precedent, and relies upon an examination of the defamatory statements that substitutes Defendants' allegation of what was defamatory for Plaintiffs', ignores the entire statements, and disregards the context of the reports and press releases.

They also ignore the time tested precedential accommodations between defamation and privacy law and the First Amendment to the United States Constitution and Article 1, §8 of the Missouri Constitution in favor of extending absolute protection for anything that might be *labeled* opinion, and substituting their concept of "opinion" for that established by our Courts. The First Amendment has not meant that false facts, whether directly stated *or implied*, can be publicized without recourse for those injured by attempting to label them "opinion". And the Missouri Constitution provides a specific limit on freedom of speech that has not been mentioned by either defendants or amici curiae: those who exercise the liberty of free speech in Missouri are "responsible for ***all*** abuses of that liberty". Mo. Const. Art. 1, §8. (Emphasis added.) That same provision affirmatively anticipates and recognizes "suits and prosecutions for libel and slander."

This basic and constitutionally established concept that those who exercise free speech are not free to abuse it is further supported by the Missouri Constitution's "open courts" provision, which states: "the courts of justice shall be open to every person, and

certain remedy afforded for every injury to person, property, ***or character***, and that right and justice shall be administered without sale, denial or delay." Mo. Const. Art. 1, §14. (Emphasis added.) Plaintiff's character and person have been injured, and she is entitled to a remedy.

II. Reply to Section I of HSUS's Substitute Respondent's Brief and Section E of Missourians for the Protection of Dogs Substitute Brief.

A. Puppy Mill as a defamatory term.

Rather than address the defamatory statements actually alleged and described by plaintiff, HSUS limits its argument to only one phrase out of the defamatory statements: "puppy mill".[1] And for the first time, Defendant HSUS claims that "puppy mill" is not defamatory because construed in its "most innocent sense" "puppy mill" has no negative connotation and simply means "a commercial farming operation in which purebred dogs are raised in large numbers". HSUS brief at p. 16. Although this "innocent sense" argument was not raised below, and therefore provides no basis for affirming the trial

[1] The full defamatory phrases with that term are alleged as follows: "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). And the "Dirty Dozen" is described as being among the "worst puppy mills in Missouri", selected "based on the number and severity of state and/or federal animal welfare violations." (L.F. 21-22).

court,[2] the discussion of what "puppy mill" means is nonetheless useful in understanding the defamatory statements and will be addressed.

HSUS's argument ignores that Defendants define and describe what they mean by the term, and, as in *Nazeri,* "an objective reading simply does not allow these words an innocent sense." *Nazzeri v. Missouri Valley College,* 860 S.W.2d 303, 311 (Mo. banc 1993). Defendants define the term in the context of the report and press releases. For example, the press release issued with the 2010 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.

HSUS's contention that "puppy mill" means nothing that would injure someone's reputation or lower their esteem in the community is not the public position of HSUS. HSUS has a list of frequently asked questions about "puppy mills" on its website, www.humanesociety.org, that contains a link to "What is a puppy mill" which informs the public that "[a] puppy mill is an inhumane, commercial dog-breeding facility in

[2] Because the court of appeals "will consider ***only the grounds raised in the motion to dismiss*** in reviewing the propriety of the trial court's dismissal of a petition", *City of Lake Saint Louis v. City of O'Fallon,* 324 S.W.3d 756, 759 (Mo. banc 2010), this issue is not before the court.

which the health of the dogs is disregarded in order to maintain a low overhead and maximize profits." Furthermore, "puppy mill" was selected by Missourians for the Protection of Dogs and the Humane Society of Missouri as the term to use in the Proposition B initiative campaign after slogan testing with focus groups to determine how its political messaging might resonate with the public. *State ex rel. Humane Society of Missouri v. Beetem,* 317 S.W.3d 669 (Mo. App. 2010). HSUS and MPD knew that the word "puppy mill" carried the worst connotations out of terms tested, and chose it for that reason. The language, including the title, of the "Puppy Mill Cruelty Prevention Act", which HSUS cites as an excuse for the term, was chosen by Missourians for the Protection of Dogs and HSUS precisely because of its negative connotations.

When HSUS cites the definition of "puppy mill" found in the Merriam-Webster Dictionary, it ignores not only the definition supplied by the context of the report, its own website, and market testing, it ignores other dictionaries and case law as well. The Oxford Dictionary defines "puppy mill" as "an establishment that breeds puppies for sale, typically on an intensive basis and in conditions regarded as inhumane." www.oxforddictionaries.com. Wikipedia, the 6th most visited website in the United States (see www.alexa.com/siteinfo/wikipedia.org), defines "puppy mill" as "a commercial dog breeding facility that is operated with an emphasis on profits over the welfare of the dogs bred, with substandard conditions of care often the norm." See also "puppy mill" definition at www.definitions.uslegal.com. "Puppy mill" is defined in *Avenson v. Zegart,* 577 F. Supp. 958, 960 (D. Minn. 1984) as "a dog breeding operation in which the health of the dogs is disregarded in order to maintain a low overhead and

maximize profits." **The derogatory nature of the term "puppy mill" is so well established that, although HSUS criticizes the court of appeals for "suggest[ing]" that 'puppy mill' is a defamatory term, per se", "puppy miller" *has* in fact, been determined to be defamatory per se in *Stearns v. McManis,* 543 S.W.2d 659, 662 (Tx. App. 1976)**. There, in upholding a verdict for slander, the court stated: "The term [puppy miller] is considered disparaging by dog fanciers. It describes one whose primary interest is in selling puppies for profit with little concern for their health or for improving the breed." Id. at 660. "Puppy mill" has no "innocent meaning" and none was intended by Defendants. And that term alone, even without the rest of the alleged defamatory statements that contained that term, or the context provided by the reports, is defamatory.

B. The defamatory statements are not simply opinions, and are provably false.

It is evident that 1) Defendant is limiting its "opinion" argument to one phrase ("puppy mill") instead of the full statements actually alleged to be defamatory; and 2) given the context and definition supplied with the report, even the use of the term "puppy mill" is provably false and not simply an opinion.

The "Dirty Dozen" report contains the following statement highlighted in Plaintiff's petition: "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. 23.) Having identified Plaintiff as a "puppy mill" by name, and named her as one of "the worst puppy mills in Missouri", (L.F. 36), the above statement applies to her. It contains no qualifier, such as "some" or "many". Did Plaintiff "cram" her dogs into "small and filthy" cages? Did she deny her dogs veterinary

care? Did she expose them to extremes of heat and cold? Did she give them no exercise or human affection? Either those conditions existed at Plaintiff's kennel or they did not. Plaintiff has alleged that they did not, a fact which must be accepted as true for purposes of the motion to dismiss.

Another provably false defamatory factual statement is that Defendants selected the "Dirty Dozen" "based upon the number and severity of state and/or federal animal welfare violations." Plaintiff was either selected based on that criteria or she was not. Plaintiff has alleged she was not. HSUS admitted in oral argument to the court of appeals that Plaintiff was listed because her son was then Missouri State Representative, now U.S. Congressman, Jason Smith. There is no need to engage in an academic discussion of what is a more severe violation: the stated criteria had nothing to do with Plaintiff's selection. The statement, as applied to Plaintiff, was false. It was purely politics, not "the number and severity of state and/or federal animal welfare violations", which led to her inclusion in the report.[3]

[3] HSUS suggests that other kennels are included in the report based on something other than the number and severity of state and/or federal animal welfare violations. This argument does not aid HSUS. It simply helps establish that contrary to the defamatory assertion that the kennels, including Plaintiff's, were selected as among "the worst puppy mills in Missouri" "based on the number and severity of state and/or federal animal welfare violations", they were not. They were chosen for other reasons, and not as a result of the claimed objective and thorough investigation which "singled [them] out from

But beyond these demonstrably false statements, there is also an implication of verifiable facts in the reports and accompanying statements. As explained in more detail in Plaintiff's substitute brief, at pp. 17-20, the United States Supreme Court in *Milkovich v. Lorain Journal Co., et al.*, 110 S. Ct. 2695 (1990) rejected an argument for a "wholesale defamation exemption for anything that might be labeled 'opinion'", a ruling followed in Missouri in *Nazeri v Missouri Valley College*, 860 S. W. 2d 303, 314 (Mo. banc 1993). Rather than accord anything that might be labeled opinion protection, the Missouri Supreme Court stated: **"[t]he 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**", and the issue of falsity relates to the defamatory facts implied. Id. at 314. Regardless of semantic arguments pertaining to labels or categories, or language pulled from pre-*Milkovich* or *Nazeri* cases such as *Henry v. Halliburton,* 690 S.W.2d 775 (Mo. banc 1985), upon which Defendants rely, there is no blanket, absolute privilege for purported opinions.

Milkovich 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…"***, which is

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the hundreds of high-volume commercial breeders in Missouri for repeatedly depriving dogs of the basics of humane care, such as food, shelter from the heat and cold, and/or basic veterinary care…" (L.F. 29, 67).

part of what Plaintiff alleged occurred here. Id. at 2706. Defendants ignore *Milkovich* and *Nazeri* in this regard and go "all in" on their fallacious argument that their statements were absolutely privileged as ostensible opinions.

The entire tenor of the statements in question was that of a fact based, objective expose. Defendants listed the criteria they employed in compiling their "Dirty Dozen" list under a heading "How we selected some of the worst kennels in Missouri". They claimed that those listed in the report were included "based upon the number and severity of state and/or federal animal welfare violations." (L.F. 22, 36.) Their introductory paragraph claims an exhaustive investigation, and the implication of the entire first page of the report, at L.F. 36, is that HSUS reviewed all or nearly all the federal and state records pertaining to violations by licensed kennels in Missouri, and those in the report, like Plaintiff, were chosen because they had more or more severe violations. HSUS did not ***want*** the reader to think it was just expressing some subjective opinion: it sought to convince the reader that it had done a thorough investigation, considered specified criteria, and had documents to back it up, including documents pertaining to the kennels not listed in the report to which the "dirty dozen" were being compared. It did not say "we think these are some bad kennels"; it said "here are the worst kennels in Missouri 'based upon the number and severity of state and/or federal animal welfare violations.'"

HSUS's attempt to convince readers that it was presenting facts and well supported conclusions, not simply its opinion, is further illustrated by its statement that "[a]vailability of photographs to verify the conditions was also a factor [in selection] in

some cases", suggesting a concern for objectivity and the ability to verify, something that would be entirely unnecessary if HSUS was only stating its opinion.

HSUS's CEO Wayne Pacelle, in an article paid for by MPD, eliminated whatever question there may have been as to whether the reports were merely expressing opinions:

> HSUS researchers identified these Dirty Dozen puppy mills and eight dishonorable mentions[,]" and "[t]his ***painstakingly documented*** report ***synthesizes information gleaned from state and federal inspection reports***, including enforcement records, animal care violations, and photographs, and reveals shocking abuses and mistreatment of dogs at the states (sic) largest puppy mills.

L.F. 23. MPD campaign director Barbara Schmitz added: "These puppy mills have an undeniable record of unconscionable violations of the minimal humane care standards in place, ***according to our study of their records***." Id.

Significantly, the report does not contain any qualifier or explanation that the report reflects only Defendants' subjective assessment. That alone is sufficient to distinguish this case from *Castle Rock Remodeling, LLC v. Better Business Bureau of Greater St. Louis*, 354 S.W.3d 234 (Mo. App. 2011), to the point that the absence here of the type of disclaimer relied upon in *Castle Rock* actually *supports* Plaintiffs position. 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. Instead of language claiming an exhaustive effort to investigate and determine the

worst puppy mills backed by documents, disclosed and undisclosed, and photographs, the BBB report in *Castle Rock* set forth the following explicit disclaimer in describing the rating process: "Ratings are determined by a proprietary formula that represents BBB's ***opinion*** as to (1) the importance of each category, and (2) the appropriate score given to the business for each category." Id. at 238 (emphasis added). These disclaimers were crucial and essential to the holding in *Castle Rock.* Defendants have cited no similar language here, and there is none.

Furthermore, HSUS, unlike the BBB, did not use a rating scale against which Plaintiff's business was assessed or graded. The BBB did not claim to have looked at all other similar businesses and decided whether Castle Rock was among the worst, which is what HSUS did here. **HSUS did not limit itself to a subjective "rating" or "grade" on a scale: *it did not even provide one*,** which makes its argument that ratings or grades are opinions inapplicable. Instead, HSUS claimed: "These puppy mills were singled out from among the hundreds of high-volume commercial breeders in Missouri for repeatedly depriving dogs of the basics of humane care, such as food, shelter from the heat and cold and/or basic veterinary care according to state and/or federal inspections reports for each dealer…." L.F. 67. This language, contained in the MPD/HSUS press release, reinforces the attempt to portray the "Dirty Dozen" list as the objective result of an investigation of "the hundreds of high-volume dealers" in Missouri. HSUS wanted the reader to believe its report was based on facts, and the ordinary reader would not have viewed the reports and associated statements as simply a subjective assessment. Instead, the reader could have "reasonably" interpreted the challenged statements as "stating

actual facts about Plaintiff." 354 S.W.3d at 242. The "general tenor of the entire work" as the result of a thorough investigation of kennels in Missouri supports rather than negates the impression Defendants were asserting underlying objective facts. Id. Finally, while it now admits it cannot prove what it said and/or implied in the reports and releases, either HSUS studied the violation reports of the "hundreds" of kennels, or it did not, and the reports either back up HSUS's assertion of more and/or more severe violations for the "Dirty Dozen", or they do not. **And, perhaps most crucially, either the selection was based on the stated criteria (whether objectively or subjectively assessed) or it was not.** Defendant HSUS ignores this latter point, but it has admitted in argument before the court of appeals that Plaintiff was selected because of politics. **She was not selected based on the listed criteria, subjectively or objectively. But it sounds more ominous to say that Plaintiff was "singled out" from among the "hundreds of high-volume commercial breeders" "based upon the number and severity of state and/or federal animal welfare violations" than it does to admit she was targeted because of politics. And the resulting damage to her reputation is much greater because of that false claim.** The truth or falsity of all these underlying assertions can be established.

Similar factors distinguish other cases referred to by Defendant HSUS: *Aviation Charter Inc.v. Aviation Research Group/US*, 416 F.3d 864 (8th Cir. 2005) and *Compuware Corp. v. Moody's Investors Services, Inc.*, 499 F3d 520 (6th Cir. 2007), unlike this case, involved ratings or grades. *Aviation Research* included disclaimers indicating that the report was advisory only, and described the subjective process utilized

by the "analysts", who make "independent judgments". 416 F.3d at 870. In the case against Moody's Investors, the court described the *analytical* services offered by Moody, noting "Moody's is a financial publisher that analyzes the financial conditions of, and publishes credit ratings for, a variety of companies." 499 F.3d at 522. Moody's engages in obviously subjective predictive analysis for a sophisticated audience as opposed to what HSUS and MPD did here: pretend to objectively report on the factual results of their investigation into kennels in Missouri. In addition, neither case involved the application of Missouri law, and both addressed summary judgment rulings rather than motions to dismiss. See also *Browne v. Avvo, Inc.,* 525 F. Supp. 2d 1249 (W.D. Wash. 2007)("Avvo's website contains numerous reminders that the Avvo rating system is subjective").

HSUS also refers to *Seaton v. TripAdvisor, LLC*, 728 F.3d 592 (6th Cir. 2013). There the disclaimer went beyond indicating that the statements were simply opinions of TripAdvisor: it informed readers that the opinions were those reported by "*travelers* on TripAdvisor." Id. at 598. Understandably, the court concluded "[w]ith this, readers would discern that TripAdvisor did not conduct a scientific study to determine which ten hotels were objectively the dirtiest in America. Readers would, instead, understand the list to be communicating subjective opinions of travelers who use TripAdvisor." Id. at 599. As to *Mirafuentes v. Estevez,* 2015 W.L. 8177935 (E.D. Va. 2015), the statement in question was whether the plaintiff was "*perceived* to be among the most corrupt Mexicans", and the "Article does not assert that [plaintiff] is corrupt or that she is one of the most corrupt Mexicans." Id. at *3. Also significant was that, unlike here, the article

did not imply that there were "further facts that justify [plaintiff's] inclusion on the list that were not disclosed." Id. at *5. It certainly did not claim to be a list of the Mexicans who are actually among the most corrupt after an exhaustive examination of the records of all Mexicans!

In summary, the cases relied upon by HSUS simply illustrate the differences between subjective evaluations and the picture of objectivity and verifiability presented by the statements in question here. At no point in Plaintiff's Fourth Amended Petition – or in the 65 pages of exhibits she attached to her petition – does the phrase 'in my [or in our] opinion' occur." Nor does the term "subjective". HSUS and MPD did not intend the reader to believe that the statements were simply expressions of opinion and intentionally avoided any such disclaimers.

Subpart D of HSUS's Point I totally misses the mark, and makes a claim for Plaintiff that she has never advocated. Plaintiff does not state that Defendants were required to disclose, much less "reprint, verbatim" all the documents reviewed by their researchers. The issue is not whether they were required to disclose additional facts, but whether the "opinions", as they categorize them, *imply the existence of facts that can be proven or disproven*. They do, as explained above, which makes their claim of "opinion" protection invalid. HSUS also incorrectly asserts that Plaintiff "objects" "only" to its "characterization" of the information disclosed, and that she agrees the facts stated or implied about her are true. As explained above, she objects to several false statements, including being listed as a "puppy mill" "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), and as being among the "worst puppy mills in Missouri", selected "based on the number and severity of state and/or federal animal welfare violations." (L.F. 21-22).

Finally, in Subpoint E, HSUS now claims that it did not identify and would not be understood to refer to Plaintiff's kennel when it specifically named her kennel among the worst "puppy mills" in Missouri, made comments about and defined "puppy mills", talked about what these "puppy mills" "had in common", and claimed that those selected, including Plaintiff, were "singled out from the hundreds of high-volume commercial breeders in Missouri for repeatedly depriving dogs of the basics of humane care, such as food, shelter from the heat and cold, and/or basic veterinary care.... (L.F. 21-22, 29, 67). To support this dubious proposition, HSUS cites to a line of cases which stand for the unremarkable concept that where a headline does not specifically identify a person, and the entire article must be read to discern the identity of those involved, and the article itself gets it right, there is no defamation. HSUS argues that the press releases must be read with the reports. And when they are read together, there is no question that plaintiff is identified and that the defamatory statements referred to her. Regardless, Defendant HSUS did not raise this issue in its Motion to Dismiss, and cannot raise it now. *City of Lake Saint Louis,* 324 S.W.3d at 759.

Here, as in *Nazeri,* "the remarks pleaded in the petition consist of outright expressions of fact and ostensible expressions of opinion which very strongly imply underlying facts. Moreover, the statements do more than suggest to the ordinary reader that respondent disagrees with appellant's conduct, and they are not too imprecise to be

actionable." 860 S.W.2d at 314. Plaintiff's petition, like that in *Nazeri*, is not subject to dismissal as seeking recovery for protected opinion.

III. Reply to Defendants' Response to Point II of Plaintiff's Brief.

Defendants did not contend that Plaintiff failed to allege any element of "false light invasion of privacy" in the motion to dismiss, and do not do so here. 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.

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). *Meyerkord* and its recognition of false light invasion of privacy has not been overturned, directly or indirectly, despite occasions for this Court to do so, most recently in *Farrow v. St. Francis Med. Ctr,* 407 S.W.3d 579 (Mo. banc 2013).

HSUS misstates the significance of *Farrow* as it relates to this case. Beyond its important implicit acceptance of *Meyerkord*, which was distinguished rather than

rejected, *Farrow* adds little to the analysis here. It presented a very different factual scenario. The statements in *Farrow* were workplace statements about job performance, as opposed to the comments here, which were broadcast statewide at press releases and worldwide on the internet. The plaintiff in *Farrow* sought recovery for her economic, employment related harm, including the loss of her job, and, according to the court, was attempting to specifically protect her reputation with the "hospital and medical community where she resides." 407 S.W.3d at 602. Plaintiff here, in her false light claim, is seeking recovery for an intrusion into her privacy and right to be left alone. She did not ask to or seek to be pulled out of her quiet life in rural Missouri and into the limelight, an intrusion that was made more odious by the false way she was presented to the general public worldwide, not just the "[dog breeding] community where she resides", lumped together with people who starve dogs and club them to death.

Another important distinction between this case and Farrow is that in Farrow, there was no argument that the Plaintiff was unable to state any of the elements of a claim for defamation. The Plaintiff there had what the Court called "a classic defamation claim." Id. This fact was conclusive in the Court's analysis of the availability of the *additional* remedy of false light invasion of privacy.

In arguing improper duplication, Defendants rely entirely on the mistaken premise that "the very same statements" form the basis for all Plaintiff's claims, an argument addressed in Plaintiff's original brief at p. 33-34. Plaintiff explained there how Defendants' argument that Plaintiff is trying to claim both false light and defamation for

the same statements is inaccurate and a major misrepresentation of the pleadings.[4] But **given this continued incorrect assertion by Defendants, a summary and comparison of the statements relied upon in the defamation counts and the publicity casting Plaintiff in a false light is perhaps appropriate**.

The defamatory statements are exemplified by the following:

1. "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). This is untrue. Plaintiff was admittedly singled out because of politics and the fact that she is Jason Smith's mother. And Plaintiff does not operate a "puppy mill" as that term was defined by Defendants or is generally understood as shown in the definitions and case law cited earlier in this brief.

2. The "Dirty Dozen" is described as being among the "worst puppy mills in Missouri", selected "based on the number and severity of state and/or federal animal welfare violations." (L.F. 21-22). This, too, is untrue, as that was not in fact the selection criteria and because, once again, Plaintiff does not operate a "puppy mill" as that term was defined by Defendants or is generally understood.

The "false light" allegations, however, are characterized by the following:

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[4] This also distinguishes *Klein v. Victor*, 903 F. Supp. 1327 (E.D. Mo. 1995), a federal case that predates *Meyerkord*. There the court found that "[t]his case does not present a situation where true facts are presented in such a fashion as to create a false impression or false light". Id. at 1338. Plaintiff's claim here does, in part.

1. Plaintiff's unwanted and offensive association in the article with those who dispose of "unwanted" dogs by clubbing the dogs, fail to discover and dispose of animals that die, keep dogs who are "very thin with ribs prominent, tucked abdomen, and palpable hip bones and vertebrae", and those who keep dogs "stacked in cages that allow feces and urine to rain down on the dogs in the lower tiers." These activities disgust Plaintiff and are repugnant to her. They do not occur at her kennel.

2. The selective editing of reports quoted and pulling them out of context to make them sound more significant and ominous than they actually were. This false impression was also exacerbated by the intentional omission of other language and inspection reports which would create a less objectionable public impression of Plaintiff and her kennel.

3. The implication *without directly stating* that *Plaintiff* had dogs that had developed interdigital cysts from being "*forced to stand continually on wire flooring"* when, in fact, those dogs were not on wire flooring. (L.F. p. 48)(After quoting part of an inspection report that indicated a dog in Plaintiff's kennel with some interdigital cysts, HSUS added this comment: [Note: Interdigital cysts are a common malady in dogs who are forced to stand continually on wire flooring. The cysts are painful and can lead to disabling infections]).

4. The decision to include in the update report only one of 3 photographs Defendants had of a bulldog Plaintiff sold and Defendants claimed was sick, when the two omitted photographs showed an active, alert healthy appearing dog and the included one showed the dog on a pillow, apparently half asleep. (L.F. 31). Plaintiff has alleged

that this photograph was chosen to cast her and her kennel in as unfavorable a light as possible, and one which gave a false impression of her.

5. The false implication in the update report that Plaintiff continued to have violations similar to those noted in the original "Dirty Dozen". (L.F. 78-79). She did not.

6. The report also misrepresented conditions at Plaintiff's kennel by implication and association. Photographs were included of some of the "Dirty Dozen", showing wire cages, ramshackle and deteriorated housing for the dogs, as well as dogs with obvious serious illnesses and health issues. See L.F. 36 – 90. While, unfortunately, the photographic quality of the certified record is much less than the original color exhibits, the captions tell the story and Plaintiff encourages the Court to examine those to see what Plaintiff's kennel was being associated with.

Put simply, this publicity, none of which constitute statements of opinions or hyperbolic rhetoric, portrayed Plaintiff as someone she is not. And they are distinct and separate from the specific statements claimed to be defamatory, despite Defendants' attempt to lump everything together. **Defendant cites no authority indicating that making defamatory statements in publicized material insulates Defendant from liability for false light with respect to other statements and impressions created by that material, and such a rule makes no sense. That is different from holding that a plaintiff cannot recover for both defamation and false light *for the same statements.***

Defendants' argument also misses the purpose of a false light invasion of privacy claim. The heart of such a claim is 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 focus in false light invasion of privacy is not on the statements themselves, individually, but the characteristics, conduct, or beliefs attributed to Plaintiff by the publicity in question, and whether the publicity places Plaintiff before the public in a false position. In fact, the statements themselves need not be false or defamatory according to the Restatement of Torts. Rest. 2nd Torts § 652E. Plaintiff's allegations in Count III set forth a false light claim based on the false implications of the report, not particular false statements. The misleading context, content, and associations 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 a classic false light claim.

It is important to note that Defendants did not substantively respond to Plaintiff's following point:

> That a false light claim can be based upon associations made in or suggested by the statements in question 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).

Plaintiff's brief at 35. The scholarly opinion in *Douglass* was written by the well-respected Judge Posner, who has been referred to in judicial opinions as one "of the country's most distinguished federal judges." *Baker v. Welch*, 2003 WL 22901051, 17 (S.D.N.Y. 2003). His analysis is correct and should be applied here.

Also incorrect is Defendant HSUS's assertion that Plaintiff advocates false light invasion of privacy as "defamation lite". In some aspects, false light is harder to prove, especially for a plaintiff who is not a public figure. Plaintiff has already noted the false light requirement of publicity, not just publication, in footnote 6 at p. 31 of her substitute brief. Publicity requires widespread dissemination, not just "any communication by the defendant to a third person". Comment *a* to Restatement (Second) of Torts, § 652D. Actual malice must be demonstrated for false light, as opposed to "fault" consisting of negligence which suffices for defamation actions brought by a private individual. *Overcast v. Billings Mut. Ins. Co.,* 11 S.W.3d 62, 70 (Mo. banc 2000). False light requires a misrepresentation of character, history, activities or beliefs that is significant enough to be "highly offensive to a reasonable person", Restatement (Second) of Torts, § 652E, while defamation only requires that the communication tend to harm the reputation of another so as to lower him in the estimation of the community or deter third persons from associating or dealing with him. Restatement (Second) of Torts, § 559. Not only the interests protected, but the elements, are distinct.

HSUS's 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. The authority Defendants rely on predates Missouri's recognition of the tort of false light

invasion of privacy in *Meyerkord* and mixes the elements of various actions for invasion of privacy. With respect to protecting First Amendment interests, it is also unnecessary and too broad given that tort's already existing requirement of "actual malice".

Defendants' argument was anticipated and addressed in detail at pages 37-39 of Plaintiff's Substitute Appellant's Brief, but a short recap is appropriate in reply, as HSUS and amici curiae continue to inappropriately mix the elements of various actions for invasion of privacy and rely on authority which did address the particular invasion of privacy claim presented here: false light. As explained in Plaintiff's brief, "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."

One of the Restatement elements of disclosure of private facts is that the facts be private, not matters of "legitimate concern to the public". No such element is required by the Restatement or appropriate for false light, where, unlike disclosure of private facts, in which 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. Plaintiff need not prove or allege that the publicity in a false light claim concerns something private rather than a matter of public interest.

And the First Amendment does not require otherwise. **As specifically held in *Meyerkord*, the Restatement elements for false light pass Constitutional muster and**

do not improperly invade First Amendment protections on speech. 276 S.W.3d at 324-325. **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). The "actual malice" standard in the Restatement "strikes the best balance between allowing false light claims and protecting First Amendment rights." 276 S.W.3d at 325. **To the extent the statements involve an issue of "legitimate public interest", the First Amendment simply requires a showing of actual malice, which is already incorporated into false light claims in Missouri under *Meyerkord*.**

IV. Reply to Sections B, C and D of Missourians for the Protection of Dogs' Response to Point I of Plaintiff's Brief.

In response to Point I of Plaintiff's substitute brief, Missourians for the Protection of Dogs argues that it did not author or publish the statements. However, that issue was raised in the trial court *only* in Missourians for the Protection of Dogs' Motion to Dismiss, which was *not* granted. Contrary to the statement of MPD at p. 8 of its substitute brief, the trial court did not "simply state[] that it was granting the motion 'for the reasons set forth in Defendant's Motion'". Instead, the court first stated it was taking up "the Motion of Defendant the Humane Society of the United States to Dismiss Plaintiff's Fourth Amended Petition, which was joined in by Defendant Missourians for the Protection of Dogs." (L.F. 141.) The *only* motion to dismiss which *was* granted here, filed by HSUS and joined in by MPD, contains no argument that HSUS's co-defendant, MPD, did not author or publish the statements. The appellate court considers only the

grounds raised in the motion to dismiss which was granted and is being reviewed on appeal. *City of Lake Saint Louis* 324 S.W.3d at 759. Issues raised only in MPD's separate motion to dismiss, such as its claim that it "did not author or publish the statements", are not before the court.

MPD's argument also fails to "assume[ ] that all of the plaintiff's allegations are true and liberally grant[ ] 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). Plaintiff pled in her Fourth Amended Petition that *both* Defendants "acting in concert, caused to be published certain statements concerning Plaintiff and her kennel as set forth in more detail below." (L.F. 4.) Additional paragraphs allege that both Defendants caused to be published "Missouri's Dirty Dozen" report and a supplemental report that contained defamatory statements. Id. Plaintiff asserted HSUS provided the reports to MPD "for the purpose of those reports being released and published throughout the State of Missouri and on the internet" and that "*Defendant Missourians for the Protection of Dogs released the report* and summary report at a press conference on October 5, 2010". (L.F. 22.) These allegations clearly attribute defamatory statements to MPD and allege that MPD had a role in the publication of the statements.

The attached documents back up these allegations. The "Dirty Dozen" report states that it was "paid for by Missourians for the Protection of Dogs/YES! On Prop B, Judy Pell , Treasurer". L.F. 62. The summary report contains the identical assertion that the report was paid for by MPD. L.F. 66. HSUS chairman and CEO Wayne Pacelle's "A Dozen More Reasons for Supporting Missouri's Prop. B" was "paid for by Missourians

for the Protection of Dogs/YES! On Prop B, Judy Pell , Treasurer". L.F. 71. The press release from MPD indicates MPD's involvement extended beyond just paying for the publication. MPD itself "announced the release of "Missouri's Dirty Dozen", L.F. 67, and included quotes, cited in the petition, by MPD campaign manager Barbara Schmitz. L.F. 68. MPD's announcement was coordinated with HSUS staff according to the emails attached to the petition at L.F. 67. The Update Report in March 2011 included the statement that "[m]ore information is available at www.MissouriansforDogs.com." L.F. 100, and HSUS stated that "*Missourians for the Protection of Dogs* released a new report today demonstrating major continuing problems in licensed puppy mills." L.F. 98.

As stated in MPD's brief, "Publication requires a showing that the defendant delivered or caused to be delivered the allegedly libelous material to a third person." Plaintiff alleged exactly that, with respect to both defendants.

MPD also asserts in Section I (D) of its brief that "the allegedly defamatory statements are not specific to Smith", which like its claim of no involvement in the report was not raised in the granted HSUS motion to dismiss but which, in addition, was not included by MPD in its own motion to dismiss. Again, this issue is not before the court.

However, such an argument, had it been made, should not have prevailed, given that the reports contain numerous references specifically to "Mary Ann Smith, Smith's Kennel, Salem", identifying Plaintiff precisely by her name, her kennel, and her town of residence, and specifically naming her as one of the "Dirty Dozen". See, e.g., L.F. 39. Comments about the "Dirty Dozen", except those specific to another particular kennel, were understood to refer to Plaintiff and addressed to her.

CONCLUSION

The law does not favor allowing harm without remedy. "Over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights." *Carey v. Piphus* , 435 U.S. 247, 257-258, 98 S. Ct. 1042, 1049 (1978). Mo. Const. Art. 1, §14 requires it, and Mo. Const. Art. 1, §8 makes those who exercise their freedom of speech "responsible for ***all*** abuses of that liberty". Defendants here seek to avoid responsibility for the harm they caused plaintiff by not only making her an object of public ridicule and notoriety, but doing so with reports and press releases that included false statements and associated her with things she abhors and presented her to the public as something she is not. Plaintiff's claims can both be brought and are not identical. They assert different legal theories, unique damages and depend on different actions of Defendants for liability. And neither of them are based on "opinions."

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 7,699 words according to the word-processing system used to prepare the brief; and

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

5. 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 February 2016, and served upon the following:

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