IN THE
MISSOURI SUPREME COURT

NO. SC 86229

STATE OF MISSOURI ex rel. BP PRODUCTS NORTH AMERICA INC.,

Relator,

v.

JOHN A. ROSS, Circuit Court Judge, 21st Judicial Circuit, Missouri,

Respondent.

ON PRELIMINARY WRIT OF PROHIBITION
FROM THE SUPREME COURT OF MISSOURI
TO THE HONORABLE JOHN A. ROSS, CIRCUIT JUDGE
TWENTY-FIRST JUDICIAL CIRCUIT, MISSOURI
REGARDING CAUSE NO. 03CC-0001622 MCV

OPENING BRIEF OF RELATOR

Dawn M. Johnson, MBE# 41991
Tina R. Carter, MBE# 49196
Greensfelder, Hemker & Gale, P.C.
2000 Equitable Building
10 South Broadway
St. Louis, MO 63102-1774
(314) 241-9090; (314) 241-4245 (FAX)
ATTORNEYS FOR RELATOR

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 5

JURISDICTIONAL STATEMENT 9

SUMMARY OF THE CASE 10

STATEMENT OF FACTS 12

POINTS RELIED ON 17

I. Relator is entitled to an order prohibiting Respondent from proceeding further with this case because the applicable statute of limitations bars Plaintiffs' claims of injurious falsehood in that Plaintiffs have not in actuality set forth injurious falsehood claims but have alleged defamation claims because their claims implicate Plaintiffs' reputational interests, and such claims are barred by the two-year statute of limitations because Plaintiffs knew of the alleged communication by BP and also the fact of their damage more than two years before they filed their lawsuit 17

II. Relator is entitled to an order prohibiting Respondent from proceeding further with this case because the applicable statute of limitations bars Plaintiffs' claims of injurious falsehood in that injurious falsehood claims of the type alleged by Plaintiffs should be subject to a two-year statute of limitations because the tort of

injurious falsehood is so broad that it may factually encompass other torts, including defamation, and thus should not automatically be given a five-year statute of limitations, or alternatively, because slander of title claims, to which Plaintiffs compare their injurious falsehood claims, should be subject to a two-year statute of limitations under the plain language of Mo. Rev. Stat. § 516.140.....18

ARGUMENT.....19

Standard of Review.....19

I. Relator is entitled to an order prohibiting Respondent from proceeding further with this case because the applicable statute of limitations bars Plaintiffs' claims of injurious falsehood in that Plaintiffs have not in actuality set forth injurious falsehood claims but have alleged defamation claims because their claims implicate Plaintiffs' reputational interests, and such claims are barred by the two-year statute of limitations because Plaintiffs knew of the alleged communication by BP and also the fact of their damage more than two years before they filed their lawsuit.....20

II. Relator is entitled to an order prohibiting Respondent from proceeding further with this case because the applicable statute of limitations bars Plaintiffs' claims of injurious falsehood in that injurious falsehood claims of the type alleged by Plaintiffs should be subject to a two-year statute of limitations because the tort of

injurious falsehood is so broad that it may factually encompass other torts, including defamation, and thus should not automatically be given a five-year statute of limitations, or alternatively, because slander of title claims, to which Plaintiffs compare their injurious falsehood claims, should be subject to a two-year statute of limitations under the plain language of Mo. Rev. Stat. § 516.140 39

CONCLUSION 47

CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT RULE 84.06(b) AND RULE 84.06(g) 49

CERTIFICATE OF SERVICE 50

EXHIBITS ..... Appendix

TABLE OF AUTHORITIES

Page

CASES

Annbar Associates v. American Express Co.,

565 S.W.2d 701 (Mo. Ct. App. 1978).....17, 21, 42

Boatmen's Bancshares, Inc. v. Director of Revenue,

757 S.W.2d 574 (Mo. 1988) 20

Cuba's United Ready Mix, Inc. v. Bock Concrete Foundations, Inc.,

785 S.W.2d 649 (Mo. Ct. App. 1990).....17, 18, 21, 26, 41

Dickson Construction, Inc. v. Fidelity and Deposit Co.,

960 S.W.2d 845 (Tex. Ct. App. 1997).....43

Doe v. Roman Catholic Diocese of Jefferson City,

862 S.W.2d 338 (Mo. 1993) 19

Gregory's Inc. v. Haan,

545 N.W.2d 488 (S.D. 1996) 44

Hurlbut v. Gulf Atlantic Life Insurance Co.,

749 S.W.2d 762 (Tex. 1987).....43

Jones v. Rennie,

690 S.W.2d 164 (Mo. Ct. App. 1985).....42

Jordan v. Greene,

903 S.W.2d 252 (Mo. Ct. App. 1995).....27

K.G. v. R.T.R.,

918 S.W.2d 795 (Mo. 1996) 22

Kansas Bankers Sur. Co. v. Bahr Consultants, Inc.,

69 F. Supp.2d 1004 (E.D. Tenn. 1999).....44

McCormack Baron Mgmt. Servs., Inc. v. American Guarantee & Liab. Ins. Co.,

989 S.W.2d 168 (Mo. 1999) 21

Nazeri v. Missouri Valley College,

860 S.W.2d 303 (Mo. 1993) 26, 45

Nettles v. American Tel. Co.,

55 F.3d 1358 (8th Cir. 1995).....27

Nolan v. Kolar,

629 S.W.2d 661 (Mo. Ct. App. 1982).....42

Overcast v. Billings Mutual Ins. Co.,

11 S.W.3d 62 (Mo. 2000).....26

Polytech, Inc. v. Sedgwick James of Missouri, Inc.,

937 S.W.2d 309 (Mo. Ct. App. 1996).....27

Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co.,

809 A.2d 243 (Pa. 2002)..... 18, 46

Shade v. Missouri Highway and Transp. Comm'n,

69 S.W.3d 503 (Mo. Ct. App. 2002).....45

State ex rel. General Electric Co. v. Gaertner,

666 S.W.2d 764 (Mo. 1984) 19

State ex rel. Noranda Aluminum, Inc. v. Rains,

706 S.W.2d 861 (Mo. 1986) 20

State ex rel. O'Blennis v. Adolf,

691 S.W.2d 498 (Mo. Ct. App. 1985) 19, 38

State ex rel. Springfield Underground, Inc. v. Sweeney,

102 S.W.3d 7 (Mo. 2003) 19, 38

State ex rel. The Police Retirement System of St. Louis v. Mummert,

875 S.W.2d 553 (Mo. 1994) 19, 38

Sullivan v. Pulitzer Broadcasting Co.,

709 S.W.2d 475 (Mo. 1986) 17, 18, 22, 23, 40, 45

Thurston v. Ballinger,

884 S.W.2d 22 (Mo. Ct. App. 1994) 27, 32

Wenthe v. Willis Corroon Corp.,

932 S.W.2d 791 (Mo. Ct. App. 1996) 17, 22, 23

STATUTES

Mo. Rev. Stat. § 516.120(4).....9, 11, 18, 39, 42, 46

Mo. Rev. Stat. § 516.140.....9, 10, 11, 17, 18, 27, 39, 46, 47

OTHER AUTHORITIES

Restatement (Second) of Torts § 573 cmt. g (1977).....24

Restatement (Second) of Torts § 623A (1977).....17, 18, 21, 23, 24, 40, 41, 42

Restatement (Second) of Torts § 624 (1977).....18, 40, 41

Restatement (Second) of Torts § 626 (1977).....18, 25, 40, 41

JURISDICTIONAL STATEMENT

Upon application of BP Products North America Inc., formerly known as Amoco Oil Company ("BP" or "Amoco" or "Relator"), this Court issued a Preliminary Writ of Prohibition on October 26, 2004. Therefore, this Court has jurisdiction of this matter under Article V, Section 4 of the Missouri Constitution. This action involves the application and interpretation of Missouri's statutes of limitation under Mo. Rev. Stat. § 516.120(4) and Mo. Rev. Stat. § 516.140. (Ex. 15 at A429 – A431; Ex. 16 at A432 – A433.) Relator contends that Plaintiffs' claims of injurious falsehood are, in actuality, defamation claims barred by the two-year statute of limitations under § 516.140. (Ex. 16 at A432 – A433.) Even if the Court determines that Plaintiffs have alleged injurious falsehood claims rather than defamation claims, Relator contends that § 516.140 applies to Plaintiffs' claims, not § 516.120(4). (Ex. 15 at A429 – A431; Ex. 16 at A432 – A433.)

SUMMARY OF THE CASE

Respondent, a Circuit Court Judge in St. Louis County, ruled that Plaintiffs, Brian Wandersee and Advanced Cleaning Technologies, Inc. (formerly known as 'OSCO"), filed their claims for injurious falsehood within the statute of limitations because the five-year statute of limitations applied to those claims. This ruling was incorrect in two respects. First, Plaintiffs' claims for injurious falsehood are, in actuality, claims for defamation because their claims implicate Plaintiffs' reputational interests. Therefore, they are barred by the two-year statute of limitations for defamation claims set forth in Missouri Revised Statute § 516.140 because Plaintiffs knew of the alleged communication by BP and the fact of their damage more than two years before they filed their lawsuit. (Ex. 16 at A432 – A433.)

Second, even if the claims are for injurious falsehood, claims of the type alleged by Plaintiffs should not automatically be subject to a five-year statute of limitations because the tort of injurious falsehood is so broad that it may factually encompass other torts, including defamation. Plaintiffs attempt to compare their injurious falsehood claim to slander of title claims. However, Plaintiffs' claims are not similar to slander of title claims and should not be given a five-year statute of limitation as such. Alternatively, if the Court determines that Plaintiffs' claims are similar to slander of title of claims, these claims should be subject to the two-year statute of limitations under the plain language of § 516.140. (Ex. 16 at A432 – A433.)

Plaintiffs claim that BP communicated with police in July 1999 stating "[o]n or before July 26, 1999 Amoco communicated with agents and employees of the Overland

Police Department and informed same that Plaintiffs had unauthorized possession of a PDQ Laserwash 4000 car wash machine which belonged to Amoco." (Ex. 3 at A31, ¶ 38.) In order to state a claim for injurious falsehood, Plaintiffs must allege economic interests, not just economic damages. The interests allegedly implicated by this communication are the reputational interests of Plaintiffs, not economic interests. Plaintiffs have stated a claim for defamation, not injurious falsehood, and, therefore, they should be barred by the two-year statute of limitations for defamation in § 516.140 because their action accrued in 1999. (Ex. 16 at A432 – A433.)

If the Court finds that Plaintiffs have alleged claims of injurious falsehood, the appropriate statute of limitations for such claims is a question of first impression in Missouri. The tort of injurious falsehood should not automatically be given a five-year statute of limitations under Missouri Revised Statute § 516.120(4) because the tort is very broad and general. (Ex. 15 at A429 – A431.) Plaintiffs point to two Missouri cases that have held that slander of title claims have a five-year statute of limitations. Although injurious falsehood claims may take the form of slander of title claims, Plaintiffs' claims are not similar to slander of title claims and should not be given a five-year statute of limitations. Further, even assuming that Plaintiffs' claims are similar to slander of title claims, such claims should be given a two-year statute of limitations under the plain language of § 516.140, which specifies the statute of limitations for slander and libel claims. (Ex. 16 at A432 – A433.)

STATEMENT OF FACTS

A. Factual Background

Plaintiff Brian Wandersee is currently the sole owner and president of Plaintiff Advanced Cleaning Technologies, Inc. ("ACT"), formerly known as OSCO Enterprises ("OSCO"). (Ex. 6 at A88 – A90.) OSCO is a distributor of car wash machines, their supplies and parts, and it provides service for these machines. (Ex. 6 at A91.) OSCO was a distributor of car wash machines for Defendant PDQ Manufacturing, Inc., in 1997 through part of 1998. (Ex. 6 at A126; A127 – A144.) OSCO marketed, installed, and serviced PDQ car wash machines, including those purchased by BP. (Ex. 6 at A91.)

In December 1997, Dave Johnson of PDQ telephoned Brian Wandersee to inform him that PDQ was shipping three PDQ Laserwash 4000 car wash machines to OSCO. (Ex. 1 at A3, ¶ 7; Ex. 6 at A92.) The machines were shipped to an OSCO facility in late December 1997. (Ex. 6 at A150; A207 – A210; A93.) BP had ordered these machines from PDQ in December 1997, and it had paid PDQ on January 6, 1998 for the machines and their installation. (Ex. 6 at A211 – A216; A217 – A221; A151; A155.) PDQ paid OSCO a commission for the sale of all three machines on January 12, 1998. (Ex. 6 at A222.) Two of the three machines were installed in March and April 1998 at Amoco gas stations in the St. Louis area. (Ex. 6 at A223 – A224.) In May 1998, PDQ and OSCO decided that they would not renew their distributor agreement. (Ex. 6 at A225 – A226; A227 – A228.) The third BP car wash machine that was shipped in December 1997 remained at OSCO's facility at 1604 Fairview in Overland, Missouri, for a year and a

half from December 1997 until July 1999. (Ex. 6 at A164 – A165.) This machine was ordered by Steve Amick, a former BP employee, for a location at O'Fallon Road and Route K in St. Charles County. (Ex. 6 at A152 – A158.) This station, however, was never built. (Ex. 6 at A180 – A181.)

On or about July 26, 1999, Ron Benhart of BP's corporate security department contacted the Overland Police Department regarding the third car wash machine that BP had purchased and that had been shipped from PDQ to OSCO in December 1997. (Ex. 6 at A146 – A147; A148 – A149.) Benhart informed the Overland police that on July 23, 1999, Tami Weeks, a former OSCO employee, contacted him and informed him that a car wash owned by Amoco was at the OSCO warehouse and that Wandersee and Steve Amick had acknowledged that they had not paid Amoco for the Amoco-owned car wash machine. (Ex. 6 at A148.) Benhart stated that Weeks told him that Wandersee had been attempting to have his sales people sell Amoco's car wash and that she, in fact, had been attempting to sell the Amoco machine. (Ex. 6 at A148.) It is undisputed that this car wash machine was in the OSCO warehouse on July 26, 1999. (Ex. 6 at A164 – A165.) Ron Benhart, along with Tami Weeks and Keith Payette, both former OSCO employees, gave written statements to Detective Charles Drew of the Overland Police Department on July 26, 1999. (Ex. 6 at A146 – A149.) Weeks told police that Wandersee and Steve Amick, an OSCO employee who previously worked for BP, had directed her to sell BP's machine. (Ex. 6 at A147.)

On July 26, 1999, Detective Drew applied for a search warrant by filing an application along with his affidavit in support. (Ex. 6 at A167 – A169.) In his affidavit,

Detective Drew cited to Ron Benhart's statement that BP had paid PDQ more than $90,000 for a Laserwash car wash machine which PDQ shipped to 1604 Fairview in December 1997, but Drew otherwise relied almost exclusively on the statements of Tami Weeks, the former OSCO employee. (Ex. 6 at A168.) According to Detective Drew's affidavit in support of his application for the search warrant, Tami Weeks stated that Wandersee "asked her to sell one PDQ Laserwash Car Washing System possessed by OSCO Enterprises" and that Wandersee "stated to her that it was a free machine commandeered from Amoco." (Ex. 6 at A168.) St. Louis Circuit Court Judge Robert Cohen signed the search warrant on July 26, 1999. (Ex. 6 at A166.) The Overland Police Department then executed the search warrant at OSCO's facility at 1604 Fairview on July 26, 1999. (Ex. 6 at A163 – A165.) The police seized parts of BP's car wash machine, which were identified by serial numbers during the execution of the search warrant, and then released those parts to Ron Benhart of Amoco. (Ex. 6 at A170; A171.)

On July 27, 1999, the day after the raid on the warehouse, Brian Wandersee and Steve Amick went to the Overland Police Department with an attorney. (Ex. 6 at A172 – A177; A94.) At that time, Wandersee and Amick were arrested for stealing over $750.00, booked, fingerprinted, and photographed. (Ex. 6 at A176 – A177.) They were released by police on the same day pending application of warrants. (Ex. 6 at A176 – A177.)

After Wandersee's initial arrest and the raid on his warehouse in July 1999, the police conducted an additional investigation at the request of the prosecutor. (Ex. 6 at A259.) On May 25, 2000, the St. Louis County Prosecuting Attorney's Office presented

the case to the grand jury through the testimony of Detective Drew. (Ex. 6 at A261; A263.) A St. Louis County grand jury indicted both Wandersee and Amick for stealing $750.00 or more. (Ex. 6 at A268 – A271.) On June 2, 2000, the Bridgeton Police Department arrested Wandersee based on a warrant for his arrest issued on May 31, 2000, by the St. Louis County Clerk of Court, and he was taken to the St. Louis County Jail where he was released several hours later. (Ex. 6 at A272 – A275; A117 – A119.)

On November 6, 2000, after depositions were taken in the criminal case, the St. Louis County Prosecuting Attorney's Office filed a nolle prosequi "for further investigation," effectively dismissing the charges against Wandersee. (Ex. 6 at A276.) The prosecutor decided to dismiss the case because of credibility problems with Tami Weeks and other non-BP witnesses. (Ex. 6 at A264 – A265.) The prosecutor further testified that a nolle prosequi has no meaning as to guilt or innocence and that he "still believed the charges were proper" after the nolle prosequi. (Ex. 6 at A265 – A266.)

B. Procedural History

Wandersee and OSCO originally filed their civil lawsuit on January 15, 2002, styled as Brian Wandersee and Advanced Cleaning Technologies, Inc. v. PDQ Manufacturing, Inc., BP Products North America Inc., Paul Faix and Janet Faix, 02CC-000179. (Ex. 1 at A1.) Plaintiffs named BP, PDQ, and Paul and Janet Faix, former OSCO employees who gave statements to the Overland Police Department after execution of the search warrant, as Defendants. Plaintiffs voluntarily dismissed their original action on February 18, 2003. (Ex. 2 at A22.) They filed the current action on April 17, 2003. (Ex. 3 at A23.) In the current case, Wandersee alleges that BP

committed the tort of injurious falsehood and false arrest and he seeks recovery for a variety of damages, including damages to ACT, legal fees, accounting fees, humiliation, embarrassment, disgrace, fright, injury to feeling, injury to reputation, emotional trauma, mental anguish, and punitive damages. (Ex. 3 at A31 – A33, ¶¶ 42, 47 and 49; Ex. 6 at A289 – A290.) ACT alleges that BP committed the tort of injurious falsehood and it seeks recovery for lost revenue, future lost revenue, expenses, and punitive damages. (Ex. 3 at A38 ¶¶ 65 and 67; Ex. 6 at A301 – A302.)

On December 31, 2003, BP filed its Motion for Summary Judgment in which it asked Respondent Circuit Court Judge John A. Ross to grant summary judgment in favor of BP and against Plaintiffs on their claims because they were barred by the statute of limitations. (Exs. 4-6.) On February 17, 2004, BP's Motion for Summary Judgment was argued, heard, and submitted to the Circuit Court. (Ex. 13 at A426.) On May 6, 2004, Judge John A. Ross issued an Order granting BP's Motion for Summary Judgment as to Wandersee's false arrest claim but denying BP's Motion for Summary Judgment on the injurious falsehood claims asserted by Plaintiffs against BP in Counts VI and XII. (Ex. 14 at A427 – A428.) The court concluded that a five-year statute of limitations applied to the Plaintiffs' injurious falsehood claims and, therefore, the claims were not barred by the statute of limitations. Relator filed a Petition for Writ of Prohibition with the Missouri Court of Appeals on July 29, 2004. The Court of Appeals denied Relator's Petition on July 30, 2004. Relator filed a Petition for Writ of Prohibition with this Court on August 16, 2004. This Court issued a Preliminary Writ of Prohibition on October 26, 2004.

POINTS RELIED ON

I. Relator is entitled to an order prohibiting Respondent from proceeding further with this case because the applicable statute of limitations bars Plaintiffs' claims of injurious falsehood in that Plaintiffs have not in actuality set forth injurious falsehood claims but have alleged defamation claims because their claims implicate Plaintiffs' reputational interests, and such claims are barred by the two-year statute of limitations because Plaintiffs knew of the alleged communication by BP and also the fact of their damage more than two years before they filed their lawsuit.

Annbar Associates v. American Express Co., 565 S.W.2d 701 (Mo. Ct. App. 1978)

Cuba's United Ready Mix, Inc. v. Bock Concrete Foundations, Inc., 785 S.W.2d 649 (Mo. Ct. App. 1990)

Sullivan v. Pulitzer Broadcasting Co., 709 S.W.2d 475 (Mo. 1986)

Wenthe v. Willis Corroon Corp., 932 S.W.2d 791 (Mo. Ct. App. 1996)

Mo. Rev. Stat. § 516.140

Restatement (Second) of Torts § 623A (1977)

II. Relator is entitled to an order prohibiting Respondent from proceeding further with this case because the applicable statute of limitations bars Plaintiffs' claims of injurious falsehood in that injurious falsehood claims of the type alleged by Plaintiffs should be subject to a two-year statute of limitations because the tort of injurious falsehood is so broad that it may factually encompass other torts, including defamation, and thus should not automatically be given a five-year statute of limitations, or alternatively, because slander of title claims, to which Plaintiffs compare their injurious falsehood claims, should be subject to a two-year statute of limitations under the plain language of Mo. Rev. Stat. § 516.140.

Cuba's United Ready Mix, Inc. v. Bock Concrete Foundations, Inc., 785 S.W.2d 649 (Mo. Ct. App. 1990)

Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co., 809 A.2d 243 (Pa. 2002)

Sullivan v. Pulitzer Broadcasting Co., 709 S.W.2d 475 (Mo. 1986)

Mo. Rev. Stat. § 516.120(4)

Mo. Rev. Stat. § 516.140

Restatement (Second) of Torts § 623A (1977)

Restatement (Second) of Torts § 624 (1977)

Restatement (Second) of Torts § 626 (1977)

ARGUMENT

Standard of Review

The Missouri Supreme Court has determined that once a statute of limitations expires and bars a plaintiff's action, the defendant has acquired a vested right to be free from suit. Doe v. Roman Catholic Diocese of Jefferson City, 862 S.W.2d 338, 341 (Mo. 1993). A Writ of Prohibition is appropriate when a trial court judge improperly intends to proceed to trial on a claim that is barred by the statute of limitations. State ex rel. General Electric Co. v. Gaertner, 666 S.W.2d 764, 765-67 (Mo. 1984); id. at 768 (Rendlen, J., concurring); State ex rel. O'Blennis v. Adolf, 691 S.W.2d 498, 500 (Mo. Ct. App. 1985) (citing General Electric, 666 S.W.2d 764, 768 (Rendlen, J. concurring)). A Writ of Prohibition is appropriate to prevent unnecessary, inconvenient, and expensive litigation. State ex rel. The Police Retirement System of St. Louis v. Mummert, 875 S.W.2d 553, 555 (Mo. 1994) (granting writ to prohibit trial court from proceeding with case in which summary judgment should have been entered); see also State ex rel. Springfield Underground, Inc. v. Sweeney, 102 S.W.3d 7, 9 (Mo. 2003) (citing Police Retirement System, 875 S.W.2d at 555). Because the denial of summary judgment is not normally appealable, the use of the writ is appropriate if, without the writ, a defendant will be compelled to undergo unwarranted and useless litigation at great expense and burden. O'Blennis, 691 S.W.2d at 500. A Writ of Prohibition is also appropriate if there is a legal issue that may escape review for some time and which is being decided wrongly by lower courts whose opinions may become precedent, and the aggrieved party may

suffer considerable hardship and expense as a consequence of such action. State ex rel. Noranda Aluminum, Inc. v. Rains, 706 S.W.2d 861, 862-63 (Mo. 1986).

Because Respondent Judge Ross determined that the five-year statute of limitations applied to injurious falsehood claims and there was no dispute regarding the factual issues at the time Respondent ruled on this matter, this case involves a question of law. Therefore, this Court exercises de novo review of this matter. Boatmen's Bancshares, Inc. v. Director of Revenue, 757 S.W.2d 574, 574 (Mo. 1988).

I. Relator is entitled to an order prohibiting Respondent from proceeding further with this case because the applicable statute of limitations bars Plaintiffs' claims of injurious falsehood in that Plaintiffs have not in actuality set forth injurious falsehood claims but have alleged defamation claims because their claims implicate Plaintiffs' reputational interests, and such claims are barred by the two-year statute of limitations because Plaintiffs knew of the alleged communication by BP and also the fact of their damage more than two years before they filed their lawsuit.

Plaintiffs claim that BP committed the tort of injurious falsehood when it communicated with the Overland Police Department about the car wash machine, which was owned by BP, but that Plaintiffs possessed on their property. Plaintiffs specifically allege that "[o]n or before July 26, 1999 Amoco communicated with agents and employees of the Overland Police Department and informed same that Plaintiffs had unauthorized possession of a PDQ Laserwash 4000 car wash machine which belonged to

Amoco." (Ex. 3 at A31 and A37 – A38, ¶¶ 38 and 64.) Plaintiffs state that at the time BP made the alleged statement, "it intended that said statement result in harm to the interests of Plaintiffs and/or should have recognized that said statement was likely to cause harm to the interests of Plaintiffs." (Ex. 3 at A31 and A37 – A38, ¶¶ 40 and 64.)

Although the law in Missouri regarding the tort of injurious falsehood is sparse, this Court and other Missouri courts that have addressed the tort of injurious falsehood have adopted § 623A of the Restatement (Second) of Torts (hereinafter referred to as "Restatement") as the basis for the tort. (Ex. 18 at A440 – A449); McCormack Baron Mgmt. Servs., Inc. v. American Guarantee & Liab. Ins. Co., 989 S.W.2d 168, 171 (Mo. 1999); Cuba's United Ready Mix, Inc. v. Bock Concrete Foundations, Inc., 785 S.W.2d 649, 651 (Mo. Ct. App. 1990); Annbar Associates v. American Express Co., 565 S.W.2d 701, 706 (Mo. Ct. App. 1978). The Restatement establishes the general principles of injurious falsehood as follows:

> One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if
>
> (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and
>
> (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.

(Ex. 18 at A441); Annbar Assocs., 565 S.W.2d at 706 (quoting Restatement (Second) of Torts § 623A (1977)).

In order to determine the statute of limitations applicable to a cause of action, Missouri courts should look both to the most analogous statute of limitations and at the essence of what the plaintiff is truly alleging, not merely at the title a plaintiff gives his claim, in order to prevent plaintiffs from evading the appropriate statute of limitations. Sullivan v. Pulitzer Broadcasting Co., 709 S.W.2d 475, 480 (Mo. 1986); Wenthe v. Willis Corroon Corp., 932 S.W.2d 791, 795-96 (Mo. Ct. App. 1996). In Sullivan v. Pulitzer Broadcasting Co., this Court stated that courts "normally apply the most analogous statute of limitations" in situations in which plaintiffs will evade a statute of limitations by filing a barred claim under a different legal theory. This Court ultimately decided not to recognize the tort of false light, but in comparing the tort of false light with the tort of defamation, this Court stated "[i]t can be argued that if the defamation statute of limitations is not applied, such a statute will become meaningless because parties will invariably claim a 'false light' invasion of privacy instead of a defamation." Id.; see also K.G. v. R.T.R., 918 S.W.2d 795, 800 (Mo. 1996) (stating that, where plaintiff attempted to plead a claim for intentional infliction of emotional distress, although many battery actions, particularly those involving sexual contact, involve an offensive touching that is extreme and outrageous that may result in emotional distress, the actions are "at their core" actions for battery and, therefore, finding specific two-year statute of limitations was not applicable would evade a clearly expressed legislative purpose).

In Wenthe v. Willis Corroon Corp., the Missouri Court of Appeals for the Eastern District stated that a court should look to the actual claim by the plaintiff, not just the label the plaintiff gave the claim, to determine the statute of limitations. 932 S.W.2d at

795-96. The court was deciding whether a claim was truly a defamation claim or a tortious interference claim. The court stated that "the better reasoned analysis and the weight of authority holds that the 'gravamen' of the complaint or 'a fair reading of the complaint in its totality,' should determine whether the cause of action is for defamation or tortious interference and then the applicable statute of limitations should be applied." Id. (internal citations omitted). The court held that "Where the tortious interference is a mere label used to avoid the statute of limitations – on what is principally a claim for slander – the action should be judged by the shorter defamation statute of limitations and barred." Id.

Plaintiffs argue that BP is citing Sullivan for the proposition that a court should apply the most analogous statute of limitations "whenever a cause of action is not covered by a specific statute of limitations." (Resp't Answer to Prelim. Writ at 5.) Plaintiffs fail to address the Wenthe case, and they mischaracterize BP's arguments. BP cites Sullivan and Wenthe for the propositions that a plaintiff should not be allowed to evade a statute of limitations by labeling his claim with another title and that a court should look to the gravamen of the claim to determine if a plaintiff is so doing. Here, Plaintiffs have not set forth a claim for injurious falsehood but have instead alleged a claim for defamation. Plaintiffs have merely labeled their claims with the title of injurious falsehood to avoid the statute of limitations applicable to defamation claims.

Section 623A of the Restatement states that injurious falsehood and defamation are very similar torts in that they "[b]oth involve the imposition of liability for injuries sustained through publication to third parties of a false statement affecting the plaintiff."

Restatement (Second) of Torts § 623A cmt. g (1977) (Ex. 18 at A447). The main difference between the two torts is that defamation is intended to protect the "personal reputation of the injured party," whereas injurious falsehood is intended to protect "economic interests of the injured party against pecuniary loss." Id. The Restatement recognizes that the two torts often overlap in some factual situations. (Ex. 18 at A448.) The Restatement comments that the factual overlap may occur in "cases of disparagement of a plaintiff's business or product," and then provides examples of when claims of injurious falsehood or defamation may be appropriate. Id. The Restatement states: "If the statement reflects merely upon the quality of what the plaintiff has to sell or solely on the character of his business, then it is injurious falsehood alone." Id. The Restatement continues: "On the other hand, if the imputation fairly implied is that the plaintiff is dishonest or lacking in integrity or that he is perpetrating a fraud upon the public by selling something he knows to be defective, the personal defamation may be found." Id.

A court must determine whether the alleged statement implicated a reputational interest or merely an economic interest. If the claim implicates a reputational interest, then it is one for defamation. Restatement (Second) of Torts § 623A cmt. g (1977) (Ex. 18 at A447 – A448). In order for a plaintiff to state an injurious falsehood claim, the communication cannot implicate the plaintiff's reputation. In section 573 of the Restatement regarding slanderous imputations affecting business, trade, profession or office, the disparagement of goods was distinguished from defamation. Restatement (Second) of Torts § 573 cmt. g (1977) (Ex. 17 at A439). The Restatement noted that if a statement discredits the quality and utility of goods without in any way reflecting

unfavorably on the producer or owner, it is disparagement of goods, which is specified in § 626 as a special application of injurious falsehood. Id. However, if a statement is made under circumstances and in a manner that implies that the manufacturer or vendor is dishonest, fraudulent, or incompetent, it is defamation. Id.

Plaintiffs contend that they have alleged claims of injurious falsehood because Plaintiff Wandersee claimed in the Petition that, as part of his damages, he "lost the benefits of his ownership of ACT." (Resp't Answer to Prelim. Writ at 9.) Plaintiffs admit that they have also alleged "that Relator's conduct hurt their reputations." (Resp't Answer to Prelim. Writ at 9; Ex. 3 at A31 and A38, ¶¶ 42 and 65.) In fact, Plaintiff Wandersee claims "humiliation, embarrassment, disgrace, fright, injury to feeling, injury to reputation, emotional trauma and mental anguish," while Plaintiff OSCO's only alleged damage is "an injury to its reputation which caused Plaintiff to lose revenue and will continue to do so in the future and to incur expenses it would not have had to otherwise." (Ex. 3 at A31 and A38, ¶¶ 42 and 65.) Plaintiffs claim that despite the allegations of injury to reputation, their injurious falsehood claims "seek relief for the damage done to their economic interests and not to their reputations." (Resp't Answer to Prelim. Writ at 9.)

Plaintiffs' analysis in which they focus solely on the alleged damages is flawed in that they argue that, because they have alleged that they suffered economic damages, they have therefore automatically implicated economic interests that BP allegedly affected when it communicated with police. Plaintiffs are working backward from their alleged damages in an attempt to prove that the interests at issue are economic. The analysis is

not as simple as examining the type of damages alleged, however. Instead, the analysis must focus on the interest implicated by the communication in question. This is highlighted by the fact that while pecuniary damages are the only damages that may be recovered in injurious falsehood claims, pecuniary damages may also be recovered in defamation claims. An individual or corporation establishing a defamation claim can recover actual damages, which includes economic and non-economic damages. Nazeri v. Missouri Valley College, 860 S.W.2d 303, 313 (Mo. 1993); Cuba's United Ready Mix, Inc. v. Bock Concrete Foundations, Inc., 785 S.W.2d 649, 650-51 (Mo. Ct. App. 1990). Focusing on damages alone does not reveal whether a claim is one for injurious falsehood or defamation.

Rather than focusing on damages alone, the Court must look at the communication itself as alleged by Plaintiffs in their Petition and what interest the allegations implicate. In this case, Plaintiffs allege that "[o]n or before July 26, 1999 Amoco communicated with agents and employees of the Overland Police Department and informed same that Plaintiffs had unauthorized possession of a PDQ Laserwash 4000 car wash machine which belonged to Amoco." (Ex. 3 at A31, ¶ 38.) According to Plaintiffs' allegations in their Petition, BP's communication to the police indicated that Plaintiffs were dishonest, were stealing, and had committed a crime. (Ex. 3 at A31, ¶ 38.) As alleged by Plaintiffs, this alleged communication falls squarely within the parameters of the definition of defamation as it is a statement impinging upon Plaintiffs' reputations. Overcast v. Billings Mutual Ins. Co., 11 S.W.3d 62, 70 (Mo. 2000). It is this alleged harm to Plaintiffs' reputations that then allegedly led to the economic damages that Plaintiffs

assert. In fact, Plaintiff OSCO clearly states that it allegedly suffered an "injury to reputation," which then caused economic damages. (Ex. 3 at A38, ¶ 65.) Because Plaintiffs have alleged that BP's communication affected their interest in their reputations, it is a claim for defamation.

Defamation claims have a two-year statute of limitations. Mo. Rev. Stat. § 516.140 (Ex. 16 at A432 – A433). Defamation claims accrue when the damages are capable of ascertainment. Thurston v. Ballinger, 884 S.W.2d 22, 26 (Mo. Ct. App. 1994). "Damages are ascertained when the fact of damage appears, not when the extent or amount of the damage is determined." Id.; Polytech, Inc. v. Sedgwick James of Missouri, Inc., 937 S.W.2d 309, 312 (Mo. Ct. App. 1996); see also Nettles v. American Tel. Co., 55 F.3d 1358, 1362-63 (8th Cir. 1995). In the context of a slander claim, damages are capable of ascertainment, and the cause of action therefore accrues, on the date that a plaintiff learned of the defamatory statement. Thurston, 884 S.W.2d at 26; Jordan v. Greene, 903 S.W.2d 252, 255 (Mo. Ct. App. 1995).

In its Motion for Summary Judgment, BP set forth many facts that proved that Plaintiffs knew about BP's alleged July 26, 1999 statement to police within a few days of the statement being made. (Ex. 6 at A81 – A83, ¶¶ 30-42.) Plaintiffs admitted these facts in their Response to BP's Uncontroverted Facts. (Ex. 8 at A343 – A344, ¶¶ 30-42.) As a result, in its Petition for Writ of Prohibition at paragraph 15, BP stated that "Plaintiffs did not contest BP's factual assertions that Plaintiffs knew in 1999 that BP had communicated with the police or that they knew they had been injured in 1999." (Relator's Pet. for Writ of Prohibition ¶ 15 (citing Ex. 8 ¶¶ 30-42).) In their

Answer/Return to the Preliminary Writ of Prohibition, Plaintiffs denied paragraph 15 of BP's Petition for Writ of Prohibition. (Resp't Answer to Writ ¶ 15.) Because Plaintiffs now deny for the first time that they knew of the communication or injury in question in 1999, BP must recite the facts supporting the conclusion that Plaintiffs knew in 1999 that BP had communicated with the police or that Plaintiffs knew that they had been injured in 1999.

A. Wandersee knew in July 1999 that BP had communicated with the police about Plaintiffs' alleged "unauthorized possession" of the car wash machine

Plaintiffs claim in their Petition that on or before July 26, 1999, BP made allegedly "false" statements to the Overland Police Department which caused them damage. (Ex. 3 at A31, ¶¶ 38-39.) Because Wandersee knew within a few days after the July 26, 1999, Overland Police Department search of his warehouse that a BP representative, specifically Ron Benhart, had spoken to the Overland Police Department about the alleged "unauthorized possession" of the car wash machine, Plaintiffs' claims for injurious falsehood are barred by the two-year statute of limitations because they waited until January 15, 2002, to file the lawsuit. The statute of limitations expired on or about July 2001.

Wandersee's own taped conversations and deposition testimony show that he knew within days of the raid on the OSCO warehouse in July 1999 that BP had communicated with the police about the car wash machine. He went so far as to call a BP employee within days of the raid and his arrest seeking help from Amoco to eliminate

the "criminal" matter. Wandersee's deposition testimony regarding his conversations with Merry Fissehazion of BP shows that Wandersee knew that Ron Benhart had communicated with the police about the car wash machine. Wandersee first called Fissehazion on July 28, 1999, and informed her that he had been detained by police and that his warehouse had been raided. (Ex. 6 at A96.) He asked Fissehazion to find out any information she could about what had occurred. (Id.)

A day or two after the July 28, 1999, conversation, Merry Fissehazion and Brian Wandersee again spoke by telephone in a conversation that Wandersee tape recorded. (Ex. 6 at A97.) Again, it is clear that Wandersee knew in July 1999 that Ron Benhart of BP had talked to police. Wandersee testified that Fissehazion told him that this was an "absolute departure" from anything she had seen at Amoco. (Ex. 6 at A97.) Wandersee explained:

> Wandersee: She referenced the fact that on numerous occasions of her dealings with Ron Benhart, I don't remember the exact words, but it's on the tape, that she would have to, in essence, I am paraphrasing, to pull teeth to get him to respond in any fashion, much less seek this kind of action, and how shocking it was for him to have taken this kind of action especially without having involved anyone at Western Region. She further –
>
> Ms. Johnson: Did she tell you that Ron Benhart would have to be 100 percent convinced that he had a good case before he would go to the police?

Wandersee: She referenced something about Ron in that regard. I don't know if that was the absolute context of it.

. . .

Ms. Johnson: What did Merry say that she, if anything, that she would do, anything further after this conversation?

Wandersee: That she was continuing to seek the - - our conversation with Ron Benhart, that I took in general to mean that she was going to seek to see if she couldn't quiet the situation and clear it up.

(Ex. 6 at A97 – A98; A230 – A232.)

Wandersee also demonstrated his knowledge that BP had talked to the police about the car wash machine when, "a couple days after the raid" on July 26, 1999, of OSCO's warehouse he tape-recorded a conversation with Mike Judge, who worked at a company named Hydro Spray, with which OSCO had business dealings. (Ex. 6 at A109.) Wandersee further speaks about his actions in immediately contacting Amoco about the situation. On the tape, Wandersee tells Judge that he went to the police station with his attorney and was told that he was "under investigation for criminal felony theft." (Ex. 6 at A247.) Wandersee told Judge that he had already contacted Amoco personnel regarding the criminal investigation. (Ex. 6 at A247-A248.)

In his conversation with Mike Judge, Wandersee not only stated that he was under investigation for criminal felony theft and had been processed at the police station, but that he knew BP corporate from Chicago was involved in the police investigation and he

even went as far as naming potential claims against BP of malicious prosecution and defamation of character.

> Brian: Before it's over, I'm going to have some people in a civil lawsuit for defamation of character, believe me. That's already been under very serious conversation. Not only PDQ but Dover and I want a piece of Amoco, too.
>
> ***
>
> Brian: Anyway, so I think that's where this is sitting, and I had personally called on all the highest ranking people that I know, locally in the [Amoco] marketing groups. Steve Amick obviously has begun doing the same with his contacts, to try to get to the bottom of this, essentially to get Amoco to see the light on what - - how serious and dangerous a little episode that they've basically I think been led down the path of and because basically right now they're open to a pretty dog gone large lawsuit for malicious prosecution and defamation of character.

((Ex. 6 at A247 – A248; A253 – A254) (emphasis added).)

Within a few days after the police search of the OSCO warehouse, Wandersee was well aware that BP had communicated to the police prior to the search. Using the accrual method applied in slander cases, in which damages are capable of ascertainment on the date that a plaintiff learns of the defamatory statement, Wandersee, and therefore

OSCO, knew of the defamatory statements within a few days of July 26, 1999, making their damages capable of ascertainment at that time. Thurston, 884 S.W.2d at 26. Because Plaintiffs' damages were capable of ascertainment in July 1999, their claims for injurious falsehood are barred because they filed them on January 15, 2002, outside the two-year time limitation that expired in July 2001.

B. Wandersee and OSCO knew they had experienced economic damages in 1999

Even if the Court does not apply the accrual method used in slander cases, in which damages are capable of ascertainment on the date that the plaintiff merely learns of the defamatory statement, and instead requires that the plaintiff must also have been aware of some economic damage as a result of the allegedly false statements, Plaintiffs' claims of injurious falsehood are barred by the statute of limitations. Plaintiffs' fact of damage that was allegedly caused by BP's statements appeared in 1999, making Plaintiffs' claims filed on January 15, 2002, outside the statute of limitations that expired in 2001.

Minutes of the corporate meetings of OSCO held in 1999 demonstrate the financial difficulty OSCO experienced beginning in 1999 allegedly due to BP's statements to police. On August 10, 1999, OSCO held a meeting for the purpose of arranging the immediate employment of Wandersee's parents, Herb and Jane Wandersee, and Wandersee's wife, Laura "to replace several persons who resigned abruptly, stating their reasons for leaving as having been in connection with the developing criminal investigation of the company and Brian Wandersee." (Ex. 6 at A120.) The minutes set

forth the compensation for the family members and also state that "[i]t was understood that the company, due to the overwhelming financial hardships that were being experienced because of the criminal investigation against it, did not presently have the funds to pay the compensation as represented, " and that "when the criminal proceedings are completed and the company's financial position is restored, such wages earned will be due to the respective persons with applicable interest." (Ex. 6 at A121.)

On August 25, 1999, OSCO held a meeting "for the purpose of arranging the immediate funding through a loan to the company from both of the families of Brian Wandersee and Herb Wandersee." The minutes state:

> It was discussed that because of the increasing financial hardship of the company due to the continuing criminal investigation relating to the PDQ car wash machine, the company has been unable to secure many of the sales that it had been working on for several months. Funds to meet payables are reaching a critically low level and such payables need to be met for the company to continue daily operations.

((Ex. 6 at A122) (emphasis added).) OSCO decided that both Herb and Brian Wandersee would loan $5,000 to OSCO in "an effort to pay immediate payable needs." (Id.) The minutes reflect that the loans would be repaid with interest when "the company's financial circumstances are strong enough." (Id.)

On September 2, 1999, OSCO held another meeting "for the purpose of structuring an arrangement for the parties present to allow equity in their personal residences to be secured by First Bank so that the company could then complete a

forbearance agreement with First Bank." (Ex. 6 at A123.) The minutes reflect that if such an arrangement was completed, the First Bank line of credit would continue to be accessible to the company for daily operating expenses. The minutes also state:

> It was again discussed that <u>because of the continuing financial hardship of the company due to the ongoing criminal investigation of the company and Brian Wandersee, relating to the PDQ car wash machine, the company has continued to fail in securing sales that it had been working on for the past several months</u>. Funds to meet payables and now payroll are reaching a critical stage and need to be met for the company to continue daily operations. Securing continued use of the existing line of credit with First Bank, it was discussed, is vital for the company to continue daily operations at present.

((Ex. 6 at A123) (emphasis added).)[1]

Plaintiffs state in their Petition that BP's statements to the police on or before July 26, 1999, the day the Overland Police Department executed the search warrant on OSCO's warehouse, are the basis of their injurious falsehood claims and these statements caused their economic damages in this case. (Ex. 3 at A31 and A37 – A38, ¶¶ 38-42, 64-

[1] At Wandersee's deposition, Wandersee testified that the August 10, 1999 minutes, the August 25, 1999 minutes, and the September 25, 1999 minutes were true and accurate copies of the minutes and were prepared at or about the time of each of the meetings. (Ex. 6 at A114 – A115.)

65.) The minutes of OSCO's meetings on August 10, 1999, August 25, 1999, and September 2, 1999, show that Wandersee and his family members involved with OSCO believed that OSCO's financial situation had taken a severe downturn as a result of the ongoing criminal investigation.

In his deposition, Wandersee confirmed that his alleged damages first appeared in 1999 and he provided more detail as to his alleged lost business. Wandersee testified that 1998 was the year for comparison because "it was the year before the impact to the egregious actions taken against our company." (Ex. 6 at A110.)

Wandersee also testified that OSCO lost several distributor agreements due to the uncertainty caused by the criminal case. (Ex. 6 at A107.) Wandersee specifically stated that he lost distributorship agreements with Hydro Spray, CSI, and Autec. He testified that Hydro Spray terminated its distributor agreement with OSCO on August 19, 1999, and that he was told that termination was based on the events that occurred in connection with the criminal investigation. (Ex. 6 at A107 – A108.) This first distributor cancellation in August 1999 signaled that OSCO had incurred damages of this type allegedly based on Amoco's contact with the Overland Police Department. Wandersee and OSCO knew in August 1999 that it had been damaged economically.

As demonstrated by the September 2, 1999 corporate minutes, Wandersee was also aware of the fact of OSCO's alleged damages in 1999 because of his interactions with OSCO's bank during this time frame. Wandersee testified at his deposition that Lindsay Gerken and Joe Ambrose from First Bank called Wandersee to meet with them at the bank within a few weeks of the search of the OSCO warehouse. (Ex. 6 at A101 -

A102.) The First Bank employees informed Wandersee that they were anonymously contacted and told that he had been arrested and the warehouse raided. (Ex. 6 at A101.) In response to First Bank's concerns about the criminal investigation, Wandersee provided interim financial statements to the bank within a few days at another meeting with bank representatives. According to Wandersee, after they presented the financials, the bank remained concerned about events and chose to freeze OSCO's line of credit. (Ex. 6 at A102.) As to the bank's decision to freeze OSCO's line of credit and the bank's ensuing actions, Wandersee testified that the bank was nervous about the police investigation and therefore demanded additional collateral for the loan. (Ex. 6 at A104 – A105.) This loan for which the bank demanded additional collateral was the same line of credit that the bank initially froze. (Ex. 6 at A105.)

Wandersee executed a Forbearance Agreement with First Bank on September 3, 1999, which referenced the additional collateral that Wandersee and other family members provided to the bank in the form of real property, including OSCO's 1604 Fairview property and Wandersee's home in St. Charles. (Ex. 6 at A106.) Wandersee testified that the purpose of the Forbearance Agreement was to restructure the line of credit as a result of the raid in July 1999. (Ex. 6 at A106.) Therefore, Plaintiffs' fact of damage was obvious in 1999 due to First Bank's decisions to freeze OSCO's line of credit, demand additional collateral, and require the first of a series of Forbearance Agreements, all of which Plaintiffs claim were due to the police investigation and Wandersee's arrest.

Wandersee is also attempting to recover accounting fees and attorneys' fees that he allegedly paid in responding to audits conducted by various government agencies starting in 1999 as a result of the allegations against him. (Ex. 6 at A111 – A112.) Wandersee testified that OSCO was audited regarding "State of Illinois Sales Tax, State of Missouri Sales Tax, and the State of Missouri Division of Employment." (Ex. 6 at A112.) He testified that the State of Illinois audit started in 1999, as referenced in a December 10, 1999, invoice that he produced from his accounting firm that noted a discussion with Tim Belz, his criminal attorney. (Id.) By this time in 1999, Wandersee said the State of Illinois "had now issued subpoenas to various vendors of mine around the country. That's why you see the reference to Tim Belz at the bottom of it, who was my criminal attorney." (Ex. 6 at A113.)

When asked how these audits were related to this case, Wandersee stated: "Well, as you come to discover when you're made the subject of baseless allegations of theft, . . . apparently, government agencies look for that kind of thing and assume if you were stealing there, then you must have been stealing elsewhere. So they come in and ask to review your books." (Ex. 6 at A112.) As a result, Wandersee and OSCO were aware of the fact that they had been damaged in 1999 when they spent money for their accountants' services in responding to the State of Illinois audit that Wandersee says was related to the police investigation. (Ex. 6 at A111 – A112.)

Based on these facts, it is obvious that Wandersee knew within days of the July 26, 1999, search of the OSCO warehouse that Amoco had communicated to the Overland Police Department and that he had a potential claim against Amoco. The evidence also

clearly demonstrates that Wandersee and OSCO experienced economic damages in 1999 that they attribute to BP's alleged actions. The fact of Wandersee's and OSCO's damages appeared in 1999. Therefore, their claims of injurious falsehood are barred by the two-year statute of limitations because they did not bring their claims until January 15, 2002, when they should have brought them no later than July 2001.

This Court should make its Preliminary Writ absolute and prevent Respondent from proceeding with this case because Plaintiffs have not alleged claims for injurious falsehood but ones for defamation. Defamation has a two-year statute of limitations and bars Plaintiffs' defamation claims. If the Court does not make its Preliminary Writ of Prohibition absolute, or in the alternative, issue a Writ of Mandamus, BP will be forced to participate in unnecessary, inconvenient, expensive, and burdensome litigation. State ex rel. The Police Retirement System of St. Louis v. Mummert, 875 S.W.2d 553, 555 (Mo. 1994) (granting writ to prohibit trial court from proceeding with case in which summary judgment should have been entered); see also State ex rel. Springfield Underground, Inc. v. Sweeney, 102 S.W.3d 7, 9 (Mo. 2003) (citing Police Retirement System, 875 S.W.2d at 555); State ex rel. O'Blennis v. Adolf, 691 S.W.2d 498, 500 (Mo. Ct. App. 1985). BP will suffer considerable hardship and expense, and Plaintiffs will have successfully evaded the statute of limitations.

II. Relator is entitled to an order prohibiting Respondent from proceeding further with this case because the applicable statute of limitations bars Plaintiffs' claims of injurious falsehood in that injurious falsehood claims of the type alleged by Plaintiffs should be subject to a two-year statute of limitations because the tort of injurious falsehood is so broad that it may factually encompass other torts, including defamation, and thus should not automatically be given a five-year statute of limitations, or alternatively, because slander of title claims, to which Plaintiffs compare their injurious falsehood claims, should be subject to a two-year statute of limitations under the plain language of Mo. Rev. Stat. § 516.140.

If this Court concludes that Plaintiffs have alleged claims for injurious falsehood because they have alleged economic damages, there remains the question of which statute of limitations is applicable to claims of injurious falsehood because Missouri courts have not addressed the statute of limitations for injurious falsehood. This is a matter of first impression in Missouri.

In their Answer to the Preliminary Writ, Plaintiffs claim that all injurious falsehood claims should have a five-year statute of limitations under § 516.120(4) without any reference to analogous statutes of limitations because injurious falsehood is not specifically enumerated in any statute of limitation. (Ex. 15 at A429 – A431.) Plaintiffs further argue that if analogous statutes are considered, their alleged injurious

falsehood claims are more like slander of title claims than defamation claims, and, therefore, the five-year statute of limitations should apply.

This Court should reject Plaintiffs' argument. Because the tort of injurious falsehood as presented in the Restatement may factually overlap at times with defamation but also encompasses torts such as slander of title or trade libel, the tort is too broad to be automatically covered by the five-year statute of limitations. (Ex. 18 at A447 – A448.) The Court should look to the type of injurious falsehood alleged to determine if the claim is more like a defamation claim or a slander of title or trade libel claim in order to determine the appropriate statute of limitations.

As previously noted, this Court stated in Sullivan that in order for statutes of limitation to be applied equally across different labeled torts that are in fact very similar, courts normally review the most analogous statute of limitations. Sullivan, 709 S.W.2d at 480. The label "injurious falsehood" is a general and broad term, and not all claims labeled as injurious falsehood are similar in nature. The Restatement states that "[t]he general principle stated in this Section [623A] is applied chiefly in cases of disparagement of property in land, chattels or intangible things or of their quality. These cases are covered by the specific applications of the principle stated in §§ 624 and 626. The rule is not, however, limited to them. It is equally applicable to other publications of false statements that do harm to interests of another having pecuniary value and so result in pecuniary loss." Restatement (Second) of Torts, § 623A cmt. a (1977) (Ex. 18 at A442).

Section 624, disparagement of property – slander of title, and section 626, disparagement of quality – trade libel, of the Restatement (Second) of Torts state that slander of title is a "special application" of the injurious falsehood principles of section 623A. Restatement (Second) of Torts, § 624 cmt. a (1977) (Ex. 19 at A452); Restatement (Second) of Torts, § 626 cmt. a (1977) (Ex. 20 at A456). Section 624 of the Restatement applies the general principles of the tort of injurious falsehood as found in section 623A to "Disparagement of Property – Slander of Title," which involves "the publication of a false statement disparaging another's property rights in land, chattels or intangible things." (Ex. 19 at A451 – A452.) Section 626 of the Restatement applies the general principles of the tort of injurious falsehood as found in section 623A to "Disparagement of Quality – Trade Libel," which involves "the publication of matter disparaging the quality of another's land, chattels or intangible things." (Ex. 20 at A456.)

While the tort of injurious falsehood is broader than just slander of title or trade libel according to the Restatement, in Missouri those cases in which the plaintiff was allowed to proceed to trial on an injurious falsehood claim involved cases in which the comments in question involved the quality or availability of goods or services. In Cuba's United Ready Mix, Inc. v. Bock Concrete Foundations, Inc., the plaintiff alleged that the defendant said that plaintiff "was delivering inferior material and that he would not be a part of the fraud." 785 S.W.2d 649, 650 (Mo. Ct. App. 1990). The Missouri Court of Appeals stated that the plaintiff's claim appeared to be "one called by various names such as disparagement of property, slander of goods, commercial disparagement, and trade libel and is now generally referred to as injurious falsehood." Id. at 651 (internal

quotations omitted). In Annbar Associates v. American Express Co., 565 S.W.2d 701 (Mo. Ct. App. 1978), the plaintiff was allowed to proceed on a theory of injurious falsehood because the defendant, a reservation service, was telling customers that the plaintiff hotel had no rooms available when in fact it did have rooms available.

Two Missouri cases state that slander of title claims have five-year statutes of limitation. In Nolan v. Kolar, 629 S.W.2d 661, 663 (Mo. Ct. App. 1982), the Missouri Court of Appeals for the Eastern District stated without discussion that slander of title claims fall under the five-year statute of limitations of § 516.120(4). (Ex. 15 at A429 – A431.) Again without discussion, the Eastern District cited Nolan for the same proposition in Jones v. Rennie, 690 S.W.2d 164, 167 (Mo. Ct. App. 1985). Thus, in those cases in which the injurious falsehood claims are slander of title, then a five-year statute would be applicable, according to the Eastern District of Missouri cases.

Although the tort of injurious falsehood may take the form of slander of title or trade libel claims, Plaintiffs' claims in this case highlight the general nature of the tort of injurious falsehood and the difficulty inherent in applying one statute of limitations, as Plaintiffs have not pleaded a slander of title or trade libel claim. Restatement (Second) of Torts § 623A cmt. a (1977) (Ex. 18 at A442). Plaintiffs have not explained how their injurious falsehood claims are slander of title claims. It is undisputed that the car wash at issue was BP's, not Plaintiffs'. Therefore, Plaintiffs cannot claim that BP interfered with their ability to sell the car wash because they had no right to do so. In addition, any alleged economic harm to Plaintiffs' business came from the reputational harm resulting from BP's alleged statements to the police that Plaintiffs had stolen the car wash. This is

not a slander of title claim. Nor can Plaintiffs claim they have a trade libel claim because the quality of Plaintiffs' goods are not in question.

Plaintiffs cite to cases from other jurisdictions to say that injurious falsehood is more akin or analogous to slander of title. In Dickson Construction, Inc. v. Fidelity and Deposit Co., 960 S.W.2d 845 (Tex. Ct. App. 1997), the Texas Court of Appeals stated that disparagement is more akin to slander of title because both require special damages. In Dickson, the court cited to the Texas Supreme Court case of Hurlbut v. Gulf Atlantic Life Insurance Co., 749 S.W.2d 762 (Tex. 1987). The Hurlbut case is instructive to the case before this Court. In Hurlbut, based on comments by the defendants, the plaintiffs' company was put in receivership, the plaintiffs' insurance licenses were revoked, the plaintiffs were arrested, jailed, and criminal and civil charges were filed against them. The court of appeals held that the plaintiffs' claims were in essence claims for slander and barred by the one-year statute of limitations. The Texas Supreme Court recognized that actions for injurious falsehood and business disparagement are similar to actions for defamation, but that the torts protected different interests of economic interests versus personal reputation. Id. at 766. The Texas Supreme Court then held that there were no special damages for the plaintiffs, thus there was no disparagement claim. The Texas Supreme Court quoted the court of appeals opinion with approval:

> No evidence was offered of damages resulting from loss of business expected from any particular customer or prospective customer to whom disparaging statements were made by defendants. The damages alleged and proved

> resulted only indirectly from the disparaging statements alleged, and more immediately from the receivership, the orders revoking their licenses, and their prosecution for misappropriation of insurance premiums.

Id. at 767. The Texas Supreme Court held "[i]n this regard we agree with the Court of Appeals that the damages proven were personal to the plaintiffs." Id. This is the exact situation found in the case before the Court in that Plaintiffs Wandersee and OSCO have alleged personal damages to their reputation that are claims of defamation, not injurious falsehood. Also, Plaintiffs have not alleged or proven any damages resulting from loss of business from any customer to whom disparaging statements were made by BP. Plaintiffs have only alleged indirect damages resulting from statements BP allegedly made to police as part of the police and prosecutor's investigation, not to any business prospect. Plaintiffs have not pointed to any property disparagement in this case.

Moreover, the other non-Missouri cases cited by Plaintiffs, Kansas Bankers Sur. Co. v. Bahr Consultants, Inc., 69 F. Supp.2d 1004 (E.D. Tenn. 1999), and Gregory's Inc. v. Haan, 545 N.W.2d 488 (S.D. 1996), stand only for the proposition that there are similarities between the causes of action of injurious falsehood and slander of title. These cases have no bearing whatsoever on whether injurious falsehood claims are properly governed by a state's statute of limitations for slander. These cases, therefore, are neither controlling nor instructive.

Because "injurious falsehood" is such a general and broad term, that can, but does not always, encompass slander of title, it is impossible to make the sweeping

determination that all injurious falsehood claims are the equivalent of slander of title claims that should be given a five-year statute of limitations. A claim of injurious falsehood that involves a statement that affects a plaintiff's reputational interests and merely results in economic damages, but in no way implicates plaintiff's title or the quality of the plaintiff's product, should not automatically be given a five-year statute of limitations.

This Court's decision in Sullivan is instructive in that in order to determine the proper statute of limitations, a court must look at the most analogous statute of limitations so that plaintiffs do not evade statutes of limitation. Statements such as those claimed by Plaintiffs are more analogous to defamation claims and should be given a two-year statute of limitations. These types of statements are particularly analogous to defamation because the current state of the law of defamation requires proof of actual damages, and does not allow for presumed damages as in decades past. Nazeri v. Missouri Valley College, 860 S.W.2d 303, 313 (Mo. 1993). If statements that have the effect of causing economic harm, without implicating title or quality of goods, are given a five-year statute of limitations, Plaintiffs will evade the defamation statute of limitations. Injurious falsehood claims must be reviewed closely to determine the appropriate statute of limitations, whether two years or five years. See Shade v. Missouri Highway and Transp. Comm'n, 69 S.W.3d 503, 509-10 (Mo. Ct. App. 2002) (noting that inverse condemnation claims have been brought under numerous theories and as a result have had various statutes of limitation).

Alternatively, even if Plaintiffs' claims can be classified as slander of title or trade libel claims, they should be given a two-year statute of limitations. As stated above, in two cases, the Eastern District Court of Appeals stated, without discussion, that slander of title cases fall under the five-year statute of limitations of § 516.120(4). (Ex. 15 at A429 – A431.) Section 516.140, however, states that the two-year statute of limitations applies to slander and libel claims. (Ex. 16 at A432 – A433.) The statute does not specify by its plain language whether the slander and libel claims to which it refers are merely traditional defamation claims or any slander and libel claims, including slander of title or trade libel.

Recently, the Pennsylvania Supreme Court in Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co., 809 A.2d 243 (Pa. 2002), had the opportunity to decide under which statute of limitations an injurious falsehood claim would fall and the case is directly on point to the issues raised here. In Pro Golf, in determining whether plaintiff's claim for "commercial disparagement," which the court characterized as one for injurious falsehood, was governed by the state's statute of limitations for slander or for injury to property, the court focused on the **nature of the conduct involved** rather than the nature of the interest protected. Id. at 247. In so doing, the court found that injurious falsehood claims are essentially for slander and expressly rejected the lower court's analysis applying the statute of limitations for injury to property which relied on the "different interests" approach advocated by Plaintiffs here. The court held that "**the statute of limitations for slander is the same whether the slander involves property or the person**." Id. (emphasis added). Because Pro Golf is directly analogous to the issues

raised here, this Court should adopt its sound reasoning based on the conduct alleged and find that Plaintiffs' injurious falsehood claims are governed by Missouri's two-year statute of limitations for slander and libel actions, no matter what form the injurious falsehood claim takes. This Court should hold that the Eastern District of Missouri cases should no longer be followed.

If the Court believes Plaintiffs have sufficiently alleged injurious falsehood claims, they should still be barred by the two-year statute of limitations. Assuming the Court of Appeals is correct that slander of title claims have a five-year statute of limitations, injurious falsehood claims should be reviewed individually because the tort is so broad that not all injurious falsehood claims are slander of title or trade libel claims as proven by Plaintiffs' claims. Plaintiffs' claims are much more similar to defamation claims and, therefore, are barred by the applicable two-year statute of limitations. Alternatively, even if Plaintiffs allege an injurious falsehood claim that is similar to slander of title or trade libel, these claims should be barred by the two-year statute of limitations because § 516.140, by its plain language, applies a two-year statute to all slander or libel claims. Because the two-year statute of limitations applies to Plaintiffs' claims, Plaintiffs' injurious falsehood claims are barred.

CONCLUSION

For these reasons, this Court should make its preliminary Writ of Prohibition absolute, and order Respondent The Honorable John A. Ross not to take any further action in this case, other than to grant summary judgment in favor of BP in this case. Alternatively, this Court issue a Writ of Mandamus requiring Respondent The Honorable

John A. Ross to order summary judgment in favor of BP and upon full hearing of all matters herein to make said writ absolute and to grant such other and further relief as this Court deems just and proper.

GREENSFELDER, HEMKER & GALE, P.C.

By_____

Dawn M. Johnson, M.B.E. No. 41991

Tina R. Carter, M.B.E. No. 49196

2000 Equitable Building

10 South Broadway

St. Louis, MO 63102

Tel: (314) 241-9090

Fax: (314) 241-4245

Attorneys for Relator

BP Products North America Inc.

CERTIFICATE OF COMPLIANCE WITH

MISSOURI SUPREME COURT RULE 84.06(b) AND RULE 84.06(g)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on Microsoft Word 97 by which it was prepared, contains 11,488 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, the signature block and the appendix.

The undersigned further certifies that the diskette filed herewith containing the Relator's Opening Brief in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

GREENSFELDER, HEMKER & GALE, P.C.

By_____

Dawn M. Johnson, M.B.E. No. 41991

Tina R. Carter, M.B.E. No. 49196

2000 Equitable Building

10 South Broadway

St. Louis, MO 63102

Tel: (314) 241-9090

Fax: (314) 241-4245

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and accurate copies of Relator's Opening Brief, Volume 1 of Appendix, and Volume 2 of Appendix were served, via first class mail, postage prepaid, on this ____ day of December, 2004, to:

Joseph R. Dulle, Esq.

Stone Leyton & Gershman

7733 Forsyth Blvd., Suite 500

St. Louis, MO 63105

Telephone: (314) 721-7011

Facsimile: (314) 721-8660

Lee G. Kline, Esq.

Gartenberg & Kline, P.C.

7777 Bonhomme, Suite 1910

St. Louis, MO 63105

Telephone: (314) 725-6040

Facsimile: (314) 725-5161

Attorneys for Plaintiffs

Michael J. Pitzer, Esq.

Rabbitt, Pitzer & Snodgrass, P.C.

100 South Fourth Street, Suite 400

St. Louis, MO 63102

Telephone: (314) 421-5545

Facsimile: (314) 421-3144

Don V. Kelly, Esq.

Gallop, Johnson & Neuman, LC

101 South Hanley Road

Suite 1600

St. Louis, MO 63105

Telephone: (314) 615-6000

Facsimile: (314) 615-6001

John A. Haase, Esq.

Godfrey & Kahn, S.C.

333 Main Street, Suite 600

Green Bay, WI 54307-3067

Telephone: (920) 436-7669

Facsimile: (920) 436-7988

Attorneys for Defendant PDQ Manufacturing, Inc.

S. Lee Patton, Esq.

11413 Manchester

Kirkwood, MO 63122-1009

Telephone: (314) 965-2888

Facsimile: (314) 965-1423

Attorney for Defendants Paul Faix and Janet Faix

The Honorable John A. Ross

Circuit Court of St. Louis County

Courts Building

7900 Carondelet Avenue

St. Louis, MO 63105

Telephone: (314) 615-1515

Facsimile: (314) 615-8280

Respondent

_____

762129