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

REPLY BRIEF OF RELATOR

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INTRODUCTION

Relator BP Products North America Inc. ("BP"), by its undersigned attorneys, hereby submits this Reply Brief, in response to Respondents' Brief.

In their Respondents' Brief, Plaintiffs Brian Wandersee and Advanced Cleaning Technologies, Inc., formerly known as OSCO Enterprises ("ACT" or "OSCO"), concede the following points, either explicitly or through their silence:

(1) The Court should determine the applicability of this Court's decision in Sullivan v. Pulitzer Broadcasting Co., 709 S.W.2d 475 (Mo. 1986), upon which BP relies, see Respondent's Brief at 12-13;

(2) The case of Wenthe v. Willis Corroon Corp., 932 S.W.2d 791, 795-96 (Mo. Ct. App. 1996), is correct in that the Court should look to the gravamen of a claim and not merely the label a plaintiff affixes to a claim when determining the statute of limitations;

(3) BP correctly set forth the method in which defamation claims accrue under Missouri law;

(4) Plaintiffs' claims accrued in July 1999 because they knew of the alleged communication by BP regarding Plaintiffs' "unauthorized possession" of the car wash and also the fact of their damage at that time;

(5) If a two-year statute of limitations applies to Plaintiffs' claims, Plaintiffs are barred from proceeding further with this case.

This Court's decision in Sullivan compels the Court to make the Writ of Prohibition absolute. The legal principle established in that case was based on the same

facts presented here and Respondent has not suggested any good reason for the Court to reverse that decision.

The dispositive issue in this case is whether a plaintiff can avoid the controlling statute of limitations when the substance of the allegations are governed by a specific statute of limitations even though the plaintiff labels the claim differently to avoid the statute of limitations. Here, the claim alleged for injurious falsehood is effectively a defamation claim in the same way that the claim for false light invasion of privacy in Sullivan was essentially a defamation claim and subject to the shorter statute of limitations. The same policy that influenced this Court's decision in Sullivan should mandate the outcome in this case. The issue is not the damages asserted, but the nature of the claims, and here, Plaintiffs' claims implicate their reputational interests and are therefore barred by the state's two-year statute of limitations for defamation.

Based on Plaintiffs' concessions and their failure to rebut Relator BP's arguments as set forth in Relator's Opening Brief, the Court should make its Preliminary Writ of Prohibition absolute.

JURISDICTIONAL STATEMENT

Plaintiffs have not contested this Court's jurisdiction of this matter under Article V, Section 4 of the Missouri Constitution. Plaintiffs therefore agree with Relator BP that this Court has the power to make its Preliminary Writ of Prohibition issued on October 26, 2004 absolute.

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.

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 .

ARGUMENT

Standard of Review

In its Opening Brief, Relator BP set forth the case law regarding the appropriateness of the issuance of a Writ of Prohibition. (Relator's Opening Br. at 19-20.) In response, Plaintiffs state that Writs of Prohibition should only issue in extraordinary circumstances and should not issue when the error is reviewable on appeal. (Resp't Br. at 8.) In doing so, Plaintiffs cite only a portion of the law regarding the issuance of Writs of Prohibition and ignore case law in which the Court considered the appropriate statute of limitations on Writ of Prohibition proceedings.

Plaintiffs fail to respond to the case of State ex rel. General Electric Co. v. Gaertner, in which the Court determined the applicability of a statute of limitations when a trial court judge intended to proceed to trial on a claim that the relator argued was barred by the statute of limitations. 666 S.W.2d 764, 765-67 (Mo. 1984); id. at 768 (Rendlen, J., concurring). In General Electric, this Court addressed the applicability of Missouri Revised Statute § 516.120(4) to third-party actions brought ancillary to the plaintiff's underlying claims for which the statute of limitations had run. General Electric, 666 S.W.2d at 765. The Court quashed its provisional writ because it determined that a tortfeasor could seek to enforce his right to obtain relative apportionment of damages by means of third-party practice whether or not the statute of limitations has expired on the original claim of the plaintiff. Id. at 767. Although the Court quashed its writ in the General Electric case, it considered the issue on the appropriateness of a particular statute of limitations during the Writ proceedings. As Judge Rendlen stated in his concurrence, "Forcing upon a defendant the expense and

burdens of a trial when the claim is *clearly* barred is unjust and should be prevented." Id. at 768 (emphasis in original); see also State ex rel. O'Blennis v. Adolf, 691 S.W.2d 498, 500 (Mo. Ct. App. 1985) (quoting General Electric, 666 S.W.2d at 768 (Rendlen, J. concurring), in a case regarding collateral estoppel). The applicability of the appropriate statute of limitations is the issue in this case, therefore, a Writ of Prohibition should be available to prevent Respondent from proceeding further with the case.

Plaintiffs also do not respond to BP's recitation of the cases in which Writs of Prohibition have issued to prevent unnecessary, inconvenient, and expensive litigation or 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. 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. Noranda Aluminum, Inc. v. Rains, 706 S.W.2d 861, 862-63 (Mo. 1986). The appropriate statute of limitations for injurious falsehood has escaped review by the appellate courts of Missouri. See Kennedy v. Microsurgery and Brain Research Inst., 18 S.W.3d 39, 43 (Mo. Ct. App. 2000). Also, BP has suggested in an alternative argument that the Missouri Court of Appeals has wrongly decided the appropriate statute of limitations for slander of title, which Plaintiffs argue is analogous to their claims for injurious falsehood. See Relator's Opening Brief at 42-47.

Rather than respond to these cases, Plaintiffs state that Writs of Prohibition should only issue when the legal issue is not appealable. The denial of summary judgment is not normally appealable, however. O'Blennis, 691 S.W.2d at 500. If Plaintiffs are allowed to proceed despite the statute of limitations bar, BP will incur great expense and burden when the continuance of this case is unnecessary because it is barred by the statute of limitations.

Plaintiffs concede by their silence that review of this matter is de novo because this case involves a question of law. Boatmen's Bancshares, Inc. v. Director of Revenue, 757 S.W.2d 574, 574 (Mo. 1988). There is no factual dispute about when the Plaintiffs' claims accrued. The issue is merely which statute of limitations applies to those claims. Therefore, based on the case law regarding the issuance of Writs of Prohibition in Missouri and the nature of de novo review, this Court should make its Preliminary Writ of Prohibition absolute.

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' arguments are fundamentally flawed in that they continue to insist that because they have alleged damages to their business, they have therefore automatically alleged harm to their business interests and have satisfied the requirement of the tort of injurious falsehood that the communication at issue be intended to harm the "interests of the other having a pecuniary value." Restatement (Second) of Torts (hereinafter referred to as "Restatement") § 623A (1977) (Ex. 18 at A441) (setting forth the elements of injurious falsehood). Plaintiffs attempt to show that they have actually alleged injurious falsehood claims by framing their economic damages as economic interests. They claim that because they have recited the elements of injurious falsehood in their Petition, "[t]he Petition does not describe a defamation claim because it arises out of the loss of Respondents' business interests and is therefore a claim for pecuniary loss rather than loss of personal reputation." (Resp't Br. at 9-10.) Plaintiffs try to further distance themselves from their claims of injuries to their reputations when they state: "Although both Wandersee and ACT allege that Relator's conduct hurt their reputations, their

injurious falsehood claims seek relief for the damage done to their economic interests and not to their reputations." (Resp't Br. at 15.) Plaintiffs are simply incorrect.

The appropriate analysis in determining whether a claim regarding an alleged false communication is one for defamation or injurious falsehood requires the Court to review the alleged statement itself and determine whether the interest implicated is reputational or economic. (Relator's Opening Br. at 20-28.) If the communication implicates a plaintiff's reputation, the claim is one for defamation. If the communication implicates the plaintiff's economic interest, the claim is one for injurious falsehood. In their Petition, 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 and A37-A38, ¶¶ 38 and 64.) It is undisputed that Relator BP's alleged communication to the police regarded Plaintiffs' "unauthorized possession" of the car wash machine. Plaintiffs cannot replead their claims in any manner that would allow them to avoid the fact that the above-quoted statement is the foundation of their claims. The Court must determine whether Plaintiffs' interests in their reputation or their economic interests are implicated by the statement in question.

The parties agree that Missouri courts have adopted the Restatement regarding injurious falsehood as authoritative. Cuba's United Ready Mix, Inc. v. Bock Concrete Foundations, Inc., 785 S.W.2d 649, 651 (Mo. Ct. App. 1990). The Restatement states that the main difference between the tort of defamation and the tort of injurious falsehood 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." Restatement (Second) of Torts § 623A cmt. g (Ex. 18 at A447). 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. (Ex. 18 at A448.) 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. (Ex. 18 at A448.) The Restatement states that the tort of injurious falsehood applies to false statements "that do harm to interests of another having pecuniary value and so result in pecuniary loss." Restatement (Second) Torts § 623A, cmt. a; see also id. at cmt. f (Ex. 18 at A442 and A447.) Therefore, if a plaintiff seeks to establish an injurious falsehood claim, it must prove that (1) the statement implicated an interest that has a pecuniary value; and (2) a pecuniary loss occurred. Id. As the Sixth Circuit stated: "Defamation deals with pecuniary loss inflicted by interference with plaintiff's personal reputation as the result of a published falsehood. By contrast, the tort of injurious falsehood addresses pecuniary loss inflicted by interference with plaintiff's property by publishing a falsehood." Falls v. The Sporting News Publ'g Co., 834 F.2d 611, 617 (6th Cir. 1987).

Under Sullivan, Wenthe and K.G. v. R.T.R., 918 S.W.2d 795, 800 (Mo. 1996), the Court must look to the most analogous statute of limitations and at the essence, or gravamen, of what Plaintiffs are truly alleging to determine the statute of limitations. (Relator's Opening Br. at 22-23.) The Court should not merely be satisfied with the title Plaintiffs give their claims because to do so would allow Plaintiffs to potentially evade the appropriate statute of limitations through artful pleading.

As BP has stated, the alleged communication at issue in this case clearly implicated Plaintiffs' reputations because it accused them of dishonesty, fraud, and theft. (Id. at 26.) Merely asking whether Plaintiffs asserted economic damages in their Petition is not the determining factor in deciding whether a claim is one for defamation or injurious falsehood because a plaintiff with defamation claims may also recover economic damages for injury to his reputational interests. (Id. at 23-27); Nazeri v. Missouri Valley College, 860 S.W.2d 303, 313 (Mo. 1993). Thus, an assertion of money damages does not reveal the type of claim at issue because it does not reveal the interest implicated. In addition, despite Plaintiffs' assertions to the contrary, Plaintiff Wandersee alleges injury to his reputation as part of his damages, as well as emotional trauma, mental anguish, humiliation and other non-economic damages. (Ex. 3 at A31, ¶ 42.) Plaintiff ACT even alleges that its only injury was "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 A38, ¶ 65.) Thus, ACT actually admits in its Petition that the injury was to its reputation and that this then caused it to lose money damages.

In their Response, Plaintiffs mischaracterize BP's reliance on the Sullivan case by stating that BP relies on 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, rendering sec. 516.120(4) useless." (Resp't Br. at 11.) Plaintiffs attempt to distinguish Sullivan by arguing that because false light was not a distinct tort recognized in Missouri, it is inapplicable to this case. (Resp't Br. at 11-12.) Plaintiffs

state that because injurious falsehood is a distinct tort recognized in Missouri, Sullivan's holdings do not apply to this case. (Id.)

Plaintiffs' characterization of BP's reliance on Sullivan is inaccurate. BP cites Sullivan, as well as Wenthe and K.G., which Respondents completely ignore, 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. If the essence of the claim is barred, a plaintiff's claim should be barred no matter what label he attaches to it.

If the Court follows Sullivan and looks to the actual claims asserted in Plaintiffs' Petition, as opposed to the label Plaintiffs attach to those claims, the Court will find that Plaintiffs have alleged claims of defamation that are barred by the two-year statute of limitations. The facts of this Court's decision in Sullivan mandate that the Court make the Preliminary Writ of Prohibition absolute in this case. In Sullivan, the plaintiff alleged that the defendant news broadcaster televised a story in which the plaintiff was accused of "unlawfully and improperly building a home with materials stolen from the City of St. Louis, . . . and that plaintiff had improperly arranged for an architect employed by the City of St. Louis to prepare the official plans for his home." Sullivan, 709 S.W.2d at 475. The plaintiff attempted to cast his claims as false light invasion of privacy claims. This Court stated that the "only apparent difference between 'false light' and defamation is that the latter protects one's *interest* in his or her reputation, while the former protects one's *interest* in the 'right to be let alone.'" Id. at 479 (emphasis in original). This Court determined that if it recognized the false light tort in this type of situation, plaintiffs would be able to evade the statute of limitations for defamation. Id. at 480. This Court

concluded that "[t]he case at bar is nothing more than the classic defamation action where one party alleges that the other published a false accusation concerning a statement of fact – in this case, a charge of criminal conduct or wrongdoing." Id. at 481.

Not only do the facts of Sullivan prove that Plaintiffs have alleged classic claims of defamation because Plaintiffs claim that BP accused them of committing a crime, but the history of the tort of defamation and the Restatement itself demonstrate that Plaintiffs have set forth defamation claims, not injurious falsehood claims. In Nazeri v. Missouri Valley College, 860 S.W.2d 303 (Mo. 1993), this Court abolished the historical distinction between slander per se and slander per quod and determined that a plaintiff must show actual damages no matter what type of slander was alleged. This Court noted in Kenney v. Wal-Mart Stores, Inc. that "[p]rior to Nazeri, defamation *per se* resulted from allegations that the plaintiff was guilty of a crime, was stricken with a loathsome disease or was unchaste (in the case of a woman), or which affected the plaintiff in his business or occupation." 100 S.W.3d 809, 814 (Mo. 2003). In Nazeri, this Court noted that if the allegation concerned harm to the plaintiff in his business, trade, or profession, it should "impute fraud, want of integrity, or misconduct in the line of one's calling." Nazeri, 860 S.W.2d at 311 (internal quotations omitted). In cases of slander per se, damages were "conclusively presumed," and a plaintiff was not required to show actual harm. Kenney, 100 S.W.3d at 814 (internal quotations omitted). Accusations of criminal conduct or fraud in business were therefore considered defamation per se. The Restatement also classified "Slanderous Imputations of Criminal Conduct" in section 571 under the topic of "Defamation Actionable Irrespective of Special Harm (Defamation Actionable Per Se)" in the Chapter entitled "Invasions of Interest in Reputation."

Restatement (Second) of Torts § 571 (1977) (Reply Appendix Ex. 1 at A1). Section 571 of the Restatement stated that one who published "a slander that imputes to another conduct constituting a criminal offense" was liable if the offense was a type which would be "punishable by imprisonment in a state or federal institution" or "regarded by public opinion as involving moral turpitude." Id.

Plaintiffs claim that Relator BP called the police and accused Plaintiffs of having "unauthorized possession" of BP's car wash machine. This accusation of stealing or theft clearly falls under the classic definition of defamation as determined by this Court in Sullivan, the history of defamation case law in Missouri, and section 571 of the Restatement because it is an accusation of criminal conduct. Because this case involves classic defamation and involves Plaintiffs' reputational interests, Plaintiffs should not be allowed to evade the statute of limitations by labeling their claims as ones for injurious falsehood. Although Missouri courts have recognized the tort of injurious falsehood to protect against harm to a plaintiff's economic interests, this recognition is irrelevant to this case because the statement in question implicates Plaintiffs' reputational interests, not their economic interests. Instead, by alleging that BP communicated about Plaintiffs' alleged criminal conduct, Plaintiffs have set forth classic claims of defamation, harming their interests in their reputations, that are barred by the two-year statute of limitations.

Plaintiffs want the Court to believe that they have alleged the elements of injurious falsehood, but that is not the case. Plaintiffs do not understand that the tort of injurious falsehood involves a two-step analysis, and that they fail to meet the first step requiring that the communication harm an economic interest. Plaintiffs essentially argue that because they have alleged business damages and have satisfied element two, they must

have automatically satisfied element one as well. This is not the case. The BP communication as alleged by Plaintiffs in their Petition implicates Plaintiffs' reputational interests because it speaks to their dishonesty, fraud and theft. Relator BP has been unable to find any Missouri case in which a statement regarding allegations of criminal activity has been allowed to proceed as a claim of injurious falsehood.[1] The allegation that the injury to Plaintiffs' reputations then led to their business losing money does not transform their claims of defamation into injurious falsehood claims.

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[1] The only published appellate cases in Missouri that substantively discuss the tort of injurious falsehood are (1) McCormack Baron Mgmt. Servs., Inc. v. American Guarantee & Liab. Ins. Co., 989 S.W.2d 168 (Mo. 1999); (2) Kennedy v. Microsurgery and Brain Research Inst., 18 S.W.3d 39 (Mo. Ct. App. 2000); (3) McCormack Baron Mgmt. Servs., Inc. v. American Guarantee & Liab. Ins. Co., 1998 WL 261154 (Mo. Ct. App. 1998); (4) Cuba's United Ready Mix, Inc. v. Bock Concrete Foundations, Inc., 785 S.W.2d 649 (Mo. Ct. App. 1990); (5) Franklin v. Mercantile Trust Co., N.A., 650 S.W.2d 644 (Mo. Ct. App. 1983); (6) Nolan v. Kolar, 629 S.W.2d 661 (Mo. Ct. App. 1982); (7) Zippay v. Kelleher, 638 S.W.2d 292 (Mo. Ct. App. 1981); and (7) Annbar Assocs. v. American Express Co., 565 S.W.2d 701 (Mo. Ct. App. 1978). There are other Missouri appellate cases that mention the tort of injurious falsehood, but they do not discuss the tort in the context of a claim for injurious falsehood. See e.g., Bennett v. Mallinckrodt, Inc., 698 S.W.2d 854 (Mo. Ct. App. 1985) (citing injurious falsehood as example where courts adopted Restatement principles).

Plaintiffs do not contest the overwhelming factual evidence detailed in BP's Motion for Summary Judgment before the trial court and in its Opening Brief before this Court that they knew in July 1999 that BP had communicated to the police that Plaintiffs had "unauthorized possession" of the car wash machine. Nor do Plaintiffs contest BP's recitation of the law that defamation claims accrue when a plaintiff first learns of the alleged false communication. Because Plaintiffs knew in July 1999 of the alleged false statement in question in this case, the two-year statute of limitations applicable under § 516.140 to slander and libel claims bars Plaintiffs' claims of defamation because they did not file suit until January 15, 2002. (Ex. 1 at A1.) The statute of limitations expired in July 2001. This Court should not allow Plaintiffs to evade the two-year statute of limitations for defamation by labeling their defamation claims as ones for injurious falsehood and relying merely upon allegations of money damages in an attempt to support their claims.

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.

Plaintiffs continue to claim that if this Court looks to the most analogous cause of action to determine the statute of limitations, it should apply the five-year slander of title statute of limitations. (Resp't Br. at 13-16.) In doing so, however, Plaintiffs still do not explain how their claims are similar to slander of title claims. Plaintiffs have not contested the fact that they did not own the car wash in question. Plaintiffs have not claimed that they had the right to sell the car wash. Nor have Plaintiffs alleged that BP put into question the ownership of property actually owned by Plaintiffs or that BP disparaged the goods sold by Plaintiffs. Slander of title occurs when a defendant puts the rightful ownership of property in question. That did not occur in this case.

Plaintiffs continue to rely principally on Dickson Construction, Inc. v. Fidelity and Deposit Co., 960 S.W.2d 845 (Tex. Ct. App. 1997), for their argument that injurious falsehood often takes the form of slander of title, but Plaintiffs fail to respond to BP's

discussion of Hurlbut v. Gulf Atlantic Life Insurance Co., 749 S.W.2d 762 (Tex. 1987), which is instructive to the case at bar. (Id. at 15-16.) In its Opening Brief, BP discussed the case of Hurlbut, on which the Dickson court relied, to demonstrate that the Texas Supreme Court distinguished between injuries that resulted to the plaintiffs' business because of their prosecution, license revocations, and the receivership of their company from the nonexistent losses of expected business from prospective customers based on the statements of the defendants. (Relator's Opening Br. at 43-44.) In Hurlbut, because the defendants had not communicated to customers about ownership of goods or the quality of goods, it was not injurious falsehood. (Id.)

If the Court determines that the types of claims alleged by Plaintiffs are injurious falsehood claims, the Court should still apply the two-year statute of limitations because injurious falsehood claims of this type are so broad that they will factually overlap with defamation claims and allow evasion of the two-year statute of limitations. If the Court allows allegedly false accusations of criminal conduct to fall under the rubric of the tort of injurious falsehood and then applies a five-year statute of limitations to those types of injurious falsehood, the Court will be expanding the law involving false publications with respect to persons in business and corporations. If an allegation of economic loss is all that is needed to qualify for the tort of injurious falsehood, a corporation such as Plaintiff ACT will always be able to evade the two-year defamation statute of limitations. A corporation can only sustain economic damages in a defamation case because it cannot suffer mental or emotional distress or other non-economic damages that individuals can sustain. A corporation can only have economic damages in injurious falsehood claims as well. Therefore, a corporation need only label its claim as injurious falsehood in order to

avoid the defamation two-year statute of limitations even if it claims that its only injury was "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," as Plaintiff ACT claimed in this case. (Ex. 3 at A38, ¶ 65.) If the Court determines that Plaintiffs' claims, in which they claim that BP accused them of criminal conduct, qualify as injurious falsehood because they have stated that they incurred economic damages, the Court should determine that not all injurious falsehood claims automatically fall under the five-year statute of limitations. If the Court determines otherwise, plaintiffs, whether individuals or corporations, will merely add economic damages to every claim involving a false statement, no matter whether an economic or reputational interest is implicated, in order to qualify their claims as injurious falsehood and avoid the two-year defamation statute. The Court should direct the lower courts to individually review a plaintiff's claims that are placed under the umbrella of injurious falsehood and determine whether the two-year or five-year statute of limitations should apply.

Alternatively, injurious falsehood claims should be barred by the two-year statute of limitations because § 516.140, by its plain language, applies a two-year statute of limitations to all slander or libel claims. Plaintiffs failed to address this argument in their Respondents' Brief. Other courts have held that, regardless of what name is applied to torts such as slander of title, it is based on false statements made concerning a plaintiff or plaintiff's property. Therefore, those courts have held that their state's statute of limitations for slander or libel apply to torts such as slander of title. See, e.g., Norton v. Kanouff, 86 N.W.2d 72, 74-77 (Neb. 1957) (discussing case law and concluding that action for slander of title was governed by one-year statute of limitations applicable to

libel and slander and not by four-year statute of limitations catch-all similar to Missouri's for action for trespass on real property or action for injury to rights of plaintiffs, not arising on contract, and not enumerated); Woodard v. Pacific Fruit & Produce Co., 106 P.2d 1043, 1044-1046 (Or. 1940) (discussing case law and finding "no substantial reason why the Legislature would make any distinction between an action involving defamation of title to property and one based upon defamation of the person"). But see Kollenberg v. Ramirez, 339 N.W.2d 176 (Mich. Ct. App. 1983) (finding three-year limitations period applied to special pecuniary damages alleged, rather than one-year period for defamation action, but one-year period applied to bar recovery of personal damages to reputation).

As noted in Pro Golf Manufacturing Inc. v. Tribune Review Newspaper Company, 809 A.2d 243 (Pa. 2002), which was cited in BP's Opening Brief but ignored by Plaintiffs, the tort of commercial disparagement, which the court characterized as one for injurious falsehood, has historically been called libel or slander in the courts in that state. Id. at 246. For that reason, the court found that, regardless of the type of damages alleged, the claims were essentially for slander and therefore governed by the state's one-year statute of limitations for libel and slander. Likewise, Missouri courts have found that injurious falsehood has been called various names such as disparagement of property, slander of goods, commercial disparagement, and trade libel. Cuba's United Ready Mix, Inc., 785 S.W.2d at 651. Therefore, claims for injurious falsehood should be governed by Missouri's two-year statute of limitations for slander and libel actions, no matter what form the injurious falsehood claim takes. For these reasons, Plaintiffs' claims are barred.

CONCLUSION

Plaintiffs have not responded to many of the arguments in BP's Opening Brief because they have essentially repeated the arguments they set forth in their Answer to the Writ of Prohibition. In its Opening Brief, BP set forth the arguments in support of its positions and also responded to the arguments Plaintiffs asserted in their Answer in an effort to fully argue the case before this Court and allow Plaintiffs an opportunity to respond to BP's arguments in opposition to Plaintiffs' arguments. Plaintiffs have failed to use the opportunity provided by the Responsive Brief to respond to BP's arguments but have merely repeated the same contentions from their Answer.

If Plaintiffs are allowed to proceed on their claims labeled injurious falsehood, Plaintiffs will be evading the appropriate two-year statute of limitations applicable to defamation claims. BP will be subjected to unwarranted and useless litigation of this case at great expense, burden and hardship to BP. For the reasons stated in this Reply Brief and those stated in BP's Opening Brief, BP respectfully requests that this Court 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 should 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.

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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 5,276 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.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and accurate copies of Relator's Reply Brief, which includes the Appendix of Exhibits for Relator's Reply Brief, were served, via first class mail, postage prepaid, on this 4th day of February, 2005 to:

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770417

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

APPENDIX OF EXHIBITS FOR RELATOR'S REPLY BRIEF

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