ROBERT ARTHUR BURNS, II, ET UX.	CASE NO.: 156480 DIV. D
	21ST JUDICIAL DISTRICT COURT
versus	
	PARISH OF LIVINGSTON
LOUISIANA TELEVISION BROADCASTING, LLC D/B/A WBRZ TV CHANNEL 2, ET AL.	STATE OF LOUISIANA

MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL

The plaintiff, Robert Arthur Burns, II, is a Lieutenant with the Louisiana State Police assigned to a post at Troop A. In November 2016, the State Police commenced an administrative investigation against Lt. Burns in response to a written complaint submitted by his ex-wife, Carmen Hawkins.[1] During the investigation, the State Police determined that on more than 50 occasions Lt. Burns had searched two law enforcement databases for non-law enforcement purposes, in violation of departmental policy and federal law. In June 2017, the State Police suspended Lt. Burns for 64 hours without pay.

In early 2017, a journalist employed by Louisiana Television Broadcasting, LLC ("WBRZ") submitted a Public Records Request to the State Police seeking the production of its investigative case file. In July 2017, a second public records request was submitted to the State Police by Christopher Nakamoto, the Chief Investigative Reporter for WBRZ. On July 19, 2017, after receiving and reviewing the investigative case file concerning Lt. Burns, WBRZ broadcast a news story which reported on the findings of the State Police and Lt. Burns's resulting suspension. In addition to the television broadcasts, a print version of the news report was posted to WBRZ's website.[2]

The news story accurately recounted the finding of the State Police, as outlined in its June 13, 2017, report, that Lt. Burns conducted a total of 52 search inquiries on his

[1] The entire suit record, as of October 4, 2017, is attached hereto as **Exhibit A.** The pages have been Bates-numbered to facilitate easy referencing. For example, Ms. Hawkins's complaint to the State Police appears at p. 53.

[2] Ex. A, pp. 91-92.

ex-wife, her current fiancé, and a former boyfriend.[3] The news story also accurately reported the State Police's finding (also set forth in its June 13, 2017, report) that Lt. Burns "admitted that fifty one of the fifty two searches, referenced above, were strictly for personal reasons and not related to any investigation," and that Lt. Burns was aware that what [he] was doing was against department policy when [he] texted that [his ex-wife] should not tell anyone because [he] could get fired for doing so."

On August 14, 2017, Lt. Burns and his wife commenced this action against WBRZ and two of its journalists. The Petition alleges the news story "unreasonably placed R. Burns in a false light before the public."[4] Lt. Burns does not dispute that any of the statements in the news story were false. Instead, he complains that the news story omitted his contention that 46 of the 52 searches of his ex-wife were "spin-off" transactions that occurred when he ran his own license plate through official law enforcement databases.[5]

Of note, Lt. Burns' contention is not addressed in the State Police's June 13, 2017, report. It is, however, addressed in a memorandum prepared by the Louisiana Department of Public Safety Internal Affairs Section. That memorandum states that the Internal Affairs Section was unable to verify Lt. Burns' contention, but that "[r]egardless of whether Lt. Burns directly or indirectly searched Ms. Hawkins information, Lt. Burns was knowingly conducting search inquiries for non-law enforcement purposes."[6]

After WBRZ and Nakamoto failed to file responsive pleadings, the Court entered a preliminary default on September 20, 2017.[7] Then, on September 28, 2017, without holding a hearing or taking testimony from any witness, including the plaintiffs, the Court granted a judgment by default against WBRZ and Nakamoto and awarded the plaintiffs general damages totaling $2,500,000.[8]

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3 Ex A, p. 83.

4 Ex. A, p. 5.

5 Ex. A, pp. 2-5.

6 Ex. A, p. 77.

7 Ex. A, pp. 17-18.

8 Ex. A, pp. 40-41.

WBRZ and Nakamoto seek to set the judgment aside via the motion for new trial pursuant to Louisiana Code of Civil Procedure article 1972 because the judgment is contrary to the law and the evidence, and alternatively, pursuant to Louisiana Code of Civil Procedure article 1973 because there is good ground therefore.

APPLICABLE LAW

1. Motion for New Trial

A new trial can be granted on peremptory or discretionary grounds. Louisiana Code of Civil Procedure article 1972, which provides the peremptory grounds, reads:

> A new trial shall be granted, upon contradictory motion of any party, in the following cases:
>
> > (1) When the verdict or judgment appears clearly contrary to the law and the evidence.
> >
> > (2) When the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during the trial.
> >
> > (3) When the jury was bribed or has behaved improperly so that impartial justice has not been done.

(Emphasis added.)

Consistent with the imperative language in the code article, the granting of a new trial is mandatory if the court finds that the judgment is contrary to the law and evidence. *Martin v. Heritage Manor S. Nursing Home*, 2000-1023 (La. 4/3/01), 784 So.2d 627, 630.

The discretionary grounds are found in Code of Civil Procedure article 1973, which provides that "[a] new trial may be granted in any case if there is good ground therefore."

Under either article, the granting of a new trial has the effect of vacating and setting aside the original judgment. *Condon v. Logan*, 2015-0797 (La. App. 4 Cir. 3/30/16), 190 So.3d 778, 783–84. The motion for new trial is an appropriate procedural

vehicle to attack a default judgment that was granted contrary to the law or evidence, or that was not supported by sufficient evidenced. *See National Income Realty Trust v. Paddie*, 98-2063 (La. 7/2/99), 737 So.2d 1270, 1272.

2. Default Judgment

The procedure for a judgment by default is principally governed by Louisiana Code of Civil Procedure articles 1701 through 1704. For a plaintiff to obtain a default judgment, he must establish the elements of a prima facie case with competent evidence. In other words, the plaintiff must present competent evidence that convinces the court that it is probable that he would prevail on a trial on the merits. *Bates v. Legion Indem. Co.*, 2001-0552 (La. App. 1 Cir. 2/27/02), 818 So.2d 176, 178. In so doing, the plaintiff must prove each element of his claim as fully as if each of the allegations of the petition had been specifically denied by the defendant. *Barnett v. State Dep't of Health & Hosps.*, 2015-0633 (La. App. 1 Cir. 11/9/15), 2015 WL 6951294, at *2 (unpublished).

Additionally, confirmation of a default judgment is similar to a trial, and the plaintiff is required to adhere to the rules of evidence despite there being no opponent to urge objections. *Id.* To that end, inadmissible evidence, except as specifically provided by law, may not support a default judgment even though it was not objected to because the defendant was not present. As the court observed in *Romious v. CBSL Transp. Servs., Inc.*, 13-765 (La. App. 5 Cir. 5/21/14), 142 So.3d 228, 230–31, *writ not considered*, 2014-1324 (La. 9/26/14), 149 So.3d 252:

> At the confirmation hearing, the rules of evidence generally apply. La. C.E. art. 1101(A). The plaintiff must follow the rules of evidence even though there is no opponent. "Because at a default confirmation there is no objecting party, to prevent reversal on appeal, both plaintiff and the trial judge should be vigilant to assure that the judgment rests on admissible evidence" that establishes a prima facie case. George W. Pugh, Robert Force, Gerald A. Rault, Jr., & Kerry Triche, HANDBOOK ON LOUISIANA EVIDENCE LAW 677 (2007). Thus, inadmissible evidence, except as specifically provided by law, may not support a default judgment even though it was not

> objected to because the defendant was not present. 19 Frank L. Maraist, CIVIL LAW TREATISE: EVIDENCE AND PROOF § 1.1, at 5 (2d ed. 2007).

Consistent with the foregoing, it has repeatedly been recognized that hearsay evidence is not admissible in a proceeding to confirm a default judgment unless it falls within a hearsay exception or is expressly authorized by La. C.C.P. art. 1702. *See e.g., Verrette v. Saltzman & Gordon Welding Serv., Inc.*, 248 So.2d 876 (La. App. 3 Cir. 1971) (holding that hearsay evidence does not sustain the burden of proving prima facie case necessary for confirmation of judgment of default). Absent any such exception or authorization, hearsay evidence does not sustain the burden of proving a prima facie case necessary for the confirmation of a default judgment. *Id.; see also Cunningham v. M & S Marine, Inc.*, 2005-0805 (La. App. 4 Cir. 1/11/06), 923 So.2d 770 (holding that an affidavit in support of confirmation of default judgment was inadmissible hearsay).

A corollary to this rule is the instruction that when a demand is in tort, a plaintiff may not offer testimony by affidavit. Rather, the plaintiff must produce his or her testimony, but may use affidavits for the corroborating evidence, including medical testimony. In *Barnett v. State Dep't of Health & Hospitals*, the First Circuit Court of Appeal confirmed that an affidavit executed by the plaintiff and offered into evidence at a confirmation hearing was inadmissible hearsay:

> In addition to testifying, Ms. Barnett also offered into evidence an affidavit she executed wherein she made various allegations regarding instances of "harassment" by Mr. Hardy. However, this affidavit is hearsay, as it is an out of court statement offered for the truth of the matter asserted and therefore cannot support the confirmation of a default judgment. See La. C.E. 801. As previously explained, hearsay is not admissible in a proceeding to confirm a default judgment unless it fits within a hearsay exception or is authorized by La. C.C.P. art. 1702. <u>While La. C.C.P. art. 1702B(2) does permit corroborating evidence by affidavit in delictual actions, such as Ms. Barnett's, it does not provide an exception for the affidavit of a plaintiff in such an action. Simply put, when a demand</u>

> is in tort, "the plaintiff must produce his or her testimony, but may use affidavits for the corroborating evidence, including medical testimony." Frank L. Maraist, CIVIL LAW TREATISE: CIVIL PROCEDURE § 12.3 (2d ed.2007). Ms. Barnett's affidavit certainly cannot be construed as corroborating evidence of her own testimony and/or claim. *See Suire v. Lafayette City–Parish Consol. Gov't*, 04–1459 (La.4/12/05), 907 So.2d 37, 58 (noting that the corroboration required by La. C.C. art. 1846 "must come from a source other than the plaintiff"). Consequently, Ms. Barnett cannot rely on her own affidavit, which is inadmissible hearsay, to sustain her burden of proving a prima facie case necessary for the confirmation of a default judgment.

(Emphasis added.)

Further, even when affidavits are permitted in a proceeding to confirm a default, they must be based on personal knowledge, and "the affiant must affirmatively establish that he is competent to testify to the matters stated by a factual averment showing how he came by such knowledge." *Parker v. Schneider*, 2014-0232 (La. App. 4 Cir. 10/1/14), 151 So.3d 679, 682 *(quoting Foundation Materials, Inc. v. Carrollton Mid–City Investors, L.L.C.*, 2010–0542 (La. App. 4 Cir. 5/25/11), 66 So.3d 1230; *see also Arkla, Inc. v. Maddox and May Brothers Casing Service, Inc.*, 624 So.2d 34 (La. App. 2 Cir. 1993); *Carte Blanche Plumbing and Heating Repair Service, Inc. v. Van Haeler*, 337 So.2d 654 (La. App. 4 Cir. 1976). Personal knowledge means something the witness actually saw or heard, as distinguished from what he learned from some other person or source. *Hibernia Nat. Bank v. Rivera*, 07–962 (La. App. 5 Cir. 9/30/08), 996 So.2d 534, 539.

Finally, in cases involving a motion for new trial after a default judgment, public policy considerations, weighing in the defendant's favor, dictate that every litigant should be allowed his day in court. *Bates*, 818 So.2d at 180.

ARGUMENT

1. Because the plaintiffs did not testify to confirm their default, the *Judgment* was rendered contrary to the law.

On September 25, 2017, the plaintiffs filed a *Motion for Confirmation of Default Judgment* which attached two affidavits (one from each of the plaintiffs) and various other documents. On September 28, 2017, the Court signed the plaintiffs' proposed *Judgment* which awarded general damages of $2,500,000.

No hearing was held, and no live testimony was offered. Indeed, the *Judgment* begins: "This cause came for confirmation **in chambers**..."[9] The sole evidence offered to confirm the default was the plaintiffs' own affidavits and the documents submitted with them.[10]

Absent testimony from the plaintiffs, the evidence offered was insufficient as a matter of law to confirm the default. The plaintiffs' affidavits essentially restate the allegations in the petition.[11] The affidavits recite that they are based on "personal knowledge," but they do not contain the required factual averment showing how such personal knowledge was obtained. Furthermore, a review of the affidavits plainly shows that they are not based on personal knowledge. Personal knowledge means something the witness actually saw or heard, and the affidavits executed by Lt. Burns and his wife contain numerous statements that do not meet this requirement.[12]

More fundamentally, the affidavits offered by the plaintiffs are inadmissible hearsay. As noted above, hearsay is not admissible in a proceeding to confirm a default judgment unless it fits within a hearsay exception or is authorized by La. C.C.P. art. 1702. And while La. C.C.P. art. 1702(B)(2) does permit ***corroborating*** evidence by affidavit in delictual actions, it does not provide an exception for the affidavit of a

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9 Ex. A, p. 40.

10 The *Judgment* states that it is rendered "for reasons this day orally assigned." However, because there was no associated hearing in open court, there were no oral reasons assigned.

11 Ex. A, pp. 22-30 (Affidavit of Robert Burns, II) and pp. 31-39 (Affidavit of Hilary Burns).

12 For instance, at page 26, Robert Burns, II avers that WBRZ and Nakamoto "failed to read the Case File." He provides no foundation for that statement. Similar statements are made in both affidavits without any corroboration as to the source of the information, or even a perfunctory explanation of how such information is within the "personal knowledge" of the affiants.

plaintiff. Simply put, when a demand sounds in tort, "the plaintiff must produce his or her testimony, but may use affidavits for the corroborating evidence, including medical testimony." *See* Frank L. Maraist, CIVIL LAW TREATISE: CIVIL PROCEDURE § 12.3 (2d ed. 2007). The plaintiffs' affidavits cannot be construed as corroborating evidence of their own testimony or claim. *See Barnett*, 2015 WL 6951294, at *3. Consequently, the plaintiffs cannot rely on their own affidavits, which are inadmissible hearsay, to meet their burden of proving a prima facie case necessary for the confirmation of a default judgment.

For these reasons, the Court's granting of the *Judgment* was contrary to the law and evidence. That alone supports the granting of the defendants' motion for new trial.

2. **Even if the plaintiffs' affidavits are considered, the *Judgment* is nevertheless contrary to the law and evidence because the evidence offered by the plaintiffs was insufficient to meet their burden of proving a prima facie case for false light invasion of privacy.**

Louisiana law recognizes a cause of action for "false light invasion of privacy." Such claims arise from publicity that unreasonably places the plaintiff in a false light before the public. The publicity need not be defamatory, but must be objectionable to a reasonable person under the circumstances and must contain either falsity or fiction. To determine reasonableness, courts must balance the plaintiff's interest in protecting his privacy from serious invasions with the defendant's interest in pursuing his course of conduct. *Bayhi v. Louisiana Television Broadcasting, LLC*, 2017-0100 (La. App. 1 Cir. 9/15/17), 2017 WL 408224 (unpublished). In any event, more than insensitivity or simple carelessness is required for the imposition of liability for damages when the publication is truthful, accurate, and non-malicious. *Roshto v. Hebert*, 439 So.2d 428 (La. 1983).

In a false light invasion of privacy action, the plaintiff must establish each of the following elements: (1) a privacy interest, (2) falsity, and (3) unreasonable conduct by the defendant. *Simpson v. Perry*, 2003-0116 (La. App. 1 Cir. 7/14/04), 887 So.2d 14, 16. Here, the evidence offered by the plaintiffs fails to satisfy each element. The failure of any one element would undermine their claims and warrant the granting a new trial.

a. Lt. Burns has no legitimate, reasonable expectation of privacy concerning investigations by his employer, the State Police, into his workplace misconduct, or in the discipline imposed.

The information WBRZ published regarding Lt. Burns concerned public, not private, facts. To prevail on a claim for false light invasion of privacy, Lt. Burns must first have a reasonable expectation of privacy that was allegedly violated by WBRZ or its employees. However, Lt. Burns is a high-ranking law enforcement officer employed by the Louisiana State Police. The news story produced and broadcast by WBRZ concerned Lt. Burns's suspension following an internal investigation into alleged workplace wrongdoing. These are matters of significant public interest.

Louisiana courts have held that public law enforcement officials have no legitimate, reasonable expectation of privacy concerning investigations into their alleged improper activities in the workplace. *City of Baton Rouge/Par. of E. Baton Rouge v. Capital City Press, L.L.C.*, 2007-1088 (La. App. 1 Cir. 10/10/08), 4 So.3d 807, 821. Additionally, the public interest in discovery and disclosure of the details of an investigation of alleged wrongdoing by law enforcement officer far outweighs any incidental privacy interest claimed by Lt. Burns under the circumstances presented here. *Id.*

The news story at issue in this action concerned the suspension of a lieutenant in Troop A of the Louisiana State Police. The investigation and suspension concerned Lt. Burns's alleged improper activities in the workplace, namely unauthorized use of two law enforcement databases. Under these circumstances, Lt. Burns had no reasonable expectation that the internal investigation or its findings would remain private. As a public employee entrusted with law enforcement responsibility, Lt. Burns should have been aware that investigations into on-the-job wrongdoing would be open to public scrutiny.

In summary, for a false light invasion of privacy to be actionable, Lt. Burns must prove an unreasonable public disclosure of embarrassing private facts. *Jaubert v. Crowley Post-Signal, Inc.*, 375 So.2d 1386, 1388 (La. 1979); *also Tonubbee v. River Pars. Guide*,

97-440 (La. App. 5 Cir. 10/28/97), 702 So.2d 971, 975, *writ denied*, 97-3012 (La. 2/13/98), 709 So.2d 747 ("The right of privacy is also limited by society's right to be informed about legitimate subjects of public interests.") Because the news report published by WBRZ concerned only matters of public interest – the suspension of a high-ranking State Police officer for violations of department policy – the judgment rendered was contrary to the law. The granting of the motion for new trial is required.

b. The evidence offered by the plaintiffs demonstrate that the facts detailed about Lt. Burns's suspension in the news story produced by Nakamoto and broadcast by WBRZ were true.

In the petition, Lt. Burns alleges that portions of the published news story are "specifically contradicted" by the investigative case file.[13] Lt. Burns focuses on the State Police's allegation that he used two law enforcement databases to conduct 46 searches for his ex-wife between November 2013 and October 2016, as well as six additional searches for men that were romantically linked to his ex-wife.

Discussing these points, WBRZ news story[14] states:

> A high ranking Louisiana State Police Lieutenant, Robert Burns II, was suspended for 64 hours recently after an investigation revealed he ran 52 searches in law enforcement databases for personal reasons, a violation of LSP policy and federal law...
>
> Problems for Burns emerged last month when he was served a letter notifying him of an impending suspension.
>
> "Since November of 2013, continuing until October 2016, you have conducted law enforcement search inquiries through Kologic and Mobile Cop for non-law enforcement purposes, in violation of department policy and federal law," the letter states.
>
> The letter goes on to say, Burns ran his ex-wife's name 46 times; her current fiancé twice and the name of the woman's former boyfriend four times. WBRZ made the editorial decision not to identify the individuals.
>
> The letter Burns received states he acknowledged the search.

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[13] Although the plaintiffs alleged in their petition that WBRZ broadcast the news story about his suspension on television, they offered no video or transcript of the segment in support of their *Judgment*. Instead, the evidence offered by the plaintiffs was limited to a print out of the version of the story published to WBRZ's website. *See* Ex. A, pp. 91-92. Accordingly, the contents of the on-air broadcasts were not before the Court when the default confirmation was considered.

[14] Ex. A, pp. 91-92.

> "You admitted that 51 of the 52 searches, referenced above, were for strictly personal reasons and not related to any investigation," the letter said.
>
> The police letter goes on to say, "You were aware that what you were doing was against department policy when you texted that she should not tell anyone because you could get fired for doing so."

The petition alleges that Lt. Burns did not purposefully search for his ex-wife's information, but that her name appeared in the search results due to "spin-off" transactions when he searched his own license plate. The evidence offered by the plaintiff shows that Lt. Burns offered the same explanation to the State Police during the internal investigation.[15]

Despite Lt. Burns's explanation, the record shows that the State Police nevertheless found his conduct violated department policy. On June 13, 2017, Lt. Colonel Michael Noel, an Assistant Superintendent of the Louisiana State Police sent a letter to Lt. Burns informing him of his suspension.[16] That letter also detailed the conclusions reached by the State Police following their investigation. Those conclusions include:

- "The Louisiana State Police Access Unit monitors all queries and their records demonstrate that you conducted the following search inquiries on Mr. Hawkins, her current fiancé (George Truax) and a former boyfriend (Christopher Manning):

Carmen Hawkins:	46 times – between 08/23/2014 and 10/13/2016	
George Truax:	2 Times –	1. 4/9/216 2. 7/15/2016
Christopher Manning:	4 Times	1. 11/26/2013 2. 11/28/2013 3. 1/31/2014 4. 1/31/2015"[17]

- "You also admitted that fifty one of the fifty two searches, referenced above were for strictly personal reasons and not related to any official investigation."[18]

- "You knowingly conducted search inquiries on at least three people for non-law enforcement purposes. You utilized the Department's computer systems/databases that are restricted to criminal justice purposes, to access

[15] Ex. A, pp. 64-69.

[16] Ex. A, pp. 83-87.

[17] Ex. A, p. 84.

[18] Ex. A, p. 84.

personal information for non-work related reasons. Your actions violated the Information Technology Section Security Policy – User Responsibilities."[19]

- "You conducted search inquiries that accessed the driver's license records of Ms. Carmen Hawkins, Mr. George Truax and Mr. Christopher Manning. By accessing this information for non-law enforcement purposes, you violated the Drivers Privacy Protection Act, Title 18 U.S.C. § 2722."[20]

- "In addition to vehicle and driver's license records, the search results also included Ms. Carmen Hawkins and Mr. George Truax computerized criminal history (CCH). By accessing this information, you violated Louisiana RS. 15:596(B)."[21]

- "In addition to conducting search inquiries for non-law enforcement purposes, you forwarded some of that information to non-law enforcement personnel. You admitted sending the information you gathered on Christopher Manning to Ms. Hawkins via text messages and Ms. Hawkins produced copies of the text messages to corroborate her complaint. Your text messages to Ms. Hawkins indicate that you were aware that what you were doing was against department policy when you texted that she should not tell anyone because you could get fired for doing so."[22]

WBRZ's news story reported that Lt. Burns was suspended for conducting computer searches of individuals and subsequently disseminating some of the information he discovered in violation of departmental policy and federal law. Simply put, the WBRZ story accurately reported the State Police's conclusions outlined in the June 13, 2017, letter.

The evidence offered in support of the default judgment, including June 13, 2017, letter, demonstrates that the reporting accurately reflected the findings of the State Police investigation. To be sure, Lt. Burns contested many of the allegations during the internal investigation, offering various explanations to account for his conduct. Those explanations are repeated in the petition. However, Lt. Burns's explanations to the contrary notwithstanding, WBRZ accurately reported on the State Police's disciplinary findings.

What's more, under Louisiana law, a news organization is entitled to rely upon information received from law enforcement officials, and no fault can be attributed to it

[19] Ex. A, p. 84.

[20] Ex. A, p. 85.

[21] Ex. A, p. 85.

[22] Ex. A, p. 86.

arising from the publication of such information absent evidence that the news organization knew the information was false, or reasonably believed it to be suspect. *See, e.g., Bates v. Times-Picayune Pub. Corp.*, 527 So.2d 407, 410 (La. App. 4 Cir. 1988), *writ denied*, 532 So.2d 136 (La. 1988) (affirming dismissal of plaintiff's defamation claim against newspaper on ground that plaintiff could not establish fault, as newspaper was entitled to rely on information given to it by the New Orleans Police Department); *Wilson v. Capital City Press*, 315 So.2d 393, 397 (La. App. 3 Cir. 1975), *writ denied,* 320 So.2d 203 (La. 1975) (reversing trial court's judgment for plaintiff on claim arising from statement published in newspaper that plaintiff had been arrested in drug raid for distribution of marijuana, when in fact he had not been arrested and was not involved in any way with raid, on ground that fault could not be attributed to newspaper, as it had relied on information obtained from the public relations director of the Louisiana State Police). Because the WBRZ news report accurately reflected the findings of the documents produced by the State Police, neither WBRZ nor Nakamoto can be held civilly liable for reporting those findings, even if those findings turn out to be wrong.

Here, WBRZ had the full investigative file in its possession before the story about Lt. Burns's suspension was broadcast. That information was provided in response to a Public Records Request by WBRZ reporters. To the extent the judgment was based on Lt. Burns's claim that WBRZ should have conducted further investigation into the details, such result is contrary to the law. It is well-established that where the source of the information is deemed proper and reliable, there is no duty to further verify the information obtained. *See Wilson*, 315 So.2d at 398. WBRZ was not only entitled to rely on the information it obtained in response to its Public Records Request, but the information published was a fair and accurate report of the State Police's investigation and findings.

To the extent the *Judgment* was based on Lt. Burns's claim that the WBRZ story was false or contained fictions, the *Judgment* was contrary to the evidence. The motion for new trial should be granted.

c. WBRZ's news report of Lt. Burns's suspension from the State Police for improper workplace conduct was a legitimate matter of public concern, and was thus reasonable.

Finally, the third element in a false light invasion of privacy case requires showing that the publicity in question "unreasonably place[d] the plaintiff in a false light before the public." *Perere v. Louisiana Television Broad. Corp.*, 2000-1656 (La. App. 1 Cir. 9/28/01), 812 So.2d 673, 676. Addressing the "reasonableness" element, the Louisiana Supreme Court has held that the reasonableness of the defendant's conduct should be determined by balancing the plaintiff's interest in protecting his privacy from serious invasions with the defendant's interest in pursuing his course of conduct. *Jaubert*, 375 So.2d at 1389.

As demonstrated above, the fact that Lt. Burns, a public employee, was suspended for workplace misconduct is a public, not private, fact. As a public employee, Lt. Burns has no legitimate, reasonable expectation of privacy concerning investigations into his alleged improper activities in the workplace, or the disciplinary action that may result from the investigation.

By contrast, WBRZ's interest in publishing the information was substantial. The news story concerning Lt. Burns's suspension related to a matter of significant public concern, *i.e.*, the conduct of public law enforcement officials. Also, the information published was not distorted, and the documents offered by Lt. Burns shows that the report accurately depicted the investigation by State Police, the findings of that investigation, and the suspension imposed. It's perfectly reasonable for a news organization like WBRZ to report on discipline imposed against a member of the local State Police troop as a result of workplace misconduct.

WBRZ's report about Lt. Burns's suspension was the product of ordinary newsgathering and reporting activities that are protected by the First Amendment to the United States Constitution. Under the circumstances, WBRZ's conduct was reasonable. The motion for new trial should be granted.

3. No evidence of any kind was offered to support an award of damages to Hilary Burns under any theory of recovery.

In addition to awarding damages to Lt. Burns, the *Judgment* also awarded $1,000,000 to his wife, Hilary Burns. That award was contrary to the law and evidence.

Hilary Burns alleges to have suffered "past, present and future mental anguish and emotional distress," "past present and future embarrassment and loss of enjoyment of life," and "past, present and future loss of standing in the community" because WBRZ disseminated a news story concerning her husband's suspension.[23] However, the evidence shows Hilary Burns is not named – directly or by implication – in the WBRZ news story.[24] Because a successful claim for false light invasion of privacy requires proving that the publicity in question unreasonably placed ***the plaintiff*** in a false light before the public, Hilary Burns has no direct cause of action for invasion of privacy. See *Perere,* 812 So.2d at 676. After all, no aspect of the WBRZ news story published anything about ***her.***

What Hilary Burns actually pleaded is a bystander claim, seeking recovery of emotional and mental damages occasioned by the damages her husband supposedly suffered due to WBRZ's alleged invasion of his privacy. The only allegation in the petition that is specific to Hilary Burns is as follows:

> Plaintiffs feel that the unjust label of [Lt. Burns] as a stalker by WBRZ has caused a persistent sense of danger to Plaintiffs' lives and well-being, a feeling that is unshakeable and has caused [Hilary Burns] to worry excessively to the point of physical illness about the well-being of [Lt. Burns] each and every work shift.[25]

Bystander claims are authorized and exclusively governed by Civil Code article 2315.6. To recover under this article, a plaintiff must show that: (1) they viewed the event causing injury to the direct victim or came upon the scene soon after; (2) the direct victim suffered such harm that it can reasonably be expected that the plaintiff would suffer serious mental anguish from the experience; (3) the emotional distress plaintiff sustained

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[23] Ex. A, p. 7.

[24] Ex. A, pp. 91-92.

[25] Ex. A, p. 6.

is both serious and reasonably foreseeable; and (4) plaintiff and the direct victim have the requisite familial relationship. Additionally, a plaintiff must show that as they witnessed the injury-causing event, or the scene of injury soon after, they were contemporaneously aware that the event had caused harm to the victim. *Trahan v. McManus*, 97–1224 (La. 3/2/99), 728 So.2d 1273.

Bystander recovery is premised on the claimant witnessing an event that "caused physical injury to another." See *Maldonado v. Kiewit Louisiana* Co., 2012-1868 (La. App. 1 Cir. 5/30/14), 152 So.3d 909, 939, *writ denied,* 2014-2246 (La. 1/16/15), 157 So.3d 1129. Lt. Burns did not allege, much less prove, that he suffered "physical injury" as a result of WBRZ's reporting. Accordingly, the award to Hilary Burns for the alleged invasion of her husband's privacy is contrary to the law.

Additionally, no competent evidence of any kind was offered to show that Hilary Burns suffered any damages. In her affidavit (which is itself not competent evidence, as discussed above), Hilary Burns claims that, "as the spouse of [Lt. Burns], has been subjected to ridicule, criticism and shunning in Affiant's local community and neighborhood."[26] She goes on to enumerate a list of vague situations that purport to demonstrate the community's ridicule of her.[27] However, no evidence of any kind was offered to corroborate her allegation that she, personally, has been subjected to public ridicule, criticism, or shunning.

Also absent from the evidence is any substantiation of Hilary Burns' claim that the WBRZ report has caused her "to worry excessively to the point of physical illness about the well-being of [Lt. Burns] each and every work shift."[28] No documentation of any kind was offered to show the nature, cause, or extent of the "physical illness" Hilary Burns claims to have suffered.

In conclusion, the award of damages to Hilary Burns is not supported by the law or evidence. For one, Hilary Burns has no personal cause of action for invasion of privacy

[26] Ex. A, p. 36.

[27] Ex. A, pp. 36-37.

[28] Ex. A, p. 37.

because the WBRZ news story at issue did not identify her, directly or indirectly. Furthermore, Louisiana law does not permit bystander recovery of damages for emotional distress when an injured party does not suffer a serious physical injury. Here. Lt. Burns is only alleged to have suffered emotional and reputational injury, but not physical injury. Finally, the evidence offered by the plaintiffs does not support any award of damages to Hilary Burns, much less an award of $1,000,000. The motion for new trial should be granted.

4. **There are significant First Amendment concerns that warrant the granting a new trial.**

The *Judgment* in this matter, rendered against a local news organization for reporting on a matter of public interest, raises substantial First Amendment concerns. Considering the quantum of general damages awarded in this case, there is a real probability that journalists in the area will curtail their investigating and reporting activities to avoid civil liability. This is precisely the harm the First Amendment seeks to avoid.

The U.S. Fifth Circuit Court of Appeals has warned that that aggressive attempts to second-guess journalistic reports of newsworthy items may chill a free press. *Ross v. Midwest Commc'ns, Inc.*, 870 F.2d 271, 275 (5th Cir. 1989). That court emphasized:

> Judges, acting with the benefit of hindsight, must resist the temptation to edit journalists aggressively. Reporters must have some freedom to respond to journalistic exigencies without fear that even a slight, and understandable, mistake will subject them to liability. Exuberant judicial blue-penciling after-the-fact would blunt the quills of even the most honorable journalists.

Id.

The potential deleterious impact of the *Judgment* in this case, and the possibility that the substantial award of general damages to the plaintiffs may discourage other investigative journalists from pursuing and reporting on matters of public interest should constitute "good grounds" for a new trial under Code of Civil Procedure art. 1973. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 294 (1964) (Black, J., concurring) ("The

half-million-dollar verdict does give dramatic proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials. The factual background of this case emphasizes the imminence and enormity of that threat.") An award of damages against a news organization for accurately reporting a matter of public interest is a miscarriage of justice, warranting a new trial. *See Bates*, 818 So.2d at 179–80. This reason, in addition to the peremptory grounds discussed above, is an additional basis for granting a new trial.

CONCLUSION

A new trial should be granted in this matter because the *Judgment* signed on September 28, 2017, is clearly contrary to the law and evidence, and, alternatively, because there are good grounds for a new trial. First, no oral testimony was offered to confirm the default against WBRZ and Nakamoto. Instead, the plaintiffs filed their own affidavits. Those affidavits, which are hearsay, are not admissible in a proceeding to confirm a default judgment.

Additionally, the other documents offered by the plaintiffs demonstrate that the judgment awarding damages for false light invasion of privacy was contrary to both the law and evidence. Indeed, the investigative case file offered by the plaintiffs *confirms* that the WBRZ news report published to its website was accurate. Moreover, the law does not allow recovery of damages under a theory of false light invasion of privacy when the publicity in question concerned a public matter (it did), was true (it was), and was in the public interest (it was).

Finally, the award of damages in favor of Hilary Burns was also contrary to the law and evidence. Not only was she not mentioned in the WBRZ news report, but she also failed to offer any evidence of any kind to corroborate her allegation that she now suffers ridicule by the community at large.

The defendants' motion for new trial should be granted, the *Judgment* set aside, and a deadline for the defendants' to file responsive pleadings should be set.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, Stephen Babcock, certify that on the 12 day of October, 2017 I served a copy of the above and foregoing *Memorandum in Support of Motion for New Trial* on the following counsel of record for this proceeding by way of fax, email, and/or First-Class U.S. Mail:

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