

In the
United States Court of Appeals
for the
Eighth Circuit

Jesse Ventura a/k/a James G. Janos,

Plaintiff-Appellee,

vs.

Taya Kyle, as Executor of the Estate of Chris Kyle

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MINNESOTA
Civ. No. 12-cv-472 (RHK/JJK) – District Judge Richard H. Kyle

**BRIEF and ADDENDUM of APPELLANT TAYA KYLE,
EXECUTOR OF THE ESTATE OF CHRIS KYLE**

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SUMMARY OF CASE AND REQUEST FOR ARGUMENT

Appellant Taya Kyle, executor of the estate of Chris Kyle (collectively “Kyle”), asks this Court to reverse the judgment below awarding Jesse Ventura \$500,000 for defamation and \$1,345,477.25 for unjust enrichment, all arising from publication of Chris Kyle’s autobiography *AMERICAN SNIPER*. Independent review of the record evidence establishes that Ventura did not carry his burdens of proving either material falsity or actual malice, which is fatal to his defamation claim. The court’s unjust enrichment award – based on allegedly defamatory speech – is unprecedented, distorts Minnesota common law, and violates the First Amendment. The judgment, therefore, must be reversed and the case dismissed. At minimum, a new trial is necessary due both to jury instructions that conflict with decisions of this Court and the United States Supreme Court and to the allowance of prejudicial references to insurance – culminating in statements by Ventura’s counsel in closing argument that the “insurer is on the hook if you find that Jesse Ventura was defamed.”

Kyle requests oral argument of 30 minutes per side because this case presents important issues under both the First Amendment and state law.

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JURISDICTIONAL STATEMENT

Kyle removed this case to the district court, which had diversity jurisdiction under 28 U.S.C. §1332(a)(1) because Ventura is a Minnesota citizen and Kyle was a Texas citizen.

This Court has appellate jurisdiction under 28 U.S.C. §1291. The district court entered final judgment disposing of all claims on August 7, 2014. ADD-7. Kyle filed a timely motion under Fed. R. Civ. P. 50 & 59(e). APP-38/ECF-404. On November 26, the district court denied those motions, ADD-8-31, and Kyle filed a timely Notice of Appeal on December 23. APP-39/ECF-417.

STATEMENT OF ISSUES

1. Did the district court erroneously instruct the jury that it could base defamation liability on its assessment of Kyle's entire "story" about Ventura, that Ventura's burden of proving falsity was only by a preponderance of the evidence, and that there is no constitutional definition of the kind of "serious doubts" about the truth necessary to support a finding of actual malice?

Most apposite authority:

- *Air Wis. Airlines Corp. v. Hooper*, 134 S. Ct. 852 (2014)
- *Aviation Charter, Inc. v. Aviation Research Grp./US*, 416 F.3d 864 (8th Cir. 2005)
- *DiBella v. Hopkins*, 403 F.3d 102 (2d Cir. 2005)
- *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657 (1989)

2. Did the district court erroneously enter judgment on Ventura's defamation claim when an independent review of the record evidence demonstrates he failed to carry his burdens of proving material falsity and actual malice?

Most apposite authority:

- *Air Wis. Airlines Corp. v. Hooper*, 134 S. Ct. 852 (2014)

- *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984)
- *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991)

3. Did the district court erroneously award damages to Ventura based on an unjust-enrichment claim that has no basis in Minnesota law, violates the First Amendment, and is not supported by competent record evidence?

Most apposite authority:

- *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826 (Minn. 2012)
- *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
- *Snyder v. Phelps*, 131 S. Ct. 1207 (2011)
- *United States v. Alvarez*, 132 S. Ct. 2537 (2012)

4. Did the district court erroneously permit cross examination and closing argument about defendant's insurance?

Most apposite authority:

- *Griffin v. Hilke*, 804 F.2d 1052 (8th Cir. 1986)
- *Halladay v. Verschoor*, 381 F.2d 100 (8th Cir. 1967)

STATEMENT OF THE CASE

This is an appeal from a jury verdict in a defamation action brought by former Minnesota Governor Jesse Ventura against the estate of Chris Kyle, an accomplished and decorated Navy SEAL who was murdered during the pendency of this lawsuit. The case arises from a brief passage in Kyle's 379-page autobiography that describes a disagreement he had with a man, called "Scruff Face" in the book, who Kyle later identified as Ventura. The passage is contained in a chapter in which Kyle reflects on his own emotional turmoil and questionable conduct following his return from combat in Iraq. It recounts how, after "Scruff Face" made disparaging comments about the SEALs and made aggressive gestures, Kyle reacted by punching him. Ventura sued Kyle for defamation, unjust enrichment and misappropriation, alleging it was false and defamatory to state that Scruff/Ventura made the disparaging comments.

A jury found Kyle liable for defamation and awarded \$500,000. It separately recommended that Kyle be found liable in equity for unjust enrichment. The jury found no liability for misappropriation. The district court subsequently entered a \$1.345 million verdict against Kyle for unjust enrichment.

A. The Parties

1. Chris Kyle

As a Navy SEAL, Kyle served four tours of duty in Iraq and was recognized as the most effective sniper in American history. He is officially credited with 160 confirmed kills in combat. He received two Silver Stars and five Bronze Medals for valor. APP-2491-92.

During this proceeding, Kyle and another man were murdered while trying to help a troubled young veteran. APP-15/ECF-135. Ventura continued his lawsuit against Kyle's estate, substituting as defendant its executor, Kyle's widow and mother of his two young children, Taya Kyle. APP-17/ECF-151, APP-85-89.

2. Jesse Ventura

Ventura is the former Governor of Minnesota. He served in the Navy on both an underwater demolition team and a SEAL reserve unit. APP-909-10. Before this lawsuit, Ventura was a vocal critic of both the SEALs and the military. Among other things, he publicly described the SEALs as "elite killer squads" that are "forced to be part of illegal gangland operations," asserted that we have an Army "run by Christian extremists and an accompanying cadre of what can only be described as neo-Nazis,"

characterized the military as “contract killers now, contract for hire,” and referred to the “fascist states of America.” Ventura also espoused his belief that the U.S. government had a hand in the 9/11 terrorist attacks. APP-1092, 1098, 1101-02, 1104-06, and said that he “won’t salute the US flag or stand for the National Anthem anymore” or otherwise “pay respect to the country,” APP-1102. He now spends much of each year “off the grid” in Mexico. APP-1004.

B. The Book

After retiring from service in 2009, Kyle wrote an autobiography entitled AMERICAN SNIPER, assisted by a co-author. HarperCollins published the 379-page book in January 2012. APP-1967-68. It describes in great detail Kyle’s SEAL training, his combat experiences in Iraq, and his difficulties adjusting to civilian life. Interspersed with accounts of his combat assignments, the book discusses Kyle’s relationship with his wife and children, focusing on the conflicting pulls of home and war, and includes passages written from his wife’s perspective. The compelling nature of Kyle’s narrative, exemplified by the popularity of the Oscar-nominated movie based on it (which mentions neither Ventura nor Kyle’s encounter with him), reflects the public’s embrace of those themes.

C. The Challenged Passage

Chapter 12 of the book, titled “Hard Times,” discusses a particularly difficult period when Kyle returned to California from Iraq because doctors believed his daughter had leukemia. The chapter explores the difficulties Kyle had returning to civilian life, including disagreements with Taya, his belief that he had abandoned his comrades, and his struggles to deal with their deaths and injuries.

One brief passage, subtitled “Punching Out Scruff-Face,” discusses an altercation with a man Kyle identifies only as “Scruff Face” during a wake for fallen Medal of Honor recipient Michael Monsoor at a bar frequented by SEALs. The passage reads in full:

AFTER THE FUNERAL WE WENT TO A LOCAL BAR FOR THE WAKE proper.

As always, there were a bunch of different things going on at our favorite nightspot, including a small party for some older SEALs and UDT members who were celebrating the anniversary of their graduation. Among them was a celebrity I'll call Scruff Face.

Scruff served in the military; most people seem to believe he was a SEAL. As far as I know, he was in the service during the Vietnam conflict but not actually in the war.

I was sitting there with Ryan and told him that Scruff was holding court with some of his buddies.

"I'd really like to meet him," Ryan said.

"Sure." I got up and went over to Scruff and introduced myself. "Mr. Scruff Face, I have a young SEAL over here who's just come back from Iraq. He's been injured but he'd really like to meet you."

Well, Scruff kind of blew us off. Still, Ryan really wanted to meet him, so I brought him over. Scruff acted like he couldn't be bothered.

All right.

We went back over to our side of the bar and had a few more drinks. In the meantime, Scruff started running his mouth about the war and everything and anything he could connect to it. President Bush was an asshole. We were only over there because Bush wanted to show up his father. We were doing the wrong thing, killing men and women and children and murdering.

And on and on. Scruff said he hates America and that's why he moved to Baja California. 9/11 was a conspiracy.

And on and on some more.

The guys were getting upset. Finally, I went over and tried to get him to cool it.

"We're all here in mourning," I told him. "Can you just cool it? Keep it down."

"You deserve to lose a few," he told me.

Then he bowed up as if to belt me.

I was uncharacteristically level-headed at that moment.

"Look," I told him, "why don't we just step away from each other and go on our way?"

Scruff bowed up again. This time he swung.

Being level-headed and calm can last only so long. I laid him out.

Tables flew. Stuff happened. Scruff Face ended up on the floor.

I left.

Quickly.

I have no way of knowing for sure, but rumor has it he showed up at the BUD/S graduation with a black eye.

ADD-54-57 ("the Excerpt"). The following pages discuss other altercations during this same period as well as Taya's negative reaction to them.

D. The Interviews

The book was released on January 3, 2012. Thereafter, Kyle gave several media interviews. Most contain no reference to the Excerpt or to Ventura. APP-1973-76.

On January 4, Kyle appeared live on the *Opie & Anthony* radio show. APP-1979-84, ADD-58-64. The bulk of the 49-minute interview centered on Kyle's early life, his military service, and its ramifications for him and his family. During the interview, a caller told the hosts that Kyle had been in a bar fight with Jesse Ventura. The hosts asked Kyle whether this was true. Taken off guard by the question, Kyle described the incident at the Monsoor wake. *Id.*

Later that afternoon, Kyle recorded an interview with Bill O'Reilly. Securing this interview was significant because books featured on his show typically experience a palpable increase in sales. APP-1976-79. The interview lasted 20-25 minutes. The next day, *The O'Reilly Factor* included a roughly five-minute excerpt. APP-1979, 1985, ADD-65-68, most of which was devoted to the book's account of Kyle's service. During the broadcast, O'Reilly endorsed the book to his viewers. APP-1977-78. O'Reilly also asked Kyle about when he "knocked Jesse Ventura to the floor with a punch." Kyle again briefly described the encounter. ADD-65-68.

E. Proceedings Below

Ventura filed this action on January 23, 2012, asserting claims for defamation, misappropriation, and unjust enrichment based on several statements made in the book and interviews about "Scruff" / Ventura. By the end of testimony, the district court had centered the case on three allegedly false and defamatory statements—namely, Kyle's assertions that Ventura had said:

- "[H]e hates America,"
- SEALs "were killing men and women and children and murdering," and
- SEALs "deserve to lose a few."

APP-2299.

In an early motion for partial summary judgment, Kyle challenged the claims for misappropriation and unjust enrichment on both state law and constitutional grounds. APP-4/ECF-11, APP-43-76. The district court denied that motion, reasoning in significant part that Kyle's "statements are *not* protected by the First Amendment if they were knowingly false and defamatory." ADD-37, 39.

After the close of discovery, Ventura moved for leave to add a claim for punitive damages. Kyle was murdered while that motion was pending. The district court thereafter denied the motion because, in Minnesota, punitive damages are not recoverable against a deceased defendant's estate. APP-84.

Kyle then moved for summary judgment. His motion asserted that Ventura, a public figure, could not carry his burden of proving by clear and convincing evidence that Kyle had published materially false and defamatory statements with actual malice. As a result, Kyle argued, Ventura could not recover for defamation and, under the district court's stated view of the First Amendment, similarly could not recover for misappropriation or unjust enrichment. APP-24/ECF-234, APP-26.

The district court denied the motion. Because Kyle's account of the event described in the Excerpt differed from Ventura's, the district court concluded that there was a question of fact for the jury on the issue of falsity. ADD-48-50. The court further reasoned that whether Kyle had "punched out" Ventura was not an ambiguous event and, "if a jury concludes Kyle fabricated part of the story, it could reasonably conclude he fabricated the rest of his story" – his descriptions of the comments he attributed to Ventura. ADD-51-52.

F. Trial

The defamation and misappropriation claims were tried to a jury in July 2014. The jury also served in an advisory capacity regarding Ventura's equitable claim for unjust enrichment.

1. Ventura's Evidence

In his own testimony, Ventura asserted that *none* of the incidents described in the book actually happened. According to his testimony, he spent the evening quietly socializing with friends and posing for photographs, leaving the bar when his friends left. APP-982, 991, 1076.

Ventura denied saying that SEALs "deserve to lose a few" or anything else derogatory about the military, and asserted his admiration for the SEALs.

APP-916-17, 952-56, 960-63, 1026-27. He testified that nobody told him he was offensive, APP-984-85; he denied ever encountering Kyle, APP-986, 1011; and he denied being punched, APP-928, 1027-28, 1075.

Ventura further testified that the use of his name increased sales of the book, but he conceded that people did not purchase it just to read the Excerpt. APP-1167. He also acknowledged that Kyle's account of the incident was widely available, without charge, on the Internet, APP-1169, and that he did not know how many of the book's sales were attributable to use of his name. APP-1166.

Ventura called three witnesses who testified they were at the bar that evening — two long-time friends and the wife of one of them. The first, Bill DeWitt, testified that he did not see or hear any altercation involving Ventura. APP-687-91. He also testified that he interacted with Ventura only briefly, early in the evening, that he did not hear anything Ventura said to anyone thereafter, and that, because of his poor hearing, "I would not have heard something unless I was right next to him." APP-682, 687, 733-34.

DeWitt testified that he was unable to observe Ventura at several points during the evening, APP-727-31, 737-40, that he did not see Ventura leave, and did not know when he left. APP-740-41.

Charlene DeWitt, Bill's wife, testified that she did not hear Ventura say anything she found offensive and did not see him get punched. APP-777-79. She recalled that Ventura mingled about for most of the evening, so she could "only speculate where he was." She testified that, depending on where the fight happened, she might have missed it. APP-779-80, 788, 810-11. Charlene DeWitt could not say when Ventura left or whether he was still there when she left. APP-779-80, 788, 802, 805, 809-11.

Rob Leonard, who considers Ventura a "brother[]," APP-828, testified that he did not see or hear the things Kyle described in the Excerpt, APP-836-39. Leonard testified that his interaction with Ventura that evening was limited and, given the size of the crowd and level of noise, it was certainly possible he missed the events Kyle recounted. APP-856-57, 860. Leonard did not see Ventura leave and did not know when he did so. APP-843.

Ventura also called his wife and son to testify about his views of the military, APP-878, 1206-07, and his love for the SEALs, APP-873-75, 1199-200. Neither wife nor son were at the bar that night. APP-875, 1204.

In addition, Ventura questioned Kyle's witnesses about changes made to the Excerpt during the drafting process. Specifically, Ventura established that, although his name appeared in earlier drafts prepared by

a co-author, Kyle removed it from the book after a friend warned that he might get sued. APP-2234. Ventura also elicited testimony that Kyle or his co-author had made other changes: qualifying a statement that Ventura sustained a black eye, removing details about another person being with Ventura, and deleting a reference to Ventura hitting his head on the sidewalk. APP-2233-34. In addition, Ventura presented evidence that Kyle disliked Ventura, and that no police report existed about the altercation. APP-523, 1931-33.

2. Kyle's Evidence

a) Kyle's deposition testimony

Although his death precluded him from testifying on his own behalf, the jury watched on videotape portions of Kyle's cross-examination at his deposition. Kyle testified he had attended Monsoor's memorial service and burial, and afterwards went to a wake at a local pub named McP's. Kyle testified that Ventura was sitting with friends at McP's when he arrived and that, throughout the evening, Ventura was "loud and belligerent" and made statements that offended those who had gathered for Monsoor's wake. APP-443. Specifically, Kyle testified that Ventura was "complaining about the war. That we shouldn't be there. Complaining about Bush, that,

you know, Bush was a war criminal. How we were killing innocent men and women and children overseas.” APP-446. Kyle testified that he approached Ventura twice and asked him to quiet down, because mourners were present. APP-446, 454-55.

Kyle testified that, as he was leaving McP’s, he passed by Ventura, and described what happened next:

[H]e was going over his deal again telling us that we should have not been over there. That we were killing innocent men, women and children. That, again, Bush was a war criminal. We should not be involved. About WMDs, faulty intel. [President Bush] was just trying to one-up his dad. And that’s when I was informing him that, you know, there were families here. You were upsetting them. Basically, letting him know that he was being a jackass and that I was not happy with him and that we were here for a wake, and that’s when he said we deserve to lose a few.

APP-463. At that juncture, Kyle testified, he asked Ventura to leave, and Ventura responded by “bowing up” or “[s]quaring off.” APP-469.

According to Kyle, he then took a step back and told Ventura “let’s both just back away,” but Ventura “took a step forward” and Kyle punched him. APP-470. Kyle testified that Ventura “fell backwards,” and he (Kyle) promptly “took off.” *Id.*

b) Other testimony

Kyle presented eleven additional witnesses who attended the wake.

Rosemary deShazo, a physician at the University of Utah, was a friend of the Monsoor family and had no connection to Kyle. APP-1346-47. She testified that she met Ventura on the patio at McP's and, when she told him she was there for Monsoor's wake, Ventura responded: "[H]e probably deserved it. They die all the time." APP-1354. She testified that she found this statement offensive and, as a result, remembered it clearly. APP-1354-55, 1375. Jeremiah Dinnell, a former SEAL, testified that he too heard Ventura say that SEALs "deserve to lose some guys." APP-1658, 1718. He testified to his certainty about what he heard, because the statement was "something that sticks with you." APP-1718.

John Kelly, an active-duty SEAL, testified that he heard Ventura "bad-mouth[] the war" and say things such as "we shouldn't be there, you guys [SEALs] are doing the wrong thing, we don't have any business being in Iraq, you're out there killing women and children, stuff like that." APP-1406. Kevin Lacz, a former SEAL later employed by Kyle's company, testified that "I can't tell you exactly what he said word for word, but when he was talking to people and me ... I had heard bits and snippets of, you

know, SEALs have it coming, this is not exactly the type of mission profile that they should be doing.” APP-1863.

Guy Budinscak, a former SEAL and medical device salesman, testified that Ventura’s comments were “really out there. You know, he was living in Mexico and he didn’t trust the U.S. Government and Bush lied. ... I mean, just kind of like wild conspiracy theories, 9/11 was an inside job.” APP-1763-64. Debbie Lee, the mother of a SEAL killed in the line of duty, testified that she heard Ventura say the Iraq war was “an unjust war and we shouldn’t be there” and that the 9/11 terrorist attack was an “inside job,” APP-1307-08, while Andrew Paul, a reservist SEAL and bank manager, testified that Ventura was

going on about the war in Iraq, the Bush Administration, his displeasure with the administration. ... He was speaking very loudly, and it was, frankly turning people off who were around him. ... [I]t was of a radical political ideological ranting, basically. You know, he was saying things like—like Bush knew that 9/11 was gonna happen. APP-1480-82.

As for the punch, Dinnell testified that, after he heard Ventura say “you ... deserve to lose some guys”, he saw Kyle punch Ventura. APP-1658. He testified that Ventura went down to the ground and then got back up. APP-1659. He also testified he saw Kyle leave the bar immediately after

punching Ventura. *Id.* Laura deShazo, Rosemary deShazo's sister and an employee of the Utah State Office of Education, APP-1238, testified that she too saw Ventura get punched at McP's, although she could not recall a particular location. APP-1249, 1280. Like Rosemary, Laura did not know Kyle, so she could not say whether it was Kyle who punched Ventura, but she was certain that she saw Ventura get hit by a white male, about six feet tall, with brownish hair. APP-1250. That matches Kyle's description.

Six other witnesses corroborated material portions of Kyle's account of the incident. Budinscak testified he noticed a commotion and saw Ventura "in the thick of it." He testified that "people were holding [Ventura] back or pulling him up" and that, based on "the way that people were around him, I thought they were lifting him up." APP-1765-67. John Jones, Assistant Director/Chief of the Intelligence and Counterterrorism Division for the Texas Department of Public Safety, APP-2069, testified that, as the crowd was starting to leave McP's, he looked toward the parking lot and saw "Jesse getting up" and "some guys helping Jesse get up." APP-2089, 2091-92. Kelly testified that, after he noticed Kyle and Ventura talking, he turned away for a moment and, when he looked back, "Ventura is on his back. ... [A]nd I look back and Chris is running towards

me.” APP-1412. He further testified he saw Ventura “[k]ind of like rocking to his back ... like he got knocked down, punched.” APP-1413. Lacz testified that he too noticed Kyle and Ventura talking “relatively close,” and then, when he looked back again, “Ventura was on the ground and Chris was leaving.” APP-1843-45. Paul testified: “[T]here was a commotion. ... And then I saw Jesse getting up, and he was yelling and screaming at Chris. ... I do remember at that point somebody kind of helping Jesse up.” APP-1490.

Four witnesses — Budinscak, Jones, Bob Gassoff, and Debbie Job, an educational assistant and mother of another SEAL severely wounded in combat — testified to hearing about the incident while still at McP’s, after Kyle had left. APP-1577-82, 1607-08, 1731-32, 1767-68, 2089, 2092, 2106-07. Five other witnesses testified they heard about it that same night or first thing the next morning. APP-1323, 1414, 1496-97, 1658, 1846.

3. References to Insurance

Kyle was insured under a policy maintained by his publisher, HarperCollins. The carrier funded Kyle’s defense, but denied coverage for any damages awarded for unjust enrichment. APP-358-61, 1888, 2066; APP-

1884. All of this information was revealed to Ventura in pre-trial discovery, although the policy itself was never admitted in evidence.

At trial, Ventura sought to elicit testimony from HarperCollins employees (an editor and a publicist) that Kyle was insured under the publisher's policy. APP-1889. Although the district court initially declined to permit him to do so, it later changed its mind, concluding that the fact that HarperCollins had insurance was necessary for the jury to assess whether its employees who testified at trial were "bias[ed]." APP-1888-89, 1995. The district court permitted Ventura to ask them if they were aware their employer maintained insurance and that it provided coverage to Kyle. Both witnesses denied any such knowledge. APP-1997-98, 2066. Ventura's counsel proceeded to discuss the policy in his closing, advising the jury that "Chris Kyle is an additional insured for defamation under the publisher's insurance policy," and that the "insurer is on the hook if you find that Jesse Ventura was defamed," APP-2236-37.

4. Verdict Form

Kyle proposed that the jury be given a special verdict form. With respect to each challenged statement, the requested form asked whether Ventura had carried his burden of proving (1) by a preponderance of the

evidence that it was defamatory, (2) by clear and convincing evidence that it was materially false, and (3) by clear and convincing evidence that Kyle either knew it was materially false or had a high degree of subjective awareness that it was probably false. APP-90-95. The proposed verdict form would have required the jury to answer each of these questions with respect to each challenged statement.

The district court declined Kyle's request. Instead, it instructed the jury to return a general verdict with respect to each of Ventura's causes of action.

5. Jury Instructions

Several of the district court's jury instructions are at issue on this appeal. APP-2270-91. First, in Instruction 8, the district court instructed the jury that:

In this case, Plaintiff Jesse Ventura claims that Chris Kyle defamed him by asserting in *American Sniper*, as well as on television and radio, that Mr. Ventura said "he hates America," the SEALs "were killing men and women and children and murdering," and the SEALs "deserve to lose a few." To prevail on this defamation claim, Mr. Ventura must prove:

One, Mr. Kyle's story about Mr. Ventura was defamatory;

Two, the story was materially false; *and*

Three, Chris Kyle published the story knowing it was false, believing it was false, or having serious doubts about its truth.

Neither party objected to this instruction.

In Instruction 8B, the jury was instructed that:

The second element is that Mr. Kyle's story about Mr. Ventura was materially false or, put another way, was not substantially accurate. The story may be substantially accurate even if it contains minor inaccuracies, as long as the substance or gist of it is accurate.

Mr. Ventura must prove this element by the greater weight of the evidence (see Instruction No. 7).

This instruction was given over Kyle's objection, and his proffered alternative, which would have advised the jury that Ventura must prove material falsity "by clear and convincing evidence," was refused.

In Instruction 8C, the jury was instructed that:

The third element is that Mr. Kyle published the story about Mr. Ventura despite:

1. Knowing the story was false; *or*
2. Believing the story was false; *or*
3. Having serious doubts about the story's truth.

Mr. Ventura must prove this element by clear and convincing evidence (see Instruction No. 7).

During its deliberations, these instructions plainly confused the jury. On their first day of deliberations, the jurors asked whether the reference in Instruction 8 to “the story” was meant to refer to the entire “Scruff Face” passage, or just to the three statements specified in that instruction. APP-2292. Kyle urged the court to instruct the jury that it was required to consider whether each statement, not the “story” a whole, was defamatory, materially false, and published with actual malice. APP-2294-307. The district court responded that the jurors “are not going to find this thing was defamatory on anything other than one of those three statements or all of them, in my mind.” *Id.* It answered the jurors’ question by instructing them that:

The “story” ... refers to the statements Mr. Kyle made about Mr. Ventura in the Punching Out Scruff Face subchapter and on television and radio, which *include* the three statements identified in your question. You are instructed to consider each element of Instruction No. 8 as to the story as a whole.

APP-2310 (*italics* added; underline in original).

Later in its deliberations, the jury sought guidance on the meaning of “serious doubt” in the phrase “serious doubts about the story’s truth” in Instruction 8C. APP-2311, 2328. Over Kyle’s objection, which focused on

the Supreme Court's consistent guidance that "serious doubt" about the truth requires "a high degree of subjective awareness of probable falsity," the district court answered: "There is no legal definition of 'serious doubt.' You will have to rely on your common sense in interpreting and applying the standard." APP-2322-26, 2329.

After four days of deliberation, the jurors announced that they could not reach a verdict. APP-2352. The district court encouraged them to continue their deliberations. After several more hours, the jury again announced it was deadlocked, APP-2353, although one juror had a question for the court: "Do we have to decide if Chris Kyle was telling the truth based on the evidence OR [d]o we have to believe that Chris Kyle thought he was telling the truth?" APP-2354. In response, the court referred the jury to Instructions 8 through 8C. APP-2355-56, 2362-68.

The jurors still could not reach a unanimous decision, and the parties agreed to accept a verdict by a majority of eight jurors. APP-2357-60, 2368-77. On July 29, the jury returned such a verdict, finding by an 8-2 vote that Ventura had proved his defamation claim and awarding \$500,000, finding unanimously that Ventura had *not* proved his claim of misappropriation, and finding in an 8-2 advisory verdict that Ventura had proved his unjust

enrichment claim and recommending damages on that claim be set at \$1,345,477.25. APP-2385-86.

After receiving the jury's verdict, the district court stated it would take some time to consider the unjust enrichment claim before entering judgment, and would "probably hear from the parties before I do that." APP-2382-83. On August 7, without additional briefing or argument, the district court entered an order adopting the jury's unjust enrichment verdict, finding that the award was "supported by a preponderance of the evidence" and that \$1,345,477.25 was "a reasonable portion (approximately 25%) of Chris Kyle's and his Estate's total profits to date and was supported by substantial evidence." ADD-1-6. Judgment was entered that same day. ADD-7.

Kyle filed post-trial motions on September 4, APP-38/ECF-404-07, and the district court denied them on November 26, ADD-8-31.

SUMMARY OF ARGUMENT

The district court made three significant errors with respect to Ventura's defamation claim. First, it erred in instructing the jury that it should focus on Kyle's "story" as a whole in determining whether Ventura had met each element of his burden of proof. The jury should have been

instructed to consider each challenged statement individually and return a verdict for Ventura only if it found at least one statement to be materially false, defamatory, and published with actual malice.

Second, the district court erred in failing to instruct the jury that Ventura was required to demonstrate by clear and convincing evidence that the statements at issue were materially false. Third, the district court erred in instructing the jurors that there is no definition of what it means to have “serious doubts” about the truth in the actual malice context, and in urging them to rely instead on “common sense” in applying that standard. There *is* a definition articulated by the Supreme Court and cited many times in this Circuit – a finding of actual malice requires clear and convincing evidence that the defendant published despite “a high degree of awareness” of the “probable falsity” of a challenged statement.

A properly instructed jury would not have rendered a verdict in Ventura’s favor. The independent review of the record that is constitutionally required in this case demonstrates that Ventura failed to carry his burden of proving, by the requisite clear and convincing evidence, that any of the three statements at issue were materially false or

published with actual malice. No reasonable jury properly instructed could have found defamation liability on the record in this case.

The unjust enrichment verdict should be reversed and the claim dismissed for multiple reasons. First, if the defamation claim is dismissed, there is no basis on which Ventura could predicate a cause of action for unjust enrichment, especially after the jury rejected Ventura's misappropriation claim.

Second, even if the defamation verdict survives, the unjust enrichment claim fails as a matter of state law. The Minnesota Supreme Court has held that no cause of action for unjust enrichment exists in the absence of a pre-existing implied or quasi-contractual relationship between the parties. It is undisputed that no such relationship existed between Ventura and Kyle. Even if such a relationship had existed, Ventura's claim would be invalid because, under this Court's precedent, a plaintiff may sustain an unjust enrichment claim based on wrongful publication only where the plaintiff's name or likeness is used in a commercial advertisement. Moreover, the equitable remedy of unjust enrichment was not available to Ventura because he potentially had an adequate remedy at

law to seek the disgorgement of Kyle's profits – his failed claim for misappropriation.

Third, the unjust enrichment award violates the First Amendment in two significant respects. The “unjust” standard on which it is necessarily based is itself too malleable and expansive a concept on which to penalize speech about a matter of public concern. Because such an award is intended solely to disgorge profits derived from allegedly false speech, and *not* to compensate a plaintiff for an actual injury, it is precluded by the constitutional protection that extends even to knowingly false statements addressing matters of public concern. The unjust enrichment award also must be reversed because it is the product of speculation and not based on record evidence demonstrating the extent, if any, to which Kyle was enriched by the statements at issue.

Finally, this Court at minimum should grant a new trial because the district court erred when it allowed the jury to hear highly prejudicial examination and argument about defendant's insurance.

STANDARDS OF REVIEW

On questions of law, this Court applies *de novo* review, with no deference to the district court or fact-finder. *Aviation Charter, Inc. v. Aviation Research Grp./US*, 416 F.3d 864, 868 (8th Cir. 2005).

Because this appeal involves claims by a public figure challenging statements made in a book addressing subjects of public concern, the First Amendment requires this Court to “‘make an independent examination of the whole record’ ... so as to assure [itself] that the judgment does not constitute a forbidden intrusion on the field of free expression,” *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 & n.26 (1964); see 2 R. Sack, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS §16.5 (2d ed., Rel. #4, 4/14). Here, the duty of independent review applies to the facts supporting the jury’s findings of actual malice, *Lundell Mfg. Co. v. ABC, Inc.*, 98 F.3d 351, 357 (8th Cir. 1996), and material falsity, *Air Wis. Airlines Corp. v. Hoeper*, 134 S. Ct. 852, 864 (2014). This constitutional duty “cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge.” *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 (1984).

ARGUMENT

I. THE DEFAMATION JUDGMENT

This Court should reverse the defamation judgment because the district court incorrectly instructed the jury with respect to both the questions of whether the statements at issue were materially false and whether Kyle published them with actual malice. Although instructional error would normally call for a new trial, the First Amendment requires an appellate court to examine the record independently and enter judgment for the defendant where, as here, no properly instructed jury could have found defamation liability. *See Sullivan*, 376 U.S. at 285.

A. Ventura's Burden to Establish Material Falsity

1. The district court erred by instructing the jury it could find liability based on the "story."

The district court erred when, responding to an inquiry, it instructed the jury it could impose defamation liability based on the entirety of the "story" Kyle told about Ventura, rather than explaining that its original instruction required Ventura to prove all of the elements of his defamation claim with respect to at least one of the three specific statements at issue.

A jury instruction is erroneous if it misstates the law. *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 864 (8th Cir. 2011). To establish a defamation claim, a plaintiff must prove, *inter alia*, that a specific statement is both defamatory and false in some material respect. *McKee v. Laurion*, 825 N.W.2d 725, 729-30 (Minn. 2013). In addition, the First Amendment requires a public figure such as Ventura to prove that such a statement was published with actual malice. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 327-28 (1974).

The Supreme Court, this Court, and the Minnesota Supreme Court have all left no doubt that, to sustain a defamation claim with respect to a group of allegedly false and defamatory statements, a plaintiff must prove each of the elements of his cause of action with respect to each such statement for which he hopes to recover damages. *See, e.g., Air Wis.*, 134 S. Ct. at 864-65 (evaluating individually each of several challenged statements); *Masson v. New Yorker Magazine*, 501 U.S. 496, 502, 522-25 (1991) (excluding from potential liability challenged statements that were not actionable and evaluating remaining statements individually); *Stepnes v. Ritschel*, 663 F.3d 952, 964-65 (8th Cir. 2011) (same); *Aviation Charter*, 416 F.3d at 868-71 (“We begin by parsing the seven allegedly defamatory

statements.”); *Michaelis v. CBS Inc.*, 119 F.3d 697, 700-03 (8th Cir. 1997); *Price v. Viking Penguin*, 881 F.2d 1426, 1429 (8th Cir. 1989); *McKee*, 825 N.W.2d at 729-30.

As originally given to the jury, Instruction 8 properly explained that the only statements at issue were the three specific statements “set forth above.” APP-2281. The instruction did not reference other aspects of the “Scruff Face” story, including most significantly whether Kyle had punched Ventura; the so-called “punch statements” are not defamatory and Ventura admitted at trial that they did not injure his reputation, APP-1112. Relying on the instruction as given, Kyle’s counsel emphasized in closing argument that the *only* statements at issue were the three challenged statements set out in the Instruction, and that the book’s references to the punch “are not defamatory and ... are already out of this case.” APP-2189-90.

Only a few hours into their deliberations, however, the jurors asked whether the “story” referenced in Instruction 8 was meant to refer to the entire Excerpt, or only to the three statements identified in the instruction. Over Kyle’s objection, the district court reversed course. It instructed the jurors that, rather than focusing their deliberations on whether Ventura

had carried his burden of proof with respect to the three challenged statements, they should instead “consider each element of Instruction No. 8 as to the story as a whole.” APP-2310.

This instruction was plainly incorrect. By giving it, the district court effectively repudiated its original instruction and left the jury free to impose liability on portions of the “story” that were not properly at issue, either because they were true (but not flattering) or false (but not defamatory). This was especially prejudicial with respect to the non-defamatory “punch statements,” the alleged falsity of which Ventura emphasized to the jury throughout the trial. *See, e.g.,* APP-202, 2232-33.¹

¹ Although the jury properly could consider whether it believed Kyle punched Ventura in deciding whether to credit the rest of Kyle’s account, a conclusion that Kyle did not punch Ventura cannot itself be a basis of liability. To paraphrase the Second Circuit, the “punch statements” theoretically might have met “all of the other elements of defamation – be factual, published, false, and about the plaintiff – but still not be actionable” because they “fail[] to rise to the necessary level of derogation.” *Chau v. Lewis*, 771 F.3d 118, 127 (2d Cir. 2014). Moreover, although the defamatory import of the three statements at issue is properly assessed in the context of the publication as a whole, *id.* at 126, *all* the required elements of a defamation claim must be present with respect to any challenged statement for it to be actionable.

This Court's treatment of the seven statements at issue in *Aviation Charter* illustrates the magnitude of the district court's error. In that case, this Court held that one of several challenged statements was true, that two others were "technically incorrect" but not defamatory, and that the remaining four were derivative of a statement of non-actionable opinion. The cumulative conclusion – that each challenged statement was non-actionable – meant the case was over, even though the various statements were each disposed of for three separate reasons. Most significantly, this Court did not allow the plaintiff in *Aviation Charter* to pursue a defamation claim by conflating one statement that was false (but not defamatory) with another that was defamatory (but true) and claiming that the overall "story" therefore constituted an actionable defamation. In this case, the district court permitted the jury to do just that.

The district court's error was compounded by its failure to provide the jury with the special verdict form proffered by Kyle that would have required it to "pars[e] the ... allegedly defamatory statements" in the manner contemplated by *Aviation Charter*, 416 F.3d at 869, and to determine whether any of them satisfied all of the elements of a valid defamation claim. Instead, over Kyle's objection, the district court employed a general

verdict form that permitted the jury to “mix and match” the alleged falsity of statements not at issue with the defamatory nature of the challenged statements. *See West v. Media Gen. Operations, Inc.*, 120 Fed. Appx. 601, 622 (6th Cir. 2005) (“When multiple defamatory statements or matters are alleged, each element, including actual malice, must be proven as to each statement or matter.”).

Especially in this context, as now-Justice Ginsburg has explained, the importance of special verdict forms and clear jury instructions in safeguarding First Amendment rights cannot be overstated. *See Tavoulareas v. Piro*, 817 F.2d 762, 809 (D.C. Cir. 1987) (Ginsburg, J., concurring). In their absence, this Court cannot properly sustain a defamation verdict on the uncertain basis of findings the jury may well not have actually made. *See West*, 120 Fed. Appx. at 619 (“the failure to give the jury a list of the defamatory statements alleged by Plaintiffs ..., combined with the use of a general verdict form ..., gives this Court no guidance as to how the jury reached its decision Simply put, we cannot tell which statements the jury found to be made, false, defamatory, and made with actual malice.”).

2. The court erred in failing to instruct the jury Ventura had to prove falsity by clear and convincing evidence.

The district court erred further when it failed to instruct the jury that Ventura was required to prove the challenged statements' falsity by clear and convincing evidence. Rather, over Kyle's objection, it instructed that Ventura was required to prove material falsity only by a preponderance of the evidence. APP-2280, 2283.

In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 661 n.2 (1989), the Supreme Court noted a split in authority on the question of whether material falsity must be proven by clear and convincing evidence, but did not decide the question. Neither this Court nor the Minnesota Supreme Court has addressed the issue. Nonetheless, most jurisdictions that have considered the matter have held that public figures must prove material falsity by clear and convincing evidence. *See, e.g., DiBella v. Hopkins*, 403 F.3d 102, 110-15 (2d Cir. 2005) (collecting cases); *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1128 (10th Cir. 2014); *see also* 1 R. Sack, *supra*, §3:4, 3-14 to -15 & n. 52 (citing cases).

These courts correctly recognize that a public figure's burden of proving material falsity *must*, as a matter of both law and logic, require

clear and convincing evidence. For one thing, the Supreme Court has emphasized that the First Amendment obligates courts “to tip [the scales] in favor of protecting true speech,” *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986), and, to that end, the clear and convincing standard properly “‘resolve[s] doubts in favor of speech when the truth of a statement is difficult to ascertain conclusively,’” *DiBella*, 403 F.3d at 114 (quoting *Robertson v. McCloskey*, 666 F. Supp. 241, 248 (D.D.C. 1987)). For another, as this case illustrates, the clear and convincing standard ameliorates what would otherwise be jury confusion: “‘To instruct a jury that a plaintiff must prove falsity by a preponderance of evidence, but must also prove actual malice, which to a large extent subsumes the issue of falsity, by a different and more demanding standard is to invite confusion and error.’” *Id.*

Since *Harte-Hanks*, the Supreme Court twice has emphasized that the issues of material falsity and actual malice are inextricably intertwined, such that the very definition of the latter requires a finding of the former. See *Masson*, 501 U.S. at 512; *Air Wis.*, 134 S. Ct. at 861 (citing *Masson* and noting that Supreme Court has “long held that actual malice requires material falsity”). In the wake of *Masson* and *Air Wisconsin*, there can be no

credible contention that a public figure bears a different, less demanding burden with respect to proof of material falsity than he does with respect to actual malice.

Indeed, as a practical matter, “it may be impossible to apply a higher standard to ‘actual malice’ than to the issue of falsity.” *Nev. Indep. Corp. v. Allen*, 664 P.2d 337, 343 n.5 (Nev. 1983). Thus, where the jury is incorrectly instructed that it may find material falsity by only a preponderance of the evidence, there is every reason to believe that such a finding will bleed over into its consideration of the actual malice issue and predetermine that inquiry, regardless of the plaintiff’s assigned burden of proof. In this case, given Kyle’s personal involvement in the events he described and the (understandable) inability of jurors to grasp the difference between the applicable burdens of proof, a finding of falsity would have led to a finding of actual malice almost *ipso facto*.

3. Ventura failed to establish by clear and convincing evidence that the challenged statements were materially false.

An independent review of the record demonstrates that Ventura failed to prove by clear and convincing evidence that the specific statements at issue were in any material sense false. The “clear and

convincing evidence” standard requires that the version of the facts on which the plaintiff relies be “highly probable,” *In re Miera*, 426 N.W.2d 850, 853 (Minn. 1988), and that the evidence supporting it be “unequivocal and uncontradicted,” *Kavanaugh v. The Golden Rule*, 33 N.W.2d 697, 700 (Minn. 1948). If nothing else, clear and convincing evidence “require[s] more than one man’s word against another.” *In re McDonough*, 296 N.W.2d 648, 694 (Minn. 1980).

A statement is not materially false “unless it ‘would have a different effect on the mind of the reader from that which the pleaded truth would have produced.’” *Air Wis.*, 134 S. Ct. at 861 (quoting *Masson*, 501 U.S. at 517). In other words, “[m]inor inaccuracies do not amount to falsity so long as the ‘substance, the gist, the sting, of the libelous charge be justified.’” *Id.*

Ventura’s affirmative evidence of material falsity was limited to:

- His own denials he made any of the statements and his attestations of admiration for the SEALs;
- The testimony of three friends that they did not hear Ventura make the statements at issue, but who conceded Ventura could have made them without their knowing;
- The testimony of Ventura’s wife and son, who were not present, that Ventura would never have made such statements; and
- The lack of a police report of the incident.

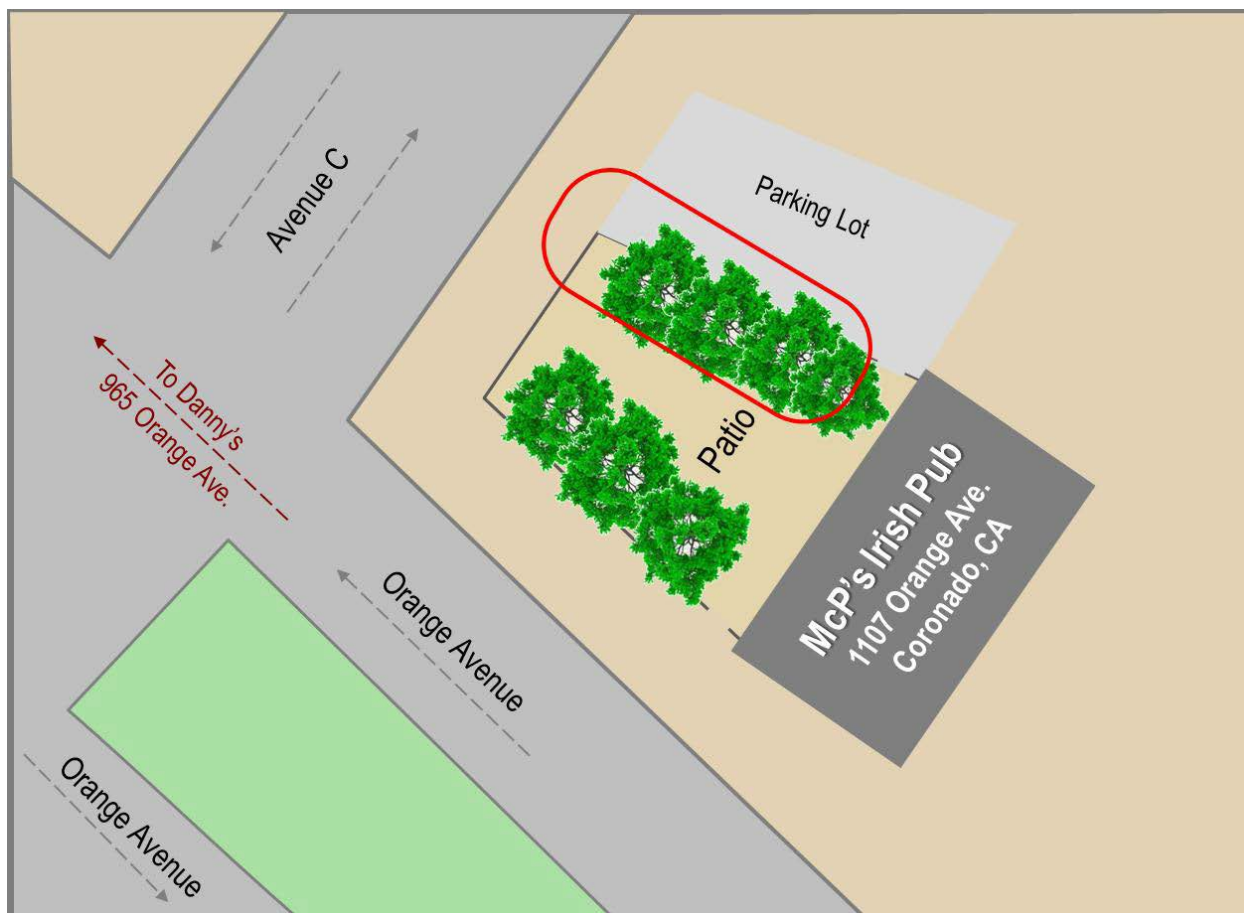
In contrast, Kyle's evidence included multiple eyewitness accounts establishing the substantial truth of Kyle's account, including:

- Kyle's testimony that Ventura said the very things he wrote in the book.
- One witness who testified unequivocally that he heard Ventura say that the SEALs "deserved to lose some guys." Another — one with no tie to either Kyle or Ventura — who testified similarly and unequivocally that she heard Ventura say that Monsoor — the Medal of Honor recipient for whom the wake was being held — "probably deserved it."
- Five witnesses who testified they heard Ventura make analogous statements conveying an anti-military sting.
- Admissions by Ventura that, in multiple public statements, he has been sharply critical of SEALs, the military, and the country, including making statements that:
 - o SEALs are "elite killer squads" who are "forced to be part of illegal gangland operations,"
 - o "[m]ore and more we're seeing an Army run by Christian extremists and an accompanying cadre of what can only be described as neo-Nazis,"
 - o "Our military has turned into contract killers now, contract for hire,"
 - o we live in the "fascist states of America,"
 - o he "won't salute the US flag or stand for the National Anthem anymore" or "pay respect to the country," and
 - o the United States government had a hand in the 9/11 terrorist attacks.

At trial, Ventura sought to undercut Kyle's evidence by referring to defense witnesses as "drunken sailors," APP-2227, and by pointing to differences in their testimony regarding precisely where and when the verbal exchange and punch occurred, APP-2220-29. Such contentions neither survive reasonable scrutiny nor assist Ventura in proving that the statements at issue are false in any material respect.

First, the differences in testimony among Kyle's witnesses are minor and immaterial. The diagram² below shows that each witness who saw the exchange *and* recalled its location remembered it taking place in the same area on or near McP's patio (within the oval):

² This diagram is based on APP-455-47, 460, 470-71, 473-74, 2434; APP-1438-43; APP-1491-95, 2407; APP-1578-79, 2400; APP-1658, 1692-94, 1716-18, 2416; APP-1787-91, 2393; APP-1843-45, 1868, 1870, 2421; APP-2104-05, 2108, 2428.



Similarly, those witnesses who said they either heard the key statements or witnessed either the punch or the related commotion all agreed it happened well after dark, which was consistent with Kyle's own memory. Those able to provide a more precise estimate testified that the punch was thrown sometime between approximately 9 and 11 p.m., as the evening was winding down and some SEALs were heading to another bar. APP-1273-74, 1437-38, 1487-89, 1578, 1657, 1731-32, 1787-88, 1842-44, 2080, 2083. Most significantly, there were *no* discrepancies among witnesses about

whether they actually heard Ventura make the statements about which each testified.

Second, regarding Ventura's suggestion that Kyle's witnesses were "drunken sailors," the evidence showed not only that several of them were not sailors at all but that most of them drank only moderately that evening. *None* of Kyle's witnesses were out of control or unable to observe their environment. APP-1401, 1834, 2083, 2109.

Ultimately, an independent review of this record reveals that Ventura failed to demonstrate even by a preponderance of the evidence that he did not make the statements attributed to him, let alone that it was "highly probable," "unequivocal," or "uncontradicted" that he did not do so. No reasonable jury – properly instructed to focus squarely on the three statements at issue and to hold Ventura to his burden of proving their material falsity by clear and convincing evidence – could have found in his favor on that dispositive issue.

B. Ventura's Burden to Establish Actual Malice

The district court also erred when it refused to provide a further explanation of Instruction 8C when requested to do so by the jury. An independent review of the record evidence demonstrates that, if the jury

had been instructed properly, it could not have found actual malice by the requisite clear and convincing evidence.

1. The court erred in refusing to explain the phrase “serious doubts about the story’s truth” when the jury asked for a definition.

Instruction 8C stated that Ventura had to prove by clear and convincing evidence that Kyle published the statements at issue despite: “1. Knowing the story was false; *or* 2. Believing the story was false; *or* 3. Having serious doubts about the story’s truth.” This instruction was based on settled case law. Specifically, the Supreme Court has explained both that a finding of “actual malice” requires clear and convincing proof of either “knowledge of falsity” or “reckless disregard for the truth,” and that “reckless disregard” requires the same quantum of evidence demonstrating that “‘the defendant in fact entertained serious doubts as to the truth of his publication.’” *Harte-Hanks*, 491 U.S. at 688 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). Moreover, the Court has instructed, to sustain a finding of “serious doubts” about the truth, “there *must* be sufficient evidence to permit the conclusion that the defendant actually had a ‘high degree of awareness of ... probable falsity.’” *Harte-Hanks*, 491 U.S. at 688 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)) (emphasis added).

On its third day of deliberations, the jury asked what Instruction 8C meant by “serious doubts.” Kyle requested that the court answer the question (as he had previously asked the court to instruct the jury, APP-30/ECF-297 pp.46-47) with the definition provided in *Harte-Hanks*. APP-2322-26. The district court, however, declined to answer the jurors’ question at all, informing them instead that there “is no legal definition of ‘serious doubt’” and that they would have to “rely on [their] common sense.” APP-2329

The district court was wrong to instruct the jury that there “is no legal definition of ‘serious doubt’” because there *is* such a definition – such a finding requires evidence that the defendant harbored a “high degree of awareness” of “probable falsity.” *Harte-Hanks*, 491 U.S. at 688. This Court and others have applied that definition for decades. *See, e.g., Campbell v. Citizens for an Honest Gov’t, Inc.*, 255 F.3d 560, 569 (8th Cir. 2001); *Secrist v. Harkin*, 874 F.2d 1244, 1251-52 (8th Cir. 1989); *Chafoulias v. Peterson*, 668 N.W.2d 642, 654-55 (Minn. 2003).

“When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.” *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946). The district court could have done so here, but it

declined. This error forced the jury to draw for itself the line separating speech protected by the First Amendment from actionable defamation and left it free to find “actual malice” by reference to a substantive standard that fell well short of what the Constitution requires.

2. Ventura failed to prove Kyle published the challenged statements with actual malice.

An independent review of the record reveals that Ventura failed to produce clear and convincing evidence either that Kyle knowingly lied about what he heard Ventura say or that he had the requisite high degree of awareness that any of the three statements were probably false.

The *only* direct evidence concerning Kyle’s state of mind necessarily came from Kyle himself. Though the jury heard only Kyle’s deposition cross-examination, his testimony was unequivocal. He was certain of the truth of what he had written about his encounter with Ventura, *see, e.g.*, APP-520-21, 527-28, 534, 537-38, 540, even asserting that he was not concerned about this lawsuit because you “[c]an’t defeat the truth,” APP-404. Although a defendant cannot ensure a verdict in his favor merely by asserting his belief in the truth of his work, *Harte-Hanks*, 491 U.S. at 690, an

author's direct testimony is certainly relevant to the constitutional calculus and to an appellate court's independent review.

Moreover, significant additional evidence corroborates Kyle's testimony. Two eyewitnesses testified that they too heard Ventura make statements about SEALs "deserv[ing]" to die. Multiple others heard Ventura make other derogatory statements about the military that night and it is undisputed that he has repeatedly and loudly made analogous assertions in a variety of public fora.

In the face of this showing, which itself precludes a finding of actual malice by clear and convincing evidence, Ventura offered only the thesis that, because he testified he did not say these things and because (according to his testimony) Kyle also lied about punching him, Kyle must have fabricated the three derogatory statements at issue attributed to Ventura. Ventura's logic is flawed.

First, the Supreme Court specifically has held that a libel plaintiff cannot establish actual malice simply by claiming that a defendant who witnessed an event and described it inaccurately must have lied. *See Bose*, 466 U.S. at 512-13. "Normally ... discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." *Id.* at 512.

Second, a mere conflict between defendant's and plaintiff's accounts of an event does not mean that one of them actually believed his own account was false or probably false; it may simply mean that one of them is mistaken. *See, e.g., Mahoney v. Adirondack Publ'g Co.*, 517 N.E.2d 1365, 1369-70 (N.Y. 1987) (dismissing claim because evidence "suggest[ed] that the falsity was more the product of misperception than fabrication"); *Long v. Arcell*, 618 F.2d 1145, 1148 (5th Cir. 1980) (same). Misinterpretation and faulty recollection are, as a matter of law, not actual malice. *Bose*, 466 U.S. at 512; *Niska v. Clayton*, 2014 WL 902680 at *5 (Minn. App. Mar. 10, 2014) (unpublished).

In this case especially, ambiguity surrounds what Ventura did or did not say that evening. People were drinking at a loud, crowded bar, misunderstandings were likely, and memories understandably fade with time. Even Ventura's counsel acknowledged in closing argument that "[w]e all know that memories fade and over time that things can blend together, especially when people are trying to recall something that happened a long time ago." APP-2218.

The district court itself acknowledged that "it is *possible* Kyle could have misinterpreted Ventura's comments to him and innocently published

a false account of them.” ADD-51. In other words, Kyle could have honestly gotten what Ventura said wrong, without being aware his statements were probably false. On this record, as a matter of law, that very real possibility precludes a finding of actual malice.

In the district court, Ventura argued that two additional factors supported a finding of actual malice: (1) Kyle’s decision to omit Ventura’s name from the book, and (2) revisions made to the “Scruff Face” portion before it was published. Neither argument has merit.

First, testimonial *and* documentary evidence established that Kyle omitted Ventura’s name because he did not want to call public attention to a dispute between two SEALs, APP-559, not because he knew the account was false and feared litigation, APP-404. Kyle testified he pushed for use of pseudonyms from the start, APP-528-30, 538-39, 2470-74, and mentioned a friend’s warning about litigation, *see* APP-2475-77, only in the hope it would help him win the argument for using pseudonyms, APP-541-43. In any event, a desire to avoid defamation litigation has little to do with whether an author doubts the truth of his work; authors, publishers and their lawyers devote significant resources to minimizing the risk of lawsuits challenging what they are confident are entirely truthful accounts.

The actual malice standard is designed to protect authors like Kyle in just such circumstances. *See Sullivan*, 376 U.S. at 279 (noting that, under a lesser standard, speakers “may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so”).

As for the challenged revisions, an independent review of the record demonstrates that all of them were insignificant and involved either wordsmithing or judgment calls about how much detail to include. None of the changes reveal Kyle contradicting himself on any material aspect of his account³ and Kyle’s co-author testified that such tweaks are a normal part of the book-writing process. APP-1913-14, 1949, 1962. More to the point, none of the changes were made to any of the three statements at issue, which were consistent throughout the drafting process. The fact that *other* revisions were made cannot constitute clear and convincing evidence of actual malice. *See Masson*, 501 U.S. at 514-15 (“the practical necessity to

³ The Court can review the *de minimis* changes by comparing the relevant portions of the book to APP-515-21, 527-28, 2466-74.

edit” requires rejection of contention “that any alteration beyond correction of grammar or syntax by itself proves falsity in the sense relevant to determining actual malice under the First Amendment”).

Simply put, no reasonable and properly instructed jury could have concluded on this record that there was clear and convincing evidence Kyle knew the three statements were probably false when he published them. As a result, the jury’s verdict in this regard cannot survive this Court’s independent review of the record.

II. THE UNJUST ENRICHMENT JUDGMENT

A. The Unjust Enrichment Judgment Cannot Stand if the Defamation Judgment is Reversed.

To maintain a cause of action for unjust enrichment under Minnesota law, a plaintiff must demonstrate that the defendant not only “benefit[ed] from the efforts or obligations of others,” but also that he “was unjustly enriched in the sense that the term ‘unjustly’ could mean illegally or unlawfully.” *First Nat’l Bank v. Ramier*, 311 N.W.2d 502, 504 (Minn. 1981); see also *United States v. Bame*, 721 F.3d 1025, 1029 (8th Cir. 2013). Here, the only underlying “illegal” or “unlawful” conduct asserted by Ventura is the publication of allegedly defamatory statements and the alleged

misappropriation of his name or likeness. The jury rejected Ventura's misappropriation claim. His derivative unjust enrichment claim must therefore fail if the underlying defamation claim is dismissed. *See Boladian v. UMG Recordings, Inc.*, 123 Fed. Appx. 165, 169 (6th Cir. 2005) (defamation claim); *Ruffin-Steinback v. dePasse*, 267 F.3d 457, 462-63 (6th Cir. 2001) (misappropriation).

B. State Law Bars the Unjust Enrichment Claim.

All apart from the validity of the defamation judgment, the unjust enrichment judgment should be reversed and the claim dismissed because it is inconsistent with Minnesota law.

1. Ventura cannot maintain a claim for unjust enrichment because he had no pre-existing contractual or quasi-contractual relationship with Kyle.

During the pendency of this action, both the Minnesota Supreme Court and the District Court of Minnesota squarely addressed the requirements for a valid unjust enrichment cause of action in Minnesota. In *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 838 (Minn. 2012), the Minnesota Supreme Court "limited the application of unjust enrichment to claims premised on an implied or quasi-contract between the claimant and the party alleged to be unjustly enriched." Relying on *Caldas*,

the District of Minnesota concluded that an unjust enrichment claim cannot stand where the plaintiff fails to allege “any promise or privity between the parties” such that the defendant owed him a contract-like pre-existing legal obligation. *Qwest Commc’ns Co. v. Free Conferencing*, 990 F. Supp. 2d 953, 982 (D. Minn. 2014); accord, *Moore v. Weinstein Co.*, 2012 WL 1884758, *49 (M.D. Tenn. May 23, 2012) (rejecting unjust enrichment claim based on infringement of privacy and trademark rights because it was “unclear why a quasi-contractual theory would even apply to the circumstances of this case”), *aff’d*, 545 Fed. Appx. 405 (6th Cir. 2013).

Here, no pre-existing implied or quasi-contractual relationship existed between the parties, and Ventura made no such claim at trial. He actually argued the opposite. Ventura presented this case as one about two perfect strangers, contending that he (1) had never heard of Kyle before the book was published and (2) did not remember meeting him at McP’s. APP-986, 1011. Ventura presented no evidence of a promise from or privity with Kyle, but instead argued the royalties Kyle received were “unjust” based on defamation and/or misappropriation. Those royalties, however, did not arise from a pre-existing relationship between the two from which the requisite contractual or quasi-contractual obligation could be said to have

arisen. As a matter of Minnesota law, therefore, Ventura failed to state a viable claim for unjust enrichment.

Ventura cannot avoid this conclusion by arguing that Minnesota law recognizes a cause of action for unjust enrichment against the author of a work “published for profit,” if it unlawfully references the plaintiff. *See Ruzicka v. Conde Nast Publ'ns, Inc.*, 733 F. Supp. 1289, 1301 (D. Minn. 1990), *aff'd*, 939 F.2d 578, 583 n.8 (8th Cir. 1991). In *Ruzicka*, the predicate cause of action for breach of contract arose from a pre-existing relationship between the author and the plaintiff – the former allegedly had promised the latter she would not be identifiable in the published article. *See* 733 F. Supp. at 1291-92.

Even in the face of such a relationship, the Court in *Ruzicka* recognized an additional state law limitation on a cause of action for unjust enrichment. As the district court explained in *Ruzicka*, in a ruling adopted by this Court, Minnesota law in such circumstances requires a plaintiff to demonstrate that the benefit unjustly received resulted from “a deliberate association with the defendant’s products in an advertising or promotional scheme.” *Ruzicka*, 733 F. Supp. at 1301; *accord*, *Young v. That Was The Week*

That Was, 312 F. Supp. 1337, 1342 (N.D. Ohio 1969), *aff'd*, 423 F.2d 265 (6th Cir. 1970).

There is no evidence that Kyle used Ventura's name in advertising or to promote a commercial product. The book is an autobiography about a matter of public concern, not an advertisement or promotion of any sort, and Ventura's name does not even appear in it. Ventura's claim is not saved by the contention that his name was mentioned in promotional interviews because, for purposes of an unjust enrichment claim, the required promotional use must be for a product or service *other than* the published work itself. *Lacoff v. Buena Vista Publ'g*, 705 N.Y.S.2d 183 (Sup. Ct. 2000) (advertising for book not promotional because the underlying work was protected expression); *accord*, *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 337 (E.D. Pa. 1996); *Nichols v. Moore*, 334 F. Supp. 2d 944, 957 (E.D. Mich. 2004); *Lane v. Random House*, 985 F. Supp. 141, 146 (D.D.C. 1995).

2. The existence of an adequate legal remedy bars Ventura from pursuing an equitable claim for unjust enrichment.

Minnesota law bars Ventura from sustaining his unjust enrichment judgment for the further reason that state law provides an adequate,

alternative legal remedy. “Unjust enrichment is an equitable doctrine,” *Caldas*, 820 N.W.2d at 838, that is not available in Minnesota “where there is an adequate legal remedy or where statutory standards for recovery are set by the legislature,” *Bame*, 721 F.3d at 1030; see *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 305 (Minn. 1996). Here, a cause of action for the tort of misappropriation, pursuant to which a successful plaintiff may potentially recover the defendant’s profits, constitutes such a legal remedy.

Jurisdictions that rely, as Minnesota does, on the *Restatement (Second) of Torts*’ rendition of the misappropriation tort, see *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 236 (Minn. 1998), authorize, in those cases in which liability has otherwise been established, recovery of the tortfeasor’s profits as an appropriate measure of the plaintiff’s damages. See, e.g., *Thorton v. W. & S. Fin. Grp. Beneflex Plan*, 797 F. Supp. 2d 796, 815 (W.D. Ky. 2011) (“any monetary benefit that [defendant] received as a result of its alleged wrongful use of [plaintiff’s] name is an appropriate measure of [plaintiff’s] actual damages”); *Nguyen v. Taylor*, 723 S.E.2d 551, 560 (N.C. App. 2012) (same). Although it has not yet addressed the issue, there is no reason to

believe the Minnesota Supreme Court would part company with the *Restatement* and the body of law construing it in this manner.⁴

The jury rejected Ventura's misappropriation claim—but “it is the *existence* of an adequate legal remedy that precludes unjust enrichment recovery;” a successfully asserted remedy is not required. *Bame*, 721 F.3d at 1031; see *Loftness Specialized Farm Equip., Inc. v. Twiestmeyer*, 742 F.3d 845, 854-55 (8th Cir. 2014) (same). Consequently, Ventura cannot properly pursue an equitable theory arising from the same conduct for which he asserted legal claims.⁵

⁴ Furthermore, at both common law and under the First Amendment, courts have refused to award equitable remedies of any sort to defamation plaintiffs. See, e.g., *Kinney v. Barnes*, 443 S.W.3d 87, 95-100 (Tex. 2014); see also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 23 (1990) (“[I]mperfect though it is, *an action for damages* is the *only* hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.”) (emphasis added; internal quotation marks omitted). Moreover, in Minnesota, defamation standards apply to all “claims that arise as a consequence of ... purported defamatory statements,” regardless of how a plaintiff labels them. *Mahoney & Hagberg v. Newgard*, 729 N.W.2d 302, 310 (Minn. 2007). Minnesota defamation law permits the recovery of multiple types of compensatory damages, but it is undisputed that those damages do *not* include disgorgement of defendant's profits. ADD-19.

⁵ The district court incorrectly held that Kyle waived this contention. An argument is adequately preserved so long as the issue was “at least mentioned in [a] party's summary judgment motion” or presented in a

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C. The First Amendment Precludes Recovery for Unjust Enrichment.

Kyle's autobiography addresses matters of public concern. It explores significant issues: the experience of American troops serving in foreign wars, the impact of their service on their families, and their interactions with the general public. As the Supreme Court has explained:

Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, ... or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.

Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011).

Where such speech is at issue, the First Amendment does not permit judges or juries to impose liability under a "highly malleable standard with 'an inherent subjectiveness about it.'" *Id.* at 1219 (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988)). Otherwise, fact finders could "impose liability on the basis of the [their] tastes or views, or perhaps on the basis of

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response brief. *Watkins Inc. v. Chilkoot Distrib.*, 719 F.3d 987, 993-94 (8th Cir. 2013); see *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 715-16 (8th Cir. 2008). Kyle raised this objection in the 2012 summary-judgment reply brief, APP-7/ECF-48 p.8, in the 2014 Trial Brief, APP-30/ECF-299 pp.25-26, in response to Ventura's Trial Brief, APP-30/ECF-304 p.2, and in post-trial motions, APP-34/ECF-349), APP-38/ECF-406), APP-39/ECF-414.

their dislike of a particular expression” or speaker. *Falwell*, 485 U.S. at 55.

An inherently subjective standard presents “a real danger of becoming an instrument for the suppression of ... vehement, caustic, and sometimes unpleasant[t] expression,” speech at the heart of the First Amendment’s protections. *Snyder*, 131 S. Ct. at 1219 (quoting *Bose*, 466 U.S. at 501) (internal quotation marks omitted).

The district court’s view of a cause of action for unjust enrichment flowing from speech about matters of public concern is expressly premised on an untethered judicial assessment of whether the expression “unjustly” enriched the defendant, and constitutes the very kind of subjective and malleable standard rejected by the Supreme Court in *Snyder* and *Falwell*. Cf. *Beverly Hills Foodland v. United Food & Commercial Workers Union*, 39 F.3d 191, 196 (8th Cir. 1994) (finding in defamation context that “[u]nfair’ is a term requiring a subjective determination” inconsistent with First Amendment).

Indeed, some Minnesota courts have construed the “unjust” requirement to permit recovery where it would be “morally wrong” not to do so. *Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. App. 2001).

While such a subjective standard may be entirely appropriate for a

prototypical, contract-based unjust enrichment claim – which does not implicate speech about public figures or matters of public concern – permitting such a cause of action based on expression a court deems to be “morally wrong” cannot be squared with the First Amendment. *See Moore*, 2012 WL 1884758, at *49 (rejecting unjust enrichment claim that “essentially overlaps with [plaintiff’s] publicity and trademark claims, which are subject to the stringent requirements of the First Amendment”); *Pittman v. Dow Jones & Co.*, 662 F. Supp. 921, 923 (E.D. La. 1987), *aff’d*, 834 F.2d 1171 (5th Cir. 1987).

In response to Kyle’s invocation of the First Amendment below, the district court concluded that, because the jury had determined the challenged statements were “knowingly false and defamatory,” they had forfeited any claim to constitutional protection. ADD-37, 39. The district court’s analysis is doubly flawed.

First, given the inherent vagueness of the “unjust enrichment” cause of action, it does not matter if the speech at issue was false, or even knowingly false. “[K]nowingly false speech does not fall outside the protections of the First Amendment.” 281 *Care Comm. v. Arneson*, 766 F.3d

774, 783 n.9 (8th Cir. 2014); see *United States v. Alvarez*, 132 S. Ct. 2537, 2545 (2012); 281 *Care Comm. v. Arneson*, 638 F.3d 621, 636 (8th Cir. 2011).

Thus, even in cases such as *Alvarez* involving knowingly false speech (in that case, the defendant's knowingly false claim that he had received the Medal of Honor), a cause of action may not be so "sweeping" and "unprecedented" in its reach that it serves to inhibit speech about public matters and to penalize expression without regard to whether doing so serves a compelling governmental interest. 132 S. Ct. at 2547. Here, a decision to authorize courts to order the disgorgement of profits derived "unjustly" from speech about a matter of public concern is demonstrably "sweeping and unprecedented" in both these ways – it opens the door to such awards whenever a judge determines, for whatever reason, that "justice" or even "morality" requires it.

To sustain an unjust enrichment claim under these circumstances, this Court would have to become the first circuit to recognize a new category of speech entirely outside the First Amendment's protections – "knowingly false" speech that "unjustly" benefits the speaker. The Supreme Court has left no doubt that there is no such category. To the contrary, the Court has strictly limited the types of unprotected speech "to

the few historic and traditional categories ... long familiar to the bar.”

Alvarez, 132 S. Ct. at 2544 (listing categories). Those categories include neither knowingly false speech, speech that “unjustly” benefits the speaker, nor any combination of the two. *See, e.g., United States v. Stevens*, 130 S. Ct. 1577 (2010); *State v. Mechert-Dinkel*, 844 N.W.2d 13 (Minn. 2014).

Second, the jury’s defamation verdict does not strip the challenged statements of First Amendment protection with respect to Ventura’s distinct claim for unjust enrichment. The Supreme Court has emphasized that the *only* constitutionally sufficient basis on which a state may afford recovery for defamatory speech about a matter of public concern is the compelling governmental interest in compensating plaintiffs for injury to their reputations. *Gertz*, 418 U.S. at 348-49 (“we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation.”); *see Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 28 (Minn. 1996) (“the purpose of a

defamation action is to compensat[e] private individuals for wrongful injury to reputation”).⁶

More importantly, the Supreme Court has emphasized that a state’s interest in affording its citizens a cause of action for defamation extends “no further” than compensating them for reputational harm. *Gertz*, 418 U.S. at 349 (emphasis added). As the Court expressly cautioned in *Gertz*, the states have no substantial interest in securing for defamation plaintiffs “gratuitous awards of money damages far in excess of any actual injury.” *Id.* Ventura received an award of \$500,000 for injury to his reputation—that award fully satisfied the only compelling state interest that justifies removing defamatory speech about a public figure from the First Amendment’s protection.

For all of these reasons, even if Minnesota law recognized such a cause of action in these circumstances, it would violate the First Amendment.

⁶ The Minnesota Supreme Court similarly refused to expand the damages recoverable for false speech when it declined to recognize the tort of false-light invasion of privacy. *See Lake v. Wal-Mart*, 582 N.W.2d at 235-36.

D. Ventura Presented No Competent Evidence Kyle Was Enriched.

The unjust-enrichment award also fails because Ventura presented no competent evidence to support an essential element of his claim. “The theory of unjust enrichment is based on what the [defendant] allegedly enriched has received.” *Georgopolis v. George*, 54 N.W.2d 137, 142 (Minn. 1952). Ventura was required to establish both: (1) that Kyle was unjustly enriched and (2) the amount of that unjust enrichment. *Rainbow Play Sys. v. Groundscape Techs., LLC*, 364 F. Supp. 2d 1026, 1041 (D. Minn. 2005).

First, Ventura introduced no evidence that Kyle was enriched *because* of his inclusion of the challenged statements in the book. No witnesses testified that they purchased the book because of those statements or even because they had become aware that Ventura was referenced in it. Ventura relied solely on speculation that the mention of his name on a radio and a television interview must have increased profits simply because sales of the book continued to rise following those appearances. Ventura’s speculation in this regard cannot be reconciled with the undisputed facts that (1) sales of books promoted on *The O’Reilly Factor*, and endorsed by O’Reilly himself, consistently increase dramatically, APP-1976-79; (2) both media appearances to which Ventura points focused on the remainder of the

book, not the small portion that discusses Scruff Face/Ventura, APP-1980-83, 1985-89; and (3) a host of promotional efforts undertaken at the same time had nothing whatever to do with Ventura, APP-1971-76.

Ventura conceded at trial that many readers bought AMERICAN SNIPER to read Kyle's account of his experiences in combat and their impact on him and his family. He further conceded that people did not need to buy the book to read about the Ventura-Kyle encounter because that account was available for free on the Internet.

Second, Ventura "failed to bear [his] burden of showing ... the extent of [Kyle's] enrichment." *Rainbow*, 364 F. Supp. 2d at 1041; *see Cantor v. Perelman*, 414 F.3d 430, 437 (3d Cir. 2005) (plaintiff must present expert testimony establishing "extent of any unjust enrichment"); *Shum v. Intel Corp.*, 630 F. Supp. 2d 1063, 1080 (N.D. Cal. 2009) (plaintiff must "introduce evidence substantiating the amount by which the defendan[t] w[as] allegedly unjustly enriched."). Having conceded that not *all* sales of the book were attributable to him, Ventura at least had the burden of proving *how many* such sales and *how much* of Kyle's royalties were attributable to it. *See Allied Erecting & Dismantling Co. v. Genesis Equip & Mfg., Inc.*, 2010 WL 4818367, *4 (N.D. Ohio Nov. 19, 2010) (granting post-trial judgment to

defendant because plaintiffs introduced “no evidence which would give the jury a principled way to find that [defendant] received a benefit ..., much less a manner in which to calculate any such benefit.”). Ventura conceded at trial that he could not do so.

The district court asserted that its award constituted “approximately 25%” of the \$6 million in royalties Ventura claimed the book had generated. The court, however, offered no basis for its assertion that “approximately 25%” of the book’s sales were driven by use of Ventura’s name; it plucked the number from thin air. It is difficult to understand how, by any reasonable calculus, the author of an autobiography recounting the horrors of war that he and his family in fact endured in the course of a 379-page book could be required, lest there be an “unjust enrichment,” to remit 25% of the proceeds from that effort to a person mentioned, not even by name, in two of those pages. Even if one accepts Ventura’s premise that the subsequent media references to him called additional attention to the book, it strains credulity to conclude that such attention was responsible for a quarter of the book’s success.

In addition, while the 25% approximation was the product of speculation, the calculation of \$6 million in royalties was flat-out *wrong*.

That figure was premised on the court's erroneous assumptions that (1) each of the approximately 1.5 million copies of the book sold for the hardcover list price of \$26.99, *and* 2) Kyle received 15% of the book's revenues after the first \$10,000. ADD-4. It was undisputed at trial that not every book was sold in hardcover and that the hardcover edition sold at different prices. Kyle's contract provided for a 15% royalty only on *hardcover* sales, and only *after* the first 10,000 *copies* sold, while paperback or electronic copies carried a smaller 5-10% royalty. Coauthors and literary agents all received a share of those royalties. APP-2435-65.

Kyle unsuccessfully called each of these errors to the district court's attention. APP-38/ECF-406 pp.7-11; ADD-15-16 n.3. At the very least, therefore, this Court must vacate the unjust enrichment award and require a new trial with respect to the calculation of that award.

III. PREJUDICIAL REFERENCES TO INSURANCE

At the very least, Kyle is entitled to a new trial because the district court allowed Ventura's counsel to cross-examine witnesses about

insurance coverage and then argue to the jury that insurance would cover an award.⁷ This flatly violated Fed. R. Evid. 411.

The baseline principle underlying Rule 411 is that evidence that a person was or was not insured is *not* admissible because such testimony or argument “will result in an unduly generous award of damages by the jury.” *Griffin v. Hilke*, 804 F.2d 1052, 1057 (8th Cir. 1986); *see also* Fed. R. Evid. 411, Advisory Committee Notes, 1972 Proposed Rules. As this Court has stressed, injecting into a trial evidence “leading to the conclusion that the damages sued for have been or will be taken care of by an insurance or indemnity company is utterly repugnant to a fair trial or to the securing of the rendition of a just verdict.” *Halladay v. Verschoor*, 381 F.2d 100, 112 (8th Cir. 1967). Ventura’s argument in closing that “Chris Kyle is an additional insured for defamation under the publisher’s insurance policy,” and that the “insurer is on the hook if you find that Jesse Ventura was defamed” were deliberate, pointed, and plainly prejudicial. APP-2236-37.

⁷ Kyle moved for mistrial based on every mention of insurance. APP-2046-47, 2066, 2266-67.

The district court's asserted rationale for allowing insurance evidence was to show witness bias. APP-1888-89, 1995. Courts have held that insurance information may be admissible to show bias, but only when the witness is employed by *the insurer* or has some other substantial connection with the insurer. *See, e.g., Charter v. Chleborad*, 551 F.2d 246 (8th Cir. 1977); *Bonser v. Shainhotlz*, 3 P.3d 422, 425-26 (Colo. 2000) (collecting cases). This is because, where the insurer has a direct financial stake in the outcome of the case, its employees might have incentive to skew their testimony in the insurer's favor.

That was not remotely the situation here. The witnesses Ventura questioned about insurance were employees of non-defendant HarperCollins, the book's publisher, not employees of the insurer. Whatever bias might be attributable to their employment by HarperCollins, it had nothing to do with insurance coverage. In fact, both witnesses – an editor and a publicist, employees not normally involved in or knowledgeable about insurance – testified unequivocally that they had no knowledge at all concerning insurance coverage. APP-1997-98, 2066. As a result, the only “evidence” the jury received on the subject came in the

form of counsel's questions. APP-2237. The policy itself was never admitted into evidence.

During trial, the district court identified "witness bias" as its only rationale for allowing references to insurance. After trial, the court asserted an alternative rationale: Taya Kyle had "opened the door" to such evidence early in the trial by testifying she had not donated book proceeds to others because she was concerned about an adverse judgment leaving her family without assets. APP-341-43.⁸ The district court had *rejected* that argument during the trial, holding that "Taya Kyle's testimony did not open the door to evidence of insurance because her testimony was accurate – the insurance policy covers only the defamation claim, not unjust enrichment or misappropriation, and thus proceeds from *American Sniper* are at risk, as she testified." APP-1884. The carrier indeed denied coverage with respect to the unjust enrichment claim. Nevertheless, the district court performed an about-face in its post-trial order without even acknowledging its contrary prior decision. APP-39/ECF-414 p.2. The district court ruled

⁸ She so testified only after Ventura accused her of not being sufficiently generous. APP-321.

correctly the first time. This fundamental evidentiary error requires a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment and direct entry of judgment in Kyle's favor, or at least remand for a new trial.

Dated: March 4, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the fourth day of March, 2015, I electronically filed the forgoing document with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

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Dated: March 4, 2015

/s/ John P. Borger
John P. Borger

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