

No. 07-99139-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MELANIE L. VALADEZ,
as Administrator of the Estate of ROGER G. VALADEZ,

Plaintiff-Appellee,

vs.

EMMIS COMMUNICATIONS and TODD SPESSARD,

Defendants-Appellants.

BRIEF OF APPELLANTS
EMMIS COMMUNICATION and TODD SPESSARD

Appeal from the District Court of Sedgwick County, Kansas
Honorable Paul Clark—District Court Case No. 05CV142

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I. STATEMENT OF THE NATURE OF THE CASE

Eight months after the BTK serial killer made his startling reappearance—and three months before anyone had ever heard of Dennis Rader—the Wichita Police released a detailed profile of the BTK serial killer and asked members of the public for their help in identifying the man who had first terrorized Wichita some thirty years earlier. Early the very next morning, Wichita Police received a “priority tip” from a local citizen implicating Roger Valadez. That evening, after having spent the day investigating the tip (and the tipster), members of the BTK Task Force, including agents from the FBI and the KBI, broke down Valadez’s door, entered Valadez’s house with their guns drawn and forcibly took Valadez’s DNA for comparison to DNA found on or near BTK’s victims.

At the same time, the police arrested Valadez on unrelated city charges and, together with an Assistant District Attorney, called the Administrative Judge of the Wichita Municipal Court at home and told her they had a “person of interest in the BTK case” in custody. Just before midnight, the judge called the jail and ordered Valadez’s bail raised from \$1,500 to “\$25,000.00 CASH ONLY.” Valadez then spent the night in jail while more than twenty officers executed a search warrant at Valadez’s house, looking for Polaroid photos of BTK’s victims, driver’s licenses of BTK’s victims, and “original BTK letters sent to the media and/or law enforcement.”

The next morning, after the jail log was publicly distributed, Wichita’s NBC television station KSN identified Valadez as a possible suspect in the BTK case. When Valadez was released from custody that afternoon, KSN reported that fact as well, and the following day KSN reported that police had cleared Valadez of involvement in the BTK case after preliminary DNA tests showed Valadez’s DNA did not match DNA found at the BTK crime scenes.

At his trial against the owner of KSN and the station's news director for defamation, invasion of privacy and outrage, Valadez unequivocally admitted that he had been a BTK suspect and that KSN's news reports were true when they reported as much.

Q. So if the purpose of KSN's reporting was to report that you were being investigated as the BTK killer, that was true, wasn't it?

A. Yes.

(Vol. XIV, 200). Despite this admission, a jury awarded Valadez \$1.1 million in damages on his claims of defamation and outrage, but failed to reach a verdict on his claim for invasion of privacy.

Before judgment could be entered on the verdict, Valadez unexpectedly died. Upon the motion of the administrator of Valadez's estate to substitute herself as plaintiff, the trial court ruled that Valadez's defamation and invasion of privacy claims had abated upon Valadez's death. The trial court ruled, however, that Valadez's outrage claim survived Valadez's death, but reduced the total damages to \$250,000 in accordance with Kansas' statutory cap on non-economic damages.

II. STATEMENT OF THE ISSUES

This appeal by Emmis Communications, the owner of television station KSN, and Todd Spessard, KSN's News Director, raises three issues:

A. Did Valadez's claim for outrage, which arose from the same conduct as his claims for defamation and invasion of privacy—both of which abated upon his death, also abate when he died?

B. Did Defendants commit the tort of outrage when KSN reported that Valadez was a possible suspect in the BTK case, a fact which Valadez himself admitted was true?

C. Were the jury instructions, which included the trial judge's personal observations on the evidence, so prejudicial as to require a new trial?

III. STATEMENT OF FACTS

Over nearly a ten-year period in the late 1970s and early 1980s, the serial killer known as "BTK," which stands for "Bind, Torture, Kill," was believed to have killed eight persons in the Wichita area. (Vol. XXII, 80). After almost two decades of silence, the killer resurfaced in March of 2004 when he sent the first of several letters to *The Wichita Eagle*. (Vol. XX, 12; Vol. XIV, 206).

Among the communications BTK sent to the press and to law enforcement after he resurfaced was a package containing what he claimed was information about himself. (Vol. XIV, 207). After discussions between FBI agents and Wichita Police detectives—all of whom were members of the BTK Task Force that had been formed following BTK's reappearance—"it was decided to do a media advisory and press release detailing much of the information that was contained in that package." (Vol. XIV, 207). That advisory was issued on Tuesday, November 30, 2004. (Vol. XIV, 207).

The Tip That Valadez Was BTK

The very next morning, at 7:50 a.m., a "priority tip" was received on the BTK Tip Line. (Vol. XIV, 209, 232). In the call, the tipster—who identified him- or herself to the police, but whose identity was not allowed to be revealed to the jury—provided information about Roger Valadez "that matched much of the media release." (Vol. XIV, 208-09, 248). Based on the information provided, three detectives drove that morning to Valadez's home at 1421 East Mt. Vernon in Wichita to investigate the tip. (Vol. XIV, 209-10). The detectives knocked on Valadez's front door "for several minutes," but no one answered. (Vol. XIV, 210).

Given the nature of the information provided by the tipster, the detectives decided to place Valadez's home under surveillance while two detectives went to conduct a "face-to-face interview" with the tipster. (Vol. XIV, 210-11). During this interview, the detectives "obtained additional information that was consistent with information released on the media advisory and information [the police] knew," information which the lead detective assigned to the tip "found consistent with [his] beliefs as to the possible BTK killer." (Vol. XIV, 211). Also during the interview the detectives—who are trained to assess witnesses' credibility—found the tipster to be credible. (Vol. XIV, 212).

While the detectives were interviewing the tipster they received some surprise information: the officers who had been surveilling Valadez's home since the detectives had first tried to make contact with him earlier that morning had seen Valadez come out of his house and go back inside, meaning that Valadez had been inside when the detectives had knocked on his door but had refused to come out. (Vol. XIV, 212-13).

The First Search Warrant – Valadez's DNA

Armed with the information provided through both the original tip and through the in-person interview of the tipster—and the knowledge that Valadez had refused to come to the door to speak with them—the police requested a search warrant for Valadez's DNA so that they could compare Valadez's DNA with DNA found at the murder scenes of Vicki Wegerle, Nancy Fox and the Otero Family, all BTK victims. (Vol. XIV, 205-07, 212-13). The request was granted by Sedgwick County District Court Judge Gregory Waller at 2:47 p.m., seven hours after the original tip was received. (Vol. XIV, 213, 232; Vol. XXI, 1).

In the meantime, Valadez's home remained under surveillance and, as a result, officers knew Valadez was still inside. (Vol. XIV, 214-15). Over the next several hours,

a team of FBI agents, KBI agents and detectives from the Wichita Police Department assembled and prepared to execute the search warrant. (Vol. XIV, 215). Under cover of darkness, the officers surrounded Valadez's home and announced their presence. (Vol. XIV, 214-15). When Valadez refused to respond to the officers, an FBI agent used a battering ram to break down the door to a side entrance of the house. (Vol. XIV, 215-16). The team then entered the house, with their guns drawn "because of the nature of the crime that we were investigating." (Vol. XIV, 216).

The officers then split up and one of them—pointing a gun at the suspect—observed Valadez coming out from the rear of the house and ordered him to stop and put his hands up. (Vol. XIV, 172 & 216-17). Valadez initially refused, but was eventually handcuffed and taken into custody. (Vol. XIV, 217). Valadez was then placed in a chair inside his house and was informed that the officers had a search warrant to take his DNA, at which time Valadez responded: "I know why you want it and you ain't gonna get it." (Vol. XIV, 217). At this point, a KBI agent held Valadez's head while a Wichita Police detective held Valadez's shoulders and a swab was inserted into Valadez's mouth to obtain a DNA sample. (Vol. XIV, 218). The DNA sample was then given to a KBI agent to deliver to the KBI Lab in Topeka for comparison with DNA found at various BTK crime scenes. (Vol. XIV, 219-20). In fact, the "Evidence Custody Receipt" for the swabs taken from Valadez states that the "Nature of the Offense" is "Murder," the "Victim" is "Wegerle Vick L," and the "Suspect" is "UNSUB/BTK." (Vol. XXII, 72).

Valadez's Arrest

After officers took Valadez's DNA from him, they transported him to the Sedgwick County jail where he was booked on an outstanding domestic violence warrant and on an outstanding bench warrant for several housing code violations. (Vol. XIV,

221). These charges—which were city charges—carried a relatively small bond. (Vol. XIV, 268; Vol. XXII, 70). Accordingly, Deputy Police Chief Terri Moses called the Administrative Judge of the Wichita Municipal Court at home and advised the judge that officers were holding a “person of interest in the BTK case.” (Vol. XIV, 261). During that call, Judge Jennifer Jones was told she would soon be receiving a call from the Sedgwick County District Attorney’s Office, which she did. (Vol. XIV, 264). Based on the information provided by the Deputy Chief and the DA’s office, Judge Jones called the jail just before midnight and ordered Valadez held on a bond of “\$25,000 CASH ONLY.” (Vol. XIV, 264-65; Vol. XXII, 69).

The Second Search Warrant – BTK’s Possessions

Meanwhile, officers were preparing a request for a second search warrant. (Vol. XIV, 222). While the officers were in Valadez’s house serving the original DNA search warrant they observed, in plain sight, numerous items that increased their level of suspicion of Valadez, including the specific type of postage stamps used by BTK to send his messages to the local media, and drawings that were similar to drawings done by BTK. (Vol. XIV, 221). The officers—who believed that BTK liked to read about himself—also found stacks of old *Wichita Eagle* newspapers. (Vol. XIV, 230).

Using this information—and Valadez’s statement to the officers attempting to take his DNA that “I know why you want it and you ain’t gonna get it”—officers prepared a second search warrant application. (Vol. XIV, 217-18, 221-23). Like the first application, this second application was submitted to Judge Waller, who granted the request and signed the warrant at 10:34 p.m. (Vol. XIV, 223; Vol. XXI, 3-4). The search warrant directed officers to seize Polaroid photos of BTK victim Vicki Wegerle, driver’s licenses of Wegerle and BTK victim Nancy Fox, the stamps officers had observed earlier,

fake law enforcement identification, drawings and photographs of bondage and/or sadomasochistic activity, and “[o]riginal BTK letters sent to the media and/or law enforcement.” (Vol. XXI, 3-4).

Officers then took this second search warrant to Valadez’s home, where officers had been standing guard to make sure evidence was not removed. (Vol. XIV, 225-26). Just before midnight, a team of more than twenty officers began to search Valadez’s house. (Vol. XIV, 226-28). During the search, officers found, among other things:

- A Browning .22 caliber gun, magazine and bullets.
- A Polaroid camera.
- A manual typewriter.
- Numerous photo IDs, including at least one of a young woman.
- Railroad signs.
- Unusual handwritten poems and papers.
- An envelope with the words “BTK” and “Otero Killings” written on the outside, along with the partial addresses of the Oteros and another BTK victim, Kathryn Bright.
- The same postage stamps BTK used to mail his communications to the media and the police.
- A past due notice for a safe deposit box.
- Stacks of old *Wichita Eagle* newspapers.

(Vol. XIV, 229-31; Vol. XXI, 5, 54, 74, 78, 99; Vol. XXII, 1-2, 4, 17-19, 60).

The search continued until 5:00 a.m. the following morning when officers—who had literally been up all night—went home to get some sleep. (Vol. XIV, 231-32). At that time, the police still considered Valadez a suspect in the BTK case. (Vol. XIV, 232, 239-40). In fact, the lead detective from the Wichita Police Department subsequently

testified that not only did he consider Valadez a suspect in the BTK case, but he believed Valadez likely was BTK.

Q. When you went home to get some sleep[,] as a member of the BTK task force assigned to investigate this tip involving Mr. Valadez, was he in your mind a suspect in the BTK murders?

A. Yes, he was.

* * *

Q. You believed he might be BTK at that time?

A. Yes.

Q. Did you believe he was BTK?

A. I believed there was a strong likelihood that he could be BTK.

(Vol. XIV, 232, 254). The detective further testified that Valadez would remain a suspect until he got back the results of the DNA results. (Vol. XIV, 240).

KAKE-TV: “The Biggest Story To Hit The City In 30 Years”

At the same time, news of the swarm of police activity at Valadez’s house—and Valadez’s arrest—was beginning to leak out. At 2:30 a.m., the local ABC television affiliate, KAKE-TV, broke into their programming and reported that “Wichita police investigators are now working what appears to be a major crime scene in south Wichita” and that “sources, good sources, are telling KAKE News that they believe it is related to BTK.” (Vol. XX, 18; Vol. XXIV, HH). The report also noted that police had arrested a 64-year old man and that the man arrested “is the same age BTK investigators believe the serial killer to be.” (*Id.*). Later that morning KAKE told its viewers “this could be the biggest story to hit Wichita in thirty years.” (Vol. XX, 20; Vol. XXIV, HH).

KAKE began its regular morning newscast at 5:00 a.m. and the BTK story dominated that newscast. (Vol. XX, 23-30; Vol. XXIV, HH). During that newscast

KAKE also reported that the “suspect was taken down to the police station at City Hall for questioning” and that he had a very high bond. (Vol. XX, 30; Vol. XXIV, HH). And when a KAKE reporter was asked about the mood of the investigators she responded that the detectives were in a “great mood.”

Mike Iuen: Beth, whenever police solve a major case they’re in a pretty good mood. Have you been able to judge what kind of mood - have they said anything at all?

Beth Jett: Absolutely. As soon as we got the first tips last night from our sources we have, we’re in contact several times an hour with our sources within the police department and so forth and that was the read that we got on all the detectives, that they were in a great mood. They couldn’t say a whole lot or chose not to say a whole lot, but everybody in a very good mood.

(Vol. XX, 28-29; Vol. XXIV, HH) (emphasis added).

KFDI: “B-T-K”

At around 4:00 a.m., Wichita radio station KFDI led its newscast with the report that “[t]here has been some developments in the BTK case.” (Vol. XX, 87). A reporter on the scene told listeners that “Wichita police officers have been on the scene here for hours conducting a search warrant on a house at the corner of Mount Vernon and Ellis.” (Vol. XX, 87). The reporter also noted that these were not just any officers, but that the “investigators we’ve seen with our own eyes here on the scene are those that have been previously involved with the BTK investigation.” (Vol. XX, 87).

The KFDI reporter also stated that “the eerie part about this whole story this morning is this house that police are going through with this search warrant happens to be right next to a set of railroad tracks.” (Vol. XX, 87). The significance of this fact was explained when the anchor noted that “this refers to some of the information that [was] released Tuesday morning by Wichita police Lieutenant Ken Landwehr that BTK has a

fascination of trains and that he apparently has always lived next to some train tracks.”
(Vol. XX, 87).

At 5:00 a.m., the station reported that one of its reporters had been to the jail and had seen the name of the 64-year old man in custody along with the letters “B-T-K.”

We do know now this morning that one person has been arrested who has a 1999 last known address of this house here at the corner of Mount Vernon and Ellis and, in fact, jail records say that name and the charges will be ready around 7:30 this morning. Now while at the jail, I did see indications of this man’s name and his age, a 64-year old man. Well we will withhold the name for now, but we did see this man’s name, his age, and the letters B-T-K written on a piece of paper and we believe that, that we do know this man’s name and someone may have possibly been arrested in connection with the BTK investigation. Again, we’re going to withhold this information until about 7:30 when the jail records become available to the public.

(Vol. XX, 88) (emphasis added).

KWCH-TV: “Police Have Their Man”

KWCH also interrupted its early morning programming sometime between 4:00 and 5:00 a.m. to report on the arrest and the activity at the house, though no videotape or transcript exists of that report. (Vol. XIII, 190). We do know that during KWCH’s regular morning newscast, which began at 5:30 a.m., a KWCH reporter broadcast live from in front of Valadez’s home, even stating, “You see the house, it’s 1421 Mt. Vernon.” (Vol. XX, 58; Vol. XXIV, HH). The reporter also discussed the presence at the scene of the many BTK investigators and the fact that investigators at most crime scenes talk freely to the media, but that the investigators at this scene had refused to talk to the media, and “that’s been what happened throughout the BTK case – police have remained very silent.” (Vol. XX, 52; Vol. XXIV, HH).

In the eyes of the KWCH reporter on the scene, all of this information led to one conclusion: “We have a very strong possibility that police have arrested BTK.”

(Vol. XX, 55; Vol. XXIV, HH) (emphasis added). But even more than that, KWCH reported that not only did the objective facts add up to that conclusion, KWCH claimed to have unnamed sources confirming this fact. As the KWCH reporter told his audience, “All of our sources are saying this is a very strong possibility that police have their man.” (Vol. XX, 55; Vol. XXIV, HH) (emphasis added).

KSN’s Coverage

Like television newsrooms all across the country, KSN’s newsroom has televisions turned to the other local stations. (Vol. XIII, 190). According to Todd Spessard, KSN’s News Director, “you watch the other guys to see if they’ve got something you need to be checking into or something like that.” (Vol. XIII, 191). In this case, that ‘something’ was Valadez’s arrest and the search of his house, which KSN learned about from seeing the events reported on the other stations. (Vol. XIII, 191).

Spessard—who has a degree in journalism from the University of Missouri and at that time had fourteen years experience in journalism, seven of which were as a television news director (Vol. XIII, 170-71)—received a call at home between 3:00 and 4:00 a.m. informing him of a possible break in the BTK case. (Vol. XII, 188; Vol. XIV, 89). He immediately came to the station, dispatched a news crew to the location, but decided not to break into regular programming. (Vol. XII, 188-89, 191-92). By 4:30 a.m. or 5:00 a.m., Spessard had learned from the Wichita Polk Directory which the station had in the newsroom that a “Roger Valadez” lived at the address where all of the police activity was occurring. (Vol. XIII, 30-31, 196-200; Vol. XXII, 78).

KSN’s normal morning newscast begins at 5:00 a.m. and the station began its newscast that morning just like the other stations in town, with the “breaking news” that “[w]e may have an arrest in the BTK serial killer case.” (Vol. XIX, 2; Vol. XXIV, 1).

KSN reported that police had an unnamed 64-year old man in custody, but cautioned viewers that the station “want[ed] to make it clear, police have not commented on this case.” (Vol. XIX, 2; Vol. XXIV, 1). Like the other stations, KSN also reported that the arrest came after the police released a profile of the serial killer that included BTK’s fascination with trains and the fact he had always lived near railroad tracks. (Vol. XIX, 2; Vol. XXIV, 1).

Despite the fact that KSN knew that a “Roger Valadez” lived at the address, KSN did not use Valadez’s name in its initial reports. (Vol. XIII, 6-7). As explained by Spessard, he elected not to use Valadez’s name at that point because he had no confirmation that Valadez was in fact the man arrested, only that a “Roger Valadez” lived at that address. (Vol. XIII, 30-31, 196).

Q. So why didn’t you just say Roger Valadez has been arrested at 5:00 a.m. on the air? You had the Polk Directory, you knew he lived there.

A. Right. This is public record at that point, but we wanted to make sure it was the same person because, you know, whatever. It said Roger Valadez in here but maybe that person had moved three days ago. There is somebody new living there. Sometimes the homes can be registered to people who own them and rent them out to somebody else.

The Polk Directory may or may not have been updated, so we want to make sure that the name that was in the Polk Directory was also the name in the jail log when the jail opened up in the morning and it matched the bond and the warrants that he’d been arrested for.

(Vol. XIII, 200). Accordingly, for the first hour and forty-five minutes of KSN’s newscast, the station did not identify the man arrested. (Vol. XIII, 6-7).

However, at around 6:45 a.m., the Sedgwick County Jail released to KSN the daily jail log, which showed that it was, in fact, “VALADEZ, ROGER G” who had been arrested at “1421 E MT VERNON IN WICHITA” and who had been booked into the jail

at 8:31 p.m. the prior evening on a bench warrant for various housing code violations. (Vol. XIII, 201-03; Vol. XXII, 67).

Accordingly, at around 6:45 a.m., KSN reporter Chanda Brown reported that the Polk Directory showed that Valadez owned the home on East Mt. Vernon and that the jail log confirmed that it was Valadez who had been arrested at that address the prior evening.

Chanda Brown: Well, Bob, we do have a little bit of new information. But before I say it, I just want to preface this with the fact that no detectives from the BTK investigation have commented on this yet. But through a Polk Directory, that is a cross-referencing guide, we have learned that for the last 20 years that a Roger Valadez and another woman with the same last name have owned this house behind me that is the center of all this attention. We have also learned from authorities up at the jail that they have confirmed that there is a Roger Valadez in police custody right now. Now above and beyond that we are not speculating, we do not know anymore as to what his connection is, if he even is connected with this BTK investigation. We just wanted to let you know of that.

(Vol. XIX, 17; Vol. XXIV, 1). The “Bob” referred to by Brown was KSN anchor Bob Donley, who concluded Brown’s report by again reminding viewers that the police were not saying Valadez was a BTK suspect.

Bob Donley: Alright. KSN’s Chanda Brown reporting live from the scene. Thank you so much. Again, as Chanda was indicating there, we want to stress throughout all of these broadcasts that so far police have not indicated in any way, officially, that the person they have taken into custody is indeed a suspect in the BTK investigation. It’s just that a lot of the people who are heading up that investigation happened to have been there when this individual was taken into custody.

(Vol. XIX, 18; Vol. XXIV, 1).

When asked at trial to explain his decision to use Valadez’s name at that point, Spessard gave this testimony:

[W]e used the name as part of covering the news events. The name was a fact in this case that we were covering. It is an event that we had decided

as a news organization was worthy of coverage and it is obvious every news organization thought it was worthy of coverage as well so at that point in time it becomes part of our guidelines. If it's an event we're putting on the air for whatever reason it's on the air. Then if his name is available, if he's been arrested, if it's public, if it's public information and more specifically in the jail log that we can verify it, then that is part of how we cover a news event.

(Vol. XIV, 70).

Moreover, throughout KSN's morning newscast, the station repeatedly advised viewers that Valadez had been arrested on unrelated charges, and that he had NOT been arrested on charges related to the BTK case.

[T]hat sort of underscores the point here that we cannot emphasize enough that at this point anyway: this person has been taken into custody on charges that are totally unrelated to BTK and mainly those are charges of trespassing and housing code violations but, right now, nothing formally dealing with BTK.

* * *

We are continuing our team coverage of what is still a developing story this morning. The arrest of a possible, and we want to underline the word "possible," suspect in connection with the BTK investigation.

* * *

We just kind of want to take a moment here and take a deep breath[] and remind ourselves that again, this is a person who has been arrested for unrelated charges to anything to do with BTK. And, now this individual[']s name is out there, we are hearing more about his background. We don't want to have that "rush to judgment" kind of thing is what I am getting at here.

(Vol. XIX, 20, 25 & 28; Vol. XXIV, 2-3).

Continuing Coverage

All three television stations provided updates on the developing story throughout the morning. (Vol. XIII, 54-55). Each station then resumed their coverage during their mid-day newscasts. KAKE, for example, led a "Special Edition" of its 11:30 a.m. newscast with: "A Wichita man is arrested overnight. His house searched and sources

say it's all connected to the BTK case.” (Vol. XX, 33; Vol. XXIV, HH). The station also reported that the “late night search and possible connection to BTK has residents here shocked.” (Vol. XX, 33; Vol. XXIV, HH). And KAKE used a map to show that “[i]f the man arrested last night is BTK, and that is a big if, but if he is, he did not have to go far to kill one of his victims.” (Vol. XX, 34; Vol. XXIV, HH). Adding to the comparisons between the man arrested and the BTK profile released by the police, the station explained, was the fact that police said BTK has a military background and “at least one of the cars parked at the house the police searched overnight did have veteran’s tags.” (Vol. XX, 34; Vol. XXIV, HH).

KAKE also continued to point out to its viewers that it was the first station to break the news that BTK case may have finally been solved after thirty years.

Jeff Herndon: Is there a break in a 30 year old case surrounding Wichita’s most notorious serial killer? Welcome to a special edition of KAKE News. The big question everyone is asking right now: has the BTK case finally been solved after 30 years?

Susan Peters: Now we can’t say for sure, but Wichita police are working what appears to be a major crime scene and sources are telling KAKE News that it is related to the BTK investigation. It is a story that broke first on KAKE and we’ve been following it all night long.

(Vol. XX, 33; Vol. XXIV, HH).¹

Not to be outdone, KWCH reported in its noon newscast that “Eyewitness News was the first station to bring you live reports from the scene.” (Vol. XX, 69-70; Vol. XXIV, HH). The station also reported that “a criminal expert we talked to today calls last night’s arrest a significant development in the BTK investigation. He says . . . this is no ordinary arrest.” (Vol. XX, 70; Vol. XXIV, HH). The report went on to note

¹ During its morning newscast KAKE had reported at least ten times that “KAKE was the first to break this story.” (Vol. XX, 23-30; Vol. XIV, HH).

that “it’s common in high profile cases for police to arrest a suspect on some minor violation and then later charge them with something else. One example: Oklahoma City bomber was first arrested on a traffic violation.” (Vol. XX, 70; Vol. XXIV, HH).

During KSN’s noon newscast, it repeated that Valadez had been arrested on charges of criminal trespass and housing code violations and that KBI agents had searched his house. (Vol. XIX, 38; Vol. XXIV, 5). The station also reported—based on an 11:18 a.m. Associated Press wire report which relied on a statement from an official KBI spokesman (Vol. XXII, 80)—that the KBI was testing the DNA of the man arrested. (Vol. XIX, 38; Vol. XXIV, 5).

Just as in its morning newscast, KSN was clear in this later newscast that Valadez had not been charged with anything connected to the BTK case. In fact, the very first report in that newscast began with the following disclaimer:

Alia Mahi: Well, Bob, I just spoke to police about an hour and a half ago and they told me they are not going to be making any comments or statements in regards to the arrest they made last night. They are saying this is just another lead, another development and that the suspect they arrested was wanted on outstanding warrants and that’s why he was arrested; that they just lead off on a tip and took this into consideration. Now, I just want to go over some key points. There has been NO confirmation in this case that this is a BTK suspect. They went on a lead, they are investigating, but there is no confirmation that this is our guy.

(Vol. XIX, 38-39; Vol. XXIV, 5).

Unlike KAKE and KWCH, which touted the fact that they were “first” with the story or “first” on the scene with live reports, KSN never touted that it was “first” to provide viewers with the name of the person arrested. (Vol. XIII, 192). At trial, Spessard explained that unlike KAKE, for example, who markets itself as always being first (Vol. XIII, 194), KSN is dedicated to getting it right, rather than getting it first.

Our purpose is not to be first, it is not to be exclusive, it is not to be only. What we do is try to be accurate. Our goal is to have the facts, to do it the right way. That's why our brand is clear, accurate, to the point. We focus on telling the truth, putting all the facts that are pertinent to a story in a story. That's what we do.

We don't worry about whether we were first, second or third. In this case to be honest, we were third. We were late to get the information. We were the last to know about it. We were last to go on the air at 5:00 a.m. That isn't something we worry about. We could have gone on the air about 3:30 shortly after we heard KAKE going on the air, but we wanted to make sure everything was right so that's why we actually waited until 5:00 a.m. to go on.

(Vol. XIV, 23-24).

Moreover, Spessard's views in this regard are not the result of some "conversion" on the eve of trial, but instead are consistent with an e-mail he sent to the KSN news staff later that same day, when he congratulated them on their work "in terms of content, performance, technical execution, [and] behind the scenes news gathering," but said nothing about their being "first" with Valadez's name. (Vol. XIX, 75).

New Developments

Later that afternoon, the Wichita Police Chief held a press conference during which he read a statement. (Vol. XIII, 100-02). KSN carried the press conference live. (Vol. XIII, 100-02). In his statement, the police chief said that the department had received many leads and that as the police investigated those leads they sometimes came in contact with people who had existing warrants and, when that happened, the police were obligated to arrest the person. (Vol. XIX, 50; Vol. XXIV, 6). He further said—without specifically stating that anyone had been arrested the prior evening—that people may have assumed that the Wichita Police Department had made an arrest in the BTK case, but that, "We have not, and I repeat, we have not made an arrest in connection with BTK." (Vol. XIX, 50; Vol. XXIV, 6).

The chief made no mention of the arrest of Valadez, nor of the search of his home. He also offered no explanation for the presence of the more than twenty officers at Valadez's home all night, the high bond which had been set for Valadez, or why Valadez's DNA has been rushed to the KBI Lab. He simply said that no one had been arrested as BTK, a fact which would have been true even if Valadez was the BTK killer given that Valadez had been "arrested" only on criminal trespassing and housing code violations.

Still later that afternoon, Valadez had his first court appearance in Wichita Municipal Court, at which time his bond was reduced to \$1,250. (Vol. XIV, 177 & 271). He was released from jail shortly afterwards. (*Id.*)

Following these developments, KSN led its 5:00 p.m. news with the fact that "in the last hour, police have confirmed that the suspect they arrested yesterday is NOT related to the BTK case." (Vol. XIX, 50; Vol. XXIV, 6). The station reported that while police were investigating a tip in the BTK case they discovered that the man whom the tip was about had outstanding warrants and had been arrested on those warrants, but that "later this afternoon, police did confirm that the man they did arrest is NOT BTK and NOT connected to this case." (*Id.*). KSN reported much the same during its 6:00 p.m. and 10:00 p.m. newscasts later that night. (Vol. XIX, 57-61, 65-68; Vol. XXIV, 6).

The following evening, at 8:33 p.m., Valadez's lawyer issued a Press Release stating that "[t]he person arrested Wednesday night is not BTK. The WPD has now confirmed that DNA testing has excluded him as a suspect in the BTK investigation." (Vol. XXII, 74).

Accordingly, KSN led its 10:00 p.m. newscast with the fact Valadez had been cleared.

Dana Hertneky: Anita, I just received this e-mail from Roger Valdez's attorney, Dan Monnat. It says the person arrested Wednesday night is not BTK. According to Monnat, the WPD has now confirmed that DNA testing has excluded him as a suspect in the BTK investigation. It goes on to read, "more than anything [the] inaccurate linking of this man to the BTK investigation illustrates that in our understandable haste to catch BTK we must not leap to conclusions that trample the rights and lives of innocent people." The release doesn't mention Valadez by name, saying it shouldn't be connected to the BTK investigation in any way. However, in fairness, we feel that since Valadez's name has been used in the past we most certainly should use it in clearing him.

(Vol. XIX, 72; Vol. XXIV, HH).

All Agree Valadez Was A BTK Suspect

Each of the six witnesses who testified at the trial of this action testified that Valadez had been a suspect in the BTK killings, including Valadez himself. Specifically, Valadez testified that he had been investigated as the BTK killer—and that KSN's reporting to that effect was truthful.

Q. So if the purpose of KSN's reporting was to report that you were being investigated as the BTK killer, that was true, wasn't it?

A. Yes.

(Vol. XIV, 200).

Valadez also called as witnesses his two adult daughters, both of whom testified that hours before KSN even went on the air they had been told their father had been arrested as BTK. Melanie Valadez, for example, testified that she knew her father "had been arrested as BTK" the night before KSN went on the air.

Q. On December 1st at 8:00 p.m. your brother, Mark, called you and told you that your father, Roger Valadez, had been arrested as BTK?

A. He told me that he thought that that's what the arrest was made for, yes.

Q. For BTK?

A. Yes.

* * *

Q. He said I think he's been arrested because the cops think he's BTK?

A. That is correct.

* * *

Q. And you knew this hours, a day before anybody at KSN knew any of this?

A. Hours before.

Q. Hours before KSN ever reported any of this, right?

A. Yes, I did know before.

(Vol. XIV, 149-50).

Valadez's other daughter, Melissa Valadez, testified that she received a call at 4:00 a.m. on December 2—an hour before KSN went on the air—telling her that her father had been arrested as BTK.

Q. Now, when you got the call at 4 o'clock in the morning -- do I have that right, it was 4 o'clock in the morning?

A. Plus or minus a couple minutes, yes.

Q. Plus or minus a couple minutes, not plus or minus a couple hours but plus or minus a couple minutes of 4 o'clock in the morning?

A. Yes, sir.

* * *

Q. I assume that words can simply not describe the fright you had at 4 o'clock in the morning to hear that your father had been arrested as BTK, is that fair?

A. It's fair that that was a consideration. That my dad was considered that, yes.

* * *

Q. And you know that all this call to you and your panic and your picking up your husband and your getting on the road, your speeding here all started an hour before my client ever even went on the air?

A. Yes.

(Vol. XIII, 163-65).

The defendants called Detective Dana Gouge, the lead detective assigned to investigate the tip that Valadez was BTK, who testified he believed at the time that Valadez was not only a BTK suspect, but “there was a strong likelihood that he could be BTK.” (Vol. XIV, 254). In fact, Gouge testified that Valadez was the only person—besides Dennis Rader—whose home was ever searched for evidence of the BTK killings. (Vol. XIV, 256). He further explained why Valadez’s home was searched.

Q. Why did you believe you might find Polaroid photographs of Miss Wegerle in Mr. Valadez’ home?

A. We believed he was a suspect in the case.

Q. What’s the next thing?

A. Driver’s license of Vicki Wegerle or Nancy Fox.

Q. Miss Fox was additionally a BTK victim?

A. Yes.

Q. What’s the third item on the search warrant?

A. Original BTK letters sent to the media and/or law enforcement.

Q. Why did you think you might find those in Mr. Valadez’ home?

A. Because he was a BTK suspect.

(Vol. XIV, 224-25).

The defendants also called Judge Jennifer Jones of the Wichita Municipal Court, who testified that she received a call at home and, in the middle of the night, increased Valadez's bail to \$25,000 cash after being told by the deputy chief of police that Valadez was a "person of interest in the BTK case." (Vol. XIV, 261).

Finally, the only other witness to testify was Todd Spessard, the KSN News Director. Like Valadez himself, Spessard testified that KSN got it right—that the station accurately reported that Valadez was a BTK suspect.

Q. This may sound simple, Mr. Spessard, but I guess maybe I need to ask this question. This person who police surrounded his house, who was arrested, whose DNA was taken, who is taken to jail, whose bond was set, whose DNA was swabbed, whose DNA was raced up to Topeka to compare to the DNA from the BTK killer, I mean, let's just be clear, that person was Roger Valadez. You got the name right?

A. Yes, we did.

(Vol. XIV, 125).

Valadez Dies

Following the trial of this matter, but before judgment had been entered, Valadez died. (Vol. IX, 77). "There is no claim that the death was causally related to Defendants' conduct." (Vol. IX, 77).

IV. SUMMARY OF ARGUMENT

In reporting that Valadez had been arrested, his DNA taken and his home searched by BTK investigators, KSN reported the truth—every witness at trial, including Valadez, testified to that effect. As such, the station was exercising its legally protected right to inform its viewers of the activities of the local police on a matter of utmost public concern in the community, the ongoing search for the serial killer who had eluded police for decades.

Accordingly, Valadez’s attempt to hold KSN and Spessard liable on a theory of “outrage” is, quite simply, outrageous. First, Valadez’s claim of outrage abated upon his death, just as his defamation and invasion of privacy claims abated. Second, even if his claim did not abate, Valadez did not establish the elements of the tort of outrage at trial. As noted above, instead of being “utterly intolerable in a civilized society,” the station’s activities were legally protected. Furthermore, even if KSN and Spessard had acted “outrageously,” there is no evidence they did so with the requisite intent to injure Valadez, who was not known to anyone at KSN prior to its broadcasts. Additionally, the evidence established that Valadez did not suffer the type of severe emotional distress the law requires. In fact, the evidence established that the only professional that Valadez consulted was a lawyer—not a doctor, psychiatrist, counselor, etc. Finally, the jury’s verdict was the result of a patently improper set of jury instructions which included an instruction in which the trial judge informed the jury that he already found that KSN had called Valadez “a serial killer whose evil exploits were known by the majority of the adult population in the community where the man arrested lived.” (Vol. IX, 34).

V. ARGUMENT

This appeal raises three issues, one of which is undecided in this State, namely, whether a cause of action for outrage survives the plaintiff’s death. KSN and Spessard argue in the first section below that it does not; that outrage, like defamation and invasion of privacy, are personal in nature and abate upon a plaintiff’s death. The second issue raised in this appeal is whether KSN’s and Spessard’s actions in correctly identifying Valadez as the subject of the police investigation into the BTK murders constituted the tort of outrage. KSN and Spessard submit this is not even a close question—that the media is legally protected from liability in such circumstances. Finally, this appeal

highlights the clearly improper and prejudicial jury instruction that the trial judge—on his own and without being asked by Valadez—used to foreclose any possible defense verdict by instructing the jury as to what “[t]he evidence in this case proves,” *i.e.*, that KSN had falsely stated that Valadez was the actual BTK killer, when the evidence at trial established that KSN only reported that Valadez was a possible BTK suspect.

A. VALADEZ’S OUTRAGE CLAIM ABATED UPON HIS DEATH.

K.S.A. 60-1802 provides as follows: “No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution or for a nuisance.” (Emphasis added). Accordingly, in *Sellars v. Stauffer Communications, Inc.*, 9 Kan. App. 2d 573, 575, 684 P.2d 450, 453 (1984), this Court held that the claims of a defamation plaintiff who died while the judgment was on appeal did not survive his death.

In *Nicholas v. Nicholas*, 277 Kan. 171, 192, 83 P.3d 214, 229 (2004), the Kansas Supreme Court held that claims for invasion of privacy similarly “do[] not survive the death of the alleged victim,” notwithstanding the fact that invasion of privacy is not among the types of claims listed in K.S.A. 60-1802. Relying on the analysis set out in *Carter v. City of Emporia*, 543 F. Supp. 354 (D. Kan. 1982), the Court explained that ““K.S.A. 60-1802 provides that claims for libel, slander and malicious prosecution, which are personal in nature, abate at the death of the party making such claims.”” *Nicholas*, 277 Kan. at 191, 83 P.2d at 227-28. The Court then went on to hold that claims for invasion of privacy are similarly “personal in nature and must brought by a living person who was the subject of that invasion of privacy.” *Id.*

The question before this Court is whether Valadez’s claim for outrage is, like his defamation and invasion of privacy claims, personal in nature such that it too abated upon

his death.² KSN and Spessard submit that both the facts and the law support the conclusion that outrage is such a claim.

First, Valadez’s outrage claim is based on the very same facts—and the very same alleged damages—as his defamation and invasion of privacy claims. As to each claim, Valadez contended that KSN’s actions in broadcasting his name as part of the station’s coverage of the police department’s investigation of him as the BTK killer constitutes (a) defamation, (b) invasion of privacy, and (c) outrage. Nowhere did Valadez ever assert that his outrage claim is supported by any other facts, nor did he allege any different damages from his outrage claim than from his other claims. As such, it is obvious that his outrage claim is functionally identical to his other, abated claims. In fact, the lower court, in its post-judgment ruling, expressly held that “[t]he finding for Plaintiff made by the jury on the ‘Defamatory’ claim . . . not only supports Plaintiff’s ‘Defamatory’ claim, but also the ‘Extreme and outrageous’ claim.” (Vol. IV, 79).

Second, in discussing the tort of outrage, both this Court and the Kansas Supreme Court have repeatedly likened the claim to both invasion of privacy and defamation. *See, e.g., Hallam v. Mercy Health Center*, 278 Kan. 339, 97 P.3d 492 (2004) (holding that outrage is similar to the tort of invasion of privacy and ruling that outrage claims are governed by the same two-year statute of limitations); *Dawson v. Assocs. Fin. Servs. Co. of Kan., Inc.*, 215 Kan. 814, 820, 529 P.2d 104, 110 (1974) (“In discussing the law relative to” the tort of outrage “we are necessarily concerned with the invasion of one’s right to privacy”); *Clevenger v. Catholic Soc. Serv. of the Archdiocese of Kan. City in*

² In answering that question this Court’s scope of review is unlimited. *See In re Marriage of Wilson*, 13 Kan. App. 2d 292, 291, 768 P.2d 835, 837 (1989) (discussing standard of review of trial court’s abatement decision).

Kan., Inc., 21 Kan. App. 2d 521, 901 P.2d 529 (1995) (holding that intentional infliction of emotional distress is similar to defamation); *see also* 62A Am. Jur. 2d Privacy § 33 (2005) (explaining how the tort of outrage is derivative of the tort of invasion of privacy).

Given the similar nature and common origin of these three claims, it is axiomatic that if defamation and invasion of privacy claims abate upon a plaintiff's death, an outrage claim—at least one based on facts that are identical to those underlying a plaintiff's defamation and invasion of privacy claims—must abate as well.

Despite this obvious conclusion, in its ruling on whether Valadez's claims survived his death, the lower court found that while Valadez's defamation and invasion of privacy claims abated (Vol. IV, 78), his outrage claim did not because "it was based on the tort of 'outrage' and the damages proved were based on 'an injury to the person.'" (Vol. IV, 79). This ruling is wrong for two reasons. First, the fact that the claim is labeled "outrage" and is, therefore, not one of the specifically denominated claims in K.S.A. 60-1802 that abate upon a party's death, ignores the holding in *Nicholas*. There, the Kansas Supreme Court held that invasion of privacy claims abate notwithstanding the fact "that K.S.A. 60-1802 does not list invasion of privacy as one of those actions which abates upon the death of a party." 277 Kan. at 188, 83 P.3d at 226.

Similarly, the trial court's argument that the tort of outrage seeks to recover for 'an injury to the person' and that it therefore survives under the general survival statute, K.S.A. 60-1801,³ ignores the holding in *Nicholas* that invasion of privacy claims do not

³ K.S.A. 60-1801 provides as follows: "In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, or for death by wrongful act or omission, shall also survive; and the action may be brought notwithstanding the death of the person entitled or liable to the same."

seek redress for ‘an injury to the person.’ Instead, the *Nicholas* Court explained that invasion of privacy claims seek recovery for intangible injuries such as “emotional devastation, humiliation and ostracism,” which the Court held are not ‘injuries to the person,’ *i.e.*, physical injuries, but are injuries to a plaintiff’s feelings. 277 Kan. at 192, 83 P.2d at 228; *see also Monroe v. Darr*, 221 Kan. 281, 285, 559 P.2d 322, 327 (1977) (“The gist of the cause of action for invasion of privacy is for direct wrongs of a personal character which result in injury to the plaintiff’s feelings.”).

Like invasion of privacy, the tort of outrage—which is also called intentional infliction of emotional distress—seeks recovery of emotional (not physical) damages. *Hallam*, 278 Kan. at 340, 97 P.3d at 494 (“the tort of outrage is the same as the tort of intentional infliction of emotional distress”). “It has been recognized in Kansas that one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another may be liable for such emotional distress based upon what has come to be referred to as the tort of outrage.” *Moore v. State Bank of Burden*, 240 Kan. 382, 388, 729 P.2d 1205, 1211 (1986) (emphasis added).

Furthermore, while evidence of physical manifestation of the alleged emotional distress is sometime used to prove (or disprove) the existence of the required severe emotional distress, *see, e.g., Miller v. Sloan, Listrom, Eisenbarth, Sloan and Glassman*, 267 Kan. 245, 259, 978 P.2d 922, 931 (1999), Kansas law is well-settled that “[n]o bodily harm to the plaintiff is required to support such an action.” *Roberts v. Saylor*, 230 Kan. 289, 292, 637 P.2d 1175, 1179 (1981).

Accordingly, it is clear that the tort of outrage—just like the tort of invasion of privacy—seeks recovery for intangible mental distress damages, and not for ‘an injury to

the person.’ As a result, Valadez’s claim for outrage did not survive his death but, instead, abated as did his other claims. This Court should therefore reverse the trial court’s ruling that Valadez’s outrage claim did not abate and remand the case with directions to enter judgment for Defendants.

B. KSN DID NOT COMMIT THE TORT OF OUTRAGE.

“[T]he elements which must be shown to establish a cause of action for outrage [are]: (1) the conduct of the defendant must be intentional or in reckless disregard of plaintiff; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between defendant’s conduct and plaintiff’s mental distress; and (4) plaintiff’s mental distress must be extreme and severe.” *Hoard v. Shawnee Mission Medical Center*, 233 Kan. 267, 280, 662 P.2d 1214, 1223 (1983). In the sections below, Defendants will show how the trial court erred in denying their motion for judgment as a matter of law (Vol. IX, 76-82, 91-106; Vol. X, 19) because no evidence exists upon which a jury could have properly found that either defendant (a) acted in an “extreme and outrageous” fashion, (b) acted intentionally or recklessly, or (c) caused Valadez severe emotional distress. *See Smith v. Kansas Gas Service Co.*, 285 Kan. 33, 40, 169 P.3d 1052, 1057 (2007) (describing standard of review as whether “evidence exists upon which a jury could properly find a verdict for the nonmoving party”).

1. The Truthful Reporting Of The Fact That Valadez Was A BTK Suspect Was Not “Extreme and Outrageous.”

To prove his claim for “extreme and outrageous” conduct, a plaintiff is required to show that the conduct in question was “so outrageous in character, and so extreme in degree, as to go beyond the bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.” *Roberts v. Saylor*, 230 Kan. 289, 292-93, 637

P.2d 1175 (1981) (holding that a doctor who had told a patient “he was sorry he ever had anything to do with me; that he despised people like me and my family for causing doctors trouble, and we was a bunch of thieves without a gun” had not committed the tort of outrage); *see also* *Wiehe v. Kukal*, 225 Kan. 478, 482-83, 592 P.2d 860, 864 (1979) (finding that no tort had been committed despite the fact that the defendant had waved a pitchfork at the plaintiff while yelling obscenities); *Bradshaw v. Swagerty*, 1 Kan. App. 2d 213, 563 P.2d 511 (1977) (finding that no tort had been committed despite the fact that the defendant had called the plaintiff a “bastard,” a “nigger,” and a “knot-headed boy”).

The Kansas Supreme Court’s holding in *Hanrahan v. Horn*, 232 Kan. 531, 657 P.2d 561 (1983), which involved an allegedly defamatory statement about the murder of a thirteen-year-old boy, is illustrative of this requirement. There, the Court held that the tort of outrage had not been committed where the defendant Horn falsely told a class of realtors that “the boy’s own father” was a “suspect” in the murder. In its opinion, the court discussed a litany of Kansas cases (including the *Bradshaw* and *Roberts* cases cited above) where claims of outrage had been rejected, and found that the facts in *Roberts* “seem more outrageous than those in this case and those statements were not actionable.” *Id.* at 536-37, 657 P.2d at 566. The court went on to explain that “Horn was told of the rumor by his wife. Telling his class of the rumor was improper, but not to the point of being utterly intolerable in a civilized community.” *Id.*; *see also* *Kincaid v. Sturdevant*, 437 F. Supp. 2d 1219 (D. Kan. 2006) (“statements alone are, as a matter of law, *not* extreme and outrageous;” instead, more than “mere words” are required to prove the tort of outrage).

The *Hanrahan* decision necessarily controls the result here. Just as in *Hanrahan*, there is no claim that KSN did anything other than report that Valadez was a possible suspect in the BTK case. There is no claim, for example, that the station's reporters misrepresented themselves as police officers in order to gain access to Valadez's home, or that they threatened Valadez's relatives in order to get information about him. Instead, the evidence at trial established that the station used publicly available sources such as the Polk Directory and the jail log to get the information it reported. (Vol. XIII, 211-12).

Accordingly, in light of the *Hanrahan* decision (where the false reporting of the plaintiff as a murder suspect was not actionable), there is simply no basis to find that KSN's truthful reporting of information concerning the police investigation into a high-profile criminal case can be found to be utterly intolerable in a civilized community.

To the contrary, the identification by the media of persons involved in criminal investigations has been constitutionally protected for decades, as evidenced by a string of cases beginning with *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), in which the United States Supreme Court held that the First Amendment protected the media from liability for the reporting of a rape victim's name.

In *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), the Court held that the First Amendment protected a newspaper that had published the name of a juvenile suspect. In its decision, the Court noted that it made no difference that the paper had learned the name of the suspect not from any public records, but from "routine newspaper reporting techniques." *Id.* at 103. As explained by the Court: "A free press cannot be made to rely solely upon the sufferance of government to supply it with information." *Id.* at 104.

Finally, in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989), the Supreme Court explained that the question of whether a media report of police activity is entitled to First Amendment protection is answered not by whether the specific name of a participant is newsworthy, but rather by whether the report as a whole is newsworthy.

It is clear, furthermore, that the news article concerned “a matter of public significance,” in the sense in which the *Daily Mail* synthesis of prior cases used that term. That is, the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities.

Id. at 536-37 (emphasis added).

Here, there is no question that Valadez was an actual BTK suspect. As Spessard testified, KSN got it right—it was Valadez who was being investigated, not his neighbor, not someone who had broken into his house, not someone who was renting Valadez’s house—it was Valadez. Because such reporting cannot be the basis of an outrage claim, the trial court erred in denying Defendants’ motion for judgment as a matter of law.

2. Defendants Did Not Act Intentionally To Cause Valadez Harm.

In addition to a defendant’s conduct being “extreme and outrageous,” the conduct also “must be intentional or in reckless disregard of plaintiff.” *Roberts v. Saylor*, 230 Kan. 289, 292, 637 P.2d 1175, 1179 (1981). This Court’s decision in *Clevenger v. Catholic Social Service of the Archdiocese of Kansas City in Kansas, Inc.*, 21 Kan. App. 2d 521, 901 P.2d 529 (1995), is instructive on the issue of intent. There, this Court ruled that an outrage case was similar to a defamation action and held that “there must be some direct evidence of malice or at the very least some indication that a defendant [in taking the challenged action] had some reason to act maliciously as to plaintiff.” *Id.* at 530, 901

P.2d at 535 (emphasis added); *see also Smith v. Welch*, 265 Kan. 868, 878, 967 P.2d 727, 734 (1998) (there can be no liability where there was “no intent to harm the victim).

As to whether KSN or Spessard acted intentionally to injure Valadez, the evidence at trial established that prior to KSN’s broadcast of the fact of Valadez’s arrest, the taking of his DNA and the search of his home by BTK investigators, no one at KSN had ever even heard of Valadez. (Vol. XIV, 78-79). He had never been an advertiser, he did not owe the station any money, and he had never been in any dispute of any kind with the station. (Vol. XIV, 79). In short, no one at KSN had any desire to hurt, injure or “get” Valadez in any way. (Vol. XIV, 79). As such, there is simply no way a reasonable jury could have found that KSN or Spessard acted with the necessary intent to injure.

As to the question of whether a defendant acted recklessly, the Kansas Supreme Court in *Hoard v. Shawnee Mission Medical Center*, 233 Kan. 267, 662 P.2d 1214 (1983), explained that “[t]he person who is reckless must have prior knowledge; he must know or have reason to know of facts which create a high degree of risk of harm to another, and then, indifferent to what harm may result, proceed to act.” *Id.* at 281, 662 P.2d at 1224 (quoting *Wiehe v. Kukal*, 225 Kan. 478, 484, 592 P.2d 860, 864-65 (1979)). In applying that test to the facts, the Court held that a hospital did not act recklessly in falsely telling parents that their daughter was dead when, in fact, she was hospitalized in critical condition at another hospital. The court explained that the hospital did not act recklessly in relying on information from a third party and in not independently corroborating that information. *Id.* at 284, 662 P.2d at 1226.

As such, the test for recklessness is not dissimilar to the common law qualified privilege in defamation law which has protected the very type of reporting at issue here

for the last fifty years. In *Stice v. Beacon Newspaper Corp.*, 185 Kan. 61, 340 P.2d 396 (1959), the Kansas Supreme Court held that “newspapers have a qualified privilege to publish as current news all matters involving open violations of the law which justify police interference, and matters in connection with inquiries regarding the commission of a crime, even though the publication may reflect on the individuals concerned and tend to bring them into public disgrace.” *Id.* at 65, 340 P.2d at 400 (emphasis added). Indeed, the Court went even further, holding that it was “immaterial” whether the plaintiff was actually “involved” in the violation or crime at issue, finding that newspaper articles about a police department investigation and the “smashing” of an organized crime ring in which the plaintiff was merely implicated as a leader constituted “qualifiedly privileged” publications. *Id.* at 61 & 66-67, 340 P.2d at 398 & 401.

To overcome this privilege, a plaintiff must show that the defendant acted with “actual malice.” *Knudsen v. Kansas Gas & Electric Co.*, 248 Kan. 469, 807 P.2d 71 (1991). “Proof of actual malice requires a plaintiff to prove that the (communication) (publication) was made with knowledge that the defamatory statement was false or with reckless disregard of whether it was false or not and that it was made with actual evil-mindedness or specific intent to injure.” PIK-Civil 3d § 127.53 (2005) (emphasis added); *see Turner v. Halliburton Co.*, 240 Kan. 1, 8, 722 P.2d 1106, 1113 (1986); *see also* PIK Comment (“The effect of *Turner* is to require proof of what is usually called common-law malice as well as *New York Times v. Sullivan* malice.”).⁴

⁴ Applying the common law actual malice requirement to the tort of outrage is also consistent with the United States Supreme Court’s holding in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), where the Court held that the First Amendment required the plaintiff in an intentional infliction of emotional distress case to show the defendant magazine publisher acted with “actual malice.”

Here, there was no evidence that KSN or Spessard acted recklessly, *i.e.*, with actual malice, in reporting Valadez's name. Instead, the evidence established that when Valadez was arrested, his DNA was taken and his house was searched by BTK investigators, his name became newsworthy. KSN's news director explained his decision to use Valadez's name this way:

[W]e used the name as part of covering the news events. The name was a fact in this case that we were covering. It is an event that we had decided as a news organization was worthy of coverage and it is obvious every news organization thought it was worthy of coverage as well so at that point in time it becomes part of our guidelines. If it's an event we're putting on the air for whatever reason it's on the air. Then if his name is available, if he's been arrested, if it's public, if it's public information and more specifically in the jail log that we can verify it, then that is part of how we cover a news event.

(Vol. XIV, 70).

As such, the evidence established that KSN and Spessard acted in what they believed was a responsible manner in informing the local community about a newsworthy event. They did not act with actual malice, either in the sense of knowingly broadcasting false information, or in the sense of acting with "actual evil-mindedness or specific intent to injure." PIK-Civil 3d § 127.53. Accordingly, no reasonable jury could have properly found that KSN and Spessard committed the tort of outrage.

At trial, Valadez attempted to show Defendants' culpability by arguing that KSN was the only media outlet to use Valadez's name. (Vol. XV, 34-36) (Valadez's lawyer in closing argument telling jurors the reason "we are really here" is because KSN used Valadez's name and the other stations did not). The mere fact, however, that other Wichita stations made a different editorial decision on the question of whether to use Valadez's name is irrelevant because even if such evidence had been sufficient to establish an ordinary standard of care, "[i]n popular use and by our decisions

‘recklessness’ is a stronger term than mere or ordinary negligence.” *Wiehe v. Kukul*, 225 Kan. 478, 483, 592 P.2d 860, 864 (1979); *see also Steere v. Cup*, 226 Kan. 566, 574, 602 P.2d 1267, 1274 (1979) (holding that evidence of negligence is insufficient to establish actual malice).

Moreover, during his testimony, Spessard specifically addressed this issue and pointed out the hypocrisy of the other stations in covering the event live, but in denying their viewers a critical piece of information, *i.e.*, the suspect’s name.

And even that day long before any of this ever began happening from a legal standpoint I remember sitting in my office thinking that it was rather ironic and even hypocritical watching the other stations covering this court event and actually not telling us who, why they were covering the event and who was appearing before the judge. In my 15 years of history in this business, and I would venture to say it would be very difficult to find any example of this in other television stations why they warranted an event worthy enough to cut in to afternoon programming to cover a court case and not tell you who was being covered.

(Vol. XIV, 72-73). Accordingly, far from showing recklessness, the evidence at trial showed Spessard made a considered, professional judgment that was consistent with established guidelines.

We used the name because it was part of the guidelines that we use. Anytime something becomes public record and it is associated with the very event that we were covering, in this case, he was arrested and was booked into jail. In fact, he actually made an appearance in court that afternoon In other words, I used that simply straight out. There was a decision made, nothing more, a process we use every day as a television station.

(Vol. XIV, 72-73).

Finally, it is mere sophistry to argue that the other stations did not identify Valadez as a BTK suspect. While it is true that the other stations may not have used Valadez’s name, they described him as a 64-year old Hispanic man living at 1421 Mt. Vernon in Wichita; they even broadcast live pictures of the front of Valadez’s house. In

the analogous area of defamation, “[i]t is not necessary that the plaintiff be designated by name; it is enough that there is such a description of or reference to him that those who hear or read reasonably understand the plaintiff to be the person intended.” Restatement (Second) of Torts § 564 cmt. b (1977).

As such, Valadez’s argument that KSN should be liable for using his name when the other television stations did not use his name, is legally unsupportable.

Finally, Valadez argued repeatedly at trial (*see* Vol. XIV, 124-25; Vol. XV, 44-46, 72) that KSN should have stopped reporting on the police investigation after KFDI reported during its 9:00 a.m. report that an Associated Press reporter had spoken with the Wichita Police Chief and he had said there had not been an arrest in the BTK case and that “the media is making a mountain out of a molehill.” (Vol. XX, 94). Valadez’s argument, however, is unpersuasive for a host of reasons.

First, the very same 9:00 a.m. KFDI report also advised: “Our reporter Josh Wells did confirm through an unnamed Wichita police officer before we even knew the location of where things were going on that there was an investigation underway and that it ‘has everything to do with BTK.’” (Vol. XX, 94) (emphasis added). The very same 9:00 a.m. KFDI report further indicated: “[T]his is coming from the Mid America News Network, also that they have spoken to an agent with the Kansas Bureau of Investigation that this man has been arrested and that he is being labeled a ‘person of high interest in the BTK case.’” (Vol. XX, 94) (emphasis added). As such, the KFDI report itself is hardly evidence that Valadez was not a BTK suspect; instead, it establishes nothing more than that the police chief was being coy.

Second, the Associated Press itself was still reporting on the story two hours later, when—at 11:18 a.m.—it reported that: “Authorities are testing the DNA of a man arrested on minor trespassing and housing code violations to see if he has any connection with the BTK serial killings that terrorized the city in the 1970s, state police said Thursday.” (Vol. XXII, 80).

But there is a more fundamental reason why Valadez cannot rely on the KFDI report to establish that Spessard acted recklessly—Spessard never heard the report.

Q. Do you agree -- do you know whether or not a reporter from the Associated Press talked to the police chief at City Hall before 9 o'clock a.m. and that the police chief told the AP reporter that there had not been an arrest in the BTK case and that the media is making a mountain out of a molehill?

A. No, sir, I'm not aware of that.

(Vol. XIV, 124). Accordingly, the KFDI report cannot be evidence of recklessness on Spessard's part given the requirement that “[t]he person who is reckless must have prior knowledge; he must know or have reason to know of facts which create a high degree of risk of harm to another, and then, indifferent to what harm may result, proceed to act.” *Hoard v. Shawnee Mission Medical Center*, 233 Kan. 267, 281, 662 P.2d 1214, 1224 (1983).

3. Valadez Did Not Introduce Evidence Of The Type Of Severe Emotional Distress Necessary To Support A Claim Of Outrage.

In *Roberts v. Saylor*, 230 Kan. 289, 295, 637 P.2d 1175, 1181 (1981), the Kansas Supreme Court held that a “threshold requirement” of an outrage plaintiff is that he or she suffer emotional distress that is “genuine and so severe and extreme that no reasonable person should be expected to endure it.” *See generally Parker v. Central Kansas Med. Center*, 178 F. Supp. 2d 1205, 1216 (D. Kan. 2001) (finding the plaintiff failed to

demonstrate severe emotional distress where she claimed only to have gotten “extremely upset”); *Glover v. NMC Homecare, Inc.*, 106 F. Supp. 2d 1151, 1171 (D. Kan. 2000) (finding that while the plaintiff “did suffer from a bout of depression, this distress [did] not rise to the level of such extreme degree that the law must intervene”); *Wood v. City of Topeka*, 90 F. Supp. 2d 1173, 1195 (D. Kan. 2000) (holding that the plaintiff’s claim of depression was insufficient to show extreme mental distress where there was no evidence that plaintiff was hospitalized, saw a doctor, took medication, or had any problems sleeping, eating, or with weight fluctuations); *Nowlin v. K Mart Corp.*, 50 F. Supp. 2d 1064, 1074 (D. Kan. 1999) (holding that the plaintiff’s claims of hopelessness, depression, and withdrawal from relationships and activities were insufficient to show extreme mental distress where the plaintiff never sought treatment for his conditions and failed to point to any physical manifestations of his distress).

Here, Valadez’s own testimony established only that (a) he believed his reputation was damaged, and (b) he was upset.

Q. Try to explain for the jury how you think their coverage has affected you over the last couple of years because it has not been two years yet.

A. The coverage has affected me in a way of defaming me, speedily ruined my reputation as a decent person. I believe I am a decent person. Seeing my daughters, especially my two girls suffer because of it has greatly hurt me, what it’s done to me, what it’s done to them, but seeing them suffer mostly is what has affected me the most.

Q. Anything else that comes to your mind at this point?

A. I just don’t think it was right. I think it was the wrong thing to do. I know right from wrong. I know that there are things that a person shouldn’t do, things that a person should do and I just think it was wrong.

Q. Are you angry at them?

A. Yes.

Q. Have you had sorrow?

A. Pardon me?

Q. Have you had sorrow?

A. Yes.

Q. Anything else that you can think of?

A. They are just -- I really can't think of words to describe the hurt that a person goes through for yourself and your family. It's just -- I don't know if there are words I can even tell you that describe it.

(Vol. XIV, 194-95). There was no testimony that Valadez displayed any physical manifestation of his distress, nor did he testify as to seeking any medical treatment of any sort, nor even counseling from a psychiatrist, counselor, minister, etc.

As such, Valadez's testimony was no different from the testimony of the plaintiff in *Roberts* who testified: "I'm upset about it; I'm still upset. I was upset then and I'm still upset." 230 Kan. at 296, 637 P.2d at 1181. In finding that this testimony failed to show the type of severe emotional distress required, the Court explained:

Although she expressed a continuing concern and nervousness resulting from the incident, such was the total extent of her emotional distress. There is no indication that psychiatric or further medical treatment or medications were necessary or that she was unable to function in a normal way thereafter.

Id.

Moreover, even if Valadez had shown that he suffered the requisite severe emotional distress, it was incumbent upon him to show that he suffered that injury as a result of KSN's broadcast, and not as the result of being roused from his home by armed agents with a search warrant and being held in jail overnight as a suspected serial killer. As Valadez himself testified, even though he knew he was not BTK, he was worried the

police were so desperate to solve the 30-year old murders that they would frame him for the terrible crimes. “I wasn’t sure what the mood of the police department was. I didn’t know if they were wanting this guy so bad that they were going to pin something on me. I mean, you do not think right when those things happen to you.” (Vol. XIV, 186).

Valadez also testified that while he was in jail he had no access to a television and that he did not know that KSN was broadcasting his name. (Vol. XIV, 179). Accordingly, his angst during the early 24 hours he was in jail was not caused, in any way, by anything KSN did. In a virtually identical situation, the Kansas Supreme Court explained in *Hanrahan v. Horn* that while it was undisputed that Hanrahan—whose son had been abducted and killed—had suffered severe emotional distress, that distress came from what happened to his son, not from the false and defamatory statement made by Horn that Hanrahan was a suspect in his son’s murder. “We agree John Hanrahan suffered severe emotional distress from his son’s disappearance and death but that was not Charles Horn’s doing.” *See Hanrahan*, 232 Kan. at 537, 657 P.2d at 566.

The same is true here. Neither KSN nor Spessard had anything to do with the tip that led to Valadez’s arrest; in fact, to this day, no one at KSN even knows who the tipster was inasmuch as his or her identity remains sealed. (Vol. XIII, 72; Vol. XIV, 248). Because Defendants are not responsible for Valadez’s distress from being investigated as a suspect in the BTK case, no reasonable jury could have found in his favor on his claim of outrage, and the trial court therefore erred in denying Defendants’ motion for judgment as a matter of law.

C. THE JURY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL AND AFFECTED THE SUBSTANTIAL RIGHTS OF DEFENDANTS.

In instructing the jury, the trial court—on its own and without any request by Valadez—gave the following instruction applicable to all three claims:

The evidence in the case proves that by certain information put out to the community by defendant, a reasonable person would conclude that a man under arrest on unrelated charges was more than likely a serial killer whose evil exploits were known by the majority of the adult population in the community where the man arrested lived.

(Vol. IX, 34) (attached as Appendix) (emphasis added).

This instruction was both erroneous and prejudicial in that it improperly removed from the jury’s province the critical question of whether (as Valadez argued) KSN reported that Valadez was the actual BTK killer, or whether (as KSN argued) the station only reported that Valadez was a possible suspect in the BTK case. In particular, by the use of the words “evidence,” “proves,” “reasonable person,” “conclude,” “was more than likely,” “serial killer” and “evil exploits,” the instruction sent the unequivocal message to the jury that the trial court had already ruled that KSN falsely reported that Valadez was the actual BTK killer.⁵

The instruction, therefore, is directly contrary to Kansas law, which—for more than 100 years—has prohibited courts from commenting “upon the weight of the evidence submitted to the jury” or assuming “the existence or non-existence of controverted facts.” *Haines v. Goodlander*, 73 Kan. 183, Syl. ¶ 5, 84 P. 986 (1906). Furthermore, the instruction is contrary to the law that instructions should not be

⁵ Because KSN and Spessard specifically objected to the Court’s proposed instruction (Vol. XV, 10-12), a new trial is required unless Valadez can show that the jury “could not reasonably have been misled” by the instruction. *See Wood v. Groh*, 269 Kan. 420, 424, 7 P.3d 1163, 1167-68 (2000).

“slanted, argumentative, or formulated to particularize one aspect of a case.” *Schwartz v. W. Power & Gas Co.*, 208 Kan. 844, 854, 494 P.2d 1113, 1121 (1972); *see also Kettler v. Phillips*, 191 Kan. 486, 488-489, 382 P.2d 478, 480 (1963) (holding that a court should not single out a particular theory or circumstance and give it undue emphasis).

Here, the question of whether KSN (falsely) reported that Valadez was the actual BTK killer or (truthfully) reported that Valadez was a BTK suspect was hotly debated at trial. Valadez argued that KSN declared Valadez was the actual killer. In his closing argument, for example, Valadez’s lawyer argued (even adopting the trial court’s use of the phrase ‘serial killer in the community’) that KSN had “connected it up” so as to say that Valadez was the BTK killer, not just a suspect in the case.

Do I have to spend any time telling you that it would be highly offensive to an ordinary person to be told that you were BTK, the worst serial killer in the community in Wichita forever? No. They can’t even argue that. It is just terrible what they did and clearly they have connected it up.

(Vol. XV, 37) (emphasis added).

Compare that to the closing argument made on behalf of KSN and Spessard, in which the jury was told KSN only reported that Valadez was a possible suspect in the case.

What did we say about him that’s false? We said he’s a possible suspect. Heck, we know we could have said it’s a lot more. He’s the prime suspect. He’s the chief suspect. He’s the first suspect that the FBI busts down his door in the middle of the night to arrest. He’s the only suspect they’ve searched his house. And, in fact, until Dennis Rader was arrested, we now know he was the only real suspect.

We didn’t say that. We said he’s a possible suspect. That’s not false.

(Vol. XV, 61-62).

As such, the trial judge’s instruction—which included his finding that “[t]he evidence in the case proves that by certain information put out to the community by

defendant, a reasonable person would conclude that a man under arrest on unrelated charges was more than likely a serial killer whose evil exploits were known by the majority of the adult population in the community where the man arrested lived”—clearly undercut a critical aspect of KSN and Spessard’s defense and made a fair trial impossible.

Moreover, the trial court’s decision to take this critical issue away from the jury was clearly error where the evidence unquestionably supported KSN’s argument that it acted responsibly in NOT reporting that Valadez was the actual killer, only a suspect in the case. For example, as noted earlier, KSN’s main anchor repeatedly advised viewers not to rush to judgment; that Valadez was only a possible suspect in the case.

Again, as Chanda was indicating there, we want to stress throughout all of these broadcasts that so far police have not indicated in any way, officially, that the person they have taken into custody is indeed a suspect in the BTK investigation. It’s just that a lot of the people who are heading up that investigation happened to have been there when this individual was taken into custody.

* * *

[T]hat sort of underscores the point here that we cannot emphasize enough that at this point anyway: this person has been taken into custody on charges that are totally unrelated to BTK and mainly those are charges of trespassing and housing code violations but, right now, nothing formally dealing with BTK.

* * *

We are continuing our team coverage of what is still a developing story this morning. The arrest of a possible, and we want to underline the word “possible,” suspect in connection with the BTK investigation.

* * *

We just kind of want to take a moment here and take a deep breath[] and remind ourselves that again, this a person who has been arrested for unrelated charges to anything to do with BTK. And, now this individual[’]s name is out there, we are hearing more about his background. We don’t want to have that “rush to judgment” kind of thing is what I am getting at here.

(Vol. XIX, 18, 20, 25 & 28; Vol. XXIV, 1-3).

Accordingly, KSN and Spessard's argument that the station had not called Valadez the actual BTK killer (only a possible BTK suspect) was not a hollow one, but rather was an extremely viable argument—that is, until its viability was extinguished by the trial court's unfair instruction taking this critical issue away from the jury.

VI. CONCLUSION

As the Kansas Supreme Court held in *Stice*, the media is protected from liability for truthful reporting on police investigations of suspected criminal activity “even though the publication may reflect on the individuals concerned and tend to bring them into public disgrace,” 185 Kan. at 65, 340 P.2d at 400, and even though the suspect is eventually found to be innocent. Were that not the law, every criminal defendant found not guilty at trial would stop at his or her lawyer's office on the way out of the courthouse and immediately file suit against the local media who had reported on the trial.

Here, KSN did nothing more than truthfully report that Valadez was a possible suspect in the BTK case. And when the police cleared Valadez the following day, KSN reported that fact, again correctly using Valadez's name.

Accordingly, even if Valadez had not died, his outrage claim could never have withstood appellate review. He did die, however, and like his defamation and invasion of privacy claims, his outrage claim abated upon his death. This Court should therefore reverse the trial court's ruling that Valadez's outrage claim did not abate and remand the case with directions to dismiss Valadez's Petition. Alternatively, this Court should reverse the trial's court ruling denying Defendants' motion for judgment as a matter of law for the reason that no reasonable jury could have found that either defendant committed the tort of outrage. In that case, the Court should again order that Valadez's

Petition be dismissed. Finally, if this Court does not remand the case with directions to dismiss Valadez's Petition, this Court should order a new trial of Valadez's outrage claim on the ground that the trial court's instructions were erroneous and prejudicial and deprived Defendants of a fair trial.

Respectfully submitted,

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I certify that two copies of Appellant's Brief were served by overnight mail on the following this 7th day April, 2008:

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Appendix

Instruction No. 3

The evidence in the case proves that by certain information put out to the community by defendant, a reasonable person would conclude that a man under arrest on unrelated charges was more than likely a serial killer whose evil exploits were known by the majority of the adult population in the community where the man arrested lived.

Defendants included plaintiff's name in the information that was put out by them.

Plaintiff claims that he has sustained damages because of the defendants' conduct in the following particulars:

1. Creating publicity placing him in a false light of a kind highly offensive.
2. Acting in a manner that was beyond the bounds of decency and outrageous in character.
3. Intentionally broadcasting and/or making statements that were false, to include the following:
 - A. That there were new developments in the BTK case
 - B. That plaintiff had been arrested in connection with the BTK investigation and as a suspect.
 - C. That it appears police may have a break in the BTK case.
 - D. That the police chief was on the scene.

- E. That if not related to the BTK case, his arrest was related to some homicide.
- F. That the amount of the bond set to insure plaintiff's appearance was increased throughout the morning.

The plaintiff has the burden to prove that his claims are more probably true than not true based on all the evidence.

The defendants generally admit that they broadcast or caused to be broadcast news reports regarding a police investigation of the plaintiff. However, the defendants deny that they were at fault, deny that the plaintiff suffered any damages, and specifically deny that their conduct defamed the plaintiff, invaded his privacy or was extreme and outrageous.