IN THE MISSOURI SUPREME COURT

No. SC 84770

CAROLYN KENNEY,

Plaintiff/Respondent,

v.

WAL-MART STORES, INC.,

Defendant/Appellant.

On Transfer from the Missouri Court of Appeals
for the Western District, Case No. WD 59936

There On Appeal from the Circuit Court
of Jackson County, Missouri,
Sixteenth Judicial Circuit, Division 5
Honorable W. Stephen Nixon, Judge

BRIEF OF AMICUS CURIAE ST. LOUIS POST-DISPATCH, L.L.C.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

Amicus curiae St. Louis Post-Dispatch, L.L.C. adopts and incorporates herein the Jurisdictional Statement contained in the Appellant's Brief.

FACTS PERTINENT TO THIS AMICUS BRIEF

This case arises from defendant Wal-Mart Stores, Inc.'s ("Wal-Mart's") alleged libel of plaintiff Carolyn Kenney ("Kenney").

In September 1996, an unknown person posted a missing child poster about plaintiff's 1-1/2 year old granddaughter at Wal-Mart's Lee's Summit store. Plaintiff alleged that the poster was false in stating that her granddaughter was missing and that it defamed plaintiff by implying that she was somehow criminally culpable in the disappearance, even though -- as the appellate court noted -- a strong argument existed that the poster simply recited truthful facts about the circumstances surrounding the secretion of the child. Kenney v. Wal-Mart Stores, Inc., No. WD 59936, 2002 Mo. App. LEXIS 1801, at *27-28 (Mo. Ct. App. Aug. 30, 2002). Plaintiff alleged that Wal-Mart learned about the poster displayed at its store; was told that it was inaccurate; yet failed to act reasonably to remove it.

The parties were in apparent agreement that plaintiff was neither a public official nor a public figure. Further, Wal-Mart's status is that of a non-media defendant. The topic of the poster -- a missing 1-1/2 year old child -- was unquestionably a matter of public concern. See Kenney v. Scripps-Howard Broad. Co., 259 F.3d 922, 923 (8th Cir. 2001) (holding, in a companion case brought by the same plaintiff against a media entity, that the "welfare and possible abduction of a child" is a matter of public interest).[1]

[1] In Scripps Howard, the Eighth Circuit affirmed a summary judgment for a media entity sued over news broadcasts concerning the police investigation into plaintiff's

The trial court submitted the case to the jury using the verdict director for libel of a private figure plaintiff found at MAI 23.06(1), which provides:

> Your verdict must be for plaintiff if you believe:
>
> First, defendant (*describe acts such as "published a newspaper article"*) containing the statement (*here insert the statement claimed to be libelous such as "plaintiff was a convicted felon"*), and
>
> Second, defendant was at fault in publishing such statement, and
>
> Third, such statement tended to [expose plaintiff to (*select appropriate term or terms such as "hatred", "contempt" or "ridicule"*)] [or] [deprive the plaintiff of the benefit of public confidence and social associations], and

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missing granddaughter. 259 F.3d at 924. Because the news report was based on official police action and because the inclusion of information provided by the mother did not materially enhance the defamatory sting of the official report, the court found the news report privileged under the fair reports privilege.

Here, the appellate court rejected Wal-Mart's reliance on the fair reports privilege. The court held that a person cannot confer the fair reports privilege upon himself by inducing the official action and then repeating what he himself has induced. Kenney, 2002 Mo. App. LEXIS 1801, at *41-42. It then held that Wal-Mart -- even though it did not prepare the poster -- must stand in the shoes of the original publisher because its liability was based on a failure to remove. Id. at *42.

Fourth, such statement was read by (*here insert name of person or persons other than plaintiff or the appropriate generic term such as "the public"*), and

Fifth, plaintiff's reputation was thereby damaged.

Unlike the corresponding instruction used in public official/figure libel cases found at MAI 23.06(2), that instruction does not include a requirement that the jury find the libelous publication to be false.[2]

The appellate court ruled that the trial court erred in giving this instruction because the instruction did not conform to this Court's holding in Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 70 (Mo. banc 2000), which identifies falsity as an element of the plaintiff's claim. Because of the significance of the issue, the court transferred the case to this Court. Kenney, 2002 Mo. App. LEXIS 1801, at *42.

[2] For the convenience of the Court, MAI 23.06(1) and (2) [1980 New], together the Notes on Use and Committee Comments following them, are set forth at Appendices A and B, respectively. MAI 23.10(1) and MAI 23.10(2) provide virtually identical verdict-directing instructions for slander claims. Although the appellate court and this brief reference only the libel instructions, the same issues exist with these slander instructions.

POINT RELIED ON

I. THE TRIAL COURT ERRED IN GIVING PLAINTIFF'S VERDICT-DIRECTING INSTRUCTION FOR LIBEL BASED ON MAI 23.06(1), BECAUSE THAT INSTRUCTION DID NOT REQUIRE THE JURY TO FIND THE COMPLAINED-ABOUT PUBLICATION FALSE, IN THAT UNDER APPLICABLE PRINCIPLES OF THE UNITED STATES CONSTITUTION, FALSITY IS AN ELEMENT TO BE PROVEN BY THE PLAINTIFF IN ANY DEFAMATION CASE INVOLVING A PUBLICATION ABOUT A MATTER OF PUBLIC CONCERN.

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986)

Anton v. St. Louis Suburban Newspapers, Inc., 598 S.W.2d 493, 498 (Mo. Ct. App. E.D. 1980)

In re IBP Confidential Bus. Documents Litigation, 797 F.2d 632 (8th Cir. 1986)

Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62 (Mo. banc 2000)

ARGUMENT

SUMMARY OF ARGUMENT

Lawsuits for libel and slander pose a grave risk of chilling one of America's most cherished liberties -- the right of free expression. For this reason, in the last forty years, courts from the United States Supreme Court down have impressed on plaintiffs pursuing such claims stringent requirements of proof. This case raises the issue of whether a libel plaintiff has the burden of proving falsity.

Beginning with New York Times Co. v. Sullivan, 376 U.S. 264, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), the Supreme Court held that public officials must prove a knowing or knowingly reckless publication of a falsehood (called "actual malice") to recover damages for libel. Shortly afterward, the Court extended this same burden to public figure libel plaintiffs, *i.e.* persons who enter the public limelight. Curtis Publ'g Co. v. Butts, 388 U.S 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967). Then, in Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), the Supreme Court ruled that the First Amendment restricted libel cases by non-public officials/figures, as well. It held that private figure plaintiffs may not recover damages for libel unless they prove that the defendant was guilty of a degree of fault rising to at least the level of negligence and that they may not recover presumed or punitive damages without proving actual malice. Finally, in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986), as a logical extension of its previous holdings, the Supreme Court placed the burden of proving falsity on libel plaintiffs.

Missouri's Approved Instructions ("MAI") for libel and slander are generally in accord with these Supreme Court pronouncements. However, MAI 23.06(1) and MAI 23.10(1), covering libel and slander cases brought by private figure plaintiffs, do not require the plaintiff to prove either falsity or fault rising to a level of at least negligence. Under these instructions, falsity need not be proven, and truth is an affirmative defense on which the defendant has the burden of proof. Further, the requisite degree of fault is in no way defined or set forth.

As such, MAI 23.06(1) and MAI 23.10(1) seem in blatant contradiction of the Supreme Court's holding in Hepps. However, the MAI committee partially corrects this contradiction by creating another contradiction -- a rule which treats non-media defendants different from media defendants. Based on what it characterizes as the "narrow" holding in Hepps, the MAI committee creates a double standard -- one applicable to private plaintiffs suing media defendants and the other applicable to private plaintiffs suing non-media defendants. The 1990 Committee Comment to MAI 23.06(2) (the verdict director for public official/figure plaintiffs) states that in cases involving private figure plaintiffs suing media defendants, "prudence would suggest that" the element of falsity should be included in the verdict director. However, plaintiffs suing non-media defendants need not prove falsity, according to the committee.

In this case, the appellate court found error in MAI 23.06(1) because it does not include a requirement that a private figure plaintiff prove falsity. Amicus curiae concurs with this holding -- not only for the reasons expressed by the appellate court, but also for

reasons expressed below.[3] The same logic and public policy that imposes a burden on plaintiffs to prove falsity in media publications should apply to a non-media defendant's public forum for publications concerning missing children. Exposing a non-media entity to liability for such publication threatens to deter non-media entities from expression of immense public value. Accordingly, the appellate court correctly found MAI 23.06(1) erroneous and correctly reversed the judgment.

[3] Amicus is also concerned about the failure of the MAI to set forth an applicable standard of fault in the jury instructions applicable to private figure plaintiffs. See, e.g., Scott, The New Libel and Slander Instruction: A Partial Federalization of Missouri Defamation Law, 37 J. MO. BAR, 149, 153 (1981), However, that issue would not seem to be before this Court at this time.

I. THE TRIAL COURT ERRED IN GIVING PLAINTIFF'S VERDICT-DIRECTING INSTRUCTION FOR LIBEL BASED ON MAI 23.06(1), BECAUSE THAT INSTRUCTION DID NOT REQUIRE THE JURY TO FIND THE COMPLAINED-ABOUT PUBLICATION FALSE, IN THAT UNDER APPLICABLE PRINCIPLES OF THE UNITED STATES CONSTITUTION, FALSITY IS AN ELEMENT TO BE PROVEN BY THE PLAINTIFF IN ANY DEFAMATION CASE INVOLVING A PUBLICATION ABOUT A MATTER OF PUBLIC CONCERN.

Missouri's verdict-directing instruction for libel where the plaintiff is not a public official/figure does not require a jury determination that the complained-about publication was false. MAI 23.06(1) [1980 New]. To raise the truth/falsity issue, however, a defendant may submit an affirmative defense instruction that relieves it of liability if a jury finds the publication to be true. MAI 32.12 [1969 New]. Although this scheme permits the issue of the falsity of the publication to come before the jury, it erroneously places the burden of proof upon the defendant, rather than upon the plaintiff.

Basing its ruling on this Court's holding in Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 70 (Mo. banc 2000), wherein this Court recognized that the elements of a private figure's cause of action for libel required it to prove falsity, the appellate court in the instant case held the absence of a required finding of falsity rendered MAI 23.06(1) invalid. Kenney, 2002 Mo. App. LEXIS 1801, at *20-21. Amicus curiae St. Louis Post-Dispatch agrees with the result reached by the appellate court regarding the invalidity of

MAI 23.06(1) and requiring falsity to be proven by the libel plaintiff. Without commenting on other aspects of the case, it urges this Court to follow and adopt the holding of the appellate court as to this point. Further, the amicus supplements the appellate court's analysis with the discussion below.

A. A LIBEL PLAINTIFF'S BURDEN OF PROOF AS TO FALSITY IN CASES AGAINST MEDIA DEFENDANTS HAS BEEN FIRMLY ESTABLISHED IN MISSOURI LAW SINCE AT LEAST 1980.

For over twenty years, Missouri courts have recognized that in a defamation plaintiff's action against a media defendant, the plaintiff must prove the falsity of the publication. See Anton v. St. Louis Suburban Newspapers, Inc., 598 S.W.2d 493, 498 (Mo. Ct. App. E.D. 1980) ("public officials, public figures and private persons suing media defendants must establish that the defendant published a false statement") (citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 490, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975)).

Indeed, the matter is now beyond question, inasmuch as in 1986, in the context of a libel case against a media defendant, the United States Supreme Court ruled that as a matter of constitutional law, a plaintiff must prove falsity to recover for defamation. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986). In Hepps, the Supreme Court placed the burden of proving falsity squarely on the shoulders of plaintiffs -- at least in defamation actions against media defendants. In so doing, the Court stated: "the common law's rule on falsity [must] fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity . . . ." 475

U.S. at 776. The Hepps court made no distinction based on whether the plaintiff was a public official/figure or a private person in requiring plaintiffs to prove falsity.

B. NO LEGITIMATE BASIS EXISTS FOR DISTINGUISHING BETWEEN SUITS AGAINST MEDIA AND NON-MEDIA DEFENDANTS.

1. MAI Improperly Casts the Burden of Proof Depending on the Status of the Defendant.

The current scheme under MAI treats media and non-media defendants differently in defamation cases brought by private figure plaintiffs, but treats them the same in cases brought by public official/figure plaintiffs. In cases with non-media defendants, a private figure plaintiff is not required to prove the falsity of the published statement. MAI 23.06(1) [1980 New]. In cases with media defendants, by virtue of a comment following MAI 23.06(2), a private figure plaintiff seemingly is required to prove falsity. In cases with public official/figure plaintiffs, a plaintiff is required to prove the falsity of the published statement notwithstanding the status of the defendant. MAI 23.06(2) [1980 New].

The asserted basis for this incongruous treatment is the Supreme Court's ruling in Hepps that plaintiffs must bear the burden of proof on falsity in suits against media defendants. In the Committee Comment to MAI 23.06(2), the drafters stated:

> In [Hepps], a narrow opinion limited to a private plaintiff suing a media defendant for libel in a matter of public concern, the court shifted the burden of proof on truth-falsity to the plaintiff.

> Concurring justices would have extended the shift in similar cases against any defendant. Paragraph Second in MAI 23.06(2) already imposes the burden [of proving falsity] on a public official plaintiff. Prudence would suggest that such a paragraph Second should be included in MAI 23.06(1) when a private plaintiff is suing a media defendant on a publication of public concern.

MAI 23.06(2) [1980 New], Committee Comment (1990 Revision).

The placement of this suggestion is hardly ideal, given that it follows MAI 23.06(2), but recommends a course of action with respect to modifying MAI 23.06(1). Aside from the potential for confusion, however, the application of this scheme creates a double standard which hinges on whether the defendant is a media entity. In suits against media defendants, plaintiffs bear the burden as to the falsity of the published statement -- as they clearly must according to the United States Supreme Court. In suits against non-media defendants, however, based on a restrictive reading of the holding in Hepps, the MAI provides that defendants bear the burden as to the truth of the published statement.

2. Shifting the Burden of Proof Depending upon the Defendant's Status as a Media or Non-Media Defendant Creates a Double Standard in Defamation Suits Unsupportable Under the First Amendment and Unnecessarily Complicates the Missouri Approved Instructions.

Although amicus St. Louis Post-Dispatch concurs with the Committee Comments that Hepps requires the inclusion of a falsity element in a defamation case against a

media defendant, it also believes that allowing different treatment in cases with non-media defendants makes little sense. The First Amendment protects the free speech rights of all publishers, not just those associated with a media entity.

Writing for the Court in Hepps, Justice O'Connor limited the scope of the holding to the facts at hand. Nothing in the holding, however, suggests that the Court had determined that a different standard should apply to non-media defendants. Indeed, her opinion did not address the question of what standard ought to be applicable when private figures sue non-media entities. As noted by Justice Brennan, who concurred with the majority in Hepps, the majority opinion reserved the question of "whether the rule . . . applies to non-media defendants." Brennan concurred for the purpose of expressing his view that the First Amendment would not permit a distinction based on the source of the speech and that the same standard of proof should be applied regardless. Hepps, 475 U.S. at 780 (Brennan J., concurring) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 781, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985) (Brennan J., dissenting)). In his earlier dissent in Dun & Bradstreet, Justice Brennan had recognized that "six Members of this Court . . . agree today that, in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." 474 U.S. 783-84.

Justice Brennan's point that there is no distinction between media and non-media libel cases makes eminent sense. The First Amendment should not recognize distinctions in the degree of protection to be afforded expression based on the identity of the speaker.

Other courts -- though none found in Missouri -- have recognized this principle in this same context.

For instance, in In re IBP Confidential Bus. Documents Litigation, 797 F.2d 632, 647 (8th Cir. 1986), the Eighth Circuit held, based on Hepps and Gertz, that a trial court applying Iowa law had erred in relieving a private figure plaintiff of the obligation of proving falsity in his libel case against a non-media entity. The court observed:

> [t]o recognize the existence of a first amendment right and yet distinguish the level of protection accorded that right based on the type of entity involved would be incompatible with the fundamental first amendment principle that "the inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual."

797 F.2d at 642 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978)). Other courts are in accord. See, e.g., Burroughs v. FFP Operating Partners, L.P., 28 F.3d 543, 549-50 (5th Cir. 1994); Pearce v. E.F. Hutton Group, Inc., 664 F. Supp. 1490, 1511-12 (D.D.C. 1987); Nizam-Aldine v. Oakland, 47 Cal. App. 4th 364, 373-74 (1996); Ayala v. Washington, 679 A.2d 1057 (D.C. 1996); Wheeler v. Nebraska State Bar Ass'n, 508 N.W.2d 917, 921 (Neb. 1993) (citing Don King Prods., Inc. v. Douglas, 742 F. Supp. 778 (S.D.N.Y. 1990)).

Speech by a media entity, a public official, a private person, or a large corporation deserves equal protection under the law. Wal-Mart's forum for publication of posters

seeking to ascertain the whereabouts of missing children is deserving of as much protection as would be available to a media publication of the same import.

Although no Missouri decision has considered the media/non-media truth falsity burden, Missouri courts have considered the issue in the context of a public official/figure plaintiff's burden of proving actual malice under New York Times Co. v. Sullivan. In considering the issue, Missouri has rejected the notion that the standard of proving actual malice should be different based on whether the publisher was a media or non-media defendant. See, e.g., Ramacciotti v. Zinn, 550 S.W.2d 217, 224 (Mo. Ct. App. E.D. 1977) (applying actual malice standard for non-media defendant); Snodgrass v. Headco Indus., Inc., 640 S.W.2d 147, 155 (Mo. Ct. App. W.D. 1982) (same); Rowden v. Amick, 446 S.W.2d 849, 858 (Mo. Ct. App. W.D. 1969) (same); McQuoid v. Springfield Newspapers, Inc., 502 F. Supp. 1050, 1054 n.3 (W.D. Mo. 1980) (applying actual malice standard for media defendant). The Restatement of Torts likewise rejects such a distinction. RESTATEMENT (SECOND) OF TORTS § 580B, comment e (1977).

Amicus St. Louis Post-Dispatch urges the court to eschew such distinctions in the instant case, as well. Here, the alleged libel concerned the alleged familial abduction of a small child. Undoubtedly, such information is of public concern, and a person suing the publisher of such information should be subject to the same burden of proving falsity whether the publisher is the media or otherwise.

CONCLUSION

All defamation plaintiffs have the burden of proving falsity, and the jury should be so instructed. Missouri's Approved Instructions, to the extent they require otherwise, are erroneous. For the reasons expressed in the opinion below, and for the added reasons expressed herein, amicus curiae St. Louis Post-Dispatch, L.L.C. requests that this Court adopt the opinion and analysis of the appellate court insofar as it concerns the invalidity of MAI 23.06(1).

Respectfully submitted,

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CERTIFICATE OF CONSENT

The undersigned counsel for *amicus curiae* St. Louis Post-Dispatch, L.L.C., pursuant to Mo.R.Civ.P. 85.05(f)(2) hereby certifies that he has contacted counsel for the parties to this appeal (Michael W. Blanton for plaintiff/respondent and Michael S. Cessna for defendant/appellant) and each has consented to the filing of this Brief *amicus curiae*.

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CERTIFICATE PURSUANT TO RULES 84.06(c) and 84.06(g)

The undersigned counsel for *amicus curiae* St. Louis Post-Dispatch, L.L.C. states:

1) The foregoing brief contains 3996 words, which is within the applicable limitations in length set forth in Rule 84.06(b); and

2) *Amicus curiae* St. Louis Post-Dispatch, LLC is filing a floppy disk pursuant to Rule 84.06(g), appropriately labeled, containing the brief in Microsoft Word format. The submitted disk has been scanned for viruses, and the virus-scanning software has reported that the disk is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing Brief of Amicus Curiae St. Louis Post-Dispatch, L.L.C., together with a virus free 3½" disc containing the brief in Microsoft Word 2000, were served, by placing same in the United States Mail, postage prepaid, this 18th day of September, 2002 to:

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