IN THE SUPREME COURT OF THE STATE OF MISSOURI

No. SC95175

**MARY ANN SMITH, D/B/A/ SMITH'S KENNEL,**
**APPELLANT,**

**vs.**

**THE HUMANE SOCIETY OF THE UNITED STATES and**
**MISSOURIANS FOR THE PROTECTION OF DOGS,**
**RESPONDENTS.**

**On Appeal from the Circuit Court of Dent County, Missouri**

# BRIEF OF AMICUS CURIAE THE MISSOURI PRESS ASSOCIATION

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## INTEREST OF AMICUS CURIAE

Amicus Curiae The Missouri Press Association represents approximately 250 newspapers throughout Missouri. Its members cover news on a local, regional, statewide and national basis on a daily or weekly cycle, but just as importantly, the member newspapers regularly offer commentary to their readers in the form of editorials about issues in their papers. Further, the newspapers also periodically offer specially-authored columns written on subjects of interest to their readers and also many offer letters to the editor from readers who wish to discuss local, regional or national events.

These articles of commentary on the news are as important to the newspaper as the news coverage. Few communities today have street corners where citizens gather to discuss events of interest. Instead, these discussions take place in the newspapers' editorial pages and in comments of citizens regarding the stories that are posted on the newspapers' websites. These editorial comments arise from news reports of matters of legitimate public interest. And while website comments are a product of this digital age, the letters to the editor and special columns have been integral to newspapers' operation since the earliest days of publications in the United States.

The Missouri Press Association was organized in 1867 for the purpose of furthering efficiency and morality in the newspaper field, promoting and improving the journalism profession, and to make the profession of journalism more beneficial to the people of Missouri. The Association was incorporated in 1922 as a not-for-profit corporation. Since inception, the Association has served as a spokesman on journalism activities for those in the newspaper field in Missouri.

The Amicus has a longstanding interest in preserving the right of the public to receive

news and commentary about important public events and activities. Participation in such discussion and consideration of these varied opinions allows citizens to participate in their community.

Amicus submits this brief to explore further the existing case law relating to the First Amendment rights of Missourians, particularly its newspapers, and the federal and state decisions which form the framework for this privilege. It pesents the perspective as to the importance of this privilege to its members. Due to the far-reaching effect a decision on this issue will have on editors of the state's newspapers, it is appropriate that Amicus be given the opportunity to weigh in on the trial court and appellate decision and the position taken by the Appellant and Respondents before this Court.

## STATEMENT OF FACTS

The Amicus Curiae hereby adopt the statement of facts submitted by the Respondents in this matter.

## POINT RELIED ON

**The appellate court erred in reversing the trial court's order dismissing the Appellant's petition because the Appellant had not properly pleaded that statements made by Respondents allegedly placed the Appellant before the public in a false light, in that a false light cause of action may not be pleaded upon the basis of statements of opinion which cannot constitute false statements.**

*Meyerkord v. Zipatoni Co.,* 276 S.W.3d 319 (Mo.App. E.D. 2008)

*Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695, 497 U.S. 1, 111L.Ed.2d. 1 (1990)

*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)

## ARGUMENT

> *I do not agree with a word you say, but I will defend to the death your right to say it.* – Attributed to Francois Marie Arouet de Voltaire, 18th Century French philosopher, historian, dramatist and essayist.

**The appellate court erred in reversing the trial court's order dismissing the Appellant's petition because the Appellant had not properly pleaded that statements made by Respondents allegedly placed the Appellant before the public in a false light, in that a false light cause of action may not be pleaded upon the basis of statements of opinion which cannot constitute false statements.**

Publishers of Missouri newspapers regularly write editorial pieces based upon matters which are of significant public concern. A journalist who writes such opinion pieces must review a significant amount of material and then summarize what he or she has learned and explain the foundation for his or her conclusions. This writing form is used not just by journalists, of course, but is used by many persons who are advocating for a particular position. Advocacy journalism, in its purest form, requires distilling large amounts of data to reach conclusions. And those conclusions are the most personal writing there can be, because they represent each person's opinion about what they have read, and distilled, and internalized.

This Court's determination of the issues presented in the arguments by Appellant and Respondents in this matter are of significant interest to all those who create opinion journalism, in all its forms. A decision by this Court as to whether the facts in this case

support a pleading of false light invasion of privacy, and to what degree a statement meant to be clearly opinion becomes actionable, cannot help but either support the right to express such opinions or significantly damper that right.

Appellant's Claim in Regard to Defamation

Appellant argues that she has properly pled a cause of action for defamation because the Respondents' reports and press releases were not mere opinion but were false statements of fact. This Amicus believes that existing case law is clear that these articles were opinion pieces and that they fall within existing case law protecting the statements of opinions as privileged and not subject to defamation causes of action.

Early common law did not focus, in its determination of whether a statement was actionable, on whether the statement was factual or opinion. Both could be the subject of a cause of action. *Milkovich v. Lorain Journal Co.*, 110 S.Ct. at 2695, 2702, 497 U.S. 1, 13, 111L.Ed.2d. 1 (1990). Instead, the doctrine of "fair comment" as an affirmative defense to defamation was seen as providing the proper latitude within public debate. Later, requirements that there be some showing of fault in order to impose liability for defamatory falsehood and the recognition of the need to show falsity and fault in speech relating to public concerns were established by courts. *Milkovich,* 110 S.Ct. at 2704, 497 U.S., at16.

But as these developments in case law were created, there was also a recognition among the courts, as *Milkovich* notes, that protection of speech under the First Amendment required a recognition that not all speech should be taken literally. In *Greenbelt Cooperative Publishing Assn., Inc., v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970), the Court spoke of the use of the term "blackmail" in a newspaper article, saying "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole...."

*Id.*, 398 U.S., at 13-14, 90 S.Ct., at 1541-1542.

And in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), while admitting there was no value in false statements of fact, the Court recognized, "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz,* 418 U.S., at 339-340, 94 S.Ct., at 3007 (footnote omitted).

The importance of this distinction is that one cannot bring a defamation case upon a statement that is solely opinion. Other cases have added additional protections, under certain circumstances, for situations involving matters of public concern and for statements that are "imaginative" or containing "rhetorical hyperbole."[1] And *Milkovich,* 110 S.Ct. at 2707, 497 U.S., at 20, also notes the fault standard – known falsity or reckless disregard of truth – in cases of a private figure and a statement about a matter of public concern, as set out in *Gertz, id.*

The Amicus believes it is important, given the context of this case, that a footnote of the Court in *Milkovich* regarding controversial statements be noted. In that opinion, in regard to its statement related to a private figure on a matter of public concern, in footnote 8, the Court noted that "Where readers know that an author represents one side in a controversy, they are properly warned to expect that the opinions expressed may rest on passion rather than factual foundation." *Milkovich,* 110 S.Ct. at 2707, 497 U.S., at 21 n.8. That footnote continues to note the facts in two other cases where the source of the content creates a

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1As cited in *Milkovich,* 110 S.Ct., at 2706, 497 U.S., at 19-20, the Amicus references *Philadelphia Newspapers, Inc., v. Hepps,* 475 U.S. 767, 1206 S.Ct. 1558, 80 L.Ed.2d 783 (1986), and the *Bresler-Letter Carriers-Falwell* line of cases cited in *Hustler Magazine, Inc., v. Falwell,* 485 U.S.46, at 50, 108 S.Ct. 876, at 879, 99 L.Ed.2d 41 (1988).

presumption that the statements made are unlikely to be statements of fact but more likely the viewpoint of the one making those statements.

The appellant in this matter has claimed defamation in regard to statements which she sets out in her Statement of Facts, citing that her business was termed among "the worst puppy mills in Missouri." (L.F. 21-22) But the statements she sets out in her statement of facts that relate solely to the Appellant are no more than just the opinion of the Respondents, based on their review of their research. It is true that the Respondents do provide research about a number of operations in the State, but their report clearly is a statement of their opinion and conclusions based upon their review of the totality of their research. It clearly sets out it is an advocacy piece by organizations with a goal of persuading readers that this opinion is one which should be followed.

Similarly, newspaper editorials frequently are written as an analysis of a large volume of information. Newspapers create advocacy content in order to persuade their readers that their opinions have merit. The fact that they may contain statements that are "imaginative" or "passionate" do not change the fact that they are opinion pieces and should be permitted within the leeway that has existed within the line of cases cited above.

Similarly, not every statement that is verifiable is not an opinion. "...[I]t may still be protected if it can best be understood from its language and context to represent the personal view of the author or speaker who made it." *Potomac Valve & Fitting Inc., v Crawford Fitting Co.*, 829 F.2d 1280, 1288 (C.A. 4 (VA), 1987). Given the source of the statements complained of by the Appellant, the Amicus believes most readers would not expect statements made by the organizations who are the Respondents to be anything but their strongly-held opinions about the subject which is the basis of this litigation.

In both situations, existing law establishes a safeguard which allows statements of

advocacy to be recognized as opinions rather than strictly statements of fact which are clearly either true or false. Therefore, because the statement that Appellant's operation is a "puppy mill" is not a "statements of fact," as is required in the elements of a defamation case, Appellant's petition should be dismissed.

Appellant's Claim in Regard to False Light

Appellant's second point relates to her claim that a cause of action exists under Missouri law for false light invasion of privacy. The statements made by Respondents, Appellant argues, placed her before the public in a false light. But, again, the Appellant fails to recognize that the statement made is solely an opinion of the Respondents and therefore her cause of action fails.

The Amicus agrees with the Appellant's statement of the elements of the tort of false light invasion of privacy. The publicity must put the plaintiff in a false light before the public that is highly offensive to the plaintiff and the plaintiff must show the speaker had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light thereby created.

However, the Amicus refers again to the argument which is set out in the section above regarding whether these statements were opinion or statements of fact, and the conclusion that Amicus argues is that the statements were opinion. If they are statements of opinion, then they cannot be proven to be true or false. They cannot place a person in a "false light" because they are not false statements, but are opinions.

One of the early cases in Missouri addressing the tort of false light invasion of privacy supports this interpretation of the elements of the tort, noting "Unlike the other three categories in the Restatement (Second) of Torts § 652A, where truth or falsity is *not* an issue,

the "false light" theory under § 652E resembles a defamation suit because each action requires the publication of false information." (Emphasis in original, footnote omitted). *Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d 475, 478 (Mo. 1986). If the information published is "opinion," it cannot be "false information." The Amicus sees no inconsistency in Respondents' argument as to these causes of action. Appellant has indeed failed to plead a cause of action in false light because she claims the statements were defamatory when they were not factual statements at all, but were statements of opinion. Further, Appellant cannot argue that the Respondents "had knowledge of or acted in reckless disregard as to the falsity" of the alleged material, as the element requires, if the material constitutes an opinion and cannot be true or false.

If this Court declines to recognize that the statements which are the foundation of this action are "opinions" rather than "false statements," then clearly that brings the allegations of the Appellant within the earlier holding of this Court in *Nazeri v. Missouri Valley College,* 860 S.W.2d 303, at 317, (1993), where this Court held that it "declined to recognize a cause of action for invasion of privacy when recovery is sought for untrue statements."

Further support for this position is to be found in the holding of *Meyerkord v. Zipatoni Co.,* 276 S.W.3d 319 (Mo.App. E.D. 2008) , where the appellate court looked at a false light invasion of privacy case and weighed the proper factual setting for framing such a tort. Citing the Restatement (Second) of Torts §652E, cmt. B (1977), the court held that a proper setting is where one "is given unreasonable and highly objectionable publicity that attributes to him or her characteristics, conduct, or beliefs that are false, and so is placed before the public in a false position." *Meyerkord,* at 323. Once again, in analyzing what set of facts would give rise to this tort, a court has held that false statements would be required. But given that the statements made by the Respondents were statements of opinion, incapable of

being proven true or false, then this set of facts fails to fall within the perimeter set out in the Restatement (Second) of Torts for a "false light" cause of action.

And the court in *Meyerkord* continues, quoting directly from *Welling v. Weinfeld,* 113 Ohio St.3d 464, 866 N.E.2d 1051, 1057 (2007), stating, "On the other hand, the plaintiff's privacy is not invaded when unimportant false statements are made, even when they are made deliberately. *Id.* at 1058. It is only when there is such a major misrepresentation of one's character, history, activities, or beliefs that serious offense may reasonably be expected to be taken by a reasonable person in his or her position, that there is a cause of action for invasion of privacy." *Meyerkord,* at 323. Again, the court is focusing on "false statements," rather than statements of opinion.[2]

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2The Amicus notes that the *Meyerkord* case cites to *West v. Media General Convergence, Inc.,* 53 S.W.3d 640 (Tenn. 2001), a case where the false light claim was recognized. That case, in which the Tennessee Supreme Court recognizes the cause of action for false light, has in its footnote 6 an illustration taken from Restatement (Second) of Torts (1977) wherein Prosser, outlines the false light cause of action as a category of the invasion of privacy tort, and in that Section §652E, Comment b, Illustration 4, it states: "A is a democrat. B induces him to sign a petition nominating C for office. A discovers that C is a Republican and demands that B remove his name from the petition. B refuses to do so and continues public circulation of the petition, bearing A's name. B is subject to liability to A for invasion of privacy." Again, the Amicus points out that this example is where a factual statement is made about A. There is no indication the cause of action for false light was to apply to opinions which are made about the plaintiff.

## CONCLUSION

For the reasons stated herein, Amicus urges this Court to overturn the Appellate Court's Order reversing the trial court's judgment, to affirm the trial court's judgment, and for such other and further relief as this Court deems just and proper in this matter.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2016, a copy of the foregoing document was served electronically upon the counsel for Appellant and Respondent via the Missouri eFiling system and that the original pleading was signed by the attorney for the Amicus.

Further, the undersigned certifies that the brief above contains 3,318 words (no lines are single spaced), has been scanned for viruses and is virus-free, and complies with the provisions contained in Supreme Court Rule 84.06 (b).

/s/ Jean Maneke
Jean Maneke