

Spring 2004

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Recommended Citation

J. Andrew Hirth, *Laying to Rest the Ecclesiastical Presumption of Falsity: Why the Missouri Approved Instructions Should Include Falsity as an Element of Defamation*, 69 MO. L. REV. (2004)
Available at: <https://scholarship.law.missouri.edu/mlr/vol69/iss2/5>

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Laying to Rest the Ecclesiastical Presumption of Falsity: Why the Missouri Approved Instructions Should Include Falsity as an Element of Defamation

*Kenney v. Wal-Mart Stores, Inc.*¹

*“Thou shalt not go up and down as a talebearer among thy people.”*²

I. INTRODUCTION

Calumny has been condemned at least since the time of Moses,³ with the Romans expanding its punishment to include written defamation as far back as the fifth century before the common era.⁴ Continually modified by kings, ecclesiastical courts, state legislatures, and the United States Supreme Court, the modern law of defamation is a thicket of presumptions, privileges, and plaintiff-specific pleadings. As the state’s interest in protecting the reputation of citizens is increasingly weighed against the First Amendment’s guarantee of free speech, the balance has tipped more and more in favor of protecting speech. Government officials were the first to bear this shifting burden,⁵ and today even private plaintiffs must prove a statement of public concern is false to recover against a media defendant.⁶

But the inroads of the United States Constitution into common law causes of action are slow and muddy, leaving substantial potholes for state courts to fill. The Missouri Supreme Court had the chance to fill one such pothole in *Kenny v. Wal-Mart Stores, Inc.*,⁷ by deciding whether truth is an affirmative defense to

1. 100 S.W.3d 809 (Mo. 2003) (en banc).

2. *Leviticus* 19:16 (King James).

3. “Thou shalt not bear false witness against thy neighbour.” *Exodus* 20:16 (King James). “Thou shalt not raise a false report: put not thine hand with the wicked to be an unrighteous witness.” *Id.* at 23:1.

4. PETER F. CARTER-RUCK, *LIBEL AND SLANDER* 35 (1973). “At the time of the Decemvirs (450 b.c.) we find that the offence of written defamation, known as *famosus libellus*, was actually punishable by death . . .” *Id.*

5. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (“The constitution[] . . . prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ . . .”).

6. See *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (“[A] private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant.”).

7. 100 S.W.3d 809 (Mo. 2003) (en banc).

libel, as suggested by statute,⁸ or whether falsity is an element of the plaintiff's prima facie case, as suggested by the United States Supreme Court.⁹ *Kenney* dodged the issue, however, reversing instead because the plaintiff had failed to prove actual damage to her reputation as required under *Nazeri v. Missouri Valley College*.¹⁰ And yet the *Nazeri* court's requirement of proving actual damages followed from that court's elimination of the distinction between *per se* and *per quod* defamation, the same distinction that had historically determined whether the falsity of the defendant's statement could be presumed.¹¹ Thus, even though *Kenney* claimed to have left the question of proving falsity unresolved,¹² the court's decision in *Nazeri* may have provided the answer ten years earlier. This Note explores the origins of the plaintiff's presumption of falsity and argues that, after *Nazeri*, the burden of proving falsity must be borne by the plaintiff in every case.

II. FACTS AND HOLDING

Lauren Kenney ("Lauren") was born on April 13, 1995,¹³ to Angela Mueller¹⁴ ("Angela") and Angela's then boyfriend Christopher Kenney ("Christopher"), the son of Plaintiff Carolyn Kenney ("Carolyn"). When the couple separated, they obtained no court order determining custody or visitation; however, both agreed that Lauren should live with Angela and that Christopher should have regular biweekly visits.¹⁵ Usually, Christopher would ask his mother Carolyn to drive Lauren from Angela's house to her own every other weekend where Christopher would join them for his visitation.¹⁶

One of Christopher's scheduled visits fell on Labor Day weekend of 1996.¹⁷ During the preceding week, he learned—or at least believed—that Angela was planning to relocate herself and Lauren to Georgia.¹⁸ On Friday, August 30, Carolyn picked Lauren up from Angela's house in a white Honda Accord with

8. MO. REV. STAT. § 509.090 (2000). "In pleading to a preceding pleading, a party shall set forth affirmatively . . . truth in defamation . . . and any other matter constituting an avoidance or affirmative defense." *Id.*

9. *See supra* notes 5-6.

10. 860 S.W.2d 303, 313 (Mo. 1993) (en banc).

11. *See infra* notes 80-84 and accompanying text.

12. *Kenney*, 100 S.W.3d at 814 n.2.

13. *Kenney v. Wal-Mart Stores, Inc.*, No. WD 59936, 2002 Mo. Ct. App. LEXIS 1801, at *3 (Mo. Ct. App. Aug. 30, 2002), *rev'd*, 100 S.W.3d 809 (Mo. 2003) (en banc).

14. At the time their child was born, Angela's surname was Miles. *Kenney*, 100 S.W.3d at 811.

15. *Id.*

16. *Id.*

17. *Kenney*, 2002 Mo. Ct. App. LEXIS 1801, at *4.

18. *Id.*

no visible license plates.¹⁹ At the same time, Christopher filed a paternity action in Clay County, Missouri, and scheduled a hearing for the following Tuesday, September 3 to establish custody.²⁰ On Saturday morning, Christopher and Carolyn took Lauren to a friend's house at the Lake of the Ozarks where Christopher called Angela to inform her of Tuesday's hearing and of his intention to keep their daughter.²¹ He refused to tell Angela where Lauren was.²²

On Sunday, September 1, Angela filed a missing person's report with the Kansas City Police Department and posted approximately one hundred missing child posters around the Kansas City Area.²³ She placed one of these posters in a Missing Children's Network display case at the Wal-Mart store in Lee's Summit, Missouri.²⁴ At the custody hearing, the judge awarded custody of Lauren to Angela and Christopher surrendered the girl to Angela.²⁵ The missing child poster was not removed from the Lee's Summit Wal-Mart for several days, however, despite the fact that three people on four separate occasions informed the store's management that the poster was inaccurate.²⁶

Just under two years²⁷ later, Carolyn filed a petition for defamation against Wal-Mart²⁸ in Jackson County, Missouri, for failing to remove the poster from its Lee's Summit store after Lauren was returned to her mother.²⁹ The case was tried before a jury who awarded Carolyn \$33,750 in actual damages and

19. *Id.*

20. *Id.*

21. *Id.* at *4-5.

22. *Id.* at *5.

23. *Kenney v. Wal-Mart Stores, Inc.*, 100 S.W.3d 809, 811 (Mo. 2003) (en banc). The poster showed a picture of Lauren with Carolyn and read as follows: "Last seen 1:30 p.m. on 8/30/96 leaving her home with paternal grandmother, Carolyn Kenney, in a 1996 or 1997 white Honda Accord, no visible license plate, now with father Christopher Kenney, and grandmother at unknown location." *Id.* Angela also contacted a local television station which broadcast a missing child report identifying Lauren as in the custody of Carolyn and Christopher Kenney. *Id.*; see also *Kenney v. Scripps Howard Broad. Co.*, 259 F.3d 922 (8th Cir. 2001) (in which Carolyn sued the television station for libel).

24. *Kenney*, 100 S.W.3d at 811.

25. *Kenney*, 2002 Mo. Ct. App. LEXIS 1801, at *7.

26. *Kenney*, 100 S.W.3d at 812.

27. The statute of limitations for defamation claims in Missouri is two years. MO. REV. STAT. § 516.140 (2000).

28. She had also previously sued KSHB-TV, the television station that aired the missing child report. *Kenney*, 100 S.W.3d at 812 n.1. Carolyn lost her first suit on summary judgment due to the fair report privilege. *Id.*; see *Kenney v. Scripps Howard Broad. Co.*, 259 F.3d 922 (8th Cir. 2001).

29. *Kenney*, 2002 Mo. Ct. App. LEXIS 1801, at *7-8.

\$392,083 in punitive damages.³⁰ Wal-Mart appealed on eight grounds,³¹ only the last of which gave the court of appeals pause: the Missouri Approved Jury Instruction 23.06(1), upon which the court modeled its verdict director, contradicted the Missouri Supreme Court's holding in *Overcast v. Billings Mutual Insurance Co.*³² by omitting the element of falsity from the prima facie claim and instead treating truth as an affirmative defense.³³ After noting that Wal-Mart had not preserved the issue for appeal,³⁴ the court of appeals nevertheless held that such a contradiction constituted plain error³⁵ because it resulted in "a miscarriage of justice to the appellant."³⁶ In view of conflicting precedents and MAI instructions,³⁷ the court of appeals not only reversed and remanded, but transferred the case to the Missouri Supreme Court under Rule 83.02³⁸ because it believed that "this case presents questions of general interest

30. *Id.* at *9. Wal-Mart's prior motions for directed verdict, as well as its subsequent motions for J.N.O.V. or a new trial in the alternative, were all overruled. *Id.* at *8-9.

31. Wal-Mart's first seven claims of error alleged that there was insufficient evidence to establish that the poster's statements were defamatory in nature, that Wal-Mart intentionally published or negligently published the poster, and that the publication damaged Carolyn; that Wal-Mart had not proven the poster was substantially true; that the poster was privileged under the fair report doctrine; and that punitive damages were inappropriate absent a showing of actual malice. *Id.* at *2.

32. 11 S.W.3d 62, 70 (Mo. 2000) (en banc). "The elements of defamation in Missouri are: 1) publication, 2) of a defamatory statement, 3) that identifies the plaintiff, 4) that is false, 5) that is published with the requisite degree of fault, and 6) damages the plaintiff's reputation." *Kenney*, 2002 Mo. Ct. App. LEXIS 1801, at *17 (emphasis added) (citing *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303 (Mo. 1993) (en banc)).

33. *Kenney*, 2002 Mo. Ct. App. LEXIS 1801, at *21.

34. *Id.* at *22-23.

35. *Id.* at *24. "[T]he law is well settled that in cases of such conflict, the law is to prevail over the applicable MAI instruction. . . . [T]he law is the dog and the MAI is the tail, and the latter cannot wag the former, such that the applicable MAI instruction must reflect the existing law, not vice versa." *Id.* at *19.

36. *Id.* at *35. "[H]ad the jury been properly instructed, with the burden being placed on the respondent to show that the alleged defamatory statements in the poster were false, the outcome of this case may very well have been different." *Id.* at *34.

37. *Compare Nazeri*, 860 S.W.2d at 313 (comporting with the five element proof of defamation in MAI 23.06(1) in which falsity is not an element), with *Overcast*, 11 S.W.3d at 70 (enumerating six elements of defamation, including falsity, citing *Nazeri* without specific page reference).

38. MO. SUP. CT. R. 83.02:

A case disposed of by an opinion, memorandum decision, written order, or order of dismissal in the court of appeals may be transferred to this Court by order of a majority of the participating judges, regular and special, on their own motion or on application of a party. Transfer may be ordered because of the general interest or importance of a question involved in the case or for the

and importance and the existing law of defamation needs re-examining.”³⁹

This request was not honored by the supreme court, which relegated the issue of truth or falsity to a footnote,⁴⁰ and instead focused its inquiry on the element of damage. The court held that the trial court’s verdict director impermissibly modified MAI 23.06(1) by removing the requirement of actual damage to reputation.⁴¹ In so holding, the court relied on its earlier decision in *Nazeri v. Missouri Valley College*, which abandoned the distinction between *per se* and *per quod* defamation such that plaintiffs need no longer “concern themselves with whether the defamation was *per se* . . . , but must prove actual damages in all cases.”⁴² The court remanded, noting that although Carolyn “may face substantial obstacles in meeting her burden of proof on retrial, this Court cannot say that it is impossible for her to present a submissible case.”⁴³ The court left unanswered the question of whether her burden of proof included the falsity of the poster.

III. LEGAL BACKGROUND

A. *From Manorial Courts to Missouri Courts: Defamation at Common Law*

The early Anglo-Saxon common law of defamation was concerned only with slander, an offense for which the guilty speaker could choose his tongue or his life.⁴⁴ After the Norman invasion, slander cases were triaged into different courts depending on the person disparaged and the resulting injury.⁴⁵ Slander

purpose of reexamining existing law.

39. *Kenney*, 2002 Mo. Ct. App. LEXIS 1801, at *42.

40. *Kenney v. Wal-Mart Stores, Inc.*, 100 S.W.3d 809, 814 n.2 (Mo. 2003) (en banc).

Wal-Mart also raised whether “truth” is an affirmative defense to be proved by defendant, or “falsity” is an element of the cause of action to be proved by plaintiff. Language in our recent cases . . . suggest[s] different answers to this issue This Court does not address the issue here and leaves it unresolved.

Id.

41. *Id.* at 814. The trial court modified MAI 23.06(1) in its verdict director by changing the approved language of “Fifth, the plaintiff’s *reputation* was thereby damaged,” to “Fifth, the poster directly caused or directly contributed to cause *damage* to Plaintiff.” *Id.* at 813.

42. *Id.* at 815 (quoting *Nazeri*, 860 S.W.2d at 313).

43. *Id.* at 818.

44. *CARTER-RUCK*, *supra* note 4, at 36.

45. *Id.* at 37. After the Norman invasion of England, there were three types of courts in the country: the king’s courts, the manorial courts (those presided over by local barons), and the ecclesiastical courts. *Id.*

against one's lord or king became a criminal offense to be tried in the king's courts.⁴⁶ Those of less than noble birth could also maintain an action for slander in their local manorial courts but only if the slander were accompanied by an assault or the destruction of property.⁴⁷

As the manorial courts began to decay, the ecclesiastical courts expanded their jurisdiction to include slander as a sin and sentenced the guilty to penance.⁴⁸ By the sixteenth century, the king's courts had also begun to hear tort actions for slander which led to many jurisdictional conflicts; in order to limit the number of defamation cases in the royal courts, the king's bench eventually held that absent "temporal" damage, slander caused only "spiritual" harm and belonged in the purview of the church.⁴⁹ When the ecclesiastical courts were eventually dismantled, the royal courts absorbed only those "spiritual" assaults for which a concomitant temporal injury could be presumed, i.e. slanders imputing a serious crime, a "loathsome" disease, a lack of chastity (only actionable by women), or a lack of professional integrity or ability.⁵⁰ These imported slanders were actionable *per se*, while all others were actionable *per quod* and required proof of special damages.⁵¹

Although there are a few references to libel in early English common law,⁵² the cause of action was not widely tried before the advent of the printing press in the fifteenth century when the infamous Star Chamber Court began to punish seditious political publications under the law of libel.⁵³ Since the Chamber also punished the sending of disparaging letters meant to incite duels,⁵⁴ it began to award private tort damages for libelous personal attacks as a means of discouraging self-help.⁵⁵ When the Star Chamber was abolished, the royal courts swept both the criminal and civil law of libel within their jurisdiction.⁵⁶

As they had with slander, the royal courts divided actions for libel into *per se* and *per quod* categories, though the distinction was different than that used for slander and carried different consequences: to be libelous *per se*, the defamatory nature of the written publication must have been self-evident, whereas libels *per quod* required resort to extrinsic facts.⁵⁷ While this distinction

46. *Id.* at 37-38.

47. *Id.* at 38.

48. William L. Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 841 (1960).

49. *Id.*

50. *Id.*

51. *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 308 (Mo. 1993) (en banc).

52. See CARTER-RUCK, *supra* note 4, at 36.

53. Prosser, *supra* note 48.

54. CARTER-RUCK, *supra* note 4, at 39.

55. Prosser, *supra* note 48.

56. *Id.*

57. *Id.* at 839-40. For example, a newspaper article reporting that a woman had been carrying on an extramarital affair would be actionable *per se*. *Id.* By contrast, an

determined whether a plaintiff had to prove that the publication was defamatory, it had no effect on damages: at common law (and in modern English law), all libel was presumed to cause damage.⁵⁸

The presumption of damage in all libel actions continued into the American common law until 1877 when the Nebraska Supreme Court⁵⁹ first required proof of actual damage for libel unless the words were actionable *per se*.⁶⁰ Other states followed Nebraska's lead, and by the mid twentieth century most states, arguably including Missouri,⁶¹ required the plaintiff to plead and to prove actual damages for libel *per quod*.⁶² Thus, the American common law of defamation has memorialized "the ancient conflict of jurisdiction between the royal and ecclesiastical courts of England"⁶³ by expanding the ecclesiastical presumption of damage into both slander and libel *per se* while requiring proof of actual damage for slander and libel *per quod*.⁶⁴

B. Other Ecclesiastical Echoes in the Law of Defamation: The Presumption of Falsity

When the Missouri Supreme Court eventually abolished the *per se/per quod* distinction in *Nazeri v. Missouri Valley College*, the court noted that "[t]he consequences of [the ecclesiastical] anachronism were of more than academic interest. The presumed damages/special damages distinction controlled the right of plaintiffs to bring a defamation claim, even though it bore little relationship to either the magnitude of a plaintiff's injury or the wrongfulness of a

article reporting that a woman had given birth, combined with the reader's knowledge that she was unmarried, would be libel *per quod*. *Id.* at 840.

58. *Id.* at 842. That all libels presumed damages but most slanders did not is probably a function of "the undue reverence of an illiterate nation for the written or printed word, which might well be expected to make libel more damaging." *Id.*

59. See *Geisler v. Brown*, 6 Neb. 254, 259 (1877):

[N]ot every false charge against an individual . . . is sufficient to sustain an action for damages. In order to authorize a recovery the plaintiff must aver in his petition, and prove on the trial, that he has sustained some special damages from the publication of the alleged libel, unless the nature of the charge is such that the words are actionable *per se*.

60. Prosser, *supra* note 48, at 843-44.

61. Missouri arguably adopted this new rule in *Creekmore v. Runnels*, 224 S.W.2d 1007 (Mo. 1949). Prosser, *supra* note 48, at 846 n.47.

62. See Prosser, *supra* note 48, at 844-48 nn.21-62. Some have argued that this change in the common law rule was the result of systemic misunderstanding of the distinctions between slander and libel, but Prosser argues that the "American" rule is more logical since a libel *per quod* is incomplete without proof of extrinsic facts that, when combined with the libelous text, result in damage to the plaintiff. *Id.* at 848-49.

63. *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 308 (Mo. 1993) (en banc).

64. *Id.*

defendant's conduct."⁶⁵ The presumption of damage, however, was but one factor controlling the plaintiff's defamation claim. Of equal import was the concomitant presumption of falsity.

At common law, there were three elements of defamation: (1) a defamatory statement, (2) referring to the plaintiff, and (3) published to a third person.⁶⁶ As these were the only elements of the plaintiff's prima facie case, "it follows that certain presumptions [were] made" in the plaintiff's favor.⁶⁷ First, "it [was] presumed in all actions for defamation that the matter complained of [was] untrue"⁶⁸ Secondly, as discussed above, it was also presumed in all actions for libel and in all actions for slander *per se* that the plaintiff suffered damage.⁶⁹ The latter was a vestige of ecclesiastical jurisdiction, but whence did the presumption of falsity arise?

Historically, no court required a plaintiff to prove that her reputation was good before hearing an action for defamation; however, all courts have allowed the defendant an affirmative defense of truth.⁷⁰ Since proving the truth of the defamatory statement would not undo the damage to the plaintiff's reputation,⁷¹ the basis for this affirmative defense must be other than rebutting the presumption of damage. The explanation lies in the fact that the ecclesiastical courts viewed the injury to one's reputation as spiritual damage.⁷² Impugning the plaintiff's character caused her psychic damage because it damaged her good name.⁷³ But such damage presupposes the good character of the plaintiff. If the defendant's statements were true, then his words would merely reflect the plaintiff's preexisting spiritual damage; they would not be the cause of any new

65. *Id.*

66. CARTER-RUCK, *supra* note 4, at 50; *cf.* MO. APPROVED INSTR. NOS. 23.06, 23.09 (1969).

67. CARTER-RUCK, *supra* note 4, at 50.

68. *Id.*

69. *Id.*

70. *Id.* at 105-06.

71. As William Murray, the chief justice of the king's bench in 1784, once observed, "The greater the truth, the greater the libel." DAVID S. SHRAGER & ELIZABETH FROST, *THE QUOTABLE LAWYER* 307 (1986).

72. *See supra* notes 49-50 and accompanying text.

73. Psychic damage was not simply a judicial fiction but a matter of cultural belief, as explained by Shakespeare's Iago:

Good name in man and woman, dear my lord,
Is the immediate jewel of their souls:
Who steals my purse steals trash; 'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him
And makes me poor indeed.

WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 3.

damage. Even though a secretly wicked plaintiff's reputation might be damaged by a truthful defamatory statement, her soul would have been damaged already and could not be harmed further by revealing the truth of her character. Thus, in the view of the ecclesiastical courts, rebutting the presumption of falsity also rebutted the presumption of spiritual, if not reputational, damage.

Although the presumption of falsity followed the rest of English common law across the ocean, American courts have altered the presumption over time and limited its application to cases of *per se* defamation. In *Walker v. Kansas City Star Co.*,⁷⁴ the Missouri Supreme Court considered whether a plaintiff defamed by accusations of sedition, conspiracy, and assault upon federal officers⁷⁵ was required to plead that the accusations were false. In that case the Kansas City Star had published several articles about rioting in Oxford, Mississippi, following the enrollment of an African-American student at the University of Mississippi.⁷⁶ Throughout its articles and headlines, the paper named former Major General Edwin Walker as the leader of one of the student charges against federal marshals guarding the door of the dormitory.⁷⁷ Walker sued the paper for libel but his action was dismissed for failure to state a claim, namely that he had failed to allege that the articles were false.⁷⁸ The supreme court reversed the dismissal and remanded for trial, holding that the "plaintiff need not plead falsity in a case of libel *per se* where he is not required to prove falsity."⁷⁹

The *Walker* court found that "[t]he essential facts [of libel] are the falsity of the charge, and its publication and libelous nature,"⁸⁰ and noted several prior cases that had been dismissed for failure to allege falsity.⁸¹ However, the court also observed that averments of falsity were not required in all cases:

In some cases, [like one] dealing with whether plaintiff owed a certain sum of money as stated by defendant, there is no cause of action unless the statement is alleged to be false. On the other hand, *there are cases in which falsity need not be alleged, e.g. . . . where the words are actionable per se . . .*⁸²

74. 406 S.W.2d 44 (Mo. 1966).

75. *Id.* at 52.

76. *Id.* at 46.

77. *Id.* at 47.

78. *Id.* at 50.

79. *Id.* at 53.

80. *Id.* at 52 (quoting *McDonald v. R. L. Polk & Co.*, 142 S.W.2d 635, 638 (Mo. 1940)).

81. See *Holliday v. Great Atl. & Pac. Tea Co.*, 256 F.2d 297, 302 (8th Cir. 1958); *Fritschle v. Kettle River Co.*, 139 S.W.2d 948, 950 (Mo. 1940).

82. *Walker*, 406 S.W.2d at 52 (emphasis added).

Under *Walker*, falsity is not an element of libel *per se* because the words are actionable by themselves, given the plaintiff's presumptively good reputation. By contrast, libel *per quod* requires that the plaintiff allege falsity because "there is no cause of action unless the statement is alleged to be false."⁸³ Although the court did not unearth the origins of the *per se* and *per quod* distinction, its holding reflects the same "ancient conflict of jurisdiction between the royal and ecclesiastical courts"⁸⁴ that led to a presumption of damage in cases of defamation *per se*.

C. *The First Amendment and the Presumptions of Damage and Falsity*

The extension of ecclesiastical presumptions from slander to libel is not the only alteration American courts have made to the common law of defamation. Of far greater impact are the United States Supreme Court decisions in *New York Times Co. v. Sullivan*⁸⁵ and its progeny, reexamining the torts of libel and slander in view of the First Amendment. One consequence of these decisions, although not the main one, has been the gradual erosion of the ecclesiastical presumptions of damage and falsity in *per se* defamation suits.

In *Sullivan*, the Supreme Court first imposed the guarantees of free speech and press on cases involving libel of "public officials" by requiring such plaintiffs to prove that the defendant's speech was motivated by "actual malice."⁸⁶ A decade later in *Gertz v. Robert Welch, Inc.*,⁸⁷ the Court extended similar protection to those who allegedly defamed private figures by requiring even private plaintiffs to prove actual malice in order to sustain *presumed* or punitive damages.⁸⁸ In the absence of actual malice, private plaintiffs were required to prove—and could only recover for—actual injury.⁸⁹ In short, *Gertz* seemed to eliminate the ecclesiastical presumption of damage by requiring plaintiffs in all cases, whether *per se* or *per quod*, to prove either actual malice or actual damages. The *Gertz* Court noted that "[t]he largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily . . . inhibit[s] the vigorous exercise of First Amendment freedoms. . . . States have no substantial interest [in granting] gratuitous awards of money damages far in excess of any actual injury."⁹⁰

83. *Id.*

84. *See supra* note 63.

85. 376 U.S. 254 (1964).

86. *Id.* at 279-80. The requisite proof was a showing that the defendant knew its statements were false or acted with reckless disregard as to whether the statements were true or false. *Id.* at 280.

87. 418 U.S. 323 (1974).

88. *Id.* at 349.

89. *Id.*

90. *Id.*

Given *Gertz*'s attack on the presumption of damage, several states,⁹¹ including Missouri,⁹² interpreted the Court's holding as abrogating the *per se/per quod* distinction.⁹³ However, the Court clarified its *Gertz* holding a decade later by limiting the "actual malice" requirement for private plaintiffs to matters of "public concern."⁹⁴ Missouri courts, like those of other states, were left to ponder whether they should reinstate the common law distinction (and the concomitant presumption of damage) they had abandoned after *Gertz*. In *Nazeri v. Missouri Valley College*,⁹⁵ the Missouri Supreme Court found the *per se/per quod* distinction "more artificial than real," and held "plaintiffs need not concern themselves with whether the defamation was *per se* or *per quod*, nor with whether special damages exist, but must prove actual damages in all cases."⁹⁶ If there had been any doubt after *Gertz*, the *Nazeri* court made clear that the ecclesiastical presumption of damage was abolished in Missouri.

The effect of the First Amendment on the presumption of falsity is less clear. In the aftermath of *Sullivan* and its progeny, Missouri's Model Approved Jury Instructions ("MAI") distinguished between classes of plaintiffs: MAI 23.06(1) covers private plaintiffs while MAI 23.06(2) covers plaintiffs who are public officials or public figures.⁹⁷ The two instructions are similar except that the public plaintiff instruction requires knowledge of falsity or reckless disregard

91. *E.g.*, *Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412, 419 (Tenn. 1978) ("We hold, therefore, that the *Per se/per quod* distinction is no longer a viable one."); *accord* *Gobin v. Globe Publ'g Co.*, 649 P.2d 1239 (Kan. 1982); *Metromedia, Inc. v. Hillman*, 400 A.2d 1117 (Md. 1979); *Agriss v. Roadway Exp., Inc.*, 483 A.2d 456 (Pa. Super. Ct. 1984); *Lent v. Huntoon*, 470 A.2d 1162 (Vt. 1983).

92. In 1980, Missouri changed its approved jury instructions (MAI), eliminating separate instructions for libel and slander *per se* and *per quod*. *Nazeri*, 860 S.W.2d at 310.

93. *Id.* at 309-10.

94. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985). "In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest [in protecting the reputation of its citizens] adequately supports awards of presumed and punitive damages—even absent a showing of 'actual malice.'" *Id.*

95. 860 S.W.2d 303 (Mo. 1993) (en banc).

96. *Id.* at 312-13.

97. MO. APPROVED INSTR. NO. 23.06(1)-(2) (2002).

for truth⁹⁸ where the private plaintiff instruction requires only “fault.”⁹⁹ Further, the instruction for public plaintiffs adds falsity itself as a separate element.¹⁰⁰ The Committee Comment (1990 Revision) to the public plaintiff instruction explained that these two differences “reflect the actual malice requirement of [Sullivan].”¹⁰¹ The third element—knowledge of falsity or reckless disregard for truth—is obviously the result of *Sullivan*.¹⁰² However, including falsity as a separate element of the plaintiff’s prima facie claim requires more explanation since it was not until six years after MAI 23.06(2) was amended that the United States Supreme Court first laid the burden of falsity explicitly on any class of plaintiffs in *Philadelphia Newspapers, Inc. v. Hepps*.¹⁰³

As in the ecclesiastical courts of England, the American defamation plaintiff was traditionally “given the benefit of a rebuttable presumption that the statement was false.”¹⁰⁴ Truth was therefore an affirmative defense at common law¹⁰⁵ and was codified as such in the Missouri Constitution,¹⁰⁶ statute,¹⁰⁷ court

98. The third element requires, defendant (*describe the act of publication such as ‘published such statement’, ‘wrote such letter’, etc.*) either:

with knowledge that it was false, or

with reckless disregard for whether it was true or false at a time when defendant had serious doubt as to whether it was true

Id. at 23.06(2).

99. The second element requires, “defendant was at fault in publishing such statement” *Id.* at 23.06(1). The Committee Comment (1980 New) to MAI 23.06(1) notes that in *Gertz*, “the Court held that so long as the states do not impose liability without fault, they may define for themselves the appropriate standard of liability for defamation to a private individual.” *Id.* at 23.06(1), Comm. Comment.

100. *Id.* at 23.06(2). “Second, such statement was false” *Id.*

101. *Id.* at 23.06(2), Comm. Comment.

102. *See supra* note 86.

103. 475 U.S. 767 (1986); *see Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490 (1975) (“The Court has . . . left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamation action brought by a private person as distinguished from a public official or public figure.”).

104. Joel D. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1353 (1975).

105. *Id.* at 1353 n.16.

106. MO. CONST. art. I, § 8. “[I]n all suits and prosecutions for libel or slander the truth thereof may be given in evidence.” *Id.* Arguably, this clause may allow truth to function as a failure of proof defense as well as an affirmative defense.

107. MO. REV. STAT. § 509.090 (2000). “In pleading to a preceding pleading, a party shall set forth affirmatively . . . truth in defamation . . . and any other matter constituting an avoidance or affirmative defense.” *Id.*

rule,¹⁰⁸ and model jury instructions.¹⁰⁹ Nevertheless, there is language in *Sullivan*¹¹⁰ and subsequent cases¹¹¹ that seemed to shift the burden of falsity onto at least public plaintiffs. Indeed, several courts¹¹² as well as the Committee Comment¹¹³ to MAI 23.06(2) read it as doing precisely that. Some courts even required a public plaintiff to prove falsity by clear and convincing evidence.¹¹⁴ Other courts disagreed and continued to follow the common law rule.¹¹⁵ It was not until *Hepps* that the United States Supreme Court clarified the holding of *Sullivan* vis-à-vis the plaintiff's burden of proof for falsity:

Because the burden of proof is the deciding factor only when the evidence is ambiguous, we cannot know how much of the speech affected by the allocation of the burden of proof is true and how much

108. MO. SUP. CT. R. 55.08. "In pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances, including but not limited to . . . truth in defamation . . . and any other matter constituting an avoidance or affirmative defense." *Id.*

109. MO. APPROVED INSTR. NO. 32.12 (2002). "Your verdict must be for defendant if you believe that the statement . . . was substantially true." *Id.*

110. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964):

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

111. *See* Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 8 (1970) ("[*Sullivan*] held that the Constitution permits a 'public official' to recover money damages for libel only if he can show that the defamatory publication *was not only false* but was uttered with 'actual malice' . . .") (emphasis added); Garrison v. Louisiana, 379 U.S. 64, 74 (1964) ("We held in [*Sullivan*] that a public official might be allowed the civil remedy *only if he establishes that the utterance was false* and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true.") (emphasis added).

112. *See* Field Research Corp. v. Patrick, 106 Cal. Rptr. 473, 478 (Cal. Ct. App. 1973) ("In a First Amendment case, plaintiff has the burden of proving falsity.") (quotation marks omitted); *see also* Goldwater v. Ginzburg, 414 F.2d 324, 338 (2d Cir. 1969); Farnsworth v. Tribune Co., 253 N.E.2d 408, 412 (Ill. 1969); Reaves v. Foster, 200 So. 2d 453, 458 (Miss. 1967).

113. *See supra* note 101 and accompanying text.

114. Eaton, *supra* note 104, at 1385.

115. *See* Corabi v. Curtis Publ'g Co., 273 A.2d 899, 908 (Pa. 1971).

is false. . . . [W]here the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech. To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.¹¹⁶

Before *Hepps*, the Court had never explicitly dealt with the presumption of falsity—even for public plaintiffs—though it has often claimed to have laid the burden of proving falsity on public plaintiffs in *Sullivan*.¹¹⁷ *Hepps* clarified whatever ambiguity *Sullivan* may have created by explicitly shifting the burden of proof for falsity onto the plaintiff: “We believe that the common law’s rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.”¹¹⁸

There is no longer any doubt that the First Amendment requires a private plaintiff to prove falsity against a media defendant that publishes matters of public concern.¹¹⁹ Yet the holding in *Hepps* was narrow. As Justice Brennan pointed out in his concurring opinion, the Court did not say whether its holding applied to non-media defendants.¹²⁰ Furthermore, the holding does not distinguish between private and public figures, though it clearly applies to the former since the plaintiff in *Hepps* was a private figure.¹²¹ It stands to reason, *a fortiori*, that public figures would have at least as great a burden as private figures under the actual malice requirement. Thus, some have argued that after *Hepps*, “the common law presumption of falsity must fail and the plaintiff, public or private, in a defamation action must plead and prove falsity as an element of his *prima facie* case.”¹²²

Even before the Court handed down its decision, the *Hepps* rule had been anticipated and applied even more broadly by many lower federal courts and state supreme courts. The Sixth Circuit had placed the burden of showing falsity

116. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986).

117. *Id.* at 775. “Our opinions to date have chiefly treated the necessary showings of fault rather than of falsity. Nonetheless, as one might expect given the language of the Court in [*Sullivan*], a public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation.” *Id.*

118. *Id.* at 776.

119. *Id.* at 777.

120. *Id.* at 780 (Brennan, J., concurring).

121. *Id.* at 776. “Here, as in *Gertz*, the plaintiff is a private figure and the newspaper articles are of public concern.” *Id.*

122. Thomas W. Cushing et al., Comment, *Hepps v. Philadelphia Newspapers Inc.: The Validity of the Common Law Presumption of Falsity in Light of New York Times and Its Progeny*, 61 NOTRE DAME L. REV. 125, 140 (1986).

on private plaintiffs five years before *Hepps*.¹²³ The Virginia Supreme Court had held a year before *Hepps* that truth could no longer be an affirmative defense against a private plaintiff because a plaintiff had to prove falsity before he could prove negligence or reckless disregard with respect to falsity.¹²⁴ With regard to public plaintiffs, most courts had shifted the burden of falsity onto the plaintiff even earlier as part of the actual malice requirement of *Sullivan*.¹²⁵

By contrast, the distinction in Missouri's Approved Jury Instructions that determines whether falsity is an element or truth an affirmative defense depends on whether the plaintiff is a public or private figure¹²⁶ rather than on whether the defendant is a news medium.¹²⁷ Further complicating the matter is *Overcast v. Billings Mutual Insurance Co.*,¹²⁸ a case between a *private plaintiff* and a non-media defendant in which the Missouri Supreme Court enumerated six elements of defamation, including falsity.¹²⁹ Thus, the MAI governing *public plaintiffs*¹³⁰ actually comports with the Missouri Supreme Court's elements of defamation for *private plaintiffs*, while the MAI governing *private plaintiffs*¹³¹ does not include falsity as an element, contradicting both *Overcast* and *Hepps*.

Add to this confusion the Missouri Constitution, statute, court rule, and MAI¹³² listing truth in defamation as an affirmative defense, and one can see why the Western District of the Court of Appeals thought "the existing law of defamation needs re-examining."¹³³ One thing is clear, however; the United

123. See *Wilson v. Scripps-Howard Broad. Co.*, 642 F.2d 371 (6th Cir. 1981).

[The] common law allocation of the burden of proof is drawn into question by the constitutional prohibition against liability without fault established in *Gertz*. The language [in *Sullivan*] and later cases makes clear that the burden of demonstrating the falsity of the defamatory statement rests on the plaintiff when the [actual] malice standard applies.

Id. at 374-75 (citations omitted).

124. *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 724-25 (Va. 1985).

125. See *supra* notes 110-12.

126. See *supra* notes 97-101 and accompanying text.

127. Whether this distinction has any relevance is unresolved; however, there is some indication that it is irrelevant. See *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 780 (1986) (Brennan, J., concurring). Justice Brennan noted that distinguishing between classes of defendants was "irreconcilable 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 the source, whether corporation, association, union, or individual.'" *Id.* (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 781 (1985) (Brennan, J., dissenting)).

128. 11 S.W.3d 62 (Mo. 2000) (en banc).

129. See *supra* note 32.

130. MO. APPROVED INSTR. NO. 23.06(2) (2002).

131. *Id.* at 23.06(1).

132. See *supra* notes 106-09.

133. *Kenney v. Wal-Mart Stores, Inc.*, No. WD 59936, 2002 Mo. Ct. App. LEXIS

States Supreme Court's First Amendment cases have severely curtailed the ecclesiastical presumptions of damage and falsity.¹³⁴ Missouri took the step of abolishing the presumption of damage altogether in *Nazeri v. Missouri Valley College*. Ten years later, *Kenney v. Wal-Mart Stores, Inc.*, presented an opportunity for the court to take the further step of abolishing the presumption of falsity.

IV. INSTANT DECISION

The Missouri Supreme Court received transfer of *Kenney v. Wal-Mart Stores, Inc.*, in order to "re-examine" Missouri defamation law, specifically whether falsity was an element or truth an affirmative defense.¹³⁵ Instead, the court chose to focus its inquiry on whether the plaintiff had to prove actual damage to reputation.¹³⁶ Writing for a unanimous six judge court,¹³⁷ Judge Price reaffirmed the ruling of *Nazeri v. Missouri Valley College*,¹³⁸ holding that "[t]he trial court's instruction misdirected the jury and allowed recovery of 'parasitic' damages without finding injury to reputation."¹³⁹

Although Wal-Mart raised nine points of error this time, the supreme court limited its analysis to only two issues: the verdict director given to the jury and the proof of actual damages.¹⁴⁰ The court first noted that "[a]ny deviation from an approved MAI instruction is presumed prejudicial error unless the contrary is shown."¹⁴¹ The Model Approved Instruction for libel of a private figure, MAI 23.06(1), includes "Fifth, the plaintiff's reputation was thereby damaged."¹⁴² However, as the court pointed out, the instruction in *Kenney* had read, "Fifth, the poster directly caused or directly contributed to cause damage to Plaintiff."¹⁴³ The court also observed that Carolyn's attorney had focused his closing argument on her emotional suffering rather than on any harm to her reputation.¹⁴⁴

1801, at *42 (Mo. Ct. App. Aug. 30, 2002), *rev'd*, 100 S.W.3d 809 (Mo. 2003) (en banc).

134. *See supra* notes 110-12.

135. *Kenney*, 2002 Mo. Ct. App. LEXIS 1801, at *42. The transfer was pursuant to Missouri Supreme Court Rule 83.02. *Id.*

136. *Kenney v. Wal-Mart Stores, Inc.*, 100 S.W.3d 809 (Mo. 2003) (en banc).

137. Judge Benton did not participate in the judgment. *Id.* at 818.

138. 860 S.W.2d 303 (Mo. 1993) (en banc).

139. *Kenney*, 100 S.W.3d at 814.

140. *Id.* at 813.

141. *Id.*

142. *Id.* (emphasis added).

143. *Id.* (emphasis added).

144. *Id.* Counsel closed by saying, "You saw my client on the witness stand in describing how it felt to know that four to six thousand people a day were looking at that poster, and you could see how she was on that witness stand. Does anyone doubt that that at least contributed to cause damage to her?" *Id.*

Next the court noted that Missouri and other states “have adopted rules requiring a plaintiff to prove reputational harm before allowing recovery for other related injuries, such as emotional distress.”¹⁴⁵ The court also recognized that defamation law had traditionally required damage to reputation as a prerequisite to emotional damage.¹⁴⁶ Finding that the jury instruction impermissibly modified the MAI to remove the element of damage to reputation, and further that counsel’s closing argument had focused solely on mental anguish without addressing reputational harm, the court concluded that the judgment on the verdict demanded reversal.¹⁴⁷

Continuing its discussion of actual damages, the court first cited *Nazeri* for its abrogation of the *per se/per quod* distinction.¹⁴⁸ Historically, the court noted, a plaintiff accused of a criminal act, a loathsome disease, or an inability to perform his profession had been slandered *per se* and was not required to prove actual harm because the ecclesiastical courts had presumed spiritual damage from such allegations.¹⁴⁹ All other accusations, deemed slander *per quod*, were historically tried in the royal courts and required proof of special damages, i.e. some pecuniary loss.¹⁵⁰ The court listed several examples of “special damages” including the “loss of a marriage, of employment, of income, of profits, and even of gratuitous entertainment and hospitality;”¹⁵¹ special damages did not include “mere annoyance or loss of peace of mind, nor even physical illness.”¹⁵² Only after a court deemed a defamatory statement actionable, either *per se* or upon proof of pecuniary damage, could the plaintiff recover for other “parasitic” damages.¹⁵³ Finding these Byzantine rules as unappealing as the *Nazeri* court had, the court reaffirmed the rule of *Nazeri* which eliminated the ecclesiastical courts’ presumption of damage and required a plaintiff to prove actual reputational harm in all cases.¹⁵⁴

Next the court turned to what might constitute actual damages by looking to other cases in Missouri, in the Eighth Circuit, and in other states. In *Bauer v. Ribaud*,¹⁵⁵ the Eastern District of the Missouri Court of Appeals had upheld summary judgment in favor of a defendant politician who had run a television

145. *Id.*

146. *Id.* (citing DAN B. DOBBS, THE LAW OF TORTS § 400, at 1117 (2001); WILLIAM L. PROSSER, THE LAW OF TORTS § 111, at 737 (4th ed. 1971)).

147. *Id.* at 814.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 814-15.

152. *Id.* at 815.

153. *Id.*

154. *Id.*

155. 975 S.W.2d 180 (Mo. Ct. App. 1997).

advertisement insinuating that his political opponent was a criminal.¹⁵⁶ Although such an accusation was once considered libel *per se*, the *Bauer* Court rejected plaintiff's case because he had not produced any evidence from polls or individual voters that his reputation had been harmed.¹⁵⁷

The court then looked to how the Eighth Circuit applied Missouri law.¹⁵⁸ In *Authaud v. Mutual of Omaha Insurance Co.*,¹⁵⁹ the Eighth Circuit held that "[s]ince *Nazeri*, . . . Missouri courts require a showing of actual damages in all defamation cases. To demonstrate actual damages, plaintiffs must show that defamatory statements caused a quantifiable professional or personal injury, such as interference with job performance, psychological or emotional distress, or depression."¹⁶⁰

Applying these standards, the *Kenney* court found Carolyn's evidence of actual reputational harm "tenuous at best."¹⁶¹ The court noted that Carolyn had "made only a conclusory statement that her reputation was injured and that she felt 'embarrassed, shocked, mad' because of the poster."¹⁶² Like the plaintiff in *Bauer*, she had not introduced any concrete evidence that her reputation had suffered; indeed her sole witness was a long time friend who testified that her estimation of Carolyn had not been affected by the poster.¹⁶³ The court further noted that there was almost no evidence of physical or emotional damage.¹⁶⁴

156. *Kenney*, 100 S.W.3d at 815.

157. *Id.*

158. *Id.* at 816 (citations omitted).

159. 170 F.3d 860 (8th Cir. 1999).

160. *Kenney*, 100 S.W.3d at 816 (citation omitted). The court also surveyed other states. New Jersey required

"[S]ome concrete proof that [the plaintiff's] reputation has been injured. One form of proof is that an existing relationship has been seriously disrupted Testimony of third parties as to a diminished reputation will also suffice to prove "actual injury." *Awards based on a plaintiff's testimony alone or "inferred" damages are unacceptable.*"

Id. (quoting *Rocci v. MacDonald-Cartier*, 731 A.2d 1205 (N.J. Super. Ct. App. Div. 1999)). Tennessee would not award damages for injury unless it "rose above embarrassment stemming from individual encounters." *Id.* at 816-17 (quoting *Murray v. Lineberry*, 69 S.W.3d 560 (Tenn. Ct. App. 2001)). Finally Hawaii found no actual harm absent lost income, some expense to mitigate or correct the defamation, or testimony by another of some concrete change in the other's estimation of the plaintiff. *Id.* at 817 (citing *Jenkins v. Liberty Newspapers Ltd. P'ship*, 971 P.2d 1089 (Haw. 1999)).

161. *Id.*

162. *Id.*

163. *Id.*

164. For example, Carolyn had no medical records, no records of psychiatric or other psychological treatment, no sleeplessness or any other symptoms of mental distress. *Id.* at 817-18.

Finally, the court looked to causation and found nothing to distinguish the Wal-Mart poster from the other ninety-nine posters Angela had posted around Kansas City or the broadcast on KSHB-TV which had already been deemed privileged by the Eighth Circuit.¹⁶⁵ In short, proof of actual damages to Carolyn's reputation was extremely weak; however, the court could not say conclusively that she could not make out a submissible case at retrial.¹⁶⁶ The court therefore reversed and remanded for a new trial without answering the question of which party bears the burden of proving truth or falsity in Missouri defamation cases.

V. COMMENT

In a footnote to its decision, the *Kenney* court noted that Wal-Mart had raised the issue of whether truth was an affirmative defense or falsity an element, the very issue for which the court of appeals had transferred the case.¹⁶⁷ Recognizing a conflict between its recent decisions¹⁶⁸ and MAI 23.06(1), the court also observed that the falsity issue "has constitutional dimensions,"¹⁶⁹ and that it should "avoid the decision of a constitutional question if the case [could] be fully determined without reaching it."¹⁷⁰ But the case was never "fully determined" because the court reversed on other grounds without declaring which party should bear the burden of proving truth or falsity on retrial. In remanding without resolving this issue, the supreme court left the lower court with no guidance.

After *Hepps*, Missouri and every other state must include falsity among the elements of a private plaintiff's prima facie case, at least when suing a media defendant for speech of public concern.¹⁷¹ But the limited mandate of *Hepps* does not resolve *Kenney* or other cases against non-media defendants,¹⁷² nor

165. *Id.* at 818; *see also supra* note 23.

166. *Kenney*, 100 S.W.3d at 818. "Though [Carolyn] may face substantial obstacles in meeting her burden of proof on retrial, this Court cannot say that it is impossible for her to present a submissible case." *Id.*

167. *Id.* at 814 n.2.

168. *Id.* (citing *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62 (Mo. 2000) (en banc); *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303 (Mo. 1993) (en banc)).

169. *Id.* (citing *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)).

170. *Id.* (citing *Union Elec. Co. v. Pub. Serv. Comm'n*, 687 S.W.2d 162, 165 (Mo. 1985)).

171. *Hepps*, 475 U.S. at 776-77.

172. Neither the Missouri Supreme Court nor the Western District of the Court of Appeals directly addressed the issue of whether the Missing Children's Network display case rendered Wal-Mart a "media defendant." The argument could be made that the publishing of the poster was analogous to KSHB-TV's broadcast of an official missing person report and that Wal-Mart was serving a media function by publishing information purely of public concern.

cases involving speech on private matters. *Overcast v. Billings Mutual Insurance Co.* might require falsity to be pleaded and proved by all plaintiffs in all cases, but *Overcast* incorrectly cited *Nazeri* for this proposition and no such enumeration of elements appears anywhere in the *Nazeri* opinion.¹⁷³ So the question remains, what burden of proof must Carolyn Kenney carry on remand? Ironically, the Missouri Supreme Court's decision to abandon the *per se/per quod* distinction in *Nazeri v. Missouri Valley College* provides the answer to this question as well.

As the court noted in *Nazeri*, the *per se/per quod* distinction was a relic of the jurisdictional conflicts between ecclesiastical and royal courts.¹⁷⁴ Slander *per se* was originally the province of the ecclesiastical courts because the injury was "spiritual" in nature.¹⁷⁵ The ecclesiastical courts presumed both that the defamatory statement caused damage and that it was false; neither procedural advantage was afforded to plaintiffs in the royal courts where all slander was *per quod*. Although the ecclesiastical courts were eventually swept away, their presumptions outlived their jurisdiction in the distinction between *per se* and *per quod* defamation, a distinction "entrenched in the very definition of the tort."¹⁷⁶

When *Nazeri* eliminated the *per se/per quod* distinction in favor of a universal damage requirement, in essence it eliminated defamation *per se* since

173. If *Overcast* changed the law, it did so without explanation and perhaps without necessity, as Judge Ellis of the Western District of the Court of Appeals noted in his partial dissent to *Kenney*. *Kenney v. Wal-Mart Stores, Inc.*, No. WD 59936, 2002 Mo. Ct. App. LEXIS 1801, at *43-45 (Mo. Ct. App. Aug. 30, 2002), *rev'd*, 100 S.W.3d 809 (Mo. 2003) (en banc) (Ellis, J., concurring in part and dissenting in part). The private plaintiff in *Overcast* mistakenly submitted MAI 23.06(2), the verdict director for public figures, when he should have submitted MAI 23.06(1). *Id.* at *43-44 (Ellis, J., concurring in part and dissenting in part). This required him to carry a greater burden at trial and thus gave Billings Mutual no reason to object to the instruction he submitted. *Id.* at *44 (Ellis, J., concurring in part and dissenting in part). Judge Ellis noted that Billings Mutual did not raise the instruction error on appeal because it wanted to keep the benefit of the heightened burden on the plaintiff. *Id.* at *44-45 (Ellis, J., concurring in part and dissenting in part). Furthermore, the *Overcast* court never dealt with the issue of falsity so it had no occasion to address the discrepancy. *Id.* at *45 (Ellis, J., concurring in part and dissenting in part). Judge Ellis wrote, "Consequently, it is my view that the *Overcast* Court neither intended, nor effected, the significant change in the law of defamation that the majority finds." *Id.* (Ellis, J., concurring in part and dissenting in part). However, he did admit that the elements of defamation, as enumerated in *Overcast*, had been cited with approval by the court of appeals in subsequent cases. *Id.* (Ellis, J., concurring in part and dissenting in part); *see also* *Deckard v. O'Reilly Auto., Inc.*, 31 S.W.3d 6, 18 (Mo. Ct. App. 2000), *overruled by* *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003); *Moore v. Credit Info. Corp. of Am.*, 673 F.2d 208 (8th Cir. 1982).

174. *See supra* note 63.

175. *See supra* notes 49-50 and accompanying text.

176. *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 308 (Mo. 1993) (en banc).

defamation *per quod* (at least in modern American common law) already required proof of actual damage. But the court went further than its holding suggests: eliminating *per se* defamation arguably eliminated all the procedural advantages granted by the ecclesiastical courts. Since the presumption of spiritual damage itself flowed from the presumption that the plaintiff's reputation was good—i.e. that he was honest, healthy, and able to work—*Nazeri* can be read as eliminating the presumption of the plaintiff's good reputation. And since good reputation is the *sine qua non* for the presumption of falsity, *Nazeri* should also be read as eliminating the presumption of falsity. Put simply, *Nazeri* eliminated the last remnants of ecclesiastical jurisprudence from American defamation law by abandoning both the presumption of damage and the presumption of falsity. Consequently, Carolyn Kenney should have to prove both on retrial.

Eliminating the distinction between *per se* and *per quod* causes of action also helps to focus the law of defamation on the interests it protects. Actions for slander and libel are meant to vindicate one's reputation rather than one's feelings or privacy; however, the traditional presumption of damage allowed a businessman to sue in the ecclesiastical courts for accusations of fraud without having to prove that anyone actually believed the accusations. Similarly, the presumption of falsity allowed a respected but secretly diseased priest to recover for accusations of syphilis even though the accusations were true (but impossible to prove). In the former scenario, the law of defamation is bent to protect the businessman's feelings, in the latter to protect the priest's privacy. But modern courts have devised other causes of action to vindicate these rights.¹⁷⁷ Eliminating the presumptions of damage and falsity shunts cases of bruised feelings and invaded privacy into causes of action more amenable to the injuries involved and protects the integrity of defamation law.

Laying to rest the reverents of ecclesiastical doctrine also aligns the law of defamation more squarely with the actual malice requirement of *New York Times Co. v. Sullivan*, granting greater protection to free speech and free press. In cases following *Sullivan*, the Supreme Court has observed that the ecclesiastical presumption of damage "invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact."¹⁷⁸ With similar concern, the Court has also noted that the common law presumption of falsity must be replaced by "a constitutional requirement that the plaintiff bear the burden of proving falsity" in order to "ensure that true speech

177. As the *Kenney* court noted, modern courts recognize actions for intentional or negligent infliction of emotional distress to compensate victims of outrageous attacks on their emotional well being. *Kenney v. Wal-Mart Stores, Inc.*, 100 S.W.3d 809, 813-14 (Mo. 2003) (en banc). Further, Missouri courts have recognized a privacy tort for public disclosure of private facts. See *Childs v. Williams*, 825 S.W.2d 4, 7 (Mo. Ct. App. 1992).

178. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

on matters of public concern is not deterred.”¹⁷⁹ Moreover, it is difficult to understand how a public plaintiff could prove the defendant’s knowledge of falsity or reckless disregard for the truth, as demanded by *Sullivan*, without first proving that the statement was indeed false.¹⁸⁰

It is also helpful to remember that the ecclesiastical courts sentenced the guilty to penance where modern courts award monetary damages. The threat of ten Hail Marys is much less likely to chill speech than the threat of a four hundred thousand dollar judgment. The higher stakes, the interest in protecting free speech, and the First Amendment’s prohibition against state established religion all advocate for the elimination of any latent holdovers from ecclesiastical law. The *Nazeri* court was wise to eliminate the presumption of damage, and the *Kenney* court would have been wise to do the same for the presumption of falsity. Its failure to do so merely delays the inexorable conclusion that *Nazeri*’s holding eliminated the presumption of falsity as well as the presumption of damage. Missouri courts should no longer recognize the ecclesiastical presumption of falsity and should henceforth require all plaintiffs to prove falsity before recovering for defamation.

VI. CONCLUSION

Even though the Missouri Supreme Court missed an opportunity in *Kenney v. Wal-Mart Stores, Inc.*, to require proof of falsity from all defamation plaintiffs, the Missouri Approved Instructions on defamation should be changed to reflect the court’s previous holdings. All defamation cases, whether maintained by public or private plaintiffs, against private or media defendants, should have the following six elements: (1) publication, (2) of a defamatory statement, (3) that identifies the plaintiff, (4) that is false, (5) that is published with the requisite degree of fault, and (6) that damages the plaintiff’s reputation.¹⁸¹ If the plaintiff is a public official or a public figure, or if the case involves speech on matters of public concern, the fifth element should incorporate the actual malice standard of *Sullivan*.¹⁸² In all other cases, the plaintiff need only prove that the defendant was negligent with regard to the falsity of her statement.¹⁸³

These six elements, with only one variable for courts to determine, comport

179. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986).

180. Many courts have in fact interpreted *Sullivan* as requiring a plaintiff to prove both falsity and fault. See *supra* notes 111-12.

181. These six elements are substantially similar to those enumerated by the Missouri Supreme Court in *Overcast v. Billings Mutual Insurance Co.*, 11 S.W.3d 62, 70 (Mo. 2000) (en banc).

182. The plaintiff must prove either actual knowledge of the falsity of the statement or reckless disregard for the truth or falsity of the statement. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

183. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

with the decisions of both the Missouri Supreme Court and the United States Supreme Court and reflect a common law of defamation free from ecclesiastical presumptions and in keeping with the First Amendment. Although requiring proof of falsity may contradict certain passages in the Missouri Constitution, statutes, and court rules listing truth as an affirmative defense,¹⁸⁴ shifting the burden onto the plaintiff does not preclude a defense of truth;¹⁸⁵ if anything, it makes a truth defense easier to win. Moreover, such language, however old or deeply imbedded in state law, cannot trump the First and Fourteenth Amendments. The MAIs on defamation must be stripped of their remaining ecclesiastical presumptions so that all plaintiffs bear the burden of proving falsity alike.

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184. See *supra* notes 106-09.

185. Cushing et al., *supra* note 122, at 139. “[T]ruth was an affirmative defense at common law because it negated a presumption of falsity. Under constitutional analysis, however, truth is a defense, not an affirmative defense, because it negates the element of falsity and not a presumption of falsity.” *Id.*

