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Steve J. Jasper

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Reporting Behind a Shield: The Growth of Missouri's Fair Report Privilege to Defame

*Kenney v. Scripps Howard Broadcasting Co.*¹

I. INTRODUCTION

The law of defamation has evolved along a curious path. It is caught in the middle of a legal tug-of-war between the freedom of speech guaranteed by the First Amendment and each state's interest in allowing its citizens to protect their reputations from being dragged through the mud. The Supreme Court of the United States and the State of Missouri continue their efforts to strike a proper balance between these interests by tinkering with the elements required for a defamation claim and by creating privileges that prevent defamation liability.

One of Missouri's attempts to strike this proper balance is found in its adoption of the fair report privilege. This privilege prevents defamation liability based on a defamatory statement that fairly and accurately reports information taken from official actions or proceedings. In *Kenney v. Scripps Howard Broadcasting Co.*,² the United States Court of Appeals for the Eighth Circuit held that Missouri's fair report privilege protected a television station from defamation liability for its news report that a grandmother was suspected of kidnapping her granddaughter.³ This Note evaluates why the court reached this decision, why applying the fair report privilege was erroneous and unnecessary, and the potential dangers of the court's holding.

II. FACTS AND HOLDING

On August 30, 1996, Carolyn Kenney picked up her sixteen-month-old granddaughter, Lauren Kenney, from the home of Lauren's mother, Angela Miles.⁴ At the time Carolyn picked up the child, Angela was not married to Lauren's father, who was Carolyn's son, Chris Kenney, and Chris and Angela did not have any agreement concerning the custody of Lauren.⁵ Over the next two days, neither Carolyn nor Chris returned Lauren to Angela.⁶

1. 259 F.3d 922 (8th Cir. 2001).

2. *Id.*

3. *See id.* at 923-24.

4. *Kenney v. Scripps Howard Broad. Co.*, No. 98-1079-CV-W-BD, 2000 WL 33173915, at *2 (W.D. Mo. June 28, 2000), *aff'd*, 259 F.3d 922 (8th Cir. 2001).

5. *Kenney*, 259 F.3d at 923. Although neither parent had sought custody of Lauren at this time, a custody hearing was scheduled for the following Tuesday. *Id.*

6. *Id.*

On September 1, 1996, Angela reported to the Kansas City Police Department that Lauren was missing or had been kidnaped.⁷ In doing this, Angela met with a police officer to explain the circumstances surrounding Lauren's disappearance.⁸ As a result of this meeting, the police officer filed an investigative report which stated that Carolyn was the last person Angela had seen with Lauren and that, after the child was taken, Chris had told Angela that Lauren was with him, but he would not say where he was located.⁹

After the officer filed the investigative report, a detective with the Kansas City Police Department filed a missing person report classifying Lauren as "a missing juvenile who was reported to have been kidnaped by a parent or other relative."¹⁰ The missing person report also stated that Carolyn was the last person Angela had seen with Lauren.¹¹ In addition to filing the missing person report, the detective called Carolyn's home and asked Carolyn's husband, Tom Kenney, if he knew where Lauren was located.¹² Tom told the detective that Lauren was with Carolyn and Chris.¹³ Based on this information, the missing person report also stated that Tom had informed the detective that Lauren was with Chris.¹⁴ Finally, on the same day the detective filed the missing person report, the detective filed a pick-up order that ordered law enforcement officers to take Lauren into custody if she was located.¹⁵

On the same day Angela reported Lauren as missing, and the same day the police reports were filed, Angela contacted Scripps Howard Broadcasting Company's Kansas City television affiliate, KSHB-channel 41 ("KSHB") about her situation.¹⁶ Angela told KSHB that Lauren was missing and provided them with copies of the police reports.¹⁷ From this information, KSHB reported the following story on the following night's ten o'clock news:

7. *Kenney*, 2000 WL 33173915, at *2.

8. *Id.*

9. *Kenney*, 259 F.3d at 923.

10. *Kenney*, 2000 WL 33173915, at *2.

11. *Kenney*, 259 F.3d at 923.

12. *Kenney*, 2000 WL 33173915, at *6.

13. *Id.*

14. *Id.* Although the missing person report stated that Tom told the detective that Lauren was with Chris, there is no suggestion in the facts stated in the district or appellate court's opinion that the missing person report stated that Tom told the detective Lauren was with Carolyn. *See Kenney*, 259 F.3d at 923.

15. *Id.*

16. *Id.*

17. *Id.* Carolyn disputes what reports Angela gave to KSHB, but the trial court found that there was no reason to doubt that Angela had provided the station with all of the necessary reports. *See Kenney*, 2000 WL 33173915, at *2.

Police are on the lookout for a missing girl who may have been abducted by a relative. Sixteen-month-old Lauren Kenney is pictured here with her mother. The child was last seen Friday afternoon when she left her house with her paternal grandmother, Carolyn Kenney. Family members believe the girl's father and grandmother are now with her at an unknown location.¹⁸

During the report, the station displayed a picture of Lauren and Angela, as well as a picture of Carolyn.¹⁹ The report concluded with a request that anyone with information call the Kansas City Police Department.²⁰

Based on this news report, Carolyn brought a defamation action against Scripps Howard Broadcasting Company ("Scripps Howard"), claiming that the report falsely accused her of kidnapping Lauren.²¹ Scripps Howard responded by filing a motion for summary judgment in the United States District Court for the Western District of Missouri.²² In its motion, Scripps Howard argued three points.²³ First, they claimed that the news report was true, and because of this, Carolyn could not prove the element of falsity required for a defamation claim.²⁴ Second, Scripps Howard argued that because the news report was a "fair and accurate account" of the police records, the television station was entitled to the fair report privilege and could not be liable for the report they had made.²⁵ Finally, Scripps Howard claimed that Carolyn had no evidence to support a claim for actual damages.²⁶

Carolyn opposed the summary judgment motion with four arguments of her own.²⁷ First, Carolyn argued that the news report, taken in its context, was not substantially true and, therefore, it was defamatory.²⁸ Next, Carolyn claimed that the fair report privilege should not be applied in this case, and, furthermore, even if it were applied, the privilege should not shield Scripps Howard from liability because the news report was not an accurate representation of the police

18. *Kenney*, 259 F.3d at 923.

19. *Kenney*, 2000 WL 33173915, at *1.

20. *Id.*

21. *Id.* at *3. Carolyn brought the suit despite her admittance that she did not suffer any damage to her professional reputation or lose any income as a result of the report. *Id.*

22. *Id.* at *1. The case was originally filed in the Circuit Court of Jackson County, Missouri, but Scripps Howard removed the case to the District Court. *Id.* at *1 n.1.

23. *Id.* at *3.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

records.²⁹ Finally, Carolyn contended that her claim for emotional distress was sufficient to support a claim for actual damages.³⁰

After considering the arguments of both parties, the district court granted summary judgment in favor of Scripps Howard.³¹ The court agreed with Scripps Howard that all of the “critical facts in the news broadcast were substantially true,” and, because of this, Carolyn failed to make an actionable claim of defamation.³² Furthermore, the court found that, even if the report was not substantially true, it was a “fair and accurate” account of the police reports, and, therefore, Scripps Howard was entitled to the protection of the fair report privilege.³³

Carolyn appealed the district court’s decision to the United States Court of Appeals for the Eighth Circuit.³⁴ In ruling on Carolyn’s appeal, the court of appeals only considered the issues relating to the fair report privilege.³⁵ The court began its analysis by acknowledging that Missouri courts have adopted the fair report privilege as a qualified privilege for a defamatory publication.³⁶ The court then noted that the privilege only applied if a publication was a fair or accurate report of an “official action or proceeding . . . that deals with a matter of public concern.”³⁷

Turning to the facts of the present case, the court pointed out that, under Missouri law, police reports are “reports of an official action subject to the fair report privilege,” and that the “welfare and possible abduction of a child is a matter of public interest.”³⁸ With these issues settled, the court addressed whether Scripps Howard’s news report was a “fair and accurate report” of the Kansas City Police Department’s documents.³⁹ Taking the information contained in the police reports as a whole and comparing it to the information contained in the news report, the court found that the news report was “at least a fair abridgment of the information” found in the police documents.⁴⁰ From this conclusion, the court held that because the welfare of a child is a matter of public concern, and because police reports are subject to the fair report privilege, and because the news report was “at least a fair abridgment” of the police reports,

29. *Id.*

30. *Id.*

31. *Kenney v. Scripps Howard Broad. Co.*, 259 F.3d 922, 923 (8th Cir. 2001).

32. *Kenney*, 2000 WL 33173915, at *4.

33. *Id.* at *7.

34. *Kenney*, 259 F.3d at 923.

35. *Id.*

36. *Id.*

37. *Id.* at 924 (quoting RESTATEMENT (SECOND) OF TORTS § 611 (1976)) (internal quotation marks omitted).

38. *Id.*

39. *Id.*

40. *Id.*

Scripps Howard's news report was shielded by the fair report privilege.⁴¹ The court, therefore, affirmed the district court's grant of summary judgment in favor of Scripps Howard.⁴²

III. LEGAL BACKGROUND

A. Overview of the Policy of a Defamation Action

Two competing policy interests are at the core of all defamation law. First, the foundation for any defamation action is each state's interest in compensating its citizens for harm inflicted by a defamatory statement.⁴³ Each person's right to protect her own reputation "reflects no more than our basic concept of the essential dignity and worth of every human being," and the responsibility of providing a way for each individual to protect her "essential dignity and worth" is left to the states.⁴⁴ The manner in which a state exercises this responsibility, however, is sharply limited by the First Amendment. The First Amendment guarantees that expression and debate on public issues "should be uninhibited, robust, and wide-open."⁴⁵ The Supreme Court has ensured the power of this guarantee by creating specific standards that must be met for a person to be held liable for a defamatory statement.⁴⁶ Through the creation of these standards, the Court has created a "constitutional bias toward unfettered speech" that often overrides an individual's right to be compensated for harm caused by a defamatory statement.⁴⁷ Still, even with this constitutional bias, as long as a state provides defamation liability in accordance with the First Amendment limitations, the state may allow its citizens to protect their reputations from

41. *Id.*

42. *Id.*

43. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); *Anton v. St. Louis Suburban Newspapers, Inc.*, 598 S.W.2d 493, 498 (Mo. Ct. App. 1980). A defamatory statement is a statement that harms a person's reputation "so as to lower him in the estimation of the community or to deter third persons from associating with him." *Pape v. Reither*, 918 S.W.2d 376, 380 (Mo. Ct. App. 1996) (internal quotation marks omitted); *see also infra* notes 54-57 and accompanying text.

44. *Gertz*, 418 U.S. at 341 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)) (internal quotation marks omitted); *Anton*, 598 S.W.2d at 498.

45. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Anton*, 598 S.W.2d at 498.

46. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986); *Time, Inc. v. Firestone*, 424 U.S. 448, 457 (1976); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 489-90 (1975); *Gertz*, 418 U.S. at 342; *N.Y. Times Co.*, 376 U.S. at 279-80.

47. *Anton*, 598 S.W.2d at 498.

defamatory statements.⁴⁸ This tension between the state interest in protecting individual reputations and the First Amendment's guarantee of free speech has created the web of elements, privileges, and defenses that make up defamation law in Missouri.

B. Defamation Law in Missouri

Under Missouri law, to succeed in a defamation action, a plaintiff must show that the defendant (1) published (2) a defamatory statement (3) of and concerning the plaintiff, (4) that is false, (5) that is published with the requisite degree of fault, and (6) that damages the plaintiff's reputation.⁴⁹ As a general rule, a jury decides whether these elements are satisfied based on the specific facts of each case.⁵⁰ If an allegedly defamatory statement, on its face, is not capable of satisfying one of the required elements, however, a court may rule that the statement is not defamatory as a matter of law.⁵¹

A statement satisfies the "publication" requirement if it is communicated to someone other than the person allegedly defamed.⁵² The element does not require that the communication be the first time the statement was made.⁵³ Every time a statement is repeated it is a "publication" in itself, and every person who plays any role in communicating the statement to a third person is considered to have published the statement.⁵⁴

Satisfying the "defamatory statement" element is not quite as simple. Under Missouri law, a statement is defamatory if it harms a person's reputation so as to "lower him in the estimation of the community or to deter third persons from associating with him."⁵⁵ Statements often fit this definition if they "tend to

48. *Id.*

49. *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 70 (Mo. 2000); *see Englezos v. Newspress & Gazette Co.*, 980 S.W.2d 25, 31 (Mo. Ct. App. 1998); MISSOURI APPROVED INSTRUCTIONS—CIVIL § 23.06(1) (6th ed. 2002); *see also* RESTATEMENT (SECOND) OF TORTS § 613 (1976).

50. *Spradlin's Mkt., Inc. v. Springfield Newspapers, Inc.*, 398 S.W.2d 859, 865 (Mo. 1966); *Coots v. Payton*, 280 S.W.2d 47, 51 (Mo. 1955).

51. *See Pape v. Reither*, 918 S.W.2d 376, 379 (Mo. Ct. App. 1996); *see also Klein v. Victor*, 903 F. Supp. 1327, 1330 (E.D. Mo. 1995); *Spradlin's Mkt., Inc.*, 398 S.W.2d at 865; *Coots*, 280 S.W.2d at 51.

52. *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 313 (Mo. 1993); *Dvorak v. O'Flynn*, 808 S.W.2d 912, 916 (Mo. Ct. App. 1991); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 797 (5th ed. 1984).

53. KEETON ET AL., *supra* note 52, § 113, at 799.

54. KEETON ET AL., *supra* note 52, § 113, at 799.

55. *Pape*, 918 S.W.2d at 380 (Mo. Ct. App. 1996) (quoting *Henry v. Halliburton*, 690 S.W.2d 775, 779 (Mo. 1985) (quoting RESTATEMENT (SECOND) OF TORTS § 559 (1976)); *see Coots*, 280 S.W.2d at 53; KEETON ET AL., *supra* note 52, § 111, at 774.

expose another to hatred, ridicule, or contempt.”⁵⁶ A statement is not defamatory, however, simply because it exposes a person to ridicule in the form of “jests or injured personal feelings.”⁵⁷ The statement must also have the tendency to negatively affect the person’s association with others or negatively affect the person’s standing in the community.⁵⁸

Whether a statement is capable of satisfying the “defamatory statement” element is a question of law for a court to decide.⁵⁹ In making this determination, a court must consider an allegedly defamatory statement in connection with the entire “publication” in which the statement was made.⁶⁰ In doing so, the court must give the words of the publication, and especially the words of the allegedly defamatory statement contained in the publication, their “plain and ordinarily understood meaning.”⁶¹ The court does this by interpreting the words as they would normally be understood by the people to whom they were addressed in the circumstances in which they were communicated.⁶²

In addition to proving that a statement is defamatory, a plaintiff in a defamation action must also show that the defamatory statement refers to her in some way.⁶³ This is known as the “of and concerning element.”⁶⁴ To satisfy this element, a plaintiff is not required to prove that the person who made the statement intended to refer to the plaintiff.⁶⁵ Rather, a plaintiff only needs to show that a recipient of the statement reasonably believed that the statement referred to the plaintiff.⁶⁶ If a statement unambiguously refers to the plaintiff, a

56. *Coots*, 280 S.W.2d at 53.

57. *Id.* at 54.

58. See *Klein v. Victor*, 903 F. Supp. 1327, 1335 (E.D. Mo. 1995); KEETON ET AL., *supra* note 52, § 111, at 773.

59. *Klein*, 903 F. Supp. at 1330; *Brown v. Kitterman*, 443 S.W.2d 146, 150 (Mo. 1969); *Pape*, 918 S.W.2d at 379; RESTATEMENT (SECOND) OF TORTS § 614 (1976); KEETON ET AL., *supra* note 52, § 111, at 774, 781. If a court finds that a statement is capable of having a defamatory meaning, the jury then has the responsibility of determining whether the statement was actually understood as having such a meaning. See *Klein*, 903 F. Supp. at 1330; *Pape*, 918 S.W.2d at 379; RESTATEMENT (SECOND) OF TORTS § 614 (1976); KEETON ET AL., *supra* note 52, § 111, at 781.

60. *Klein*, 903 F. Supp. at 1330; *Duggan v. Pulitzer Publ’g Co.*, 913 S.W.2d 807, 810 (Mo. Ct. App. 1995); *Anton v. St. Louis Suburban Newspapers, Inc.*, 598 S.W.2d 493, 497 (Mo. Ct. App. 1980); KEETON ET AL., *supra* note 52, § 111, at 781-82.

61. *Duggan*, 913 S.W.2d at 810; see *Klein*, 903 F. Supp. at 1335; *Brown*, 443 S.W.2d at 150 (referring to the concept as the “natural meaning”).

62. *Anton*, 598 S.W.2d at 497.

63. *Klein*, 903 F. Supp. at 1334; *Pape*, 918 S.W.2d at 380; *Duggan*, 913 S.W.2d at 811; KEETON ET AL., *supra* note 52, § 111, at 783.

64. See *Klein*, 903 F. Supp. at 1334; KEETON ET AL., *supra* note 52, § 111, at 783.

65. *Davis v. R.K.O. Radio Pictures, Inc.*, 191 F.2d 901, 904 (8th Cir. 1951); see RESTATEMENT (SECOND) OF TORTS § 564 (1976).

66. *Davis*, 191 F.2d at 904; *Klein*, 903 F. Supp. at 1334; RESTATEMENT (SECOND)

court may find that this element is satisfied as a matter of law, but if there is any question about whether the statement refers to the plaintiff, the jury decides whether this element is satisfied.⁶⁷

The fourth element that a plaintiff in a defamation action must prove is the falsity element.⁶⁸ To satisfy this element, a plaintiff must show that the allegedly defamatory statement is a "false statement of fact."⁶⁹ This standard has two discrete, yet interrelated, requirements. First, a plaintiff must prove that the statement is one of fact, rather than opinion.⁷⁰ The reason for this is that the "First Amendment's guarantee of freedom of speech makes expressions of opinions absolutely privileged" against defamation liability.⁷¹ The rationale behind this privilege is that opinions, unlike statements of fact, are not capable of being proven true or false, and due to this distinction, false *statements of fact* have little or no social value, while *opinions* are arguable and advance the First Amendment's goal of creating "uninhibited, robust, and wide-open debate."⁷² Opinions, therefore, are socially valuable, and, because of this, a person who states an opinion is absolutely protected from defamation liability for doing so.⁷³

Whether an allegedly defamatory statement is an opinion or a statement of fact is a question of law for a court to decide.⁷⁴ This determination is not dependent on whether the person who made the statement labels the statement as his or her opinion.⁷⁵ Rather, the crucial distinction between a statement of fact

OF TORTS § 564 (1976); see KEETON ET AL., *supra* note 52, § 111, at 783.

67. *Davis*, 191 F.2d at 904; *Klein*, 903 F. Supp. at 1334.

68. See *supra* note 49 and accompanying text.

69. *Anton v. St. Louis Suburban Newspapers, Inc.*, 598 S.W.2d 493, 498 (Mo. Ct. App. 1980); see *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986); KEETON ET AL., *supra* note 52, § 116, at 839. It is unclear whether this kind of showing is required to satisfy the falsity requirement in every defamation action, but it is certain that, when a defamation defendant is a member of the media, a plaintiff must show that an allegedly defamatory statement was a "false statement of fact." *Philadelphia Newspapers, Inc.*, 475 U.S. at 776-77; *Anton*, 598 S.W.2d at 498.

70. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17-20 (1990); *Pape v. Reither*, 918 S.W.2d 376, 380-81 (Mo. Ct. App. 1996); *Anton*, 598 S.W.2d at 498-99.

71. *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 314 (Mo. 1993); see *Milkovich*, 497 U.S. at 18-20; *Pape*, 918 S.W.2d at 380; *Anton*, 598 S.W.2d at 498; see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

72. *Gertz*, 418 U.S. at 339-40; *Anton*, 598 S.W.2d at 498.

73. See *Nazeri*, 860 S.W.2d at 314; *Anton*, 598 S.W.2d at 498.

74. *Nazeri*, 860 S.W.2d at 314; *Pape*, 918 S.W.2d at 379; *Diez v. Pearson*, 834 S.W.2d 250, 252 (Mo. Ct. App. 1992); *Anton*, 598 S.W.2d at 499. Once a court determines that an allegedly defamatory statement is a statement of fact, the jury has the task of determining whether it was actually understood by the recipients as being a statement of fact. *Pape*, 918 S.W.2d at 379; *Diez*, 834 S.W.2d at 252.

75. *Milkovich*, 497 U.S. at 18-19; *Nazeri*, 860 S.W.2d at 314. Simply couching a statement in terms of "It is my opinion" or "I believe" does not necessarily mean that the

and opinion is that a statement of fact contains some element that is “provable as false.”⁷⁶ To decide whether a statement contains an element that is “provable as false,” a court looks to the “totality of the circumstances” surrounding the statement to determine whether, at the time the statement was made, an ordinary person receiving the statement would have believed that the statement contained information that was capable of being true or false.⁷⁷ If not, the statement is an opinion, and the person who made the statement cannot be liable for defamation as a result of making the statement.⁷⁸

The second requirement a plaintiff in a defamation action must satisfy to prove that an allegedly defamatory statement was a “false statement of fact,” is to show that the statement of fact was, in fact, false.⁷⁹ To meet this requirement, a plaintiff has to do more than show that the statement was not literally true in every aspect.⁸⁰ A plaintiff must show that the statement was not “substantially true.”⁸¹ A statement is considered “substantially true” if the “gist” or “sting” of the allegedly defamatory statement was true.⁸² In other words, a statement is not considered false unless the fact contained in the statement that makes the statement defamatory is not true.⁸³

The fifth element a plaintiff in a defamation action must prove is that the statement was published with the degree of fault required by the First

statement is an opinion as defined for defamation law. *Milkovich*, 497 U.S. at 19.

76. See *Milkovich*, 497 U.S. at 19; *Klein v. Victor*, 903 F. Supp. 1327, 1331 (E.D. Mo. 1995); *Pape*, 918 S.W.2d at 381.

77. *Diez*, 834 S.W.2d at 252; see *Pape*, 918 S.W.2d at 381-82; *Anton*, 598 S.W.2d at 499.

78. See *Milkovich*, 497 U.S. at 18-20; *Pape*, 918 S.W.2d at 380-82; *Anton*, 598 S.W.2d at 498-99.

79. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986); KEETON ET AL., *supra* note 52, § 116, at 839. It was once the common view that a defendant in a defamation action had the burden of proving the truth of an allegedly defamatory statement as an affirmative defense. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 489-90 (1975); *Moritz v. Kansas City Star Co.*, 258 S.W.2d 583, 585 (Mo. 1953); *Turnbull v. Herald Co.*, 459 S.W.2d 516, 519 (Mo. Ct. App. 1970). Indeed, some courts still refer to truth as a defense to a defamatory action. See *Love v. Commerce Bank of St. Louis*, 37 F.3d 1295, 1296 (8th Cir. 1994). The prevailing modern view, however, is that, due to the Supreme Court’s requirement that a plaintiff prove some level of fault in a defamation action, a defamation plaintiff now has the burden of proving the falsity of an allegedly defamatory statement. RESTATEMENT (SECOND) OF TORTS § 613 cmt. j (1976); KEETON ET AL., *supra* note 52, § 111, at 783. The Supreme Court has explicitly given the plaintiff this burden when a “plaintiff seeks damages against a media defendant for speech of public concern.” *Philadelphia Newspapers, Inc.*, 475 U.S. at 777.

80. *Turnbull*, 459 S.W.2d at 519; KEETON ET AL., *supra* note 52, § 116, at 842.

81. *Turnbull*, 459 S.W.2d at 519.

82. *Id.*; KEETON ET AL., *supra* note 52, § 116, at 842.

83. *Turnbull*, 459 S.W.2d at 519.

Amendment and state law.⁸⁴ The reason some level of fault must be shown is because the First Amendment guarantee of freedom of speech and the press was not adequately protected under the traditional common law approach that allowed for defamation liability without a showing of any fault in the making of a defamatory statement.⁸⁵ To give real meaning to the First Amendment's guarantee of "uninhibited, robust, and wide-open" debate, every person must be free to make some "mistakes" as to the truth of their statements without fear of defamation liability for doing so.⁸⁶ In recognition of this, the Supreme Court, along with subsequent state courts, has provided specific level of fault requirements that a plaintiff must prove to hold a defendant liable for a defamatory statement.⁸⁷

The level of fault a plaintiff must show to hold a defendant liable for a defamatory statement depends on whether the plaintiff is a private or public figure.⁸⁸ So, the first question that must be addressed to determine whether a plaintiff has satisfied the "level of fault" requirement is whether the plaintiff is a public figure. There are two ways in which a plaintiff may be considered to be a public figure.⁸⁹ First, in rare circumstances, a person may "achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts."⁹⁰ More commonly, however, a person is a public figure because he "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."⁹¹

84. *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 70 (Mo. 2000); MISSOURI APPROVED INSTRUCTIONS—CIVIL § 23.06(1) (6th ed. 2002); *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341-52 (1974).

85. *KEETON ET AL.*, *supra* note 52, § 113, at 805; *see Gertz*, 418 U.S. at 341-52; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964).

86. *See Gertz*, 418 U.S. at 340; *N.Y. Times Co.*, 376 U.S. at 269-72; *KEETON ET AL.*, *supra* note 52, § 113, at 804.

87. *Gertz*, 418 U.S. at 342; *see KEETON ET AL.*, *supra* note 52, § 113, at 804-05.

88. *Gertz*, 418 U.S. 342-49; *KEETON ET AL.*, *supra* note 52, § 113, at 805. There are several reasons for this distinction. First, a public figure usually has greater access to the means needed to counteract defamatory speech. *Gertz*, 418 U.S. at 344. Also, in becoming a public figure, it is arguable that a person "assumes the risk" of being a target of defamation, and because of this, it should be more difficult for a public figure to recover when she is subjected to the risk she assumed. *Id.* at 344-45. Finally, statements made regarding a public figure are more likely to relate to a matter of importance to society as a whole, and, thus, the statements are more highly valued under the First Amendment. *See KEETON ET AL.*, *supra* note 52, § 113, at 805.

89. *Gertz*, 418 U.S. at 351; *KEETON ET AL.*, *supra* note 52, § 113, at 806.

90. *Gertz*, 418 U.S. at 351; *see Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976); *KEETON ET AL.*, *supra* note 52, § 113, at 806.

91. *Gertz*, 418 U.S. at 351; *see Time, Inc.*, 424 U.S. at 453; *KEETON ET AL.*, *supra* note 52, § 113, at 806.

If a plaintiff is a public figure in either sense, she may only satisfy the “level of fault” element of a defamation action if she proves that the allegedly defamatory statement was made with “actual malice.”⁹² To prove “actual malice” a plaintiff must show, with clear and convincing evidence, that the defendant made the statement “with knowledge that it was false or with reckless disregard of whether it was false or not.”⁹³

A plaintiff who is not a public figure is required to make a much lesser showing of fault to satisfy the “level of fault” element. The Supreme Court allows the states to define the specific level of fault that must be shown by a plaintiff who is a private figure, but, at a minimum, the states must require that a private plaintiff show that the defendant had *some* level of fault in making the allegedly defamatory statement.⁹⁴ Under the law of Missouri, a plaintiff who is a private figure must show that the defamatory statement was made with negligence as to the truth of the statement.⁹⁵

The final element that a plaintiff in a defamation action must prove under Missouri law is that the defamatory statement caused harm to her reputation.⁹⁶ The Supreme Court has provided some leeway for states to find a defendant liable for defamation even without a showing that a plaintiff’s reputation was actually damaged.⁹⁷ The Court has held that the states may base defamation liability on injuries as vague as “personal humiliation” and “mental anguish and suffering.”⁹⁸ Missouri, however, has declined this invitation, and Missouri law still requires that a plaintiff show actual injury to her reputation to state a *prima facie* case for defamation.⁹⁹

92. *N.Y. Times, Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Englezos v. Newspress & Gazette Co.*, 980 S.W.2d 25, 30 (Mo. Ct. App. 1998).

93. *N.Y. Times Co.*, 376 U.S. at 279-80; *see Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 n.30 (1984); *Gertz*, 418 U.S. at 342; *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 70 (Mo. 2000).

94. *Gertz*, 418 U.S. at 347; *Hoeflicker v. Higginsville Advance, Inc.*, 818 S.W.2d 650, 651 (Mo. Ct. App. 1991).

95. *Overcast*, 11 S.W.3d at 70. To recover punitive damages, a private plaintiff must show that the statement was made with “actual malice” as defined for the level of fault requirement for public figures. *Id.*; *Williams v. Pulitzer Broad. Co.*, 706 S.W.2d 508, 512 (Mo. Ct. App. 1986).

96. MISSOURI APPROVED INSTRUCTIONS—CIVIL § 23.06(1) (6th ed. 2002); *Overcast*, 11 S.W.3d at 70.

97. *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976); *see KEETON ET AL.*, *supra* note 52, § 116A, at 844.

98. *Time, Inc.*, 424 U.S. at 460.

99. *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 313 (Mo. 1993); MISSOURI APPROVED INSTRUCTIONS—CIVIL § 23.06(1) (6th ed. 2002). Missouri law does allow a plaintiff to recover for harm such as mental anguish *after* she has proven the elements required to state a *prima facie* case of defamation. *Nazeri*, 860 S.W.2d at 316.

C. The Fair Report Privilege

Even if a plaintiff has proven all of the elements necessary to state a claim for defamation, a defendant may still escape liability if he can show that a privilege applies to his situation.¹⁰⁰ There are several specific categories of privileges, but as a general rule, a privilege applies to prevent liability for defamation where circumstances exist, or are reasonably believed to exist by the person making a statement, such that the person making the statement has an interest that gives him a “duty to communicate the alleged defamatory matter to another person or persons having a corresponding interest or duty.”¹⁰¹ Whether a privilege exists in each specific case is a matter of law for a court to decide.¹⁰²

The Restatement (Second) of Torts recognizes a special privilege known as the “fair report privilege.”¹⁰³ The Restatement states the privilege as follows:

The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.¹⁰⁴

In 1981, the Court of Appeals for the Western District of Missouri officially adopted this privilege in the exact language as it is provided in the Restatement,¹⁰⁵ and, since then, Missouri courts have consistently reaffirmed the viability of this privilege as part of Missouri’s defamation law.¹⁰⁶

The fair report privilege is based on the “interest of the public in having information made available to it as to what occurs in official proceedings and

100. See *Turnbull v. Herald Co.*, 459 S.W.2d 516, 520 (Mo. Ct. App. 1970); *KEETON ET AL.*, *supra* note 52, § 115, at 824-25.

101. *Turnbull*, 459 S.W.2d at 520. A discussion of all the myriad of specific privileges that have been recognized by courts is beyond the scope of this Note, but for a delightful summary see *KEETON ET AL.*, *supra* note 52, § 115, at 824-32.

102. *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 72 (Mo. 2000).

103. *RESTATEMENT (SECOND) OF TORTS* § 611 (1976).

104. *Id.*

105. *Shafer v. Lamar Publ’g Co., Inc.*, 621 S.W.2d 709, 711-13 (Mo. Ct. App. 1981).

106. See *Klein v. Victor*, 903 F. Supp. 1327, 1336 (E.D. Mo. 1995); *Englezos v. Newspress & Gazette Co.*, 980 S.W.2d 25, 32 (Mo. Ct. App. 1998); *Hoeflicker v. Higginsville Advance, Inc.*, 818 S.W.2d 650, 651 (Mo. Ct. App. 1991); *Erickson v. Pulitzer Publ’g Co.*, 797 S.W.2d 853, 857 (Mo. Ct. App. 1990); *Williams v. Pulitzer Broad. Co.*, 706 S.W.2d 508, 510-11 (Mo. Ct. App. 1986); *Lami v. Pulitzer Publ’g Co.*, 723 S.W.2d 458, 459 (Mo. Ct. App. 1986).

public meetings.”¹⁰⁷ The basic idea is that providing the privilege will spur “freedom of discussion” and, at the same time, encourage the government to “be responsive to the will of the people” by making its official actions more readily known to the public.¹⁰⁸ Also, because the privilege is limited to official proceedings or meetings open to the public, a report of such merely makes members of the public aware of information they would have known had they attended the meeting or had they taken any other action to know information they already had a right to know.¹⁰⁹

In each defamation case, the defendant has the burden of proving that, under the facts of the case, the fair report privilege applies to him, and whether the defendant has satisfied this burden is a matter of law for the court to decide.¹¹⁰ To meet his burden of proving that the fair report privilege should be applied to protect him from liability, a defamation defendant must prove that (1) the information he reported was taken from an “official act or proceeding” or a meeting open to the public, (2) the information he reported was a “matter of public concern,” and that (3) his report was a “fair and accurate” account of the official act or proceeding.¹¹¹

As just stated, the fair report privilege extends only to protect reports of “an official action or proceeding or a meeting open to the public.”¹¹² For the purposes of the privilege, an “official act or proceeding” includes “any action taken by any officer or agency of the government of the United States, or of any State or of any of its subdivisions.”¹¹³ Included in this definition is any action taken by “organizations that are by law authorized to perform public duties.”¹¹⁴

Missouri courts have often found that action taken by the police, and reports filed by the police, are “official actions” as required for the application of the fair report privilege.¹¹⁵ Indeed, this is supported in some part by the explicit

107. *Shafer*, 621 S.W.2d at 711-12 (quoting RESTATEMENT (SECOND) OF TORTS § 611 cmt. a (1976)); *see also* *Butler v. Hearst-Argyle Television, Inc.*, 49 S.W.3d 116, 119 (Ark. 2001); KEETON ET AL., *supra* note 52, § 115, at 836.

108. *Shafer*, 621 S.W.2d at 713.

109. *See* *Medico v. Time, Inc.*, 643 F.2d 134, 140-41 (3d Cir.), *cert. denied*, 454 U.S. 826 (1981); *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 331 (Minn. 2000); KEETON ET AL., *supra* note 52, § 115, at 836.

110. *Hoeflicker*, 818 S.W.2d at 652; *Erickson*, 797 S.W.2d at 857; *Williams*, 706 S.W.2d at 511.

111. *See* *Englezos*, 980 S.W.2d at 32; *Shafer*, 621 S.W.2d at 711-13; RESTATEMENT (SECOND) OF TORTS § 611 (1976).

112. *Englezos*, 980 S.W.2d at 32.

113. *Shafer*, 621 S.W.2d at 712 (quoting RESTATEMENT (SECOND) OF TORTS § 611 cmt. d (1976)).

114. RESTATEMENT (SECOND) OF TORTS § 611 cmt. d (1976).

115. *See* *Moritz v. Kansas City Star Co.*, 258 S.W.2d 583, 585 (Mo. 1953) (reports of actions taken by police are privileged); *Biermann v. Pulitzer Publ'g Co.*, 627 S.W.2d

language of the comments to Restatement (Second) of Torts Section 611, which provides that “[a]n arrest by an officer is an official action.”¹¹⁶ Not all police action, however, is considered “official action” under the Restatement’s recitation of the fair report privilege. The comments to the Restatement note that “statements made by the police . . . as to the facts of the case . . . are not yet part of . . . the arrest itself,” and, therefore, reports on such statements are not privileged.¹¹⁷ No Missouri court has addressed this limiting language, and based on Missouri’s continued application of the privilege to a wide range of police activity, both before Missouri’s official adoption of the Restatement’s version of the fair report privilege and after, it is questionable whether a Missouri court would give effect to the limiting language contained in the Restatement.¹¹⁸

There is also no clear consensus in the courts of other jurisdictions concerning the effect, if any, of the Restatement’s language that limits what police action should be considered “official action.” Some courts have, while generally adopting the fair report privilege as stated in the Restatement, explicitly rejected the Restatement’s limiting language.¹¹⁹ Other courts have simply recognized that whether the Restatement’s limiting language is the law of their state is an open question and then relied on other grounds to make their decision in the case before them.¹²⁰

Assuming he has satisfied the “official action” requirement, the second circumstance that a defendant must prove to gain the protection of the fair report privilege is that the report contained a “matter of public concern.”¹²¹ Neither the comments to the Restatement nor Missouri case law provides any insight into what is required to show that a report contains a matter of public concern.¹²²

87, 88-89 (Mo. Ct. App. 1981) (privilege to report on information contained in police files); *Turnbull v. Herald Co.*, 459 S.W.2d 516, 520-21 (Mo. Ct. App. 1970) (reports concerning actions taken by police and the police statements regarding the reason for arrest were privileged). Although two of these cases were decided prior to the explicit adoption of the fair report privilege as stated in the Restatement, the cases are relevant because they applied the common law equivalent to the fair report privilege that existed in Missouri prior to *Shafer v. Lamar Publ’g Co., Inc.*, 621 S.W.2d 709 (Mo. Ct. App. 1981).

116. RESTATEMENT (SECOND) OF TORTS § 611 cmt. h (1976).

117. *Id.*

118. *See Moritz*, 258 S.W.2d at 585; *Biermann*, 627 S.W.2d at 88-89; *Turnbull*, 459 S.W.2d at 520-21.

119. *See Medico v. Time, Inc.*, 643 F.2d 134, 139-40 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981) (reports based on information in FBI reports not explicitly a part of an arrest were within the scope of the fair report privilege).

120. *See KARK-TV v. Simon*, 656 S.W.2d 702, 704 (Ark. 1983) (relying on inaccuracy of the report to find that the privilege did not apply).

121. *Englezos v. Newspress & Gazette Co.*, 980 S.W.2d 25, 32 (Mo. Ct. App. 1998); *see* RESTATEMENT (SECOND) OF TORTS § 611 (1976).

122. The most relevant statement is contained in an opinion by the United States

This is most likely due to the fact that, because the fair report privilege is limited to reports of official acts or proceedings or meetings open to the public, it is assumed that every report that fits the “official action” requirement will necessarily be about a “matter of public concern.”

The final, and most important, requirement that must be shown for a defendant to be protected by the fair report privilege is that the report is a “fair and accurate” account of an official act or proceeding.¹²³ To satisfy this requirement under Missouri law, it is not necessary that a defendant prove that the report was an exact replication of the official act or proceeding.¹²⁴ Rather, a defendant satisfies the “fair and accurate” requirement if he can show that the report provided the people who received it with a “substantially correct” account of the official act or proceeding.¹²⁵ Still, if a defendant takes it upon himself to add to the report something that was not contained in the official act or proceeding or if he produces the report to the audience in such a way as to create an unfair or erroneous impression, his report is not considered “fair and accurate,” and the report is not protected by the fair report privilege.¹²⁶

Two previous cases provide good examples of when the “fair and accurate” requirement is, and is not, satisfied. First, in *Shafer v. Lamar Publishing Co.*,¹²⁷ the Court of Appeals for the Western District of Missouri found that a newspaper report was a “fair and accurate” account of events that took place at a city

District Court for the Eastern District of Missouri, which stated that “child abuse . . . is a matter of public concern.” *Klein v. Victor*, 903 F. Supp. 1327, 1331 (E.D. Mo. 1995). The reasoning for this statement, however, was not explained, and the court’s statement was not related to the fair report privilege. *See id.* As a result, the value of this statement, as it relates to the “public concern” requirement of the fair report privilege, appears to be minimal at best.

123. *Moritz*, 258 S.W.2d at 585; *Duggan v. Pulitzer Publ’g Co.*, 913 S.W.2d 807, 811 (Mo. Ct. App. 1995); *Erickson v. Pulitzer Publ’g Co.*, 797 S.W.2d 853, 857 (Mo. Ct. App. 1990); *Williams v. Pulitzer Broad. Co.*, 706 S.W.2d 508, 510-11 (Mo. Ct. App. 1986); *Shafer v. Lamar Publ’g Co.*, 621 S.W.2d 709, 712 (Mo. Ct. App. 1981); *Turnbull*, 459 S.W.2d at 520; *see also Spradlin’s Mkt., Inc. v. Springfield Newspapers, Inc.*, 398 S.W.2d 859, 864 (Mo. 1966); *Hoeflicker v. Higginsville Advance, Inc.*, 818 S.W.2d 650, 651 (Mo. Ct. App. 1991); RESTATEMENT (SECOND) OF TORTS § 611 (1976); KEETON ET AL., *supra* note 52, § 115, at 837.

124. *Hoeflicker*, 818 S.W.2d at 652; *Shafer*, 621 S.W.2d at 712; RESTATEMENT (SECOND) OF TORTS § 611 cmt. f (1976); KEETON ET AL., *supra* note 52, § 115, at 838.

125. *Hoeflicker*, 818 S.W.2d at 652; *Shafer*, 621 S.W.2d at 712; RESTATEMENT (SECOND) OF TORTS § 611 cmt. f (1976); *see also* KEETON ET AL., *supra* note 52, § 115, at 838.

126. *Shafer*, 621 S.W.2d at 712; *Turnbull*, 459 S.W.2d at 520-21; RESTATEMENT (SECOND) OF TORTS § 611 cmt. f (1976); *see also Spradlin’s Mkt., Inc.*, 398 S.W.2d at 864; *Moritz*, 258 S.W.2d at 586.

127. 621 S.W.2d 709 (Mo. Ct. App. 1981).

council meeting.¹²⁸ In *Shafer*, the report in question stated that some participants in a city council meeting had accused a police officer of “knocking up” his sixteen-year-old daughter.¹²⁹ In holding that this report was a fair and accurate account of the meeting, the court noted that such an accusation had actually been made at the meeting and that, even though the newspaper had no proof of whether the accusation was valid or not, the newspaper report simply stated that the accusation had been made.¹³⁰ The report, therefore, was “fair and accurate.”¹³¹

At the other end of the spectrum is the report complained about in *Hoeflicker v. Higginsville Advance, Inc.*¹³² In *Hoeflicker*, the Court of Appeals for the Western District of Missouri found that a newspaper report which inaccurately listed the plaintiff as a defendant in a wrongful death lawsuit was not a “fair and accurate” account of court proceedings.¹³³ The court reached this decision despite the fact that the newspaper had based its report on a file docket maintained by the city clerk which did erroneously list the plaintiff as a defendant to a wrongful death suit.¹³⁴ Nevertheless, the court found that, because the report described the specific allegations in the suit, it went beyond simply describing the contents of the file docket, and, therefore, the report could only be protected by the fair report privilege if the report was a fair and accurate account of the suit, and not the file docket.¹³⁵ Because the plaintiff was not actually a defendant in a wrongful death action, the court found that the report added facts beyond the official proceeding on which it was reporting, and because of this, the report was not a fair and accurate account of the lawsuit.¹³⁶

IV. INSTANT DECISION

In *Kenney v. Scripps Howard Broadcasting Co.*,¹³⁷ the United States Court of Appeals for the Eighth Circuit applied Missouri law to determine whether the fair report privilege protected a television station from defamation liability for reporting in an evening newscast that the plaintiff was suspected of kidnapping her granddaughter.¹³⁸

128. *Id.* at 714.

129. *Id.* at 710.

130. *Id.* at 713-14.

131. *Id.* at 714.

132. 818 S.W.2d 650 (Mo. Ct. App. 1991).

133. *Id.* at 652.

134. *Id.* at 651.

135. *Id.* at 652.

136. *Id.*

137. 259 F.3d 922 (8th Cir. 2001).

138. *Id.* at 923. Even though the court below had also ruled on the merits of

The court began its analysis by stating that, under Missouri law, “reports of legislative, judicial or executive proceedings” are subject to a qualified privilege.¹³⁹ Furthermore, the court stated that Missouri has officially adopted the fair report privilege as it was set out in the Restatement (Second) of Torts Section 611 (1976), which provides:

The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrences reported.¹⁴⁰

Interpreting the language of this section of the Restatement, and using prior Missouri cases that had already done so as a guide, the court specified that the fair report privilege only applied to “matters of public concern” that are “stated in a report of an official action or proceeding or meeting open to the public.”¹⁴¹ The court also specified that the privilege “can only be overcome if the matters published were not a fair and accurate report” of the proceeding.¹⁴²

The court then turned to the facts of the present case to determine whether the fair report privilege applied to protect the television station from defamation liability.¹⁴³ First, the court noted that Missouri courts of appeals have held that police reports are “reports of an official action,” and are, therefore, generally within the scope of the fair report privilege.¹⁴⁴ Next, without explanation, the court stated that “the welfare and possible abduction of a child is a matter of public interest.”¹⁴⁵

With these decisions made, the only remaining concern for the court was whether the news report was a “fair and accurate” account of the police reports.¹⁴⁶ The court stated that a police pick-up order and missing person report supported the station’s report that police were looking for the plaintiff’s

Kenney’s defamation claim as well as the application of the privilege, the Eighth Circuit Court of Appeals focused its decision solely on the application of the fair report privilege. *Id.*

139. *Id.*

140. *Id.* at 923-24 (quoting RESTATEMENT (SECOND) OF TORTS § 611 (1976)).

141. *Id.* at 924 (citing *Englezos v. Newspress & Gazette Co.*, 980 S.W.2d 25, 32 (Mo. Ct. App. 1998)).

142. *Id.* (citing *Shafer v. Lamar Broad. Co.*, 621 S.W.2d 709, 713 (Mo. Ct. App. 1981)).

143. *Id.*

144. *Id.* (citing *Erickson v. Pulitzer Publ’g Co.*, 797 S.W.2d 853, 857 (Mo. Ct. App. 1990), *Biermann v. Pulitzer Publ’g Co.*, 627 S.W.2d 87, 88 (Mo. Ct. App. 1981)).

145. *Id.*

146. *Id.*

granddaughter.¹⁴⁷ The court then noted that a box on the missing person report indicated that the police believed the missing girl had been abducted by a relative and that notes on an investigative report stated that the girl had last been seen with the plaintiff.¹⁴⁸ Also, the court stated that the notes on the investigative report provided that the girl's mother believed the girl was with the plaintiff and the girl's father at an "undisclosed location."¹⁴⁹ Taking all of these facts together, the court found that the news report stating that the plaintiff was suspected of kidnapping her granddaughter was "at least a fair abridgement of the information contained in the official police documents."¹⁵⁰ Therefore, the court held that the defendant's newscast was protected by the fair report privilege.¹⁵¹

V. COMMENT

In *Kenney v. Scripps Howard Broadcasting Co.*,¹⁵² the United States Court of Appeals for the Eighth Circuit erroneously and needlessly applied Missouri's fair report privilege against defamation and, in doing so, extended the privilege beyond its justification. The court specifically held that the fair report privilege applied to protect Kansas City television station KSHB-channel 41 ("KSHB") from defamation liability for reporting in an evening newscast that the plaintiff was suspected of kidnapping her granddaughter.¹⁵³ The court applied the privilege based on its conclusions that (1) the police reports KSHB relied on for its story were "reports of an official action," (2) the welfare of children is a "matter of public interest," and (3) KSHB's report was a "fair and accurate" account of the police reports.¹⁵⁴ In making these decisions, the court correctly identified the three requirements that must be met for the fair report privilege to apply, but, in at least two instances, the court incorrectly found that the facts of the case satisfied the requirements.

The court's finding that police reports are "reports of official action," and, therefore, a report based on police reports may be protected by the fair report privilege, is debatable but probably correct. According to Missouri law, "official action" includes "any action taken by any officer or agency of the government of the United States, or of any State or of any of its subdivisions."¹⁵⁵ It seems

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. 259 F.3d 922 (8th Cir. 2001).

153. *Id.* at 924.

154. *Id.*

155. *Shafer v. Lamar Publ'g Co., Inc.*, 621 S.W.2d 709, 712 (quoting RESTATEMENT (SECOND) OF TORTS § 611 cmt. d (1976)).

readily apparent that a city's police force is an agency of the government of a state or its subdivisions. So, it would seem reasonable to assume that any action taken by the police should be considered "official action." This assumption, however, is not completely supported by the comments to the Restatement.¹⁵⁶ The comments specifically provide that statements made by police that are not yet a part of an arrest are not to be considered "official action."¹⁵⁷ Under this limiting language, because the police reports KSHB relied on to make their news report were merely investigatory in nature and not connected to any arrest, the police reports could not be considered "official action" under the Restatement.

Still, the limiting language of the Restatement is probably not a part of Missouri's fair report privilege analysis, and the preliminary police reports relied on by KSHB are probably correctly considered "official action" under Missouri law. No Missouri court has ever adopted, or even considered, the language of the Restatement that limits police action that may be considered "official action" to action actually related to an arrest.¹⁵⁸ In fact, several Missouri courts have had no problem finding that actions taken, or statements made, by police prior to or completely unrelated to an arrest were "official action" and within the scope of the fair report privilege.¹⁵⁹ So, because Missouri has adopted a broad definition of what action may be considered "official action," and has completely ignored the limiting language of the Restatement, it appears consistent with Missouri law to find that the police reports relied on by KSHB were "official action."

The *Kenney* court's finding that child welfare is a "matter of public interest," and that KSHB's report of the possible abduction of plaintiff's granddaughter, therefore, satisfied Missouri's fair report privilege requirement that reports be a matter of "public concern," is on much shakier ground. In making this conclusion, the court simply stated, as a matter of fact, that "the welfare and possible abduction of a child is a matter of public interest."¹⁶⁰ This idea has some support in the case law of Missouri.¹⁶¹ In *Klein v. Victor*, the United States District Court for the Eastern District of Missouri stated that "child abuse . . . is a matter of public concern," but in reaching this decision the district court, just like the *Kenney* court, provided no explanation or limitation concerning its statement.¹⁶²

There is no argument that in some respects both the *Kenney* and *Klein* court are correct. The welfare of children, possible child abduction, and child abuse

156. See *supra* notes 113-14 and accompanying text.

157. See RESTATEMENT (SECOND) OF TORTS § 611 cmt. h (1976).

158. See *supra* note 115 and accompanying text.

159. See *supra* notes 112-15 and accompanying text.

160. *Kenney v. Scripps Howard Broad. Co.*, 259 F.3d 922, 924 (Mo. Ct. App. 2001).

161. See *supra* note 122 and accompanying text.

162. *Klein v. Victor*, 903 F. Supp. 1327, 1331 (E.D. Mo. 1995); see *supra* note 122 and accompanying text.

are certainly important societal concerns. At some point and in some circumstances, however, these broad societal concerns become so individualized and personal that they cannot fairly be considered to be a “public concern.” An example or two will make this point more clearly. Suppose that a local school district is considering changing its graduation requirements. In this situation, each member of the community that comprises the school district would undoubtedly have an interest in the possible changes. This interest can be stated in broad terms as a public concern in the education of children. So, broadly stated, the education of children is a “matter of public concern.” Now, suppose that Emma Clark, a student in the school district, is in danger of failing her Algebra class. This problem clearly falls within the broad category of “the education of children,” but almost no one would think that whether Emma studies as much as she should or is doing all of her Algebra homework each night is a “matter of public concern.” Most people would unquestionably see Emma’s problem as a private concern to be dealt with by Emma, her teacher, and Sara and Matt Clark, her parents.

Similarly, most people would agree that infant healthcare, as a broad concept, is a matter of public concern. Still, if Emma Clark, now an infant, becomes jaundiced, it seems absurd to think that the precise amount of time that Sara and Matt Clark place Emma under bilirubin lights every day could be considered a matter of public concern.¹⁶³ Even though this situation clearly falls into the category of infant healthcare, an admitted “matter of public concern,” the circumstances have become so personal and individualized that this precise situation is no longer a matter of public concern.

The same reasoning applies to the facts of the *Kenney* case. In *Kenney*, the court makes the unquestionably accurate broad statement that “the welfare and possible abduction of a child is a matter of public interest.”¹⁶⁴ Under the specific facts of the case, however, the circumstances are so private and individualized that the precise location of the plaintiff’s granddaughter could not be rightfully considered a matter of public interest. According to the facts as recited by the court, the “missing” girl’s parents had never been married and had no custody order or agreement dictating which parent had what kind of parental rights.¹⁶⁵ When the girl was not returned to the mother as the mother had expected, she was not worried that some stranger had taken her daughter. Rather, everything she told to the police and KSHB indicated that she believed her daughter was

163. In extreme cases of neglect, Sara and Matt could be civilly or criminally liable, but only in these cases, and perhaps not even then, could their individual health care decisions regarding their child be considered a matter of concern for the public at large.

164. *Kenney*, 259 F.3d at 924.

165. *Id.* at 923. The mother and father had a court date to finally establish an official custody arrangement for the Tuesday after the weekend in which the girl was reported missing. *Id.*

with the girl's father.¹⁶⁶ In fact, the girl's mother received a phone call from the father in which he stated that he had their daughter.¹⁶⁷ So, the possible "abduction" was actually a simple dispute over which parent should have custody of the girl until a custody agreement was established. This kind of parental dispute is a personal matter to be worked out by the parents and those people, such as the police officers and the plaintiff, the parties specifically seek out for help. This is true even though the situation falls into the broad category of "child welfare" or "child abduction." Where the plaintiff's granddaughter spent the night in question is of no interest to anyone else in the community, and the information contained in the police report and subsequent news report, therefore, was not a "matter of public concern." Because of this, Missouri's fair report privilege should not have applied to protect KSHB from defamation liability.

Even if the contents of the police reports KSHB relied on for its news report were a matter of public concern, the United States Court of Appeals for the Eighth Circuit incorrectly found that KSHB's report was a "fair and accurate" account of the contents of the police reports. Under Missouri law, a report of an official action related to a matter of public concern must be a "fair and accurate" account of the official action to be entitled to the protection of the fair report privilege.¹⁶⁸ In making its decision that KSHB had satisfied this "fair and accurate" requirement, the *Kenney* court stated that KSHB's news report was "at least a fair abridgement of the information contained in the official police documents."¹⁶⁹ This statement correctly recognizes that the "fair and accurate" requirement does not demand an exact replication of the information contained in an official action or proceeding.¹⁷⁰ Still, a report must be "substantially correct" in the sense that it does not add anything not contained in the official action or proceeding and does not present a report in a manner that conveys a misleading impression about the contents of an official action or proceeding.¹⁷¹

If KSHB's news report had actually been a fair abridgement of the information contained in the police reports as the court suggested it was, it would have been a "fair and accurate" account of the police reports. KSHB's report, however, went beyond the information that was contained in the report, and in addition, presented the information contained in the police reports in an unfair manner. During KSHB's report, it stated that "[f]amily members believe the girl's father and grandmother are now with her at an unknown location."¹⁷² Yet,

166. *Id.*

167. *Id.*

168. *See supra* notes 123-36 and accompanying text.

169. *Kenney*, 259 F.3d 922 at 924.

170. *See supra* note 124 and accompanying text.

171. *See supra* notes 124-26 and accompanying text.

172. *Kenney*, 259 F.3d at 923.

nowhere in the police reports did it state that anyone, family members or otherwise, believed that the girl was presently with her grandmother. The police reports did state that the plaintiff grandmother was the last person to be seen with the girl,¹⁷³ but this hardly justifies the jump in logic that the plaintiff would still be with the girl, especially when the police reports explicitly noted that the girl was believed to be with her father.¹⁷⁴ So, by stating that family members believed the girl was currently with the plaintiff, KSHB's news report went beyond the information contained in the police reports, and, because of this, it was not an "accurate" account of the police reports.

KSHB's report was also not a "fair" account of the police reports. The "fair" portion of the "fair and accurate" requirement of the fair report privilege is violated if a story is presented in such a way as to mislead an audience about the contents of an official action or report.¹⁷⁵ During KSHB's report, it displayed a picture of the "missing" girl and a picture of the plaintiff.¹⁷⁶ This directly suggests that the plaintiff was the prime suspect in the girl's abduction. This was simply not the case as it was presented in the police documents. According to the documents, it is obvious that the police believed the father was primarily responsible for the girl's disappearance.¹⁷⁷ Yet, KSHB chose to display a picture of the plaintiff and not the father. By doing this, the news station distorted the information that was actually contained in the police reports and provided its audience with a misleading impression of the contents of the police reports. This distortion necessarily means that the report was not a "fair" account of the police reports. Because of this, and also because the news report provided information that was not contained in the police reports, the news report was not a "fair and accurate" account of the police reports. KSHB, therefore, should not have been given the protection of the fair report privilege, and the United States Court of Appeals for the Eighth Circuit erroneously applied Missouri's fair report privilege to the case.

The *Kenney* court not only incorrectly applied Missouri's fair report privilege to protect KSHB from defamation liability, but they also applied the privilege to a case that could have easily been dismissed without the use of the privilege. The court could have dismissed the case because the plaintiff had

173. *Id.* at 923-24; *see supra* notes 7-14 and accompanying text. The facts of the case suggest that the plaintiff's husband told police he believed the plaintiff was currently with the missing girl, but this was never reflected in the police reports. *Kenney*, 259 F.3d at 923. In one of the final sentences of the court's opinion, the court states that a note on the investigative report indicated that the girl's mother believed the girl was with the plaintiff. *Id.* at 924. This point, however, which would seem to be key to the case, was never made by the court below, or even by the instant court in its recitation of the facts.

174. *Id.* at 923.

175. *See supra* note 126 and accompanying text.

176. *Kenney*, 259 F.3d at 923.

177. *Id.*

failed to plead the elements required for a prima facie defamation claim. To make a valid defamation claim under Missouri law a plaintiff must show that the defendant (1) published (2) a defamatory statement (3) of and concerning the plaintiff, (4) that is false, (5) that is published with the requisite degree of fault, and (6) that damages the plaintiff's reputation.¹⁷⁸

According to the facts of the case, KSHB's news report clearly satisfies the first three elements. First, KSHB broadcast its report to the entire Kansas City viewing area, easily satisfying the "publication" requirement. Second, the statement that police and family members believed that the plaintiff played some role in abducting her granddaughter is necessarily the kind of statement that would lower her "in the estimation of the community and deter third persons from associating with" her. Because this is all that must be shown to prove that a statement is defamatory,¹⁷⁹ the plaintiff's accusation based on KSHB's news report satisfies the second element of defamation. Third, because KSHB's news report specifically named the plaintiff and showed her picture, there is no question that the statements contained in the report were "of and concerning" the plaintiff.

The plaintiff failed, however, to satisfactorily prove the three remaining elements. To satisfy the "falsity" element, the plaintiff is required to prove that the defamatory statement was a "false statement of fact."¹⁸⁰ To meet this requirement the plaintiff must show that the defamatory statement was a statement of fact and that it was false.¹⁸¹ In the *Kenney* case, the precise defamatory statement at issue was KSHB's statement that family members believed the plaintiff was with the missing girl.¹⁸² This statement is provable as false in that it is either true or not true that family members believed that the plaintiff was with the missing girl. The statement, therefore, is a statement of fact. From the facts of the case, however, it does not appear that the statement was false. Both the missing girl's mother and the plaintiff's husband told the police that they believed the plaintiff was with the missing girl.¹⁸³ So, the statement that family members believed the missing girl was with the plaintiff was true, and because of this, the plaintiff failed to satisfy the falsity element of a defamation claim.

Similarly, the plaintiff did not, and could not have, satisfied the "level of fault" element of a defamation claim. Under Missouri law, a plaintiff in a

178. *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 70 (Mo. 2000); *see Englezos v. Newspress & Gazette Co.*, 980 S.W.2d 25, 31 (Mo. Ct. App. 1998); MISSOURI APPROVED INSTRUCTIONS—CIVIL, § 23.06(1) (6th ed. 2002); *see also* RESTATEMENT (SECOND) OF TORTS § 613 (1976).

179. *See supra* notes 49-62 and accompanying text.

180. *See supra* note 68 and accompanying text.

181. *See supra* notes 68-83 and accompanying text.

182. *Kenney*, 259 F.3d at 923.

183. *Id.*

defamation action who is not a public figure must prove that the defendant made a defamatory statement with negligence as to the truth of the statement.¹⁸⁴ As already stated, the plaintiff could not prove that KSHB's allegedly defamatory statement was false, and because of this, she would have no way of showing that KSHB was negligent as to the truth of the statement. So, the plaintiff could not have satisfied the "level of fault" element of a defamation claim as required by Missouri law.

Finally, the plaintiff had not satisfied the sixth element of a defamation action. This element requires a plaintiff to prove that her reputation is damaged in some way beyond mere ridicule.¹⁸⁵ At the lower court, the plaintiff readily admitted that she had not suffered any damage to her reputation as a result of KSHB's story.¹⁸⁶ This admission made it impossible for the plaintiff to contend that she could satisfy the final element of a defamation action, and as a result, she failed to state a *prima facie* case of defamation against KSHB.

By incorrectly and needlessly applying Missouri's fair report privilege, the *Kenney* court extended the privilege beyond its justification and provided an example of the dangers of applying a defamation privilege beyond the circumstances that justify the privilege. The primary justification for the fair report privilege is that it serves the public's interest in receiving information concerning matters of public concern.¹⁸⁷ The goal is allowing the public to enjoy greater freedom of expression and greater ability to have the government respond to the public's will.¹⁸⁸ This justification was not served by KSHB's report. As stated previously, the issue of which parent the plaintiff's granddaughter was with at the time she was reported missing was a matter of private, rather than public, concern, and the public had no justifiable interest in the information contained in the news report.¹⁸⁹ The Kansas City community gained no greater ability to control their government as a result of receiving information regarding the girl's mother's claim of abduction, and learning of the police activities concerning the girl in no way encouraged the kind of freedom of discussion the privilege was meant to encourage.

184. *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 70 (Mo. 2000); *see supra* note 93 and accompanying text. The plaintiff was a private figure because she fits neither of the two possible ways in which a person may be considered a public figure. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

185. *See supra* notes 96-99 and accompanying text.

186. *Kenney v. Scripps Howard Broad. Co.*, No. 98-1079-CV-W-BD, 2000 WL 33173915, at *5 (W.D. Mo. June 28, 2000), *aff'd*, 259 F.3d 922 (8th Cir. 2001).

187. *See supra* notes 107-09 and accompanying text.

188. *See supra* notes 107-09 and accompanying text.

189. Although the news report added a request for help at the end of the story, the main thrust of the story seems to have been the mere fact that the girl was missing and that family members believed she was with her father and grandmother. *See Kenney v. Scripps Howard Broad. Co.*, 259 F.3d 922, 923 (8th Cir. 2001).

By stretching the requirements of Missouri's fair report privilege to apply to a case where the justification for the privilege would not be served, the United States Court of Appeals for the Eighth Circuit laid the groundwork for continued misapplication of the privilege to future cases in which the justification will be just as obviously missing. The court's application of the privilege may not seem like that great of a concern because it would almost certainly have reached the same result if it had simply made its ruling based on the merits of the plaintiff's claim. Nevertheless, because the court forced the privilege to fit in a case in which it had no proper application, the court has loosened the requirements of the privilege and created a precedent by which the privilege may be applied in future cases where a plaintiff does, in fact, have a valid defamation claim. Thereby, the *Kenney* court may have prevented future plaintiffs from recovering, even though they may have suffered real harm to their reputations, and even though, under the circumstances, the public's interest in freedom of expression is not furthered in any meaningful way by the application of the fair report privilege.

VI. CONCLUSION

The *Kenney* decision incorrectly applied Missouri's fair report privilege to a case that did not warrant or need the protection of the privilege. In doing so, the United States Court of Appeals for the Eighth Circuit expanded the fair report privilege beyond the justification that gave rise to the privilege in the first place. This decision makes it more difficult for future Missourians to recover for actual harm to their reputation suffered as a result of a defamatory statement without providing any measurable benefit to the public of Missouri.

STEVE J. JASPER

