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A Missed Opportunity to Clarify the Burden of Proof as to Truth or Falsity Under Missouri Defamation Law: Kenney v. Wal-Mart Stores, Inc.

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A MISSED OPPORTUNITY TO CLARIFY THE BURDEN OF PROOF AS TO TRUTH OR FALSITY UNDER MISSOURI DEFAMATION LAW: *KENNEY v. WAL-MART STORES, INC.*

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I. INTRODUCTION

The Missouri Supreme Court recently had an opportunity to clarify the following issue of confusion under Missouri defamation law: Does the defendant bear the burden of proof as to the truth of the defamatory statement as an affirmative defense or does the plaintiff bear the burden of proof as to the falsity of the statement as an element of the cause of action? In *Kenney v. Wal-Mart Stores, Inc.*, a jury instruction used at trial did not require the plaintiff to prove the falsity of the defamatory statement.[1] On appeal, the appellate court recognized that the Missouri Supreme Court's 2002 opinion in *Overcast v. Billings Mutual Insurance Co.* listed proof of falsity as one of the elements of the cause of action for defamation.[2] The clash between the instruction and the law was not a run-of-the-mill instruction error, though, for the instruction used was published in Missouri Approved Instructions ("MAI"), the State's mandatory jury instructions.[3] In *Kenney*, the Supreme Court had an

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1. Kenney v. Wal-Mart Stores, Inc., No. WD 59936, 2002 WL 1991158, at *7 (Mo. Ct. App. W.D. Aug. 30, 2002).

2. *Id.* at *6; *see* Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 70 (Mo. 2002) (en banc).

3. *See* April 8, 2002 Order of the Missouri Supreme Court, *cited in* MISSOURI APPROVED JURY INSTRUCTIONS (6th ed. 2002) ("The aforesaid forms must be used on and after January 1, 2003 . . . ."); MO. R. CIV. P. 70.02(b) ("Whenever Missouri Approved Instructions contains an instruction applicable . . . such instruction *shall* be given to the exclusion of any other instructions on the same subject.") (emphasis added); Stalcup v. Orthotic & Prosthetic Lab, Inc., 989 S.W.2d 654, 658 (Mo. Ct. App. 1999) ("Use of Missouri Approved Instructions is mandatory in any case where the instructions apply.") (citing Smith v. Kovac, 927 S.W.2d 493, 497 (Mo. Ct. App. 1996)).

opportunity to evaluate the mandatory instruction and the caselaw as competing sources of law, and eliminate the confusion over the burden of proof as to truth or falsity under Missouri's defamation law.[4]

Ultimately, the Missouri Supreme Court did not decide the issue of the burden of proof as to truth or falsity.[5] The court reversed and remanded for a new trial,[6] and based its ruling, on the improper modification of a MAI instruction related to the prerequisite of actual reputational damage and on the insufficiency of proof of actual harm.[7] The court acknowledged the confusion regarding the issue of the burden of proof but, as discussed herein, its discussion simply may have created further confusion.[8]

This Article describes the current state of the law with respect to the burden of proof as to truth or falsity for defamation claims under Missouri law in the context of the Missouri Supreme Court's recent opportunity to consider the matter in *Kenney v. Wal-Mart Stores, Inc.* The *Kenney* procedural and factual histories are set forth at Part II. Part III's rough outline of relevant First Amendment jurisprudence provides the context for a description of Missouri's defamation law, which is set forth at Part IV. Part V analyzes the Supreme Court's ruling in *Kenney*, and the Conclusion, at Part VI, outlines a few practical consequences of the Supreme Court's failure to clear up the issue of which party bears the burden of proof as to truth or falsity.

II. *KENNEY* FACTS

The facts underlying the appellate court's ruling arose from a child custody dispute that sparked, flared, and extinguished over the course of Labor Day weekend in 1996.[9] Beginning Friday, August 30, sixteen-month-old Lauren Kenney was to spend the weekend with her father, Christopher Kenney. Christopher Kenney and Lauren's mother, Angela Mueller, were not married and did not live together. Lauren resided with Angela, and although Lauren's

4. Kenney v. Wal-Mart Stores, Inc., No. SC 84770, 2003 WL 1711949 (Mo. Apr. 1, 2003) (en banc). Arguably, there is little to evaluate. It is well-settled that the law prevails over an MAI, as the *Kenney* appellate court noted. *See Kenney*, 2002 WL 1991158, at *6 (citing Letz v. Turbomeca Engine Corp., 975 S.W.2d 155, 167 (Mo. Ct. App. 1997)).

5. *Kenney*, 2003 WL 1711949, at *4 n.2 ("This Court does not address the issue here and leaves it unresolved."). The court justified its failure to decide the issue on its policy of avoiding constitutional issues where a case could be determined on other grounds. *Id.* (citing State *ex rel*. Union Elec. Co. v. Pub. Serv. Comm'n, 687 S.W.2d 162, 165 (Mo. 1985) (en banc)).

6. *Id.* at *8 ("Though Ms. Kenney 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.").

7. *Id.* at *3 (noting the court needed only to address the submitted verdict director and the sufficiency of proof of actual damage).

8. *Id*. at *4 n.2.

9. *See Kenney*, 2002 WL 1991158, at *2. The facts set forth herein are drawn from the appellate court's opinion. *See id.* at *1-3.

visits with Christopher were common, there was no court order mandating a visitation schedule or otherwise establishing custody.

Lauren's paternal grandmother, Carolyn Kenney, retrieved Lauren from Angela's home on the afternoon of August 30 and took Lauren to visit Christopher where he worked. Christopher and Angela had agreed that Lauren would be returned to Angela's home two days later, on September 1. The same day Lauren was retrieved from Angela, because Christopher believed Angela was planning to take Lauren to Georgia soon—possibly to live permanently—he filed a petition to establish Lauren's custody in Clay County Circuit Court. A hearing on the petition was scheduled for Tuesday, September 3, just four days later. Because Christopher suspected that Angela might depart with Lauren to Georgia before the hearing if he returned Lauren to Angela before the hearing (as they had previously agreed), he left the Kansas City area and took Lauren to Lake of the Ozarks in central Missouri. Although Christopher called Angela to inform her that he would not be returning Lauren on September 1 as originally planned, he refused to disclose where the child would be. Carolyn Kenney accompanied her son and granddaughter to Lake of the Ozarks.

Later that weekend, Angela prepared and circulated a missing child poster which set forth the circumstances of Lauren's "disappearance." The posters described Lauren's appearance, stated that Lauren was in the custody of her father and grandmother, and displayed a picture of Carolyn Kenney. One of the posters found its way into a locked display case at Wal-Mart's Lee's Summit, Missouri store, which featured posters circulated by the National Center for Missing and Exploited Children. No Wal-Mart employee authorized the placement of the poster within the display case. Although a Wal-Mart manager was informed that the poster was false on September 1, Wal-Mart's managers were unable to remove the poster at that time because they could not locate the key to unlock the display case.

At the same time the poster was discovered in Wal-Mart's display case, Angela approached the Kansas City Police Department and KSHB-TV 41, and she asked them to help her locate Lauren. The police issued a pick-up order, and the television station aired a report about Lauren.[10] On September 2, Christopher and Carolyn Kenney returned to Kansas City with Lauren, and the custody hearing was conducted the next day. Christopher and Carolyn Kenney

10. The television report contained the following language:

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. Lauren has curly hair and hazel eyes, she is two feet five inches tall, and sixteen months old. If you have any information, please call the Juvenile Division of the Kansas City Police Department or your local law enforcement agency. *Id.* at *3.

delivered Lauren to Angela after the circuit court's determination that primary custody should be awarded to Angela.

Nearly two years after the Labor Day Weekend custody battle, Carolyn Kenney brought a defamation action against Wal-Mart for its role in the publication of the allegedly false information about her role in Lauren's "abduction."[11] A Jackson County jury rendered a verdict for Carolyn and awarded her $33,750 in actual damages and nearly $400,000 in punitive damages.[12]

Wal-Mart appealed the trial court's ruling to the Missouri Court of Appeals, arguing the trial court erred in denying its motion for directed verdict and motion for judgment notwithstanding the verdict.[13] The appellate court held that the trial court erred by submitting to the jury an instruction that failed to require a finding of falsity of the defamatory statement.[14] Such an instruction, the court held, was in conflict with the Missouri Supreme Court's holding in *Overcast v. Billings Mutual Insurance Co.*,[15] which identified falsity as an element of a cause of action for defamation.[16] Due to the significance of the issues, the appellate court transferred the case to the Missouri Supreme Court.[17]

III. A BRIEF LOOK AT THE EVOLUTION OF THE UNITED STATES SUPREME COURT'S DEFAMATION JURISPRUDENCE

At common law, a defamation plaintiff did not need to prove the falsity of the defamatory statement to prevail—the falsity of the communication was presumed.[18] A defendant could overcome this presumption, however, if he proved the truth of the statement.[19] Since 1964, the United States Supreme Court's defamation rulings have departed from the common law's substantive standard of fault and procedural burdens regarding falsity.[20]

The Supreme Court first constitutionalized defamation[21] in *New York Times Co. v. Sullivan*.[22] There, the Court held that a public-official plaintiff

11. *See id.*
12. *Id.*
13. *Kenney*, 2002 WL 1991158, at *1.
14. *Id.* at *10-11.
15. Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62 (Mo. 2002) (en banc).
16. *Kenney*, 2002 WL 1991158, at *6; *Overcast*, 11 S.W.3d at 70.
17. *Kenney*, 2002 WL 1991158, at *13.
18. ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS 46 (2d ed. 1994).
19. *Id.*
20. *See also id.*
21. *See id.* at 1 ("Since 1964, the history of the law of defamation has in large measure been the history of the establishment of First Amendment doctrine to govern the torts of libel and slander . . . .").
22. 376 U.S. 254 (1964).

must prove "actual malice" to prevail in a libel action.[23] Because a defendant needed only to prove the truth of the libelous publication to prevail at common law,[24] the Court's decision in *Sullivan* represented a significant step toward greater protection of speech. The *Sullivan* decision not only altered defamation claims procedurally, by requiring the plaintiff to prove falsity rather than the defendant, but also substantively, by elevating the standard for liability from mere negligence to the more rigorous actual malice standard.[25] In *Curtis Publishing Co. v. Butts*, the Supreme Court went one step further and extended the requirement that plaintiffs prove actual malice to public figures other than public officials.[26]

With respect to private figures, the Supreme Court, in *Gertz v. Robert Welch, Inc.*, ruled that such plaintiffs must prove that a defendant was at least negligent to recover actual damages and that the defendant acted with actual malice to recover punitive damages.[27] Until 1986, the requirement that a defendant had to prove the truth of the defamatory statement in a defamation action brought by a private-figure plaintiff remained unchanged. The Court's decision in *Philadelphia Newspapers, Inc. v. Hepps*, however, reversed the common law burden and required private-figure plaintiffs prove the falsity of the defamatory statement.[28] Justice O'Connor's opinion limited this holding to the facts of the case, which involved a media-entity defendant being sued over a matter of public concern.[29] Although Justice Brennan's concurrence questioned the logic of not protecting the speech of non-media-entity defendants just as much as the speech of media-entity defendants,[30] the Court has not extended the requirement that plaintiffs prove the falsity of the defamatory statement beyond the narrow facts of *Hepps*.

23. *Id.* at 279-80. "Actual malice" is fault beyond negligence. *See* Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 70 (Mo. 2002) (en banc) ("'Actual malice' is defined as a false statement made '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.'") (citing Snodgrass v. Headco Indus., Inc., 640 S.W.2d 147 (Mo. Ct. App. 1982)).

24. C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of* New York Times Co. v. Sullivan, 78 IOWA L. REV. 237, 245 (1993).

25. SACK & BARON, *supra* note 18, at 46 ("[The Supreme Court's] holding that public plaintiffs must prove 'actual malice' . . . to recover for defamation implied that such plaintiffs must also bear the burden of establishing falsity, contrary to the common law scheme.").

26. 388 U.S. 130, 155 (1967). Throughout this article, public officials and non-official public figures will collectively be referred to as "public figures."

27. 418 U.S. 323, 349 (1974).

28. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986).

29. *Id.* at 779 n.4. MAI recognizes the media-/non-media-entity distinction created by *Hepps*. *See infra* text accompanying notes 35-36.

30. *Hepps*, 475 U.S. at 779-80.

IV. MISSOURI LIBEL LAW

Missouri's libel law, as expressed in its mandatory jury instructions, MAI,[31] is generally in accord with the United States Supreme Court's holdings with respect to defamation.[32] For instance, the verdict-directing instruction designated for claims brought by public figures and public officials, MAI 23.06(2), requires a finding that the libelous statement was false:

> Your verdict must be for plaintiff if you believe:
>
> First, defendant (*describe act such as "published a newspaper article"*) containing the statement (*here insert the statement claimed to be libelous such as "plaintiff was a convicted felon"*), and
>
> Second, such a statement was false, and
>
> Third, 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, and
>
> Fourth, such statement tended to [expose plaintiff to (*select appropriate term or terms such as "hatred," "contempt," or "ridicule"*)] [or] [deprive the plaintiff of the benefit of public confidence and social associations], and
>
> Fifth, such statement was read by (*here insert the name of person or persons other than plaintiff or the appropriate generic term such as "the public"*), and
>
> Sixth, plaintiff's reputation was thereby damaged.[33]

This instruction comports with the United States Supreme Court's holding in *Sullivan*.[34]

The instruction designated for libel claims brought by private-figure plaintiffs, however, differs from the United States Supreme Court's current defamation precedent. The Missouri "verdict-directing" instruction for such claims, MAI 23.06(1), fails to require that such plaintiffs prove the falsity of the libelous statement:

31. *See supra* note 3 (discussing mandatory nature of MAI instructions).

32. *See* MAI 23.06(1); MAI 23.06(2); *see also* MAI 23.10(1) [1980 New] (slander action brought by private figure); MAI 23.10(2) [1980 New] (slander action brought by public figure).

33. MAI 23.06(2).

34. *See supra* text accompanying notes 22-25 (discussing *Sullivan*).

> Your verdict must be for plaintiff if you believe:
>
> First, defendant (*describe act such as "published a newspaper article"*) containing the statement (*here insert the statement claimed to be libelous such as "plaintiff was a convicted felon"*), and
>
> Second, defendant was at fault in publishing such statement, and
>
> Third, such statement tended to [expose plaintiff to (*select appropriate term or terms such as "hatred," "contempt" or "ridicule"*)] [or] [deprive the plaintiff of the benefit of public confidence and social associations], and
>
> Fourth, such statement was read by (*here insert name of person or persons other than plaintiff or the appropriate generic term, such as "the public"*), and
>
> Fifth, plaintiff's reputation was thereby damaged.[35]

Such an instruction and its failure to require the plaintiff to prove falsity of the allegedly defamatory statement contradicts *Hepps*, which required that, at least in an action against a media-entity defendant over a matter of public concern, a plaintiff bears the burden of proof as to the falsity of the defamatory statement.[36] The authors of MAI attempted to bring MAI 23.06(1) into conformance with *Hepps'* holding, but did so through a Committee Comment which accompanied a 1990 revision to the instructions. Specifically, this Comment suggests that a paragraph requiring the plaintiff to prove the falsity of the libelous statement be inserted into MAI 23.06(1), but only when the plaintiff was suing a media defendant about a matter of public concern:

> In [*Hepps*], a narrow opinion limited to a private plaintiff suing a media defendant for libel in a matter of public concern, the court shifted the burden of proof on truth-falsity to the plaintiff. Concurring justices would have extended the shift in similar cases against any defendant. Paragraph Second in MAI 23.06(2) already imposes the burden [of proving falsity] on a public official plaintiff. Prudence would suggest that such a paragraph Second should be included in MAI 23.06(1) when a private plaintiff is suing a media defendant on a publication of public concern.[37]

The Committee Comment merits discussion for at least two reasons. First, the Comment is poorly placed. From its location in the materials following MAI 23.06(2) (the verdict-directing instruction for suits brought by public-figure plaintiffs), it dictates a course of action with respect to MAI 23.06(1), the verdict-director for suits brought by private-figure plaintiffs. Of more significance, though, is that the Comment endorses a strange view—that

35. MAI 23.06(1). The verdict-directing instruction for slander claims, found at MAI 23.10 (1), also fails to require the plaintiff to prove falsity. *See* MAI 23.10(1).

36. *See supra* text accompanying notes 28-30 (discussing *Hepps*).

37. MAI 23.06(2) Committee Comment (1990 Revision).

speech should be afforded more or less protection based on the identity of the speaker.[38]

The contrast between MAI 23.06(1) and MAI 23.06(2) demonstrates that Missouri has adopted the distinction between private-figure and public-figure plaintiffs initially endorsed in *Sullivan*.[39] The Missouri Supreme Court's recent opinion in *Overcast v. Billings Mutual Insurance Co.*,[40] however, adds a wrinkle to this landscape. There, the court included falsity of the defamatory statement as an element of the cause of action to be proved by a private-figure plaintiff in a defamation action against a non-media-entity defendant.[41] As the *Kenney* appellate court opinion recognized,[42] the *Overcast* opinion's inclusion of falsity as an element contradicted the absence of such a requirement in MAI 23.06(1).[43]

When the Missouri Supreme Court considered *Kenney*, the clash between MAI 23.06(1) and the *Overcast* opinion's enumeration of defamation elements meant the defamation waters in Missouri were running a bit muddier than usual. In *Kenney*, the court had an opportunity to clear up matters by either restating the elements of a defamation action brought by a private-figure plaintiff (and thereby implicitly overruling anything in *Overcast* to the contrary) or by rewriting, amending, or otherwise providing guidance that would harmonize MAI 23.06(1) with the expression of the defamation elements found in *Overcast*.

V. THE MISSOURI SUPREME COURT'S RULING IN *KENNEY V. WAL-MART STORES, INC.*

The entirety of the Supreme Court's consideration of the burden of proof issue in its *Kenney* opinion was expressed in the few lines of Footnote 2:

38. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the United States Supreme Court considered whether certain political speech was entitled to less protection because the speaker was a corporation. In the majority opinion, Justice Powell explained that the political speech at issue was "the type of speech indispensable to . . . a democracy," and that this was no less true simply because the speech came "from a corporation rather than an individual." *Id.* at 777. "The inherent worth of the speech in terms of its capacity for informing the public," Justice Powell continued, "does not depend upon the identity of its source, whether corporation, association, union, or individual." *Id.*

39. *See supra* text accompanying notes 22-25 (discussing *Sullivan*).

40. 11 S.W.3d 62 (Mo. 2002) (en banc).

41. *Id.* at 70 ("[E]lements 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.") (citing Nazeri v. Mo. Valley Coll., 860 S.W.2d 303 (Mo. 1993) (en banc)).

42. Kenney v. Wal-Mart Stores, Inc., No. WD 59936, 2002 WL 1991158, at *6 (Mo. Ct. App. W.D. Aug. 30, 2002).

43. *See supra* text accompanying note 35 (setting forth MAI 23.06(1)).

> Wal-Mart also raised whether "truth" is an affirmative defense to be proved by the defendant, or "falsity" is an element of the cause of action to be proved by the plaintiff. Language in our recent cases of *Nazeri v. Missouri Valley College* and [*Overcast*] suggest different answers to this issue, although neither case addressed the issue expressly. The resolution of this issue has constitutional dimensions. "A court will avoid the decision of a constitutional question if the case can be fully determined without reaching it." This Court does not address the issue here and leaves it unresolved.[44]

Thus, the court acknowledged the current confusion about which party bears the burden of proof as to the truth or falsity of the defamatory statement, but it placed the blame on its interpretation of *Nazeri*[45] and *Overcast*. This differs from the reasoning of the appellate court, which considered the clash between the applicable MAI's and the *Overcast* opinion's recitations of the elements of defamation as a source of confusion.[46] A glance at *Nazeri* and *Overcast* will illuminate the foundation of the Supreme Court's observation that there is uncertainty regarding the burden of proof as to truth or falsity.

A. Nazeri v. Missouri Valley College

In *Nazeri*, following the dismissal of her petition, the plaintiff appealed her claims of slander, prima facie tort, intentional infliction of emotional distress, tortious interference with business relationship, and invasion of privacy.[47] In its discussion of Nazeri's slander claims, the court clarified the law with respect to the existence of the slander *per se* and slander *per quod* distinction.[48] This distinction underscored the issue of whether a plaintiff was entitled to damages in a defamation action based on the nature of the defamation.[49]

The *Nazeri* court's consideration of the *per se* and *per quod* distinctions specifically, and its consideration of the defamation claim generally, however, did not include a discussion of the burden of proof as to truth or falsity of the defamatory statement.[50] The court merely engaged in a review of Missouri's prior rejection of the *per se*/*per quod* distinction (as evidenced by the then-applicable slander instructions in MAI),[51] and it re-affirmed that Missouri did

44. Kenney v. Wal-Mart Stores, Inc., No. SC 84770, 2003 WL 1711949, at *4 n.2 (Mo. Apr. 1, 2003) (citations omitted).

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

46. *Kenney*, 2002 WL 1991158, at *6.

47. *Nazeri*, 860 S.W.2d at 306.

48. *Id.* at 307-15.

49. *Id.* at 308 ("[s]lander *per se* encompassed false statements that the plaintiff was guilty of a crime, afflicted with a loathsome disease, or unchaste . . . [or regarding the plaintiff's occupation and in] such cases, the plaintiff was not required to plead damages, as damages were presumed . . . .").

50. *See id.* at 307-15; *see also Kenney*, 2002 WL 1991158, at *6 ("Our reading of *Nazeri* does not disclose the laundry list of six proof elements cited in *Overcast*.").

51. *See Nazeri*, 860 S.W.2d at 310-13.

not recognize the distinction.[52] At no point in its opinion did the *Nazeri* court set forth a list of the elements of defamation that excluded proof of falsity.[53]

B. Overcast v. Billings Mutual Insurance, Inc.

In *Overcast*, the plaintiff brought an action seeking insurance benefits and recovery for defamation.[54] The Missouri Supreme Court affirmed the judgment of the trial court for contract damages on the insurance benefits claim and for actual and punitive damages on the defamation claim.[55] Although the burden of proof as to the truth or falsity of the defamatory statement was not a substantial issue in *Overcast*, it was, in fact, the *Overcast* opinion's recitation of the elements of defamation that caught the attention of the *Kenney* appellate court.[56] The *Overcast* opinion cited *Nazeri* as support for its list of the elements of defamation, which include: "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."[57]

C. What is the Real Source of the Confusion over Which Party Bears the Burden of Proof as to Truth or Falsity?

In *Kenney*, the Missouri Supreme Court attributed confusion as to which party bears the burden of proof as to the truth or falsity of the defamatory statement to the opinions in *Nazeri* and *Overcast*.[58] This attribution is less than convincing, but in the end, uncertainty remains. The *Kenney* appellate court identified a conflict between MAI 23.06(1) and the elements from *Overcast* as the source of confusion over which party bears the burden of proof.[59] The appellate court correctly understood the relationship between current Missouri law and the authority of the instructions contained in MAI, and it ruled that the use of MAI 23.06(1) was error, because it did not reflect the current state of the law (as set forth in *Overcast*).[60] The Missouri Supreme Court, however, when

52. *Id.* at 313 ("Accordingly . . . we believe the abandonment of this distinction as evidenced by our MAI instructions was and still is correct.").

53. *See generally id.* at 307-15; *see also supra* note 50 (discussing the *Kenney* appellate court's reading of *Nazeri*).

54. 11 S.W.3d 62, 64 (Mo. 2002) (en banc).

55. *Overcast*, 11 S.W.3d at 73.

56. *See* Kenney v. Wal-Mart Stores, Inc., No. WD 59936, 2002 WL 1991158, at *6 (Mo. Ct. App. W.D. Aug. 30, 2002).

57. *Overcast*, 11 S.W.3d at 70 (citing *Nazeri*, 860 S.W.2d 303).

58. Kenney v. Wal-Mart Stores, Inc., No. SC 84770, 2003 WL 1711949, at *4 n.2 (Mo. Apr. 1, 2003) (en banc).

59. *Kenney*, 2002 WL 1991158, at *6.

60. *Id.* ("[T]he law is well settled that in cases of such conflict, the law is to prevail over the applicable MAI instruction.") (citing Letz v. Turbomeca Engine Corp., 975 S.W.2d 155, 167 (Mo. Ct. App. 1997)).

confronted with the source of confusion on the burden of proof issue, chose to ignore the difference between *Overcast* and MAI 23.06(1) and relied, instead, upon different suggestions arising from its opinions in *Nazeri* and *Overcast*.[61]

The claim that a reading of these two cases could support different outcomes as to whether the plaintiff or the defendant bears the burden as to truth or falsity is suspect. After all, as described above, the *Nazeri* opinion at no point contains language discussing the burden of proof as to truth or falsity, and at no point advocates placing the burden upon the defendant (as would be necessary for *Nazeri* to conflict with *Overcast*).[62] Moreover, *Overcast* cites *Nazeri* as support for its enumeration of the elements of defamation.[63] Thus, although the Missouri Supreme Court's opinion in *Kenney* claims conflict between *Nazeri* and *Overcast* on the issue of the burden of proof as to truth or falsity,[64] the *Overcast* opinion's citation to *Nazeri* supports the claim that *Overcast* can be harmonized with *Nazeri*.[65]

Ultimately, whether a true conflict between *Nazeri* and *Overcast* exists is of little consequence, for what is certain is that the enumeration of defamation elements in *Overcast* conflicts with MAI 23.06(1),[66] and that there is confusion regarding the burden of proof.[67] It is unfortunate, though, that in the Missouri Supreme Court's effort to avoid the issue of the burden of proof as to truth or falsity, it may have steered lower courts in the wrong direction in their attempts to resolve this issue before the Missouri Supreme Court does so. Moreover, the Missouri Supreme Court's failure to acknowledge the basis upon which the appellate court found error in the trial court's use of MAI 23.06(1) (namely, its conflict with *Overcast's* enumeration of defamation elements) does little to assist lower courts that may find the *Kenney* appellate court's reasoning persuasive.

The court's inaction with respect to the burden of proof issue is troubling, because the question of the burden of proof is almost certain to arise again, and soon. It may be, in fact, that at the *Kenney* retrial, the trial judge will need to choose between a proposed instruction placing the burden of proof as to falsity on the plaintiff (as the *Kenney* appellate court advocated based on its interpretation of *Overcast*) and a proposed instruction placing the burden of proof as to truth on the defendant (as the currently-applicable MAI mandates).

61. *Kenney*, 2003 WL 1711949, at *4 n.2. It seems fundamental that the more recent case prevails over the earlier case, though. *See Kenney*, 2002 WL 1991158, at *6 (citing State v. Williams, 9 S.W.3d 3, 12 (Mo. Ct. App. 1999)).

62. The *Kenney* appellate court recognized this. *See supra* note 50 (discussing the *Kenney* appellate court's reading of *Nazeri*).

63. *See* Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 70 (Mo. 2002) (en banc).

64. *See Kenney*, 2003 WL 1711949, at *4 n.2.

65. *See Overcast*, 11 S.W.3d at 70.

66. *See Kenney*, 2002 WL 1991158, at *6.

67. *See Kenney*, 2003 WL 1711949, at *4 n.2.

VI. CONCLUSION

The Missouri Supreme Court's ruling in *Kenney v. Wal-Mart Stores, Inc.* represents a missed opportunity to clarify the elements of the State's defamation cause of action. The court's decision allowing the elements of Missouri's defamation action to remain cloudy is unfortunate. Notwithstanding their basis for leaving the "constitutional" issue for another day, litigants and lower courts are certain to struggle with basic issues of pleading, proof, and jury instruction because of the Missouri Supreme Court's decision not to decide. When the Missouri Supreme Court ultimately answers which party bears the burden of proof as to the truth or falsity of defamatory statements, it will need to reconcile its prior discussions of the elements of defamation (for instance, from *Overcast*) with the currently published (though, because of *Overcast*, arguably no longer applicable) verdict-directing instruction for defamation claims brought by private-figure plaintiffs.