

Fired Columnist's Suit Against Kansas City Star Dismissed

*Article About His Firing Was True;
Made Without Actual Malice*

By Eric Weslander

A news publication's article about its own termination of a public-figure columnist, for violating the organization's plagiarism policy, was protected under the First Amendment from claims for defamation, prima facie tort, and negligent infliction of emotional distress, a Missouri state court concluded in a recent pair of decisions in *Steve Penn v. Cypress Media, LLC et al.*, No. 1416-CV-26391 ([Mo. Cir. June 13, 2016](#)) and ([Mo. Cir. June 15, 2016](#)).

Background

The action stemmed from *The Kansas City Star's* publication on July 13, 2011, of an article about longtime reporter and columnist Steve Penn's termination for what the Star's management concluded to be clear violations of their ethics policy: Penn admitted that on numerous occasions, he copied entire portions of other people's writing, verbatim and without attribution, into his "Commentary" column for the *Star*.

The statements in the article that Penn alleged to be defamatory were as follows:

- That editors discovered, during the normal editing process, that Penn had "lifted" material from press releases verbatim.
- That Penn was dismissed "for using material that wasn't his and representing it as his own work."
- That Penn was "in some cases presenting others' conclusions and opinions as his own and without attribution;" and
- That according to a quote in the article from Mike Fannin, Editor and Vice President of *The Star*: "Steve made some serious errors of judgment that we concluded were clear violations of our ethics policy."

Penn did not dispute in his lawsuit that he had engaged in the wholesale copying of others' writing. Rather, he claimed that despite the *Star's* express policy prohibiting wholesale

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copying of other people's work without attribution, there was an unwritten exception for press releases. Penn asserted that because press-release authors "release" them to the public and desire to see their words used, copying them verbatim into a "Commentary" column without attribution could not be plagiarism—and that the article was therefore necessarily false.

Penn filed his original petition in Jackson County Circuit Court on June 29, 2012, consisting of two counts against the *Star's* operator, Cypress Media, LLC: "defamation a/k/a libel" (Count I) and prima facie tort (Count II). Following a full discovery period, the *Star* moved for summary judgment as to both counts, on grounds that the statements in the article were all substantially true or statements of opinion; (b) Penn was a public figure with no evidence of actual malice; and (c) the prima facie tort doctrine only applies to conduct that does not fall under a traditional tort theory, and therefore could not be used to backstop an invalid defamation claim.

On Nov. 4, 2013, two weeks prior to the start of trial, the Hon. Edith Messina denied the *Star's* summary-judgment motion without explanation. On Nov. 17, 2013, a day before trial was scheduled to begin, Penn dismissed the action with prejudice, beginning a one-year savings period. He re-filed his action on Nov. 7, 2014, adding claims for negligent infliction of emotional distress against both the *Star* and Editor Mike Fannin. The re-filed matter was assigned to the Hon. W. Brent Powell.

The *Star* then removed the case to the U.S. District Court for the Western District of Missouri on diversity-jurisdiction grounds, where it filed a Motion to Dismiss the alternative counts for prima facie tort and negligent infliction of emotional distress, followed immediately by a Motion for Summary Judgment as to the defamation count. After Penn stipulated that his damages did not exceed \$75,000, the Hon. Fernando J. Gaitan, Jr. remanded the action back to the Circuit Court of Jackson County.

The *Star* then filed its third Motion for Summary Judgment, as well as a Motion to Dismiss the alternative counts, under the applicable state-law standards.

In a decision issued June 13, 2016, Judge Powell granted the *Star's* Motion for Summary Judgment as to the defamation claim, first rejecting Penn's argument that the prior 2013 order by Judge Messina denying the Motion for Summary Judgment was the "law of the case" which prohibited Judge Powell from considering the motion. Judge Powell concluded that the law of the case doctrine does not limit a trial court's discretion to reconsider and change its interlocutory orders prior to entry of final judgment.

Noting that it was not in serious dispute that Penn was a public figure, Judge Powell held that pursuant to the actual-malice standard as articulated by the U.S. Supreme Court and interpreted by Missouri state courts, Penn was required to "submit evidence 'with convincing

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clarity” (emphasis in Court’s ruling) showing a genuine issue of material fact from which a reasonable jury could find that the *Star* acted with actual malice.

Judge Powell classified the statements at issue as falling into two categories: (a) statements about alleged conduct, and (b) statements regarding violation of the *Star*’s ethics policy.

As to the first category, Judge Powell concluded, “Penn does not dispute that he used press releases without attribution. To that extent, there is no genuine dispute of material fact about whether or not the portions of the statement regarding Penn’s conduct are true.”

As to the second category, Judge Powell concluded that Penn’s allegations that some reporters believed his actions were not a violation of the ethics policy was insufficient to create a “genuine conflict of material fact” as to whether the *Star* made the statement with actual malice. Judge Powell quoted the *Star*’s ethics policy at length and concluded that, just as in a factually similar prior decision by the *Warner v. Kansas City Star*, 726 S.W.2d 384, 391 (Mo. App. 1987), Penn’s actions “arguably violate[d]” the ethics policy. The Court held that the disputed statement was therefore “arguably true,” and that “Penn is not entitled to bring a defamation claim if he believes that the policy was unfairly applied to him,” concluding that no reasonable jury could find that the *Star* acted with actual malice when it published the statement.

On June 15, 2016, Judge Powell granted the *Star*’s Motion to Dismiss the alternate counts for Prima Facie Tort and Negligent Infliction of Emotional Distress, confirming that these theories may not be used as surrogates for a defamation claim that cannot survive the actual-malice standard. As to prima facie tort, the Court relied on the holding in *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 315 (Mo. 1993) that prima facie tort is “not a duplicative cause of action established either by the failure to prove a recognized tort claim, or by *the failure of such a claim on account of a particular defense*.” (Emphasis in Court’s ruling). The Court concluded that “Recovery for damaging or injurious statements should be in defamation or other recognizable torts; and Penn cannot justify bringing an action for prima facie tort just because Defendants have a valid defense to such torts.”

Similarly, as to Penn’s two negligent infliction of emotional distress counts, the Court confirmed that because the “harmful conduct alleged by Penn against the Defendants consists solely of speech—namely the publication of the article,” First Amendment standards applied whether the claim was styled as one for defamation or for infliction of emotional distress. The Court concluded: “To recover for emotional distress caused to a public figure by speech, the First Amendment requires a showing of a false statement of fact and actual malice. Because Penn has failed to plead a false statement of fact in Counts III and IV, they must be dismissed.”

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