STATE OF MINNESOTA

IN SUPREME COURT

Case No: A17-1068

Ryan Larson,

Appellant,

Gannett Company, Inc., a foreign corporation; Gannett Satellite Information Network, Inc., a foreign corporation; Multimedia Holdings Corporation, a foreign corporation, d/b/a/ KARE 11-TV and d/b/a the St. Cloud Times,

Respondents.

BRIEF OF APPELLANT

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The Court of Appeals concluded the statements were protected by the privilege.

Apposite Cases: *Moreno v. Crookston Times Printing Co.*, 610 N.W. 2d 321 (Minn. 2000); *Jadwin v. Minneapolis Star & Tribune*, 390 N.W.2d 437 (Minn. Ct. App. 1986); *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985)

2. Did the Court of Appeals err in reversing judgment as a matter of law (JMOL) on falsity?

Because it applied the fair report privilege, the Court concluded that omitting the falsity by implication instruction was harmless error.

Apposite Cases: *Lewis v. Equitable Life Assurance Soc. of the United States*, 389 N.W. 2d 876 (Minn. 1986); *Price v. Viking Press, Inc.*, 625 F. Supp. 641 (D. Minn. 1985); *Cianci v. New Times Publishing Co.*, 639 F. 2d 54 (2d Cir. 1980).

3. Did the Court of Appeals err in reversing the Order granting a new trial?

The Court of Appeals reversed the new trial for all eight statements because

of the privilege and for the three dismissed statements because of the incremental harm doctrine.

Apposite Cases: *Schlieman v. Gannett Minn. Broadcasting Inc.*, 637 N.W. 2d 297 (Minn. App. 2001); *Carradine v. State*, 511 N.W.2d 733 (Minn. 1994)

STATEMENT OF THE CASE

Ryan Larson sued KARE 11 and *The St. Cloud Times* for eleven defamatory statements in five publications that said or implied he killed Cold Spring Police Officer Tom Decker. Larson, a student at St. Cloud Technical & Community College, was awakened and arrested by police in his apartment the evening of November 29, 2012, after Officer Decker was shot and killed.

Less than twelve hours later, Drew Evans of the Minnesota Bureau of Criminal Apprehension (BCA) led a press conference in Cold Spring and explained that Larson was arrested and in custody. A Department of Public Safety (DPS) news release was distributed. ADD121. Evans, Stearns County Sheriff John Sanner, and Cold Spring Police Chief Phil Jones made brief statements followed by questions from reporters. ADD112-20. In answering reporters' questions, Evans repeated that the investigation was preliminary, active, and ongoing, and they were continuing to follow up all leads and could not share

details. ADD115. None of the law enforcement officials said Larson shot and killed Decker or that they believed he was responsible. *Id*.

That evening, KARE 11's 6:00 newscast broadcasted defamatory statements by anchor Julie Nelson and in an interview with Decker's mother conducted by reporter John Croman. ADD124,126. At 10:00, KARE 11 published several more defamatory statements, including statements by Nelson, reporter Jana Shortal, and in a kare11.com story. ADD135-37,142. Larson's mugshot, name, and "officer killed," were featured. ADD131.

The December 1, 2012 *St. Cloud Times* published a front page story titled "Man faces murder charge" containing Larson's photo and two defamatory statements. ADD144.

Larson was released from jail with no criminal charges because he was not the killer. After his release, on December 5, 2012 another article was published and included quotes from a former in-law of Decker's implying Larson was the killer. ADD144.

None of the defamatory statements were attributed to the press conference, news release, or jail log, nor were they described as summaries, until this litigation.

In January, 2013, law enforcement identified Eric Thomes as the killer, but he committed suicide as authorities prepared to capture him.

The district court denied summary judgment on the fair report privilege,

concluding the privilege was inapplicable and the statements were not substantially accurate. ADD70,76.

At trial, Larson's requested instruction on falsity by implication in CIVJIG 50.25 was denied. ADD149,150. Three more statements alleging defamation by implication were dismissed. A divided jury found all eight statements were defamatory, but not false. ADD044.

The district court granted judgment as a matter of law (JMOL) on falsity, finding the implication of the statements that Larson killed Officer Decker was false. ADD033,36. A new trial was granted on negligence and damages and for the three dismissed statements. ADD038-041.

The Court of Appeals reversed. It concluded the press conference and news release were official proceedings and the statements were fair summaries and abridgements thereof protected by the fair report privilege. It ruled the statements were substantially accurate based upon the verdict on the falsity question. It reversed JMOL on falsity, concluding the failure to instruct on falsity by implication was harmless error. It reversed the new trial on all eight statements and determined that the three reinstated statements were barred by the incremental harm doctrine.

The media must be held accountable for publishing false and defamatory statements about private individuals.

STATEMENT OF FACTS

1. Arrest of Ryan Larson.

Officer Tom Decker was shot and killed behind Winner's Bar the evening of November 29, 2012. ADD.76. Larson was living in an apartment above the bar while attending St. Cloud Technical & Community College. T-711,712,713. Around midnight, he was woken by police in his apartment, handcuffed, and taken to the Stearns County jail. T-716,717. He then learned that Officer Decker had been shot. T-717,718.

2. Press Conference of November 30, 2012.

The morning after his arrest, Drew Evans of the Minnesota Bureau of Criminal Apprehension (BCA) led a press conference and explained that Larson was arrested and in custody. ADD112. A Department of Public Safety (DPS) news release was distributed. ADD121. Evans, Stearns County Sheriff John Sanner, and Cold Spring Police Chief Phil Jones gave short statements which were followed by questions from reporters. T-769,ADD112-20.

The press conference was to provide information to the public and media concerning where law enforcement was at that stage of the investigation. T-771. Larson was identified because he was taken into custody in connection with the incident and information about him was public, having already appeared on the Stearns County website jail roster. T-772,773,796.

Evans emphasized it was an "active and ongoing investigation." T-770,ADD115. He cautioned this was a "very preliminary" investigation just hours after the incident occurred. T-798. He said that no determination had been made that Larson was responsible for shooting and killing Officer Decker or that enough evidence existed with which to charge him. T-773,774.

When asked if anyone else was involved, Evans responded "again, we don't have any information to believe that at this time, but it's in the early stages of the investigation. We continue to follow up on all leads." ADD115. Evans refused to provide details to the media when pressed for information, saying "That's part of the active investigation" and "We can't discuss that at this time." ADD115-16. Law enforcement repeatedly declined to provide information and details about the investigation and killing. ADD115-120.

3. The Trial.

A. November 30, 2012 6:00 p.m. KARE 11 Reports.

1. Anchor Julie Nelson.

Nelson opened the newscast reading the Decker murder story, stating:

> **"Police say that man—identified as 34-year old Ryan Larson—ambushed Officer Decker and shot him twice, killing him."**

T-198, Ex. 1,ADD124. While Nelson read the script, a full screen graphic appeared with Larson's color mugshot and "Officer killed" and "Suspect" next to

"Ryan Larson." T-447, 448. The 6:00 newscast was viewed by 95,200 households. T-653,678,679.

Nelson did not attend the press conference or watch it before the newscasts and could not remember if she saw the news release. T-194-95. She had not personally gathered information from law enforcement for her script nor talked to the reporters about their sources of information. T-194-95,200.

Nelson's 6:00 report was written by producer Panhia Yang. T-195-96, 239, 481,Ex. 1,ADD123-24(6:00 script). Yang did not have the name of a law enforcement official who made the statement. T-472. She did not know how she got the information and had not watched the press conference. T-472. She was unable to say if the news release was used in writing the story, but she did not use the jail log for writing the 6:00 story. T-474,504. She did not have any other source or sources for the statement by Nelson. T-488.

Yang took no steps to verify the source of the statement. T-490-91. She did not confirm the source with Executive Producer Rebecca Rohde-Eckblad who approved the script. T-434,495. Yang was unaware of any evidence connecting Larson to the murder. T-504.

Yang knew that being "booked into jail" meant that he was in custody awaiting charges. R-474. She agreed that the news release did not say that Larson was charged with murder. T-474-75.

Yang read the script for the 5:00 newscast. T-496,Ex. 6(script for 5:00). But the 5:00 newscast included no statements that police or investigators said Larson had shot and killed Officer Decker. T-498. She was unaware of any new information between the 5:00 and 6:00 newscasts. T-498-99.

Rohde-Eckblad watched the press conference and agreed law enforcement did not use "those exact words" reported by Nelson. T-434, 440, Ex. 101. She knew Larson had not been charged with a crime and was unaware of facts showing he was involved in Decker's murder. T-441,442. She could not remember seeing the news release. T-453. She did not recall any discussions with Yang about the sources of the statements. T-437.

KARE 11's policy was not to name suspects before being charged with a crime because they may not be the ones who committed the crime. T-211-12. But the policy was not followed for Larson upon approval of news director Jane Helmke. T-212,236.

2. John Croman's 6:00 Report.

After Nelson's lead in, the story was sent to reporter John Croman in Cold Spring. Croman interviewed Officer Decker's mother, Rosella Decker, and reported:

"Rosella holds no ill-will against the man accused of killing her son."

The man was Larson. T-262, 263, 268 Ex. 1,ADD126-27. Croman brought up Larson in the recorded interview. T-373. In response to Croman's questions about her son's murder, and Larson, Mrs. Decker said:

> **"His mind must have been really messed up. Tom would have forgave him."**

T-263, 264.

Croman knew Larson had not been charged when he interviewed Mrs. Decker. T-264. He didn't see the jail log until later and did not attend the press conference. T-249,251,257.

Croman agreed that none of the law enforcement officers said Larson shot and killed Officer Decker. T-369. They were being very guarded with details and information so as not to jeopardize the case. T-253. He knew Evans did not say the investigation was over. T-370, 371. He said those who cover the courts knew that charging doesn't happen until the district attorney brings the criminal complaint forward. T-257

3. Closing 6:00 Report.

Towards the end of the story, Nelson reported:

> **"Ryan Larson, the man accused of killing Officer Decker, could be charged as early as Monday."**

Ex.1,ADD123; Ex.108. Yang admitted nobody said this at the press conference or that they had evidence with which to charge him. T-495,496. Yang and Rohde-

Eckblad did not discuss the source of this statement. T-495. Yang wrote the script, but was unaware of new information about the case between the 5:00 and 6:00 newscasts. T-434,494.

B. November 30, 2012 10:00 p.m. KARE 11 Reports.

1. Julie Nelson Opening.

Nelson read the script for the 10:00 newscast stating:

> **"Investigators say 34-year old Ryan Larson ambushed the officer, shooting him twice. Larson is in custody."**

T-204, Ex. 2,ADD132,Ex. 110. The 10:00 newscast was watched by 125,800 households. T-678,679.

Nelson testified the statement came from the press conference, but she made no attempt to interview anyone in law enforcement about what happened or contact the County Attorney's Office for information. T-205-06. She did not ask the reporters if they had made additional interview inquiries. T-207. Nelson was unaware of steps to verify the statements that Larson shot and killed Officer Decker. T-207.

Producer Nick Peterson wrote the 10:00 stories read by Nelson approved by executive producer Ian Philbrick. T-240,517, 518,520 Ex. 2,ADD132. Peterson's practice was to reference the source and follow up with reporters in the field about their sources to verify accuracy. T-515. The story included a full screen graphic of Larson's mug shot. T-519, Ex. 110.

KARE 11's policy is to attribute statements to particular sources because they do not personally have the information. T-516,517. Peterson, however, did not know if a reporter provided the information and he had no direct source for the text read by Nelson. T-522,523. He did not know whether the statement was true or false and said that's why they attributed it to the investigators. T-523. He said it was not up to KARE 11 to determine whether the statement was true or false. T-523.

2. Kare11.com Report.

Nelson referenced the website story at Kare11.com. T-208. The story, visible in the 10:00 newscast, contained Larson's photo with the caption "Suspect jailed in fatal shooting of Cold Spring officer." T-208,Ex.14,ADD142. The story reported:

> **"Investigators believe he fired two shots into Cold Spring Police Officer Tom Decker causing his death."**

T-209,Ex.14,ADD142. The story reported that investigators would not describe the events they believed transpired. Ex.14,ADD142. Neither Nelson nor Philbrick knew who wrote the story. T-209,553. The story made no attribution to the press conference or news release and Respondents presented no evidence of its source.

3. Jana Shortal's "Opened Fire" Story.

Shortal reported on the murder at 10:00. T-304,Ex. 110 (Video). She did not attend the press conference, but watched a tape of it later that day. T-293,297,

Ex. 101. She agreed law enforcement gave limited details about what happened. T-298. She did not interview anyone in law enforcement or remember contacting the County Attorney's Office and saw no criminal charge documents. T-298,299.

Shortal wrote her story that was approved by Peterson and Philbrick. T-305,Ex.2,ADD135-37. The story was a package piece, with parts of it pre-recorded with sound bites and her reporter track. T-306. The story included video with quotes from Mrs. Decker from Croman's interview. T-307. The story quoted a local resident describing Officer Decker being one of the "good guys." T-308-09. Shortal continued:

> **"He was the good guy last night going to check on someone who needed help. That someone was 34-year old Ryan Larson who investigators say opened fire on Officer Decker for no reason anyone can fathom."**

T-309, Ex. 2,ADD136. Shortal admitted that no law enforcement official made this statement. T-298,309. She came up with the words "opened fire" and added "for no reason anyone can fathom." T-309,310. She said it wasn't up to her to determine whether the statement that Larson shot and killed Officer Decker was true or false. T-311.

Shortal received no new information about Larson's involvement between 5:00 and 10:00 p.m. T-314, 315. She did not recognize the news release and didn't remember using the jail log for her stories. T-331,334.

Philbrick didn't remember taking steps to verify the accuracy of Shortal's story. T-552. Peterson admitted that no law enforcement official made the statement before the 10 o'clock newscast and that it was not made at the press conference or in the news release. T-527. Peterson did not ask Shortal where she obtained the information in her story. T-527. While he thinks it was his job to verify the accuracy of stories, he could not remember doing so here. T-524.

4. Closing 10:00 Report.

After Shortal's report the story went back to Julie Nelson. With Larson's full screen color mugshot across the screen and graphics "Ryan Larson" and "Officer Killed," Nelson reported **"Charges could be filed as early as Monday against Ryan Larson … the man accused of killing officer Decker."** Then, she said:

> **"He does not have an extensive criminal history, but was cited with disorderly conduct in 2009. He was a second year machine tool student at St. Cloud Tech. Larson is being held in the Stearns County Jail."**

Ex.2,ADD140. Peterson wrote the script, but without information about Larson being charged or formally accused of murder. T-529, 530.

C. 'Man faces murder charge' Article.

*The St. Cloud T*imes published a front page story on December 1, 2012 under the headline:

"Man faces murder charge."

Reporter Kari Stenman wrote the article that included Larson's mug shot and "Ryan Michael Larson" below his image. Ex. 119,ADD144. She knew that Larson had not been formally charged with murder. T-,387,401.

The article reported:

> **"Police say Larson is responsible for the shooting death of Cold Spring Richmond Police Officer Tom Decker."**

T-410-11, Ex. 119,ADD144. At trial, Stenman admitted the statement was false. T-401.[1]

Stenman did not attend the press conference, but watched it from the news room. T-384,410. She conducted no interviews with law enforcement about the details surrounding Officer Decker's shooting death. T-385-86. Her story did not attribute the statements to the press conference, news release, or jail log. T-393, 417.

Stenman acknowledged that nobody used the specific words that Larson was responsible for the shooting death of Officer Decker or that Larson shot and killed him. T-387-88,391,417. She had no idea who made the statement. T-393.

Reporters at the newspaper had criteria for verifying facts for stories. T-405. The criteria entailed making sure they had a source on the record or documentation. T-405. It was important to have a source on the record about facts used in a story so that the reporter and reader always knew where the information

was coming from. T-405. The *Times* policy was to never to use anonymous sources. T-405.

Reporter David Unze said that for attributing sources, the paper needs to have someone in a position to know that it's true and accurate so that the readers know they did not make it up. T-563. For breaking news stories, they attribute statements to an individual who has made the statement so that the reader can know who is directly responsible for making the statement in print. *Id*.

Larson called the newspaper from jail to let the community know he did not kill Officer Decker and the real killer remained in the community. T-726,Ex.120. He was released from custody on December 4, 2012, due to lack of evidence connecting him to the crime. *Id*.

D. December 5, 2012 Article.

The St. Cloud Times published a front page story titled "County lets Cold Spring suspect go" by Stenman and Unze. T-397, 398,Ex. 120,ADD146. Stenman knew that prosecutors determined there was no evidence to charge Larson with a crime, but she never interviewed anyone in law enforcement for the story. T-398.

Instead, she interviewed relatives of Officer Decker at Larson's release, including Roxie Knowles, and wrote:

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[1] The newspaper's distribution is around 20,000. T-560.

> **"Knowles said she came to the jail Tuesday because she had one thing she wanted to say to Larson – if she got the chance to see him leave the jail. 'This isn't over, she said.'"**

T-399,400,ADD148.

Knowles also discussed concern for the safety of her sister's children after Larson's release. Ex. 120,ADD148.

E. Ryan Larson.

Larson testified he did not shoot and kill Officer Decker and had nothing to do with his murder. T-718. He was never charged with a crime in connection with the killing. T-718.

After his release from jail, he left town and did not return to Cold Spring because Chief Jones told him not to return for his own safety. T-728,733. He eventually lived with a friend in St. Cloud and then Waite Park. T-729.

Larson was not allowed to return to school. T-756. He missed final exams, failed classes, and placed on academic warning. T-756,760, Ex. 25. He had to pay for classes he failed before returning in 2014 and graduate in 2015. T-757,762,764-65.

He said the statement by Nelson in KARE 11's 6:00 newscast "Police say that man identified as 34-year old Ryan Larson ambushed Officer Decker and shot him twice, killing him" was false because law enforcement never said that and because he had not shot and killed Officer Decker. T-730,731,732. He described

how the statement made him feel, "having something published like that for everybody to see or hear, being accused of one of the most heinous crimes that a person could possibly be accused of, it – I mean, it hurts. It's not something I wish upon anybody." T-732. He avoided the public. T-733.

In Croman's interview of Mrs. Decker, Larson said the part of the statement about him killing her son was false. T-733-34. He had not been accused by law enforcement of killing her son and he did not kill Officer Decker. T-732, 734. The statement caused hurt and pain in different ways by saying he was responsible for Officer Decker's death in the small community. T-734.

Larson said Nelson's statement at 6:00 that "Ryan Larson, the man accused of killing Officer Decker, could be charged as early as Monday" was false. T-735. He received no paperwork or criminal charges. T-735. He did not shoot and kill Officer Decker. T-732. The statement was painful to him to be accused of such a heinous crime. T-735. He was ridiculed in the community. T-735.

Larson testified that Croman's report at 6:00 with the statement "His mind must have been really messed up to do something like that. I know Tom would have forgave him" was false. T-736. This made him appear to have done it and that he had issues to be worked out and did not make him look good in the community. T-737.

Larson testified Nelson's statement at 10:00 "Investigators say 34-year old Ryan Larson ambushed the officer, shooting him twice. Larson is in custody" was false because authorities never said that and he did not ambush and shoot Officer Decker. T-738-739. The statement made him feel horrible, hurt, insulted, embarrassed, and confused. T-739.

Larson said Shortal's report at 10:00 was fabricated and false, except for the part about Decker being the good guy. T-739. Law enforcement never said those words and he did not open fire on Officer Decker. T-739-40. Shortal's words made him feel hurt, confusion, frustration, and anger. T-740.

In the 10:00 newscast, Nelson's statement "He does not have an extensive criminal history but was cited with disorderly conduct in 2009. He was a second-year machine tool student at St. Cloud Tech. Larson is being held in the Stearns County jail," accompanied by Larson's name, mugshot, "officer killed," and "suspect," made it look like he was responsible for Officer Decker's death. T-741. He felt hurt, frustration, confusion, and anger from this statement. T-741.

The kare11.com article stating "Investigators believe he fired two shots into Cold Spring Police Officer Tom Decker, causing his death" was false because Larson had not killed Officer Decker. T-741. This statement made him feel hurt, confusion, anger, and frustration, T-741.

Larson said the "Man faces murder charge" headline was false because it was a definitive statement he was facing charges when he was not. T-742-43, Ex. 119,ADD144. The statement "Police say Larson is responsible for the shooting death of Cold Spring-Richmond Police Officer Tom Decker" was false because police never made the statement and he was not responsible for the shooting death of Officer Decker. T-743. The headline made Larson feel ridiculed, anger, hurt, confused and did not make sense. T-744. The comments by Knowles in the December 5th article conveyed his guilt and he felt anger, confusion and hurt. T-745.

F. "Shooting the Messenger" Closing.

After Larson's request for the falsity by implication instruction was denied, Respondents' counsel pointed to law enforcement as responsible for Larson's harm:

> "And they're seeking to hold the defendants in this case accountable for the harm that was caused by law enforcement when they told the world that Mr. Larson was arrested for the ambush murder of Officer Decker. That's shooting the messenger and that's wrong."

T-1149,1154,1162.

SUMMARY OF THE ARGUMENT

The fair report privilege does not apply to statements beyond the fact of arrest before judicial control. It likewise does not apply when the publication does not clearly attribute the statements to the specific official proceeding or record.

Summaries of law enforcement press conferences and news releases are not official proceedings or records entitled to the privilege. Even if the privilege applied, it was lost because the statements were not substantially accurate. Respondents' statements portrayed a different effect on the mind of the recipients than did the precise truth.

It was error for the jury not to decide whether the statements were false by implication. No evidence or argument was presented that Larson was the killer. The verdict on falsity was palpably contrary to the undisputed facts that Larson did not shoot and kill Officer Decker, what statements were published, and when they were published. A reasonable jury could only conclude that the implication of the eight statements that he was the killer was false. The district court correctly granted judgment as a matter of law (JMOL) on falsity and ordered a new trial on negligence and damages. The district court properly ordered a new trial on the three dismissed statements, finding that a reasonable jury could conclude they were false and defamatory by implication.

The Court of Appeals erred in concluding that summaries of the press conference and news release were protected by the privilege, that JMOL on falsity should be reversed, that the falsity instruction satisfied substantial accuracy for the privilege and abuse of privilege under *Moreno*, and that the incremental harm doctrine barred the three dismissed statements.

The Court of Appeals should be reversed and the case remanded for a new trial consistent with the district court's post-trial Order. ADD029.

ARGUMENT

I. Standard of Review.

A new trial based on an error of law is reviewed de novo. *Halla Nursey, Inc. v. Bauman-Furrie & Co.*, 454 N.W. 2d 905, 910 (Minn. 1990).

II. The Fair Report Privilege Does Not Apply to Summaries of Statements Made by Law Enforcement in a Press Conference and News Release.

Extending the fair report privilege to summaries of statements made by law enforcement at the press conference and in the news release went beyond the scope and purpose of the privilege. Minnesota should not extend the privilege to include summaries by the media about statements made at a press conference and news release by law enforcement before criminal charges are filed and the case is under judicial control with opportunity to confront the statements. The extension of the privilege unfairly protects false and defamatory statements about private individuals like Larson before being criminally charged, while depriving them of a remedy for defamation.

The purpose of a defamation action is to compensate a private citizen for wrongful injury to his or her reputation. *Richie v. Paramount Pictures Corp.*, 544 N.W. 2d 21, 28 (Minn. 1996); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-49

(1974); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991). The fair report privilege is an exception to the common law rule that one who publishes or republishes a defamation "adopts" it as his own. *Dameron v. Washington Magazine, Inc.*, 779 F. 2d 736, 739 (D.C.Cir. 1985). The basis of the privilege is the interest of the public in having information made available to it as to what occurs in official proceedings and public meetings. *Id.*, *Bufalino v. Associated Press*, 692 F. 2d 266, 271 (2d Cir. 1982).

Courts have balanced the need for a robust and unfettered press and the possible chilling effect on the dissemination of information to the public against the constitutional right to a remedy for those injured by defamatory statements and established limitations to the fair report privilege. ADD087. There is, however, no constitutional value in false statements of fact. *Gertz*, 418 U.S. at 339-40.

The media's rush to publish should not supersede a private cause of action for defamation when the individual is not otherwise protected by the opportunity to confront the statements in official proceedings. The Court of Appeals misapplied the fair report privilege for a private person by its erroneous: 1) analysis of *Moreno v. Crookston Times Publishing Co.*, 610 N.W. 2d 321 (Minn. 2000); 2) determination that the press conference and news release were official proceedings; 3) failure to require proper attribution of the statements; and 4)

extrapolation of "substantial accuracy" from the falsity instruction for the fair report privilege and incorrect falsity instruction. These will be addressed in turn.

1. *Moreno*.

In *Moreno v. Crookston Times Printing Co*., 610 N.W. 2d 321 (Minn. 2000), this Court addressed the fair reporting privilege, but did not extend it beyond the precise statements made in the confines of official proceedings. The Court recounted that in *Nixon v. Dispatch Printing Co.*, 112 N.W. 258 (Minn. 1907), it recognized a privilege for the fair and accurate reporting of a judicial proceeding. *Id*., at 332. The same policy considerations in *Nixon* supported extending that privilege to fair and accurate reports of legislative proceedings as well, including city council meetings. *Id*. The fair and accurate reporting privilege extends to protect the accurate and complete report or a fair abridgment of events that are part of the regular business of a city council meeting. *Id*., at 333.[2]

The privilege rests on two principles. "First, because the meeting was public, a fair and accurate report would simply relay information to the reader that she would have seen or heard herself were she present at the meeting. *Moreno*, 610 N.W. 2d at 331. The second principle is the obvious public interest in having

[2]*Nixon* held that a report of a judicial proceeding, if fair and impartial, is privileged. 112 N.W. at 259. The Court distinguished proceedings in court under the control of a judge where both sides may be heard, versus the filing of a complaint, never presented to the court for action and not a judicial proceeding, for recognizing the privilege. *Id*., at 258-59. This reasoning applies here.

public affairs made known to all." *Id.*(citation and quotation omitted). The privilege is not defeated by common law malice, but by a showing that the report is not a fair and accurate report of that proceeding. *Id*., at 333.

The privilege only applies to reports of official public proceedings. *Moreno*, 610 N.W. 2d at 331. Official action must be taken before the privilege attaches to the reporting of a [judicial] proceeding. *Hurley v. Northwest Publications, Inc.*, 273 F. Supp. 967, 971 (D. Minn. 1967).

In the context of a criminal investigation, *Moreno* instructed that "while an arrest or indictment is an official act generally covered by [Section 611 of the *Restatements (Second) of Torts*], 'statements made by the police of by the complainant or other witnesses or by the prosecuting attorney as to the facts of the case or evidence expected to be given are not yet part of the judicial proceeding or of the arrest itself and are not privileged under this Section." *Id.*, at 333.[3]

A "reporter is not privileged under this Section to make additions of his own that would convey a defamatory impression, nor to impute corrupt motives to any one, nor to indict expressly or by innuendo the veracity or integrity of any of the parties." *Moreno*, 610 N.W. 2d at 333, citing *Restatement (Second) of Torts, Sec.*

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[3] To be considered defamatory a statement must be communicated to someone other than the plaintiff, it must be false, and it must tend to harm the plaintiff's reputation and to lower him in the estimation of the community. *See Phipps v. Clark Oil & Refining Corporation, et al*, 408 N.W. 2d 569, 573 (Minn. 1987).

611, cmt. f. This limitation on the privilege is also expressed with respect to arrests. *See id.* at cmt. h.

A similar rule for official immunity applies to allegedly defamatory statements made in a police report. *See Carradine v. State*, 511 N.W. 2d 733, 737 (Minn. 1994); *Moreno*, 610 N.W. 2d at 333. As long as the officer's comments only reiterated the contents of his official report, he was protected. *Id.* To the extent that his comments departed from his report and those comments not in his report significantly added to the plaintiff's injury, however, then such comments would not be privileged. *Id.*

Larson had not been criminally charged or appeared before a judge when the statements were published. The statements were not subject to judicial control and he had no opportunity to confront them in official proceedings. Because Respondents added contextual material, not part of the press conference, news release, or jail log that conveyed a defamatory impression and commented Larson as a killer, beyond the fact of his arrest, the statements are not privileged. *Id.*, 610 N.W. 2d at 333; *Nixon*, 112 N.W. at 259.

The Court found the summaries of the press conference and news release privileged for three reasons stemming from *Moreno*. Op. at 14. One, it concluded that a law enforcement press conference is a "meeting open to the public that deal[s] with matters of public concern," citing Section 611 of *Restatement*

(Second) of Torts. Op. at 14. "Likewise, a law-enforcement news release is a 'report of an official action or proceeding.'" *Id.* It concluded that *Moreno's* analysis of the city council meeting was applicable to the press conference and news release because they were public, and that "a fair and accurate report would simply relay information to the reader that she would have seen or heard herself were she present at the hearing." *Id.* It emphasized the public interest in relaying the public information provided by law enforcement. *Id.*

2. Proceedings Not Covered by the Privilege.

Law enforcement press conferences and news releases are not official recurring government functions essential to democracy like judicial proceedings or city council meetings entitled to the privilege. The privilege only applies in official proceedings wherein both sides have an opportunity to be heard. *See Moreno*, 610 N.W.2d at 329; *Nixon*, 112 N.W. at 259. Private individuals have no opportunity to confront defamation at a press conference they otherwise enjoy at regular official proceedings like city council meetings or cases under judicial control.

While the murder of a police officer is a matter of public interest, the press conference and news release are not official actions in the same sense as a city council meeting or judicial proceeding. No official record is created by a press conference or news release that becomes part of the investigation and neither are required by statute or other authority to enjoy the privilege. *See Phillips v.*

Evening Star Newspaper Co. 424 A.2d 78, 89–90 (D.C. Ct. App. 1980). No official action would be taken, no issues debated, and no official business conducted, in contrast to a judicial proceeding or city council meeting.

The context of the press conference is significant. There was no criminal complaint detailing charges or allegations involving Larson, the murder occurred less than twelve hours before, and few details were available.

Law enforcement did not comment on or imply what their individual or collective beliefs were regarding Larson's guilt or responsibility for the crime. ADD111-120. Police did not comment on the strength of the evidence. *Id*. Evans testified that no determination had been made that Larson was responsible for ambushing, shooting and killing Officer Decker or that there was enough evidence with which to charge him. T-773,774. If asked at the press conference if law enforcement believed that Larson was responsible for shooting and killing Officer Decker, Evans replied "No. And I would have answered, you know, it's too soon for us to make such determinations." T-776.

Evans said that providing information about the progress of the investigation did not include saying they captured the killer of Officer Decker. T-780. They said that somebody was apprehended or was in custody in connection with this crime. *Id.*

When asked how he would have responded if asked at the press conference if Larson had been accused or charged with murdering Officer Decker, Evans responded "…it's a preliminary investigation. We do not make the determination. That's a determination to be made by the county attorney, and that is not – we would not make that determination." T-775.

The Court of Appeals' ruling will shield false summaries by the media of reports of law enforcement statements. Law enforcement will remain subject to more stringent standards for defamation, with privilege limited to actual statements under *Carradine* which makes little sense. This sweeping rule will not promote fair and accurate reporting. Instead, it will protect defamatory reports of citizens committing crimes before being charged and the case under judicial control regardless of whether they had anything to do with the crime. The rush to be first to report should not replace the need for fair and accurate reporting. Keeping the privilege as a narrow exception to cases under judicial control maintains that balance.

The Court's conclusion that a fair and accurate report would simply relay information to the reader that he or she would have seen or heard herself were she present at the meeting is incongruous to a privilege covering "summaries."[4] Op. at

[4] Larson does not agree Respondents' statements were "summaries" of the press conference, news release, or jail log, but uses the Court's description for uniformity.

14. Readers and viewers of summaries receive a different version of events than they would see or hear if they were present at the meeting. *Moreno* and Section 611 of the *Restatement (Second) of Torts* do not specify that summaries are encompassed by the privilege. Summaries are susceptible to embellishment and cherry picking pieces of information like what happened here. The Court's conclusion is inconsistent with *Moreno's* admonishment about adding material that could convey a different impression to the reader.

The second reason cited by the Court was that comments to *Restatement (Second) Torts* Section 611 support the view that the fair-report privilege applies to official written statements by law enforcement. Op. at 16. The Court referenced comment i dealing with public meetings. *Id*. While the press conference was open to members of the media, it was not a public meeting for all to attend similar to a city council meeting or judicial proceeding. No advance notice was published to the general public, nor were members of the public invited. See Minn. Stat. §§ 13D.01 and 13D.04; *See St. Cloud Newspapers, Inc. v. Dist. 742 Comm. Schools*, 332 N. W. 2d 1 (1983). The only invitees and attendees were members of the media. *Id*.

The Court next concluded that comment d to Section 611 supported the privilege. Op. at 15. The Court relied on language extending the privilege to official action taken by an officer or agency of the government, or any of its

subdivisions, and language providing that the privilege applies to reports of official hearings or meetings "even though no official action is taken." Op. at 15.

Comment d, however, provides examples that narrow the application of the privilege to "reports of proceedings before any court, whether it is one of general or limited jurisdiction" and similar proceedings, judicial in character. *See* comment d. None of the examples in comment d apply.

Finally, comment d states "[i]t is unclear whether the privilege extends to a report of an official proceeding that is not public or available to the public under the law." *Id*. This leaves open the question whether press conferences by law enforcement where only the media are hastily invited are public meetings and official proceedings for the privilege. Larson contends they are not.

The third reason offered by the Court was that the criminal defamation statute supported extension of the privilege because the press conference was convened by state, county, and municipal agencies. Op. at 15. Minn. Stat. § 609.765, subd. 3(4), however, is distinguishable. This subdivision provides an exception to subd. 2 "if the communication consists of a fair and true report or a fair summary of any judicial, legislative or other public or official proceedings." Subdivision 2 provides: "Whoever with knowledge of its false and defamatory character orally, in writing or by any other means, communicates any false and defamatory matter to a third person without the consent of the person defamed is

guilty of criminal defamation …." *See* Minn. Stat. § 609.765, subd. 2. Subdivision 2 is similar to the actual malice standard for media defamation claims by public officials requiring a showing of knowledge of falsity or reckless disregard for the truth. *Moreno,* 610 N.W. 2d at 329. Private individuals have only a negligence standard for liability. *Id.*, at 331. Therefore, Minn. Stat. § 609.765, subd, 3(4) is inapplicable.

The Court disagreed with the district court's view of comment h to Section 611 of *Restatement (Second) of Torts*, reasoning that comment h means the privilege does not apply to unofficial police comments that are not part of an official meeting or statement by law enforcement. Op. at 17.

The attempt to delineate "official" from "unofficial" sheds little light on the issue, absent a definition of unofficial police comments. Op. at 17. The press conference encompassed questions from reporters that erroneously became part of the official statements of law enforcement by virtue of the Court conferring the privilege on the entire press conference. The "summaries" did not emanate strictly from prepared statements by law enforcement, but encompassed answers to questions from reporters. The responses were just that -- answers to questions by reporters seeking information they did not have. Evans repeatedly said he could not give details and that the investigation was active and ongoing. They were not prepared official statements as part of an official proceeding and were not entitled

to the privilege. One reporter asked if Officer Decker was related to NFL player Eric Decker. ADD117. Except for the fact of Larson's arrest, these were unofficial statements not part of an official proceeding. This illustrates the danger of casting a wide net of privilege over the entire press conference that protects random statements made by the media, not by law enforcement. *Cf. Carradine*, 511 N.W. 2d at 733.

Nothing in comment h to Section 611 limits its applicability to "unofficial" police comments. The Court provided no guidance for determining "official" versus "unofficial" police comments. Neither the number of law enforcement officials involved, nor the location of where the statements are made, should matter. The answers by Evans, Sanner, and Jones at the press conference were no different than if they had been standing outside on the steps of the building. They were unscripted and unofficial for purposes of the privilege. The privilege should not be extended to such unscripted questions and responses. *See Stokes v. CBS, Inc.*, 25 F. Supp. 2d 992, 1007-08 (D. Minn. 1998).[5]

Citing comment h to Section 611 of the *Restatement*, one treatise summarized why these events are not covered under the privilege:

> Informal statements by police and prosecutors, as in interviews and press conferences, do not constitute "official proceedings" of the type covered by this privilege. This is so, although in some cases the speakers

[5] Assuming *arguendo* the privilege applies, it should be applied sparingly to official statements by police, not unofficial colloquies with the media.

> themselves may be eligible for the protection of other privileges, or although reliance on the speakers, even in the absence of the privilege, may help support a defense of due care on the part of the publisher. A conversation between a reporter and a detective is not a public event that requires, or merits, coverage under this privilege. And extra-judicial defamation of the citizenry by the police is not a vital process of democratic government.

Harper, James & Gray, Law of Torts, Sec 5.24 pp. 244-45.ADD90-91.

The Court of Appeals referenced comment h to support its conclusion that "[a] reporter also may not make additional comments, *not part of the meeting*, that would convey a defamatory impression or impute corrupt motives to any one, [or] … indict expressly or by innuendo the veracity or integrity of any of the parties," then failed to apply it. Op. at 17. None of the statements were made in the press conference or news release. The Court seemed to realize this by characterizing them as "summaries." *Moreno* and Section 611 of *Restatement (Second) of Torts* do not afford the privilege to media summaries beyond arrest not under judicial control.

The Court's denunciation of the district court's description of the press conference and news release as "extra-judicial" mischaracterized the analysis. Op. at 18-19. The district court applied *Moreno* to Larson's case. It did not attempt to limit the scope of official proceedings to judicial proceedings as illustrated by it's discussion of *Moreno*.

"While an arrest or indictment is an official act generally covered by [Section 611 of the *Restatement (Second) of Torts*], 'statements made by the police

or by the complainant or other witnesses or by the prosecuting attorney as to the facts of the case or evidence expected to be given are not yet part of the judicial proceeding or of the arrest itself and are not privileged under this Section.'" *Moreno*, 610 N.W. 2d at 333.

The district court's analysis is consistent with *Moreno*. Speculation that the district court would have applied the privilege if Respondents' statements had been made during a city council meeting, and therefore indistinguishable, is misplaced. Op. at 18. A city council meeting is a recurring government proceeding. The plaintiff in *Moreno* could have appeared at another council meeting and given a rebuttal on the record, unlike Larson who had no such option.

The Court of Appeals gave short shrift to the prohibitions against extra-judicial statements that will have a substantial likelihood of materially prejudicing a jury in a criminal matter. Op. at 18-19. Prosecutors and law enforcement are prohibited by Minn. R. Prof. Cond. 3.6 and 3.8 from making extra-judicial statements that will have a substantial likelihood of materially prejudicing a jury trial in a criminal matter. Acknowledging "the importance of ensuring that media coverage does not taint the jury pool," the Court concluded "[w]e trust that law enforcement also has this in mind and tempers its official proceedings." Op. at 19.

These rulings create an absurd rule that allows the media to publish extra-judicial statements and summaries that were not, and could not have been,

published by law enforcement or prosecutors, and should be overturned. *See Carradine*, 511 N.W. 2d at 737.

No compelling public benefit exists for extending the privilege before the time required for prosecutors to file criminal charges. Authorities can hold an individual for 36 hours after an arrest before being brought before a judge, with certain exceptions. *See* Minn. R. Crim. P. 4.02, Subd. 5(1). A complaint must be presented to the judge before the appearance in Rule 4.02, Subd. 5(1). *See* Minn. R. Crim. P. 4.02, Subd. 5(2). This protects the rights of the individual to confront the charges promptly. Requiring the media to wait until criminal charges are filed, and judicial control over the case is exercised, before reporting details of the crime is reasonable and provides protection to individuals while promoting accurate reporting.

The rush to publish breaking news is no more important than procedural protections for charging individuals under arrest and their right to confront the charges. The media should not publish speculative summaries about what happened when law enforcement and prosecutors decline to provide it or do not have it before judicial control.

The rule announced by the Court of Appeals protects defamatory reports of false criminal accusations if there is an arrest, jail log, press conference, or news

release the media can point to after the fact. Private individuals should not lose their claims for defamation in these circumstances before judicial control.

3. Lack of Proper Attribution Defeats Privilege.

In order to enjoy the protection of the privilege, the publication must clearly attribute the statement in question to the official proceeding or document on which it is reporting or from which it is quoting. *See* R. Sack: Sack on Defamation, Sec. 7.3.5, p. 7-19. Because none of Respondents' defamatory statements were attributed to the news conference, news release, jail log, or as summaries, they are not entitled to the privilege. It must be apparent from either specific attribution or the overall context that the stories were quoting, paraphrasing, or otherwise drawing upon official documents or proceedings, unlike here. *Dameron, Inc.*, 779 F.2d at 739; *Masson*, 501 U.S. at 513; *Hughes v. Washington Daily News Co.*, 193 F. 2d 922 (D.C. Cir. 1952). Respondents raised the press conference, news release, and jail log as sources for the summaries only after litigation commenced.

The privilege's underlying purpose—encouraging the dissemination of fair and accurate reports—also suggests a natural limit to its application. *Dameron*, 779 F. 2d at 739. The privilege is unavailable where the report is written in such a manner that the average reader would be unlikely to understand the article (or the pertinent section thereof) to be a report on or summary of an official document or proceeding. *Id*.

The privilege is intended to facilitate media reporting of official proceedings so that the public may be informed. *Bufalino,* 692 F. 2d at 271; *See* Comment *a* to § 611. The privilege "should not be interpreted to protect unattributed defamatory statements supported after-the-fact through a frantic search of official records." *Bufalino*, 692 F. 2d at 271; *Dameron*, 779 F. 2d at 739, quoting *Gertz v. Robert Welch, Inc.*, 680 F. 2d 527, 536 (7th Cir. 1982), *cert. denied,* 459 U.S. 1226 (1983); *See also Phillips*, 424 A. 2d at 89 ("two major hurdles in the privilege ... [1] fair and accurate report[ing] ... [and 2] proper attribution").

These conclusions flow from an understanding that the intended beneficiary of the privilege is the public, not the press. *Dameron*, 779 F. 2d at 739. "The privilege is not simply a convenient means for shielding the media from tort liability. Rather, the privilege springs from the recognition that in a democratic society, the public has both the right and the need to know what is being done and said in government—even if some of that is defamatory." *Id*. Such interests are not served by inaccurate or faithless summaries of such reports. *Id.*, at 740. Respondents' publications did not make clear that the reports were paraphrasing, summarizing, or otherwise drawing upon the news conference, news release, or jail log so that the viewers and readers would know those were the sources. Accordingly, the lack of proper attribution defeats the privilege.

4. Substantial Accuracy Errors.

The fair report privilege is a qualified privilege and to claim its protection, a news report must be accurate and complete, or a fair abridgement of the occurrence reported. *Moreno*, 610 N.W. 2d at 333; *See Restatement (Second) of Torts* § 611. Order,11/10/16,p.2,ADD071. The legal test regarding whether the report is "fair and accurate" was explained in *Jadwin v. Minneapolis Star Tribune*, 390 N.W. 2d 437 (Minn. Ct. App. 1986). The question is whether the report is "substantially accurate." A statement is substantially accurate "if its gist or sting is true, *that is, if it produces the same effect on the mind of the recipients which the precise truth would have produced*." *Id.*, at 441(Emphasis added)(quoting *Williams v. WCAU-TV*, 555 F. Supp. 198, 202 (E.D. Pa. 1983); *see also Prosser and Keeton on the Law of Torts* § 116, at 842 (W. Keeton ed. 5th ed. 1984).

By contrast, "substantially accurate" in CIVJIG 50.25, stating the definition of falsity given to the jury, omitted the highlighted language from *Jadwin*. It provided that "[a] statement or communication is false if it is not substantially accurate. Substantial accuracy does not require every word to be true. A statement or communication is substantially accurate if its substance or gist is true." T-1251-52.

The Court of Appeals erred by departing from *Jadwin* in concluding that the verdict on falsity answered the question of whether the statements were

substantially accurate for the fair report privilege. Op. at 20-22. The Court improperly extrapolated the falsity verdict to find substantial accuracy for the fair report privilege without considering *Jadwin*. The definition of falsity under CIVJIG 50.25 given to the jury was different than the definition of substantial accuracy in *Jadwin*.

The jury never decided whether the statements produced the same effect on the mind of the recipient which the precise truth would have produced. *Jadwin*, 390 N.W. 2d at 441. If the jury was to decide privilege, then it should have been instructed with the *Jadwin* definition. Disregarding *Jadwin* changed the outcome.

The Court of Appeals couched the substantial accuracy analysis in terms of abuse of the privilege, noting that "[e]ven if the fair-report privilege is applicable, the privilege can be abused or 'defeated' upon a showing that the report was not fair or accurate, or that the report included additional material that was outside the official proceeding and the additional material conveyed a defamatory meaning," citing *Moreno*, 610 N.W. 2d at 334. Op. at 20. It then reviewed substantial accuracy from a summary judgment perspective concluding there was a genuine issue of fact whether the reports were substantially accurate summaries or fair abridgements of law-enforcement statements at the press conference and in the news release. Op. at 20,21. This was contrary to *Jadwin*.

Oddly, the Court stated the appropriate standard was whether Respondents' reports accurately summarized or fairly abridged statements made by law enforcement at the press conference or in the news release, citing *Moreno*, 610 N.W. 2d at 334. Op. at 21. But it then applied the jury's answer to the falsity question under CIVJIG 50.25 in its analysis of the privilege. Op. at 21-22. The jury did not consider whether the standard under *Moreno* was met and this reasoning is erroneous.

Where there is no dispute as to the underlying facts, the question of whether a statement is substantially accurate is one of law for the court. *Jadwin*, 390 N.W. 2d at 441. The district court correctly determined that there were no disputes about the underlying facts and that the statements were not substantially accurate. ADD70-75.

The analysis by the Court of Appeals further requires finding that the privilege applied before answering whether it was abused. The initial determination of whether a communication is privileged is a question of law for the court to decide. *Bahr v. Boise Cascade Corp.*, 766 N.W. 2d 910, 920 (Minn. 2009); *Lewis v. Equitable Life Assurance Soc. of the United States*, 389 N.W. 2d 876, 890 (Minn. 1986). The district court ruled that the privilege did not apply. ADD70-75. The question of whether the privilege was abused was never tried to the jury.

The Court of Appeals erred by finding the privilege applied, and that it was not abused, by extrapolating the verdict on falsity that emanated from a different definition under CIVJIG 50.25 than the standard in *Jadwin*. The Court further applied an erroneous legal standard for abuse of privilege under *Moreno* that was not contained in the jury instructions or verdict form. Op. at 21.[6]

Because the district court found the privilege inapplicable, Larson had no opportunity to present evidence on or argue abuse of the privilege. The jury was not instructed on privilege, or abuse of privilege, and did not answer questions on these issues. The Court erred in reversing JMOL on falsity and Order for new trial based upon its *sua sponte* analysis of substantial accuracy and abuse of the privilege that foreclosed Larson from a meaningful opportunity to address it. *See Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 419 (Minn. Ct. App. 2003). Accordingly, a new trial is appropriate.

Next, although none of the reports attributed the statements to the press conference, news release, or jail log, the Court erroneously concluded the statements were substantially accurate if all of these sources were considered together. Op. at 21. But there was no evidence Respondents considered these sources together for each of the eight statements. Reporters, producers, and

[6] The Court of Appeals' review of summary judgment rulings on privilege and substantial accuracy after trial appears to conflict with *Bahr*. *See* 766 N.W. 2d at 919.

executive producers could not give specific sources at trial, much less say they considered them together. It is not up to the Court to do so for them.

This ruling further conflicts with evidence of the actual publications. For example, the kare11.com story stated "Investigators believe he fired two shots into Cold Spring police officer Tom Decker, causing his death." ADD142. The article goes on to say, however, "While investigators would not describe the events they believed transpired …". *Id*. This showed knowledge that investigators did not describe the killing at the press conference and the statement was not substantially accurate.

The Court of Appeals did not address statements 1-8 individually. Even if the privilege extended to statements made in the press conference and news release, the six statements the district court found went beyond the fact of arrest and were not substantially accurate included:

> **Police say that man – identified as 34-year old Ryan Larson – ambushed Officer Decker and shot him twice, killing him.**
>
> * * *
>
> **Ryan Larson, the man accused of killing Officer Decker, could be charged as early as Monday.**
>
> * * *
>
> **Investigator say 34-year old Ryan Larson ambushed the officer, shooting him twice. Larson is in custody.**
>
> * * *

> **He was the good guy last night going to check on someone who needed help. That someone was 34-year old Ryan Larson who investigators say opened fire on Officer Tom Decker for no reason anyone can fathom.**
>
> *** * ***
>
> **Investigators believe he fired two shots into Cold Spring police officer Tom Decker, causing his death.**
>
> * * *
>
> **Police say Larson is responsible for the shooting death of Cold Spring-Richmond Police Officer Tom Decker.**

Order,ADD70-71.

Applying *Jadwin*, the effect the precise truth of the press conference, news release, and jail log would produce on the mind of the recipient was that Officer Decker had been shot in what appeared to be an ambush-style killing when he responded to a call for a welfare check. The subject of the welfare check, Larson, had been interviewed by Stearns County deputies and some of the investigation was ongoing. Larson was taken into custody and booked at the Stearns County jail on murder charges. The investigation was in its very early stages and was active and ongoing and police continued to investigate the crime.

To the contrary, the effect the statements would produce on the mind of the recipients was that police firmly believed Larson killed Officer Decker, that they were likely proceeding with murder charges, and those charges could be brought as early as Monday. There was no sense that the investigation was in its early,

preliminary stages. There was no sense that the investigation was ongoing. The effect of each statement was that the police had their man. The investigation was over. Each of the Respondents' statements gave the impression that police concluded without a doubt that Larson killed Officer Decker and that the investigation was not active. Each of the statements created the impression of finality to the investigation and certainty to the idea that Larson had killed Officer Decker that was not presented in the news conference, news release, and jail log.

During the press conference, Evans emphasized that the investigation was in its preliminary stages. ADD115. For example, in response to a question whether there was reason to believe there might be some other individual involved, Evans replied "Again, we don't have any information to believe that at this time, but it's in early stages of the investigation, we continue to follow-up on all leads." Ex.102,ADD115. In response to a question regarding whether something had happened in Larson's life that could have triggered him to be upset, Sheriff Sanner replied "Again, it's far too early in the investigation to make a comment in reference to that." Ex.102,ADD117.

The press conference was replete with statements like: "Again, that's part of the active and ongoing investigation." ADD115. "That's part of the active investigation. We can't discuss that at this time." *Id.* "Again, that's part of the active investigation and we just can't comment on that at this time." ADD116.

"It's - - again, that's part of the active crime scene and we just – we can't discuss the details of the active crime scene at this time." *Id.*

Law enforcement officials did not comment on or imply what their individual or collective beliefs were regarding Larson's guilt or responsibility for the crime. Order,ADD0073. They did not comment on the strength or the evidence. *Id*. In fact, had reporters directly asked the police if they were saying that Larson was the person responsible for shooting Office Decker, the officers would have denied the statement or refused to comment and reiterated the investigation was active and ongoing. ADD074. If reporters had asked police if they believed Larson was the person responsible for shooting Officer Decker, the officers again would have either denied that statement or refused to comment and reiterated that the investigation was active and ongoing. *Id*.

The statements "Police say" Larson shot and killed Officer Decker went way beyond what the police actually said at the press conference and beyond the fact of his arrest. The underlying implication that Larson was responsible for Officer Decker's death was false and therefore did not produce the same effect on the mind of the recipient which the precise truth would have produced. *Jadwin,* 390 N.W. 2d at 441.

Because of this evidence, each of Respondents' statements produced a harsher effect or sting on the mind of the recipients than the precise truth would

have produced and they are not substantially accurate. *Jadwin*, 390 N.W. 2d at 441.

Two statements conveyed the fact of arrest or charge of a crime, but were not substantially accurate:

Rosella holds no ill-will against the man accused of killing her son.

* * *

Man faces murder charge.

The effect of the precise truth of the press conference, news release, and jail log would produce on the recipient was that investigators were in the early hours of their investigation, they had arrested one suspect and were continuing an active investigation, and that the Stearns County Attorney's Office had not charged Larson with a crime. Order,ADD074.[7]

To the contrary, the effect of each of these statements would produce on the mind of the recipient was that Larson had been formally charged with murder by the Stearns County Attorney's Office. *Id*. In this context, "accused" generally means charged with a crime. *Id*. *Accuse – Definition of accuse in Merriam-Webster Dictionary*, (visited November 13, 2017),https://www.merriam-webster.com/dictionary/accuse (to charge with a fault or offense ... to charge with an offense judicially or by public process); Black's Law Dictionary, 5th Ed., p.31

[7] Croman acknowledged this in his testimony. T-368.

(To bring a formal charge against a person). The implication was that Larson was charged with killing Rosella Decker's son with evidence to support it.

The statement "Man faces murder charge" clearly would produce on the mind of the recipient that Larson had been formally charged with murder. ADD075. These statements produced a harsher effect or sting on the mind of the recipients than the precise truth would have produced. *Id*. The statements are not substantially accurate and not protected by the privilege. *Id.*; *Jadwin*, 390 N.W. 2d at 441.

II. The Court of Appeals Erred in Reversing Judgment as a Matter of Law (JMOL) on Falsity.

The Court of Appeals erred in reversing JMOL on statements 1-8. Op. at 22. The Court reasoned that a genuine issue of material fact existed whether statements 1-8 "accurately reported or fairly abridged law-enforcement statements from the November 30 press conference and news release." Op. at 22. Based on this definition of substantial accuracy from the fair report privilege in *Moreno*, the Court concluded that the district court erred granting partial judgment to Larson post- trial by determining that statements 1-8 were false as a matter of law. *Id.*

But the definition of substantial accuracy relied upon by the Court was never presented to the jury in the instructions to define falsity or as a question in the verdict form. The language in *Moreno*, however, is not a definition of falsity and *Moreno* does not attribute it as such. The ruling misstates the definition of falsity

and should be reversed. *See Christie v. Estate of Christie*, 911 N.W. 2d 833, 838 (Minn. 2018); *In re Estate of Butler*, 803 N.W. 2d 393, 398 (Minn. 2011).

The Court erred by applying the wrong definition of falsity to grant the fair report privilege, reverse the JMOL on falsity, and reverse the Order for new trial. *Christie*, 911 N.W. 2d at 838; *In re Estate of Butler*, 803 N.W. 2d at 398. When an issue is submitted to the jury on an erroneous instruction, a new trial should be granted unless it appears as a matter of law that the jury's determination is correct. *Becker v. Allow Hardfacing & Engineering Co.*, 401 N.W. 2d 655, 660 (Minn. 1987). The Court further mischaracterized the posture of the falsity instruction, observing, "[a]ppellants do not challenge the falsity instruction" and therefore "we do not determine whether the falsity instruction correctly stated the applicable law for the fair report privilege." Op. at 24.n.8. Larson challenged the falsity instruction, however, and the omitted language from CIVJIG 50.25.

The jury's findings on falsity were "contrary to the applicable law in the case" and undisputed evidence. *Diesen v. Hessburg*, 455 N.W. 2d 446, 452 (Min. 1990)(quoting *Dean v. Weisbrod*, 217 N.W. 2d 739, 742-43 (1974)). The instruction under CIVJIG 50.25, sans the falsity by implication language, gave the wrong law of falsity that was corrected by JMOL. *See Lewis*, 389 N.W. 2d at 888. The omitted language provided that "A statement or communication is also false if

the implication of the statement is false." *See Lewis*, 388 N.W. 2d at 888; CIVJIG 50.25.[8]

The district court's ruling that the statements were false as a matter of law was proper because viewing the evidence in the light most favorable to Respondents, no reasonable jury could find otherwise. *Diesen,* 455 N.W. 2d at 452; *Jadwin*, 390 N.W. 2d at 441; PTOrder,ADD036. When the underlying facts are undisputed, judgment as a matter of law that the eight defamatory statements were false can be decided by the court. *Diesen*, 455 N.W.2d at 452; *Jadwin*, 390 N.W. 2d at 441; *Nadeau v. Ramsey County*, 277 N.W. 2d 520, 522 (Minn. 1979); *Williams v. WCAU-TV*, 555 F. Supp. at 203. There was no dispute about what statements were published, when they were published, and that Larson was not the killer. The underlying facts and implication he killed Officer Decker were false as a matter of law.

In addressing falsity, the content of the defamatory statement must be the implication of the statement -- that is, did Larson ambush, shoot and kill, Officer Decker --not whether law enforcement actually made the statement. *Lewis*, at 888-89. Without the falsity by implication instruction, the underlying falsity was disregarded and enabled Respondents to argue that law enforcement caused

[8] A court errs of it gives a jury instruction that materially misstates the law. *Lindstrom v. Yellow Taxi Co. of Minneapolis*, 214 N.W. 2d 672, 676 (Minn. 1974).

Larson's harm – "[t]hat's shooting the messenger and that's wrong." T-1162. This misstated the law. *Id.* The Appeals Court conflated the truth/falsity issue with the substantial accuracy of a report under the fair report privilege.

The falsity inquiry focuses on the underlying implication of a statement and not on whether the statement itself is false. *Lewis*, 389 N.W. 2d 888-89. In *Lewis*, employees were fired for gross insubordination and claimed they had to tell future employers thereby requiring the employees to self-publish defamatory statements. *Id*. The defendant argued it was true that the reason they were fired was for gross insubordination. *Id*. However, the court held it was proper to focus on the truth of the underlying implication of the statement: whether the employees *actually* engaged in gross insubordination. *Id*.

Answering "No" to the falsity question cannot be sustained by the evidence at trial. *Diesen*, 455 N.W. 2d at 452. An answer to a special verdict question will be set aside when it is perverse and palpably contrary to the evidence or where the evidence is so clear to leave no room for differences among reasonable people. *Hauenstein v. Locite Corp.*, 347 N.W. 2d 272, 275 (Minn. 1984). Upholding the negative answer would wrongly indicate that the statements were true which is palpably contrary to the law and undisputed evidence. *Lewis*, 389 N.W. 2d at 888.

The Court confused falsity by implication with defamation by implication in reversing JMOL on falsity. Op. at 25. It ruled "the district court erred in its

conclusions that statements 1-8 required an instruction on falsity by implication, which is when true statements 'because of the particular juxtaposition of the statements or the omission of particular facts become false,'" citing *Schlieman v. Gannett Minn. Broad., Inc.*, 637 N.W. 2d 297, 303 (Minn. App. 2001), *review denied* (Minn. Mar. 19, 2002).

But this language in *Schlieman* derives from defamation by implication contained in CIVJIG 50.10, not falsity by implication in CIVJIG 50.25. ADD149-50. The jury found the statements defamatory. Larson was entitled to the falsity by implication instruction in CIVJIG 50.25 because the underlying implication of the statements that he was the killer were false and the Court erred ruling otherwise.

1. Republication.

The district court correctly ruled that Respondents' argument that they were the "messenger" delivering statements from law enforcement was contrary to law. PTOrder, ADD0034. "Unless protected by a privilege, defendants are as liable for republication of a defamatory statement as if they had made the statement themselves." *Price v. Viking Press, Inc.*, 625 F. Supp. 641, 644-45 (D. Minn. 1985)(citing *Cianci v. New Times Pub'g Co.*, 639 F. 2d 54, 60-61(2d Cir. 1980)); *Hoover v. Peerless Publications, Inc.*, 461 F. Supp. 1206 (E.D. Pa. 1978); *Bible Faith Lutheran Church of India, Inc. v. Assoc. of Free Lutheran Cong. Mission*

Corp., 1991 WL1300878 at *18 (D. Minn. Aug. 1. 1991). PTOrder,ADD034. This rule has been widely recognized. *Cianci*, at 61; *See e.g.*, *Restatement, Second, Torts*, s 578 (1977); *Olinger v. American Savings and Loan Assoc.*, 409 F. 2d 142, 144 (D.C. Cir. 1969).

Larson's post-trial motion requested JMOL or new trial based on republication that raises a fundamental error of law. *Lewis*, 389 N.W. 2d at 885. Fundamental errors of law [in jury instructions] are reviewable on appeal so long as they have been assigned as errors in the motion for new trial. *Id*. Larson argued that republication of the statements was defamatory at trial and in his post-trial motion. T-72-74, Trial Day 2, 11/8/16. Republication encompassed statements with "police say" or "investigators say" as well as the underlying false implication that Larson was the killer. The repeater cannot defend on the ground of truth that the source did, in fact, utter the statement, like the "don't shoot the messenger" argument. *Cianci*, 639 F. 2d at 61; *Olinger*, 409 F. 2d at 144. This is similar to *Lewis* that focused on the falsity of the underlying implication of whether the plaintiff actually engaged in gross insubordination, not whether the words "gross insubordination" were stated by the employer. *Lewis*, 389 N.W. 2d at 889. A falsity by implication and republication instruction would be requested at the new trial and should be addressed by the Court because its impact on this case and the likelihood of it recurring in the future.

IV. The Court of Appeals Erred in Reversing the Order for New Trial.

The Court erred in reversing the Order for new trial on negligence and damages for the eight statements and the three dismissed statements that were defamatory by implication. These will be discussed in turn.

1. Negligence and Damages.

The Court reversed the new trial on negligence and damages based on its erroneous rulings on the fair report privilege, substantial accuracy, and falsity by implication. *See supra*. Reversal of these issues will reinstate the new trial on negligence and damages.

"A new trial is required if the jury instruction was erroneous and such error was prejudicial to [the objecting party] or of the instruction was erroneous and it effect cannot be determined." *Christie*, 911 N.W. 2d at 838 (citation omitted)(internal quotation marks omitted). The Court erred by reversing the new trial on negligence and damages for the eight statements for which the district court granted JMOL on falsity.

A new trial should be granted because the jury received erroneous instructions that affected the outcome. *See Becker*, 401 N.W. 2d at 660.[9] The erroneous instruction and verdict on falsity was incorrectly extrapolated to satisfy

[9] Larson also moved for a new trial on falsity and renews this as an alternative to JMOL.

substantial accuracy for abuse of the fair report privilege. As discussed, this improperly injected the standard for abuse of the privilege from *Moreno* to reverse JMOL on falsity, without applying *Jadwin* for the fair report privilege, and the falsity by implication instruction. *See supra*. Because of these errors, a new trial is proper.

A private individual may recover damages by showing that the defendants were negligent when they made false statements. *Moreno*, 610 N.W. 2d at 329. This considers whether the defendant knew or in the exercise of reasonable care should have known that the defamatory statement was false. *Id*, at 329; *Alharbi v. Theblaze, Inc.*, 190 F. Supp. 3d 334, 358 (D.Mass.2016).

The district court's findings from which the jury could find negligence remain valid. T-1039-42. The jury could find that what the police were saying is that they had someone in custody and are investigating. They indicated they did not have other suspects but were continuing to investigate and follow up. The response by Sheriff Sanner was about other victims when asked if anybody else was involved. T-1040. It was not part of the prepared statement of the police. *Id*. The reporter asked if there was anybody else injured or involved and he said no. *Id*. The district court correctly found that the jury could easily find that police were not saying that they were not looking for other suspects; they said specifically they were following up. T-1040-41. They could find they were not saying the

community was safe, but that they had someone in custody and were still investigating. T-1041. They had not determined that Larson was the killer and emphasized the investigation was active and ongoing. *Id*. Respondent's stories gave the opposition impression, i.e., that Larson was the killer, the police had their man, and the community was safe. T-1039-40.

Respondents presented no evidence the statements or underlying implication of the statements were true or that Larson was the killer. Some watched the news conference where none of the statements were made that raises doubts about the accuracy of the reports. The statements were not in the news release or jail log. Respondents knew investigators refused to describe events they believed transpired, but then published statements as though they did so. Larson was not criminally charged. A jury could conclude it was unreasonable to publish the statements.

Respondents' abandonment of policies for attribution supports negligence. They said it was important to verify sources that attribute statements to speakers so that the speaker was identifiable, then failed to do so.

Respondents published the statements as though they had official information to support them when they did not. A jury could find that publishing stories that conveyed the opposite effect of the truth of what was said was negligent.

By finding the statements were defamatory, the jury concluded that Larson suffered harm to his reputation. *See McKee v. Laurion*, 825 N.W. 2d 725, 729-30 (Minn. 2013). Further evidence of damages and harm is discussed in the incremental harm doctrine discussion, *infra*.

2. New Trial for the Three Dismissed Statements.

The Court of Appeals erred in reversing the new trial on the three statements for defamation by implication. A statement may be defamatory by implication if: (1) it leaves out certain facts so that the statement conveyed has a defamatory meaning, (2) it linked statements in a way that conveyed a defamatory meaning, or (3) it stated an opinion that conveyed defamatory facts. *Utecht v. Shopko Dept. Store*, 324 N.W. 2d 652, 653-54 (Minn. 1982); *Toney v. WCCO Television*, 85 F. 3d 383, 396 (8th Cir. 1996). Context is critical to meaning because a false statement that is defamatory on its face may not be defamatory when read in context and a statement that is not defamatory on its face may, in fact, be defamatory when read in context. *Schlieman*, 637 N.W. 2d at 304.

The first statement by KARE reported:

> **"His mind must have been really messed up to do something like that. I know that Tom would've forgave him.**

This statement by Rosella Decker appeared in a package report by John Croman. The clear implication of the statement was that Larson had shot and killed Officer Decker and presumption of his culpability. This passage linked the

statements with Croman's report in which he said Larson was accused of killing Decker. *See Michaelis v. CBS, Inc.*, 119 F. 3d 697, 701 (8th Cir. 1997).

Because a reasonable jury could find this statement implied that Larson killed Officer Decker, he is entitled to a new trial. PTOrder,ADD039. The clear implication of the statement was that Larson had shot and killed Officer Decker that presumed his culpability in the context of the story. This passage linked the statements with Croman's report in which he said Larson was accused of killing Decker and the statement should not have been dismissed.

The next KARE 11 statement said:

> **"The 34-year old does not have an extensive criminal history – but was cited with disorderly conduct in 2009. He was a second year machine tool student at St. Cloud Tech. Larson is being held in the Stearns County Jail."**

The statements were broadcast by Nelson in the 10:00 newscast with Larson's name, color mug shot, "officer killed" across the screen. The statements followed Shortal's report stating Officer Decker "**was the good guy last night going to check on someone who needed help.**" The shot changed to Larson's color mugshot and Shortal stating "**That someone was 34-year old Ryan Larson who investigators say opened fire on Officer Tom Decker for no reason anyone can fathom.**" It was then that the story cut to Rosella Decker who stated: "**His mind must have really been messed up to do something like that. I know Tom would've forgave him**." The story shortly returned to the studio when

Nelson stated, over Larson's color mugshot, "**Charges could be filed as early as Monday against Ryan Larson … the man accused of killing Officer Decker**. She closed the story by stating: "**The 34-year old does Not Have an Extensive Criminal History – But Was Cited With Disorderly Conduct in 2009. He Was a Second Year Student at St. Cloud Tech. Larson is Being Held in The Stearns County Jail."**

In context, it implied that Larson was the killer and this was his crime despite his background and the jury should have been given this statement. *See Michaelis*. 119 F. 3d at 701; *Toney*, 85 F. 3d at 395.

The statement by Roxie Knowles said:

> **"She had one thing to say to Larson if she got to [sic] the Chance to see him leave the jail. This isn't over."**

The statement was in the "County lets Cold Spring suspect go" article of December 5, 2012, after Larson's release from jail. ADD148. This language followed comments on the third page about Officer Decker's ex-wife being concerned for the safety of her children – after Larson was released. *Id*. The article omitted that there was no evidence of Larson's involvement in the crime. The newspaper knew Larson denied any involvement. The placement of the statement in the article made him look guilty. *See Cianci*, 639 F. 2d at 60.

This statement implied he was the killer who was out of jail in public as a danger. *Id*. In context, Knowles' statement implied he was involved with the

killing, she wanted to confront him about it, and that he should not have been released. The jury should have been given the statement to decide whether it constituted defamation by implication.

Because the underlying implication of the three statements that Larson killed Officer Decker was false, the Court erred in reversing the Order for new trial. ADD038-41.

3. Incremental Harm Doctrine.

The Court erred in applying the incremental harm doctrine to bar the three statements. ADD.026-028. Minnesota has not adopted the doctrine to bar defamation claims by private individuals for statements in separate publications against media defendants and it is inapplicable. *Carradine*, 511 N.W.2d at 737; *Masson*, 501 U.S. at 522.

The incremental harm doctrine measures the incremental reputational harm inflicted by the challenged statements beyond the harm imposed by the nonactionable remainder of the publication. *Masson*, 501 U.S. at 522. It does not measure the harm imposed by the other actionable statements. Because the eleven defamatory statements were in five separate publications, the Court erred treating them as though they appeared in one publication in applying the incremental harm doctrine. There was no evidence that the same viewers and readers saw all of the statements to trigger the doctrine.

In *Carradine*, the plaintiff argued the statements to the press did not amount to a substantial repetition of the statements in the arrest report. 511 N.W. 2d at 737. This Court observed that "if a jury properly might find that the additional statements significantly added to any injury sustained by the plaintiff over and above any injury sustained as a result of the absolute statements, then plaintiff should be allowed to proceed to trial, ... otherwise not. *Id.* *Carradine* involved a public person and statements in only one publication, not five.

The statements were not incremental to one publication, but constituted separate defamatory statements causing damages and harm to his reputation. He need not prove some statements were more damaging than others and damages are within the jury's province. *See Anderson v. Liberty Lobby v. Anderson*, 746 F. 2d 1563, 1568 (D.C. Cir. 1984)(rejecting the argument that plaintiff's damaged reputation by prior publications cannot be further damaged).

The Court's analogy of absolute privilege, the fair-report privilege, and the incremental harm doctrine is misplaced. Op. at 27. The statements by Mrs. Decker and Knowles were not products of the press conference, news release, or jail log, nor was Nelson's, and were not privileged.

Larson presented evidence of harm from each statement and should be permitted to do so for the three reinstated statements. T-730-45,827. Op. at 27. A jury may find some statements more harmful than others. The defamation

verdict proved that the eight statements tended to harm his reputation and lower him in the estimation of the community. *McKee*, 825 N.W. 2d at 729-39; ADD044.

Larson presented evidence of harm and significant additional injury from Respondents' statements beyond the fact of his arrest, the news release, and the jail log, as the district court recognized. T-1009-10. *Moreno*, 610 N.W. 2d at 332, 333. His claims were not premised on him being arrested or labeled as a suspect, but on each of the false and defamatory statements causing him harm and damages. T-1011.

Larson testified about the harm caused by the statements and addressed each one separately. T-730-745. He described feeling hurt, horrible, insulted, embarrassed, angry, ridiculed, frustrated, and confused by the statements. He dropped out of school, failed classes, and moved away. Chief Jones told him to stay away for his own safety. T-733,922. He avoided the public for his safety and became isolated. T-732,733,852.

Jeff Scoles described negative comments about Larson and that his reputation in the community was ruined. T-922,923. Larson's therapist, Rashmi O'Hara, diagnosed him with major depressive disorder and panic disorder with agoraphobia. T-820. She testified that each statement about him shooting and killing Officer Decker would have prompted the symptoms he displayed in

therapy. T-827. Social media postings made critical and disparaging remarks about Larson and his reputation that were hurtful and threatening. T-850-52,Ex.26. The Court erred applying the incremental harm doctrine.

CONCLUSION

The fair report privilege does not protect summaries of statements by law enforcement at press conferences and news releases before judicial control. Larson was entitled to JMOL on falsity and a new trial on negligence, damages, and the three dismissed statements, and the case should be reversed and remanded for trial.

RESPECTFULLY SUBMITTED,

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Dated: August 27, 2018

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CERTIFICATE OF BRIEF LENGTH

Counsel for Appellant certifies that except as set forth herein this brief complies with the type limitation of Rule 132 and contains 13,999 words. The following word processing software system was used to prepare this brief: Microsoft word 2010. The brief and addendum have been scanned for viruses and are virus free.

Dated: August 27, 2018 s/Stephen C. Fiebiger
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