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STATE OF MINNESOTA

IN SUPREME COURT

Case No: A17-1068

Ryan Larson,

Appellant/Cross-Respondent,

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/Cross-Appellants.

REPLY BRIEF OF APPELLANT/CROSS RESPONDENT

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I. The First Amendment Affords Private Individuals the Right to Be Compensated for Harm Caused by Media Defamation.

The balance of First Amendment interests against rights of private individuals to compensation for damages to reputation has historically weighed in favor of compensating private individuals who have no other recourse. This right should not be eliminated to enable the media to publish breaking news containing false and defamatory statements before criminal charges are filed and the case is under judicial control.

1. Protecting Private Reputations.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the U.S. Supreme Court held that there is no constitutional value in false statements of fact. *Id.*, at 340. "Neither the intentional lie nor the careless error materially advance society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Id.*, quoting *New York Times v. Sullivan*, 378 U.S. 254, 271 (1964). "They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Gertz*, 418 U.S. at 340, quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). "Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers." *Curtis Pub. Co. v. Butts*, 388

U.S. 130, 170 (1967) (concurrence, Warren, C.J.). "The right to communicate information of public interest is not unconditional." *Butts*, 388 U.S. at 150.

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. *Gertz*, 418 U.S. at 341. States should not lightly abandon this purpose because "the individual's right to protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty. The protection of private personalty, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition … as a basic of our Constitution.'" *Gertz* 418 U.S. at 341; *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966)(concurring opinion).

The Supreme Court recognized that "a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship." *Gertz*, 418 U.S. at 340. "The need to avoid self-censorship by the news media, however, is not the only social value at issue." *Id.*, at 341. "Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation." *Id.* Defendants' arguments would sacrifice the value of defamation law so it can enjoy near absolute protection from private defamation actions.

The context in which *Gertz* observed that "[t]he First Amendment requires that we need to protect some falsehood in order to protect speech that matters" occurred with respect to the free debate of issues and ideas, not reporting on the murder of a police officer. *Gertz*, 418 U.S. at 341; Br.Resp/CA at 23. Defendants' defamatory statements were not published in the context of debate over issues affecting the broader public, but followed a news conference and news release dispensing preliminary information about a crime.

Gertz observed:

> The communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

418 U.S. at 345.

Gertz created no exception for the media to publish false statements about private individuals even though the falsehoods are a matter of public interest. *Gertz* 418 U.S. at 345,346.

"So long as they do not impose liability without fault, States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Gertz*, 418 U.S. at 347. In

cases of private defamation against media defendants involving a public concern or official, the burden of proving falsity rests with the private plaintiff. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

Minnesota recognized these parameters for defamation while safeguarding the purpose of defamation actions 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). The burden of proving falsity rests with private plaintiffs against media defendants with no strict liability or defamation *per se* for cases involving matters of public concern. *Richie*, 544 N.W.2d at 26. A negligence standard of fault is applied for recovery of actual damages. *Jadwin v. Minneapolis Star and Tribune Co.*, 367 N.W.2d 476, 489 (Minn. 1985)(*Jadwin I*). A private individual may recover actual damages for media defamation upon proof that the defendant knew or in the exercise of reasonable care should have known that the defamatory statement was false. *Id.*, at 491. The conduct of defamation will be judged on whether the conduct was that of a reasonable person under similar circumstances. *Id.*

The Court articulated the importance of the right of a private person to bring a defamation action this way: "Throughout history, personal reputation has been

cherished as important and highly worthy of protection." *Jadwin I*, 367 N.W.2d at 491, citing *Gertz*, 418 U.S. at 344-45.[1]

Private individuals' sole means of vindicating defamatory statements by the media should not be lost by expanding the fair report privilege. Expanding the privilege to reports "on matters of public concern" and "breaking news" is unwarranted where defendants falsely reported that Larson shot and killed a police officer before charges were filed and the case was under judicial control. Defendants could have waited to verify charges were filed instead of inventing details about him shooting and killing Officer Decker. No public interest or benefit is served by reporting false statements that mislead the public and defame a person's cherished reputation.

Media broadcasts and articles further require that attribution of the official source of the defamatory statements be made in the publication. *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 739 (D.D.C. 1985); *Bufalino v.*

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[1] The Court's footnote noted "In the words of Shakespeare:

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

William Shakespeare, *Othello The Moor of Venice*, Act III, scene 3, line 155; *Jadwin I*, 367 N.W.2d at 491,n.20.

Associated Press, 692 F.2d 266, 271 (2d Cir. 1982); *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 536 (7th Cir. 1982). *See* Section IV, Attribution, *infra*. Because defendants failed to attribute the statements to the press conference, news release, or jail log in their publications, they are not entitled to the privilege. *Id*.

Defendants offer no explanation how the defamatory statements summarized the entire news conference, news release, or jail log, without attributing them as the source. Protecting defamatory statements as summaries of official proceedings or documents without attribution is unprecedented and will unnecessarily expand the fair report privilege to deny private individuals a remedy for defamation.

II. The Fair Report Privilege Does Not Bar Larson's Claims.

1. Press Conference and News Release Are Not Covered by the Privilege.

Moreno does not support application of the fair report privilege. ADD014. The Court of Appeals concluded that "the fair-report privilege applies to protect news reports that accurately and fairly summarize statements made by law enforcement during an official press conference and in an official news release." ADD014. The Court observed:

> We agree with the district court that the fair-report privilege applies to news reports that summarize information in a jail log or in a court order authorizing detention. Because appellants' news reports contained information not included in the jail log and detention order, we must determine if the fair report privilege protects appellants' statements summarizing the press conference and the news release."

ADD012,n3.

But the district court did not hold that the privilege applied to summaries of these documents. SJOrder,ADD093-095. Extending the privilege to media "summaries" was the Court of Appeals' brainchild.[2]

2. Official Proceedings and Matters of Public Concern.

Defendants conflate official proceedings with matters of public concern, contending that because the news conference and news release were "public" they are official. Br.Resp/CA at 25-26,27, 28. No authority holds that whenever an agency head speaks to the press it constitutes an official proceeding. Evans said the purpose of the news conference was to provide information to the public and the media concerning the investigation, not to take official action. T-771;Ex. 101(News conference video).

"The public doesn't go to press conferences," according to reporter Shortal. T-336. Press conferences are not official proceedings contributing to the democracy of the whole where official action is discussed, debated, and decided like city council or judicial proceedings. *See* Harper, James & Gray, Law of Torts, Sec. 5.24 pp. 244-45.

[2] Larson neither confuses nor conflates the privilege, but points out the Court's errors. Br. Resp/CA at 25,26.

Evans explained that for an active criminal investigation, the information is considered confidential and nonpublic under Minnesota law. T-776. He said they could not give out details of what happened with respect to Officer Decker's killing. T-255. No determination had been made that Larson was responsible for shooting and killing Officer Decker. T-773. Evans would not have said that Larson had been determined to be responsible for the murder if asked at the news conference. T-776. He said someone was apprehended and in custody in connection with this crime. It was not to say they had captured the killer or they would have used those words. T-780.

3. Unscripted Questions and Answers in a Press Conference by Law Enforcement are Not Covered by the Fair Report Privilege.

Law enforcement's unscripted answers to reporters' questions are not protected. Informal statements by police in interviews and news conferences do not constitute "official proceedings of the type covered by the privilege." *See* Harper, James & Gray, Law of Torts, Sec. 5.24 pp.244-45. The district court recognized the difference between prepared statements by law enforcement informal follow up responses to questions. For example, a reporter asked, "Anybody else injured or any other outstanding people involved?" ADD117.

Sheriff Sanner responded "no." *Id*.[3] The district court found that Sanner was responding to whether there were any other victims who were hurt or involved. T-1040. The court noted "He's being asked not in the scripted prepared statement …he was being asked about was anybody else hurt or involved, he says." "It was just a follow-up question, it wasn't the prepared statement of the police." *Id*. ADD117.

The *Restatement* suggests that unscripted questions and answers by the press are not protected because "[a] person cannot confer this privilege upon himself by making the original defamatory publication himself and then reporting to other people what he has stated." *See Restatement (Second) Torts*, § 611, cmt. b.

Defendants cite no authority recognizing that question and answers between reporters and police are official statements and proceedings and privileged. The legal treatise and Restatement cited above, along with *Carradine*, indicate they are not. *See Prins v. International Tel. and Tel. Corp.*, 757 F. Supp. 87, 93 (D.D.C. 1991); *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 537 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983). The fair report privilege should not be expanded to encompass purported summaries of informal questions and answers by the media.

4. The Source of Defendants' Defamatory Statements is Unsupported by the Record.

[3] Defendants mischaracterize this exchange as evidence their reports were substantially accurate and law enforcement presented Larson as the "lone" suspect while not looking for anyone else. Br.Resp/CA at 40-41.

Testimony by defendants' journalists shows that the press conference, news release, and jail log were not used in preparing each of the stories containing the defamatory statements.

Panhia Yang produced KARE 11's 6:00 newscast and wrote the script for Nelson. T-469,470;ADD123. Yang could not identify the source for Nelson's statement that "Police say that man – identified as 34-year old Ryan Larson -- ambushed Officer Decker and shot him twice -- killing him." ADD124. She did not know if she obtained the statement from the news release. T-498. She could not recall even seeing the news release. T-507. She testified not having watched the news conference, but that she watched it a week before trial. T-472. She did not use the jail log. T-504.

The executive producer at 6:00, Rebecca Rohde-Eckblad, knew that law enforcement had not said "Police say that man identified as 34-year old Ryan Larson ambushed Officer Decker and shot him twice, killing hm." T-440. But she approved the script. T-441,447. She could not recall talking to Yang about the source of the information. T-443. She could not remember the news release. T-452,453.

Reporter Croman could not say for certain whether he used or relied on the news release or news conference in preparing his reports. T-273, 276. He did not use the jail log. T-257,342.

Nick Peterson produced KARE 11's 10:00 newscast. T-513-14. He wrote Nelson's script, including the statement that "Investigators say 34-year old Ryan Larson ambushed the officer, shooting him twice." T-518,521; ADD132. He did not have a direct source for the statement and did not know whether it was true or false. T-522-23. He initially said the information came from the Stearns County Sheriff's Office, but could not recall the individual. T-521. He could not remember the news release. T-531.

Ian Philbrick was executive producer of the 10:00 newscast and approved the script. T-538,539. He did not watch the press conference before the newscast. T-542. He did not recognize the news release. T-546. He could not identify who wrote the kare11.com story shown in the 10:00 newscast. T-553. No evidence of the source of the kare11.com story was presented.

Shortal admitted that no one in law enforcement said that Larson shot and killed Officer Decker in the news conference and that they gave limited details. T-298. She knew he had not been charged and that being booked was different from being charged. T-299. She did not recognize the news release and did not know if she had seen it before. T-331,332. She did not recall reading the line from the news release stating "Larson was booked into the Stearns County jail on murder charges early this morning." T-332. She did not remember using the jail log. T-333-34.

In writing the "Man faces murder charge" article, Stenman said she gathered the statement "Police say Larson is responsible for the shooting death of Cold Spring-Richmond Police Officer Tom Decker" from law enforcement after the new conference. T- 392-93. She admitted no one made the statement and the statement was false. T-391,401. She knew that Larson had not been charged. T-401. She could not say whether she had seen the news release and did not remember using it for her story. T-396. She did not say the information for her stories came from a combination of the news conference, news release, and jail log, before trial. T-393.

Because the sources were in dispute and there was no attribution of the statements to the news conference, news release, and jail log, the Court erred determining as a matter of law that the fair report privilege applied. *In Re Estate of Butler,* 803 N.W. 2d at 399.

5. *Restatement* and *Moreno*.

Defendants' argument the news conference was official because it involved public officials is unfounded. Br.Resp/CA at 31.

Defendants' contention that the privilege does not hinge on the substance of what was said would create an unmanageable law of defamation and eliminate claims of private individuals. Br. Resp/CA at 32. *Moreno* did not allow for the media to publish anything when a matter of public concern was presented. Instead,

it enunciated steps for determining whether the fair report privilege existed and how the privilege "can be defeated if additional contextual material, not part of the proceeding, is added that conveys a defamatory impression or comments on the integrity or veracity of any party." *Moreno*, 610 N.W. 2d at 333. *Moreno's* analysis extends beyond determining whether the privilege existed, and the Court of Appeals erred by not doing so.[4] *See* Section IV, Additional Context, *infra*.

Defendants' theory that unscripted questions and answers are official instead of unofficial is unsupported. Br.Resp/CA at 33. No explanation is offered how viewers and readers would know whether the questions and answers were from a "formal news conference" by law enforcement heads, or by an arresting officer on the road, absent attribution to the alleged official proceeding or document.

Defendants' use of "Police say" or "Investigators say" provided no attribution, leaving ambiguity as to whether the substance emanated from a "formal news conference" or news release instead of from an arresting officer. The public had no idea whether the statements were "official" or "unofficial," who made them, or when and where they were made. Br.Resp.CA at 33. Informal questions by the media should not become official statements similar to the police report in *Carradine* and such a rule would be unprecedented.

[4] Amici recognize this mistake and argue *Moreno* should be overruled. Br. Amici at 18-21. But *Moreno* provides safeguards when the media presents additional

6. Other Jurisdictions Inapposite.

Sacrificing private individuals' cherished reputations to apply caselaw from other jurisdictions with different facts makes little sense. Br.Resp/CA at 35,n.9.

Extending the privilege would stray from *Moreno* and the Restatement as illustrated by *Lee v TMZ Productions, Inc.*, 710 F. App'x 551 (3d Cir. 2017), relied upon by defendants. Br. Resp/CA at 35. *Lee* is distinguishable because the plaintiff had been criminally charged and the case under judicial control at the time of the news conference, unlike here. *Id.*, at 558; *Compare Yerkie v. Post-Newsweek Stations, Michigan, Inc.*, 470 F. Supp. 91, 93-94 (D. Md. 1979)(privilege applicable to reports of official proceedings applies to a report of the fact of arrest or the fact that a charge has been made, not other statements).

7. Policy Considerations Weigh Against the Privilege.

Requiring the media to wait 36 hours before charges are filed, or not filed, before publishing detailed criminal accusations against individuals will not promote "self-censorship," but will safeguard verifiable reporting of criminal cases and protect private reputations. Br.Resp/CA at 34. This is compatible with Minnesota Rules of Professional Conduct 3.6 and 3.80 and enhances protections for a fair trial when charges are filed, and further protects against false reporting of criminal conduct when they are not. *See* Minn. R. Crim. P. 4.02, Subd.5.

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contextual material outside official proceedings that conveys a defamatory

KARE 11 generally does not name suspects before being criminally charged. T-211. This is because they may not be the one who committed the crime. T-211-12. According to news director Jane Helmke, they did so for Larson because it was "high profile." T-1044,1045. Falsely publicizing-high profile cases serves no public interest and increases the risk of broader exposure of the defamation. The media should be held accountable for publishing statements as facts that are unverified, false, and defamatory.

The 6:00 and 10:00 newscasts were broadcast to 95,200 and 125,800 households, respectively. T-678-79. The audience covers a large part of Minnesota and into Wisconsin. T-651. The risk of harm resulting from the publication of false statements was substantial, given this large audience.

Law enforcement officials at the news conference emphasized the investigation was preliminary, active and ongoing, and that they continued to follow up all leads. ADD115-119. But defendants omitted this information without explanation.

Croman's assignment was to cover reaction from Officer Decker's family, not deliver a message of public safety. He asked Mrs. Decker if her son knew Larson, but then characterized him as "the man accused of killing her son."

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impression, or comments on the veracity or integrity of a party.

Shortal's 10:00 report focused on the "tone" of the community, not that the public was safe from a killer at large. T-304. She interviewed a woman with a stroller who described Officer Decker as one of the "good guys."

Defendants never challenged Minn. Stat. § 604A.35 below, but its protections are sound. Br.Resp/CA at 37. The press can report without fear of liability if they report the facts. Their desire to notify people so they can resume their normal activities, or that an emergency has dissipated, does not outweigh the right of private individuals to compensation when defamed by the press. Br.Resp/CA at 37.

III. Defendants' Statements Were Not Substantially Accurate Under the Fair-Report Privilege.

"Substantial accuracy" in the fair report privilege analysis provides that "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 recipient which the precise truth would have produced." *Jadwin v. Minneapolis Star & Tribune*, 390 N.W.2d 437, 441 (Minn. Ct. App. 1986)(*Jadwin II*). The fair report privilege is not absolute and will be lost if it is shown that the privilege has been abused. ADD095. The privilege "can be defeated if additional contextual material, not part of the proceeding is added that conveys a defamatory impression or comments on the veracity or integrity of any party. ADD096; *Moreno*, 610 N.W.2d at 333; *see also Restatement (Second) Torts* § 611 cmt. f. This standard was not applied. ADD025-27. The Court wrongly

used the jury verdict on falsity to apply the fair report privilege to statements 1-8. The Court's errors changed the outcome of the case.

A. Extrapolation of Falsity Verdict.

The falsity verdict emanated from the falsity instruction for "substantially accurate" in CIVJIG 50.25. This definition 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 falsity instruction, however, omitted the additional language from *Jadwin II* for the fair report privilege stating: "that is, if it produces the same effect on the mind of the recipients which the precise truth would have produced." *Jadwin II*, 390 N.W.2d at 441; CIVJIG 50.25,ADD149. The Court of Appeals used the wrong law to apply the privilege.

B. Statements Not Substantially Accurate.

Defendants' arguments that six statements are substantially accurate takes them out of context and mischaracterizes Larson's position. Br.Resp/CA at 39-40. The six statements the district court found that 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.

Law enforcement did not make these defamatory statements about Larson at the press conference or in the news release and these statements are false, as is the implication he was the killer. Minnesota has generally required defamatory matter be set out verbatim. *Moreno*, 610 N.W.2d 326-27. The requirement for alleging defamatory statements verbatim in the complaint should apply to defendants

reciting verbatim statements they later contend are derived from official proceedings or documents.[5] *See Carradine*, 511 N.W.2d at 733.

Masson addressed minor inaccuracies in quotations of statements, not statements invented by the media. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991). A similar conclusion was reached in *McKee v. Laurion*, 825 N.W.2d 725, 730-31 (Minn. 2013), determining that different versions of statements by the same speaker did not satisfy falsity. *Id*. Neither *Masson* nor *McKee* concluded that verbatim statements were never required. To enjoy privilege, strict adherence to verbatim language of official proceedings and reports has been required for statements that differed from those in the official report as illustrated by cases in which it was not. *Carradine*, 511 N.W.2d 733; *See Moore v. Dispatch Printing Co*., 92 N.W. 396, 397 (Minn. 1902). Requiring verbatim statements be attributed to official proceedings or documents for the fair report privilege is consistent with *Moreno*.

Defendants' statements were not substantially accurate in the context of the newscasts and articles and these statements were not made by law enforcement. Defendants omitted law enforcement's repeated admonishments that they could not disclose details of events, the investigation was active and ongoing, and they

[5]Helmke testified law enforcement used the exact words "Ryan Larson ambushed Officer Decker, shot him twice, killing him," but the record shows otherwise. T-685,689,1063; Br.Resp/CA at 40.

continued to follow up on all leads. ADD115. No one at the news conference said every investigation is active and ongoing until a defendant is convicted, nor did defendants report this. ADD112-20. Omissions of important information affected the gist or sting and conveyed that police had their man and the case was over. T-1040-41. It also implied that Larson was the killer.

Defendants mischaracterize other statements out of context. Br.Resp/CA at 40. Sheriff Sanner never "confirmed law enforcement was not seeking anyone else." *Id.* Instead, he was asked if "[a]nybody else injured or were any other outstanding people involved?" ADD117. The district court agreed that he was talking about other victims. T-1040. *See* Section II.3, *supra*.

Larson's arrest did not confirm the police's belief he murdered Officer Decker. Br. Resp/CA at 41. No officer testified about evidence to support probable cause. Defendants admitted knowing of no evidence supporting Larson's involvement and concede he was not the killer. Br.Resp/CA at 4.

The impressions from defendants' publications differed significantly from the precise truth. Br.Resp/CA at 41. Officials never said they captured the killer and gave very limited and undetailed information about the killing. Evans testified that if they intended to communicate that they had captured the killer, they would have used those words. The kare11.com story stated that "investigators would not

describe the events they believed transpired," yet specific statements were made about Larson's culpability. ADD142.

Defendants' argument that each article or report makes clear that Larson was the lone suspect and not that the investigation was over is misplaced. Br. Resp/CA at 42. *See* Sanner discussion, *supra*. In context, the omissions, mischaracterizations of the questions and answers at the news conference, combined with the specific defamatory statements that Larson shot and killed Officer Decker, were not substantially accurate.

C. The Two Statements Conveying the Fact of Arrest or Charge were Not Substantially Accurate.

Croman's interview with Rosella Decker saying Larson was "accused of killing her son" was not substantially accurate. During the interview, Croman asked her if her son knew Larson. T-264,373. She said "no" and described how she thought her son would have "forgave" him. T-263-64,373. Instead of using Larson's name, however, Croman reported: **"Rosella holds no ill-will against the man accused of killing her son."** T-263. Croman knew at the time that Larson had not been criminally charged. T-264. He also knew that being booked did not mean he had been formally charged. T-257. Croman did not contact the Stearns County Attorney's Office to verify whether he had been charged and said that was not his job that day. T-279.

Larson's testimony related to damages for how he felt when he was "accused" by defendants. Br.Resp/CA at 43. He described how he felt after Nelson's statement that "Investigators say 34-old Ryan Larson ambushed the officer, shooting him twice. Larson is in custody." T-738. He described being accused by the media, not formally accused by law enforcement like Croman's report implied. T-739.

The **"Man faces murder charge"** headline was not substantially accurate. Br.Resp/CA at 43. Larson's photo and name appeared below the headline. ADD144. He had not been charged with murder, but the headline heavily implied he had and that evidence existed to support criminal charges. Defendants knew being booked into jail was not tantamount to being charged with murder and admitted that Larson had not been charged when the stories were published.

The use of a defamatory headline in a newspaper report, qualification of which is found only in the text of the article, is not privileged. ADD095, quoting *Restatement (Second) of Torts* § 611, cmt. f. For example, "although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it, as for example … the use of a defamatory headline in a newspaper report, qualification of which is found only in the text of the article." *Id.* People often scan headlines without reading the full story. The story further

reported that "Police say Larson is responsible for the shooting death of Cold Spring-Richmond Police Officer Tom Decker," which was false. ADD144. The headline and statement were not substantially accurate.

IV. Additional Contextual Material Defeats the Privilege.

Under *Moreno,* even if the court finds the statements privileged and a fair and accurate report, the privilege "can be defeated if additional contextual material, not part of the proceeding, is added that conveys a defamatory impression or comments on the veracity or integrity of any party." *Moreno*, 610 N.W.2d at 333. "The entire report then would be subject to evaluation as any other allegedly defamatory statement." *Id.* Hence, even if the statements and reports of defendants are deemed to emanate from official sources, and to be fair and accurate so as to be privileged (which Larson disputes), they can be defeated by additional contextual material not part of the proceeding that conveys a defamatory impression of Larson or comments on his veracity or integrity. *Id*. The Court of Appeals erred in finding that the privilege barred Larson's claims without making this analysis. *Id.*

Determining whether additional material affected the nature of the report is a question best left to the district courts. *Moreno,* 610 N.W.2d at 333; *Carradine v. State*, 511 N.W.2d 733, 737 (Minn. 1994).

Defendants' argument that the "alleged defamation is not based on both protected and unprotected sources" is contrary to *Moreno* and the record. Br.Resp/CA at 26. They skirt the additional contextual material issue because it defeats the privilege. Amici propose overruling this rule from *Moreno* without authority. Br.Amici at 18-19.[6] But overruling *Moreno* would allow the media to portray private individuals in a "lurid light," convey a defamatory impression or innuendo, then deprive the person of recourse for damage to their reputation. *See Brown v. Hearst Corp.*, 54 F.3d 21, 24 (1st Cir. 1995).

KARE 11 used techniques at 6:00 and 10:00 to enhance and convey additional contextual material about Larson not presented in the press conference, news release, or jail log. This included the full screen color mugshot of Larson; "Officer Killed" and "Ryan Larson" graphics; pre-recorded packages; linkage of team reports; interviews with towns people and Decker's grieving mother; the names, reactions, and photos of Decker's four small children; the emotion of the murder; voice overs of video and Larson's mugshot; references to Larson's other encounters with the law; and sharp statements about him shooting and killing Officer Decker. These techniques defeat the privilege, as they clearly implied his

[6] Amici's contention that the "additional contextual material" principle does not defeat the privilege defies *Moreno's* holding. 610 N.W. 2d at 333; *See Stokes v. CBS, Inc.*, 25 F. Supp.2d 992, 1007-08 (D. Minn. 1998); *Brown*, 54 F. 3d at 24.

guilt and commented on his veracity and integrity as a killer. *Moreno*, 610 N.W.2d at 333; *Stokes* 25 F. Supp.2d at 1007-08; *Brown*, 54 F.3d at 24.

In the 6:00 newscast, Larson's mugshot with graphics were used with Nelson's voice over about the murder, stating, "The 31-year was shot and killed last night while conducting a welfare check on a suicidal man. Police say that man – identified as 34-year old Ryan Larson – ambushed Officer Decker and shot him twice – killing him." *See* Ex. 108 (Video of 6:00); ADD124 (Script); ADD131(Mugshot with graphics).

The story transitioned to other reporters and packaged pieces with graphics including "Police Officer Killed" leading to Croman's interview with Mrs. Decker in her farmhouse with pictures of his family. Croman's voice over asked if she knew Larson, saying "Rosella holds no ill-will against the man accused of killing her son." T-263. Mrs. Decker's stoic description about the children's reaction to their father's death, was connected to her comment that "His mind must have been really messed up. Tom would have forgave him." T-263. These techniques conveyed the on the family connected to Larson as the killer not part of the news conference, news release, or jail log. This defamatory impression commented on him as the one who killed her son and the father of Decker's children and defeated the privilege under *Moreno*. 610 N.W. 2d at 333.

KARE 11's 10:00 newscast similarly linked several stories about the murder using techniques enhancing the defamation of Larson. *See* Ex. 110 (Video); ADD132 (Script). The lead report by Nelson used the same graphics that accompanied Larson's mugshot for the start of the team reports. His mugshot was on screen approximately twenty seconds while Nelson read the statement about him being accused of killing Officer Decker, and again later in the story. T-528-29; ADD130.

The story went to Shortal in Cold Spring. She presented an emotional packaged piece containing video clips from other stories, including Croman's interview with Rosella Decker. T-306,307. Shortal began by slowly saying "This is story only a mother can really tell." T-307. Mrs. Decker was shown at home reminiscing: "Any time you needed help, couldn't have asked for a more wonderful son." T-308. Shortal said "But she shouldn't have to. Her son shouldn't have been taken." T-308. She mixed her voice overs comments with Mrs. Decker's. ADD135-39. The story showed a community woman saying "He was definitely one of the good guys." T-308. 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 open[ed] fire on Officer Decker for no reason anyone can fathom." T-309; Ex. 110 (Video);ADD136. Rosella Decker says "His mind must have been messed up. Tom would've forgave him."

ADD136. Shortal somberly reported "If there were one job Tom loved more than policing this town … is fathering his kids, Kelly and Jade, Justin and Devon … ages 5, 6, 7 and 8." *Id.* Mrs. Decker's voice described his distraught children saying "They took it really hard … wouldn't talk or anything." *Id.*

Returning to Nelson, she pointed viewers to the kare11.com story that appeared behind her with Larson's photo. T-532; Ex.110;ADD141,142. The online story added information about Larson's brushes with the law, highlighting jail records including a disorderly conduct misdemeanor, and multiple driving violations. ADD143.

The "Man faces murder charge" article added material conveying defamatory impressions of Larson. He did not face murder charges, but the headline conveyed the impression that he had. ADD144. The article reported that Police said he was responsible for the shooting death of Officer Decker, but police never made the statement and he was not responsible. *Id*. It implied he was the killer and evidence existed showing he committed the murder. The photo was not from Larson's 2012 jail log. *Compare* ADD 122 and ADD144. The article described his past guilty plea to disorderly conduct involving intimidation of his girlfriend, a jail sentence served, lawsuits for debts owed, and an eviction. This commented on his veracity and integrity that was not included in the press

conference, news release, or jail log, and defeats the privilege under *Moreno*. *See* ADD0144 and ADD122.

In *Stokes*, the wife suspected of murdering her husband sued for defamation based on interviews with the lead investigator. Each report employed techniques and rhetoric that greatly magnified the effects of the investigator's statements. *Id.*, 25 F. Supp.2d at 1000. The broadcasts included slow motion video inside the home, use of hidden cameras, comments about her behavior, analogies to another murder, and other techniques. *Id.*, at 1000-01. The court observed "[t]he media defendants did much more than reiterate or summarize official documents or proceedings. They broadcast … allegedly defamatory statements, statements nowhere to be found in any public record." *Stokes*, 25 F. Supp.2d at 1007-08. *Stokes* recognized television broadcasts can exacerbate the defamatory effect that might not be apparent from a transcript. *Id.*, at 999, citing *Corporate Training Unlimited, Inc. v. National Broadcasting Co.*, 868 F. Supp. 501, 507 (E.D.N.Y. 1998)(Courts must scrutinize juxtaposition of audio and video portions of broadcast).

In *Brown v. Hearst Corp.*, the plaintiff sued for defamation following a story implying he murdered his wife. Plaintiff was a pilot whose wife disappeared following the couple's widely publicized divorce. In a bizarre coincidence, another pilot had been convicted recently for murdering his wife and disposing of

her body in a wood chipper. Defendant broadcast a news magazine comparing the two cases. The story focused on incriminating evidence, but mentioned no exculpatory evidence. The plaintiff alleged the broadcast amounted to defamation by innuendo. *Id.*, 54 F.3d at 23-25.

In denying the privilege, the court noted the newscast included evidence in addition to that presented in the divorce proceeding. It used techniques (voice overs, filmed interviews, recreations) and rhetoric—especially the doubtful analogy of the wood chipper murder—that sharpen the cutting edge of the implicit charge. *Id*. Where the evidence is thus enlarged and the charge cast in a more lurid light, it is not clear that the fair report privilege automatically shields the larger whole. *Brown*, 54 F.3d at 25.

Similarly, defendants used techniques (color mugshot, graphics, voice overs, team reports connecting stories, recorded interviews, past brushes with the law, emotional reaction of Decker's small children and Rosella Decker, family photos, the exaggerated "good guy" story, being a father, community members, etc.) that conveyed the defamatory impression that Larson was the killer not presented at the press conference, news release, or jail log. The publications commented negatively on his veracity and integrity by characterizing him as a killer with a checkered past, in stark contrast to Officer Decker. Under *Moreno*, the privilege is defeated. *Moreno*, 610 N.W. 2d at 333.

V. Lack of Proper Attribution Defeats Privilege.

Defendants' failure to attribute each defamatory statement to the news conference, news release, or jail log, defeats the privilege.[7] The requirement for the media to attribute their statements to official proceedings or documents to enjoy the fair report privilege has been widely adopted and should be applied here. *Dameron*, 779 F.2d at 739; *Bufalino*, 692 F.2d at 271; *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 536 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 254 (2d Cir. 1988); *Adelson v. Harris*, 973 F. Supp.2d 467, 482-83(S.D.N.Y. 2013); *Prins v. International Tel. and Tel. Corp.*, 757 F. Supp. 87, 93-94 (D.D.C. 1991); *Burke v. Sparta Newspapers, Inc.*, 2018 WL 3530839 at *6 (Tenn. Ct. App. 2018).[8]

It must be made 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. Defendants only raised the press conference, news release, and jail log as sources after litigation commenced.

[7]The attribution argument is not new and was argued in the Court of Appeals and district court. Br.Resp/CA at 44.

[8]By contrast, Stenman attributed a specific statement to Chief Jones from the news conference about Larson's interactions with the department. ADD144-45. Readers could think the statement about Larson being responsible for the shooting death of Officer Decker came from elsewhere since it lacked attribution.

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. Viewers and readers of defendants' publications were not informed the statements emanated from the press conference, news release, or jail log, and would have no idea these were the purported protected sources of the information. Accordingly, the failure to attribute them to their alleged official proceedings and documents defeats the privilege.

VI. The Court of Appeals Erred by Applying the Wrong Law to Find the Fair Report Privilege Applied.

Defendants misstate the Court of Appeals' holding with respect to using the falsity verdict to apply the fair report privilege. Br.Resp/CA at 46. The Court of Appeals held that "if law-enforcement statements from the jail log, press conference, and news release are considered together, a reasonable jury may conclude that statements 1-8 were substantially accurate reports of official statements." ADD021. But there were no jury instructions given with this as the law or for consideration by the parties. The Court of Appeals erred using these sources to apply the privilege.

The jury's finding on falsity for statements 1-8 came from the definition of falsity under CIVJIG 50.25, not the definition of substantial accuracy under *Jadwin II* for the fair report privilege. ADD149. The falsity instruction at trial provided:

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. In determining whether a statement is false, the words must be construed as a whole without taking any word or phrase out of context. The meaning of the statement must be construed in the context of the article and broadcast as a whole. **Plaintiff bears the burden of proving that a statement is false by the greater weight of the evidence.**

T-1251-52. (Emphasis added).

This instruction did not state the law for substantial accuracy for the fair report privilege under *Jadwin II*. It did not explain that "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 recipient which the precise truth would have produced." 390 N.W.2d at 441. The jury was never instructed on the law for the fair report privilege, nor asked to decide privilege, and Larson was prejudiced by the Court extrapolating the wrong standard to bar his claims.

1. Prejudicial Burden of Proof Change.

The use of the falsity verdict to apply the fair report privilege wrongly shifted the burden of proof for the fair report privilege to Larson. Defendants bear the burden of showing the fair report privilege applies, while Larson bore the burden of proving falsity for his defamation claims. *Jadwin I*, 367 N.W.2d at 481. Larson was prejudiced by the Court's removing defendants' burden of proving the existence of the privilege and substantial accuracy. *Id.*; *Stuempges v. Parke Davis & Co.*, 297 N.W.2d 252, 272 (Minn. 1980)(defendant has burden of showing the

existence of a conditional privilege). The jury was not asked whether defendants proved the statements were substantially accurate to be privileged. *See* ADD045-66. The Court erroneously placed the burden of defeating the privilege on Larson by extrapolating the jury's answer to the falsity questions and applying the fair report privilege. T-1252. *See Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018). Because the Court of Appeals' use of the falsity verdict wrongly shifted the burden of proof for the privilege to Larson, he was prejudiced by the Court barring his claims.

2. Other Prejudicial Errors.

If the fair report privilege applied, the jury should have been instructed that the privilege "can be defeated if additional contextual material, not part of the proceeding, is added that conveys a defamatory impression or comments on the veracity or integrity of any party." *Moreno*, 610 N.W.2d 333. The Court of Appeals' failure to consider how the privilege can be defeated substantially prejudiced the outcome of the case by barring Larson's claims, reversing the JMOL on falsity, and denying him a new trial.

Larson further was limited in his ability to argue falsity by implication because the district court denied his request for the instruction. Br.Resp/CA at 47. He had no opportunity to argue defendants' failure to prove the existence of the privilege, that the statements did not satisfy the definition of substantial accuracy

under *Jadwin* II for purposes of the privilege, and that the privilege can be defeated by additional contextual material under *Moreno*. As a result, he was substantially prejudiced by the Court of Appeals' ruling.

VII. The District Court Properly Granted Judgment as a Matter of Law (JMOL) on Falsity.

The district court properly granted JMOL on falsity because based upon the undisputed evidence, the jury's verdict was contrary to the applicable law of falsity. ADD036. *Diesen v. Hessburg*, 455 N.W.2d 446, 452 (Minn. 1990)(quoting *Dean v. Weisbrod*, 217 N.W.2d 739, 742-43 (1974)). 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. The undisputed evidence was that Larson did not ambush, shoot, and kill the officer. Larson testified he did not shoot and kill Officer Decker and that he had nothing to do with his death. Evans confirmed that Larson was no longer a suspect and no evidence of his involvement in the murder was presented at trial.

The court looks to the underlying implication of the statement in determining truth or falsity. *Lewis v. Equitable Life Assurance Society*, 389 N.W.2d 876, 888-89 (Minn. 1986); ADD150,CIVJIG50.10. 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 defendants, no reasonable jury could

find otherwise. *Diesen*, 455 N.W.2d at 452; PTOrder,ADD036. Because the underlying facts were undisputed, judgment as a matter of law that the eight defamatory statements were false, and the implication of the statements was false, was proper. *In Re Estate of Butler*, 803 N.W.2d 393, 399 (Minn. 2011); *Diesen*, 455 N.W.2d at 452.

Defendants conflate falsity by implication with defamation by implication, but they are distinct principles. Br. Resp/CA at 49,50; Compare CIVJIG 50.25 and 50.10, ADD149-50. *Diesen* held that a public person could not bring a defamation by implication claim and did not address falsity by implication. 455 N.W.2d at 450. Br.Resp/CA at 50. The Court of Appeals made the same mistake. ADD025. The jury instruction for falsity by implication provides that "*A statement or communication is also false if the implication of the statement is false*." *See* CIVJIG 50.25, ADD149. By contrast, a statement may be defamatory by implication because the defendant:

1. Left out certain facts so the statement conveyed a defamatory meaning;
2. Linked statements together in a way that conveyed a defamatory meaning; or
3. Stated an opinion that conveyed defamatory facts.

See CIVJIG 50.10,ADD150.[9]

The district court conflated defamation by implication with falsity by implication in denying Larson's request for the falsity by implication instruction, saying "all the statements that are still going to the jury don't rely on implication, they're all just straight true or false." T-1154-55. The court was referencing its dismissal statements 9-11 for defamation by implication that were subsequently reinstated. PTOrder,ADD038-041.

The jury found all eight statements defamatory without the defamation by implication instruction. ADD044-065. But it was on the question of falsity where they answered "no." This was because it did not receive the falsity by implication instruction language in CIVJIG 50.25. The district court recognized its error in denying the falsity by implication instruction and ruled that "[g]iven the context in which each statement was made, the implication of each statement was that Mr. Larson killed Officer Decker. There is no evidence that Mr. Larson killed Officer Decker. The statements are defamatory in nature and false." ADD036. Because

[9] Minnesota recognizes defamation by implication by a private person against a media defendant. *See Phipps v. Clark Oil & Refining, Inc.*, 408 N.W.2d 569 (Minn. 1987); *Michaelis v. CBS, Inc.*, 119 F.3d 697, 701 (8th Cir. 1997); *Toney v. WCCO Television*, 85 F.3d 383, 391 (8th Cir. 1996); *Stokes*, 25 F. Supp.2d at 998; *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990). *Diesen* involved a public official and did not foreclose defamation by implication claims by private individuals. *Toney*, 85 F.3d at 391. Defendants did not seek review of constitutional issues. Br. Resp/CA at 51. Nevertheless, the claim passes constitutional muster. *See Milkovich*, 497 U.S. at 18.

the statements were false by implication as a matter of law, JMOL was proper. ADD033,036.

Larson was not required to show defendants "juxtaposed anything," as defendants contend, to show the underlying implication of the statements he killed Officer Decker was false. *Lewis*, 389 N.W.2d at 888-89; *Michaelis*, 698 F.3d at 701; CIVJIG 50.25.

By submitting the falsity question to the jury, but excluding language in the instructions whereby falsity could be found by implication, defendants were free to argue it was the police who made the statements. The jury then was allowed to decide liability of defendants by whether their reporting was substantially accurate, not whether the statements were true or false. The exclusion of the falsity by implication instruction prejudiced Larson by not having the correct law of falsity that warranted JMOL.

Defendants mischaracterize Larson's position stating he "does not dispute the falsity instruction mirrored the model jury instruction. Br. Resp/CA at 49. This is wrong. *See* discussion, *supra*. The omission of the falsity by implication instruction in CIVJIG 50.25 prejudicially misstated the law that the district court corrected by granting JMOL.

A. Republication.

Larson's post-trial motion on republication was predicated upon defendants' "shooting the messenger" closing argument that misstated the law. ADD034; T-1162. The district court agreed. Br. Resp/CA at 52; ADD034. The absence of the falsity by implication instruction misled the jury and changed the outcome because it allowed defendants to argue the jury should not shoot the "messenger," which was contrary to law. T-1162; PTOrder,ADD034. *See Price v. Viking Press, Inc.*, 625 F. Supp. 641, 644-45 (D. Minn. 1985); *Cianci v. New Times Pub'g Co.*, 639 F.2d 54, 61 (2d Cir. 1980).

The jury's verdict was not set aside because of the failure to instruct the jury on republication as the Court of Appeals concluded. ADD023,n.7. Instead, the district court cited the law on republication because defendants' "shooting the messenger" argument misstated the law. PTOrder,ADD035; *See Dean v. Weisbrod*, 217 N.W.2d at 745 (disposition of counsel's argument left to discretion of district court). The misstatements were unanticipated and the republication issue was preserved in Larson's post-trial motion. *See Lewis*, 389 N.W.2d at 885.

Defendants did not seek review of the constitutional issue, nor raise it below. Br. Resp/CA at 53.[10]

[10] Larson need not adduce evidence the press was negligent in not discovering he was actually innocent. Br.Resp/CA at 53,n.16. There was other evidence of negligence.

VIII. Order for New Trial Properly Granted.

1. Negligence and Damages.

Because the district court granted JMOL on the defamatory nature and falsity of the eight statements, it properly ordered a new trial on negligence and damages. PTOrder,ADD038,42-43.

2. New Trial on the Three Dismissed Statements.

The district court properly granted a new trial on the three statements based on defamation by implication. PTOrder,ADD038.

i. "[S]he had one thing she wanted to say to Larson if she got to [sic] the chance to see him leave the jail. "This isn't over," she said."

The district court agreed that a reasonable jury could have found this statement was defamatory by implication. PTOrder,ADD040-41. In context, the statement implied that Larson was involved with the killing. The article omitted that there was no evidence of Larson's involvement. *Michaelis*, 119 F.3d at 701. Defamation by implication includes the juxtaposition of facts to imply a defamatory connection between them. *Id*. A defendant does not avoid liability by simply establishing the truth of the individual statement. Instead, the defendant must defend the juxtaposition of the two statements or the omission of certain facts. *Id*. The article was organized such that Knowles' statements followed comments about Officer Decker's ex-wife being concerned for the safety of her

children – after Larson was released. In context, this implied that Larson was the killer.

Defendants cite no authority that other articles in the newspaper absolve them of liability, nor present evidence that readers of this article also read other articles. Br.Resp/CA at 55.

Defendants' statements are not pure opinion. Br. Resp/CA at 55. Statements of opinion, moreover, can support defamation by implication if susceptible of defamatory meaning. *See Utecht v. Shopko Dept. Store*, 324 N.W.2d 652, 653-54 (Minn. 1982); *Toney*, 85 F.3d at 394; *Milkovich*, 497 U.S. at 21; CIVJIG50.10. Implications, like plain statements, can give rise to a defamation claim. Toney, 85 F.3d at 394. Defendants pull pieces of the statement out of context for their analysis. Br.Resp/CA at 55. The district court properly concluded a reasonable jury could find that the implication of Knowles' statements was that Larson was the killer. PTOrder,ADD040-41.

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

The district court correctly ordered a new trial for this statement because a reasonable jury could find the statement was defamatory by implication because it implied that Larson killed Officer Decker. PTOrder,ADD039. This passage was linked with Croman's report in which he said Larson was accused of killing her son, Officer Decker. *See Toney*, 119 F.3d at 701. This was not opinion, but

susceptible of defamatory meaning. *Utecht*, 324 N.W.2d at 653-54; *Milkovich*, 497 U.S. at 21. In context, the statement was defamatory by implication. *See Schlieman v. Gannett Minnesota Broadcasting, Inc.*, 637 N.W.2d 297, 304 (Minn. Ct. App. 2001).

iii. "[H]e 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 district court properly granted a new trial because, in context, a reasonable jury could find this statement was defamatory by implication. PTOrder,ADD039. The statement was broadcast in KARE 11's 10:00 newscast and linked together with defamatory statements by anchor Nelson, reporter Shortal's "good guy" story, and pieces from Croman's interview with Rosella Decker. These were combined with strategic graphics of "Officer Killed, "Ryan Larson," and Larson's color mugshot across the screen. PTOrder,ADD040. *See Michaelis*, 119 F.3d at 701; CIVJIG 50.10,ADD150.

The district court carefully explained the context in which the statement appeared in the newscast. PTOrder,ADD039-40. Defendants' assertion that a falsity by implication theory only arises when the statements being juxtaposed are true is unsupported and makes no sense. Br. Resp/CA at 57. The statements implied a defamatory connection with the story that Larson was the killer. The district court correctly found that "[g]iven this context, a reasonable jury could

have found that the statements implied Mr. Larson was responsible for killing Officer Decker." PTOrder,ADD040.

3. Incremental Harm.

The incremental harm doctrine was erroneously applied to the three reinstated statements in light of the verdict finding the other eight statements were defamatory. Br. Resp/CA at 57; *See* ADD044-065. Defendants' faulty logic that the incremental harm doctrine applies to statements not covered by the fair report privilege is unsupported by *Moreno* or *Carradine*. *Id*. Such a conclusion would create the unprecedented rule that statements in different publications not protected by the fair report privilege are barred by the incremental harm doctrine.

The Court's conclusion that Larson offered no evidence that he suffered any additional harm through statements 9-11 that he did not sustain through statements 1-8, is wrong and misstates the law. He can prove damages from each statement. The jury found statements 1-8 were defamatory. This determined that each statement "tended to harm his reputation and lower him in the estimation of the community." *McKee*, 825 N.W.2d at 728-29; ADD044-065. The jury may find Larson sustained more damages for some statements than others, including statements 9-11.

The fact that two of the statements appeared in KARE 11 newscasts does not help defendants. Br. Resp/CA at 58. The statements were in separate publications.

The 6:00 newscast featured Rosella Decker's "Tom would've forgave him" statement while the second statement by Nelson appeared in the 10:00 newscast. The incremental harm doctrine cannot be applied to statements in multiple publications. *See Masson*, 501 U.S. at 522. There was no evidence the same viewers watched both newscasts and read the article in *The St. Cloud Times*. The doctrine requires the court to undertake a factual inquiry into the reputational damage caused by the remainder of the publication. *Id.*, at 523. This was impossible since defendants' statements were made in multiple publications.

Limiting the applicability of the incremental harm doctrine to statements within a single publication makes sense and is consistent with *Carradine*. Defamed parties should not lose their ability to seek compensation because the defendants have published multiple defamatory statements in multiple publications. *See Liberty Lobby, Inc., v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984), vacated and remanded on other grounds, 477 U.S. 242 (1986).

Defendants' argument that the Roxie Knowles statement has not caused Larson harm is unfounded. Br.Resp/CA at 59.

4. Harm to Reputation.

Larson has produced evidence of legally cognizable harm. Br. Resp/CA at 59. The verdict finding statements 1-8 were defamatory found harm to his reputation and lowering of him in the estimation of the community. *McKee*, 825

N.W.2d 728-29; ADD044-65. Each statement referred to Larson, was published, with harm to his reputation supported requiring a new trial on damages. PTOrder,ADD038,042-43. Finally, the order for new trial did not limit the nature, type, or scope of damages for Larson's defamation claims. ADD038.

5. Negligence.

The district court properly ordered a new trial on "whether Defendants knew or, in the exercise of reasonable care, should have known, each statement was false." *Moreno*, 610 N.W.2d at 329; ADD038. The record is replete with evidence of negligence by defendants who do not challenge it. *See* Br.App.at 54-55.

The standard for negligence is that of a reasonable person and expert testimony is not required. Although customs and practices within the profession are relevant in applying the negligence standard, custom is not controlling. *Jadwin I*, 367 N.W.2d at 491-92; *LeDoux v. Northwest Publications, Inc.*, 521 N.W.2d 59, 68 (Minn. Ct. App. 1994), *review denied*.

CONCLUSION

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

RESPECTFULLY SUBMITTED,

STEPHEN C. FIEBIGER LAW OFFICE, CHARTERED

Dated: _October 26, 2018____

s/Stephen C. Fiebiger_____

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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 9,884 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: _October 26, 2018_____

s/Stephen C. Fiebiger_____

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