No. A17-1068

STATE OF MINNESOTA
IN SUPREME COURT

Ryan Larson,

Appellant/Cross-Respondent,

vs.

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

Respondents/Cross-Appellants.

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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STATEMENT OF ISSUES

1. **Whether the fair and accurate reporting privilege ("fair-report privilege") applies here to press reports based upon a law enforcement agency's news conference and news release.**

   Defendants raised this issue before, during, and post-trial. Doc.13; Doc.156; Tr.999-1004. The district court held the fair-report privilege did not extend beyond the fact and charge of arrest. App.Add.35-36, 70; Tr.1100-01. The Court of Appeals concluded the news conference and news release were covered by the privilege, and credited the jury's finding that the statements were substantially accurate.

   Most Apposite Authorities:

   Moreno v. Crookston Times Printing Co., 610 N.W.2d 321 (Minn. 2000);

   Restatement (Second) of Torts §611.

2. **Whether the Court of Appeals' reversal of judgment as a matter of law ("JAML") on falsity must be affirmed, where the jury was properly instructed, its finding supported by substantial evidence, falsity-by-implication is inapplicable, and republication was waived.**

   The district court vacated the judgment and granted JAML for Larson on the falsity element, under a falsity-by-implication and republication theory. App.Add.31-38. Defendants preserved this issue in jury instructions, trial objections, and post-trial briefing. Doc.156; Tr.1104-37. The Court of Appeals found the jury instructions were proper and that the jury's finding on the falsity element applied to substantial accuracy under the fair-report privilege.

   Most Apposite Authorities:

   Diesen v. Hessburg, 455 N.W.2d 446 (Minn. 1990);

   Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876 (Minn. 1986), *affirming in part, reversing in part*, 361 N.W.2d 875 (Minn. App. 1985).

3. Whether the Court of Appeals' reversal of the order for new trial should be affirmed where the statements not tried to the jury are non-actionable under a defamation-by-implication theory or the incremental harm doctrine, and no reasonable fact finder could find for Larson on negligence or damages.

The district court granted a new trial for three statements it had previously dismissed on Defendants' JAML motion. Tr.1004-06, 1101-02; App.Add.38-41; Doc.156. The Court of Appeals found these statements were properly dismissed under the incremental harm doctrine, and had no reason to address Defendants' alternative arguments that judgment was compelled due to the lack of evidence on negligence or causation/harm. While those alternative arguments can be left for remand if necessary, Plaintiff briefed them here.

Most Apposite Authorities:

Carradine v. State, 511 N.W.2d 733 (Minn. 1994);

Richie v. Paramount Pictures Corp., 544 N.W.2d 21 (Minn. 1996);

Diesen v. Hessburg, 455 N.W.2d 446 (Minn. 1990);

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

STATEMENT OF THE CASE

This case concerns the press's vital ability to report on breaking news based on information disseminated by law enforcement in official news conferences and news releases under the fair-report privilege's protection. Applying this Court's precedent in *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321 (Minn. 2000), the Court of Appeals held—consistent with other jurisdictions—that the fair-report privilege applies to law enforcement news conferences and news releases. App.Add.11-19. The Court of Appeals also concluded that the jury was properly instructed on falsity, and it credited the jury's finding that the statements reported by the media defendants were substantially accurate. App.Add.24-26. The Court of Appeals ordered judgment for Defendants, holding that the incremental harm doctrine recognized in *Carradine v. State*, 511 N.W.2d 733 (Minn. 1994) barred a new trial on three purportedly defamatory statements not previously submitted to the jury. App.Add.26-28.

Plaintiff Ryan Larson filed this defamation suit against Respondents Multimedia Holdings Corporation d/b/a KARE 11-TV ("KARE 11") and the St. Cloud Times ("St. Cloud Times") (collectively, "Defendants"), for their news coverage identifying Larson with the murder of Cold Spring police officer Tom Decker. On November 29, 2012, Officer Decker was shot and killed while performing a welfare check on Larson. That night, Larson was arrested and booked for murder, as reflected in the publicly-available jail log. The next morning, top officials from three law enforcement agencies held a news conference. They stated Officer Decker had been "shot twice, and died" in an "ambush[]" when responding to "calls of concern from the family of Ryan Larson"; that

Larson was in custody "in connection with this incident"; and though it was in the investigation's early stages, law enforcement did not have "any reason to believe there might be some other individual involved." App.Add.111-20. The Minnesota Department of Public Safety issued a corresponding news release. App.Add.121.

Larson alleged that eleven statements in Defendants' subsequent news coverage were defamatory. App.Add.101-10. Eight of those statements—relying on the news conference, news release, and/or jail log—reported that "police" or "investigators" "say" or "believe" Larson shot and killed Officer Decker, and Larson is "accused of" or "faces [a] murder charge." Later, Larson was released without charges. It is uncontested he was not the killer.

The case was heard in Hennepin County District Court, the Honorable Susan N. Burke presiding. The court rejected Defendants' fair-report privilege arguments concerning the news conference and news release, reasoning the privilege applied only to the jail log and the fact and charge of Larson's arrest. App.Add.70. Before the case went to the jury, the court determined its earlier finding of no substantial accuracy as to the fair-report privilege did not preclude the jury from reaching the falsity element of a defamation claim, and that a "jury could find either way." Tr.1111, 1135. The court also granted JAML for Defendants on the three other statements as non-actionable opinion statements or true. Tr.1100-04.

The eight remaining statements went to the jury. At Larson's request, the verdict form separately presented each "police say" statement in its entirety, rather than isolating the underlying statement that Larson shot and killed Officer Decker. Doc.87. Larson did

not request a republication instruction. The verdict form also asked the jury to determine whether each statement was false, and followed the pattern jury instruction. App.Add.44-69; Resp'ts.Add.3. Larson's request for the optional falsity-by-implication instruction was denied. Tr.1136, 1154-55.

The jury returned a verdict for Defendants, finding that Larson failed to prove falsity, and judgment was entered accordingly. App.Add.44-69. Six months later, the district court granted Larson's motion for JAML and new trial. It concluded the eight statements were defamatory and false as a matter of law under a falsity-by-implication and republication theory, and it ordered a new trial on negligence and damages. App.Add.33-34, 38. The court also ordered a new trial under a defamation-by-implication theory for the three statements previously dismissed. App.Add.38-41.

The Court of Appeals reversed, ordering judgment for Defendants. App.Add.28. Larson petitioned this Court for review; Defendants conditionally cross-petitioned that the statements at issue were substantially accurate as a matter of law under the fair-report privilege.

STATEMENT OF FACTS

I. Officer Decker's Murder And Law Enforcement's Information To The Public And Press

Around 11 p.m. on Thursday, November 29, 2012, Officer Tom Decker was shot and killed while responding to a welfare check at an apartment near Winners Bar in Cold Spring. App.Add.121.

A. Jail Log

Early the next morning, the Stearns County website's publicly-available jail log showed that 34-year-old Ryan Larson had been booked in jail, listed "MURDER 2" as the "Charge," and included Larson's photograph. App.Add.122; *see* Tr.772-73.

B. News Conference

Around 9 a.m. that same day, a joint news conference was held by three law enforcement agencies, represented by Stearns County Sheriff John Sanner ("Sheriff Sanner"); Minnesota Bureau of Criminal Apprehension ("BCA") Department Assistant Superintendent Drew Evans ("Superintendent Evans"); and Cold Spring Police Chief Phil Jones ("Chief Jones"). *See* Ex.101[1]; Add.75. As Superintendent Evans explained at trial, "the purpose of the news conference was to provide information to the public and to the media to provide to the public concerning where we were at that stage of that particular investigation." Tr.771. The news conference was broadcasted live by at least one television station. Tr.410, 783-84, 949.

Sheriff Sanner started the news conference[2] by detailing the circumstances of the shooting: "At about 9 o'clock last evening, the Stearns County Sheriff's Office received calls of concern from the family of Ryan Larson that he was potentially suicidal." App.Add.112. Officers "failed to make contact with him at that time," but "did return approximately an hour and 45 minutes later, still attempting to make contact with the

[1] Video of the news conference was Exhibit 101 at trial.

[2] Larson's claim (App. Br. at 2) that "Drew Evans … led a press conference" is wrong.

individual." App.Add.112. "[W]hen the officers pulled up, Officer Decker left his squad car, and a very short time later was confronted by an armed individual, shot twice, and died." App.Add.112.

Next, Superintendent Evans provided an "update … on the current status of the investigation." App.Add.112. He explained: "[S]hortly after Officer Decker was killed, the area was surrounded by police that responded to the area. A SERT team from the Stearns County Sheriff's Office was eventually able to take into custody the subject of the welfare check. After that occurred, he was interviewed by Stearns County deputies, and some of that investigation is still ongoing." App.Add.113. Evans then addressed aspects of the "active and ongoing investigation." *Id.* Before turning over the news conference to Chief Jones, Evans stated again, "Ryan Larson was taken into custody and was booked into the Stearns County jail in connection with this incident."[3] *Id.*

Chief Jones spoke next, addressing Officer Decker's background, family, and work on the police force. App.Add.114. The news conference then opened to press questions. All three officials answered questions.

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[3] Larson, in describing the news conference, claims: "[Evans] 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." App. Br. at 6 (citing Tr.773-74). But it was only at *trial* that Evans was asked, "what determination, if any, had been made by law enforcement" at the time of the news conference. Tr.773-74. And Evans only testified, "No determination had been made certainly by my office," qualifying his response by saying, "I was not part of the arresting team, and so I can't comment on their thought process on that." Tr.773. He also admitted the Stearns County Sherriff's office was the lead investigative agency and that he did not know all the evidence in that office's possession that led to Larson's arrest. Tr.788-90.

Two questions addressed whether there was "reason to believe there might be some other individual involved." App.Add.115. Superintendent Evans answered, "[W]e don't have any information to believe that at this time, but it's in early stages of the investigation." *Id.* When another reporter asked, "Anybody else injured or *were any other outstanding people involved*?" Sheriff Sanner stated, "No." App.Add.117 (emphasis added).

Some questions explored motive. When asked if "Officer Decker was familiar with the suspect? Did he know him?" Chief Jones[4] said, "I don't believe so." App.Add.115. Chief Jones later answered that another officer "was familiar with this individual" but did not "seem to have a lot of background either." App.Add.116. And when asked, "Any idea what was going on in his [Larson's] life," or whether "something triggered him last night to be notably upset," Sheriff Sanner answered, "it's far too early in the investigation to make a comment in reference to that." App.Add.116-17.

In response to questions about the "crime scene" and shooting, Superintendent Evans and Sheriff Sanner generally declined to comment. *See* App.Add.116-20. But when asked, "Where was Larson when he shot at Officer Decker?" they did not correct or clarify the reporter's characterization that Larson had fired the shots. App.Add.116. Superintendent Evans also stated directly, "it's apparent to us that the officer was ambushed at the scene." App.Add.119.

[4] The transcript mistakenly shows that statement was Sheriff Sanner's. Tr.1302-05.

Sheriff Sanner closed the news conference. App.Add.120. None of the three officials made any request to the public or media for information, or suggested other suspects might be involved in the shooting.

C. News Release

The same day as the news conference, the Minnesota Department of Public Safety issued a "NEWS RELEASE," "FOR IMMEDIATE RELEASE," to an "extensive list" of outlets, for the press to disseminate to the public. App.Add.121; *see* Tr.785. It was titled "COLD SPRING POLICE OFFICER KILLED IN THE LINE OF DUTY" and stated:

> Officer Tom Decker, 31, was shot and killed around 11 p.m. Thursday night near Winner's Bar on Main Street in Cold Spring as Decker and his partner conducted a welfare check at a nearby apartment. Officer Decker died at the scene.

App.Add.121. The next paragraph detailed Larson's arrest:

> Law enforcement agencies from across the region along with the Minnesota State Patrol launched a search for the suspect. Within an hour, Stearns County SWAT team investigators took Ryan Michael Larson, 34, of Cold Spring into custody. Larson was booked into the Stearns County Jail on murder charges early this morning.

App.Add.121.

II. The Next Day's News Coverage

Officer Decker's murder was breaking news, described at trial as "in every paper and every channel." Tr.929; *see* Tr.248, 320, 343, 345, 347-48. The Star Tribune's front-page headline was "SUICIDE CALL SENT COP INTO AMBUSH," with the sub-title, "Ryan M. Larson has been accused of shooting Cold Spring officer Tom Decker." Ex.140. The story was also covered by multiple TV stations, including one that carried

the news conference live. Tr.410, 783-84, 949; *see* Tr.374. KARE 11 and the St. Cloud Times also covered the story.

A. KARE 11

KARE 11 ran stories on Officer Decker's murder and Larson's arrest in its 5 p.m., 6 p.m., and 10 p.m. broadcasts on November 30, as well as an online article that same day.[5] None of Larson's defamation claims are based on the 5 p.m. broadcast, despite the similar content in all three broadcasts regarding his arrest. Tr.189-90, 427. All three featured Julie Nelson as the anchor, as well as reporters John Croman or Jana Shortal in Cold Spring. The KARE 11 team that reported this story relied on the news conference, news release, and/or the jail log issued by law enforcement in preparing the story.[6]

1. November 30, 2012, 6 p.m. newscast

KARE 11's 6 p.m. newscast began with a teaser, including a clip of Chief Jones at the news conference saying "We're going to miss him," and an interview clip of Rosella Decker, Officer Decker's mother. Ex.108 at 0:27-:38.

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[5] Scripts from the broadcasts are in Appellant's Addendum. The allegedly defamatory statements are italicized herein and appear as alleged in the complaint and charged to the jury. App.Add.30-31. Exhibits 11, 108 and 110 are the broadcast videos. Other statements from the broadcasts quoted in this brief are not official transcripts—the videos themselves are the evidence.

[6] Larson repeatedly mischaracterizes the record as to what sources the KARE 11 journalists viewed or relied upon, or exclusively cites their deposition testimony used for impeachment, rather than their trial testimony. *See* App. Br. at 7-12. The trial testimony is found here: Tr.250-52 (Croman—news conference and news release); Tr.191, 194 (Nelson); Tr.297, 309, 319-20, 334 (Shortal—news conference, news release, jail log); Tr.470, 473, 490 (Yang—news conference and "believe[s] also a news release"); Tr.435 (Rohde-Eckblad—news conference); Tr.236 (Helmke); Tr.520 (Peterson—news conference and news release).

Nelson, the anchor, started the story, "Condolences are pouring in tonight for the family of the Cold Spring police officer who died in the line of duty, Tom Decker." *Id.* at 0:46. Like the 5 p.m. broadcast where Nelson identified that "Ryan Larson is in jail – accused of Officer Decker's murder" (Exs. 6, 11), Nelson stated in the 6 p.m. report, "The 31 year-old 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.*" Ex.108 at 0:56-1:00; Doc.94 ¶13.

After Nelson, Croman reported on Officer Decker. Clips of two unnamed townspeople were played, one of whom talked about hearing the news on the radio. *Id.* at 1:20-58. The report then turned to Croman's interview with Rosella Decker, parts of which had also been included in the 5 p.m. broadcast. *Id.* at 2:05. Croman states, "*Rosella holds no ill will against the man accused of killing her son.*" *Id.* at 2:28. Next, Rosella states, "*His mind must have been really messed up, to do something like that. I know Tom would have forgave him.*" *Id.* at 2:33; Doc.94 ¶22; *compare* Ex.11.

After Croman described a "poignant scene" involving a procession of police cars and a hearse, Nelson provided information on funds for Officer Decker's family. Ex.108 at 2:40-3:36. Nelson closed the story by stating, "*Ryan Larson, the man accused of killing Officer Decker, could be charged as early as Monday.*" *Id.* at 3:38; Doc.94 ¶14. Nelson continued to read—with Larson's picture and the words "Officer Killed," "Suspect," and "Ryan Larson" on the screen—the same information reported at the 5 p.m. broadcast: "The 34 year old does not have a long criminal history, but was cited with disorderly conduct and 5th degree domestic assault in the past. He was a second

year machine tool student at St. Cloud Tech. Police say that they don't believe Larson had any previous contact with Officer Decker." Ex.108 at 3:42; *compare* Ex.11.

2. November 30, 2012, 10 p.m. newscast

The 10 p.m. broadcast began with a teaser showing a clip of Rosella Decker, followed by an excerpt of the news conference showing all three law enforcement officials, with Sheriff Sanner stating, "[T]his is a very difficult day for everyone in public safety." Ex.110 at 0:08-22. The teaser closed talking about the town and Officer Decker's family. *Id.* at 0:24-40.

Nelson began the story, "The body of Cold Spring Police Officer Tom Decker is being guarded around the clock until his funeral. A preliminary autopsy shows that Officer Decker died of multiple gunshot wounds. *Investigators say 34 year old Ryan Larson ambushed the officer, shooting him twice. Larson is in custody*." *Id.* at 0:46.

The story then turned Shortal, who reported on the shock and sadness in the community, and then cut to interview clips of Rosella Decker. *Id.* at 1:06-52. Another Cold Spring resident was shown stating Officer Decker "was one of the good guys." *Id.* at 1:53. Shortal said, "*He* [Officer Decker] *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*." *Id.* at 1:55. Rosella Decker was then shown, saying, "*His mind must have really been messed up, to do something like that. I know Tom would have forgave him.*" *Id.* at 2:06. Shortal, with clips from Rosella, commented on Officer Decker's children. Shortal closed by discussing Cold Spring and "people walking in a bit of a daze around here

Julie, just not quite understanding what exactly happened last night, and especially why it happened." *Id.* at 3:15.

The story returned to Nelson, who stated, "Charges could be filed as early as Monday against Ryan Larson, the man, as Jana mentioned, who's accused of killing Officer Decker." *Id.* at 3:27-:45. With Larson's photo, name, and the words "Suspect," and "Officer Killed" on the screen, Nelson reported, "*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.*" *Id.* The story concluded with information about memorial funds for the family. *Id.*

3. December 1, 2012 online article

On December 1, 2012, KARE 11 posted an online article titled, "Suspect jailed in fatal shooting of Cold Spring officer." Resp'ts.Add.6-8 It began, "A man whose family described him as suicidal is now behind bars in Stearns County held on suspicion of second degree murder in the alleged ambush of a Cold Spring police officer." *Id.* The next paragraph read, "Stearns County Sherriff John Sanner says 34-year-old Ryan Michael Larson was arrested in an apartment above Winner's bar in downtown Cold Spring late Thursday. *Investigators believe he fired two shots into Cold Spring police officer Tom Decker, causing his death.*" *Id.* The article also reported what was known about Officer Decker's response to the welfare check, citing Sheriff Sanner and Superintendent Evans, and described what was known about Larson. *Id.*

B. St. Cloud Times

The St. Cloud Times' front page on December 1, 2012 was dedicated to Officer Decker's killing. Resp'ts.Add.9. The top story was, "Area mourns death of Cold Spring officer." *Id.* At the bottom right was an article titled "*Man faces murder charge*." *Id.* The article—written by Karie Petrie (a/k/a Kari Stenman at trial)—began, "A Cold Spring man has been arrested in connection with the shooting of a police officer Thursday night. Ryan Michael Larson, 34, is in Stearns County Jail and faces possible charges of second-degree murder. *Police say Larson is responsible for the shooting death of Cold Spring-Richmond Police Officer Tom Decker*."[7] App.Add.144; *see* Tr.393-95, 589-90. The article cited Chief Jones as saying his department hadn't had much interaction with Larson, and Jeff Scoles, the owner of Winners Bar, described Larson as a "normal person." App.Add.144-45. The article closed with details about Larson's criminal background, a civil suit, and student status. *Id.*

III. Events And News Coverage Of Larson's Release

From jail, Larson called the St. Cloud Times, claiming innocence. Ex.113. On December 4, 2012, the St. Cloud Times published an online article detailing Larson's version of events. *Id.* KARE 11 published the same online article. *See id.*; Tr.1056-57.

That same day, Larson was released—a story both Defendants covered. App.Add.146-47. The Minnesota Department of Public Safety issued another news

[7] Contrary to Larson's suggestion, Stenman never admitted this allegedly defamatory statement—as attributed to "police"—was false. App. Br. at 14. Stenman was asked only whether the underlying "statement that 'Larson is responsible for the shooting death of Cold Spring-Richmond Police Officer Tom Decker' is false." Tr.401.

release, stating, "at this time there is not sufficient documented evidence to continue to hold Ryan Larson." Ex.107. This release, in contrast, requested that "[a]nyone with information regarding this crime … contact the Stearns County Sheriff's Office." *Id.*

The St. Cloud Times covered Larson's release and his professed innocence in its December 5, 2012 print edition. App.Add.146. The front-page article began, "Five days after he was arrested as the suspect in the shooting death of Cold Spring-Richmond Police Officer Tom Decker and two days after proclaiming his innocence in a jailhouse phone call, Ryan Larson walked out of jail Tuesday a free man." Resp'ts.Add.12. The story continued on the same page Larson's interview appeared. Resp'ts.Add.14. On that page, the article reported on the "crowd gathered outside the jail," which included "Roxie Knowles, the twin sister of Decker's former wife, Becky Decker." App.Add.148. The article reported Knowles as saying, "(The culprit) could be somebody in the crowd." *Id.* Knowles "said her sister fears for the safety of her children because there are so many unknowns about what happened or what led to the shooting." *Id.* The article relayed, "*Knowles said she came to the jail Tuesday because she 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*." *Id.* The article ended stating investigators were urging "anyone who has any information about what happened Thursday night to call investigators." *Id.*

IV. Subsequent Coverage And Events

On December 18, 2012, the St. Cloud Times featured an article about a $100,000 reward. Ex.121 at 1. It also included an article titled, "Larson returns to Cold Spring

apartment," published after Larson called the St. Cloud Times stating police had ransacked his apartment. *Id.*; *see* Tr.601.

In January 2013, authorities reported at a news conference that a person of interest, Eric Thomes, hung himself after officers visited his house. Ex.116 at 0:19. In August 2013, investigators issued a news release stating they had "completed the active portion of their investigation," and that, although "the investigation will continue," investigators would have arrested Thomes for Decker's murder. Ex.17. The release stated there was "no information that Mr. Larson participated in Officer Decker's murder," but that at the time, sufficient probable cause existed to arrest Larson. *Id.*; *see* Ex.106. Both KARE 11 and the St. Cloud Times covered these developments. Exs.116, 117, 118, 122.

V. The Trial

A. The Fair-Report Privilege

Larson alleged that the eleven statements italicized above were defamatory. Doc.94 ¶¶13-34. The case went to trial after the district court limited the fair-report privilege's scope to only the jail log and Larson's arrest and charge of arrest, excluding the news conference and news release. App.Add.72-74, 76; Tr.4-5, 1111.

B. Journalists' Testimony Regarding Falsity, Substantial Accuracy, Attribution, and Standard of Care

At trial, several KARE 11 and St. Cloud Times journalists testified. Their testimony was the sole evidence regarding the standard of care. Larson called no expert.

Larson's counsel pressed the journalists on whether Defendants' statements were the "exact" or "verbatim" words in the news conference or news release. Every journalist generally testified that Defendants did not use law enforcement's exact words, but fairly and accurately summarized the information in their public statements. *See, e.g.*, Tr.202, 215-16 (Nelson); Tr.253-55, 369 (Croman); Tr.309-10, 336 (Shortal); Tr.387-88 (Stenman); Tr.435-36 (Rohde-Eckblad); Tr.501-06 (Yang); Tr.522-24 (Peterson); Tr.556-57 (Philbrick); Tr.577-78 (Helmke); Tr.685, 689 (Unze); Tr.699-700 (Bodette).

Larson also pressed Defendants on their references to "police" or "investigators" rather than to individual officers. Tr.1226, 1229. But every journalist asked testified that reporting "police say" or "investigators say" was proper attribution, particularly when the information came from multiple law enforcement sources. Tr.438 (Rohde-Eckblad); Tr.395 (Stenman); Tr.210, 217 (Nelson); Tr.514-15, 528 (Peterson); Tr.589-90 (Unze); Tr.958 (Bodette); Tr.1047 (Helmke).

Moreover, every witness asked testified that, in this breaking news situation, it was not the press's duty to independently investigate the murder or independently verify what law enforcement said. Tr.217-18, 226, 328-29, 359-61, 490, 501, 523-25, 595. News outlets also had varying practices as to whether they named suspects before they were charged. Tr.1044. KARE 11's general practice was not to do so, subject to exceptions at News Director Helmke's discretion. Tr.1044-45. Helmke decided the exception applied here given the significant public importance of a small-town police officer's murder and law enforcement's own exception in holding a news conference and identifying the person arrested. *Id.*

C. Larson and His Counsel Claimed that the Falsity and Harm Were False Characterizations of Law Enforcement's Statements

Larson's counsel, at various times in trial, suggested two theories of the case: (1) Defendants did not accurately report what law enforcement had said; and (2) Defendants were liable for republishing the underlying statement that Larson shot and killed Officer Decker. *E.g.*, Tr.72-74. Larson on the stand, however, explicitly disclaimed any republication theory, and made clear that the alleged falsity was that what Defendants reported was not what law enforcement said. For every statement with a reference similar to "Police say," Larson's attorney asked him why the statement was false. *E.g.*, Tr.730-43. Each time, Larson responded, "[b]ecause police never said that." *Id.* The assertion in Larson's brief that he also testified that the statements were false because he did not shoot and kill Officer Decker, misstates the record. *See* App. Br. at 16-19. Larson never testified that the statements alleged in the complaint—that "police say"—were also false for another reason. Instead, Larson's counsel would ask, for example, "And had you shot and killed Officer Decker?" with Larson replying, "Absolutely not"—a point Defendants never disputed. Tr.731; *see also* Tr.730-43.

Moreover, Larson explicitly confirmed that his alleged harm was based on the difference between what law enforcement said and Defendants reported. Larson testified:

> Q. In looking at that statement or listening to that statement, how did that make you feel?
>
> A. Of course it made me feel horrible, hurt, insulted, embarrassed, confused. I mean, there's—you can put any negative emotion and it would apply to the feelings felt when you're accused of something like that. *And when I say accused, I don't mean accused by law enforcement, I mean accused by the media.*"

Tr.739 (emphasis added).

Furthermore, Larson offered no evidence of harm to his reputation from the allegedly defamatory statements by KARE 11 or the St. Cloud Times. While Larson testified how each allegedly defamatory statement made him "feel," his testimony was limited to feelings of humiliation and emotional harm. *See* Tr.730-44; App. Br. at 16-19, 61-62. And while Larson identified other purported harm, neither Larson nor any other witness offered any actual evidence linking that harm to Defendants' allegedly defamatory statements. *See* Tr.733, 922 (Chief Jones); Tr.755-61 (effects at school); Tr.925-30, 1217 (Scoles); Tr.827-32 (court sustained objection to statement by Larson's therapist for lack of foundation).

D. Directed Verdict on Three Statements

At the close of evidence, the district court granted Defendants' JAML motion on falsity as to three statements. Tr.1101-02. First, the district court found the 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," incapable of a defamatory meaning. Tr.1101. The second statement dismissed was, "[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.'" The court found "[t]his isn't over" to be "an opinion," "not actionable," and "[not] precise or specific in terms of what even is meant by that statement." Tr.1101-02. The court concluded the third statement—"His mind must have really been messed up to do something like that. I know Tom would've forgave him"—was "an opinion and not actionable." Tr.1102.

E. Submission to the Jury and its Verdict

The case was submitted to the jury, which was asked to make separate determinations on defamation, falsity, negligence, and—over Defendants' objection—19 categories of damages for each of the eight statements remaining in the case. App.Add.44-69. The jury returned a verdict for Defendants, answering "No" eight times as to whether, "By the greater weight of the evidence, was this statement false?" *Id.* Judgment was entered for Defendants. Resp'ts.Add.5.

VI. The District Court's Post-Trial Order

The district court granted Larson's post-trial motion and ordered a new trial, finding the statements submitted to the jury were defamatory in nature and false as a matter of law based on defamation-by-implication, falsity-by-implication, and republication theories, and rejecting Defendants' fair-report privilege and waiver arguments. App.Add.29-38. The court also ordered a new trial on the three previously dismissed statements, citing defamation-by-implication and that each statement could be found to imply Larson was responsible for killing Officer Decker. App.Add.38-42.

VII. The Court Of Appeals' Decision

Defendants appealed, and the Court of Appeals reversed the new trial order and reinstated the jury verdict, with instructions for judgment to be entered for Defendants. App.Add.2. First, the Court of Appeals "conclude[d] 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" relying on *Moreno*, the Restatement, and Minnesota's criminal defamation statute. App.Add.11-

15. The court also held—over Defendants' arguments the issue could be decided as a matter of law because they so clearly met the substantial accuracy test—that whether the statements were fair and accurate under the privilege was a jury question. App.Add.21.

Next, the Court of Appeals concluded that the jury instructions on falsity were substantially correct as applied to the fair-report privilege, and thus credited the jury's finding. App.Add.25. The court also determined a falsity-by-implication instruction was inappropriate on the alleged defamatory statements as they were submitted to the jury. App.Add.26. Finally, the court held that the three other statements on which the district court ordered a new trial were barred by the incremental harm doctrine. App.Add.26-27. The court never needed to, and did not, reach Defendants' alternative arguments on lack of negligence and causation/harm.

This Court granted review.

SUMMARY OF ARGUMENT

Reversing the Court of Appeals decision would have devastating effects on the press, serious repercussions for public safety, and dangerously infringe upon the First Amendment. This Court has long recognized a fair-report privilege covering the press's fair and accurate reporting on official proceedings or actions, or public meetings. The principles governing this Court's case-by-case application to judicial proceedings and legislative activities, such as city council meetings, compel its extension to the executive branch, here official law enforcement news conferences and news releases. Such proceedings are official government action with the very purpose of disseminating information to the public—radically distinct from private tips or informal interviews with

arresting officers or investigators. The vast majority of jurisdictions addressing this issue hold that the fair-report privilege applies in these circumstances; a contrary decision would leave Minnesota an outlier. Reversal would also result in self-censorship by the press and hamstring law enforcement's ability to disseminate critical information to the public. The public would be left in the dark, and while there are statutory protections from civil suits when the government asks the press to report on a statutorily-defined "emergency," the fair-report privilege is vital in allowing the press to inform the public outside of such an "emergency" or when any immediate danger has dissipated, as here.

Critically, this case does not come to this Court pre-trial. The jury has already found the allegedly defamatory statements were not false. The district court's order, and Larson's arguments here, are an affront to this Court's pronouncement that it "will not overturn a jury finding on the issue of falsity unless the finding is manifestly and palpably contrary to the evidence." *Lewis v. Equitable Life. Assur. Soc'y*, 389 N.W.2d 876, 889 (Minn. 1986). The statements at issue here, if anything, compelled a finding they were fair and accurate as a matter of law. There is no basis for resuscitating this suit for a potential new trial under an inapplicable "implication" theory, a never-requested republication instruction, and where the incremental harm doctrine bars the statements. The Court of Appeals should be affirmed.

ARGUMENT

I. Standard Of Review

A grant of a new trial "based on an error of law" is reviewed *de novo*. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990); App. Br. at

21. JAML on falsity may be granted only "when the evidence is so overwhelming on one side that reasonable minds cannot differ as to the proper outcome." *Lamb v. Jordan*, 333 N.W.2d 852, 855 (Minn. 1983) (quotation omitted). Review is *de novo*, and "the evidence is to be viewed in the light most favorable to the verdict." *Id.*

II. The First Amendment And Common Law Protect The Press From Defamation Claims

Defamation in general, and the fair-report privilege in particular, stand at the intersection of First Amendment protections for the press and common law libel claims. Although "historically treated … as being solely within the province of the states," *Moreno*, 610 N.W.2d at 328, when "the speech is of public concern but the plaintiff is a private figure," as here, "the Constitution still supplants the standards of the common law." *Phila. Newspapers v. Hepps*, 475 U.S. 767, 775 (1986); *see N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 299 (1964).

While Larson states that the "purpose of a defamation action is to compensate a private citizen for wrongful injury to his or her reputation," all three cases he cites highlight the tort's limits. App. Br. at 21-22. *Masson* recognizes that "[m]inor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (quotation omitted); *see McKee v. Laurion*, 825 N.W.2d 725, 730 (Minn. 2013) (same). *Gertz* imposes a constitutional requirement for the standard of care because the "First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). This forecloses strict

liability, with this Court "adopt[ing] a negligence standard for private individuals asserting defamation claims in Minnesota." *Moreno*, 610 N.W.2d at 329 (discussing *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 491 (Minn. 1985)). And *Richie* limits damages: "defamation claim cannot succeed based only on humiliation or other types of emotional harm," but requires that plaintiffs "show actual harm to their reputations." *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 30 (Minn. 1996).

As for the fair-report privilege, Larson cites decades-old federal cases to establish the privilege's parameters. *See* App. Br. at 22 (citing *Dameron v. Wash. Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985); *Bufalino v. Associated Press*, 692 F.2d 266 (2d Cir. 1982)). This ignores and diminishes that "Minnesota was in the forefront for protection of public debate," including "fair and impartial reporting of official proceedings and statements on matters in the public interest." *Britton v. Koep*, 470 N.W.2d 518, 520 (Minn. 1991). And the privilege's application here, as the Court of Appeals correctly found, is compelled "[b]ased on *Moreno*"—this Court's most recent and on-point decision on the subject. App.Add.14.

III. The Fair-Report Privilege Bars Larson's Claims

A. Fair-Report Privilege Principles

As the Court of Appeals recognized, this Court's decision in "*Moreno* guides our understanding of the fair-report privilege," dictates the result here, and compels its application to fair and accurate reports on official law enforcement news conferences and news releases. App.Add.14. *Moreno* affirmed "the policy objective that the fair and accurate reporting privilege supports—that the public interest is served by the fair and

accurate dissemination of information concerning the events of public proceedings." *Moreno*, 610 N.W.2d at 332. This Court also found the Restatement "persuasive," invoking its formulation of the privilege: that "the publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported." *Id.* at 331-32 (citing Restatement (Second) of Torts §611) [hereinafter "Restatement"].

Application of the privilege is a two-part inquiry, which Larson confuses and conflates. *E.g.*, App. Br. at 26-28. The first question is whether the privilege applies to the proceeding being reported on. This Court has addressed this on a case-by-case basis, recognizing "a privilege for the fair and accurate reporting of a judicial proceeding," *Moreno*, 610 N.W.2d at 332 (citing *Nixon v. Dispatch Printing Co.*, 112 N.W. 258 (Minn. 1907)), and finding in *Moreno* that the "same policy considerations … support extending that privilege to fair and accurate reports of legislative proceedings as well, including city council meetings," *id.* Those "policy considerations" "rest[] on two basic principles." *Id.* at 331. 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." *Id.* (citing Prosser & Keeton on Torts §115 at 836). "The second principle is the 'obvious public interest in having public affairs made known to all.'" *Id.* (quoting same).

The second question is whether the privilege has been "lost by a showing that the report is not a fair and accurate representation of the proceedings or meetings." *Id.*. All

parties agree the standard is "substantial accuracy"—whether "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." *See* App. Br. at 38 (quoting *Jadwin*, 390 N.W.2d at 441). When the alleged defamation is based on information from both protected and unprotected sources (which is not the case here), the privilege can be lost "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.

Whether the privilege exists "is a question for the court"; whether the privilege has been defeated is "for the jury to determine unless the facts are such that only one conclusion can reasonably be drawn." Restatement §619 cmts. a, b; *see Chafoulias v. Peterson*, 668 N.W.2d 642, 649-51 (Minn. 2003). If the privilege is defeated, "the entire report then would be subject to evaluation as any other allegedly defamatory statement," including for "some showing of fault before liability for defamation may be imposed." *Moreno*, 610 N.W.2d at 331-33.

B. The Privilege Covers Law Enforcement News Conferences and News Releases

1. The news conference and news release are covered by the privilege

The same principles recognized in *Moreno* compel extending the privilege to official law enforcement news conferences and news releases.[8] Both fall squarely within *Moreno*'s and the Restatement's formulation of the fair-report privilege as covering a

[8] Larson has not challenged the fair-report privilege's extension to the jail log.

"report of [1] an official action or proceeding *or* [2] a meeting open to the public that deals with a matter of public concern." *Moreno*, 610 N.W.2d at 331 (emphasis added); *see* Restatement §611 cmts. d, i.

First, both the news conference and news release were "public." The news conference was attended by the press and broadcast live on television. *Supra* at 6. Superintendent Evans testified the very "purpose of the news conference was to provide information to the public and to the media to provide to the public." Tr.771. Applying the privilege to law enforcement news conferences fits cleanly within the privilege's "basic principle[]" that "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; *see* Restatement §611 cmt. i. Likewise, the news release was publicly available and issued by law enforcement for dissemination to the public. Tr.785.

It was undisputed that the news conference and news release "deal[t] with a matter of public concern." *Id.*; *see* Tr.1154; Larson Ct. App. Br. at 39 n.12; Resp'ts.Add.3; App.Add.149. The privilege's "second principle"—the "obvious public interest in having public affairs made known to all," *Moreno*, 610 N.W.2d at 331—is at its peak in these circumstances, where a serious crime has occurred, and the public needs to be informed of its safety or solicited for information.

Second, both the news conference and news release are covered by the privilege's alternative application to "an official action or proceeding." *See id.*; Restatement §611 & cmt. d; App.Add.15. Both are *official* actions or proceedings by state or local law

enforcement agencies. *See* Restatement §611 cmt. d. The comments were not by low-level officers, but top law enforcement officials or the agency itself. Nor were these off-the-record or informal comments, but statements at a formal, planned, and public news conference. The same is also true of the news release—"[s]ince the holding of an official hearing or meeting is in itself an official proceeding, the privilege includes the report of any official hearing or meeting, even though no other action is taken." *Id.* cmt. d; *see* App.Add.15. Official law enforcement news conferences and news releases, like those here, are subject to the fair-report privilege.

2. Larson's arguments fail

i. The news conference and news release were "official"

Larson does not meaningfully dispute that law enforcement news conferences and news releases are not "official." Instead, he argues they "are not recurring government functions essential to democracy like judicial proceeding or city council meetings entitled to the privilege." App. Br. at 26. But *Moreno* imposed no such test. Instead, this Court determined that the privilege previously extended to judicial proceedings "support[ed] extending that privilege to fair and accurate reports of legislative proceedings as well, including city council meetings." *Moreno*, 610 N.W.2d at 332. There is no basis for not extending the privilege to formal news conferences and news releases by the executive branch.

Moreover, Larson's claim that the "privilege only applies in official proceedings wherein both sides have an opportunity to be heard," has no support in this Court's precedent. App. Br. at 26 (citing *Moreno*, 610 N.W.2d at 329; *Nixon*, 112 N.W. at 259).

Moreno made clear that "*Nixon*'s holding [was] that pleadings not yet accepted by a court are outside the scope of the fair and accurate reporting privilege." *Moreno*, 610 N.W.2d at 329. There, the concern was that because the "court does not pass upon the question whether or not [the complaint] shall be filed," a "party desiring to libel another may do so with impunity by entitling the libel in an action, labeling it a complaint, and filing it with the clerk." *Nixon*, 112 N.W. at 258. Those concerns, however, are absent here, because there was *official* action—the statements at the news conference and news release were made by top law enforcement officials and the agency itself.

Nor is the opportunity to confront the purported defamer a prerequisite. *See* App. Br. at 21-26. In *Moreno*, this Court extended the privilege's protection to statements made by a private citizen who "asked for an opportunity to speak" as the meeting was "prepared to adjourn," and accused a police officer of criminal conduct without the officer present. 610 N.W.2d at 324.

Larson's argument that "the press conference and news release are not official actions in the same sense as a city council meeting or judicial proceeding," misses the mark. App. Br. at 26. *Moreno* did not turn on whether judicial proceedings and city council meetings are "official" in the same sense. Instead, this Court based its extension of the fair-report privilege on the "same *policy considerations*." *Moreno*, 610 N.W.2d at 332 (emphasis added). Those same policy considerations apply here, for the reasons discussed above and by the Court of Appeals. *Supra* at 25-27; App.Add.13-14.

Finally, Larson's claim that there is no statutory basis for applying the privilege to law enforcement news conferences and news releases is wrong. App. Br. at 26. As

Moreno referenced, Minnesota has a criminal statute protecting fair reports of judicial and legislative proceedings, and policy considerations likewise "warrant such protection in the civil context as well." 610 N.W.2d at 333 (citing Minn. Stat. §609.[76]5). Moreover, the Court of Appeals rightly observed that the same statute also protects "a fair and true report or a fair summary of any judicial, legislative, *or other public or official proceedings*," and so applies here. Minn. Stat. §609.765, subd. 3(3) (emphasis added); *see* App.Add.15-16. Larson does not dispute that reference to "other public or official proceedings" includes law enforcement news conferences and news releases. Instead, he argues criminal liability would only attach upon a finding of actual malice, not mere negligence as applicable in civil cases involving private figures. App. Br. at 31. But the requirements to find criminal liability does nothing to undermine the fair-report privilege's application "in the civil context." *Moreno*, 610 N.W.2d at 333. And Larson's distinction between a public and private figure (App. Br. at 26, 31) is meaningless when there is no indication the plaintiff in *Nixon* was a public figure.

ii. The news conference and news release were "public"

Larson also argues that the news conference was not protected as a "public" meeting because "it was not a public meeting for all to attend similar to a city council meeting or judicial proceeding." App. Br. at 29. But Larson does not offer any record support that the news conference and news release were not "public," nor any legal support that only meetings subject to Minnesota's open meeting law are "public" under the fair-report privilege. *Id*. The Restatement, rather, is clear that the privilege "also extends to a report of *any* meeting, assembly or gathering that is open to the general

public and is held for the purpose of discussing or otherwise dealing with matters of public concern." Restatement §611 cmt. i (emphasis added). Here, where the general public could view the news conference and news release—indeed, their very purpose was public dissemination—the privilege attaches.

iii. Larson misinterprets the Restatement

Larson also argues the fair-report privilege's application here is inconsistent with Restatement §611, particularly comments d ("official proceedings") and h ("arrest").

Larson's argument that comment d is limited to proceedings "judicial in character" is baseless. App. Br. at 30. "The privilege … extends to the report of *any* official proceeding, or *any* action taken by any officer or agency of the government of the United States, or of any State or of any of its subdivisions." Restatement §611 cmt. d (emphases added). Larson's other argument that, according to comment d, "it 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" (App. Br. at 30), is not a prohibition, and regardless, is meaningless here where the news conference and news release *were* available to the public.

Larson's arguments regarding comment h are similarly flawed. Larson invokes comment h because it was quoted in *Moreno*: "While an arrest or indictment is an official act generally covered by this section, '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.'" 610 N.W.2d at 333 (quoting Restatement §611 cmt. h); *see* App. Br. at 24. But Larson also recognizes that *Moreno*

did not use comment h to determine whether the city council meeting was covered by the privilege. *See id.* Instead, it was discussed regarding when a press report would not be fair and accurate because the defamatory statement included *additional* material "*not part of the meeting*." *Moreno*, 610 N.W.2d at 331, 333; *see* App.Add.17.

Larson's argument under comment h that in a criminal investigation the only substance subject to the privilege's protection is the fact of arrest or charge of crime, is inconsistent with *Moreno*, which itself concerned details regarding suspected criminal activity. App. Br. at 31-34. *Moreno* shows that if the proceeding or meeting is covered by the privilege, the privilege's application does not hinge on the *substance* of what was said. Here, the official proceeding, activity, or meeting was the news conference itself. The privilege's applicability does not rise and fall on the substance of what was said in that news conference, especially when the statements related to Officer Decker's murder, an unquestioned matter of public concern.

Comment h instead reflects only that *unofficial* statements by law enforcement, separate from those made at an *official* news conference or news release, are not protected. App.Add.17-18. Case law also reflects this. As Larson notes, this Court's decision in *Carradine v. State* addressed whether a trooper had immunity for "statements … to a reporter" "made in response to press inquiries about the arrest." 511 N.W.2d 733, 734-36 (Minn. 1994). *Carradine* held the trooper's unofficial statements to the press were unprotected, unless they "amounted to an exact repetition or a substantial repetition, without amplification or comment, of the statements made in the arrest report, which is a matter of public record available to the press." *Id.* at 737. A key distinction there was

that the trooper's statements were unofficial and in response to press inquiries, when instead, "troopers are encouraged to refer questions to a public affairs officer in well-publicized cases." *Id.* But here, the statements are not unofficial statements by arresting officers in response to a reporter's inquiry. Instead, the news conference and news release were the official public affairs response by agencies and their top officials—the kind of statements that *Carradine* said should have been issued. Official statements by law enforcement heads, supervisors, or the agency, in a formal news conference or news release initiated by law enforcement, are fundamentally different than unofficial statements by an arresting officer in a one-on-one response to a reporter's inquiry.

Furthermore, Larson's attempt to differentiate between the prepared remarks by law enforcement at the news conference and the responses to reporter's questions (App. Br. at 31-32) runs afoul of *Moreno*, which extended the privilege to the "events that are part of the regular business of a city council meeting," including unexpected public comments by a private citizen as the council was "prepared to adjourn for the evening." 610 N.W.2d at 324, 333. Here, the question-and-answer session was part of the official news conference and at law enforcement's invitation. App.Add.113-14, 119-20. Larson's arguments are baseless.

iv. Larson's other arguments fail

Larson argues that press "summaries" of law enforcement's statements should not be covered by the privilege. App. Br. at 27-29. But not only is that argument wrong, *see* App.Add.2; *Moreno*, 610 N.W.2d at 328 n.5, 329, 333 (discussing Minn. Stat. §609.765,

subd. 3(3)), it has no bearing on the predicate question of whether the proceeding, action, or meeting being reported on is within the privilege's scope.

Larson places unfounded reliance upon the Minnesota Rules of Professional Conduct's prohibition on prosecutors making extrajudicial statements that "will have a substantial likelihood of materially prejudicing a jury trial in a pending criminal matter." *See* App. Br. at 34 (citing Minn. R. Prof. Cond. 3.6, 3.8); App.Add.18-19. But there has been no showing those rules should have prohibited the news conference and news release here, and regardless, even if they did, the fair-report privilege does not rest on whether the government action was "proper"—the privilege exists for when *false* information is relayed. The rules Larson cite do not trump the policy that "the public interest is served by the fair and accurate dissemination of information concerning the events of public proceedings" (Add.Add.19 (quoting *Moreno*, 610 N.W.2d at 332)), especially when there are mechanisms such as *voir dire* to guard against an unbiased jury. *See id.* (citing *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 563-64 (1976); Tr.771, 781-82.

3. Other jurisdictions overwhelmingly find the fair-report privilege applies

Tellingly absent from Larson's brief is a citation to any decision refusing to protect the press from defamation claims in these circumstances. In contrast, numerous courts have held the fair-report privilege applies in these very circumstances—where the press reported information from a law enforcement news conference or news release in which the wrong person was identified, or the person in custody was subsequently

released.[9] *See, e.g.*, *Lee v. TMZ Prods.*, 710 F. App'x 551, 559 (3d Cir. 2017); *McDonald v. Raycom TV Broad., Inc.*, 665 F. Supp. 2d 688, 691-92 (S.D. Miss. 2009); *Steer v. Lexleon, Inc.*, 472 A.2d 1021, 1026-27 (Md. App. 1984); *Jones v. Taibbi*, 512 N.E.2d 260, 267 (Mass. 1987); *Nelson v. Cmty. Newspaper Co.*, 2000 Mass. Super. LEXIS 322, at *10-14 (July 21, 2000); *Freedom Communs., Inc. v. Sotelo*, 2006 Tex. App. LEXIS 5132, at *11 (June 15, 2006).

All these cases cited or adopted the Restatement. They are thus consistent with *Moreno*'s invocation of the Restatement, and highlight the fact that Restatement §611 comments d and h are no impediment here.

The treatise statement Larson cites is unsupported. *See* App. Br. at 32-33 (citing Harper, James & Gray, Law of Torts, §5.24 at 244-45). While it says "press conferences[] do not constitute 'official proceedings,'" it cites no case for this proposition. And the one case Larson cites is inapposite. *See* App. Br. at 26-27 (citing *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 89-90 (D.C. App. 1980). *Phillips* involved a "hot line" where police recorded a message about a crime the media could access by telephone, and also provided a written narrative in a "log" book available to the press. *Id.* at 81-82 & n.3. The court found this log was not an "official document"

[9] Other cases have also extended the fair-report privilege to law enforcement news conferences or news releases, and found the press protected from liability in other factual circumstances. *E.g.*, *Conterras v. Vill. of Woodridge*, 1994 U.S. Dist. LEXIS 5969, at *7-14 (N.D. Ill. May 4, 1994); *Martinez v. WTVG*, 2008 Ohio App. LEXIS 1518, at *8-9; *Wright v. Grove Sun Newspaper Co. Inc.*, 1994 OK 37, ¶14, 873 P.2d 983; *Stewart v. NYT Broad. Holdings, LLC*, 2010 OK CIV APP 89, ¶¶15-18, 240 P.3d 722; *Williams v. Cox Newspapers, Inc.*, 2009 Tex. App. LEXIS 6484, at *10-12 (July 31, 2009).

entitled to the privilege's protection, but instead "represents little more than an informal arrangement between the police and the media, a joint venture, which consists of nothing more sanctified than unofficial statements of police regarding a crime." *Id.* at 89. Here, in contrast, the news conference and news release were publicly available, officially-issued statements by top law enforcement officials or the agency itself.

The fair-report privilege, under Minnesota law, extends to official law enforcement news conferences and news releases. Any contrary decision would render Minnesota an outlier jurisdiction, and abdicate its position at the "forefront for protection" of the fair-report privilege. *See Britton*, 470 N.W.2d at 520.

4. Policy considerations compel the privilege's application

Finally, public policy considerations compel the fair-report privilege's application here. Larson's contention that "[n]o compelling public benefit exists for extending the privilege before the time required for prosecutors to file criminal charges" is baseless. App. Br. at 35. As Larson acknowledges, there could be up to "36 hours" between an arrest and filing of charges. *Id.* It would also eliminate all protection in cases where the press reports on law enforcement news conferences in which a suspected criminal is at large. A rule that, pre-charge, would substantively limit what could be reported from a news conference to only things that did not link the crime to a particular individual, would result in self-censorship by the press and prevent the media from live broadcasting the news conference. The information provided and solicited in these news conferences and news releases, however, is essential. The need for law enforcement to inform the public about whether it is safe, and in turn solicit information that could lead to finding

the perpetrator, is critical, as highlighted by law enforcement's continued news conferences and news releases after Larson's release, and the examples by the amici below. First Amendment protections against self-censorship should be at their pinnacle when the press is actively relied upon by law enforcement and the public in disseminating information on serious crimes, particularly when dangerous suspects may be at large, areas unsafe, or victims missing or hurt.

Nor is the protection from civil liability for "notifying the public of an emergency" provided by Minn. Stat. §604A.35 adequate. The press should not solely be able to notify the public without fear of liability when there is an active emergency that may, for example, make it unsafe for children to play outside or walk to school. Citizens and families also deserve to be informed *after* the emergency has dissipated, and not only 36 hours after charges have been brought, on whether they can resume their normal activities without fear or danger—information §604A.35 would not cover and that the press could not report without fear of liability unless the fair-report privilege were in place.

C. Defendants' Statements Were Fair and Accurate and Protected by the Fair-Report Privilege

1. Fair and accurate reporting means "substantial accuracy"

"Having concluded that the fair and accurate reporting privilege extends" to the law enforcement news conference and news release, this Court "must now decide whether [the eight purportedly defamatory statements are] a fair and accurate report." *Moreno*, 610 N.W.2d at 333. The parties agree that the "legal test regarding whether the report is 'fair and accurate' was explained in *Jadwin v. Minneapolis Star Tribine*, 390

N.W.2d 437 (Minn. Ct. App. 1986)," and is "whether the report is 'substantially accurate.'" App. Br. at 38. The parties also agree 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 recipients which the precise truth would have produced.'" *Id.* This is the same standard applicable to the falsity element, but specifically compares the statement reported by the press to the statement made in the official proceeding, action, or public meeting. *See Masson*, 501 U.S. at 517; *McKee*, 825 N.W.2d at 730.

Verbatim recitation is not required. Instead, the "existence of both a speaker and a reporter; the translation between two media … and the practical necessity to edit and make intelligible a speaker's perhaps rambling comments, all make it misleading to suggest that a quotation will be reconstructed with complete accuracy." *Masson*, 501 U.S. at 515. This Court holds the same. *See McKee*, 825 N.W.2d at 730-31. And the *Jadwin* case Larson relies upon did not find the press's report to be a verbatim recitation, but "a fair and accurate *summary*." *Jadwin*, 390 N.W.2d at 441-42 (emphasis added).

2. The statements submitted to the jury were fair and accurate as a matter of law

The eight purportedly defamatory statements submitted to the jury were fair and accurate as a matter of law. There was no need to turn to the jury verdict. The Court of Appeals, in finding a jury issue, refused to analyze whether the facts here, under the "substantial accuracy" standard, lead to only one conclusion that can reasonably be drawn. App.Add.21; *see* Restatement §619 cmt. b. Instead, it recognized the statements that went to the jury were not verbatim recitations, and stated "a reasonable jury may

conclude that statements 1-8 were substantially accurate reports of official statements," without analyzing whether the "gist," "sting," or "substance" was the same as a matter of law. App.Add.021. The Court of Appeals' "caution that summary judgment is not a substitute for trial," App.Add.21 (quoting *Utecht v. Shopko Dep't Store*, 324 N.W.2d 652, 653-54 (Minn. 1982)), ignored this Court's recent pronouncement that where what was said is undisputed, the court can decide as a matter of law whether the "gist" or "sting" is the same, *McKee*, 825 N.W.2d at 730.[10]

i. The six statements Larson claims go beyond the fact of arrest are fair and accurate

Larson claims that six statements were not substantially accurate because they "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." App. Br. at 44. Those statements are:

> 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[s] 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.

[10] No deference is owed to the district court's order that these eight statements were not fair and accurate under the fair-report privilege. The district court "vacated" that portion of its order (App.Add.9), and regardless, where the statements are undisputed, review is *de novo*. *Chafoulias*, 668 N.W.2d at 649-50.

> 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.

App. Br. at 42-44.

Notably, Larson has apparently abandoned his primary argument at trial—that Defendants' statements were not substantially accurate because they did not use the "exact words" from the news conference, news release, or jail log. *E.g.*, Tr.700. Larson no longer argues that police did not say Larson ambushed, shot, and killed Officer Decker. This is for good reason. That argument fails as a matter of law, given that a demand for verbatim recitation is contrary to precedent.[11] *See Masson*, 501 U.S. at 515; *McKee*, 825 N.W.2d at 730-31; *Moreno*, 610 N.W.2d at 333.

Instead, the focus of Larson's argument is that "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." App. Br. at 43-44. But Defendants' statements, in the context of law enforcement's statements as a whole, were substantially accurate. Sherriff Sanner confirmed law enforcement was not seeking anyone else; Superintendent Evans stated they "don't have any information to believe" at that time there might be another individual involved; and no one at the news conference or in the news release

[11] Nor does the "tone and language" used by phrases like Larson "opened fire … for no reason anyone can fathom" create any different gist or sting. *See Lee*, 710 F. App'x at 559. Moreover, law enforcement offered no motive, and regardless, "minor inaccuracies of expression or detail are immaterial." *McKee*, 825 N.W.2d at 730.

indicated a continuing public danger or sought the public's help. This is in contrast to the news releases after Larson's release soliciting the public's assistance. *See* Exs.16, 17, 107. And Larson's reliance on Superintendent Evans's after-the-fact suppositions at trial as to what he would have clarified if he had been asked, are—particularly in light of his admission that Stearns County was the lead investigative agency and he was not aware of all the evidence available to that agency—irrelevant and inappropriate. App. Br. at 27, 45. The very fact Larson was arrested confirms police's belief he murdered Officer Decker, because "[p]robable cause for an arrest has been defined to be a 'reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.'" *State v. Harris*, 202 N.W.2d 878, 881 (Minn. 1972) (quotation omitted); *see* Tr.789; Ex.17, Ex.106.

Defendants' statements cannot be found to have "created the impression of finality to the investigation and certainty to the idea that Larson had killed Officer Decker that was not present in the news conference, news release, and jail log." App. Br. at 44; *see* App.Add.73 (now-vacated Order). Courts have squarely rejected this argument. Last year, the Third Circuit found the fair-report privilege applied to a defamation suit filed by a person wrongly accused and charged in a prostitution sting, and who before her release, was identified by media based on a press conference and press release by the New York Attorney General. *Lee*, 710 F. App'x at 558-59. Among her arguments against the fair-report privilege's application was that "certain portions [of the articles] omit the words 'accuse or 'allege,' giving the impression [she] was guilty of the conduct described." *Id.* at 559. But the Third Circuit flatly rejected that argument, because "we do not evaluate

the application of the fair-report privilege on the basis of selective quotes," and "presume that the public reads the entire article when we assess its fairness and accuracy." *Id.* (quoting *Salzano v. N. Jersey Media Grp. Inc.*, 993 A.2d 778 (N.J. 2010)). Here, as in *Lee*—which applied the same "gist" or "sting" standard—each article or report makes sufficiently clear that Larson was the lone suspect, not that the "investigation was over." App. Br. at 44. The KARE 11 newscasts made clear Larson was "accused," when displaying Larson's picture identified him as a "suspect," and reported that charges could be, but had not yet been, filed. *Supra* at 11-13. And the KARE 11 online article stated Larson was being held on "suspicion" in the "alleged ambush" of Officer Decker. *Supra* at 13. Likewise, the St. Cloud Times article made clear Larson "faces *possible* charges of second-degree murder." *Supra* at 14 (emphasis added). These statements, viewed in context, were substantially accurate.

Furthermore, Larson's argument that the reports failed to convey this was an "ongoing" investigation "in its early, preliminary stages" (App. Br. at 43-44), belies the readers' and viewers' common sense when the statements were made within hours of Officer Decker's murder. It also fails to consider that law enforcement considers every investigation "active and on-going" until a defendant is convicted. Tr.790-91. The "gist" or "sting" is the same—there is no material difference in the effect between what was reported, and the effect the "precise truth" would have had on a reader or viewer.

ii. The two statements Larson claims convey the fact of arrest or charge were substantially accurate

Larson claims the remaining two statements "were not substantially accurate" because the effect each "would produce on the mind of the recipient was that Larson had been formally charged with murder":

> Rosella holds no ill-will against the man accused of killing her son.
>
> Man faces murder charge.

App. Br. at 46.

Larson is wrong. For the first statement, Larson argues that, "[i]n this context, 'accused' generally means charged with a crime." *Id.* But the definition of "accused" is not so narrow.[12] Larson himself made this clear when he testified "to the feelings felt when you're *accused* of something like that." Tr.739 (emphasis added). And even if the word "accuse" *can* have that meaning, *see* App.Add.74-75 (now-vacated Order), it does not here, where both broadcasts reporting "Rosella holds no ill-will against the man accused of killing her son," also made clear charges "*could* be" filed as early as Monday.[13] *Supra* at 11; *see Lee*, 710 F. App'x at 559.

Nor does the St. Cloud Times headline "Man faces murder charge" produce the impression that Larson had been formally charged. *See* App. Br. at 47. That headline

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[12] *See* Webster's Collegiate Dictionary 50 (9th ed. 1989) ("accuse" means "to charge with a fault or offense"); Oxford Online Dictionary (2018), https://en.oxforddictionaries.com/definition/accuse ("accuse" means "[c]laim that (someone) has done something wrong").

[13] Below, Larson made this same argument with respect to the statement, "Ryan Larson, the man accused of killing officer Decker, could be charged as early as Monday." Larson Ct. Appeals Br. at 37. That argument fails for the same reasons.

means he has the *prospect* of being charged. *See* Webster's Collegiate Dictionary 443 (9th ed. 1989) ("face" can mean "to have as a prospect"); Oxford Online Dictionary (2018), https://en.oxforddictionaries.com/definition/face (same). And the context of the article clarified Larson "faces *possible* charges of second-degree murder."

Critically, even if the statements produced the impression Larson had already been charged with a crime, that would be immaterial. The Massachusetts Supreme Court addressed these circumstances directly, in a case recognized by *Moreno*, concluding, "[a]lthough the plaintiff was not actually charged, the impact of that statement did not create a substantially greater defamatory sting than an accurate report that the plaintiff had only been booked on suspicion of murder." *Jones*, 512 N.E.2d at 266. By the same reasoning, any argument as to these statements fails.

iii. Larson's new attribution arguments are waived, and fail in any event

For the first time, Larson argues attribution is a separate, independent requirement for the fair-report privilege's applicability. App. Br. at 36-37. This argument is waived. *See Johnson v. Paynesville Farmers Union Coop. Oil Co.*, 817 N.W.2d 693, 707 n.11 (Minn. 2012). At summary judgment, during trial, and before the Court of Appeals, to the extent Larson raised attribution, it related only to substantial accuracy (whether those were the "exact words" of any officer) or negligence (whether Defendants followed their own policies). *See* Doc.19 at 44-45, 52-54; Larson Ct. App. Br. at 27, 36, 59.

Regardless, Larson's argument fails. First, neither *Moreno* nor the Restatement reference, much less require, "attribution" as a separate stand-alone requirement.

Moreno, 610 N.W.2d at 329-33; Restatement §611. Second, Defendants did attribute their reports by saying "police" or "investigators" "say" or "believe," consistent with their policies. As every journalist witness affirmed, that was attribution. *Supra* at 17. Third, it was apparent law enforcement was the source for information regarding the investigation and Larson as a suspect. The KARE 11 and St. Cloud Times reports, for example, included what was readily identifiable as a mugshot of Larson. And the KARE 11 broadcasts each included a brief clip from the news conference. *Supra* at 10-13.

Larson's cases from other jurisdictions are inapposite. *Dameron* involved a sidebar in a magazine discussing certain plane crashes, without referencing the NTSB investigation that was the source for the information. *Dameron*, 779 F.2d at 737-38. The court did not impose any requirement of "specific attribution"; it was enough if attribution to protected sources was "apparent" from the article's "overall context." *Id.* at 739. Here, the reports identified they were conveying what "police say," unlike *Dameron*, where the impression was that the conclusions were based on the reporter's own research. *Id.* at 740. *Bufalino* is likewise inapposite. There, the concern was that the press cannot after-the-fact point to official records it did not actually rely upon. *Bufalino*, 692 F.2d at 270. But here, the news conference, news release, and jail log were viewed and relied upon contemporaneously by reporters. *Supra* at 10 n.6.

Critically, another case Larson cites, *Phillips*, is on point and fatal to Larson's new attribution claim. App. Br. at 37 (citing *Phillips*, 424 A.2d at 89). There, in a case involving information received from a police "hot line," the court found the requirement of "proper attribution" met by the article's references to what "D.C. police said" and was

"according to police." *Phillips*, 424 A.2d at 82, 89. To the extent attribution is an independent requirement, Defendants properly did so using the same "police say" references.

3. Alternatively, the Court of Appeals properly credited the jury's finding for purposes of the fair-report privilege

Alternatively, and at a minimum, "a reasonable jury *may* conclude that statements 1-8 were substantially accurate reports of official statements." App.Add.21 (emphasis added); *see* Tr.1111. Here, that is what the jury found, and it entitles Defendants to judgment, as the Court of Appeals held. App.Add.24-25.

It is of no consequence that the district court erroneously found the fair-report privilege did not apply, and cast its instruction as one on falsity, rather than substantial accuracy under the privilege. *See* App.Add.25. A new trial is required only "[i]f the instruction destroys the substantial correctness of the charge as a whole, causes a miscarriage of justice, or results in substantial prejudice." *Marlock v. St. Paul Guardian Ins. Co.*, 650 N.W.2d 154, 159 (Minn. 2002). Thus, "[w]here instructions overall fairly and correctly state the applicable law, appellant is not entitled to a new trial." *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002). Moreover, "even if an affirmative misstatement of law in an instruction was fundamental error," there is no entitlement to a new trial if it cannot be "demonstrate[d] in the record that such error had changed the outcome of the case or otherwise prejudiced it." *Halla*, 454 N.W.2d at 911.

Here, the charge to the jury was substantially correct, and regardless, Larson cannot claim prejudice when the jury instruction on falsity, following the model jury

instruction, was the same standard Larson concedes governs substantial accuracy for the fair-report privilege. *Compare* Doc.127 at 14 *and* App.Add.149, *with* App. Br. at 38 (quoting *Jadwin*, 390 N.W.2d at 441). "Substantial accuracy" is the standard for both, as measured by whether the "gist" or "substance" is the same, considering the words as a whole and in context. *Compare Jadwin*, 390 N.W.2d at 441, *with McKee*, 825 N.W.2d at 730 (quoting *Masson*, 501 U.S. at 517). Moreover, Larson's counsel in closing arguments specifically argued the jury should find these statements false because "[n]obody in the police said that." Tr.1208-10. And the jury considered each purportedly defamatory statement in its entirety—including the "police say" language—against this standard. The jury's finding that each was substantially accurate controls and is dispositive, compelling judgment for Defendants.

Larson's arguments to the contrary fail. Larson's primary argument is that the jury was not "instructed with the *Jadwin* definition," because only the "gist" or "substance" standard was given, not the alternative formulation of whether "it produces the same effect on the mind of the recipient which the precise truth would have produced." App. Br. at 38 (quoting *Jadwin*, 390 N.W.2d at 441). But this "precise truth" formulation is also recognized in *McKee* and *Masson* as an alternative formulation for falsity. *See* 4 Minn. Practice – Jury Instructions, CIVJIG 50.25 "Use Note" (6th ed. 2014) (quoting *McKee*, 825 N.W.2d at 730 (quoting *Masson*, 501 U.S. at 517)). Yet the model jury instructions, and Larson's own proposed falsity instruction, included only the "substance or gist" phrasing. *See* App.Add.149; Doc.86 at No. 14. Larson's argument is effectively waived, and regardless is meritless. Nothing requires that a jury be instructed

on every alternative articulation of a legal standard. The standard is whether the instructions "overall fairly and correctly state the applicable law." *Hilligoss*, 649 N.W.2d at 147. Larson offers no meaningful argument that the instruction here failed to do so.

Second, Larson argues the Court of Appeals found *Moreno*'s articulation of the fair and accurate reporting standard controlled, but that *Moreno*'s phrasing was not given to the jury. App. Br. at 39-40, 47-48. This argument fails because the *Jadwin* standard, which Larson says controls, was put to the jury. Indeed, *Moreno*'s discussion of substantial accuracy when alleged defamation is based on information from sources both protected and unprotected by the fair-report privilege is inapplicable here. 610 N.W.2d at 333. Unlike *Moreno*, where the complaint alleged the entire "article was defamatory," without "distinguish[ing] any particular part," *id.* at 334, here, Larson alleged specific statements—which were based on the news conference, news release, and/or jail log—were defamatory, Doc.94 ¶¶13-34. Regardless, *Moreno* focused on substantial accuracy and the need to consider the entire statements; the substantially same instruction was given here. Any minor variation here is distinct from the cases cited by Larson. *Christie* and *Becker*, for example, dealt with fundamental differences in the jury instructions on "the applicable standard of proof." *See* App. Br. at 48; *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018); *Becker v. Allow Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 659-60 (Minn. 1987); *see also In re Estate of Butler*, 803 N.W.2d 393, 400 (Minn. 2011) (JAML is proper when the evidence compels it under the correct legal standard).

Finally, Larson's arguments that substantial accuracy was a question for the court, that the issue was never tried to the jury, and that Larson had no opportunity to argue the

privilege, are baseless. App. Br. at 40-41. While substantial accuracy under the fair-report privilege could have been found by the court as a matter of law given the clear facts in Defendants' favor, it is generally for the jury. *See* Restatement §619. And here, Larson's counsel specifically argued in closing that Defendants' statements were not what police said, and that question was put to jury. Larson cannot show how the instruction was prejudicial error. The jury's finding compels judgment for Defendants.

IV. The District Court's JAML Order On The Falsity Element Was Properly Reversed

Separate from Larson's arguments regarding the fair-report privilege, he also challenges the Court of Appeals' decision to reverse the district court's JAML order for Larson on the falsity element. But reinstatement of the jury verdict was correct. The jury was properly instructed on falsity, Larson's falsity-by-implication and republication arguments do not apply given how he tried his case, and based on this Court's decision in *Diesen v. Hessburg*, 45 N.W.2d 446 (Minn. 1990), an "implication" theory is not cognizable in a case involving a matter of public concern.

A. The Jury Was Properly Instructed on Falsity, and the Jury's Finding Is Supported by the Record

The jury's finding on falsity—separate from the fair-report privilege—is an alternative ground for affirming the Court of Appeals.[14] Larson does not dispute the falsity instruction mirrored the model jury instruction. *Compare* Doc.127 at 14, *with*

[14] *See Stand Up Multipositional Advantage MRI, P.A. v. Am. Family Ins. Co.*, 889 N.W.2d 543, 546 n.4 (Minn. 2017) (court may consider "alternative ground on which to affirm a judgment in respondent's favor").

App.Add.149. And if the fair-report privilege does not apply, falsity was proper for the jury to reach, since the "entire report then would be subject to evaluation as any other allegedly defamatory statement." *Moreno*, 610 N.W.2d at 333. The jury found these statements were not false, and this "court will not overturn a jury finding on the issue of falsity unless the finding is manifestly and palpably contrary to the evidence." *Lewis*, 389 N.W.2d at 889. Here, the jury's finding is supported by ample evidence, particularly where the eight statements were submitted in their entirety to the jury, and the district court acknowledged that the falsity element was one where "[a] jury could find either way." Tr.1111. The Court of Appeals can also be affirmed on this ground.

B. The District Court's and Larson's Arguments for a Falsity-by-Implication and Republication Theory Fail

The crux of Larson's falsity argument is that "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." App. Br. at 49. Larson contends that an optional falsity-by-implication instruction permitted by the model jury instructions was compelled here. *Id.* at 49-51. But falsity-by-implication as established by this Court in *Diesen* and envisioned in the model instructions does not apply here. Instead, it arises "if the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts." *Diesen*, 455 N.W.2d at 450 (quotation omitted); App.Add.149. But Larson alleged each of the eight statements, on its own, is false—he did not claim Defendants juxtaposed anything. Nor did the statements *omit* any facts to

imply Larson killed Officer Decker. Instead, Larson's theory was that Defendants *added* words not said by law enforcement to *explicitly* (not implicitly) say Larson killed Officer Decker. Moreover, as the Court of Appeals found, the caveats such as "police say" prevent a conclusion that "these statements implied Larson actually killed Decker." App.Add.26. A "falsity-by-implication" instruction, as intended by the optional instruction in CIVJIG 50.25 and *Diesen*, is inapplicable.

Even if Larson had properly alleged a falsity- or defamation-by-implication theory (which he did not), its application here would be constitutionally foreclosed. App.Add.26 (recognizing but not reaching "weightier constitutional issue"). *Diesen* recognized that "[g]reater constitutional protection is afforded speech about public officials' conduct *and other matters of public concern* than that of a strictly private nature." 455 N.W.2d at 450 (emphasis added). *Diesen*'s holding "declin[ing] to allow a public official to prove falsity by implication where the challenged statements are true," *id.* at 451-52, should likewise extend to issues of public concern and a private figure.[15] The public interest is the same whether it involves a public or private figure, and the private person's interests are less pronounced when the challenged statements themselves are true, and the only alleged falsity is the statement's *implication*.

Larson, and the district court, simply confused "defamation by implication" with "republication." *See* App. Br. at 51-52. But Larson never sought a jury instruction on

[15] Other jurisdictions have so held. *E.g.*, *Collins v. WAFB, LLC*, 2017 U.S. Dist. LEXIS 58844, at *22 (E.D. La. Apr. 18, 2017) (Louisiana law); *Royal Palace Homes, Inc. v. Channel 7 of Detroit, Inc.*, 495 N.W.2d 392, 394 (Mich. App. 1992).

republication, nor did he argue plain error when seeking to proceed on that theory on appeal. App.Add.23-24 n.7. And critically, Larson himself disavowed any such theory on the stand—making clear the claimed falsity and harm was that what the press reported was not what the police said. *Supra* at 18. The Court of Appeals correctly refused to consider this issue. App.Add.23-24 n.7.

Larson's reliance on *Lewis* is misplaced. *Lewis* addressed whether, in a compelled republication context, "it is the truth or falsity of the underlying statement … that is relevant." 389 N.W.2d at 888. There, the plaintiffs had been terminated by their former employer for the stated reason of "gross insubordination," even though they had not engaged in grossly insubordinate conduct. *Id*. at 888-89. The plaintiffs brought a defamation suit against their former employer, on the basis that when asked why they had left their previous employment, they had to state they had been terminated for "gross insubordination," which was defamatory and false. *Id.* at 882. This Court held that "[r]equiring that truth as a defense go to the underlying implication of the statement, at least where the statement involves more than a simple allegation, appears to be the better view." *Id.* at 889. Critically, however, in *Lewis* the truth/falsity instruction (quoted in the Court of Appeals' decision), contained no specific instruction on "implication" or the "underlying statement. *See Lewis*, 361 N.W.2d at 881. Instead, the interrogatory to the jury on truth/falsity was submitted in a manner whereby the jury could exclusively focus upon the underlying implication of the statement: "Were the words 'gross insubordination' as applied to each of the plaintiffs substantially true?" *Id.* That is *not* the case here. Larson instead asked that each of the eight allegedly defamatory

statements, in their entirety—including that "police say"—be submitted to the jury. Doc.87 at 2-3; App.Add.44-62. Larson did *not* request that the jury instead be asked, "Were the words 'Ryan Larson—ambushed Officer Decker and shot him twice, killing him,'" substantially true?"[16]

Having elected to submit the question to the jury in a way that allowed the jury to consider the truth/falsity of each of the statements *in their entirety*, Larson cannot now obtain JAML under the theory that the "underlying statements" alone must be considered. *Lewis* itself is conclusive on this point, having held that "the truth or falsity of a statement is inherently within the province of the jury. This court will not overturn a jury finding on the issue of falsity unless the finding is "manifestly and palpably contrary to the evidence." *Lewis*, 389 N.W.2d at 889. This is a constitutional issue here, given the First Amendment's "constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." *Phila.*, 475 U.S. at 776. Larson cannot, post-trial and on appeal, disavow a theory upon which he tried his case to the jury and for which there is ample evidence to support the jury's verdict. *See Bouke v. Shere*, 145 N.W. 808, 809 (Minn. 1914); *see also Edelstein v. Duluth, M.&I.R.R. Co.*, 31 N.W.2d 465, 470 (Minn. 1948).

[16] This was a strategic choice by Larson's counsel. All of Larson's negligence and actual malice theories hinged on the entire "police say" statements—i.e., it was negligent for the press to indicate the police had said something that they did not—rather than on the underlying statement, which would have required Plaintiff to adduce evidence that the press was negligent in not discovering Larson was actually innocent. *See Moreno*, 610 N.W.2d at 329.

V. The Court Of Appeals Properly Reversed The Order For New Trial

Finally, the Court of Appeals properly reversed the district court's order for a new trial. The three statements the district court originally dismissed are non-actionable under any defamation- or falsity-by-implication theory. And as the Court of Appeals properly held, that issue does not need to be reached because the statements are non-actionable under the incremental harm doctrine.

Larson also addresses two alternative bases for relief raised by Defendants to the Court of Appeals, but that the court never had to reach—lack of evidence on negligence or causation/harm. Though it would be appropriate for the Court of Appeals to first pass on those issues if this case was reversed and remanded, because Larson has briefed those issues and it is within this Court's authority to reach them, they are also briefed here.

A. The Three Statements Were Properly Dismissed and Cannot Be Revived by an "Implication" Theory

The district court properly granted JAML on the three remaining statements, finding there was no evidence they were false, and that any defamation- or falsity-by-implication theory failed. Tr.1101-04. The district court erred by reversing that finding post-trial, reasoning under a defamation-by-implication theory that "a reasonable jury could have found they implied Mr. Larson killed Officer Decker." App.Add.41.

1. "[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 resurrected this statement by Roxie Knowles, the twin sister of Officer Decker's ex-wife, with no explanation other than that it could be found that "the

statement implied that Mr. Larson killed Officer Decker." App.Add.40-41. Larson attempts to justify the court's order by arguing that "placement of the statement in the article made him look guilty." App. Br. at 58. But Larson himself takes the statement out of context. Larson argues Knowles's statement "followed comments … about Officer Decker's ex-wife being concerned for the safety of her kids – after Larson was released." *Id.* But in those statements, Knowles did not point to Larson as the possible killer. Instead, she was quoted as stating, "(The culprit) could be somebody in the crowd." App.Add.148. And the article's reference to concern for the kids' safety did not cite Larson's release as the reason, but instead that "there are so many unknowns about what happened or what led to the shooting." *Id.* Moreover, Larson's argument that "the article omitted that there was no evidence of Larson's involvement in the crime" (App. Br. at 58) is baseless, when the article included the BCA's stated reason for why Larson was released, and the headline of another article appearing on the same page was, "From jail, Larson: I didn't shoot Decker." Ex.120 at 3. There is no juxtaposition or omission of statements in the article giving rise to a defamation-by-implication claim.

Even if the statement could be found to be *defamatory*-by-implication, the " First Amendment protects statements of pure opinion from defamation claims." *McKee*, 825 N.W.2d at 733. And "a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990). The statement "[t]his isn't over" is non-actionable because it "cannot be reasonably interpreted as stating a fact and it cannot be proven true or false."

McKee, 825 N.W.2d at 733. Nor is it a statement like "'In my opinion John Jones is a liar,'" which "standing alone—can reasonably be interpreted as implying that there are facts known to the speaker to cause him to form such an opinion." *Milkovich*, 497 U.S. at 26. Here, there is nothing in context indicating Knowles knew any facts about Larson unknown to police or others. Her "rhetorical hyperbole" is non-actionable. *Id.* at 17, 20.

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

This quote from Rosella Decker, Officer Decker's mother, in the KARE 11 broadcasts, is likewise non-actionable. The district court's post-trial order was similarly devoid of reasoning for resuscitating this claim, other than citing to defamation-by-implication and concluding that a "reasonable jury could have found that the statement implies that Mr. Larson killed Officer Decker." App.Add.39. But this expression from a grieving mother is an unverifiable opinion on a matter of public concern and non-actionable. *See Milkovich*, 497 U.S. at 26; *McKee*, 825 N.W.2d at 733. Nor is it the type of opinion statement that could be false-by-implication, when there is nothing in the statement or surrounding context implying there are facts known only to Rosella Decker that it was Larson who killed her son.

3. "[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."

This statement in KARE 11's 10 p.m. broadcast, which appeared with Larson's mugshot, his name, and the text "Officer killed" and "Suspect," is likewise non-actionable. The district court's post-trial reasoning consisted of a recitation of numerous

other statements in the report—including some Larson submitted to the jury as defamatory. App.Add.39-40. Larson simply repeats the same rationale. App. Br. at 57-58. This makes no sense; every true and innocuous statement in a broadcast in which there is an allegedly defamatory statement does not become independently actionable under an implication theory, as the district court held. And a falsity-by-implication theory only arises when the statements being juxtaposed are *true*, *see Diesen*, 455 N.W.2d at 449-51, while here, Larson tries to juxtapose this statement with others he claims are *false*. Moreover, as the district court recognized in its original order, this statement was true, and the most defamatory aspect was the word "Suspect" appearing in the background—something protected by the fair-report privilege. Defamation- or falsity-by-implication is inapplicable as to this statement.

B. Larson's Claims as to the Three Other Statements Independently Fail Under the Incremental Harm Doctrine

As the Court of Appeals properly concluded, this Court need not reach the arguments above because the three remaining statements fail under the incremental harm doctrine. App.Add.26-28. Larson does not dispute that the incremental harm doctrine, as adopted by this Court in *Carradine*, is Minnesota law. App. Br. at 59-62. As articulated in *Carradine*, "if a jury properly might find that the additional [defamatory] statements significantly added to any injury sustained by plaintiff over and above any injury sustained as a result of the absolutely privileged statements, then plaintiff should be allowed to proceed to trial …; otherwise not." 511 N.W.2d at 737; App.Add.26-27. Nor can its application to the fair-report privilege be doubted, where *Moreno* specifically

endorsed *Carradine*'s standard in determining whether additional statements not covered by the fair-report privilege are actionable. *Moreno*, 610 N.W.2d at 333.

The incremental harm doctrine is dispositive here. The Court of Appeals properly found that "Larson offered no evidence that he suffered any additional harm through statements 9-11 that he did not also sustain through statements 1-8, which were protected by the fair-report privilege." App.Add.27. Larson does not contest this finding. He nowhere argues that he suffered *additional* harm from these three statements. *See* App. Br. at 59-62. None of the evidence of harm Larson offers is tied to these three statements, and his intimation that he was not permitted to present evidence of harm as to these statements is spurious, when the statements were dismissed *after* the close of evidence. *See* Tr.1100-04; App. Br. at 60-61.

Instead, Larson's primary argument is that 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," and thus the three statements cannot be measured against the other eight, but instead, must be measured as against each publication in which it appeared. App. Br. at 59. Even if that limitation were true, however, the doctrine would still bar the two statements from the KARE 11 broadcasts, which appeared in conjunction with other statements found to be nonactionable by the jury and Court of Appeals. The "implication" that Larson was responsible for killing Officer Decker, does not add, much less significantly add to any harm suffered by reports *explicitly* stating that he was believed to have done so. And Larson has made no argument that the third statement—the quote by Knowles in the St.

Cloud Times—caused any harm, much less harm significantly adding to any experienced as a result of the rest of the article not claimed to be defamatory.

Larson cites no Minnesota authority for his limitation of strictly looking at statements within a single publication. *Carradine* itself, for example, does not call for a comparison to the harm caused by the non-actionable remainder of the *publication*, but to the harm caused by the statements found by the Court to be "absolutely privileged statements." 511 N.W.2d at 737; *see Kenney v. Wal-Mart Stores, Inc.*, 100 S.W.3d 809, 818 (Mo. banc 2003). Here, the eight statements submitted to the jury as defamatory were found to be protected by the fair-report privilege. Moreover, Larson himself invited comparison between the 5 p.m. KARE 11 broadcast he did not allege was defamatory, and the 6 p.m. and 10 p.m. broadcasts he claimed were—even though many statements in the 5 p.m. broadcast were the same or substantially similar to those he complains of in the later broadcasts. Here, where Larson has done nothing to disaggregate the harm purportedly suffered among the different reports and the different statements, there is no basis for permitting claims to proceed that "implied" that Larson killed Officer Decker, when statements explicitly saying he did so were non-actionable.

C. Alternatively, a New Trial for Negligence and Damages Is Inappropriate Where Those Elements Fail as a Matter of Law

1. Larson offered no evidence of legally cognizable harm

Alternatively, judgment for Defendants is required because Larson offered no evidence of legally cognizable harm. Because the new trial order was limited to negligence and damages, Larson could recover damages only upon a showing of *actual*

injury. *See Gertz*, 418 U.S. at 349-50. Without an order for a new trial on actual malice, presumed damages are unavailable. *See Richie*, 544 N.W.2d at 26. And the only harm Larson testified was "actually caused by the statements"—addressing "each one separately"—was "describ[ing] feeling hurt, horrible, insulted, embarrassed, angry, ridiculed, frustrated, and confused by the statements." App. Br. at 61 (citing Tr.730-45). But this Court has held that a suit like this—by a private figure on an issue of public concern against a media defendant—"cannot succeed based only on humiliation or other types of emotional harm." *Richie*, 544 N.W.2d at 30.

None of Larson's other claimed damages include any evidence they were directly caused by Defendants' purportedly defamatory statements, as opposed to the fact of his arrest for murder. *See* App. Br. at 61-62. Larson's claims are not actionable.

2. Larson offered no legally cognizable evidence of negligence

Finally, the reversal of the new trial order can be affirmed on the alternative basis that Larson presented no cognizable evidence of negligence. *See Moreno*, 610 N.W.2d at 329 (quoting *Jadwin*, 367 N.W.2d at 491); *see* Defs.' Ct. Appeals Br. at 50-51. Larson's argument that a "jury could find that publishing stories that conveyed the opposite effect of the truth of what was said was negligent" (App. Br. at 54-55), is the very *res ipsa loquitor* argument the Restatement cautions against (Restatement §580B, cmt. g) and is unconstitutional for essentially imposing the strict liability standard the First Amendment forecloses per *Gertz*. Moreover, Larson called no expert, and all the journalists testified their practices were followed here. *Supra* at 16-17. There was no legally cognizable evidence of negligence.

CONCLUSION

For all the foregoing reasons, the fair-report privilege should be found to apply as a matter of law and the Court of Appeals otherwise affirmed, with instructions for judgment to be entered for Defendants.

Dated: September 26, 2018

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of the brief is 16,433 words. This brief was prepared using Microsoft Office Word 2016.

Dated: September 26, 2018

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