STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1531

Byron Johnson,
Appellant,

vs.

Kaija Freborg,
Respondent.

Filed July 25, 2022
Reversed and remanded
Jesson, Judge
Concurring in part, dissenting in part, Wheelock, Judge

Hennepin County District Court
File No. 27-CV-21-3888

John G. Westrick, Samuel A. Savage, Savage Westrick, P.L.L.P., Bloomington, Minnesota (for appellant)

Alan P. King, Chelsea Gauger, Goetz & Eckland P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Reyes, Presiding Judge; Jesson, Judge; and Wheelock, Judge.

SYLLABUS

In this defamation case, when the totality of the circumstances are considered as required by *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 881 (Minn. 2019), one party's Facebook post accusing another of sexual assault did not involve a matter of public concern.

OPINION

JESSON, Judge

In this defamation case, we must balance two important interests: protection of personal reputation and freedom to speak on matters of public concern. As the Minnesota Supreme Court explained, "personal reputation has been cherished as important and highly worthy of protection throughout history." *Maethner*, 929 N.W.2d at 875 (quotation omitted). But protection of personal reputation must not come "at the cost of chilling speech on matters of public concern." *Id.* Here, we weigh these interests in the context of a Facebook post. Respondent Kaija Freborg identified appellant Byron Johnson in that post as one of three dance instructors who had sexually assaulted her. Johnson sued Freborg for defamation, and Freborg moved for summary judgment. The district court granted summary judgment to Freborg because it determined that her statement was true and involved a matter of public concern. Because the record, viewed in the light most favorable to Johnson, reveals a material issue of disputed fact regarding the veracity of Freborg's statement, and because the dominant theme of the statement did not involve a matter of public concern, we reverse and remand.

FACTS

We begin with the parties to this defamation lawsuit. Johnson is a dance instructor and event promoter. Freborg was the director of a bachelor's program in nursing and assistant professor at Augsburg college, until she relocated to California. She worked as a staff nurse for 17 years before receiving a doctorate in nursing from Augsburg in 2011, after which she spent ten years as a professor.

Freborg took a dance class instructed by Johnson in 2011. The parties began to communicate outside of the dance class a few months after meeting. In 2012, the parties' relationship became sexual. Freborg and Johnson agree that this stage of their relationship was consensual. The relationship lasted until around 2015. The only occurrence before 2015 that Freborg characterized as nonconsensual was an unsuccessful attempt by Johnson to videotape a sexual encounter between the couple.

In early 2015, Freborg attended a party at Johnson's house. She claims that Johnson "approached her while she was intoxicated and alone, grabbed her hand and put it down his pants onto his genitals without [her] consent." Johnson admitted to approaching Freborg while she was intoxicated and placing her hand on his genitals, but he also maintained that he "never engaged in any non-consensual activities with" Freborg.[1]

In May 2015, the parties communicated by text message about the incident. In the exchange, Freborg told Johnson of her recollection that he had approached her while she was intoxicated and put her hand under his shirt and pants. Johnson replied: "If you say so, I definitely don't remember it going that way." Freborg replied, "I do." The parties' relationship ended in 2015 following this incident.

Five years later, in July 2020, Freborg posted a public message on her Facebook profile. In her post Freborg said:

> Feeling fierce with all these women dancers coming out. So here goes . . . I've been gaslighted/coerced into having sex, sexual[ly] assaulted, and/or raped by the following dance instructors: Byron Johnson, Saley Internacional, and Israel

[1] Johnson stated during discovery that he did not recall any specific conversations about consent with Freborg.

> Llerena. If you have a problem with me naming you in a public format, th[e]n perhaps you shouldn't do it [three shrugging-person emojis]
> #metoo
> #dancepredators[2]

Later that day, Freborg edited her post and replaced the statement "I've been gaslighted/coerced into having sex, sexual[ly] assaulted, and/or raped by the following dance instructors," with the statement "I've experienced varying degrees of sexual assault** by the following dance instructors." Freborg explained that she edited her post after receiving feedback. The second post read:

> Feeling fierce with all these women dancers coming out. So here goes . . . I've experienced varying degrees of sexual assault** by the following dance instructors: Byron Johnson, Saley Internacional, and Israel Llerena. If you have a problem with me naming you in a public format, th[e]n perhaps you shouldn't do it [three shrug emojis]
> #metoo
> #dancepredators
>
> ** I was given feedback from a good friend of mine about how words like rape from a white woman can be triggering for black men.[3] I want to respect the black men out there reading this and so I have changed the wording on this post. These are important discussions to have and I appreciate the incredible friends I have who are willing to support me and also call me out. Thank you!! [folded-hands emoji]

Johnson responded by posting a message as a comment on Freborg's post. Johnson stated that he was confused and that he "categorically den[ied]" Freborg's accusation. Freborg responded, saying that she was "not interested in any kind of manipulative cat and

[2] Freborg "tagged" all three individuals referenced in the post, meaning that the post was linked to their individual Facebook accounts.
[3] Johnson is Black and Freborg is White.

mouse game with" Johnson and characterized his professed confusion as an attempt to gaslight her.[4] A few days later, Freborg deactivated her Facebook account. Before then, her post received 182 comments.

Johnson filed suit, alleging that Freborg defamed him with her Facebook post in both its original and edited form. Johnson contended that Freborg's statement was defamatory per se because she accused him of criminal conduct. Later, Johnson moved the district court to allow him to seek punitive damages.

Freborg moved for summary judgment. She argued that she is entitled to judgment as a matter of law because Johnson produced no evidence of actual damages and is not entitled to presumed damages because her statements are protected by the First Amendment. In support of her motion, Freborg attached Johnson's responses to her requests for admission, including one in which he admitted approaching her at his home while she was intoxicated, grabbing her hand, and placing it on his genitals. She also produced text messages in which the parties discussed a separate occasion during which Johnson tried to record the two during a sexual encounter without her consent. Further, Freborg attached seven other Facebook posts from other people and a screenshot of a text message. Those posts (and the text) concerned accusations against three international dance instructors: four against a Canadian instructor, three against a Swiss instructor, and

[4] In a response to an interrogatory, Freborg explained that she understands the term "gaslighting" to mean "the use of tactics such as lying, deflecting blame, blame-shifting, and twisting or reframing conversations to psychologically manipulate someone into questioning their sanity."

one against a Portuguese instructor.[5] She also included two articles discussing sexual assault in the dance community, an MPR article from the same year as her post about a dance studio in Minnesota, unconnected to Johnson, and a two-year-old blog post about how to deal with predatory behavior by dance instructors that was not about Minnesota specifically. Finally, she attached a number of articles discussing the #metoo movement in general.

The district court denied Johnson's motion to add a claim for punitive damages and granted Freborg's motion for summary judgment. The court determined as a matter of law that Johnson approached Freborg while she was alone and grabbed her hand and placed it on his genitals without her consent. In reaching this decision, the court in part relied on the text messages between Johnson and Freborg discussing his unsuccessful attempt to videotape a sexual encounter without her consent, as well as Johnson's response to a request for admission. Accordingly, the court concluded that Freborg's statements about Johnson were true. And because the court determined that Freborg's posts reached a matter of public concern—and that Johnson had not shown that she acted with actual malice—the court concluded that Johnson could not succeed with his defamation claim as a matter of law.

Johnson appeals.

[5] Two of the posts were posted on the same day as Freborg's, but the record does not contain the time of day at which the posts were published. The remaining posts were published after Freborg's post.

ISSUES

I. Is there a genuine issue of material fact regarding the truth or falsity of Freborg's statement that precludes summary judgment?

II. Does Freborg's statement involve a matter of public concern?

ANALYSIS

This appeal requires us to determine whether the district court properly granted summary judgment on the grounds that Freborg's Facebook statement is (1) true, and (2) involves a matter of public concern. If the record supports the district court's determination that Freborg's statement is undisputedly true, Johnson's defamation claim fails as a matter of law.[6] If the record does not support that conclusion, the veracity of Freborg's statement is a disputed question of fact for a jury—unless the communication involves a matter of public concern.

This fork in the road of defamation law is driven by the First Amendment's protection of the right to free speech. When the defamatory communication involves either a public figure or a matter of public concern, the First Amendment makes recovery in a defamation case more difficult. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964); *Jadwin v. Minneapolis Star & Trib. Co.*, 367 N.W.2d 476, 486 (Minn. 1985). Under common law, damages are presumed for certain defamatory statements, including communications alleging the commission of a crime. *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 25 (Minn. 1996). But given

[6] *See Larson v. Gannet Co.*, 940 N.W.2d 120, 130 (Minn. 2020) (requiring plaintiff to show falsity of allegedly defamatory statement).

the First Amendment's concern for "uninhibited, robust, and wide-open debate" on public matters, it imposes a higher fault standard in such cases. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (quotation omitted). In Minnesota, that higher fault standard requires a showing that a communication that involves a matter of public concern (even if false) was made with actual malice.[7] *Maethner*, 929 N.W.2d at 878-79. In short, this demanding test forecloses certain defamation cases from jury consideration (and limits potential damages) in order to protect that wide-open public debate. *Britton v. Koep*, 470 N.W.2d 518, 520-21 (Minn. 1991).

With the interaction between the truth or falsity and the public nature of the communication in mind, we turn to the elements of defamation. Under common law, a plaintiff alleging defamation must prove that the defendant made (1) a false and defamatory statement about the plaintiff, (2) in an unprivileged publication[8] to a third party, that (3) harmed the plaintiff's reputation. *Maethner*, 929 N.W.2d at 873.

Here, the parties agree that Freborg's public Facebook post tagging Johnson was an unprivileged publication to multiple third parties. But the parties differ on whether Freborg's statement was false and the extent of the damage it caused Johnson's reputation.

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[7] The actual-malice standard requires a plaintiff to show that the defendant acted either with the knowledge that the statement was false, or with reckless disregard as to the truth or falsity of the statements. *Weinberger v. Maplewood Rev.*, 668 N.W.2d 667, 673 (Minn. 2003).

[8] In some cases, a qualified privilege may apply to a defendant that would require the plaintiff to prove malice. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 920 (Minn. 2009). For example, the Minnesota Constitution grants "absolute privilege to members of the State Senate and House of Representatives" when they are acting in their official role. Minn. Const. art. IV, § 10; *Harlow v. State, Dep't of Hum. Servs.*, 883 N.W.2d 561, 570 (Minn. 2016). No such absolute or qualified privilege is applicable here.

As to the last element, most defamation cases require proof of actual damages to reputation, but there are exceptions when the defamatory statement includes "false accusations of committing a crime." *Id.* at 875 (quotation omitted). In these cases, a private party could recover presumed damages for the defamatory statements—but only if the plaintiff clears one additional hurdle. A private plaintiff may not recover presumed damages if the defamatory statement involves a "matter of public concern" unless the plaintiff also establishes "actual malice." *Id.* at 878-79.

Mindful of all the above, we consider the district court's determination that there was no genuine issue of fact with respect to the truth or falsity of Freborg's statement and that her statement involved a matter of public concern.

I. The veracity of Freborg's statement presents a genuine issue of material fact that precludes summary judgment.

We begin with whether the district court erred in determining as a matter of law that Freborg's statement is true.

A district court shall grant summary judgment to a movant who shows that there is no genuine issue as to any material fact and who is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01. On appeal from summary judgment, we review the district court's determination that there are no genuine issues of material fact and application of the law de novo. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). A material fact is one which will affect the result or outcome of the case depending on its resolution. *Westfield Ins. Co. v. Wensmann, Inc.*, 840 N.W.2d 438, 450 (Minn. App. 2013), *rev. denied* (Minn. Feb. 26, 2014). We examine the evidence in the light most favorable

to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Here, the district court primarily relied on Johnson's admission that he had sexual contact with Freborg to conclude that summary judgment was appropriate. But while Johnson admitted to having sexual contact with Freborg, his admission did not address whether the act was consensual.[9] And in a separate response, he stated that "I have never engaged in any non-consensual activities with [Freborg]." Further, Johnson disputed Freborg's characterization of the incident in the text exchange in May 2015, and he responded to Freborg's Facebook post denying her allegations. Nevertheless, the court determined as a matter of law that Johnson had nonconsensual sexual contact with Freborg, and stated that "describing this nonconsensual contact as sexual assault is substantially accurate, if not completely truthful." Generally, sexual contact between adults must be nonconsensual to constitute sexual assault. *See, e.g.*, Minn. Stat. § 609.3451, subd. 1 (2020) ("A person is guilty of criminal sexual conduct in the fifth degree if . . . the person engages in *nonconsensual sexual contact*." (emphasis added)).[10] Reviewing Johnson's statement in the light most favorable to him—the party against whom relief was granted—whether Freborg's statement is true presents a genuine issue of material fact.

[9] We recognize that a person may be so intoxicated that they are not capable of consenting to sexual contact, Minnesota Statutes section 609.341, subdivision 7 (Supp. 2021), but Freborg did not allege that was the case here.

[10] We refer to elements of fifth-degree sexual assault not to imply that Freborg had to prove that Johnson satisfied each element, but rather to support the general principle that consent is an element of sexual-assault claims involving adults.

We are not persuaded otherwise by the text messages in which Johnson and Freborg discussed him attempting to videotape her without consent. This evidence may be persuasive to a jury evaluating the issue of consent. Indeed, a jury may well believe Freborg over Johnson. But these messages about unsuccessful videotaping do not change the summary-judgment standard concerning genuine issues of material fact. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (holding summary judgment is inappropriate if there exists a genuine issue of material fact). Given this record, the truth or falsity of Freborg's statement is for the jury to decide. Accordingly, the district court erred by granting summary judgment.

II. The dominant theme of Freborg's Facebook statement was personal and did not involve a matter of public concern.

The existence of a factual dispute about the falsity of the Facebook post does not end our review. Johnson claims that the post entitles him to presumed damages because Freborg accused him of both criminal behavior and an act of moral turpitude. *Maethner*, 929 N.W.2d at 875. As a result, we must address whether the text involves a matter of public concern. *Id.* at 875-76. If it does, the statement is protected by the First Amendment and Johnson cannot recover presumed damages unless he can establish actual malice. *Id.* at 879; *see also Gertz*, 418 U.S. at 349.[11]

We begin with the post itself. Recall the text:

> Feeling fierce with all these women dancers coming out.
> So here goes . . . I've been gaslighted/coerced into having sex,

[11] In *Gertz*, the Supreme Court explained that in a defamation case by a private plaintiff, states may impose any standard of liability "so long as they do not impose liability without fault." 418 U.S. at 347.

> sexual[ly] assaulted, and/or raped by the following dance instructors: Byron Johnson, Saley Internacional, and Israel Llerena. If you have a problem with me naming you in a public format, th[e]n perhaps you shouldn't do it [three shrug emojis]
> #metoo
> #dancepredators

The question before us is whether this post involves a public concern as opposed to a private matter.[12] Here, the district court concluded that Freborg's statements involved a matter of public concern: specifically, the #metoo movement. The parties agree that we should review this determination as a question of law. We agree as well. The *Maethner* court directed district courts to follow the test set out in *Snyder v. Phelps*, 562 U.S. 443, 454 (2011). 929 N.W.2d at 881. Federal courts have long regarded whether a statement involves a matter of public concern as a question of law. *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983); *Allen v. City of Pocahontas, Ark.*, 340 F.3d 551, 556 (8th Cir. 2003) (applying *Connick*). Consistent with this federal and Minnesota caselaw, we consider whether Freborg's statement involved a matter of public concern de novo, without the benefit of precedent on facts similar to those before us.

We begin our analysis by harkening back to why we have the public-concern test: speech involving a public concern is not only protected by—but is at the heart of—the First Amendment. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985). Part of our challenge is that the contours of what constitutes a public

[12] We recognize that Freborg posted a refined version of this text, narrowing the allegations leveled against Johnson and two other instructors to exclude allegations of rape. But both posts were published, even if later removed. And the differences between the two posts are not material to the analysis of whether they involve a matter of public concern.

concern are not marked by bright lines. To address where those lines must be drawn here, we turn to cases from the United States and Minnesota Supreme Courts for guidance.

In 2011, the Supreme Court acknowledged that "the boundaries of the public concern test are not well defined." *Snyder*, 562 U.S. at 452 (quotation omitted). The Court then sought to clarify the public-concern framework in a case involving the Westboro Baptist Church. There, the issue was whether the leader of that church could claim First Amendment protection for organizing a protest with slogans near a funeral of a soldier killed in the Iraq war. *Id.* at 448. The protest placards expressed statements like "God Hates the USA/Thank God for 9/11," "Thank God for Dead Soldiers," "Priests Rape Boys," and "You're Going to Hell." *Id.*

Addressing those placards, the Court explained that: "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social or other concern to the community, or when it is a subject of legitimate news interest, that is, a subject of general interest and of value and concern to the public." *Id.* at 453 (quotations and citations omitted). To assess whether that was the case, the Court examined the "content, form, and context of the speech." *Id.* (quotation omitted). Considering the "content," the Court contrasted Westboro's speech (addressing homosexuality in the military and scandals involving the Catholic clergy) as "matters of public import" with the speech at issue in *Dun & Bradstreet*, which involved a false credit report sent to five creditors about a construction contractor that affected the contractor's ability to do business. 472 U.S. 749 at 751. Alluding to the "form," the Court noted that the speech was intended to reach "as broad a public audience as possible" and that the

messages, overall, spoke to broader societal issues—not messages specifically directed at the deceased soldier or his family specifically.[13] *Snyder*, 562 U.S. at 454. As to the "context," the Court noted that the signs were displayed on public land, next to a public street and that the funeral setting did not transform the speech into a private rather than public concern. *Id.* at 454-55. Accordingly, the Court concluded that the placards at the funeral protest constituted speech on a matter of public concern as opposed to speech "on public matters [that] was intended to mask an attack . . . over a private matter." *Id.* at 455.

In *Maethner*, the Minnesota Supreme Court applied the construct set out in *Snyder*: the determination of whether speech involves a matter of public or private concern is based on a totality of the circumstances, and courts should consider the content, form, and context of the speech, with no one factor being dispositive.[14] 929 N.W.2d at 881. In doing so, courts should "evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said." *Id.* (quotation omitted).[15]

The speech at issue in *Maethner* involved pictures and statements on Facebook posted by Maethner's ex-wife, which identified her as a survivor of domestic violence, as

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[13] The Supreme Court noted that a few of the signs, such as those expressing "You're Going to Hell" and "God Hates You," could have been viewed as relating to the soldier and his family, but that it would "not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues." *Snyder*, 562 U.S. at 454. The Court further relied on Westboro's history of public speech on similar issues and the lack of a pre-existing relationship between the parties. *Id.* at 455.

[14] The "content, form, and context" considerations for determining whether speech implicates a matter of public concern were first set out in *Connick*. 461 U.S. at 147-48.

[15] The *Maethner* court, also noting that the public-concern test was not well defined, explained that in past cases, the court had "labeled speech as a matter of public concern without much discussion or explanation." 929 N.W.2d at 880.

well as statements in an article for Someplace Safe's newsletter describing the "Survivor Award" that she received. *Id.* at 871. Nowhere was Maethner's name mentioned in the speech. *Id.* He argued, however, that people would understand the statements referred to him as the perpetrator of domestic abuse. *Id.* at 872.

Did this speech involve a matter of public concern because it related to domestic violence? The supreme court agreed that it did as "a general proposition." *Id.* at 881. But a general proposition was not enough. *Id.* Instead, the courts must consider the form and context of the speech, as well as other relevant factors. *Id.* One such factor is whether the statements were disseminated in the news media.[16] *Id.* The supreme court thus remanded to the district court to decide whether the challenged statements involved a matter of public or private concern. *Id.*[17]

With this precedent in mind, we consider the statement in the context of the totality of circumstances here. The district court determined that Freborg's statement implicated a matter of public concern. After explaining what a hashtag is, the court reasoned that: "[T]he #metoo movement itself is certainly a matter of public concern," because that movement "gained international prominence in 2017 when it went viral." We agree with the district court's analysis as far as it goes. But it does not go far enough.

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[16] In so holding, the supreme court relied upon *Snyder* and *Schuster v. U.S. News & World Report, Inc.*, 602 F.2d 850, 853 (8th Cir. 1979), highlighting that the speech underlying those cases involved subjects of "legitimate news interests," or "reporting on matters of public interest." *Maethner*, 929 N.W.2d at 881 (quotations omitted).

[17] Unlike in *Maethner*, the district court here addressed this issue prior to appeal.

Sexual assault—like domestic violence—is generally a matter of public concern. *See id.* at 876 (discussing sexual abuse of children). That does not end our inquiry. Turning first to the content of the speech here, we note that it is more singularly directed at an individual than the speech in *Snyder*. Unlike the few placards arguably directed at the soldier and his family, the bulk of Freborg's statement directly accused Johnson (and two others) of sexual assault. And because Freborg's post directly named the individuals, Freborg's statement goes further than the statement in *Maethner*, where the plaintiff was unnamed. The only portions of the post not directly aimed at the three men were the opening phrase "feeling fierce with all these women dancers coming out," and the addition of the hashtags: #metoo, and #dancepredators.

As to the form and context of the speech, the use of the hashtags, which are designed to expose a post beyond the user's immediate network, certainly demonstrates that Freborg sought to share her views in a manner designed to reach a broad public audience.[18] *Snyder*, 562 U.S. at 454. On the other hand, the parties' prior relationship also factors into our examination of context. *See id.* at 455 (explaining that because there was no prior relationship between Westboro and the soldier, the Court was "not concerned" that "Westboro's speech on public matters" was meant to disguise a personal attack). And context requires us to consider two other factors: was the Facebook post in response to a public discussion and did it result in media dissemination?

[18] According to Facebook, hashtags are meant for participation in public conversations and are "the first step to help people more easily discover what others are saying about a specific topic." Facebook, *Public Conversations on Facebook* (June 12, 2013) https://about.fb.com/news/2013/06/public-conversations-on-facebook.

To answer the first question, we look to the record. In its decision, the court stated that "the record is replete with other content regarding this specific problem in this specific community." We would not characterize the record in this fashion. Only two items attached by Freborg in support of her summary-judgment motion arguably related to the dance community of which Freborg and Johnson were a part. Freborg attached a Minnesota Public Radio news article about an alleged pattern of abuse by a different dance instructor. She also attached a blog post entitled "Dance Predators"—to which she presumably referred in her post—but that blog post is not about a particular community or person.[19] The blog post predates Freborg's statement by two years. And the thrust of the blog involves how to prevent and deal with bad behavior in the dance community.[20] There was no public discussion or article—or even Facebook post—which involved Johnson, to which Freborg was arguably responding.[21]

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[19] Freborg also attached a number of articles and studies about the #metoo movement generally, which did not specifically address the dance community.

[20] None of the avenues for dealing with predatory behavior in the dance community set forth in this blog post involved posting accusations on social media.

[21] We contrast this with the situation in *Chafoulias v. Peterson*, where the supreme court addressed whether a limited purpose public figure inserted himself into a "public controversy." 668 N.W.2d 642, 652-53 (Minn. 2003). In doing so, the court defined a public controversy as follows:

> Many stories may be considered "newsworthy" and deserving of the public's attention, but may not be a "public controversy." A public controversy requires two elements: (1) there must be some real dispute that is being publicly debated; and (2) it must be reasonably foreseeable that the dispute could have substantial ramifications for persons beyond the immediate participants.

Id. at 562.

Nor does the record demonstrate media dissemination of Freborg's accusations.[22] Certainly, the record includes posts made *after* hers.[23] And she attached comments responding to her post. But *Maethner* and the cases upon which it relies talk in terms of responsive "media coverage," which differs from responses to speech from members of the public. 929 N.W.2d at 881 (quotation omitted).

Whether Freborg's speech involved a matter of public concern, given the totality of the circumstances, is a difficult balance. In essence, the question is whether it is a public concern when one person accuses her former consensual partner of sexual assault and adds hashtags to facilitate discussion. Certainly, broad dissemination, in and of itself, should not qualify speech as involving a public concern. But does broad dissemination of an accusation during a national discussion of sexual harassment qualify? This national discussion was (and is) important. It relies on collective voices. But does this context override the considerations set out above when balancing protection of personal reputation and free-speech rights here?

The supreme court's application of this standard—albeit in a slightly different context—is instructive. The *Chafoulias* court reversed the grant of summary judgment to one defendant because it concluded that there was an issue of fact as to whether she *created* the public controversy, rather than responded to it. *Id.* at 658-59. Here, examination of the context provided by the record does not illuminate a pre-existing controversy regarding Johnson and the general Minnesota dance community.

[22] While Freborg's brief and oral argument talked sweepingly about concerns in the dance community, no one asked us—or the district court—to take judicial notice of additional matters to support this concern.

[23] These include seven Facebook posts and one text message accusing three international dance instructors of sexual assault from Canada, Switzerland, and Portugal, respectively.

No caselaw requires this court to make that leap. Nor have we been presented with persuasive authority that would compel us to do so.[24] The United States Supreme Court's focus on the "thrust and dominant theme" of the communication, cited approvingly by the Minnesota Supreme Court, counsels us that Freborg's statement is personal in nature. *Id.* (quoting *Snyder*, 562 U.S. at 454.) To hold that this accusation is a matter of public interest—which would take the question of the truth or falsity of Freborg's statement from the jury—would stretch current Minnesota law, based on the nature of the #metoo movement. And that is not the role of an intermediate court. *Hayden v. City of Minneapolis*, 937 N.W.2d 790, 796 (Minn. App. 2020).

In sum, we cannot say that the thrust and dominant theme of Freborg's speech spoke to broader public issues, as opposed to personal ones, under the totality of the

[24] The parties did not present any caselaw considering an accusation of sexual assault in the #metoo context. In our research, we found two recent cases considering these types of claims. *Fredin v. Middlecamp*, 500 F. Supp. 3d 752 (D. Minn. 2020); *Coleman v. Grand*, 523 F. Supp. 3d 244, 250-51 (E.D. N.Y. 2021), *appeal docketed*, No. 21-800 (2d Cir. Mar. 26, 2021). Neither case is precedential. And both are distinguishable. In *Fredin*, the defendant, who operated a public Twitter account focused on women's issues, tweeted pictures of the plaintiff—from different dating websites using multiple names—stating that he was the subject of two restraining orders and ending: "Please [retweet] to help keep women safe. *Fredin*, 500 F. Supp. 3d at 770. A second post praised "[t]he power of sharing," and relayed an additional accusation against the plaintiff. *Id.* The day of the second post, the City Pages published a story about the restraining orders referenced in the defendant's first tweet. *Id.* at 70-71. In concluding that the statement involved a matter of public concern, the district court relied on the public nature of the Twitter account and responsiveness to the City Pages article. *Id.* at 777. *Coleman* involved an open letter accusing one professional musician of sexually assaulting another. 523 F. Supp. 3d 244, 250-52. The legal context (and state law) differed and involved New York's anti-SLAPP law (a law aimed at preventing lawsuits being filed against persons exercising their constitutional rights) which requires a plaintiff to prove actual malice for a defamatory statement that involves a matter of public concern. *Id.* at 257 (citing N.Y. Civ. Rights Law § 76-a(2) (2020)).

circumstances. As a result, we reverse the district court's conclusion to the contrary and remand for a jury trial on Johnson's defamation claim.[25]

DECISION

Viewed in the light most favorable to Johnson, the truth or falsity of Freborg's statement presents a material issue of disputed fact. And because the dominant theme of Freborg's statement did not involve a matter of public concern, the district court also erred by granting Freborg's summary-judgment motion on the ground that it involved a matter of public concern.

Reversed and remanded.

[25] Because we conclude that Freborg's statement did not involve a matter of public concern, Johnson is not required to prove actual malice in order to recover presumed damages. We therefore do not reach Johnson's argument that the district court erred by determining as a matter of law that he could not show actual malice.

WHEELOCK, Judge (concurring in part, dissenting in part)

This appeal raises the issue of whether a social-media post made as part of the #MeToo movement relates to a matter of public concern. The majority concludes that it does not. I disagree. On the issue of whether the appellant offered evidence sufficient to demonstrate a genuine issue of material fact when the record is viewed in the light most favorable to him, the majority concludes that he did, and therefore summary judgment is not appropriate. Because of the procedural posture of the matter, I conclude that Johnson offered just enough evidence regarding consent to create a genuine issue of material fact precluding summary judgment on the issue of the falsity of Freborg's statement that Johnson sexually assaulted her. Thus, I concur with the majority in part and respectfully dissent in part.

Genuine Issue of Material Fact on Consent

The district court granted summary-judgment dismissal of Johnson's defamation claim on the ground that he did not present evidence sufficient to demonstrate that a question of material fact exists regarding the falsity of Freborg's statement.[1] Johnson

[1] The record contains evidence that not all activity in Johnson and Freborg's relationship was consensual. Freborg submitted evidence into the district court record showing that a year before the 2015 incident, Johnson tried to videotape her during a sexual encounter without her consent, and she texted him afterward that it felt "violating." In addition, the text-message conversation between Johnson and Freborg after the 2015 incident included a text from Johnson to Freborg saying that she "shouldn't judge [him] off of that night" and that "[t]here was a lot of drinking that happened."

admitted that he "approached [Freborg] while she was intoxicated and alone, grabbed[2] her hand and put it down [his] pants onto [his] genitals." Freborg averred that this encounter was not consensual and submitted supporting documentation: her affidavit, deposition, responses to requests for admission, and copies of text messages with Johnson. Johnson relied on two pieces of evidence to create a genuine issue of material fact: (1) his response of "deny" to a follow-up request for admission that the act of grabbing Freborg's hand and putting it down his pants onto his genitals "constituted an act of sexual assault" and (2) his affidavit wherein he stated that he never sexually assaulted Freborg and that "[e]very interaction we had was consensual."

While the district court inferred from Johnson's initial admission that the contact was nonconsensual and that Freborg's statement was therefore "substantially accurate, if not completely truthful,"[3] Johnson's assertion that all contact with Freborg was consensual reveals an issue of fact that requires a fact-finder to evaluate and weigh credibility. The supreme court has repeatedly cautioned us "against usurping the role of a jury when evaluating a claim on summary judgment. Summary judgment is a blunt instrument that is inappropriate when reasonable persons might draw different conclusions from the evidence presented." *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 232 (Minn.

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[2] The words that we use are important. The request for admission to which Johnson replied, "[a]dmit," and to which he did not object or offer any additional information or modification, stated, "Admit that, on at least one occasion at your residence, you approached Defendant while she was intoxicated and alone, grabbed her hand and put it down your pants onto your genitals."

[3] The district court also relied on at least one other incident—the attempt to videotape Freborg without her consent—in its order granting summary judgment.

2020) (quotation omitted); *see also Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (stating that when reviewing a grant of summary judgment, an appellate court must not weigh facts or determine the credibility of affidavits and other evidence and that "the nonmoving party has the benefit of that view of the evidence most favorable to him" (quotation omitted)).

I therefore concur with the majority that the truth or falsity of Freborg's statement should be decided by a jury and that the district court erred by granting summary judgment on this issue.

Speech Related to a Matter of Public Concern

As the majority explains, the determination of whether speech involves a matter of public concern must be made based on the totality of circumstances, including the content, form, and context of the speech, with no single consideration being dispositive. *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 881 (Minn. 2019). The allegedly defamatory statement in this case was made as part of the #MeToo movement—a fact to which the majority devotes only passing attention.

The #MeToo movement is characterized by survivors of sexual abuse creating social-media posts disclosing their experiences with sexual harassment and sexual violence and identifying their abusers. *See, e.g.*, Benedetta Faedi Duramy, *#MeToo and the Pursuit of Women's International Human Rights*, 54 U.S.F. L. Rev. 215, 217 (2020).[4] Survivors

[4] Although the #MeToo movement's explosive growth in public discourse can be traced to an invitation by celebrity Alyssa Milano for followers to reply "me too" if they had been sexually harassed or assaulted, Tarana Burke, an activist and nonprofit founder, initiated

end their posts with the now-ubiquitous hashtag, #MeToo.[5] That hashtag categorizes the posts and allows them to be associated with a community discussion on the subject of sexual abuse.[6] As one commentator explained:

> #MeToo. The hashtag almost immediately removed the thin veil hiding women's secreted but widely-known experiences with sexual harassment, discrimination, and violence. In very short order, #MeToo revealed the expansive extent of the problem and challenged society to reevaluate its historical refusal to trust women when they brought forth allegations. Armed with the hashtag and the internet's broad reach,

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the original #MeToo movement on MySpace in 2006 as a way for women and other survivors to share their stories of sexual assault and harassment. JoAnne Sweeny, *The #MeToo Movement in Comparative Perspective*, 29 Am. U. J. Gender Soc. Pol'y & L. 33, 34 (2020); Lesley Wexler et. al., *#MeToo, Time's Up, and Theories of Justice*, 2019 U. Ill. L. Rev. 45, 51 (2019). The movement has evolved into millions of posts in which individuals shared their experiences with sexism, harassment, and assault. Duramy, *supra*, at 217.

[5] A hashtag is "a word or phrase preceded by the symbol # that classifies or categorizes the accompanying text (such as a tweet)." *Merriam-Webster Dictionary* 570 (11th ed. 2014).

[6] This is one explanation of hashtags and how they work:

> Clicking on a hashtag takes you to another page that shows you all other tweets containing that same hashtag making it easy for other Twitter users to search for that keyword. Initially, Twitter users created hashtags to categorize messages and organize conversations around a topic. The function of hashtags in tweets has expanded to include commentary, including opinions, jokes, and has even created a communication-style likened to the "90s air quote." Hashtag use has spread beyond Twitter and connected Twitter communications and real-world communication.

Ellyn M. Angelotti, *Twibel Law: What Defamation and Its Remedies Look Like in the Age of Twitter*, 13 J. High Tech. L. 430, 456 (2013). Hashtags are used on many social-media platforms, including Facebook, "to find and connect with others who were also engaging in a discussion on that topic." Ann Nenoff, *#metoo: A Look at the Influence and Limits of "Hashtag Activism" to Effectuate Legal Change*, 2020 U. Ill. L. Rev. 1327, 1331 (2020).

> survivors narrated their traumatic experiences and called out perpetrators.

Kendra Doty, *"Girl Riot, Not Gonna Be Quiet"—Riot Grrrl, #MeToo, and the Possibility of Blowing the Whistle on Sexual Harassment*, 31 Hastings Women's L.J. 41, 53 (2020). The #MeToo movement was both prompted by and has itself generated media focus on the prevalence of sexual harassment and assault. Duramy, *supra*, at 218-20.

The district court determined that in July 2020, respondent Kaija Freborg added her voice to the growing chorus of the #MeToo movement. As the majority explains, Freborg made a Facebook post in which she stated that she had been "gaslighted/coerced into having sex, sexually assaulted, and/or raped by" three specific dance instructors, including Johnson. She later amended the post to state that she had "experienced varying degrees of sexual assault" by dance instructors, including Johnson.

A key issue before this court is whether Freborg's Facebook post is speech on a matter of public concern. Viewing that post under the totality of the circumstances and in light of its content, form, and context, I conclude that it is. Freborg made the post as part of a now-global conversation about the prevalence of sexual harassment and assault and the need to shine light on once-secreted personal experiences. Freborg submitted with her motion for summary judgment articles about the #MeToo movement, including articles addressed specifically to sexual-assault issues in the dance community. Freborg explained that she was moved to share her own experiences after seeing other women share theirs. This context makes abundantly clear that Freborg's Facebook post involves a matter of public concern.

The content and form of Freborg's post also demonstrate that it involved a matter of public concern. As to content, the text of Freborg's post clearly reflects her intent to participate in the #MeToo conversation. She began the post: "Feeling fierce with all these women dancers coming out." And she ended the post with two hashtags: #MeToo and #dancepredators. As to form, Freborg's made her post "public" on her Facebook page, meaning that anyone on Facebook could see and share her post, even if they were not her Facebook "friend." A screenshot of Freborg's post shows that 305 people reacted to her post, 182 commented, and 16 shared it. Presumably, many more people read her post without reacting to it via Facebook's interactive options.

The majority agrees that sexual assault is a matter of public concern,[7] but then engages in further analysis that I believe inappropriately separates Freborg's statement from its context within the #MeToo movement. The majority focuses on a perceived lack of public concern regarding Freborg's specific allegations against Johnson, which the majority characterizes as private. But the *Maethner* analysis requires us to consider the alleged defamatory statement under the totality of the circumstances, including, in this case, the critical context of the #MeToo movement. When Freborg's Facebook post is properly so considered, the inescapable conclusion is that it involves a matter of public concern. There are at least five specific areas where I diverge from the majority's analysis of the issue of whether the speech here is on a matter of public concern.

[7] At oral argument, Johnson conceded that sexual assault against women "particularly now" is an issue of public concern but argued that "[t]his isn't Harvey Weinstein." Thus, Johnson appears to recognize that #MeToo posts naming certain individuals are a matter of public concern but believes he does not fall within that group.

First, the majority reads *Maethner* to require courts to consider whether statements were "disseminated in the news media" as a factor that may be dispositive. But the supreme court's discussion of whether statements were disseminated in news media goes to the question of whether the subject discussed, e.g., child sexual abuse, domestic abuse, etc., is a matter of public concern; it does not require that the challenged speech was itself disseminated after being published to a third party. Moreover, the supreme court held in *Maethner* that the media-defendant versus nonmedia-defendant distinction was not determinative in and of itself, but it "may have relevance in analyzing whether the challenged statements involve a matter of public concern." *Maethner*, 929 N.W.2d at 881. In other words, dissemination in the news media can be a factor in determining if a statement was a matter of public concern but is not dispositive; rather, this factor is intended to protect journalistic freedom by adding another tool to identify speech regarding a matter of public concern.

Second, the majority's reliance on *Chafoulias v. Peterson,* 668 N.W.2d 642 (Minn. 2003), is misplaced because the majority conflates the analysis regarding a "public controversy" with the analysis regarding "matters of public concern." *Chafoulias* determined whether a public controversy existed in order to determine if the plaintiff was a limited-purpose public figure. 668 N.W.2d at 651-52. Whether a person is a public figure is a distinct issue from whether speech regards a matter of public concern, and the former issue is not relevant to the question before this court. *Maethner* does not indicate that the analysis for identifying a limited-purpose public figure should be applied to determine matters of public concern and does not use the phrases "public controversy" or

"pre-existing controversy" when describing how we must analyze matters of public concern.[8] Thus, caselaw does not require that a public controversy must preexist speech that involves a matter of public concern.

Third, although the supreme court's decision in *Maethner* was guided by *Snyder v. Phelps*, 562 U.S. 443, 455 (2011),[9] it does not follow that *Snyder* supports a conclusion that Freborg's speech is private rather than regarding a matter of public concern. The United States Supreme Court stated that the lack of a prior relationship or conflict between the Westboro Church and the individual soldier allayed any concern it might have that "Westboro's speech on public matters was intended to mask an attack . . . over a private matter." *Snyder*, 562 U.S. at 455. The lack of a prior relationship or conflict relieved the Court from engaging in an analysis about the extent to which such a relationship or conflict would impact its determination regarding the nature of Westboro's speech, but that fact did not dictate the Court's ultimate holding that Westboro's speech involved a matter of public concern. The Court said as much, which the majority acknowledges, when it stated that even if some of the messages were directed at the individual soldier or his family, "that

[8] *Maethner* does not rely on *Chafoulias* for the matter-of-public-concern standard, but does cite to *Chafoulias* once, in a footnote, for the rule that in order to "meet the actual malice standard, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Maethner*, 929 N.W.2d at 879 n.7 (quoting *Chafoulias,* 668 N.W.2d at 655).

[9] I disagree with the majority's understanding that *Maethner* "adopted" *Snyder*. *Maethner* refers to *Snyder* as establishing some "guiding principles" and based its holding that "the determination of whether speech involves a matter of public or private concern is based on a totality of the circumstances" on *Snyder*'s "guidance." *Maethner*, 929 N.W.2d at 880-81 (quoting *Snyder*, 562 U.S. at 454-55).

would not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues." *Snyder*, 562 U.S. at 455. Here, the "overall thrust and dominant theme" of Freborg's speech is participation in the #MeToo movement to experience community support and to empower and protect other women who have had similar experiences, as opposed to masking an attack over a private matter with Johnson.

Fourth, the recent federal district court decision in *Fredin v. Middlecamp* is persuasive and facilitates our review of Johnson's arguments. 500 F. Supp. 3d 752, 766 (D. Minn. 2020), *aff'd*, 855 F. App'x 314 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 1417 (2022). Minnesota appellate courts have had limited opportunities to apply the "public concern" standard outlined in *Maethner*. The only Minnesota case we found that applied the public-concern standard in *Maethner* determined that because a statement was made by a public employee while working, and the statement was about a former public employee's work, the statement related to a matter of public concern. *See Madison v. Todd County*, No. A20-0794, 2021 WL 1344021, at *5 (Minn. App. Apr. 12, 2021), *rev. denied* (Minn. June 29, 2021). But in *Fredin*, the District of Minnesota applied *Maethner* to determine that statements from a public Twitter account that named the plaintiff as a repeated sexual harasser and alleged rapist had addressed a "matter of public concern." *Fredin*, 500 F. Supp. 3d at 766. Although "federal court interpretations of state law are not binding on state courts," *State ex rel. Hatch v. Emps. Ins. of Wausau*, 644 N.W.2d 820, 828 (Minn. App. 2002), they may be persuasive provided they are consistent with the supreme court's rationale, *In re Est. of Eckley*, 780 N.W.2d 407, 411 (Minn. App. 2010).

In analyzing the question of whether the speech was about a matter of public concern, the court in *Fredin* stated that "*[t]he content of the speech here addressed harassment and rape, and more specifically, the subject of women coming forward to share their experiences in this regard*. The form of the speech, on a public Twitter account, was not confined to a limited audience . . . it is publicly available." 500 F. Supp. 3d at 777 (emphasis added). The court thus concluded that the speech was not private, and therefore it was subject to a higher standard of protection.

The primary difference between Freborg's speech and the speech at issue in *Fredin* is that the court in *Fredin* identified an additional factor that weighed in favor of finding that the statement addressed a matter of public concern: the speech was responsive "at least in part" to a news article published the same day about the alleged abuser.[10] *Id.* The matter of public concern at issue in *Fredin* is substantially the same as in this case. *Id.* ("The overall subject of the statement—sexual harassment and rape—is a topic of public interest to society at large, rather than simply a matter of private concern."). The use of social media to participate in a larger conversation about the matter of public concern is also substantially similar. *Id.* ("In addition, the statement was posted on the @CardsAgstHarassment Twitter account, a publicly available platform that regularly addressed issues of harassment and violence against women."). Finally, both the *Fredin*

[10] The majority attempts to distinguish *Fredin* on the ground that, shortly after the defendant's statement was posted to a public Twitter account, a local newspaper covered a story involving the specific individual and the same general behavior. *Fredin*, 500 F. Supp. 3d at 777. The focus on whether a media outlet covered similar allegations regarding the individual named in the protected speech does not reflect a meaningful distinction and is misplaced, regarding dissemination in the news media, as discussed above.

case and this case involved speech that identified a specific individual as part of a #MeToo discussion. Because of the similarities between *Fredin* and this case, the *Fredin* decision is particularly relevant and persuasive, and it supports a conclusion that Freborg's speech was on a matter of public concern.

Fifth, the majority applies the totality-of-the-circumstances rule as if the only speech at issue is the portion of the Facebook post that named Johnson and two other dance instructors to conclude that the statement was personal and did not involve a matter of public concern; however, the entire post must be analyzed as a single expression. "[W]here, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). Freborg's Facebook post cannot be picked apart—the speech is inextricably intertwined and must be analyzed under the applicable totality-of-the-circumstances test as a whole. When the test is applied to the full statement, there is no doubt that the thrust and dominant theme of Freborg's speech is about a matter of public concern.

Finally, I have grave concerns about the potential chilling effect that the majority's approach will have on the exercise of free speech with regard to #MeToo. I agree with the majority that the stakes of balancing the interests in cases such as this are high for individuals on both sides of the issue. And while I also agree that a person cannot render his or her speech a matter of public concern merely by adding a hashtag to a social-media

post, I further conclude that naming an individual in a post does not require that a court determine that the speech is not a matter of public concern. As the majority notes, we must balance the important interests of protection of personal reputation and freedom to speak on matters of public concern. The supreme court in *Maethner* counseled:

> We have recognized that personal reputation has been cherished as important and highly worthy of protection throughout history. But at the same time, courts cannot offer recourse for injury to reputation at the cost of chilling speech on matters of public concern, which occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.

929 N.W.2d at 875 (quotations omitted). Here, where Johnson would have an opportunity to prevail under the second prong of the test allowing him to show that Freborg's speech was made with actual malice, the balance tips in favor of protecting Freborg's free-speech rights and speech associated with the #MeToo movement as a matter of public concern.

Actual Malice

Because I would conclude that Freborg's Facebook post involves a matter of public concern, I would also conclude that Johnson could only recover the presumed damages that he seeks in this case if he were able to prove actual malice. *Id.* at 878-79. To be made with actual malice, "a statement must be made with the knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 873. Whether evidence in the record is sufficient to support a finding of actual malice is a question of law. *Id.* at 879 n.7. "[T]o meet the actual malice standard, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [their] publication." *Id.*

The district court determined that there was no genuine issue of material fact regarding malice primarily because it concluded that the allegedly defamatory statements were true. Because I would remand for a trial on the issue of falsity, I would also remand for trial on the facts underlying the issue of actual malice.

In sum, I would conclude that at the summary-judgment stage when the evidence is viewed in the light most favorable to Johnson, the evidence presented with respect to the falsity of Freborg's statement creates a genuine issue of material fact that renders summary judgment inappropriate and requires that we reverse and remand for additional proceedings, but I would further conclude that Freborg's speech involves a matter of public concern. Accordingly, I would affirm the district court's decision in part, reverse it in part, and remand with instructions that Johnson be required to prove actual malice.