STATE OF MINNESOTA

IN SUPREME COURT

A17-1068

Court of Appeals

Chutich, J.
Concurring in part and dissenting in part,
Anderson, J., Gildea, C.J.

Ryan Larson,

Appellant,

vs.

Filed: February 26, 2020
Office of Appellate Courts

Gannett Company, Inc., et al.,

Respondents.

Stephen C. Fiebiger, Stephen C. Fiebiger Law Office, Chtd., Burnsville, Minnesota, for appellant.

Steven J. Wells, Timothy J. Droske, Nicholas J. Bullard, Dorsey & Whitney LLP, Minneapolis, Minnesota, for respondents.

Faegre Drinker Biddle & Reath LLP, Minneapolis, Minnesota, for amici curiae Star Tribune Media Company LLC, Fox/UTV Holdings, LLC, The E.W. Scripps Company, the Associated Press, Digital First Media, Gray Television Group, Inc., Meredith Corporation, the Minnesota Newspaper Association, The Media Institute, The National Association of Broadcasters, and The Reporters Committee for Freedom of the Press.

Randy M. Lebedoff, Minneapolis, Minnesota, for amicus curiae Star Tribune Media Company LLC.

Bruce D. Brown, Katie Townsend, Caitlin Vogus, Washington, D.C., for amicus curiae The Reporters Committee for Freedom of the Press.

S Y L L A B U S

1. The fair and accurate reporting privilege protects the reporting of information about a matter of public concern that is disseminated by law enforcement officers at an official press conference or in an official press release. Here, the district court erred in failing to recognize the existence of this privilege.

2. The fair and accurate reporting privilege may be defeated if statements in a news report were not a fair and accurate account of an official law enforcement press conference or press release. Here, although two of the statements in the news reports were fair and accurate as a matter of law, a new trial is required on five other statements because neither the jury instructions nor the special verdict form adequately advised the jury about the proper inquiry for determining whether the privilege was defeated, and the error was prejudicial.

3. Certain statements falling outside the scope of the fair and accurate reporting privilege are not actionable as a matter of law because they are non-actionable opinion, true, or not capable of defamatory meaning.

Affirmed in part, reversed in part, and remanded.

O P I N I O N

CHUTICH, Justice.

In this case we consider whether the fair and accurate reporting privilege protects news reports about statements on a matter of public concern made by law enforcement officers at an official press conference and in an official press release. Because we conclude that the privilege does apply, we must also consider whether the jury instructions

adequately advised the jury on the proper focus of its inquiry in determining whether the privilege was defeated—that is, whether the statements in the news reports were a fair and accurate account of the press conference or press release. This matter arises from the 2012 shooting death of a Cold Spring police officer and the arrest that same night of appellant Ryan Larson in connection with the murder. The next day, representatives from three law enforcement agencies held a press conference to announce Larson's arrest and to discuss the ongoing investigation; that same day, the Minnesota Department of Public Safety issued a corresponding press release.

Larson was released from jail without being charged with a crime and then later cleared as a suspect. In other words, law enforcement officers had arrested Larson for a murder that he did not commit. Larson sued state and local law enforcement officers for various civil rights violations.[1] He also sued respondents Multimedia Holdings Corporation d/b/a KARE 11-TV and the St. Cloud Times in state court for defamation based on their news coverage about his arrest. He claimed that 11 statements in the news reports about the murder investigation were false and harmed his reputation.

A jury found for respondents, but the district court set the jury verdict aside and ordered a new trial. The court of appeals reversed the district court's post-trial order and

[1] Larson's claims against employees of the Minnesota Bureau of Criminal Apprehension have been settled. By order dated November 13, 2019, the federal district court dismissed with prejudice Larson's remaining claims against Stearns County, the Stearns County Attorney, and local law enforcement officers. *Larson v. Sanner*, Civ. Nos. 17-63, 18-2957 (PAM/LIB), 2019 WL 5966322, at *3 (D. Minn. Nov. 13, 2019).

ordered that the judgment for respondents be reinstated. *Larson v. Gannett Co.*, 915 N.W.2d 485, 488 (Minn. App. 2018).

We granted Larson's petition for review and respondents' request for conditional cross-review. We conclude that, concerning the 11 alleged defamatory statements in the news reports, (1) the fair and accurate reporting privilege applies to the 7 statements that reported information about a matter of public concern disseminated by the law enforcement officers at the press conference and in the press release; (2) the jury instructions and the special verdict form did not adequately set forth the relevant factors that the jury should consider in determining whether the privilege was defeated for lack of fairness and substantial accuracy, an error that was prejudicial as to 5 of the statements, but not as to 2 of the statements that are protected by the privilege as a matter of law; and (3) the remaining 4 statements that are not covered by the privilege are not actionable as a matter of law. Therefore, we affirm the decision of the court of appeals in part, reverse that decision in part, and remand to the district court for a new trial consistent with this opinion.

FACTS

On November 29, 2012, around 11:00 p.m., Cold Spring Police Officer Tom Decker was shot twice outside a bar in Cold Spring. Officer Decker was responding to a request from Larson's parents to check on Larson, who lived above the bar. About an hour after the shooting, the police entered Larson's apartment while he was sleeping and arrested him. Larson was brought to the Stearns County jail in St. Cloud and booked on suspicion of second-degree murder. The Stearns County website's publicly available jail log listed Larson's name, age, "charge" of "MURDER 2," and photograph.

Official Press Conference and Minnesota Department of Public Safety Press Release

At 9 a.m. the next morning, a short press conference was convened by three law enforcement agencies. The Chief of the Cold Spring Police Department, the Sheriff of Stearns County, and the Deputy Superintendent of the Minnesota Bureau of Criminal Apprehension ("Bureau") appeared, made statements, and answered questions. The press conference was televised live.

The Stearns County Sheriff began by briefly describing the circumstances of the shooting, including the welfare call by Larson's parents. The Bureau Deputy Superintendent spoke next. He described the Bureau's investigation, including that "[a] SERT team from the Stearns County Sheriff's Office was eventually able to take into custody the subject of the welfare check." He noted that the investigation was "active and ongoing," and that "[w]e'll continue to follow up to determine exactly what happened in this incident." Before turning the conference over to other speakers, the Deputy Superintendent stated, "And as we noted, um, Ryan Larson was taken into custody and was booked into the Stearns County jail in connection with this incident."

The Chief next spoke about Officer Decker's background, family, and work on the police force. The law enforcement officers then answered questions from members of the media. The media's inquiries focused immediately on the arrested suspect, Larson. The first question asked was whether Officer Decker knew Larson. Other questions included where Larson was when he shot Officer Decker, what kind of weapon Larson used, and whether, in light of the welfare call, the police knew more about Larson's state of mind.

The officials refrained from going into detail on the investigation and declined to answer some questions, noting that the investigation was in its early stages. When asked if there was "any reason to believe that there might be some other individual involved," the Bureau's Deputy Superintendent responded that "we don't have any information to believe that at this time." At the end of the press conference, he also stated "from our preliminary investigation, . . . it's apparent to us that the officer was ambushed at the scene."

On the day of the press conference, the Minnesota Department of Public Safety ("Department") issued a press release entitled "Cold Spring Police Officer Killed in the Line of Duty." The press release was posted on the Department's public website. The release stated that "within an hour" of launching a search for the suspect, "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."

Officer Decker's death and the press conference were covered by the media throughout Minnesota as "breaking news." The defamation claims here concern 11 statements[2] made by KARE 11 or the St. Cloud Times concerning the investigation, including the law enforcement press conference and Larson's release from Stearns County Jail.

Coverage by KARE 11

KARE 11 broadcast the story on its evening newscasts on November 30, 2012, and in an online article that same day. Its 6:00 p.m. newscast featured a "packaged" report by

[2] For ease of reference, the 11 alleged defamatory statements in Larson's complaint are set forth below in bold text.

a reporter on location in Cold Spring. The news anchor introduced the segment: "Condolences are pouring in tonight for the family of the Cold Spring Police Officer who died in the line of duty, Tom Decker. 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.**" The newscast then cut to the reporter, who introduced an interview with the victim's mother: "**[She] holds no ill-will against the man accused of killing her son.**" The officer's mother is recorded saying, "**His mind must have really been messed up to do something like that. I know Tom would have forgave him**." When the reporter finished, the news anchor ended the story by stating, "**Ryan Larson, the man accused of killing Officer Decker, could be charged as early as Monday.**"

The 10:00 p.m. newscast followed much the same format, but with a different reporter in Cold Spring. The news anchor introduced the segment: "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.**" The report included a clip of a local resident stating that Officer Decker was "one of the good guys." The reporter then said, "**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.**"

After showing more clips from the interview with Officer Decker's mother, the newscast cut back to the anchor, who said, "Charges could be filed as early as Monday against Ryan Larson, the man . . . who is accused of killing Officer Decker." Larson's mugshot, retrieved from the jail log, appeared on the screen next to his name and the words "Officer Killed" and "Suspect." Meanwhile, the anchor stated, "**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 Stearns County Jail.**"

At the close of the story, a screen shot of an article published on kare11.com was displayed. Viewers were directed to the article, which bore the headline "Suspect jailed in fatal shooting of Cold Spring Police Officer." The article noted that Larson was held "on suspicion of second degree murder in the alleged ambush of a Cold Spring police officer." It also stated, "**Investigators believe he fired two shots into Cold Spring police officer Tom Decker, causing his death**."

Coverage by the St. Cloud Times

The following day, December 1, 2012, the St. Cloud Times covered Officer Decker's death in numerous front-page articles. The largest headline read: "Area mourns death of Cold Spring officer." A smaller headline in a separate article read, "**Man faces murder charge**," with the subheading, "Larson called 'normal person.' " The article reported that 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.**"

Larson was released from jail on December 4, 2012. A press release issued by the Department of Public Safety stated that "at this time there is not sufficient documented evidence to continue to hold Ryan Larson" and requested "[a]nyone with information regarding this crime" to contact the authorities. Earlier that day, Larson had called the St. Cloud Times to declare his innocence and to let people know that the real killer remained in the community. Both the St. Cloud Times and KARE 11 published online articles about his statements that day, and the St. Cloud Times ran a print story on December 5 as well.

The St. Cloud Times article was titled, "County lets Cold Spring suspect go," with the subtitle "Prosecutors did not have enough evidence to charge." The article covered reactions by the community to Larson's release, including that of the twin sister of Officer Decker's ex-wife. She expressed unease about the developments, stating that the culprit "could be somebody in the crowd." The report then stated: "**[She] 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."** The article ended with investigators urging anyone with information about the shooting to contact law enforcement.

The police officially cleared Larson as a suspect in August 2013. In January 2013, a person of interest in the investigation committed suicide after police officers questioned

him. Law enforcement investigators connected the murder weapon back to the person of interest. The St. Cloud Times covered these developments in subsequent news articles.

Procedural History

Larson sued respondents for defamation, claiming that the following 11 statements made in the television newscasts, the online news article, and the news articles printed in the St. Cloud Times harmed his reputation:[3]

1. Police say that man—identified as 34-year-old Ryan Larson—ambushed officer Decker and shot him twice—killing him.

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

3. 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.

4. Investigators believe he fired two shots into Cold Spring Police Officer Tom Decker, causing his death.

5. Police say Larson is responsible for the shooting death of Cold Spring-Richmond Police Officer Tom Decker.

6. [The officer's mother] holds no ill-will against the man accused of killing her son.

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

8. Man faces murder charge.

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[3] For ease of reference, we adopt the court of appeals' numbering of these statements. As the court of appeals aptly noted, statements 1 through 5 attributed information to what police or investigators said or believed, statements 6 through 8 refer to the accusation against Larson, and statements 9 through 11 convey other information about Larson. Only the first 8 statements were considered by the jury because the district court found, as a matter of law, that the final 3 statements could not support a defamation claim.

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

10. 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.

11. [She] 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.

The procedural history of the litigation is complex, but the portions relevant to our decision are summarized here. This appeal arises from the parties' motions that followed a jury trial held in November 2016. At the close of evidence at the trial, the district court concluded that statements 9 through 11 were not "capable of . . . defamatory meaning" as a matter of law and, therefore, those statements were not submitted to the jury. The district court also denied Larson's request for an instruction on "falsity by implication." As to the jury instructions that were given, the district court closely followed the model jury instructions governing defamation claims. *See* 4 Minn. Dist. Judges Ass'n, *Minnesota Practice—Jury Instruction Guides, Civil*, CIVJIGS 50.10–.60 (6th ed. 2014). Notably, Larson did not seek an instruction on republication.

For statements 1 through 8, the 25-page special verdict form required the jury to make findings on defamation, falsity, and negligence for each statement, in addition to separate questions on damages. The jury found that the 8 statements were defamatory but that Larson failed to prove that any of the statements were false. Consequently, the jury did not make any findings on negligence or damages.

Larson then moved for judgment as a matter of law or, alternatively, for a new trial. The district court granted judgment as a matter of law in part. It rejected respondents' argument that the statements were protected by the fair and accurate reporting privilege. Instead, the court agreed with Larson that the jury should have been allowed to consider his claims based on a defamation-by-implication theory. Concluding that "the implication of each statement was that Mr. Larson killed Officer Decker," the court held that the 8 statements submitted to the jury were defamatory in nature and false as a matter of law, entitling Larson to a new trial on the issues of negligence and damages. Reversing course, the district court also revived statements 9 through 11, concluding that they could support a viable defamation-by-implication theory. Therefore, the court ordered a new trial on all 11 statements.

Respondents appealed. The court of appeals reversed the order for a new trial, concluding that statements 1 through 8 are protected by the fair and accurate reporting privilege. *Larson v. Gannett Co.*, 915 N.W.2d 485, 492–97 (Minn. App. 2018). Although the court of appeals determined that the accuracy of the news reports was a fact question for the jury, the court of appeals held that question was resolved by the jury's decision that the statements were not false. *Id.* at 496, 499. Regarding statements 9 through 11, the court of appeals held that any error in dismissing them was harmless under the common law incremental-harm doctrine. *Id.* at 500. Accordingly, the court of appeals ordered the district court to enter judgment in respondents' favor. *Id.* This appeal followed.

ANALYSIS

Absent a privilege foreclosing relief, recovery for defamation requires a plaintiff to prove four elements:

> (1) the defamatory statement was communicated to someone other than the plaintiff; (2) the statement is false; (3) the statement tends to harm the plaintiff's reputation and to lower the plaintiff in the estimation of the community; and (4) the recipient of the false statement reasonably understands it to refer to a specific individual.

McKee v. Laurion, 825 N.W.2d 725, 729–30 (Minn. 2013) (citations omitted) (internal quotation marks omitted).

I.

Even if every element of a defamation claim is established, a speaker is not liable if an absolute or qualified privilege protects the defamatory statement and the qualified privilege is not abused. *Bol v. Cole*, 561 N.W.2d 143, 148–50 (Minn. 1997). An absolute privilege affords the speaker the highest protection—it protects potentially defamatory statements regardless of the speaker's motive or state of mind.[4] *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 328 (Minn. 2000). A qualified privilege extends to a broader range of circumstances and, to be privileged, the statements must be made in good faith, on a proper occasion, with a proper motive, and upon reasonable or probable

[4] We have applied an absolute privilege to statements made by participants in judicial proceedings, *Matthis v. Kennedy*, 67 N.W.2d 413, 417 (Minn. 1954); statements made by a high-level agency official in the performance of official duties, *Johnson v. Dirkswager*, 315 N.W.2d 215, 223 (Minn. 1982); and statements made by a state trooper in a written arrest report, *Carradine v. State*, 511 N.W.2d 733, 736–37 (Minn. 1994).

cause.[5] *Bol*, 561 N.W.2d at 149–50 (applying a qualified privilege to statements made by mental health providers to protect a child from abuse). These privileges exist because "statements made in particular contexts or on certain occasions should be encouraged despite the risk that the statements might be defamatory." *Lewis v. Equitable Life Assurance Soc'y of the U.S.*, 389 N.W.2d 876, 889 (Minn. 1986).

The privilege at issue here—the fair and accurate reporting privilege—shields a speaker from liability under the common law rule of republication. Under the republication doctrine, a speaker may be liable for repeating the defamatory statements of another. *See Church of Scientology of Minn. v. Minn. State Med. Ass'n Found.*, 264 N.W.2d 152, 156 (Minn. 1978) (noting the common law republication rule); 1 Robert D. Sack, *Sack on Defamation* § 7:3.5[B][1] (5th ed. 2017) (noting that the fair and accurate reporting privilege is an exception to the republication rule).

The fair and accurate reporting privilege is similar to an absolute privilege. In *Moreno*, we held that, like an absolute privilege, the fair and accurate reporting privilege cannot be defeated by common law malice—that is, proof of ill will or improper motive in the publication of the statements. 610 N.W.2d at 329, 333. Unlike an absolute privilege,

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[5] *See, e.g.*, *Britton v. Koep*, 470 N.W.2d 518, 520 (Minn. 1991) (noting that "Minnesota was in the forefront for protection of public debate" by recognizing a qualified privilege for "[f]air comment on the conduct of public officials"); *Lewis v. Equitable Life Assurance Soc'y of the U.S.*, 389 N.W.2d 876, 890 (Minn. 1986) (recognizing a qualified privilege for "an employer's communication to an employee of the reason for discharge"); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 257 (Minn. 1980) (extending a qualified privilege to an employer's statements about a past employee's qualifications and work record).

however, the fair and accurate reporting privilege "may be lost by a showing that the report is not a fair and accurate representation of the proceedings or meetings." *Id.* at 331.

We review a district court's order to grant a new trial for an abuse of discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). But a grant of a new trial "based on an error of law" is reviewed de novo. *Id.* Whether the fair and accurate reporting privilege applies here is a question of law that we review de novo. *See Minke v. City of Minneapolis*, 845 N.W.2d 179, 182 (Minn. 2014); *Moreno*, 610 N.W.2d at 328.

Larson challenges the court of appeals' conclusion that the fair and accurate reporting privilege applies to the news reports about the information communicated by the law enforcement officers at the press conference and in the news release. He and respondents dispute whether our decision in *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321 (Minn. 2000), supports extending the fair and accurate reporting privilege to official law enforcement news conferences and official press releases, an issue of first impression in Minnesota. For the reasons stated below, we conclude that the principles recognized in *Moreno* and the values underlying the First Amendment warrant applying the fair and accurate reporting privilege to the circumstances presented here.

Moreno extended the fair and accurate reporting privilege to "the accurate and complete report or a fair abridgement of events that are part of the regular business of a city council meeting." 610 N.W.2d at 334. Before *Moreno*, the privilege had been recognized to protect reports of judicial proceedings, *Nixon v. Dispatch Printing Co.*,

112 N.W. 258, 258–59 (Minn. 1907), but *Moreno* was the first case to apply the privilege to reports about legislative proceedings, 610 N.W.2d at 332.

In *Moreno*, during the public comment portion of a city council meeting, a citizen asked the council to "stop Officer Moreno from dealing drugs out of his Police car." 610 N.W.2d at 323. The Crookston newspaper reported the accusation in an article, as well as the police chief's response stating that the department "would be remiss" not to follow up on the accusation, but denying rumors that an officer had been arrested. *Id.* at 324. The paper also relayed details from its own investigation, including references to the citizen, which we concluded "could be interpreted as commenting on his 'veracity or integrity.' " *Id.* at 324, 334. The police officer sued the newspaper for defamation, claiming the entire article to be defamatory. *Id.* at 325. Because the record did "not permit us to determine as a matter of law whether the material in the Times' article that reported events other than those of the city council meeting conveyed a defamatory impression," we remanded the case to the district court for further determination of this issue. *Id.* at 334.

In considering whether the privilege applied to the newspaper article, we noted that, as a matter of policy, the privilege exists because "the public interest is served by the fair and accurate dissemination of information concerning the events of public proceedings." *Id.* at 332. In particular, we found the "articulation of the common law on the fair and accurate reporting privilege" in section 611 of the Restatement (Second) of Torts to be "persuasive." *Id.* Section 611 provides, "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 abridgement of the occurrence reported." Restatement (Second) of Torts § 611 (Am. Law Inst. 1975).

In *Moreno*, we further explained that the fair and accurate reporting privilege is based on two principles. "First, because the meeting was public, a fair and accurate report would simply relay information to the reader that she would have seen or heard herself were she present at the meeting."[6] 610 N.W.2d at 331 (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 115 (5th ed. 1984)). "The second principle is the 'obvious public interest in having public affairs made known to all.' " *Id.* (quoting *Prosser and Keeton on Torts*, *supra*, § 115). The public's interest in receiving information provided by the government about important matters, and in knowing what public officials are doing, is a weighty one. *See Sack on Defamation*, *supra*, § 7.3.5[B][2].

Moreno further noted that the Legislature, in the context of criminal defamation, enacted a privilege for "a fair and true report or a fair summary of any judicial, legislative or other public or official proceedings." Minn. Stat. § 609.765, subd. 3(3) (2018), *cited in Moreno*, 610 N.W.2d at 327 n.3. This statutory reference to "other public or official proceedings" shows legislative support for applying the civil version of the reporting privilege beyond the previously recognized judicial and legislative contexts to the specific law enforcement context present in this case. *See Moreno*, 610 N.W.2d at 333.

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[6] This "agency" rationale recognizes that when a person accurately reports information conveyed in an official press conference, she essentially stands in for the public at large. *See generally Sack on Defamation*, *supra*, § 7:3.5[B][2] (describing agency rationale).

The principles articulated in *Moreno* convince us to extend the privilege's protections to the media reporting at issue here. Accordingly, we hold that the fair and accurate reporting privilege protects news reports that accurately and fairly summarize statements about a matter of public concern made by law enforcement officers during an official press conference and in an official news release. As in *Moreno*, we take an incremental approach confined to the "legal questions presented by the facts of this case and made within the context of our own common law." 610 N.W.2d at 332. And following *Moreno*, we find the policy objectives of the Restatement to be persuasive—that the public interest is served by the fair and accurate dissemination of information concerning the events of public or official actions or proceedings—even though we do not adopt the Restatement in its entirety. *See Moreno*, 610 N.W.2d at 332.[7]

Analyzing these objectives here, we first conclude that the press conference and press release were public. The event was televised and the press release was posted online. A representative from the Bureau of Criminal Apprehension testified at trial that the very "purpose of the news conference was to provide information to the public and to the media to provide to the public." Doubtless, the corresponding press release was issued for the same purpose. Applying the privilege here fits neatly with the privilege's "agency principle": "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

[7] Contrary to the dissent's fears, this rule of law is not a "wholesale adoption" of section 611 or an "unreasonably broad" rule. The dissent's characterization of our decision mistakes our articulation of the *rationale* for the fair and accurate reporting privilege for the *rule* of law that we announce.

meeting." *Moreno*, 610 N.W.2d at 331; *see also* Restatement (Second) of Torts § 611 cmt. i.

Larson contests this conclusion, arguing that the press conference was not "public" because only the media were invited and the public was not given "advance notice" that the meeting would occur. This view of what proceedings are "public" is far too narrow. The clear purpose of the press conference was to convey information to the community, and the community was able to view the press conference live on television or through the subsequent media coverage. In every practical sense, the press conference was "open to the public." Restatement (Second) of Torts § 611.

Larson nonetheless argues that, even if public, extending the privilege to media "summaries" of a press conference does not align with the privilege's agency principle. *See Moreno*, 610 N.W.2d at 331. *Moreno* squarely forecloses this argument because we recognized there that when a proceeding is protected by the privilege, the protection extends to any "fair abridgement of events that are part of the regular business of" that proceeding. *Id*. at 334. Larson's argument is also contradicted by the criminal defamation privilege, which expressly protects "fair summar[ies]" of any public or official proceeding. Minn. Stat. § 609.765, subd. 3(3). Allowing the press some leeway in its depiction and reporting of public events is also supported by the principles of the First Amendment and sound public policy. As the Supreme Court has stated, "in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in

convenient form the facts of those operations." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

To be sure, the media's reporting of an event may be an imperfect proxy for first-hand experience. But the privilege ensures that the media's distillation of an event is not too imprecise; a plaintiff can still defeat the privilege's protection by demonstrating that the report was not an "accurate and complete report or a fair abridgement" of the proceeding. *Moreno*, 610 N.W.2d at 334.

Second, the press conference and press release involved a "matter of public concern." *Id.* at 331 (quoting Restatement (Second) of Torts § 611). Speech on matters of public concern "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 875 (Minn. 2019) (quoting *Snyder v. Phelps*, 562 U.S. 443, 452 (2011)).

Here, the police statements involved the sudden slaying of a community police officer, which Larson and the dissent agree is a matter of public concern. The citizens of Cold Spring and surrounding communities had a great need to be informed about matters affecting their safety and their ability to go about their daily activities without fear. And under some circumstances, such as when a suspected criminal remains at large, it is important for the public to be so informed and for the government to be able to caution the public and solicit pertinent information.

The media's reports about the conduct of the law enforcement agencies in investigating a matter of public concern promote key values of transparency and accountability. These news reports not only facilitate communication between state

officials and the public that they serve, but they also allow the public to assess the quality of the state and local officials' response to a public safety emergency. *See Johnson v. Dirkswager*, 315 N.W.2d 215, 220 (Minn. 1982) (according an absolute privilege to a cabinet-level official, reasoning that "the purpose of the privilege is not so much to protect public officials but to promote the public good, *i.e.*, to keep the public informed of the public's business"). The privilege's "second principle"—the " 'obvious public interest in having public affairs made known to all' "—is certainly met here. *Moreno*, 610 N.W.2d at 331 (quoting *Prosser and Keeton on Torts*, *supra*, § 115).

Although the dissent rightly agrees that "the murder of a police officer and the expenditure of public funds to investigate that crime are a matter of public concern," the dissent believes that the identity of the person who is the focus of the investigation "cannot be said to be of sufficient public concern" for the privilege to apply. The dissent opines instead that the police should simply inform the public "that a suspect is in custody or that they have no reason to believe that anyone else is in danger." Notably, however, the fair and accurate reporting privilege focuses on the *reporting* of what the police say—it does *not* control the *substance* of what the police say at an official press conference or in an official press release. *Moreno* specifically instructs that "the report must be either an accurate and complete report of events at the proceeding or a fair abridgment thereof." 610 N.W.2d at 331–32.

The dissent's limitation would force the press to make quick, ad hoc determinations about which public law enforcement statements to omit from live broadcasts, rebroadcasts, and reporting because they are not "of sufficient public concern" for the privilege to apply,

while at the same time making sure that an abridged summary of what occurred at the press conference is "fair." And when the state does announce a criminal investigation, the dissent would place the onus of liability for a potentially false accusation not just on the original speaker—here, the state by way of its law enforcement officers—but on the media.[8]

We see little sense in that rule. A rule that places defamation liability on a party that has no control over the original message cannot deter the conduct that defamation law seeks to prevent.[9]

Third, reports about the press conference and press release are covered by the privilege's application to "an official action or proceeding." *Moreno*, 610 N.W.2d at 331. (quoting Restatement (Second) of Torts § 611). The press conference was organized by the leaders of law enforcement agencies, in the context of their official duties, to inform the public of the investigation. Although not every statement made by a law enforcement officer to the press is an official action, the statements made here during a planned, formal

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[8] The dissent attempts to lessen the damage that its rule would inflict on the media by noting that the media would have protection from liability under the negligence or actual-malice standards of care. These protections, however, are cold comfort against the heavy costs of litigation. Such costs, we have recognized, risk rendering the media "ineffective as guardians of the public weal by deterring investigation of controversial subjects or even official misconduct." *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 491 n.19 (Minn. 1985).

[9] The dissent notes in a footnote the various laws and procedures governing the behavior of law enforcement agencies. We agree that these provisions are important safeguards. The presence of these protections substantially decreases the odds that a law enforcement officer in an official press conference will purposely or carelessly defame someone.

press conference, to convey information about an ongoing criminal investigation, were official actions that were part of an official proceeding and subject to the privilege. *See* Restatement (Second) of Torts § 611 cmt. d; *see also Jones v. Taibbi*, 512 N.E.2d 260, 267 (Mass. 1987) (noting that defendants may be privileged to report allegations if they "were made public as part of an official statement by the [Los Angeles Police Department]"); *Wright v. Grove Sun Newspaper Co.*, 873 P.2d 983, 985, 988 (Okla. 1994) (concluding that a press conference held by a district attorney to distribute information about a drug investigation was "official because [it] concern[s] the investigative function of the office"). These statements are in stark contrast to informal interviews or private conversations with arresting officers or investigators, which are neither official actions or proceedings nor open to the public.[10]

Larson proposes that for an action or proceeding to be "official" it must be "recurring" and "essential to democracy." He also asserts that "official" proceedings must provide an opportunity for "both sides to be heard" and result in an "official record."

These criteria are unsupported by precedent, and Larson fails to explain how they serve the interests advanced by the fair and accurate reporting privilege. In *Moreno*, for

[10] For example, our decision in *Carradine v. State* concerned statements that a state trooper made in an arrest report and in response to informal press inquiries related to the arrest report. 511 N.W.2d 733, 736 (Minn. 1994). In determining when an absolute privilege applied, we distinguished between those statements made by an officer in "the performance of his function as an officer" and those statements that were "not at all essential to the officer's performance of his duties as an officer." *Id.* at 737. Moreover, *Carradine* suggests that the law enforcement officers here are at least protected by a qualified privilege. *Id.* at 737 n.3. Absent the fair and accurate reporting privilege, however, the media *reporting* their statements would have *less* protection from liability than the original speaker. Our decision avoids this inconsistent result.

example, the citizen's accusations against the officer were prime examples of ad hoc or impromptu public statements, and the officer certainly had no immediate opportunity to rebut the citizen's accusations. 610 N.W.2d at 324. And even assuming that the privilege requires the proceeding to be "essential to democracy," a government-sponsored press conference and press release concerning the exercise of police power undoubtedly qualifies. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring) ("Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government.").

For these reasons, we conclude that the statements made here during a planned, formal, press conference, to convey information about an ongoing criminal investigation of public interest, were official actions that were part of an official proceeding and the reports from that proceeding are subject to the privilege.

The dissent claims that our holding conflicts with *Nixon*. But, as *Moreno* recognized, *Nixon* provides little guidance because "we did not discuss the nature and scope of the privilege" in that case "nor did we discuss its applications to other public proceedings." *Moreno*, 610 N.W.2d at 331. And *Nixon* is distinguishable factually. There, the source of the defamation was a private party, who made defamatory statements about another private party in a legal complaint filed in district court, which were then reported by a newspaper. 112 N.W. at 258. Here, the source of the defamatory statements was not a private party, but government officials who held a press conference to inform the public about an ongoing criminal investigation. Unlike *Nixon*, the news reports here "serve the

administration of justice" and were a "legitimate object of public interest" because the statements were made by law enforcement officials in the performance of their duties. *Id.*

Equally important, as we recognized in *Moreno*, *Nixon* was "decided nearly 60 years before the Supreme Court articulated the First Amendment implications of defamation sanctions" in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *Moreno*, 610 N.W.2d at 330. And *Nixon* was also decided well before the Minnesota Rules of Civil Procedure—and its procedural safeguards against frivolous complaints—were enacted.[11]

Larson further maintains, as the district court found in its post-trial order granting a new trial, that the privilege must be limited to reporting upon the fact of arrest "until criminal charges are filed, and judicial control over the case is exercised." He and the dissent assert support for this limitation in comment (h) to section 611 of the Restatement, which states:

> An arrest by an officer is an official action, and a report of the fact of the arrest or of the charge of crime made by the officer in making or returning the arrest is therefore within the conditional privilege covered by this Section. On the other hand 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 the 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.

Restatement (Second) of Torts § 611 cmt. h.

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[11] The Rules of Civil Procedure deter a party from filing complaints to defame another party. *See* Minn. R. Civ. P. 11.02 (prohibiting a party or its attorney from presenting a pleading "for any improper purpose" or that lacks evidentiary support); Minn. R. Civ. P. 11.03 (allowing a court to impose sanctions for violating Rule 11.02); *see also Sack on Defamation*, *supra*, § 7:3.5 (noting that under the "modern" rule "[t]he damage resulting from use of the filing of a complaint or petition to disseminate a libel, it is argued, is better addressed by aggressive pursuit of sanctions against attorneys and parties who make allegations in bad faith or without support than permitting redress against a republisher").

Reliance on comment (h) is misplaced. To be sure, we cited comment (h) in *Moreno*, but we did so in a section of the opinion that described how the entirety of section 611 of the Restatement (Second) of Torts functions. 610 N.W.2d at 332. We noted that the broad principles in section 611 are narrowed in application, and cited comment (h) in explaining that the fair and accurate reporting privilege can be *defeated* when the reporter makes "additional comments, *not part of the meeting*, that would convey a defamatory impression or 'impute corrupt motives to anyone, [or] . . . indict expressly or by innuendo the veracity or integrity of any of the parties.' " *Id.* at 332 (emphasis added) (quoting Restatement (Second) of Torts § 611 cmt. f).[12]

More importantly, the assertion by Larson and the dissent that comment (h) means that the privilege is limited to the fact of arrest or criminal charge is flatly contradicted by *Moreno*, which involved reporting on allegations of criminal activity before any arrest occurred. There, we held that the fair and accurate reporting privilege applied to a newspaper article about a citizen's accusation of specific criminal activity by a police officer even though the officer had not been arrested and no judicial proceeding was underway. *Id.* at 334. The news report was privileged because it relayed public comments

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[12] *Moreno* did not adopt section 611 or any of the comments specifically. 610 N.W.2d at 332. To the extent that comment (h) is persuasive, we agree with the court of appeals' observation that it is best understood "to mean that the privilege does not apply to unofficial police comments that are not a part of an official meeting or statement by law enforcement." *Larson*, 915 N.W.2d at 495. This view harmonizes, in the law enforcement context, comment (h) with comment (i), entitled "[P]ublic meetings." According to comment (i), the privilege "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 (Second) of Torts § 611 cmt. i. The press conference here falls squarely within this description.

made at a city council meeting. *Id.* The thrust of *Moreno* is that, if a proceeding is covered by the privilege because it is an official proceeding open to the public, the *application* of the privilege does not depend upon the content of what was said. Here, rather than a city council meeting, the official proceeding was a law enforcement press conference.

Finally, we are unpersuaded by the argument that extending the privilege to reporting of official law enforcement press conferences and press releases "will have a substantial likelihood of materially prejudicing a jury trial in a pending criminal matter." Minn. R. Prof. Conduct 3.6; *see also* Minn. R. Prof. Conduct 3.8 (requiring prosecutors to refrain from "making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6"). Although we know that tension may exist in some cases between protecting freedom of the press and preserving an unbiased jury pool, we cannot conclude that extending ethical rules for lawyers to non-lawyer public officials is appropriate, given the public interest in "the fair and accurate dissemination of information concerning the events of public proceedings." *Moreno*, 610 N.W.2d at 332.

Further, procedural mechanisms, such as a change of venue or voir dire, already exist to protect a defendant's rights. *See* Minn. R. Crim. P. 24.03, subd. 1 (change of venue); Minn. R. Crim. P. 26.02, subd. 4 (voir dire examination); *see also Stuart*, 427 U.S. at 563–64 (acknowledging voir dire as a method to preserve the defendant's right to a fair trial even when intense press coverage is present); *Sheppard v. Maxwell*, 384 U.S. 333, 350, 353 (1966) (implicitly recognizing that a change of venue may protect a defendant's right to a fair trial and noting that "where there was no threat or menace to the integrity of the trial, we have consistently required that the press have a free hand, even though we

sometimes deplored its sensationalism" (citations omitted) (internal quotation marks omitted)). And the passage of time alleviates the effect of potentially prejudicial comments about a criminal case made by a government official. *See State v. Parker*, 901 N.W.2d 917, 921–22, 926–27 (Minn. 2017) (concluding that comments made by a county attorney at a press conference more than a year before trial did not affect the defendant's substantial rights because the jurors were not aware of the statements).

Decisions from other jurisdictions provide further support for our decision to extend the fair and accurate reporting privilege to reports of law enforcement press conferences and press releases. According to one judicial tally in 2010, 47 states recognize the fair and accurate reporting privilege in some form or another. *Salzano v. N.J. Media Grp., Inc.*, 993 A.2d 778, 787 n.2 (N.J. 2010) (listing state statutes and decisions recognizing the fair and accurate reporting privilege). We are far from an outlier in recognizing that the fair and accurate reporting privilege extends to press conferences held by law enforcement officers.[13]

[13] *See Kilgore v. Younger*, 640 P.2d 793, 796–97 (Cal. 1982) (holding that the privilege protects reports based on a press conference held by the attorney general in a legally convened public meeting); *Jones*, 512 N.E.2d at 266–67 (concluding that the fair and accurate reporting privilege protects news reports of murder allegations, later proven to be false, made by the Los Angeles Police Chief at a press conference); *Thomas v. Tel. Publ'g Co.*, 929 A.2d 993, 1010 (N.H. 2007) (stating that "[t]he privilege also protects reports that meet the accuracy requirements . . . and are based upon press conferences, interviews with a police chief, or other types of official 'conversations' " (citation omitted)); *Wright*, 873 P.2d at 989–90 (concluding that a press conference held by a district attorney was an official public occasion subject to the privilege); *see also Lee v. TMZ Prods. Inc.*, 710 Fed. Appx. 551, 558–59 (3d Cir. 2017) (applying New Jersey's version of the privilege to news reports based on a press conference and news release of the New York Attorney General).

We acknowledge that balancing the public's right to know with a defamed person's interest in protecting his reputation is a "difficult and sensitive task." *Johnson*, 315 N.W.2d at 221. Personal reputation is " 'highly worthy of protection,' " but "at the same time, courts cannot offer recourse for injury to reputation at the cost of chilling speech on matters of public concern." *Maethner*, 929 N.W.2d at 875 (quoting *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 491 (Minn. 1985)).

For the policy reasons set forth in *Moreno*, and based upon the values underlying the First Amendment, we conclude that the balance here weighs in favor of applying the fair and accurate reporting privilege to news reports of information disseminated by law enforcement officers about a matter of public concern at an official press conference or in an official press release. Accordingly, the district court erred when it determined, during trial and in its post-trial order, that the fair and accurate reporting privilege does not apply to the statements at issue in this case.

II.

Having concluded that the fair and accurate reporting privilege applies here, we next consider Larson's argument that the privilege has been abused or "defeated." *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 333 (Minn. 2000). Once a defendant has demonstrated the existence of a qualified privilege, "the burden shifts to plaintiff to prove that the privilege has been abused, which is generally a question for the jury." *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 257 (Minn. 1980).

As we explained in *Moreno*, the privilege "is defeated by a showing that the report is not a fair and accurate report" of the public proceeding. 610 N.W.2d at 333. A report is

fair and accurate if the report "simply relay[s] information to the reader that she would have seen or heard herself were she present" at the proceeding. *Id.* at 331. The report "cannot be edited in such a manner as to misrepresent the proceeding and become misleading." *Id.* at 332 (citing Restatement (Second) of Torts § 611 cmt. f).

Because the district court incorrectly determined that the fair and accurate reporting privilege did not apply to the news reports here, the district court did not instruct the jury on the factors to consider in deciding whether the privilege had been defeated. Instead, the district court instructed the jury on general principles of defamation, including the element of falsity. The district court used the definition of "false" from the model jury instructions:

> A statement or communication is false if it is not substantially accurate. Substantial accuracy does not require every word to be true. A statement or communication is substantially accurate if its substance or gist is true.

4 Minn. Dist. Judges Ass'n, *Minnesota Practice—Jury Instruction Guides, Civil*, CIVJIG 50.25 (6th ed. 2014). But the district court also included language about context in this instruction: "In determining whether a statement was false, the words must be construed as a whole without taking any word or phrase out of context. The meaning of the statement must be construed in the context of the article or broadcast as a whole."

Larson contends that even if the fair and accurate reporting privilege applies here, the privilege was "lost." He argues that the jury instructions did not accurately convey the concepts of fairness and substantial accuracy. He further argues that the jury never had a chance to decide whether the statements in the news reports "produced the same effect on the mind of the recipient which the precise truth would have produced." Respondents, by contrast, contend that the statements in the news reports were "fair and accurate as a matter

of law." According to respondents, there is "no need to turn to the jury verdict" because the news reports conveyed the "gist" or "sting" of the message conveyed at the press conference and by the press release. Alternatively, respondents urge us to rely upon the jury's verdict that the statements were not false to conclude that the fair and accurate reporting privilege was not defeated for lack of substantial accuracy.

"The district court has broad discretion in determining jury instructions, and we will not reverse where jury instructions 'overall fairly and correctly state the applicable law.' " *Stewart v. Koenig*, 783 N.W.2d 164, 166 (Minn. 2010) (quoting *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002)). A new trial is required, however, if an erroneous instruction "destroys the substantial correctness of the charge as a whole, causes a miscarriage of justice, or results in substantial prejudice." *Domagala v. Rolland*, 805 N.W.2d 14, 31 (Minn. 2011). A jury instruction is prejudicial if the instruction is misleading on a crucial element in a case and "would have changed the outcome of the case." *Id*. If we cannot determine the effect of an erroneous jury instruction, "we will give the complainant the benefit of the doubt and grant a new trial." *Id.*

The court of appeals determined that the district court erred by failing to use the fair and accurate reporting privilege "as the starting point from which to analyze the falsity instructions." *Larson*, 915 N.W.2d at 498. Nonetheless, the court of appeals concluded that "the district court's falsity instruction did not destroy the 'substantial correctness of the charge as a whole.' " *Id.* at 499 (quoting *Domagala*, 805 N.W.2d at 31). The court of appeals ultimately credited the jury's finding that the statements were not false as resolving

the issue of whether the privilege was defeated. *Id.* at 499. The court of appeals therefore concluded that the district court erred in granting Larson a new trial. *Id.* at 500.

We agree with respondents that, as a matter of law, statements 7 and 8 were fair and accurate reports of the press conference and press release and, therefore, the privilege applies. But for the reasons that follow, we conclude that a new trial is required to determine whether the fair and accurate reporting privilege was defeated for statements 1 through 5.

The question of whether a qualified privilege was defeated generally is a jury question. *Lewis*, 389 N.W.2d at 890 (citing Restatement (Second) of Torts § 619 (Am. Law Inst. 1975)). When more than one conclusion can be drawn from undisputed facts, the question of substantial accuracy and fairness should go to the jury. *See Utecht v. Shopko Dep't Store*, 324 N.W.2d 652, 654 (Minn. 1982). But the question of whether a qualified privilege was defeated need not be submitted to the jury if "the facts are such that only one conclusion can be reasonably drawn." Restatement (Second) of Torts § 619 cmt. b; *cf. McKee*, 825 N.W.2d at 730–31 (concluding that no genuine issue of material fact existed as to the falsity of various statements in a defamation case that did not involve a privilege and deciding substantial accuracy as a matter of law).

The district court instructed the jury here only on substantial accuracy, using the model jury instruction on the falsity element of a defamation claim. But the focus in determining whether the fair and accurate reporting privilege was defeated is not on "the truth or falsity of the content of the defamatory statement," but on "the accuracy with which the statement is *reported*." *Moreno*, 610 N.W.2d at 331 (emphasis added); *see also KBMT*

Operating Co. v. Toledo, 492 S.W.3d 710, 714 (Tex. 2016) ("When the privilege applies, the gist of an allegedly defamatory newscast must be compared to a truthful report of the official proceedings, not to the actual facts."). This distinction matters because when the privilege applies, the re-publisher is not liable if the statement is reported accurately and fairly, even if the underlying statement is false.[14] As noted above, the fair and accurate

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[14] This distinction is why falsity-by-implication cases do not fit comfortably in the context of the fair and accurate reporting privilege inquiry. The falsity-by-implication doctrine instructs that even if a statement is true on its face, a defamation action may be maintained if the implication of the statement is untrue. *Lewis*, 389 N.W.2d at 889 (holding that a truth defense must "go to the underlying implication of the statement, at least where the statement is more than a simple allegation"). *Lewis* illustrates the principle well. The case involved employees claiming defamation under a compelled self-publication theory because they were forced to tell prospective employers that they had been fired for gross insubordination. *Id.* at 886. The employees asserted that the employer's determination of gross insubordination was a false pretext for justifying their termination and that they had, in fact, not been grossly insubordinate. *See id.* at 888. We held that the employees' defamation claims could proceed because the jury found that being forced to repeat to prospective employers a literally true statement—"I was fired for gross insubordination"—implied a false fact that the employee had actually been grossly insubordinate. *Id.* at 889. In other words, the employees' defamation claims survived because the underlying fact implied by the statement—that the employees were grossly insubordinate—was untrue.

The whole point of the qualified fair and accurate reporting privilege, however, is that in limited circumstances a report about another person's statement is not subject to defamation liability—even if the facts underlying the statement are *not* true. The distinction is made clear if we assume momentarily that the qualified fair and accurate reporting privilege applied to a newspaper report that the employer in *Lewis* stated that the employees had been fired for gross insubordination. (In reality, of course, the privilege would not apply because the report about the *Lewis* employees is not a report on a public proceeding.) Under the fair and accurate reporting privilege, the newspaper report would be protected from defamation liability even if the employees proved that they did not commit gross insubordination: the opposite of the result in *Lewis*. *Id.* Stated another way, if the falsity-by-implication principle were transferred whole-cloth into the fair and accurate reporting privilege inquiry, that principle would effectively swallow the privilege in every case by requiring the defendant to prove that any reported statement made by others in the proceeding was substantially accurate.

This conclusion does not mean, however, that the *implications* of a report about another's statement are irrelevant to our analysis under the fair and accurate reporting

reporting privilege is an *exception* to the common law republication rule, which provides that a speaker who knows or should know that a statement is false and defamatory but repeats it nonetheless is equally as liable for the defamation as the original speaker. *See Church of Scientology of Minn. v. Minn. State Med. Ass'n Found.*, 264 N.W.2d 152, 156 (Minn. 1978).

The court of appeals concluded that the district court's falsity instruction sufficiently instructed the jury "on the substantial accuracy of the news report." *Larson*, 915 N.W.2d at 499. The court therefore found that the district court erred in ordering a new trial. *Id.* at 498–500.

We disagree that the jury instructions were sufficient. We conclude that the district court's instruction on falsity was an incomplete instruction regarding the factors that a jury should consider in determining whether the fair and accurate reporting privilege was defeated. To be sure, the district court did instruct the jury on the "substantial accuracy" standard that applies in deciding the falsity element in a general defamation case not involving a privilege. And the substantial accuracy standard is relevant to the jury's inquiry in determining whether the fair and accurate reporting privilege was defeated. A report may be substantially accurate even if the report is not "exact in every immaterial detail."

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privilege. As discussed elsewhere in the opinion, if a report implies a meaning that is different from the meaning conveyed by the reported-upon statement, the qualified fair and accurate reporting privilege would not protect the report. For example, if the news reports here omitted or added crucial facts in a manner that conveyed an erroneous impression of the information conveyed at the press conference to the listener or reader, the privilege may be defeated. *See Moreno*, 610 N.W.2d at 333 (stating that fair and accurate reporting privilege can be defeated if the report contains "additional contextual material . . . that conveys a defamatory impression").

Restatement (Second) of Torts § 611 cmt. f. In other words, we may overlook only minor inaccuracies in the report for the privilege to be preserved; the report must "convey[] to the persons who read it a substantially correct account of the proceedings." *Id.*

Moreover, to be protected by the privilege, "[n]ot only must the report be accurate, but it must be fair." *Id.* A news report may not be fair if the report omits or misplaces law enforcement statements or adds contextual material in a way that changes the meaning of the statements. *See Moreno*, 610 N.W.2d at 333. Our recognition of the privilege rests in part on the principle that a fair and accurate report of statements made by law enforcement officers "simply relay[s] information" that individuals would have heard or read themselves if they had actually attended the press conference or read the press release. *Id.* at 331.

In other words, a news report is fair and accurate if the report has "the same effect on the mind" of the listener or reader as that which attending the press conference or reading the press release would have had.[15] *McKee*, 825 N.W.2d at 730; *see Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (holding that a "statement is not considered false unless it 'would have a different effect on the mind of the reader from that

[15] This same principle applies in defamation actions that do not involve the assertion of a privilege. In *McKee*, we articulated a test for falsity that incorporated this principle—that "[a] statement is substantially true if it would have the same effect on the mind of the reader or listener as that which the pleaded truth would have produced." 825 N.W.2d at 730 (citing *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991)). Because the jury may not be familiar with the meaning of the term "gist," instructing a jury on falsity may involve including a clarifying instruction that the statement is substantially true if it would have the same effect on the mind of the reader or listener as that which the original statement would have produced.

which the pleaded truth would have produced' " (quoting R. Sack, *Libel, Slander, and Related Problems* 138 (1980))). That is, the substance of the *meaning* of the report must be the same—must communicate the same notion—as the underlying statement. *McKee*, 825 N.W.2d at 730; Restatement (Second) of Torts § 611 cmt. f.

Therefore, for a news report to be protected by the fair and accurate reporting privilege, the media cannot edit or present the law enforcement statements in a way that makes the report misleading. *Moreno*, 610 N.W.2d at 332. Specifically, the privilege can be defeated if the report is not "a fair abridgment" of events at the proceeding, *id.* at 331, or the report contains "additional contextual material . . . that conveys a defamatory impression or comments on the veracity or integrity of any party," *id.* at 333. This inquiry—an essential component of determining if the fair and accurate reporting privilege protects a report—was not included in the jury instructions and special verdict form used here.

Because the district court concluded that the fair and accurate reporting privilege did not apply here, the district court did not instruct the jury on the factors to consider in determining whether the statements were fair and accurate, and the special verdict form did not ask the jury to decide whether the privilege had been defeated by reporting that was not fair and accurate. We conclude that the jury instructions were incomplete and potentially misleading and therefore did not "fairly and correctly state the applicable law." *Hilligoss*, 649 N.W.2d at 147; *see also Domagala*, 805 N.W.2d at 31.

The district court should have instructed the jury to consider whether the news reports were fair and accurate accounts of the law enforcement statements. The crucial

inquiry for the jury is whether the statements in the news reports communicated to the viewer or reader the same meaning that someone who actually attended the press conference or read the press release would have taken away from the press conference or press release.[16] Especially in a case involving the fair and accurate reporting privilege, this key question, modified to fit the circumstances here, best encapsulates the issue for the jury: Did the reported statements produce the same effect on the mind of the listener or the reader as the oral and written statements of the law enforcement officers at the press conference or in the press release? If the court had framed the issue this way, the jury would have clearly understood that its charge was to determine the fairness and accuracy of the reported statements and not whether the underlying substance of those statements—that Larson killed Officer Decker—was true or false. The district court's instructions did not make this distinction clear and therefore were misleading as to a crucial inquiry in this case. *See Domagala*, 805 N.W.2d at 31.

Because the district court did not adequately instruct the jury on the fairness and accuracy inquiry, we conclude that the error was potentially prejudicial to Larson and that

[16] Respondents, in fact, recommended to the district court that the jury instructions and the proposed special verdict form include this key concept. One proposed instruction stated, "A report is considered substantially accurate, and a fair report if its gist or sting is true, *meaning that it produces the same effect on the mind of the recipient*[] *which the truth would have produced.*" (Emphasis added.) Similarly, respondents proposed that the special verdict form list every statement and then ask, as the first question, "Did the statement produce the same effect on the mind of the recipients as the written and/or oral statements of law enforcement?"

he is entitled to a new trial so that a jury can determine whether the privilege was defeated concerning statements 1 through 5:

1. Police say that man—identified as 34-year-old Ryan Larson—ambushed officer Decker and shot him twice—killing him.

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

3. 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.

4. Investigators believe he fired two shots into Cold Spring Police Officer Tom Decker, causing his death.

5. Police say Larson is responsible for the shooting death of Cold Spring-Richmond Police Officer Tom Decker.

Larson's arguments on appeal go to the question of whether the privilege was defeated. For example, he argues that the news reports omitted certain facts and did not appropriately convey that the investigation was in its very early stages, as law enforcement officers stated at the press conference and in the press release. The district court agreed that, if the privilege did apply here, the news reports "created the impression of finality to the investigation and certainty to the idea that Mr. Larson had killed Officer Decker," which was "not present" in the press conference or press release. According to the district court, the news reports did not give the impression that the investigation was in a preliminary stage and that the investigation was ongoing; rather, the effect of each of the statements was that "police had their man" and "[t]he investigation was over." In sum, the district court determined that each of the "statements produced a harsher effect or sting on the mind of the recipients than the precise truth would have produced."

But this is a question for the jury to decide. If the jury had been adequately instructed on the fairness and accuracy inquiry, the jury could have reasonably concluded that the privilege was defeated because the statements in the news reports did not convey the same meaning as the statements at the press conference and in the press release. Because the erroneous jury instructions possibly prejudiced Larson, he is entitled to a new trial[17] on statements 1 through 5. *See George v. Estate of Baker*, 724 N.W.2d 1, 10 (Minn. 2006) (explaining that a jury instruction is prejudicial if the erroneous instruction could have influenced the jury's analysis).

We conclude, however, that only one conclusion can be drawn regarding statements 7 and 8: they were fair and accurate as a matter of law. These statements are:

> 7. Ryan Larson, the man accused of killing Officer Decker, could be charged as early as Monday.
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> 8. Man faces murder charge.

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[17] The dissent would usurp the role of the jury and hold that the privilege was defeated because these statements were "false as a matter of law." We have long held that "the truth or falsity of a statement is inherently within the province of the jury." *Lewis*, 389 N.W.2d at 889. Even if there is "no disputed material fact about the content of the press conference, the broadcast, or the newspaper article," as the dissent states, we cannot decide falsity as a matter of law if a jury can draw different conclusions from undisputed facts. *See McKee*, 825 N.W.2d at 730 ("As a general rule, the truth or falsity of a statement is a question for the jury."). "Only where the facts are undisputed and reasonable minds can draw but one conclusion from them does the question for determination become one of law for the court." *Conover v. N. States Power Co.*, 313 N.W.2d 397, 401 (Minn. 1981). Regarding statements 1 through 5, a new trial is required because a jury might reasonably draw different conclusions regarding the substantial accuracy and fairness of any one of the statements.

Larson asserts that these statements were not accurate because the effect of each statement "would produce on the mind of the recipient" that he "had been formally charged with murder." We disagree.

The use of the term "accused" in statement 7—"Ryan Larson, the man accused of killing Officer Decker, could be charged as early as Monday"—which was part of a KARE 11 newscast, cannot reasonably be interpreted in the technical, legal sense as meaning that Larson had already been charged with murder. The statement itself includes the phrase "*could be charged* as early as Monday," which clearly communicated that Larson had not yet been formally charged. (Emphasis added.) Given the context of his announced arrest, we conclude, as a matter of law, that this statement is protected by the fair and accurate reporting privilege.[18]

Similarly, concerning statement 8—the headline in the St. Cloud Times "Man faces murder charge"—the use of the word "faces" simply conveyed to the reader that Larson had the prospect of being charged in the future. *See Webster's Collegiate Dictionary* 414−15 (10th ed. 1998) (defining "face" as "to have as a prospect"). Moreover, taking into account the context, the article accompanying the headline clearly stated that Larson was

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[18] We note that some courts have held as a matter of law that the distinction between "arrested" and "charged" is immaterial when applying the privilege. *See Williams v. WCAU-TV*, 555 F. Supp. 198, 203–04 (E.D. Pa. 1983) (concluding that a statement made during a broadcast that the plaintiff "will be charged for bank robbery," even though he was never charged, was substantially accurate because the plaintiff was arrested); *Jones*, 512 N.E.2d at 266 (concluding that "the report of the plaintiff's arrest did not become substantially inaccurate merely because the report incorrectly stated that the plaintiff had been charged with murder" because "[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").

in the Stearns County Jail and "face[d] *possible* charges of second-degree murder." (Emphasis added.) Accordingly, we conclude, as a matter of law, that this statement is also protected by the fair and accurate reporting privilege.

Therefore, we affirm the court of appeals' decision regarding statements 7 and 8, but reverse and remand for a new trial on whether the fair and accurate reporting privilege has been defeated regarding statements 1 through 5.

III.

Finally, we consider whether a new trial is required concerning statement 6 and statements 9 through 11, which were not reports of the law enforcement statements made at the press conference or in the press release and, therefore, are not subject to the privilege. The district court initially dismissed statements 9 through 11 from the case as not actionable. Later, the district court reversed course and ordered a new trial on these statements, concluding that it was error to dismiss the statements because a reasonable jury could understand the statements as implying that Larson killed Officer Decker.

We review a district court's order for a new trial for an abuse of discretion. *Halla Nursery, Inc.*, 454 N.W.2d at 910. But when an order for a new trial is based on a question of law, we review the district court's decision de novo. *Stoebe v. Merastar Ins. Co.*, 554 N.W.2d 733, 735 (Minn. 1996).

Here we consider the following statements:

> 6. [The officer's mother] holds no ill-will against the man accused of killing her son.[19]
>
> 9. His mind must have really been messed up to do something like that. I know Tom would have forgave him.
>
> 10. 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.
>
> 11. [She] 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.

We must decide whether these statements can support a defamation claim as a matter of law.

Larson claims that each of these statements implied that he killed Officer Decker. At common law, if a " 'defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts, he may be held responsible for the defamatory implication, *unless it qualifies as an opinion*, even though the particular facts are correct.' " *Diesen v. Hessburg*, 455 N.W.2d 446, 450 (Minn. 1990) (emphasis added) (quoting *Prosser and Keeton on Torts*, *supra*, § 116 (5th ed. Supp. 1988)). "Whether defamatory meaning is conveyed depends upon how an ordinary person understands the language used in the light of surrounding circumstances" and "the words

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[19] The court of appeals treated statement 6 as one of the statements protected by the fair and accurate reporting privilege. *See Larson*, 915 N.W.2d at 500. But this statement was not part of the report of statements made at the law enforcement press conference or in the press release; rather, the statement related to an interview with Officer Decker's mother. The privilege does not apply to this statement.

must be construed as a whole without taking any word or phrase out of context." *McKee*, 825 N.W.2d at 731 (citations omitted) (internal quotation marks omitted).

First, we consider statement 6—the statement that Officer Decker's mother "holds no ill-will against the man accused of killing her son." This statement was made during a KARE 11 broadcast as part of the description of the reporter's interview with Officer Decker's mother. After the report on the interview, the segment cut back to the KARE 11 anchor, who then stated that "Ryan Larson, the man accused of killing Officer Decker, could be charged as early as Monday." The anchor's statement is statement 7, which we discussed above in connection with the fair and accurate reporting privilege. As we concluded regarding statement 7, the word "accused" in statement 6, when considered in the context of the news report, does not connote a formal legal charge of murder, as Larson contends; in fact, the report makes clear that Larson had not yet been charged with a crime. Further, the statement that the officer's mother "holds no ill-will" is not capable of a defamatory meaning. Therefore, we conclude that the defamation claim concerning statement 6 fails as a matter of law.

Next, we consider statements 9 and 11, and conclude that these statements are non-actionable opinion. The First Amendment protects opinion from defamation liability. *Diesen*, 455 N.W.2d at 450 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974)). In assessing whether a statement is an opinion, we consider its "specificity and verifiability, as well as [its] literary and public context." *Id.* at 450. A statement that is merely "rhetorical hyperbole," moreover, is considered non-actionable. *McKee*, 825 N.W.2d at 733 (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19–20 (1990)).

Statement 9 was made by Officer Decker's mother to a reporter and then broadcast on KARE 11. In response to the reporter's questions, Officer Decker's mother said of the suspect, "His mind must have really been messed up to do something like that. I know Tom would have forgave him." This statement speculates about the suspect's state of mind and further opines about how her dead son would have charitably forgiven his alleged killer. In the context of the entire newscast, no ordinary listener would understand statement 9 to be an assertion of fact, or to imply an assertion of fact, about Larson.

Statement 11 appeared in the St. Cloud Times and was made by the twin sister of Officer Decker's ex-wife, who had been asked for a reaction to the possibility that Larson would be released from jail. Larson's claim is based on the article's statement that "[She] 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." The full context of the article makes clear, however, that these statements were not about Larson's guilt, but the speaker's own worries. Immediately preceding the quoted passage, the article states: " '(The culprit) could be somebody in the crowd,' [she] said." She 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." Properly considered in its context, we fail to see how statement 11 can be reasonably understood as anything other than opinion or "rhetorical hyperbole." *See McKee*, 825 N.W.2d at 733.

Finally, turning to statement 10, the statement was made by the KARE 11 anchor and conveyed information about Larson's background, including his criminal history: "[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 Stearns County Jail." The information about Larson's criminal history is a matter of public record, entitled to First Amendment protection. *See Cox*, 420 U.S. at 496; *see also Carradine v. State*, 511 N.W.2d 733, 737 (Minn. 1994) (noting that an arrest report "is a matter of public record available to the press"). His status as student was a true statement. In addition to being public and true, statement 10 does not "juxtapose[] a series of facts so as to imply a defamatory connection between them." *Diesen*, 455 N.W.2d at 450. Because no implication of defamation arises from statement 10, Larson's defamation-by-implication claim fails.[20]

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals in part, reverse in part, and remand to the district court for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

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[20] Given these conclusions, we need not consider the court of appeals' conclusion that Larson is barred from recovery on these statements under the incremental-harm doctrine. *Larson*, 915 N.W.2d at 500. It is also unnecessary to consider respondents' arguments regarding the evidence of negligence and damages. The jury did not answer these questions on the special verdict form, the district court concluded that a new trial on these issues was necessary though for reasons different from those explained here, and the court of appeals did not reach these issues. *Id.* Because a new trial must be held to determine whether the privilege was defeated, that trial will also, if necessary, encompass issues of negligence and damages.

C O N C U R R E N C E & D I S S E N T

ANDERSON, Justice (concurring in part, dissenting in part).

This case requires us to balance the tension between "free and open public discourse and an individual's right to compensation for harm to reputation." *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 329 (Minn. 2000). Although we have "long sought to protect and enhance free and open discussion of public issues," we have also recognized that "personal reputation has been cherished as important and highly worthy of protection." *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 490–91 (Minn. 1985). We have struck a balance between these two interests through a complex array of privileges and shifting requirements for the elements of a prima facie defamation case. *Id.* at 480. Because the court tips that balance too far here in favor of the press, effectively immunizing the press from liability for falsely accusing a private citizen of murder, I respectfully dissent.[1]

The facts of this case are not disputed. In 2012, Cold Spring police officer Tom Decker was shot to death. Police arrested appellant Ryan Larson in connection with Officer Decker's death. But Larson was never charged with any crime and police later learned that the real killer was somebody else.

Even though their investigation was in its early stages, police held a press conference and issued a press release the day after the shooting, announcing that they had

[1] I agree with the court's conclusion that, because statements 9–11 fall outside the scope of the privilege at issue here, they are not actionable as a matter of law. Thus, I join in the court's decision in that part of section III of the opinion that addresses statements 9−11.

arrested Larson. Respondents, through KARE 11 and the St. Cloud Times newspaper, covered the press conference. KARE 11's 6 p.m. newscast stated, among other challenged statements, "Police say that . . . Ryan Larson . . . ambushed Officer Decker and shot him twice—killing him."

Larson sued respondents for defamation, identifying 11 different statements that he contended were defamatory. In five of these statements, respondents reported that police said or believed that Larson had killed Officer Decker.

Larson requested that the district court instruct the jury on defamation by implication as follows: "A statement or communication is also false if the implication of the statement is false." 4 Minn. Dist. Judges Ass'n, *Minnesota Practice—Jury Instruction Guides, Civil*, CIVJIG 50.25 (6th ed. 2014) (hereinafter CIVJIG 50.25). The district court denied this request.

The jury determined that the statements at issue were defamatory but not false. The district court, however, granted Larson's posttrial motion and held that the statements were false as a matter of law because the implication of the statements—that Larson killed Officer Decker—was false. The court also rejected respondents' argument that the fair and accurate reporting privilege immunized them from Larson's defamation claim. Thus, the district court determined that a new trial was required, to address the issues of negligence and damages. The court of appeals reversed, holding that the fair and accurate reporting

privilege applied to 8 of the 11 statements cited by Larson in his complaint, and thus the district court erred by granting a new trial. We granted Larson's petition for review.[2]

I.

I turn first to the question of the fair and accurate reporting privilege. We have discussed this privilege in only two cases, applying it in one case, *Moreno*, 610 N.W.2d at 334, and declining to apply it in the other, *Nixon v. Dispatch Printing Co.*, 112 N.W. 258, 259 (Minn. 1907). In both cases, we declined to apply the privilege broadly because to do so would undermine "[t]he constitutional guaranty to the citizen of a certain remedy for all wrongs." *See Nixon*, 112 N.W. at 258; *see also Moreno*, 610 N.W.2d at 331 (noting that a "narrow application" of the privilege balances its broad protection). The court ignores that caution today in favor of an expansive and limitless rule of privilege. At its outset, the fair and accurate reporting privilege was a narrow common law privilege designed to protect fair reporting on adversarial judicial proceedings; it had no application to reporting on law enforcement press conferences. Even if the privilege is to be expanded beyond the well-reasoned limits recognized at common law, as this court did in *Moreno*, a further expansion to encompass the circumstances here misunderstands our precedent. But even relying on the court's dubious expansion of the privilege, I would hold that the statements made were not "fair and accurate" as a matter of law.

[2] We also granted respondents' cross-petition on the question of whether their news reports were fair and accurate.

A.

I begin with the observation that the Minnesota Constitution *specifically* promises the residents of Minnesota the right to a remedy in our courts for damage to character. Minn. Const. art. 1, § 8 ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character . . . ."). That constitutionally mandated remedy for the wrong of libel or slander did not appear out of thin air. The common law, developed over hundreds of years, has long recognized a remedy for damage to reputation from defamation. *See* Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 Colum. L. Rev. 546, 547–61 (1903) (reviewing how early laws, including Roman, Christian, Germanic, and English law, protected a person's reputation); 1 William Blackstone, *Commentaries on the Law of England in Four Books* *134 (1753) ("The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled, by reason and natural justice; since without these it is impossible to have the perfect enjoyment of any other advantage or right."). Significant litigation vindicating an individual's right to protect reputation emerged as early as the seventeenth century. *See* Van Vechten Veeder, *supra*, at 559 (referencing several seventeenth-century cases); *see also Allen v. Pioneer Press Co.*, 41 N.W. 936, 938 (Minn. 1889) (acknowledging that the right at common law to protect one's reputation included the ability to bring an action to seek "damages to his standing and reputation"); *King v. Lake* (1670) 145 Eng. Rep. 552, 552–53 (providing an example of seventeenth-century common law refinement of defamation law by distinguishing between libel and slander). While a fair and accurate reporting privilege developed in

common law, the courts were mixed regarding whether the privilege extended beyond adversarial judicial proceedings to ex parte judicial hearings; what was clear was that some kind of judicial proceeding was required.[3] In accord with the common law, we held in *Nixon* that publishing the contents of a complaint was not an adversarial judicial proceeding and the publication was not protected by the fair and accurate reporting privilege. 112 N.W. at 258–59.

The right of a person "to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). Importantly, "[t]he protection of private personality, like the protection of life itself, is left primarily to

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[3] At common law, the fair and accurate reporting privilege was a limited privilege recognized only when reporting on judicial proceedings because these official proceedings provided inherent protections to others. A nineteenth-century Rhode Island case explained the rationale for this limited privilege:

> If a man has not the right to go around to tell of charges made by one against another, much less should a newspaper have the right to spread it broadcast and in enduring form . . . . When the charges come up for adjudication, however, although their publication may be as harmful and distressing to the person accused as if they had been published before their consideration by a court, a different rule applies. Individual feelings are no longer considered, for the reason, as stated by Judge Holmes: "It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself, with his own eyes, as to the mode in which a public duty is performed."

Metcalf v. Times Publ'g Co., 40 A. 864, 865–66 (R.I. 1898) (tracing the history of the fair and accurate reporting privilege from early English precedent through its adoption into United States jurisprudence).

the individual States under the Ninth and Tenth Amendments." *Id.* By extending the privilege, the court has deprived Larson of his historic right to seek justice from those who, in his view, have damaged his reputation.

B.

I acknowledge that we have already exceeded the bounds of common law when in *Moreno* we extended this privilege to legislative proceedings. 610 N.W.2d at 332–33 (extending the fair and accurate reporting privilege from judicial proceedings to include legislative proceedings based on "policy considerations"). It is not necessary to address the wisdom of that extension here in order to recognize that further expansion of the privilege is neither consistent with the history of defamation law nor wise under our existing jurisprudence.

The court grounds its application of the privilege in the Restatement (Second) of Torts, which describes this privilege as one protecting the fair and accurate "report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern." Restatement (Second) of Torts § 611 (Am. Law. Inst. 1977). But we have never fully adopted section 611 and a wholesale adoption of this Restatement section is inconsistent with our cautious approach to privileges in general and to this privilege in particular. *See Zutz v. Nelson*, 788 N.W.2d 58, 62 (Minn. 2010) (noting that an "[a]bsolute privilege is not lightly granted and applies only in limited circumstances"); *see also Moreno*, 610 N.W.2d at 332 (declining to adopt section 611 in full).

Other than referencing section 611, the court does not clearly articulate why the privilege applies here. The court states multiple times that the press conference was

"official" and that the agency's press release was "official," apparently because "officials" conducted the press conference and wrote the press release. Under that logic, the media has immunity to report on any press conference held by any government employee and the scope of the fair and accurate reporting privilege is effectively limitless. Because of the court's broad rule, any government official or employee will be able to call a press conference or disseminate a press release that defames private individuals and the press, with impunity, will be able to widely circulate that defamation. Such expansive immunity is flatly inconsistent with section 611 of the Restatement and with our own precedent.[4]

Section 611 itself is inconsistent with the court's expansive application of the privilege. Comment (h) to section 611 makes clear that "statements made by the police . . . as to the facts of the case or the 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." Restatement

[4] The court's rule will be difficult to implement. The rule requires courts to make ad hoc determinations on whether something is an "official action." Without any standards to anchor these decisions, courts must first decide what is, or is not, an "official duty" of a government employee. From there, courts must decide whether the government employee's speech was "official" speech undertaken to fulfill that duty. And in light of the court's decision today, it is hard to imagine what speech will not be deemed "official" if all a government employee must do is call a press conference or publish a press release. This rule is unreasonably broad and has the potential to swallow all of the carefully crafted privileges and defenses that currently exist in the law of defamation. Moreover, with the rise of the Internet, which defendants are "media" and therefore qualify for this reporting privilege will be difficult to determine with any certainty. *See Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 876 (Minn. 2019) (acknowledging a defendant's argument, although finding it nondispositive, that "determining who qualifies as a member of the media has become untenable with the rise of the internet and the decline of print and broadcast media").

(Second) of Torts § 611 cmt. h. Consistent with the comment to section 611, the privilege should not apply here.[5]

The court's expansive new rule is also inconsistent with our precedent. The court, relying on *Moreno*, concludes that the privilege applies because the press conference was a meeting open to the public that deals with matters of public concern. But state law required the city council meeting at issue in *Moreno* to be open to the public. *See* Minn. Stat. § 13D.01, subd. 1(b)(4)–(5) (2018) (requiring that meetings of governing bodies of cities and towns be open to the public). There is no statute that requires police to hold press conferences or issue press releases.

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[5] The court states that to the extent we cited comment (h) favorably in *Moreno*, our reference has little utility in determining when the fair and accurate reporting privilege applies because we were using it to explain only how that privilege can be defeated. This distinction misapprehends our discussion in *Moreno*. Although we explained ways in which the fair and accurate reporting privilege can be defeated, we specifically discussed the problem that arises when reporters include "additional contextual material, not part of the proceeding" in their reports. *Moreno*, 610 N.W.2d at 333. Because this material is not covered by the privilege, the use of this additional material can defeat an otherwise privileged report. *Id.* As an example of such additional material *not covered by the privilege*, we included statements by the police about the facts of a case that are not yet part of a judicial proceeding. *Id.* To be additional contextual material, a statement first must be outside the privilege. Thus, this discussion was as much a comment on the inapplicability of the fair and accurate reporting privilege to police statements like the ones at issue in this case as it was about ways in which the privilege can be defeated.

The court also contends that *Moreno* contradicts the limits of comment (h) because, in that case, a citizen's accusation that a specific person had committed criminal activity was privileged even though judicial proceedings were not underway. But the fair and accurate reporting privilege is not concerned with the identity of the first speaker. Instead, it applies to *reports* from public proceedings. Accordingly, the citizen's statements in *Moreno* were protected because they were made as "part of the regular business of a city council meeting." *Id.* But the law enforcement statements *about* the citizen's statements were outside the privilege because law enforcement's statements were not made as part of a privileged proceeding. *Id.* at 334.

Moreover, that a government employee chooses to make something public cannot be the basis for extending a near-absolute immunity to media who report on that publication.[6] In *Moreno*, for example, the fact that the police chief spoke to the media and that the media reported on the police chief's statements did not entitle the media to the privilege for reporting on the chief's statements. We limited the privilege only to the "report on the events of the city council meeting." *See* 610 N.W.2d at 334. *Moreno*, therefore, does not support the court's rule.

The court's broad application of the privilege also conflicts with *Nixon*. In *Nixon*, the question was whether the fair and accurate reporting privilege applied to immunize

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[6] The court bases its extension of the privilege on its concern for a situation where the media has less protection from liability than the government official on whom the media is reporting. I am not at all troubled by this result and do not find it inconsistent as the court does. The court's reliance on *Carradine v. State* and *Johnson v. Dirkswager* misunderstands our reasoning for extending absolute immunity to certain actions of public officials. As we concluded in *Carradine*:

> [T]he purpose of extending absolute immunity to an officer performing a certain governmental function is not primarily to protect the officer personally from civil liability (although that is the effect of absolute immunity). Rather, the rationale is that unless the officer in question is absolutely immune from suit, the officer will timorously, instead of fearlessly, perform the function in question and, as a result, government—that is, the public—will be the ultimate loser.

511 N.W.2d 733, 735 (Minn. 1994).

Absolute privilege and the fair and accurate reporting privilege serve different purposes, and there is nothing inconsistent about extending one and not the other. Further, the court's rule does not even resolve the purported inconsistency. Our decision in *Johnson*, that a high-level state official "has an absolute privilege, in the performance of his official duties, to communicate defamatory material" does not also support the court's broad application of the privilege. *Johnson v. Dirkswager*, 315 N.W.2d 215, 223 (Minn. 1982). In *Johnson*, a privilege applied because state law required that the reasons for the employer's termination decision be made public. *Id.* There is no such statutory mandate in this case.

reporting by the media on accusations made in a complaint that was filed in court. 112 N.W. at 258. Obviously, the complaint was public because it had been filed in court. *Id.* (noting that "by virtue of . . . statute the clerk must exhibit the [complaint] in his office for the inspection of any person"). But we held that the unilateral decision of a plaintiff to file a complaint did not clothe the media with immunity to publish the allegations. *Id.* at 258–59. Rather, we held that, for the privilege to apply, there needed to be a "judicial proceeding," and before there would be a "judicial proceeding," there needed to be a matter "under the control of the judge, where both sides may be heard. *Id.* at 259. A fair report of such a proceeding would include the claims of all parties as made in court." *Id.* at 258–59. Under the circumstance in *Nixon*—where the complaint had "never been presented to the court for its action"—the privilege did not apply. *Id.* Consistent with *Nixon*, the unilateral decision of law enforcement to hold a press conference and issue a press release does not provide immunity to the media to publish defamatory statements made at that press conference or in that press release.[7]

The court concludes, however, that the privilege applies here because the subject discussed at the press conference involved a matter of public concern. And the court repeatedly invokes the values of the First Amendment and principles of government accountability to support its conclusion that the media has immunity here. These values

[7] Unable to square its rule with *Nixon*, the court casts *Nixon* aside as an old case, then casts *Moreno* aside because "*Moreno* recognized [that] *Nixon* provides little guidance." In fact, *Moreno* relied on the analysis in *Nixon* to conclude that the privilege should apply. *Moreno*, 610 N.W.2d at 332 ("The same policy considerations found in *Nixon* support extending that privilege to fair and accurate reports of legislative proceedings as well, including city council meetings.").

and principles have little to do with the facts here. Importantly, the media here did not report about government misconduct or defame a government employee. This case is about a private citizen who was falsely accused by certain media representatives of shooting and killing a police officer. But the court does not explain just exactly how the First Amendment is served by extending immunity to the press for making false accusations.[8]

Certainly, the murder of a police officer and the expenditure of public funds to investigate that crime are a matter of public concern. But the identity of the person who is the focus of the police investigation cannot be said to be of sufficient public concern to warrant the application of the immunity the media seeks here. *See Rouch v. Enquirer & News of Battle Creek, Mich.*, 357 N.W.2d 794, 801 (Mich. Ct. App. 1984) ("[T]here is an important distinction between matters which truly promote the public interest and matters which are merely interesting to the public."), *aff'd*, 398 N.W.2d 245 (Mich. 1986), *superseded by statute as recognized in Northland Wheels Roller Skating Ctr., Inc. v. Detroit Free Press, Inc.*, 539 N.W.2d 774, 779 (Mich. Ct. App. 1995). The court does not and could not demonstrate otherwise because any public interest is satisfied when law enforcement informs the public that a suspect is in custody or that there is no reason to believe that anyone else is in danger. Law enforcement routinely issues such statements without revealing the identity of the suspect or the details of the crime.

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[8] One of the cases the court cites, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), shows that the court's reliance on First Amendment principles is misplaced. There, the media published the name of a rape victim, which the media was able to obtain because the victim's name was in a court filing in a pending and public criminal case. *Id.* at 471−73. Here, by contrast, there was no pending criminal case because no criminal charges were ever filed.

Further, there is no public policy, compelling or otherwise, that requires us to extend the privilege this far. In fact, privileging the dissemination of this kind of defamation is antithetical to the constitutional guarantees of a fair trial. *See* U.S. Const. amend. XIV, § 1; Minn. Const. art. 1, § 6. Law enforcement press conferences and news releases of this sort have substantial potential "to prejudice those whom the law still presumes to be innocent and to poison the sources of justice." *Lancour v. Herald & Globe Ass'n*, 17 A.2d 253, 259 (Vt. 1941). This cost outweighs the public's appetite for information about the commission and investigation of crime before judicial proceedings have been initiated. *Cf. McAllister v. Detroit Free Press Co.*, 43 N.W. 431, 437 (Mich. 1889) ("It is indignity enough for an honest man to be arrested and put in prison for an offense of which he is innocent, . . . without being further subjected to the wrong and outrage of a false publication of the circumstance of such arrest and imprisonment, looking towards his guilt, without remedy.").[9]

This is not to say that reports of law enforcement press conferences and press releases can never be privileged. As the court posits, there might be a situation where "a suspected criminal remains at large" and a press conference is held "to caution the public and solicit pertinent information." A qualified privilege likely extends to such a press

[9] The court admits that tension *may exist* in some cases between protecting freedom of the press and preserving an unbiased jury pool. Here, the record shows that at least 95,000 households likely viewed the 6 p.m. broadcast and at least 125,000 households likely viewed the 10 p.m. broadcast that accused Larson of killing a police officer and, of course, the only daily newspaper in St. Cloud also accused him of murdering a police officer. It can be safely said that the court's understated observation about "tension" is accurate, to say the least.

conference. *See Bol v. Cole*, 561 N.W.2d 143, 150 (Minn. 1997) (extending a qualified privilege to an accusation of child abuse published in an effort to prevent further harm). Further, the commission and investigation of a crime is a matter of public concern. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public . . . ."); *Jacobson v. Rochester Commc'ns Corp.*, 410 N.W.2d 830, 832, 836 n.7 (Minn. 1987) (noting that news reports about a criminal trial and the out-of-court activities of the accused were matters of public concern). Thus, if the press republish police statements about the commission and investigation of a crime, defamed citizens will need to prove that the press was negligent to make a prima facie case, *Jadwin*, 367 N.W.2d at 491, and must prove actual malice to recover presumed or punitive damages, *see Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 878–79 (Minn. 2019).

The court dismisses these protections out of concern for the media having to bear the costs of litigation and the possibility that such costs could deter the media from investigating "controversial subjects or even official misconduct." Of course in this case, the media was not deterred from its reporting even though we had not yet extended the privilege the court recognizes today and the court is resolutely silent on the financial burden on Larson associated with his attempts to restore his shattered reputation. Moreover, completely absent from the court's evaluation is any consideration of the reputational interests of the private citizen who was harmed here.

As we recognized in *Jadwin*, the very case the court cites, private citizens are "deserving of recovery" and they "ordinarily have little to no media access to rebut alleged libelous charges." 367 N.W.2d at 491. And because a private citizen's "sole means to vindicate his or her reputation may be [a] judicial determination that the injurious statement is in fact false," we declined to adopt a fault standard that would "go too far in extinguishing the only protection a private individual may invoke." *Id.* I would follow this same path here. Given the other protections that our law already provides to the media, the reduced public interest, and the important reputational interests at stake, I would not extend the fair and accurate reporting privilege to law enforcement press conferences and press releases.[10]

[10] The court concludes that extending the privilege to law enforcement press conferences and press releases will allow the public to hold the government accountable and oversee the performance of public officials and institutions. This is unpersuasive. Although media reports may facilitate communication between state officials and the public, while also allowing the public to assess the quality of state officials' responses to a public safety emergency, these interests are satisfied by reporting that a suspect is in custody. To do more, to identify that suspect before he faces criminal charges, is entirely unnecessary to the articulated goals. Moreover, it is hard to imagine how the restrained statements such as those made at the press conference here will allow the public to monitor any wrongdoing by the police or a lack of integrity in the criminal justice system.

Other laws aimed at transparency and accountability of law enforcement—and the criminal justice system as a whole—are better tools to achieve this goal. *See, e.g.*, Minn. Stat. §§ 13.82 (defining categories of law enforcement data as private, confidential, or open to the public, and describing procedures to make this data available if applicable), 299C.18 (mandating that the Bureau of Criminal Apprehension submit a biennial report to the Governor and the Legislature detailing the operations of the bureau), 626.8459(a) (mandating that the Peace Officer Standards and Training Board conduct reviews on all state and local law enforcement agencies to ensure compliance with statutes and rules, and that the board report detailed information about those reviews to the Legislature) (2018); Minn. R. Pub. Access to Recs. of Jud. Branch 2 (setting out rules for public access to records of the judicial branch, with the presumption that the records of all courts are "open to any member of the public for inspection or copying" unless an exception in the rules applies or a court orders otherwise); Minneapolis, Minn. Police Department Pol'y & Proc.

II.

I would not apply the privilege here. Rather, I would reach the same conclusion that the district court reached; that is, that statements one through eight are false as a matter of law. The dispositive question is whether the reports about the November 30 law enforcement press conference made during KARE 11's evening news broadcasts and published the next day in the St. Cloud Times communicated to the viewer or reader the same meaning that someone who actually attended the press conference would have taken away from the press conference. After comparing the undisputed statements made at the press conference and the undisputed reports by respondents, I conclude that the answer to that question as a matter of law is "No." Thus, I would remand to the district court for the sole purpose of determining the negligence of respondents and the damages that respondents must pay to compensate Larson, as the district court properly required under its posttrial order.[11]

A.

When analyzing defamation claims, we must carefully balance two competing values: (1) "the right to speak freely about issues of concern" and (2) an individual's right

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Manual § 4-223 (2018) (regulating and requiring the use of body cameras in certain situations).

Finally, I disagree with the court's assertion that it makes "no sense" not to immunize the media because the media was not responsible for the "original message." Why this should matter, the court does not explain. In any case, not only was the media in control of the dissemination of the message that Larson shot and killed a police officer, as I explain later, those statements also were not the "original message."

[11] The same analysis would lead me to conclude that even if the privilege applied, it would not protect the media here because their reporting was not fair and accurate.

to protect his or her reputation, which "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Maethner*, 929 N.W.2d at 891 (Thissen, J., dissenting) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)). This same balancing of interests is critical whether the alleged defamer is an individual passing rumors on the street corner or a large media company communicating with many viewers or readers. Indeed, our concern about damage to reputation should be heightened when the alleged defamer can reach tens of thousands of viewers.[12]

In *McKee v. Laurion*, we adopted the following test for whether a statement about what someone else said or wrote is false:

> If the statement is true in substance, minor inaccuracies of expression or detail are immaterial. Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge is justified. A statement is substantially true if it would have the same effect on the mind of the reader or listener as that which the pleaded truth would have produced.

825 N.W.2d 725, 730 (Minn. 2013) (citations omitted) (internal quotation marks omitted).

Two key principles emerge from this test. First, we may overlook only "minor" inaccuracies. *Id.* (citing Restatement (Second) of Torts § 581A cmt. f (Am. Law. Inst. 1977) ("*Slight* inaccuracies of expression are immaterial provided that the defamatory

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[12] It is notable that most news outlets in the Twin Cities follow the commendable rule that the names of persons alleged to have committed crimes are not released until the person is actually charged with the crime. For reasons about which one can only speculate, respondents chose not to follow that general practice when reporting on the murder of Officer Decker. Certainly, a primary public purpose of the law enforcement press conference—to reassure the local community that the police were actively and diligently investigating the crime and that a potential shooter had been apprehended—did not require respondents to report Larson's name.

charge is true in substance." (emphasis added))). Second, when comparing an allegedly defamatory statement with a statement that differs from the actual statement made by the speaker, the focus is not on the difference in the words of the statements themselves, but on the meaning communicated by those words. *Id.* at 730–31. The substance of the *meaning* of the alleged defamatory statement must be the same—must communicate the same notion—as the actual statement. *Id.* at 730; *see Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (stating that falsity is judged by whether changes in a statement "result[] in a material change in the meaning conveyed by the statement").

In *McKee*, a doctor sued for defamation when a patient's son posted statements about the doctor on the Internet. 825 N.W.2d at 728. Our analysis of those statements illustrates that the critical inquiry is whether the meaning communicated by the alleged defamatory statement and the actual statement is the same.

First, the son claimed that the doctor had told the patient and his family that the doctor had "spen[t] time finding out if you transferred or died." *Id.* at 730. The doctor testified that he had made a joke that he was glad to find the patient in a regular hospital bed because "you only go one of two ways when you leave the intensive care unit; you either have improved to the point where you're someplace like this [a regular bed] or you leave because you died." *Id.* We concluded that, because both statements "communicate the notion that patients in the intensive care unit who have suffered a hemorrhagic stroke leave the intensive care unit either because they have been transferred to a regular room or they have died," the substance communicated by the alleged statement and the actual statement was the same. *Id.* at 730–31.

Second, the son alleged that the doctor told the family that "44% of hemorrhagic strokes die within 30 days. I guess this is the better option." *Id.* at 729. The doctor acknowledged that, although he told the family that some ICU patients die, he denied referencing the specific percentage. *Id.* at 731. We held that the mention of the percentage was irrelevant because the point of the communication—its "gist or sting"—was mentioning to a worried family that hemorrhagic stroke patients die. *Id.* at 730. In that context, both the alleged statement with the percentage and the actual statement communicated the same meaning. *Id.* Accordingly, we concluded that the statement as alleged was not false.

Third, the son alleged that the doctor said it "doesn't matter" that the patient's gown did not cover his backside. *Id.* at 731. The doctor claimed that he told the patient that the gown "looks like it's okay." *Id.* Because "[c]ommenting that the gown 'looks like it's okay' is another way of communicating that 'it didn't matter' that the gown was not tied in the back," we held that "any inaccuracy of expression does not change the meaning of what [the doctor] admits to having said." *Id.* Consequently, we determined that the statement was not actionable. *Id.*

This focus—measuring falsity based on the *meaning* communicated by the statement—is also illustrated by *Lewis v. Equitable Life Assurance Society of the U.S.*, 389 N.W.2d 876 (Minn. 1986). In *Lewis*, terminated employees sued an employer who had fired them for "gross insubordination." *Id.* at 880. The former employees alleged that they were forced to republish to prospective employers that they had been fired for "gross insubordination" even though (the former employees contended) they had not been grossly

insubordinate. *Id.* at 882. The employer argued that the district court erred by holding the employer liable for defamation because the statement that the former employees made—that they had been fired for gross insubordination—was true. *Id.* at 886. We disagreed and held that the falsity of a statement must be judged based on the "underlying implication of the statement"—in other words, the meaning communicated by the statement. *Id.* at 889. Accordingly, the former employees were not barred from recovering defamation damages if the underlying statements—that the former employees actually engaged in gross insubordination—were false. *Id.* at 888–89; *see generally* Minn. Dist. Judges Ass'n, CIVJIG 50.25.

The test that we have applied in *McKee* and *Lewis* accords with the United States Supreme Court's decision in *Masson*, 501 U.S. at 516–17. There, and as relevant here, the Supreme Court expressly rejected a looser "rational interpretation" theory of similarity between an alleged statement and an actual statement. *Id.* at 518–20. Under this theory, an "altered quotation is protected [from defamation liability] so long as it is a 'rational interpretation' of an actual statement." *Id.* at 518. The Supreme Court explained that this "interpretive license" is necessary when an author relies "upon ambiguous sources." *Id.* at 519. But when the author of a statement seeks to convey what a speaker said through quotations, the author cannot take interpretative license—offer a "rational interpretation"—of what the author thought the speaker really meant. *Id.* at 519–20. "Were we to assess quotations under a rational interpretation standard, we would give journalists the freedom to place statements in their subjects' mouths without fear of liability." *Id.* at

520. And that, the Supreme Court reasoned, would be bad for journalism and for the values that the First Amendment seeks to protect:

> By eliminating any method of distinguishing between the statements of the subject and the interpretation of the author, we would diminish to a great degree the trustworthiness of the printed word and eliminate the real meaning of quotations. Not only [the subjects of defamatory statements,] but the press doubtless would suffer under such a rule. Newsworthy figures might become more wary of journalists, knowing that any comment could be transmuted and attributed to the subject, so long as some bounds of rational interpretation were not exceeded.

Id.

In summary, a report of what someone else said is true, for defamation purposes, when (laying the report and the statement side by side) the report contains only minor or slight differences from, and, more critically, communicates the same meaning as, the statement itself.[13]

B.

With these principles in mind, I turn now to the actual statements made at the press conference and in the press release, then compare those statements to the defamatory statements broadcast and published by respondents.

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[13] The current jury instruction, as prepared by the Minnesota District Judges Association, CIVJIG 50.25, provides: "A statement or communication is false if it is not substantially accurate. Substantial accuracy does not require every word to be true. A statement or communication is substantially accurate if its substance or gist is true." I am not sure that the words "substance" and "gist" provide much clarity to jurors, and thus I agree with the court that a clarifying instruction, perhaps drawing from *McKee*, may be useful to jurors.

The Press Conference

On November 30, law enforcement officers from the Stearns County Sheriff's Office, the Minnesota Bureau of Criminal Apprehension (BCA), and the Cold Spring Police Department held a press conference about the shooting. The Sheriff started with a description of the incident. He noted that Officer Decker was responding to a call that Larson was potentially suicidal. He stated: "[W]hen 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." The Sheriff did not identify Larson as the "armed individual."

A deputy superintendent from the BCA spoke next. He noted that the Sheriff's Office took the subject of the welfare check (Larson) into custody. He stated: "After that occurred, he was interviewed by Stearns County deputies, and *some of that investigation is still ongoing*." (Emphasis added.) The BCA representative further stated:

- "Members of the BCA crime scene have processed the crime scene, and that's still in process right now, gathering evidence related to this investigation."

- "We have agents and deputies from the Stearns County Sheriff's Office, along with other police personnel in the area, conducting follow-up investigation and interviews . . . around the entire state of Minnesota at this time."

- "[T]his is an active and ongoing investigation. We'll continue to follow up to determine exactly what happened in this incident. And, as we noted, . . . Ryan Larson was taken into custody and booked into the Stearns County jail in connection with this incident."[14]

[14] The Minnesota Department of Public Safety issued a news release on November 30 as well. The news release stated: "We're still in the very early stages of this ongoing and active investigation" and reported that, earlier in the morning of November 30, Larson had been taken into custody and booked into Stearns County Jail on murder charges.

After the Cold Spring Police Chief spoke about Officer Decker, the three law enforcement officers took questions from reporters. In response to questions about investigators "walking out near the river," the BCA representative emphasized "that's part of the active and ongoing investigation. All I'll say is that it's an active crime scene and that we're . . . looking for and gathering evidence related to this crime right now." Significantly, when asked if there was any reason to believe that there might be other individuals involved, the BCA representative reinforced that "we don't have any information to believe that at this time, but it's in early stages of the investigation. We continue to follow up on all leads."

In response to questions about a weapon and where Larson was when he shot at Officer Decker, the BCA representative refused to confirm any details or even that Larson was the shooter, stating each time that he could not "discuss" or "comment" on an active investigation: "[A]gain, that's part of an active crime scene, and we just, we can't discuss the details of the active crime scene at this time." When asked about the reports that Larson was suicidal, the Sterns County Sheriff stated, "Again, it's far too early in the investigation to make a comment in reference to that."

Finally, reporters asked the law enforcement officers whether Officer Decker had a partner with him when he arrived on the scene. The BCA representative responded that Officer Decker "was with a partner when he was shot. And, you know, what I can say about this from our preliminary investigation . . . it's apparent to us that the officer was ambushed at the scene." After another two questions, the Sterns County Sherriff ended the press conference, observing that "it wouldn't be prudent for us to comment any further on this."

In summary, the law enforcement officers stated no fewer than 13 times over the course of a short press conference that the investigation was active and ongoing, preliminary and in its early stages, and in process. Not once during the press conference did any law enforcement officer state that Larson ambushed, shot, or killed Officer Decker. Not once during the press conference did any law enforcement officer state that Larson had been charged in the murder of Officer Decker. Not once during the press conference did any law enforcement officer accuse Larson of killing Officer Decker.

KARE 11 Television News Coverage

KARE 11 began its 6 p.m. broadcast as follows:

> Condolences are pouring in tonight for the family of the Cold Spring Police Officer who died in the line of duty, Tom Decker. 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.

Later in the broadcast, the KARE 11 news anchor once again described Larson as "the man accused of killing Officer Decker."

KARE 11 again began its 10 p.m. broadcast with the story of Officer Decker's murder:

> The body of Cold Spring Police Officer Tom Decker is being guarded around the clock until his funeral. A preliminary autopsy shows Officer Decker died of multiple gunshot wounds. Investigators say 34-year-old Ryan Larson ambushed the officer, shooting him twice. Larson is in custody.

The broadcast then switched to a reporter at the scene. After showing part of the interview with Officer Decker's mother, the reporter said that 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." The broadcast then returned to the mother, who speculated that Larson's mind was messed up. A bit later, the broadcast returned to the station and the anchor stated, "Charges could be filed as early as Monday against Ryan Larson, the man accused of killing Officer Decker," and followed with a description of Larson's criminal history and status as a machine tool student at St. Cloud Technical & Community College.[15]

St. Cloud Times Reporting

On December 1, the St. Cloud Times understandably devoted significant coverage to the killing of Officer Decker, as well as to the investigation. In one story titled "Man faces murder charge," the paper reported that "Ryan Michael Larson, 34, is in Stearns County Jail and faces possible murder charges of second-degree murder. Police say Larson is responsible for the shooting death of Cold Spring-Richmond Police Officer Tom Decker."

C.

I agree with the court that the same test applies when analyzing whether a statement is "fair and accurate" for purposes of the qualified fair and accurate reporting privilege or whether a statement is false for purposes of the proving the essential elements of a defamation claim. In both cases we compare what was reported to have been said with what was actually said. But in a typical defamation case, we compare the defendant's

[15] KARE 11 also posted a story on its website. The story states that a man was being "held on suspicion of second degree murder in the alleged ambush of a Cold Spring police officer" and that "[i]nvestigators believe he fired two shots into Cold Spring police officer Tom Decker, causing his death."

report on what a plaintiff allegedly said and what the plaintiff actually said, while the statements compared in a qualified fair and accurate reporting privilege case are the reports about a statement made *about* the plaintiff by a third party and what the third party actually said. *Compare McKee*, 825 N.W.2d at 730–31 (comparing statement of alleged defamer with actual statement of plaintiff), *with Moreno*, 610 N.W.2d at 331 (stating that focus is on the accuracy with which the statement of a third party is reported). This difference matters because the qualified fair and accurate reporting privilege may protect the reporter from liability even if the underlying third-party statements about the plaintiff are false. The underlying inquiry in both cases—whether the second, reported statement communicated the same meaning as the actual statement (whether made by the plaintiff or by a third party about the plaintiff)—is the same.

In this case, then, our inquiry is whether respondents' reports about the law enforcement press conference communicated the same meaning that someone who actually attended the press conference would have taken away from the press conference.

A person attending the press conference would have fairly concluded that law enforcement was in the midst of an active, ongoing, and early-stages investigation. The person would have learned that Larson had been arrested as a suspect in the murder that was under investigation. But nothing about what law enforcement said at the press conference supports the takeaway that law enforcement had determined that Larson ambushed, shot, and killed Officer Decker or that law enforcement was accusing the as-yet uncharged Larson of doing so. Certainly law enforcement never said anything close to those things. Indeed, when asked about the possibility of another shooter, law enforcement

expressly cautioned that "we don't have any information to believe that at this time, but it's in early stages of the investigation. We continue to follow up on all leads."

The same person watching KARE 11 that night would have reached a much different conclusion. The viewer would have come away with the clear impression that law enforcement accused Larson of the shooting. The viewer was told that law enforcement stated that Larson "ambushed Officer Decker and shot him twice—killing him" and that Larson "opened fire on Officer Tom Decker for no reason anyone can fathom." Similarly, a person reading in the December 1 St. Cloud Times that "[p]olice say Larson is responsible for the shooting death of Cold Spring-Richmond Police Officer Tom Decker" would have come to the same impression: that law enforcement stated that Larson was the shooter.

We have decided questions of falsity as a matter of law where the content of an alleged defamatory statement and an actual statement is undisputed. *See McKee*, 825 N.W.2d at 730–31. There is no disputed material fact about the content of the press conference, the broadcasts, or the newspaper article. The statements made by law enforcement at the November 30 press conference objectively communicated a much different meaning and narrative than the story told to viewers of KARE 11's November 30 news broadcast and the readers of the December 1 St. Cloud Times. Therefore, I conclude that KARE 11's statements made during the 6 p.m. and 10 p.m. broadcasts on November 30 and the statement in the St. Cloud Times article published the next day did not communicate the same meaning as the press conference as a matter of law.

A free and robust press that is motivated to inform and educate the public about important public matters is undoubtedly critical to our democracy, and a broad cushion around the press is necessary to accomplish that end. But we also expect the press to act responsibly in how it conducts its work. That did not happen here. Accordingly, I would hold that, even if a qualified fair and accurate reporting privilege applies to the November 30 press conference, respondents are not entitled to the protection of the privilege because their reports were not "fair and accurate." For the same reasons, I would hold that the reports by respondents were false as a matter of law because they did not communicate the same meaning that law enforcement conveyed at the press conference.

Accordingly, I would remand to the district court for the sole purpose of assessing whether the media companies were negligent in their reporting and, if so, the damages that Larson suffered as a result of respondents' defamatory statements.

GILDEA, Chief Justice (concurring in part, dissenting in part).

I join in the concurrence and dissent of Justice Anderson.