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Torts: Sacrificing Individual Recovery for Media Protection—Larson v. Gannett Co., 940 N.W.2d 120 (Minn. 2020)

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TORTS: SACRIFICING INDIVIDUAL RECOVERY FOR MEDIA PROTECTION—*LARSON V. GANNETT CO.*, 940 N.W.2D 120 (MINN. 2020).

Rachel Lantz[‡]

I. INTRODUCTION

Imagine a scenario in which a city is in unrest; a man has been killed at the hands of police officers, so protestors have been filling the streets for days, demanding change.[1] In the midst of a protest, a semi-truck enters a closed road and barrels through thousands of protestors. The driver is taken into custody. Law enforcement officers hold an impromptu press conference to inform the city, although the conference is closed to the public because of a global pandemic. In the press conference, the officers state that a man has been taken into custody for swerving into the crowds, and he has ties to a right-wing extremist group; however, the investigation is ongoing. The media promptly reports on these official statements to amplify this relevant government investigation to the public. Once the man is released from custody, he wants to sue the media for defamation—he is not a member of a right-wing extremist group, and the collision was an accident. Should the media be liable for reporting the officials' defamatory statements, especially those of public concern? Before the Minnesota Supreme Court extended the fair and accurate reporting privilege to cover official news conferences in *Larson v. Gannett Co.*,[2] media organizations could have been liable just for republishing the officers' defamatory statements.[3]

What if, instead of just republishing the officers' statements, the

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[1] This imaginary scenario is based on real events that occurred in summer 2020 in Minneapolis, Minnesota. However, there was never a press conference in which officers made defamatory statements about the semi-truck driver. *See* Pam Louwagie & Jessie Van Berkel, *Tensions on Streets Slowly Ebb in Wake of George Floyd's Death*, STAR TRIB. (June 2, 2020), https://www.startribune.com/tensions-on-streets-ebb-in-wake-of-george-floyd-s-death/570942192/ [https://perma.cc/37BM-GTAD] (explaining the killing of George Floyd and resulting protests); *see also Tanker Truck Drives Into Minneapolis George Floyd Protestors on I-35W Bridge; Driver in Custody*, CBS MINN. (May 31, 2020), https://minnesota.cbslocal.com/2020/05/31/breaking-semi-truck-appears-to-drive-through-protest-marchers-on-i-35w-bridge/ [https://perma.cc/CVS6-HFT2].

[2] 940 N.W.2d 120 (Minn. 2020).

[3] *Id.* at 132 (noting that extending the fair and accurate reporting privilege to official law enforcement news conferences and official press releases is an issue of first impression in Minnesota).

media reported that the man was not only brought into custody, but was also arrested and charged because he intended to run over the protestors? That exaggerated report, while loosely based on information garnered from the news conference, would not be a fair and accurate representation of the officers' statements. Should the report still be privileged? If not, how should the court determine when exaggerations go too far? The *Larson* court had to grapple with these exact questions as they established a new inquiry to determine whether a report is fair and accurate.[4]

Larson is a case about defamation, an individual's ability to recover, and the power of the media. In this case, the Minnesota Supreme Court extended the fair and accurate reporting privilege—for the first time—to protect media publications "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."[5] This privilege relieves a media company of liability for publishing defamatory statements spoken by officials.[6] The power of this privilege is both encouraging and frightening. On one hand, protecting the media from liability may serve public interest by advancing and unveiling corrupt government practices. On the other hand, if not contained, this privilege may advance the media's ability to report disinformation without repercussion. Even worse, the privilege could prevent individuals from recovering for their damaged reputation—a right guaranteed by the Minnesota Constitution.[7]

This Paper begins with an explanation of the origins of defamation law and the fair and accurate reporting privilege, and it presents the factual and procedural history of the *Larson* case. The Analysis argues that the court correctly extended the privilege's scope per precedent and policy and established a comprehensive test that theoretically balances an individual's and the media's conflicting interests. However, by remanding the case, there remains a lack of clear boundaries concerning what constitutes a fair and accurate report.[8] While the court reasonably protected the media for public benefit, an individual's ability to recover for his or her tarnished reputation may have been diminished.

II. HISTORY

A. Origins of defamation law and privileges

The tort of defamation allows a plaintiff to recover against a person

[4] *Id.* at 133.
[5] *Id.*
[6] *Id.*
[7] *See* MINN. CONST. art. I, § 8.
[8] *See Larson*, 940 N.W.2d at 143.

who published false statements injuring the plaintiff's reputation.[9] English common law originally imposed strict liability against those who published defamatory statements of another.[10] The common law rule of republication holds publishers liable because "tale bearers are as bad as tale makers."[11]

The development of privileges helped eliminate the harsh sting of defamation liability.[12] Absolute privileges have generally attached to specific governmental proceedings to encourage people to speak freely without fear of liability.[13] Conditional or qualified privileges protect speech that deserves some immunity, but the protection may be forfeited if the privilege is abused.[14] The fair and accurate reporting privilege is a qualified privilege that can shield the press from defamation liability.[15]

B. Development of the fair and accurate reporting privilege in common law and constitutional law

The fair and accurate reporting privilege originated as an exception to the common law rule of republication, creating a common law qualified defense.[16] With the fair and accurate reporting privilege, a publisher could repeat defamatory statements made by others without liability.[17] Because the privilege protects those who publish defamatory statements, the underlying substance of the defamatory statement is not at issue. Instead, the privilege is upheld if the publisher's summary of the defamatory statement is fair and accurate.[18]

This privilege also has a constitutional source that originated when the Supreme Court articulated First Amendment free speech implications in defamation suits.[19] The Supreme Court rulings in *New York Times Co. v. Sullivan* and *Gertz v. Robert Welch, Inc.* constitutionally protected the

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[9] *See* Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 480 (Minn. 1985).
[10] *See* Moreno v. Crookston Times Printing Co., 610 N.W.2d 321, 328 (Minn. 2000); *see also* Michael C. Cox & Elizabeth M. Callaghan, *To Be or not to Be, Malice is the Question: An Analysis of Nebraska's Fair Report Privilege from a Press Perspective*, 36 CREIGHTON L. REV. 21, 23 (2003).
[11] *See* Cox & Callaghan, *supra* note 10, at 21.
[12] *See id.*
[13] RODNEY A. SMOLLA, 1 RIGHTS AND LIABILITIES IN MEDIA CONTENT: INTERNET, BROADCAST, & PRINT § 6:73 (2d ed.) (2020).
[14] *Id.*
[15] *See* Cox & Callaghan, *supra* note 10, at 27.
[16] *See* SMOLLA, *supra* note 13, at § 6:73.
[17] *Id.*
[18] *Id.* § 6:83.
[19] New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964); *see also* Cox & Callaghan, *supra* note 10, at 21.

media's right to discuss public officials and figures.[20] In *Sullivan*, the First Amendment protected a newspaper that published an editorial critiquing a public official in his official capacity.[21] *Sullivan* created an "actual malice" standard that required a public official to prove a defamatory statement was made with knowledge or reckless disregard of falsity to recover for defamation.[22] This test helped "protect the enterprise of news reporting from the chilling effects of defamation suits."[23] As a result, *Sullivan* protects false reports about public officials published without actual malice.[24] *Sullivan* made falsity an element of the plaintiff's prima facie case so that plaintiffs have the burden to prove the inaccuracy of defendants' statements.[25] This landmark case protected the press's freedom to report on public officials.[26]

Gertz clarified that private individuals could prevail "on a less demanding showing than that required by *New York Times*," recognizing that private individuals have a greater interest in protecting their reputation than those who place themselves in the public eye.[27] *Gertz* also clarified that states may decide the liability standard for publishers of defamatory information regarding private individuals, as long as they do not impose strict liability or violate First Amendment considerations.[28] This case recognizes the two opposing interests in *Larson*: a private person's ability to recover from a defamatory statement and the press's free speech in reporting on official reports, regardless of its defamatory nature.[29] In doing so, the *Gertz* Court suggested a private individuals' right falls between the harsh, strict liability imposed at common law and the heightened "actual malice" standard required by *Sullivan* for public officials.[30] In recognizing the press's need to speak freely, the *Gertz* Court ensured the press had "the 'breathing space' essential to [its] fruitful exercise."[31] *Gertz* recognizes a minimum threshold of liability, compelled by the First Amendment, by requiring that states not impose defamation fault without liability.[32]

The Supreme Court has provided minimum constitutional guidance for states imposing defamation liability standards. *Philadelphia*

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[20] *See Sullivan*, 376 U.S. at 279 (allowing the press a right to freely discuss public officials by requiring a showing of malice to prove defamation); Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974) (differentiating the defamation standard of *Sullivan* for private individuals).
[21] *Sullivan*, 376 U.S. at 282–83.
[22] *Id.* at 281–82.
[23] *Id.* at 282.
[24] *Id.*
[25] *Id.* at 270–71.
[26] *Id.*
[27] Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974).
[28] *Id.* at 347.
[29] *Id.* at 346.
[30] *Id.*
[31] *Id.* at 342.
[32] *Id.* at 347.

Newspapers, Inc. v. Hepps builds on *Gertz*'s new boundaries for private figures, holding that "the Constitution still supplants the standards of the common law" when speech is made about a private figure regarding a matter of public concern.[33] Thus, a plaintiff bringing a defamation claim under these circumstances has a greater burden than a purely private plaintiff, but a burden less than a public figure.[34] As in both *Gertz* and *Sullivan*, it is the plaintiff's burden to show falsity before recovering damages.[35] The private figure in *Hepps* was required to prove falsity of the media defendant's speech, which regarded a matter of public concern, before recovery.[36]

In *Cox Broadcasting Corp. v. Cohn*, a statute was unconstitutional because it imposed sanctions on media that accurately published a rape victim's name obtained from judicial records that were open to public inspection and court proceedings.[37] The Court found that a plaintiff's privacy interest was lessened because the information was already available on a public record.[38] As Justice White explained, the press is a vital connection between the citizen and the government.[39] *Florida Star v. B.J.F.* further balanced free press and state-created privacy protections, holding that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order."[40] Thus, the Court recognized that imposing liability for truthful reporting may be more dangerous than many state interests.[41]

Throughout these constitutional developments, confusion remains at the state level for both defamation plaintiffs and the media. Because *Gertz* allows states to establish their own standards for defamation law as long as they are not infringing upon free speech rights, various forms of the fair and accurate reporting privilege are recognized across jurisdictions.[42] As a result,

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[33] Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986).
[34] *Id.*
[35] *Id.* at 776.
[36] *Id.* at 768–69.
[37] Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).
[38] *Id.*
[39] *Id.* at 491 ("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 to him in convenient form the facts of those operations.").
[40] 491 U.S. 524, 541 (1989).
[41] *Id.*
[42] John J. Watkins Charles, *Gertz and the Common Law of Defamation: Of Fault, Nonmedia Defendants, and Conditional Privileges*, 15 TEX. TECH L. REV. 823, 879 (1984). There are generally three ways states may approach such a conditional privilege: they may not recognize a privilege, have a privilege that may be defeated by "a showing of knowing falsity or reckless disregard for the truth," or allow the privilege to be defeated by "knowing falsity or reckless disregard for the truth as well as such common-law methods as improper motive or excessive

states are inconsistent in their tests of fair and accurate reports, where the privilege applies, and what will defeat the privilege.[43] This varied application causes confusing and different applications of the privilege across jurisdictions, to which Minnesota is no exception.

C. The fair and accurate reporting privilege in Minnesota

The Minnesota Constitution recognized an individual's right to recover for defamation by proclaiming an individual is "entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character . . . ."[44] However, the Minnesota Supreme Court first limited this right by endorsing the fair and accurate reporting privilege in *Nixon v. Dispatch Printing Co.*[45] The court conservatively endorsed the privilege by holding that reports on judicial proceedings are privileged, but reports on judicial pleadings were outside the privilege's safe harbor.[46] The court drew the line between reports on pre-trial and post-trial materials.[47] Reports on pre-trial materials are not privileged because the materials are not in the court's control, and "publication can in no manner serve the administration of justice."[48] However, reports regarding claims made in court may be protected because a judge can ensure fair procedural safeguards for both parties.[49] One reason for distinguishing between pre- and post-trial materials may be because the *Nixon* decision came before the Minnesota Rules of Civil Procedure's safeguard against frivolous complaints, and so the court held an interest in ensuring proceedings were fairly moderated before the media reported.[50] This first appearance of the fair and accurate reporting privilege in Minnesota held that reports may be protected if they fairly and accurately regard judicial proceedings.[51]

However, since the 1907 *Nixon* decision, the United States free speech climate has changed due to the constitutional backdrop of *Sullivan*, *Gertz*, and other free speech developments.[52] These changes caused the Minnesota Supreme Court to respond to *Gertz* by adopting a negligence standard, finding that a private individual may recover upon showing the

publication." *Id.* However, most fair and accurate reporting privileges may be defeated by a showing the publication is not a fair or accurate report of the original proceeding. *Id.*

[43] *Id.*

[44] MINN. CONST. art. I, § 8.

[45] *See* 101 Minn. 309, 313, 112 N.W. 258, 259 (1907).

[46] *Id.*

[47] *See id.*

[48] *Id.*

[49] *Id.*

[50] Larson v. Gannett Co., 940 N.W.2d 120, 137 (Minn. 2020).

[51] *See id.*

[52] *See supra* Section II.B.

defendant knew or should have known that the defamatory statement was false.[53]

The fair and accurate reporting privilege has developed in Minnesota—although minimally—since its original appearance in *Nixon* through a combination of statutes and selective adoption by the Minnesota Supreme Court. A criminal defamation statute, adopted by the legislature post-*Nixon*, privileges communications that "consist of a fair and true report or a fair summary of any judicial, legislative or other public or official proceedings."[54] While this statute imposes criminal liability, the Minnesota Federal District Court has persuasively argued that because the criminal statute mentions "public or official proceedings," news reports regarding official, public reports should also be privileged in the civil setting.[55]

In *Moreno v. Crookston Times Printing Co.*, the Minnesota Supreme Court adopted the fair and accurate reporting privilege to cover legislative proceedings.[56] A police officer brought a defamation suit against a local newspaper which reported a citizen's alleged defamatory statements made about the officer at a city council meeting.[57] The court adopted the privilege to cover these circumstances and reasoned that the "public interest is served by the fair and accurate dissemination of information concerning the events of public proceedings."[58] The court was persuaded by the Restatement (Second) of Torts section 611 comment b that states once a report is within the range of the fair and accurate reporting privilege, fault is determined by the report's accuracy and not by a common law malice showing.[59] Once extending the privilege to city council meetings, the court should have determined whether the newspaper article was fair and

[53] Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 491 (Minn. 1985).

[54] MINN. STAT. § 609.765 subdiv. 3(3) (1963) (current version at MINN. STAT. § 609.765 subdiv. 3(3) (2020)).

[55] *See* Schuster v. U.S. News & World Report, Inc., 459 F. Supp. 973, 979 (D. Minn. 1978) (holding that an accurate report of a grand jury indictment did not constitute defamation).

[56] Moreno v. Crookston Times Printing Co., 610 N.W.2d 321, 333 (Minn. 2000) (holding that an officer's defamation suit was defeated by the fair and accurate report privilege because the privilege extended to events that were regular business of a city council meeting, including a citizen's ad hoc speech).

[57] *Id.* at 323.

[58] *Id.* at 332.

[59] *Id.* at 331. The other standard that could have been adopted is an "actual malice" standard in which a showing of "knowing or reckless disregard for the truth or falsity of a statement" must be made. *Id.* at 329. This standard is not satisfied if a plaintiff only proves that the defendant should have known a statement was false, without showing the defendant did know the statement was false. *Id.* Actual malice is still a lesser standard from common law malice which requires proof of "ill will or improper motive." *Id.*

accurate, or whether the report was edited to be misleading.[60] However, the court did not make this inquiry; it remanded the case to the district court to determine if additional contextual material—not on appeal—impermissibly commented on the officers' integrity.[61] Minnesotans were left without clear boundaries of what will defeat the fair and accurate reporting privilege.

Yet, *Moreno* established that Minnesota's fair and accurate reporting privilege protects fair and accurate reports of regular city council meetings, and the qualified privilege is "defeated by a showing that the report is not a fair and accurate report of that proceeding."[62] This was the last time the court addressed the fair and accurate reporting privilege until the *Larson* decision.

III. THE *LARSON* DECISION

In *Larson v. Gannett Co.*, the plaintiff brought a defamation suit against the local media company after being falsely accused of murdering a police officer in Cold Spring, Minnesota.[63] The plaintiff argued the media company should be liable for publishing defamatory statements naming him as the murderer, as the statements did not fairly and accurately represent the official news conferences and press releases regarding his arrest for the murder.[64] On appeal, the Minnesota Supreme Court expanded the scope of the fair and accurate reporting privilege.[65] The privilege now protects fair and accurate reports on official news conferences and press releases.[66] The court also established a test to determine whether the media's reports were fair and accurate—whether the reports created the same "gist" or "sting" as the original news conference and press release.[67]

A. Facts of the Larson case

In 2012, a Cold Spring police officer responded to a welfare check request on Ryan Larson, during which the officer was shot and killed.[68] An hour later, officers entered Larson's apartment, found Larson sleeping, and took him into custody on suspicion of murder.[69] The next

[60] *Id.* (replacing the common law requirements that a publication be made in good faith, without malice); *see also* Cox & Callaghan, *supra* note 10, at 30 (noting that common law malice created a qualified privilege).
[61] *Moreno*, 610 N.W.2d at 334.
[62] *Id.* "The privilege is not defeated by a showing of common law malice." *Id.*
[63] *Id.* at 126.
[64] *Id.*
[65] *Id.* at 148.
[66] *Id.*
[67] *Id.* at 141.
[68] *Id.* at 126. The officer was shot twice outside the bar that Larson lived above. *Id.*
[69] *Id.*

morning, law enforcement officers held a live press conference and answered questions about the investigation.[70] One officer reported that "the subject of the welfare check" had been taken into custody.[71] The officials indicated that while the suspect was in custody, the investigation was active and ongoing.[72] At the end of the press conference, another officer stated, "Ryan Larson was taken into custody and booked . . . in connection with this incident."[73] When media asked if there was any other person of interest for the murder, the officials responded, "we don't have any information to believe that at this time."[74] The same day, the Minnesota Department of Public Safety released an official press release titled "Cold Spring Police Officer Killed in the Line of Duty."[75]

That night, Kare 11 released evening news and online reports that depicted Larson as a murderer, with headlines stating, "Police say that man—identified as 34 year-old Ryan Larson—ambushed Officer Decker and shot him twice—killing him."[76] The *St. Cloud Times* newspaper also released numerous front-page articles alleging that Ryan Larson shot the officer.[77]

Larson was released from jail five days after being taken into custody and officially cleared as a suspect for the murder in 2013.[78] Larson sued the Gannett Company, the owners of the media outlets, for defamation in eleven statements published in the Kare 11 television broadcasts, an online article, and in the *St. Cloud Times* newspaper articles.[79]

B. District Court and Court of Appeals decisions

The district court jury trial occurred in 2016.[80] While eleven statements were highlighted as grounds for defamation, three of the statements were declared not "capable of . . . defamatory meaning" and excluded from jury consideration.[81] The district court instructed the jury using the "falsity" instruction—an instruction used to determine an element

[70] *Id.* at 127.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.* The press release discussed that investigators had taken Ryan Larson into custody in relation to the murder. *Id.*
[76] *Id.* at 128.
[77] *Id.* at 128–29.
[78] *Id.*
[79] *See id.*
[80] *Id.* at 130.
[81] *Id.*

of a regular defamation claim.[82] The jury found the remaining statements defamatory, but not false.[83] After this result favoring the respondents, Larson moved for judgment as a matter of law, which the district court granted in part.[84] The district court set the jury's verdict aside, finding the jury should have been allowed to consider the claims on a defamation-by-implication basis.[85] In doing so, the district court rejected the defendants' argument that the fair and accurate reporting privilege should extend to official news conferences.[86] The court awarded Larson a new trial on all statements.[87]

The respondents appealed Larson's award of a new trial.[88] The court of appeals reversed and reinstated judgment for respondents, finding that eight statements were covered by the fair and accurate reporting privilege.[89] The court of appeals found that the district court's "falsity" jury instruction appropriately directed "[the jury's] attention on the substantial accuracy of the news report," and to "construe words as a whole . . . to assess the meaning of each statement in context."[90] As a result, the court of appeals held that the jury made an adequate finding based on the given instructions, and reentered judgment in favor of the defendants.[91] Larson appealed to the Minnesota Supreme Court.[92]

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[82] *Id.* at 141. *See infra* Section III.C.2 (discussing that this was not the correct instruction and finding that the correct inquiry would compare the meaning of the report to the original statements, not examine the underlying statements).

[83] *Larson*, 940 N.W.2d at 130. Statements one through eight, considered by the jury, included: 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"; and 8) "Man faces murder charge." *Id.* at 129.

[84] *Id.* at 130. Note, Larson did not ever request an instruction on republication liability, which is the umbrella doctrine for the fair and accurate report privilege and the exception to the common law republication rule. *Id.* The common law republication doctrine creates liability when one repeats defamatory statements made by another. *See id.* at 130–31.

[85] *Id.* at 130. This theory was dismissed at the court of appeals and supreme court. *Id.*

[86] *Id.*

[87] *Id.*

[88] Larson v. Gannett Co., 915 N.W.2d 485, 487 (Minn. Ct. App. 2018).

[89] *Id.* at 500.

[90] *Id.* at 499. The Minnesota Supreme Court criticized this jury instruction because it requires the jury to consider whether the underlying substance of the statements ("that Larson killed Officer Decker") was true. *Larson*, 940 N.W.2d at 143.

[91] *Larson*, 915 N.W.2d at 500.

[92] *Larson*, 940 N.W.2d at 130.

C. The Minnesota Supreme Court decision to expand the scope of the fair and accurate reporting privilege

Larson's appeal brought an issue of first impression to the Minnesota Supreme Court: should the fair and accurate reporting privilege protect media reports on official press conferences and news releases?[93] The Minnesota Supreme Court decided it should, holding 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."[94] Consequently, the court found that the fair and accurate reporting privilege could apply to seven of the statements as they "reported information about a matter of public concern disseminated by the law enforcement officers at the press conference and in the press release."[95] However, the court found the jury instructions did not contain the relevant factors to determine whether the privilege was defeated.[96] After establishing a more focused inquiry to determine whether a report is fair and accurate, the court remanded the case for a new trial so a jury could determine whether the news reports were fair and accurate, or whether the privilege was defeated.[97]

1. Extension of Scope

In deciding to extend the privilege to cover official press conferences and press releases, the court relied on policy established in *Moreno* and First Amendment principles.[98] The first value *Moreno* emphasized is that "the public interest is served by the fair and accurate dissemination of information concerning the events of public proceedings."[99] *Larson* involved a public news conference, so the agency principle was served—a person in attendance would receive the same

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[93] *See id.* at 131.
[94] *Id.* at 133.
[95] *Id.* at 126.
[96] *Id.* at 142. The district court instructed the jury using the "falsity" jury instruction regularly used for defamation claims. *Id.* This instruction inquires whether the content of the statement was true or false but does not determine the accuracy for which the statement was reported on. *See id. See also infra* Section III.C.2.
[97] *Larson*, 940 N.W.2d at 126 (affirming court of appeals decision in part and reversing in part as to separate statements not covered by fair and accurate reporting privilege); *see also infra* Section IV.B.3.a (describing the new test).
[98] *Larson*, 940 N.W.2d at 131; Moreno v. Crookston Times Printing Co., 610 N.W.2d 321, 332 (Minn 2000).
[99] *See Larson*, 940 N.W.2d at 132 (quoting *Moreno*, 610 N.W.2d at 332).

information that a report about the meeting described.[100] While the court does not discuss what makes a meeting "public" in other circumstances, it accentuates that the purpose of the news conference at hand was to communicate information to the general public.[101] Additionally, information regarding the news conference was later made available to the public.[102]

While Larson argued that a summary of the news conference does not serve the "agency principle,"[103] the court rebutted that if a proceeding is privileged, any fair and accurate summary of the proceeding must also be privileged.[104] The court reasoned that the First Amendment protections and public interest allow the press leeway to write summaries.[105] Additionally, this privilege may be defeated if the summaries are not an "accurate and complete report or a fair abridgement" of the official news conferences or press releases.[106]

Secondly, the *Larson* court extended the privilege because the news conference and press release regarded a "matter of public concern," similar to *Moreno*.[107] Matters of public concern entail the highest amount of First Amendment protection.[108] When public concern is at interest, the media must be able to quickly disseminate information from government officials to the public to promote public safety.[109] The press's role is not only to inform the public, but to increase government transparency by allowing the public "to assess the quality of the state and local officials' response to a public safety emergency."[110] Accordingly, the *Larson* court reasoned that the media reports on a local police officer's murder investigation regarded a matter of public concern.[111] The court found that the media's reports increased transparency and promoted accountability of the investigation.[112]

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[100] *See id.* at 133; *Moreno*, 610 N.W.2d at 331 (finding that a fair and accurate report serves the agency principle if it were to "simply relay information to the reader that she would have seen or heard herself were she present at the meeting.").
[101] *See Larson*, 940 N.W.2d at 133.
[102] *Id.* at 133–34.
[103] *Id.* at 134. Because the agency principle serves to relay information heard at a public meeting, the plaintiff argued media summaries cannot "align with the privilege's agency principle." *Id.*
[104] *Id.*
[105] *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975); *Larson*, 940 N.W.2d at 134.
[106] *Larson*, 940 N.W.2d at 134 (quoting *Moreno*, 610 N.W.2d at 334).
[107] *See id.* (quoting *Moreno*, 610 N.W.2d at 331); *see also* RESTATEMENT (SECOND) OF TORTS § 611.
[108] *Larson*, 940 N.W.2d at 134 (quoting Snyder v. Phelps, 562 U.S. 443, 452 (2011)) ("Speech on matters of public concern 'occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'").
[109] *Id.*
[110] *See id.*
[111] *Id.*
[112] *Id.*

The third reason the court extended the privilege was to protect reports about an "official action or proceeding."[113] The fair and accurate reporting privilege covers "statements made . . . during a planned, formal, press conference, to convey information about an ongoing criminal investigation of public interest, [because they] were official actions that were part of an official proceeding."[114] The court distinguishes that while statements in a formal, planned setting are privileged, other communications between law enforcement officers and the press may not be.[115] In *Larson*, law enforcement officials organized the news conference as part of their official duties.[116] The court reasoned this official action, done in furtherance of official duties, fit squarely within the definition of an official proceeding.[117] An action or proceeding need not be "recurring" or "essential to democracy" to be official.[118]

Furthermore, the court reasoned that because the Legislature included "public or official proceedings" in the state's criminal defamation statute, it is reasonable to extend the privilege to public or official proceedings in the civil context.[119] While the court was persuaded by section 611 of the Restatement, it did not endorse the entire Restatement because it only incrementally advanced the privilege on these facts.[120]

The court argues its ruling does not overrule *Nixon*.[121] *Nixon* was distinguishable because it regarded reports on pleadings made by a private citizen about a private citizen.[122] Additionally, *Nixon* was decided sixty years before the United States Supreme Court ruled on First Amendment

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[113] *See id.* at 135 (quoting Moreno v. Crookston Times Printing Co., 610 N.W.2d 321, 334 (Minn 2000); *see also* RESTATEMENT (SECOND) OF TORTS § 611.

[114] *Larson*, 940 N.W.2d at 136.

[115] *See id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 611, cmt. d, h. Comment (h) states that while an arrest is an official action and reports of the action are privileged, "statements made by the police . . . are not yet part of the judicial proceeding or of the arrest itself and are not privileged under this Section." *Id.* The court found comment (h) irrelevant because it explains that when an official makes defamatory comments in addition to the proceeding at issue, and not as part of the proceeding, the privilege may be defeated; here, the comments were part of the full, official press conference. *Larson*, 940 N.W.2d at 136–38.

[116] *Larson*, 940 N.W.2d at 135.

[117] *Id.*

[118] *Id.* at 136.

[119] *Id.* at 133; *see* MINN. STAT. § 609.765 subdiv. 3(3) (1963) (current version at MINN. STAT. § 609.765 subdiv. 3(3) (2020)); *see also* Schuster v. U.S. News & World Rep., Inc., 459 F. Supp. 973, 978 (D. Minn. 1978) (arguing that Minnesota's criminal defamation statute should be applied in the civil context).

[120] *Larson*, 940 N.W.2d at 133.

[121] *See id.* at 136–37.

[122] *Id.*; *compare id.* at 139 (extending fair and accurate reporting privilege to cover official proceedings, including official press conferences and releases) *with* Nixon v. Dispatch Printing Co., 101 Minn. 309, 112 N.W. 258, 259 (1907) (holding that pleadings filed with the court, not yet part of judicial proceedings, are not privileged).

implications of defamation in *Sullivan v. New York Times*.[123]

2. Creation of "gist" or "sting" test

After deciding the privilege covered the press conference at issue in *Larson*, the Minnesota Supreme Court had to determine which test would define whether a report is fair and accurate—that is, what will defeat the privilege. The district court's "falsity" jury instructions were insufficient.[124] Although the jury instruction's substantial accuracy inquiry was relevant, it was not clear whether the inquiry was directed at the underlying official statements or whether the media's statements were fair and accurate reports of the official statements.[125] To correct this mistake, the Minnesota Supreme Court described the correct inquiry as follows.

a. The Larson Majority

The court established that the fair and accurate reporting privilege "'is defeated by a showing that the report is not a fair and accurate report' of the public proceeding."[126] Once the defendants have shown that the privilege covers the proceedings, the burden shifts to the plaintiff to show the privilege has been defeated.[127] A report that is fair and accurate will provide the same "gist" of the defamatory statements as if the reader was present at the proceeding.[128] It cannot be edited or add contextual information that would be misleading.[129] The report must be "substantially accurate."[130] While the court addressed that a report cannot add contextual material, it did not discuss whether adding "jocular commentary" would be tolerated.[131]

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[123] *Compare Nixon*, 101 Minn. at 313, 112 N.W. at 259 (1907) *with* New York Times Co. v. Sullivan, 376 U.S. 254, 254 (1964).

[124] *Larson*, 940 N.W.2d at 141. The district court found the privilege did not apply to official proceedings and instructed the jury on the element of "falsity," which is an element of a general defamation claim. *Id.* at 140. The court of appeals found the "falsity" instruction was sufficient to instruct the jury on determining the substantial accuracy of the news report. *Id.* at 140–41.

[125] *Id.* at 143–44.

[126] *Id.* at 139 (quoting Moreno v. Crookston Times Printing Co., 610 N.W.2d 321, 333 (Minn. 2000)).

[127] *Id.* The Minnesota Supreme Court remanded for a new trial on the five statements. *Id.* at 145.

[128] *Id.* at 139–40.

[129] *Id.* at 139.

[130] *Id.*

[131] *See id.* at 142. *But see* Lee v. TMZ Prod., Inc., 710 F. Appx. 551, 559 (3d Cir. 2017) (finding that a report on a news conference falsey accusing the plaintiff as being involved in a prostitution ring was privileged because its jocular commentary did not change the underlying statement).

The jury instructions must frame the question so that the jury determines the reported statements' fairness and accuracy compared to the official proceedings, and not whether the underlying official statements were true or false.[132] The court established other guidelines, including that a fair and accurate report will have "the same effect on the mind of the listener or reader" as a person attending the press conference.[133] The privilege is defeated if a report is edited to become misleading or is not a fair abridgment of the proceeding.[134] Additional contextual material may defeat the privilege.[135] The resulting inquiry, as stated by the Minnesota Supreme Court, is: "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?"[136] Because the jury instructions failed to state the applicable law, Larson is entitled to a new trial with the corrected jury instructions to determine whether the privilege was defeated for statements one through five.[137]

Minnesota's fair and accurate reporting privilege allows the jury to decide whether the published reports were fair and accurate compared to the official proceedings, unless no reasonable jury could conclude that the statements were fair and accurate; then, the court must find the report is not fair and accurate as a matter of law.[138] The correct inquiry analyzes the fairness and "substantial accuracy" of the report;[139] the report need not be "exact in every immaterial detail";[140] the inquiry should address the effect on the mind of the reader;[141] and additional comments may defeat the privilege.[142]

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[132] *Larson*, 940 N.W.2d at 143. All defamation claims will contain underlying statements that are false; however, the fair and accurate report privilege intends to shield the media from liability for republishing false statements that others said. *Id.* Thus, it is imperative that the inquiry is whether the published statements are fair and accurate compared to the original statements, not whether they are false. *Id.*

[133] *Id.* at 142, 156 (quoting the adopted test from McKee v. Laurion, 825 N.W.2d 725, 730 (Minn. 2013)); *see also* Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 516–518 (1991) (holding that the element of falsity in the context of defamation will overlook minor inaccuracies and focus on the substantial truth).

[134] *Larson*, 940 N.W.2d at 143.

[135] *Id.*

[136] *Id.*

[137] *Id.* at 144. The court is only providing a trial on five of the original eleven statements; statements seven and eight are fair and accurate as a matter of law, nine through eleven were not capable of defamatory meaning. *Id.* at 130, 145.

[138] *Id.* at 141, 145.

[139] *Id.* at 142.

[140] *Id.*

[141] *Id.*

[142] *Id.* at 137.

b. The Larson Concurrence/Dissent

The concurrence/dissent agrees with the majority that the test must inquire whether the meaning of the report is the same as the meaning communicated at the news conference.[143] Justice Gildea joined Justice Anderson in his partial concurrence and partial dissent. The concurrence argues the correct 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."[144] This is similar to the majority's test, which analyzes whether the original and challenged statements carry the same gist or sting.[145] However, after agreeing on the appropriate test, Justices Anderson and Gildea found that the report was not fair and accurate as a matter of law.[146]

c. The aftermath of Larson

After the Minnesota Supreme Court ruling, the respondents petitioned for a writ of certiorari to the U.S. Supreme Court on August 27, 2020.[147] The respondents argued that the Minnesota Supreme Court's decision placed the respondents at risk of liability for defamation when a jury had already found the statements to be true.[148] Thus, a remand was unnecessary because the jury assessed whether the media's statements were fair and accurate.[149] Respondents argued that the jury had already been instructed on the "falsity" inquiry—the same test the Minnesota Supreme Court advised on remand—and when given those instructions, found that the statements were substantially accurate.[150] The writ was denied on October 13, 2020.[151]

IV. ANALYSIS

The fair and accurate reporting privilege is essential to the

[143] *Id.* at 149–50 (Anderson, J., concurring in part and dissenting in part) (agreeing with the test described by the majority while dissenting that the privilege should extend to official proceedings).
[144] *Id.* at 161.
[145] *Id.* at 143.
[146] *See id.* at 161–62; discussion *infra* Section IV.B.3.c.
[147] Petition for a Writ of Certiorari, Gannett Co., Inc., v. Larson, 940 N.W.2d 120 (2020) (No. 20-252), 2020 WL 5234948.
[148] *Id.* at *5.
[149] *Id.* at *4.
[150] *Id.* Note that the Minnesota Supreme Court, while providing similar instructions on remand, clarified the correct focus of the substantial accuracy test is to compare the report and original statements.
[151] Gannet Co., Inc. v. Larson, *cert. denied*, 141 S.Ct. 559 (2020).

continued existence of the media. Without the privilege, the media would be subject to increased liability and litigation—a deadly combination for large and small news companies alike.[152] The media would be just as liable for reports on a falsely accused person as the officers who originally issued the false accusation. As a result, the media would likely be chilled in its reporting.[153] However, this privilege conflicts with the Minnesota Constitution, which guarantees that "[e]very person is entitled to a certain remedy in the laws for all injuries of wrongs which he may receive to his person, property or character."[154]

Attempting to balance these conflicting interests, the Minnesota Supreme Court extended the fair and accurate reporting privilege to cover reports on official news conferences and press releases regarding a matter of public concern.[155] In expanding the scope of the privilege, the Minnesota Supreme Court followed precedent and was guided by widely accepted policy rationales.[156] Additionally, the court established a test to determine what constitutes a fair and accurate report.[157] The resulting privilege greatly protects the media. By tipping the scale to favor media protections, the resulting precedent may disrupt recovery for plaintiffs like Larson.

A. The scope of the privilege was correctly extended to official press conferences and press releases.

For the first time in *Larson*, the court expanded the fair and accurate reporting privilege to cover not only judicial and legislative proceedings, but also official press conferences and press releases presented by government officials regarding matters of public concern.[158] The Minnesota Supreme Court reasoned that extension of the privilege is proper and does not overrule precedent.[159]

1. Precedent

While Larson and the dissent argue that the majority exceeded the privilege's scope as established in *Nixon* that protected only judicial

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[152] *See* Robert J. Sheran & Barbara S. Isaacman, *Do We Want a Responsible Press?: A Call for the Creation of Self-Regulatory Mechanisms*, 8 WM. MITCHELL L. REV. 1, 48–49 (1982).
[153] *Id.* ("The effect . . . [of lower fault standards] on the media is . . . fewer resources . . . [for] their primary functions of gathering, editing, and disseminating the news . . . [making] the media less effective in their job of keeping the public informed.").
[154] MINN. CONST. art. 1 § 8.
[155] Larson v. Gannett Co., 940 N.W.2d 120, 133 (Minn. 2020).
[156] *Id.* at 133, 138.
[157] *Id.* at 133.
[158] *See id.* at 132.
[159] *Id.*

proceedings,[160] this argument fails to account for constitutional free speech developments over the past eighty years. Additionally, the *Larson* decision minimally expands upon the privilege's scope established in *Moreno*, which has been upheld.[161]

The combined concurrence and dissent argues that the court's extension of the scope oversteps precedent, relying entirely on *Nixon*.[162] *Nixon* was the first Minnesota case to recognize the fair and accurate reporting privilege by distinguishing that judicial proceedings are privileged whereas pleadings are not.[163] Pleadings were excluded from the privilege in 1907 because they had not yet reached the court and did not allow both sides to be heard, thus they were not considered judicial.[164] At that time, professional rules against frivolous complaints did not exist; thus, privileging complaints would allow anyone to amplify defamatory statements in the newspaper by merely filing a complaint.[165] Since *Nixon*, procedural safeguards against frivolous complaints now prevent such a scenario from occurring.[166] While *Nixon* was appropriately decided in its time, the climate surrounding free speech has changed.[167]

Thus, when deciding to extend the privilege in *Moreno* for the first time since *Nixon*, the court was responding to over eighty years of constitutional free speech development in which speech—especially speech regarding matters of public concern and government happenings—had great protection. In *Moreno*, the court avoided overruling *Nixon* and extended the fair and accurate reporting privilege to cover reports of regular business in public city council meetings.[168] This extension was the springboard for extending the privilege again in *Larson*.

Speech about public officials and official government acts is more protected than speech about private citizens.[169] As a result, those that publish public officials' speech should be more protected than those who publish

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[160] *See id.* at 136, 152.
[161] *See id.* at 132–33 (referencing the two principles on which the *Moreno* decision was based as well as the court's decision to uphold *Moreno* and apply the privileges protection in this case).
[162] *Id.* at 148.
[163] Nixon v. Dispatch Printing Co., 101 Minn. 309, 313, 112 N.W. 258, 259 (1907).
[164] *See id.*
[165] *See Larson*, 940 N.W.2d at 137.
[166] MINN. R. CIV. P. 11.02 (requiring presentations to the court to be made in good faith).
[167] *See supra* Section II.B.
[168] *See* Moreno v. Crookston Times Printing Co., 610 N.W.2d 321, 333 (Minn. 2000).
[169] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974) ("Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.").

private citizens' speech.[170] However, the court before *Larson* only extended the privilege to publishers of private speech.[171] It would be inconsistent with defamation precedent to deny the same privilege and liability protections to publishers of public officials' speech—a category of speech that is more protected.[172] For example, if the court did not extend the privilege, journalists reporting on law enforcement statements at a stand-alone press conference discussing a killer-at-large would not be protected, but reporting on a private citizen's haphazard speech discussing the same issue at a scheduled city council meeting would be protected.[173] If the *Larson* court did not extend the privilege's scope, the privilege's application would be inconsistent.

Larson and the concurrence/dissent also argued that the privilege conflicts with *Nixon*.[174] However, *Nixon* did not discuss the privilege's scope beyond judicial proceedings.[175] *Nixon* privileged judicial proceedings because they entailed a fair hearing that a judge had some control over.[176] For the same reasons, the privilege did not protect pleadings as they could be frivolous and without merit.[177] This distinction was necessary because *Nixon* involved a private party attempting to defame another private party in pleadings.[178] In addition, protecting pleadings "can in no manner serve the administration of justice, or any other legitimate object of public interest."[179] Entirely different than *Nixon*'s private pleadings, *Larson* involves a public official's statement on an investigation of public concern.[180] Additionally, a legitimate purpose of public interest is served by protecting media reports about official law enforcement statements regarding a

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[170] *Compare* New York Times Co. v. Sullivan, 376 U.S. 254, 260 (1964) (barring liability for press comments about public officials without proof of malice) *with Gertz*, 418 U.S. at 344 ("Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater."). The publishers of public officials' speech should have more protection than the publishers of private individuals' speech.

[171] *See Moreno*, 610 N.W.2d at 333 (holding the privilege extended to a private individual speaking at a city council meeting).

[172] *See, e.g.*, *Gertz*, 418 U.S. at 344; *see also Sullivan*, 376 U.S. at 260 (distinguishing between categories of public versus private individuals).

[173] Brief of Amicus Curiae Star Trib. Media Co., LLC, Associated Press, Fox/UTV Holdings, LLC, *ex rel.* KMSP Fox 9, the Minn. Newspaper Ass'n & Rep. Comm. for Freedom of Press at 10, Larson v. Gannett Co., 915 N.W.2d 485 (Minn. Ct. App. 2018) (No. A17-1068), 2017 WL 10752201 [hereinafter Brief for Amici].

[174] Larson v. Gannett Co., 940 N.W.2d 120, 136 (Minn. 2020).

[175] Nixon v. Dispatch Printing Co., 101 Minn. 309, 312, 112 N.W. 258, 259 (1907).

[176] *Id.*

[177] *Id.*

[178] *Id.* at 313, 259.

[179] *Id.*

[180] *See generally* Larson v. Gannett Co., 940 N.W.2d 120, 134 (Minn. 2020) (referring to the publicly held press conference and press release involving the "slaying of a community police officer").

suspected murderer at an official news conference.[181] The extension of the privilege's scope in *Larson* does not overrule *Nixon*, but clarifies an area not previously considered.[182]

Larson and the concurrence/dissent's argument that the privilege, if applied to official proceedings, must be limited to reports on arrests only after commencing judicial actions would contradict the *Moreno* decision.[183] *Moreno* privileged speech that accused a private citizen of criminal activity before any charges were filed.[184] The privilege's scope would be inconsistent if limited to reports only after a formal criminal charge commenced. And with uncertainty, media speech would be chilled.[185] *Larson* correctly expanded upon the *Moreno* framework by privileging reports on official proceedings before judicial action commences.

The expansion of the privilege's scope accords with Minnesota precedent. Additionally, this expansion to official proceedings is consistent with section 611 of the Restatement,[186] and rulings in jurisdictions outside of Minnesota, including a case upheld by the U.S. Supreme Court.[187]

2. Policy of extending the privilege

Three policy theories support extending the fair and accurate reporting privilege to official proceedings regarding matters of public concern; agency, public interest in important matters, and public as supervisors.[188] First, the media acts as government agents when it amplifies

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[181] *See id.* at 136.

[182] *See id.*; *see also Nixon*, 101 Minn. at 309, 112 N.W. at 258.

[183] *Larson*, 940 N.W.2d at 138.

[184] *Id.* at 137 (finding that *Nixon* and RESTATEMENT (SECOND) OF TORTS § 611, cmt. h support this reasoning).

[185] *See* Maethner v. Someplace Safe, Inc., 929 N.W.2d 868, 875 (Minn. 2019) ("Courts cannot offer recourse for injury to reputation at the cost of chilling speech on matters of public concern."); *see also* Wynn v. Smith, 16 P.3d 424, 430 (Nev. 2001) ("The purpose of this exception is to obviate any chilling effect on the reporting of statements already accessible to the public.").

[186] RESTATEMENT (SECOND) OF TORTS § 611 (AM. LAW INST. 1975) ("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.").

[187] *See, e.g.*, Time, Inc. v. Pape, 401 U.S. 279, 287 (1971) (privileging an official government organization's report); *see also* Jones v. Taibbi, 512 N.E.2d 260 (Mass. 1987) (extending privilege to official statements by police departments); Wright v. Grove Sun Newspaper Co., 873 P.2d 983, 990 (Okla. 1994) (privileging a press conference held by an investigator because it is within the official duties of an officer).

[188] *See generally* Paul Brock Bech, *Isolating the Marketplace of Ideas from the World: Lee v. Dong-A Ilbo and the Fair Report Privilege*, 50 U. PITT. L. REV. 1153, 1159 (1989) (describing agency, supervisory, and informational rationales to be the most widely used explanations for the privilege); *see also* Cox & Callaghan, *supra* note 10, at 27; 4 Minn. Prac.,

official government messages that the public would hear if attending the proceeding.[189] Second, the media holds government officials accountable by exposing their actions to allow scrutiny of government policies and corresponding activities.[190] The fair and accurate reporting privilege "reflects the judgment that the[re is a] need, in a self-governing society, for free-flowing information about matters of public interest."[191] Third, the public has an interest and a right to be informed about matters of public concern.[192] The public will benefit by expanding the privilege in Minnesota to protect media while reporting on official news conferences by public officials.

a. The "Agency" Rationale

The simplest supporting rationale for the fair and accurate reporting privilege's extension is that the media can only report what the public would have heard if attending the official meeting themselves.[193] However, citizens are busy, and "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 to him in convenient form the facts of those operations."[194] Just as the public does not have the time to observe, local law enforcement agencies do not have the platform to disseminate information as quickly and productively as the media.[195] Consequently, the media is best situated to report on official government proceedings.[196]

However, some argue that the media may amplify government speech which may not be widely known without the media's help.[197] If the media did not amplify the government's speech, the speech would remain in the time and place in which it was originally spoken.[198] As a result, when the government happens to make defamatory statements, the person's injured reputation would not be as widespread but for the media's amplification.

The impact that greater liability would have on the media outweighs this concern. If the media was not privileged to report on official

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Jury Instr. Guides—Civil, CIVJIG 50.31 (6th ed. 2014) (citing agency and public interest in public affairs, but not the public as supervisors, as the basis for the privilege).

[189] Cox & Callaghan, *supra* note 10, at 30–31.

[190] *Id.* at 31.

[191] Lee v. TMZ Prods., Inc., 710 F. App'x 551, 557 (3d Cir. 2017).

[192] Bech, *supra* note 188, at 1160.

[193] *See* RESTATEMENT (SECOND) OF TORTS § 611, cmt. i (AM. LAW INST. 1975); *see also* 4 Minn. Prac., Jury Instr. Guides—Civil, CIVJIG 50.31 (6th ed. 2014).

[194] Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975).

[195] *Id.*

[196] *See id.*

[197] Bech, *supra* note 188, at 1159.

[198] *Id.*

government statements, the media could be chilled.[199] Media organizations would either be cautious in their reporting or not report on public officials at all if they could be liable for merely republishing statements that public officials spoke—statements the media had no control over—which were later found defamatory. This implication would be unfair; as the old saying goes, "don't shoot the messenger."[200] Saving the media from the bullets of liability, especially when they are solely amplifying speech by public officials on matters of public concern, greatly benefits our society.

b. Public interest in matters of public concern

The public has a right to know about information shared at official government proceedings.[201] If the media is not privileged when reporting on such proceedings, they may hold back on reporting vital news or safety concerns because of the extreme liability risk.[202]

The media coverage of George Floyd's death in May 2020 exemplifies the need for this privilege to cover official government proceedings. As information regarding protests, riots, and escalated situations changed, the media quickly and succinctly distilled the important headlines from news conferences to benefit public safety.[203] Because of the public and viral nature of the riots, police collected video footage to help identify rioters, which created conditions ripe for false information to quickly spread. For example, an individual dubbed the "Umbrella Man" was videoed nonchalantly breaking AutoZone windows and falsely named as a St. Paul police officer on social media channels.[204] The St. Paul police department issued a press release clearing the falsely accused police officer's

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[199] *See, e.g.*, Wynn v. Smith, 16 P.3d 424, 430 (Nev. 2001) ("The purpose of this exception is to obviate any chilling effect on the reporting of statements already accessible to the public.").

[200] *See generally Shooting the Messenger and Don't Shoot the Messenger*, GRAMMARIST, https://grammarist.com/idiom/shooting-the-messenger-and-dont-shoot-the-messenger/ [https://perma.cc/G6W9-VEZN].

[201] *See* 4 Minn. Prac., Jury Instr. Guides—Civil, CIVJIG 50.31 (6th ed. 2014); *see also* Bech, *supra* note 188, at 1160.

[202] *See* Moreno v. Crookston Times Printing Co., 610 N.W.2d 321, 333 (Minn. 2000).

[203] Emily Haavik, Estefan Saucedo & Bill Strande, *'Very few incidents' reported Sunday Night, Police Warn There are Still 'Outside Agitators' in Twin Cities*, KARE 11 (June 1, 2020), https://www.kare11.com/article/news/local/george-floyd/george-floyd-protests-minneapolis-st-paul-day-six/89-0450ec60-6d6f-4472-a306-8b066cbd0fc8 [https://perma.cc/A7WH-EBF6] (reporting on Governor Walz's news conference where the Department of Corrections Commissioner discussed the investigation of a semi-truck driver that drove into a crowd of protesters).

[204] Jaclyn Peiser, *'Umbrella Man' went Viral Breaking Windows at a Protest. He was a White Supremacist Trying to Spark Violence, Police Say*, WASH. POST, (July 29, 2020), https://www.washingtonpost.com/nation/2020/07/29/umbrella-man-white-supremacist-minneapolis/ [https://perma.cc/NPZ4-H5JR].

name, which was quickly amplified by the media.[205] And with the fair and accurate report privilege, if the police wrongly identified a rioter, the media would still be shielded from liability even if they shared the official statement. Regardless of what was reported, the media's role in quickly amplifying important information regarding public safety is vital in volatile situations such as these.

If local media sources were chilled and stopped reporting on official government proceedings like press releases and news conferences, people could be without up-to-date news, and others may turn to less reliable, unregulated social media sources—furthering the spread of disinformation.[206] In the Twin Cities, the public benefitted from media reports on official news conferences during a time of unrest, just as in *Larson*, the public benefitted from reports on the murder investigation. Without the fair and accurate reporting privilege, the media's role in amplifying official updates of public concern may not be as effective.

c. Public as supervisors

Keeping the public informed about public officials and public affairs has long been another reason to support the privilege and First Amendment speech in general.[207] After all, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."[208] The media is a tool to help keep government officials responsible to the public.[209] The media's news reports on government proceedings not only promote communication between officials and the public, but "allow the public to assess the quality of the state and local officials' response to a public safety emergency."[210] Extending this privilege to cover reports on official government proceedings will promote the transparency and accountability of government actors.

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[205] *Surveillance Video Confirms that Saint Paul Police Officer Jacob Pederson is not 'Umbrella Man'*, CITY OF SAINT PAUL, (June 8, 2020), https://www.stpaul.gov/news/surveillance-video-confirms-saint-paul-police-officer-jacob-pederson-not-%E2%80%98umbrella-man%E2%80%99 [https://perma.cc/TX8J-QMMG]; John Shipley, *St. Paul Police: Video Shows Officer isn't 'Umbrella Man'*, PIONEER PRESS, (June 8, 2020), https://www.twincities.com/2020/06/08/umbrella-man-st-paul-police-officer-george-floyd-minneapolis/ [https://perma.cc/PLF3-Q62P] (noting that this article was released on the same day of the St. Paul press release).

[206] *George Floyd protests: Misleading Footage and Conspiracy Theories Spread Online*, BBC NEWS, (June 2, 2020), https://www.bbc.com/news/52877751 [https://perma.cc/9AH3-DA3H].

[207] Larson v. Gannett Co., 940 N.W.2d 120, 133 (Minn. 2020) (quoting *Moreno*, 610 N.W.2d at 331); *see also* Bech, *supra* note 188, at 1178.

[208] Mills v. State of Alabama, 384 U.S. 214, 218 (1966).

[209] *Id.* at 219.

[210] *Larson*, 940 N.W.2d at 134.

This rationale has not yet been endorsed by the Minnesota Practice Series as a basis for the privilege.[211] However, after recent civil unrest, this rationale may provide another perspective to this privilege's importance. Today, the media's role in keeping law enforcement accountable has never been more important. Even before the killing of George Floyd on May 25, 2020, the amici predicted a situation in which the Black Lives Matter movement would benefit because the media was afforded a privilege to unveil corrupt police procedures and amplify the reports.[212] "[T]he law of this State should incentivize the media to serve as a check on police—to bring their activities out of the shadows and into the sunlight—especially during that time period when there is no check in the form of judicial oversight."[213] To ensure future law enforcement actions are transparent, the media must be able to report on official law enforcement statements and proceedings without liability.[214] Furthermore, the media's role is vital before judicial intervention occurs to privilege not just judicial or legislative proceedings, but official news conferences and press releases as well. As the amici point out, significant corrupt government activity may occur before judicial oversight begins.[215]

Thus, the court's extension of the fair and accurate reporting privilege to official news conferences and press releases which regard a matter of public concern is supported by Minnesota precedent and well-known policy rationales.[216] This advance is incremental and may only apply to public proceedings with official government speech.[217] The *Larson* court clarified that this privilege will not adhere to "unofficial police comments that are not a part of an official meeting or statement by law enforcement."[218] To determine whether a proceeding is privileged, it must be public, regard a matter of public concern, and be organized by an official in his or her official duties.[219] In Minnesota, this privilege now extends to judicial proceedings and official legislative proceedings, including private citizen speech at city council meetings, as well as official news conferences and

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[211] *See generally* 4 Minn. Prac., Jury Instr. Guides—Civil, CIVJIG 50.31 (6th ed. 2014) (citing agency and public interest in public affairs as the base for the privilege).
[212] *See* Brief for Amici, *supra* note 173, at 22.
[213] *Id.* at 22–23.
[214] Cox & Callaghan, *supra* note 10, at 27–28 ("Hamilton's reasoning echoes a commonsensical basis for the privilege: 'if the press, fearful of libel suits, failed to report on the judiciary and the proceedings leading up to judicial decisions, the public would not have an ongoing, comprehensive view of the system, and thus one of the very tools necessary for a self-governing society would be lost.'").
[215] *See* Brief for Amici, *supra* note 173, at 22.
[216] Larson v. Gannett Co., 940 N.W.2d 120, 136 (Minn. 2020).
[217] *Id.* at 133.
[218] *Id.* at n.12.
[219] *Id.* at 133–35.

press releases regarding a matter of public concern.[220]

B. The test established may favor media protection over an individual's right to recover.

While privileging official government proceedings raises concerns of overly protecting the media, the privilege does have boundaries. This Section analyzes those boundaries by examining how the majority created a test that balances conflicting interests, how other jurisdictions have determined whether a report is fair and accurate, and the implications of this test's application to the *Larson* facts. A jury verdict could either help create clear standards for the limits of this privilege, or could instead destroy the ability for a plaintiff to recover for a damaged reputation.

1. Conflicting interests

Before addressing the test's limits, the conflict between the media's ability to report on government proceedings and the plaintiff's ability to recover when the media does not fairly report on those proceedings must be acknowledged. As *Gertz* established in the defamation context, "[s]ome tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury."[221]

a. Right for media to speak

American citizens, including media organizations, have a First Amendment right to free speech, especially when the speech relates to matters of public concern.[222] The fair and accurate reporting privilege advances this First Amendment right by ensuring the media is not liable for repeating other's defamatory statements. However, if the media is unfairly held liable for their publications on government speech, the media may be chilled in their reporting.

Thus, in endorsing the fair and accurate reporting privilege, the majority embraced the right to and importance of media speech. Moreover, the majority's test, which requires the report to communicate the same message as the original statement, provides a broad cushion for the media,

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[220] *See* Nixon v. Dispatch Printing Co., 101 Minn. 309, 313, 112 N.W. 258, 259 (1907); Moreno v. Crookston Times Printing Co., 610 N.W.2d 321, 333 (Minn. 2000); *Larson*, 940 N.W.2d at 136.

[221] Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

[222] U.S. CONST. amend. I. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 265–66 (1964).

similar to other jurisdictions.[223]

b. Right for individuals to recover

However, on the other side of the scale, a private individual's right to recover for a tarnished reputation is "highly worthy of protection."[224] Private individuals are often more vulnerable to tarnished reputations as they cannot easily rebut false statements.[225] Justice Anderson also recognized that "the Minnesota Constitution *specifically* promises the residents of Minnesota the right to a remedy in our courts for damage to character."[226]

As a result, any expansion of this privilege could deprive a plaintiff, like Larson, of his or her state constitutional right to recover for damage to his or her character.[227] If the boundary of what constitutes a fair and accurate report is too great, individuals may be unable to recover from media companies for such damage.[228] Additionally, if given a broad scope of interpretation without liability, disinformation may run amok.[229]

2. General survey of the fair and accurate reporting privilege test in other jurisdictions

Jurisdictions have used part, or all, of section 611 of the Restatement to influence their fair and accurate reporting privilege.[230] Generally, "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."[231]

However, the limits of this common law privilege are not consistent across jurisdictions. The following Section will broadly describe the

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[223] *See* RESTATEMENT (SECOND) OF TORTS § 611, cmt. f (AM. LAW INST. 1977).
[224] Maethner v. Someplace Safe, Inc., 929 N.W.2d 868, 875 (quoting Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 491 (Minn. 1985)).
[225] *See Gertz*, 418 U.S. at 344.
[226] Larson v. Gannett Co., 940 N.W.2d 120, 149 (Minn. 2020) (Anderson, J., concurring in part, dissenting in part) (emphasis in original).
[227] *Id.*
[228] *See id.*; *see also* Hartzog v. United Press Ass'ns., 202 F.2d 81, 83 (4th Cir. 1953) (holding that defamatory statements that summarize events inaccurately are actionable).
[229] *See infra* Section IV.B.3.b.2
[230] RESTATEMENT (SECOND) OF TORTS § 611 (AM. LAW INST. 1977) (noting that neither the State Supreme Court or Appellate Court in Alabama, Arizona, Arkansas, California, Colorado, Connecticut, D.C., Delaware, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Washington, West Virginia has referenced § 611 in case opinions).
[231] *Id.*

privilege's nuances and its accompanying test.

a. Who should decide whether the report is fair and accurate?

Many courts are in consensus that after a defendant has shown the privilege applies to their publication, a jury may be required to determine the factual question of whether the published content is fair and accurate.[232] The Fifth Circuit has stated that it is not proper for the court to determine whether the fair and accurate reporting privilege applies when there exists more than one conclusion; it is instead a question for a jury.[233] Placing the responsibility on the jury is necessary because of the extensive fact inquiry.[234]

However, courts will take the decision away from a jury if no reasonable jury could decide a report was unfair and inaccurate.[235] The Ninth Circuit upheld a district court summary judgment decision that found a report was fair and accurate as a matter of law.[236] In finding a report both fair and accurate as a matter of law, the court protected the press from unnecessary litigation, finding that "speedy resolution of cases involving free speech is desirable" so that First Amendment rights are not chilled.[237] Other California courts have held the fair and true inquiry may be a matter of law if there is no dispute as to the material facts.[238]

Additionally, the First Circuit determined that whether a report is fair and accurate is a matter of law and may be determined by the judge.[239] In these cases, the court found the privilege had been abused, and the reports were unfair and inaccurate as a matter of law.[240]

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[232] *See* SMOLLA, *supra* note 13, at § 6:83.

[233] *Id.* (discussing reversal of summary judgment in Doe v. Doe, 941 F.2d 280 (5th Cir. 1991) where an author made an allegation that Dr. DiLeo had played a part in Dr. Martin Luther King, Jr.'s assassination based on a legislative report); *see also* RESTATEMENT (SECOND) OF TORTS § 619, cmt. b (1977).

[234] *See Doe*, 941 F.2d 280 (addressing whether the fair and accurate reporting privilege was abused: "abuse issues are indeed jury questions, so long as the facts admit of more than one conclusion"); *see also* Levine v. CMP Publications, Inc., 738 F.2d 660, 668 (5th Cir. 1984) ("Where the evidence presents a conflict about whether the published statement is a substantially true account of what was said in the public proceeding or whether the ordinary reader would construe the statement as such an account, then the jury must resolve these issues.").

[235] *See* Dorsey v. Nat'l Enquirer, Inc., 973 F.2d 1431, 1435 (9th Cir. 1992).

[236] *Id.*

[237] *Id.* (quoting Good Gov't Grp. of Seal Beach, Inc. v. Superior Court, 586 P.2d 572, 578 (Cal. 1978).

[238] *Id.* at 1435–36.

[239] *See, e.g.*, Howell v. Enter. Publ'g Co., 920 N.E.2d 1, 21 (Mass. 2010); *see also* Barhoum v. NYP Holdings, Inc., No. 126711, 2014 Mass. Super. LEXIS 52, at *26 (Mass. Super. Ct. Mar. 7, 2014).

[240] *Howell*, 920 N.E.2d at 23; *Barhoum*, No. 126711, 2014 LEXIS 52, at *26.

b. What is the test to determine whether a report is fair and accurate?

The fair and accurate reporting privilege, adopted most often as a qualified privilege, can be defeated by showing that the report was not a fair and accurate summary of the proceeding.[241] While some courts blended these terms into one test, others attempted to create two separate inquiries.[242]

To determine whether an article is a fair and accurate abridgement of the original proceedings, some courts describe the inquiry as a "gist" or "sting" test.[243] This test inquires whether a reader would find an article carries materially greater "sting" than the original proceeding.[244] The test does not require that an official proceeding be repeated in the exact manner it was presented; it allows the media a "certain amount of literary license."[245] In allowing the media a "degree of flexibility," they are not required to justify every word choice as long as the report's substance is accurately delivered.[246] However, the degree of flexibility is up for interpretation—it remains a factual inquiry to determine what will make a report substantially harsher, or change the meaning so that a reader is impressed with a different "gist."[247]

The Restatement emphasizes that a report must not only be accurate, but fair.[248] This bifurcated approach influenced some courts to consider each prong separately.[249] It is unclear if this provides a substantially different outcome.

c. Does additional context defeat the fair and accurate reporting privilege?

The Restatement cautions that a reporter cannot "make additions of his own that would convey a defamatory impression."[250] Some courts explain that the privilege is forfeited "by making exaggerated additions, or

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[241] 50 AM. JUR. 2D *Libel and Slander* § 300 (2020); *see also* Cox & Callaghan, *supra* note 10, at 36.

[242] *Compare* Larson v. Gannett Co., 940 N.W.2d 120, 143 (Minn. 2020) ("Did the reported statements produce the same effect on the mind of the listener . . . ?") *with Howell*, 920 N.E.2d at 22 ("[I]s the report sufficiently factually incorrect *or* sufficiently mischaracterized that the impression on the reader is so unfair to the plaintiff as to warrant placing it outside the privilege?") (emphasis added).

[243] *See* Dorsey v. Nat'l Enquirer, Inc., 973 F.2d 1431, 1436 (9th Cir. 1992).

[244] *Id.*

[245] *Id.*

[246] *Id.* (quoting McClatchy Newspapers, Inc. v. Superior Court, 234 Cal. Rptr. 702, 711 (Cal. Ct. App. 1987)).

[247] *Id.*

[248] RESTATEMENT (SECOND) OF TORTS § 611, cmt. f (AM. LAW INST. 1975).

[249] *See* Howell v. Enter. Publ'g Co., 920 N.E.2d 1, 21 (Mass. 2010).

[250] RESTATEMENT (SECOND) OF TORTS § 611, cmt. f (AM. LAW. INST. 1975).

embellishments to the account."[251] While a report may phrase the title to attract attention, the media cannot place an inaccurate spin on the proceedings.[252] Neither will the report be privileged if the report becomes a one-sided interview or investigation headed by the media.[253]

Nonetheless, a dramatic tone does not necessarily mean the report is unfair or inaccurate. The Third Circuit ruled in favor of a news outlet that added jocular commentary while reporting on a news conference that wrongly accused a plaintiff of involvement with a prostitution ring.[254] The report was privileged because the "defamatory sting" of the news conference was the same as the report: the article conveyed the same information as someone who would have attended the press conference.[255] The court found that a distasteful or insulting tone will not defeat the privilege as long as the underlying facts remain the same.[256]

3. The implications of the fair and accurate test established in Larson

The Minnesota Supreme Court did not stray too far from other jurisdictions' treatment of the privilege and its limits. However, based on these facts, a jury's interpretation of these instructions is imperative to maintain the correct balance between the media's right to speak and the individual's right to recover. In this Section, the majority's test will be applied to Larson's facts to understand whether it strikes the proper balance.

a. Application of the test: did the court get it right?

If a jury was presented with the majority's test on remand, the inquiry would be whether the additional context provided by the media had created a harsher "gist" than law enforcement officers actual statements.[257]

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[251] Pellegrino Food Prod. Co. v. Valley Voice, 875 A.2d 1161, 1165 (Pa. Super. Ct. 2005) (citing DeMary v. Latrobe Printing & Publishing Co., 762 A.2d 758, 762 (Pa. Super. Ct. 2000)) (noting the privilege was defeated because the author had embellished impressions she received during a meeting).

[252] Alan v. Palm Beach Newspapers, Inc., 973 So. 2d 1177, 1180 (Fla. Dist. Ct. App. 2008) (holding that although some of the information was phrased to catch readership's attention, it was still fair and accurate).

[253] Tharp v. Media Gen., Inc., 987 F. Supp. 2d 673, 687 (D.S.C. 2013) (finding that a report was not substantially true when the media did not base their report on the public record of the plaintiff's arrest, but instead conducted their own interview and went beyond the facts that could have been gleaned from the press release).

[254] Lee v. TMZ Prods. Inc., 710 F. App'x 551, 559 (3d Cir. 2017). The news outlet reported on the Attorney General's press release stating Lee had been arrested and accused of involvement with a prostitution ring which was an accurate summary, although it was later found the plaintiff had been wrongly arrested. *Id.*

[255] *Id.*

[256] *Id.*

[257] *See* 4 Minn. Prac., Jury Instr. Guides—Civil, CIVJIG 50.31 (6th ed. 2014).

While, as the majority resounds, a reasonable juror *could* construe that the media's additional contextual material creates a harsher "gist" and destroy the privilege, a reasonable juror should find that the media's additional contextual material changed the meaning of the original news conference statements.[258] The media's reports created a substantially harsher "gist" than what a person attending the press conference would have heard.[259]

While KARE 11 and the *St. Cloud Times* did report the same underlying message—that Larson had been taken into custody in connection with the murder—they added additional context.[260] For example:

> Police say that man—identified as 34-year-old Ryan Larson—ambushed officer Decker and shot him twice—killing him. . . . 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*.[261]

This statement was based on the press conference and release in which law enforcement officers repeatedly emphasized the early and ongoing nature of the investigation.[262] At the press conference, a deputy stated that Larson, the subject of a welfare check, had been taken into custody; however, "[Larson] was interviewed . . . *and some of that investigation is still ongoing*."[263] When asked whether Larson was the shooter, the representative refused to acknowledge that Larson was involved with the shooting and again made clear that the investigation was still ongoing, so the officers could not comment on that matter.[264]

A viewer of the KARE 11 news report or a reader of the *St. Cloud Times* would have gathered that the police arrested Larson for ambushing, shooting, and killing a police officer—when in fact, the law enforcement officers said no such thing.[265] They only indicated that Larson was arrested as a suspect, the investigation was early and ongoing, and they were continuing to follow up on all other leads.[266] However, Larson's reputation was destroyed because of the media's intense focus on him as the only suspected murderer, despite his later exoneration as a suspect.[267] While the

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[258] Larson v. Gannett Co., 940 N.W.2d 120, 145 (Minn. 2020).
[259] *See id.* at 161–62 (Anderson, J., concurring in part, dissenting in part).
[260] *See id.* at 128.
[261] *Id.* (emphasis added).
[262] *Id.* at 158–59 (Anderson, J., concurring in part, dissenting in part). This language was vocalized no fewer than thirteen times during the press conference. *Id.*
[263] *Id.*
[264] *Id.*
[265] *Id.* at 161.
[266] *Id.*
[267] *See id.* at 126–29. While no one had ever been arrested for the killing, another person of interest had committed suicide after police officers questioned him. *Id.*

majority correctly found that statements six through eight did not convey defamatory meaning or were non-actionable opinion, statements one through five provide a much different effect on the mind of a viewer/reader than what a person would have understood from the news conference.

b. On remand

The Minnesota Supreme Court remanded the case to the district court to decide whether the privilege was defeated with this inquiry: "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?"[268] The court found that a remand was necessary because, first, the instructions provided at district court were incorrect,[269] and second, a reasonable juror *could* find that the reports were unfair and inaccurate reports of the news conferences or press releases.[270] The majority practiced judicial restraint and sent the case back to a jury on remand.[271] The following Section will predict the impacts of this decision.

1. A verdict for Larson

Justice Anderson, in dissent, argues that the news broadcasts and articles "did not communicate the same meaning as the press conference as a matter of law," because the reports projected a meaning of finality, whereas the press conference emphasized the early stages of the investigation.[272] While the majority did not engage in this analysis, it is very possible that a jury could find that the reports and original proceedings did not convey the same meaning.

A verdict in favor of Larson would establish clear boundaries of the fair and accurate reporting privilege in Minnesota that do not yet exist.[273]

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[268] *Id.* at 148.

[269] *See id.* at 139. The jury was given instructions on "falsity," which asked whether the statements were substantially accurate. Because these instructions did not specify whether the inquiry was to the underlying statements or to the report compared to the original statements, the majority finds the instructions were inaccurate. *See id.*

[270] *Id.* at 141.

[271] *Id.* at 148.

[272] *Id.* at 161 (Anderson, J., concurring in part, dissenting in part). Because Justice Anderson finds an individual's right to recover for damage to personal reputation to be so compelling, he would take the question from the jury and find the statements false as a matter of law and the defendants liable for negligence damages. *Id.*

[273] *See, e.g.*, Moreno v. Crookston Times Printing Co., 610 N.W.2d 321, 334 (Minn. 2000). This case, one of the only other modern decisions regarding the fair and accurate report privilege in Minnesota, did not have enough of a record to determine whether the privilege was defeated.

Thus, a verdict for Larson would establish that on these facts, additional context changed the meaning of a report and defeated the fair and accurate reporting privilege. Additionally, Larson would be compensated for the damages to his reputation, and the importance of an individual's right to recover for defamation in Minnesota would be bolstered.[274]

2. A verdict for respondents

However, if on remand, the jury found the statements to be fair and accurate reports of the original proceedings, broad media protections may result and disfavor an individual's right to recover for a damaged reputation. The change in meaning from the original proceeding to the media reports, in this case, would set a standard for the media's ability to report on future proceedings with flair. It could open the door to broad interpretations of what is fair and accurate and steamroll not only Larson's, but future individual's reputations. Providing the media with a broad interpretative lens may lead to disinformation or "fake news."[275]

Justice Anderson emphasizes the need for a "free and robust press that is motivated to inform and educate the public about important public matters" while recognizing that the media must be responsible in their work.[276] And in an era of fake news, holding the media accountable for reporting disinformation, disguised as government news, is a commendable goal.[277] In this context especially, when the media is held out as amplifying government speech, there is a heightened need to hold media companies liable if their reporting is not fair and accurate. Additionally, when the statements concern a private individual, the media must report even more fairly and accurately because private individuals are not able to easily recover.[278] There is much at stake in this case if a jury were to find statements

[274] *See Larson*, 940 N.W.2d at 148–49 (Anderson, J., concurring in part, dissenting in part) (emphasizing the importance of an individual's right to recover for damage to personal reputation).

[275] David O. Klein & Joshua R. Wueller, *Fake News: A Legal Perspective*, 20 J. INTERNET L., Apr. 2017, at 6 (defining "fake news" as "online publication of intentionally or knowingly false statements of facts."). However, under this definition, the privilege could be defeated because the statements were made knowingly to be intentionally false.

[276] *Larson*, 940 N.W.2d at 161 (Anderson, J., concurring in part, dissenting in part).

[277] *See* Björnstjern Baade, *Don't Call a Spade a Shovel – Crucial Subtleties in the Definition of Fake News and Disinformation*, VERFASSUNGSBLOG, (Apr. 14, 2020), https://verfassungsblog.de/dont-call-a-spade-a-shovel/ [https://perma.cc/XFA6-2M8Q] ("[F]ake news or disinformation can also encompass distorted statements, which are in themselves factually correct, but presented in a way that makes it likely that false conclusions are drawn from them.").

[278] *See* Erwin Chemerinsky, *Keynote Address: Fake News, Weaponized Defamation and the First Amendment*, 47 SW. L. REV. 291, 292 (2018) ("When it comes to reputation, a person who has been tarnished by false speech, may never be able to regain the lost reputation, setting the record straight usually fails to eliminate the tarnish."); *see also Larson*, 940

one through five to be fair and accurate.

c. Was there a better way?

While the Minnesota Supreme Court practiced judicial restraint in sending the determination of a fair and accurate report back to district court, there is much at risk if a jury found this to be a fair and accurate report. Moreover, if the case were to be settled out of court, the State of Minnesota would, again, be left without clear boundaries of what types of facts constitute a fair and accurate report.[279]

The court could have engaged in Justice Anderson's analysis to decide the case as a matter of law.[280] This decision would be beneficial for Larson and could create workable boundaries of the privilege to hold the media accountable in Minnesota. In Massachusetts, the court decides whether a report is fair and accurate as a matter of law, finding that the privilege is already very generous.[281] While this is usually a fact-intensive inquiry, the record is clear on these facts, and without other precedent as to how this privilege is applied in Minnesota,[282] the jury may not understand how "fair" and "accurate" are applied in practice. On the one hand, if the court were to instead decide this case as a matter of law, a clearer picture of the privilege's limits would exist. On the other hand, in remanding back to a jury, the court has followed its precedent and maintained judicial restraint.[283]

N.W.2d at 156 (Anderson, J., concurring in part, dissenting in part). As Justice Anderson recognized, an individual's right to recover for defamatory statements which tarnish their reputation is incredibly important.

[279] While the court did decide that statements seven and eight were fair and accurate as a matter of law, the statements at issue—those that added additional context—are much more telling of how much flexibility the media may have in their reports. *Larson*, 940 N.W.2d at 160 (Anderson, J. concurring in part, dissenting in part).

[280] *See id.* at 161. Justice Anderson stated, "[w]e have decided questions of falsity as a matter of law where the content of an alleged defamatory statement and an actual statement is undisputed," and proceeded to find that because statements one through eight communicated a meaning of finality, the statements should be found not fair and accurate as a matter of law. *Id.*

[281] *See* Barhoum v. NYP Holdings, Inc., No. 126711, 2014 LEXIS 52, at *9 (Mass. Mar. 7, 2014). Investigators circulated an e-mail to the press asking for more information about two suspects in relation to the Boston Marathon bombing. A corresponding news article gave the impression that the two suspects were guilty and the court determined it was, as a matter of law, not a fair and accurate report. A settlement followed this decision. *See also* Howell v. Enter. Publ'g Co., 920 N.E.2d 1, 21 (Mass. 2010) (noting that the standard is generous and requires judge to decide whether privilege attaches).

[282] *See* Moreno v. Crookston Times Printing Co., 610 N.W.2d 321, 334 (Minn. 2000) (holding that while city council meeting is within the privilege's scope, there was not enough of a record to determine whether the privilege was defeated).

[283] *Larson*, 940 N.W.2d at 140–41 (holding that when more than one conclusion can be drawn from undisputed facts, the question should go to the jury).

V. CONCLUSION

Because of *Larson*, the fair and accurate reporting privilege is extended to publications regarding matters of public concern made by public officials at official press conferences or in official press releases. The public is benefited because limiting media liability encourages reporting on government proceedings that are timely, fair, and accurate—a necessity in our world today. This protection may encourage the media to bring the public closer to government happenings and may even unveil corruption.

However, these commendable outcomes do not come without caution. Although this extension brings good news to the media, this extension will remove a defamed individual's ability to recover from the organization that amplified the defamatory statements if the media reported fairly and accurately. Additionally, although the court engaged in a robust discussion that established some limits, it risked a lot more than Larson's reputation by remanding the decision to a jury. If, on remand, a jury were to find that the media's report was fair and accurate, a future plaintiff's ability to recover for defamatory statements may be diminished.[284] Moreover, it could allow the media a broad cushion in their reports of government proceedings, which—without fear of liability—could only increase disinformation and fake news. Nevertheless, hope remains that one's reputation will not be sacrificed in the name of media protection.

[284] *See supra* Section IV.B.3.b.2.