APPENDIX

APPENDIX A
STATE OF MINNESOTA

IN SUPREME COURT

A21-1531

Chutich, J.

Dissenting, Gildea, C.J., Anderson, Hudson, JJ.

Byron Johnson,

Respondent,

vs.

Filed: September 20, 2023
Office of Appellate Courts

Kaija Freborg,

Appellant.

Scott. M. Flaherty, Taft Stettinius & Hollister LLP, Minneapolis, Minnesota; and

John G. Westrick, Samuel A. Savage, Savage Westrick, PLLP, Bloomington, Minnesota, for respondent.

Alan P. King, Daniel E. Hintz, Natalie R. Cote, Goetz & Eckland P.A., Minneapolis, Minnesota, for appellant.

S Y L L A B U S

1. Analysis of the totality of the circumstances—including the content, form, and context of defendant's Facebook post that accused the plaintiff in this defamation action and two other dance instructors of sexual assault—shows that her speech involved a matter of public concern, namely, sexual assault in the context of the #MeToo movement.

2. Because a genuine issue of material fact exists as to the truth or falsity of defendant's alleged defamatory statement, we cannot resolve the issue of actual malice upon appeal; accordingly, we remand the matter to the district court for trial on the issues of veracity and actual malice.

Reversed and remanded to the district court for further proceedings.

O P I N I O N

CHUTICH, Justice.

This case involves a defamation claim brought by respondent Byron Johnson—a private figure—

against appellant Kaija Freborg. Johnson sued Freborg after a post on Freborg's Facebook page accused Johnson and two other dance instructors from the Twin Cities dance community of varying degrees of sexual assault. Johnson was one of Freborg's dance teachers, and the two previously had a casual sexual relationship that lasted for about a year.

The district court granted Freborg's motion for summary judgment, finding that Freborg's speech was true and, alternatively, that her speech involved a matter of public concern and was not made with actual malice. The court of appeals reversed. It held that the truth or falsity of Freborg's statement presented a genuine issue of material fact. The court of appeals further held, in a divided opinion, that because the dominant theme of Freborg's post involved a matter of private concern, Johnson was not required to prove actual malice to recover presumed damages. The court of appeals remanded the case to the district court for further proceedings.

We granted Freborg's petition for review on whether her statement involved a matter of public concern. Because the overall thrust and dominant theme of Freborg's post—based on its content, form, and context—involved a matter of public concern, namely, sexual assault in the context of the #MeToo movement, her statement is entitled to heightened

protection under the First Amendment to the United States Constitution. Before Johnson may recover presumed damages, he must therefore show that Freborg's speech was not only false, but also that the post was made with actual malice.

Accordingly, we reverse the court of appeals on the issue of public concern and remand the case to the district court for further proceedings to determine the veracity of Freborg's post and, if the post is found to be false, whether the making of the post meets the constitutional actual-malice standard.

FACTS

Freborg and Johnson met in 2011, and Freborg, then a faculty member at a local university, began to take dance lessons from Johnson at a Twin Cities dance studio. Sometime in 2012, the parties began a casual sexual relationship. Freborg agrees that many of their sexual encounters were consensual. She claims, however, that not all of their interactions were consensual, including an allegation that Johnson approached her in 2015 at his home during a party "while [she] was intoxicated and alone, grabbed [her] hand and put it down his pants onto his genitals" without her consent. This allegation, and its veracity, is at the heart of her Facebook post and the litigation.

After the 2015 party, Freborg and Johnson ended their sexual relationship and continued to contact one another only in the context of dance lessons; these dance-related communications lasted until sometime in 2017. By 2020, they had not spoken to one another for several years.

On July 14, 2020, Freborg posted the following public message[1] on her Facebook page:

After receiving feedback about her message, Freborg clarified in the post's comment thread that she was not accusing Johnson of rape ("[t]his type of

[1] Johnson alleges Freborg's post reached thousands of Facebook users, many of whom were not Facebook "friends" with Johnson or Freborg.

coercion [rape] has nothing to do with [Johnson]"). She also edited her post 2 days later to exclude allegations of rape:

Johnson posted a response on Freborg's public Facebook thread:

Freborg posted the following response on the thread:

Over 300 people "reacted" to Freborg's posts, 182 readers commented on them, and they were publicly "shared" 16 times.

Some of the response to Freborg's posts was positive. Commenters told her that she was "brave" and a "survivor." Others seemingly reinforced her posts by explaining their own negative experiences in the Twin Cities dance community. For example, one commenter noted that Freborg was "not the only

one of us who has been sexually assaulted in the dance world." Another commented that she does not "dance in certain spaces within the [Twin Cities] because of feeling diminished, preyed upon, unvalued, etc."

Other commenters, however, came to Johnson's defense. One person, for example, explained that people should "wash [their] laundry at the COURTS" and only come forward on social media "after the person [accused of sexual assault] is PROVEN guilty." Another accused Freborg of slander and criticized her unwillingness to engage with Johnson's response to her posts.

In response to the varied comments to her posts, Freborg later explained that she "did this for the safety of other women, and really to show that we as women can disrupt the status quo by calling sh*t out." On July 27, 2020, just shy of 2 weeks after the original post was published, Freborg deactivated her Facebook account, removing the post and its thread from public view.

Johnson sued Freborg for defamation. He claimed that both Freborg's original and edited posts accused Johnson of raping Freborg, thereby painting him as a rapist. Johnson argued that his reputation suffered as a result and that he lost business because of the posts. After discovery, Freborg moved for summary judgment claiming that: (1) her speech

was true; (2) her speech was a matter of public concern; and (3) Johnson failed to show that her speech was made with actual malice.

To support her summary judgment motion on the issue of public concern, Freborg presented the following evidence about the global impact of the #MeToo movement. The #MeToo movement was conceived to allow women to share their experiences of sexual assault and harassment and to seek accountability from their abusers.[2] The hashtag collects the posts and enables a community discussion to occur on the subject of sexual abuse. One study submitted by Freborg stated that the movement "was exceptionally effective in rapidly increasing awareness around sexual misconduct," and that researchers have opined that "social movements [like #MeToo] can rapidly affect the norms for behavior by changing perceptions of a societal problem."

Freborg also submitted information about sexual assault specifically in the dance community. She submitted a blog titled "Dance Predators" that provided suggestions on how to combat predatory behavior by dance instructors; a news story by

[2] Freborg submitted articles in support of her summary judgment motion showing that the movement gained international attention—particularly on social media—in 2017 during the Harvey Weinstein sexual abuse scandal in Hollywood.

Minnesota Public Radio about sexual assault in a local Twin Cities dance studio; and seven other social media posts from dancers, two posted the same day as Freborg's post in July, that called out the predatory behavior of three prominent international dance instructors in the global dance community.

Johnson also moved for partial summary judgment on the issues of liability and actual malice. Additionally, he moved to amend his complaint to add a claim for punitive damages. Johnson claimed that Freborg's posts involved a matter of private, not public, concern because even if the #MeToo movement qualifies as a matter of public concern, Freborg's specific posts were personal in nature. He asserted that the sources Freborg relied upon about the dance community were insufficient to show that her speech involved a matter of public concern. Johnson also argued that Freborg's posts suggested that Johnson raped her even though she openly admitted he had not, so Freborg acted with actual malice because she knowingly posted false information. He asked the district court for a jury trial only on the issue of damages.

The district court granted Freborg's motion for summary judgment. First, the court found that Freborg's statements were true. Second, the court rejected Johnson's claim that the posts were too personal in nature to be a matter of public concern,

specifically relying on Freborg's use of the #MeToo hashtag and the context of the posts. The court also noted that "[t]he record is replete with other content regarding this specific problem [sexual assault] in this specific community [the Twin Cities dance community]." Finally, the district court found that—even if Freborg's speech was false—Johnson failed to show actual malice, which is required to recover presumed damages for defamatory statements that involve a matter of public concern.

The court of appeals reversed. *Johnson v. Freborg*, 978 N.W.2d 911 (Minn. App. 2022). The court held that a genuine issue of material fact existed about the veracity of Freborg's posts, making summary judgment inappropriate. *Id*. at 917–18. In a divided opinion, the court further held that Freborg's speech was a matter of private, not public concern. *Id*. at 923. The court therefore did not reach the issue of actual malice. *Id*. at 923 n.25.

One judge dissented, stating that the totality of circumstances showed that Freborg's statements relate to a matter of public concern. *Id*. at 924–29 (Wheelock, J., concurring in part, dissenting in part). Considering the content, form, and context of the speech, the dissent reasoned that Freborg "made the post as part of a now-global conversation about the prevalence of sexual harassment and assault and the need to shine light on once-secreted personal experiences." *Id*. at 926.

Freborg petitioned this court for review on one issue: whether her speech involved a matter of public concern, which we granted. She does not challenge the court of appeals' conclusion that a genuine issue of material fact exists about the veracity of her speech and agrees that a remand to the district court is appropriate on this issue. Consequently, we do not address the veracity issue further here and limit our analysis to the claim that her speech involved a matter of public concern.

ANALYSIS

We review the district court's grant of summary judgment de novo. *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 874 (Minn. 2019). To decide whether summary judgment is appropriate, we must determine "whether the district court erred in its application of the law to the facts." *Id.* (citation omitted) (internal quotation marks omitted). In addressing whether a statement involves a matter of public concern, federal courts have viewed the issue as a question of law, *see Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983), and we likewise review the question of whether speech involves a matter of public concern de novo. We also review de novo the determination of "[w]hether evidence in the record is sufficient to support a finding of actual malice." *Maethner*, 929 N.W.2d at 879 n.7.

I.

To determine whether Freborg's speech involved a matter of public concern, we start with some general principles involving defamation. "Under the common law, a plaintiff pursuing a defamation claim 'must prove that the defendant made: (a) a false and defamatory statement about the plaintiff; (b) in [an] unprivileged publication to a third party; (c) that harmed the plaintiff's reputation in the community.'" *Maethner*, 929 N.W.2d at 873 (alteration in original) (quoting *Weinberger v. Maplewood Rev.*, 668 N.W.2d 667, 673 (Minn. 2003)). Certain types of speech, like accusations of "criminal behavior or moral turpitude"—including accusations of sexual assault—are considered "defamation per se." *Id.* at 875 (citing *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 25 (Minn. 1996) (internal quotation marks omitted). If a statement is found to be defamatory per se, we then presume harm to a plaintiff's reputation without requiring the plaintiff to prove actual damages. *Id.* Johnson asserts that he is entitled to presumed damages under this standard.

Like all laws regulating speech, however, "the doctrine of defamation per se cannot offend the constitutional guarantees of the First Amendment." *Id.* We have long recognized that "personal reputation has been cherished as important and highly worthy of protection." *Jadwin v. Minneapolis Star & Trib. Co.*, 367 N.W.2d 476, 491 (Minn. 1985). But we cannot "offer recourse for injury to reputation at the cost of chilling speech on matters

of public concern, which 'occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'" *Maethner*, 929 N.W.2d at 875 (quoting *Snyder v. Phelps*, 562 U.S. 443, 452 (2011)).

Given this commitment to "uninhibited, robust, and wide-open" debate on issues of public concern, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), "a private plaintiff may not recover presumed damages for defamatory statements involving a matter of public concern unless the plaintiff can establish actual malice." *Maethner*, 929 N.W.2d at 878–79. To meet this constitutional actual-malice standard, "a statement must be 'made with the knowledge that it was false or with reckless disregard of whether it was false or not.'" *Id.* at 873 (quoting *Weinberger*, 668 N.W.2d at 673) (internal quotation marks omitted). Freborg contends that this heightened standard applies to her speech because her posts involved a matter of public concern.

In *Maethner*, a defamation case, we held that the determination of whether speech is of public or private concern in a particular case is "based on a totality of the circumstances." *Id.* at 881. In particular, "courts should consider the content, form, and context of the speech." *Id.* "No single factor is 'dispositive;' rather, courts should 'evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.'" *Id.*

(quoting *Snyder*, 562 U.S. at 454). In addition, in weighing the circumstances of the speech, we must make "an independent examination of the whole record." *Snyder*, 562 U.S. at 454 (citation omitted) (internal quotation marks omitted).

Maethner involved statements by Maethner's ex-wife—posted on her private Facebook page under the name Jacki Hansen Maethner—identifying herself as a survivor of domestic violence, as well as an article published in a newsletter of a domestic violence organization describing the "Survivor Award" that she had received. *Maethner*, 929 N.W.2d at 871. Maethner's ex-wife and the organization also posted pictures on Facebook of her holding the award. *Id.*

Even though he was not named in the posts, Maethner claimed that, given the use of his distinct last name by his ex-wife, the speech essentially accused him of domestic violence. *Id.* at 872. We recognized that "as a general proposition," speech relating to domestic violence is a matter of public concern. *Id.* at 881. But, in addition to the subject of the speech, we explained that "the form and the context of the speech must also be considered, as well as any other relevant factors." *Id.* Because neither the district court nor the court of appeals had specifically addressed the issue of public concern, we remanded the case back to the district court "to decide in the first instance whether the

challenged statements involve a matter of public or private concern." *Id*. at 881–82.

Similar to *Maethner*, we recognize that "as a general proposition," speech relating to sexual assault is a matter of public concern. *See also Richie*, 544 N.W.2d at 26 (concluding that "discussion of sexual abuse of children by their parents and legal recourse available to the abused child" were "certainly of public concern"). But *Maethner* clearly instructs us that no per se rule applies to suggest that statements about sexual abuse (or any other crime) are always matters of public concern. Instead, we must, on a case-by-case basis, apply the totality of the circumstances test and balance the content, form, and context of the speech, as well as any other pertinent factors, to determine whether speech involves a purely private matter or is a statement about a matter of public concern intended to influence public discussion about desired political or social change. Balancing the totality of the circumstances of the Facebook posts here, we conclude that, although the speech involved personal aspects, the predominant theme of Freborg's speech involved a matter of public concern, namely sexual assault in the context of the #MeToo movement.

A.

We begin with the content—the "what"—of Freborg's speech, and we review the entire thread of

the Facebook postings when determining whether "a forbidden intrusion on the field of free expression" has occurred. *See Sullivan*, 376 U.S. 284–86; *see also Snyder*, 562 U.S. at 453–54. The subject of the Facebook posts involved accusations of sexual assault by three dance instructors in the local Twin Cities dance community. In her first post, Freborg stated that she had been "gaslighted/coerced into having sex, sexual[ly] assaulted, and/or raped" by three specific dance instructors, including Johnson. She amended her post 2 days later to delete the word "raped," stating instead that she had "experienced varying degrees of sexual assault" by the three dance instructors, again including Johnson.[3] The last line of the original and amended posts stated, "If you have a problem with me naming you in a public format, then perhaps you shouldn't do it."

In evaluating whether these personal portions of Freborg's posts—the identification, tagging, and admonishing of the three instructors—make the speech a private affair, we must weigh these statements against the remaining text. First, the original and amended post prominently begin with this statement: "Feeling fierce with all these women dancers coming out." Then, before listing the

[3] Freborg's amended post stated that she changed the wording of her original post based on feedback from a good friend that the word "rape" could be a trigger word. She also acknowledged in the Facebook thread and in private Facebook messages that Johnson never raped her.

varying degrees of sexual assault that she says she experienced, Freborg states, "So here goes . . . ." This introduction suggests that she was encouraged by other women speaking out about sexual assault in the dance community to reveal her own experience and to add her voice to the community conversation.

Second, Freborg ends her posts with the well-known #MeToo hashtag and a #DancePredators hashtag, connecting her experience directly to the dance community and the broader #MeToo movement. This social movement is characterized by survivors of sexual abuse creating social media posts disclosing their experiences with sexual violence and identifying their abusers. Benedetta Faedi Duramy, *#MeToo and the Pursuit of Women's International Human Rights*, 54 U.S.F. L. Rev. 215, 217 (2020). The movement seeks to connect survivors, encourage victims to tell their story, and increase awareness of the scope of the problem of sexual assault. JoAnne Sweeney, *Social Media Vigilantism*, 88 Brook. L. Rev. 1175, 1219–21 (2023). "'For many #MeToo claimants, what they want is to tell their story.' Indeed, the phrase 'me too' is inherently about connection; it tells others that they are not alone and that they are understood. Such affirmations can be healing in their own right as a form of social support." *Id*. at 1219 (citation omitted).

Third, her subsequent explanation of her motives in the post thread—that she made the posts "for the safety of other women" and to show how

"women can disrupt the status quo"—suggests that her posts were an attempt to raise awareness for other women, including women in the dance community, and inspire social change. These three factors, considered together, in addition to the broader context and response to the posts, show that Freborg frames her Facebook posts "as her contribution to the larger discussions occurring at the time of the #MeToo movement." *Coleman v. Grand*, 523 F. Supp. 3d 244, 259 (E.D.N.Y. 2021).

Johnson claims that the explicit use of "you" three times in the last line of the initial and amended post to condemn the instructors' alleged abusive behavior, and Freborg's reply to his comment on her posts, show that the content of Freborg's speech was not to add her voice to the #MeToo movement but to get "vengeance" on him. He asserts that Freborg's posts—identifying him and two other instructors in the local dance community—were too limited in scope to implicate the broader #MeToo movement. He further contends that his preexisting relationship with Freborg shows that she used the movement to mask a purely private attack on his character. He cites the Supreme Court's decision in Snyder to show that the content of Freborg's posts was personal in nature.

A preexisting relationship—or the lack thereof—is certainly a consideration in weighing whether the speech involves a matter of public concern. *See Snyder*, 562 U.S. at 455 (stating that

there was no prior relationship between the Westboro Baptist Church and the soldier "that might suggest Westboro's speech on public matters was intended to mask an attack on Snyder over a private matter"). Here, however, two considerations cause us not to heavily weigh Johnson's assertion that Freborg's speech was a matter of private concern because she was a "jilted former lover, who waited five years before publicly attacking Johnson." First, the passage of that many years between the end of the parties' relationship, which Johnson described as a "casual sexual relationship," and the post suggests that the speech was not a personal attack in response to the relationship ending. Second, the inclusion of two other dance instructors implies that the post had less to do with Freborg's previous relationship with Johnson, and more about speaking up about alleged sexual abuse in the Twin Cities dance community generally.

Johnson cites the Supreme Court's decision in *Snyder* to show that the content of Freborg's post was personal in nature. In *Snyder*, the issue was whether the speech of the leader of the Westboro Baptist Church could receive First Amendment protection when he organized a protest with offensive placards near the funeral of a soldier killed in the Iraq war. The signs included general messages such as "God Hates the USA/Thank God for 9/11," "America is Doomed," "God Hates Fags," and "Priests Rape Boys." *Snyder*, 562 U.S. at 448, 454. The Court held that the signs addressed

"matters of public import" including "homosexuality in the military, and scandals involving the Catholic clergy." *Id*. The Supreme Court acknowledged, however, that the content of a few signs like "You're Going to Hell" and "God Hates You" could be viewed as containing personal messages to the dead soldier and his family. *Id*. The Court concluded, however, that the few personal messages did "not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues." *Id*.

After weighing the personal aspects of the posts here with those elements addressing broader public issues, we reach a similar conclusion about content: even though Freborg named, tagged, and admonished three specific instructors in her post, these personal messages do not outweigh the dominant theme of her speech—to discuss sexual assault in the dance community, a matter of public import.

The dissent takes a narrow view of a "matter of public concern," essentially limiting those matters "to self-government," "government officials," or "government performance." But that narrow perspective is rooted primarily in decades-old Supreme Court case law. *See*, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 (1974); *Time, Inc. v. Firestone*, 424 U.S. 448 (1975). The dissent's narrow perspective disregards the development of the law

over the past five decades and the Supreme Court's broader view of matters of public concern. According to a more recent case, "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.' " *Snyder*, 562 U.S. at 453 (citations omitted), quoted in *Maethner*, 929 N.W.2d at 880.[4] As we noted in

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[4] The dissent suggests that because Snyder involved a claim for intentional infliction of emotional distress, the public concern test from *Snyder* does not apply in the context here, a defamation action. But we have previously articulated the exact same public concern test from Snyder in a defamation action: "that '[s]peech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community' or when the subject of the speech is 'of general interest and of value and concern to the public.'" *Maethner*, 929 N.W.2d at 880 (quoting *Snyder*, 562 U.S. at 453). We explained that "[t]he facts of *Snyder* are particularly helpful in illustrating how to analyze whether statements are ones of public concern" and cited Snyder for the articulation of " 'some guiding principles' " for distinguishing between a public and a private concern. *Id.* (quoting *Snyder*, 562 U.S. at 452). And we specifically explained that these guiding principles apply "in determining the constitutional protections afforded to speech in tort actions," without distinguishing between actions for intentional infliction for emotional distress and other tort actions like defamation. *Id.*

We are not alone in relying on Snyder to guide the public concern determination in tort actions generally. For

Maethner, speech involving a matter of public concern is within "the core of First Amendment protection . . . to assure the unfettered interchange of ideas for the bringing about of political and *social changes* desired by the people." Maethner, 929 N.W.2d at 879 (citation omitted) (internal quotation marks omitted) (emphasis added).[5]

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example, in considering whether speech qualified as a matter of public concern, the Second Circuit explained that the Snyder public concern test applies to "any tort alleging reputational harm," "regardless of the claim at issue, be it defamation, intentional infliction of emotional distress, or negligence." *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 129 (2d Cir. 2013) (emphasis added); *see also*, e.g., *Cousins v. Goodier*, 283 A.3d 1140, 1149–52 (Del. 2022) (applying the Snyder public concern test to hold that a claimed defamatory email was "speech that addressed a matter of public concern: the ongoing national debate about the use of American Indian iconography in sports logos," noting that "the First Amendment's Free Speech Clause can serve as a defense in state tort suits" generally (emphasis added)); *Monge v. Univ. of Pa.*, ___ F. Supp. 3d ___, No. CV22-2942, 2023 WL 3692935, at *2 (E.D. Pa. May 26, 2023) (applying the Snyder public concern test to a defamation claim). Overall, it is the nature of the speech itself that guides our public concern inquiry, not the nature of the claim.

[5] Even if we were to view matters of public concern as relating primarily to "self-government" or "government performance," there are strong indications that the #MeToo movement has catalyzed government action. For example, since 2017, several federal laws have been amended or passed in direct response to the movement. *See*, *e.g.*, Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 13307, 26 U.S.C. § 162(q)(1) (removing tax deductions for "any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is

Consistent with *Snyder*, we conclude that Freborg's Facebook post fits this broader conception of public concern.

Finally, although not binding upon us when weighing the content of Freborg's speech, we find persuasive a recent defamation case with similar facts. *Fredin v. Middlecamp*, 500 F. Supp. 3d 752 (D. Minn. 2020), *aff'd*, 855 F. App'x 314 (8th Cir. 2021) (per curiam) (unpublished). In Fredin the federal district court, applying Minnesota law, found that a post on a public Twitter account that included pictures of a person and explicitly accused him of repeated sexual harassment and rape qualified as a matter of public concern. *Id*. at 777. In weighing the totality of the circumstances, the district court found that "[t]he content of the speech here addressed harassment and rape, and more specifically, the subject of women coming forward to share their experiences in this regard." *Id*. The court therefore concluded that the speech was entitled to the actual

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subject to a nondisclosure agreement"); Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, § 2(a), 136 Stat. 27 (2022) (amended the Federal Arbitration Act, 9 U.S.C. § 402, to make any "predispute arbitration agreement or predispute joint-action waiver" for sexual harassment claims unenforceable); Speak Out Act, 42 U.S.C. §§ 19401–04 (recognizing that because "[s]exual harassment and assault remain pervasive in the workplace and throughout civic society," 42 U.S.C § 19401(1), "no nondisclosure clause or nondisparagement clause agreed to before the dispute arises shall be judicially enforceable" 42 U.S.C § 19403(a)).

malice standard of protection. *Id*. We believe the same conclusion about content is justified here.

In sum, although Freborg's speech identifies and addresses Johnson directly and has some aspects of airing a personal dispute, the dominant theme of her posts speaks to the broader issue of sexual abuse in the context of the #MeToo movement, a matter of public concern. After seeing other women share their experiences, she offered her own story, hoping to raise awareness about the prevalence of sexual assault, to keep other women safe, and to show that women "can disrupt the status quo" to bring about social change.

B.

Turning next to the form—the "where"—of Freborg's speech, this factor further supports a conclusion that Freborg's posts were on a matter of public concern.[6]6 Freborg disseminated her speech on her Facebook account, making her post publicly available to anyone. The use of the internationally recognized hashtag for the #MeToo movement allowed her message to be disseminated publicly and broadly on Facebook. Here, the #MeToo hashtag does what a public account, blog, or journal

[6] Notably, at oral argument before us, Johnson agreed that the form of Freborg's speech pointed to the posts being a matter of public concern, although he noted that no one factor is dispositive.

dedicated to these issues would by spreading the message to an unlimited audience.

The Supreme Court has acknowledged the power of Facebook, declaring that today "the 'vast democratic forums of the Internet' . . . and social media in particular" provide the "most important places . . . for the exchange of views." *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017) (quoting *Reno v. Am. C.L. Union*, 521 U.S. 844, 868 (1997)). The Court further noted that social media acts as the "modern public square" and that sites like Facebook "allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" *Id.* at 107. It follows that Freborg specifically chose this modern public square as a way for her message "to reach as broad a public audience as possible." *Snyder*, 562 U.S. at 454; *see also Fredin*, 500 F. Supp. 3d at 777. Accordingly, this factor weighs in favor of concluding that Freborg's speech involved a matter of public concern.

To be clear, attaching a hashtag—even the well-recognized #MeToo hashtag—to the end of a social media post is not in and of itself determinative of whether the speech involves a matter of public concern. The use of a hashtag is only one relevant consideration in balancing the totality of the circumstances.[7] Importantly, when courts are

[7] Just as the use of a hashtag does not automatically transform a matter into one of public concern, the naming of a specific

reviewing the use of a specific hashtag, they should consider all other relevant factors, including content and context.[8] A hashtag, even the globally recognized hashtag at issue here, can never provide blanket First Amendment protections. The critical question will remain: based upon the totality of the circumstances in light of the record as a whole, does the speech involve a matter of public or private concern?

C.

Finally, the full context—the "how"—of Freborg's posts also weighs in favor of holding that her speech involved a matter of public concern. Johnson agrees that we can and should look at the entire thread associated with Freborg's posts. He asserts, however, that it engendered "no discussion about how to engage in democratic self-governance," which he maintains would help support Freborg's theory that the context of her post was intended to raise awareness and bring accountability.

The responses to the posts refute that claim on its face. The posts generated much discussion and

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person does not mechanically characterize the matter as one of private concern. Such a binary approach would ignore the crux of the inquiry—whether balancing the totality of the circumstances shows that a matter is one of public concern.

[8] Here, for example, the hashtag at issue is at the heart of the #MeToo movement—so much so that the *hashtag itself* is directly in the name of the movement and critical to the dissemination of its message and goals.

mixed reactions: some gave Freborg their full support and validated the claims in her posts by citing their own negative experiences, while others were critical of the posts and how Freborg chose to speak about what happened to her. These reactions facilitated conversations about the appropriate measures that victims should take when speaking out and how to properly support sexual assault victims generally. The robust and unfettered discussion in the thread following the initial post supports the conclusion that the form and context of this speech makes this speech a matter of public concern, rather than a purely private matter.

As discussed above, the context of the #MeToo movement is a key factor in our analysis. The #MeToo movement has had a direct impact on society and how communities address sexual assault across industries. Data shows, for example, the number of sexual harassment complaints the U.S. Equal Employment Opportunity Commission received jumped by 13.6 percent after #MeToo went viral. Sweeney, *Social Media Vigilantism*, 88 Brook. L. Rev. at 1222. Further, reports now show that more people believe that "those who commit harassment or assault are now more likely to be held responsible and victims are more likely to be believed." Anna Brown, *More Than Twice as Many Americans Support Than Oppose the #MeToo Movement*, Pew Rsch. Ctr. 12 (Sept. 29, 2022). And Congress has taken steps to lessen the shroud of secrecy that surrounds settlements relating to

sexual harassment or sexual abuse. *See* Speak Out Act, 42 U.S.C. §§ 19401–04; Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 13307, 26 U.S.C. § 162(q)(1).

Many other jurisdictions also have acknowledged the importance of #MeToo speech in the context of the First Amendment. *Fredin*, 500 F. Supp. 3d 752; *Coleman v. Grand*, 523 F. Supp. 3d 244, 259 (E.D.N.Y. 2021) (finding that the open letter that the defendant circulated accusing the plaintiff of abuse and sexual harassment involved a matter of public concern); *Dossett v. Ho-Chunk, Inc.*, 472 F. Supp. 3d 900, 908 (D. Or. 2020) (finding that the publication of workplace-related #MeToo allegations involved a matter of public concern); *Fells v. Serv. Emps. Int'l Union*, 281 A.3d 572, 584 (D.C. App. 2022) (holding that there was a prima facie showing that the publication of workplace-related #MeToo allegations involved a matter of public concern); *Goldman v. Reddington*, No. 18-CV-3662, 2021 WL 4099462, at *4 (E.D.N.Y. Sept. 9, 2021) (finding that a defendant's LinkedIn and Facebook posts accusing plaintiff of sexual assault concerned "more than a purely private matter" (internal quotation marks omitted)).

In addition, Freborg provided adequate evidence of the #MeToo conversations happening about predatory behavior in the dance community, including a series of similar posts made on and around the time of her own July 14, 2020 post. Her

statements fit well within the context of a legitimate social movement.[9]

Johnson cites other contextual factors to show that Freborg's posts are not a matter of public import. As noted above, he contends that his previous relationship with Freborg demonstrates that the nature of her speech was private. But the mere existence of a previous relationship is not a dispositive factor in assessing the nature of the speech, and it does not negate the importance of speaking out against sexual assault in society. Many victims who come forward to speak about their experiences of sexual assault often have a preexisting relationship with their abusers. *See*, *e.g.*, *Fredin*, 500 F. Supp. 3d at 763–64 (granting summary judgment to one of the women named in the plaintiff's defamation lawsuit who previously

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[9] Noting its concern that the #MeToo movement can be manipulated to launch false accusations against innocent persons, the dissent references striking historical examples of the shocking violence that resulted from false interracial allegations of inappropriate behavior. It also references a more current case of false accusations, where the person making the false accusations faced criminal consequences.

It is true that false accusations of sexual assault can cause serious harm to the person accused. It is also true that research shows that these types of false accusations of sexual assault are rare. Caitlin K. Cervenka & Christine M. Crow, *Lawyering in the #MeToo Era*, 109 Ill. B.J. 30, 31 (2021) ("[W]hile false allegations of sexual violence do occur, they are rare; studies have shown that the rate of false allegations is between 2 and 10 percent.").

had been romantically involved with the plaintiff); see also Lauren R. Taylor & Nicole Gaskin-Laniyan, Sexual Assault in Abusive Relationships, 256 Nat'l Inst. of Just. 12, 12–14 (Jan. 2007). In Minnesota, for example, a grim statistic shows that one in every three women will experience violence, rape, or stalking by an intimate partner in their lifetime. *Domestic Violence in Minnesota*, Nat'l Coal. Against Domestic Violence (2020). If we were to hold that the mere existence of a previous relationship between Johnson and Freborg makes Freborg's speech private in nature, the impact would be an unnecessary chilling effect on the exercise of free speech by victims of sexual assault and their ability to effect social change.

Johnson next contends that, unlike Westboro Baptist Church and the owner of the account used to tweet about Fredin, Freborg had no prior history speaking out about the #MeToo movement or sexual abuse and harassment generally. We do not give this contention much, if any, weight. To hold that victims of sexual assault can only speak out about their experiences if they themselves are already advocates would certainly chill other alleged victims from coming forward. *See Fredin*, 500 F. Supp. 3d at 777 (noting the importance of and protecting speech that addressed "harassment and rape, and more specifically, *the subject of women coming forward to share their experiences in this regard*" (emphasis added)). Johnson's argument also fails to consider that every alleged victim, be they an advocate or not,

must make a first statement. If we were to conclude that Freborg's speech was private in nature simply because she had no history of advocacy, that would discourage any person not already engaged in advocacy work from telling their story about what happened to them and adding their voice to the desire for social change because they could be liable for per se defamation.

Moreover, even with the heightened protection of the actual-malice constitutional standard, the speech of victims of sexual assault may well be chilled. Given the potential threat and costs of defending a defamation lawsuit, many victims of sexual assault may choose not to speak out at all. *See* Shaina Weisbrot, *The Impact of the #MeToo Movement on Defamation Claims Against Survivors*, 23 CUNY L. Rev. 332, 352–53 (2020) (explaining that while #MeToo has empowered more people to speak out, this speech has led to more defamation lawsuits, especially if the accused has significant power or resources).

Finally, Johnson cites *Maethner* and a lack of media coverage of Freborg's posts to show that the posts concerned a private matter. *Maethner* does not *require*, however, that Freborg's speech be later disseminated by the media for it to be considered a statement of public import. There, we held that the dispositive inquiry regarding the availability of presumed damages "is not on the status of the defendant as a media or nonmedia defendant" but

"whether the matter at issue is one of public concern." *Maethner*, 929 N.W.2d at 877. We later cited Eighth Circuit cases that noted that "media coverage is a good indication of the public's interest" and stressed "the importance of journalistic freedom in investigating and reporting on matters of public interest." *Id.* at 881 (citations omitted) (internal quotation marks omitted). We then noted that dissemination of statements in the news media is "one of many relevant factors in determining whether the statements involve a matter of public concern." *Id.* Our discussion in *Maethner* therefore suggests that this non-dispositive factor serves to protect journalists in traditional media by adding another consideration to identify speech on a matter of public concern. Given this background and that Freborg's posts were made on Facebook, a website that *Packingham* describes as a "powerful mechanism" for the robust exchange of views, 582 U.S. at 107, the fact that no news media reported Freborg's posts is not a decisive factor in assessing the public import of the speech.

After considering the context of Freborg's posts, we conclude that this factor shows that her speech involved a matter of public concern.

D.

In sum, weighing the content, form, and context of Freborg's statements in light of the whole record, we conclude that the overall thrust and dominant theme of the posts involved a matter of

public concern. We therefore hold that Freborg's speech is subject to heightened protection under the First Amendment. Accordingly, to prevail on his defamation claim for presumed damages, Johnson must show that Freborg's posts not only were false, but that they were made with actual malice.

II.

Turning to the issue of actual malice, we note that the court of appeals did not rule on this issue because it held that Freborg's speech involved a matter of private concern. *Freborg*, 978 N.W.2d at 923 n.25. Nor did Freborg raise the issue of actual malice in her petition for review. Consequently, the parties agree that, if we conclude that the challenged speech here involved a matter of public concern, we should remand the case to the district court for a trial on the veracity of Freborg's speech and actual malice. We agree for the following reasons.

The district court concluded as a matter of law that the record contained insufficient evidence of actual malice. But the court of appeals held that a genuine issue of material fact existed as to the veracity of Freborg's speech, making summary judgment improper. *Id.* at 918. Given the fact issue on falsity—and because Freborg was both the speaker and the publisher of the alleged defamatory statements—if a jury finds that Freborg's speech was false, sufficient evidence may allow the jury to further find that Freborg made the statements with

actual malice.[10] We therefore reverse the district court's ruling on actual malice and remand this case for further proceedings.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and remand the case to the district court for further proceedings.

Reversed and remanded.

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[10] To succeed in a defamation case, a plaintiff must always prove that a statement is false. We note that when the alleged sexual abuse involves a private interaction between two people, if the plaintiff shows that the allegations were false, the constitutional actual-malice standard may not pose much of an additional burden. This is so because the standard requires that the statement be made with the "knowledge that it was false or with reckless disregard of whether it was false or not." *Maethner*, 929 N.W.2d at 873 (citation omitted) (internal quotation marks omitted).

D I S S E N T

GILDEA, Chief Justice (dissenting).

In this defamation case, we are asked to decide whether heightened First Amendment protections apply to Kaija Freborg's accusation that Byron Johnson, her former dance instructor and romantic partner, "gaslighted/coerced [her] into having sex, sexual[ly] assaulted, and/or raped" her. The question is not whether Freborg's speech is protected at all; it is. Existing precedent already dictates those protections. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (noting that states may "not impose liability without fault"); *Jadwin v. Minneapolis Star & Trib. Co.*, 367 N.W.2d 476, 492 (Minn. 1985) (adopting negligence standard in response to *Gertz*). The narrow question here is whether Freborg's speech is so central to the purpose of the First Amendment that it is entitled to the heightened protections reflected in the constitutional actual malice standard. The majority concludes that the actual malice standard applies to Freborg's speech because Freborg wrote about sexual assault and included #MeToo in her post. I disagree. In my view, Freborg's personal Facebook post, on her personal Facebook page, concerning private conduct between two people with a private relationship, is not speech that the constitutional actual malice standard protects. Accordingly, I dissent.

A.

Historically, defamatory speech, such as allegations of criminal behavior akin to those made here, fell outside the scope of the First Amendment. *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 328 (Minn. 2000) (noting that "defamatory comments were, by definition, not protected speech under the First Amendment."). But in *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court said, "that the reputational interests protected by state libel law must yield when in conflict with the central meaning of the First Amendment." *Jadwin v. Minneapolis Star & Trib. Co.*, 367 N.W.2d 476, 481 (Minn. 1985) (citing *New York Times*, 376 U.S. at 273–75). The New York Times Court adopted the actual malice standard to strike a balance between reputational interests and First Amendment protections.[1]

The majority concludes that Minnesotans' reputational interests must yield here because Freborg's speech is a matter of public concern and therefore worthy of the heightened First Amendment protection of the constitutional actual malice standard. I disagree. Providing redress for Minnesotans who have been accused by name of sexual assault does not conflict with the "central

[1] Under this constitutional standard, a plaintiff cannot recover damages for injury to reputation unless the plaintiff proves that the defendant made the statement at issue knowing it was false or with reckless disregard for the statement's falsity. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

meaning of the First Amendment." *Jadwin*, 367 N.W.2d at 481. Accordingly, under Supreme Court precedent, the constitutional actual malice standard does not apply. Examination of the Court's precedent and application of the required totality of the circumstances test confirms this.

1.

Our analysis of Supreme Court precedent must begin with *New York Times*, the case in which the Court created the constitutional actual malice standard. There, the Supreme Court recognized that speech by the press that criticized public officials for their official conduct was so valuable that, even if it was defamatory, the First Amendment required that the speech be given some protections so that the speech was not unnecessarily chilled. 376 U.S. at 278–79. The Court created the "actual malice" standard to provide that protection—public officials may not recover damages for a defamatory falsehood relating to their official conduct unless they prove that the statement was made with "actual malice." *Id*. at 279–80. The Court grounded the result in the fact that the speech at issue— citizen commentary on the performance of their government—went to the very heart or "central meaning of the First Amendment." *Id*. at 273; *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 (1974) (describing *New York Times* as "defin[ing] a constitutional privilege intended to free criticism of public officials

from the restraints imposed by the common law of defamation").

The majority holds that this actual malice standard from *New York Times* applies to Freborg's allegation that Johnson sexually assaulted her. But the animating principle in New York Times was the connection of the speech to principles necessary to a successful democracy, such as the citizenry's ability to comment freely on the performance of their government. *See New York Times*, 376 U.S. at 273, 279–80. Freborg's speech has nothing whatsoever to do with the government or government officials, and nothing in *New York Times* supports the majority's extension of the actual malice standard to the speech at issue here.

The Supreme Court's jurisprudence on the actual malice standard since *New York Times* likewise does not support the majority's extension of the standard to Freborg's speech. The Court discussed the applicability of the actual malice standard in *Gertz v. Robert Welch*, 418 U.S. 323 (1974). In *Gertz*, as in *New York Times*, the speech was grounded in commentary about government performance. *See Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756 (1985) (noting that the speech at issue in Gertz "involved expression on a matter of undoubted public concern" because the article questioned whether a prosecution of a police officer was part of a Communist campaign to discredit local law enforcement agencies).

The *Gertz* Court recognized that states have a "legitimate interest" in providing compensation to people whose reputations have been harmed by defamation, and that that interest needed to be balanced against competing First Amendment considerations to ensure that speech the First Amendment values is not chilled. 418 U.S. at 348–50. When the plaintiff is a private individual, the Court concluded, the government's interest in compensating for reputational harm was greater than in the case of public official/public figure plaintiffs, such as the plaintiff in *New York Times*. *Gertz*, 418 U.S. at 343–44. The Court held that states have "substantial latitude" in providing remedies to private plaintiffs for reputational injuries and that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood." *Id*. at 345, 347. But the Court clarified that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id*. at 349.

The Supreme Court limited *Gertz* in *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). Unlike the facts of *New York Times* and *Gertz*, *Dun & Bradstreet* involved only private, nonmedia parties: the plaintiff was a construction contractor and defendant was a credit reporting agency. *Dun & Bradstreet*, 472 U.S. at 751. The

plaintiff sued the defendant for erroneously reporting to third parties that the plaintiff had filed for bankruptcy. *Id.* at 751–52. The plurality opinion reasoned that *Gertz* applied only to speech on matters of public concern and that *Dun & Bradstreet* involved a matter of "purely private concern." *See id.* at 763 ("We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern."). Thus, the Court allowed the plaintiff to recover presumed damages without proving actual malice.

Read together, *New York Times*, *Gertz*, and *Dun & Bradstreet* hold that the actual malice standard applies to protect speech about a public figure, government official or the performance of government more generally, but the standard does not apply to speech about a private plaintiff on a matter of private concern. *See Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 877–78 (Minn. 2019).[2] For the former, a plaintiff must show actual malice to recover; for the latter, state law governs. And for speech to be a "matter of public

[2] The parties agree that there is no media defendant here as in *New York Times*, and they also agree that the parties involved are not public or government figures. Thus, the only way that the actual malice standard would apply is if Freborg's Facebook post is speech on a matter of public concern.

concern" sufficient to warrant application of the constitutional actual malice standard, that speech must relate to self-government. *See Dun & Bradstreet*, 472 U.S. at 759 (noting that "the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent"); *New York Times*, 376 U.S. at 269 ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."); *see also* Elena Kagan, *A Libel Story: Sullivan Then and Now*, 18 L. & Soc. Inquiry 197, 212 (1993) (noting that one approach to understanding the *New York Times v. Sullivan* line of cases is to "view[] *Sullivan* as primarily a case about the speech necessary for democratic governance").

2.

The majority argues that I have interpreted the Supreme Court's precedent too narrowly. For support, the majority essentially equates matters of interest to the public to those of public concern. *Supra* at 17. But the Supreme Court has already concluded that when the issue is the application of the constitutional actual malice standard, there is a dispositive difference between matters of public interest and matters of public concern. *Time, Inc. v.*

Firestone, 424 U.S. 448, 454 (1975). In *Time, Inc.*, the Court made clear that not all matters of interest to the public are matters of public concern for purposes of applying the First Amendment. *See Time, Inc.*, 424 U.S. at 454, 457 (rejecting petitioner's attempt to "equate 'public controversy' with all controversies of interest to the public" and concluding the speech at issue was private speech because it "add[s] almost nothing toward advancing the uninhibited debate on public issues thought to provide principal support for the decision in *New York Times*."). And the Court confirmed that Gertz had "repudiated" the view that the "*New York Times* privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest." *Id.* at 454; *see also Gertz*, 418 U.S. at 346 (rejecting "[t]he 'public or general interest' test for determining the applicability of the *New York Times* standard" because that test "inadequately serves both of the competing values at stake"); *cf. Waldbaum v. Fairchild Pub., Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980) ("A public controversy is not simply a matter of interest to the public."). Time, Inc. involved a news magazine article that included reports that the defendant had extramarital affairs. The Court declined to apply the New York Times "actual malice" standard, opting instead for the standard requiring some proof of fault from *Gertz*. *Time, Inc.*, 424 U.S. at 457; *see also id.* at 469–70 (Powell, J., concurring). In short, the Court in *Time,*

Inc. continued the long line of cases including *New York Times, Gertz*, and *Dun & Bradstreet*, that hold that speech about governance and self-government is speech on a matter of public concern for purposes of the constitutional actual malice standard.

I acknowledge, as we have recognized in other cases, that as a general proposition speech discussing crime can be speech on a matter of public concern. *See Maethner*, 929 N.W.2d at 881 (noting that as a "general proposition" "speech relating to domestic violence involves a matter of public concern"); *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 25–26 (Minn. 1996) (noting that child sexual abuse is matter of public concern).[3] But Freborg was not discussing crime in general, the prevalence of crime in our society, or the

[3] Importantly, neither *Maethner* nor *Richie* adopts a per se rule. In *Maethner*, we did not disagree with the "general proposition" that "speech relating to domestic violence involves a matter of public concern," but we declined to address whether the speech in that case (all of which discussed domestic violence) was speech on a matter of public concern. 929 N.W.2d at 881. Instead we noted that the district court did not reach a conclusion on the question and remanded the case to the district court for further consideration. *Id.* Richie involved media defendants, which is a material difference to application of the constitutional actual malice standard. *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 23 (Minn. 1996). In short, we did not hold in either case that speech about sexual abuse and harassment is always entitled to First Amendment protection. *See supra* at 17.

government's response to crime. Rather, she made a specific accusation of criminal conduct on Facebook—that a person she identified by name sexually assaulted her. Although the public may be interested in Freborg's allegations, I would hold that such speech is not a matter of public concern for First Amendment purposes. *Bierman v. Weier*, 826 N.W.2d 436, 462 (Iowa 2013) (holding that book author's allegation that identified person committed sexual assault was not a matter of public concern for First Amendment purposes); *W.J.A. v. D.A.*, 43 A.3d 1148, 1157–58 (N.J. 2012) (holding that defendant's speech on website he created where he alleged that his uncle sexually abused him was not a matter of public concern).

The majority disagrees but it makes no real attempt to connect Freborg's Facebook post to commentary that goes to an issue important to self-government or to the "central meaning of the First Amendment." *See New York Times*, 376 U.S. at 273; *see also Jadwin*, 367 N.W.2d at 481. Instead, the majority focuses its analysis on how the broader MeToo movement related to social change. I acknowledge the important contributions the MeToo movement has made to our society. But this case is not about the MeToo movement; it is about a Facebook post where Freborg accused Johnson of sexual assault and then included "#MeToo." We are tasked with evaluating whether Freborg's *single* Facebook post was speech on a matter of public concern, not the entire MeToo movement. Moreover,

the majority cannot connect Freborg's post to any particular change in statute, nor do the changes to federal law cited by the majority—changes that concern settlement, arbitration, and nondisclosure—even apply to this case. The focus of those changes is apparently on workplace sexual assault and harassment, and has nothing to do with sexual violence committed at a private party between people with a personal relationship who met through a hobby.[4]

The majority also supports its focus on the importance of the MeToo movement generally with statistics that show the prevalence of sexual violence and domestic abuse against women. *Supra* at 22–24. This reliance on statistics and the MeToo movement generally reveals a values-based approach to applying the First Amendment that is not consistent with the First Amendment's prohibition on "viewpoint discrimination." *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 383–84, 391 (1992) (noting that unprotected categories of speech "can, consistently with the First Amendment, be

[4] For similar reasons, the majority's reliance on statistics about the increase in Equal Employment Opportunity Commission complaints and the fact that "people who commit sexual harassment or assault in the workplace are now more likely to be held responsible for their actions" are misplaced. *See supra* at 22; Anna Brown, *More Than Twice as Many Americans Support Than Oppose the #MeToo Movement*, Pew Rsch. Ctr. 4 (Sept. 29, 2022). Freborg's speech was not about workplace sexual violence.

regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content"). I see no reason to apply the First Amendment differently in the MeToo context.

3.

Snyder, a case about intentional infliction of emotional distress—not defamation— does not compel a contrary conclusion. *Anthony List v. Dierhaus*, 779 F.3d 628, 632 (6th Cir. 2015) (observing that *Snyder* was not a defamation case and suggesting that Snyder was of limited application to defamation cases).[5]

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[5] In *Maethner*, we said that the test discussed in *Snyder*, which looks at the form, content, and context for the alleged tortious activity, should be considered but that no one factor was dispositive and that our test would require an examination of the totality of the circumstances to decide whether the actual malice standard applied. 929 N.W.2d 881. The majority's focus on the result in *Snyder* to compel a result in this case is not consistent with that direction.

The majority also cites three cases to support its reliance on *Snyder* to compel the result here. *Supra* at 17–18 (citing *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113 (2d Cir. 2013), *Cousins v. Goodier*, 283 A.3d 1140 (Del. 2022), and *Monge v. Univ. of Pa.*, ___ F. Supp. 3d ___, No. CV22-2942, 2023 WL 3692935 (E.D. Pa. May 26, 2023)). These cases are inapposite. *Dongguk* is of no help because the defendant in that

In *Snyder*, the U.S. Supreme Court held that a claim for intentional infliction of emotional distress will not lie in the face of a First Amendment challenge when the allegedly distress-causing conduct is speech about a matter of public concern. Speech intended to inflict emotional distress does not fall into the category of speech that was historically unprotected by the First Amendment, whereas defamatory speech does. *See Snyder*, 562 U.S. at 451 n.3. This makes the State's interest in preserving a cause of action weigh more heavily here than in *Snyder*, and the First Amendment interest in protecting speech weigh less. *Maethner*, 929

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case "concede[d] that the defamatory statements addressed public figures and matters of public concern." 734 F.3d at 122. And the court's use of *Snyder* was confined to the negligence claim stated in the complaint. In other words, unlike the majority here, the Second Circuit in *Dongguk* did not use Snyder to resolve the plaintiff's defamation claim. *Id*. at 127. *Cousins* is likewise unhelpful to the majority because *Cousins*, like *Snyder*, is not about the actual malice standard in a defamation case. The defamation claim in that case was dismissed because the plaintiff could not prove that the alleged defamatory statement was false. 283 A.3d at 1160. And *Monge* involves a media defendant and criticism of a university professor's performance. 2023 WL 3692935, at *1. The court did not use Snyder to compel a conclusion on the application of the constitutional actual malice standard (which is what the majority does here). *Id*. at *3. Rather, the court relied on Snyder's public-concern analysis for the proposition that the plaintiff had to prove falsity, something that is not at issue here. *Id*.

N.W.2d at 870–71 (noting that the purpose of the content, form, and context inquiry is "to strike a delicate balance between the State's interest in providing redress for citizens claiming reputational injury and the free speech protections the First Amendment provides").

Another important distinction between defamation and intentional infliction of emotional distress also influenced the Court's analysis in *Snyder*. An element of intentional infliction of emotional distress is the outrageousness of the conduct. But outrageousness can have important value to speech, and permitting liability based on the "outrageousness" of speech permits juries to discriminate on speech based on its content or the viewpoint conveyed. *See Snyder*, 562 U.S. at 458 ("'Outrageousness,' however, is a highly malleable standard with an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.") (citation omitted) (internal quotation marks omitted)). The Court found the risk of chilling speech based on a malleable standard of outrageousness "unacceptable" because " 'in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate "breathing space" to the freedoms protected by the First Amendment.'" *Id.* (citing *Boos v. Barry*, 485 U.S. 312, 322 (1988)). In other words, it was important to the Court's analysis that the outrageousness element of the tort of

intentional infliction of emotional distress risked a jury verdict on the basis of jurors' opinions and subjective judgments.

That risk is much lower in a defamation case. In a defamation case, a jury will consider the content of the speech only to evaluate its truth or falsity. Unlike the intentional-infliction-of-emotional-distress context, the jury in a defamation case cannot impose liability based on their own subjective judgments about the outrageousness of the speech.[6]

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[6] The majority disagrees that the cause of action affects our application of *Snyder*, arguing that the "form, content, and context" test should apply in exactly the same way in an intentional infliction of emotional distress case as in a defamation case. *See supra* at 17 n.4. The reason for the "form, content, and context" inquiry is "to ensure that courts themselves do not become inadvertent censors." *See Snyder*, 562 U.S. at 452. And the risk of becoming inadvertent censors turns on the cause of action. *See id*. at 458 (balancing the First Amendment against the state's interest in preserving a cause of action for "outrageous" speech). The touchstone of the test in a defamation case is balancing the First Amendment protections against the state's interest in preserving a cause of action for damage to reputation, whereas the touchstone in an intentional infliction of emotional distress case is balancing the First Amendment with the state's interest in maintaining a cause of action for infliction of emotional distress. *See id*. at 462–63 (Breyer, J., concurring) ("To uphold the application of state law in these circumstances would punish Westboro for seeking to communicate its views on matters of public concern without proportionately advancing the State's interest in protecting its citizens against severe emotional harm."). The cause of action necessarily affects the balance.

Finally, regarding the relevance of *Snyder* to the result here, the Court said in *Snyder* that it was writing a "narrow" holding, one "limited by the particular facts" of *Snyder*. 562 U.S. at 460. The case did not even discuss the constitutional actual malice standard, and the majority is unable to explain how a case that does not even mention the standard compels the conclusion that the standard applies here.[7]

4.

Even though *Snyder* cannot compel the result here, we have recognized that analyzing the form, content, and context of the speech, as the Court did in *Snyder*, can be a helpful piece of the totality of the circumstances analysis. *Maethner*, 929 N.W.2d at 881.

i.

The "form" asks where the speech occurred. The parties agree that the speech here occurred on a social media platform that was publicly viewed by many people, and that the use of a hashtag made the post more accessible to the public.[8] The fact that the

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[7] *Snyder* is, as the majority notes, more recent than *New York Times*, *Gertz*, and *Time, Inc. Supra* at 17. But nothing in *Snyder* can be fairly read as modifying the analysis courts should follow for application of the constitutional actual malice standard, a standard that was not even mentioned in the case.

[8] The majority considers Freborg's use of #MeToo as relevant to the form, content, and context of her post. I consider it relevant only to form.

speech was made in a "modern public square" is a relevant consideration in assessing whether the speech is deserving of First Amendment protection. *See Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). But it is not dispositive. Indeed, even though the speech at issue in *Time, Inc.* appeared in a national news magazine, the Supreme Court held that the speech did not rise to the level of warranting First Amendment protection. *Time, Inc.*, 424 U.S. at 457.

ii.

Turning next to the "content" of Freborg's Facebook post, I conclude that the "overall thrust and dominant theme" of Freborg's Facebook post was to accuse Johnson of sexual violence. *Maethner*, 929 N.W.2d at 880–81. Specifically, Freborg identifies Johnson and two others by name, accuses them of sexual violence, and speaks directly to them in her post. She also "tags" Johnson in the post, which made sure that her post would be linked to him through his own Facebook presence. By tagging Johnson in the post, Freborg further confirms that Johnson—and not some broader societal issue—is the target of her speech.

But, according to the majority, the thing that separates Freborg's Facebook post from any other speech accusing another of sexual assault is that Freborg included #MeToo (and to a lesser extent, #DancePredators), which shows that she intended to

participate in a hashtag-based social movement.[9] I disagree.

While use of a hashtag makes the post available more broadly to the public, it does not change the overall thrust of Freborg's speech. Freborg's speech included #MeToo, but the post made no mention of government policy changes or systemic problems. Moreover, the content of Freborg's speech was disconnected from the MeToo movement. Unlike the individual defendant in *Maethner*, Freborg did not include generalized education about crime, a general call to action, or highlight her work with an advocacy organization relevant to the MeToo movement. *See Maethner*, 929 N.W.2d at 871–72 (describing posts). Instead Freborg focused on allegations of criminal conduct against her, stating "I've been gaslighted/coerced into having sex, sexual[ly] assaulted, and/or raped by the following dance instructors . . . " Johnson is specifically identified by name and Freborg accuses

[9] The majority also states that "attaching a hashtag—even the well-recognized #MeToo . . . is not in and of itself determinative of whether the speech involves a matter of public concern." But this characterization misrepresents the majority's analysis. The only thing the majority points to as connecting Freborg's post to a movement is #MeToo, and the matter of public concern that the majority cites to is "sexual assault in the context of the #MeToo movement." In other words, the matter of public concern is the MeToo movement and the connection to the MeToo movement was Freborg's use of #MeToo. So it seems that in this case at a minimum, the use of a hashtag was determinative.

him of sexual violence against her. Freborg even speaks directly to Johnson and the other alleged perpetrators, saying, "If *you* have a problem with me naming you in a public format, then perhaps you shouldn't do it." (Emphasis added.) Freborg's own words make clear that the overall thrust of her speech was to call out private people for private behavior.

iii.

Finally, I consider the context of Freborg's post. The context of Freborg's post is the subject of much debate in this litigation. The majority places Freborg's post in the context of the MeToo movement. The majority acknowledges that Freborg and Johnson had a prior personal relationship but dismisses that because the relationship ended years earlier, and so, the majority concludes, Freborg's intent was not to level a "personal attack" against Freborg. *See Snyder*, 562 U.S. at 455.

While I agree with the majority that parts of Freborg's speech are connected to the MeToo movement in the sense that she included #MeToo in her post, the context of her post was personal. The record reflects no history from Freborg of speaking out against sexual violence. She and Johnson knew each other through the dance community, which Freborg's counsel admitted during oral argument was a "hobby." Freborg's post does not implicate Johnson's public or workplace conduct, but his conduct at a private party. And Freborg and Johnson

had a prior personal relationship.[10] In this litigation, Freborg asserted that at various times during their relationship Johnson requested to have unprotected sex, then had sex with other women after they agreed to be monogamous, gave Freborg a sexually transmitted disease, blamed Freborg for

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[10] I do not "mechanically characterize the matter as one of private concern" based on the nature of Freborg and Johnson's relationship. Instead I consider it a factor in the totality of the circumstances analysis that the First Amendment commands. Because this is a totality of the circumstances analysis, I agree with the majority that "the mere existence of a previous relationship is not a dispositive factor in assessing the nature of the speech." And I acknowledge that sexual violence often occurs between people with preexisting relationships. But the fact that perpetrators of sexual violence often have relationships with their victims does not mean that we should ignore the personal relationship between Freborg and Johnson in our analysis of whether the speech was on a matter of public concern in a defamation case.

The existence of a prior relationship, while perhaps commonplace in this specific type of defamation case, is still important to consider in our analysis. We must consider all of the facts—this is a balancing test that weighs First Amendment interests against the State's interest in providing a remedy for damage to reputation. *See Gertz*, 418 U.S. at 341 ("The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, . . . the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'" (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring opinion))).

giving him a sexually transmitted disease, laughed at Freborg, called her dumb, and suggested she "made it all up in her head." Regardless of whether the purpose of Freborg's post was to mount a "personal attack" or to participate in the MeToo movement, there is an undeniable personal element to the Facebook post at issue here, and the personal nature of the dispute permeates this litigation.

Moreover, even accepting that Freborg's post occurred in the context of the MeToo movement, her post is different from the protest in Snyder. In Snyder, the speech at issue was the entire protest. Snyder's father sued the protest organizer, the participants of the protest, and the Westboro Baptist Church for the protest.[11] *Snyder*, 562 U.S. at 448–49 (noting that the Westboro Baptist Church was the defendant, and that the church "frequently communicates its views by picketing"). If the MeToo movement is an online protest, then the proper parallel for the Westboro Baptist Church's protest is the entire MeToo movement—Freborg's individual post is akin to one protester holding just one sign. The *Snyder* court even suggested that some of the individual signs might be private speech if they were viewed standing alone. *See Snyder*, 562 U.S. at 454

[11] In its discussion of *Snyder v. Phelps*, the majority suggests that only the leader of the Westboro Baptist church, the man who organized the protest, was a party to the lawsuit. But Snyder sued the leader, his daughters (who participated in the protest), and the church. *See Snyder*, 562 U.S. at 449–50.

("[E]ven if a few of the signs—such as "You're Going to Hell" and "God Hates You"—were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro's *demonstration* spoke to broader public issues." (emphasis added)).

The context of the speech is also different from *Richie* and *Maethner*, which were cases involving media or advocacy organizations. Freborg, in contrast, is not a member of the media and she did not post on a public Facebook page for an advocacy organization with a mission to help victims of domestic violence. She is a private person posting on her personal Facebook page. *See Richie*, 544 N.W.2d at 26 (noting that the defendants were members of the media); *Maethner*, 929 N.W.2d at 871 (involving speech by an advocacy organization).

In sum, Freborg was a private person, leveling an allegation of private conduct at a private event, against a person with whom she had a personal relationship, all on her personal Facebook page—a page with no history of discussing issues of sexual violence. Consistent with the animating principle from the Supreme Court, we should not apply the actual malice standard to Freborg's speech because it does not fall within the central purpose of the First Amendment. The majority disagrees, but it has not cited a case where a court has applied the constitutional actual malice standard to speech

where a private individual accuses an identified person of a crime in a private social media post that includes a hashtag.[12] Considering the form, content,

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[12] The majority describes *Fredin v Middlecamp*, as "a recent defamation case with similar facts." *See supra* at 18 (citing 500 F. Supp. 3d 752, 777, 798 (D. Minn. 2020), *aff'd*, 855 F. App'x 314 (8th Cir. 2021) (per curiam) (unpublished)). But in *Fredin*, two defendants had secured harassment restraining orders against the plaintiff and a third defendant reported about those harassment restraining orders on a social media account. 500 F. Supp. at 760; *see Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (concluding that the First Amendment precludes states from imposing civil liability based on the publication of true information in public, official court records); *Quigley v. Rosenthal*, 327 F.3d 1044, 1060 (10th Cir. 2003) (noting that "the existence of a civil lawsuit" is a "relevant factor" to reviewing whether speech concerns a matter of public concern). The social media account in *Fredin* was generally dedicated to addressing "subjects of online and real life misogyny, harassment, [and] rape culture." *Fredin*, 500 F. Supp. 3d at 770 (internal quotation marks omitted). And the media reported on the social media posts. In short, *Fredin* is a markedly different case in that it involved accusations made in public judicial proceedings that were reported in the media. Here, by contrast, the accusations are made in a personal social media post.

The anti-SLAPP cases that the majority relies on likewise do not compel the result majority reaches. *See Fells v. Serv. Employees Int'l Union*, 281 A.3d 572, 581 (D.C. App. 2022) (noting a statutory definition for public interest); *Goldman v. Reddington*, No. 18-CV-3662RPKARL, 2021 WL 4099462 (E.D.N.Y. Sept. 9, 2021); *Dossett v. Ho-Chunk, Inc.*, 472 F. Supp. 3d 900 (D. Or. 2020); *Coleman v. Grand*, 523 F. Supp. 3d 244 (E.D.N.Y. 2021). Although these laws incorporate the constitutional standard under the First Amendment to some extent, anti-SLAPP laws are state

and context of Freborg's speech, I would hold that her speech is not a matter of public concern. *See Kristofek v. Vill. Of Orland Hills*, 832 F.3d 785, 794 (7th Cir. 2016) ("While none of the three factors is dispositive, content is the most important.").

B.

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statutes, and cases interpreting state statutes are distinguishable on that ground alone. *See*, *e.g.*, Fells, 281 A.3d at 581 (noting that the statute "defines '[i]ssue of public interest' as 'an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place.'"); *Coleman*, 523 F. Supp. 3d at 259 (explicitly stating that New York law defines public concern broadly, as "a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants" (citation omitted) (internal quotation marks omitted)). These cases do not purport to interpret the First Amendment and are therefore not helpful here. Moreover, many of these cases involve direct criticism of government actors or public persons, making the speech at issue in these cases akin to that at issue in New York Times. *See Goldman*, 2021 WL 4099462, at *4 (also applying New York's broad definition of "matter of public concern" and noting that the defendant's speech included "extensive criticism of the law enforcement investigation of her sexual-assault complaint"); *Dosset*, 472 F. Supp. 3d at 908 (explaining that the speech at issue concerned "alleged workplace misconduct by the highest-ranking legal officer of the oldest and largest organization of American Indian and Alaska Native tribal governments"); *Fells*, 281 A.3d at 584 (concluding that plaintiff was a public figure because he "voluntarily thrust" himself into the debate on sexual harassment as the workplace as "interim President of the National Fast Food Workers' Union").

Ultimately, as we have recognized, the question of public concern is based on the totality of the circumstances, and the purpose of the analysis is to balance the state's interest in preserving a cause of action for damages to reputation against preserving speech the First Amendment Values. *Maethner*, 929 N.W. 2d at 881; *Gertz*, 418 U.S. at 343-44. One of the circumstances that must be considered is the consequences of embracing the broad hashtag rule that the majority writes. *See Snyder*, 562 U.S. at 452 (explaining that "the boundaries of the public concern test are not well defined" and that the form, content, and context test and standards articulated by the Supreme Court are "guiding principles" (citation omitted) (internal quotation marks omitted)). Applying the majority's rule, any speech that includes a hashtag is a matter of public concern and subject to the heightened actual malice standard. This is troubling.[13]

Minnesota has a long and deep history of recognizing and protecting reputational interests. *See Maethner*, 929 N.W2d at 875 ("We have recognized that 'personal reputation has been cherished as important and highly worthy of protection' throughout history." (quoting *Jadwin*, 367 N.W.2d at 491)). The reasons for protecting

[13] For example, under the majority's rule of law, a father who accuses the mother of his children of child abuse on social media using #FathersRights in his post would have the benefit of the actual malice standard.

reputational interests extend beyond financial compensation, because defamation can also cause "personal humiliation, and mental anguish and suffering." *See Time, Inc.*, 424 U.S. at 460; *see also Richie*, 544 N.W.2d at 28 ("[E]motional damages are not compensable absent harm to reputation."). We should not be so quick to abandon this history.

Important in our consideration of Minnesota's history of protecting reputational interests is an acknowledgement that false accusations of rape and sexual assault have been used as a weapon to damage reputation and sometimes—even in recent history—resulted in death or wrongful imprisonment.[14] *See* Mark Curriden & Leroy

[14] The majority suggests that reputational interests are less important in the context of sexual assault allegations because "research shows that these types of false accusations of sexual assault are rare." *Supra* at 23 n.9. Then the majority cites to Caitlin K. Ceryenka & Christine M. Crow, *Lawyering in the #MeToo Era*, 109 Ill. B.J. 30, 31 (2021) for the proposition that "while false allegations of sexual violence do occur, they are rare; studies have shown that the rate of false allegations is between 2 and 10 percent." In turn, Ceryenka & Crow cite to David Lisak et al.'s article *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 Violence Against Women 1318 (2010). Lisak et al. conducted a review of the number of women who falsely reported sexual assaults *to the police* at "a major university in the Northeastern United States" and concluded that approximately 6 percent of the cases reported to police were demonstrably false. Lisak at 1327, 1329–30. Lisak went on to conclude that a fair estimate of the number of false reports of sexual assault made to police was somewhere between 2 and 10 percent. Freborg's Facebook

Phillips, Jr., *Contempt of Court*, 36, 166 (1999) (discussing historic inequality in discussion and prosecution of rape); Hon. Victoria A. Roberts, *The Scottsboro Boys*, 80 Mich. Bar J. 62, 62–64 (explaining that, in 1931, nine young Black men were falsely accused of raping two white women on a train; eight of the boys were tried and sentenced to death); *Alexander v. Oklahoma*, 382 F.3d 1206, 1211–12 (10th Cir. 2004) (discussing the Tulsa Race Riot, a 24-hour riot in 1921 that left as many as 300 people dead and was prompted by a rumor that a Black man assaulted a white woman); Julianne McShane, *Stanford University Employee Charged with Making 2 False Sexual Assault Allegations*,

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post is not akin to a report to a police officer. *Id*. at 1330. A person reporting sexual assault to a police officer faces more barriers than someone posting to Facebook, and presumably expects an investigation. Thus the majority's assertion that "false accusations are rare" and therefore unimportant is unsupported by any *relevant* citation.

More to the point, even accepting that false reports may be uncommon, the infrequent nature of false report crimes does not diminish the importance of preserving a civil action to protect reputational interests when falsely reported crimes do occur. This is particularly so if the truth or falsity of the allegation is an element of the cause of action. I have faith in the ability of Minnesota juries to carefully consider defamation cases involving accusations of sexual violence. We do not need to extend First Amendment protection to all speech accusing anyone of a crime that uses a hashtag. As discussed above, the Supreme Court's First Amendment precedent does not command the majority's result, and we should be cautious in adopting such a sweeping rule of law.

NBC News (Mar. 16, 2023, 3:02 PM), https://www.nbcnews.com/news/crime-courts/stanford-university-employee-charged-making-2-false-sexual-assault-all-rcna75264 (discussing a complaint that alleged the defendant "twice made false accusations of rape against someone matching the description of a Black male co-worker"); *see also* Samuel R. Gross et al., Race and Wrongful Convictions in the United States 2022, Nat'l Registry of Exonerations 18 (Sept. 2022) ("Two thirds of those misidentified rape defendants were Black men, most of whom were misidentified by white victims."); Amanda Holpuch, *4 Black Men Exonerated in False Case of Rape in '49*, N.Y. Times, Nov. 23, 2021, at A15 (noting that four Black men were falsely accused of rape in Florida in the late 1940's, and that one was killed by a mob and one was fatally shot by law enforcement).[15]

It is also important to recall that the constitutional actual malice standard was born out of concern for chilling speech about government, speech that is essential to the vibrancy of our

[15] None of this analysis is intended to suggest that Freborg herself is lying. I agree with the majority that the truth or falsity of Freborg's statements is a question for the jury. I share this history only to emphasize that the State's interest in protecting reputation is serious—it can have life-or-death and life-or-liberty consequences. Accordingly, we ought to proceed with caution in extending First Amendment protection to statements that accuse others of crimes.

democracy.[16] *New York Times*, 376 U.S. at 265–83; Maethner, 929 N.W.2d at 877– 78. Freborg's accusation that Johnson raped her comes nowhere close to such speech. And a consequence of the majority's hashtag rule will likely be more posts like hers—posts accusing others of violence and bad behavior. In some circumstances, posts on social media that single out and accuse others of wrongdoing go by another name: cyberbullying. *See What Is Cyberbullying*, stopbullying.gov, https://www.stopbullying.gov/cyber bullying/ what-is-it (last updated Nov. 5, 2021) ("Cyberbullying includes sending, posting, or sharing negative, harmful, false, or mean content about someone else. It can include sharing personal or private information about someone else causing embarrassment or humiliation."). We should not lightly open the floodgates for more speech like this— especially because one in five teenage girls experience cyberbullying, and medical experts agree that cyberbullying is one of several factors contributing to a mental health crisis among teenagers. Azeen Ghorayshi & Roni Caryn Rabin,

[16] I agree with the majority that sexual assault and sexual violence are societal problems and that crimes of violence against women are underreported. What I fail to see is why this problem requires us to extend additional First Amendment protection to Freborg's Facebook post accusing a particular person of a particular instance of sexual violence. The majority's statistics show that crime happens; the statistics do not show that speech about rape, sexual assault, and sexual violence are uniquely entitled to First Amendment protection.

Teen Girls Report Record Levels of Sadness, N.Y. Times, Feb. 14, 2023, at A16; *see also The Relationship Between Bullying and Suicide*, CDC (Apr. 2014) (discussing the link between bullying and adolescent mental health). Earlier this year, the U.S. Surgeon general noted a need for greater protections for children, including government regulations on social media companies. *See* U.S. Surgeon General, *Social Media & Youth Mental Health: The U.S. Surgeon General's Advisory*, U.S. Dep't of Health and Hum. Servs. (2023). By extending broad First Amendment protection to Freborg's Facebook post—and especially by basing this extension primarily on the use of hashtags—the majority unnecessarily restricts the government's ability to address the growing cyberbullying crisis. *Cf. New York Times*, 376 U.S. at 277 ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.").

This is not to say that Freborg's speech should be left entirely unprotected—and it is not. Historically, a defendant in a defamation per se case needed to prove that the statements at issue were true. *See* Matthew L. Schafer, *In Defense: New York Times v. Sullivan*, 82 La. L. Rev. 81, 114 (2021) ("While the rule prevailing at common law was that even truth was no defense to a libel, . . . cases show early courts realizing that for a republican government to be successful, some of the more draconian aspects of libel law had to be relaxed.").

The burden now rests with the plaintiff to prove falsity. *Richie*, 544 N.W.2d at 25. And, consistent with Gertz, even in the context of defamation per se, the plaintiff must prove that the defendant was negligent in making the defamatory speech. *See Gertz*, 418 U.S. at 347 ("[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."); *Jadwin*, 367 N.W.2d at 492 (adopting a simple negligence standard in response to *Gertz*). In other words, Johnson must prove that Freborg's accusation was false and that Freborg did not act with reasonable care when she falsely accused him of sexually assaulting her.

C.

Based on the totality of the circumstances here, I would hold that the actual malice standard does not apply to Freborg's speech. Freborg posted on her personal Facebook account that a person she identified by name raped her. Freborg and Johnson knew each other personally, they first met through a personal hobby, they had a personal and private sexual history, and the speech at issue here accuses another of a crime. The mere fact that Freborg made these allegations amid a social movement and included #MeToo in her post does not convert her otherwise private speech into speech on a matter of

public concern entitled to heightened First Amendment protection. Accordingly, I dissent.

ANDERSON, Justice (dissenting).

I join in the dissent of Chief Justice Gildea.

HUDSON, Justice (dissenting).

I join in the dissent of Chief Justice Gildea.

ATTACHMENTS OMMITTED

APPENDIX B

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1531

Byron Johnson,
Appellant,

vs.

Kaija Freborg,
Respondent.

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

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

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1531

Byron Johnson,
Appellant,

vs.

Kaija Freborg,
Respondent.

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

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

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

SYLLABUS

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

OPINION

JESSON, Judge

In this defamation case, we must balance two important interests: protection of personal reputation and freedom to speak on matters of public concern. As the Minnesota Supreme Court

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

FACTS

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

receiving a doctorate in nursing from Augsburg in 2011, after which she spent ten years as a professor.

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

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

In May 2015, the parties communicated by text message about the incident. In the exchange, Freborg told Johnson of her recollection that he had approached her while she was intoxicated and put

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

her hand under his shirt and pants. Johnson replied: "If you say so, I definitely don't remember it going that way." Freborg replied, "I do." The parties' relationship ended in 2015 following this incident.

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

> Feeling fierce with all these women dancers coming out. So here goes . . . I've been gaslighted/coerced into having sex, sexual[ly] assaulted, and/or raped by the following dance instructors: Byron Johnson, Saley Internacional, and Israel Llerena. If you have a problem with me naming you in a public format, th[e]n perhaps you shouldn't do it [three shrugging-person emojis]
>
> #metoo
>
> #dancepredators[2]

Later that day, Freborg edited her post and replaced the statement "I've been gaslighted/coerced into having sex, sexual[ly] assaulted, and/or raped by the following dance instructors," with the statement "I've experienced varying degrees of sexual

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

assault** by the following dance instructors." Freborg explained that she edited her post after receiving feedback. The second post read:

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

[3] Johnson is Black and Freborg is White.

Johnson responded by posting a message as a comment on Freborg's post. Johnson stated that he was confused and that he "categorically den[ied]" Freborg's accusation. Freborg responded, saying that she was "not interested in any kind of manipulative cat and mouse game with" Johnson and characterized his professed confusion as an attempt to gaslight her.[4] A few days later, Freborg deactivated her Facebook account. Before then, her post received 182 comments.

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

Freborg moved for summary judgment. She argued that she is entitled to judgment as a matter of law because Johnson produced no evidence of actual damages and is not entitled to presumed damages because her statements are protected by the First Amendment. In support of her motion, Freborg attached Johnson's responses to her

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

requests for admission, including one in which he admitted approaching her at his home while she was intoxicated, grabbing her hand, and placing it on his genitals. She also produced text messages in which the parties discussed a separate occasion during which Johnson tried to record the two during a sexual encounter without her consent. Further, Freborg attached seven other Facebook posts from other people and a screenshot of a text message. Those posts (and the text) concerned accusations against three international dance instructors: four against a Canadian instructor, three against a Swiss instructor, and one against a Portuguese instructor.[5] She also included two articles discussing sexual assault in the dance community, an MPR article from the same year as her post about a dance studio in Minnesota, unconnected to Johnson, and a two-year-old blog post about how to deal with predatory behavior by dance instructors that was not about Minnesota specifically. Finally, she attached a number of articles discussing the #metoo movement in general.

The district court denied Johnson's motion to add a claim for punitive damages and granted Freborg's motion for summary judgment. The court determined as a matter of law that Johnson

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

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

Johnson appeals.

ISSUES

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

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

ANALYSIS

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

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

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

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

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

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

[8] In some cases, a qualified privilege may apply to a defendant that would require the plaintiff to prove malice. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 920 (Minn. 2009). For example, the Minnesota Constitution grants "absolute privilege to members of the State Senate and House of Representatives" when they are acting in their official role.

harmed the plaintiff's reputation. *Maethner*, 929 N.W.2d at 873.

Here, the parties agree that Freborg's public Facebook post tagging Johnson was an unprivileged publication to multiple third parties. But the parties differ on whether Freborg's statement was false and the extent of the damage it caused Johnson's reputation. As to the last element, most defamation cases require proof of actual damages to reputation, but there are exceptions when the defamatory statement includes "false accusations of committing a crime." *Id.* at 875 (quotation omitted). In these cases, a private party could recover presumed damages for the defamatory statements—but only if the plaintiff clears one additional hurdle. A private plaintiff may not recover presumed damages if the defamatory statement involves a "matter of public concern" unless the plaintiff also establishes "actual malice." *Id.* at 878-79.

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

Minn. Const. art. IV, § 10; *Harlow v. State, Dep't of Hum. Servs.*, 883 N.W.2d 561, 570 (Minn. 2016). No such absolute or qualified privilege is applicable here.

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

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

A district court shall grant summary judgment to a movant who shows that there is no genuine issue as to any material fact and who is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01. On appeal from summary judgment, we review the district court's determination that there are no genuine issues of material fact and application of the law de novo. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). A material fact is one which will affect the result or outcome of the case depending on its resolution. *Westfield Ins. Co. v. Wensmann, Inc.*, 840 N.W.2d 438, 450 (Minn. App. 2013), *rev. denied* (Minn. Feb. 26, 2014). We examine the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Here, the district court primarily relied on Johnson's admission that he had sexual contact with Freborg to conclude that summary judgment was appropriate. But while Johnson admitted to having sexual contact with Freborg, his admission did not

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

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

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

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

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

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

he can establish actual malice. *Id.* at 879; *see also Gertz*, 418 U.S. at 349.[11]

We begin with the post itself. Recall the text:

> Feeling fierce with all these women dancers coming out. So here goes . . . I've been gaslighted/coerced into having sex, sexual[ly] assaulted, and/or raped by the following dance instructors: Byron Johnson, Saley Internacional, and Israel Llerena. If you have a problem with me naming you in a public format, th[e]n perhaps you shouldn't do it [three shrug emojis]
> #metoo
> #dancepredators

The question before us is whether this post involves a public concern as opposed to a private matter.[12] Here, the district court concluded that Freborg's statements involved a matter of public

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

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

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

We begin our analysis by harkening back to why we have the public-concern test: speech involving a public concern is not only protected by— but is at the heart of— the First Amendment. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985). Part of our challenge is that the contours of what constitutes a public concern are not marked by bright lines. To address where those lines must be drawn here, we turn to cases from the United States and Minnesota Supreme Courts for guidance.

In 2011, the Supreme Court acknowledged that "the boundaries of the public concern test are not well defined." *Snyder*, 562 U.S. at 452 (quotation

omitted). The Court then sought to clarify the public-concern framework in a case involving the Westboro Baptist Church. There, the issue was whether the leader of that church could claim First Amendment protection for organizing a protest with slogans near a funeral of a soldier killed in the Iraq war. *Id.* at 448. The protest placards expressed statements like "God Hates the USA/Thank God for 9/11," "Thank God for Dead Soldiers," "Priests Rape Boys," and "You're Going to Hell." *Id.*

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

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

In *Maethner*, the Minnesota Supreme Court applied the construct set out in *Snyder*: the determination of whether speech involves a matter of public or private concern is based on a totality of the circumstances, and courts should consider the content, form, and context of the speech, with no one

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

factor being dispositive.[14] 929 N.W.2d at 881. In doing so, courts should "evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said." *Id.* (quotation omitted).[15]

The speech at issue in *Maethner* involved pictures and statements on Facebook posted by Maethner's ex-wife, which identified her as a survivor of domestic violence, as well as statements in an article for Someplace Safe's newsletter describing the "Survivor Award" that she received. *Id.* at 871. Nowhere was Maethner's name mentioned in the speech. *Id.* He argued, however, that people would understand the statements referred to him as the perpetrator of domestic abuse. *Id.* at 872.

Did this speech involve a matter of public concern because it related to domestic violence? The supreme court agreed that it did as "a general proposition." *Id.* at 881. But a general proposition was not enough. *Id.* Instead, the courts must consider the form and context of the speech, as well

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

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

as other relevant factors. *Id.* One such factor is whether the statements were disseminated in the news media..[16] *Id.* The supreme court thus remanded to the district court to decide whether the challenged statements involved a matter of public or private concern. *Id.*[17]

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

Sexual assault—like domestic violence—is generally a matter of public concern. *See id.* at 876 (discussing sexual abuse of children). That does not end our inquiry. Turning first to the content of the speech here, we note that it is more singularly

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

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

directed at an individual than the speech in *Snyder*. Unlike the few placards arguably directed at the soldier and his family, the bulk of Freborg's statement directly accused Johnson (and two others) of sexual assault. And because Freborg's post directly named the individuals, Freborg's statement goes further than the statement in *Maethner*, where the plaintiff was unnamed. The only portions of the post not directly aimed at the three men were the opening phrase "feeling fierce with all these women dancers coming out," and the addition of the hashtags: #metoo, and #dancepredators.

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

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

attack). And context requires us to consider two other factors: was the Facebook post in response to a public discussion and did it result in media dissemination?

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

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

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

Johnson, to which Freborg was arguably responding.[21]

Nor does the record demonstrate media dissemination of Freborg's accusations.[22] Certainly,

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

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

Id. at 562.

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

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

the record includes posts made *after* hers.[23] And she attached comments responding to her post. But *Maethner* and the cases upon which it relies talk in terms of responsive "media coverage," which differs from responses to speech from members of the public. 929 N.W.2d at 881 (quotation omitted).

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

No caselaw requires this court to make that leap. Nor have we been presented with persuasive

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

authority that would compel us to do so.[24] The United States Supreme Court's focus on the "thrust and dominant theme" of the communication, cited approvingly by the Minnesota Supreme Court, counsels us that Freborg's statement is personal in nature. *Id.* (quoting *Snyder*, 562 U.S. at 454.) To hold that this accusation is a matter of public

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

interest—which would take the question of the truth or falsity of Freborg's statement from the jury—would stretch current Minnesota law, based on the nature of the #metoo movement. And that is not the role of an intermediate court. *Hayden v. City of Minneapolis*, 937 N.W.2d 790, 796 (Minn. App. 2020).

In sum, we cannot say that the thrust and dominant theme of Freborg's speech spoke to broader public issues, as opposed to personal ones, under the totality of the circumstances. As a result, we reverse the district court's conclusion to the contrary and remand for a jury trial on Johnson's defamation claim.[25]

DECISION

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

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

motion on the ground that it involved a matter of public concern.

Reversed and remanded.

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

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

Genuine Issue of Material Fact on Consent

The district court granted summary-judgment dismissal of Johnson's defamation claim on the ground that he did not present evidence sufficient to demonstrate that a question of material fact exists regarding the falsity of Freborg's statement.[1] Johnson admitted that he "approached [Freborg] while she was intoxicated and alone, grabbed[2] her hand and put it down [his] pants onto [his] genitals." Freborg averred that this encounter was not consensual and submitted supporting documentation: her affidavit, deposition, responses

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

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

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

to requests for admission, and copies of text messages with Johnson. Johnson relied on two pieces of evidence to create a genuine issue of material fact: (1) his response of "deny" to a follow-up request for admission that the act of grabbing Freborg's hand and putting it down his pants onto his genitals "constituted an act of sexual assault" and (2) his affidavit wherein he stated that he never sexually assaulted Freborg and that "[e]very interaction we had was consensual."

While the district court inferred from Johnson's initial admission that the contact was nonconsensual and that Freborg's statement was therefore "substantially accurate, if not completely truthful,"[3] Johnson's assertion that all contact with Freborg was consensual reveals an issue of fact that requires a fact-finder to evaluate and weigh credibility. The supreme court has repeatedly cautioned us "against usurping the role of a jury when evaluating a claim on summary judgment. Summary judgment is a blunt instrument that is inappropriate when reasonable persons might draw different conclusions from the evidence presented." *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 232 (Minn. 2020) (quotation omitted); *see also Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (stating that when reviewing

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

a grant of summary judgment, an appellate court must not weigh facts or determine the credibility of affidavits and other evidence and that "the nonmoving party has the benefit of that view of the evidence most favorable to him" (quotation omitted)).

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

Speech Related to a Matter of Public Concern

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

The #MeToo movement is characterized by survivors of sexual abuse creating social-media posts disclosing their experiences with sexual harassment and sexual violence and identifying their abusers. *See, e.g.*, Benedetta Faedi Duramy, *#MeToo and the Pursuit of Women's International Human Rights*, 54

U.S.F. L. Rev. 215, 217 (2020).[4] Survivors end their posts with the now-ubiquitous hashtag, #MeToo.[5] That hashtag categorizes the posts and allows them to be associated with a community discussion on the subject of sexual abuse.[6] As one commentator explained:

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[4] Although the #MeToo movement's explosive growth in public discourse can be traced to an invitation by celebrity Alyssa Milano for followers to reply "me too" if they had been sexually harassed or assaulted, Tarana Burke, an activist and nonprofit founder, initiated the original #MeToo movement on MySpace in 2006 as a way for women and other survivors to share their stories of sexual assault and harassment. JoAnne Sweeny, *The #MeToo Movement in Comparative Perspective*, 29 Am. U. J. Gender Soc. Pol'y & L. 33, 34 (2020); Lesley Wexler et. al., *#MeToo, Time's Up, and Theories of Justice*, 2019 U. Ill. L. Rev. 45, 51 (2019). The movement has evolved into millions of posts in which individuals shared their experiences with sexism, harassment, and assault. Duramy, *supra*, at 217.

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

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

> Clicking on a hashtag takes you to another page that shows you all other tweets containing that same hashtag making it easy for other Twitter users to search for that keyword. Initially, Twitter users created hashtags to categorize messages and organize

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

Kendra Doty, *"Girl Riot, Not Gonna Be Quiet"—Riot Grrrl, #MeToo, and the Possibility of Blowing the Whistle on Sexual Harassment*, 31 Hastings Women's L.J. 41, 53 (2020). The #MeToo movement was both prompted by and has itself generated

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> conversations around a topic. The function of hashtags in tweets has expanded to include commentary, including opinions, jokes, and has even created a communication-style likened to the "90s air quote." Hashtag use has spread beyond Twitter and connected Twitter communications and real-world communication.

media focus on the prevalence of sexual harassment and assault. Duramy, *supra*, at 218-20.

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

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

Freborg's Facebook post involves a matter of public concern.

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

The majority agrees that sexual assault is a matter of public concern,[7] but then engages in further analysis that I believe inappropriately separates Freborg's statement from its context within the #MeToo movement. The majority focuses

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

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

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

factor in determining if a statement was a matter of public concern but is not dispositive; rather, this factor is intended to protect journalistic freedom by adding another tool to identify speech regarding a matter of public concern.

Second, the majority's reliance on *Chafoulias v. Peterson,* 668 N.W.2d 642 (Minn. 2003), is misplaced because the majority conflates the analysis regarding a "public controversy" with the analysis regarding "matters of public concern." *Chafoulias* determined whether a public controversy existed in order to determine if the plaintiff was a limited-purpose public figure. 668 N.W.2d at 651-52. Whether a person is a public figure is a distinct issue from whether speech regards a matter of public concern, and the former issue is not relevant to the question before this court. *Maethner* does not indicate that the analysis for identifying a limited-purpose public figure should be applied to determine matters of public concern and does not use the phrases "public controversy" or "pre-existing controversy" when describing how we must analyze matters of public concern.[8] Thus, caselaw does not

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

require that a public controversy must preexist speech that involves a matter of public concern.

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

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

change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues." *Snyder*, 562 U.S. at 455. Here, the "overall thrust and dominant theme" of Freborg's speech is participation in the #MeToo movement to experience community support and to empower and protect other women who have had similar experiences, as opposed to masking an attack over a private matter with Johnson.

Fourth, the recent federal district court decision in *Fredin v. Middlecamp* is persuasive and facilitates our review of Johnson's arguments. 500 F. Supp. 3d 752, 766 (D. Minn. 2020), *aff'd*, 855 F. App'x 314 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 1417 (2022). Minnesota appellate courts have had limited opportunities to apply the "public concern" standard outlined in *Maethner*. The only Minnesota case we found that applied the public-concern standard in *Maethner* determined that because a statement was made by a public employee while working, and the statement was about a former public employee's work, the statement related to a matter of public concern. *See Madison v. Todd County*, No. A20-0794, 2021 WL 1344021, at *5 (Minn. App. Apr. 12, 2021), *rev. denied* (Minn. June 29, 2021). But in *Fredin*, the District of Minnesota applied *Maethner* to determine that statements from a public Twitter account that named the plaintiff as a repeated sexual harasser and alleged rapist had addressed a "matter of public concern." *Fredin*, 500 F. Supp. 3d at 766. Although

"federal court interpretations of state law are not binding on state courts," *State ex rel. Hatch v. Emps. Ins. of Wausau*, 644 N.W.2d 820, 828 (Minn. App. 2002), they may be persuasive provided they are consistent with the supreme court's rationale, *In re Est. of Eckley*, 780 N.W.2d 407, 411 (Minn. App. 2010).

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

The primary difference between Freborg's speech and the speech at issue in *Fredin* is that the court in *Fredin* identified an additional factor that weighed in favor of finding that the statement addressed a matter of public concern: the speech was responsive "at least in part" to a news article published the same day about the alleged abuser.[10]

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[10] The majority attempts to distinguish *Fredin* on the ground that, shortly after the defendant's statement was posted to a public Twitter account, a local newspaper covered a story

Id. The matter of public concern at issue in *Fredin* is substantially the same as in this case. *Id.* ("The overall subject of the statement—sexual harassment and rape—is a topic of public interest to society at large, rather than simply a matter of private concern."). The use of social media to participate in a larger conversation about the matter of public concern is also substantially similar. *Id.* ("In addition, the statement was posted on the @CardsAgstHarassment Twitter account, a publicly available platform that regularly addressed issues of harassment and violence against women."). Finally, both the *Fredin* case and this case involved speech that identified a specific individual as part of a #MeToo discussion. Because of the similarities between *Fredin* and this case, the *Fredin* decision is particularly relevant and persuasive, and it supports a conclusion that Freborg's speech was on a matter of public concern.

Fifth, the majority applies the totality-of-the-circumstances rule as if the only speech at issue is the portion of the Facebook post that named Johnson and two other dance instructors to conclude that the statement was personal and did not involve

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involving the specific individual and the same general behavior. *Fredin*, 500 F. Supp. 3d at 777. The focus on whether a media outlet covered similar allegations regarding the individual named in the protected speech does not reflect a meaningful distinction and is misplaced, regarding dissemination in the news media, as discussed above.

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

Finally, I have grave concerns about the potential chilling effect that the majority's approach will have on the exercise of free speech with regard to #MeToo. I agree with the majority that the stakes of balancing the interests in cases such as this are high for individuals on both sides of the issue. And while I also agree that a person cannot render his or her speech a matter of public concern merely by adding a hashtag to a social-media post, I further conclude that naming an individual in a post does not require that a court determine that the speech is not a matter of public concern. As the majority notes, we must balance the important interests of protection of personal reputation and freedom to

speak on matters of public concern. The supreme court in *Maethner* counseled:

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

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

Actual Malice

Because I would conclude that Freborg's Facebook post involves a matter of public concern, I would also conclude that Johnson could only recover the presumed damages that he seeks in this case if he were able to prove actual malice. *Id.* at 878-79. To

be made with actual malice, "a statement must be made with the knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 873. Whether evidence in the record is sufficient to support a finding of actual malice is a question of law. *Id.* at 879 n.7. "[T]o meet the actual malice standard, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [their] publication." *Id.*

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

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

and remand with instructions that Johnson be required to prove actual malice.

APPENDIX C
27-CV-21-3888

Filed in District Court
State of Minnesota
10/25/2021 10:29 AM

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF HENNEPIN	FOURTH JUDICIAL DISTRICT

Byron Johnson,
Plaintiff,

vs.

Kaija Freborg,
Defendant.

ORDER GRANTING SUMMARY JUDGMENT MOTION

The above-captioned Defamation case came before the Honorable David L. Piper on September 27, 2021 for a hearing on Defendant's Motion for Summary Judgment and Plaintiff's Motion to Add a Claim for Punitive Damages.

Samuel A. Savage, Esq. appeared on behalf of Plaintiff Byron Johnson ("Johnson"). The gist — as will be more fully explained herein - of Plaintiff's Motion is for punitive damages, due to what he

asserts Defendant's postings on Facebook have done to him personally and professionally.
Chelsea L. Gauger, Esq. appeared on behalf of Defendant Kaija Freborg ("Freborg"). The gist — as will be more fully explained herein - of Defendant's Motion is that the First Amendment to the Constitution protects Defendant's negative postings about Plaintiff on Facebook.

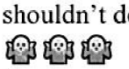
Based on the pleadings, affidavits, memoranda, and arguments of counsel, the Court now makes the following:

SUMMARY OF UNDISPUTED FACTS

1. Plaintiff and Defendant had an intimate relationship that continued for approximately one year, starting around 2013. (Complaint ¶ 5; Answer ¶ 5).

2. The intimate nature of the parties' relationship ended sometime in 2015. (Complaint ¶ 7; Answer ¶ 7).

3. On or about July 14, 2020, Defendant posted on her Facebook page:

Feeling fierce with all the women dancers coming out. So here it goes… I've been gaslighted/coerced into having sex, sexually assaulted, and/or raped by the following dance instructors: Byron Johnson, @Saley Internacional, and @israel Llerena. If you have a problem with me naming you in a public format, than perhaps you shouldn't do it.

#metoo
#dancepredators

(Complaint ¶ 9; Answer ¶ 7).

4. Plaintiff did not rape Defendant. (Complaint ¶ 11; Answer ¶ 9).

5. Defendant, on one occasion at his residence, approached Defendant while she was intoxicated and alone, grabbed her hand and put it down his pants onto his genitals. (*Gauger Aff.*, Ex. 4, p. 2).

6. One text conversation between Plaintiff and Defendant seemingly involves a discussion about Plaintiff videotaping Defendant (while Plaintiff and Defendant were having sex) without consent. (*Gauger Aff.*, Ex. 2).

7. Plaintiff requested that Defendant tell him exactly what he did to her or why his name was mentioned in the posting. (Complaint ¶ 16; Answer ¶ 14). Defendant responded by commenting:

> In all honesty I'm not interested in any kind of manipulative cat and mouse game with you. If you're "confused" (as I've heard many people say when gaslighting others to get outcomes they want) I suggest you talk to the many, many other women you've done this to or better yet talk to a therapist. "We" do not need to do better, you do.

(Complaint ¶ 16; Answer ¶ 14).

8. Defendant later edited the post referenced in paragraph 3 to read as follows:

Feeling fierce with all these women dancers coming out. So here goes... I've experienced varying degrees of sexual assault** by the following dance instructors: Byron Johnson, Saley Internacional, and Israel Llerena. If you have a problem with me naming you in a public format, then perhaps you shouldn't do it 🙈♀🙈♀🙈♀
#metoo
#dancepredators
**I was given feedback from a good friend of mine about how words like rape from a white woman can be triggering for black men. I want to respect the black men out there reading this and so I have changed the wording in this post. These are important discussions to have and I

appreciate the incredible friends I have who are willing to support me and also call me out. Thank you!! 🙏

(Complaint ¶ 20; Answer ¶ 18).

9. Defendant wrote in a private message to another individual: "I was feeling good for a moment and then this am they started sharing personal texts and calling me a liar. I get that this goes with the territory but every once in a while I doubt myself. Am I being unfair? Am I making this up? Was I too harsh or vague in depicting Byron's role in all this. As he's never raped me but . . . I feel healed and don't mind these conversations but holy sh*t what about women who are not. No wonder women don't come forward. All the awful things people say and post." (*PI. Memo. In Opp.*, Ex. 9).

CONCLUSIONS OF LAW

1. By posting the statements to Facebook, Defendant communicated them to someone other than the plaintiff.

2. These statements tended to harm Plaintiff's reputation.

3. These statements, nonetheless, were true. Plaintiff admits to non-consensual sexual contact with Defendant when he put her hand down his pants and onto his genitals at his house. This is correctly categorized as sexual assault.

4. "Taking *Gertz* and *Dun & Bradstreet* together, the proper focus regarding the availability of presumed damages is not on the status of the defendant as a media or nonmedia defendant. Rather, the dispositive inquiry is whether the matter at issue is one of public concern." *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 877 (Minn. 2019).

5. The statements in Defendant's posts reached a matter of public concern, namely, the #metoo movement and sexual abuse, and therefore presumed damages are unavailable to Plaintiff absent a showing of actual malice.

6. Plaintiff has not shown that the Defendant acted with actual malice, primarily because the statements were not actually false. Therefore, it would have been impossible for her to make the statements "with the knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *Maethner, v. Someplace Safe, Inc.*, 929 N.W.2d 868, 873 (Minn. 2019).

7. Because the statements in Defendant's posts were true, Plaintiff is unable to prove an essential element of defamation. No genuine issue of material fact remains on this point, and therefore summary judgment should be granted because Plaintiff cannot sustain a

cause of action for defamation as a matter of law.

8. Because Plaintiff has no underlying theory of harm remaining after Summary Judgment is granted on the defamation claim, his Motion to Add a Claim for Punitive Damages is legally insufficient and therefore should be denied as a matter of law.

ORDER

1. Defendant's Motion for Summary Judgment is **GRANTED**.

2. Plaintiffs Motion to Add a Claim for Punitive Damages is **DENIED**.

3. The attached Memorandum is incorporated as a part of this Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated:

BY THE COURT:

s/ David L. Piper
Judge David L. Piper
Piper, David
2021.10.24
13:31:34-05'00'

Filed in District Court
State of Minnesota
Oct 25, 2021 3:28 pm

JUDGMENT
I Hereby Certify that the above Order Constitutes the Entry of Judgment of the Court
Sarah Lindahl-Pfieffer, Court Administrator
By s/ Deborah Lund
Oct 25, 2021

MEMORANDUM

Plaintiff Johnson filed a complaint against Defendant Freborg asserting a claim of common-law defamation *per se*—which, if proved, allows a plaintiff to recover for presumed damages—based upon a July 14, 2020 Facebook post and subsequent comments by Freborg on that post. On July 1, 2021, Plaintiff filed a Notice of Motion and Motion for leave to amend his complaint to add a count of punitive damages. On August 30, 2021, Defendant filed a Notice of Motion and Motion for summary judgment and dismissal of Plaintiffs action against her, together with costs and disbursements. The Court will first consider the Motion for Summary Judgment and then the Motion to Add a Claim for Punitive Damages.

I. Defendant's Motion for Summary Judgment

Standard of Review

"The Court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. "A moving party is entitled to summary judgment when there are no facts in the record giving rise to a genuine issue for trial as to the existence of an essential element of the nonmoving party's case." *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 847-48 (Minn. 1995) (citation omitted). The moving party must support its allegation that there is no genuine issue as to any material fact by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits, stipulations . . . admissions, interrogatory answers, or other materials. . ." Minn. R. Civ. P. 56.03. The nonmoving party "may not rest on mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial." *Nicollet Restoration*, 533 N.W.2d at 848 (citations omitted). "Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial." *Id*. (citations omitted).

Defamation

To prove defamation, a plaintiff must show that defendant (1) made a false statement; (2) communicated it to someone besides the plaintiff; and (3) that the statement "tended to harm the plaintiffs reputation and lower him in the estimation of the community." *Keuchle v. Life's Companion P. CA*, 653 N.W.2d 214, 218 (Minn. Ct. App. 2002) (citing *Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406 Minn. 1994)).

However, actions for defamation implicate First Amendment interests. "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). In *Sullivan*, the Supreme Court decided that the First Amendment requires a plaintiff to show "actual malice" in order for a State "to award damages for libel in actions brought by public officials against critics of their official conduct." *Id*.

Later, the Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). The Gertz Court distinguished the level of protections afforded to private persons involved in matters of public concern from that afforded to public persons

involved in matters of public concern, allowing a "private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* [to] recover only such damages as are sufficient to compensate him for actual injury." *Gertz*, 418 U.S. at 350. Additionally, the Court later held that "permitting the recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985).

However, the Minnesota Supreme Court has spoken on the issue: "Taking *Gertz* and *Dun & Bradstreet* together, the proper focus regarding the availability of presumed damages is not on the status of the defendant as a media or nonmedia defendant. Rather, the dispositive inquiry is whether the matter at issue is one of public concern." *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 877 (Minn. 2019). Explaining that "neither the Supreme Court nor our court makes a media/nonmedia distinction in defamation cases brought by public officials or public figures," the Court clarified that "[t]he rule should not be different when the plaintiff is a private individual but the matter nonetheless raises an issue of public concern." *Id.* at 878. "Accordingly, it is the private or public concern of the statements at issue—not the identity of the speaker—that provides the First

Amendment touchstone for determining whether a private plaintiff may rely on presumed damages in a defamation action. . . . Consistent with these principles, we hold that a private plaintiff may not recover presumed damages for defamatory statements involving a matter of public concern unless the plaintiff can establish actual malice." *Id.* at 878-79.

The statements obviously meet the publication requirement: they were posted to Facebook for others to read. They also clearly tend to harm Plaintiffs reputation. Therefore, the threshold issue before the Court is: (1) whether the statements were false for the purposes of the summary judgment motion. If the statements were true, then Plaintiffs defamation claim cannot survive summary judgment. If the statements were false, then the Court must decide the following two issues: (2) were the statements of *Freborg* matters of public concern; (3) were the statements made with "actual malice." If the statements were matters of public concern not made with actual malice, then Johnson cannot recover presumed damages under a theory of defamation per se.

(1) The statements were not false, and therefore do not support an action for defamation

As discussed above, one of the elements of defamation is that the defendant made a false

statement. *Keuchle*, 653 N.W.2d at 218. Defendant correctly points out that the statements were not even false. The first Facebook post clearly states: "I've been gaslighted/coerced into having sex, sexually assaulted, *and/or* raped by the following dance instructors . . ." (Complaint ¶ 9) Plaintiff's Admission to Defendant's Request for Admission No. 10 establishes the truthfulness of the statement:

> 10. Admit that, on at least one occasion at your residence, you approached Defendant while she was intoxicated and alone, grabbed her hand and put it down your pants onto your genitals.
> RESPONSE: Admit.

(*Gauger Aff.*, Ex. 4, p. 2). The Court finds that describing this nonconsensual contact as sexual assault is substantially accurate, if not completely truthful. Additionally, one text conversation in the record seemingly involves a discussion about Plaintiff videotaping Defendant without consent. (*Gauger Aff.*, Ex. 2). This fact also renders Defendant's statements substantially accurate.

Plaintiffs argument is essentially that Defendant falsely accused him of rape. But neither post accuses the Plaintiff of rape. The post references three different individuals and three different things: gaslighting/coercion, sexual assault, and/or rape. "And/or" clearly implies that

the list is not necessarily disjunctive or conjunctive as applied to any or all of the individuals mentioned. Plaintiff asks this Court to read the statement as "and" thereby making it a false statement. The Court cannot meet Plaintiffs burden for him. The statements were not false, and therefore a cause of action for defamation cannot be sustained. Summary judgment is GRANTED.

(2) The statements of Freborg were matters of Public Concern

"Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,'... or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public . . . ." *Snyder v. Phelps*, 562 U.S 443, 453 (2011) (citations omitted). The Court in Snyder found that the public demonstration by the Westboro Baptist Church had a dominant theme which "spoke to broader public issues." *Id*. at 454. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

The Minnesota Supreme Court has held "that the determination of whether speech involves a matter of public or private concern is based on a

totality of the circumstances. Specifically, courts should consider the content, form, and context of the speech. No single factor is `dispositive;' rather, courts should 'evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said." *Maethner*, 929 N.W.2d at 881 (citing Snyder). "In *Snyder* the Court explained that Is] peech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community' or when the subject of the speech is 'of general interest and of value and concern to the public.'" *Id*. at 880.

Importantly, the Supreme Court in *Connick v. Myers* clarified that "[the inquiry into the protected status of speech is one of law, not fact." *Connick*, 461 U.S. at 148, n. 7. Therefore, if the undisputed facts before this Court, interpreted in the light most favorable to the nonmoving party, Johnson, show that the statements reached a matter of public concern, then the issue can be resolved on summary judgment.

(a) What was said

As outlined above, Freborg's post and edited post (collectively "posts") accused three different individuals by name or handle of three different things: gaslighting/coercion into having sex; sexual assault; and/or rape. (Summary of Undisputed Facts

III 3, 6). Furthermore, Freborg included two hashtags in the post: #metoo" and "#dancepredators." Hashtags enable users of social-media sites to cross-reference content in posts, sometimes facilitating exposure to a larger audience.

(b) Where it was said

The posts were both on Facebook. Facebook is a social media platform often used for public discussions. Some posts on Facebook are clearly matters of public concern, while others are not.

(c) How it was said

The inclusion of hashtags, especially "#metoo" weigh in favor of a finding that this speech reached a matter of public concern. Hashtags themselves are designed to share a topic or theme broadly, because they enable users to search the hashtag and see posts from many different users who may not be in their immediate network.

The #metoo movement itself is certainly a matter of public concern. Plaintiff nearly admits as much. Founded in 2006 by Tarana Burke, the movement gained international prominence in 2017 when it went viral.

Plaintiffs argument is essentially that this post is too personal to be a matter of public concern. The Court is not persuaded. Plaintiff even attempts to distinguish the facts at issue here from those in *Snyder*, where the Supreme Court found that statements by members of the Westboro Baptist Church protesting a military funeral with signs that read "Thank God for Dead Soldiers," "Fags Doom Nations," "America is Doomed," "Priests Rape Boys," and "You're going to Hell" were on matters of public concern. Plaintiff argues that this case can be distinguished from *Snyder* because Johnson and Freborg had a prior relationship which involved casual sex. He further argues that a "trending hashtag cannot be all that is required to convert a personal, private attack on an individual into a matter of public concern . . . . To hold otherwise would open the door to defamatory statements being excused simply because the author included a trending hashtag of a related public issue when making the statement." (Pl. Memo. in Supp. at 10).

This argument is specious. First, the hypothetical conspicuously deemphasizes that the author would be including a trending hashtag "of a related public issue." Simply using any random hashtag would not make the statement reach a matter of public concern. Rather, the use of a hashtag to spread a statement on a related public issue would be of public concern at least partly because of its content and not the hashtag, as is the

case here. The record is replete with other content regarding this specific problem in this specific community. (*Gauger*, *Aff.*, Ex. 7, 8). Context is important, and it is simply inaccurate to say that this Court is holding that a hashtag alone can allow a statement to reach a matter of public concern.

Furthermore, Plaintiffs argument is noticeably vulnerable to the same criticism: by this logic, anyone involved in a casual sexual relationship with another individual would be unable to speak to matters of public concern regarding that individual. Not only does the Court find the implications of that conclusion far-reaching and inconsistent with First Amendment principles, but the Court also refuses to carve out an exception for parties with prior relationships to the actual-malice standard applicable to statements of public concern absent any supporting binding precedent.

This Court finds that Freborg's statements were on a matter of public concern, namely the #metoo movement, based on the totality of the circumstances.

(3) The statements were not made with actual malice

"The question of whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Harte-*

Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 685 (1985); *Maethner*, 929 N.W.2d at 879; *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11 (1984) ("The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'").

To meet the Constitutional actual-malice standard, a statement must be "made with the knowledge that it was false or with reckless disregard of whether it was false or not." *Maethner*, 929 N.W.2d at 873 (quoting *New York Times*, 376 U.S. 254). The standard is a heightened one: it requires a showing that the statement was made with a high degree of awareness of its probable falsity, or that the speaker entertained serious doubts as to the truth of the statement. *In re Charges of Unprofessional Conduct Involving File No. 17139*, 720 N.W.2d 807, 813 (Minn. 2006) (citations omitted). Actual malice is a subjective standard. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989).

It is difficult for the Court to analyze the hypothetical scenario in which Defendant's statements were false with respect to this element. Falsity is essential to the actual malice standard because subjective knowledge or reckless disregard of truth is not possible if the statements are true. However, if the Court were to interpret the statement as a false rape allegation, Plaintiff still would not have met the actual malice standard.

Plaintiff argues that various statements and messages with other individuals show Defendant's actual malice. For example, she said to one individual: "I was feeling good for a moment and then this am they started sharing personal texts and calling me a liar. I get that this goes with the territory but every once in a while I doubt myself. Am I being unfair? Am I making this up? Was I too harsh or vague in depicting Byron's role in all this. As he's never raped me but . . . I feel healed and don't mind these conversations but holy sh*t what about women who are not. No wonder women don't come forward. All the awful things people say and post." (*Pl. Memo. in Opp.*, Ex. 9). Plaintiff argues that this statement shows that Defendant entertained the probability of the post's truth or untruth, which shows actual malice.

But that is not the standard. In fact, these posts show Defendant did not act with actual malice. Not only is this message a reaction to being called a

liar, but it also shows only that Defendant was entertaining the implications of her true statement. She literally questions whether it was "too vague" or if she was "being unfair," both of which are compatible with telling the truth. An individual doubting herself after being called a liar by many people on the internet does not show that the statements were made with knowledge that the statements were false nor with reckless disregard for their truth or falsity; this just shows she was doubting a very serious accusation she made. There is room between doubt and actual malice.[11]

The Court's reasoning applies equally well to other statements the Plaintiff highlights, for example: "yes I grouped men and actions together ... if they call me a liar I'm not sure that I care." (*Pl. Memo. in Opp.*, Ex. 7). Plaintiff also points to a conversation between Defendant and another individual, in which Defendant asked whether deleting her post would "make [her] look guilty of wrongdoing." (*Pl. Memo. in Opp.*, Ex. 10 at 17). The individual responded that "fun the court of law, I doubt this would prove any guilt. In the court of public opinion it may be different." (*Id*). Defendant responded: "And that's why I posted it. I think it

[11] Additionally, even if these conversations tended to show actual malice, the Court doubts that this meets the Constitutional standard of "clear and convincing" evidence of actual malice. See Bose Corp_ v. Consumers Union of U.S., Inc., 466 U.S. 485, 511 (1984).

really helped people begin to talk about this." (*Id*. at 18).

Again, even if the statements were false, these statements do not show actual malice. Defendant says she doesn't care if she's called a liar, not that she doesn't care if she lied. That statement is still compatible with her belief that her statement was true. The same goes for the other exchange: Defendant is worried that deleting the post would make her look guilty of something. That fear could exist even if what she said were true.

II. Plaintiff's Motion to Add a Claim for Punitive Damages

Plaintiffs cannot seek punitive damages at the commencement of a civil action. Minn. Stat. § 549.191. A plaintiff may only seek punitive damages through a motion to amend the complaint to add a claim for punitive damages. *Id*. "[I]f the court finds prima facie evidence in support of the motion," it shall grant the moving party permission to amend the pleadings. *Id*.

"The general rule is that punitive damages are not available without actual or compensatory damages." *Bucko v. First Minnesota Say. Bank, F.S:B.*, 452 N.W.2d 244, 249 (Minn. Ct. App. 1990) (citing *Meizner v. Buecksler*, 13 N.W.2d 754 (Minn. 1944)). However, there is an exception "for

defamation per se cases because of the intangible nature of the harm addressed by the tort." *Id*. (citations omitted).

However, here, there is no longer a defamation per se cause of action because the Court has granted summary judgment on that claim. Plaintiff then has no theory of underlying harm whatsoever upon which punitive damages could be collected. Therefore, Plaintiff's Motion to Add a Claim for Punitive Damages is DENIED.

In Sum

As is evident, this Court relies heavily upon the holding in Maethner in this decision: the issue herein is a matter of public concern and Plaintiff can not establish actual malice because Defendant's statements — albeit negative, hostile, and damaging to Plaintiff's personal and professional reputation - were true, reading Defendant's statements literally. See *Maethner v. Someplace Safe*, 929 NW 2d 868 (Minn. 2019). Absent Plaintiff's Admissions, a different decision may have been reached.

Conclusion

Because no genuine dispute of material fact exists as to whether the statements in Defendant's posts are true, Defendant's Motion for Summary Judgment is GRANTED. Even if a genuine dispute

of material fact had been presented on that point, though, the Court still finds that the posts reached a matter of public concern, requiring the Plaintiff to show that Defendant made the statements with actual malice. The Court finds that Defendant did not make the statements with actual malice—that is, knowledge of the statements' falsity or reckless disregard for whether they were true or not—because the statements were not false. Even if the statements were false, the record does not contain evidence presenting a genuine issue of material fact suggesting that Defendant's subjective outlook when she made the posts could meet the Constitutional actual-malice standard. Therefore, Plaintiffs defamation claim for presumed damages is insufficient as a matter of law, and presumed damages are Constitutionally impermissible. Defendant's Motion is also GRANTED on these grounds.

Because Plaintiff has no underlying theory of harm upon which a punitive damages claim could be added, Plaintiffs Motion to Add a Claim for Punitive Damages is DENIED.

APPENDIX D

STATE OF MINNESOTA SUPREME COURT

JUDGMENT

Byron Johnson,
Respondent, Appellate Court #A21-1531
vs.
Kaija Freborg, Trial Court # 27-CV-3888
Appellant.

Pursuant to a decision of the Minnesota Supreme Court duly made and entered, it is determined and adjudged that the decision of the Hennepin County District Court, Civil Division herein appealed from be and the same hereby is reversed and remanded. Judgment is entered accordingly.

It is further determined and adjudged that Byron Johnson herein, have and recover of Kaija Freborg herein the amount of $1,120.25 as costs and disbursements in this cause, and that execution may be issued for the enforcement thereof.

Dated and signed: November 14, 2023

FOR THE COURT

Attest: Christa Rutherford-Block

Clerk of the Appellate Courts

Statement For Judgment

Costs and disbursements in the Amount of: $1,120.25

Attorney Fees in the Amount of:

Total: *$1,120.25*

Satisfaction of Judgment Filed: _____
Dated

Therefore the above Judgment is duly satisfied in full and discharged of record

Attest: *Christa Rutherford-Block* *By:*
Clerk of the Appellate Court *Assistant Clerk*