STATE OF MICHIGAN

COURT OF APPEALS

JERRY REIGHARD,

Plaintiff-Appellant,

v

ESPN, INC., and DANIEL MURPHY,

Defendants-Appellees.

FOR PUBLICATION
May 12, 2022
9:20 a.m.

No. 355053
Isabella Circuit Court
LC No. 2019-015498-CZ

Before: BOONSTRA, P.J., and M. J. KELLY and SWARTZLE, JJ.

PER CURIAM.

In this defamation action, plaintiff Jerry Reighard (Reighard) appeals by right the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(10). We affirm in part, reverse in part, and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

For 35 years, Reighard was the head women's gymnastics coach at Central Michigan University (CMU). On February 20, 2019, CMU announced that it had placed Reighard on paid administrative leave pending an investigation. No details regarding the investigation were disclosed in that announcement. However, citing confirmation by CMU's athletic director, multiple news articles reported on that date that the investigation had "nothing to do with [former gymnastics physician] Larry Nassar's case or sexual misconduct of any kind"[1] or "Title IX"[2].

[1] See *People v Nassar*, unpublished per curiam opinion of the Court of Appeals, issued December 22, 2020 (Docket No. 345699) (indicating that Larry Nassar, a physician at Michigan State University and the team physician for USA Gymnastics, pleaded guilty to multiple counts of criminal sexual conduct based on his sexual abuse of dozens of teenage and prepubescent girls).

[2] See 20 USC 1681 et seq.

Defendant Daniel Murphy is a reporter for defendant ESPN, Inc. In that capacity, Murphy had previously reported on issues relating to gymnastics, including coverage of Nassar's sexual abuse of gymnasts and John Geddert's reported physical and mental abuse of gymnasts.[3] Indeed, Murphy's reporting in 2018 regarding the Nassar sexual abuse scandal has earned him and his ESPN colleagues multiple awards—including an IRE[4] Award for Sports Investigations and a Peabody Award.[5] Murphy also has co-authored a book entitled: *Start by Believing: Larry Nassar's Crimes, the Institutions that Enabled Him, and the Brave Women Who Stopped a Monster*. According to Murphy, the book refers to Geddert as one of the individuals who enabled Nassar.

On February 21, 2019, Murphy posted on Twitter[6] consecutive tweets about two public announcements concerning women's gymnastics coaches in Michigan. The first tweet referred to an announcement by the Michigan attorney general:

> Michigan's attorney general announced today her office is taking over an investigation of John Geddert, the 2012 Olympic team head coach and close friend of Larry Nassar. Several gymnasts have publicly abused [sic] Geddert of physically and mentally harming them.

The second tweet—which was posted within a minute of the first tweet—addressed CMU's announcement concerning Reighard:

> On the same day as the AG's announcement, Central Michigan said it was putting longtime gymnastics coach Jerry Reighard on leave amid an internal review. No details of the review were shared, but Reighard has a long personal and professional relationship with Geddert.

Reighard requested a retraction of the tweets. Murphy then searched for and discovered the earlier reporting in which CMU had confirmed that its investigation of Reighard had nothing to do with Nassar or Title IX. Murphy also then spoke directly with a CMU representative, who again confirmed to Murphy that the investigation had nothing to do with Nassar or Title IX, and that by "Title IX," he meant "sexual misconduct." Following that conversation, Murphy concluded that a retraction was unnecessary because there was nothing factually incorrect in the tweets. Instead, on March 11, 2021, he posted an additional tweet—which he testified was not

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[3] John Geddert was head coach of the 2012 gold-medal U.S. women's gymnastics Olympic team. He died by suicide in 2021 after being charged with multiple counts of criminal sexual assault and human trafficking, including of minors. See, e.g., https://www.espn.com/olympics/gymnastics/story/_/id/30969557/court-documents-detail-deceased-coach-john-geddert-alleged-abuse (last accessed April 18, 2022).

[4] Investigative Reporters and Editors. See https://www.ire.org (last accessed April 15, 2021).

[5] See https://peabodyawards.com (last accessed April 15, 2021).

[6] Murphy's Twitter account advertised his then-forthcoming book.

meant as a retraction, but instead was intended to "add more information to [his] reporting"—on Twitter:

> Central Michigan hopes to have its internal investigation of Jerry Reighard completed by the end of the semester. An athletic dept. spokesman confirmed today Reighard remains on paid leave and the investigation is not connected to the Larry Nassar scandal or sexual misconduct.

Reighard filed suit, alleging that Murphy's initial tweets constituted defamation per se and false light invasion of privacy.[7] After defendants answered the complaint, discovery ensued. Murphy testified at his deposition that, before publishing the tweets, confidential sources had informed him that Reighard had been placed on administrative leave, that Reighard, like Geddert, had a reputation for physically and mentally abusing gymnasts, and that Geddert and Reighard had a longstanding and friendly relationship. To verify the information, Murphy read CMU's announcement placing Reighard on administrative leave pending an investigation. He also reviewed a 2012 news article indicating that Reighard and Geddert had a professional relationship and that they were friendly with each other. He testified that it was important that he perform due diligence to confirm what he had been told, and that due diligence was important because "[i]t's my job." He also testified that his purpose was to establish a relationship between Reighard and Geddert.

Murphy indicated that, based on what he had learned, he believed there might be a connection between the attorney general's announcement regarding the investigation into Geddert and CMU's announcement regarding its investigation into Reighard. In his view, his two initial tweets properly raised that question. He indicated that at the time of his tweets, he had no information suggesting that Reighard was "connected to Larry Nassar and Geddert in any sexual abuse scandal" or that Reighard had been accused of any kind of sexual abuse "in a criminal sense." He acknowledged that, in his first tweet, he established a relationship between Nassar and Geddert, and in his second tweet, he established a relationship between Geddert and Reighard. But he denied that his tweets had linked the three men. Despite the reference to Nassar in the first tweet,

[7] The complaint did not include an express count for defamation by implication. However, the complaint did allege that, by posting the tweets, defendants were "attempting to connect [Reighard] to individuals in the gymnastics community who have been accused of physically and mentally abusing student-athletes." It further alleged that "Defendants' statement implies that [Reighard] was placed on administrative leave due to similar behavior engaged in by Mr. Nassar and of which Mr. Geddert has been accused of." Consequently, the parties litigated the case as setting forth a claim for defamation by implication. Indeed, in moving for summary disposition, defendants described the defamation by implication claim as Reighard's "main claim," and Reighard described it as the "heart" of his case. On remand, the trial court should order any amendment of the pleadings it deems necessary to squarely allege, in accordance with the parties' interpretation and litigation of the existing complaint, a claim of defamation by implication.

he testified that he did not believe the thread raised any question as to whether the investigation into Reighard was related to Nassar or sexual-abuse allegations.

Murphy also testified, however, that he had not attempted to contact Reighard or CMU's athletic director before posting his tweets, because "[t]he information I needed was in a public press release." He also testified that he had not seen the earlier news reports confirming that there was no connection between the investigation of Reighard and sexual misconduct of any kind or the sexual-abuse scandal concerning Nassar. He testified that he did not know whether, had he known that information, he would have tweeted as he did. He indicated that he did not know whether it would have been important to include that information in his tweets, and that he could not say or control how anyone might read them.

Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that the tweets did not assert any defamatory or materially false facts, that they did not constitute defamation by implication, and that Reighard—a limited-purpose public figure—could not demonstrate that Murphy had acted with actual malice. Reighard responded that the tweets contained materially false facts[8] and that they had implied that he was guilty of physical and sexual abuse like Geddert and Nassar. He also argued that he was not a limited-purpose public figure, but that even if he were, Murphy had acted with actual malice when posting the tweets.

Following a hearing, the trial court granted defendants' motion, concluding there were no genuine issues of material fact regarding Reighard's defamation and false light claims because the tweets were substantially true and, even if they were not, Reighard was a limited-purpose public figure and there was no evidence that Murphy had acted with actual malice.[9] Reighard moved for reconsideration, arguing that the trial court had failed to address his claim for defamation by implication. The trial court denied the motion. This appeal followed.

II. STANDARD OF REVIEW

Reighard argues that the trial court erred by granting defendants' motion for summary disposition. This Court reviews de novo a trial court's decision on a motion for summary disposition and whether the trial court properly applied the constitutional standard for defamation. *Redmond v Heller*, 332 Mich App 415, 438; 957 NW2d 357 (2020). Summary disposition under MCR 2.116(C)(10) is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." "A genuine issue of material fact exists when the record leaves open an issue upon

[8] For example, Reighard contended that he never had a personal relationship with Geddert. And Reighard pointed out that the CMU announcement (concerning Reighard) did not occur "on the same day" as the attorney general's announcement (concerning Geddert and Nassar), as the tweets had temporally linked them; instead, the CMU announcement had been made the day before the attorney general's announcement. Those issues are not before us on appeal.

[9] On appeal, defendants contend that summary disposition was appropriate because Reighard cannot establish a claim for defamation per se. The trial court, however, did not grant summary disposition on that basis. Consequently, we do not address that particular argument further.

which reasonable minds might differ." *Johnson v Vanderkooi*, 502 Mich 751, 761; 918 NW2d 785 (2018) (quotation marks, citation, and alteration omitted). The trial court must consider the "pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

III. ANALYSIS

A. DEFAMATION AND THE FIRST AMENDMENT

The law of defamation lies at a crossroads with that of the First Amendment. The First Amendment, of course, protects, in part, freedom of speech and freedom of the press. US Const, Am I ("Congress shall make no law . . . abridging the freedom of speech, or of the press.").[10]

The law of defamation arises—as a matter of state common law—from the world of tort. It seeks to protect against injury to reputation caused by the publication of falsehoods:

> A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. [3 Restatement Torts, 2d, §559 at 156.]

Thus, "[a] communication is defamatory if it tends to lower an individual's reputation in the community or deters third persons from associating or dealing with that individual." *Ireland v Edwards*, 230 Mich App 607, 614; 584 NW2d 632 (1998). "However, not all defamatory statements are actionable." *Id*. Generally, "[i]f a statement cannot be reasonably interpreted as stating actual facts about the plaintiff, it is protected by the First Amendment." *Id*. See also *Milkovich v. Lorain Journal Co*, 497 US 1, 20; 110 S Ct 2695; 111 L Ed 2d 1 (1990). "Thus, at least some expressions of opinion are protected." *Ireland*, 230 Mich App at 614, citing *Milkovich*, 497 US at 18–20. Otherwise, a plaintiff can establish a defamation claim by showing:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. [*Smith v Anonymous Joint Enterprise*, 487 Mich 102, 113; 793 NW2d 533 (2010) (quotation marks and citation omitted).]

The quandary lies in determining at what point the law of defamation abridges freedom of speech or of the press.

[10] The First Amendment applies to the states by virtue of the Fourteenth Amendment. US Const, Am XIV.

1. THE STARTING POINT

The starting point for that analysis is how the framers of the First Amendment perceived its interaction with the common law of defamation. As Justice WHITE stated in *Gertz v Robert Welch, Inc*, 418 US 323; 94 S Ct 2997; 41 L Ed 2d 789 (1974) (WHITE, J., dissenting):

> For some 200 years—from the very founding of the Nation—the law of defamation and right of the ordinary citizen to recover for false publication injurious to his reputation have been almost exclusively the business of state courts and legislatures. Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule. Given such publication, general damage to reputation was presumed, while punitive damages required proof of additional facts. The law governing the defamation of private citizens remained untouched by the First Amendment because until relatively recently, the consistent view of the Court was that libelous words constitute a class of speech wholly unprotected by the First Amendment, subject only to limited exceptions carved out since 1964. [*Id*. at 369-370.]

2. *NEW YORK TIMES* AND ITS PROGENY

In 1964, the United States Supreme Court issued its seminal decision in *New York Times Co v Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964). It adopted an "actual malice" test for defamation claims brought by public officials relating to criticism of their official conduct:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. [*Id*. at 279-280.]

That test has since been expanded to public figures. See *Curtis Publishing Co v Butts*, 388 US 130; 162; 87 S Ct 1975; 18 L Ed 2d 1094 (1967). The Court in *Gertz* described public figures as follows:

> Respondent's characterization of petitioner as a public figure raises a different question. That designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions. [*Gertz*, 418 US at 351.]

B. DEFAMATION BY IMPLICATION

A subset of the tort of defamation is known as "defamation by implication." "[A] cause of action for defamation by implication exists in Michigan, but only if the plaintiff proves that the

defamatory *implications* are materially false." *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315, 330; 583 NW2d 725 (1998). See also *Locricchio v Evening News Ass'n*, 438 Mich 84, 122; 476 NW2d 112 (1991); *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 702; 609 NW2d 607 (2000). "[S]uch a cause of action might succeed even without a direct showing of any actual literally false *statements*." *Hawkins*, 230 Mich App at 330. Liability for defamation by implication may be imposed based not on what is affirmatively stated, but on what is implied when a defendant "juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts [such that] he may be held responsible for the defamatory implication." Prosser & Keeton, Torts (5th ed), § 116, p 117. "A defamation by implication stems not from what is literally stated, but from what is implied." *White v Fraternal Order of Police*, 909 F2d 512, 518 (DC Cir, 1990).

C. APPLICATION

On appeal, Reighard argues that, even if the statements in Murphy's tweets were not themselves materially false, the implications arising from the statements were false. He further argues that there was sufficient evidence of actual malice to survive summary disposition. We agree, in part.

1. THE IMPLICATIONS

As noted, the tweets, which were published on February 21, 2019, stated:

> Michigan's attorney general announced today her office is taking over an investigation of John Geddert, the 2012 Olympic team head coach and close friend of Larry Nassar. Several gymnasts have publicly abused [sic] Geddert of physically and mentally harming them.
>
> On the same day as the AG's announcement, Central Michigan said it was putting longtime gymnastics coach Jerry Reighard on leave amid an internal review. No details of the review were shared, but Reighard has a long personal and professional relationship with Geddert.

Reighard identifies two allegedly defamatory implications in the tweets. First, that there was a connection between CMU's decision to place him on administrative leave and the attorney general's investigation into the allegations that Geddert had physically and mentally harmed gymnasts. Second, that there was a connection between Reighard being placed on administrative leave and Nassar or sexual-abuse allegations.

2. CAPABLE OF DEFAMATORY MEANING

"[A] court may decide as a matter of law whether a statement is actually capable of defamatory meaning." *Ireland*, 230 Mich App at 619 (citation omitted). "Where no such meaning is possible, summary disposition is appropriate." *Id.* "A communication is defamatory if, considering all the circumstances, it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

Id.

Although the trial court held, on reconsideration, that the tweets "[did] not create a clear implication that plaintiff committed the same kind of sexual abuse crimes as Nassar," it did not address whether the alleged implications, if proven, were capable of defamatory meaning. Plaintiffs argue that the tweets could reasonably be interpreted as connecting Reighard with sexual abuse allegations. Defendants disagree. We agree with Reighard.

The first tweet identified Geddert as the head coach of the 2012 Olympic team and that he was close friends with Nassar. At the time, it was well-known that Nassar had been the team physician for USA Gymnastics and had treated many gymnasts in his role as a physician at Michigan State University. The second tweet identified Reighard as CMU's "longtime gymnastics coach" and stated that Geddert and Reighard are also friends. Thus, reading the tweets in context, a reasonable reader could infer that all three men had been involved in gymnastics and were friends with each other.

Next, the first tweet stated that the attorney general was taking over an investigation into allegations that Geddert had physically and mentally harmed several gymnasts. Further, by mentioning Geddert's close association with Nassar, the tweet arguably implied a connection between the investigation into Geddert and Nassar's sexual-abuse convictions. The second tweet links to the first by referencing the attorney general's investigation. It then noted that Reighard had been placed on administrative leave pending an internal review. It stated that no details of the review were shared by CMU; however, by using the word "but" in its final sentence, the tweet arguably implied that the reason Reighard was placed on administrative leave was related to a supposedly long, personal and professional relationship with Geddert. In doing so, a reasonable reader could read the tweets as implying that Reighard had engaged in the same type of misconduct for which the attorney general was criminally investigating Geddert—physically and mentally harming gymnasts. Further, a reasonable reader could conclude that Reighard was or could have been involved in sexual misconduct or in the Nassar sexual-abuse scandal.

We conclude, particularly in light of the manner in which the statements contained within the tweets were juxtaposed with one another, that the implications complained of are capable of defamatory meaning. See *Ireland*, 230 Mich App at 619-620. The implication that Reighard's placement on leave was related to allegations that Geddert had physically and mentally harmed gymnasts tended to harm Reighard's reputation so as to lower him in the estimation of the community or deter third persons from associating or dealing with him. That assessment is even more true with respect to the second alleged implication, i.e., that Reighard's placement on leave was related to Nassar or sexual abuse allegations. This is not so strained a reading of the tweets as to make summary disposition appropriate. Rather, we conclude that it is one that a reasonable jury should assess. Thus, these statements are actionable.[11]

[11] We reject defendants' suggestion that the tweets at most raised a question, and that questions are not capable of defamatory meaning. First, the tweets did not pose a question. Second, "a blanket protection of defamation liability for any and all questions is inappropriate," *Boulger v Woods*, 917 F 3d 471, 480 (CA 6, 2019), just as it is inappropriate when statements are couched in terms of opinion, *Milkovich*, 497 US at 19 ("[s]imply couching such statements in terms of

3. FALSITY

In another context, this Court has observed that "claims of defamation by implication, which by nature present ambiguous evidence with respect to falsity, face a severe constitutional hurdle." *Locricchio*, 438 Mich at 122. That is only partially true in this case, however.[12]

To analyze this element or Reighard's defamation-by-implication claim, we will separately analyze each of the complained-of implications. With regard to the first implication, i.e., that there was a connection between CMU's investigation of Reighard and the attorney general's investigation of Geddert (for alleged physical and mental abuse),[13] Reighard has failed to put forth any evidence. Rather, he merely asserts that it is false, without directing this Court to the factual basis for his conclusion. In doing so, he has abandoned the issue. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position."). Moreover, it is undisputed that CMU ultimately fired Reighard for misconduct related to instructing gymnasts to conceal symptoms of injuries from physicians so that the gymnasts could be cleared to compete notwithstanding their injuries. This undisputed conduct relates to the physical or mental abuse of gymnasts. Because that was also the reported basis of the attorney general's investigation of Geddert, we conclude that there is no triable issue with regard to the falsity of this alleged implication. There thus was no record evidence refuting the alleged implication that CMU placed Reighard on leave for reasons related to the investigation of Geddert (for allegedly physically and mentally harming gymnasts). Consequently, the implication was not, as a matter of law, materially false, and summary disposition on this claim of defamation by implication was therefore proper.

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opinion does not dispel these implications"). Finally, based on our independent review of the totality of the evidence, the tweets raised not mere questions but actionable implications that reasonably should be assessed by the fact-finder. Defendants' interpretation would effectively negate an entire area of Michigan jurisprudence—defamation by implication—an invitation that we decline.

[12] In *Philadelphia Newspapers v Hepps*, 475 US 767; 106 S Ct 1558; 89 L Ed 2d 783 (1986), the Supreme Court held that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." *Id.* at 777. In other words, it fashioned "a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." *Id.* at 776. See also *Milkovich*, 497 US at 16; *Rouch v Enquirer & News of Battle Creek Michigan*, 440 Mich 238, 259; 487 NW2d 205 (1992) ("In contrast to the early common law, where falsity was presumed and the defendant was required to prove substantial truth as a defense, the burden of proving falsity has now been shifted to the plaintiff."), citing *Hepps*, 475 US at 768-769.

[13] We note that while Geddert ultimately was charged with crimes involving sexual abuse, nothing to that effect was reflected in either the attorney general's announcement or Murphy's tweets.

The same cannot be said, however, with regard to the second implication, i.e., that there was a connection between Reighard being placed on administrative leave and Nassar or sexual-abuse allegations. Indeed, the falsity of that implication is uncontested. Moreover, the evidence reflects that CMU confirmed on February 20, 2021—as reported by multiple news outlets at that time—that its investigation into Reighard was not connected to Nassar or allegations of sexual abuse. Moreover, when Murphy contacted CMU after being asked to retract his tweets, he was provided with the same information. Reighard has therefore satisfied the "falsity" element with respect to the second complained-of implication.

We note that, in granting summary disposition in favor of defendants, the trial court concluded in part that the "gist" of the statements contained in the tweets was accurate. However, the trial court at that time was considering only the factual statements expressly set forth in the tweets. In subsequently denying Reighard's motion for reconsideration, the trial court reiterated that it had previously found that the gist of Murphy's tweets was accurate. The trial court's language derives from what is known as the "substantial truth defense." As our Supreme Court stated in *Rouch v Enquirer & News of Battle Creek Michigan*, 440 Mich 238; 487 NW2d 205 (1992):

> The common law has never required defendants to prove that a publication is literally and absolutely accurate in every minute detail. For example, the Restatement of Torts provides that "[s]light inaccuracies of expression are immaterial provided that the defamatory charge is true in substance." [*Id.* at 258-259, citing 3 Restatement Torts, 2d, §581, comment f, p 237.]

The Court in *Rouch* further noted that, notwithstanding that *Hepps* had shifted the burden of proof (of falsity) to the plaintiff, the definition of falsity, based on common-law doctrine, remained as set forth in *Masson v New Yorker Magazine, Inc*, 501 US 496; 111 S Ct 2419; 115 L Ed 2d 447 (1991):

> The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. . . . It overlooks minor inaccuracies and concentrates upon the substantial truth. . . . The essence of that inquiry, however, remains the same whether the burden rests upon plaintiff or defendant. Minor inaccuracies do not amount to falsity so long as "the substance, the gist, the sting, of the libelous charge be justified." . . . Put another way, the statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." [*Rouch*, 440 Mich at 260, citing *Masson*, 501 US at 516-517 (citations omitted in original).]

We further note that this Court has stated that "there is no logical reason why the substantial truth defense should not apply in cases involving the gist or the sting of defamatory implications from statements that are literally true." *Hawkins*, 230 Mich App at 333.

That said, we conclude in the circumstances of this case that the second implication complained of by Reighard, i.e., that there was a connection between Reighard being placed on administrative leave and Nassar or sexual-abuse allegations, would, if proved, "have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Masson*,

501 US at 517. Consequently, any implication that Reighard was placed on administrative leave for reasons related to Nassar or sexual abuse allegations was false, and the trial court erred, with respect to this alleged implication, to the extent it granted summary disposition on the basis of the "gist" or substantial truth of the statements contained in the tweets.

4. LIMITED-PURPOSE PUBLIC FIGURE

The trial court held that Reighard was a limited-purpose public figure. And, as the trial court noted, many courts indeed have classified sports figures, including coaches, as public figures (or limited-purpose public figures) by virtue of their positions, at least with regard to comments concerning their positions. Reighard has now stipulated to limited-purpose-public-figure status.[14]

5. ACTUAL MALICE

Because Reighard has been deemed to be a limited-purpose public figure, he must also establish by clear and convincing evidence that Murphy made the allegedly defamatory implication with actual malice. See *Ireland*, 230 Mich App at 615. Of course, in the defamation context, "actual malice" does not refer to a defendant's motive or any sense of ill will in the ordinary sense of the term. See *Harte-Hanks Communications, Inc v Connaughton*, 491 US 657, 666-667 and n 7; 109 S Ct 2678; 105 L Ed 2d 562 (1989) ("The phrase 'actual malice' is unfortunately confusing in that it has nothing to do with bad motive or ill will."). Rather, as explained in *Ireland*,

> Actual malice is defined as knowledge that the published statement was false or as reckless disregard as to whether the statement was false or not. Reckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or insufficient investigation. Furthermore, ill will, spite or even hatred, standing alone, do not amount to actual malice. "Reckless disregard" is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, but by whether the publisher in fact entertained serious doubts concerning the truth of the statements published. [*Ireland*, 230 Mich App at 622 (quotation marks and citation omitted).]

See also *Harte-Hanks*, 491 US at 688 ("In a case such as this involving the reporting of a third party's allegations, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.") (citation and internal quotation omitted); *Grebner v Runyon*, 132 Mich App 327, 337; 347 NW2d 327 (1984) ("[T]here was a genuine issue as to whether MegaMedia, in fact, entertained serious doubts concerning the truth of the statements published and whether the failure to make a phone call verifying the report amounted to reckless disregard as to the truthfulness of the report. We find that this matter should have been left to the trier of fact. Where the credibility of a witness or deponent is crucial, summary judgment should

[14] In response to defendants' motion for summary disposition, Reighard argued that he was not a limited-purpose public figure. The trial court, however, disagreed, and Reighard expressly does not contest that conclusion on appeal.

not be granted. Plaintiff's allegations were sufficient to withstand a motion for summary judgment.").

Thus, " 'actual malice' is a subjective concept." *Smith*, 487 Mich at 115. It "mandates a subjective inquiry concentrating on the knowledge of a defendant at the time of a publication." *Ireland*, 230 Mich App at 305. However, a defendant will not automatically prevail in a defamation case by stating that the statements were made with a belief that they were true, because a defendant's state of mind may be established "through circumstantial evidence." *Smith*, 487 Mich at 115-116. Moreover, "[a]lthough failure to investigate will not alone support a finding of actual malice . . . the purposeful avoidance of the truth is in a different category." *Harte-Hanks*, 491 US at 692 (citation omitted).

The actual malice test is further complicated in this case by the fact that Reighard's claim is one of defamation-by-implication. This Court has said (albeit in the analogous false light invasion of privacy context) that when the plaintiff's injury arises from an allegedly harmful implication, the plaintiff must prove by clear and convincing evidence that the defendant "intended or knew of the implications that the plaintiff is attempting to draw . . . ." *Battaglieri v Mackinac Ctr for Pub Policy*, 261 Mich App 296, 305; 680 NW2d 915 (2004) (quotation marks and citation omitted). See also *Royal Palace Homes, Inc*, 197 Mich App at 56 (stating that a defendant is not responsible for every defamatory implication that may be drawn from a report of true facts, unless evidence is presented that the defendant intended the defamatory implication).

But what does it mean to "intend" the implication? Delving a bit deeper into the authorities relied on by these cases answers the question. In short, just as "actual malice" means either knowledge or recklessness with regard to *falsity*, so too, "intended" in this context means either knowledge *or recklessness* with regard to the *implication*. See, e.g., *Saenz v Playboy Enterprises, Inc*, 841 F2d 1309, 1318 (CA 7, 1988) (stating that the plaintiff must show that "the defendants either intended *or were reckless* with regard to the potential falsity of defamatory inferences which might be drawn from the article") (emphasis added). That is, "[n]ot only must the plaintiff establish that the statement is susceptible of a defamatory meaning which the defendants knew to be false or which the defendants published with reckless disregard for its potential falsity, but also that the defendants intended to imply *or were reckless* toward the implications. *Id*. (emphasis added; footnote omitted). Stated another way, "the communicative-intent element of actual malice in defamation-by-implication cases can be satisfied by reckless disregard for the defamatory meaning of a statement." *Kendall v Daily News Pub Co*, 716 F 3d 82, 91 (CA 3, 2013). See also *White*, 909 F2d at 519 ("It is no defense that the defendant did not actually intend to convey the defamatory meaning, so long as the defamatory interpretation is a reasonable one.").

To satisfy that element in this case, Reighard directs this Court to Murphy's deposition testimony. Specifically, Murphy testified that when he wrote the tweets, he did not know—one way or the other—whether there had been allegations of sexual abuse against Reighard, and that he did not believe at the time that there was "any connection with sexual abuse" between Reighard, Geddert, and Nassar. That indeed would seem to establish that Murphy lacked awareness as to whether it was true that there was a connection between Reighard and Nassar or any sexual-abuse allegations. It may even suggest that he did not subjectively believe that the alleged implication was true. It does not, however, answer the question whether Murphy intended to convey, or was reckless in conveying, the implication.

We conclude, however, that there is adequate circumstantial evidence for this question to be decided by the fact-finder. As noted, for example, by using the word "but" in the final sentence of the second tweet, Murphy seemed to imply that Reighard was placed on administrative leave for reasons that were related to a supposedly long, personal and professional relationship with Geddert. And those assertions were neatly juxtaposed with an immediately-preceding statement establishing a personal relationship between Geddert and Nassar. Moreover, while acknowledging that due diligence was an essential part of his job, and therefore that it was necessary for him to verify the information he had learned, he pointedly did not attempt to contact either Reighard or CMU's athletic director before posting his tweets, and he did not do even the minimal due diligence that would have alerted him to the fact that CMU had already confirmed—as had been publicly reported—that its investigation of Reighard had nothing to do with Nassar or any sexual misconduct allegations.

We recognize that "failure to investigate the accuracy of a communication before publishing it" is not alone sufficient to establish actual malice. *Smith*, 487 Mich at 117.[15] However, "a 'purposeful avoidance of the truth' is dissimilar from the mere 'failure to investigate,' and 'a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity' of a publication is sufficient to find reckless disregard." *Id.*, citing *Harte-Hanks*, 491 US at 692. In this case, in the totality of the circumstances and based on our independent review of the entire record, we conclude from the juxtaposition of the statements contained in the successive tweets, the use and positioning of the word "but" in the final sentence of the second tweet, and Murphy's failure to perform even basic due diligence—notwithstanding his acknowledgement of his professional duty to do so—to explore the accuracy of what we deem to be a reasonable interpretation of the defamatory implication of the tweets, that a reasonable fact-finder could find by clear and convincing evidence that Murphy had conveyed the implication of his tweets with actual malice. Indeed, our conclusion is perfectly in line with that of the Supreme Court in *Harte-Hanks*, which found that the record evidence—including the newspaper-defendant's failure to interview an important witness and failure to listen to an available tape recording of an interview of the witness, was—just as had been true in *Curtis Publishing*—" 'unmistakably' sufficient to support a finding of actual malice." *Harte-Hanks*, 491 US at 692-693.

Accordingly, we reverse the trial court's order granting summary disposition in favor of defendants with respect to the second complained-of defamatory implication.

[15] Citing *Harte-Hanks*, 491 US at 665, the trial court noted (and defendants argue on appeal) that "even an 'extreme departure from professional standards' by a reporter would not constitute actual malice." However, the Supreme Court in *Harte-Hanks* used that language not to sanction extreme departures from professional standards of reporting, but rather simply to point out that it derived from the standard that a plurality of the Court had proposed for public figures in *Curtis Publishing*, which had been rejected by a majority of the Justices in favor of an extension of the *New York Times* "actual malice" standard.

6. FAULT

Because—as the fact-finder will on remand be instructed— the elements of a defamation claim include "fault amounting at least to negligence on the part of the publisher," *Smith*, 487 Mich at 113, liability will not be imposed in this case absent a showing of "fault," see *Gertz*, 418 US at 347. That issue is therefore properly left to the fact-finder.

D. FALSE LIGHT INVASION OF PRIVACY

Because Reighard's defamation and false light invasion of privacy claims are governed by the same legal standards, see *Ireland*, 230 Mich App at 624-625, we similarly reverse in part the trial court's order granting summary disposition on Reighard's false light invasion of privacy claim.

IV. CONCLUSION

For all of the reasons stated, we affirm in part and reverse in part the trial court's order granting summary disposition in favor of defendants, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs are awarded, neither party having prevailed in full. MCR 7.219(A).

/s/ Mark T. Boonstra
/s/ Michael J. Kelly
/s/ Brock A. Swartzle

STATE OF MICHIGAN

COURT OF APPEALS

JERRY REIGHARD,

Plaintiff-Appellant,

v

ESPN, INC., and DANIEL MURPHY,

Defendants-Appellees.

FOR PUBLICATION
May 12, 2022

No. 355053
Isabella Circuit Court
LC No. 2019-015498-CZ

Before: BOONSTRA, P.J., and M. J. KELLY and SWARTZLE, JJ.

BOONSTRA, P.J. (*concurring*).

I fully concur in the majority opinion. I write separately simply to expand upon its rationale, to provide some historical context, and to suggest that the United States Supreme Court look anew at the morass that the law of defamation has become. Much has happened since the Supreme Court began issuing opinions in this area of law nearly sixty years ago. The "actual malice" standard that the Court created began small, but has been ever-expanding in its reach and now, in practice, seems to have become nearly insurmountable. At the same time, the news media has been transformed. It exists today in an internet world that no one could have imagined at that time. With a mere social media keystroke, virtually anyone and everyone can publish at will. There is an increasing rush to publish in order to be the first to print. Too often, the casualty is accuracy in reporting, as shortcuts are taken in the investigation and verification process that would serve to guarantee accuracy. We are thus left in today's world with an emboldened media (although that word is becoming increasingly difficult to define) that, as a result of the protections the Supreme Court afforded to it—perhaps for good reason at the time—increasingly perceives a court-sanctioned license to publish whatever it wishes, without fear of consequence. At the same time, much of the fourth estate has lost sight of its journalistic mission, and instead engages in issue and political advocacy under the guise of "reporting." And the "Big Tech" companies that operate popular social media platforms purport to be able to define the real "truth," and therefore censor those who do not subscribe to their favored narratives.

Freedom of speech is fundamental. Freedom of the press is equally so. Those fundamental First Amendment rights remain as important today as they were when the Bill of Rights was ratified in 1791. But we are all losers when the law becomes so distorted as to eliminate all manner

of accountability for those who would recklessly damage personal reputations ostensibly in the name of freedom of speech or freedom the press, no matter the reason or motive.

I. DEFAMATION AND THE FIRST AMENDMENT

As the majority opinion adeptly describes, defamatory speech was originally considered to be unprotected by the First Amendment. That is, defamatory statements remained actionable under state common law irrespective of the First Amendment. That began to change when the United States Supreme Court issued its decision in *New York Times Co v Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964). Since then, the reach of that decision, and of the "actual malice" test that the Court adopted, has been ever-expanding; indeed, what began as a narrow exception appears now to have swallowed the rule.

A. HISTORICAL BACKDROP

To properly understand the monumental scope of that transformation, I commend to the reader additional portions of Justice WHITE's historical summation in *Gertz v Robert Welch, Inc*, 418 US 323; 94 S Ct 2997; 41 L Ed 2d 789 (1974) (WHITE, J., dissenting). While lengthy, it merits a careful read, in order to put the questions before us in a proper context. Justice WHITE stated, in part:

> The Court does not contend, and it could hardly do so, that those who wrote the First Amendment intended to prohibit the Federal Government, within its sphere of influence in the Territories and the District of Columbia, from providing the private citizen a peaceful remedy for damaging falsehood. At the time of the adoption of the First Amendment, many of the consequences of libel law already described had developed, particularly the rule that libels and some slanders were so inherently injurious that they were actionable without special proof of damage to reputation. As the Court pointed out in *Roth v. United States*, 354 U.S. 476, 482, 77 S.Ct. 1304, 1307, 1 L.Ed.2d 1498 (1957), 10 of the 14 States that had ratified the Constitution by 1792 had themselves provided constitutional guarantees for free expression, and 13 of the 14 nevertheless provided for the prosecution of libels. Prior to the Revolution, the American Colonies had adopted the common law of libel. Contrary to some popular notions, freedom of the press was sharply curtailed in colonial America. Seditious libel was punished as a contempt by the colonial legislatures and as a criminal offense in the colonial courts.
>
> Scant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers. On the contrary, "(i)t is conceded on all sides that the common-law rules that subjected the libeler to responsibility for the private injury, or the public scandal or disorder occasioned by his conduct, are not abolished by the protection extended to the press in our constitutions." 2 T. Cooley, Constitutional Limitations 883 (8th ed. 1927).
>
> Moreover, consistent with the Blackstone formula, these common-law actions did not abridge freedom of the press. See generally L. Levy, Legacy of Suppression:

Freedom of Speech and Press in Early American History 247-248 (1960); Merin, Libel and the Supreme Court, 11 Wm. & Mary L.Rev. 371, 376 (1969); Hallen, Fair Comment, 8 Tex.L.Rev. 41, 56 (1929). Alexander Meiklejohn, who accorded generous reach to the First Amendment, nevertheless acknowledged:

> No one can doubt that, in any well-governed society, the legislature has both the right and the duty to prohibit certain forms of speech. Libelous assertions may be, and must be, forbidden and punished. So too must slander. . . . All these necessities that speech be limited are recognized and provided for under the Constitution. They were not unknown to the writers of the First Amendment. That amendment, then, we may take it for granted, does not forbid the abridging of speech. But, at the same time, it does forbid the abridging of the freedom of speech. It is to the solving of that paradox, that apparent self-contradiction, that we are summoned if, as free men, we wish to know what the right of freedom of speech is.

Political Freedom, The Constitutional Powers of the People 21 (1965). See also Leflar, The Freeness of Free Speech, 15 Van.L.Rev. 1073, 1080-1081 (1962).

Professor Zechariah Chafee, a noted First Amendment scholar, has persuasively argued that conditions in 1791 "do not arbitrarily fix the division between lawful and unlawful speech for all time." Free Speech in the United States 14 (1954). At the same time, however, he notes that while the Framers may have intended to abolish seditious libels and to prevent any prosecutions by the Federal Government for criticism of the Government, "the free speech clauses do not wipe out the common law as to obscenity, profanity, and defamation of individuals."

The debates in Congress and the States over the Bill of Rights are unclear and inconclusive on any articulated intention of the Framers as to the free press guarantee. We know that Benjamin Franklin, John Adams, and William Cushing favored limiting freedom of the press to truthful statements, while others such as James Wilson suggested a restatement of the Blackstone standard. Jefferson endorsed Madison's formula that "Congress shall make no law . . . abridging the freedom of speech or the press" only after he suggested:

> The people shall not be deprived of their right to speak, to write, or otherwise to publish anything but false facts affecting injuriously the life, liberty or reputation of others . . .. F. Mott, Jefferson and the Press 14 (1943).

Doubt has been expressed that the Members of Congress envisioned the First Amendment as reaching even this far. Merin, Libel and the Supreme Court, 11 Wm. & Mary L.Rev. 371, ss 379-380 (1969).

This Court in bygone years has repeatedly dealt with libel and slander actions from the District of Columbia and from the Territories. Although in these cases First Amendment considerations were not expressly discussed, the opinions of the Court

unmistakably revealed that the classic law of libel was firmly in place in those areas where federal law controlled. See e.g., *Washington Post Co. v. Chaloner*, 250 U.S. 290, 39 S.Ct. 448, 63 L.Ed. 987 (1919); *Baker v. Warner*, 231 U.S. 588, 34 S.Ct. 175, 58 L.Ed. 384 (1913); *Nalle v. Oyster*, 230 U.S. 165, 33 S.Ct. 1043, 57 L.Ed. 1439 (1913); *Dorr v. United States*, 195 U.S. 138, 24 S.Ct. 808, 49 L.Ed. 128 (1904); *Pollard v. Lyon*, 91 U.S. 225, 23 L.Ed. 308 (1876); *White v. Nicholls*, 3 How. 266, 11 L.Ed. 591 (1845).

The Court's consistent view prior to *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), was that defamatory utterances were wholly unprotected by the First Amendment. In *Patterson v. Colorado, ex rel. Attorney General*, 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879 (1907), for example, the Court said that although freedom of speech and press is protected from abridgment by the Constitution, these provisions "do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." This statement was repeated in *Near v. Minnesota, ex rel. Olson*, 283 U.S. 697, 714, 51 S.Ct. 625, 630, 75 L.Ed. 1357 (1931), the Court adding:

> But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the commonlaw rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our Constitutions. *Id.*, at 715, 51 S.Ct. at 630.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942) (footnotes omitted), reflected the same view:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Beauharnais v. Illinois, 343 U.S. 250, 254-257, 72 S.Ct. 725, 729-731, 96 L.Ed. 919 (1952) (footnotes omitted), repeated the *Chaplinsky* statement, noting also that nowhere at the time of the adoption of the Constitution "was there any suggestion that the crime of libel be abolished." And in *Roth v. United States*, 354 U.S., at 483, 77 S.Ct., at 1308 (footnote omitted), the Court further examined the meaning of the First Amendment:

> In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances

> are not within the area of constitutionally protected speech. *Beauharnais v. Illinois*, 343 U.S. 250, 266, 72 S.Ct. 725, 735, 96 L.Ed. 919. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press. [*Gertz*, 418 US at 381-386 (WHITE, J., dissenting) (footnotes omitted).]

B. *NEW YORK TIMES* AND ITS PROGENY

With that historical backdrop in mind, where are we today? The United States Supreme Court issued its seminal decision in *New York Times* in 1964. While seemingly narrow in scope (insofar as it applied only to defamation claims brought by public officials relating to criticism of their official conduct), it opened the door to the federalization of defamation law and to the all-too-typical result: a creeping progression by which the exception becomes the all-encompassing rule.

New York Times was premised on a desire to guarantee citizens, in the course of debating public issues, a right to criticize their elected officials on matters of official conduct. *Id.*, 376 US at 270-273. The Court concluded that a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions . . . dampens the vigor and limits the variety of public debate," and is therefore "inconsistent with the First and Fourteenth Amendments." *Id.* at 279. The Court thus adopted—in those limited circumstances—an "actual malice" test:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. [*Id.* at 279-280.]

Within three years, the Court had extended that test to apply not only to public officials on matters of official conduct, but to "public figures." See *Curtis Publishing Co v Butts* (and its companion case, *Associated Press v Walker*), 388 US 130; 162; 87 S Ct 1975; 18 L Ed 2d 1094 (1967). More accurately, Justice HARLAN's lead opinion in *Curtis Publishing* (in which only a plurality—four—of the Justices joined), appeared to announce an entirely new test applicable to an undefined set of "public figures":

> We consider and would hold that a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, *on a showing of highly unreasonable conduct constituting an extreme departure from the standard of investigation and reporting ordinarily adhered to by responsible publishers.* [*Id.* at 155 (emphasis added).]

The lead opinion in *Curtis Publishing* referred to " 'public figures' under ordinary tort rules," *Curtis Publishing*, 388 US at 154, and described that one of the named plaintiffs (the athletic director and former head football coach of a public university) "may have attained that

status by position alone," and that the other named plaintiff (a former general who had "taken command of the violent crowd and had personally led a charge against federal marshals sent there to effectuate the court's decree and to assist in preserving order") may have done so "by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy." *Id*. at 140, 155.

A majority of the Court (i.e., the other five Justices) subscribed to the pertinent aspects of Chief Justice WARREN's concurring-in-the-result opinion; instead of adopting the new test proposed by the lead opinion, the Court thereby effectively extended the *New York Times* "actual malice" standard to "public figures":

> Mr. Justice HARLAN's opinion departs from the standard of *New York Times* and substitutes in cases involving 'public figures' a standard that is based on 'highly unreasonable conduct' and is phrased in terms of 'extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers' (ante, p. 1991). I cannot believe that a standard which is based on such an unusual and uncertain formulation could either guide a jury of laymen or afford the protection for speech and debate that is fundamental to our society and guaranteed by the First Amendment.
>
> To me, differentiation between "public figures" and "public officials" and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy. . . . [I]t is plain that although they are not subject to the restraints of the political process, "public figures," like "public officials," often play an influential role in ordering society. And surely as a class these "public figures" have as ready access as "public officials" to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials." The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.
>
> I therefore adhere to the *New York Times* standard in the case of "public figures" as well as "public officials." It is a manageable standard, readily stated and understood, which also balances to a proper degree the legitimate interests traditionally protected by the law of defamation. . . . [T]he *New York Times* standard is an important safeguard for the rights of the press and public to inform and be informed on matters of legitimate interest. Evenly applied to cases involving "public men"—whether they be "public officials" or "public figures"—it will afford the necessary insulation for the fundamental interests which the First Amendment was designed to protect. [*Curtis Publishing*, 388 US at 162-165 (WARREN, C.J., concurring in the result).]

The expansion of the *New York Times* standard did not end there. For example, in *Rosenbloom v Metromedia, Inc*, 403 US 29; 92 S Ct 1811; 29 L Ed 2d 296 (1971), abrogated by

Gertz, 418 US at 345-347, a four-member plurality of a once-again fractured Court[1] extended the *New York Times* standard to *private* persons when the allegedly defamatory falsehoods concerned matters of general or public interest. *Id*. at 52 ("We thus hold that a libel action . . . by a private individual . . . for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false of not.") (footnote omitted).[2]

As noted, the Court in *Gertz* later rejected the *Rosenbloom* plurality's approach with regarding to *liability* for defamation of private individuals; but, in doing so, it did preclude liability absent a showing of "fault." See *Gertz*, 418 US at 347 ("We hold 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."). Further, it limited the *damage* recovery available to private plaintiffs absent a showing under the "actual malice" standard. *Gertz*, 418 US at 349 ("we hold 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").

The Court in *Gertz* expanded upon the *Curtis Publishing* description of public figures, stating:

> Respondent's characterization of petitioner as a public figure raises a different question. That designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions. [*Id.* at 351.]

The latter category of "public figures" has come to be known as that of a "limited-purpose public figure." See, e.g., *Wolston v Reader's Digest Ass'n, Inc*, 443 US 157, 165-166; 99 S Ct 2701; 61 L Ed 2d 450 (1979).

Dissenting in *Gertz*, Justice WHITE (who had joined the Court's opinion in *New York Times*) decried the Court's departure from the historical perspective of the First Amendment in relation to defamation law:

> The Court could not accept the generality of this historic view in *New York Times Co. v. Sullivan*, *supra*. There the Court held that the First Amendment was intended

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[1] Justice DOUGLAS did not participate. The eight participating Justices issued four separate opinions, ranging from declining a further intrusion of *New York Times* into state defamation law to affording the news media absolute immunity from liability for defamation.

[2] This standard of the plurality opinion was later adopted by many states and lower courts. See *Gertz*, 418 US at 379 and n 10 (WHITE, J., dissenting).

> to forbid actions for seditious libel and that defamation actions by public officials were therefore not subject to the traditional law of libel and slander. If these officials (and, later, public figures occupying semiofficial or influential, although private, positions) were to recover, they were required to prove not only that the publication was false but also that it was knowingly false or published with reckless disregard for its truth or falsity. This view that the First Amendment was written to forbid seditious libel reflected one side of the dispute that reged [sic] at the turn of the nineteenth century and also mirrored the views of some later scholars.
>
> The central meaning of *New York Times*, and for me the First Amendment as it relates to libel laws, is that seditious libel—criticism of government and public officials—falls beyond the police power of the State. 376 U.S., at 273-276, 84 S.Ct., at 722-724. In a democratic society such as ours, the citizen has the privilege of criticizing his government and its officials. But neither *New York Times* nor its progeny suggests that the First Amendment intended in all circumstances to deprive the private citizen of his historic recourse to redress published falsehoods damaging to reputation or that, contrary to history and precedent, the Amendment should now be so interpreted. Simply put, the First Amendment did not confer a "license to defame the citizen." W. Douglas, The Right of the People 36 (1958).
>
> I do not labor the foregoing matters to contend that the Court is foreclosed from reconsidering prior interpretations of the First Amendment. But the Court apparently finds a clean slate where in fact we have instructive historical experience dating from long before the first settlors, with their notions of democratic government and human freedom, journeyed to this land. Given this rich background of history and precedent and because we deal with fundamentals when we construe the First Amendment, we should proceed with care and be presented with more compelling reasons before we jettison the settled law of the States to an even more radical extent. [*Gertz*, 418 US at 386-388 (WHITE, J., dissenting).]

III. APPLICATION

As outlined in the majority opinion, we have, of course, decided this case under existing law—such as it is. And I agree entirely with the majority's analysis of plaintiff's defamation-by-implication claim, with the clarification that the majority provides, i.e., that in applying the actual malice test in the context of a defamation-by-implication claim, either knowledge *or recklessness* satisfies the requirement that the defendant have intended the implication. I further note that I have difficulty discerning how plaintiff "voluntarily inject[ed] himself or [was] drawn into a particular public controversy," *Gertz*, 418 US at 351, so as to become a limited-purpose public figure. Moreover, I have concerns that, by virtue of the progression of the law that I have described, essentially everyone is now at least a limited-purpose public figure, such that the *New York Times* exception has indeed swallowed the rule.[3] That said, inasmuch as plaintiff does not contest his limited-purpose-public-figure status, I will not address the issue further.

[3] As one example of just how far this progression has apparently advanced, the plaintiff in *Ireland v Edwards*, 230 Mich App 607; 584 NW2d 632 (1998), was found to be—and indeed stipulated

III. WHERE DO WE GO FROM HERE?

As noted, and while we have resolved this case on the basis of existing law, I have serious concerns about the state of the law in this area, both with regard to its progressive deviation from the historical underpinnings of both the common law of defamation and the constitutional jurisprudence of the First Amendment, and with regard to its continuing applicability in the modern world. I therefore join Justice THOMAS and Justice GORSUCH in calling for the United States Supreme Court to take a fresh look at the jurisprudence in this area. As Justice THOMAS recently stated in *Berisha v Lawson*, __ US ___, ___; 141 S Ct 2424, 2424-2425; 210 L Ed 2d 991 (2021); (THOMAS, J., dissenting from the denial of certiorari):

> [Petitioner] now asks this Court to reconsider the 'actual malice' requirement as it applies to public figures. As I explained recently, we should. . . .
>
> This Court's pronouncement that the First Amendment requires public figures to establish actual malice bears "no relation to the text, history, or structure of the Constitution." . . . In fact, the opposite rule historically prevailed: "[T]he common law deemed libels against public figures to be . . . more serious and injurious than ordinary libels." *McKee* [*v Cosby*], 586 U.S. [___] at ___; 139 S. Ct [675]at 679[; 203 L Ed 2d 247 (2019)] (opinion of THOMAS, J.).
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> * * *
>
> The lack of historical support for this Court's actual-malice requirement is reason enough to take a second look at the Court's doctrine. Our reconsideration is all the more needed because of the doctrine's real-world effects. Public figure or private, lies impose real harm. . . .
>
> The proliferation of falsehoods is, and always has been, a serious matter. Instead of continuing to insulate those who perpetrate lies from traditional remedies like libel suits, we should give them only the protection the First Amendment requires.

And as Justice GORSUCH, also dissenting from the denial of certiorari, poignantly added:

> At the founding, the freedom of the press generally meant the government could not impose prior restraints preventing individuals from publishing what they wished. But none of that meant publishers could defame people, ruining careers or lives, without consequence. Rather, those exercising the freedom of the press had a responsibility to try to get the facts right—or, like anyone else, answer in tort for the injuries they caused.
>
> This principle extended far back in the common law and far forward into our Nation's history. As Blackstone put it, "[e]very freeman has an undoubted right to lay what sentiments he pleases before the public," but if he publishes falsehoods

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that she was—a limited-purpose public figure. She was the mother of a child who was the subject of a custody action. *Id*. at 615.

"he must take the consequence of his own temerity." 4 W. Blackstone, Commentaries on the Laws of England 151–152 (1769). Or as Justice Story later explained, "the liberty of the press do[es] not authorize malicious and injurious defamation." *Dexter v. Spear*, 7 F.Cas. 624 (No. 3,867) (CCDRI 1825).

This was "[t]he accepted view" in this Nation for more than two centuries. . . . As a rule, that meant all persons could recover damages for injuries caused by false publications about them. . . .

This changed only in 1964. . . . Since 1964, however, our Nation's media landscape has shifted in ways few could have foreseen. . . . The effect of these technological changes on our Nation's media may be hard to overstate. Large numbers of newspapers and periodicals have failed. . . . Network news has lost most of its viewers. . . . With their fall has come the rise of 24-hour cable news and online media platforms that "monetize anything that garners clicks." . . . No doubt, this new media world has many virtues—not least the access it affords those who seek information about and the opportunity to debate public affairs. At the same time, some reports suggest that our new media environment also facilitates the spread of disinformation. . . . A study of one social network reportedly found that "falsehood and rumor dominated truth by every metric, reaching more people, penetrating deeper . . . and doing so more quickly than accurate statements." . . . All of which means that "the distribution of disinformation"—which "costs almost nothing to generate"—has become a "profitable" business while "the economic model that supported reporters, fact-checking, and editorial oversight" has "deeply erod[ed]." . . .

It's hard not to wonder what these changes mean for the law. In 1964, the Court may have seen the actual malice standard as necessary "to ensure that dissenting or critical voices are not crowded out of public debate. . . . But if that justification had force in a world with comparatively few platforms for speech, it's less obvious what force it has in a world in which everyone carries a soapbox in their hands. Surely, too, the Court in 1964 may have thought the actual malice standard justified in part because other safeguards existed to deter the dissemination of defamatory falsehoods and misinformation. . . .. In that era, many major media outlets employed fact-checkers and editors, . . . and one could argue that most strived to report true stories because, as "the public gain[ed] greater confidence that what they read [wa]s true," they would be willing to "pay more for the information so provided." . . . Less clear is what sway these justifications hold in a new era where the old economic model that supported reporters, fact-checking, and editorial oversight is disappearing.

These questions lead to other even more fundamental ones. When the Court originally adopted the actual malice standard, it took the view that tolerating the publication of *some* false information was a necessary and acceptable cost to pay to ensure truthful statements vital to democratic self-government were not inadvertently suppressed. . . . But over time the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability. . . .

The bottom line? It seems that publishing *without* investigation, fact-checking, or editing has become the optimal legal strategy. . . . Under the actual malice regime as it has evolved, "ignorance is bliss." . . . Combine this legal incentive with the business incentives fostered by our new media world and the deck seems stacked against those with traditional (and expensive) journalistic standards—and in favor of those who can disseminate the most sensational information as efficiently as possible without any particular concern for truth. . . . What started in 1964 with a decision to tolerate the occasional falsehood to ensure robust reporting by a comparative handful of print and broadcast outlets has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable. . . . If ensuring an informed democratic debate is the goal, how well do we serve that interest with rules that no longer merely tolerate but encourage falsehoods in quantities no one could have envisioned almost 60 years ago?

Other developments raise still more questions. In 1964, the Court may have thought the actual malice standard would apply only to a small number of prominent governmental officials whose names were always in the news and whose actions involved the administration of public affairs. Here again, the Court may have thought that allowing some falsehoods about these persons and topics was an acceptable price to pay to ensure truthful statements vital to democratic self-government were not inadvertently suppressed. Perhaps the Court weighed the costs and benefits similarly when it extended the actual malice standard to the "pervasively famous" and "limited purpose public figures."

But today's world casts a new light on these judgments as well. Now, private citizens can become "public figures" on social media overnight. Individuals can be deemed "famous" because of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most. . . .

Again, it's unclear how well these modern developments serve *Sullivan*'s original purposes. Not only has the doctrine evolved into a subsidy for published falsehoods on a scale no one could have foreseen, it has come to leave far more people without redress than anyone could have predicted. And the very categories and tests this Court invented and instructed lower courts to use in this area—"pervasively famous," "limited purpose public figure"—seem increasingly malleable and even archaic when almost anyone can attract some degree of public notoriety in some media segment. Rules intended to ensure a robust debate over actions taken by high public officials carrying out the public's business increasingly seem to leave even ordinary Americans without recourse for grievous defamation. At least as they are applied today, it's far from obvious whether *Sullivan*'s rules do more to encourage people of goodwill to engage in democratic self-governance or discourage them from risking even the slightest step toward public life.

. . . [G]iven the momentous changes in the Nation's media landscape since 1964, I cannot help but think the Court would profit from returning its attention, whether in this case or another, to a field so vital to the "safe deposit" of our liberties.

[*Berisha*, ___ US at ___; 141 S Ct at 2426-2430 (GORSUCH, J., dissenting from the denial of certiorari).]

I agree.

IV. CONCLUSION

For these reasons stated, and for the reasons stated by the majority, I concur in affirming in part and reversing in part the trial court's order granting summary disposition in favor of defendants, and in remanding for further proceedings consistent with this opinion.

/s/ Mark T. Boonstra