

CAN A PUBLIC FIGURE WIN A LIBEL SUIT WHEN THE MEDIA REPORTED THE TRUTH?—DEFAMATION AND FALSE IMPRESSIONS

I. INTRODUCTION

The media relies on the truth as a complete defense against defamation suits.¹ In a growing number of cases, however, public figures² are not suing the news media for false statements; rather, they are suing for false impressions.³ The courts are divided on whether they can impose liability on the news media for defamation by implication based on a false impression without contravening the first amendment.⁴ The convoluted nature of defamation law, and the lack of clear and concise rulings concerning defamation by implication,⁵ create uncertainty about whether

1. The common law rule, prior to 1964, stated that truth is an affirmative defense to a defamation action. See W. KEETON, D. DOBBS, R. KEETON, & R. OWEN, *PROSSER AND KEETON ON TORTS* 839 (5th ed. 1984) [hereinafter *PROSSER & KEETON*].

In 1964, the Supreme Court, in *New York Times v. Sullivan*, 376 U.S. 254 (1964), created a constitutional privilege, based on the first amendment privileges of freedom of the press and speech, that defeats a party's ability to recover for defamation against members of the mass media for disseminating information to the general public. When the challenged statements are true, many jurisdictions decline to allow a public official to prove falsity by implication or libel by innuendo. See, e.g., *Pietrafeso v. D.P.I., Inc.*, 757 P.2d 1113, 1115-16 (Colo. Ct. App. 1988); *Cibenko v. Worth Publishers, Inc.*, 510 F. Supp. 761, 765 (D.N.J. 1981); *Strada v. Connecticut Newspapers, Inc.*, 193 Conn. 313, 477 A.2d 1005, 1012 (1984); *Schaefer v. Lynch*, 406 So. 2d 185, 188 (La. 1981). See also *infra* note 11 and accompanying text for a discussion of jurisdictions permitting a public figure to prove falsity by implication.

2. See *infra* notes 19-21 and accompanying text.

3. See *infra* notes 29-68 and accompanying text. The scope of this Recent Development is limited to a discussion of a mass media defendant's public figure defamation by implication. However, because a "false statement" is an element of the general tort of defamation, whether brought by a public or private figure, court rulings regarding the falsity prong of the test for private figure defamation are relevant to the decision of whether a cause of action exists. For a general discussion of private figure defamation claims, see Katz, *First Amendment—Defamation—Private Individual May Recover Presumed and Punitive Damages Without a Showing of Actual Malice—Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 16 SETON HALL 785 (1986); Comment, *Defamation and Employment Relationships: The New Meanings of Private Speech, Publication, and Privilege*, 28 EMORY L.J. 871 (1989); Comment, *Defamation Law—Libel and Slander—Private Individual Required to Show Actual Malice to Prove Defamation Where Topic of Speech is of Genuine Public Concern—Sisler v. Gannett Co.*, 19 RUTGERS L.J. 157 (1987).

4. See *infra* notes 30-42 and accompanying text.

5. See *infra* notes 6-18 and accompanying text. Defamation law has become subdivided into numerous categories. For example, different standards apply depending upon whether the plaintiff is a public or private figure, whether the defendant may invoke privilege, whether the matter is private

public figures will be able to overcome a media defendant's first amendment right to freedom of expression.

II. DEFAMATION BY IMPLICATION

The court in a defamation by implication cause of action must determine whether the media statements, though not individually defamatory, are capable of creating a defamatory impression.⁶ Defamation by definition involves expression that injures reputation.⁷ Defamation by implica-

or public, and whether the statement is fact or opinion. *See generally* PROSSER & KEETON, *supra* note 1, at 113-16.

One common misunderstanding regarding defamation pertains to the faulty analogy drawn to the tort of false light. The tort of false light invasion of privacy arises when a defendant communicates something factually untrue about an individual or when the communication carries a false implication. To be actionable, the falsehood must be "material and substantial" and achieve widespread publicity. Though similarities exist between defamation and false light, false light is not an analytical subspecies of defamation. Furthermore, false light invasion of privacy encompasses a broader class of speech than defamation. In addition, plaintiffs may establish false light claims on the basis of injured feelings whereas defamation by definition applies only to reputational injury. Finally, false light limitations consist only of the requirements of substantiality and vagueness. For a general discussion of the tort of false light invasion of privacy, *see* Zimmerman, *False Light Invasion of Privacy: The Light that Failed*, 64 N.Y.U. L. REV. 364 (1989); PROSSER & KEETON, *supra* note 1, at 773-78, 863-66.

6. The presiding court in a defamation action bears the responsibility for determining the statement's capability to convey a defamatory meaning. *White v. Fraternal Order of Police*, 909 F.2d 512, 518 (D.C. Cir. 1990); *Southern Air Transport, Inc., v. American Broadcasting Cos.*, 877 F.2d 1010, 1013-15 (D.C. Cir. 1989).

7. Four elements for a cause of action in defamation are:

1. a false and defamatory statement concerning another;
2. an unprivileged publication 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 or the existence of special harm caused by the publication.

RESTATEMENT (SECOND) OF TORTS § 558 (1977).

Some states define "defamatory" as simply tending to injure reputation. *See, e.g.*, *Robertson v. McCloskey*, 666 F. Supp. 241, 247 (D.D.C. 1987); *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 1357 (Colo. 1983) (en banc); *Byars v. Kolodziej*, 48 Ill. App. 3d 1015, 363 N.E.2d 628, 630 (1977); *Denny v. Mertz*, 84 Wis. 2d 654, 267 N.W.2d 304, 308 (1978), *cert. denied*, 459 U.S. 883 (1982).

Others adopt specific, stated criteria. *See, e.g.*, *Kimmerle v. New York Evening Journal, Inc.*, 262 N.Y. 99, 186 N.E. 217, 218 (1933) (defines defamation as "words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society"). New York courts have added to this definition that which "tends to disparage a person in the way of his office, profession or trade." *See Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 603 F. Supp. 377, 384 (E.D. Pa. 1985); *Held v. Pokorney*, 583 F. Supp. 1038, 1041-42 (S.D.N.Y. 1984); *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 442, 273 A.2d 899, 904 (1971) (quoting RESTATEMENT OF TORTS § 559 (1938)) (communica-

tion stems not from what the media literally stated, but from what the statements imply.⁸ The court cannot manufacture an implied defamatory meaning from words not capable of sustaining such meaning.⁹

To determine the meaning of an implied defamatory statement¹⁰ the United States Court of Appeals for the District of Columbia Circuit applies a general test: whether the recipient reasonably understood the statement as intentionally defamatory.¹¹ Application of this general standard becomes convoluted when the media report materially accurate facts concerning a public figure. Though truth often protects a media defendant from liability,¹² a defendant that juxtaposes a series of facts to imply a defamatory connection between them or creates a defamatory implication by omitting certain facts, may face liability for defamation by

tion is defamatory if it tends to so harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him); *Nichols v. Item Publishers, Inc.*, 309 N.Y. 596, 132 N.E.2d 860, 862 (1956). See also *Gallagher v. Johnson*, 188 Mont. 117, 611 P.2d 613, 615 (1980) (defamation is a statement that "exposes any person to hatred, contempt, ridicule, or obloquy or which causes him to be shunned or avoided or which has a tendency to injure him in his occupation"). See generally Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986).

Still other courts abandon the search for a comprehensive definition and decide each case on its own facts. See, e.g., *Beamer v. Nishiki*, 66 Haw. 582, 670 P.2d 1264 (1983) (whether a statement is defamatory "depends, among other factors, upon the temper of the times, . . . with the result that words harmless in one age, in one community, may be highly damaging to reputation at another time or in a different place"); *Galvin v. Gallagher*, 81 Ill. App. 3d 926, 401 N.E.2d 1243 (1980); *Newell v. Field Enters., Inc.*, 91 Ill. App. 3d 735, 415 N.E.2d 434 (1980).

8. See *Tavoulaareas v. Piro*, 817 F.2d 762, 780 (1987) (en banc), cert. denied, 484 U.S. 870 (1987); See generally R. SMOLLA, LAW OF DEFAMATION 4.05 (1990).

The Eighth Circuit does not recognize defamation by implication against a public figure. See *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1432 (8th Cir. 1989) (citing *Janklow v. Newsweek*, 788 F.2d 1300, 1304 (8th Cir.), cert. denied, 499 U.S. 883 (1986)). Accord *Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012, 1016-17 (1st Cir.), cert. denied, 488 U.S. 821 (1988).

9. *White v. Fraternal Order of Police*, 909 F.2d 512, 519 (D.C. Cir. 1990).

10. The meaning of a communication is the meaning the recipient, correctly or mistakenly, reasonably understood the statement to express. RESTATEMENT (SECOND) TORTS § 563 (1977). To determine whether a cause of action for defamation by implication exists, the language used, as a matter of law, must convey a defamatory meaning, and the jury must find that the recipient actually understood the language in that sense. If the recipient's defamatory interpretation is reasonable, it is irrelevant that the defendant did not intend to convey a defamatory meaning. Intent, however, is very relevant in establishing the specific elements of defamation by implication of a public figure because the tort requires a showing of actual malice.

11. *White*, 909 F.2d at 518. See F. HARPER, THE LAW OF TORTS § 5.4 (1986). The Eighth Circuit rejects this approach. See *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir.), cert. denied, 499 U.S. 883 (1986) (illustrating the severe limitations of defamation by implication regarding materially true reports).

12. See *supra* note 1 and accompanying text.

implication.¹³

The media defendant's affirmative conduct provides the tortious element creating defamation by implication.¹⁴ For example, if a communication, viewed in its entirety, merely conveys materially true facts from which the plaintiff reasonably can draw defamatory inferences, no libel exists.¹⁵ However, if by the particular manner or language by which the media defendant conveys the true facts, the communication supplies additional, affirmative evidence¹⁶ suggesting that the media defendant intended or endorsed the defamatory inference, the communication

13. See PROSSER & KEETON, *supra* note 1, at 839.

The rule that makes truth relevant to the "gist" or "sting" of the publication protects the defendant who has got the details wrong but the "gist" right; but it also works in reverse, to impose liability upon the defendant who has the details right but the "gist" wrong. Thus, if the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts, he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct . . . [If the particular facts are artificially juxtaposed] the truth of the particular facts provides no protection; if not, the truth is complete protection.

Id.

14. *White*, 909 F.2d at 520.

15. *Id.*

16. *McBride v. Merrell Dow Pharmaceuticals, Inc.*, 717 F.2d 1460 (D.C. Cir. 1983), illustrates sufficient additional evidence. In *McBride*, the court held the true statement that a doctor received \$5000 a day for his expert testimony was capable of supporting an implied defamatory meaning. The court found it possible to conclude that because the plaintiff's case was weak it required an excessive payment to secure any doctor as an expert witness. Hence, the statement implied that the expert sold his testimony. *Id.* at 1465. The court found that the implied defamatory meaning arose not from the mere reporting of the \$5000 per day rate, but from the juxtaposition of the \$5000 payment with the fees the defendant normally pays such experts. The publication read: "These expert witnesses included William McBride . . . who was paid \$5000 a day to testify in Orlando. In contrast, Richardson-Merrell pays witnesses \$250 to \$500 a day, and the most it has ever paid is \$1000 a day." *Id.* at 1462.

In *Southern Air Transport Inc., v. American Broadcasting Cos.*, 877 F.2d 1010 (D.C. Cir. 1989), the court considered whether a factually accurate report, which stated that Southern Air used planes owned by a South African cargo company to transport arms to a Central American Contra base, was reasonably capable of conveying the defamatory implication that Southern Air maintained a partnership with the South African government. The court analyzed whether the juxtaposition of visual graphics and commentary could imply defamatory meaning, and concluded that nothing in the defendant's specific treatment of Southern Air made it reasonable to impute a partnership between Southern Air and the South African government. *Id.* at 1015-16.

Janklow v. Newsweek, Inc., 759 F.2d 644, 648-49, (8th Cir. 1985), *rev'd on other grounds*, 788 F.2d 1300 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883 (1986), demonstrates one court's limitation on defamation by implication regarding materially true reports. The Eighth Circuit held that a report of the true fact of a 14-year-old's rape allegation was not capable of bearing a defamatory meaning that Janklow was actually guilty of the alleged rape, even though the report omitted the facts that: (1) Janklow had passed a lie detector test; (2) the alleged victim was "untestable" because of her emotional display during her polygraph exam; (3) the medical exam showed no signs of rape; and (4) numerous federal authorities called the rape allegations unfounded.

becomes capable of bearing a defamatory meaning.¹⁷ It is immaterial whether the media defendant actually intended or endorsed the defamatory inference.¹⁸

III. CONSTITUTIONAL DEVELOPMENTS OF PUBLIC FIGURE DEFAMATION

Separate and distinct from the doctrine of defamation by implication, courts also developed defamation law concerning public figures.¹⁹ In *New York Times Co. v. Sullivan*,²⁰ the Supreme Court established the constitutional rule that public figures²¹ cannot recover damages for defa-

17. *White*, 909 F.2d at 520. If, for example, in *Southern Air Transport*, the media had superimposed a "South Africa Connection" graphic over the footage of Southern Air's plane, sufficient affirmative evidence most likely would have existed to justify imputing the defamatory meaning that Southern Air was in partnership with South Africa. *Id.*

18. *Id.*

19. *Id.* Historically, the common law of defamation derived from a compelling societal interest to prevent and redress attacks upon reputation. See Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1351-52 (1975) (detailed discussion of the history of defamation law through 1975). As a result of judicial sentiment reflecting extreme distaste for defamatory statements, particularly because of the injured party's inability to control the defamatory statements of another, the law of defamation used a severe strict liability standard. PROSSER & KEETON, *supra* note 1, at 771-72.

Prior to 1964, the plaintiff needed to prove the statement "tends so to harm the reputation as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* at 774 (quoting the RESTATEMENT (SECOND) OF TORTS § 559 (1977)). The burden of proving the statement's truth rested on the defendant. PROSSER & KEETON, *supra* note 1, at 804.

However, the common law judges were aware of the competing interest of freedom of expression and, as a result, developed privileges, both absolute and conditional, to protect free and open debate. Eaton, *supra*, at 1360-63. The privileges fell into two categories: absolute immunity and qualified immunity. See PROSSER & KEETON, *supra* note 1, at 815-39.

The trend of carving out specific strict liability privileges evidenced an effort to preserve the interest of freedom of expression that remained outside the constitutional framework for many years. Note, *Protection of Reputation Versus Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation*, 63 S. CAL. L. REV. 433, 422 (1990).

20. 376 U.S. 254 (1964). Sullivan, the police commissioner of Montgomery, Alabama, brought a libel suit against four Alabama clergymen and the New York Times. *Id.* at 256. The plaintiff premised his allegations on two paragraphs in a full-page advertisement soliciting contributions for the support of the black student movement, the struggle for blacks' right to vote, and for legal defense of Martin Luther King, Jr. *Id.* at 256-57. The paragraphs contained minor inaccuracies regarding the specific details of police conduct; the advertisement did not mention Sullivan by name. Because of the strict standard by which the common law treats defamation, the jury returned a verdict for the plaintiff of \$500,000. *Id.* at 256. The Supreme Court reversed and remanded. *Id.* at 292.

21. The *Sullivan* holding applied to public-figure plaintiffs. However, in an effort to provide greater freedom of speech, the Court extended application of the *Sullivan* test to more plaintiffs.

In 1967, the Supreme Court consolidated the opinions of *Curtis Publishing Co. v. Butts*, 388 U.S.

mation without clear and convincing proof²² that the defendant made a false statement²³ with actual malice.²⁴ Actual malice requires the media defendant to have made the statement "with knowledge that it was false or with reckless disregard of whether it was false or not."²⁵ Furthermore, the Court in *Sullivan* mandated its power to make an independent examination of the whole record.²⁶ The Court found this high level of scrutiny necessary to prevent intrusion on the first amendment right to free expression.²⁷ The Court asserted that it affords greater constitutional protection to speech concerning public officials' conduct and other matters of public concern, because of the "profound national commit-

130 (1967) and *Associated Press v. Walker*, 388 U.S. 130 (1967), and held that the distinctions between the private sector and public sector were so blurred that the adoption of separate standards of proof had no basis in law, logic, or first amendment policy. *Id.* at 163. The Court blended the issue of who is a public figure with the issue of what is the public concern, and extended the *Sullivan* test to include public officials and public figures. *Id.* at 164. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (plurality of the Court expanded *Sullivan* to apply to cases based on an allegedly defamatory publication concerning a matter of public or general interest).

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court held: for cases involving a public figure or public official, the plaintiff bears the burden of proving actual malice. *Id.* at 343. The state may define the appropriate level of liability for a publisher or broadcast defendants when the plaintiff is not a public figure or official. *Id.* at 347. The plaintiff receives compensation only for actual injuries unless the plaintiff alleges defendant's knowledge of falsity or reckless disregard for the truth. *Id.* at 349.

For a general discussion of defamation of a private plaintiff, see *supra* note 3.

22. In *Cruzan v. Missouri Dep't of Health*, 110 S. Ct. 2841, 2853 (1990), the Supreme Court noted that the "clear and convincing" standard of proof is a higher standard, reflecting a social judgment about the importance of particular types of adjudication.

23. Under the traditional *Sullivan* test, the requirement for a false statement means that at least some part of the statement is untrue. This Recent Development focuses on the possibility that true statements juxtaposed to create a false impression satisfy *Sullivan*'s falsity prong. Courts have not clearly ruled on this possibility. See *infra* notes 29-52 and accompanying text.

24. *Sullivan*, 376 U.S. at 279-80. The actual malice standard is very difficult to satisfy. For example, failure to edit words used to remove liability does not give rise to actual malice nor does portraying public figures in a non-flattering manner. For cases finding no actual malice, see *Newton v. National Broadcasting Co.*, 913 F.2d 652 (9th Cir. 1990); *Diesen v. Hessburg*, 455 N.W.2d 446 (Minn. 1990); *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 603 F. Supp. 377 (E.D. Pa. 1985); *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa. Super., 448 A.2d 6 (1982).

25. *Sullivan*, 376 U.S. at 279-80.

26. *Id.* at 285. The independent examination of the record is not equivalent to de novo review. In de novo review, the reviewing court makes an original appraisal of all evidence to determine whether or not the court should enter judgment for the plaintiff. *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 514 n.31 (1984). In independent examination, review is limited to those portions of the record pertaining to the actual malice determination. *Id.*

27. *Sullivan*, 376 U.S. at 285 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)).

ment" to the principle of uninhibited debate on public issues.²⁸

IV. PROVING FALSITY BY FALSE IMPRESSION, NOT FALSE STATEMENT

Once the court surpasses the threshold issue of whether a true statement reasonably could convey a defamatory meaning, the public figure must then demonstrate the falsity of the defamatory statement. A public figure fulfills the falsity prong of the *Sullivan* test by demonstrating that the statement was false, or that the omitted underlying facts, if reported, would have negated the false implication.²⁹ Whether true statements juxtaposed to create a false impression satisfies *Sullivan*'s "false statement" requirement is unclear.

In *Dunlap v. Philadelphia Newspapers, Inc.*,³⁰ the Superior Court of Pennsylvania broke away from the traditional interpretation³¹ of *Sullivan*'s false statement requirement. In *Dunlap*, a police officer sued a newspaper for defamation. The newspaper's headline read, "Wide Police Corruption Revealed."³² Beneath the bold headline a smaller headline³³ read, "Patrol Outside, Gambling Inside."³⁴ Two photographs appeared below the caption; the larger of the two showed a man placing his hand inside a marked³⁵ police car.³⁶ The photograph caption read, "Sergeant's Car 17B Stops Outside Known Gambling Location," while the title of the article itself read, "We Watched Gambling Spot Until Policemen Nabbed Us."³⁷ The article expressed that Officer Dunlap was "more

28. *Sullivan*, 367 U.S. at 270. See also *Rose v. Koch*, 278 Minn. 235, 254, 154 N.W.2d 409, 423 (1967) (quoting *Sullivan*, 376 U.S. at 270).

29. *Diesen v. Hessburg*, 455 N.W.2d 446, 455 (Minn. 1990). See also *White v. Fraternal Order of Police*, 909 F.2d 512, 521 (D.C. Cir. 1990); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412, 420 (Tenn. 1978). The plaintiff also must meet the other elements of the *Sullivan* test. This Recent Development addresses only the complexities surrounding the falsity prong of the test. See PROSSER & KEETON, *supra* note 1, at 839.

30. 301 Pa. Super. 475, 448 A.2d 6 (1982).

31. The traditional interpretation of the *Sullivan* falsity prong requires falsity of the actual statements. See *supra* note 23.

32. *Dunlap*, 301 Pa. Super. at 478, 448 A.2d at 8.

33. Two smaller headlines appeared immediately beneath the bold headline. The one on the left read: "Patrol Outside, Gambling Inside," while the one on the right stated, "Hidden Cameras Confirm Reports of Payoff System." *Id.*

34. *Id.*

35. The marking on the police car was "17B." *Id.*

36. *Id.*

37. The article began immediately beneath the photograph of car 17B. *Id.* The article dis-

than likely"³⁸ the sergeant in the car.³⁹

Though the facts in the article were true,⁴⁰ the court held that the combination of the article, headlines, and photographs gave rise to a false and defamatory inference that Dunlap accepted a bribe.⁴¹ Thus, the court stated that the literal accuracy of the separate statements did not render the communication true when the implication of the communication as a whole was false.⁴²

Other courts hold false impressions sufficient to satisfy the falsity prong of a defamation claim. For example, in *Memphis Publishing Co. v.*

cussed the two newspaper journalists' "stakeout." *Id.* In reference to the photographs, the article stated:

1. The reporter arrived at the designated location at 4:00 p.m. and found the street empty with the exception of luxury cars and one man pacing the street in front of the rowhouse.
2. Later the reporters observed other men speaking with the single man before entering the rowhouse.
3. At 5:47 p.m. car 17B arrived. The man who remained outside of the rowhouse walked out into the street, leaned on the driver's side, and reached into the squad car through an open window.
4. At 5:51 p.m. the car left.

Id.

38. After the incident, reporters called the station. The person who answered the phone reported that Officer Dunlap drove car 17B. *Id.* at 8. Another reporter interviewed Officer Dunlap that Monday. The reporter asked Officer Dunlap if he drove car 17B that day, and he responded, "more than likely." The officer also identified the man leaning into the car as Vincent Wileczyk, the town drunk. *Id.* at 9.

39. *Id.* at 8-9. Before reaching the issue of falsity, the court first considered the threshold issue of whether the article reasonably could convey a defamatory meaning. *Id.* Agreeing with the lower court, the superior court found that the article reasonably could convey the defamatory meaning that Officer Dunlap took a bribe. *Id.* at 10.

40. The statements at issue were: "We called the 17th precinct police station and asked who was driving car 17B that day and was [sic] told it was occupied by Sgt. Samuel Dunlap;" when "asked if he was driving car 17B that day he said, 'more than likely.'" Officer Dunlap acknowledged that the statements "reported only the undisputed and true facts." *Id.* at 14.

41. *Id.* at 14-15. The officer did not say it was false for the article to discuss the existence of police corruption and the connection of the officer in car 17B with that corruption. Rather, Officer Dunlap argued only that he was not in the car at that time, making the article's implication false. *Id.* at 15 n.10.

The court found that the proof of "truth" must go to the "sting" or "gist" of the defamatory claim. The test is "whether the [alleged] libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Id.* at 15 (quoting R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 50-51, 137-138 (1980)).

42. Though the court held that defamation by implication could exist, for a public figure to prevail in any defamation action, the public figure must fulfill all of the *Sullivan* prongs, including actual malice. Though the court believed a false inference existed, satisfying the falsity prong, the court found no actual malice existed to sustain a cause of action. *Id.* at 16. To date, the Supreme Court has not foreclosed the possibility of fulfilling the *Sullivan* false statement requirement with juxtaposed true statements that create a false impression. It simply never has reached the issue.

Nichols,⁴³ a private citizen alleged defamation by implication because the media's article implied that she had an affair. If the media had reported all of the facts, the defamatory impression would not have existed. The court held that the defendants misplaced their reliance on the truth because the question was "whether libel as published would have a different effect on the mind of the reader from which the pleaded truth would have produced."⁴⁴ The court stated that the statements so distorted the truth as to make the entire article false and defamatory.⁴⁵

Similarly, in *Evening News Association v. Locricchio*,⁴⁶ two developers of the Pine Knob entertainment complex filed a libel suit against the Detroit News. The suit involved eleven news articles between April 1977 and April 1979 concerning the owners' involvement in the development and operation of their entertainment facility. The Detroit News reported that the owners, Locricchio and Francell, had both business and personal associations with convicted felons and identified organized crime figures. The two men sued the newspaper for libel on the grounds that the article created a false impression connecting them to organized crime.⁴⁷ They also asserted that the articles entitled "The Pine Knob Story" hindered them from obtaining financing and ultimately they declared bankruptcy.⁴⁸

The jury awarded Francell \$3 million in damages, but the judge overruled the jury award, stating that the series of articles was not libelous due to insufficient proof that the newspaper's statements concerning Francell were untrue.⁴⁹ On appeal, the Michigan Court of Appeals found that the articles created the false impression that linked Francell to organized crime and questionable financial activities. Therefore, the court held that the jury could find "defamation by implication" when it considered the series of articles as a whole. Though *Evening News Association* and *Memphis Publishing* concern a private party, the courts' discussion of false impression is relevant to the tort of defamation by implication in general, because any party must fulfill the false statement requirement.

Conversely, Minnesota has generally denied plaintiffs the right to re-

43. 569 S.W.2d 412 (Tenn. 1978).

44. *Id.* at 420 (quoting *Fleckenstein v. Friedman*, 266 N.Y. 19, 23, 193 N.E. 537, 538 (1927)).

45. *Memphis Publishing*, 569 S.W.2d at 420.

46. 469 U.S. 1018 (1984).

47. Proprietary to United Press International, Aug. 25, 1983.

48. Proprietary to United Press International, Sept. 5, 1985.

49. More Michigan News Briefs, United Press International, Feb. 28, 1989.

cover for defamation by implication. In *Diesen v. Hessberg*,⁵⁰ the Minnesota Supreme Court reversed a lower court ruling following recovery for defamation based on false impressions. The Minnesota Court of Appeals chose to follow an analysis similar to that applied in *Dunlap* to determine that libel by implication existed.⁵¹ In *Diesen*, a former county attorney brought a libel action against a newspaper, alleging that the newspaper's series concerning his treatment of battered women suits left the false impression that he ineptly and leniently prosecuted domestic abuse cases.

The appellate court found the implication of one of the articles substantially false because the article omitted material facts.⁵² The court of appeals found that the omission of facts left the reader with the impression that, even though the assailant severely assaulted the victim, Diesen did not believe the action merited felony prosecution. The court found for Diesen, holding that: the media omitted known facts creating a false impression; the record supported the finding of actual malice; and the statement implying Diesen's malfeasance was not constitutionally protected.⁵³

The Minnesota Supreme Court reversed. The court concluded that the omissions, considered in totality, had no material effect in changing the thrust or tenor of the article.⁵⁴ The supreme court stated that the organizing and editing of articles are within a newspaper's discretion.⁵⁵ The court examined the challenged statements' specificity, verifiability, and literary and public context, and determined that the statements constituted protected opinion not fact.⁵⁶ The allegedly false implication was unspecific and unverifiable.⁵⁷ Therefore, any implication drawn from such a statement constituted constitutionally protected criticism of a public official.⁵⁸

50. 455 N.W.2d 450 (Minn. 1990).

51. *Diesen v. Hessberg*, 437 N.W.2d 705 (Minn. Ct. App. 1989).

52. Specifically, the article failed to mention that: 1) Kathy Berglund, the victim, had told the assailant's probation officer that she believed chemical dependency treatment was more appropriate for Melvin Defoe, the assailant; 2) Diesen had requested jail time for Defoe; and 3) Berglund admitted she was unable to go through any court process at that point in time. *Diesen*, 437 N.W.2d at 708.

53. *Id.* at 710-12.

54. *Diesen*, 455 N.W.2d at 450.

55. *Id.* (citing *Strada v. Connecticut Newspapers, Inc.*, 193 Conn. 313, 326, 477 A.2d 1005, 1012 (1984)).

56. *Diesen*, 455 N.W.2d at 451.

57. *Id.*

58. *Id.* at 452.

The court, however, did not foreclose completely the possibility that true statements creating a false impression could fulfill the requirement of falsity. Rather, the court stated that a "false implication arising out of the statements is *generally* not actionable in defamation by a public official."⁵⁹ The court also was able to reject Diesen's claim on other grounds: failure to establish actual malice.⁶⁰

The Court of Appeals for the District of Columbia Circuit took yet another approach in *White v. Fraternal Order of Police*.⁶¹ In *White*, the court separated the issue of defamatory meaning from falsity, stating that the two are distinct elements of the tort of defamation. The *White* court placed *Memphis Publishing* in the category of cases that defines "false statement" as opposed to asking the threshold question of whether "this statement [is] capable of conveying a defamatory meaning."⁶² However, the court stated that the *Memphis Publishing* decision suggests that the omission of material facts might in some cases supply the missing ingredient to place a literally true communication into the field of implied defamation. The court never reached this issue. If omissions may be sufficient to prove defamatory meaning, perhaps satisfaction of the *White* standard also satisfies the falsity requirement. No court has addressed this possibility.

In *Newton v. National Broadcasting Co.*,⁶³ the Ninth Circuit avoided the issue of defamation based upon false impression and decided the case on another ground. In *Newton*, entertainer Wayne Newton brought a defamation action against NBC as a result of a three and one-half minute story, concerning the entertainer's purchase of gambling casino, that aired on NBC Nightly News.⁶⁴

Newton asserted that the broadcast conveyed the false impression that mafia and mob sources helped him buy the Aladdin casino in exchange for a secret share of the purchase.⁶⁵ Newton also claimed that the broadcast created the impression that, while under oath, he deceived the Ne-

59. *Id.* (emphasis added).

60. *Id.* at 452-54. For cases with similar fact/opinion analysis, see *Ollman v. Evans*, 750 F.2d 970, 977-84 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985); *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302-1305 (8th Cir. 1986), *cert. denied*, 479 U.S. 883 (1986); *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783-84 (9th Cir. 1980).

61. 909 F.2d 512 (D.C. Cir. 1990).

62. *Id.* at 520.

63. 913 F.2d 652 (9th Cir. 1990).

64. *Id.* at 655.

65. *Id.* at 656.

vada State gaming authorities about his relationship with the mafia.⁶⁶

The jury found for Newton, and awarded him more than \$19 million in damages. They found that one or more of the broadcasts conveyed a false and defamatory statement and impression. The jury also found that the media made the defamatory statements with knowledge of the falsity or with serious subjective doubts about the statement's truth. Furthermore, the jury determined that the media defendants intended to convey a false or defamatory impression.⁶⁷

The Ninth Circuit disposed of the appeal based on Newton's inability to fulfill the actual malice prong of the *Sullivan* test. Thus, the Ninth Circuit did not foreclose the possibility of fulfilling the *Sullivan* false statement requirement with juxtaposed true statements that create a false impression. The court simply failed to reach the issue.⁶⁸

V. RAMIFICATION OF PUBLIC FIGURE DEFAMATION BASED ON FALSE IMPRESSIONS

The amorphous and imprecise nature of "impressions" create extreme difficulties for media defendants to defend against false impression suits.⁶⁹ Because a communication's implication varies with the implicator, it is difficult to determine the specific implied meaning.⁷⁰ Media defendants rely heavily on first amendment protection to disseminate the news properly, and fear that a tort based on false impressions will suppress information to which the public deserves access.

Conversely, public figures hail the rising trend toward liability grounded on false impression as a correction in the application of first amendment protection, which formerly allowed the media only to hint at wrongdoing.⁷¹ Such advocates argue that the media is "manipulating around" the first amendment. They assert that if the courts prohibit awards based on false impression, victims of malicious mass media defamation have no available remedy. Without remedy, no deterrence will

66. *Id.*

67. *Newton v. National Broadcasting Co.*, 677 F. Supp. 1066, 1067 (D. Nev. 1987).

68. *Newton*, 913 F.2d at 657-58, n.5.

69. *False Impression Can Spur Libel Suits, Even if News Media Get the Facts Right*, Wall St. J., May 15, 1990, at B1, col. 3.

70. *Diesen v. Hessburg*, 455 N.W.2d 446, 455 n.1. (Minn. 1990). For example, in *Diesen*, it is difficult to determine what the implication is. One could state that the articles frame *Diesen* as an inept or unfit prosecutor, or a capable prosecutor who lacks the necessary force to prosecute successfully certain types of cases. *Id.*

71. Wall St. J., *supra* note 69, at B1, col. 3.

exist to prevent the media from juxtaposing facts and taking statements out of context.⁷²

Conflict frequently arises when individuals, exercising their right to speak freely, make false statements injuring the reputation of others. Courts strive to strike a balance between protecting individual reputations and promoting freedom of expression. The rigid *Sullivan* test illustrates the Supreme Court's reluctance to diminish first amendment protection. Its actual malice standard is very difficult for a public figure plaintiff to satisfy; the Court chose to protect all but the "most malicious false statements" concerning official conduct.⁷³

The *Sullivan* Court's standard of review for public figure defamation cases⁷⁴ also illustrates the Court's reluctance to constrict first amendment freedoms. The Court mandated an independent examination of the whole record to assure the Court that the judgment does not constitute a forbidden intrusion on the field of free expression.⁷⁵ The requirement of independent appellate review reflects the deeply held conviction that judges must preserve constitutional liberties.⁷⁶ The disallowance, by many jurisdictions, of a public official's offer to prove falsity by implication when the challenged statements are true,⁷⁷ gives credence to the strength of first amendment protection.

Courts have not foreclosed the possibility of defamation by implication; nor do their decisions preclude proof of false impression, rather than false statements. Elaborate discussions of the importance of first amendment protection do, however, illustrate judicial reluctance to cut back this freedom in any significant manner. Courts seem to use the actual malice prong of the *Sullivan* test as a crutch to dispose of most public figure defamation cases.⁷⁸ Thus, while the media no longer can rely exclusively on the truth as a complete defense to defamation suits, they can rest, even if somewhat uneasily, on the plaintiff's difficulty of proving actual malice with the clear and convincing evidence required to give rise to public figure defamation.

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72. *Court Urged to Overturn Libel Award to Singer*, L.A. Times, April 14, 1990, at B3, col. 1.

73. Note, *supra* note 19, at 422.

74. 376 U.S. 254 (1964).

75. *Id.* at 285.

76. *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 410-11 (1984).

77. *See supra* note 1.

78. *See supra* note 74 and accompanying text.